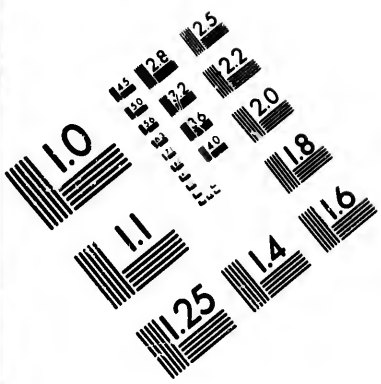

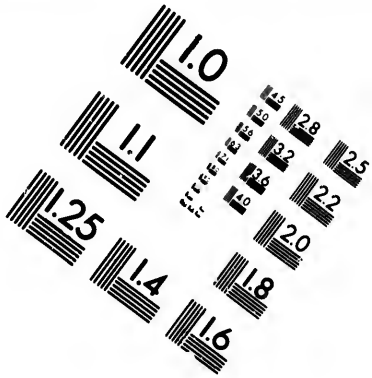

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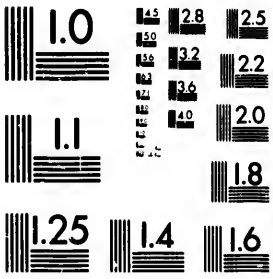

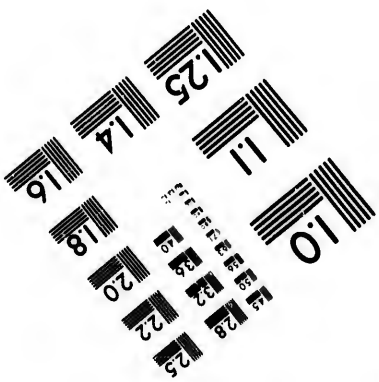

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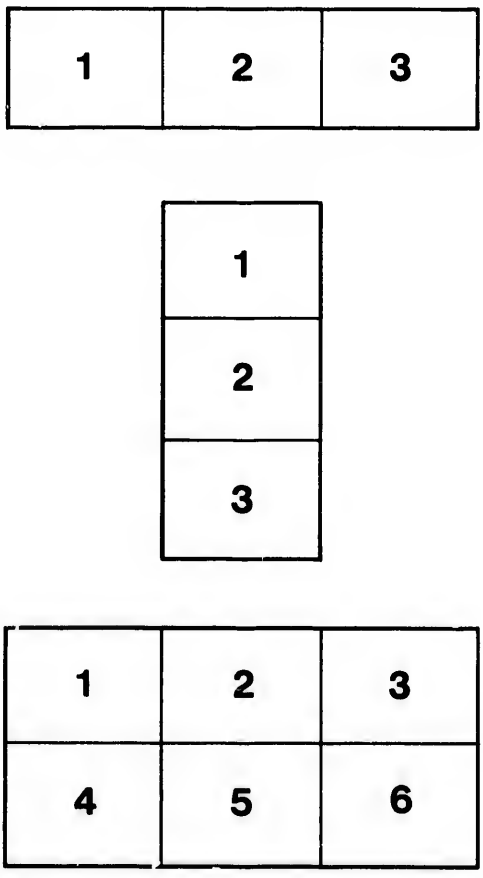

THE

ONTARIO INSOLVENCY CASE

IN THE PRIVY COUNCIL

COUNCIL CHAMBER, WHITEHALL,
DECEMBER 12TH, 1893.

PRESENT:

THE RIGHT HON. THE LORD CHANCELLOR (LORD HERSCHELL).
THE RIGHT HON. LORD WATSON.
THE RIGHT HON. LORD MACNAGHTEN.
THE RIGHT HON. LORD SHAND.
THE RIGHT HON. SIR RICHARD COUCH.

THE ATTORNEY-GENERAL OF ONTARIO

——VS.——

THE ATTORNEY-GENERAL OF CANADA

COUNSEL FOR THE APPELLANT:
THE HON. EDWARD BLAKE, Q.C., M.P.; MR. HALDANE, Q.C. M.P.;
AND MR. R. M. BRAY.

COUNSEL FOR THE RESPONDENT:
SIR RICHARD WEBSTER, Q.C., M.P., AND MR. CARSON, M.P.

Argument of Mr. Blake for the Appellant

This Argument is printed as a further slight contribution to the discussion on the Interpretation of the Constitutional Act

TORONTO:
THE BRYANT PRESS, 20 BAY STREET
1894

EXTRACTS

R. S. O., Chapter 124

An Act respecting Assignments and Preferences by Insolvent Persons

1. In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment with intent, in giving such confession, *cognovit actionem*, or warrant of attorney, to confess judgment to defeat or delay his creditors wholly or in part or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors, or over any one or more of such creditors, every such confession, *cognovit actionem*, or warrant of attorney to confess judgment shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution.

2. Every gift, conveyance, assignment, or transfer, delivery over or payment of goods, chattels, or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company, or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void.

3. (1) Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or to another assignee resident within the Province of Ontario, with the consent of the creditors as hereinafter provided, for the purpose of paying ratably and proportionately, and without preference or priority, all the creditors of the debtor their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor, nor to any *bona fide* gift, conveyance, assignment, transfer, or delivery over of any goods, securities, or property of any kind, as above mentioned, which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of goods or other property; provided that the money paid, or the goods or other property sold or delivered, bear a fair and reasonable relative value to the consideration thereof.

* * * * * * * * *

(2) Every assignment for the general benefit of creditors, which is not void under section 2 of this Act, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act, and shall be subject in other respects to the provisions of this Act until and unless a subsequent assignment is executed in accordance with this Act.

* * * * * * * * *

(5) The debtor may in the first place, with the consent of a majority of his creditors having claims of $100 and upwards, computed according to the provisions of section 19, make a general assignment for the benefit of his creditors to some person other than the sheriff, and residing in this province.

4. Form of assignment for general benefit of creditors.
5. How claims are to rank.
6. Appointment of assignee.
(2) Estate to vest in assignee.
7. Rights of assignee.
8. Recovery of proceeds where property sold.
9. An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands.
10. Amendment of assignment by court.
11. Remuneration of assignee.
12. Notice of assignment to be published.
(2) Assignment to be registered.
13. Penalty for neglecting publication.
(4) Liability of sheriff.
14. Compelling publication and registration.
15. Assignment not invalidated by omission to publish, etc.
16. Assignee to call meeting of creditors.
17. Meeting of creditors by request of majority thereof.
(2) Judge to give directions in case creditors do not attend.
18. Voting at meeting.
19. Scale of votes.
20. Proof of claim.
21. Accounts to be prepared by assignee.
22. Notice of dividend sheet.
23. Set off.
24. Affidavits.

The Ontario Insolvency Case.

ARGUMENT BY MR. BLAKE FOR THE APPELLANT.

MR. BLAKE: I appear, my Lords, for the appellant with my learned friends, Mr. Haldane and Mr. Bray. The appeal is on a case referred to the Court of Appeal of Ontario under a recent Statute which comes now, for the first time, before the Court; and I may therefore, perhaps, begin by stating that Statute.

It provides for a reference to the High Court or a Divisional Court thereof or to the Court of Appeal by the Lieutenant-Governor in Council of any matter which he thinks fit to refer; and the Court is there upon to hear and consider the same and certify its opinion with reasons. Then,

"In case the matter relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the Legislature of this Province, or of some provision in any such Act, the Attorney-General of Canada shall be notified of the hearing, in order to be heard, if he sees fit."

Then, the opinion of the Court is to be deemed a judgment of the Court, and an appeal shall lie there[illegible] as in the case of a judgment in an action. Then,

"In case of the matter being appealed from the High Court, or a Divisional Court thereof, to the Court of Appeal, sections 2, 3, 4, 5, and 6 shall apply in like manner as if the original reference had been to the Court of Appeal. An appeal to Her Majesty in Her Privy Council, from a judgment of any Court on a reference under this Act, shall not be subject to the restrictions contained in the Revised Statute of this Province."

My Lords, the case came before the Court of Appeal for Ontario, in which there were sitting four Judges of that Court. The Chief Justice of the Court was of opinion against the constitutional validity of the provision submitted for consideration.

THE LORD CHANCELLOR: Was it whether an Ontario Act was *ultra vires*?

MR. BLAKE: Yes, or rather whether one clause of an Ontario Act was *ultra vires*. Mr. Justice Osler delivered no judgment. Mr. Justice Burton was, as had theretofore been explained in former cases, of opinion that the Act was within the competence of the Legislature, but felt bound by an intermediate decision of the Supreme Court to conclude the contrary; and Mr. Justice Maclennan was in favor of the validity of the Act. So that of the judges who actually delivered judgment, the opinions of the majority were in favor of the proposition which the judgment of the Court affirmed to be unsound.

LORD WATSON: One of the Judges declined jurisdiction in the matter.

MR. BLAKE: Yes; I believe Mr. Justice Osler's opinion is rather opposed to the policy of the Legislature in passing this Act, and that he thought it consistent with his judicial duty to decline the function imposed on him by the Act.

LORD WATSON: I think grave questions might arise as to whether a question of this kind is or not a question for the Provincial Legislature, or whether it is a question for the Legislature of the Dominion. The Attorney-General for the Dominion is making no objection.

MR. BLAKE: No, my Lord; the Attorney-General appeared by counsel, who argued the case before the Court of Appeal.

LORD WATSON: There might have been a great question whether the Province could regulate the proceedings.

MR. BLAKE: At present no such question is raised.

LORD SHAND: Mr. Justice Osler says that for reasons already given by him on other occasions he did not feel called upon to answer the question.

MR. BLAKE: Of course the question might have been raised by a private suitor in a cause.

LORD WATSON: Here the Attorney-General appears and submits to the jurisdiction of the Court.

MR. BLAKE: Yes; the question is as to the validity of the 9th section of the Revised Statute of Ontario of 1887, chapter 124, which Act is entitled "An Act respecting Assignments and Preferences by Insolvent Persons." The section specially before your Lordships for consideration, though the line of argument taken by those opposed to the Act, and by certain of the Judges below, involves the whole Act, is the 9th, which reads thus: —

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the Sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the Sheriff's hands."

The contention of the Attorney-General of Canada is that the whole Act, and consequently, of course, this particular section, is beyond the competence of the Provincial Legislature, because it comes within the class of matters enumerated in the 91st section, entitled "Bankruptcy and Insolvency."

Now, there had been, as I have already intimated, several prior decisions on the Act as a whole, although I am not aware that in any one of those decisions this particular section had become the subject of judicial decision. It had, however, become matter of observation, though not of judicial decision, and there has been a very great conflict of opinion.

THE LORD CHANCELLOR: Is the only question now before the Board that particular section?

MR. BLAKE: The other side contend that they are able to establish that the whole Act is a Bankruptcy

and Insolvency Act, and that even though the 9th section with less objectionable surroundings might be valid, yet it falls as a part of, and as incidental to, the whole Act; and, therefore, in that sense the whole Act comes before your Lordships.

LORD WATSON: Did the Dominion, when they came into Court, raise the wider question? The matter remitted by the appellant, the Attorney-General of Ontario, is simply that question.

MR. BLAKE: I do not at all deny the right——

THE LORD CHANCELLOR: Did the Government only use the rest of the Act as showing that this section being in such an Act is *ultra vires?*

MR. BLAKE: Yes. I do not at all deny their right to argue it, though I do not agree in the soundness of the argument. I think they have a perfect right to make that contention. Therefore, it is perhaps well that your Lordships should know in advance the condition of judicial opinion, without referring to the judgments in detail at this moment. At an early stage, Chief Justice Armour held the Act within Provincial competence. Then came Chief Justice Galt, who was against. Then came Chief Justice Hagarty and Mr. Justice Osler, who were both against. Thus there are three against. Then Mr. Justice Patterson and Mr. Justice Burton and Mr. Justice Maclennan were in favor. Thus there have been four favorable and three adverse opinions. I do not include the judgments in the Supreme Court case to which I have referred, because I strongly contend that whether that case be rightly or wrongly decided it does not at all govern this one; but, even if so, the numbers of judicial opinions would be about balanced.

Now, my Lords, the contention of the Province is that the 9th clause and the whole Act, so far as it is necessary to deal with the whole Act, are both within more than one of the enumerations of section 92. Nor do I think that, in one sense, this contention is denied. What is contended is that they might have been within section 92 but for the withdrawal effected by section 91, under the heading "Bankruptcy and Insolvency." We contend they are within "Property and Civil Rights," "Administration of Justice," "Procedure in Civil Cases," and "Local and Private Matters." Well, the other side contend that, although but for the existence of the enumeration in section 91 of "Bankruptcy and Insolvency," that might be the result, yet the subject-matter of the Act is by that enumeration clearly withdrawn.

THE LORD CHANCELLOR: Do you dispute that if within "Bankruptcy and Insolvency" it would be excluded?

MR. BLAKE: No, my Lord. The question really is what "Bankruptcy and Insolvency" mean in the B.N.A. Act That is the question with which we have to deal. Now, the point is one of very great practical importance. There has not been for some years, since the year 1880, any Bankruptcy or Insolvency legislation of the Dominion; nor is it at all likely, as far as one can see, that any such legislation will soon pass.

LORD WATSON: Has there been any legislation since 1867 by the Dominion Legislature?

MR. BLAKE: Yes; if your Lordships wish now to hear the state of things at 1867, and since 1867, I will give it in a moment. Prior to 1867—in 1864 – an Insolvency Act had been passed by the Parliament of the Old Province of Canada, applicable, of course, only to the two present Provinces of Ontario and Quebec.

LORD WATSON: I suppose you do not dispute that, so far as it dealt with Bankruptcy and Insolvency within the meaning of section 91 of the British North America Act, the Dominion Parliament alone could could modify or alter that statute.

MR. BLAKE: No, my Lord, I do not dispute that. The whole object of my argument will be to find what the meaning of this statute is, and what, in the absence of legislation by the Dominion Parliament on the subject, is the meaning of the words "Bankruptcy and Insolvency" in the B.N.A. Act.

LORD WATSON: You say there is a fringe of questions.

MR. BLAKE: Debatable ground—

LORD WATSON: Not debatable when they enter and take possession.

MR. BLAKE: But which may be covered by both subjects.

LORD WATSON: Which the Provincial Legislature may occupy until it is superseded by the Parliament of Canada; and that the matters dealt with in section 9 are within the classes of subjects reserved to the Provincial Legislature.

MR. BLAKE: "Property and Civil Rights," and so forth; even though they might be found to be within the power, whether strained or otherwise, of the Dominion Parliament, if and when they choose to exercise that power.

LORD WATSON: I suppose if "Property and Civil Rights" stood alone, and there was no assignment of "Bankruptcy" to the Dominion Parliament, probably "Civil Rights" would include the power to legislate on the subject of "Bankruptcy."

MR. BLAKE: That I take as axiomatic. It is to my mind absolutely clear; and decisions made by this Board in early cases have established it. An interpretation has been put on "Property and Civil Rights" which makes that quite clear; and I therefore lay down as axiomatic the proposition that, but for the withdrawal and save to the extent to which the withdrawal operates, the Provincial Legislature would have a right to legislate on this topic. As I was saying, the condition of things at the time of the passing of this Act was this—

LORD SHAND: Do you mean it would be temporarily good, and would be destroyed if the Dominion chose to legislate on the subject?

MR. BLAKE: It would be good as within "Property and Civil Rights."

LORD SHAND: That is very curious.

LORD WATSON: I do not know whether it is a precise decision; but with reference to the judgment of this Board in *Cushing* v. *Dupuy* it cannot be disputed that there are some subjects that may be dealt with by both Legislatures.

MR. BLAKE: Yes.

LORD WATSON: As I understand the decision there, it went to this, that there may be an exercise of exclusive power of legislation given to the Dominion Parliament by section 91. It may be necessary and within their powers and authority to modify matters which fall within the province of the Provincial Legislature.

MR. BLAKE: Yes, that is the line of argument I propose to address to your Lordships.

LORD WATSON: That assumes, in the absence of legislation by the Dominion, that the rights of the parties must be regulated by the Provincial Legislature.

MR. BLAKE: That is to say in some; I do not say in all cases. There may be subjects in which the line is so sharply and clearly drawn that it is quite plain the subject must remain excluded from Provincial jurisdiction from the beginning, though the Dominion Parliament do not choose to exercise their power. But there is more than one subject, there are several subjects, in which it is impossible to aver but that the exercise of power by the Dominion Parliament is essential in order to withdraw from the Provincial Legislature some part, at any rate, of the power which would fall within the range of Dominion power if it chose to act.

THE LORD CHANCELLOR: The 9th section provides as to an assignment for the general benefit of creditors under this Act. Is this referring to section 3, subsection 1?

MR. BLAKE: No. I am afraid I shall have to trouble your Lordships, when I begin to discuss the Act itself, with the history of the legislation. It is material to the true construction of the Act. Now, it is desirable to know at once what the condition of things was, at and since Confederation, with reference to this matter. In 1864 an Insolvent Act had been passed by the Parliament of the late Province of Canada, which had operation in Upper Canada, now Ontario, generally as to both traders and non-traders, and in Lower Canada, now Quebec, as to traders only. So far as I remember, any legislation that has taken place in any part of the Dominion on the subject of Bankruptcy and Insolvency has taken the title of "Insolvency." We have not taken the title of "Bankruptcy" in modern years. Thus, there was no Insolvency law affecting non-traders in Quebec at Confederation. There was an Insolvency law affecting traders in Quebec, and affecting all debtors in Ontario.

LORD WATSON: I suppose the same law is applicable to solvent as to insolvent persons. When you say no Insolvency law, you mean the law of the land applied equally to solvent as to insolvent persons.

MR. BLAKE: Yes. There was no special law directed to the case of Insolvency. In the other two Provinces which were conjoined under the Confederation Act, Nova Scotia and New Brunswick, there was no Insolvent or Bankrupt law. This being the condition at Confederation, in 1869 the Dominion Parliament passed an Insolvency law which had application to traders only. In 1875 it was repealed, and a new Insolvency law passed, which also had application to traders only. In 1880, after a general election, that Insolvency law was repealed by a great majority of the House, and there has never since been any attempt to pass any fresh law.

SIR RICHARD WEBSTER: There were two small amendments in between.

MR. BLAKE: Yes, amendments which I was instrumental in passing, with the view of keeping the law on the Statute Book, if possible; but since 1880 there has been no Insolvency law whatever, nothing at all in the nature of Bankruptcy or Insolvency legislation in the Dominion Parliament; and therefore we find it now clearly only a potential attribute, the character and extent of which is, as we contend, matter of uncertainty, to be solved in fact only by the action of the Dominion Parliament.

THE LORD CHANCELLOR: Is the contention, on the other side, that the Insolvency laws passed prior to the Dominion Act in Ontario or in the Province of Canada still exist?

MR. BLAKE: No, my Lord, because they were, in effect, repealed. When the Act of 1869 passed, the old Insolvency law was, in effect, repealed by the Legislature which alone had jurisdiction to repeal it, the Parliament of Canada. That being a Bankruptcy and Insolvency law, the Provincial Legislature did not attempt to touch it: but when the Dominion Parliament acted they, in effect, repealed that law, and enacted a new or amended law, applicable to the whole Dominion. So that there is no contention between us such as might have arisen under other conditions, or as to the fact that the law is extinct. There is no Insolvency law. It would not advance the argument to enter at this moment into the clauses of the legislation in question here; but its governing clauses find their root as long ago as 1858 in the Parliament of the Old Province of Canada; the 1st, 2nd, and 3rd sections, which are really, as we conceive, the governing clauses, have been law from that early period.

LORD WATSON: That is to say, it was in force before the Confederation Act was passed.

MR. BLAKE: Yes; from 1858—not all the details of this long Act, but the provisions against fraud and preference.

LORD WATSON: I suppose specially enacted in the Statutes of Ontario, Consolidated.

MR. BLAKE: Yes; only with a very considerable additional amount of ancillary provision.

LORD WATSON: Assuming that the Dominion Parliament alone could deal with the matter, would that constitute an invasion of their rights?

MR. BLAKE: To apply the proverb, it would be like a chip in porridge—it would do neither good nor harm. If the Act was within the exclusive province of the Dominion Parliament, the Provincial Legislature could not repeal, or amend, or re-enact it.

THE LORD CHANCELLOR: The old Act of 1858 had been repealed by the Dominion Parliament.

MR. BLAKE: Not the Act of 1858. That has never been touched; and I draw an argument from that. An Insolvency Act was passed by the old Parliament of the Province of Canada in 1864. But it did not touch the Act of 1858. The Dominion Parliament, in effect, repealed that Insolvency Act of 1864, but they did not try to touch the Act of 1858. They passed Bankruptcy and Insolvency Acts twice. But they did not touch the Act of 1858. From all this I argue that the subject of the Act of 1858 is admitted to be comprised, not within Bankruptcy and Insolvency, but within "Property and Civil Rights." No harm, of course, could be done by a Provincial Act which simply pretended to re-enact Dominion legislation. Its continued validity would depend solely on the Dominion action.

LORD WATSON: I understand there has been an express repeal by the Dominion Legislature of any statute touching upon Insolvency.

MR. BLAKE: I think so. The Act of 1864 has been, in effect, repealed by the Dominion Legislature. I said that an Insolvency Act had been passed by the Parliament of the Province of Canada in 1864. When, in 1869, the Dominion Parliament legislated for the whole Dominion in Insolvency, they, in effect, repealed the prior Act, a step which was quite within their competency.

SIR RICHARD COUCH: The Act of 1858 has never been expressly repealed.

MR. BLAKE: Neither expressly nor impliedly. Not a single judge has expressed a doubt that the subject-matter of the Act of 1858 was within the power of the Provincial Legislature; that they were the proper persons to re-enact it, and consolidate it, and amend it. So far as that is important, there is a concurrence of judicial opinion that the Act of 1858, being in those respects *in pari materia* with the 13th Elizabeth, cap. 5, is not within "Bankruptcy and Insolvency," and therefore is brought and remains within "Property and Civil Rights."

My Lords, before going further, it may be worth while to recall to your Lordships' attention those rules of construction laid down by this Board upon which we rely. And, first, I cite that which declares that the presumption is in favor of the validity of an impugned Act, as indicated in *Valin* v. *Langlois*, 5 App. Cas., page 115. Next, that which decides that the Act should, if possible, if susceptible of more than one construction, be so construed as to bring it within the power of the enacting Legislature. Amongst the cases which indicate the disposition of this Board to adopt that mode of construction, I would refer to *McLeod* v. *The Attorney General of New South Wales*, Appeal Cases (1891). That was a case dealing with the marriage laws; and a limited interpretation was under this rule given to the words "whatsoever" and "wheresoever."

THE LORD CHANCELLOR: That was a case referred to in the judgment I delivered at the commencement of to-day's proceedings.

MR. BLAKE: Yes, my Lord. I will not at this moment delay your Lordships by reading the passage; but I argue that it does correctly propound the obviously reasonable method of construing *ut res magis valeat quam pereat*. Then, thirdly, the true nature and characteristics of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs; in other words, we must ascertain what is the primary matter dealt with. This is the proposition laid down in *Russell* v. *The Queen*, 7 App. Cas., page 829. Then, fourthly, a restatement at a comparatively late period of a wise rule of construction which your Lordships had occasion very early to lay down, and upon which you have always acted, is made in an accentuated form in *The Bank of Toronto* v. *Lambe*, 12 App. Cas., page 575, where the question was of legislative competence under section 92. To generalize the propositions which the judgment in that case applied to the particular case in hand, the questions to be tried are, first, does the subject fall within any, and, if any, what, class of matters embraced in section 92? Secondly, if it does, is the Court compelled by anything in section 91, or in any other parts of the Act, to cut down the full meaning of the words in section 92 so that they shall not cover this subject? This phrasing indicates not merely the rule, but also the spirit in which the rule is to be applied. If the subject be, as I have said, within section 92 standing by itself, is the Court *compelled* by anything in section 91 to *cut down the full meaning of the grant in section 92* so that it shall not cover the subject?

Then the fifth rule to which I advert is that which states that subjects which, in one aspect and for one purpose, may very properly fall within section 92 may, in another aspect and for another purpose, fall within section 91 (*Hodge* v. *The Queen*, 9 App. Cas., page 130). That rule, we contend, does practically include the kernel of the present question. Next, I venture to lay down another proposition, as established by authorities which I will quote to your Lordships at greater length, because, oddly enough, they do not merely touch the general principle, but also deal with the particular subject-matter now in hand. My proposition is that, even though the Dominion Parliament might by legislation passed under one or other of the heads in section 91 appropriate some particular Provincial field otherwise covered by section 92 so as to exclude the Province from its further occupation, yet it by no means follows that, in the absence of such Dominion legislation, the Provincial field is to be taken as limited by the possible range of unexercised power by the Dominion Parliament. The contrary has, in fact, been held. I believe that such reconciliation as was effected of the different decisions in the case of the Temperance Act was reached upon this very basis; and I refer to *Hodge* v. *The Queen*, which I have already cited; though I do not deal at large with that matter, my learned friend, Mr. Haldane, who is very familiar with it from having actually participated in most of these cases, having undertaken to expound that part of the argument.

THE LORD CHANCELLOR: Was *Hodge* v. *The Queen* the Temperance case?

MR. BLAKE: Yes; and *Russell* v. *The Queen*. But I will refer your Lordships to the other cases which to my mind establish the same proposition, cases which deal with this very subhead of Bankruptcy and Insolvency; and, first of all, I will cite the case which has been already quoted by one of your Lordships of *L'Union St. Jacques de Montreal* v. *Belisle*, Law Reports, 6 Privy Council, page 31.

THE LORD CHANCELLOR: There is one of those Temperance cases which I argued, and I think there was no judgment delivered, was there? Their Lordships reported their advice without reasons.

MR. BLAKE: That was a special reference, in which the advice was reported without reasons. There were three altogether, including the case to which your Lordship refers; but I may briefly state one proposition which my learned friend has undertaken to deduce, namely, that the circumstance of action by the Dominion within its potential sphere does vitally affect the situation.

LORD WATSON: All this seems to me to resolve itself into this proposition, that in order to give exclusive legislative power to the Dominion Government matters with which the Provincial legislation deals must be shown to be some of the enumerated matters that fall within section 91. I think that that proposition holds good when the field is clear of legislation; I mean that when the field is occupied by the legislation of the Dominion Parliament, it may be that the authority for such legislation extends to matters of the modification of the law in the Province—modifications of the law as to property and civil rights, these being matters with which, in the absence of legislation by the Dominion, the Province could properly have dealt with.

MR. BLAKE: That is the line of argument I intend to pursue.

LORD WATSON: There is that difference between the two cases. For instance, if they had established a scheme for the distribution of Bankrupt Estates, it would be quite within the power of the Dominion Legislature to make, as ancillary to that scheme, certain provisions which modified the Civil Law, but it could not be said that these matters, in the absence of any scheme of Bankruptcy enforced by Statute of the Dominion Parliament, were beyond the power of the Province under section 91.

MR. BLAKE: Quite so. I think the more it is examined, the more it will be seen to be absolutely impossible to construe the B.N.A. Act satisfactorily, or indeed without plunging into difficulties the extent of which one cannot estimate, on any other principle than that.

LORD WATSON: Sir Montague Smith, I think, in the case of *Cushing* v. *Dupuy*, made the observation upon that clause as to Bankruptcy and Insolvency that it would be impossible to take that step and establish a proper scheme without doing something as to civil rights.

MR. BLAKE: In the absence of a Dominion scheme there is a valid Provincial title, which may be qualified when a Dominion scheme is brought into existence. In the case of *L'Union St. Jacques de Montreal* v. *Belisle*, which is reported in 6 P.C., page 31, there is (with respect, it may be said) a very strong instance of the disposition of the Board to view impugned Provincial legislation favorably, with the desire of giving it such a construction as will render it valid.

LORD WATSON: I think you may assume that the cases decided by this Board—it is true of a great many—were decided with this view, not to express any ground for judgment beyond what was necessary for the decision of the case, and there is a caution against treating the subject in any other way by Sir Montague Smith, who delivered the opinion of the Board in *Cushing* v. *Dupuy*; and they must be taken as without prejudice to any other questions arising between those two clauses.

MR. BLAKE: I can quite see the wisdom of dealing with an Act of this kind on such a principle of exposition; though it may be stated that it is important to look at the whole Act in coming to any decision, yet the actual decision itself ought to be no wider than the particular case requires. But in the case I quote, I may fairly say that the decision, being no wider than the case required, was still another example of the favorable method of interpretation which I invoke. Because, what was it? It was the case of a charitable Society of some kind to which people subscribed, and from which they received benefits under contract. The beneficiaries included four widows, of whom two had accepted a composition, which the other two had declined. The benefits amounted to a dollar and a half a week, or seventy-three dollars a year. Two of the widows declined to accept two hundred dollars cash in full settlement for a life annuity of seventy-three dollars a year which had been accepted by the others; and the Legislature, by an Act, the preamble of which declared that the Society could not without ruin continue to pay the dollar and a half a week, forced on the reluctant widows the acceptance of the two hundred dollars, with a saving clause that, if at any time the finances of the Society recovered so that it had ten thousand dollars to the good, then the widows should be entitled to claim a restoration of their former position. That was held by this Court to be an Act to prevent the Society from going into insolvency rather than a special Insolvency law. True, the Act did prevent the Society from going into insolvency; but only by forcing its creditors to accept a composition of their demands. Then in deciding that which it was necessary for the purposes of the case to find, even under or in connection with that favorable interpretation, namely the meaning of "Bankruptcy and Insolvency" under section 91, the phrases used are these:

"There is no indication in any instance"—that is to say, in any instance under section 91—"of anything being contemplated, except what may be properly described as general legislation, such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing *Faillite* Bankruptcy and Insolvency, all which are well-known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become Bankrupt or Insolvent according to rules and definitions prescribed by law, including, of course, the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law, covering this particular association, is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. Benjamin, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of the statute, should thereupon, *ipso facto*, fall under the legal administration in Bankruptcy or Insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their competency, nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature, afterwards, to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with Bankruptcy and Insolvency."

LORD WATSON: That was giving effect to the words "local and private."

MR. BLAKE: Yes, in that particular case. But there is no magic in those words; and if it comes within "Property and Civil Rights," the same principle must apply. We hold it comes within both.

LORD WATSON: I do not think the words "Civil Rights" and "Property" would have sufficed to take it out of the rule. A general rule applicable to the Province on particular cases. I do not think you could get out by alleging the power of the Provincial Government. Taking a particular branch of a schedule that deals with Property and Civil Rights may be quite different when you come to the words "Bankruptcy and Insolvency."

MR. BLAKE: My contention is that if but for something in section 91 "Property and Civil Rights" would have covered the legislation, then this principle applies just as much as it applies where the legislation would, but for section 91, have come within "local and private matters." As a fact, "local and private matters" is the only subject with reference to which a special limitation is affixed. The judgment proceeds:

"But no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the Provincial Legislature over this local and private association should be in abeyance, or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases."

LORD WATSON: That rather goes, to my mind, to this, that if there had been a general law in those terms or to the same effect, but making it applicable to all individuals instead of to the exceptional circumstances of one individual, I do not think that the law would have been laid down to the effect that the Province could have interfered.

THE LORD CHANCELLOR: I do not see how the question, whether it affects one or more, touches such a case as this.

MR. BLAKE: I do not myself perceive any distinction. Acting upon that principle to which Lord Watson has referred, the Privy Council first decided that this was a local and private matter, and they based their decision upon that heading; but the principle and theory on which the decision, after placing the legislation under its proper heading, goes is

that a local and private matter is within section 92, and therefore within Provincial legislative jurisdiction, unless withdrawn under section 91; and that it might have been so withdrawn had Dominion legislation of a general description been enacted; but that no such thing having taken place, it remains within Provincial legislative jurisdiction; and therefore I apply the decision precisely to the case in hand.

LORD WATSON: This is a general enactment.

MR. BLAKE: Certainly; and it is all the more important, therefore, to apply that proposition.

THE LORD CHANCELLOR: It is always difficult to deal with a matter of this sort in the abstract; and to take an illustration, I can imagine a question of this sort: A scheme of Bankruptcy and Insolvency, the primary object of which is to provide that, if a man is unable to pay his creditors in full, there is to be a fair distribution of his assets amongst them, and then you have engrafted on that a number of ancillary provisions which, no doubt, touch the property. It may be—I am not expressing any opinion—that if you had a Bankrupt and Insolvent law, and those ancillary provisions relating to it, the matters so dealt with could not be touched by a Provincial Act, yet that nevertheless, if you had no Insolvency law and had not passed these ancillary provisions relating to it, the provisions which may be natural and proper ancillary provisions to such a law may nevertheless remain, if you have no such law, within the Provincial Legislature.

MR. BLAKE: Your Lordship has stated precisely my argument better than I could have put it. That is the ground I am endeavoring to take; and I maintain that any other proposition would, as your Lordships will see as you go further into this case, lead to an unheard-of and most extraordinary condition of things. In fact, you would have to define the extent and range of "Property and Civil Rights" and "Local and Private Matters," not by the Dominion's action, but by the Dominion's inaction. You would have to paralyze the action of the one Legislature without any attempt on the part of the other Legislature to exercise their power—only because as ancillary to a possible Bankruptcy and Insolvency law the Legislature might, if it pleased, do this, that, or the other thing, which it is all-important should be done for the good of the community, but which it does not do at all, which it could not do primarily, and does not do as ancillary because it has not done the principal thing, namely, passed a Bankruptcy or Insolvency law. The judgment proceeds:

"It was suggested, perhaps not very accurately, in the course of the argument, that, upon the same principle, no part of the land in the Province, upon the sea coasts, could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea coast is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislation as to all matters coming under the head of 'Militia, Military and Naval Service and Defence.'"

Here your Lordships see how indefensibly contracted would be the view taken of this decision were if held to apply only the particular subhead to matters of a local and private nature—because the power of the Province to deal with the lands of the Province comes under "Property and Civil Rights"; and thus the illustration of the power of the Province given by their Lordships in support of their judgment comes under the subhead to which I have adverted.

"Any part of the land in the Province of Quebec might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that because this which has not been done as to some particular land might possibly have been done; therefore, it not having been done, all power over that land, and therefore over all the land in the Province, is taken away so far as relates to legislation concerning matters of a merely local or private nature. That their Lordships think is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular Society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was, in any legal sense, within the category of insolvency. And, in point of fact, the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose the final distribution of its assets, on the footing of Insolvency or Bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and, possibly, at some future time, recovering its property, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated. Their Lordships are clearly of opinion that this is not an Act relating to Bankruptcy and Insolvency."

THE LORD CHANCELLOR: Which case is it you are reading from?

MR. BLAKE: *L'Union St. Jacques de Montreal* v. *Belisle*. Then take the next case, *Cushing* v. *Dupuy*, 5 App. Cas., page 409, which once again indicates, to my mind, by the very language in which it affirms the jurisdiction of the Dominion Parliament, the absolute necessity of such an interpretation as will leave certain powers to the Provincial Legislature until the Dominion Parliament does act. "It would be impossible," say their Lordships, "to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights."

LORD WATSON: That case clearly shows that this right which is so interfered with and modified in the course of constructing a Bankruptcy scheme may be, until the scheme is actually legislatively constructed, open to alteration and modification by the Provincial Legislature.

MR BLAKE: That is precisely my line of argument. It speaks of ordinary rights of property, and other civil rights. Here, at any rate, we get within "property and civil rights," and not within "matters of a local and private nature"; and we get with reference to property and civil rights the affirmance of this, that the Dominion Parliament cannot advance a step in using the power to create a Bankruptcy and Insolvency scheme of legislation without touching the Provincial sphere, which, however, until it does choose to act, remains, as we contend, intact.

LORD WATSON: That is a case which is so far an authority, that it turns on these two subsections of section 91 and section 92.

MR. BLAKE: That is quite true. I hold it fortifies my view of the real meaning and force of your Lordship's previous decision, that when we come to deal with *Cushing* v. *Dupuy* precisely the same line of argument is adopted as to "property and civil rights," which was not expressly stated, but which was, as I contend, inevitably implied in *L'Union St. Jacques de Montreal* v. *Belisle*, to be applicable to the larger as well as to the minor subject. The judgment proceeds:

"Nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with Insolvency. It is, therefore, to be presumed—indeed, it is a necessary implication—that the Imperial Statute, in assigning to the Dominion Parliament the subjects of Bankruptcy and Insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the

Provinces." "How far?" "*So far as a general law relating to those subjects might affect them.*"

They have a power to interfere if they choose to legislate; but, until they do interfere by legislating, things are where they were. No one can tell beforehand whether they will interfere at all, or what the character of their interference may be; and in the meantime property and civil rights remain intact.

LORD WATSON: That is putting it too high, I think. The Provincial Parliament had power to establish a Bankruptcy scheme before the Act.

MR. BLAKE: I agree that before applying this principle one would, first of all, have to find out, if possible, what a Bankruptcy scheme is.

THE LORD CHANCELLOR: A scheme of distribution amongst creditors of the property of a person who could not pay his debts as they fell due. It is not necessary for your proposition to contest that.

MR. BLAKE: Not at all—at least I do not think so—but I suggest these additions—capable of enforcement at the instance of the creditors, and to be followed on conditions by the discharge of the debtor from his liabilities. If we add these, as I conceive, material elements, then, if we must make a definition of Bankruptcy and Insolvency on some general principle, they would lead to a conclusion satisfactory to my mind.

THE LORD CHANCELLOR: Then you would not contend that if it was actually the creation of a Bankruptcy Law?

MR. BLAKE: As I have just now attempted to define it.

THE LORD CHANCELLOR: Whatever is the proper definition of a Bankruptcy Law, you would not dispute that although the Dominion had not dealt with it the Province could not.

MR. BLAKE: I would not.

LORD WATSON: I did not suppose you would carry it so far.

MR. BLAKE: Not at all.

LORD WATSON: Although there is an exclusive right of legislation given by section 91 on this matter to the Dominion, yet there are rights in the Province which the introduction of a scheme of Bankruptcy would, to some extent, displace.

MR. BLAKE: Yes.

LORD WATSON: And considerably modify.

MR. BLAKE: Yes.

LORD WATSON: So far as they are merely modifying the Civil Law for the purpose of introducing it in the Province, they are touching on matters with which the Province may deal in the absence of legislation.

MR. BLAKE: Yes. Then the third case to which I would refer at this stage is *The Citizens' Insurance Company* v. *Parsons*, 7 App. Cas., page 96, in which the question under consideration was that of the regulation of trade and commerce; and I refer to it for the purpose of reading these words:

"Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction" (in the direction of regulating trade and commerce). "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of pre insurance in a single Province, and, therefore, that its legislative authority does not, in the present case, conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of section 92. Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect property or civil rights in the Provinces, or the legislative power of the Provincial Legislatures in relation to those subjects."

There you see advanced the proposition which Lord Watson suggested. It is plainly implied that a competent exercise of the power to regulate trade and commerce by the Dominion Parliament might modify or affect the power to deal with property and civil rights, which until that competent exercise had taken place would remain in the hands of the Provincial Legislature. That is our line.

"Questions of this kind, it may be observed, arose and were treated by this Board in the cases of *L'Union St. Jacques de Montreal* v. *Belisle* and *Cushing* v. *Dupuy*."

So that you get the assertion of that proposition coupled with an indication of the view of the Board at that time of the nature of the decisions in those two cases.

LORD WATSON: On the whole, it would be more difficult to define what is meant by trade and commerce than to define what is meant by Bankruptcy and Insolvency.

MR. BLAKE: Perhaps so. But your Lordships will have to consider what has been meant in times past by Bankruptcy and Insolvency. There was a time when a Bankruptcy Act was enacted in order that corporal punishment might be administered to the bankrupt. There have been all sorts of provisions made at different times; and one does not know how far the law may extend. "Bankruptcy and Insolvency" can, in truth, hardly be, in strictness, defined except by the action of the Legislature which is to deal with the subjects; and you must look to the statute for the legal definition of the relation which is to create Bankruptcy or Insolvency; and to ascertain how extensive and thorough, or how partial and ineffective, may be the system which is the creation of that statute.

THE LORD CHANCELLOR: So far as they would touch property and civil rights, is it not the essence of Bankruptcy and Insolvency, as understood in 1867 at all events, that it should provide for the administration of the estate of the insolvent person, and the distribution of his assets among his creditors?

MR BLAKE: If I were called on to make a definition of a system of Bankruptcy and Insolvency, I should say that not merely then for the first time, but for a long time previously, the fundamental view had been that, morally, the property of a man who had become unable to pay his debts in full was a fund for the payment of his creditors as far as it would go, and ought to be divided ratably and proportionately between them——

THE LORD CHANCELLOR: Whether they proposed to divide it ratably or give a preference—we shall see presently whether other elements are involved, too—was not that element necessarily involved in the conception of Bankruptcy and Insolvency in the year 1867?

MR. BLAKE: I think it was involved in the conception of Bankruptcy and Insolvency; but I do not think it was limited to that conception. I think, independently of that conception, Common Law and common sense would rather have indicated, apart from Bankruptcy law altogether, the notion of a ratable and equal distribution as one that was to be favored.

LORD WATSON: I do not know that we are dealing with technical terms. Bankruptcy, to my mind—I may be quite wrong—rather suggests the condition of an insolvent who has been declared by law to be bankrupt.

THE LORD CHANCELLOR: Formerly, in English law, the distinction was that Bankruptcy was the case of a trader, and Insolvency the case of a non-trader.

MR. BLAKE: Of course.

LORD WATSON: Insolvency means that a person cannot pay his debts.

THE LORD CHANCELLOR: A law relating to insolvency was a law relating to distribution among the creditors of an estate of an insolvent person.

LORD WATSON: And as everybody's private affairs are not open to all the world, and the state of his money matters, one of the first essentials of all Bankruptcy law is to lay down a test of Bankruptcy or Insolvency to enable his creditors to proceed against him as if he were in that condition, without necessarily making themselves acquainted with his affairs, or having an accountant in to discover whether he can pay. There are certain tests which the law accepts as evidence for the time being of Insolvency or Bankruptcy.

MR. BLAKE: They are purely conventional conditions. They are terms which the law for the time being sets up as tests.

THE LORD CHANCELLOR: It seems to me that there is very little necessariiy included in the idea of Bankruptcy or Insolvency. The law in different countries may impose conditions and insert provisions for the protection of creditors, but none of them can be said to be of the essence of Bankruptcy or Insolvency law. I think it always was simply provided that if a man could not pay his debts, his estate should at the application of a creditor be vested in an official whose business it should be to distribute it. If there was nothing else but that, that would be a Bankruptcy law.

MR. BLAKE: It would, I suppose.

LORD WATSON: A just distribution of the whole of the bankrupt's and insolvent's estate amongst his lawful creditors according to their rights and preferences.

THE LORD CHANCELLOR: If not a just distribution, it would be still bankruptcy. Any legislation which said that, on a person being unable to pay his debts, the Court would provide or the law would provide by some order of Court or otherwise for the distribution of his property would be a Bankruptcy law or Insolvent law as understood in 1867, if there was nothing beyond that. I think, taken with that, if the Court took from him the distribution of his property, there should be no right to sue him for the debt from that moment.

MR. BLAKE: Your Lordship has interposed with the observation I was going to make as a suggested addition to the essential elements, if one were called on to make the definition. It would then be a scheme for getting hold of the assets of the debtor and dividing them according to law or the legal demands of justice between his creditors—a scheme of which, it may be, the debtor would be entitled to avail himself voluntarily, but of which the creditors certainly ought to be entitled to avail themselves by putting the debtor *in invitum* into Bankruptcy or Insolvency—a scheme which, as your Lordship has said, taking out of his hands the administration of his assets, should upon conditions of honesty, providence, and so forth, upon conditions varied from time to time as experience should indicate, relieve him from liability to be sued for any balances remaining after that administration. Now, it is quite clear that, supposing you lay that down, you must leave to the sense of the Legislature at the moment of legislative action the definition of what should be presumed to be the essential elements of bankruptcy. Nor do we in this definition embrace any of the minor details and the numerous conditions on which creditors would be entitled to intervene, or debtors to be discharged.

THE LORD CHANCELLOR: With reference to fraudulent preference, which is a common adjunct to Bankruptcy law, that is obviously not an essential part.

MR. BLAKE: Quite so; nor anything that is *in pari materia* with the Statute of Elizabeth. That has been the holding with reference to the earlier sections of this Act, that it is not Bankruptcy or Insolvency at all. There are innumerable details as to the conditions on which the law should be invoked.

THE LORD CHANCELLOR: Reputed ownership, for example.

MR. BLAKE: Yes; and the conditions on which discharge should be allowed; the circumstances under which a creditor should be permitted to proceed; the priorities of creditors; the rights as between creditors and purchasers or transferees—all these questions interfering with property and civil rights remain absolutely unsettled. One does not know how far the Legislature may go, or in what direction.

LORD WATSON: Supposing there had been a scheme of Bankruptcy enacted by the Legislature of the Dominion, but it had merely gone the length of directing in what circumstances Bankruptcy proceedings should issue, and for adjudication, and then making provisions for getting in the estate and the appointment of a trustee, and had simply directed that the estate should be distributed according to law as to their respective rights and preferences, would that have ousted the power and authority of the Provincial Legislature to direct what their preferences *inter se* would be?

MR. BLAKE: Far from it; I think that would rather have imposed a duty of action on the Provincial Legislature.

LORD WATSON: They have this subject in their hand, and an enactment in these terms would not imply that the law as to preferences between debtors should not be disturbed or should remain undisturbed in the case of creditors of insolvents, but should be altered so far in the case of creditors who were not creditors of insolvents. It would be very inconvenient.

MR. BLAKE: The scheme of the B.N.A. Act is rather to leave with the Provinces everything that, at any rate, would come within procedure.

LORD WATSON: A creditor might find himself in this position, that the Provincial Legislature was only entitled to deal with the law affecting preferences of creditors so far as related to creditors of solvent persons. The creditor might find himself in this predicament, that he was subject to one law of preference so long as his debtor was insolvent, and subject to another law whenever the debtor became bankrupt.

MR. BLAKE: My impression is that with reference to everything which would, even on a larger interpretation of the word, come within "procedure," it

would be more consonant with the true theory of the B.N.A. Act to leave that to the Provincial Legislature, to which is given an exclusive power to deal with procedure in civil matters.

LORD WATSON: On the other hand, I rather think it has been suggested more than once, and generally accepted, that the intention was to leave to the Dominion the power to make provisions in Bankruptcy which would extend to the whole country.

MR. BLAKE: Certainly.

LORD WATSON: To put creditors in different Provinces in precisely the same position as regards the dealing with an insolvent estate.

MR. BLAKE: By all means.

THE LORD CHANCELLOR: You could not in a scheme by means of separate Provincial legislation as to property and civil rights put them in the same position, because under exactly similar circumstances there might be a right which would have to be recognized in the Bankruptcy Court in the one Province which would not be recognized in the other.

MR. BLAKE: There is no doubt about that at all. Then there seems to me to be this observation, which, perhaps, has hardly received sufficient attention——

LORD WATSON: I suppose in certain circumstances they might forfeit a right in such a way that when bankruptcy supervened there would be no claim against the debtor.

MR. BLAKE: They might destroy the right of the creditor or the right under a contract. That would be only dealing under Provincial law with property and civil rights. Even if the Provincial Legislature might not have the right to discuss the assets of the insolvent, yet I venture to suggest that the intention was to allow matters of procedure to be dealt with by the Provincial Legislature, and that when the Dominion Parliament does deal with Civil, as contradistinguished from Criminal, matters the intention rather was that it should make the fundamental provisions establishing the right.. ; and that the remainder as part of "The Administration of Justice, including procedure in Civil Cases," should stay with the Province—

LORD WATSON: I feel the force of your argument and it gets rid of questions which might be very difficult. Your argument I understand to be this: Until there is legislation, you are not to assume that Bankruptcy legislation ought to or will include the regulation of the rights of creditors *inter se*. They may leave that to the Common Law, and if it was left to the Common Law that would not prevent the Provincial Legislature from altering the Common Law of the Province. But another question might arise if the Dominion Legislature were to enact a Bankruptcy law not confining itself in the way I have indicated, but were to go on to make provisions for the preference of creditors in the bankruptcy; but until it has done that there is nothing to warn the Provincial Legislature off the field.

MR. BLAKE: Yes, my Lord. And another and difficult question might arise as to the precise range of the respective powers, and a further question might arise when there had been but a partial exercise of the power.

LORD WATSON: Then the matter for consideration, if they were so to legislate, would be whether the power was really incidental to the construction of a Bankruptcy scheme.

MR. BLAKE: Precisely.

LORD WATSON: There may be a considerable distinction between what is necessary to the idea of the Bankruptcy scheme and what may be incidental.

MR. BLAKE: No doubt, and that is a part of the argument that seems to me to be invincible.

LORD WATSON: With a Bankruptcy scheme it must always be open to the Legislature charged with the enactment of that scheme to consider how much they leave to the Common Law and leave to the Provincial Legislature.

MR. BLAKE: Yes, perhaps within limits; and granting all that, which is the most favorable interpretation that can be suggested for the powers of the Dominion Parliament—the largest interpretation you can give—

LORD WATSON: I do not express any opinion on that.

MR. BLAKE: I say so because it leaves open to them, at any time, the assertion of their extreme rights.

LORD WATSON: In other words, you put it that till the power is exercised the strictest limit must be assumed.

MR. BLAKE: Yes. Take the absolute essentials until such time as they choose to act; and when they choose to act they can, unembarrassed by any prior decision of any Court, assert the proposition that, though such and such are the only absolute essentials —are Insolvency and nothing else—yet, naturally and reasonably, for the purpose of uniformity and convenience, and so forth, they have a right to go a great deal further, and may provide for various details, thus putting in abeyance Provincial legislation which in the meantime was operative. That is a convenient construction. It leaves most at large, and it does least harm. At present the Dominion are acting a little like the dog in the manger; they will not act themselves. They will not take the food; nor do they propose to allow that it shall be obtained by anybody else. And that attitude is assumed, it is to be observed, under a constitution which gives two other methods of obviating difficulty. The first is a power of disallowance of any Act of this kind. If it happened that the Dominion, having determined upon adopting the policy of Bankruptcy and Insolvency laws for themselves, found the Provincial Legislature enacting laws which they thought trespassed on what should be the reasonable provisions of a Bankruptcy and Insolvency law, which it would be within the power of the Dominion to enact, but which would be contrary to the policy the Dominion Legislature thought ought to prevail, they could disallow the law and so prevent its coming into force. But, if they did not think fit to do so at that time, then, on the theory I am now suggesting of an elastic interpretation of Bankruptcy and Insolvency, they could at any time they chose to intervene, by negative or affirmative legislative provisions, prescribe the object and conditions of a Bankruptcy and Insolvency law, and so, if thought fit, put in abeyance the Provincial legislation which up to that time had been in force. Now, I desire to place before your Lordships two alternatives as to the meaning of "Bankruptcy and Insolvency." The first, that it is absolutely elastic and indefinite; that these are relations which require to be defined and regulated by the law itself, and of which, unless and until defined and regulated, it is impossible to anticipate the definition by antecedent judicial interpretation. And that, I think, is consistent with the exposition of Lord Selborne where he speaks of "certain well-known relations," because in that exposition,

when he gets a little further on, he speaks of those relations as existent "according to definitions prescribed by law, including the conditions on which the law is to be brought into operation"; and therefore the law really is to prescribe what its own nature and extent shall be. If you take "Bankruptcy and Insolvency" to be that, you merely say it is insusceptible of definition in any sense which entitles you to withdraw from "Property and Civil Rights" any particular condition or relation unless and until the concrete case has arisen and Dominion legislation has taken place. That is the first alternative. If, on the other hand, the view already hinted at in the course of my argument be adopted, and you say we cannot give a complete definition of what Bankruptcy and Insolvency may possibly mean, because it may mean a great deal or it may mean a very little; but there is, upon the last analysis, a residuum, an essential and vital element which you can, as a legal proposition, affirm and define, and that element is thus and so; then, no doubt, you get by construction a short and sharp line, beyond which line, even in the absence of Dominion legislation, the Local Legislature cannot pass under "Property and Civil Rights." Well, what is this essential residuum, this vital element? Who is to lay it down? Are you to take what is suggested as a definition by Lord Selborne, that it is certain well-known principles of law, known not merely to British subjects, but to most civilized countries? Is it to be the law of England, or the law of Scotland, or the law of Ireland, or the law of the United Kingdom, as it stood in 1867, or the law of Nova Scotia, or New Brunswick, where there were none, or that of Lower Canada, where it was limited, or that of Upper Canada, where it was more extended? These are some of the difficulties in which one is plunged when one attempts the task. But I do not at all dissent from what I understood to be the suggestion of your Lordship as to what must be reckoned essential elements—

LORD WATSON: Do you say the words "Bankruptcy and Insolvency" refer to some local condition —local statutes?

MR. BLAKE: To some local condition to be created by law.

LORD WATSON: In the case of a person who cannot apparently pay his debts?

MR. BLAKE: And until so created absolutely vague and indeterminate; but if not absolutely vague and indeterminate, then, going as far as you can go in the absence of such a law, comprising, and for the moment limited to, certain essential elements. And the advantage of this view is this, that once we have got these essential elements we can look at once to the statute under consideration and see whether it comprises them; and so decide the question of jurisdiction.

LORD WATSON: Supposing they pass an enactment treating him in an exceptional way—call him what you like, bankrupt or insolvent—I suppose you would say then, so long as he is not left a free agent to make assignments, if he pleases, of the whole of his estate, and, therefore, to pass by competing creditors, it is immaterial, and the law lays its hand on him and on his estate, and says, "You shall not touch that; it shall be divided by somebody else amongst your creditors," and that at once gives him the status.

THE LORD CHANCELLOR: Is there any system of Bankruptcy or Insolvency that you know of in which the element does not exist of the man's disposal of his property being prevented, and his coming under some legal control as to the administration of it?

MR. BLAKE: I do not think so. No. As to Insolvency as distinguished from Bankruptcy, prior to Lord Westbury's Act Insolvency law was founded on another principle altogether. I understand the old Insolvency law was a measure of relief to the debtor, and in mitigation of the rigor of imprisonment for debt he was committed to gaol, but was allowed to get out.

LORD MACNAGHTEN: On making an assignment.

MR. BLAKE: Yes.

THE LORD CHANCELLOR: Then it was essential to take from him his property.

MR. BLAKE: Necessarily.

THE LORD CHANCELLOR: And to have it administered.

MR. BLAKE: He was in the gaol. His body was there as satisfaction to the creditor. He could make an application to the Court on disclosing all his property, on which application, after certain proceedings, he could obtain relief and get out of gaol. That was the old Insolvency law. In 1861 the distinction between Bankruptcy and Insolvency was abolished.

THE LORD CHANCELLOR: Is there in any country a system of Bankruptcy and Insolvency in which the tying a man's hands as to a free distribution of his property and compelling the distribution of his property in a particular way has not been the essential element?

MR. BLAKE: Not in modern times at all.

THE LORD CHANCELLOR: What we have to deal with is 1867. You cannot, since 1867, point to any system of Bankruptcy and Insolvency where that was not an essential element, whatever else there may have been.

MR. BLAKE: No; I opened this second alternative with the view of presenting to your Lordships the two elements which I thought should be regarded as essential in 1867. First, that there should be a procedure for a discussion of the estate for the benefit of creditors, and in support of the moral duty of an insolvent to see that his property should go to pay his debts ratably, and therefore a procedure compellable by creditors; secondly, that there should be a procedure for the relief of the debtor who, at any rate incidentally and as consequent upon the taking of his property out of his hands, should, in a proper case and on proper conditions, be entitled, having given up all, to get some relief from his debts.

THE LORD CHANCELLOR: I am not quite so sure about the second as being essential. Of course, you could not let him be sued while the Court was administering his property. You could not let that property, to be ratably distributed, be seized by a particular creditor, whether a creditor at the time or a subsequent creditor; but I am not sure it would be essential to the idea of Bankruptcy or Insolvency that you should liberate him from his debts.

MR. BLAKE: If you take the status of the law in 1867, which is, I think, the test your Lordship was applying, this certainly was part of the then law, and was thought to be a right. I do not say an absolute and unrestricted right, because if the man was dishonest or profligate, or did not make a proper disclosure, or was careless and imprudent, or did not pay a certain dividend, he might not be entitled to the relief.

THE LORD CHANCELLOR: Inasmuch as there were restrictions on discharge, those restrictions, one can conceive being largely increased, so that you could say a man would not be absolutely discharged

till he had paid 20 per cent. in the pound. I am not quite so sure about that as about the first.

MR. BLAKE: Very well, my Lord; for me, the first is enough. I suggest the two elements, however, quite admitting that as to the discharge the various enactments have shown from the beginning that it was not regarded by the Legislature as a necessary and unrestricted right, consequential upon the creditors asserting their claim to take his property, that the debtor should be released.

LORD WATSON: Is it not always implied in the words "Bankruptcy and Insolvency" that you are to put an end, and the law steps in to put an end, to the debtor's right to deal with the estate in creating preference amongst the creditors?

THE LORD CHANCELLOR: And to put an end to the creditors' power to get hold of the estate, but not necessarily to the creditors' right to force relief against the debtor in any other way than by getting part of his estate. I do not, at the present moment, see that it is essential to this case whether there is a second element.

MR. BLAKE: I do not think it is. One does not like to part with the second string to one's bow. But I quite agree that for the purpose of my case the first element is adequate. Ever since the time of Queen Anne, the principle of discharge has been recognized in all Bankruptcy Acts; and though it is said in some of the judgments to be modern, yet I have heard lately of things being thought to be "as dead as Queen Anne," and being proved very ancient and extinct, indeed, by that comparison.

Now, my Lords, if either one of those provisions is admitted to be an essential element of Bankruptcy or Insolvency, then not merely the ninth clause, but the whole Act is not an Insolvency law; for I think it may be laid down without doubt or dispute, first, that this Act does not give to the creditors any right whatever to get hold in any way of the assets of the debtor or to put the law into operation; and, secondly, that it gives no right to the debtor to obtain relief or a discharge. Whatever may be said affirmatively of the Act, I think it may be said negatively that it comprises neither of these two provisions; and not comprising either of those two provisions, we find excluded the essential characteristics or characteristic of "Bankruptcy and Insolvency." Therefore, my argument is that, while it is quite possible, as shown by the cases to which I have referred, that the Dominion may at some time so act as to supersede, in part, this legislation, and to appropriate, in part, this field; while it may make a very wide or a very narrow law; while it may deal with ancillary provisions to a large or to a limited extent; while it may take up the question of procedure very extensively, or not at all, it leaves open, in the meantime, that doubtful and debatable ground; and the Court will not pronounce in favor of the abstraction from the Provincial Legislature of its power until there has been an assumption by the other Legislature of the right to legislate.

THE LORD CHANCELLOR: Do you say an assignment which a man chooses to make, but is under no obligation to make to a trustee, for the benefit of the whole of his creditors, does not differ from an assignment he might make for the benefit of one or two creditors?

MR. BLAKE: It does not at all differ. These assignments have been more favored, as being that reasonable and moral thing which a debtor ought to do, than assignments for particular creditors; but they derive their force from no law or notion of Bankruptcy or Insolvency in the legal sense, but from the Common Law and the recognition of their natural justice.

THE LORD CHANCELLOR: It obtains what force it has simply by the act of the person who makes the assignment, although there is no other conveyance or deed of transfer.

MR. BLAKE: Certainly. In the absence of any restraining law, he might assign for the benefit of any one or more creditors. When he assigns for all, he does the thing which morally he ought to do; and such assignments have always been looked upon with more favor by judges than the others; but the right is an old Common Law right, and does not depend on any special legislation whatever.

Then, my Lords, before I turn to the history of the legislation, I wish to make one other illustrative comparison, and that is with the article of "The Criminal Law," because it affords a very plain example of the sort of "in-and-out" construction which I propose should be applied. You might, perhaps, construe "The Criminal Law," as embraced in clause 91, as being the general body of Criminal law which had prevailed in the Dominion, or the general Common and Statutory Criminal law of the United Kingdom; or you might construe it to include a power to make new Criminal laws, and by the repeal of existing Criminal laws to remove from the category of the Criminal law particular Acts which, up to that time, had been within it. The more indefinite and elastic construction is that which has been universally adopted in the Dominion; that this is a power—though I can suggest cases in which there might be an atrocious strain of that power—cases in which, perhaps, judicial interference might be invoked—yet this is a power, with regard, at any rate, to any subject on which there is a reasonable pretence for action, to create a crime out of that subject, and so to bring it within the Dominion power from that time; to make a new crime, as for instance, in the case of certain offences against women which have been made crimes within the past few years. Till that time, those Acts might have been prohibited by a Provincial law with a penal sanction up to imprisonment with hard labor for life—the second severest punishment known to British law. The moment the Dominion Parliament said that the particular Act which we will assume had been prohibited by Provincial law with a penalty was a crime, and gave another method of punishment, I apprehend that law would, at any rate, be valid, and it would probably supersede the Provincial law, and thus the area of "The Criminal Law" would be enlarged, and that of "Property and Civil Rights" invaded, if not restricted. So, again, you might take Acts out of the category of the Criminal law, as has, in fact, been done. When Confederation passed, certain laws based on old British laws with reference to contracts of service made some breaches of contract of service criminal; but about 1876 it was felt that those breaches of contracts of service really were civil wrongs only, and ought not any longer to retain the attribute of criminality. What the Dominion Parliament did was to repeal those laws and make a new law—a new and limited Dominion law. What was the result? The breaches ceased to be crimes. What followed as the avowed intention? That they fell within the denomination of civil wrongs; that the area of "Property and Civil Rights" as a Provincial subject became enlarged; and that an unchallengeable power arose in the Provincial Legislature to pass laws prohibiting those breaches of contracts of service, and affixing a penalty to a violation of the law. Thus by my

plan you get the most convenient method of carrying out the great objects of the Constitutional Act.

Now I come, at last, to the history of this legislation; and if your Lordships turn to the commencement of the print I will go through it, showing, as rapidly as I can, how things went on. As I have said, the really essential parts of this Act—the fundamental parts in regard to which all the rest may be said to be simply perfective and ancillary—were the inclusion of what is to be found in the 22nd Victoria, cap. 5, passed in the year 1858. What is the title of that Act? It is "An Act for abolishing arrest in civil actions in certain cases, and for the better prevention and more effectual punishment of fraud." Now, that Act was passed by the late Provincial Legislature; but though it legislated for the two parts of the United Province of Canada, the Act applied only to Upper Canada—now Ontario. Why? Because, as your Lordships know, the Lower Canada, or Quebec, law was different from the Ontario law; and practically in this case it differed because there had always been in the Civil Code of Lower Canada provisions under which an execution enured for the benefit, not only of the single creditor who put in the execution, but of all other creditors who might put in their claims. The property seized was discussed, and the proceeds were applied ratably. That being the law in Quebec, so far as concerned executions, it did not require improvement. Then, what happened in Upper Canada under this law? The first section printed here, the 18th of the Act, deals practically with executions. It provides:

"Every confession," and so on, "by any person, being, at the time, in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency with intent to defeat or delay creditors, wholly or in part, or with intent thereby of giving one or more of the creditors a preference over other creditors, or over any one or more of such creditors, shall be invalid and ineffectual to support any judgment or writ of execution; and every such confession," and so on, "shall be deemed and taken to be null and void as against the creditors of the party giving the same to all intents and purposes whatsoever."

Well, that is really in large part the Statute of Elizabeth. And as to section 19:

"If any person, being, at the time, in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency shall make, or cause to be made, any gift, conveyance, assignment, or transfer, of any of his goods, chattels, or effects, or deliver or make over any bills, bonds, notes, or other securities or property, with intent to defeat or delay the creditors of such person, or with intent of giving one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer, or delivery, shall be deemed and taken to be absolutely null and void," etc.

What is done with reference to an assignment for the benefit of all creditors? There is a proviso in the nature of a saving clause only:

"Provided always that nothing herein contained shall be held or construed to invalidate or make void any deed of assignment made or executed by any debtor for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts."

THE LORD CHANCELLOR: That simply leaves it alone.

MR. BLAKE: Leaves it alone; and it is simply left alone still to-day. That provision is carried through down to the Act which is impugned. So that you get these two simple propositions: a proposition as to executions, and a proposition as to transactions made with intent to delay, defeat or prefer, declaring them to be null and void against creditors if made in particular circumstances.

LORD WATSON: Practically what has been done by the clause complained of is that the Provincial Legislature has stepped in and said that when such a deed as is excepted by the proviso has been executed, it shall take effect against execution creditors.

MR. BLAKE: Yes; but your Lordship has not yet been made aware, because I have not come to it yet, what alterations had previously been made in the law as to execution creditors. I must come to that somewhat later on. As I have urged, and as it has been universally held by the judges who have discussed the subject, this legislation was validly affirmed by the Provincial Legislature which affirmed it, and would have been valid original Provincial legislation after Confederation as being within "Property and Civil Rights," and *in pari materia* with the Statute of Elizabeth. That is the line of argument which we take, and which is supported by a consensus of judicial opinion.

LORD WATSON: It was saved by the Confederation Act.

MR. BLAKE: All prior Provincial legislation was saved for all purposes; but the power to touch such legislation rested after Confederation exclusively with the Legislature within whose dominion the subject passed. And what I am submitting is that a dealing with that pre-Confederation Act would have fallen exclusively within the Provincial power. In part, it is a reproduction of the Statute of Elizabeth. In one element it is more comprehensive, because it extends to preferences. In another it is nominally more limited, because it is confined expressly to persons either in insolvent circumstances or unable to pay their debts in full, or knowing themselves to be on the eve of insolvency. But, in truth, the mischief of the Statute of Elizabeth was practically limited to cases of that class. Nobody asked for an order to get back some property that had been abstracted through a transaction void under the Statute of Elizabeth if there was plenty of other property left to pay all the debts. It was only when, irrespective of the transaction, or consequent upon it, there ensued a deficiency of assets for the payment of the debts that the Statute of Elizabeth had any practical or actual operation at all. It was only where there was not enough property left for the payment of the debts that the Statute was useful. If a man had £100,000, and liabilities of £20,000, and made, to defeat or delay creditors, a conveyance of £10,000, of course no question arose; there was no necessity for impugning the transaction. That observation has acquired additional force from the remark of Lord Tenterden in *Shears* v. *Rogers*, 3 B. & A., p. 369, in which he points out that there is high authority for the view that the Statute of Elizabeth was limited to that class of case. If we pause for a moment at the Act of 1858, the right of the creditors, as ascertained by judicial decisions in the Province, and, as I apprehend, in consonance with the English law, would be that an execution creditor might either for himself or on behalf of all the body of execution creditors proceed to avoid the transaction, and so discuss the assets; and that the creditor in a proper case, even where the debt had not matured, and so he was unable to get judgment, might take some proceeding for such conservatory process as an injunction. There are circumstances in which the creditor can take the benefit of the Statute of Elizabeth in respect of a debt, without having obtained execution; not the whole benefit, perhaps, but, at any rate, such benefit as will result in the asset remaining available till the execution has been obtained. Who can doubt, then, that it would be legislation ancillary to and perfective of that passed in 1858 if we were to provide that the creditor should

be entitled to avoid and discuss for the benefit of all without having got execution? You have a law under which, applying the principle of action established for the Statute of Elizabeth, an execution creditor can, either for himself or on behalf of himself and others, proceed to avoid and discuss. You have a law under which, applying the same principle of action, he can, even though not yet an execution creditor, do certain things towards avoidance and discussion. It would be perfective of such legislation, ancillary to such legislation, properly belonging to such legislation, to provide, if the Legislature so pleased, that any creditor should be entitled to avoid and discuss on behalf of the whole body without any execution. It might be as matter of law convenient or inconvenient, good or bad policy, but these would be questions of policy inseparably connected with the principal Act, and to be decided by the Legislature which had dominion over its subject.

LORD WATSON: I thought, in England as well as other countries, the original early legislation was all to the effect of declaring nullities, and that certain acts on the part of the person under certain circumstances amount to fraud, and to set them aside. The idea of attaching the estate and distributing it among creditors is much more recent.

MR. BLAKE: That is quite true. Taking the Act of the 13th Elizabeth, at that time there was no such idea. Each creditor came in as he pleased and fought for his own hand; avoided the fraudulent transfer and seized the asset under his writ; but I maintain it was reasonably part of an extension and perfection of such legislation to provide machinery by which a creditor might have relief without execution on behalf of himself and all other creditors, or that any creditor might step in and take the benefit of pending proceedings. Then, again, if you go a step further, who can doubt that it would be competent to the same Legislature, and germane to, fairly belonging to, the same subject, to provide that a trustee for all the creditors under a debtor's assignment should so directly represent the body of creditors as that he could on their behalf avoid and discuss.

THE LORD CHANCELLOR: All that you deal with there is one particular asset that somebody has seized, and you make that transaction in relation to that particular asset void. You may do that, as it strikes me at the moment, without any law, Bankruptcy and Insolvency law, and you might have a Bankruptcy and Insolvency law which would not do it.

MR. BLAKE: Certainly; but I go this much farther, that to provide the machinery for further facilities for the execution of your law, either by allowing the creditor to avoid and discuss without the seal and mark of an execution, or by allowing a trustee appointed by the debtor for the payment of his creditors to represent the creditors directly, and on their behalf to avoid and discuss, would be as clearly within the competence of the Legislature as the previous provision.

THE LORD CHANCELLOR: Take the illustration you gave of what was done in the French Province. That was allowed when the execution and the other creditors came in and interfered, but nobody would call that Bankruptcy and Insolvency.

MR. BLAKE: No. Then if I get thus far, that such a law as that of 1858 is recognized as Provincial; that assignments for the benefit of all creditors are recognized as valid; that provision under which a creditor with execution, and to a certain extent a creditor without execution, can avail himself of the law is recognized as Provincial; and that it is admitted to be within Provincial competence to provide that without execution all creditors or assignees for the benefit of all creditors may avail themselves fully of that law, I turn to section 9, and I enquire what section 9 does. And the answer is, that is exactly what section 9 does. All that section 9 does is to say that this transfer which is void as against creditors may be declared to be void as against them at the instance of the assignee for their benefit. This throws light on the character of the legislation and brings it within the local purview; because I advance with confidence the view that within the local purview must be the conditions on which, the form in which, the method by which, the extent to which the rights of creditors shall be asserted. They are all "property and civil rights." Having declared certain classes of transactions void as against creditors, all the rest, all that is done by section 9, is mere machinery to make that declaration effective. It is now suggested, on the other side, to be an extraordinary thing that the debtor and the assignor should be able to defeat his own deed by a subsequent deed, and that the claimant thereunder should be able to assert higher rights than his assignor. In the sense in which it is called extraordinary, this is not in the least an argument against us. It is not a reason for bringing the subject within either Dominion or Provincial legislation. It is irrelevant. But the proposition is no more extraordinary than the 27th Elizabeth, under which a grantor by a voluntary deed could by his own subsequent deed for value oust that deed, and, in effect, make a title in a subsequent grantee; and this, being a reasonable provision and an effective way of accomplishing the object, is within the competence of the Legislature. It is *in pari materia* with the Statute of Elizabeth, and with the Provincial Statute on which it is based.

My Lords, that Provincial Statute was consolidated in 1859; page 4 of the print shows the consolidation; and it is important to repeat the observation in this connection, that being on the Statute Book of the old Province of Canada from before 1859, in 1864 the Province passed the Insolvent Act, which was applicable to traders only in Lower Canada, and in Upper Canada to all. That Act remained in force for those three years, but though during the existence of these Insolvent Acts this Act of 1858 was naturally less used, because there were many conditions in which the Insolvent Act practically superseded it, yet it was never repealed, but remained in existence. Nobody ever supposed it was repealed or modified or changed impliedly, as it certainly was not expressly, by the Insolvent Act. There it stood on its own merits; and that also forms a mark of acknowledged distinction from Insolvency and Bankruptcy legislation.

THE LORD CHANCELLOR: There is a passage in a work on Bankruptcy which I have here which makes this statement as to what the old law was in Bankruptcy:

"The jurisdiction in Bankruptcy has authority to deal with that which is the Bankrupt's Estate, whereas it has no power to determine what is the Bankrupt's Estate. If the question is a legal one, it must be tried at law, if equitable, in the Court of Chancery."

So that they regarded the Court of Bankruptcy as a mere distributing Court of what was the bankrupt's estate, but the law decided what was the bankrupt's estate, so that the making things part of the bankrupt's estate which were not at Common Law part of his estate was a mere later development of the Bankruptcy law.

MR. BLAKE: Yes. And there was the creation afterwards of a power to transfer from the ordinary Courts to the Bankruptcy Court the trial of those questions. It required an express statute to do that, when it was found more convenient to consolidate the whole administration of the estate; but up to that time the ordinary law was brought into operation to determine what was the bankrupt's estate. Now, in 1864, an Insolvent Act was passed by the same Provincial Parliament which had passed the Act of 1858. The two Acts existed on the Statute Book together. The Insolvent Act was not thought to supersede the other, and though the other was less used during the existence of the Insolvent Act, yet it might have been used, and in fact was used, from time to time, and of course it came into very powerful operation after the Insolvent Act was ultimately repealed.

Now, when the Dominion Parliament passed its Insolvent Act in 1869, and when later it passed its Act of 1875, and later amended that Act twice, it never attempted to interfere with the Act of 1858, which, on the hypothesis or some of the hypotheses presented in this case, would have been a Dominion Act. It stands under any circumstances. And what I want your Lordships to consider, secondly, is that indisputable proposition that sections 1, 2, and 3 of the Act in question stand. They are law—

LORD WATSON: Until made the law of the Province by the Imperial Act of 1867.

MR. BLAKE: I am referring to the reproductions of sections 18 and 19 of the old Act of 1858. They are, in one sense, made the law of the Province; they are the law applicable to the Province.

LORD WATSON: That does not affirm their character, because these might be laws which only the Dominion would meddle with.

MR. BLAKE: Doubtless. But what I am saying is that whether you determine that they are laws that the Dominion only could meddle with, or laws that the Province might meddle with, they are on the Statute Book, because the Dominion has not meddled with them, and the Local Legislature has only amended them, leaving their substance untouched, as I shall point out. What the Local Legislature has done is, in cases of doubt—if this were a case of doubt—deserving of some attention; what the Local Legislature has done repeatedly and without objection by the Dominion Legislature, and what the Dominion Legislature has abstained from doing, may be looked at. I have referred to what the Dominion Legislature abstained from doing when it did interfere in Bankruptcy and Insolvency. They did not touch the law. What the Local Legislature did was to re-enact in consolidation and to revise and amend this law. There are, I think, as many as eight local Acts of Parliament touching this legislation. In 1877, in the print at page 5; in 1884, at page 7; in 1887, at page 7; in 1889, at page 15, and in 1890 at the same page, will be found local legislation dealing with this law.

LORD WATSON: Consolidation?

MR. BLAKE: Some revision, some consolidation, some amendment. Then, again, in 1891 and 1892.

LORD WATSON: The Consolidated Statutes of the Province are dated 1887, with subsequent modifications.

MR. BLAKE: Yes. Now, what conditions had supervened, and how was it that the Local Legislature came to act at all in this connection? It was because of the repeal of the Insolvency legislation which, in one form or another, had been in force from 1864 to 1879. It was repealed, and very great evils followed; a game of grab was played, in the way of individual creditors grasping property, obtaining preferential conveyances, obtaining chattel mortgages, obtaining assignments, producing unequal distribution, which bore very hardly, indeed, on foreign creditors, and interfered with the general credit and interests of the country. A learned judge, Mr. Justice John Wilson, in his judgment in the case of *Gottwalls v. Mulholland*, after the repeal of the Insolvency Act, suggested very strongly that some of the most pressing evils to which I have referred could be mitigated by the adoption by the Local Legislature of the Quebec system as far as it went. That suggestion was made in 1879; and in the year 1880 was passed (your Lordships will find it at page 17 of the print) an Act which permanently modified the rights of execution creditors. And it was in that view that I ventured to say to my Lord Watson, a while ago, that we had better ascertain what were the rights of execution creditors in 1877 before deciding how far their position was modified by the legislation under consideration. I refer your Lordships to the Act called "The Creditors' Relief Act," passed in 1880, and appearing as the Revised Statute of Ontario of 1887, which has been law since 1880, substantially in its present form. I do not think I need trouble your Lordships with a detailed reference. I may say, shortly, that the effect was that where an execution went into the sheriff's hands, either creditors or judgment creditors were entitled to take certain proceedings, the details of which are given at great length in the Act, which enabled them to become claimants on the discussable estate of the debtor through the sheriff under any one execution, the execution thus operating as an attachment for the benefit of all who chose to come in, and effecting, not a preferential, but a ratable and proportionate distribution of the exigible assets amongst all the creditors of the debtor.

SIR RICHARD WEBSTER: Judgment creditors.

MR. BLAKE: Not judgment creditors exclusively, or even mainly. Certificates were obtainable by creditors under procedure prescribed by the Act. Instead of suing, you presented a claim before an officer, and the other side had a notice, and had power to contest; but if they did not contest after a certain short interval, then the officer gave you a certificate.

LORD WATSON: The first attachment operated for the benefit of all who chose to come in.

MR. BLAKE: And it was no longer necessary to sue in the ordinary sense.

LORD WATSON: That provision would apply to solvent as well as insolvent.

MR. BLAKE: Yes.

LORD WATSON: It might be more useful in one case than the other.

MR. BLAKE: Probably. It would have its practical operation, just as the Statute of Elizabeth had its practical operation, when there was a deficiency. If there was enough for all, it would not be material in any case, and the remedy was, as I have said, given upon and in consequence of the abolition of the Insolvent Act.

THE LORD CHANCELLOR: It is an exceptional case where a man lets an execution be levied when he is solvent.

MR. BLAKE: It is. He may, perhaps, if he knows himself to be on the eve of insolvency.

THE LORD CHANCELLOR: There are some exceptions, but it is the exception rather than the rule.

MR. BLAKE: There are some cases reported of solvent but eccentric persons who never pay except under execution.

THE LORD CHANCELLOR: I think they are the exception.

MR. BLAKE: I hope so. Thus your Lordships find that, since the year 1880, there has been on the Statute Book a law which, in effect, abolishes priority amongst execution creditors, not merely amongst themselves, but as between themselves and other creditors; because it gives to all creditors the right to avail themselves of the circumstance that any one creditor has issued an execution, and it provides for the discussion of the assets in favor of all those creditors. That was a very important improvement; but it dealt with only one element of the matter, the assets exigible under execution; it did not in terms deal with or advance the avoidance of preferential or fraudulent assignments. They were left as they stood, and the old law and remedies applied; but when they applied, I apprehend they would, under the operation of the new law, have applied for the benefit of all.

Then it was found that some of the evils of preference continued, and that the defects of the law of 1880 were serious. Seven years elapsed after the passage of the Act in 1880, under which the relief provided by the Civil Code of Quebec had been given to Ontario, and in 1887 was passed the Act which is specially under consideration here, and which is set out at page 7 of the print. The first section of that Act is equivalent to the first portion of the 18th section of the original Act of 1858. The 2nd section of that Act is equivalent to the first portion of the 19th section of the Act of 1858. The 3rd section of that Act is the latter part of the 19th section of the Act of 1858, that part which prevents a prior assignment form being invalidated. But, my Lords, strange to say, so far from that being an extension of the Act of 1858, it is a restriction: for whereas the Act of 1858, in its proviso, simply said that nothing in the section should render invalid any assignment made for the purpose of payment of creditors ratably and proportionally, this section says that nothing in the section shall apply to any assignment made for that purpose to certain specified persons. The assignment must be made to a sheriff of the county, or an assignee resident within the Province, with the consent of the creditors, in order that whatever benefits are derivable from the restrictive or saving clause shall apply. That is important in order that your Lordships may see that the Legislature were doing nothing more than the Act of 1858 provided, but were doing, if anything, something rather less; for, whereas the exception in the Act of 1858 was general as to all assignments of a certain character, to whomsoever made, the exception now in existence is limited to assignments of that character when made to specified persons, either the sheriff or the assignee, with the consent of the creditors. That being understood, what remains? I contend before your Lordships that all the remaining sections of this Act, and notably section 9, are simply ancillary provisions, carrying out and effectuating the operation of these first three sections, which are, as I have shown, sections 18 and 19 of the original Act.

LORD WATSON: I should think it would be admitted that if the Provincial Parliament had power to deal with and modify these sections of the Act of 1858, it would be difficult to maintain that they had not power to enact section 9. The argument against you, I should think, must be that there was no power to enact those sections.

MR. BLAKE: Your Lordship will have observed that I laid considerable stress on the fact that they had power to make these modifications, and that this was competent Provincial legislation. I have not, indeed, stated that argument as fully as I might, because it appears that the consensus of judicial opinion and the arguments up to this date have been on the line that these two sections are within the Provincial power.

THE LORD CHANCELLOR: It is quite clear, if you look at the English law, from the earliest times till quite recently, that you might have an assignment for the general benefit of creditors quite independent of bankruptcy.

MR. BLAKE: Certainly. There is no question about that.

LORD MACNAGHTEN: Those assignments were made Acts of Bankruptcy by Acts of Parliament.

MR. BLAKE: Yes.

LORD MACNAGHTEN: And made Acts of Bankruptcy because they put the property in a different course of distribution to what Bankruptcy law directs, and supposing they took it out of Bankruptcy; that is why it was made an Act of Bankruptcy.

MR. BLAKE: The Legislature said, first of all, that it was evidence of a condition of bankruptcy—

LORD MACNAGHTEN: Intended or having the effect of delaying creditors, because they took it out of the owner's hands to pay his debts.

MR. BLAKE: And they conceived that the general public interests were best served by providing that persons in such a condition that they were obliged to make an assignment should make it in the form the law had recognized, so that the assets might be discussed and administered under one general law.

LORD MACNAGHTEN: They had declared in express terms that those particular assignments were acts of bankruptcy. It required a statute to make it.

MR. BLAKE: Yes.

THE LORD CHANCELLOR: Where you have no Bankruptcy system, it could not be an act of bankruptcy. It would be a mere Common Law assignment; and all that section 9 does is to say that this Common Law assignment shall not have a certain precedence. That is all.

MR. BLAKE: That is all. If one looks comprehensively at the Act, it is clear, first, that, the Act not validating or creating this assignment, it must depend for its efficacy in the general law; and, next, that all that is done is to give conveniences for the effectuation of the purposes of the assignment. By the 2nd subsection it is provided that

"Every assignment for the general benefit of creditors, which is not void under section 2 of this Act, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act."

That is not now material.

LORD WATSON: What I am pointing to is this. I do not know that this is necessary for your case, and I need not say more than this, that it is open to discussion whether section 19 of the Act of the 16th August, 1858—taking that section—is or is not legislation in Insolvency: "If any person being at the time in insolvent circumstances, or unable to pay his debts in full, or, knowing himself to be on the eve of insolvency, shall make," and so on. If that is legislation in Insolvency within the meaning of section 91, then there was no power in the Legislature of

Ontario to modify or alter that clause. They can consolidate it, and take all the usual proceedings; but if it is legislation in Insolvency, and with relation to Insolvency within the meaning of section 91, they would have no power to alter it. Supposing that is so, the question would still remain, but the case would be clearer in favor of section 9 of the Act in question before us if that was not Insolvency legislation, but it is by no means exhaustive of the right of the Province to enact section 19.

MR. BLAKE: No, because all that the Province has done is this. What have they done as to 19—

LORD WATSON: It looks very much like Insolvency legislation—section 19 of the Act of 1858.

MR. BLAKE: What have they done about it? You must consider the particular thing they have done—

LORD WATSON: That was part of the statute law of 1867.

MR. BLAKE: Doubtless.

LORD WATSON: I understand that in Lower Canada, which had been the Province of Canada from 1840 to 1867, it was altered in that respect by the introduction of the Code. The Code was enacted in Lower Canada in 1866, before the Act of 1867 passed; but there are provisions in the Act, it may be—I rather think there are—however, there might be provisions in the statute law of Upper Canada, or Ontario, with which the Provincial Legislature had no power to deal, but only the Parliament of Canada.

MR. BLAKE: Doubtless. I quite concede that.

LORD WATSON: I do not think you ought to assume that section 19 of that Act of 1858 was not legislation in Insolvency. It professes to be so.

MR. BLAKE: Well, I do not know—

LORD WATSON: That depends upon the original point you have discussed.

MR. BLAKE: On the meaning of "Insolvency," and on legislation with reference to persons being either in or on the eve of insolvency; that is to say, *ex hypothesi*, not actually in insolvency, but only on the brink.

LORD WATSON: It occurred to me at the time you were arguing that first point that another view might be that the Act of 1867 was framed in view of the law then existing in the Province, and it might not be an unreasonable reading of the Statute to think that they had in view not only what might be done, but what had already been done by express legislation. That rather lies outside this, because, assuming that this had been Insolvency legislation within the contemplation of the Act of 1867, that legislation did not touch, so far as I can see, anything that was enacted in section 9.

MR. BLAKE: No.

LORD WATSON: Of course, if that section 19 of the Act of 1858 includes Insolvency legislation, then you would be bound to say section 9 does not.

MR. BLAKE: I think this is *a fortiori*.

THE LORD CHANCELLOR: Quite apart from Bankruptcy provisions, there were provisions dealing with transactions, and making them fraudulent and void as against creditors, which implied Insolvency, because, if a man was solvent, and able to pay, there were no means of making that transaction void because he had other assets with which to pay them. Therefore, the whole basis of that was that a man was unable to pay all his creditors, and had attempted preferentially to deal with one. Then you had Bankruptcy legislation followed by Insolvency legislation, the primary subject of which was the distribution of the man's assets. In connection with that no doubt there has been legislation on the same lines as that legislation—the Statute of Elizabeth, for example—making certain Acts void, and therefore dealing with acts of bankruptcy, but only for the purpose of the distribution of his property. That only makes it his property for the purpose of the bankruptcy or insolvency distribution. The doubt in my mind is whether any statute which deals with a transaction and makes it void, which has no relation to its being void, because there is to be a distribution, or in connection with a distribution, can be said to be Bankruptcy or Insolvency.

MR. BLAKE: That is certainly the argument I would advance. Take clause 19 of the Act of 1858. Supposing we were to strike out the words after the word "person" down to the word "insolvency."

THE LORD CHANCELLOR: The earliest Bankruptcy Act here appears to have been 34 and 35 Henry VIII., chapter 4, which recites that:

"Where divers and sundry persons obtaining into their hands great substance of other men's goods do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience, Be it therefore enacted by authority of this present Parliament: That the Lord Chancellor of England or Keeper of the Great Seal, the Lord Treasurer, the Lord President, Lord Privy Seal, and other of the King's Most Honorable Privy Council, the Chief Justices of either Bench for the time being, or three of them at the least, whereof the Lord Chancellor or Keeper of the Great Seal, Lord Treasurer, Lord President or the Lord Privy Seal, to be one, upon every complaint made to them in writing by any persons aggrieved concerning the premises, shall have power and authority by virtue of this Act to seize all the man's goods and sell them and distribute them ratably amongst the creditors."

That was the first Bankruptcy Act that provided for that. Then you find the 13th Elizabeth, chapter 5, which was "An Act against Fraudulent Deeds, Alienations," etc. It was not a Bankruptcy Act, but applied whether the man was made bankrupt or not, and that is followed by "An Act touching Orders for Bankrupts," which enabled commissions to be issued. That is chapter 7:

"Forasmuch as notwithstanding the Statute made against Bankrupt in the thirty-fourth year of the Reign of Our late Sovereign Lord King Henry VIII. those kind of persons have and do still increase into great and excessive numbers, and are like more to do if some better provision be not made for the repression of them and for a plain declaration to be made and set forth who is and ought to be taken and deemed for a Bankrupt"—

and then there is power to issue a commission and adjudicate the man bankrupt.

MR. BLAKE: I would invite your Lordships to consider this proposition: Supposing we eliminate the words after persons "being at the time in insolvent circumstances," etc., and make each of these two clauses absolutely general, they would not cease to apply to the person because he was in insolvent circumstances, or because he was on the eve of insolvency. They would remain applicable to that class of cases in which only they are practically useful or important; because, as your Lordship has agreed, the Statute of Elizabeth is of use only where there is a deficiency; provisions against preference are useful only where there is not enough to pay all; and if you eliminate the words on which my learned friends may rest as words indicating that this is Insolvency legislation, you will see the Provincial Legislature has unquestioned power to deal with transactions of this kind made by any person in any condition whatever, inclu-

sive of the condition expressly prescribed, and to which the operation of the Statute is in terms limited; that being the condition to which, in the nature of things, it is practically limited, because it is useful only where it is wanted, and it is wanted only where there is not enough to pay all—where the person is in or on the eve of insolvency. So that it would seem to me that the attempt to limit ought not to be considered as in effect extending the power of the Legislature beyond its lawful bounds. I invite your Lordships with earnestness to consider the absence of Bankruptcy and Insolvency legislation by the Dominion Parliament—

THE LORD CHANCELLOR: I take it the object of putting in those words is for the protection of the individual who gets the benefit. If you can show that the man was solvent, your deed is a good one.

MR. BLAKE: I think so; that can be the only object. They do not want that transactions should be interfered with in any other than the class of cases in which it is reasonable that they should be interfered with. They leave them as much as possible protected and untouched, and they leave as much security and certainty to transactions between parties as may be consistent with the object of the Act. But supposing this had not been made part of some Bankruptcy and Insolvency legislation, would anybody say such a law was not a good law of the Provincial Legislature? Would anybody say that an adverse conclusion was to be reached by the process of implying that it did not apply to a person who, in point of fact, had never been a bankrupt or insolvent, but was simply impecunious?

THE LORD CHANCELLOR: Do you say the word "Bankruptcy" was not a known word in any Provincial legislation?

MR. BLAKE: Yes, my Lord. It is invariably "Insolvency," though applied to traders and containing "Bankruptcy" provisions.

THE LORD CHANCELLOR: It would look as if the word "Bankruptcy" was introduced from our law.

MR. BLAKE: Yes; I will not affirm that in some old legislation, before my time, there may not have been a law entitled Bankruptcy, but in modern times we have used the phrase "Insolvency" as indicative of both classes of debtors, traders and non-traders, and as covering the whole range. I think it was prudent to insert "Bankruptcy" in the article; because an argument might have been founded on the absence of the word, having regard to the state of the English law, and also to the difference recognized in some Provincial legislation between traders and non-traders.

THE LORD CHANCELLOR: Because with the conjunction of the two it may be to some extent in your favor as indicating what is meant by the nature of the Insolvency law that is referred to.

LORD WATSON: What is the meaning of the word "Bankrupt"?

THE LORD CHANCELLOR: *Banco rotto*, in Italian. If the party could not pay, he was said to be "bench broken."

MR. BLAKE: What is practically done by the rest of this Act? First of all, everything that is essential to maintain this Act is in the earlier sections to which I have referred. I show that every essential to maintain these sections is in the Act of 1858, and I show that all the rest is mere machinery to carry out these purposes. For instance, there is a short form of assignment. The Provincial Legislature can frame short forms of deeds, transfers, mortgages, chattel mortgages, and make provisions as to the method of charge or transfer. It is provided that you can use a few certain words to express a great many other words, much, maybe, to the harm of the conveyancer and copyist—

LORD WATSON: How do you distinguish between Bankruptcy and Insolvency?

MR. BLAKE: I make no distinction.

LORD WATSON: Do they mean anything different?

MR. BLAKE: No.

THE LORD CHANCELLOR: In English law, if that may be supposed to affect it, Bankruptcy and Insolvency would mean the case of people unable to pay their debts. The distinction, if it is supposed to be taken from the English law—and the Imperial Legislature may possibly be supposed to be influenced by the terminology of the English law—may be that Bankruptcy and Insolvency were intended here to cover the case of traders and non-traders.

MR. BLAKE: Possibly; although there had been a fusion of the law before 1867; as I understand by the Act of 1861.

THE LORD CHANCELLOR: That is quite true, but very recent.

MR. BLAKE: Very recent. The intention, I have no doubt, was to place it beyond cavil and contention that the legislation was not to be confined to either traders or non-traders, but that both classes of the community were to be included within the power of the Dominion Parliament. That must have been the object. All the rest of the Act, as I was saying, is to carry out the object of the earlier provisions. Those provisions stand on an undisputed foundation, because they are provisions before Confederation, not repealed or attempted to be altered in any essential particulars. Then you find the assignee is given by the 7th section:

"A right of suing for the rescission of agreements, deeds, and instruments, or other transactions made or entered into in fraud of creditors, or made or entered into in violation of this Act."

Then you get section 9, which gives precedence to an assignment such as is described in the Act over all judgments and executions not completely executed. How that would be in the absence of the Act of 1880 may be a different question from that before us, who must remember that we have already the Act of 1880, which abolished the priority of execution creditors over one another, and of execution creditors over non-execution creditors. Remembering this, is it not clear that section 9 only provides that this assignee for the benefit of creditors can assert their full rights on behalf of the whole body of creditors? They had already the right to equality of treatment, and, therefore, this is a mere provision whereby that right to equality may be effectively asserted. It makes no substantial change at all in the condition of the creditors. Then there are later sections which make numerous provisions as to the method of controlling the estate by the creditors; but all that is, as I submit, entirely ancillary. It is mere machinery. Therefore, my Lords, we contend with confidence that the 9th section, operating upon the law as it stood at that time, operates within the domain of "Property and Civil Rights."

THE LORD CHANCELLOR: Supposing there was a provision that any conveyance for the benefit of all a man's creditors should avoid any conveyance for any individual creditor or limited number of his creditors with superior priority, would that be a bad law because the fact that he made a conveyance to all his creditors would show he was insolvent?

MR. BLAKE: I submit not. I cannot see that it would. And yet I can understand that, if a Bankruptcy or Insolvency law were passed by the Dominion, it might contain provisions which would supersede such a law.

THE LORD CHANCELLOR: It might very well supersede all transactions within a limited time.

MR. BLAKE: I can understand that. But I cannot see, in the absence of such a Dominion law, how the question can arise; and your Lordships see every argument of convenience is in favor of the construction which is proposed, because it does not abstract a single possible power of the Dominion Parliament to mould this matter as it pleases. It simply leaves a power to be used as long and as far as the Dominion Parliament does not interfere. That is all that is asked by us. But what, on the other side, is asked is that—while the Dominion Parliament does not interfere—the Provincial Legislature is not to be allowed to interfere, and that within a vague range, of which I cannot at all discern the limits or lines; a construction which would involve obscurity and confusion and paralysis from the moment it was adopted.

THE LORD CHANCELLOR: The giving of certain licenses is in the power of the Provincial Legislature.

MR. BLAKE: Yes.

THE LORD CHANCELLOR: Supposing there was a law which said that no person who has not paid his creditors in full should be entitled to such a license.

MR. BLAKE: Certain Provincial licenses are allowed only for revenue purposes. I am inclined to doubt whether the suggested law would be within the spirit of the grant, which is with a view to revenue for local purposes. Now, I will trouble your Lordships with some references to the judgments which have been delivered, which are to be found at page 2 of the Record. The Chief Justice adverts to the case of *Clarkson* v. *The Ontario Bank*.

LORD SHAND: Why was this section 9 taken out and made the subject of a case by itself?

MR. BLAKE: I cannot say, my Lords.

SIR RICHARD WEBSTER: It had arisen in a County Court case, in which this particular claim had been made under this kind of deed as between the execution creditors. That is how it came up. There was a proce ding upon it.

MR. BLAKE: There had been proceedings on other parts of the Act.

LORD SHAND: It naturally throws you into the examination of the statute as a whole.

MR. BLAKE: I do not admit that

LORD SHAND: It runs into the question very much whether that statute is one within your power.

THE LORD CHANCELLOR: You do not admit that?

MR. BLAKE: No. Certainly not.

THE LORD CHANCELLOR: The statute may, in many parts, deal with Insolvency, and in other parts deal with other matters.

MR. BLAKE: Certainly. First, I suggest that, as a whole, the statute is one within Provincial competence; and, secondly, I contend that even though you may find parts of the statute which are possibly "Insolvency"—it is for my learned friends to point out those which they contend to be such—but, even so, if they are not the substratum of the whole, I distinguish—

THE LORD CHANCELLOR: We must be entitled, not only to look at the whole, because the provisions standing by themselves might be ancillary to provisions in the old ones.

MR. BLAKE: And therefore I argue that it is impossible to look at clause 9 without looking at its relations; but its relations may be such as would show you that it would stand, even though certain parts of the Act might be void. I now turn to the judgments, to which it is my duty to refer. At page 2 of the Record, the Chief Justice adverts to the decision of *Clarkson* v. *The Ontario Bank*, and three others, in which the constitutionality of the Act was considered, and says that he has re-examined his adverse opinions and sees no reason to alter them. Then he thinks that section 9 cannot be separated from the rest of the statute. It provides:

"That an assignment under the Act shall take precedence of all judgments and executions not completely executed by payment. I believe that this section was relied on, and considered as one of the chief arguments against the Act, as showing the most marked evidence of the creation of a new system for the administration of Insolvent Estates interfering with the ordinary laws as regards debtor and creditor, and as trenching on the subject of Bankruptcy and Insolvency. I find it impossible to separate it from the rest of the Act, or to give an opinion as to its effect standing by itself, unless I arrived at a judgment the opposite to that expressed in 1883, to which I still fully adhere."

May I be permitted to observe that the section interferes with the ordinary law only as regards debts?

THE LORD CHANCELLOR: I do not understand that.

MR. BLAKE: It seemed to me a construction unduly limiting the power of the Legislature. There is no "ordinary law" in the sense of a law fixed as those of the Medes and Persians. The Legislature may alter all or any of the laws.

THE LORD CHANCELLOR: They have power to deal with any property or civil rights.

MR. BLAKE: The latter phrase I cannot object to on the same ground, as an expression of opinion, however much I may dissent from its soundness, "trenching on the disputable subject of Bankruptcy and Insolvency," but the former part seems to me to indicate a state of mind with reference to the function of the Legislature not conducive to the formation of a correct conclusion. Then he goes on:

"The opinions of the Judges of the Supreme Court in *Quirt* v. *The Queen* (19 Sup. Ct. 543) seem to support the view that legislation of the nature of that now before us, affecting the distribution of insolvent estates, is appropriated by the Federation Act to the Dominion Parliament."

There, again, we reach the old question. *Quirt* v. *The Queen* was a case in which, after much conflict of opinion, and by the narrowest possible majority, the Supreme Court held that certain legislation by the Dominion Parliament, directed to the administration of the affairs of the insolvent Bank of Upper Canada, was within the jurisdiction of the Dominion Parliament. They may have been right or wrong. I may very well, for the purposes of this case, be indifferent whether they were right or wrong My whole argument is based on the proposition that while the Dominion Parliament could exercise large powers in part superseding previously effectual Provincial legislation, until such exercise it would be perfectly competent to the Provincial Legislature to act. And, therefore, though an argument might be advanced against the decision in *Quirt* v. *The Queen* somewhat analogous to arguments that might be advanced on the other side in the case of *L' Union St. Jacques de Montreal* v. *Belisle*, still the existing conditions do not, in the slightest degree, make the former case material to our purpose. I admit that the decision indicates a very large and extensive potential range of legislation in the hands of the Dominion Parliament. I say that the larger you make the potential range,

the further you say it is possible for the Dominion Parliament to go, the more essential it is that you should keep free the hands of the Local Legislature, dealing with Property and Civil Rights, unless and until that range of power is entered on and occupied by the Dominion Parliament. Because the more ample the power you assign to the Dominion Parliament to meddle with the sphere of the Local Legislature, the deeper the wound Parliament can make in "Property and Civil Rights," the larger the area upon which it can infringe, the greater the "cantle" it can carve out of "Property and Civil Rights," the more indefinite and elastic the range of its potential action, the more important it is to decide that at any rate until Parliament chooses to act the other Legislature shall not be disabled from acting.

Then Mr. Justice Burton says he can add but little to what he said in the case of *Edgar* v. *The Central Bank*:

"The Parliament of Canada, having power to pass laws for the good government of the Dominion, were entrusted with the exclusive power of passing laws on the subject of Bankruptcy and Insolvency; and the question is whether this section falls within those terms. Their meaning is, I think, well expressed by Lord Selborne thus; 'The words describe in their well-known legal sense provisions made by law for the administration of the estate of persons who may become bankrupt or insolvent according to rules and definitions prescribed by law, including, of course, the conditions on which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.' In other words, Bankruptcy and Insolvency were well-known legal terms, not confined to the state of things in England, or the Provinces, at the time of the passing of the Confederation Act, but applicable to systems of legislation with which the whole civilized world were presumed to be familiar. The Dominion Parliament, and that Parliament alone, can determine whether the legal relation of Bankrupt or Insolvent shall be created out of any given combination of facts or circumstances; but there would seem to be a difference of opinion as to the true meaning to be attributed to the language of Lord Selborne. It appears to be thought by some that he was not dealing with the well-known legal sense of the terms Bankrupt or Insolvent, but that the words had relation to all persons unable to pay their debts in full, and in that sense therefore insolvent, and not to persons declared by competent authority to be bankrupt or insolvent."

There is certainly, as there not infrequently happens in cases of definitions, a dispute as to what Lord Selborne's definition means; but whatever may be true conclusions as to his reference in the words "according to rules and definitions prescribed by law," whether they apply to the immediately preceding phrase, "who may become bankrupt or insolvent," or to the remoter word "administration," when you find him stating what the rules and definitions prescribed by law include, and when you see they include the conditions on which the law is to be brought into operation, it seems to me that he plainly meant that the condition of "Bankruptcy and Insolveney" is comprised within the conditions on which the law as to Bankruptcy and Insolvency is to be brought into operation, and therefore that the phrase has a conventional sense, to be, in effect, created by the law, and which it is impossible to define in advance.

LORD WATSON: Unless the scheme of that Act is varied by the condition, the condition here to which this clause refers is that the debtor himself shall execute an assignment for the benefit of his general creditors in compliance with that Act. It may be a great inducement to execute that assignment to prevent his estate being torn in pieces by conflicting creditors; but whenever he does do it, it appears to me, from that moment, judging from a hasty examination of the Act, that everything goes on as if this administration had been at the instance of the creditors.

THE LORD CHANCELLOR: Excepting that the distribution in that case by the person depends upon the act of the debtor and the power which he gives to distribute, and not any power which the law gives.

MR. BLAKE: It is his voluntary act. At an early stage of my argument I endeavored to ascertain what were the essential elements of "Bankruptcy and Insolvency"; and if one of these essential conditions is, as I contend, the power of the creditors to bring the law into operation, that element is here lacking. It does not exist; it is only the voluntary act of the debtor that brings the law into operation; and then, once so brought into operation, there are facilities for the execution of his voluntary act, and machinery by which that which he chooses to do may be most expeditiously, and most satisfactorily, and most economically carried out. Therefore, we are back again at what the definition of "Bankruptcy and Insolvency" is. To continue:

"'What business man,' said one of the counsel who was contending that this Act was *ultra vires*, 'could suppose for a moment, on reading the title to this Act (R.S.O. 124), or the language of the first section, that it was not Insolvency legislation?' But, with great respect, that is not the test. A business man, not versed in legal terms, would, very likely, so understand the enactment; but the question is what is the true construction of the words used by the Imperial Legislature when dealing with the distribution of legislative powers? And when we find these powers included with other classes of subjects of national and general concern, such as trade and commerce, and find also that power is given in the same general terms to deal with property and civil rights to the Legislatures of the Provinces, we are driven to enquire how far those general words are qualified by anything appearing in section 91. If the meaning of the words in question is not such, as I suppose, a power to declare who shall be bankrupt or insolvent, and to legislate in reference to them, it would follow that the Parliament could deal with persons unable to pay their debts of each Province, and the powers of the Province in respect to any such matters would be gone. That, I venture to think, was never intended, but the words must receive a more limited construction, and, probably, be treated in the same way as the words 'regulation of trade and commerce' have come to be construed, as confined to matters of national or general concern affecting the whole Dominion. The statute, the section of which we are considering, with the exception of the provisions against preferences"—

that is, perhaps, a slip, because the provisions against preferences were substantially in from the beginning; more stringent provisions are inserted, but that is the only difference—

"was on our Statute Book since 1858, and for a long period when we had a Bankrupt or Insolvent Act, but it was always construed like the Statute of Elizabeth, and never treated as an Insolvent Act, nor was a person availing himself of the provisions ever spoken of as an insolvent, although he was in a state of insolvency in the sense that he was unable to meet his liabilities. That it would extend to all persons unable to meet their liabilities is evidently the view entertained by the late Chief Justice of the Supreme Court in *Regina* v. *Chandler*, 2 Cart. 421. That case was decided very shortly after Confederation, and would scarcely be so decided at the present day. The matters dealt with by the statute come clearly within the definition of property and civil rights, and the onus is therefore upon those who attack it to show its validity. I find it very difficult to understand upon what ground local legislation making provision for the distribution of a man's estate among his creditors, and even for his discharge, can be impugned as being beyond their jurisdiction."

LORD WATSON: That reason seems to reach the case where the law compelled the debtor to make over his estate.

MR. BLAKE: Yes; I should infer that Mr. Justice Burton went, perhaps, that far.

LORD SHAND: A provision for an adjudication in Bankruptcy?

LORD WATSON: Yes.

MR. BLAKE: "In the case of *Edgar* v. *The Central Bank* I went in detail over several of the other sections"—and then he says he still thinks that the reasons apply to these sections, and that he should hold it good except for the decision of the Supreme Court in *Quirt* v. *The Queen*. I will not trouble

your Lordships with reading that part now, because I have stated previously, with a view to curtailing my argument, the reason why I conceive *Quirt* v. *The Queen* is not material. The whole of the remainder of the judgment relates to *Quirt* v. *The Queen*, and the learned Judge adopts a construction of that case from which I have respectfully ventured to differ, and bases on that construction his view that he is not at liberty to act on his own opinion.

Then Mr. Justice Maclennan points out that the Act was enacted originally on the 30th March, 1885—that is, in its present form—as an Act respecting assignments for the benefit of creditors:

"Several amendments have been made to this Act since it was first enacted, and section 9 has also been amended, but the amendment has not affected the question of its validity. Neither at the time the section was first enacted, nor at any time since, has there been any Bankruptcy or Insolvency law of the Dominion in force except the Winding-Up Act, which applies only to banks and other incorporated companies, and, perhaps, some special Acts for settling the affairs of companies, such as Acts relating to the affairs of the Bank of Upper Canada. The Insolvent Acts which had been in force in the Province continuously from the time of Confederation until the year 1880 had been repealed on the 1st April, in that year, by the Act 43 Vict., c. 1, entitled 'An Act to repeal the Acts respecting Insolvency now in force in Canada,' and the Winding-Up Act was passed in 1882. In March, 1888, the constitutional validity of the Provincial Statute was raised in four cases in this Court"—naming them. Then: "The learned Chief Justice and Mr. Justice Osler were of opinion that the whole Act, except the first two sections, was invalid, and Mr. Justice Patterson and my brother Burton were of a contrary opinion."

Then he says the question was in one case reserved, and he adopts the opinion that the section is valid. Then he says:

"The question depends on the sense in which the words 'Bankruptcy and Insolvency' are used in the B.N.A. Act, section 91, etc. (reading to the words at page 7, line 26). 'If the Legislature can abolish priority between an execution creditor and creditors who have no executions, so that the latter shall stand on an equality with the former.' I say again the effect of the Act of 1880 was more wide than the phrase in that judgment appears to indicate. If the one is not Bankruptcy and Insolvency legislation, I am unable to see why the other should be so regarded. It is merely the effect and operation of an execution which has been altered by the legislation in each case. But I incline to the opinion that, except so far as the Dominion chooses, from time to time, to occupy the field of Bankruptcy and Insolvency legislation, the Province may occupy it. I think that follows from the manner in which their respective powers are defined by sections 91 and 92 of the B.N.A. Act. In the *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 110, it was decided by the Judicial Committee that the phrase 'property and civil rights in the Province' employed in No. 13, section 92, included rights in the Province; employed in No. 13, section 92, included rights arising out of contracts, and, therefore, those words embrace the whole law of debtor and creditor. What the Act does, then, is to give the whole field of property and civil rights to the Province, and then to give to the Dominion that part of it which answers to the description of Bankruptcy and Insolvency. Bankruptcy and Insolvency are excepted or substracted from the general field of property and civil rights. Now, if Bankruptcy and Insolvency were susceptible of clear definition, apart from legislation like bills of exchange and promissory notes, patents of invention, copyright, and the like, there would be no difficulty in saying, with reference to any particular Act of legislation, that it was or was not within the exception, and so that it was or was not within the power of the Province."

LORD WATSON: The argument of that learned Judge goes a long way beyond yours.

MR. BLAKE: Yes.

LORD WATSON: It goes this length, that in all these cases the whole field is clear, because it would extend to adjudication in Bankruptcy. I think it would go that length.

MR. BLAKE: Probably it does.

LORD MACNAGHTEN: That was his view—until the field is occupied.

LORD WATSON: A regular scheme of Bankruptcy might be passed by the Provincial Legislature.

MR. BLAKE: Probably his view goes that far; but while suggesting the same contentions, I have presented also and mainly a narrower view on which I am content to rest.

(*Adjourned for a short time.*)

MR. BLAKE: I was troubling your Lordships with the judgment of Mr. Justice Maclennan.

"But, apart from legislation, Bankruptcy and Insolvency is not definable. Apart from legislation there is no such thing as Bankruptcy or Insolvency. Parliament may pass Acts of that character, and when it does the subject is defined, and we can see what it is. Whatever part of the field of property and civil rights it occupies for that purpose is taken away from the Province, but no more. So far as any such Act extends, the law of the Province must yield, and is overborne; but, beyond that, it is the power and duty of the Province to care for the public interest, and to enact and enforce proper laws in relation to property and civil rights. Bankrupt and Insolvent laws are not a necessity, are not an essential part of every system of jurisprudence or of government. There may or may not be such laws. If Parliament thinks fit to have such laws, it has the exclusive power to enact them, but it is not obligatory; and if there be no such law, it is still necessary that there be some law of debtor and creditor, and that subject is expressly given to the Province. There was no such thing as Bankruptcy or Insolvency at the Common Law. There was no distinction between the fraudulent or insolvent debtor and any other debtor who did not pay his creditors. There was the same remedy against all, by action, judgment, and execution, and all debtors alike were held bound until full payment. Bankruptcy and Insolvency, therefore, are wholly the creation of legislation, and without legislation they do not and cannot exist. The impossibility of defining Bankruptcy in the abstract, and apart from legislation, is apparent from the history of the subject. The first Bankruptcy Act in England was the Act 34 & 35, H. 8, chapter 4, in the year 1542, and between that time and the passing of the Act 24 & 25 Vict., chapter 134, which was in force when the B.N.A. Act was passed, a very large number of such Acts was passed, changing the character of the legislation from time to time. The Acts which were passed prior to 1825 will be found *in extenso* in the 1st vol. of the 8th edition of Cook on Bankruptcy (1823), and an examination of them will show how the definition of the subject changed from time to time with the legislation. That change is shown strikingly by a comparison between the Act of H. 8 and the Act of 24 & 25 Vict., in 1861,"

and he quotes the passage which the Lord Chancellor has already quoted, and states the duties which are now abstracted from the duties of your Lordship's office.

"That continued to be the law of Bankruptcy for a long time, and the changes which were made afterwards were made gradually until, by the law of 1861, all persons, whether traders or non-traders, whether honest or dishonest, whether they were or were not possessed of sufficient property to pay their debts in full, were made subject to the law in case they had committed certain defined acts or defaults. These acts or defaults are enumerated at page 127 of Doria and McRae on Bankruptcy (1863), and some of them are the following: non-payment after judgment debtor summons by either trader or non-trader; suffering execution to be levied on any of his goods and chattels for any debt exceeding £50 by a trader; and non-payment within seven days by a trader, and within two months by a non-trader, after decree or order peremptory in equity, bankruptcy, or lunacy. Prior to the Act of 1861, and as far back as the 13th Elizabeth, the law was confined to traders; as to all other persons, there was no such law. The history of the subject in this country shows the same variety in Bankruptcy legislation. In the Provinces of Ontario and Quebec, there had been a Bankrupt Act in force, more or less, from 1843 to 1856, when it expired"—

therefore, your Lordship sees that there was, in the early days of the Queen, a Bankruptcy Act—from 1843 to 1856. Then the learned Judge says the Act was called a Bankrupt Act—

"after which there was none until 1864. The Act of that year was called 'The Insolvent Act of 1864,' and, although called an Insolvent Act, it was in reality a Bankrupt Act, and it was made applicable in Lower Canada to traders only; but in Upper Canada to all persons, whether traders or not. This is the Act which was in force in Ontario and Quebec when the B.N.A. Act was passed, and while it was undoubtedly, in its nature, a Bankruptcy Act, it differed in many respects from the English Act. I do not know what, if any, Bankruptcy or

Insolvency laws existed at that time in any of the other Provinces of the Dominion."

I have stated to your Lordships that there were none at all.

"The Act of 1864 was repealed in 1869, and a new Act was passed, extending to the whole Dominion, called 'The Insolvent Act of 1869.' It was confined to traders, and any trader unable to meet his engagements might either take the benefit of it voluntarily, or might, under defined circumstances, be compelled to do so. The Act of 1869 was re-enacted with considerable alterations in 1875, and was still confined to traders. This law continued in force until 1880, when it was repealed, and since that time there has been no Dominion law of Bankruptcy or Insolvency, except as already stated, the Winding-up Act, which is confined to corporations, and perhaps some special acts relating to particular cases, such as the Bank of Upper Canada Act. What I mean is that there has not been since that time, and there is not now, any general law of the Dominion taking up or occupying any certain part or section of the law of debtor and creditor for its operation as a law of Bankruptcy and Insolvency. While there was such a Dominion law, the law of the Provinces had to give way. Parliament could declare, and did declare, that to the extent defined by that law the relations of debtor and creditor were to be regulated and adjusted by and under that law. Within its limits was the realm of Bankruptcy and Insolvency which Parliament had appropriated to itself. All without these limits which concerned the same relation was left to the Legislature of the Province, as being a part of property and civil rights. While the Act was in force it seems clear the Province could deal with anything outside of it, and when it was repealed I think the whole field was left to the Province."

Therefore confirming the remarks of Lord Watson that his Lordship takes a very wide view.

"I think, therefore, that the true solution is that Parliament may pass laws of Bankruptcy and Insolvency, and may thereby define the nature and extent of its interference with the law of the Province for that purpose," etc., etc. (Reading to the words on line 10, page 11.) "Subject to be overborne and displaced if and whenever the Dominion, in the exercise of its jurisdiction, should think fit to make other provisions."

These citations close the argument which I have to address to your Lordships.

[*Judgment delivered 24th February, 1891, by the Lord Chancellor.*]

This appeal is presented by the Attorney-General of Ontario against a decision of the Court of Appeal of that province.

The decision complained of was an answer given to a question referred to that Court by the Lieutenant-Governor of the province in pursuance of an Order in Council.

The question was as follows:—

"Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, chapter 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons'?"

The majority of the Court answered this question in the negative; but one of the Judges who formed the majority only concurred with his brethren because he thought the case was governed by a previous decision of the same Court; had he considered the matter *res integra* he would have decided the other way. The Court was thus equally divided in opinion.

It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the Provincial Legislature by section 92 of the British North America Act, 1867, which enables that legislature to make laws in relation to property and civil rights in the province unless it is withdrawn from their legislative competency by the provisions of the 91st section of that Act, which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency.

The point to be determined, therefore, is the meaning of those words in section 91 of the British North America Act, 1867, and whether they render the enactment impeached *ultra vires* of the Provincial Legislature. That enactment is section 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting Assignments and Preferences by Insolvent Persons." The section is as follows:—

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

In order to understand the effect of this enactment it is necessary to have recourse to other sections of the Act to see what is meant by the words "an assignment for the general benefit of creditors under this Act."

The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment, or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it.

The second section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors or give any of them a preference.

Then follows section three, which is important:—

Its first subsection provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors as thereinafter provided for the purpose of paying ratably and proportionately, and without preference or priority, all the creditors of the debtor their just debts.

The second subsection enacts that every assignment for the general benefit of creditors which is not void under section two but is not made to the sheriff nor to any other person with the prescribed consent of the creditors shall be void as against a subsequent assignment which is in conformity with the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith.

The fifth subsection states the nature of the consent of the creditors which is requisite for assignment in the first instance to some person other than the sheriff.

These are the only sections to which it is necessary to refer in order to explain the meaning of section nine.

Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the Province and in the Dominion. The enactments of the first and second sections of the Act of 1887 are to be found in substance in sections 18 and 19 of the Act of the Province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor ratably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the Statute of 1858 was passed there was no Bankruptcy law in force in the Province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the Statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory.

This Act was in operation at the time when the British North America Act came into force.

In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the Provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875, which, after being twice amended, was, together with the Amending Acts, repealed in 1880.

In 1887, the same year in which the Act under consideration was passed, the Provincial Legislature abolished priority amongst creditors by an execution in the High Court and County Courts, and provided for the distribution of any moneys levied on an execution ratably amongst all execution creditors, and all other creditors who within a month delivered

to the sheriff writs and certificates obtained in the manner provided for by that Act.

Their Lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the Provincial Parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that Parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further and gives to all creditors under an assignment for their general benefit a right to a ratable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the ninth section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been *intra vires*, supposing section nine had applied to all assignments without these restrictions, it seems difficult to contend that it became *ultra vires* by reason of them. Moreover, it is to be observed that by subsection (2) of section 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act.

At the time when the British North America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the Province of Canada. Attention has already been drawn to the Canadian Act.

The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors.

It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy, with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for.

It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the words "Bankruptcy" and "Insolvency" in section 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be ratably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships, the learned Counsel for the Respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

In their Lordships' opinion these considerations must be borne in mind when interpreting the words "Bankruptcy" and "Insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and others matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

Their Lordships will therefore humbly advise Her Majesty that the decision of the Court of Appeal ought to be reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.