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3rd Session, 5th Parliament, 20 Victoria, 1857.

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**BILL.**

An Act to facilitate the recovery of certain commercial and other debts founded upon instruments or promises in writing, and for other purposes.

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Received and read, first time, Wednesday, 4th  
March, 1857.

Second reading, Friday, 6th March, 1857.

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MR. ANTOINE AIMÉ DORION.

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TORONTO:

PRINTED BY JOHN LOVELL, MONCE STREET.

**An Act to facilitate the recovery of certain commercial and other debts founded upon instruments or promises in writing, and for other purposes.**

**W**HEREAS it is necessary to provide a more summary and expeditious mode of recovering certain mercantile and other debts than now exists, and to provide for the relief of debtors in certain cases; Therefore Her Majesty, &c., enacts as follows : Preamble.

5 I. Summary proceedings as hereinafter prescribed may be taken for the recovery of any sum of money actually due in the following cases: When summary proceedings may be taken.

1st. Upon any bond, mortgage, obligation and promise in writing for the payment of a sum of money only and for value or consideration had and received, against the obligor and in favor of the obligee. Upon obligations in writing.

10 2nd. Upon a negotiable promissory note, against the maker, endorser, or guarantor, and in favor of the holder who has received the same in good faith before maturity, for a valuable consideration and without notice of any defence. Promissory notes.

15 3rd. Upon a draft, check, or bill of exchange, against the drawer, indorser, acceptor or guarantor, and in favor of the holder who has received the same in good faith before maturity, for a valuable consideration and without notice of any defence. Bills of Exchange, &c.

20 4th. Upon any judgment rendered by any Court of Civil Jurisdiction in Upper Canada, in the British dominions or in any foreign State, which can form the basis of an action in Lower Canada, against the judgment creditor. Foreign Judgments.

25 5th. Upon any account for goods sold and delivered, against the purchaser and in favor of the vendor, but only when such vendor is a Merchant or Trader, and such goods were sold in the ordinary course of his trade or business. Accounts for Goods sold and delivered.

II. The summary proceedings mentioned in the next preceding section, may be had before a Judge of the Superior Court and shall apply to all demands founded on the causes of action in the said section mentioned, of which the said Superior Court has cognizance. Such proceedings may be had before a Judge of S. C.

30 III. The proceedings shall begin by a declaration shewing the cause of action to be one of those mentioned in the first section, to which shall be annexed the original bond, mortgage, obligation or promise in writing, when the same shall not have been passed before a Notary, or a Notarial How proceedings shall be commented.

copy thereof if the same was passed before a Notary, or the note, draft, check, Bill of Exchange, or account, as the case may be, on which the action is founded, or a copy thereof.

Service, how and where to be made.

IV. Service shall be made by a Bailiff of the Superior Court when made within the District in which the defendant is to appear, and by the Sheriff when in another District, on the defendant or on the several defendants sued, either upon them personally, or at their domicile or place of business, by delivering to such defendant or defendants a copy of the declaration and annexed papers certified by the plaintiff's Attorney, or by the Sheriff or Bailiff serving the same, with a notice in writing from the plaintiff or his Attorney, that the demand will be presented for judgment thereon, to a Judge of the said Superior Court or other person acting as such, in the Court House, in the District, at a specified time, which shall not be less than forty-eight hours after the service, and one additional day for every ten leagues distance above five leagues from the place of the service to the Court House of the District wherein the defendant is to appear.

Judgment may be entered up on the declaration.

V. At the place and time specified in the notice, it shall be the duty of the Judge of the Superior Court or person acting as such, to whom the declaration and notice, with a certificate of the service, mentioning the time and place thereof, shall have been presented, if the service be regular and the conclusions of the demand are borne out by the notarial documents produced therewith, to indorse on the declaration an order that judgment be entered for the amount justified by the said demand and documents, unless the defendant do then put in a sufficient answer in writing to the demand, and upon such order the Prothonotary shall enter judgment accordingly in the Registers of the Superior Court.

Plaintiff to produce evidence in support of other than Notarial documents.

VI. When the demand shall be founded on other than Notarial documents, the plaintiff upon making oath of the truth of such facts as are necessary to be proved to entitle him to recover judgment in a Court of Civil Jurisdiction, or upon proof by one witness of the said facts, shall be entitled to the order and Judgment mentioned in the last section.

Declaration and papers to form record.

VII. The declaration and papers thereunto annexed, or therewith filed and all proceedings had thereon, shall form the record in the case, and be deposited among the records of the Superior Court.

Defendant may make a defence within certain delays.

VIII. At the time and place specified in the notice or within such delay as may be granted by the Judge on sufficient cause shewn, the defendant may file a plea or pleas to the demand; the plaintiff may file answers or replications to the plea filed by the defendant, and no further pleading shall be allowed unless leave of the Court shall have been first obtained. On the pleadings being completed either party may fix a day for the adduction of evidence or the hearing of the cause as the case may be; Provided twenty-four hours' notice be given to the adverse party of the day and hour so fixed.

Proviso.

After hearing Judge to make order for Judgment.

IX. After hearing the cause the Judge shall indorse on the back of the declaration his order for such judgment as will meet the justice of the case, which order shall be entered by the Prothonotary as provided for judgments by default, or he may at his discretion order that the parties be heard before the Superior Court, in the ordinary course, at its next sitting.

X. If only a part of the claim be contested, the Plaintiff shall be entitled to his judgment for the residue, and the issue for the contested portion, shall be completed and tried as provided in the eighth section.

If only part of claim is contested.

XI. If within from the rendering of a Judgment as aforesaid, the amount thereof be not paid, the Plaintiff shall be entitled to sue out in the ordinary form, a writ of execution against the Defendant's moveable and immoveable property; Provided that no sale of the moveable property seized under such writ, shall take place unless fifteen full days shall have elapsed between the day on which the Judgment shall have been rendered and the day of sale; Provided also, that no immoveable property shall be seized until after the sale and discussion of the goods and chattels of the Defendant.

Proceedings in case amount of Judgment remains unpaid.

Proviso.

XII. If on the day of the appearance, or any day thereafter within fifteen days after the judgment shall have been rendered, the Defendant or Defendants enter into a bond with two sufficient sureties, before one of the Judges of the Superior Court, to pay the amount of the claim for which judgment may be, or shall have been rendered by the Superior Court and all costs and interest thereon, (of which tender of security at least one day's notice shall be given to the Plaintiff,) all proceedings shall be suspended and the declaration shall be considered as returned on that day into the Superior Court, and delays to plead, and all other proceedings to trial and judgment shall be had therein, as in a cause pending before the said Superior Court, and as if no proceedings had been adopted before a Judge, the delays to plead reckoning from the date of such bond.

Proceedings to be suspended upon Defendant's giving security to abide by Judgment of S. C.

XIII. If any such demand shall be dismissed by the Judge, the Plaintiff, on payment of costs, and on giving security in the manner provided in the last section, for the costs to be incurred in the Superior Court, shall be entitled to proceed on his declaration before the Superior Court; or he shall be entitled to renew his demand therein, in the ordinary manner; and the delay to plead to such demand shall be reckoned from the date of the bond so given, or from the return day of his action, if the same be renewed.

Plaintiff may renew action in certain cases upon giving security.

XIV. Any Creditor shewing one of the causes of action mentioned in the first section of this Act, may require from the Prothonotary a Writ of Attachment against the property and estate of his debtor, upon an affidavit, as now required by law, for the issuing of a Writ of Attachment from the Superior Court; and the proceedings subsequent to the issuing of such writ shall be had according to the provisions of this Act.

Creditor may cause a Writ of Attachment to issue in certain cases.

XV. Any attachment made under this Act shall be removed by the Defendants giving security, as provided for by the 12th section of this Act, or by a judgment of a Judge to that effect.

Defendant may remove attachment by giving security.

XVI. All Writs of Attachment and all Writs of Execution issued upon proceedings had under this Act, shall be issued and executed in the same manner as Writs of Attachment and Execution issued from the Superior Court.

Writs, &c. how to be issued and executed.

In case no Judge shall be in attendance. XVII. If no Judge be in attendance on the return day of the action, or on the day appointed for any proceedings under this Act, within one hour after the hour fixed, then such return or such proceedings shall be postponed to the next juridical day, at the same hour; and thence to the next subsequent day, and so on until a Judge shall be in attendance. 5

Proceedings upon oppositions *afin d'annuler*. XVIII. All oppositions *afin d'annuler* made to the seizure of personal or real property, may be tried before one Judge of the said Superior Court; and the proceedings, after the opposition shall have been filed, shall begin by the filing, on the part of the Plaintiff or of the Defendant or other interested party, of a plea or contestation, with a notice to appear before the Judge at a specified time, at the Court House of the District, to answer to such plea; and the further proceedings shall then be had, as provided for in an ordinary action under this Act. 10

Oppositions *afin de distraire*. XIX. In all uncontested oppositions *afin de distraire*, either of the parties to the suit may have the judgment entered upon the order of the Judge, after production of the necessary rules, orders, and admissions. 15

Prothonotary may act for Judge by consent of parties. XX. Notwithstanding anything in this Act, the Prothonotary may, by consent of both parties, without the order of the Judge, make all entries, certify all proceedings, receive the evidence and admissions of parties, and enter judgment; and may also receive all bonds and securities, and, in fact, do all the acts which a Judge is empowered by this Act. 20

Costs regulated. XXI. The fees and costs chargeable on all proceedings under this Act, by Attornies, Prothonotaries, Sheriffs, and Bailiffs, shall be regulated by a tariff to be made by the Judges of the Superior Court; and until such tariff shall be made, such fees and costs shall be those now chargeable in the Superior Court in similar cases. 25

Books, notes, &c., may be seized as evidence of debts due. XXII. On all writs of attachment and execution issued from any Court of Civil Jurisdiction, against a merchant or trader, the Sheriff or Bailiff executing the same may demand and seize all books of account, notes, papers, or documents, being evidences of debt, which he may find in his possession. 30

In case of refusal to deliver up such books, papers, &c. XXIII. Any merchant or trader who, upon being required to deliver to the Sheriff or Bailiff executing such Writ of Attachment or Writ of Execution, his books of account, notes, papers, and any documents being evidences of debt, shall refuse to do so; or who shall deliver such books of account, bills, notes, papers, or any document being the evidence of a claim or debt in his favor, but shall refuse to furnish a statement of the several sums due by virtue of the same, and of the residences of the parties; or shall wilfully furnish or deliver a false statement thereof, or who shall make a false entry in his books; or shall, after being so required, deliver false receipts; or receive any sum or sums of money due to him at the time of such requirement or seizure,—shall be guilty of a misdemeanor, and on being convicted thereof before a Court of competent jurisdiction, shall be liable to imprisonment not exceeding six months. 40 45

When debts owing may be sold. XXIV. When the proceeds of the goods and chattels of any merchant or trader shall be insufficient to satisfy the judgment, the debts owing

to the debtor, and his interest in any lease, may be sold under the direction of one of the Judges of the Superior Court: Provided that no one debt exceeding £25 shall be sold, before proceedings shall have been had to recover the same, in the manner provided for by law, unless it appear by affidavit, to the satisfaction of the Judge, that the debtor thereof is insolvent or cannot be found; or that, for some other cause, the debt cannot be recovered, in whole or in part, without considerable risk.

Proviso.

XXV. Any transferable share or shares in any unincorporated company may be seized under a Writ of Attachment or Execution, and sold in the same manner as shares in an incorporated company may now be seized and sold.

Shares in unincorporated Companies may be seized and sold.

XXVI. Any judgment creditor may avail himself of a seizure already made of his debtor's moveable and immoveable estate at the suit of another creditor, without renewing such seizure, (whether the same shall have been made in virtue of a Writ of Attachment or of a Writ of Execution,) by serving, pending such seizure, on the Sheriff or Bailiff having made the same, a certified copy of his judgment, with an order from the Prothonotary of the Court where the judgment shall have been rendered, to levy the amount thereof out of the property already seized on such debtor.

Any judgment creditor may avail himself of a pending seizure and execution.

XXVII. A merchant or trader, unable to meet his liabilities and to pay his debts, may at any time apply to a Judge of the Superior Court in the District wherein he shall have his principal place of business, and upon a petition setting forth his embarrassments, accompanied by a schedule containing the names, places of residence of his creditors, and the amount of his indebtedness to each of them, shall obtain an order to summon all his creditors having claims of £15 and upwards, to appear before a Judge of the Superior Court, to take into consideration the proposal to be made by the said debtor.

Trader unable to meet liabilities may take certain proceedings for his relief.

XXVIII. The day appointed for the meeting of creditors shall be within one month after the service of the notice to the creditors residing in the Province, and within three months after such service if all the creditors reside out of the Province.

When meeting of creditors shall take place.

XXIX. Service of the notice shall be made by leaving a copy of the order at the domicile or place of residence of each creditor residing in the City, Town, Village, Parish, or Township in which the debtor has his several places of business within the Province, and by transmitting by mail a copy of the said order addressed to his other creditors.

Notice of such meeting how given.

XXX. On the day appointed for the meeting, it shall be the duty of the Judge to require proof of the service of the said notice in the manner hereinbefore provided, and the service shall be declared insufficient if it does not appear that the notices were served or were deposited in the Post Office, according to the circumstances of the case, at least ten full days before the day of such meeting.

Service of notice to be proved.

XXXI. On the day of the meeting the debtor shall be required to file a statement under oath of all his assets and of all his liabilities, and to produce his books and all vouchers which may be required from him, and

Statement to be filed by debtor.

at such meeting he shall be allowed to correct his list of creditors, and also to give a statement in writing of the terms he offers to his creditors.

Statement to contain an offer of composition and a surrender of estate.

XXXII. The statement mentioned in the last section shall specify the amount in the pound which the debtor is willing to pay his creditors, the terms of payment, whether the offer is made with or without interest and with or without security, and shall also contain another offer to deliver up for the benefit of his creditors the whole of his estate, both real and personal, in case the composition offered should not be accepted. 5

Provisional assignees to be appointed.

XXXIII. The majority of the creditors present at such meeting may appoint provisional trustees to examine into the state of the affairs of the debtor, and report at an adjourned meeting of the creditors, of which adjourned meeting due notice shall be given to all the creditors in the manner provided by the 31st section. 10

Proceedings in order to obtain certificate of discharge.

XXXIV. If at such first meeting or at any subsequent or adjourned meeting the debtor shall produce an acceptance in writing of the offer of composition, signed by at least two-thirds in number and in value of all his creditors having each a claim against him of over £15 currency, a deed of composition shall be entered into in conformity with the said offer or such modification thereof as shall have been agreed upon by the said creditors, being two-thirds in number and value, and shall be deposited in the record of proceedings in the Prothonotary's Office, after being signed by the Judge as being the deed of composition agreed upon between the said debtor and his creditors; upon the fying of the said deed of composition, the Judge shall deliver to the said debtor a certificate of discharge, the effect of which shall be to discharge such debtor from all debts and liabilities due by him to the creditors mentioned in the schedule by him sworn to as a correct statement of all his creditors' claims. No privileged or hypothecary creditor shall be reckoned in forming the necessary number or amount of claims to agree to such a deed of composition, except only for the amount for which he will consent to relinquish his privileged or mortgage claim and rank as an ordinary creditor. 15  
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Effect of Deed of Composition.

XXXV. The said deed of composition shall be binding upon the debtor in favor of all the creditors mentioned in the Schedule furnished by such debtor, although they may not have been parties thereto. 35

Creditors not mentioned in schedule not affected.

XXXVI. The said deed of composition shall not deprive any creditor not mentioned in the schedule of creditors, of any right, claim or recourse he might have had prior to the said deed of composition.

Persons jointly liable with debtor not discharged by certificate.

XXXVII. No person jointly or severally liable with the debtor either as co-debtor, or as security, or as drawer, endorser or guarantor of a bill of exchange, or as endorser or guarantor of a promissory note, or in any way responsible for the debt or debts of the said debtor shall be discharged by such certificate of discharge. 40

Upon refusal by creditors to accept composition.

XXXVIII. In case of refusal by the creditors to accept the terms of composition offered at such first meeting, or at any subsequent meeting, the said debtor shall assign and deliver for the benefit of his creditors all his estate both real and personal to an official assignee to be appointed by the Judge. 45



XXXIX. On such assignment and delivery being made by the debtor of his estate to the said assignee and on the production of the consent of at least two-thirds in number and in value of all the creditors named in the said schedule of creditors, not reckoning the privileged and hypothecary creditors, the said debtor shall be entitled to his certificate of discharge as mentioned in the 38th section of this Act.

How debtor may then obtain his discharge.

XL. Notwithstanding the consent of two-thirds in number and value of the creditors, it shall always be in the power of the Judge to suspend or refuse any certificate of discharge whenever he shall be satisfied that the said debtor has secreted any part of his estate, with a view to take advantage of this Act or that he has otherwise acted fraudulently towards his creditors or any of them.

Judge may refuse certificate in certain cases.

XLI. Before any certificate of discharge is granted to the said debtor he may be examined by the Judge or by the creditors or official assignee on any matter relating to his estate and business.

Debtor may be examined.

XLII. The claims of the creditors may be contested by the debtor or by any other party interested before one of the Judges of the Superior Court in the summary manner provided for by this Act for the claims mentioned in the first section thereof.

Debtor may contest claims of creditors.

XLIII. No certificate shall be granted by the Judge until every contested claim shall have been determined by a judgment, unless the creditors consenting to the composition whose claims are not contested be sufficient in number and value to entitle the debtor to his discharge.

Certificate not to be granted until claims determined.

XLIV. A summary appeal to the Superior Court shall be allowed to any creditor, and to the debtor, from any final judgment rendered by the Judge on any contested claim, or from any order suspending, refusing or granting any certificate of discharge.

Appeal allowed to creditors and debtors.

XLV. The appeal mentioned in the last section shall be by petition, setting forth the grounds of complaint, and the costs on such appeals shall be the same as on appeals from the Circuit Court.

How such appeal shall be brought.

XLVI. Every Assignee named under the provisions of this Act shall be vested with the estate assigned by the debtor, and may sue in his own name or in the name of the said debtor and do all other acts necessary to be done in the interest of the creditors, and shall be accountable for the said estate and the proceeds thereof to the creditors who shall have filed their claims duly attested in the Prothonotary's Office, and he shall be *contraignable par corps* for the same; such assignee shall further be subject to such orders as the judge may, from time to time, give as to the sale of the said estate and the distribution of the proceeds thereof.

Powers and duties of assignees.

XLVII. All claims by creditors may be filed in the Prothonotary's Office and be sworn to by the creditor, his clerk, agent or attorney, before a Judge of any Court of record, the Prothonotary or any Commissioner authorised by the Court to take affidavits within the Province.

Claims of creditors, how filed.

XLVIII. It shall be lawful for the Judge to require further evidence of any claim or claims so filed against the estate of a debtor.

Judge may require further evidence.

- Compensation to assignees. **XLIX.** The Judge shall allow to the assignee or assignees of any estate all necessary expenses and such a further sum as he shall deem to be a reasonable compensation or commission for their trouble in winding up the estate.
- Allowance to debtor obtaining certificate. **L.** The Judge may in his discretion allow to the debtor who shall have obtained his certificate of discharge, out of the proceeds of his estate, any sum of money not exceeding ten per cent. of the net proceeds of such estate, nor the sum of two hundred pounds in the aggregate. 5
- Distribution of proceeds of estate. **LI.** The proceeds of the estate after payment of all necessary expenses, shall from time to time be distributed between the creditors, first, according to the priority of their privileged and mortgage claims, and the surplus, (or in case there be no privileged or hypothecary claims, the whole) in proportion to the amount of the respective claims filed and allowed. 10
- Notice of final dividend. **LII.** No final dividend shall be made of the estate of the debtor until a notice of the time and place of payment thereof be given to the creditors mentioned in the schedule produced by the debtor who shall not have at the time filed their claims in the Prothonotary's Office. 15
- How such notice shall be given. **LIII.** The notice mentioned in the last section shall be given by the assignee in the manner provided for all other notices required under this Act. 20
- Affidavit of acceptance of composition. **LIV.** The acceptance by any creditor of the composition offered shall be accompanied by an affidavit, and shall be in the form of the Schedule A.
- Affidavit of acceptance of surrender of Estate. **LV.** The acceptance by any creditor of an assignment of all the estate of the debtor shall be accompanied by an affidavit, and shall be in the form of the Schedule B. 25
- Affidavits how may be sworn. **LVI.** All affidavits required under the provisions of this Act may be sworn to before a Judge, Commissioner or other Officer duly authorised to take affidavits, whether in or out of the Province.
- Application of Act. **LVII.** This Act shall apply to Lower Canada only.

**SCHEDULE A.**

I, A. B., of creditor of C. D., of to the amount of £ as per account hereunto annexed, do hereby agree to accept the terms proposed by the said C. D. in the offer by him made before , Judge of the Superior Court on the , to wit: in the pound on my claim payable, —.

(Signed,)

I, A. B., of creditor of C. D. of being duly sworn depose and say that I am a *bonâ fide* creditor of C. D. for the sum of £ currency; that I have not purchased the above claim, or become the creditor of the said C. D. to consent to the composition he has offered to his creditors; that I have received no remuneration or promise of remuneration nor any money or security whatsoever to give my consent to his said offer of composition, and I have signed.

Sworn before me at  
this day of 18 . }

## SCHEDULE B.

I, A. B., of                    creditor of C. D. of                    to the amount of £                    ,  
 currency, do hereby consent that the said C. D. should obtain a discharge  
 of the said claim against him upon his transferring and making over to  
 such assignee as may be appointed to that effect, under the provisions  
 of the Act, &c., (*title of this Act*) all his estate, both real and personal,  
 for the benefit of his creditors.

185

(Signed,)

I, A. B., of                    creditor of C. D. of                    being duly sworn, depose  
 and say;                    That I am a *bonâ fide* creditor of the said C. D.                    ,  
 for the sum of £                    , currency, as per account hereunto annexed; that  
 I have not purchased the above claim, or become the creditor of the said  
 C. D. for the purpose of granting or securing a discharge to the said C.  
 D., that I have received no remuneration or promise of remuneration, nor  
 any money or security whatsoever, to give my consent to the discharge  
 of the said C. D. and I have signed.

Sworn to before me                    }  
 at                    this                    }

B<sup>101</sup>