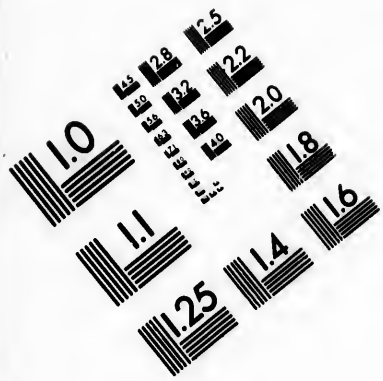


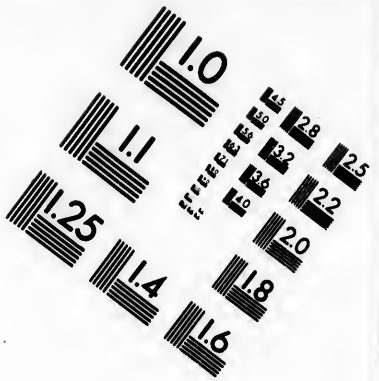
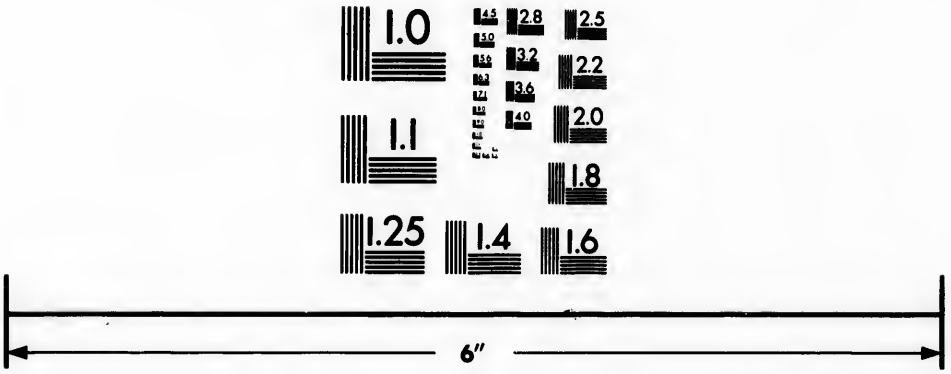


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distortion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments:/ Commentaires supplémentaires:

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
					✓						

The copy filmed here has been reproduced thanks to the generosity of:

Library of the Public
Archives of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

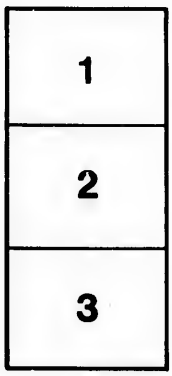
La bibliothèque des Archives
publiques du Canada

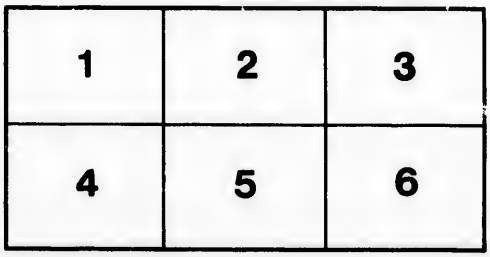
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





REMARKS

On the Question of

THE RETROACTIVITY

OF THE

BANKRUPT ORDINANCE

2 VICT. CHAP. 36,

AND OF

BANKRUPT LAWS IN GENERAL.

MONTREAL:

PRINTED BY JAMES STARKE & CO.

1843.

REMARKS,

&c.

There is not probably at present, any question more generally or more anxiously discussed, among the legal and mercantile men in this city, than that of the operation of the Bankrupt Ordinance, now in force in this part of the Province. Do the provisions of this Ordinance embrace debts contracted before, as well as those contracted after, it was passed? Does the certificate obtained under the Ordinance operate to discharge the Bankrupt from the former as well as from the latter class? In a word, is the Ordinance retrospective, or not? This question,—one of paramount interest at the present moment,—is closely connected with, and naturally suggests, another and more general question: Should a bankrupt law be retrospective as well as prospective, and govern alike debts contracted before and after its enactment?

As a Bill upon the subject of bankruptcy is, I believe, to be submitted to the Legislature during the present session, it may not be improper, at the present moment, to make a few observations on both these deeply interesting questions; more especially, as many of those whose duty will require them to legislate on the subject, may not have time to investigate its merits for themselves.

The opinions, whatever may be their merits, which I have formed on these questions, are at least not hastily taken up, but are the result of a careful and anxious consideration of the subject. The more I investigated the matter, the more reasons I saw to confirm me in these opinions: —first, That our bankrupt law is, and was intended to be, retrospective; and, secondly, That every bankrupt law ought to be retrospective.

It would not, perhaps, be necessary to say much in support of the former of these propositions, were it not that the question has already been much agitated amongst the members of the bar, and some of the most eminent names are ranked upon the opposite side. This is perhaps to be accounted for, partly from the circumstance that, generally speaking, the law of bankruptcy has hitherto received but very slight attention from the bar of Lower Canada, and partly from the fact that those professional men in other respects most competent to judge, came to the consideration of the question with minds predisposed, from the natural effects of a legal bias, to decide against the retroactivity of *any* law. They failed, it appears to me, from these causes, to perceive that the peculiar nature of a bankrupt law, to say nothing of the express terms of the present Ordinance, necessarily exempted it from the operation of the general rule, that laws shall not have a retrospective effect.

I now proceed to show that the Ordinance must, if construed according to the clear and explicit meaning of its terms, be regarded as retrospective; in other words, that it embraces equally, in its purview, debts contracted before and after its enactment, and that both classes of debts are extinguished equally by the certificate.

I may premise these observations by remarking that throughout the entire Ordinance not the slightest attempt is made, either directly or indirectly, in any solitary place, to separate or distinguish in any way between the two classes of debts, or to limit the application of the statute to one class only. On the contrary, wherever debts are spoken of, the most general and comprehensive terms seem designedly selected, to guard, as it were, against the possibility of any such limited construction being put upon its terms.

The preamble sets forth briefly the scope and objects of the Ordinance :—

" Whereas, it is expedient to provide the means of " discovering and securing the estates of bankrupts, for " the benefit of their creditors, and of administering and " distributing the same, and also to afford relief to such " bankrupts as *shall*, without any fraud or gross miscon- " duct, *have become* unable to pay all their debts in full, " and who *shall have* made a full disclosure and discovery " of their estates," &c.

The statute has a twofold object: first, to secure the estates of bankrupts, for the benefit of their creditors; and, secondly, to afford relief to the honest but unfortunate bankrupt. The terms used in the preamble are comprehensive and general, and certainly contain nothing which limits the application of the statute to any one class of creditors or any one class of bankrupts. On the contrary, the reasons which render the provisions of the statute expedient for one class of creditors or bankrupts, have precisely the same force when applied to the other class.

The words, however, of the subsequent clauses of the ordinance are still more express and comprehensive, and

would seem to place the meaning of the Legislature beyond the possibility of being mistaken.

The third section of the Ordinance proceeds to show under what circumstances a trader may take advantage of its provisions. The words are—"That *any trader* resid- "ing in this Province, who shall desire to take the benefit "of the Ordinance, may apply, by petition, &c., setting "forth his inability to pay all his debts, and his willing- "ness to assign all his estates and effects for the benefit "of his creditors; and if it shall appear, to the satisfac- "tion of the Commissioner, that the debts due from such "applicant amount to not less than £200 currency, the "Commissioner shall forthwith, by warrant under his "hand and seal," &c.

The fifth section contains a description of the debts that may be proved and allowed against the estate of the trader. The words are—"That ALL DEBTS, due and "payable from such bankrupt at the time of the first pub- "lication of the notice of issuing the said warrant, may "be proved and allowed against his estate, assigned as "aforesaid; and *all debts then absolutely due*, although "not payable till afterwards," &c. There cannot be any doubt, that debts contracted before the passing of the statute are proveable against the estate of the bankrupt, under the very clear and general terms of this section.

Now, in the ninth section, provision is made for grant- ing the bankrupt's certificate, under certain conditions therein specified; and it is further declared, "That the "bankrupt shall thereby be absolutely and *wholly dis-* "*charged from* ALL *his debts*, which shall at any time be "actually proved against his estate assigned as aforesaid, "and from ALL DEBTS WHICH ARE PROVEABLE under this "Ordinance, and due to any persons who shall be resi-

" dent within this Province, at the time of the first pub-
" lication of the notice of the issuing of the warrant."—
So far, then, as regards creditors resident in Lower Canada at the time specified, the bankrupt is, by the unequivocal and express terms of this section, *discharged from all his debts* PROVEABLE UNDER THE ORDINANCE. But we have already seen that debts contracted before the passing of the statute *are clearly proveable* under the Ordinance, by section 3. The conclusion is irresistible, that the bankrupt is by his certificate discharged from all debts contracted before the passing of the Ordinance, where such debts are due to persons residing in the Province at the time specified in the ninth section.

If any doubt can be entertained as to the meaning of the Ordinance as now worded, it will be removed by a consideration of the circumstances connected with the enactment of the Ordinance by the Special Council. I have now before me a copy of the original draft of the Ordinance, as submitted to the Special Council. By the ninth section of the original draft, debts contracted before the passing of the bill were clearly excluded from the operation of the bankrupt's certificate, and were not discharged thereby. The operation of the certificate is expressly limited, by the following words in that section: " And if it shall then appear to the satisfaction of the " Commissioner that the bankrupt has made," &c., " the " Commissioner shall grant him a certificate thereof; " and the bankrupt shall be thereupon absolutely and " wholly discharged from all his debts which shall be at " any time actually proved against his estate, and from " all debts which are proveable under this Ordinance, and " *which are founded on any contract made by him after* " *this Ordinance shall go into operation, if made within*

" *this Province, or to be performed within the same, and*
" *from all debts which are proveable as aforesaid, and*
" *which are founded on any contract made by him after this*
" *Ordinance shall go into operation, and due to any person*
" *who shall be resident within this Province.*"

The certificate, in the above draft, was accordingly limited in its operation to those debts which are "founded " on any contract made after this Ordinance shall go into " operation," &c.—the words given in italics in the above section, being copied verbatim in the form of the certificate.

The Special Council, which was then composed principally of merchants of high standing,—men well qualified to judge of the merits of such a measure,—saw clearly that a law such as that projected in the draft, which would operate to extinguish some debts and leave others untouched, would necessarily be productive of great injustice. They accordingly struck from the ninth section, and also from the form of the certificate, the clause, given above in italics, by which the operation of the statute was limited to debts founded on contracts made previous to the passing of the bill. By the above clause in the draft, the bill was carefully and strictly limited in its operation to one class of debts: the Special Council rejected this clause of limitation, and by so doing, rendered the bill applicable to all debts equally.

By rejecting the above clause, the Special Council deliberately declared their intention that the operation of the statute should not be restricted to those debts which had been contracted previous to the enactment of the statute, but that it should extend equally to all debts. In a word, they declared that the statute should be retrospective as well as prospective in its effects.

In doing this, the Special Council were opposed by one of their legal members, on the ground that they would thus render the law retrospective; but, though fully aware that such would be the necessary result, they persisted in their alteration; and the Ordinance, thus altered, after being submitted to the law officers of the Crown in England, received the royal sanction.

I have thus established, I think, satisfactorily, as well from what is expressed in the Ordinance as from what was purposely *not expressed*, that the Ordinance was intended to be, and is in fact, retrospective.

Here, however, it is necessary to refer to the 28th section of the Ordinance, upon which those who would give the Ordinance an exclusively prospective operation mainly, if not entirely, rely. It is as follows:—"And be "it further ordained and enacted, by the authority afore- "said, that all the provisions of law inconsistent with the "provisions of this Ordinance are hereby repealed, "saving all rights which have accrued to any person by "virtue of the same, which shall be judged and decided "upon in the same manner as if this Ordinance had not "been passed."

It cannot be supposed that the Legislature which struck from the ninth section, in two places, the words "and which are founded on any contract made by him "since the passing of the said Ordinance," clearly and avowedly in order to render the Ordinance referrible to all debts, whether contracted before or after the law should go into operation, intended, by the vague words contained in the 28th section, to nullify what they had already done, and virtually to replace the clause which they had deliberately rejected. But, perhaps it may be said, that the Legislature repented of the change which

they had made in the bill, and resolved by the 28th section, to restore it to its former state, and give it a prospective operation only. Surely, if the Legislature entertained such an intention when they sanctioned the 28th clause, they would have replaced the words which they had previously, in two places, struck from the ninth clause, and thus have rendered the bill, as it was before, clearly and exclusively prospective.

It is also to be borne in mind, that the 28th section formed part of the original draft of the Ordinance. Now, by the ninth section of the original draft, as has been already shown, all debts contracted before the law had passed, were *expressly excepted* from its operation. It therefore follows, that as this class of debts could not have been affected by the ninth or any other of the preceding sections, the 28th section cannot have been intended, in the original draft, to protect this class. I think I may go so far as to say, that, in order to interpret the Ordinance so as to confine it to debts contracted after the law had come into operation, we must either read the ninth section as if all the words which have been struck out still formed a part of it, or we must regard the 28th clause as having been framed to protect rights to which it could not possibly have been intended to refer either in the draft or in the Ordinance; and thus we would give to the ninth clause a meaning directly opposed to that intended and expressed by the Legislature, or to the 28th a meaning which could never have been contemplated when the law was passed.

It is important to observe the nature of the 28th section, on which so much stress is laid by the advocates of the non-retroactivity of the Ordinance. It is a clause called technically, a "*saving clause*," couched in vague

and general terms, introduced *pro formâ* at the close of this Ordinance, as of almost every other law. The general rule respecting the interpretation of such "saving clauses," is clearly laid down by Dwarris, in his valuable work, as follows:—"A saving clause, in a statute where it "is directly repugnant to the purview or body of the act, "and cannot stand without rendering the act inconsistent "and destructive of itself, is to be rejected."

Now, if the 28th section is to be considered as making the Ordinance referrible only to a particular class of debts, it is directly opposed to the purview or body of the Ordinance, and therefore, according to the rule last cited, must be rejected. I shall also hereafter show that the proposed construction of that section would not only be repugnant to the purview, but would defeat the object of the Ordinance, and render it destructive of itself.

Independently, however, of the inference as to the *animus* of the Legislature, derived from the difference between the draft and the Ordinance, it appears to me plain, that had the Legislature intended to confine the effect of the certificate to debts contracted after the law had passed into operation, they would have said so in express terms, and not made use of such comprehensive words as those contained in the fifth section: "*All debts* "due and payable from such bankrupt at the time of the "first publication of the notice of the issuing of the said "warrant," &c.; and if, by the 28th section, it had been intended to exempt from the operation of the Ordinance all debts contracted before the law went into operation, the Legislature would have spoken plainly, and would not have attempted to produce that effect by the use of the loose and general terms, "That all the provisions of law "inconsistent with the provisions of this Ordinance are

" hereby repealed, saving all rights which have accrued " to any person by virtue of the same."

Having thus attempted to show that the 28th section cannot have the meaning which has been put upon it by those who would restrict the effect of the Ordinance, I shall submit my own views respecting the true object of that clause.

The Ordinance contains twenty-eight enacting sections. The 25th, 26th, and 27th sections, merely define the powers of the Commissioners with reference to assignees, witnesses, and the like; and therefore may, for the purposes of the present discussion, be lost sight of. The first twenty-one sections of the Ordinance, regulate the rights of creditors, as between the creditors and the bankrupt. The next three sections refer to the rights of creditors, as amongst each other. The provisions of the Ordinance in these three sections are directly opposed to the provisions of laws which they have superseded.— Now, I contend, that the rights reserved under the 28th section are the rights which had accrued under the provisions of laws which are repealed as being inconsistent with the provisions of these three, the 22nd, 23rd, and 24th sections, which appear to me to be the only parts of the Ordinance directly opposed to the common law. In order to be fully understood, it will be requisite to remind the reader of the rights which creditors enjoyed under the previously existing laws. By the 176th article of our " Coutume de Paris," the seller of goods for ready money, if not paid, could, within a reasonable time, follow his goods, and claim them in the hands of a third party; and by the 177th article, if the seller had even given credit, and the goods were seized by *another creditor* in the hands of the purchaser, in the state in which the latter

received them, the seller had a privileged claim upon the proceeds of the sale. Further, by our common law, when a copartnership became insolvent, the assets of the firm were divided among the copartnership creditors, to the exclusion of the creditors of the copartners individually; but the assets of each copartner were not set aside for his own separate creditors. Again, by our common law, no provision was made for the registering of the marriage contracts of traders. Now, by the 22nd, 23rd, and 24th sections of the Ordinance, important changes were made relative to the provisions of the law on all these subjects. Thus, the 22nd section of the Ordinance declares, that the separate estate of each partner shall be appropriated to pay his separate creditors. The provision of law, giving a concurrent right to the copartnership creditors to rank on the separate estate, is, in fact, repealed by this section. The 23rd section deprives the seller of goods of the privileges which he had under the 176th and 177th articles of the Custom, and introduces, in lieu thereof, the right of stoppage in transitu, as provided by the law of England. By this section, therefore, the provisions of the 176th and 177th articles of the Custom are in effect repealed. The 24th section requires the marriage contracts of certain traders to be enregistered, in default of which the contract shall be null and void, *as against the creditors of the bankrupt.*

It was to preserve the rights which had accrued under the provisions of the law thus repealed, that the 28th section was necessary. A few examples will show the salutary effect of the clause, in these respects:—A. B. & Co. stop payment, after the proclamation of the Bankrupt Ordinance. Their assets are £10,000; their liabilities, £20,000. The separate estate of A. amounts to £10,000,

and his separate creditors have claims to that extent. Among the creditors of the firm, is C. who holds their promissory note for £5,000, dated before the passing of the Ordinance. The estate of the firm is divided before the separate estate of A. By our common law, C. would have received £3750; by the general rule of our Bankrupt Ordinance, £2500 only. The right of C. to the £1250, the difference between these sums, thus endangered by the 22nd, was preserved by the 28th section of the Ordinance, according to my interpretation of that clause. Again, A. B. & Co. when they failed, had ten bales of cloth in their possession, which they had purchased from C. for £1000, before the passing of the Ordinance. The bales are seized by another creditor, exactly in the same state as when they were purchased; and the cloth, when sold, produces the cost price. By the common law, C. would have £1000; by the 23rd section of the bankrupt law, he could receive but £500. Here, the claim of C. was endangered by the 23rd section of the Ordinance, and again the saving clause in the 28th section, as construed by me, comes to his relief.

The 28th section, thus understood and interpreted, harmonizes with the remainder of the Ordinance, and, in the words of Blackstone, "furnishes matter for every clause "of the statute to work and operate upon." Whereas, if interpreted as the advocates of the non-retroactivity of the Ordinance would wish, it stands forth a disconnected, isolated fragment, diametrically opposed to the object and terms of the remainder of the Ordinance.

I think that I have thus established satisfactorily that the Bankrupt Ordinance under our consideration was clearly intended to be retroactive;—that the whole body of the Ordinance, but more especially the 5th and 9th

sections, most expressly make it retroactive;—that the 28th section, if rightly interpreted, is not opposed to the retroactivity of the Ordinance, but has an import consistent with it;—and, finally, that, even if the 28th section were repugnant to the retroactivity of the Ordinance, the Ordinance would notwithstanding continue retroactive, and the 28th section must be so far rejected.

Having, therefore, established that the present Ordinance is retroactive, I shall prove that the principle of retroactivity is not a novelty in bankrupt laws, but that it has been admitted and acted upon by the Legislature of the State of New York, by the Congress of the United States, and by the Imperial Parliament. Here it is worthy of observation, that in the various arguments which have taken place upon this question, not one solitary instance has been adduced of a purely prospective bankrupt law.

The Constitution of the United States, art. 1, sec. 10, declares that "no State shall pass any *ex post facto law, or law impairing the obligation of contracts.*"

The Legislature of the State of New York, on the 3rd day of April, 1811, passed an act entitled, "An Act for "the benefit of Insolvent Debtors and their Creditors." By this law, on the petition of any person imprisoned or prosecuted for a debt, or on the application of any creditor of a debtor imprisoned, proceedings might be had before certain tribunals by the act established, whereby all the debtor's property was to be taken and divided among his creditors, and he liberated from imprisonment, and "*discharged from all his debts.*"

Soon after the passing of this law, in April, 1811, the highly important case of Sturges *vs.* Crowninshields, (reported 4th Wheaton, p. 122,) was brought on in the

Circuit Court of Massachusetts. The plaintiff's claim was founded on two notes, dated at New York, 22nd March, 1811. The defendant pleaded his discharge obtained under the New York Insolvent Act of April, 1811. This case excited much interest, as involving important points of constitutional law. The questions that were discussed are enumerated in the commencement of the report of the case, and were these:—

"1. Whether, since the adoption of the Constitution "of the United States, any State has authority to pass a "bankrupt law.

"2. Whether the act of New York (April, 1811) was "a bankrupt law.

"3. Whether that law did not impair the obligation of "contracts."

It is to be remarked, that the words of the act of the State of New York are not in any degree more general than the words of our Ordinance, and that the debt claimed by Sturges, the plaintiff, was contracted before that law was passed; yet no attempt was ever made to show that the law did not extend to that debt: on the contrary, it was assumed by both parties that the law did extend to debts contracted before the passing of the law; and thence the plaintiff contended that it was contrary to the Constitution, because it impaired the obligation of contracts.

The Court, in rendering judgment, said that the law did extend to the debt claimed by the plaintiff, and therefore that the law was unconstitutional and null.

Now, applying the principles upon which this judgment is based to the Bankrupt Ordinance of Lower Canada, it must necessarily be declared, that the law is general, —that it applies to all debts.—and, as it does not in any

respect exceed the power of the legislature, that the same objection is not applicable to it, which was successfully urged against the law of the State of New York. I have not now access to the laws of Congress; but we learn from the arguments of the counsel in Sturges *vs.* Crowninshields, that Congress did pass a bankrupt law, (April 4, 1800, c. 173, s. 51,) and that this law was afterwards repealed, in 1805. And it appears to have been admitted by all parties that the discharge of the debtor under this law, was referrible to past as well as to future contracts.

But, be that as it may, it cannot be denied that the principle of retroactivity was fully adopted and carried out by the more recent bankrupt law passed by Congress, in 1841; and yet it will be seen by reference to that law,* that its terms are not more general than those of our Ordinance.

---

* The words of the Act of Congress, of August, 1841, respecting the discharge, are—

"And be it further enacted, that every bankrupt who shall *bona fide* "surrender all his property and rights of property, with the exception "before mentioned, for the benefit of his creditors, and shall fully com- "ply with and obey all the orders and directions which may from time "to time be passed by the proper Court, and shall otherwise conform "to all the other requisitions of this Act, shall (unless a majority in "number and value of his creditors who have proved their debts shall "file their written dissent thereto,) be entitled to a full discharge from "all his debts, to be decreed and allowed by the Court which has de- "clared him a bankrupt, and a certificate thereof granted him by such "Court accordingly, upon his petition filed for such purpose: such "discharge and certificate, however, not to be granted until after ninety "days from the decree of bankruptcy, nor until after seventy days "notice, in some public newspaper designated by such Court, to all "creditors who have proved their debts, and other persons in interest, "to appear, at a particular time and place, to show cause why such "discharge and certificate shall not be granted."

I next advert to the bankrupt laws passed by the English Parliament, and will show that the same principle has been admitted in their laws on this subject.

No allusion is necessary to the earlier bankrupt acts, as the important "principle of the discharge of the per-"son, future estate, and effects of the bankrupt," was, we are informed by Lord Henley, first introduced by the 4th and 5th of Anne, chap. 17, sec. 19. The statutes on this subject were temporary; they were continued from time to time during the reign of George the First; and, amongst others, we have the 5th Geo. I. chap. 24. This act provides, that all persons who should become bankrupts, and should surrender themselves, and should in all things conform as in the said act is directed, shall be discharged from *all debts* due and owing by them at the time they did become bankrupts, in case the Commissioner should grant a certificate as to their having conformed.

This act expired on the 14th May, 1729; but its more important provisions were renewed in 1732, by the 5th Geo. II. chap. 30. The preamble of this statute sets forth the numerous evils that had arisen from the want of a good bankrupt law; and in the remedy provided, we find that a discharge was to be granted to the conforming bankrupt, from all debts, whether contracted before or after the law went into operation. This law, in express terms, refers to "any person or persons who, since the "14th May, 1729, hath or have become bankrupts." It is manifest that the debts contracted in England, between 1729 and 1732, when there was no law by which a debtor could obtain a discharge, were in precisely the same position as debts contracted in Canada before the passing of the Bankrupt Ordinance; and yet the British Parliament, as appears by the preamble of the 5th Geo. II. chap. 30,

for the benefit of creditors, made all the provisions of that law, and more particularly the certificate, referrible to all debts, whether contracted before or after the passing of the law.

The words of the English statute which grant the discharge, are not, in any way, more general than those of our Ordinance on the same subject. It is true, that the context in the English statute places the intention of the Legislature beyond the possibility of doubt; but this arises from the circumstance of the English legislature having been compelled to refer to the statute which had expired, whereas, no such necessity existed with respect to our Ordinance.

I regret that I have not as yet been able to obtain a copy of an act recently passed by the legislature of New Brunswick, which, I am informed, is clearly retroactive, and has been invariably so construed and acted upon in all the courts of justice of that Province.

If, as I think, I have established that our Bankrupt Ordinance is, and was intended to be, retroactive, and that our Special Council, in adopting this principle, had the sanction of the legislatures of two of the most enlightened commercial nations, I may now proceed to establish that they had a still higher sanction for their conduct,—the sanction of reason and justice. And this leads me to my second proposition, "That every bankrupt law ought to be retroactive." I shall endeavour to prove this, by showing, that a bankrupt law merely prospective, must necessarily be partial and unjust, whereas, a bankrupt law retrospective as well as prospective, may, if properly framed in other respects, secure and grant the means of enforcing the rights of creditors, speedily, effectually, and inexpensively, and, at the same time,

afford such relief as is consistent with justice, to honest, but unfortunate, debtors.

Firstly, a bankrupt law, merely prospective, must necessarily be partial and unjust.

In order to effect that which is the primary object of every bankrupt law, that is, to secure the whole of the bankrupt's estate for the benefit of all the creditors, it is absolutely necessary to deprive the debtor of all his ordinary rights over his property. The assignment by the commissioner has this effect, and the warrant in bankruptcy absolutely prevents the debtor from paying any one of his creditors. The debtor being thus, by a single blow, denuded of all his property, for the benefit of all his creditors, it would be manifestly unjust to allow a part of the creditors to administer and divide his estate, according to their own interests and wishes, and at the same time, to permit the remainder of the creditors to harrass the debtor with executions and imprisonment; yet such must be the result, if we confine the bankrupt law to a merely prospective operation.

The creditors whose debts had been contracted after the passing of the bankrupt law, would, of course, avail themselves of the advantages which it affords them, and place themselves in immediate possession of the whole of the bankrupt's property, and the creditors, whose debts date before the passing of the law, by refraining to come in under the commission, would have it in their power to harrass the debtor, thus divested of all means of satisfying their claims.

So long as a debtor has his estate in his own hands, he need not despair; his friends, to supply a deficiency, may come to his assistance, his creditors may accept a compromise, or he may by some fortunate speculation increase

his means, so as to meet the demands of his creditors; but no situation in life can be more utterly hopeless, or more deserving of commiseration than that of an honest debtor, who, after having been divested by law of every vestige of his property, is cast upon the world, destitute of all means, and still exposed to the claims of unrelenting creditors.

A system of law which would thus, on the one hand, deprive the debtor of his property, and prohibit him from paying any of his creditors, and which, at the same time, would allow some of those creditors to coerce his person, for the purpose of obtaining payment from him, would be in the last degree tyrannical and unjust.

Every humane or just mind must admit, that the same law which prohibits the debtor from paying any one of his creditors, ought to prevent every one of his creditors from suing him; that if the creditors, contrary to the common law, are allowed to enter upon the estate of the debtor, and manage it as they wish, without reference to the interests of the debtor, they cannot complain if obliged to content themselves with that estate; in short, that the law, which deprives an honest man of all his assets, should at the same time relieve him from all his liabilities.

The injustice that would ensue from giving to a bankrupt law a purely prospective operation, is not, however, the only evil which would result from such a construction, I think it can be shown that it would be impossible for many years to carry the law, if so interpreted, into operation. If the law be not retrospective, it cannot extinguish debts dating prior to the passing of that law; and if so, the creditors to whom such debts are due, ought not to be compelled to place themselves in a position in which they would have to accept a dividend, as payment in full of

those debts : on the contrary, the law should afford them the means of exercising their rights without prejudice to themselves.

My views will be best explained by an example :— A. B. & Co. fail, after the passing of the bankrupt law. Their liabilities amount to £20,000. C. is a creditor for £500, which was due before the law was passed. The claims of the other creditors, D. E. & F. were acquired after the date of the law. D. E. & F. force A. B. & Co. into the bankrupt court, and obtain possession f the estate of that firm. All the opponents of the doctrine of non-retroactivity, to whom I have had an opportunity of speaking, admit that, if a creditor prove his claim before the commissioner, and accept a dividend, the claim so proved is *ipso facto* discharged. Our Ordinance is express on the point. Under these circumstances what course must C. adopt? If he accept a dividend in the Bankrupt Court, his claim for the balance is lost. If he be a passive witness of the distribution of his debtors' estate, without participating in it, he jeopards the whole. If C. cannot bring the proceeds of the property of A. B. & Co. before the common courts by means of attachment (*saisie arret,*) and executions, his privilege is worse than useless; and if he can, by the service of an attachment on the assignees, bring the property of the bankrupts before the common court, he would, in effect, thereby deprive the assignees of their official character under the Ordinance, and render them nothing more or less than garnishees in the King's Bench ; and the estate of the debtor, instead of being divided, at a trifling expense, in the Bankrupt Court, would then be subjected to the ruinous expense of a distribution in the law courts. The Court of Bankruptcy and the superior tribunal would be

in constant collision; and the bankrupt law rendered, for many years, a dead letter.

The claims, therefore, of this privileged class of creditors,—to secure which is the object of a purely prospective law,—must, if enforced, operate great injustice to the debtor, produce infinite confusion in the courts of justice, prevent the practical operation of the law, and defeat effectually one of its primary objects,—the ultimate discharge of debtors deserving relief. Such would be the results of a non-retroactive construction of the 28th section. I think, therefore, that I am fully warranted in affirming, that this construction is not merely repugnant to the terms and spirit of the Ordinance, but renders it inconsistent with, and destructive of, itself.

I shall now proceed to discuss the latter clause of my second proposition—that a general bankrupt law, in which all creditors are placed on the same footing, will, if properly framed, avoid all these evils, and will moreover afford the best means of securing and enforcing the rights of creditors generally, at the same time that it grants a just relief to debtors. Our Ordinance, although requiring in its details some alterations, is, I maintain, a general bankrupt law so framed as to secure both these important objects. To it, therefore, I shall now direct my attention.

The primary object of our bankrupt law, as of every other bankrupt law, is, "to provide the means of discover-
"ing and securing the estates of bankrupts, for the bene-
"fit of their creditors."

The warrant in bankruptcy is the most powerful means that the law can devise for this purpose. By this proceeding, a creditor may, at a trivial expense, and in a single hour, effect more than he could have done by the common law, at infinite expense, and after the delay of years.

In the common tribunal, a fraudulent and wealthy debtor might, for many months, and sometimes for years, prevent the recovery of a judgment against him; the sale of his goods and lands was attended with great expense, and still greater delay, and as to his books, and the great mass of his outstanding debts, they were utterly beyond the reach of his creditors.

The warrant in bankruptcy, in a moment places the "messenger" in possession of the whole of the bankrupt's property, including the books of account and papers, which could never have been obtained by any other means. The bankrupt ceases to have the power of collecting his debts, which are vested by law in the assignees. The vast importance of obtaining possession of a debtor's books is manifest. If the books leave any part of the bankrupt's conduct in obscurity, that alone is such misconduct as will prevent a discharge; if the books have been regularly kept, and the bankrupt has been guilty of fraud, he can hardly escape detection.

The law, besides thus discovering and securing the estates of bankrupts, professes to furnish the means of administering and distributing those estates.

As to the distribution of the property, the mode adopted by the legislature appears to be unobjectionable.

The creditors whose claims are by law privileged, whether by mortgage or otherwise, rank by preference upon the property subject to such privilege, and the common creditors divide the remainder of the estate among them in proportion to the amount of their respective claims, and the possibility of one creditor's obtaining any advantage over the others is completely excluded.

As to the question of expense, it is sufficient to remark that the bar are unanimous in regarding the bankrupt law as the severest blow to their professional emoluments.

Such, then, is the beneficial operation of our Bankrupt Ordinance, when interpreted as a general bankrupt law, not limited in its operation to one particular class of debts, but embracing all debts equally, whether contracted before or after its enactment.

Thus interpreted, it avoids all the evils necessarily inherent in a law purely prospective, and at the same time secures the most effectual way the attainment of the two cardinal objects of a bankrupt law,—the equitable distribution of the effects of the debtor amongst his creditors, and the relief of the deserving though unfortunate debtor.

The second proposition proposed to be proved, "That every bankrupt law ought to be retrospective," has thus, I think, been satisfactorily established, directly and indirectly, positively and negatively. Indirectly and negatively, by shewing that a bankrupt law not being retrospective must be productive of much evil and injustice; directly and positively, by shewing that being retrospective it avoids this evil and injustice, and (if otherwise properly framed) secures most effectually the important objects for which it is designed.

I now conclude these remarks, having, I think, shown that our bankrupt law is, and was intended to be, retrospective; that the bankrupt laws of other countries have been retrospective; that a bankrupt law, purely prospective, would be opposed to the interests of creditors, the principles of justice and the dictates of humanity, and would be moreover inconsistent with, and destructive of, itself: whereas a general bankrupt law, prospective and retrospective, may be made the means of effectually securing and enforcing the legitimate rights of creditors, and at the same time of affording equitable relief to deserving debtors.