CORRESPONDENCE.

the plaintiff ought to have been recouped from the estate, the $50 loaned to the insolvent when the chattel mortgage was taken, just as a mortgage for a present *bona fide* advance would be good, it is evident that no adjustment of any such equitable claim could be made in an action of replevin. The County Court held, as was held in *McQuirk* v. *McLeod*, that the plaintiff was driven to his remedy under sec. 125, and therefore, that the action must fail; but the Judge went on further to find on the evidence that the chattel mortgage was made in contemplation of insolvency, and therefore, so far as it purported to secure a pre-existing debt, it was void as an unjust preference; thus deciding for the defendant under both sections, 125 and 133. On appeal to the Supreme Court of Nova Scotia, this judgment was set aside, the decision being pronounced by the Honourable the present Minister of Justice (whose opinion has become, from his new position, a matter of practical legislative importance,) as follows:

THOMPSON, J.—"The learned judge below decided this case on the principle that sec. 125 of the Insolvent Act of 1869 prevents all actions being brought against a person who is an assignee of an insolvent for anything done as assignee, and compels all persons who seek redress against him to resort to the Judge of Insolvency. Sec. 125 has, however, no such general application. The Dominion Parliament, probably, had no power to enact that every one who has a cause of action against a certain class of persons must resort to a certain tribunal, and that all other Courts must be closed against him, as was suggested by Wilson, C. J. (then Wilson, J.,) in *Crombie* v. *Jackson*, 34 U. C. 575. I think that Parliament never intended that by sec. 125. For the performance of those duties which arise from the Insolvent Act, and for the enforcement of those rights which are created by that Act, the remedy is that pointed out in sec. 125 as, for instance, in relation to the manner in which the assignee shall administer the estate and pay dividends, the resort must be to the Judge of Insolvency, in order to prevent the estate from being consumed in litigation, and to accomplish speedy justice. When, however, the assignee does that which the law does not authorize him to do, in relation, for example, to a person who has not filed a claim, and is, therefore, not a creditor within the meaning of the Insolvent Act, even though that person be a creditor of the insolvent in the ordinary acceptation of the term, or has property of the insolvent under lien, section 125 does not interfere with the jurisdiction of the ordinary tribunals. In this case, therefore, that section did not prevent the plaintiff, who held a bill of sale on the property of the insolvent, from enforcing that bill of sale, or from holding the property until the security was paid off. The assignee took all that the insolvent could give him, but that was only an equity of redemption in the goods, unless the bill of sale was fraudulent, in which case the assignee also had in him the rights of creditors as well. The matter of fraud, then, had to be tried irrespective of sec. 125. This was the decision of Ritchie, E.J., in *Tucker* v. *Creighton*, N. S. Eq. Rep. 261, and has been held in the various cases there referred to as well as in others—for example. *Burke* v. *McWhirter* 35 N. C. As to the question of fraud, there is in the case some evidence which would be allowed to go to a jury as evidence of fraud. If the learned judge had found that evidence sufficient, we should have had to decide whether it was so in our opinion in view of what the insolvent and the plaintiff say on the subject, but the judge has not so found. He has felt controlled by section 125 and, so far from concluding that the bill of sale was wholly fraudulent, he intimates that he thinks it may be good to the extent of $50. If good to that extent the plaintiff must recover, and as the case went off below on the first point we think that justice will be best served by simply allowing the appeal with costs, and sending the case back to be tried anew."

There was no dictum in the judgment below that the section applied to "all actions" against an assignee for "anything done as assignee," and if there were, the application of the section to the particular case, or cases of the same class, was all that was in controversy. The oral decision of the judge below was reported in the following words: "I gave judgment for defendant on the ground that the action would not lie in face of section 125 of the Insolvent Act, and because I find the bill of sale was made in contemplation of insolvency, and adjudge it an undue preference contrary to the policy of the Insolvent Act; although I intimated that in the administration of the estate the plaintiff might, perhaps, successfully claima lien on the proceeds of the goods in question to the extent of any money lent at the time the bill of sale was executed—say the $50 if so loaned at that time—but not for the antecedent debt; as that would be giving him an undue preference over other creditors."

Tucker v. *Creighton*, *ante*, was a case of real estate; and in *Burke* v. *McWhirter* it would seem that the claimant of the goods was not a creditor at all; it was a mere case of disputed ownership.

In view of these conflicting decisions by Courts and judges of high authority, I would suggest the urgent necessity of such legislation as will tend to more fully secure uniformity in the administration