

the 34th section it is enacted that "the landlord or other person to whom any rent is due from the bankrupt, may, *at any time*, either before or after the commencement of the bankruptcy, distrain upon the goods and effects of the bankrupt for the rent due to him from the bankrupt, *with this limitation*, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt, may prove under the bankruptcy for the overplus due, for which the distress may not have been available."

In our Insolvent Act of 1864, there is no provision whatever impairing the right of the landlord to distrain for rent in arrear. So long as the goods were on the demised premises they were equally liable to distress after a voluntary assignment to an assignee, or after the appointment of an assignee in compulsory liquidation, as before. The Act providing that the tenant's property should pass to assignees, did not divest the landlord of his right to distrain the goods upon the demised premises; so that, the Act of 1864 being wholly silent upon the point, the landlord's right to distrain remained unimpaired. The Act of 1865 first introduced the clause which we have now to construe, and which is repeated in the Act of 1869.

The object of the Act of 1865 was, it is plain, to remove to a certain extent, for the benefit of the general creditors, the advantage which particular creditors may have acquired before the insolvency by superior diligence. By the 12th section it was enacted that "the operation of the 7th sub-section of section 2, and of the 22nd sub-section of section 3, in the Act of 1864," (namely, those sections relating to the vesting of the property of the insolvent in his assignee), "shall extend to all the assets of the insolvent, of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the sheriff or sheriff's officer under such writ."

By the 13th section it was enacted that "no lien or privilege upon either the personal or real estate of the insolvent shall be created for any judgment debt, or for the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing, under such writ, the effects or estate of the insolvent, unless such writ of execution shall have issued and been delivered to the sheriff at least thirty days before the execution of a deed of assignment or the issue of a writ of attachment under the said Act."

And by section 14, it was enacted that "the preferential lien of the landlord for rent in Upper Canada, is restricted to the arrears of rent due during the period of one year, last previous to the execution of a deed of assignment, or the issue of a writ of attachment under the said Act, as the case may be, and from thence so long as the assignee shall retain the premises leased."

By the Act of 1869 still further provision is made for the benefit of the general creditors, to the prejudice of a particular creditor who may have obtained judgment and execution.

By the 59th section it is enacted that "no

lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects and estate of the insolvent, *if before the payment over to the plaintiff of the moneys actually levied under such writ*, the estate of the debtor shall have been assigned to an *interim assignee*, or shall have been placed in compulsory liquidation under this Act."

As relates to landlords, the provision in this Act, namely, section 81, is identical in expression with the 14th section of the Act of 1865, save that it is made to extend to Nova Scotia and New Brunswick, as well as to Ontario. There is however, a proviso to the 10th section of the Act of 1869, which may perhaps be found to throw some light upon the point in debate. In that section, which defines the effect of a voluntary assignment made to an *interim assignee*, it is "provided that no pledgee of any of the effects of the insolvent, or any other party in possession thereof, with a lien thereon, shall be deprived of the possession thereof without payment of the amount legally chargeable as a *preferential claim* upon such effects, except in the case, hereinafter provided for, of such pledgee or party in possession proving his claim against the estate and putting a value upon his security."

The question now is, what is the proper construction to be put upon the term, "the preferential lien of the landlord for rent," in the 81st section of the Act of 1869.

The term is used as if it had a well-known meaning recognized by law. Now the only case in which a landlord's right to distrain is spoken of as a lien at all, is in the case of his tenant's goods being taken in execution. In that case, it having been held that a landlord could not distrain the goods of his tenant taken in execution, because of their being in *custodia legis*, it was by 8 Anne, ch. 14, sec. 1, enacted that "no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatever, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of any such execution or extent, pay to the landlord of the said premises all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking of such goods or chattels by virtue of such execution, provided the said arrears do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit the execution is sued out, paying the said landlord one year's rent, may proceed to execute his judgment as he might have done before the making of this Act." Chief Baron Gilbert, in his work upon distress, speaks of this Act as giving to the landlord a species of lien upon the goods of the tenant on the demised premises, though seized and taken in execution, and the object and effect of it is to give to the landlord a *preference*, to a certain extent, over the execution creditor: in that sense it may be termed a