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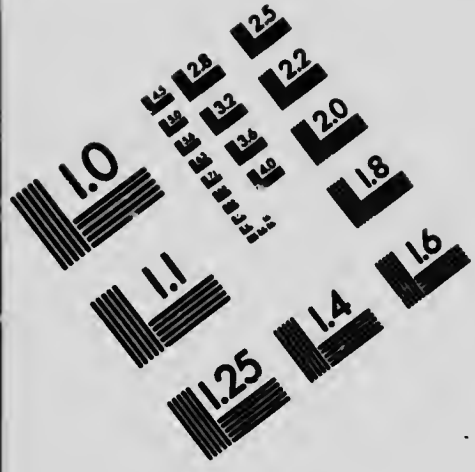

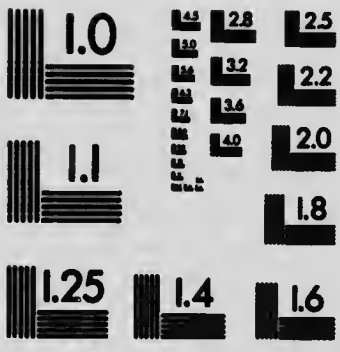

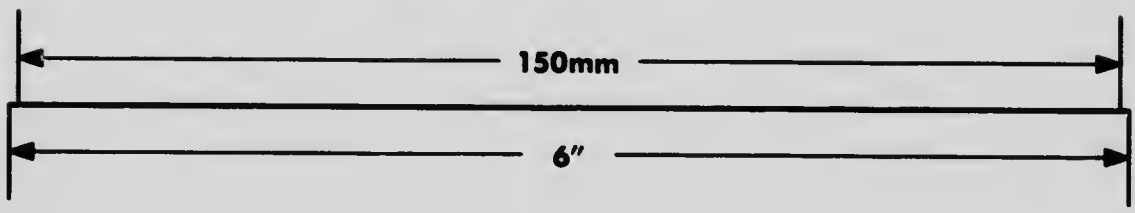

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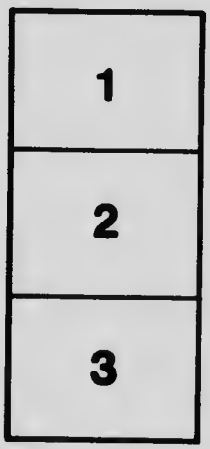

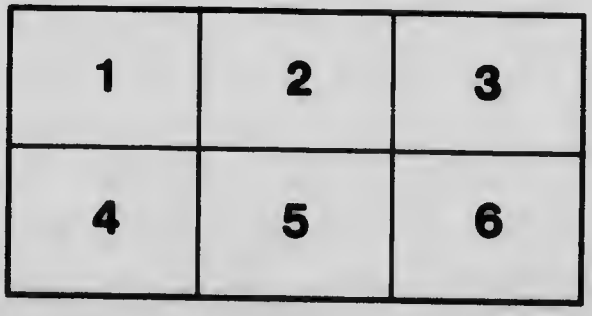

FRAUDS ON CREDITORS

AND

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

A TREATISE ON THE CANADIAN LAW OF FRAUDULENT TRANSFERS, FRAUDULENT PREFERENCES, AND ASSIGNMENTS FOR THE BENEFIT OF CREDITORS;

TOGETHER WITH

NUMEROUS CONVEYANCING AND OTHER FORMS CONNECTED WITH THE ADMINISTRATION OF THE INSOLVENT'S ESTATE.

BY

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PREFACE.

The subject of Frauds on Creditors, embracing Fraudulent Transfers and Settlements and Fraudulent Preferences, is one which, though of great importance to the mercantile community and calling for frequent consideration by the practitioner, has not hitherto been the subject of any extended Canadian treatise. It was with the view of supplying in some measure the deficiency that this work was undertaken, and it is hoped that it may be found useful by those called upon to consider this somewhat difficult branch of the law.

The effect of the enactments of the different Provinces is considered, and the decisions in all Provinces, other than Quebec, as well as English cases, are cited. Numerous American cases are also referred to for the purpose of throwing light on matters not satisfactorily settled by the Canadian and English authorities.

Historical matter and discussions of theories have as far as possible been avoided, and it has also been thought preferable to adhere closely to the exact language of the Judges in cases cited, even though such a course be not conducive to continuity of expression.

In addition to the treatise on the law of Frauds on Creditors, it has been thought advisable to append a brief treatment of the subjects of Assignments for the Benefit of Creditors and Composition Deeds.

TORONTO, May, 1903.

W. R. P. P.

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PART I.

TRANSFERS IN FRAUD OF CREDITORS.

CHAPTER I.

INTRODUCTORY.

Statute of Elizabeth.—By the Statute of 13 Elizabeth, chapter 5, it is in substance provided that every transfer of property real and personal and every bond suit judgment and execution had or made with malice fraud covin collusion or guile, with intent to delay hinder or defraud creditors and others of their just and lawful actions debts accounts damages and forfeitures, shall be taken as against the persons disturbed hindered delayed or defrauded to be utterly void. This Statute is generally in force throughout the Provinces where English law has been adopted(*a*).

Provincial Acts.—Most of the Provinces have also passed supplementary enactments similar in form and substance to the Statute of Elizabeth, and providing that every transfer of property, real or personal, by an insolvent person with intent to defeat, hinder, delay or prejudice creditors, shall as against the creditors injured, delayed or prejudiced, be utterly void. The principal operation of the Provincial legislative enactments, however, is in regard to preferences, which are rendered void by them.

(*a*) R.S.O. (1897), chap. 334, re-enacts secs, 1, 2 and 5 of the Statute of Elizabeth; R.S.B.C. (1897), chap. 86, re-enacts secs. 1, 2 and 5. R.S.O. 1897, chap. 115, and R.S.M. (1891), chap. 61, are declaratory Acts, declaring the proper construction of 13 Eliz., chap. 5.

Scope of Different Acts.—In regard to transfers made with intent to defraud creditors it may be said that the Statute of Elizabeth is broader in its operation than the Provincial legislation. The former applies to transfers made by any person with the prohibited intent while the latter applies only to transfers made by insolvents. Further only "creditors" in the strict sense can invoke the provisions of the local acts while the Statute of Elizabeth operates in favor of "creditors and others," who are disturbed, hindered delayed or defrauded in respect of their just and lawful actions, debts, accounts, damages and forfeitures.

Statute of Elizabeth Declaratory.—Before the Statute of Elizabeth and similar statutes were enacted, the rules of common law were regarded as voiding all fraudulent transfers. In the opinion of eminent authorities the Statutes of Elizabeth were simply declaratory of the common law(*aa*).

It is important to bear this in mind having regard to the liberal construction which has always been placed upon the Statutes of Elizabeth by the Courts.

Earlier Legislation.—The first statute dealing with this subject appears to be 50 Edward III., chapter 6. This statute enacts that if it be found that any person shall make a gift fraudulently or by collusion, his creditors shall have execution of the tenements and chattels transferred as if no such gift had been made.

The next enactment was that of 2 Richard II., Statute 2, chapter 3. This was followed a century later by a statute of 3 Henry VII., chapter 4, which provided that all deeds of gift of goods and chattels made or to be made on trust to the use of the person or persons that made the same shall be void and of non-effect. The Statute of 13 Elizabeth, chapter 5, was a great advance on its predeces-

(*aa*) *Twyne's case*, 3 Rep. 82b; *Cadogan* v. *Kennett* (1776), 2 Cowper, 432; *Sands* v. *Codwise*, 4 Johnson, N.Y., 596.

sors and has been universally regarded as a monument of genius.

Construction of Statutes of Elizabeth.—So eminent an authority as Lord Mansfield has said that the statute cannot receive too liberal an exposition or be too much extended in the suppression of fraud(*b*).

It might be thought that as the statutes were penal they would be strictly construed, but it is a settled rule that they shall receive the most liberal construction, and in fact all statutes in suppression of fraud should be equitably expounded even though they are highly penal(*c*).

In construing the statute regard must also be had to (1) the protection to be afforded to creditors and, (2) the rights of innocent persons(*d*).

Transfers for Value.—Those who seek to impeach a deed executed for valuable consideration have to prove an actual and express intent to defraud or delay creditors in both parties to the deed(*e*), and it is not sufficient to show that the result of such a deed has been to delay or exclude creditors(*f*).

Voluntary Transfers.—In the case of a voluntary deed it is sufficient to show that the effect is to defraud, delay or prejudice creditors. The concurrence of absence of consideration and directly prejudicial effect will be sufficient to avoid it(*g*).

Policy of Law.—It should also be borne in mind in construing the enactments that the policy of the law was and

(*b*) *Cadogan* v. *Kennett* (1776), 2 Cowper, 432. And see *Tucker* v. *Young* (1877), Man. R. Temp. Woods 186.

(*c*) *Wimbush* v. *Tailbois*, Plowden 50; *Goooh's case*, 5 Rep. 50; *Cadogan* v. *Kennett*, *supra*.

(*d*) See *Dewey* v. *Baynton* (1805), 6 East 257; *Re Johnson* (1881), 20 Chy. D. 393.

(*e*) *Re Johnson* (1881), 20 Chy. 389.

(*f*) *Freeman* v. *Pope* (1870), L.R. 5 Chy., p. 538; *Middleton* v. *Pollock* (1876), 2 Chy. D. 104.

(*g*) *Re Lane-Fox*, [1900] 2 Q.B. 508; *Taylor* v. *Coenen* (1875), 1 Ch. D. p. 640.

is to favor the equal distribution of the debtor's estate among his creditors, excepting in some special case which can be plainly proved to be not against that policy(*h*).

Provincial Acts.—The part of the Provincial Acts, which deals with fraudulent conveyances, when analyzed and compared will be found not only to be based upon the same principle but also substantially to mean the same thing as the Statute of Elizabeth, 13 Elizabeth, chap. 5. Indeed, almost the very terms are identical, and there is little difference in substance. In fact the clause in the Provincial Acts is substantially the same as sections 1 and 5 of the Statute of 13 Elizabeth. The main difference between the Acts being swept away, the Courts are remitted to the decisions under the Statute of Elizabeth for the interpretation and construction of the Provincial Acts. This would seem to throw the whole question back on the common law, and it was laid down as a general rule that all deceitful practices in defrauding or endeavoring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty were contrary to and prohibited by the common law(*i*).

Essential Elements of Fraud.—To constitute a disposition of property fraudulent within the terms of the statute there must be a debtor with intent to defraud in his mind, a conveyance or transfer of some property which might have been made available by creditors in payment of their debts and out of which the creditors could have realized at least a portion of their claim and there must also be, of course, creditors to be defrauded.

(*h*) *Ivey* v. *Knox* (1885), 8 O.R. 635.

(*i*) *Tucker* v. *Young* (1877), Man. R. Temp. Woods 200. See also on this point *Gotwalls* v. *Mulholland* (1864), 15 C.P. 62; 3 E. & A. 195; *Metcalf* v. *Keefer* (1860), 8 Gr. 392.

The law does not regard fraudulent practices that do no injury and no matter how fraudulent the intent of transferor may have been unless the subject matter of the transfer were something which would be available to creditors they cannot be said to be injured by the transfer nor could they be benefited if the transfer were made void.

This would apply to all things of no substantial value and also to property encumbered beyond its full value. It would further apply to property exempt by statute from execution such as necessary household furniture, homesteads, etc.(*j*)

Property of which the debtor is merely the legal and not the beneficial owner would not be subject to the provisions of the statute. At common law the earnings of the wife during coverture belong to the husband and if they were invested could be made available to the creditors of the husband. Similarly with the earnings of his infant children. The rule in regard to married women has, however, been changed by the Married Women's Property Acts in most Provinces.

A Question of Fact.—The question whether a conveyance is entered into with intent to delay, hinder or defraud creditors is a question of fact. It can become a question of law only when to certain ascertained facts the law attaches a significance which governs the conclusion(*k*). It was held in some early cases of which the leading one is *Edwards* v. *Harben*(*l*), that under certain circumstances this was a question of law for the Courts. But apart from this very exceptional case, the great weight of authority is in accord in treating the question as one of fact for the

(*j*) See Title "Property" *infra*.

(*k*) *Allan* v. *McTavish* (1883), 8 A.R. 440.

(*l*) (1788), 2 T.R. 587.

jury(*m*). The Court has to decide in each particular case whether under all the circumstances it can come to the conclusion that the intention of the settlor in making a settlement was to delay, hinder, or defraud his creditors. It is impossible to penetrate into a man's mind and ascertain what his intentions are or were. The facts only can be looked at in order to ascertain what inference can be fairly drawn as to the intention of the settlor(*n*).

No certain rules can be laid down as to what is an honest transaction or the opposite, every case must stand on its own footing(*o*).

Where the facts which must govern the Court in coming to a conclusion are different in each case, while an isolated fact may not be sufficient to induce the Court to set aside the transaction as fraudulent, a combination of facts may irresistibly lead to that conclusion(*p*).

Hinder, Delay and Defraud.—To hinder and delay creditors is to do something which is an attempt to defraud and yet coming short of an actual defrauding of creditors. Examples of this are not as common as of the ordinary defrauding.

An example is a conveyance made by an insolvent debtor to a trustee for his own benefit for life and after his death for the payment of his debts(*q*). A more common example is a sale by an insolvent to a third party on long credit with the prohibited intent(*r*).

The scope of the statute includes three matters, first, a debtor might dispose of his proprety in such a way as

(*m*) See *Thompson* v. *Webster* (1859), 5 Jurist N.S. 668; 7 Jurist N.S. 531.

(*n*) *Kent* v. *Riley* (1872), L.R. 14 Equity 190.

(*o*) *Doe dem Jones* v. *Nevers* (1879), 18 N.B. 627.

(*p*) *De Long* v. *Gillis* (1898), 31 N.S. 61.

(*q*) *Young* v. *Heeremans* (1870), 66 N.Y. 374.

(*r*) See *Blum* v. *McBride* (1887), 5 S. W. Rep. 641.

to place obstacles in the way of legal process; in the second place, he might attempt to delay payment to a later date or, in the third place, to defraud his creditors absolutely by preventing the enforcement of the just claim(*s*).

A man may by transfer, defeat, delay or defraud his creditors though at the time, he had on paper more property than sufficient to cover all liabilities. The property retained may be inaccessible or slow of realization, and it is obvious that creditors are thus delayed(*t*).

So an alienation of all a debtor's property but certain future rents which were sufficient to pay creditors but postponed their realizing their claims is bad as "delaying" creditors(*u*).

But a settlement by a person having ample means can not be voided because some years afterwards the effect proves to be to defeat or delay creditors(*v*).

It has never been decided that in order to give the creditor status to attack a transfer that he *personally* should have been hindered, delayed or defrauded or that the intention should have been to hinder, delay or defraud him personally; it is sufficient if it was made with the intent of defrauding one creditor and if so it is then void as to all(*w*).

Surety.—A surety is not justified in placing his property out of the reach of liability any more than if he were the principal debtor(*x*).

Subsequent Creditors.—The provisions of the statute are held to extend to subsequent creditors, but not unless

(*s*) *Sutton* v. *Hanford*, 11 Mich. 513; *Means* v. *Dowd*, 128 U.S. 273.

(*t*) *Thompson* v. *Webster* (1859), 7 Jur. N.S. 532.

(*u*) *Murtha* v. *McKenna* (1867), 14 Gr. 59.

(*v*) *Re Lane-Fox*, [1900] 2 Q.B. 508.

(*w*) *Jenkyn* v. *Vaughan* (1856), 3 Drew 419; *Graham* v. *Furber* (1854), 14 C.B. 410.

(*x*) *Goodricke* v. *Taylor* (1864), 2 DeG. J. & S. 135.

the transfer was made with express intent to delay, hinder or defraud them, that is, persons who might become creditors, or unless after the settlement the settlor had no means sufficient for payment of his existing debts and there still remain debts unsatisfied which were due at the date of the transfer(*y*).

It should also be noted that if a settlement is set aside as fraudulent against creditors whose debts existed at the time of its execution, subsequent creditors are entitled to participate(*z*).

Valid Inter Partes.—Another important principle is that the statute operates only in favor of creditors and other third parties prejudiced and as between the parties themselves and all persons claiming under them fraudulent conveyances are binding(*a*).

(*y*) *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Freeman* v. *Pope* (1870), L.R. 5 Ch. 544; *Jenkyn* v. *Vaughan* (1856), 3 Drew 419.

(*z*) *Barling* v. *Bishopp* (1860), 29 Beav. 417.

(*a*) *Olliver* v. *King* (1856), 8 D. M. & G. 110.

CHAPTER II.

WHO ARE CREDITORS.

1. *Under 13 Elizabeth.*

The Statute of 13 Elizabeth, chapter 5, as has already been stated, affords a remedy to "creditors and others" while the supplementary Provincial legislation is limited to "creditors" alone. In considering the effect of the words "creditors and others," it is well to note that the section speaks of them being defrauded of their just and lawful actions, debts, accounts, damages and forfeitures.

Who are Creditors?—Mr. May is of opinion that the words "creditors and others" are wide enough to include any person who has a legal demand against the settlor so that he may ultimately rank as a creditor, although at the date of the settlement he may have no immediate legal right to enforce his demand. The character of the claim so long as it is a legal one is, in his opinion immaterial(*b*). But though the right of action for damages, etc., arose before the transfer, yet if judgment is not recovered until after the transfer the judgment creditor is regarded as a subsequent creditor(*c*).

Various Examples.—The following classes of claimants have been held to be "creditors" under the Statute of Elizabeth;—a person with a right of action in tort(*d*)

(*b*) May, 2nd ed., 163.

(*c*) See Title "Subsequent Creditors"; *Barling* v. *Bishopp* (1860), 29 Beav. 417; *Evans* v. *Lewis* (1876), 30 Ohio St. 11.

(*d*) *Ashley* v. *Brown* (1890), 17 A.R. 500.

such as seduction(*e*); or for slander(*f*); or assault and battery(*g*); or trespass(*h*); or criminal conversation(*i*). But claimants of this kind do not become creditors until they crystalize their claim into a judgment. Till then there is merely a liability which may or may not result in a debt(*j*). The wrongdoer is in no sense a debtor by reason of the tort until judgment is given against him. Accordingly such a claimant cannot proceed to attack a transaction contrived to hinder or delay him until he has obtained judgment(*k*). And the nature and merits of the claim must be regarded in arriving at the intent(*l*).

A prosecuting woman under a bastardy act(*m*). The beneficiaries or creditors of an estate are "creditors" of the administrator and may attack a voluntary conveyance of the assets(*n*). So also a *cestui qui trust*(*o*). This has been questioned in later cases, but in the case of *Sharp* v. *Jackson*(*p*) Lord Halsbury took occasion to say that although there are other and peculiar elements in the relation between a *cestui qui trust* and trustee, undoubtedly the relation of debtor and creditor can and does exist(*q*).

A transfer before marriage to defeat a wife's incohate right to dower has also been set aside(*r*).

(*e*) *Cameron* v. *Cusack* (1890), 17 A.R. 489; *Ashley* v. *Brown.*

(*f*) *Gurofski* v. *Harris* (1896), 27 O.R. 201; *Shean* v. *Shay* (1873), 42 Ind. 375.

(*g*) *Martin* v. *Walker*, 12 Hun. (N.Y.) 46.

(*h*) *Barling* v. *Bishopp* (1860), 29 Beav. 417.

(*i*) *Ashley* v. *Brown* (1890), 17 A.R. 500.

(*j*) *Cameron* v. *Cusack* (*supra*); *Ex p. Mercer* (1886), 17 Q.B. D. p. 294.

(*k*) *Cameron* v. *Cusack.*

(*l*) *Cameron* v. *Cusack.*

(*m*) *Leonard* v. *Bolton* (1891), 153 Mass. 428.

(*n*) *Gooch's case*, 3 Coke 60a; *Richardson* v. *Horton* (1843), 7 Beav. 112; *Anderson* v. *Anderson* (1861), 27 Ala. 662.

(*o*) *McLemore* v. *Nuckolls* (1861), 37 Ala. 662.

(*p*) [1899] A.C. 419.

(*q*) See *Infra.*

(*r*) *Smith* v. *Smith* (1847), 6 N.J. Eq. 515.

A claimant for alimony is within the statute(*s*). So also a party liable on a contract by which he may become liable for the payment of money, even under a voluntary bond(*t*); or an accommodation note(*u*); also on a guarantee(*v*). The lessor is a creditor of the lessee where there is a continuous liability for rent under a lease(*w*). Lord Selburne says in *Re Ridler*(*v*) that the matter must be looked at as if the event had really happened, the possibility of which the parties must have had in contemplation when the liability was created(*x*).

And a man is not at liberty to take a sanguine view but is bound to take a reasonable view of what is likely to happen(*v*).

Other contingent liabilities are possible claims arising out of the fluctuations of the stock market(*y*); a possible claim arising out of unliquidated partnership accounts(*z*); a covenant by a husband to pay a sum of money to his wife if she survives him(*a*); a liability on shares not fully paid up or subject to a double liability by statute(*b*).

A voluntary assignee of a debt is a creditor if the assignment is sufficient to pass the legal right to the debt(*c*). But not as against a transfer for value(*d*).

A person upon whom a robbery has been committed is even before a conviction entitled to be considered as a

(*s*) *Campbell* v. *Campbell*, 29 Gr. 252; *Blenkinsopp* v. *Blenkinsopp* (1849), 12 Beav. 568; *Bailey* v. *Bailey* (1873), 61 Me. 361.
(*t*) *Lechmere* v. *Earl of Carlisle* (1738), 3 P. Wms. 222.
(*u*) *Williamson* v. *Codrington* (1750), 1 Ves. Sr. 511.
(*v*) *In re Ridler* (1882), 22 C.D. 74.
(*w*) *O'Brien* v. *Whigam* (1896), 9 App. Div. N.Y. 113; *Payne* v. *Mortimer* (1859), 1 Giff. 118.
(*x*) And see *Rider* v. *Kidder* (1805), 10 Ves. 360.
(*y*) *Crossley* v. *Ellworthy* (1871), L.R. 12 Eq. 164.
(*z*) *Denison* v. *Tattersall* (1868), 18 L.T.N.S. 303.
(*a*) *Rider* v. *Kidder* (1805), 10 Ves. 360.
(*b*) *Re Provincial Building Society* (1891), 30 N.B. 628.
(*c*) May, p. 168.
(*d*) *Saunders* v. ———, Holt 327.

creditor of the party committing the robbery, although the remedy for recovering the amount may be suspended till after conviction. And a subsequent creditor may take advantage of the existence of this species of indebtedness to attack a voluntary transfer(*e*).

A Surety.—A surety is not a creditor until he has paid the debt. The liability of the principal debtor to the surety is not a debt coming within the definition of *debitum in presenti solvendum in futuro,* nor a debt upon a contingency; it is not a debt at all, although it is quite possible that a debt may arise(*f*).

The only remedy that a surety has apart from payment of the debt and bringing an action against the debtor is to bring an action to compel the creditor upon being properly indemnified to take such proceedings against the debtor as might be necessary to protect the surety(*g*).

In most of the Provinces the rule laid down in *Hope* v. *Grant* has been altered by a statutory amendment providing that the term "creditor" shall be deemed to include any surety, and the endorser of any promissory note or bill of exchange who would by payment by him of the debt, promissory note or bill of exchange in respect of which such surety was entered into or such endorsement given become a creditor of the person giving the preference, within the meaning of the Act.

If the transferee is an endorser or surety merely, in the absence of such statutory amendment the transaction

(*e*) *Reid* v. *Kennedy* (1874), 21 Gr. 86. And see generally *Barrack* v. *McCulloch* (1856), 3 K. & J. 110; *Leukner* v. *Freeman*, Freeman Ch. 236; *Pickstock* v. *Lyster* (1815), 3 M. & S. 371.

(*f*) *Cockburn* v. *Sylvester* (1877), 1 A.R. p. 476; *Federal Bank* v. *Harrison* (1884), 10 P.R. 273; *Hope* v. *Grant* (1890), 20 O.R. 623. See also *Morphy* v. *Colwell* (1902), 3 O.L.R. 314; *Campbell* v. *Roche* (1891), 18 A.R. 646; *Ex p. Stubbins* (1881), 17 C.D. at 68; *Molsons Bank* v. *Halter* (1889), 16 A.R. 323; *Nelles* v. *Paul* (1879), 4 A.R. 1.

(*g*) *Federal Bank* v. *Harrison* (1884), 10 P.R. 271. But see *Re Blackpool Motor Car Co., Limited,* [1901] 1 Ch. 77; *In re Paine,* [1897] 1 Q.B. 122; and *Re Warren,* [1900] 2 Q.B. 138.

could not, of course, be attacked as a preference, and it would be necessary to reply upon the Statute of Elizabeth and prove that the transaction was devised and contrived to delay, hinder and defraud(*h*).

It has been held that this amendment was evidently not intended to apply to the case of a security given contemporaneously with or in pursuance of an agreement contemporaneous with the endorsement. What is aimed at is to prevent a person who has become a surety, without taking security for his indemnity, afterwards when his liability as such has become fixed and he is potentially a creditor, procuring security from his principal(*i*).

Where the endorsement is only a device to evade the statute by enabling security to be indirectly given to the creditor it can not stand. And where security is taken in this roundabout way it is regarded as a suspicious circumstance(*j*).

But while a surety is not generally regarded as a creditor, he is regarded as a debtor to the principal creditor, and his liability to the latter is one which comes within the provisions of the Statutes of Elizabeth(*k*). A purchaser of land subject to a mortgage occupies a similar relation to the vendor, there being an implied contract on his part to pay the mortgage moneys as they fall due(*l*).

Mortgagees and Secured Creditors.—There seems at one time to have been uncertainty and confusion as to whether mortgagees were to be looked upon as creditors under this statute(*m*). But the mere fact of a creditor having some-

(*h*) *Hope* v. *Grant* (1890), 20 O.R. at p. 631.

(*i*) *Kerry* v. *James* (1894), 21 A.R. at p. 341.

(*j*) *Powell* v. *Calder* (1885), 8 O.R. 505.

(*k*) *Holmes* v. *Bonnett* (1892), 24 N.S. 279; *Goodricke* v. *Taylor* (1864), 2 DeG. J. & S. 135.

(*l*) *Beatty* v. *Fitzsimmons* (1893), 23 O.R. 245; *Oliver* v. *McLaughlin* (1893), 24 O.R. p. 50.

(*m*) *Allan* v. *McTavish* (1883), 8 A.R. p. 465.

thing in pawn pledge hypothec or mortgage does not destroy his character as a creditor or deprive him of the right which the statute gives a creditor. If, however, he is a secured creditor and has sufficient of the assets of the debtor in his hands to fully cover the indebtedness, then undoubtedly the statute was not intended for him but for the general and unsecured creditors. There is a presumption that the security is adequate, but if it be shown that the mortgaged property is not sufficient to satisfy the debt the mortgagee, of course, will be a creditor for the balance(*n*).

Security Adequate.—In the case of *Clarke* v. *Hamilton Provident*(*o*), it was said that a creditor holding ample security is not a creditor who requires protection. The creditor who is thus secured has been provided for by compact between him and his debtor, and it would not seem unreasonable that as against the secured creditor, the debtor should be allowed to secure another creditor out of his goods, for that is not done at the expense of the former, nor is the debtor, as to the former, to be deemed in insolvent circumstances. If the security is, or may, be scanty, that is a point to be established by evidence.

Inadequacy Proven.—Where a secured creditor holding a mortgage on land has established that his security is altogether inadequate and was known by the debtor to be so prior to the voluntary conveyance, that conveyance must be held to be fraudulent as against creditors(*r*). And a mortgagee whose security is admittedly insufficient may bring an action to set aside a conveyance as fraudulent without first realizing his security(*s*).

(*n*) *Sun Life* v. *Elliott* (1900), 31 S.C.R. 91; *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419.

(*o*) (1884), 9 O.R. 177.

(*r*) *Dundee Mortgage Co.* v. *Patterson* (1889), 6 Man. R. 66.

(*s*) *Sun Life* v. *Elliott* (1900), 21 S.C.R. 91.

Giving up Security.—A mortgagee may by giving up his security sue as if he were an ordinary creditor(*q*).

Second Mortgagee.—A second mortgagee cannot attack the prior mortgage(*p*).

2. *Under Provincial Acts.*

Creditors under Provincial Acts.—While the protection of the Statute 13 Elizabeth is extended to "creditors and others" who have lawful actions, the Provincial Acts are limited in application to creditors in the strict sense of the word(*t*), and to an assignee for the general benefit of creditors.

Unmatured Debt.—It is not, however, necessary that the debt should be actually due and payable, and a suit may be brought by a creditor under the Provincial Acts on behalf of himself and all other creditors before the maturity of his claim(*u*).

"Creditors" Explained.—There have been several recent cases in Ontario in which the meaning of the word "creditors" in section 2 of the Ontario Assignments and Preferences Act has been discussed.

Claim for Damages.—These cases all affirm the principle that a person having a claim founded in tort is not a creditor within the meaning of that section. The effect of this is that a person being threatened with an action for damages may convey his assets to a creditor with the intent of defeating the possible judgment and the transaction cannot be qu..stioned.

(*q*) *Doe* v. *Knight* (1826), 5 B. & C. 671; *Ede* v. *Knowles* (1843), 2 Y. & C. 172; *Lister* v. *Turner* (1846), 5 Hare 281.
As to sureties see p. 12 *supra*.

(*p*) *Warren* v. *Taylor* (1862), 9 Gr. 59.

(*t*) *Oliver* v. *McLaughlin* (1893), 24 O.R. p. 50; *Gurofski* v. *Harris* (1896), 27 O.R. 201.

(*u*) *Macdonald* v. *McCall* (1885), 12 A.R. 593.

In *Ashley* v. *Brown*(*uu*) it was said that one who has a right of action for tort and subsequently recovers judgment is not a creditor within the meaning of the Ontario Assignments and Preferences Act so as to be in a position to attack under that Act a transaction entered into by the *tort feasor* before the action was commenced. In such a case the attacking party must rely upon the Statute of Elizabeth and prove that it was devised with the intention of delaying, hindering and defrauding him. And if the transaction is merely a preference it is not, of course, within the prohibition of the Statute of Elizabeth(*v*). In *Cameron* v. *Cusack*(*vv*) also the Court held that a conveyance by a debtor of his assets to pay his existing debts cannot be impeached by one who at the time has a right of action against him for a tort and subsequently recovers judgment, and this was re-affirmed in *Gurofski* v. *Harris* (*w*).

Preferences Affecting Subsequent Creditors.—It has been held that there cannot be a preference in respect of a person who is no creditor at all at the time and who does not become a creditor until long after the act complained of(*x*). Or in other words subsequent creditors cannot attack a preferential transaction. Accordingly in so far as the preference sections of the Provincial Acts are concerned it is unnecessary to say anything further regarding subsequent creditors. As to the Provincial provisions in regard to defeating creditors the same reasoning would not apply

(*uu*) (1890) 17 A.R. 500.

(*v*) *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523; *Middleton* v. *Pollock* (1875), 2 Ch. D. 104; *Holbird* v. *Anderson* (1793), 5 T.R. 235.

(*vv*) (1890), 17 A.R. 489.

(*w*) (1896), 27 O.R. 201; 23 A.R. 717. See also *Ex p. Games* (1879), 12 C.D. 314; *Alton* v. *Harrison* (1869), L.R. 4 Ch. 626; *Totten* v. *Douglas* (1871), 18 Gr. 532.

(*x*) *Ashley* v. *Brown* (1890), 17 A.R. p. 504.

and they appear to extend to subsequent creditors(*xx*). But as the Statute of Elizabeth covers all that these particular Provincial provisions include, the matter is of little practical interest.

3. *Other Principles.*

Claims Barred by Statute—Illegal Claims.—A creditor whose claim is barred by statute is not entitled to the benefit of the Act(*y*), nor if his claim is void as against public policy(*z*); or if his claim is illegal(*zz*); or if he is barred by acquiescence(*a*).

Cestui Que Trusts.—In *Molsons Bank* v. *Halter*(*b*), it seems to have been considered that the relationship of *cestui que trust* and trustee was not one of creditor and debtor at all, and that consequently enactments in bankruptcy or insolvency statutes against preferences do not apply at all to securities given to *cestui que trusts*. In the light of recent English decisions, it seems necessary to modify this view in some degree.

The dictum of Lord Halsbury in *Sharp* v. *Jackson*(*c*) "that although there are other and peculiar elements in the relation between a *cestui que trust* and trustee undoubtedly the relation of debtor and creditor can and does exist," seems to have been adopted in subsequent cases, and it was said by Buckley, J., in *Re Blackpool Motor Car Co.*(*d*), that it must now be taken that as between trustee and *cestui que trust* there does exist the relation of debtor and creditor.

(*xx*) See *Gurofski* v. *Harris*, 27 O.R. p. 205.
(*y*) *Struthers* v. *Glennie* (1887), 14 O.R. 726.
(*z*) *Bruggerman* v. *Hoerr* (1862), 7 Minnesota 337.
(*zz*) *Alexander* v. *Gould* (1804), 1 Mass. 165.
(*a*) *Olliver* v. *King* (1856), 8 DeG. M. & G. 110. And see Tit. Defences in Proceedings to Attack Transfer.
(*b*) (1889), 18 S.C.R. 88.
(*c*) [1899] A.C. 419.
(*d*) [1901], 1 Ch. at p. 85.

This view was also adopted by Wright, J., in *Re Lake* (*e*). The latter Judge goes on to discuss the exact scope and limits of the doctrine. He says:—

"It was further argued for the trustees of the settlement on the same authorities that a preferential payment by an insolvent trustee, made by him in order to repair a breach of trust, may be, and in this case ought to be, regarded as made by him not as debtor, but as trustee, and not with a view to prefer the *cestui que trust* as creditor, but with a view to satisfy the trustee's own conscience. This doctrine does not appear to have commended itself to the Court of Appeal in *Ex parte Ball*(*f*); but no further doubt is apparently thrown upon it in the House of Lords in *Sharp* v. *Jackson*(*g*); and the only question at present open is, what is the exact scope and limit of this doctrine? Of course, if the fund or property which the debtor hands over is itself impressed with a trust, the question does not arise: he is merely performing his legal or equitable obligation in handing it over. Next, if it is affirmatively proved that the debtor did not act with a view to prefer the trust estate, and acted merely to protect himself from penal or other consequences, that is settled to be no fraudulent preference. Again, if it is proved that he acted merely to satisfy his own conscience as a trustee, and not in the interests of the trust estate as a creditor, there is no fraudulent preference, if *Ex parte Taylor*(*h*) is good law. And possibly the doctrine is to be carried to this extent, that there may be a presumption that the trustee has acted for the satisfaction of his conscience as trustee, and not with a view to prefer the trust estate as creditor. But I do not find any authority which necessarily

(*e*) (1901), 1 Q.B., at p. 714.
(*f*) 35 W.R. 264.
(*g*) [1899], A.C. 419.
(*h*) 13 Q.B.D. 295.

gives any further extension to the doctrine so as to justify under all circumstances a preference by the trustee of the trust estate. If it is established by evidence that he acted not in his own interest, nor from a sense of duty binding his conscience as a trustee to prefer a particular trust estate or to prefer trust creditors over ordinary creditors, and still more if it is shown that, having committed several similar breaches of trust, he, without circumstances creating any special duty in favor of a particular trust estate, gives it a preference with a view to prefer it over the others, that must, it seems to me, be sufficient to bring the case within the section."

Right to Sue Transferable.—The right to attack a conveyance as fraudulent passes by assignment of his debt by a creditor subject of course to any equities which may subsist between the original creditor and the debtor. The words of the statute are that transactions shall be void against a person and his assigns whose actions, suits, debts, accounts, damages, penalties, forfeitures are, shall or might be in any wise disturbed, hindered, delayed or defrauded. This has been taken to extend to the heirs, successors, executors and administrators of the creditor as well as his assigns, or his trustee under insolvent or bankrupt Acts (*a*), but not a transferee of an assignee(*b*).

Assignee for Creditors.—But, apart from legislative enactment, an assignee of the debtor for the benefit of creditors is in no higher position than his assignor and cannot attack the conveyance(*c*).

(*a*) *Acraman* v. *Corbett* (1861), 1 J. & H. 410; *Ex p. Russell* (1882), 19 Ch. D. 588; *Ex p. Chaplin* (1884), 26 Ch. D. 319; *Warren* v. *Williams* (1864), 52 Maine 349.

(*b*) Waite, par. 185. And see *Lumsden* v. *Scott* (1883), 4 O.R. 323.

(*c*) *Coats* v. *Kelly* (1886), 15 A.R. 81; *Kerry* v. *James* (1894), 21 A.R. 338; and see *Clarkson* v. *McMaster* (1896), 25 S.C.R.; Title Assignee *infra*.

Debts of Trifling Amount.—Where the creditor's debt is of a trifling amount the Court will not assist him, and in Ontario it has been held that a creditor having a judgment in the Division Court for an amount under $40 cannot attack a conveyance of land as voluntary or fraudulent for he has not a claim sufficient in amount to permit an execution being issued against lands as provided by the Division Court Act and he cannot make his position any better by suing on behalf of other creditors(*d*).

(*d*) *Zillias* v. *Deans* (1891), 20 O.R. 539.

CHAPTER III.

THE PROPERTY TRANSFERRED.

Exigible Property Only.—All kinds of property, real and personal, legal and equitable, vested and reversionary or contingent which are subject to the payment of debts or liable to be reached by any form of execution at the time of a fraudulent conveyance are subject to the provisions of the Statute of Elizabeth and of the Provincial Acts(*e*).

Property not exigible under any form of execution or exempt from execution is not subject to the provisions of the statute; in fact the whole question of what property is contemplated by the statute resolves itself into tho question cf what property can be reached under any form of execution(*f*).

Amending Execution Laws. — Statutory amendments which have the effect of increasing the range of property liable to attack by creditors have also the effect of making it subject to the provisions of the Statute of Elizabeth and the Provincial Acts.

Trivial Value.—The thing conveyed must be of some real value otherwise the removal or setting aside of the fraudulent conveyance would be of no benefit to the creditors and the Courts would not lend their aid(*g*).

Choses in Action.—The reason why choses in action were formerly held not to be goods and chattels, namely, be-

(*e*) *Warnock* v. *Kloepfer* (1888), 15 A.R. 324; 18 S.C.R. 701; *Blakely* v. *Gould* (1897), 24 A.R. 153; May p. 17.

(*f*) *Lodor* v. *Creighton* (1859), 9 C.P. 295. But see *Doll* v. *Hart* (1890), 2 B.C.R. 32.

(*g*) *Ithaca Gaslight Co.* v. *Treman* (1883), 93 N.Y. 660.

cause they could not be seized by creditors, is quite inapplicable to the present state of the law as they may now be taken in execution(*h*).

Transfer of Whole Assets.—It is doubtful if a voluntary settlement of *all* the settlor's property even if he is not a trader can in any sense be supported against a liability, even though the liability be contingent, if he should ultimately be called on to pay(*i*). And the inclusion of a debtor's whole assets is a badge of fraud(*j*). But a mortgage of all the grantors then existing and after acquired property to secure an existing debt and future advances is not necessarily void under 13 Elizabeth, chap. 5. If, of course, it is a mere cloak for retaining some benefit to the grantor it will be void(*k*).

Property Within Acts.—To determine what property is exigible in the various provinces reference, of course, must be made to the execution Acts of the different provinces(*l*).

From these Acts it will be seen that money and securities of various kinds, such as cheques, bills, bonds, notes, mortgages, stocks and shares, which were formerly not subject to execution are now in general included and so come within the prohibition of the Statutes of Elizabeth. Equities in chattels or land and contingent interests in land are in the same position.

(*h*) *Warnock* v. *Kloepfer* (1888), 15 A.R. 326.

(*i*) *Re Ridler* (1882), 22 Chy. D. p. 80.

(*j*) *Brown* v. *Sweet* (1880), 7 A.R. 725. And see Title "Badges of Fraud."

(*k*) *Ex p. Games* (1879), 12 Ch. D. 314; *Alton* v. *Harrison* (1869), L.R. 4 Ch. 622.

(*l*) Ont. R.S., 1897, p. 899; Ont., 1899, cap. 7; N.S.R.S., 1873, cap. 104; 1877, cap. 7; 1879, cap. 17; 1880, cap. 15; 1883, cap. 12; N.S.R.S., 1884, cap. 124; 1885, cap, 34; 1889, cap. 40; 1892, cap. 20; N.B.C.S., 1877, cap. 47; 1892, cap. 16; Man. R.S., 1891, cap. 53; 1892, cap. 14; 1893, cap. 12; 1894, cap. 12; 1895, cap. 13; 1898, cap. 18; 1900, cap. 12; P.E.I., 1875. cap. 11; B.C.R.S. 1897, cap. 72; 1898, cap. 22; 1899. cap. 27; N.W.T.R.O., 1888, No. 45 and 58; 1892, No. 14; 1893, No. 16; 1894, No. 26; C.O. 1898, cap. 26 and 27 and cap. 34 (extra judicial seizure); 1898, No. 14.

By the application of rules of construction the particular species of property cited below have been held to be subject to the provisions of the Statute of 13 Elizabeth, chapter 5.

Foreign Lands.—Land in another province or a foreign country, but not where the law of that country is not shown to be the same as the law of the Province where the action is brought(*m*).

Curtesy.—An estate by curtesy is within the Act(*n*), though where the release of the estate by curtesy was in a deed made by a daughter in which the father and husband joined, it was held that the purchase money was not garnishable by his creditors(*n*).

Vendor's Lien.—A vendor's lien, however, is not a right of property, an estate in lands nor a charge on lands. It is only a remedy for a debt. The right is a mere possibility depending on the contingency of non-payment of the debt with the privilege of establishing an equitable claim by decree of the Court(*p*).

Leasehold.—A leasehold is, of course, property and it is now settled that the covenants and burdens in the lease are not "good consideration" under 13 Elizabeth, chapter 5 (*q*), though they do afford a valuable consideration under 27 Elizabeth(*r*).

(*m*) *Purdom* v. *Pavey* (1896), 26 S.C.R. 412; *Burns* v. *Davidson* (1892), 21 O.R. 547; *Henderson* v. *Bank of Hamilton* (1894), 23 S. C.R. 716.

(*n*) *Palmer* v. *Lovett* (1892), 14 P.R. 415.

(*p*) *Bank of Montreal* v. *Gordon* (1896), 11 Man. R. 366. But see *Parke* v. *Riley* (1866), 3 E. & A. 215; *Rathbun* v. *Cuthbertson* (1875), 22 Gr. 465; *Lacey* v. *Ingle* (1847), 2 Ph. 413; *Harding* v *Harding* (1872), L.R. 13 Eq., 493; *Dryden* v. *Frost* (1837), 3 Myl. & C. 670.

(*q*) *Re Ridler* (1882), 22 Ch. D. p. 82.

(*r*) *Price* v. *Jenkins* (1877), 5 Ch. D. 619; *Ex p. Hillman* (1878), 10 Ch. D. 622.

Powers of Appointment—Debts—Legacies. — Property subject to a general power of appointment is within the Act(*s*). A particular debt or general book debts of a merchant(*ss*) are also within the Acts, attachment being the recognized process of execution by which they may be reached.

And a cancellation or release of a debt or mortgage is as much prohibited as an assignment to a third person(*t*).

Policies of Insurance.—Policies of insurance of any kind, whether fire, life or other form of insurance, may also come within the scope of the Acts(*u*).

Amount Involved.—It has been contended that, apart from statutory enactment, where a debtor fraudulently assigns life policies which subsequently become payable by his death, his creditors were only defrauded by the amount of the premiums. It has been held in England that there is a semblance of truth in this contention, but the

(*s*) *White* v. *Sansom* (1746), 3 Atk. 411; *Townshend* v. *Windham* (1750), 2 Vesey Sr. 1.

(*ss*) *Warnock* v. *Kloepfer* (1888), 15 A.R. 324; *Labatt* v. *Bixel* (1881), 28 Gr. 593; *Sibthorp* v. *Moxom* (1747), 3 Atk. 581; *Hudson's Bay Co.* v. *Hazlett* (1895), 4 B.C.R. 450.

(*t*) *Bank of U. C.* v. *Shickluna* (1863), 10 Gr. 157; *Henderson* v. *Lloyd* (1862), 3 F. & F. 7; *Slack* v. *Tolson* (1826), 1 Russ. 553. But a debtor may forego a benefit such as a legacy; *Bain* v. *Malcolm* (1887), 13 O.R. 444; *Henderson* v. *Lloyd* (1862), 3 F. & F. 7; *Barber* v. *Connecticut Ins. Co.* (1891), 61 Conn. 240; *Campbell* v. *Prescott* (1808), 15 Ves. Jr. 500; *Bennett* v. *Batchelor*, 3 Bro. C.C. 29; and see *Rittinger* v. *McDougall* (1360), 10 C P. 395; *Ferguson* v. *Carman* (1868), 26 U.C.R. 26.

(*u*) *Weekes* v. *Frawley* (1893), 23 O.R. 235; *Canadian Mutual* v. *Nisbet* (1900), 31 O.R. 562; *Ivey* v. *Knox* (1885), 8 O.R. 635; *Bank of Montreal* v. *McTavish* (1867), 13 Gr. 395; *Re Mouat* (1899), 1 Ch. 831; *Law* v. *London Policy Co.* (1855), 1 K. & J. 223; *Stokoe* v. *Cowan* (1861), 29 Beav. 637; *Skarf* v. *Soulby* (1849), 1 Mac. & G. 364; *Penhall* v. *Elwin* (1853), 1 Sm. & Gif. 267; *Taylor* v. *Coenen* (1876), 1 Ch. D. 636; *Prentice* v. *Steele*, 4 Montreal Sup. Ct. 319. But see opposite view *Alleyne* v. *Darcy* (1855), 5 Ir. Ch. R. 56; and see *Lee* v. *Gorrie* (1864), C.L.J. 76. Bonus additions to a paid-up policy have recently been held in Ontario to be exigible under execution, and a receiver may be appointed to receive the money; *Canadian Mutual* v. *Nisbet* (1900), 31 O.R. 565.

answer to it is that the creditors have a right to all the property which would have belonged to him. Being insolvent, he was not at liberty to reduce the amount of the property by the payment of the premiums, but, as by paying the premiums he kept on foot the policies, creditors are entitled to have that property which resulted from such payment(*w*).

Effect of Statutes.—In considering the question of life policies, regard must be had to special local enactments, if any. Thus it is provided in Ontario that if the policy was effected and premiums paid by the assured with intent to defraud his creditors, the creditor shall be entitled to receive out of the sum secured an amount equal to the premiums so paid(*x*).

The Ontario Insurance Act also provides that the insured may make a declaration that the policy is for the benefit of his family, and if made such declaration shall be deemed to create a trust for their separate use, and the money shall not be subject to the control of the insured or his creditors. It has been thought, having regard to this provision, that a creditor could not only not question such a declaration but that it might be validly made even after a receiver for the policy had been appointed in a suit by a creditor. In fact that the declaration might be made at any time before the maturity of the policy and in case of seizure under execution before the sale or disposal thereunder and that too whether the insured was solvent or otherwise(*y*).

It has been held in some of the United States, apart

(*x*) R.S.O. 1897, cap. 203, sec. 151, sub-sec. 2; see also Ont. 1888, cap. 22; N.B., 1895, cap. 25; Man. R.S., 1891, cap. 88; 1895, cap. 26; 1898, cap. 25; 1899, cap. 17; B.C.R.S., 1897, cap. 104; P.E.I., 1899, cap. 16; N.W.T. C.O., 1898, cap. 49.

(*w*) *Taylor* v. *Coenen* (1876), 1 Ch. D. p. 641.

(*y*) See *Weekes* v. *Frawley* (1893), 23 O.R. pp. 241, 242.

from the provisions of statutes in favor of beneficiaries, that the assignment by an insolvent of policies on the life of himself, in favor of his wife, child or other relative, is not fraudulent(*z*).

And where the policy is validly made payable to the wife or other beneficiary free from the claims of creditors the beneficiary can divest herself of her interest by an assignment and this might be attacked by her creditors on proper grounds(*a*).

Claims for Damages.—While choses in action may be reached by creditors and made subject to the payment of debts under the above rules, claims for damages for tort such as libel, malicious presecution, etc., cannot apparently be reached by creditors. This is on the principle that such claims are not assignable. This must, however, be limited to injuries to the person. Where the damage is to the property of the debtor and has the effect of diminishing in value such property the right of action, it has been said, can be reached by the creditors(*b*).

Seats in Stock Exchange.—The general principle governing these appears to be that they carry with them an incorporeal right of property which may be assigned subject to the rules of the stock exchange. Although of a character somewhat peculiar and though its ownership is clogged with conditions, it is nevertheless a valuable right capable of transfer, and to hold that such property was not subject to the debts of its owner would be somewhat incongruous(*c*).

(*z*) *Cole* v. *Marpole* (1881), 98 Ill. 58; *McCutcheon's Appeal* (1881), 99 Pa. St. 133.

(*a*) *Graham* v. *Canada Life* (1894), 24 O.R. 607; and see *Dolen* v. *Metropolitan Life* (1894), 26 O.R. 67.

(*b*) *Hudson* v. *Peets* (1844), 11 Paige, New York, 184.

(*c*) See *Powell* v. *Waldron* (1882), 89 New York 331. As to preferring Stock Exchange creditors see Title "Preferences."

See also *Clarkson* v. *Toronto Stock Exchange* (1887), 13 O.R. at p. 224.

Trade Marks.—The right to use a trade mark is a form of property which may be the subject of a transfer, but only where it is transferred in connection with the good will of the business in which the trade mark has been used. It is not exigible under execution(*d*).

But if the trademark is one merely denoting the place of manufacture it has been held in the United States to constitute property and to be subject to the rights of creditors(*e*).

Copyrights.—It has also been held in the United States that copyrights and royalties payable by publishers are property which may be attached(*f*).

Patents.—Similarly with patent rights; the patentee may assign his interest voluntarily and it would pass to his assignee in insolvency. A patent may apparently be seized under a fi. fa., and the debtor's interest sold(*g*).

The American courts have held that it was proper subject of a bill in equity by a creditor, though not seizable under any fi. fa. or other common law execution(*h*).

If the courts were to allow these species of property or rights to be exempt from creditors it is clear that the ends of justice might readily be defeated, for debtors wishing to defraud their creditors would merely have to single out one of the exempted species of property and invest all their money in it in order to be safe.

(*d*) *Gegg* v. *Bassett* (1902), 3 O.L.R. 263; but see *Gilman* v. *Hunnewell* (1877), 122 Mass. 139.

(*e*) *Warren* v. *Warren Thread Co.* (1883), 134 Mass. 247; *Kidd* v. *Johnson* (1879), 100 U.S. 617.

(*f*) *Lord* v. *Hart* (1875), 118 Mass. 271. And see *Allan* v. *Lyon* (1883), 5 O.R. 615.

(*g*) *Coleman* v. *Rawlinson*, 1 F. & F. 330; *Harley* v. *Harley*, 11 Ir. Ch. Rep. 451.

(*h*) *Hesse* v. *Stevenson* (1803), 3 B. & P. 565; *Ager* v. *Murray* (1881), 105 U.S. 126; *Barton* v. *White* (1887), 144 Mass., 281; *Greene* v. *Keene* (1884), 14 R.I. 388; *Stephens* v. *Cady*, 14 Howard 528.

Liquor License.—A liquor license is in general a purely personal trust and in the absence of statutory authority cannot be transferred by the licensee(*i*).

Liquor license acts now commonly provide for transfers of licenses subject to certain conditions and to the discretion of the licensing body. Whether there is an interest in the license that can be reached by creditors will largely depend on these enactments. And it should be borne in mind that the discretion must be exercised judicially and not arbitrarily(*j*). Usually the license appertains only to a certain business carried on on specific premises. Where the licensing act provides that "assigns" of this business may obtain the consent of the Board to user of the license, it might perhaps be thought that assigns by operation of law such as execution creditors might be entitled to stand in the shoes of the licensee(*k*). In Pennsylvania, which has such an enactment, it has, however been held that the creditor of a liquor licensee has no interest in the question of a transfer of the license to another(*l*).

Corporate Franchise.—A corporate franchise such as taking or operating a railway cannot in general be assigned(*m*).

Improvements.—Improvements placed by a debtor upon real property of a third party acting with him for the purpose of defrauding creditors can be followed and the estate in the real property charged in favor of creditors

(*i*) *R.* v. *Booth* (1883), 3 O.R. 144; *Sanderson* v. *Goodrich*, 46 Barb. 616.

(*j*) *Re Haslem* v. *Schnarr* (1898), 30 O.R. 89.

(*k*) See *Re Abbott & Medcalf* (1891), 20 O.R. 299.

(*l*) *Burns* v. *License*, 13 Pa. Co. Ct. 141. And see *Re Jenny*, 19 Misc. (N.Y.) 244; *Miles* v. *Mathusa*, 19 Misc. (N.Y.) 96.

(*m*) See *Bickford* v. *Grand Junction Ry. Co.* (1877), 1 S.C.R. p. 738.

to the extent of the increased value(*e*). A common illustration of this is where a man though indebted spends his money in enhancing the value of property standing in his wife's name. In such a case the amount of the increase in value for which no consideration is given by the wife and which has been added to her estate in fraud of creditors in equity belongs to them and will be declared a charge upon the land for their benefit(*f*).

Change of Form.—In the United States it is a settled rule also that property cannot be placed beyond the reach of creditors by mere change in its form and character and where plant which has been fraudulently transferred was renewed and repaired the Courts said that having had the benefit of the old plant there was no reason in equity why the new should not be subject to the rights of the creditors(*g*).

Fraudulently Conveyed Assets.—Where property is placed in the name of another for the purpose of protecting it against creditors of the actual purchaser, it belongs to the purchaser, and the grantee having no interest in it may convey it to the true owner at any time, and the creditors of the former have no right to have the conveyance set aside. That would be obtaining what did not really belong to their debtor(*h*).

Future Acquired Property.—It has long been settled that an assignment of future acquired property for value acts in equity by way of agreement binding the conscience of the assignor and so binding the property from the

(*e*) *Jackson* v. *Bowman* (1867), 14 Gr. 156; *Davidson* v. *McGuire* (1880), 27 Gr. 483; 7 A.R. 98.

(*f*) *Lynde* v. *McGregor*, 13 Allan 182.

(*g*) *McClosky* v. *Stewart* (1882), 63 Howard Pr. N.Y. 137.

(*h*) *Gibbons* v. *Tomlinson* (1891), 21 O.R. 489. But see *Johnson* v. *Kline* (1888), 16 O.R. 129.

moment when the contract became capable of being performed. And there is no distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him and one assigning future bequests and devises to which he may under any will become entitled(*i*).

There is one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is that on it coming into existence it shall answer the description in the assignment or in other words that it shall be capable of being identified as the thing or as one of the very things assigned. When there is no uncertainty as to its identification it will immediately vest in the assignee(*j*).

A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come *in esse* and is capable of being identified as that to which the contract refers, there is in it no such vagueness as to prevent a Court of equity from enforcing the contract(*k*).

Book Debts—Registration.—In considering the validity of a charge on book debts it must also be remembered that registration in any form is not necessary in regard to such a charge(*l*). And such a charge is equally valid although

(*i*) *Horsfall* v. *Boisseau* (1894), 21 A.R. 663.

(*j*) *Tailby* v. *Official Receiver* (1888), 13 A.C. page 533.

(*k*) *Re Clarke* (1887), 36 Ch. D. 348. And see *Brantom* v. *Griffiths* (1876), 1 C.P.D. 349; 2 C.P.D. 212; *Lunn* v. *Thornton* (1845), 1 C.B. 379; *McAllister* v. *Forsyth* (1885), 12 S.C.R. 1; *Thomas* v. *Kelly* (1888), 13 A.C. 506; *Holroyd* v. *Marshall* (1862), 10 H.L.C. 191; *Kitching* v. *Hicks* (1883), 6 O.R. 739.

(*l*) *Taylor* v. *Whittimore* (1853), 10 U.C.R. 440. But see *Short* v. *Ruttan* (1854), 12 U.C.R. 79, not followed in this case.

it is contained in a document purporting to charge chattels where the latter charge is invalid for want of registration. Where the legal part of a contract is severable from that which is illegal, the former is good and valid whether the illegality exist by statute or by common law(*m*).

Expected Profits.—An assignment of profits expected to be made out of a contract to do work does not come within the Statute of Elizabeth or the Provincial Acts, where nothing has been earned and no money is due on the contract. It depends entirely upon the debtor himself whether the contract will ever be carried out and any money ever become payable under it. Until moneys become payable there is nothing which can be attached or levied by means of an execution, nor can a receiver be properly appointed in respect of such profits(*n*). That being so, the assignment is not open to attack(*o*). To put it another way the debtor cannot be compelled to work for his creditors(*p*).

Other Interests.—Shares in a ship are within the Act (*a*) as are an indivisible chattel interest(*b*), and the purchasers rights under an agreement for purchase of land (*c*), or of an assignee of the purchaser(*d*). Property

(*m*) *Kitching* v. *Hicks, supra.* As to what is sufficient description to cover future acquired property of this kind, see also *Re Thirkell* (1874), 21 Gr. 492; *Mason* v. *Macdonald* (1875), 25 C.P. 435. See *Pickering* v. *Ilfracoombe Rr. Co.* (1868), L.R. 3 C.P. at page 250; and see also *Olmstead* v. *Smith* (1858), 15 U.C.R. 421; *Carscallen* v. *Moodie* (1857), 15 U.C.R. 92.

(*n*) See *Holmes* v. *Millage*, [1893] 1 Q.B. 551; *Harris* v. *Beauchamp*, [1894] 1 Q.B. 801; *Cadogan* v. *Lyric Theatre* 1894), 3 Ch. 338.

(o) *Blakeley* v. *Gould* (1897), 24 A.R. 153; 27 S.C.R. 68.

(*p*) *Baby* v. *Ross* (1892), 14 P.R. 440.

(*a*) *Trerice* v. *Burkett* (1882), 1 O.R. 80.

(*b*) *Gunn* v. *Burgess* (1884), 5 O.R. 685; *Re McDonagh* v. *Jephson* (1889), 16 A.R. 107.

(*c*) *Peters* v. *Stoness* (1889), 13 P.R. 235. And see *Wood* v. *Hurl* (1880), 28 Gr. 146; *Gillies* v. *How* (1872), 19 Gr. 32.

(*d*) *Ward* v. *Archer* (1894), 24 O.R. 650. As to transfer of agreement for sale of reversionary interest, see *Torkington* v. *Magee*,

exempted by statute from seizure under execution is, of course, not within the statute as creditors cannot be injured by its transfer(*q*). Unless a creditor is placed in a worse position by a conveyance than he was before he cannot complain. And insurance moneys payable in respect of exempted chattels are governed by the same rule(*r*).

Similarly where the thing transferred is of trivial value the Court will not extend its aid. There must be a possibility of practical benefit to the creditor(*s*).

On the same principle a transfer of property in which the debtor had no beneficial interest cannot be impeached by his creditors(*t*). So where the debtor is a mere conduit pipe for the legal title(*u*). Exemptions by statute from execution under the head of "Tools of trade" do not apparently apply in favor of members of liberal professions(*v*).

The equity in property subject to several mortgages is within the Act(*w*). But not apparently an incohate right to dower(*x*). Nor crops grown on fraudulently conveyed lands where the labor and men were supplied by the vendee(*y*).

A father has a right to the earnings of his infant children, and if he receives their earnings it has been held

[1902] 2 K.B. 427. As to right of locatee, see *Cann* v. *Knott* (1890), 19 O.R. 422. And as to interest under undisclosed trust see *Re Trusts Corporation & Medland* (1892), 22 O.R. 538.

(*q*) See, however, *West* v. *Ames* (1897), 2 N.W.T.R. Part 2, 138; *Doll* v. *Hart* (1890), 2 B.C.R. 32.

(*r*) *Osler* v. *Muter* (1892), 19 A.R. 94.

(*s*) *Ithaca Gas Light Co.* v. *Treman*, 93 N.Y. 660.

(*t*) *Dunn* v. *Whalen*, 66 Hun. (N.Y.) 634.

(*u*) *Silvers* v. *Potter*, 48 N.J. Eq. 539.

(*v*) *Demers* v. *O'Connor*, Q.R. 10 S.C. 371; 7 S.C. 216.

(*w*) See *Beamish* v. *Pomeroy* (1858), 6 Gr. 586.

(*x*) *Cottle* v. *McHardy* (1870), 17 Gr. 342.

(*y*) *Kilbride* v. *Cameron* (1867), 17 C.P. 373.

that he could not validly invest them in the infant's name to protect them from creditors(*z*).

A purchase in name of child or wife is, of course, within the Act(*b*). So a sale of property and settlement of purchase money(*c*), or even a sale of good will and settlement of the purchase money(*d*).

Situs of Property.—As to certain personal property such as tangible chattels and the like there is an actual local position. As to other kinds, such as debts and choses in action, the property is intangible, and though not possessing in strictness locality, yet a situs is attributed to it by a legal fiction by connecting it in different ways with a particular place or country. A debt *per se*, although a chattel and part of the personal estate, has, of course, no absolute local existence; but it does possess an attribute of locality, arising from and according to its nature(*pp*).

(*z*) *Worth* v. *York*, 35 N. Car. 206. As to foreign property or debts payable in foreign countries see Title "Conflict of Laws," *infra*.

(*b*) May p. 20; Bump. 2nd Amer. Ed. 237.

(*c*) *Barrack* v. *McCulloch* (1856), 3 K. & J. 117.

(*d*) *French* v. *French* (1855), 6 D. M. & G. 95.

(*pp*) As to situs of debts see Title "Conflict of Laws."

CHAPTER IV.

THE FORM OF THE TRANSACTON.

Form Immaterial.—The form of the transaction is in general immaterial. The Statute of Elizabeth specifies all and every "feoffment, gift, grant, alienation, bargain and conveyance," and also "every bond, suit, judgment and execution had or made." The Provincial Acts specify in addition every "assignment or transfer, delivery over or payment." In the present state of the law it may be laid down that if property of any kind subject to any process of execution is transferred with the necessary intent then the transaction may be attacked. The form of the transaction will not cause its true nature to be disregarded(*q*).

The fact that the agency of legal process has been used will not save a fraudulent arrangement, not even a valid judgment regularly enforced(*qq*). Nor can a collusive sale by sheriff stand(*r*). But a *bona fide* purchase at sheriff's sale by a creditor and a subsequent loan of the goods to debtor was held valid(*s*).

Miscellaneous Examples.—Marriage settlements may, of course, be within the provisions if vitiated by fraudulent intent and also general assignments for the benefit of creditors(*ss*).

(*q*) *Re Watson*, 25 Q.B.D. 27; *Madell* v. *Thomas*, [1891] 1 Q.B. 230.

(*qq*) *Billiter* v. *Young* (1856), 6 E. & B. 1; *Imray* v. *Magnay* (1843), 11 M. & W. 267; *Hunt* v. *Hooper* (1844), 12 M. & W. 664.

(*r*) *Watson* v. *McCarthy* (1864), 10 Gr. 416.

(*s*) *Williams* v. *McDonald* (1850), 7 U.C.R. 381.

(*ss*) See these Titles.

The same principles apply to voluntary appointments as to voluntary assignments and where a man has a general power of appointment or a particular power coupled with an interest in default of appointment he cannot by a voluntary appointment prevent creditors from reaching the assets over which the right of appointment may be exercised(*t*); but not a particular power of appointment among certain persons of whom the debtor is not one since the debtor cannot appoint to himself and accordingly his creditors cannot be injured by a voluntary appointment (*u*). An appointment by a husband of moneys payable to him by the Crown in favor of his wife was held invalid in *McPherson* v. *Shannon*(*v*).

If a note or other obligation is given advisedly and intentionally for a larger sum than is really due in order to permit of the recovery of a judgment for more than the true debt it is void under the Statute of Elizabeth(*w*).

The release by a mortgagee of a mortgage may be a "gift or alienation"(*x*), and so with the release of a debt(*y*).

On the same principle an agreement not to enforce a bond may be attacked(*z*). Nor will a man be allowed to do by a roundabout conveyance what he could not do directly(*a*). Nor to do in one way what he could not do in another(*b*).

(*t*) *Whittington* v. *Jennings* (1834), 6 Sim. 493; *Troughton* v. *Troughton* (1747), 3 Atk. 656; *Stilwell* v. *Mellersh* (1851), 20 L.J. Ch. 356; *White* v. *Sansom* (1746), 3 Atk. 410.

(*u*) *Clemmow* v. *Converse*, 16 Gr. 552.

(*v*) (1881), 28 Gr. 378.

(*w*) *Clemmow* v. *Converse*, 16 Gr. 552.

(*x*) *Bank of U. C.* v. *Shickluna* (1863), 10 Gr. 157.

(*y*) *Sibthorp* v. *Moxom* (1747), 3 Atk. 581; *Henderson* v. *Lloyd* (1862), 3 F. & F. 7.

(*z*) *Slack* v. *Tolson* (1826), 1 Russ. 553.

(*a*) *McDonald* v. *McLean* (1869), 16 Gr. 665.

(*b*) *Fitzer* v. *Fitzer* (1742), 2 Atk. 511.

So a purchase of land or other property in the name of a third person will be set aside, for it is fraudulent alienation of money which is now, in most jurisdicitions, exigible(*c*), and a purchase in name of a son was held void even where the creditors intervened between the date of the purchase and the date of the deed(*d*).

Improvements on the property of another with his knowledge and consent may also be followed and the realty charged to the extent of the improvements(*e*).

Where, however, moneys cannot be taken in execution under the local laws such a transaction cannot be attacked for if the debtor had given the money to the third party who had purchased the property with it the transaction could not be impeached(*f*).

A lease made by a debtor of his farm property by which he was to remain in possession for a year, and out of the crop pay himself the rental for the whole term of $1,500 was declared fraudulent in *Way* v. *Massey Manufacturing Co.*(*g*). The plain intent of such a lease was said to be to enable the lessor to carry on his farming operations for the year without danger of being interfered with by his creditors.

If a debtor fraudulently expends his means in payment of premiums of life insurance policies, his creditors may recover from the beneficiary a sum equal to the premiums paid with interest(*gg*).

(*c*) *Miller* v. *McCuaig* (1900), 13 Man. R. 220; *Barrack* v. *McCulloch* (1856), 3 K. & J. 110.

(*d*) *Waddle* v. *McGinty* (1868), 15 Gr. 261.

(*e*) *Dundas* v. *Dutens* (1790), 1 Ves. Jr. 198; *Peoples' Nat. Bank* v. *Loeffert* (1897), 184 Pa. St. 164. See further on this point Title "Property."

(*f*) *Fletcher* v. *Sedley*, 2 Vern. 490; *Glaister* v. *Hewer*, 8 Ves. 199.

(*g*) (1886), 4 Man. R. 38.

(*gg*) See Title "Property—Insurance." And see the following American cases on this: *Stokes* v. *Ammerman*, 121 N.Y. 337; *Ingles* v. *New England Mutual Life Ins. Co.*, 27 Fed. Rep.. 249; *Aetna Nat. Bank* v. *U. S. Life Ins. Co.*, 24 Fed. Rep. 770; *Pence* v. *Makepeace*, 65 Ind. 345; *Stigler* v. *Stigler*, 77 Virg, 163; *Chapman* v. *McIlwraith*, 77 Mo. 38.

Refusing Legacy.—While the Statute of Elizabeth is directed against fraudulent alienations of property whereby a debtor diminishes his estate, it does not touch the case of his neglecting or refusing to enrich himself. Thus though a legacy gives a right of property from the day of its acceptance, the acquisition is not perfect, it only becomes definite by the will of the legatee. A donation may be offered and refused, an inheritance may be offered and repudiated; property may be given under a condition that depends on the donee to fulfil and and he may neglect to perform it. In all these cases, creditors have nothing of which to complain, because the debtor's patrimony remains exactly what is was before. In this the common law follows the civil law which gave creditors no right to complain if a debtor repudiated an inheritance or a legacy, and the debtor being permitted to repudiate a whole legacy, is *a fortiori* not open to attack for repudiating a part(*hh*).

Refusal to Work.—Nor is there any law which compels a man to work for his creditors, if he chooses to live in idleness or which prevents him giving away his time and services or devoting them towards satisfying one creditor's demand. So where a debtor's wife mortgaged her farm for the purpose of paying some of his debts and subsequently instead of his continuing to work the farm for his own benefit, as he had formerly done, the debtor agreed that until the mortgage was paid off he would work it for his wife alone, it was held that this arrangement was not illegal nor unreasonable, and that on no principle could it be said that it was a making away with property in order to defeat or defraud creditors(*i*).

(*hh*) *Bain* v. *Malcolm* (1887), 13 O.R. 444, per Proudfoot, J.
(*i*) *Baby* v. *Ross* (1892), 14 P.R. 440.

Lien Agreement.—A lien agreement of the ordinary kind made between a customer and dealer and providing that no property in the material supplied should pass to the customer, but that notwithstanding any improvement or work upon them or change of form or addition thereto or use thereof they should still remain the property of the vendor, and that he should also have the property in the finished goods, is not a sale assignment or transfer of goods or property within the meaning of the statute which has the necessary effect of defeating or delaying creditors(*j*).

Security to One Partner.—And there is nothing to prevent one partner in a firm from advancing moneys to a third party from the firm's assets and taking a mortgage in his own name to secure the debt(*k*).

Transfer to "One Man Company."—A form of transfer that has become popular in recent years and bids fair to become more so is a sale by a trader to a limited company dominated by himself in consideration of shares or other securities of that company. This, of course, is a transfer for valuable consideration and concurrence of intent must be shown. It is also clear that the company is absolutely distinct from the shareholders(*l*).

In a case of this kind in Ontario it was held that the company was a mere alias or agent of the assignor and that the transfer was a fraud on his creditors and must be set aside subject, however, to the rights of the creditors of the company(*m*).

This decision, however, was reversed by the Court of

(*j*) *Wellbanks* v. *Heney* (1890), 19 O.R. 549.

(*k*) See *Hobbs Hardware Co.* v. *Kitchen* (1889), 17 O.R. 363; *McLeod* v. *Fortune* (1859), 19 U.C.R. 98; *Jones* v. *Harris* (1871), L.R. 7 Q.B. 157.

(*l*) *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572.

(*m*) *Rielle* v. *Reid* (1897), 28 O.R. 497.

Appeal(*n*). That Court held that when a limited liability company has been regularly formed in accordance with the Companies Acts for the purpose of taking over and carrying on the business of a trader who is insolvent, the conveyance of the assets of the latter to the company though it may be open to attack on the ground that it is fraudulent and void as against creditors under the Statute of Elizabeth cannot be set aside on the ground that the company is a mere alias or agent for the trader.

Salomon v. Salomon.—The case of *Salomon* v. *Salomon* (*o*) is a very instructive one on this question. It was there decided that it is not illegal for a trader in order to limit his liability and obtain a preference of a debenture holder over other creditors to sell his business to a limited company which he himself absolutely dominates, the business then being solvent and all the terms of sale being known to and approved by all the shareholders, and all the requirements of the Companies Act being complied with.

In this case a solvent trader transferred his business to a limited company with a nominal capital of £40,000. The company consisted of himself, his wife, daughter and four sons, he holding all the shares except six, the par value of the shares being £1.

In part payment of the purchase money, debentures forming a floating security were issued, and in addition 20,000 shares of fully paid up stock. Subsequently the company was wound up and after satisfying the debentures there was not enough left to pay the ordinary creditors.

The House of Lords held, after careful consideration that the company could not be said to be the mere alias or agent of or trustee for the vendor, and that there was no

(*n*) 26 A.R. 54.
(*o*) [1897], A.C. 22.

fraud upon creditors or shareholders, and that neither the company nor the liquidator suing in the name of the company was entitled to rescind the contract of purchase.

Re Carl Hirth.—In the case of *Re Carl Hirth* (*p*) Salomon's case was considered by the Court of Appeal in England, Lord Lindley saying that the question was never raised there whether the creditors of a solvent trader who had converted himself into a company and transferred all his assets to a company could not impeach the transaction as a fraud upon the creditors under the Statute of Elizabeth, or as an act of bankruptcy under the Bankruptcy Act.

The facts in this case were that a trader, who was liable under a judgment, purported to sell the business to a company which he had formed for the purpose, in consideration of fully paid up shares of stock and of the company undertaking to pay his debts. He was the Chairman, Managing Director and Secretary of the company, and held substantially the whole of the shares in it. Within three months from the formation of the company, a bankruptcy petition was presented against him, and an order made. His liabilities exceeded two thousand pounds, and he had no assets.

A winding up order was also made and a contest arose between the trustee in bankruptcy and the liquidator of the company in regard to the assets so transferred to the company.

The Court of Appeal was of the opinion that the transaction was a juggle and a fraud, and although not clear that it could be set aside under the Statute of Elizabeth, declared it was void under the Bankruptcy Act. They said that to reach it under the Statute of Elizabeth it must be shown that the sale was of the whole or substantially of the whole of Hirth's property, and it must also be

(*p*) [1899], 1 Q.B. 612.

shown that the company had notice that he was cheating his creditors, while under the Bankruptcy Act the Court would not have to consider whether the person taking the property knew anything about the fraud or not, nor whether that which was transferred was the whole or substantially the whole of the debtor's property.

It seems to be essential to the artificial creation called the company, that the law should recognize only that artificial existence quite apart from the motives or conduct of the individual corporators(*q*).

Cameron v. Perrin.—The case of *Cameron* v. *Perrin*(*r*) was a somewhat peculiar case. There the plaintiffs sold their stock in trade to one who had managed it for them as their agent, and took a chattel mortgage thereon as security for the purchase money. The mortgage also included sundry other chattels the property of the purchaser. At the time of the sale and mortgage there were executions in the sheriff's hands by which these latter goods were bound. The Judge of the County Court found that they had been included in the mortgage in order to defeat or delay an expected execution. It was held by the Ontario Court of Appeal affirming the judgment of the County Court (Osler, J.A., dissenting), that the acceptance by the plaintiffs of a mortgage on goods which they knew were already bound by execution, rendered the whole transaction fraudulent and void against creditors, so that the whole stock in trade sold became subject to the executions.

(*q*) *Rielle* v. *Reid* (1899), 26 A.R. 54; *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572. [For a discussion of the fiduciary relationship between the promoters of the company and its shareholders, and the validity of contracts between a company and its directors as promoters, and also the effect of contract made by directors of one company with themselves as directors of another company, see *Lagunas* v. *Lagunas*, [1899] 2 Ch. 392.].

(*r*) (1887), 14 A.R. 565.

The Court of Appeal said: "What the statute does, in favor of creditors, is to avoid the mortgage as a conveyance. It strikes at that part of the transaction which has entered into with the fraudulent intent. The intent, it is urged, was to protect the other goods; but we cannot see any satisfactory answer to the charge that the intent of the whole conveyance was to defeat or delay creditors. The other goods may have been what the parties principally sought to cover, but they brought the stock into the transaction as part of their scheme, and treated it as what in law it was, and what between the parties it remained, the property of the former agent, the purchaser"(*s*).

(*s*) This case may also be regarded as authority for the proposition that when a vendor takes a chattel mortgage back from the purchaser to secure the purchase money and this chattel mortgage is invalid owing to some defect, or is regarded as void as against creditors, it cannot be supported either on the principle that the vendor has a lien on the goods for the purchase money or that they are impressed with a trust in his favor. Where goods are at the time of the contract in the possession of the buyer as agent of the vendor, the mere completion of the contract operates as a delivery of possession, and the vendor's lien is abandoned when he makes delivery of the goods to the buyer.

For a consideration of the Form of Preferential Transactions see Title "Preferences."

CHAPTER V.

INTENT TO DEFRAUD.

Intent.—The question of intent, under the Statute of 13 Elizabeth, chapter 5, is the same whether the transaction impeached is voluntary or for value. The statute does not declare voluntary conveyances to be void, it only declares all fraudulent conveyances to be void. But whether a conveyance be fraudulent or not depends upon its being made upon good consideration and *bona fide*. When the transaction is voluntary the fact that creditors are defeated gives rise to a presumption of fraudulent intent, but where there has been a valuable consideration the presumption does not arise. The intent has to be deduced as a fact from the whole evidence, not necessarily without aid from the fact, if it so appears, that creditors have been delayed, or defeated, but without the more or less conclusive effect which the authorities have attached to that fact in the case of voluntary settlements(*t*).

A Question of Fact.—The intent to delay, hinder or defraud under the Statute of Elizabeth or the Provincial Acts is a question of fact. It can become a question of law only when to certain ascertained facts the law attaches a significance which governs the conclusion. This is a proper construction to be placed upon the language of Lord Mansfield when he says in *Worseley* v. *Demattos*(*u*), "whether a transaction be fair or fraudulent is, however, a question of law. It is a judgment of law upon the facts

(*t*) *Beavis* v. *Maguire* (1882), 7 A.R. 704. And see generally *Doe d. Wilcox* v. *Thorne* (1836), 4 O.S. 315; *Doe d. Daily* v. *Van Koughnet* (1836), 5 O.S. 246; *Burchill* v. *Flett* (1894), 32 N.B. 330.

(*u*) (1758), 1 Burr. p. 468.

and intents." It was indeed held in the early case of *Edwards* v. *Harben*(*v*), that under certain circumstances this was a question of law for the Courts. Apart from this very exceptional case the authorities are all in accordance in treating the question as one of fact for the jury(*w*). Not being able to try the mind of a man, we must arrive at his intent by an examination of his acts connected with the surrounding circumstances. The Court has to decide in each particular case whether under all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to delay, hinder or defraud his creditors(*x*).

Not Mental Intention.—The debtor's actual mental intention even if ascertained is not necessarily conclusive. A man may give his property to his wife acting under the impression that he is acting legally and within his rights, but if by so doing his existing creditors are hindered or delayed the transaction may still be set aside(*y*). The inference of fraud may arise despite an absolutely honest purpose(*z*). On the other hand the fact that a voluntary conveyance has the effect of defeating creditors is not necessarily conclusive as to the intent(*a*).

Intent of Agent.—The actual fraudulent intent need not be personal to the grantor and an agent's fraud may

(*v*) (1788), 2 T.R. 587.

(*w*) *Tucker* v. *Young* (1877), Man. R. Temp. Wms. 200; *Allan* v. *McTavish* (1882), 8 A.R. 440.

(*x*) *Allan* v. *McTavish* (1882), 8 A.R. 440. And see *Thompson* v. *Webster* (1859), 5 Jur. N.S. 668; 7 Jur. N.S. 531.

(*y*) *Winchester* v. *Charter* (1867), 97 Mass. 140. And see *Ex p. Mercer*, 17 Q.B.D. 290.

(*z*) *Coleman* v. *Burr* (1893), 93 N.Y. 17; *Roberts* v. *Victor* (1892), 130 N.Y. 585.

(*a*) *Carr* v. *Corfield* (1891), 10 O.R. 218; *Allan* v. *McTavish* (1882), 8 A.R. 440 (*supra*).

vitiate the transaction(*b*). If, for example, a husband acting under general power of attorney from his wife in the course of her business makes false statements, and incurs liabilities on her behalf and afterwards makes a fraudulent general assignment it will be set aside. The husband's frauds become the frauds of the wife in such a case and she is responsible for them, no matter how destitute of knowledge of them she might be(*c*).

Notice of Intent.—In cases of voluntary gifts it matters not whether the volunteer had notice of the fraud but where there has been a conveyance for value not only must fraud be shown but it must also be shown that the purchaser was party or privy to the fraud(*d*). And in all cases the fact of creditors being delayed or hindered, if such is the fact, while it does not dispense with further proof of intent is, of course, relevant evidence as to the intent(*e*). The question of intent being a question of fact, it has been held that a witness may give evidence as to his intention in performing an act when such intention is material(*f*). But in general the intent must be inferred from a consideration of all circumstances of every kind connected with the transaction.

Intent Against Creditors Generally.—It is not necessary to establish a specific intention to delay, hinder or defraud the particular creditor or creditors who attack a transaction. The attempt to delay, hinder or defraud one creditor renders the transaction void as to all. For example, if the motive in making the conveyance was to

(*b*) See *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 265.

(*c*) *Warner* v. *Warren* (1871), 46 N.Y. 228.

(*d*) See *infra*, pp.

(*e*) *Allan* v. *McTavish* (1883), 8 A.R. 470.

(*f*) *Dillon* v. *Anderson* (1870), 43 N.Y. 236. As to whether the transferor's evidence as to his intention in the transaction is admissible see *Bedell* v. *Chase* (1866), 134 N.Y. 386.

place the property beyond the reach of the plaintiff in a proposed action, in case of the defendant's failure in the suit and a consequent liability for damages or costs, the deed is void and must be set as against creditors existing at the time the deed was made. This is so even although the making of the deed prove to be an unnecessary precaution. It is the purpose and intent which is to be regarded not what actually occurs(*h*). And if one of the several purposes of a transfer is to defeat a creditor the sale is void(*i*).

Family Arrangements.—Although family transactions by which creditors are defeated are ordinarily looked upon by the Court with a good deal of suspicion, yet when the evidence is clear and satisfactory they will not be set aside(*j*).

(*h*) *Monro* v. *McDonald* (1884), 26 R. & G. (N.S.) 349; *Scott* v. *Burnham* (1872), 19 Gr. 234.

(*i*) *Scott* v. *Burnham* (1872), 19 Gr. 234. Compare intent in Preferential Transactions where the dominant motive must be to prefer.

(*j*) *McDonald* v. *McQueen* (1893), 9 Man. R. 315. See also as to family transactions *Rice* v. *Rice* (1900), 31 O.R. 59; 27 A.R. 121; *The Bank of Upper Canada* v. *Beatty* (1862), 9 Gr. 321; *Buchanan* v. *Dinsley* (1865), 11 Gr. 132; and *Stevenson* v. *Franklin* (1869), 16 Gr. 139. And see this title *infra*.

CHAPTER VI.

INTENT TO DEFRAUD IN TRANSFERS WITHOUT CONSIDERATION.

Voluntary Transfers.—All men should be just before they are generous, and debtors are no exception to the rule. Accordingly if a person being indebted makes a gift or transfer not supported by valuable consideration which does not leave him in a position to be just to his creditors, or in other words if he has not enough property left to pay existing debts, the transaction is voidable and presumed fraudulent so far as existing creditors are concerned(*k*). But this presumption may be rebutted by evidence negativing such intent(*l*). The transfer is also void against creditors whose debts accrued subsequently if an express intent to defraud them can be proved(*m*). If however, a man is solvent at the time of the transfer and after taking away the property which is put into settlement he remains solvent and does not at the time contemplate doing anything which could lead to insolvency the transfer cannot be attacked(*n*).

Early Views.—There have at different times been different constructions placed on the statute in regard to what is necessary evidence that a voluntary settlement was executed with the intention of defeating or delaying

(*k*) *Allan* v. *McTavish* (1882), 8 A.R. 466; *Sun Life* v. *Elliott* (1901), 31 S.C.R. 91; *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538; *Bank of Montreal* v. *Davis*, 9 O.R. 556.

(*l*) *Carr* v. *Corfield* (1891), 20 O.R. 218.

(*m*) *Ex p. Russell* (1882), 19 Chy. D. 588; *Ware* v. *Gardiner* (1869), 7 Eq. 317; *Spirett* v. *Willows* (1865), 3 DeG. J. & S. 293. (See Title "Subsequent Creditors).

(*n*) *McKay* v. *Douglas* (1872), L.R. 14 Eq. p. 121.

creditors. In the earlier cases a mere indebtedness of any kind on the part of the settlor was considered sufficient to void the instrument(*o*).

Subsequently it was thought that the mere fact of a voluntary settlor being indebted was not sufficient to vitiate the settlement but that is was necessary that at the time it was executed he should be insolvent(*p*).

Accepted Doctrine.—It is now the generally accepted view that the question of fraud does not depend on whether the settlement was voluntary or the debtor insolvent at the time he made it but upon whether considering all the facts the amount of the liabilities, assets, and all other circumstances of the case the intention of the debtor appears to have been to hinder, delay or defraud his creditors(*q*). All the contemporaneous circumstances should be considered in reaching a conclusion as to what the intent of the debtor was in making a transfer; subsequent circumstances, however, need not be considered except those which must necessarily have been contemplated by the debtor(*r*).

Allan v. McTavish.—The principle of this case may be thus stated:—Where there is no direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts and without which the debts cannot be paid, then, since it is a necessary consequence of the settlement that some of the creditors must remain

(*o*) *Russell* v. *Hammond* (1738), 1 Atk. 15; *Holloway* v. *Millard* (1816), 1 Mad. 414.

(*p*) *Lush* v. *Wilkinson* (1800), 5 Ves. Jr. 384; *Shears* v. *Rogers* (1832), 3 B. & Ad. 362.

(*q*) May 2nd Ed. p. 61; *French* v. *French* (1855), 6 De G. M. & G. 95; *Thompson* v. *Webster* (1859), 4 Drew. 628.

(*r*) *Re Lane-Fox*, [1900] 2 Q.B. 508; *Ex p. Russell* (1882), 19 Chy. D. 588; *Re Maddever* (1884), 27 Chy. D. 523; *Genge* v. *Wachter* (1899), 4 Terr. L.R. 122.

unpaid, the law infers intent and a Judge should in directing a jury state that the intent is presumed(*s*).

Embarassment of Debtor.—The mere fact, however, that the transferor is in embarrassed circumstances is not by itself sufficient ground from which to infer fraudulent intention if the property left out of the settlement is sufficient to pay all the debts then owing either due or accruing due(*t*).

And if an embarrassed debtor receives adequate present consideration his estate is not diminished by the transaction and no one can be said to be injured(*u*).

What Indebtedness is Necessary.—The rule as to what indebtedness is necessary has been stated by Lord Langdale in *Townsend* v. *Westcott*(*v*), in a manner which has been frequently approved of. He said that the real construction of the statute does not warrant the proposition that the existence of any debt at the time of the execution of the deed was sufficient to induce the Court to set it aside because there is hardly any man who can avoid being indebted to some amount. He may intend to pay every debt as soon as it is contracted and constantly use his best endeavors and have ample means to do so and yet may be frequently if not always indebted in some small sum. There may be a withholding of the claim contrary to his intention by which he is kept indebted in spite of himself. It would be idle to allege this as the least foundation for assuming fraud or any bad intention. That on the other hand it has been said that something amounting to insol-

(*s*) *Allan* v. *McTavish* (1882), 8 A.R. p. 466. And see *Hart* v. *McLean*, 22 R. & G. (N.S.); *Irwin* v. *Freeman* (1867), 13 Gr. 465; *Freeman* v. *Pope* (1870), L.R. 5 Chy. 583.

(*t*) *Kent* v. *Riley* (1872), L.R. 14 Equity 190; *Day* v. *Day* (1889), 17 A.R. p. 160.

(*u*) *Re Johnson* (1881), 20 Chy. D. 397.

(*v*) (1840), 2 Beav. 340.

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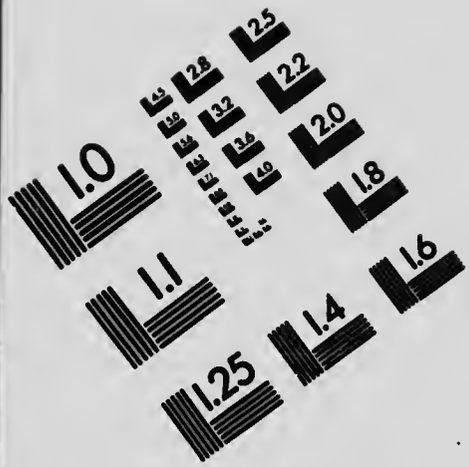

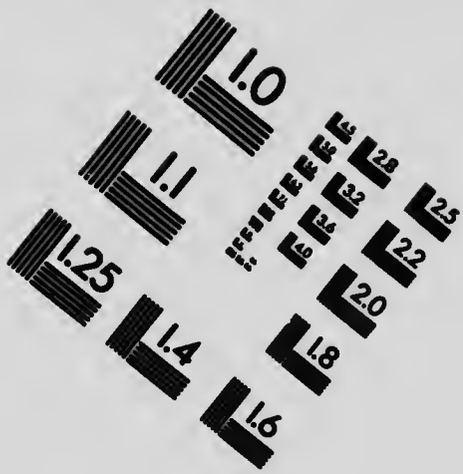

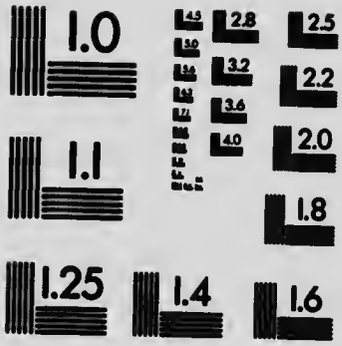

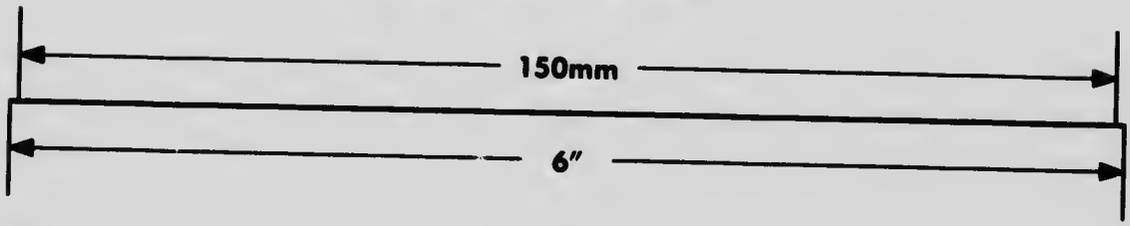

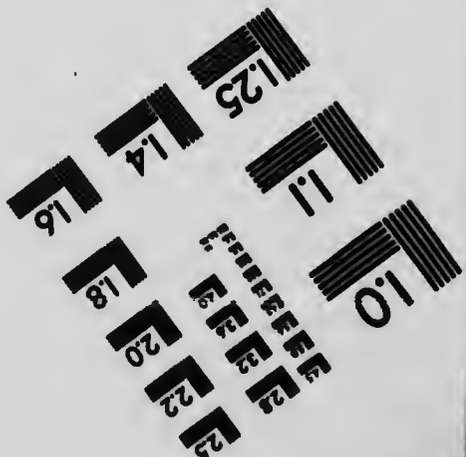

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vency must be proved to set aside a voluntary conveyance. This too is inconsistent with the principle of the Act and with the judgments of the most eminent Judges.

Proof of isolated debts is not what is required except so far as they are material evidence of an intention to defraud creditors or as a foundation for the enquiry as to the state of the debtor's affairs, but if it can be shown that the settlor at the time he made the settlement was indebted to the extent of insolvency or became so by the transfer of the property, that is sufficient to invalidate the settlement(*w*).

In *Holmes* v. *Penney*(*x*), Pagewood, V.C., said the existence of property at the time of the settlement not included in it but ample for the payment of debts then due would "negative the fraudulent intention." In *Freeman* v. *Pope* (*y*), Giffard, L.J., said that if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors the law would infer that he intended by making a voluntary settlement to defeat and delay them. But as has already been stated the more recent cases have established that if it appears from all the circumstances that the effect might be anticipated and has been to defeat, delay or defraud creditors the Court will presume the fraudulent intention and it is not necessary to bring actual proof that the debtor had the intention of doing so(*z*).

Clear Intent to Defraud.—If, however, there is a clear intention to defraud this will be sufficient to over-ride all other considerations and where a man settled his property

(*w*) *Smith* v. *Cherrill* (1867), L.R. 4 Equity 390; *Ex p. Russell* (1882), 19 Chy. D. 588.

(*x*) (1856), 3 K. & J. 90.

(*y*) (1870), L.R. 5 Chy. page 545.

(*z*) See *Spencer* v. *Slater* (1878), 4 Q.B.D. 13; *Re Ridler* (1882), 22 Chy. D. 82; *Green* v. *Paterson* (1886), 32 Chy. D. 95; *Ex p. Mercer* (1886), 17 Q.B.D. 290.

and did not engage in trade for eighteen years thereafter, the settlement providing that the life estate retained by him was to be determined on his bankruptcy, the transaction was held to be clearly fraudulent and the intention of the debtor was said to be manifested by his desire to put his property out of the reach of possible future creditors by a trust in his own favor(*a*).

Spirrett v. Willows.—In this connection the case of *Spirrett* v. *Willows*(*b*) must be considered. There the grantor was solvent but after his executing the instrument in question wasted all his other assets before a certain debt became due.

Lord Westbury in giving judgment said:—"There is some inconsistency in the decided cases on the subject of conveyance in fraud of creditors but I think the following conclusions are well founded. If the debt of a creditor by whom the voluntary settlement is impeached existed at the date of the settlement and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement *it is immaterial whether the debtor was or was not solvent after the making of the settlement.* It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owed at the time of making the settlement but not actually paying them cannot give a different character to the settlement or take it out of the statute; it still remains a voluntary alienation or deed of gift whereby in the event the remedies of the creditors whose debts existed at the time are delayed, hindered or defrauded. I am therefore of the opinion that this settlement is void as against the plaintiff."

Criticism.—This case has been adversely criticized by more than one Judge and is open to the criticism that "if

(*a*) *Acraman* v. *Corbett* (1861), 1 J. & H. 410. See Title "Terminable Interests," *infra*.

(*b*) (1865), 3 DeG. J. & S. 293.

the propositions laid down there are taken as abstract propositions they go too far, and beyond what the law is or was at that time. But if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision"(*c*). There was in the case, obviously, clear and plain evidence of an actual intention to defeat creditors, which would, it might be supposed, render other enquiry unnecessary.

Mr. May, in his work on Fraudulent Conveyances states that the judgment in *Spirrett* v. *Willows* may now be taken merely to have established the proposition that a settlement by a man owing any debt, of all his property available to pay that debt is within the very words of the statute fraudulent and void against that debt. In his opinion the true principle which is now firmly established is that a valid voluntary settlement may now be made by a settlor indebted at the time, provided that ample available assets are left out of the settlement to meet those debts, whether the debts are then actually payable or not(*d*).

Other Statements of the Principle. — The question whether a voluntary settlement can stand against creditors at its date may be said to depend on whether they can get a present payment of their debts without resorting to the property in settlement(*e*).

Availability of Assets Retained.—Not only, however, must a transferor have sufficient property left after making the transfer to meet all his existing debts and liabilities, but that property must be actually available for the purpose(*f*).

(*c*) See *Allan* v. *McTavish* (1882), 8 A.R. p. 459.

(*d*) May 2nd Ed. p. 49. And see *Ex p. Huntable* (1876), 2 Chy. D. 54; *Re Ridler* (1882), 22 Chy. D. 74; *O'Doherty* v. *Ontario Bank* (1882), 32 C.P. 285.

(*e*) *Green* v. *Paterson* (1886), 32 Ch. D. 95.

(*f*) *Ex p. Russell* (1882), 19 Chy. D. 588.

Creditors' Laches.—Where after a transfer or settlement a creditor has ample assets to satisfy existing debts, creditors who fail to proceed to recover their claims do so at their own risk, for if by some unforeseen event the debtor's remaining assets are impaired, the creditor cannot then seek to realize on the settled assets(*g*).

Intention of Voluntary Grantee.—It should be noted in regard to voluntary transfers that the intention of the grantor only is material(*h*). The grantee may be absolutely innocent and without notice of the intent of the grantor, and the transaction will still be set aside(*i*). In the converse case of the grantee having a fraudulent intent and the grantor being innocent of such intent, the transaction may also be set aside(*j*).

General Statement.—From a consideration of the preceding principles it is clear that the mere fact of a transfer being voluntary will not, without more, render it voidable by creditors, much less by the grantor. This principle applies equally where it is supported by meritorious consideration(*k*).

And it is clearly right that it should be so, for if a man not indebted and not intending any fraud could not make an effective settlement in favor of, say, his wife or children, because, by possibility, he might afterwards become indebted, it would be a reduction of the principles of law to an absurdity(*l*).

Gifts to Charity.—An insolvent debtor cannot give away his property to charity any more than he can make a valid gift to a private person if the intent is clearly fraudu-

(*g*) *Clements* v. *Eccles* (1847), 11 Ir. Eq. 229.
(*h*) *Oliver* v. *McLaughlin* (1893), 24 O.R. 41.
(*i*) *McKay* v. *Douglas* (1872), L.R. 14 Eq. 106.
(*j*) *Cornish* v. *Clark* (1872), L.R. 14 Eq. 184.
(*k*) *Kent* v. *Riley* (1872), L.R. 14 Equity 190.
(*l*) See *White* v. *Witt* (1876), 24 W.R. 727.

lent(*m*), but a gift for charitable purposes is presumed to be charitable and not fraudulent(*n*). In other words, it does not come within the general rule as to voluntary transfers, but the intent must be expressly proven.

Presumption in Voluntary Transfers.---The case of *Carr* v. *Corfield*(*o*) affords an illustration of the principle that the presumption of fraudulent intention where there were existing creditors and the effect of the conveyance was to defeat, hinder or delay them, is not an irrebutable presumption. The debtor there, acting under the mistaken belief that she was a trustee of certain land, made a conveyance of it to the supposed beneficiary, honestly thinking that she was carrying the trust into effect. There was, however, no valid trust binding upon her. This circumstance was regarded as sufficient to negative an intent on the part of the debtor to defraud the creditors(*p*). In another case a merchant conveyed to his son two parcels of land to be held by him for himself and his infant brother until the coming of age of the latter. When he came of age the land was reconveyed to the father, who immediately gave two conveyances back, one to each of the sons. At the time the first conveyance was made the father was in a condition to pay all his debts in full, even after deducting the property in question, but he was insolvent at the time of the second conveyance. It was held that under the circumstances the second conveyance could not be deemed to be made with intent to hinder, delay or defraud creditors, it being merely to carry out the original arrangement(*q*).

(*m*) *St. George's Church* v. *Branch* (1894), 25 S.W. Rep. 218.

(*n*) *Ramsay* v. *Gilchrist*, [1892] A.C 412.

(*o*) (1890), 20 O.R. 218.

(*p*) But see *Sun Life v. Elliott* (1901), 31 S.C.R. 91; *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538; *Ex. p. Mercer* (1886), 17 Q.B.D. at p. 301; *Ex p. Taylor* (1886), 18 Q.B.D. 295.

(*q*) *Bank of Montreal* v. *Davis* (1885), 9 O.R. 556.

Grantor's Ignorance of His Circumstances.—The grantor in a voluntary conveyance must be deemed to have known the state of his circumstances, whether he really knew or not, and evidence that he did not will not necessarily rebut the presumption of fraud(*r*). But if he was not aware of his inability to meet his liabilities and had contracts or prospects on hand from which he might reasonably have been expected to make a profit, though they afterwards proved unsuccessful, the presumption might be rebutted(*s*).

Insolvency Soon After Transfer.—There is a further important principle, namely, that if insolvency takes place shortly after the execution of a voluntary transfer, that will in general be sufficient evidence on which to set aside the transfer. There may, however, be exceptions to this rule, and where the insolvency has been directly caused by some unexpected loss, such as fire, or something which could not have been reasonably reckoned upon when the settlement was executed, that will bring the transfer within the exceptions(*t*).

Determining Debtor's Position.—The question sometimes resolves itself into a matter of determining upon conflicting evidence what was the value of the various assets of the debtor at the time he made the transfer, and comparing the amount of his liabilities(*u*). The assets, too, must be available for creditors at the time of the transfer(*v*), though the liabilities need not necessarily be matured. The mere fact of a creditor having something in pawn, pledge, hypothec or mortgage does not destroy his character as creditor or

(*r*) *Christy* v. *Courtenay* (1849), 13 Beav. 96.

(*s*) *Re Russell* (1882), 7 A.R. 777.

(*t*) *Fleming* v. *Edwards* (1896), 23 A.R. 718. See also *Crossley* v. *Elworthy* (1871), L.R. 12 Equity p. 167; *Townsend* v. *Westacott* (1840), 2 Beav. 340. (See further Title "Subsequent Creditor.")

(*u*) *Bank of Montreal* v. *Davis* (1885), 9 O.R. 556.

(*v*) *Ex. p. Russell* (1882), 19 Ch. D. 598.

deprive him of the right which the statute gives a creditor. If, however, he is a secured creditor, and has sufficient of the assets of the debtor in his hand to fully cover the indebtedness, then undoubtedly the statute was not intended for him. There is a presumption that the security is adequate, but if it be shown that the mortgaged property is not sufficient to satisfy the debt, the mortgagee, of course, will be a creditor for the balance(*w*).

Onus of Proof.—The onus is on those supporting a voluntary conveyance to show the existence of other property available for creditors(*x*).

Solvency.—The question of solvency depends not on the nominal value of unsaleable goods, but upon whether enough can be realized from the property to pay the liabilities. Whether creditors can make their debts if they try to enforce their collection by judicial process is a surer test than the opinion of indifferent persons(*y*).

Intention—"Necessary Consequences."—It must also be noted that the language that has been used in a great many cases, that a man must in point of law be held to have intended the necessary consequences of his own acts, is apt to mislead by confusing the boundary between law and fact, and consequences which can be foreseen with those which cannot(*z*).

No doubt in coming to a particular conclusion as to the intention in a man's mind, one should take into account the

(*w*) *Sun Life* v. *Elliott* (1901), 31 S.C.R. 91. And see *Crombie* v. *Young* (1894), 26 O.R. 194; *Jenkyn* v. *Vaughan* (1856), 3 Drew 419; *Ware* v. *Gardiner* (1869), L.R. 7 Eq. 317. And see Title "Creditors."

(*x*) *Osborne* v. *Carey* (1888), 5 Man. R. 237; *Taylor* v. *Jones*, (1743), 2 Atk. 600; *Masuret* v. *Mitchell* (1879), 26 Gr. 435; Dundee *Mortgage Co.* v. *Peterson* (1889), 6 Man. R. 66.

(*y*) *Rae* v. *McDonald* (1887), 13 O.R. at p. 359; *Warnock* v. *Kleopfer* (1887), 14 O.R. 288; Affirmed 15 A.R. 324; 18 S.C.R. 701.

(*z*) *Ex p. Mercer* (1886), 17 Q.B.D. at p. 301.

necessary result of the acts which he has done, using the words "necessary result" not metaphysically but in their ordinary business sense. And, of course, if there was nothing to the contrary, one would come to the conclusion that the man did intend the necessary result of his acts. "But if other circumstances make one believe that the man did not intend to do that which the Court is asked to find that he did intend, to say that, because that was the necessary result of what he did, one must find contrary to the evidence, that he did not intend to do it, is to ask the Court to find that to be a fact which one really believes to be untrue in fact"(*a*).

Classes of Cases.—There appear to be a number of more or less well defined cases which all appear to be governed by the principles stated in this chapter. They have been catalogued by Mr. Hunt as follows:—(1) Where the property which remains in the hands of the settlor after the execution of the voluntary settlement is either insufficient for payment of his existing debts or is protected by some rule of law from being taken in execution(*b*); or (2) where the property of the settlor which remains after the voluntary settlement is executed is of such a nature or in such a situation that the creditors will be obliged to wait a considerable length of time or incur great expense before it can be realized, as if it be a contingent interest or be situated abroad or consist of debts(*c*), or (3) where the settlor was after the execution of the instrument in perfectly solvent circumstances, but has since divested himself of so much of the property which was reserved out of the settlement that there is not enough left to pay the debts which he owned at the time the settlement was made(*c*), or (4)

(*a*) See *Ex p. Mercer* (1886), 17 Q.B.D. pp. 298-301; *Cunningham* v. *Curtis* (1896), 5 B.C.R. 472.

(*b*) *Strong* v. *Strong* (1854), 18 Beav. 408.

(*c*) *Thompson* v. *Webster*, 7 Jur. N.S. 531.

where a voluntary settlement has the effect of hindering or delaying existing creditors, or (5) where a person has incurred a liability to pay a debt upon a contingency or at a future day, and then voluntarily assigns so much of his property that he has not the means of satisfying the debt when it becomes due(*d*), or (6) where such settlements have hindered or delayed persons to whom the settlor had previous to the date thereof become bound as surety for the payment of money(*e*), or (7) to whom he had given securities which were not payable till after his decease(*f*). All these cases appear to be now governed by the above mentioned rules.

(*c*) *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538.

(*d*) *Crossley* v. *Elworthy* (1871), L.R. 12 Equity 158.

(*e*) *Goodricke* v. *Taylor* (1864), 2 DeG. J. & S. 135.

(*f*) *Adames* v. *Hallett* (1868), L.R. 6 Equity 468. See Hunt on Fraudulent Conveyances, 2 Ed. 55.

CHAPTER VII.

Intent to Defraud in Transfers for Valuable Consideration.

Difficulty of Impeaching.—One who desires to attack a conveyance for valuable consideration is confronted with a task of great difficulty. He must show an express intent to defraud on the part of the grantor, and the onus is upon him. It is not sufficient to prove that the result of the transfer is to delay or exclude creditors(*g*), and if the transfer is for valuable consideration to a purchaser without notice of an intention to defraud creditors, it cannot be attacked at all. The purchaser is more entitled to be protected than the creditors themselves; their claim is on the general estate, but he has paid for the particular property transferred to him. Further he is expressly exempted from the operation of the act(*h*).

Notice to Transferee Necessary.—It matters not whether the transfer be by way of sale or mortgage. In order to bring the lender of the money who takes security within the Statute of Elizabeth it is necessary to show that the person lending the money and taking the security was not innocent of fraudulent intent. If he be innocent of such intent he cannot be affected by the fact, if it be a fact, that there was a fraudulent intent unknown to him, in the mind of the borrower. The purchaser for value in good faith without notice is within the very terms of section 6 of the Statute

(*g*) *Hickerson* v. *Parrington* (1891), 18 A.R. 635; *Re Johnson* (1881), 20 Ch. D. 389; *Harman* v. *Richards* (1852), 10 Hare 81.

(*h*) *George* v. *Milbanke* (1803), 9 Ves. 190; *Re Johnson* (1881), 20 Ch. D. 389; *Hale* v. *Saloon, Etc. Co.* (1859), 4 Drew. 492; *Prewit* v. *Wilson* (1880), 103 U.S. 24; *Brown* v. *Sweet* (1880), 7 A.R. 725.

of Elizabeth, and a mortgagee is a purchaser *pro tanto*(*i*). Notice of the indebtedness merely of the grantor is not alone sufficient under the Statute of Elizabeth; there must be notice of the fraudulent intent. As was said in *Copis* v. *Middleton*(*j*), if notice of debts were sufficient to avoid a sale a purchaser would need not only an abstract of the vendor's title, but an abstract of his circumstances. And there is no principle of law which compels any man bargaining for or taking security upon goods to make any enquiry either before or afterwards as to what disposition it is intended to make of the money or property transferred(*k*).

If it be admitted or be apparent that there was a fraudulent intent participated in by both parties, then further enquiry as to consideration or other facts is unnecessary(*l*).

Under modern execution acts, money, being generally exigible, may be the subject of fraudulent settlement(*m*).

Even though there were some suspicious circumstances, a purchase will be upheld unless it is shown that it is a contrivance to defraud creditors and that the purchaser was privy to it(*n*).

Intent Under Provincial Acts.—As to the question of intent under the Provincial Acts, it may be regarded as generally settled that both in regard to the intent to defeat creditors and the intent to prefer, the transferee must be

(*i*) *Brown* v. *Sweet* (1880), 7 A.R. 725; *Bott* v. *Smith* (1859), 21 Beav. 511; *Alton* v. *Harrison* (1869), L.R. 4 Ch. 622.

(*j*) (1817), 2 Mad. 430.

(*k*) *Burns* v. *Wilson* (1897), 28 S.C.R. 207.

(*l*) *Bott* v. *Smith* (1856), 21 Beav. 511; *Cadogan* v. *Kennett* (1776), Cowp. 434; *Twyne's case*, 2 Co. fol. 80 p. 212; *Acraman* v. *Corbett* (1861), 1 J. & H. 410; *Ex. p. Chaplin* (1884), 26 Ch. D. 319.

(*m*) *Christ's Hospital* v. *Budgin* (1712), 2 Vern. 683; *Neale* v. *Day* (1858), 28 L.J. (N.S.), Ch. 45; *French* v. *French* (1855), 6 DeG. M. & G. 95.

(*n*) *Hickerson* v. *Barrington* (1891), 18 A.R. p. 643.

shown to have had notice, if not of the actual intent, at least of the embarrassed creditor of the debtor(*o*). And this notwithstanding that the effect of the preferential transfers as evidence of the intent has several times been the subject of recent legislation, while the provisions regarding transfers to defeat creditors remain substantially as they were when first enacted.

A different view has, however, been taken under the Provincial Act in Manitoba(*p*).

Intent to Defeat Execution.—In *Wood* v. *Dixie*(*q*), it was decided that if a conveyance was made *bona fide* and with the intention that the property should pass, the conveyance would not be fraudulent, though made to defeat an expected execution(*r*). This view was adopted in Ontario in the case of *Smith* v. *Moffatt*(*s*). It had been said previously in Ontario that *Wood* v. *Dixie* practically did away with the Statute of Elizabeth(*t*), but the Court of Appeal considered they must be governed by that case, the principle of which had been generally adopted by all Courts of law and equity in England(*u*).

The law has been altered in some of the Canadian Pro-

(*o*) See *Hepburn* v. *Park* (1884), 6 O.R. 472; *Burns* v. *McKay* (1885), 10 O.R. 167; *McRoberts* v. *Steinhoff* (1886), 11 O.R. 369.

(*p*) See *Schwartz* v. *Winkler* (1901), 13 Man. R. 493. And for a discussion of intent under the Provincial Acts see Title "Intent in Preferential Transactions."

(*q*) (1845), 7 Q.B. 892.

(*r*) *Hall* v. *Kissock* (1853), 11 U.C.R. 9. And see *Janes* v. *Whitehead*, 11 C.B. 406; *Bank of Toronto* v. *Eccles* (1862), 2 E. & A. 74; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Marlow* v. *Orgill*, 8 Jur. N.S. 829; *Johnson* v. *Osenton* (1869), L.R. 4 Ex. 107; *Clark* v. *Morrell*, 21 U.C.R. 600.

(*s*) (1869), 28 U.C.R. 486.

(*t*) *Gotwalls* v. *Mulholland*, 15 C. P. 75 per Wilson, J.

(*u*) And see also *White* v. *Stevens* (1850), 7 U.C.R. 340; *Smith* v. *Moffatt* (1869), 28 U.C.R. 486; *Whelpley* v. *Riley* (1851), 7 N.B. 275; *Alton* v. *Harrison* (1869), L.R. 4 Ch. 622; *Ex p. Games* (1879), 12 Ch. D. 314.

vinces in this respect by enactments declaring the proper construction to be placed on the statute(*v*).

These Acts provide that if a transfer is made with the prohibited intent, the fact that it is founded on a valuable consideration and is made with the intention of passing the property will not save it.

The effect of these Acts is to alter the rule to what seems a more natural, not to say honest, construction, and one that is similar to that originally placed upon it by Lord Mansfield in *Worseley* v. *De Mattos*(*w*). He says if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price to enable him to defeat the creditor's execution, it is fraudulent(*x*).

In other words, a sale made with the intent of both vendor and vendee to defeat the creditors of the former is void whether the sale was or was not intended to take effect as between the parties to it(*y*).

And if the purchaser knows the intent of the grantor is to defraud his creditors, the fact that he has paid a valuable consideration, and that the property was intended to pass to him will not avail him. There must be *bona fides* on his part; that is to say, ignorance of the fraudulent intent on the part of the vendor(*z*). But in the Provinces where the declaratory Act has not been passed the principle of *Wood* v. *Dixie* will govern.

Transfer to Creditor.—A transfer to secure an existing debt, even though made with intent to prevent the pro-

(*v*) See R.S.O. (1897) cap. 115; R.S.M. (1891) cap. 61.

(*w*) (1758), 1 Burr. 467.

(*x*) See *Dalglish* v. *McCarthy* (1872), 19 Gr. 582.

(*y*) *Wood* v. *Irwin* (1869), 16 Gr. 398. And see *Bank of U. C.* v. *Thomas* (1862), 9 Gr. 321; (1864), 2 E. & A. 502; *Morrison* v. *Steer* (1871), 32 U.C.R. 182; *Merchants' Bank* v. *Clarke* (1871), 18 Gr. 594; *Re Johnson* (1881), 20 Ch. D. 389; *Fraser* v. *Thompson* (1859), 1 Giff. 49; *Bulmer* v. *Hunter* (1869), L.R. 8 Eq., 46; *Cadogan* v. *Kennett* (1776), 2 Cowp. p. 435.

(*z*) *Cameron* v. *Cusack* (1890), 17 A.R. 489; *Steele* v. *Ramsay* (1885), 1 Terr. L.R. 1.

perty being seized under execution at the suit of another creditor, is not void under Elizabeth, chap. 5, if the transferee does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor. So long as there is an existing debt and the transfer is made for the purpose of securing that debt, and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, he is protected and the transaction cannot be held void(*a*). On the other hand, if a man having many creditors assigns to one of them property exceeding in value the amount of the debt, to the extent of the excess he thereby defeats and delays the others(*b*).

General Assignment.—An assignment for the benefit of creditors generally is, as has long been settled, free from impeachment under the Statute of Elizabeth. If, however, such an instrument contains provisions for the benefit of the assignor, or for the personal benefit of the assignee, putting it in his power and making it his interest to hinder creditors, the assignment having a tendency to delay the prompt realization of the assets and the application to the satisfaction of creditors, the deed may be one which it would be unreasonable to require creditors to accept and in that case they are manifestly entitled to insist on its avoidance under the statute(*c*).

Turning Assets Into Money.—It has been said by the Supreme Court of Canada that the payment of money to a person in exchange for property of that person does not, *per se*, affect in any way the *quantum* of his assets avail-

(*a*) *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523.

(*b*) *Merritt* v. *Niles* (1881), 28 Gr. p. 351: *Hale* v. *Allnutt* (1856), 18 C.B. 505.

(*c*) *Kirk* v. *Chisholm* (1896), 26 S.C.R. 111. See further as to this, title "Assignment."

able for his creditors generally(*d*). But it should not be overlooked that the conversion of all tangible assets into cash is often a preparatory step in a fraudulent scheme, to be followed by a concealment or distribution of the cash. In a Massachusetts case, it was laid down that if a debtor with the purpose to defeat his creditors converts his land into money because money is more easily shuffled out of sight than land, he commits a gross fraud. If his object for making the sale is known to the purchaser, and he nevertheless takes the transfer, his title is worthless as against creditors, though he may have paid a full price(*e*).

Notice to Solicitor of Tranferee.—A person is affected with notice of that which is known to his solicitor, on the principle that it is the duty of the solicitor to inform his client of the fact, and it will be assumed that he has discharged his duty. But there can be no breach of duty in not informing a client unless the solicitor himself had a personal knowledge. Most of the cases applying the doctrine that knowledge in the solicitor is notice to the client, are cases in which it would be a direct fraud on the part of the client, with notice of the facts known to his solicitors, to do what he has done. Many have been cases of taking a conveyance with knowledge in the solicitor of there being a previous conveyance, and with intent by registration or otherwise to displace or postpone the title of a previous grantee(*f*). This imputed knowledge has not been extended to matters which have no reference to rights affected by that transaction, but which merely relate to the motives and ob-

(*d*) See per Sedgewick, J., in *Burns* v. *Wilson* (1897), 28 S.C.R. 207.

(*e*) *Wadsworth* v. *Williams* (1868), 100 Mass. 126; *Covanhovan* v. *Hart* (1853), 21 Pa. St. 500. As to question of intent to prefer, see "Preferences," *infra*.

(*f*) *Brown* v. *Sweet* (1881), 7 AR. p. 739; *Re Marseilles Extension Ry. Co.* (1871), L.R. 7 Ch. 161.

jects of the parties or to the consideration upon which the matter in hand is founded(*h*). To carry this doctrine further than it has already been carried would lead to mischievous consequences(*i*).

And where such motives exist in the mind of a solicitor as would be sufficient, with ordinary men, to induce them to withhold information from the client, the presumption is that it is withheld, and the uncommunicated knowledge of the solicitor is not imputed to the client as notice(*j*). In *Gibbons* v. *Wilson*(*k*), what was known to the solicitor was the fraudulent intent of the debtor, which was necessary to be concealed from the party advancing the money, in order that he might loan his money upon a security which would be utterly worthless if he had notice of it. The Court thought it quite as improbable that the information of such a fraud would be communicated by the solicitor to the innocent client in such a case as in a case where he had been expressly directed by the other client not to communicate a fact, and that the reason for presuming that the solicitor has discharged his duty by giving notice did not exist in such a case. They further said that it would be an encouragement of fraud to apply the rules of notice which were established for the safety of mankind to a transaction like this; it would be sanctioning a scheme to rob a man by colluding with his solicitor.

Knowledge Acquired in Impeached Transaction.—In one of the most recent cases on the subject, *Burns* v. *Wilson*(*l*), the Supreme Court of Canada laid down the rule that knowledge on the part of the solicitor for a mortgagee

(*h*) *Wyllie* v. *Pollen* (1863), 32 L.J. Ch. 782.
(*i*) *Brown* v. *Sweet*, *supra*.
(*j*) *Cameron* v. *Hutchinson* (1869), 16 Gr. 526.
(*k*) (1890), 17 A.R. 1.
(*l*) (1897), 28 S.C.R. 207.

acquired in connection with the impeached transaction was notice to the mortgagee, and that he must be held to know what his solicitor knew. Having such notice the defence of ignorance on the part of the principal would be of no avail as against the knowledge of the solicitor, and the money could not be held to be advanced in good faith. In this case which was very similar to *Gibbons* v. *Wilson*(*m*), a debtor executed a chattel mortgage in favor of a money lender by whom a loan was made. The money which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor, who at the same time delivered to the solicitor a bond indemnifying the mortgagee against any loss under the chattel mortgage. It was held that all the circumstances being necessarily known to the solicitor in the transaction of the business must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequence of illegally preferring a particular creditor over others and that the advance was not a *bona fide* payment of money within the meaning of the statutory exceptions(*n*).

Badges of Fraud in Conveyances for Value.—Secrecy has always been the accompaniment of fraud, and for this reason circumstantial evidence must usually be the main dependence of creditors attacking a transaction. From the earliest cases to the present time we find certain circumstances recurring which have been so often repeated and have become so commonly known in fraudulent transac-

(*m*) (1890), 17 A.R. 1.

(*n*) See also *Re Colemere* (1865), L.R. 1 Chy. 128; *Sykes* v. *Bond* (1861), 7 Jur. N.S. 1024; *Sharpe* v. *Foy* (1868), L.R. 4 Ch. 35; *Cave* v. *Cave* (1880), 15 Chy. D. 639; *Saffron* v. *Rayner* (1880), 14 Chy. D. 406; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231.

tions that they have been catalogued as "badges of fraud." They are, in short, facts calculated to throw suspicion on the transaction and to call for an explanation.

Twyne's Case(*nn*).—This celebrated case has been the subject of repeated comments by Judges down to the present day, and is a monument of acute legal perception and mastery of legal principles. P. was indebted to T. in the sum of £400, and also to C. in the sum of £200; C. commenced an action of debt against P., and, pending the action, P. secretly executed a deed of gift of all his goods and chattels, being of a value about £300, to T. in satisfaction of his debt. P., however, retained possession of the goods and dealt with them as owner, selling some of them, and sheared certain sheep, marking them with his own mark. C. obtained judgment against P. and levied an execution on the goods. T. resisted and claimed the goods by virtue of the deed of gift. The case came before the Court of Star Chamber, and after consideration they laid down that there were certain badges of fraud appearing. First, the gift was general without exception of the donor's wearing apparel, etc.; second, the donor continued in possession and acted as owner of the goods and by means thereof traded with others and defrauded and deceived them; third, the transfer was secret; fourth, it was made pending the action; fifth, there was a secret trust between the parties; sixth, the deed contained certain unusual recitals to the effect that it was made honestly, truly and *bona fide*. Probably the most surprising thing about the case to the modern reader is the presence of certain features of fraudulent dealings which are generally considered as modern, and the accurate way in which they were singled out as badges of fraud and properly catalogued.

(*nn*) 2 Co. fol. 80 p. 212.

Effect of Badge of Fraud.—There are no such things as indelible badges of fraud(*o*), for, as has been stated before, all the circumstances must be considered and the conclusion drawn from the whole, whether the transaction was a fair one or not(*p*).

While a single one of these circumstances being present may not be sufficient to stamp the transaction as fraudulent, yet when several recognized badges of fraud occur in the same transaction, very strong evidence will be required to repel the presumption of fraudulent intent. But even then the transaction will be upheld unless it be shown that it was a contrivance to defraud creditors and that the purchaser was privy to it(*q*).

Principal Badges of Fraud.—The principal badges of fraud now recognized are: (1) The generality of conveyance; that is, the inclusion of all or substantially all the debtor's assets(*u*). (2) Continuance in possession by the debtor(*v*). (3) A voluntary conveyance *pendente lite* to defeat an execution(*w*), or to defeat a debt shortly to fall due(*x*), or to defeat a contingent liability(*y*). (4) Engag-

(*o*) May p. 93.

(*p*) *Re Johnson* (1881), 20 Ch. D. 394.

(*q*) *Hickerson* v. *Parrington* (1891), 18 A.R. 643.

(*u*) *Stileman* v. *Ashdown* (1742), 2 Atk. 481; *Ware* v. *Gardiner* (1869), L.R. 7 Eq. 317; *Re Wood* (1872), L.R. 7 Ch. 302; *Twyne's case*, 1 Sm. L.C. 9th ed., p. 1. But see *Alton* v. *Harrison* (1869), L.R. 4 Ch. 622; *Brown* v. *Sweet* (1880), 7 A.R. 725.

(*v*) *Shireff* v. *McKeen* (1883), 23 N.B. 184; *Way* v. *Massey* (1886), 4 Man. 38; and see *Doe d. Roy* v. *Hamilton* (1842), 6 O.S. 410; *Ranney* v. *Moody* (1856), 6 C.P. 471; *Williams* v. *Rapelje* (1858), 8 C.P. 186.

(*w*) *White* v. *Stevens* (1850), 7 U.C.R. 340; *Whelpley* v. *Riley* (1851), 7 N.B. 275; *Monro* v. *McDonald* (1894), 26 N. S. 349; *Scott* v. *Burnham* (1872), 19 Gr. 234; *King* v. *Marissal* (1744), 3 Atk. 192; *Jones* v. *Asgurt*, Skinner, 357; *Alton* v. *Harrison* (1869), L.R. 4 Chy. 622; *Wood* v. *Dixie* (1845), 7 Q.B. 892; *Ex p. Games* (1879), 12 Chy. D. 314.

(*x*) *Spirrett* v. *Willows* (1865), 3 DeG. J. & S. 293.

(*y*) *Re Ridler* (1882), 22 Chy. D. 74.

ing in trade soon after a settlement(*z*). (5) Some benefit retained under the settlement to the settlor(*a*).

Any power of revocation in favor of a settlor is a badge of fraud, for he has not in reality divested himself of the property(*b*). (6) Secrecy of the transfer.

Now that bills of sale must generally be registered to be valid against creditors, one of the circumstances generally relied on to show fraud, namely, secrecy of the transfer, is frequently wanting(*r*). Non-registration of a chattel mortgage because of the money lender's dislike to appear publicly in that capacity, was held by the Privy Council not to be a badge of fraud(*s*).

Minor Badges of Fraud.—The following may be said to be minor badges of fraud:—A conveyance absolute in form but in reality only a security(*c*); gross excess of value of property contained in a mortgage of the amount of the indebtedness(*d*); sales on long periods of credit(*e*); unusual acts by the parties with the obvious intention of giving the transaction the appearance of *bona fides*(*f*). These are regarded as minor badges of fraud, much as unusual formality or accuracy of computation. One obvious criticism has been made of this class of cases, that they may place a person on the horns of a dilemma. If formality is observed in the transaction, this may be argued as a badge of fraud. If, on the other hand, informality characterizes it, this may also be argued to be a badge of fraud.

(*z*) *Crossley* v. *Elworthy* (1871), L.R. 12 Eq. 158.

(*a*) *Way* v. *Massey* (1886), 4 Man. R. 38; *Re Cross* (1870), 19 W.R. 153.

(*b*) *Leacock* v. *Chambers* (1886), 3 Man. R. 645; *Smith* v. *Hurst* (1852), 10 Hare 44; *Alton* v. *Harrison* (1869), L.R. 4 Chy. 626.

(*r*) *Shireff* v. *McKeen* (1883), 23 N.B. 184.

(*s*) *Morris* v. *Morris*, [1895] A.C. 625.

(*c*) *Smith* v. *Onion* (1847), 19 Vt. 429.

(*d*) *Davis* v. *Schwartz* (1894), 155 U.S. 641; *Lawton* v. *Tarratt*, 9 N.B. 1.

(*e*) *Roberts* v. *Shepard* (1867), 2 Daly (N.Y.) 112.

(*f*) *Stevens* v. *Pierce*, 147 Mass. 510.

Other minor badges of fraud are failure to keep a memorandum of the transaction(*g*); or to procure receipts for debts which have been discharged(*h*); sale of chattels without examination by the purchaser(*i*); employment of the vendor by the vendee after the sale(*j*); transferring property to a party without his knowledge(*a*); destruction of papers relating to the transaction(*b*); taking money in payment instead of a cheque(*c*); antedating the instrument(*d*). Where a creditor, after seizing the goods of his debtor, allows them to remain for a long time in his hands, this is evidence of fraud within 13 Elizabeth(*e*). Retaining possession of a deed is a very strong circumstance to show that it was really intended as a shield to the debtor; so also is continuing to deal with the property as owner(*f*).

Relationship.—The authorities on the effect of relationship between the parties are conflicting in different jurisdictions(*g*). It might seem that relationship or friendship between the parties could prove nothing of importance. They are quite consistent with honesty and one naturally goes to a friend or relative when in trouble. When other circumstances, however, indicate fraud, a new light may be thrown on the relationship of the parties and such relationship may be a badge of fraud(*h*).

(*g*) *Hubbard* v. *Allen*, 59 Ala. 300.

(*h*) *Webb* v. *Ingham*, 29 W. Va. 389.

(*i*) *Godfrey* v. *Miller*, 80 Cal. 420.

(*j*) *McKibbin* v. *Martin*, 64 Pa. St. 352.

(*a*) *Way* v. *Massey* (1886), 4 Man. R. 38.

(*b*) *Burke* v. *Burke*, 34 Mich. 455.

(*c*) *Smith* v. *White*, 50 Hun. N.Y. 603.

(*d*) See *Graham* v. *Chisholm* (1881), 2 R. & G. 33.

(*e*) See *Wert* v. *Skip* (1749), 1 Ves. Sr. 239; *Lovick* v. *Crowder* (1828), 8 B. & C. 132; *Imray* v. *Magnay* (1843), 11 M. & W. 267; but see *Remmett* v. *Lawrence* (1850), 15 Q.B. 1010; *Hunt* v. *Hooper* (1844), 12 M. & W. 664.

(*f*) *Stevenson* v. *Franklin* (1869), 16 Gr. 139; *Leacock* v. *Chambers* (1886), 3 Man. R. 645.

(*g*) *Rice* v. *Rice* (1899), 31 O.R. 59; affirmed 27 A.R. 121.

(*h*) See *Cracknall* v. *Janson*, 11 Ch. D. 1.

CHAPTER VIII.

SUBSEQUENT CREDITORS.

Generally.—The position of a subsequent creditor attacking a transaction and proving the express intent to defraud is no different from that of a creditor whose debt arose before the impeached transaction either in case of a voluntary conveyance or a conveyance for value(*i*). If the express intent cannot be proven neither a prior nor a subsequent creditor can set aside a conveyance for value.

Where Transfer is Voluntary.—It remains to be considered when a voluntary transfer can be set aside by a creditor whose debt came into existence after the date of the transfer. The rule may be shortly stated to be that a subsequent creditor must show either a substantial debt due at the time of the impeached transaction which still remains unpaid, or the existence of circumstances from which it would be inferred that the transfer was made with the express intention of hindering or defrauding creditors(*j*).

A recent statement of the rule is that in *Re Lane-Fox*(*jj*), where it is said that a voluntary settlement honestly entered into at the time it is made, all then existing debts being paid, and the settlor retaining an income sufficient for reasonable and probable requirements ought not to be treated as fraudulent and void under the Statute of Elizabeth merely because some years afterwards it has the

(*i*) *Graham* v. *Furber* (1854), 14 C.B. 410. See Title "Intent in Transfers for Valuable Consideration."

(*j*) *Hayward* v. *McKay* (1895), 28 N.S. 152; *Jenkyn* v. *Vaughan* (1856), 3 Drew 419; *Freeman* v. *Pope* (1870), L.R. 9 Eq. 206; L.R. 5 Chy. 538.

(*jj*) [1900] 2 Q.B. 508.

effect of defeating or delaying the subsequent creditors of the settlor. But if it appears that the settlement was made in order to defeat future creditors, that will of course be sufficient to avoid(*k*). Another statement of the rule is that a voluntary conveyance or settlement by a person not indebted at the time and not in business or not contemplating entering into business, is good as against future creditors of the settlor or donor(*l*). A subsequent creditor must, however, do more than merely establish a debt existing prior to the impeached transaction and remaining still unsatisfied, in order to obtain relief. He certainly cannot be in a better position than the prior creditor would be if he were making the attack. The prior creditor would not be entitled to set aside the transaction merely because it was voluntary; he must show that the debtor was so much in debt, so involved that he could not pay his debts, or that the effect of the settlement was to reduce him to that position, or that there was fraud in fact(*m*).

Underlying Principle.—The reason that a subsequent creditor is allowed to maintain an action to set aside a voluntary conveyance under 13 Elizabeth, chap. 5, where a debt of a prior date to the conveyance is still unpaid, is that if a prior creditor set aside a settlement, a subsequent creditor would be entitled to participate *pro rata*(*n*). So that he has an equity to participate and may bring his action to enforce that equity. If, however, the antecedent creditors cannot impeach such settlement, neither can the subsequent

(*k*) *Collard* v. *Bennett* (1881), 28 Gr. 556.

(*l*) *O'Doherty* v. *Ontario Bank* (1881), 32 C.P. 285; *Curtis* v. *Price* (1805), 12 Ves. 89; *Kidney* v. *Coussmaker* (1806), 12 Ves. 136; *Montague* v. *Sandwich* (1797), 12 Ves. 148.

(*m*) *Vinden* v. *Fraser* (1881), 28 Gr. 502.

(*n*) *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419; *Beaumont* v. *Thorpe* (1747), 1 Ves. Sr. 26; *Strong* v. *Strong* (1854), 18 Beav. 408; *Taylor* v. *Jones* (1743), 2 Atk. 600; *Gugen* v. *Sampson* (1866), 4 F. & F. 974.

creditor impeach it, merely on account of the settlor's indebtedness to him. So, if the prior debt has been barred by lapse of time and the prior creditor has thus lost his right to impeach the transaction, the subsequent creditor will as a result lose his equity to impeach the transaction(*o*).

When Grantor Insolvent.—There is, however, an exception to the general rule in the case of a settlement made by a person when really insolvent. Under such circumstances the transfer may be impeached by a subsequent creditor, even though no debt is proved to exist which was contracted at the date of the settlement(*p*).

Continuing Indebtedness.—And if a debtor pays off the debts which he owed prior to the transfer and substitutes a fresh set, this will not make a voluntary settlement good(*q*). In the case of a continuous dealing and accounting where the customer goes on paying with the one hand on general account and purchasing fresh goods to an equal or larger amount with a constantly increasing balance against him, the creditor is from the commencement of such dealings as long as the ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance. The mere fact that prior debts have been paid off will not alone render the transaction valid although it is entitled to great weight. A great deal will depend upon the mode in which debts are paid. Paying off one debt by contracting another is not getting out of debt. To prove that prior debts have been paid off is not sufficient, if in doing so the debtor has contracted others to an equal amount(*r*).

(*o*) *Struthers* v. *Glennie* (1887), 14 O.R. 726. See also *Freeman* v. *Pope* (1870), L.R. 9 Eq. 206; *Ede* v. *Knowles* (1843), 2 Y. & C.C.C. 172; *Lush* v. *Wilkinson* (1800), 5 Ves. 387; *Jenkyn* v. *Vaughan* (1856), 3 Drew 419.

(*p*) *Taylor* v. *Coenen* (1876), 1 Ch. D. 629; *Crossley* v. *Elworthy* (1871), L.R. 12 Eq. 158.

(*q*) *Holmes* v. *Penney* (1856), 3 K. & J. 90.

Appropriation of Payments.—The rule as to appropriation of payments cannot be applied so as to defeat an action to set aside a fraudulent conveyance by showing that in the course of subsequent dealing between the parties the creditor has been paid a sum sufficient to wipe out the debt as it originally stood(*r*). In the case of *Cameron* v. *Kerr*(*s*), a firm had a line of credit with the bank, and, wishing to extend it, gave a mortgage on the homestead of one of the partners, the other partner joining in the covenant to pay. At a later date, all the then existing discounts had been paid off, and it was contended that the partner was discharged from his covenant to pay. The court held that the real transaction was that the bank was to advance from time to time monies as required up to the agreed amount on the security of the customer's paper and the mortgage was collateral to secure the balance, and that the replacing of paper with fresh paper from time to time did not in any sense pay the indebtedness to the bank, unless the general balance was reduced.

Where Contemporaneous Debts Paid.—If a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, and there is no debt still unpaid which was in existence at the time of the impeached transaction, then it is necessary to show either that the settlor made the settlement with the express intent to delay, hinder or defraud creditors, or that at the time of the settlement the settlor was in a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is therefore fraudulent and void(*t*).

(*r*) *Ferguson* v. *Kenny* (1889), 16 A.R. 276.

(*s*) (1878), 3 A.R. 30.

(*t*) *Taylor* v. *Coenen* (1876), 1 Ch. D. 636; *Ferguson* v. *Kenny* (1889), 16 A.R. 276. And see *Bank of B.N.A.* v. *Rattenbury* (1859), 7 Gr. 383.

And in determining the presence of the express intent to defraud, the ordinary badges of fraud will be regarded much the same as in the case of a transfer for valuable consideration. Of these the principle ones are the inclusion of the debtor's entire property; his continuing in possesion after the transfer; voluntary conveyance *pendente lite* or to defeat execution or a maturing liability and the retention of a benefit by the grantor(*u*).

Future Indebtedness.—In *Stileman* v. *Ashdown*(*v*), it was said that it is not necessary that a man should be actually indebted at a time he enters into a voluntary settlement, for if a man does it with a view of being indebted at a future time, it is equally fraudulent and ought to be set aside.

Transfer Before Commencing Business.—This class of case has usually arisen where a man was about to engage in trade and sought to tie his property up so that it could not be made available by future creditors should his business prove unsuccessful(*w*).

In *Mackay* v. *Douglas*(*x*), a man being about to enter a somewhat hazardous trade made a voluntary settlement on his wife and became a bankrupt within the year. At the time the transaction was impeached, no debt was owing which had been incurred before the date of the settlement. It was held on the principle of *Stileman* v. *Ashdown*, that the transaction was void as being made with a view to a future state of things or the settlor becoming indebted at a future time(*y*). In *Ex parte Russell*(*z*), Lord Jessel stated the principle thus: "A man is not entitled to go into a hazardous business, and immediately before doing so to settle all

(*u*) For further discussion of badges of fraud see that title; *supra*.

(*v*) (1742), 2 Atk. 477.

(*w*) *Murphy* v. *Abraham* (1863), 15 Ir. Chy. 371; *Graham* v. *Furber* (1854), 14 C.B. 410; *Crossley* v. *Elworthy* (1871), L.R. 12 Eq. 158; *Spirrett* v. *Willows* (1865), 3 DeG. J. & S. 293.

(*x*) (1872), L.R. 14 Eq. 106.

his property voluntarily, the object being if he succeeds in business to make a fortune for himself and if he fail to leave his creditors unpaid, they will bear the loss." That is the very thing that the Statute of Elizabeth was meant to prevent. In *Campbell* v. *Chapman*(*a*), Chief Justice Spragge said: "I take the rule to be that where a voluntary settlement is made with a view to the uncertainties of business by a person about to engage in business, the settlement will be very closely enquired into; and where it embraces the whole of the settlor's property, it will be difficult to resist the conviction that it was made in order to hinder and defeat creditors in the event of the business proving unsuccessful, so far as the withdrawal of the settled property would have that effect."

Onus of Proof.—And where a trader has made such a settlement which injures subsequent creditors, the burden of proof of *bona fides* of the settlement rests on the settlor(*b*). The general policy of the Act 13 Elizabeth, chap. 5, is that those who are engaged in transactions of buying and selling are not by means of a voluntary settlement to take their property out of the reach of their creditors. If a man make a transfer under such circumstances, that is, when it is doubtful whether he is in a solvent condition, and if so, whether he is like to remain so, it is in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed(*c*). The mere fact of the subsequent insolvency, if it does not result from

(*y*) See also *Ex p. Pearson* (1873), L.R. 8 Ch. 667; *Ex p. Russell* (1882), 19 Ch. D. 588; *Taylor* v. *Jones* (1743), 2 Atk. 600; *Townshend* v. *Windham* (1750), 2 Ves. Sr. 1.

(*z*) (1882), 19 Chy. D. 588.

(*a*) (1879), 26 Gr. 240, at p. 242.

(*b*) *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106; *Lai Hop* v. *Jackson* (1895), 4 B.C.R. 168.

(*c*) Per Malins, V.C., in *Crossley* v. *Elworthy* (1871), L.R. 12 Eq. p. 164; *Taylor* v. *Coenen* (1876), 1 Chy. D. 636.

the conveyance, or if it could not be regarded as within the contemplation of the settlor at the time of the conveyance will not of itself avoid the deed. Thus, when a man is solvent at the time of the settlement, but becomes insolvent the next year by reason of some unexpected loss which he could not have foreseen, such settlement will not on that account be held bad(*d*). And in making an estimate of the value of the assets of a debtor at the time of making a settlement or transfer the basis must be the opinion of a reasonable man, and not a sanguine man(*e*).

Mixed Claims Accruing Before and After Transfer.—Where a creditor's claim accrued as to some items before the transfer which it is sought to attack, and as to other items subsequent to the transfer and all these items are embodied in one judgment, it has been held in the United States that the creditor must be treated as a subsequent creditor(*g*).

The case of *Real Estate Co.* v. *Yorkville Road Co.*(*h*), is instructive on the question of the accrual of the right of action by a creditor and its effect in determining whether he is a subsequent or a prior creditor. Judgment was recovered on a covenant as to the validity of certain mortgages and in the action it was alleged that the agreement was induced by certain misrepresentations. The misrepresentations were made before the impeached transaction, but the covenant was made subsequent to it.

The Court said, in delivering judgment: "Granted that such misrepresentations were then made, there was no act-

(*d*) *Holloway* v. *Millard* (1816), 1 Madden 414; *Buckland* v. *Rose* (1859), 7 Gr. 440; *King* v. *Keating* (1865), 12 Gr. 29; *Fleming* v. *Edwards* (1895), 23 A.R. 718.

(*e*) *Ex p. Mercer* (1886), 17 Q.B.D. 290; *Re Ridler* (1882), 22 Chy. D. 74; *Ex p. Russell* (1882), 19 Chy. D. 588. And see p. 56, *supra*.

(*g*) *Reed* v. *Woodman* (1827), 4 Maine 400; *Moritz* v. *Hoffman*, 35 Ill. 553. But see *Henderson* v. *Henderson*, 133 Pa. St. 399.

(*h*) (1885), 9 O.R. 464.

ing on the misrepresentations by the applicants until they executed the covenant, and that was subsequent to the impeached conveyance. No cause of action would in any aspect of the case arise till then, and in any event not having been prosecuted the parties could not be said to become creditors in respect of it. It would be an abuse of language to call them prior creditors. Their legal and only position must be that of subsequent creditors."

Where a creditor becomes such by endorsing and ultimately paying a note of the debtors after a voidable transaction, he is in the position of a subsequent creditor, even although the liability was incurred by the debtor prior to the impeached conveyance(*i*).

Claims Accrued After Notice of the Transfer.—A subsequent creditor whose claim has arisen after he had knowledge or notice of the conveyance which he seeks to attack will be held to be estopped or debarred from attacking it. He cannot strictly be said to be defrauded, for he has not furnished the goods on the credit of the assets prior to the transfer. This at least is the doctrine of the American Courts(*j*).

As to what would constitute notice sufficient to bring the case within this rule see *Marshall* v. *Roll*(*k*). It was there held that mere recording of the conveyance would not afford constructive notice, but in this regard the provisions of the various Provincial Land Registration Acts and decisions should be considered. It has been held in Ontario that a second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors(*l*).

(*i*) *Ferguson* v. *Ferguson* (1884), 9 O.R. 218.

(*j*) *Munroe* v. *Smith* (1875), 79 Pa. St. 459; *Knight* v. *Forward* (1863), 63 Barbour N.Y. 311; *Baker* v. *Gilman* (1868), 52 Barbour N.Y. 39.

(*k*) (1891), 139 Pa. St. 399.

(*l*) *Warren* v. *Taylor* (1862), 9 Gr. 59.

CHAPTER IX.

INTERESTS TERMINABLE ON INSOLVENCY.

1. Limitations to the Settlor Until Bankruptcy and Then Over.—First: Where the settlement is of the settlor's property alone. The rule here seems clear that such a settlement is in fraud of the creditors of the settlor, and cannot stand as against them. Property cannot be limited to a man in such a way as to screen it from his creditors or a to prevent him from disposing of it, while his profit in it still continues.

The early case of *Higinbotham* v. *Holme*(*a*) laid down this rule. Here there was a settlement of certain property by a man not indebted, in trade or intending it, to the use of himself for life, unless he should embark in trade, and in the life of his wife become bankrupt, and from his decease or bankruptcy to secure an annuity for his wife. Later the settlor entered trade and became bankrupt. The settlement was declared void as against his creditors. It was said "the settlement looks forward to the purpose of becoming a trader, that change being adopted with the express object of taking the case out of the reach of the bankruptcy laws."

The still earlier case of *Ex parte Oxley*(*b*) decided that a marriage settlement by a trader giving his bond and other property in trust for his wife in the event of his bankruptcy or death, was void.

The result in both cases is the same, but in view of the late decision in *Re Holland*(*c*) (noted below), the former is

(*a*) (1812), 19 Ves. 88.
(*b*) 1 B. & B. 257.
(*c*) [1902] 2 Ch. 360.

now doubtful law, though the latter is still unchanged. The distinction between the two cases is that in the first the settlor was not actually in trade at the time of the settlement, while in the latter he was(*d*).

Settlor's Property not Settled by Itself.—Second: Where the settlement is of the settlor's property divided from the wife, or of the settlor's and the wife's property mixed. The most recent adjudication on this phase of the subject is contained in *Re Holland, Gregg* v. *Holland*(*e*), a decision of the English Court of Appeal. Here the settlor being entitled in right of his wife to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling in, he and his wife would assign it to trustees on the usual trusts for the wife, husband and issue of the marriage, the husband's life interest being determinable on bankruptcy. The husband was not indebted at the time, nor was he contemplating embarking in trade. This settlement was made in 1873. In 1877 the wife died. In 1898 the husband was declared bankrupt. In 1899 the fund fell into possession. There was issue of the marriage. It was held that the settlement was good against the trustee in bankruptcy on the ground, *inter alia,* that there was no evidence of its having been made with intent to defeat creditors so as to render it void under 13 Elizabeth, chap. 5, and no such intent ought, in the circumstances, to be inferred.

In his judgment, Vaughan Williams, L.J., said: "The property, the subject of the settlement, only came to the husband in her (the wife's) right. Under these circumstances it was right and proper that the husband should make some settlement, and the one he did make seems to me to have been a right and proper settlement, provided only

(*d*) See also on this point *Ex p. Barter* (1884), 26 Ch. D. 510, and *Merry* v. *Pownall*, [1898] 1 Ch. at p. 309.

(*e*) [1902] 2 Ch. 360.

he was not, at the time of the execution of the settlement, unable to pay his creditors or contemplating entering upon or continuing in a business of such a speculative nature as to be likely to land him in financial embarrassment. * * I do not think the decision in *In re Pearson*(*f*) is right; * * in each case you must look at the whole of the circumstances and then ask whether the conveyance was in fact executed with the intent to defeat and delay creditors." His Lordship referred to the case of *Montefiore* v. *Behrens*(*g*), and thought the wife's property was in possession, and not in reversion in that case, though it was authority for the rule that a settlement by the husband of property coming to him in right of his wife is not made fraudulent by a clause making the husband's life estate thereunder determinable on his bankruptcy. *In re Pearson*(*h*), thus overruled, brings down with it, as to this point, the case of *Higinbotham* v. *Holme*(*i*), for the two cannot be distinguished. *In re Pearson* was the case of a man who in 1858, not being in trade and not in debt, settled some money to himself for life determinable on bankruptcy and then over. In 1873 he went into trade and in 1875 he was adjudicated a bankrupt. Under these circumstances, Bacon, C.J., held the settlement was void *in toto* as against the trustee in bankruptcy. *Ex parte Oxley*(*j*) can be distinguished in that there the settlor was actually in trade.

Where a wife, married in 1883, was possessed of separate property, and allowed that property to pass into her husband's hands, but not as a gift nor as a loan for purposes of his trade; and where the husband, having applied part of her property to his own use, settled the residue of

(*f*) (1876), 3 Ch. D. 807.
(*g*) 35 Beav. 95.
(*h*) (1876), 3 Ch. D. 807.
(*i*) Noted *ante*.
(*j*) Noted *ante*.

it, together with some of his own property, upon trusts, under which he took a life interest, with a proviso for the cesser thereof in the event of his bankruptcy, the wife having no notice of any fraud or fraudulent intent on his part; Held, in an action to set aside the settlement that it was not void, and that, to the extent of the wife's property received by the husband, the proviso for the cesser of his life interest was good.

Property of Husband and Wife Brought into Settlement.—Stirling, J., in his judgment, said: "It has been long established that if a husband and wife both bring property into a marriage settlement, a trust of the income of the wife's property in favor of the husband until his bankruptcy (and then over) is good while a similar trust of the income of the husband's property is bad"(*k*).

Wife's Property Not Brought to Settlement.—If, however, the wife's property is not brought into settlement, but is paid over to the husband, then it has been held that a trust of the income of the husband's own property in favor of himself until bankruptcy is good to the extent of the wife's fortune(*l*).

"Where the Court can find a definite sum which can be appropriated as the wife's property, it regards it not as the consideration she gives for the rest, but as the identical property which she contributed as her fortune upon the marriage(*m*).

If the settlement is of the wife's own property or is in

(*k*) *MacKintosh* v. *Pogose*, [1895] 1 Ch. 505. And compare *Lockyer* v. *Savage*, 2 Str. 947; *Higinbotham* v. *Holme* (1812), 19 Ves. 88.

(*l*) *Ex p. Cooke*, 8 Ves. 353; *Ex p. Hodgson*, 19 Ves. 206; *Higginson* v. *Kelly*, 1 B. & B. 252.

(*m*) *Per* Hatherley, V.C., in *Whitmore* v. *Mason*, 2 J. & H. 214.

the nature of a mortgage of settlor's property to secure wife's fortune, it is valid(*n*).

2. Limitations to the Settlor Until Death, Bankruptcy or Other Events.—Here the validity of the settlement depends on whether or not the estate of the settlor had been determined by death or one of the other events before the bankruptcy intervened.

In *In re Detmold, Detmold* v. *Detmold*(*o*), a marriage settlement of settlor's own property was made on trust to pay the income to himself "during life or till he shall become bankrupt, or shall assign, charge, incumber the said income, or shall do or suffer something whereby the same or some part thereof would, through his act, default or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons"; and from and after the determination of the trust in favor of the settlor, upon trust to pay the income to his wife during her life.

Held, that the gift to the wife was valid in the event of an involuntary alienation by process of law of the income in favor of a judgment creditor of the husband.

North, J., said: "A settlement by a man of his own property on himself for life, with a clause forfeiting his interest in the event of alienation, has never, so far as I know, been defeated in favor of a particular alienee; it has only been defeated in favor of the settlor's creditors generally, on the ground that it would be a fraud in the bankruptcy law. I think the principle of *Brooke* v. *Pearson* and *Knight* v. *Brown*(*p*) applies to an involuntary alienation by operation of law in favor of a particular creditor."

(*n*) *Higginson* v. *Kelly*, 1 B. & B. 255; and *Hinton, Ex p.*, 14 Ves. 598.

(*o*) (1889), 40 Ch. D. 585.

(*p*) See below.

In *In re Brewer Settlement, Morton* v. *Blackmore*(*q*), a settlement was in terms as follows:—"Upon trust to pay income to settlor until his death or bankruptcy, or until he should 'assign, charge or incumber the said income or do or suffer anything whereby the same or some part thereof should through his act or default become payable to or vested in some other person or persons' with remainder in favor of children of the marriage. *Inter alia* it was held that the limitation until bankruptcy was bad as against his creditors, the settlor's life interest not having been terminated before the date of the bankruptcy (as was also the case *In re Detmold*)."

3. Limitations to the Settlor Until Alienation, Either Voluntary or Involuntary, by Operation of Law in Favor of a Particular Creditor.—It has often been held that a clause in a settlement providing for forfeiture of property in the event of a voluntary alienation is good. In *Brooke* v. *Pearson*(*r*), by a marriage settlement a rent charge out of the husband's property was to become payable to his wife if he mortgaged it or became bankrupt. He mortgaged it first and later become bankrupt. Held, that the wife's claim having arisen upon the mortgage it was not avoided by a subsequent bankruptcy. In *Knight* v. *Browne*(*s*) there was a settlement of the husband's property upon trust to pay him the rents until he should become bankrupt, mortgage, charge, alien, dispose of or incumber the same or should die, whichever event should happen first—then over to the wife. Held, that from the date of mortgage the trust for the wife became operative(*t*).

(*q*) [1896] 2 Ch. 503.
(*r*) (1859) 27 Beav. 181.
(*s*) (1861) 9 W.R. 515.
(*t*) See also *Phipps* v. *Lord Ennismore*, 4 Russ. 131; *Synge* v. *Synge*, 4 Ir. Ch. Rep. 337; *Re Callan's Estate*, 7 L.R. Ir. 102.

In re Detmold, Detmold v. *Detmold*(*u*) was a case where there was a limitation over to the wife taking place by reason of an involuntary alienation by process of law of the income of the settled property in favor of a particular judgment creditor of the husband. It was held valid(*v*).

4. Property May be Lawfully Settled Upon Some Other Person With a Clause Determining the Grantee's Interest Upon the Latter's Bankruptcy or Insolvency(*w*).—Therefore the life estate of the husband in a marriage settlement may be made determinable on these events, if the property was not brought into settlement by himself(*y*); and in such a case his interest may also be made determinable upon any attempt by him to alien or incumber the property.

(*u*) Noted *ante*.

(*v*) Vide Lewin on Trusts, 10th ed., at p. 112, where the reason assigned for this holding is that the wife is a purchaser for value.

(*w*) *Billson* v. *Crofts*, 15 Eq. 314; *Re Aylwin's Trusts*, 16 Eq. 585.

(*y*) *In re Ashley, Ex p. Wreford* [1892], 1 Q.B. 522; *Brandon* v. *Robinson*, 18 Ves. 429; *Ex p. Hinton*, 14 Ves. 598.

CHAPTER X.

CONSIDERATION.

"Good Consideration."—It may be said at the outset that the words "good consideration" in the statute mean "valuable consideration"(*a*). And transfers based on meritorious consideration, nominal considerations or considerations entirely inadequate, are regarded as voluntary(*b*).

It is clear that an immoral consideration will not support a transfer as against creditors. And in a British Columbia case a transfer by an insolvent to a woman in consideration of arrears of wages found to be payable to her on account of illicit cohabitation was set aside(*c*).

A voluntary deed is clearly void as against creditors, however meritorious a consideration it may have; and it is obviously as great a fraud on creditors for an insolvent to put his property out of the reach of creditors by transferring it to a friend at an undervalue, as by transferring it to him without receiving for it any valuable consideration(*d*).

Valuable Consideration.—A valuable consideration may consist either of some right, interest, profit or benefit accruing to the one party, or some preference, detriment, loss or responsibility given, suffered or undertaken by the other(*e*).

Nominal consideration, such as "the sum of $1.00," does not, of course, oblige the creditor to regard the conveyance

(*a*) *Twyne's Case*, 3 Rep. 80b; *Middleton* v. *Pollock* (1875), 2 Ch. D. 108.

(*b*) *Doe* v. *Routledge* (1777), 2 Cowp, 705; *Bayspoole* v. *Collins* (1871), L.R. 6 Ch. 228.

(*c*) *Holten* v. *Vandall*, 7 B.C.R. 331.

(*d*) *Crawford* v. *Meldrum*, 3 E. & A. 101; *Merritt* v. *Niles*, 28 Gr. 346.

(*e*) *Currie* v. *Misa*, L.R. 10 Exch. 162.

as one for valuable consideration, but may allow the parties to give evidence that there were other considerations(*f*).

Inadequacy.—Adequacy of consideration is not necessary to maintain a transaction, but great inadequacy is a badge of fraud, and if it is so gross as to render it apparent that the transaction was a fraudulent contrivance, the transaction cannot stand as against creditors, and any inadequacy may afford some evidence of fraud(*g*).

In some cases, however, the transfer has been allowed to stand as a security for the moneys actually advanced(*h*),

Inadequacy of Consideration—Family.—Inadequacy as between husband and wife or members of a family does not suggest knowledge of a fraud in the same way that a conveyance for inadequate price to a stranger sometimes does(*i*).

Where Fraudulent Intent.—If the fraudulent intent in which both parties to the transaction have concurred is proved, then it is unnecessary to enquire into the consideration for the transfer. In practice, however, *mala fides* is

(*f*) *Walker* v. *Burrows*, 1 Atk. 94, and *Tarleton* v. *Liddell*, 17 Q.B. 390. See also *Llanelly R.R. Co.* v. *London R.R. Co.*, L.R. 8 Ch. 942.

(*g*) *Strong* v. *Strong*, 18 Beav. 408; *Tennent* v. *Tennents*, L.R. 2 H.L. (Sc.) 6; *Hale* v. *Alnutt*, 18 C.B. 505; *Hickerson* v. *Parrington*, 18 A.R. 640.

(*h*) See *Douglas* v. *Culverwell*, 3 Giff. 251; *Lomax* v. *Buxton*, L.R. 6 C.P. 111; *Doe* v. *Routledge*, 2 Cowp. 705.

(*i*) *Carradice* v. *Currie* (1872), 19 Gr. 108; *Moore* v. *Crofton* (1846), 3 J. & Lt. 438. And see *Copis* v. *Middleton* (1817), 2 Mad. 410; *Crawford* v. *Meldrum* (1866), 3 E. & A. 101; *Re Johnson* (1881), 20 Ch. D. 389; *Rice* v. *Rice* (1899), 31 O.R. 59; *Osborne* v. *Carey* (1888), 5 Man. R. 237; *Montgomery* v. *Corbit* (1896), 24 A.R. 311; *Forrest* v. *Laycock* (1871), 18 Gr. 611; *Bank of Toronto* v. *Irwin* (1881), 28 Gr. 397; *Merritt* v. *Niles* (1881), 28 Gr. 346; *Dufresne* v. *Dufresne* (1886), 10 O.R. 773; *Leacock* v. *Chambers* (1886), 3 Man. L.R. 645; *Hale* v. *Alnutt* (1856), 18 C.B. 505; *Dolin* v. *Coltman* (1684), 1 Vern. 294. But the effect of the Provincial enactments should not be overlooked. They provide in general that the goods or other property sold or transferred must bear a fair and reasonable relative value to the consideration therefor.

usually proved only by inference from a number of circumstances of which the consideration is one(*m*).

In Bona Fide Transactions.—The question of consideration is the most important in *bona fide* transactions. Where the transaction is tainted with *mala fides*, the presence even of an ample consideration will not save it. *Mala fides* supersedes all inquiry into the consideration, but *bona fides* alone is not always sufficient to support a transaction not founded on any valuable consideration(*n*).

Erroneous Statement of the Consideration.—An erroneous statement of the consideration does not invalidate a transaction as a matter of law, but is a circumstance to be considered in coming to a conclusion on the question of intent(*p*).

Thus in the case of *Doe dem Jones* v. *Nevers*(*r*), where the consideration expressed in the deed was not supported by any evidence that it in reality had been paid, and the fair inference from the circumstances of the purchaser is that he never had any such sum, a transaction was set aside in New Brunswick; and in *Gignac* v. *Iler*(*s*), where the statement of the consideration in a conveyance was untrue, the onus was held to be upon the grantee to prove beyond reasonable doubt that there was some other good consideration, and his own unsupported evidence that such existed is insufficient, and the conveyance must be treated as voluntary.

Present Advance and Past Debt.—An assignment by a debtor of all his property partly as a security for a past debt, and partly as a security for a substantial fresh ad-

(*m*) *Nunn* v. *Wilsmore*, 8 T.R. 528; *Russel* v. *Hammond*, 1 Atk. 13. And see *Mulcahy* v. *Archibald*, 30 N.S. 121.

(*n*) May, p. 233. And see *Corbett* v. *Corbett*, Russ. Eq. Dec. N.S. 40.

(*r*) 18 N.B. 627.

(*s*) 29 O.R. 147.

vance is not necessarily a fraudulent preference(*t*). And it is sufficient if there is a contemporaneous verbal agreement by the creditor to make further advances to a sufficient amount, and such advances are afterwards made(*u*). An agreement to give goods on credit is sufficient where they were subsequently supplied(*w*).

It is not a question whether the further advance was greater or smaller, but whether there was a *bona fide* intention of carrying on the business(*w*).

Consideration a Question of Fact.—Although a valuable consideration may be specified in a deed, it is a question of fact whether the same is real or fictitious, and where the consideration is set up as arising out of services performed by the son as clerk to his father, evidence of the mode of living and extravagant habits of the son, and the father's complaints of his extravagance and of payments of moneys for him, is admissible to disprove the validity of the consideration(*x*).

Promissory Notes.—The giving of a note as part of the consideration in a chattel mortgage transaction when it is accepted in place of the money is tantamount to advancing the money(*y*).

Discounted Drafts.—Where part of the consideration of a mortgage is covered by drafts drawn by the mortgagee in the due course of business on the mortgagor, and discounted at the bank, the mere fact of the draft having been discounted at the bank would not justify the Court in assuming that the debt represented by the draft was paid and that

(*t*) *Ex p. Games*, 12 C.D. 321.
(*u*) *Re Winstanley*, 1 C.D. 290.
(*w*) *Ex p. Sheen*, 1 C.D. 560. See Title "Preference."
(*x*) *Doe dem Barlow* v. *Hatfield*, 4 N.B. 122.
(*y*) *Building and Loan Association* v. *Palmer*, 12 O.R. 1. See also *Walker* v. *Niles*, 18 Gr. 210.

the remedy of the draft was alone to be looked to. Therefore the amount of the indebtedness of the mortgage could not be said to be untruly stated(*z*).

Covenant to Indemnify.—Where to evade a call on unpaid stock the shareholder assigned all his estate except the shares to a friend in consideration of covenants to indemnify and provide for him, it was held that the assignment was void as against the company, and it was entitled to payment of the call out of the estate(*o*).

"Slow Notes".—In *Lawton* v. *Tarratt*(*q*), where a debtor transferred all his property in consideration of promissory notes payable in five years without security, it was held in an action by a creditor to attack the transaction, that the value of the notes in the market and the probable means of the purchaser paying them were relevant evidence to show the transaction was fraudulent.

Loan.—An advance in the nature of a loan is sufficient consideration for a conveyance by way of security(*a*).

Debt.—And an existing debt is also with regard to the Statute of Elizabeth considered a valuable consideration(*b*).

Giving Up Gift.—And it would seem that if a man gives up what has been voluntarily given to him, such as a voluntary bond, and receives something else in exchange, the return of the original gift to the donor is a valuable consideration for a second transfer by the latter(*c*). But a transaction of this kind should be closely scrutinized.

(*z*) *Hepburn* v. *Park* (1884), 6 O.R. 472.

(*o*) *Re Troughton*, 71 L.T. 427.

(*q*) 9 N.B. 1.

(*a*) *Thompson* v. *Webster*, 4 Drew 628.

(*b*) *Belcher* v. *Prittie*, 10 Bing. 408; *Holt*[illegible] v. *Anderson*, 5 T.R. 235.

(*c*) *Ex p. Berry*, 19 Ves. 218; *Nixon* v. *Hamilton* 2 D. & W. 364; *Stiles* v. *Attorney-General*, 2 Atk. 152.

Leaseholds.—In assignments of leaseholds there has been held to be a consideration on the part of the transferee if he covenants to pay the rent and perform the covenants of the lease(*d*).

This, however, was a decision on the statute, 27 Elizabeth, chap. 4, and it has since been held not to apply to 13 Elizabeth. Leaseholds, shares not fully paid, and certain other species of property, though imposing an obligation on the transferee, may yet be said to confer a net benefit(*e*).

Voluntary Transfers Made Good by Subsequent Matters.—A conveyance, though voluntary on the face of it, may be made valid by subsequent circumstances. This is on the ground that such a transaction is not void, but voidable merely, and if some consideration arises before its attack, it relates back to validate it(*f*).

Illustrations of this principle are a voluntary transfer made good by a subsequent payment of money and a voluntary settlement made good by subsequent marriage.

If an assignment or appointment has been made to a volunteer and the subject matter is afterwards transferred for value by a volunteer, the purchaser from him has a better equity than the creditors(*g*).

Where a party agrees to advance money in consideration of a settlor making a settlement on third parties, this will be regarded as made for valuable consideration, and will be upheld, though voluntary as regards the third parties(*h*).

(*d*) *Price* v. *Jenkins*, 5 Ch. D. 619. The assumption of a mortgage may be good consideration for the transfer of the equity. *Hickerson* v. *Parrington*, 18 A.R. 640.

(*e*) *Re Ridler*, 22 Ch. D. 81.

(*f*) *Clarke* v. *Willot*, L.R. 7 Ex. 313. And see *Parr* v. *Eliason*, 1 East 95.

(*g*) *Conrad* v. *Corkum* (1902), 35 N.S.R. 288; *Morewood* v. *South Yorkshire R.R. Co.*, 3 H. & N. 798.

(*h*) *Thompson* v. *Webster*, 7 Jur. N.S. 531.

Defective Mortgage.—An existing chattel mortgage, though invalid as against creditors, for want of registration, is good as between the parties, and is a good and valuable consideration for the execution of a second mortgage in identical terms, which by compliance with the Bill of Sales Acts, on being registered may become valid as against creditors(*i*).

Payment of Money to a Wife.—The onus of proof that payments of income by a wife to her husband out of her separate estate were by way of loan and not of gift, is on the wife, and the evidence of a husband and wife if without corroboration, is not sufficient to support an allegation to this effect. Accordingly a conveyance made by the husband to the wife in consideration of past payments of this nature must be regarded as a voluntary conveyance(*j*).

In the case cited it must not be overlooked that the moneys paid by the wife had always been treated by the husband as his own and formed part of the fund out of which the family disbursements were made. No separate account was ever kept of them, and no promise to repay them was ever made, nor was interest paid or agreed to be paid(*k*).

Consideration—Bar of Dower.—In the case of *Morris* v. *Martin*(*m*), a husband executed to his wife a chattel mortgage to secure her against loss by reason of her having barred her dower in certain mortgages of land. As the real estate turned out, it seemed doubtful whether the dower at the time it was barred had any real value but at that time there was a reasonable expectation that it would have realized a considerable sum. The wife appeared to so believe, and that belief on her part and on the part of the hus-

(*i*) *Bertrand* v. *Parkes*, 8 Man. R. 175.

(*j*) *Rice* v. *Rice*, 31 O.R. 59; 27 A.R. 121.

(*k*) *Osborne* v. *Carey*, 5 Man. R. 237; and see *Boulton* v. *Boulton*, 28 S.C.R. 592.

(*m*) 19 O.R. 564.

ban.' would be a perfectly good consideration for the giving to her of security against loss that she might sustain by releasing what all then seemed to have thought a valuable property.

Where a transfer was made to certain trustees with the intent that a debtor's wife should in lieu of dower receive an annuity for life, but the wife was not a party to the deed, it was held that the alleged relinquishment of the wife's dower was not a valuable consideration for the settlement, as her dower still remained(*n*).

So in *Beavis* v. *Maguire*(*o*), a husband mortgaged his property several times and finally sold the equity of redemption. The wife barred her dower in each mortgage under an agreement made with her husband on the first occasion that he would convey other property to her. On this claim being reiterated on the sale of the equity of redemption, the husband conveyed other land to a trustee for her. The effect of the conveyance was to interfere with the remedies of creditors as by it a substantial part of the property of the debtor was withdrawn and there were not sufficient assets left to pay creditors in full. The question was, was this a *voluntary conveyance*? If the bar of dower were in an equitable estate alone, there would be no consideration as the wife would not have been entitled to dower out of an equitable estate of which her husband did not die seized. But where the bar of dower takes in lands of which the husband has the legal estate, that will be sufficient consideration(*p*). And it was thought that as the agreement dated from the time of the first mortgage it afforded a good consideration.

(*n*) *Re Conlan's Estate*, 29 L.R. Ir. 199.

(*o*) 7 A.R. 704.

(*p*) And see *Black* v. *Fountain*, 23 Gr. 174; *Fleury* v. *Pringle*, 26 Gr. 67; *Robertson* v. *Robertson*, 25 Gr. 486; *Forrest* v. *Laycock*, 18 Gr. 611; *Morris* v. *Morton*, 19 O.R. 564; *Re Music Hall Block*, 8 O.R. 225.

Family Arrangements.—Where members of a family agree to convey their interests in the estate of their father for the benefit of their mother during her life, with power to encroach on the corpus if necessary for her support, and this is subsequently carried out by a joint conveyance, the consideration is regarded as a valuable one, even though no direct benefit accrued to the transferor whose transfer was attacked by creditors. If any of the parties other than the debtor had conveyed to the trustees they could have compelled the debtor to do his part or answer in damages for failure. His conveyance therefore is the result of a legal claim(*o*).

And where a father had conveyed to his son certain lands in consideration of a bond to support and maintain him for life, and subsequently the son reconveyed to the father in consideration of the release from further liability on the bond, this was held to be a valuable consideration and was supported, although the son was in expectation that his property would be seized under execution(*p*).

Agreement for Support.—A *bona fide* agreement made between a son and a father, that the son will support the father and his wife for life, if satisfactorily proved, is good consideration for a conveyance by a debtor, and where such conveyance had been made to defeat a threatened action for *tort*, it cannot be set aside(*s*).

It is not necessary, to establish such an agreement, to prove it with sufficient clearness to enable either party to it to enforce specific performance(*ss*).

It has, however, been held in Nova Scotia that where the sole consideration for a deed is the future maintenance of

(*o*) *Randall* v. *Dopp*, 22 O.R. 422.
(*p*) *Atkinson* v. *Bourgeois*, 1 N.B. Eq. 641.
(*s*) *Montgomery* v. *Corbit*, 24 A.R. 311.
(*ss*) *Ibid.*

the grantor this is not sufficient. It may be a meritorious consideration, but it is not a valuable consideration because it simply means a transfer by which the grantor by parting with all his means secures future maintenance at the expense of his creditors. This is in reality retaining a benefit for himself(*t*).

Family Arrangements—Infants' Wages.—Where an infant son made remittances to his father from his earnings, the latter agreeing to repay the amounts as soon as the son should require them, and after coming of age continued the remittances, the father agreed unless payment was made to convey his farm to him subject to certain incumbrances upon it. The total amount advanced was $1,600, and the equity of redemption was transferred by the father to the son in consideration of this amount. The conveyance being attacked, the defendant pleaded that it was made *bona fide* and for value.

It was contended that the remittances by the son must have been by way of gift, while the son was an infant, on the theory that the father was entitled to earnings of his son while an infant. Spragge Chancellor said in giving judgment:—"The English authorities, though perhaps less explicitly than the American cases, warrant the position that a child earning wages for himself and receiving them himself with the assent of his father, is entitled to those wages, as his own, and that they are not the property of his father. If he paid a portion of them to his father, it must be by way of gift, or it may be by way of loan. To establish it as a gift, something more than the mere fact of remitting must be shown, though, less, I apprehend, would be sufficient, than must be necessary between strangers.

(*t*) *Conrad* v. *Corkum* (1902), 35 N.S. 288; *McNeill* v. *McPhee* (1898), 31 N.S. 140; and see also *Newcombe* v. *Simonds*, Russ. Eq. N.S. 484; *Doe d. Keith* v. *Correy*, 29 N.B. 287; *Pourrier* v. *Harding*, 15 N.B. 120.

In this case there was some evidence of agreement from the first ...at the money remitted was by way of loan; but such evidence, I take to be unnecessary. There is no evidence of the remittance being intended or understood to be by way of gift. It follows that upon the son coming of age, and indeed before he came of age, the father stood indebted to him for the moneys from time to time remitted. The evidence given of agreement after the coming of age that unless advances were repaid the son should have the land, was not necessary to the defendant's case, if the advances were made and the conveyances made and taken in good faith, for if the father stood indebted to the son for the sum of $1,600, and that was the value or about the value of the land, there was nothing to prevent the conveyance of the land, in satisfaction of the debt, without any previous agreement" (*u*).

Family Arrangements—Wife's Wages.—In the absence of an agreement, a promise to pay a member of the family for services is not implied, and the transfer made in consideration of services rendered will be held voluntary (*v*). In a New York case it was said that it would act disastrously in domestic life and create discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home. If she could sue him upon such contracts and establish them upon the disputed and conflicting testimony of the members of the household, frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services rendered under such secret unknown contracts (*w*).

(*u*) *Jack* v. *Greig*, 27 Gr. 6. And see *De Long* v. *Gillis*, 31 N.S. 61.

(*v*) *Ridgeway* v. *English*, 22 N.J. Law 409. But see *Graves* v. *Davenport*, 50 Fed. Rep. 881.

(*w*) *Coleman* v. *Burr*, 93 N.Y. 17.

The Consideration of Marriage.—Marriage has been called the most valuable consideration known to the law, and will support an ante-nuptial settlement against credtiors and subsequent purchasers. Such a settlement will avail against these whether the settlor was husband or wife, or some third party who has placed himself *in loco parentis*. For instance, if a father in consideration of the marriage of his son were to convey an estate in fee to his son, the son would be a purchaser for valuable consideration though no consideration had passed to the father but the marriage(*a*). The mere fact that at the time of the settlement the husband was insolvent to the knowledge of the wife, will not render the settlement bad as regards her interests and those of the children (*b*). But if the marriage be entered into, and the settlement devised for the express purpose of defrauding the husband's creditors, this arrangement will be void by virtue of 13 Eliz. (*c*). Similarly it will be void where the wife is privy to the fraud upon the creditors(*d*).

Extent of Marriage Consideration.—The consideration of marriage extends to support limitations in a settlement in favour of husband, wife and children, who are considered as purchasers of their interests (*e*).

The collateral relations of husband and wife, or the children of a previous or future marriage, or the illegitimate issue of either party, however, are not within the marriage consideration. The settlement will therefore be considered as voluntary as regards them(*f*), unless the interests

(*a*) *O'Gorman* v. *Comyn* (1804), 2 Sch. & Lef. 147; *Power* v. *Bailey* (1808), 1 B. & B. 49; *Davidson* v. *Maguire* (1881), 7 A.R. 98.

(*b*) *Kevan* v. *Crawford* (1877), 6 Ch. D. 29; and *Campion* v. *Cotton* (1810), 17 Ves. 264.

(*c*) *Re Pennington*, 5 T.L.R. 29.

(*d*) *Fraser* v. *Thompson* (1859), 4 DeG. & J. 659; *Thompson* v. *Gore* (1886), 12 O.R. 651.

(*e*) *Reeves* v. *Reeves* (1771), 9 Mod. 128.

(*f*) *Attorney-General* v. *Jacobs Smith*, [1895] 2 Q.B. 341.

given to such collaterals are so mingled with the interests of the parties within the marriage consideration that it is impossible to exclude them without also destroying the interests of such children. Limitations to collaterals in family settlements may at times be supported on the ground that they had been made the subject of special agreement by the parties to the contract, each of whom had a right to draw back unless his proposals in favour of his relatives were acceded to (*g*).

Post-Nuptial Settlements.—Post-nuptial settlements unsupported by an ante-nuptial agreement are voluntary, and will not stand if creditors are delayed (*m*).

A post-nuptial settlement made in pursuance of an ante-nuptial agreement in writing is considered as regards creditors and subsequent purchasers in the same light as an ante-nuptial settlement (*h*).

If, however, the post-nuptial settlement extends to a class not contemplated by the ante-nuptial agreement, the settlement as to these will be considered voluntary and void against creditors and subsequent purchasers (*i*). Also the ante-nuptial agreement must have been a binding one. It must have been in writing and properly signed so as to satisfy the Statute of Frauds (*j*). Unless there are circumstances (other than the marriage itself) amounting to part performance of the contract to take the case out of the statute (*k*).

(*g*) *Roe* v. *Mitton* (1767), 2 Wilson 356; *Pulvertoft* v. *Pulvertoft* (1811), 18 Ves. 84.

(*m*) *In re Troughton*, [1894] W.N. 154.

(*h*) *Doe d Barnes* v. *Rowe*, 6 Scott 525; *Boustead* v. *Shaw* (1879), 27 Gr. 280; *Collard* v. *Bennett* (1881), 28 Gr. 556; *Vinden* v. *Fraser* (1881), 28 Gr. 502.

(*i*) *Doe dem Barnes* v. *Rowe* (1838), 4 Bing. N.C. 737.

(*j*) *Field* v. *White* (1885), 29 Ch. D. 358; *Jorden* v. *Money* (1854), 5 H.L.C. 185.

(*k*) *Warden* v. *Jones* (1857), 23 Beav. 487; *Alderson* v. *Maddison* (1881), 7 Q.B.D. 174; *Randall* v. *Morgan* (1805), 12 Ves. 67.

Where, however, there is no writing, equity will sometimes relieve in spite of the statute, as where the execution of the ante-nuptial agreement has been prevented by collusion or fraud (*l*).

The case of *Thompson* v. *Gore*(*n*) has been regarded as authority for the principle that where a settlement by the husband is not the real consideration for the marriage, and the wife would have consented to the marriage without such a settlement being made, the settlement must be treated as voluntary. The wife was asked at the trial whether she would not have married the settlor without the settlement, which from the nature of the marriage contract is an obviously absurd question. The real principle of the decision, however, appears to be stated in page 665 of the judgment. The wife was greatly implicated in the design and end of her husband to defraud his creditors, and in addition the settlement made was grossly out of proportion to the station and circumstances of the husband.

The settlement should be one which an honest woman reasonably advised might have reasonably supposed to be fair and proper (*o*).

Post-nuptial settlements which are not in pursuance of an ante-nuptial agreement in writing, but which are supported by valuable consideration, will stand against creditors and subsequent purchasers. Thus settlements in consideration of an additional portion or of a bargain between husband and wife are deemed to be made for valuable consideration (*p*).

(*l*) *Montacute* v. *Maxwell* (1720), 1 P. Wms. 618; *Jorden* v. *Money* (*vide ante*).

(*n*) 12 O.R. 651.

(*o*) See *Commercial Bank* v. *Cooke*, 9 Gr. 524.

(*p*) *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; *Hewison* v. *Negus*, 16 Beav. 594; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; *In re Foster and Lister*, 6 Ch. D. 87.

Wife's Portion.—In *Davidson* v. *Maguire*(*q*), a marriage was contemplated and the lady's father agreed with the prospective husband that if the latter would erect a house on the father's land, he would convey the same to his daughter as a marriage portion. After the marriage the house was built by the husband and the lot conveyed to the daughter by the father as previously agreed. Some time after the husband became insolvent, and the transaction was attacked. The Court held that the house was built in consideration of the conveyance by the father, and that a settlement or provision such as the building of the house was good though made after marriage, being made in consideration of the portion conveyed to the wife by her father. Such a transaction, however, must be *bona fide*; if it is a mere contrivance to endow the wife at the expense of creditors, it would be tainted with fraud and could not be supported.

(*q*) 7 A.R. 98.

See also as to Ante-nuptial Settlements:—*Cooper* v. *Pennington*, 59 L.T. 744; *Cook* v. *Hendry*, 7 C.P. 354; *Commercial Bank* v. *Cooke*, 9 Gr. 524; *Whittemore* v. *Lemoine*, 10 Gr. 125; *Ryland* v. *Alnutt*, 11 Gr. 135; *Mulholland* v. *Williamson*, 12 Gr. 91; *Jackson* v. *Bowman*, 14 Gr. 156; *McGregor* v. *Rapelje*, 18 Gr. 446; *Leys* v. *McPherson*, 17 C. P. 266.

And as to Post-nuptial Settlements:—*Re Holland*, [1901] 2 Ch. 145; *Crafford* v. *McDonagh*, 5 L.J. 187; *Goodwin* v. *Williams*, 5 Gr. 539; *Buckland* v. *Rose*, 7 Gr. 440; *King* v. *Keating*, 12 Gr. 29; *Mason* v. *Scott*, 20 Gr. 84 *Merchants Bank* v. *McDonald*, 19 Gr. 476; *Cotton* v. *Van Sittart*, 20 Gr. 244; *Black* v. *Fountain*, 23 Gr. 174.

And see further as to arrangements between husband and wife:—*Sun Life* v. *Elliot*, 31 S.C.R. 102; *Fraser* v. *Macpherson*, 34 N.B. 417; *Chambers* v. *Douglas*, 23 N.B. 484; *Osborne* v. *Carey*, 5 Man. R. 237; *West* v. *Ames*, 2 N.W. Terr. R., part 2, 138; *Driscoll* v. *Fisher*, Trueman N.B. 89; *Brown* v. *Peace*, 11 Man. R. 409; *Jackson* v. *Bowman*, 14 Gr. 156; *Boustead* v. *Shaw*, 27 Gr. 280; *O'Doherty* v. *Ontario Bank*, 32 C.P. 285.

Separation Deeds.—A covenant in a separation deed by the wife's trustees to indemnify the husband against the debts which may be contracted by the wife during separation is sufficient consideration to support an agreement by the husband for the benefit of the wife: *Wilson* v. *Wilson*, 1 H.L.C. 538; *Jones* v. *Waite*, 7 C. & F. 101. Similarly where a separation deed contained an agreement by the trustee for the wife that she would support the children, this was held a valuable consideration: *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364.

PART II.

FRAUDULENT PREFERENCES.

CHAPTER XI.

CONSTITUTIONALITY OF THE PROVINCIAL LEGISLATION. RESPECTING PREFERENCES.

According to the provisions of section 91 of the British North America Act the Dominion Parliament has exclusive legislative authority over all matters relating to bankruptcy and insolvency, and a Dominion Act respecting these subjects is *intra vires* although it may interfere with "property and civil rights in the Provinces," two groups of matters in respect of which the Provincial Legislatures are given legislative authority. In *Cushing* v. *Dupuy* (*a*) it was urged that the provisions of the Dominion Insolvency Enactment of 1875 interfered with "property and civil rights in the Provinces, and that the Act was therefore *ultra vires*," Sir Montague E. Smith, in delivering the judgment of the Privy Council, said: "It is 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 in the Provinces, so far as a general law relating to those subjects might affect them."

(*a*) (1880), 5 App. Cas. 409.

And in *Tennant* v. *Union Bank of Canada* (*b*) it was laid down that the legislation of the Dominion Parliament, so long as it strictly relates to the subject enumerated in sec. 91, is of paramount authority, even though it touches upon the matters assigned to the Provincial Legislature by sec. 92.

In *Clarkson* v. *Ontario Bank* (*c*), the validity of an Act of the Legislature of Ontario, passed 30th March, 1885, 48 Vict., chap. 26, entitled "An Act respecting assignments for the benefit of creditors," of which the present Ontario Act respecting assignments and preferences by insolvent persons, R.S.O. (1897), 147, is a re-enactment, was brought in question. The effect of this case was to establish that there being no statute of the Dominion on bankruptcy and insolvency, an Act of the Ontario Legislature for the purpose of enabling insolvent debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after acquired property is *intra vires*.

Validity of Ontario Statute.—In 1894 the validity of sec. 9 of the Ontario Act respecting assignments and preferences (now sec. 11 of R.S.O. (1897), chap. 147) was passed upon in the *Attorney-General of Ontario* v. *The Attorney-General of Canada* (*d*). Section 9 of that Act read 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." The Court of Appeal for Ontario having decided against

(*b*) [1894] A.C. 31.
(*c*) (1887), 15 A.R. 166.
(*d*) [1894] A.C. 189.

the validity of the Act (*e*), the Province appealed to the Privy Council. For the Dominion it was argued that in considering whether sec. 9 is *ultra vires*, the whole Act, chap. 147 R.S.O., must be considered. It cannot be considered apart from these sections, especially, which relate to the effect of assignments for the general benefit of creditors, to the proceedings consequent upon such assignment and to the position of an assignee thereunder. Such assignments necessarily contemplate the insolvency of the assignor. That it is not necessary, in order to bring this Act within art. 21 of sec. 91 B.N.A. Act, to show that it contains compulsory provisions as to the disposal of an insolvent's estate, voluntary assignments for the purpose of effecting that disposal are a necessary part of a bankruptcy system; that what the Province has done by this Act is not, when fairly considered, ancillary to a system which the Dominion might have prescribed, but it is in substance a declaration that laws shall exist in the Province which the Dominion has decided shall not so exist, referring to Dominion Act, 43 Vict., chap. 1, which abolished the Insolvency Acts in Canada. These contentions did not, however, prevail, the Privy Council holding that the provisions of sec. 9 are merely ancillary to bankruptcy law, and as such are within the competence of the Provincial Legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament. In the judgment of the Court these words were used: "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 independent 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 assign-

(*e*) 20 A.R. 489.

ment 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. The validity of the assignment by the debtor and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent.

It will be seen that it is a feature common to all 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 among his creditors whether he is willing that they shall be so distributed or not."

In *L'Union St. Jacques de Montreal* v. *Belisle* (*f*), it was held by the Judicial Committee, reversing the Court of Queen's Bench (appeal side) in Lower Canada, that the Act of the Provincial Legislature of Quebec, 33 Vict., chap. 58, to relieve the financial embarrassment of a local society related to a matter of merely a local or private nature in the Province within sec. 92 of the B.N.A. Act, 1867, and as such was within the legislative capacity of the Quebec Provincial Legislature, and did not fall within sec. 91 of Bankruptcy and Insolvency. There the respondent sued the appellant society to recover an instalment of an annuity to which she was admittedly entitled under the rules of the society. The appellant pleaded the Provincial Act, in which the society was authorized to pay the respondent $200 in lieu of all benefits, and if she failed to accept it, to place it on deposit and pay the respondent the interest. The respondent contended that the Act was unconstitutional. Lord Selborne, in delivering the judgment of the

(*f*) (1874), L.R. 6 P.C. 31.

Committee, said: "The fact that this particular society appears on the face of the 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 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. The Act does not terminate the company, it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy, on the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated." On sec. 92 Lord Selborne said: "The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section, their Lordships do not decide it, certain matters being upon that assumption all those which are not mentioned in the 92nd section are reserved for the exclusive legislation of the Dominion Parliament. But beyond controversy there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature." Among those in the last is thus expressed—"generally, all matters of a merely local or private nature in the Province." Clearly this matter is private, clearly it is local, so far as locality is to be considered. And unless, therefore, the general effect of that head of sec 92 is for this purpose qualified by sec. 91, it is a matter within the exclusive competency of the Provincial Legislature. Now, sec. 91 qualifies it undoubtedly, if it be within one of the different classes of subjects there especially enumerated. But the onus is on the respondent to show that this being of itself

of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

In *The Queen* v. *Chandler* (*g*) the Supreme Court of New Brunswick decided that an Act which provides for the examination of a debtor by a Judge and for his discharge from gaol on proof that he is unable to pay his debts and that he has made no fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass. This decision proceeded on the ground that all insolvency legislation was assigned by the B.N.A. Act to the exclusive legislative authority of the Parliament of Canada. Since this ruling the Insolvency Acts of Canada have been repealed, and the decision of the Privy Council in the *Attorney-General of Ontario* v. *Attorney-General of Canada,* noted *supra,* has made it clear that, in the absence of any Dominion legislation on the question of bankruptcy and insolvency, the Provincial Legislatures have the power to legislate on matters ancillary to a bankruptcy law.

Nova Scotia Legislation.—In *Re Wallace Huestis Grey Stone Co.*(*h*), an Act of the Legislature of Nova Scotia was considered. The Act provided for the winding-up of companies in general, where a resolution to that effect was passed by the company or where the Court so ordered at the instance of a contributory, on its being made to appear that such order was just and equitable. The Act could be enforced, although no debts were due by the company, but could not be called into operation by a creditor. The Supreme Court of Nova Scotia held that the Act did not partake of the character of an insolvent law, and was within the legislative authority of a Provincial Legislature.

(*g*) (1869), 1 Hannay 556.
(*h*) (1881), Russ. Eq. R. 461.

CHAPTER XII.

INSOLVENCY OF DEBTOR.

Under the Provincial Acts it is necessary in attacking a transaction as a preference to show that it was made when the debtor was in insolvent circumstances or unable to pay his debts in full or knew he was on the eve of insolvency(*a*).

This fact of insolvency must in all cases be proved by the attacking creditor, and even in those cases where there is a statutory presumption of invalidity the attacking creditor has none the less to assume the onus of proving insolvency.

Meaning of Term.—A debtor is insolvent in the strict legal sense of the term if he has not sufficient property if sold under legal process or at a forced sale under execution to pay all his debts(*b*).

What has to be shown, however, under the Provincial Acts, is not a state of insolvency in the strict legal sense. Nor are the debtor's assets to be valued at their fixed value in cash on the market at an ordinary sale in the course of trade. A man may be deemed insolvent in the sense of the Acts if he does not pay his way and is unable to meet the current demands of creditors, and if he has not the means of paying them in full as their claims mature, out of his assets realized upon a sale for cash or its equivalent(*c*).

(*a*) See R.S.O. (1897), chap. 147, sec. 2.

(*b*) *Rae* v. *McDonald* (1887), 13 O.R. 352.

(*c*) *Warnock* v. *Kloepfer* (1887), 14 O.R. 288; 15 A.R. 342; 18 S.C.R. 701; *Davidson* v. *Douglas* (1868), 15 Gr. 347; *Teale* v. *Younge*, McL. & Y. 497; *Whitney* v. *Toby* (1884), 6 O.R. 54. And see *Rae* v. *McDonald* (1887), 13 O.R. at p. 366, and *Stuart* v. *Thomson* (1893), 23 O.R. at p. 512; *Sutherland* v. *Nixon* (1862), 21 U.C.R. 629; *Hersee* v. *White* (1869), 29 U.C.R. 232; Bump's Law of Bankruptcy, 10th ed., p. 813; Clarke's Insolvent Acts (1877), p. 26.

It is not necessary that the debtor should be either technically a declared insolvent or openly and notoriously insolvent(*d*). It was at one time thought that some different or greater meaning was to be given to the words "unable to pay his debts in full"(*e*), than to "in insolvent circumstances," but it may now be considered settled that both expressions refer to the same financial condition(*f*).

Assets Covered by Securities.—And the fact that all the assets of a debtor are covered by mortgage or other security is not alone sufficient to render him insolvent. Equities of redemption are assets realizable under execution, and must be taken into account(*g*).

Determining Value.—The sale as a determinant of value must be a fair and reasonable one. But it is impossible to lay down any rule for general application. What would be fair and reasonable must be determined by the facts of each case(*h*). The value is to be estimated at the date of the impeached transaction, and decreases in values and presumably subsequent increases must be taken into account(*i*).

Unmatured Liabilities.—And where the debtor's liabilities are not wholly matured, he should not be deemed to be in insolvent circumstances if he could sell his property on terms which will enable him to pay those debts which have matured, and others as they mature(*j*).

(*d*) *Davidson* v. *Douglas* (1868), 15 Gr. 347.

(*e*) *Rae* v. *McDonald* (1887), 13 O.R. at p. 357.

(*f*) *Bertrand* v. *Canadian Rubber Co.* (1897), 12 Man. R. 27; *Clarkson* v. *Sterling* (1887), 14 O.R. at p. 463; *Dominion Bank* v. *Cowan* (1887), 14 O.R. at p. 466.

(*g*) *Dominion Bank* v. *Cowan* (1887), 14 O.R. 465.

(*h*) *Clarkson* v. *Sterling* (1887), 14 O.R. at p. 463.

(*i*) *Clarkson* v. *Sterling* (1887), 14 O.R. 460.

(*j*) *Bertrand* v. *Canadian Rubber Co.* (1897), 12 Man. R. 27.

See further p. 166 *infra*, and pp. 55, 56, *supra*.

CHAPTER XIII.

Fraudulent Preferences Generally.

Policy of Bankruptcy Laws.—The policy of the bankruptcy laws of England on which our law of preferences is founded, has two principal objects, viz., the management of the estate of the insolvent, and its ratable division among his creditors without preference or priority.

The bankruptcy laws were based on the civil law and while the common law rewarded the diligent creditor by distributing the estate of the debtor according to priority of judgment, the bankruptcy system regards the assets of the debtor as belonging to the whole body of creditors, and properly to be distributed ratably among them(*d*).

General Principles.—Before considering the provisions of the various Provinces in regard to fraudulent preferences it may be well to glance at the general principles regarding preferences, apart from these Acts. The origin of fraudulent preferences may be traced to the time of Lord Mansfield. Though the first statute relating to bankruptcy contained no provision invalidating payments or transfers to prefer a creditor, Lord Mansfield held that if a debtor in contemplation of bankruptcy, with a view to evade the bankruptcy law, voluntarily gave a preference to a particular creditor to the prejudice of the other creditors, such a preference was a fraud upon the bankrupt law(*e*).

There were, then, two main essentials: 1st, a transfer delivery payment, etc., made in contemplation of bank-

(*d*) Robson, 2 ed., p. 1.

(*e*) *Martin* v. *Pewtress*, 4 Burr. 2477; *Crosby* v. *Crouch* (1808), 2 Campbell 166.

ruptcy, and, 2nd, such transfer must be made voluntarily(*f*).

Contemplation of Insolvency.—The question whether the transaction was entered into in contemplation of bankruptcy, was one of fact and where the transaction was impeached in a Court of Equity, that Court might direct an issue to determine the question(*g*). The onus was on the party impeaching the transaction to show that it was made in contemplation of bankruptcy, but it was sufficient to show such facts as taken together would satisfy the jury that bankruptcy was at the time of the transaction in contemplation of the debtor. The fact that the debtor was in embarrassed circumstances was not, however, to be regarded as conclusive evidence of the contemplation of bankruptcy(*h*). Where the apparent object of the transaction was to avoid bankruptcy, or if advances were made to enable the debtor to meet maturing liabilities, or goods were advanced concurrently with the taking of security, to enable him to continue his business, the transaction could not be regarded as made in contemplation of bankruptcy. A transfer by a debtor of part only of his property in contemplation of bankruptcy, was regarded as an act of bankruptcy, if the effect was to make the debtor insolvent or to disable him from carrying on his business(*i*).

The law as to "contemplation of bankruptcy" was accurately stated in *Gibson* v. *Boutts*(*j*). The Court said that

(*f*) *Ex p. Bolland* (1871), L.R. 7 Ch. 24. For effect of early Canadian legislation on the subject see 22 Vict. chap. 96, secs. 18, 19 (Ont.), C.S.U.C.C. ch. 26, secs. 17, 18. The Dominion Insolvent Acts were in force from 1864 to 1880.

(*g*) *Abbott* v. *Burbage*, 2 Scott 656; *Davison* v. *Robinson* (1857), 3 Jur. N.S. 791; *Flook* v. *Jones*, 12 Moore 96.

(*h*) *Belcher* v. *Prittie* (1834), 10 Bingham 408; *Cook* v. *Pritchard* (1843), 5 Man. & G. 329.

(*i*) *Smith* v. *Cannan* (1853), 2 E. & B. 35; *Ex p. Foxley* (1868), L.R. 3 Ch. 515.

(*j*) 3 Scott 229.

where a party is in so hopeless a state of insolvency that he cannot reasonably expect to avoid bankruptcy, though he choose to fight it off as long as possible, a payment voluntarily made by him to a favored creditor cannot be looked on in any other light than as intended to defeat the bankrupt laws(*k*). In some cases, however, it was held that a mere consciousness of insolvency on the part of the debtor would not be sufficient, that they must show actual contemplation of bankruptcy on his part in order to avoid the transaction(*l*).

"Voluntary."—In the second place the preference must have been "voluntary." As this doctrine is contemplated in the legislative enactments of most of the Provinces, it will be considered more at length hereafter(*ll*). It is clear that if the transfer or payment to a creditor was made in consequence of an act of such creditor, as by threat of proceedings against the debtor to realize the debt, the resulting transfer could not be considered voluntary in any sense of the word(*m*); and, in fact, the simplest request might be sufficient to deprive the transfer of its voluntary character, if the payment was the undoubted result of that request(*n*).

Present Meaning of "Preference."—The Supreme Court of Canada has laid down that the word "Preference" in the Provincial Statutes is used in the sense in which it was commonly understood before the passage of these Acts. By the statutory provisions it was not intended in any way to attribute to the word "preference" a wider scope than previous decisions had given it, or to alter or interfere with the signification which had in accordance with its etymological

(*k*) *Ex p. Simpson* (1844), 1 DeG. 9.

(*l*) See *Atkinson* v. *Brindall* (1835), 2 Bingham N.C. 225; *Morgan* v. *Brundrett* (1833), 5 B. & Ad. 289.

(*ll*) See title "Pressure."

(*m*) *Thompson* v. *Freeman* (1786), 1 T.R. 155.

(*n*) *Strachan* v. *Barton* (1856), 11 Exch. 647.

meaning been affixed to the expression when used in bankruptcy and insolvency statutes, by Courts of the highest authority(*o*).

In the light of this decision the principles just referred to may well be borne in mind, and the English cases on preferences may generally speaking be said to be applicable(*oo*).

(o) *Stephens* v. *McArthur* (1891), 19 S.C.R. at p. 451.

(*oo*) In considering the effect of recent English decisions it is necessary to have regard to the wording of sec. 92 of the Bankruptcy Act of 1869, which is as follows:—

"92. Every conveyance, or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same become bankrupt within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration."

After the enactment of this provision there arose a controversy as to whether it was declaratory of the law or not, and as to how far the old rules in regard to preferences were still applicable.

This matter was discussed in the case of *Ex p. Griffith* (1883), 23 C.D. 69. The Court there said: "Everybody knows that originally there was no express statutory enactment in regard to fraudulent preference. But from the time of Lord Mansfield down to 1869 the Courts considered that certain transfers of property were frauds upon the bankruptcy law, though there was no statutory enactment upon the subject. Then came the Bankruptcy Act of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference, and the Act uses very definite language. Now what is the method which has been pursued by judicial decisions since? I think it is very unfortunate. I do not say that it has led to any wrong decision, but I think that it has had a tendency to draw one's mind away from the true question. The first thing which the Courts did was to discuss the question whether the Act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old inquiries as to what were the deductions which followed from the adoption of this verbal equivalent. And so we have been drawn into questions of pressure and volition, and at length in the present case we have got into a discussion as to what is the motive of a motive, whatever that

The Substance of the Transaction Regarded.—The substance of the transaction must be regarded and not the form(*p*), and any transaction which is merely colorable, but is in reality a preference, will be set aside, as procurng goods to be taken under an execution(*q*); or the delivery up of goods to a creditor under a colorable sale to him(*r*). But this principle is not universal(*s*).

Lease to Creditor.—The lease in good faith for a fair rent by a debtor to his creditor and the subsequent application of the rent in part payment of the indebtedness has been thought to be a transaction which could not be impeached as a preference(*t*).

Giving Possession to Mortgagee.—And where the taking of possession under a chattel mortgage which is void as against creditors under the Chattel Mortgage Act from some informality in its form is allowed to validate the transaction, it has been held that such a taking of possession by a creditor could not be viewed as a preference(*u*).

Lien Agreement.—Supplying materials under an arrangement by which the property was to remain in the party supplying them, notwithstanding any change in their

may mean. I think it is a wiser policy to go back, as I do, in a humble spirit to the words of the statute, and, without discussing motives of motives, inquire whether the transaction was entered into with a view to give the one creditor a preference over the others."

As to whether preferences come within the Criminal Code see title "Criminal Proceedings."

(*p*) *In re Watson* (1890), 25 Q.B.D. 27, and cases cited there; *Madell* v. *Thomas*, [1891], 1 Q.B. 230.

(*q*) *Gore* v. *Lloyd*, 12 M. & W. 479.

(*r*) *Rust* v. *Cooper* (1777), Cowp. 629; *Nixon* v. *Jenkins* (1793), 2 Henry Bl. 135.

(*s*) See *Salomon* v. *Salomon*, [1897] A.C. 22; *Rielle* v. *Reid* (1899), 26 A.R. 54.

(*t*) *Smith* v. *Lawrence* (1891), 27 C.L.J. 116.

(*u*) *Bank of Hamilton* v. *Tamblyn* (1888), 16 O.R. 247.

form during the process of manufacture is not obtaining a preference(*v*).

Paying Statute Barred Debt.—In *Re Lane*(*w*), an insolvent debtor paid part of a debt barred by the Statute of Limitations, with the object of reviving the debt and enabling the creditor to prove against him in insolvency for the balance due. The debt up to the date of such payment had always been treated by the debtor and creditor as a subsisting debt, and one which it was intended should be ultimately paid.

The Court held that this was not a preference. If there had been a payment of a large sum there would have been strong evidence of the intent to prefer, but the only intention that the debtor had was to provide a legal remedy for the recovery of the debt by the creditor, and payment made with that object could not be said to be made with intent to prefer.

It was also held that such a payment was a sufficient part payment to take the debt out of the operation of the Statute of Limitations(*x*).

Security to Gain Extension for Payment.—Where a debtor, believing that by getting an extension of time for the payment of a debt he will be able to carry on his business and to get such an extension *bona fide* gives the creditor a mortgage to secure the claim, this will be sufficient to rebut a presumption of fraudulent intent or intent to prefer. So, where a company, being indebted and believing that their charter did not allow a mortgage to be made to secure an overdue debt, made an agreement to give such a mortgage for the advance of a larger sum, agreeing to return

(*v*) *Wellbanks* v. *Heney* (1890), 19 O.R. 549. See also title "Form of Transfer."

(*w*) (1889), 23 Q.B.D. 74.

(*x*) See also *Finch* v. *Gilray* (1889), 16 A.R. 484.

the amount of the debt to the mortgagees, and *bona fide* believed that by getting the time from the creditor they would be able to carry on their business, it was held that the mortgage could not be considered a preference, although the company shortly afterwards became insolvent(*y*).

Purchasing Debt to Set It Off.—A debtor may also purchase at a rate on the dollar a debt due by an insolvent creditor to a third person, and set it off against his own indebtedness to that creditor(*c*).

Paying Wages.—The debtor may pay wages in full either in cash or bills or goods, as such payments are in general specially protected by the statutes. A substitution of securities is also unimpeachable if the debtor's estate has not have been lessened in value to his creditors(*cc*).

Fresh Security.—In a case of *Re Tweedale*(*k*), a debtor for good consideration had given a security which both parties intended to be good, but which turned out to be valueless owing to a decision of the Court. The debtor just prior to becoming a bankrupt, gave a fresh security, with the sole object of remedying a defect in the first security, being under the impression that he was obliged to do so. It was held that as the debtor's intention was only to cure the previous error, this was sufficient to negative the presumption that the fresh security was given with intention of preferring the creditor.

(*y*) *Long* v. *Hancock* (1885), 12 S.C.R. 532.

(*c*) *Thibaudeau* v. *Garland* (1896), 27 O.R. 391. See also *ante*, p. 34, title "Form of the Transaction."

(*cc*) See R.S.O. (1897), cap. 147, sec. 3 (5); R.S.B.C. (1897), cap. 87, sec. 36; N.S., 61 Vict. cap. 11, sec. 7; N.B., 58 Vict. cap. 6, sec. 3 (4); P.E.I., 61 Vict. cap. 4, sec. 8 (1); R.S.M. (1903), cap. 8, secs. 28 and 47

(*k*) [1892] 2 Q.B. 216.

(*l*) See also *Ex p. Nelson* (1886), 55 L.T.N.S. 819.

So if a new chattel mortgage is taken instead of renewing the old one(*m*).

Payments of Money.—Most of the Provincial Acts have also provided that "payments of money to a creditor" are not open to attack as preferences(*rr*).

And this exception applies to all payments of money, and it is not necessary that they should be shown to be *bona fide*. The Legislature has chosen to except from the operation of the Act any payment of money to a creditor, and the Courts would not be justified in interpolating the expression *bona fide* in that clause in order to infer that if the creditor had notice that the debtor was in a state of insolvency when he made it, it was a payment *mala fide*, and forbidden by the Act(*s*).

The enactment is in this particular different from the 92nd section of the Imperial Bankruptcy Act, dealt with in *Tomkins* v. *Saffery*(*t*). By the latter part of that section it was provided that it should not effect the rights of a payee in good faith and for valuable consideration, and it was held that a creditor receiving payment with knowledge that he who made it was a person unable to pay his debts in full as they became due from his own moneys was not a payee in good faith within the meaning of the Act.

Payment of Maturing Debt.—The English Bankruptcy Act invalidates payments of cash, and under its provisions it has been held that a payment by a person who is insolvent to his knowledge, but who is continuing his business, of

(*m*) *Rogers* v. *Carroll* (1899), 30 O.R. 328.

(*rr*) See R.S.O. (1897), chap. 147, sec. 3; N.S., 61 Vict. cap. 11, sec. 5; P.E.I., 61 Vict. cap. 4, sec. 4 (1); N.B., 58 Vict. cap. 6, s. 3 (1); R.S.M. (1903), cap. 8, sec. 44; B.C., 1 Ed. VII., cap. 15, sec. 40. Payments of money are avoided, by the Canadian Winding-up Act, if made within thirty days before the petition is presented. See R.S.C. 1886, chap. 129, sec. 72.

(*s*) *Campbell* v. *Roche* (1891), 18 A.R. 646.

(*t*) (1877), 3 A.C. 213 at p. 236.

maturing bills, is not necessarily a fraudulent preference, because the presumption to be drawn from such payment is not that it was made to prefer the creditor, but to enable the debtor to continue to carry on his business(*d*).

The same principle has been applied in England if the debtor returns specific goods to his creditor(*cc*).

But this principle does not apply where the bill is not paid in due course, as, for instance, where the bill was not presented for payment at maturity, but was held over at the request of the acceptor and subsequently paid(*e*). And if the debtor in making a payment really believes himself to be under a legal obligation, on reasonable grounds, to do so, it will not be regarded as preferential, even athough his belief was mistaken(*f*); but he must believe the obligation to be a legal one, and if he is acting merely from a sense of duty or desire to do what he considers just in the matter, it would not be sufficient(*g*).

It is not a fraudulent preference, either, to repay money which has been advanced to the creditor for a specific purpose that has failed, as, *e.g.*, for the purpose of making a compromise with his creditors(*h*). Nor is a transfer regarded as fraudulent preference where the debtor's object was not to benefit a creditor, but to benefit himself(*j*).

Payment, What is—Cheque.—The line between a payment of money and a transfer of security is sometimes not clearly marked. While the former is good, the latter may

(*d*) *Re Clay* (1895), 3 Manson 31.

(*cc*) *Edwards* v. *Glyn* (1859), 2 E. & E. 29; *Harris* v. *Rickett* (1859), 4 H. & N. 1; *Sinclair* v. *Wilson* (1855), 20 Beav. 324; *Re Walker* (1873), L.R. 8 Ch. 614.

(*e*) *Re Eaton*, [1897] 2 Q.B. 16.

(*f*) *Re Vautin* [1900] 2 Q.B. 325; *Bills* v. *Smith* (1865), 34 L.J.Q.B. 68.

(*g*) *Re Fletcher*, 9 Morrell 8; *Re Vingoe* (1890), 1 Manson 416.

(*h*) *Toovey* v. *Milne* (1819), 2 B. & Ald. 683; and see *Re Mills*, 5 Morrell 55.

(*j*) *Re Arnott* (1889), 6 Morrell 215.

be void. Thus, it was held in *Armstrong* v. *Hemstreet*(*u*) that the handing of an unaccepted cheque of a third person to a creditor, where at the time there were funds in the bank to meet the cheque, was a payment of money within the statute. The Court said the fact that the cheques of the third party were deposited by the debtor in the creditor's bank instead of being paid direct to him, cannot affect in one way or other the question to be determined, which is whether the handing by the debtor to the creditor of the cheque of a third person upon a bank in the place where the creditor lived, the maker of the cheque having funds there to meet it, is a payment of money within the statute.

The maker of the cheques had to his credit in the bank a balance sufficient to meet them. The payee would have received the amount of them in bank bills had he presented the cheque and asked for them. Instead of doing so, he gave the cheques to his creditor, who took them as cash, and no doubt obtained cash or credit for them. The Court said it would be placing entirely too restricted a construction upon the Act to hold that this was not a payment of money within its intention and meaning. If these cheques were not called money, then neither would bank notes be money, nor any other medium of exchange except coin. In its wider sense money means any equivalent or circulating medium readily used for the exchange of goods or services. This view, however, has since been dissented from.

Davidson v. Fraser.—In *Davidson* v. *Fraser*(*v*), the Court of Appeal said that they thought it would be far too narrow a construction to hold that a payment to a creditor by the insolvent's own cheque would not be payment in money within the meaning of the statute; nor did they think

(*u*) (1892), 22 O.R. 336. See the next case.
(*v*) 23 A.R. 439; (1897), 28 S.C.R. 272.

it necessary to the validity of such payment that the creditor should have drawn the money from the bank. It operated then and there as a payment, a conditional payment, it is true, that is to say, the original debt would have revived in the event of the dishonor of the cheque, but it was, subject to that contingency, a payment as full as if the insolvents had drawn the money and paid it to the creditor. But they considered that there was a marked distinction between such a case and the transfer of the cheque of a third party, which in the hands of the insolvent was a security as fully as a bill at three days or three months, and would have been liable to seizure under an execution, and the assignment of such a security to a creditor, if made with either of the intents mentioned in the statute, is a preference and void as against the insolvent's creditors(*w*).

Maclennan, J.A., in his judgment, said that the transfer of a cheque of a third person is a transfer of a security which does not become payment until presented and honored by the bank. The money in the bank in that case and until the time of the payment is not the debtor's money and never becomes his if he transfers the cheque. No doubt cheques of persons in good credit are accepted and transferred with great freedom, particularly after having been marked good by the bank, and are virtually treated as actual money. But the question is whether the cheques in question were money within the meaning of the Act.

Gordon v. Union Bank.—In *Gordon* v. *Union Bank*(*x*), the case of *Davidson* v. *Fraser* was distinguished. A trader in insolvent circumstances sold his stock-in-trade in good faith and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who

(*w*) See, however, dissenting judgment of Osler, J.A., in this case.

(*x*) (1899), 26 A.R. 155.

held as a collateral security a chattel mortgage on his stock-in-trade.

The purchaser had an account with the same bankers and gave to them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque.

It was held that this was a payment of money to a creditor, and not a realization of a security, and that the bankers were not liable to account to the creditor for the amount received.

The Court of Appeal said that the facts distinguished this case from *Davidson* v. *Fraser*. There the transaction was the transfer by the debtor of the cheque of a third person which had come into the debtor's custody and control, and that transfer was held not to be a payment of money within the Act. Here the cheque of the purchasers of the goods was handed directly to the bank in payment of its claim. It was certainly never intended that the decision in *Davidson* v. *Fraser* should be considered to mean that what took place in this case was not a payment of money within the statute.

It was further said that it made no difference whether it was the debtor's money or the purchaser's money which the bank received in discharge of their claim.

The effect of these decisions may be shortly summed up by saying that a man's own cheque is not a security for money; the cheque of a third party is such a security; that the handing over of the first to a creditor is a payment of cash, while the handing over of the second is simply a transfer of a security for money(*y*).

The fact that the money paid is derived from a sale, of the debtor's stock in trade, which sale was brought about

(*y*) See also *Halwell* v. *Township of Wilmot* (1897), 24 A.R. 628.

for this purpose by one who had endorsed notes for the debtor, was held not to take the case out of the statutory exception, notwithstanding the fact that the money was paid to relieve the endorser of his liability(*z*).

In *Building & Loan Association* v. *Palmer*(*a*), certain notes of the debtor's were held by a banker; the debtor sold his property, and the purchaser gave the banker his note for the amount of the purchase, which was the same amount, and the debtor's notes were given up by the banker; and it was held that the transaction was a *bona fide* payment within the meaning of this section(*b*).

Payments in Course of Trade.—*Bona fide* payments made in the ordinary course of trade to innocent parties are expressly protected in the Provincial Acts(*c*). These provisions are, of course, largely declaratory of what the law was before. As all payments of money, however fraudulent, by a debtor to his creditor, are protected, "payments" must be limited to payments in securities or goods.

In *Butcher* v. *Stead*(*d*), it was held that a payee in good faith meant a payee without notice that any fraud or fraudulent preference was intended.

In order that the favored individual to whom the payment is made should be exempted from the provisions of the statute, he must have received it *bona fide*, that is, he must not be conscious himself of an intention to favor one creditor above another. That will entitle him to hold the payment so made to him in preference, he himself not being

(*z*) *Harvey* v. *McNaughton* (1884), 10 A.R. 616.

(*a*) (1886), 12 O.R. 1.

(*b*) See also *Langley* v. *Van Allen* (1902), 32 O.R. 216; 3 O.L.R. 5; 32 S.C.R. 174.

(*c*) See R.S.O. (1897), cap. 147, sec. 3 (1); R.S.M. (1903), cap. 8, sec. 44; N.B., 58 Vict. cap. 6, sec. 3 (1); P.E.I., 61 Vict. cap. 4, sec. 4 (1); N.S., 61 Vict. cap. 11, sec. 5.

(*d*) (1875), L.R. 7 H.L. 839.

a guilty party, that is, not being conscious of a preference being intended to be given to him(*e*).

But if a creditor takes the whole or substantially the whole of the property of his debtor in payment of a past due debt, knowing that there are other creditors, he cannot be said to be acting in good faith(*f*).

Sales in Course of Trade.—Similarly, *bona fide* sales in the ordinary course of trade to innocent purchasers are protected(*g*).

En Bloc.—This provision is not limited in its scope to the protection of mere buying and selling over the counter, and sale by a debtor to his creditor of his whole business, the debt being part of the consideration, and the balance being paid over to the debtor, if made in good faith, is not in itself objectionable(*h*). The case cited was a peculiar one, the facts being shortly as follows:—The defendant, Rothwell, was a bookseller and stationer, and sold out his business as a going concern to the defendant Blackwood, who gave Rothwell his notes for the purchase money. Blackwood carried on the business for some time, and, not being successful approached Rothwell, and, after a good deal of negotiation persuaded him to buy back the business at a certain rate on the dollar of the assets, a balance of purchase money still due by Blackwood to Rothwell being deducted from the amount coming to Blackwood on the new transaction, and Rothwell giving to Blackwood his notes for the balance. Blackwood at the time of this re-sale to Rothwell was insolvent, but it was clearly shown that Rothwell had entered

(*e*) And see *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505.

(*f*) *Re Jukes*, [1902] 2 K.B. 58. And see *Shears* v. *Goddard*, [1896] 1 Q.B. 406; *Re Lake*, [1901] 1 Q.B. p. 710.

(*g*) R.S.O. 1897, cap. 147, sec. 3 (1); C.S.B.C. (1888), cap. 51, sec. 2; R.S.M. (1903), cap. 8, sec. 44; N.B., 58 Vict. cap. 6, sec. 3 (1); P.E.I., 61 Vict. cap. 4, sec. 4 (1); N.S., 61 Vict. cap. 11, sec. 5.

(*h*) *Clarkson* v. *Rothwell* (1886), 11 C.L.T. 67.

into the transaction in good faith and without any knowledge of the insolvency. The Court held that the transaction was a fair business bargain, and a real *bona fide* sale, and that at all events it was protected by the section under discussion.

And it may in fact, be said to be a general rule that in the absence of *mala fides* there is nothing to prevent a creditor buying goods from the debtor and allowing the debt to form part of the consideration(*i*).

Security Given for Present Payment or Advance.—The Provincial Acts have also in general afforded protection to any *bona fide* conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind 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 goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

These provisions are largely declaratory. In general it may be said that the debtor's assets will not be diminished in the case of such a security being given if he receives, as the statutes provide, a fair and reasonable relative value in exchange. What is meant by these last words is a question of fact in each instance(*j*).

These provisions have not received a narrow construction, and security for the price of goods *to be* delivered will

(*i*) *Lewis* v. *Brown* (1884), 10 A.R. 639. See, however, *Dana* v. *McLean* (1901), 2 O.L.R. p. 470.

(*ii*) R.S.O. (1897), cap. 147, se. 3 (1).

(*j*) *Cameron* v. *Perrin* (1887), 14 A.R. 565.

be upheld as made "in consideration of any present actual *bona fide* sale or delivery of goods"(*j*).

It was held in an early case that it is not an advance in money to pay off the claims of other creditors at the debtor's request, and take security for the amount so paid and for the original debt(*l*).

In the light of more recent cases the authority of this decision is questionable.

Cash Proceeds of Security Paid to Prefer Creditor.—There has been somewhat of a conflict of decision as to the question whether a debtor can borrow money, giving a security on his effects to the lender, and pay the proceeds over to a creditor, or cause them to be paid by the lender direct to the creditor. It might be thought that this was a most effectual way of preferring a creditor, but it has not been so regarded. To make the matter clear it will be necessary to advert somewhat at length to the views taken by different courts.

Stoddart v. Wilson.—In the case of *Stoddart* v. *Wilson*(*m*), a debtor being pressed by one of his creditors, arranged that his wife should convey property to such creditor in payment of the debt, a small balance being handed over to the debtor, who thereupon made a chattel mortgage to his wife to secure her for an amount equal to the creditor's claim or the purchase money which she would have received. This transaction was held not to be within the saving clause. The Divisional Court said:—

"It is true that the saving clause does not expressly provide that the payment or advance of money, or the sale or delivery of goods must be made to the person making the transfer of goods which the Act protects, but that must be

(*k*) *Goulding* v. *Deeming* (1887), 15 O.R. 201.
(*l*) *Boyd* v. *Glass* (1883), 8 A.R. 632.
(*m*) (1888), 16 O.R. 17.

the intention; otherwise preferences would be rendered easier than ever by the intervention of a third person, and the whole effect of the second section of the Act would be done away with. Where a debtor receives an advance of money or a supply of goods in such a manner as to leave him untrammelled in his action with regard to them, his assets are naturally increased to that extent for the general benefit of his creditors at large, and nothing is withdrawn from them when he gives back on the spot a security for the advance or for the value of the goods which have been supplied to him. But where the alleged advance either never comes to the debtor's hands at all, or comes to them only in such a way that it must at once pass through them into the hands of a favored creditor, I think the transaction cannot be treated as a *bona fide* payment or advance of money to the creditor.

"The distinction, therefore, between a transaction such as this and the transactions which are protected by the saving provisions in the Act, is a substantial and not a mere technical one. Under the transaction now in question there could be only one way in which the value of the property could be applied, and that was in paying off the claim of this creditor; no other creditor could possibly obtain any benefit from the transfer; and it is this necessary preference of a particular creditor which places the transaction outside of the class of transactions which I conceive it was the intention of the Legislature to protect."

The Court further said:—"It is plain, having regard to the purpose of the Act, that the 'payment,' 'advance,' 'sale,' and 'delivery' here referred to mean 'payment,' 'advance,' 'sale' and 'delivery' to the maker of the 'gift, conveyance, assignment, or transfer, delivery over, or payment' which is impeached as being void by section 2 of the Act, and that the 'payment' or 'advance' must be in actual cash and not in money's worth."

Johnson v. Hope.—In *Johnson* v. *Hope*(*n*), the case of *Stoddart* v. *Wilson* was discussed. The Court of Appeal said that it was in effect there held that to maintain the mortgage it was essential that either the wife should have conveyed her property direct to her husband, or that she should have obtained the price from the vendee, and have paid it to her husband, so that he might have had the opportunity of paying it to his creditors generally, although it was admitted he could, without impropriety, have at once paid it, the moment it came into his hands, to the same persons who had bought his wife's property, from whom it had come in the first place, in satisfaction of their debt.

They were unable to see how it could be said that as between the husband and the wife it was not a case of a conveyance made in consideration of a present actual *bona fide* sale or delivery of goods or other property, there being no question raised of relative value. It is undoubted law that the purchaser of property may require the conveyance to be made to his nominee instead of himself; and the vendor, on receiving the consideration, whatever it may be, whether cash, or mortgage of the same, or other estate or property, has no option but to comply with the vendee's direction, and is compellable by law to do so. In like manner, also, the vendor or mortgagor of property may, when the moment comes for paying the purchase money, or advancing the loan, direct and require the money to be paid to another person, and the purchaser or lender must comply. The principle of *Stoddart* v. *Wilson*, if followed, would compel the Court to hold that although the Act expressly permits an embarrassed debtor unrestricted freedom to sell his property for full value, either for money or goods, and to borrow money on the security of any of his property, yet the purchaser or lender may not obey the directions of the

(*n*) (1890), 17 A.R. 10.

vendor, or borrower, as to the payment of the money, as he might do in transactions with other people, without the peril of losing his money or his security. They thought such a construction of the statute would be highly inconvenient and dangerous, and ought not to be adopted, otherwise than as the effect of clear and unmistakeable language used by the Legislature.

Gibbons v. Wilson.—And in *Gibbons* v. *Wilson*(*o*), *Stoddart* v. *Wilson* was again disapproved.

The facts were: A solicitor, acting for a creditor, obtained for the debtor on the security of a chattel mortgage a loan from another client *who was ignorant of the purpose* for which the loan was required. The solicitor, by direction of the debtor, out of the moneys advanced paid off the creditor in full, and shortly afterwards the debtor assigned.

The Ontario Court of Appeal said in their judgment that they were unable to see why the form should necessarily be gone through, as was decided in *Stoddart* v. *Wilson*, of paying the money into the hands of the borrower himself. The statute has not forbidden a debtor to employ an agent to do for him what he may lawfully do for himself, and if the payment or advance be made to an agent for him, it is sufficient to support a security given by him in consideration of such advance.

It makes no difference that the money so advanced is to the knowledge of the lender to be used to pay a creditor and thus give him a preference. If a payment of money to a creditor is not forbidden by the Act, can it under any circumstances be the lender's concern that the borrower intends to pay a debt with the borrowed money? It may be said that this is a mere evasion of the Act, and that the creditor is more effectually preferred than if he had taken a mortgage, but the question is whether the thing done comes within the prohibition.

(*o*) (1890), 17 A.R. 1.

In considering this case in the light of the subsequent case of *Burns* v. *Wilson*(*p*), it should be noted that the lender here was ignorant of the purpose for which the loan was required, and it was not proved that his solicitor, who was also acting for the mortgagor, had notice that the latter was insolvent, or unable to pay his debts in full.

Campbell v. Roche.—The next case was *Campbell* v. *Roche*(*q*). There the mortgagee, being surety for a debt of the mortgagor, raised money and advanced it with a large additional amount to the mortgagor, who was then in insolvent circumstances to the knowledge of the mortgagee, receiving therefor the mortgage in question. The insolvent thereupon paid the debt for which the mortgagee was surety, and other notes on which relatives were endorsers, out of the moneys thus raised.

It was argued that the whole scheme was a fraud for the purpose of securing a preference to members of the family who had come under liability for the insolvent; but though there was some suspicion in regard to this, the Court thought that the evidence was not sufficient to establish any fraudulent scheme; nor was there sufficient evidence on which to find actual knowledge on the part of the mortgagee as to the purposes for which the money advanced by him was to be applied.

The Court said that unless an actual and express intent could be shown to have existed on the appellant's part in advancing the money *to aid the mortgagor in doing something forbidden by the Act;* or unless he appeared to have been actually privy to such intent on the part of the mortgagor, the conveyance was not invalidated. Nor is it enough that the evidence raises a suspicion that the lender may have been aware of the borrower's wrongful intention. Nor

(*p*) (1897), 28 S.C.R. 207.
(*q*) (1891), 18 A.R. 646.

is the lender bound to look to the application of the borrowed money. The fact that a debtor is insolvent, or on the eve of insolvency, does not affect his power to borrow money on the security of his property, and to give a valid security therefor, even though the lender may know, or have reason to know the state of his affairs, provided always that the latter is *ignorant of any intention on the part of the former to contravene the provisions of the statute.*

This case went to the Supreme Court of Canada and is reported there under the name of *Campbell* v. *Patterson*(*r*). The Supreme Court said that so far as the mortgagee could be affected there was no evidence that the mortgage was executed for any other purpose or with any other intent than that it should operate *bona fide* by way of security for a present actual *bona fide* advance of money; and the transaction was affirmed.

Burns v. Wilson.—The most recent case is that of *Burns* v. *Wilson*(*s*). The facts were that in order to give a preference to a particular creditor, a debtor who was in insolvent circumstances executed a chattel mortgage upon his stock in trade in favor of a money lender by whom money was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor, who, at the same time delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the Acts respecting assignments and preferences,

(*r*) (1892), 21 S.C.R. 645.
(*s*) (1897), 28 S.C.R. 207.

and to bring the case within the ruling in *Gibbons* v. *Wilson*(*t*). It was held that all the circumstances, necessarily made known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bona fide* payment of money within the meaning of the statutory exceptions.

The judgment of the Supreme Court was delivered by Sedgewick, J., who said, page 215:—"The principal question in controversy is as to Wilson. Was this mortgage, so far as he was concerned, by way of security for a 'present actual *bona fide* advance of money'?

"Now, I admit that an insolvent debtor may sell or mortgage his property for money *and then pay that money* to one of his creditors, even though in doing so he should give a preference to that creditor over all of the other creditors, and further that such a transaction cannot be successfully attacked under the statute, even though the lender knows of the debtor's intent to effect such a preference, and we have so held in *Campbell* v. *Patterson*(*u*). The payment of money to a person in exchange for property of that person does not *per se* affect in any way the *quantum* of his assets available for his creditors generally, and there is no principle of law which compels any man bargaining for or taking security upon goods to make any inquiry either before or afterwards as to what disposition it is intended to make of the money or property transferred. He is none the less debarred from completing the transaction, even although aware of its purpose.

"Now, in our view all of these transactions must be viewed as one transaction. Each of its constituent facts

(*t*) (1890), 17 A.R. 1.
(*u*) (1892), 21 S.C.R. 645.

has relation to every other in connection with it, and all must stand or fall together. The defendant company were rightly desirous of payment or security for their debt. They called in the aid of a solicitor to advise as to how this desire might be accomplished. The solicitor had, in substance, in his possession, funds of his principal with full powers of investing them. Both he and the company knew that the debtor could not give a security direct to the company. That would undoubtedly be a violation of the statute, but the solicitor suggests:—'In your interest I can get over the statute. I have read *Gibbons* v. *Wilson*(*v*); I will take my client's money and pay you and get the debtor to give a chattel mortgage to me, you at the same time giving me a bond of indemnity that I will eventually get back my money.' It was a happy suggestion, is immediately adopted, and the transaction is completed upon these lines. I may have drawn too strong inferences from the admitted facts, but it is clear that substantially the transaction was just as I have stated. I do not think that under these circumstances the money, even although it was Wilson's money, was given in good faith. The whole intent and object of the scheme, so far as the company was concerned, and so far as its solicitor (he being Wilson's solicitor as well) was concerned, was to secure the payment in full of their claim, the necessary consequence of which was, and was known to be, that all the other creditors would be, at all events hindered and delayed in their remedies, if not, as matters subsequently turned out, defeated altogether. The money was not money paid to the debtor at all. The chattel mortgage was a mere instrument taken by the company to secure the object they had in view. Wilson himself was a like instrument used by them to aid in the same purpose, nothing more than a mere portion of the machine

(*v*) (1890), 17 A.R. 1.

devised by the solicitor to work out his ingenious plan. It *was not upon the security of the goods that the solicitor paid the money,* but it was because he knew, whether by verbal promise or by reason of the written indemnity of the company, they would protect him and Wilson from all loss in the matter, and under these circumstances it seems to me an impossible task to show that there was a *bona fide* payment of money. On the contrary, it was a *mala fide* payment to the company for the purpose of avoiding the statute under the guise of a colorable or fictitious payment to the debtor.

Result of Decisions.—This case has been regarded as overruling the case of *Gibbons* v. *Wilson*(*w*). But it seems to be clearly distinguishable, for, as the Supreme Court said, it was not upon the security of the goods that the money was advanced, but because of the written indemnity of the creditors, and that the mortgagee was a mere tool, and that under such circumstances it would be impossible to claim that the payment was a *bona fide* payment of money within the meaning of the statute.

In *Gibbons* v. *Wilson,* on the other hand, the loan was a *bona fide* advance on the security of the goods, the lender being ignorant of the purpose for which the loan was required, and it was not proved that his solicitor, who was also acting for the mortgagor, had notice that the latter was insolvent.

Having regard to the foregoing decisions it may be regarded as established (1) that an insolvent may mortgage his property and pay the money, the proceeds of the mortgage, to the creditor or creditors.

(2) And he may cause them to be paid directly or indirectly by the lender to the creditor.

(3) He may do this though it is his intention from the outset so to apply the funds when obtained.

(*w*) (1890), 17 A.R. 1.

(4) The mortgagee is not concerned with what is done with the proceeds and he is not put on his inquiry as to their disposition.

(5) He may be even aware that they are to be applied in payment of a creditor, and it will not invalidate the transaction provided he is ignorant of any intention on the part of the debtor to contravene the provisions of the Act.

(6) But the advance must be a *bona fide* and real advance to the debtor on the security of his effects, and if it is only colorably so, and the whole arrangement is a scheme of the creditor, who indemnifies the lender and uses him as a tool to evade the Act, the advance is not *bona fide* and the transaction cannot be supported.

Indirect Preference.—It has been generally enacted that in case of a valid sale of goods, security or property, and payment or transfer of the consideration, or part thereof by the purchaser to a creditor of the vendors under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made(*x*).

As the invalidating provisions of the statutes do not in general extend to payments of money to a creditor, this enactment is limited in its scope to transfers of considerations other than money, such as bills, notes or goods(*xx*).

Notice to Solicitor.—Where the same solicitor is acting for both the borrower, the lender and the payee or creditor, knowledge on the part of the solicitor acquired in connection with the impeached transaction will be taken as notice

(*x*) See R.S.O. (1897), cap. 147, sec. 3, sub-secs. 1 and 2; R.S. M. (1903), cap. 8, sec. 45; N.S., 61 Vict, cap. 11, sec. 3 (1); P.E.I., 61 Vict. cap. 4, sec. 4 (a); N.B., 58 Vict. cap. 6, sec. 3 (a).

(*xx*) See discussion p. 124, *supra*.

to the lender, and he will be held to know what his solicitor knew. If there was an intention on the part of the debtor to contravene the statute and this was known to the solicitor, the defence of ignorance on the part of the lender would be of no avail as against the knowledge of his solicitor, and the money could not be held to be advanced in good faith(*y*).

Stephens v. Boisseau.—Where a chattel mortgagee sells under power of sale, and after payment of his secured claim applies the surplus in payment of an unsecured debt due by the mortgagor to him, this is not a preference, because there was no arrangement between the parties that such a course should be pursued, and therefore there could not be said to be any gift, conveyance, assignment or transfer of anything made with intent to defeat, hinder, delay or prejudice the creditors of the assignor(*yy*).

It was said in this case:—"The money in question was part of the proceeds of the goods sold under a valid mortgage. It came lawfully and honestly into the hands of the defendant, and not by any gift, conveyance, assignment or transfer by the mortgagor with the intent of effecting a preference such as is declared to be illegal by the Assignments and Preferences Act, and except in and by a redemption suit I am unable to see how the defendant could have been prevented from applying it on his unsecured debt, or how any part of it could be taken out of his hands as long as anything was due to him either on his mortgage or otherwise. While the second stock of goods was still unsold, and even after they were sold and while the proceeds were still in Court, the plaintiff might have insisted on the mortgage account being taken, and on having the sum in question

(*y*) *Burns* v. *Wilson* (1897), 28 S.C.R. 207. For a discussion of how far the lender in cases such as this is affected by notice to his solicitor see Title "Notice to Solicitor," *supra*.

(*yy*) *Stephens* v. *Boisseau*, 23 A.R. 230; affirmed 26 S.C.R. 437.

applied on the mortgage debt; for the money in Court represented the mortgaged goods, and the defendant could have no larger claim to the money in Court than to the goods themselves. But the plaintiff did not do that; he allowed his claim to the goods to be barred, and he allowed the proceeds to be paid to the defendant, and in my judgment, under those circumstances, his claim is lost."

Pre-Existing Debt and Fresh Advance.—It is provided by the Provincial Acts that nothing contained in them shall invalidate a security given to a creditor for a pre-existing debt where by reason of the giving of the security a further advance in money is made by the creditor in the *bona fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full(*z*).

It was formerly doubtful whether or not a transfer by a debtor of all his effects in consideration of an existing debt and a fresh advance was good. Thus it was said that the sale of the whole for the price merely of a part because the old debt is taken as a part of the price comes within the mischiefs deduced from the earlier cases. The trader gets no present equivalent for part of his stock and the transfer has the effect of defeating his creditors(*a*).

Common Law Rule.—It had, however, been settled apart from this legislative enactment that the transfer is good where the advance is of a substantial sum and made *bona fide* for the purpose of enabling the debtor to meet his obligations, or, if he be a trader, to enable him to carry on his business(*b*).

(*z*) See R.S.O. (1897), cap. 147, sec. 3, sub-sec. 5; R.S.M. (1903), cap. 8, sec. 47; N.B., 58 Vict. cap. 6, sec. 3 (4).

(*a*) *Graham* v. *Chapman* (1852), 12 C.B. at p. 103; *Hutton* v. *Cruttwell* (1852), 1 E. & B. 15; *Lacon* v. *Liffen* (1862), 4 Giff. 75.

(*b*) *Kalus* v. *Hergert* (1876), 1 A.R. 75; *Churcher* v. *Johnston* (1874), 34 U.C.R. 528; *Squire* v. *Watt* (1869), 29 U.C.R. 328; *Thorne* v. *Torrance* (1868), 18 C.P. 29; *Re Hurst* (1876), 12 U.C.L.J.N.S. 205; *Lomax* v. *Buxton* (1871), L.R. 6 C.P. 107; *Ex p. Haw-*

Underlying Principle.—It will thus be seen that these statutory provisions have merely modified the law and that they must be read in the light of the English cases. The underlying principle of the rule may be said to be that the debtor receives an equivalent for his effects transferred. It is not necessary that the advance should be immediate if there is an agreement to make the advance and it is afterwards made(*c*).

Ross v. Dunn.—In *Ross* v. *Dunn*, a mercantile firm to whom a customer was indebted on unmatured paper, part of which was under discount at a bank, in good faith and in the honest belief that it would enable him to carry on his business, agreed to make a fresh advance to him of about one-half of his indebtedness to them, and took from him to one of the firm a chattel mortgage for the whole amount, the mortgagee making the usual affidavit of *bona fides*. When the mortgage was executed a cheque for the fresh advance was given to the customer, who, pursuant to a subsequent arrangement, did not use it, but afterwards drew at intervals on the firm until the amount of the cheque was paid, when it was returned.

It was held that the mortgage was valid because it was made in the *bona fide* belief that the mortgagor would thereby be enabled to continue his business and pay his debts in full and that the parties could treat the cheque as cash is they so desired(*d*).

Affidavit of Mortgagee.—The question was also raised in this case that the statutory affidavit of *bona fides* could not

well (1883), 23 Ch. D. at p. 63°; *Bell* v. *Simpson* (1857), 2 H. & N. 410; *Pennell* v. *Reynolds* (1861), 11 C.B.N.S. 709; *Allen* v. *Bonnett* (1870), L.R. 5 Ch. 577; *Ex p. Izard* (1874), L.R. 9 Ch. 271; *Ex p. Winder* (1875), 1 Ch. D. 290; *Re Colemere* (1865), L.R. 1 Ch. 128.

(*c*) *Ross* v. *Dunn* (1889), 16 A.R. 552; *Ex p. King* (1875), 2 Ch. D. 256; *Ex p. Sheen* (1876), 1 Ch. D. 560.

(*d*) As to what is an "advance" see Title "*Bona fide* advance," *supra*. See also *Codville* v. *Fraser* (1902), 14 Man. R. 12.

properly be made, but the Court thought there was nothing improper in the mortgagee swearing the debtor was justly and truly indebted to him in so much money, even though the cheque had not been presented or paid. And an agreement to supply goods on credit may be a sufficient consideration at common law(*e*).

It has even been held that such a transfer may be valid even though the agreement for the new advance could not be specifically enforced, and is not one for the breach of which damages could be recovered(*f*).

Amount of Advance.—It is not necessary that the new advance should be of a greater amount than the old debt, or even to an equal amount, if it be made *bona fide*, but if the amount is relatively small, that may afford evidence that the real object was to obtain a preference by securing the old debt(*g*).

Hyman v. Cuthbertson.—In *Hyman* v. *Cuthbertson*(*h*), the evidence showed that the mortgagees made a special advance of a sum more than their prior claim against the debtor, for the purpose of enabling him to pay off his other creditors and to continue to carry on business, and this was regarded as sufficient to rebut any inference of intent to obtain a preference. But after all, the greatness or smallness of the advance, though taken into consideration, is not the real test, but did the lender intend that the advance should enable the debtor to carry on his business, and had he a reasonable ground for so believ-

(*e*) *Ex p. Sheen* (1876), 1 Ch. D. 560.

(*f*) *Ex p. Wilkinson* (1882), 22 Ch. D. 788.

(*g*) *Ex p. Fisher* (1872), L.R. 7 Ch. 636; *Kalus* v. *Hergert* (1876), 1 A.R. 75. And see also *Long* v. *Hancock* (1886), 12 S.C.R. 532.

(*h*) (1885), 10 O.R. 443.

ing(*i*). And apparently the uncommunicated intention of the debtor or the actual result of the advance are not material(*i*).

Real Object of Transaction.—If it is apparent in any way from the circumstances that the real object was to secure the old debt and obtain a preference, and not to enable the debtor to continue in business, the transaction will be set aside(*j*).

And the fact that the security given covers the goods to be advanced or which may be bought with the money to be advanced, and gives a right of seizure on them as well as other after-acquired property, will not render the transaction void(*k*).

Valuable Security Given Up by Creditor in Consideration of Payment.—It is provided in most of the Provinces that in case any payment has been made to the creditor of an insolvent debtor which is void under the Act, and any valuable security given up by the creditor in consideration of the payment, the creditor shall be entitled to have the security restored, or its value made good to him, before, or as a condition of the return by him of the payment so improperly made.

It has also been generally provided that the statute shall not affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up any valid security which he held for the payment of the debt so paid unless the value of the security is restored to the creditor, nor shall it apply to the substitution in good faith of one security for another security for the same debt, so

(*i*) *Ex p. Johnson* (1884), 26 Ch. D. 338; *Administrator General of Jamaica* v. *Lascelles*, [1894] A.C. 135.

(*j*) *Ex p. Fisher* (1872), L.R. 7 Ch. 636.

(*k*) *Hutton* v. *Cruttwell* (1852), 1 E. & B. 15; *Kevan* v. *Maucson* (1871), 24 L.T. 395; *Harris* v. *Rickett* (1859), 4 H. & N. 1. But see *Graham* v. *Chapman* (1852), 12 C.B. 85.

far as the debtor's estate is not thereby lessened in value to the other creditors(*l*).

Meaning of Enactment.—What is referred to in the statute is some property of the debtor which has been given up to him or of which he has had the benefit, and on which the creditor, if still the holder of it, would be bound to place a value under the statute. Accordingly, the liability of the indorser of a promissory note made by the debtor and held by the creditor for part of his debt is not a valuable security within the meaning of the statute(*m*).

Beattie v. Wenger.—The Ontario Court of Appeal said in giving judgment in this case:—"The question is, what is meant by the words 'valuable security' in this section—a security which has been 'given up' by the creditor in consideration of the payment, and which is to be 'restored,' or its value 'made good' to him, before or as a condition of the return of the payment? This language does not appear to me apt to confer upon the Court the power of reinstating the liability of a person who was a mere surety of the insolvent debtor, or of declaring that such person was not discharged by the impeached transaction between the creditor and the principal debtor. The action which may be brought to recover back the payment or goods received is an action by the assignee against the creditor, and is one with which the insolvent and his surety have no concern. The condition which in a certain event is to be imposed is one the performance of which rests with the assignee. The security to be restored or made good is one which he can restore or make good, in short, a security the property of the debtor, or his estate, which, or the value of which, has passed to the debtor or the assignee, or of which

(*l*) R.S.O., 1897, cap. 147, sec. 3; R.S.M., 1903, cap. 8, sec. 46; N.S., 61 Vict. cap. 11, sec. 8; P.E.I., 61 Vict. cap. 4, sec. 4 (3); N. B., 58 Vict. cap. 6, sec. 3 (3).

(*m*) *Beattie* v. *Wenger*, 24 A.R. p. 78.

the debtor, and, therefore, presumably his other creditors, had the benefit before making the assignment. It can hardly be that the Legislature meant that the assignee should restore to the creditor with one hand what he took away with the other. The security intended, as I think, is one upon which, if the creditor were still the holder of it, he would be bound to place a value when ranking on the estate, under section 19 (4), and of a similar nature to those referred to in sub-section 4 of section 3, the value of which is in one of the cases there provided for, to be 'restored,'' that is to say, given back to the creditor. This means, in my opinion, something which the creditor had given up to the debtor, and of which he or his estate had received the benefit. So also, in another case mentioned in the sections, the substitution of one security for another for the same debt, which is permitted so far as the debtor's estate is not thereby lessened in value to the other creditors. The intention of the Act evidently is that the debtor's estate shall not be augmented both by the return of the payment avoided by the Act, and the retention of the security which the creditor had given up to the debtor in consideration of the payment. It cannot have been intended to affect the position of one who was a mere surety for the debtor, against whom the creditor might well be left to assert any rights which might be open to him on the avoidance of the payment, under the authority of such cases as *Pritchard* v. *Hitchcock*(*n*) and *Petty* v. *Cooke*(*o*).

''In cases to which I think sub-section (3) is confined, there is no injustice in refusing to order repayment by the creditor to the assignee without the return or making good by the latter of any security which he had from the debtor's estate, and which he had given up in consideration of the payment and this even although the creditor had deliber-

(*n*) 6 M. & G. 151.
(*o*) L.R. 6 Q.B. 790.

ately intended to obtain a preference, and had actively done what is forbidden and declared to be invalid by the Act. There can be no reason why the debtor's estate should profit by the transaction, or why the creditor should be punished by the loss of his security in addition to his being compelled to repay what he had given it up for; but it is difficult to believe that the Legislature intended that a payment which is expressly invalidated by the Act should yet be practically irrecoverable by the assignee, where the creditor has given up such a security as that in question—a security in which the estate is not interested, simply because the effect of the invalid transaction may have been to discharge the surety and to destroy the security''(*p*).

Agreement to Give Security.—If there be a precedent duty by contract or otherwise to make an assignment or return of the specific goods to the creditor, such assignment or return will not in general be construed as a fraudulent preference(*q*).

The transfer must be referred to the contract or duty, and the voluntary nature of the act is thus negatived(*r*).

And it is quite clear and well settled that a transfer of other goods made in pursuance of a pre-existing, binding and *bona fide* agreement is valid(*s*). These principles of bankruptcy law are not modified by the legislation of most of the Provinces(*t*).

Underlying Equitable Principle.—A Court of Equity regards that which has been agreed to be done as done, and therefore it has said that if it was really part of an understanding, when money or goods were advanced, that security should be given, then that security would be the same

(*p*) *Churcher* v. *Johnston*, 34 U.C.R. 528.

(*q*) *Patterson* v. *Kingsley* (1878), 25 Grant 425.

(*r*) *Brayley* v. *Ellis* (1884), 9 A.R. 565 at p. 594.

(*s*) *Clarkson* v. *Sterling* (1888), 15 A.R. 234.

(*t*) *Clarkson* v. *Sterling*. See, however,, secs. 40-42 of the Manitoba Act, R.S.M., 1903 cap. 8, which render all preferential transactions attacked within sixty days utterly void.

thing as if the security had been actually given at the time. The security would be sustained by the previous agreement(*u*).

Clarkson v. Sterling.—In *Clarkson* v. *Sterling* a large sum of money was advanced, and by contemporaneous agreement under seal it was provided that it was to be repaid at any time after a certain date, upon the lender giving six months notice in writing. The borrower covenanted that if he made default in payment, he would, on notice, forthwith assign bills receivable or debts due of sufficient value to satisfactorily secure the repayment of the loan.

Notice was given, but the borrower failed to comply. Subsequently several demands were made for security, but it was not obtained for six months, shortly after which the borrower assigned for the benefit of his creditors. The Court of Appeal held that the statute must be read as not applicable to assignments made expressly in fulfilment of a valid pre-existing contract, and which merely by the wrongful delay or evasion of the debtor had been delayed until a state of things supervened which rendered it assailable.

Embury v. West.—So in *Embury* v. *West*(*w*), the Court said that if notes were endorsed upon the faith of an absolute promise to give a mortgage, and it was afterwards taken in good faith in pursuance of such promise and before the maturing of the liability, there being no evidence that it was purposely postponed until the mortgagors were in a state of insolvency, the mortgage must be regarded as relating back to the time when the liability was incurred, and cannot be deemed a preference in intent or in effect.

(*u*) *Ex p. Burton* (1879), 13 Ch. D. 102. Per James, L.J., at p. 108. Approved in *Clarkson* v. *Sterling* (1888), 15 A.R. 234.

(*w*) (1888), 15 A.R. 357.

It was also held, as regards a security of this kind, at all events, that when money is advanced upon the faith of an absolute promise by the debtor to give a chattel mortgage, the sum advanced must be considered as a present actual advance on the security of the mortgage. A transaction cannot be said to be a preference where it is of the essence of the transaction that the secured creditor should not become a creditor at all unless on the terms of being protected by the security impeached. The Act is levelled at cases where all creditors being on an equal footing, one by means of a security gets an advantage over the others(*x*).

Postponing Security.—But the doctrine will not protect transactions where the giving of the security is purposely delayed until the debtor is in a state of insolvency or *in extremis*, in order to prevent the destruction of his credit, which would result from the registration of a chattel mortgage.

Evidence of Fraudulent Intention.—Such postponement must be regarded as evidence of an intention to commit a fraud upon his general creditors(*y*).

Agreement Not to Register Mortgage.—Where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession, such a mortgage was considered by Chief Justice Strong, in *Clarkson* v. *McMaster*, to be void on the grounds of public policy *ab initio*.

The law requires the transaction to be open and notorious, and to be made so, either by registering the mortgage

(*x*) *Goulding* v. *Deeming* (1888), 15 O.R. 201. See also *Smith* v. *Fair* (1885), 11 A.R. 755.

(*y*) *Ex p. Fisher* (1872), L.R. 7 Ch. per Mellish, L.J., at p. 644; approved in *Clarkson* v. *Stirling* (1888), 15 A.R. 234; *Webster* v. *Crickmore* (1898), 25 A.R. 97; *Clarkson* v. *McMaster* (1895), 25 S.C.R. 96; *Breese* v. *Knox* (1897), 24 A.R. 203; *Hope* v. *May* (1897), 24 A.R. 16; *Jones* v. *Kinney* (1884), 11 S.C.R. 708.

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or taking possession of the goods. And such an agreement is in effect that the transaction be concealed from subsequent creditors, purchasers and mortgagees, and is an agreement to contravene the statute. Similarly it has been said that an agreement that the giving of the chattel mortgage is to be postponed, because to file it would injure the debtor's business, until his circumstances make it wholly imprudent, as well as unnecessary to longer refrain from taking it, is as much opposed to the policy of the law as the actual taking of a chattel mortgage under an agreement that it is not to be filed as required by the statute. In each case there is concealment from the other creditors of the mortgagor, and the dealing should be treated as void, *ab initio*(*z*).

Mere Delay in Giving Security.—Where advances were made on condition that a chattel mortgage should be given, but the fulfilment of the promise was delayed from time to time for various reasons, such as the mortgagor having been busy with various other matters, the Court upheld the transaction(*a*).

Must Security Correspond With Agreement.—The agreement to give security need, however, not be definite and precise(*b*); and although the agreement is not one which could be proved with sufficient clearness to enable a party to specifically enforce it, it may be sufficient to rebut an inference of fraudulent intent(*c*). Where a certain form of security is specified, it is not clear whether the security must be of the exact nature contained in the promise(*d*).

(*z*) *Webster* v. *Crickmore* (1898), 25 A.R. p. 102.

(*a*) *Lawson* v. *McGeoch* (1893), 20 A.R. 464.

(*b*) *Webster* v. *Crickmore* (1898), 25 A.R. 97. And see *Armstrong* v. *Johnston* (1900), 32 O.R. 15.

(*c*) *Hope* v. *May* (1897), 24 A.R. 16.

(*d*) See *McRoberts* v. *Steinhoff* (1886), 11 O.R. 369 at p. 373.

Agreement to Give Security in Event of Insolvency.—If the agreement is merely tantamount to a promise to secure the creditor in the event of insolvency it is of no avail. In *Armstrong* v. *Johnston*(*e*), the debtors made a general promise that they would secure their creditor, but no specific security was ever definitely mentioned. The debtors were insolvent at the time they made the promise, and the Court was of opinion that a promise on their part under these circumstances, of such a vague character, would mean little more than that they would protect their creditor as far as possible in case of trouble, because it could hardly fail to be apparent that their giving the security on any of their available assets would simply mean immediate insolvency. In plain terms the general promise set up could only mean that the debtors being unable at present to pay or secure the account, for fear of bringing on immediate insolvency, would pay or secure the debt in the future, in case their affairs should become actually desperate. Such a promise has never been held to be one sufficient to rebut a presumption such as it raised by the statute in regard to preferential transactions, and cannot justify a preference.

Similarly in *Jones* v. *Kinney*(*f*) the promise was only to give security in case anything should happen. This was taken by the Court to mean in case of insolvency, and such a promise was regarded as entirely invalid, it being considered that any general agreement that a creditor should have priority in the event of insolvency is contrary to the policy of the law(*g*). So, in England it has been said to be a fraud on the Bankruptcy Act to agree with a trader that he should give a security, if he got into difficulties, but he in the meanwhile should enjoy the benefit and credit of ap-

(*e*) 32 O.R. 15.

(*f*) (1884), 11 S.C.R. 708.

(*g*) Compare *Tomkins* v. *Saffery* (1877), 3 A.C. 213.

pearing to be the absolute and unencumbered owner of the property(*h*). And an agreement which leaves the giving of security to the voluntary act of the debtor, who is himself to determine when it is to be given, and who, therefore, has it in his power, if he thinks fit so to do, to withhold it altogether, is still more objectionable(*i*). And there is no reason why the principle should not apply to the case of an agreement to give security on specific property, as well as on all the insolvent's property(*j*).

Where such an agreement is a verbal one, it ought to be closely scrutinized, and the evidence in support of it clear, for it is evident that there are many opportunities for collusion counected with it(*k*).

Debtor Known to be Insolvent.—If at the time the agreement was given, the debtor was hopelessly insolvent, to the knowledge of the creditor, security given in pursuance of it cannot be supported by an agreement given under such circumstances(*l*). The Court said in the case cited that the agreement in question there did not provide for any extension of time or fix any limit of time within which the mortgage was to be given. It was simply to be put in force in case at any time the creditors so demanded, and there was obviously a scheme to take the agreement and not enforce it for sixty days, and then set up if the security after being given were attacked, that they had taken it in pursuance of an agreement made more than sixty days prior. They further said that the Courts were not bound to apply any equitable rule giving a retrospective view to the mortgage and treat it as if made when the agreement was made,

(*h*) *Re Tunstall* (1879), 13 C.D. 102; *Ex p. Kilner* (1879), 13 C.D. 245.

(*i*) *Jones* v. *Kinney* (1884), 11 S.C.R. at p. 719.

(*j*) *Jones* v. *Kinney* (1884), 11 S.C.R. 719.

(*k*) *Kerry* v. *James* (1894), 21 A.R. at p. 341.

(*l*) *Breese* v. *Knox* (1887), 24 A.R. 203. And see *Montgomery* v. *Corbit* (1896), 24 A.R. 311; *Hope* v. *May* (1896), 24 A.R. 24.

contrary to the real intention of the parties, and in order to aid the creditors in their scheme to defeat the purposes of the statute.

They also laid down that the doctrine of pressure is not applicable to a case of this kind, where an agreement is secured at the time when both parties were aware of the existence of insolvency, and that it would be most dangerous to hold that such an agreement could be validated by pressure(*m*).

And a security may be validated by such an agreement if the mortgagor believed that by reason of the agreement he was under an obligation to give security, even although he was actually under no such obligation(*n*).

Verbal Agreement Good as Between Parties.—Apart from special legislation, a *bona fide verbal* agreement to give security, even though indefinite in its terms, may avail to rebut the presumption of intent(*o*).

Where, however, as in Ontario, such agreements, if in respect of chattels, are required to be registered to be valid (see R.S.O. chap. 148, sec. 11) as against creditors, it is probable that if not so registered an agreement would not

(*m*) *Breese* v. *Knox* (1897), 24 A.R. 203. In *Stewart* v. *Thompson* (1893), 23 O.R. 503, a young man under twenty-one made an offer of marriage by a letter to a young woman and in the letter promised, if she would marry him, that he would give her all the property he had, describing it simply as "my farm" and naming the township in which it was situated. The young woman accepted the offer unconditionally by letter. The marriage took place and a conveyance was executed of the property to her. Subsequently the parties destroyed the letters, but notwithstanding this, it was held that the letters formed an antenuptial contract enforceable in spite of their destruction, upon satisfactory evidence of their contents being given, and that such contract was sufficient to negative the existence of intent to defeat creditors. See also *Goulding* v. *Deeming* (1888), 15 O.R. 201; *McRoberts* v. *Steinhoff* (1886), 11 O. R. 369; *Kerry* v. *James* (1894), 21 A.R. 338; *Smith* v. *Fair* (1895), 11 A.R. 755; *Robins* v. *Clarke* (1880), 45 U.C.R. 362; *Brayley* v. *Ellis* (1882), 1 O.R. 119; and *Boustead* v. *Shaw* (1879), 27 Gr. 280.

(*n*) *Re Tweedale*, [1892] 2 Q.B. 216; *Re Vautin*, [1900] 2 Q. B. 325.

(o) *Webster* v. *Crickmore* (1898), 25 A.R. 97.

avail for any purpose, evidentary or otherwise, to the prejudice of a creditor, the statute having rendered it "absolutely void" as against creditors. It cannot be overlooked, however, that such an unregistered agreement is valid between the parties, and as between them enforceable. This being so, it is possible that such an agreement might be considered as evidence of good faith in making a transfer pursuant to it(*p*).

The registration of such an agreement, it may be added, does not in any way validate or protect an agreement which would itself be void as a preference(*q*).

Equitable Title Co-Exists With Legal Title Under Mortgage.—Where an agreement to give a chattel mortgage is duly made and registered if required to be registered and subsequently a mortgage is made in pursuance of the agreement and duly registered, the giving of such mortgage whereby the legal title becomes vested in the mortgagee does not revest in the mortgagor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee may rely on it where the mortgage is ineffectual for any reason(*r*).

"The chattel mortgage was intended merely to clothe the mortgagee with the legal title and vest in him the legal property in the goods. The equitable title continued as it was before, not having for a moment revested in the debtor and therefore although the legal mortgage may have been ineffectual for some reason, it could not impair the previous title and even if the mortgage is void as against an execution creditor the agreement is still valid and operative and a good security for the debt of the mortgagee."

(*p*) See *Webster* v. *Crickmore* (1898), 25 A.R. at p. 99; and compare *Bertrand* v. *Parkes*, 8 Man. R. 175.

(*q*) *Breese* v. *Knox* (1897), 24 A.R. 203.

(*r*) *Fisher* v. *Bradshaw* (1902), 4 O.L.R. 162.

Conveyance of Debtor's Whole Property.—In England it is clear that a transfer of a debtor's whole property without any present equivalent or substantial consideration, would be treated as a fradulent assignment, and therefore as an act of bankruptcy, whether made under pressure or not. The distinction taken between the effect of a conveyance of part and of the whole of the debtor's property seems to have been this; where he retained a substantial portion of his effects after making the conveyance complained of, no absolute presumption could be raised against him that he did not intend to pay all his creditors out of the profits of what he retained; but where he retained nothing he must be taken to have made the conveyance with the necessary intention of defeating and delaying his other creditors, for no other result could follow from his action (*s*).

Ontario Decisions Differ.—It has been thought that under our law a conveyance made with intent to give one creditor a preference over the others is fraudulent; that a conveyance made in Ontario by a debtor whereby he strips himself of everything in favor of one creditor, who gives him no present equivalent has the same necessary result as in England, viz., to prevent the other creditors from recovering any portion of their claims, and must equally here as there be taken to be made with the intent that this result shall follow. On this principle, it has been thought that there is no reason why, although we have no bankruptcy legislation here, we should not adopt and apply the line of decisions referred to, nor why having adopted from the English, and followed the farthest point to which its authors carried it, the unsatis-

(*s*) See the judgment of Jervis, C.J., in *Graham* v. *Chapman* (1852), 12 C.B. 85. See also *Wilson* v. *Day*, 2 Burr. 827; *Newton* v. *Chantler* (1806), 7 East 138; *Siebert* v. *Spooner* (1836), 1 M. & W. 714; *Woodhouse* v. *Murray* (1867), L.R. 2 Q.B 634; *Philps* v. *Hornstedt* (1875), 1 Ex. D. 62.

factory and artificial doctrine that pressure is the only proper test of a debtor's intention where he has transferred only a part of his property, we should take it up again where they have abandoned it for more reasonable tests, and should insist on applying it to cases in which they never deemed it applicable, viz., where he has transferred the whole of his property(*t*). These views are accepted in Manitoba and New Brunswick(*u*). But they have not been adopted in Ontario; in fact the opposite view has been taken and the question may be regarded as set at rest for the present in Ontario by the decision of the Court of Appeal in *Davies* v. *Gillard*(*v*). No reasons were, however, given in the judgment of the Court of Appeal in the *Davies* case. In the *Hope* case it was said that the doctrine that a deed which covers substantially the whole of a man's property in consideration of a past debt is an act of bankruptcy without fraud in fact is the question of judicial decision under the administration of the bankrupt laws and finds as such no place in determining the question of validity of the instrument under the Ontario Act(*w*).

(*t*) See *Davies* v. *Gillard* (1891), 21 O.R. 431; *Brayley* v. *Ellis* (1882), 1 O.R. 119.

(*u*) See *Roe* v. *Massey* (1892), 8 Man. R. 126; *McLeod* v. *Wright* (1877), 17 N.B. 68.

(*v*) (1891), 19 A.R. 432; and *Hope* v. *May* (1897), 24 A.R. 16.

(*w*) *Hope* v. *May* (1897), 24 A.R. p. 27. See also *Lomax* v. *Buxton* (1871), L.R. 6 C.P. 107.

CHAPTER XIV.

PREFERENTIAL AND FRAUDULENT CONFESSIONS OF JUDGMENT.

It has been enacted in most of the Provinces that 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(*n*).

This provision first became law in Ontario in 1858, and was enacted at the instance of the mercantile community to remedy to some extent the want of a bankrupt law, by preventing insolvent debtors from preferring one creditor to another, and by compelling, so far as possible, by its provisions, an equal distribution of the estates among all the creditors. While the Act endeavored to prevent the debtor himself when in insolvent circumstances from helping a particular creditor by any act of his own to a portion of his

(*n*) See R.S.O. (1897), cap. 147, sec. 1; N.S., 61 Vict. cap. 11, sec. 1; P.E.I., 61 Vict. cap. 4, sec. 2; N.B., 58 Vict. cap. 6, sec. 1; R.S.B.C. (1897), cap. 87, s. 2.

property, it left open to any such creditor by active proceedings on his part, the debtor being passive, to wipe away the whole estate from other creditors, however just their claims might be(*o*). The original of this provision is found in the Act Respecting Relief of Insolvent Debtors, Consolidated Statutes of Upper Canada, 1859, chap. 26, sec. 17, and was identical with the provisions now generally in force.

Cognovits Valid at Common Law.—As at Common Law a preference given to one creditor was not fraudulent or void, nor was it within the provisions of the Statute of Elizabeth, so it was held that the giving of a *cognovit* or warrant of attorney to a creditor with intent to prefer him was not open to attack. This was held in the case of *Holbird* v. *Anderson*(*oo*). Lord Kenyon, C.J., in giving judgment, said: "There is no fraud in this case, the plaintiff was preferred by his debtor, not with a view to any benefit to the latter, but merely to secure the payment of a just debt to the former, in such I see no illegality or injustice The words of the Statute 13 Elizabeth do not apply to this case, for this warrant of attorney was given on a good consideration."

Insolvent Circumstances.—This and similar provisions only apply where the debtor is in insolvent circumstances, and this is the first point of proof in a creditor's case. The insolvency necessary to be shown is inability to meet the demands of creditors as they become due and to pay them in full out of his assets realized upon a sale for cash or its equivalent(*p*).

(*o*) *McKenna* v. *Smith* (1862), 10 Gr. 40; *Turner* v. *Lucas* (1882), 1 O.R. 623; see also *Young* v. *Christie* (1859), 7 Gr. 312, and *Davis* v. *Wickson* (1882), 1 O.R. 369.

(*oo*) (1793), 5 T.R. 235.

(*p*) *Warnock* v. *Kloepfer* (1887), 14 O.R. 288, and for a fuller discussion see title "Insolvency of Debtor," p. 107, *supra*.

Confession of Judgment.—A confession of judgment is a voluntary submission to the jurisdiction of the Court giving what might otherwise be obtained by formal proceedings without process, etc.; a formal admission. A judgment by consent is a judgment by confession(*q*).

Cognovit.—Where the defendant in an action has no defence, he may usually give the plaintiffs a written confession of the action upon condition that he shall be allowed a certain time for the payment of the debt or damages, the amount of which is generally agreed upon. This is called a *cognovit* or *cognovit actionem*. It impliedly authorizes the plaintiff's solicitor to do everything necessary to obtain judgment against the defendant, if he fails to comply with the conditions on which it is given. That part of the document which contains the terms on which the defendant is to be allowed to discharge the plaintiff's claim is called the *defeazance*. It must be written on the same piece of paper as the *cognovit*(*s*). *Cognovits* are not now of frequent occurence.

Warrant of Attorney.—Warrant of Attorney originally meant the same thing as power or letter of Attorney(*r*), but at the present time the term is merely a written authority from a person enabling the person to whom it is given, the attorney, to enter an appearance for him in an action and to allow judgment to be entered for the plaintiff, or to suffer judgment to go by default(*s*).

Such a warrant is usually given to secure the payment of a sum of money and is therefore qualified by a condition that it shall not only be put in force if the debt is not paid by a certain day. This condition was expressed in the document called the defeazance which usually contains

(*q*) *Andrews* v. *Deeks* (1850), 20 L.J. Ex. 127.
(*r*) Co. Litt. 52a.
(*s*) Chitty Pr. 950; Archbold Pr. 762.

various stipulations designed to facilitate the execution of the judgment when obtained. The defeazance must be written on the same paper or parchment as the warrant and its execution is required to be attested by a solicitor who must explain the nature of the documents to the debtor before he signs it(*t*). Warrants of Attorney are not now of such frequent occurrence as formerly.

Construction of Section.—These provisions have been strictly construed and it is only when the transactions come within the very terms of the section that they can be impeached under it. Thus where the defendant defended an action while in a second he allowed judgment to go by default, it was held that these proceedings did not offend against the provisions of the section(*u*). The statute avoids a judgment the recovery of which is facilitated by the debtor in order to aid the creditor in gaining priority, but not all such judgments. There are several ways in which the recovery of judgment may be facilitated, other than by confession *cognovit actionem* or warrant of attorney, as by abstaining from making any defence in the first suit, or by entering appearance and making no further defence. Only the first class in terms in prohibited by the statute. It might have been reasonable to prohibit the others also or to have made a general provision against a debtor preferring a creditor where two suits are pending against him, but this was not done and it would be against principle and authority to depart from the common law any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give(*v*). It must be borne in mind that it was not illegal or fraudulent at common

(*t*) Co. Litt. 52a.

(*u*) *Heaman* v. *Seale* (1881), 29 Gr. 278.

(*v*) *Labatt* v. *Bixel* (1881), 28 Gr. 593.

law for a debtor to prefer one creditor to another(*w*), so that if the transaction is to be set aside it must be force of the statutory provision alone.

No Duty to Defend.—The debtor is not bound to delay or defend any suit, and there is nothing fraudulent in his waiving terms of credit(*x*), or in his not insisting on the merger of the debt if there were any such merger(*y*). In fact where the debt is *bona fide* no other creditor can object to the judgment merely because there was a defence which the debtor might have set up and did not(*z*).

Foregoing Credit.—This section does not prohibit a party acting *bona fide* from admitting immediate indebtedness and foregoing a credit, getting in accordance with the terms of the original indebtedness, a certain discount in lieu thereof by taking which the debt becomes immediately payable. Nor is there any law to prohibit a creditor from suing to recover a debt or to prohibit the debtor from suffering judgment by default, when he will have no defence to the action, or to prohibit a creditor having a regular judgment from issuing execution against the debtor's goods with the obvious intention to secure this debt(*a*).

Ritchie, C.J., in giving the judgment of the Supreme Court of Canada in *McDonald* v. *Crombie*, said that the language of the statute is too clear and explicit to admit of any doubt as to its legitimate construction, and that the insolvent in that case not having given any confession, *cognovit* or warrant of attorney, instruments, well known to and understood in the law, nor any instruments, documents or writs whatever, which by the most strained con-

(*w*) *Holbird* v. *Anderson* (1793), 5 T.R. 235.
(*x*) *Macdonald* v. *Crombie* (1883), 2 O.R. 243.
(*y*) *King* v. *Duncan* (1881), 29 Gr. 113.
(*z*) *Bowerman* v. *Phillips* (1888), 15 A.R. 679.
(*a*) *Macdonald* v. *Crombie* (1885), 11 S.C.R. p. 111; *Martin* v. *McAlpine* (1883) 8 A.R. 675. And see *Union Bank* v. *Douglas*, 1 Man. R. 135.

struction of any language could in his opinion be tortured into a confession *cognovit* or warrant of attorney the transaction could not be within the purview of the statute.

Striking Out Defence.—In *Davis* v. *Wickson*(*b*) an action was commenced, and on the same day appearance was entered, a statement of claim delivered and statement of defence delivered, and an order made in Chambers by consent striking out the defence and allowing judgment to be entered, which was done and writs placed in the sheriff's hands, and it was there said that the first judgment was not open to attack. Nor is the withdrawal of a dispute under the Ontario Division Courts Act(*c*).

Result of Decisions.—Judicial decisions have thus, as has been seen, limited the words of the Act to the instruments technically known as such at the time of the passing of the Act(*d*).

Proof of Fraud.—It is not necessary under this section that the confession of judgment, etc., should be "fraudulently" given. The section does not use that word, but the giving of a judgment by confession by a person in insolvent circumstances, voluntarily or by collusion with a creditor with intent to defeat or delay his creditors or to give a preference to one of them over the others is treated by the statute as a fraudulent act.

Pressure.—If the transaction is attacked on the ground of its being a voluntary one, pressure will be a sufficient defence. If, however, the transaction is attacked as collusive, pressure alone cannot be an answer(*e*).

(*b*) (1882), 1 O.R. 369.
(*c*) *Bailey* v. *Bank of Hamilton* (1894), 21 A.R. 156.
(*d*) *Turner* v. *Lucas* (1882), 1 O.R. 623.
(*e*) For a full discussion of the doctrine of pressure see title "Pressure."

Two Sets of Circumstances.—This provision describes two sets of circumstances, under either of which a *cognovit*, etc., given by an insolvent debtor is to be deemed and taken to be null and void. One is if given voluntarily. If the *cognovit* was not given voluntarily so far it is not impeachable. But it may still be void if given collusively and with the intent pointed out by the statute. Its not being impeachable on the one ground cannot save it if impeachable on the other ground. To save it if impeachable on the other ground there should be the conjunctive "and" instead of the disjunctive "or." As it stands the existence of either set of circumstances is sufficient to hold, otherwise would not be giving the words used their ordinary grammatical meaning(*k*).

Collusion.—It is not necessary, however, that the confession should be fraudulently given in order to be collusive. "By collusion" means "by agreement," and it is sufficient that it was pre-arranged(*f*). Where there was a *bona fide* agreement between a creditor and a debtor that the creditor should be allowed to obtain a judgment in priority to a certain other creditor, and a judgment was obtained in this way, it was held that the judgment was null and void under this section, and that executions issued thereon and certificates thereof, registered as a charge against the lands of the debtors should be set aside and cancelled. Not only was the fraudulent element absent, but it was found as a fact that the object of the arrangement was that the debtors should be protected so as to be able to carry on their business and receive moneys to meet their liabilities. And it was also found that the creditor did not intend immediately to enforce his judgment(*g*).

(*k*) *Martin* v. *McAlpine* (1883), 8 A.R. 675.
(*f*) *Gill* v. *Continental Gas Co.* (1872), L.R. 7 Ex. 332.
(*g*) *Edison General Electrical Co.* v. *Westminster, etc., Trawway Co.*, [1897] A.C. 193.

Former View.—It was formerly held that collusion imported a secret agreement made for a fraudulent purpose(*h*). Where the debtor was hopelessly insolvent and this was known to the creditor as well as to himself, and the creditor thereupon brought pressure to bear on the debtor, it was said by the Court that the pressure under such circumstances resolved itself into this, that the creditor suggested an evasion of the law which would enable him to obtain priority and preference over the other creditors and the debtor acquiesced in and adopted that suggestion. This was regarded as a joint act of such a character as to come within the term "Collusion" used in the Statute(*i*). In another case collusion was said to exist where two persons apparently in a hostile position, or having conflicting interests, by arrangement do some act to injure a third person or deceive the Court. Thus, where a person brought an action for penalties against a company by arrangement with them for purpose of protecting them against other actions by persons for the same penalties, it was held that the judgment was obtained by collusion(*j*).

Creditors' Relief Acts.—It is no longer in all Provinces a material advantage to the creditor to be first in obtaining judgment and execution, as Creditors' Relief Acts have been passed and the provisions under discussion are not of as great importance as formerly in those Provinces. Where there are no such Acts these provisions maintain their importance(*kk*).

(*h*) *Batterbury* v. *Vyse* (1863), 2 H. & C. p. 46; *White* v. *Lord* (1863), 13 C.P. p. 292; *Meriden Silver Co.* v. *Lee* (1882), 2 O.R, 451.

(*i*) *Meriden Silver Co.* v. *Lee.*

(*j*) *Girdlestone* v. *Brighton Aquarium Co.* (1878), 3 Ex. D. 137; 4 Ex. D. 107.

(*kk*) R.S.O. (1897), chap. 78; N.W.T. (1893), No. 25; C.O. (1898), chap. 26.

Roach v. McLachlan.—The effect in narrowing the operation of the above provisions of the Creditors' Relief Act of Ontario, sec. 4, and similar provisions, has been considerably limited by the decisions of *Roach* v. *McLachlan*(*l*), and *Breithaupt* v. *Marr*(*m*). In the former case it was held that executions placed in the hands of the sheriff subsequent to the making of a chattel mortgage by the execution debtor affect only the equity of redemption and are not entitled under the Creditors' Relief Act to share with executions placed in his hands prior to the giving of the mortgage. The principle on which this judgment was based is clearly set out by Osler, J.A., in *Roach* v. *McLachlan*(*n*), as the following extract will show:—"The Creditors' Relief Act professes to deal only with the levy of money upon an execution against the property of the debtor. It does not interfere with the rights of mortgagees or the rights of creditors, as they may be affected or altered by a mortgage or sale of such property after the issue of an execution.

"Notwithstanding the execution, the property remains the debtor's property to sell or mortgage it as he pleases. If he does so, it ceases to be his property and becomes the property of the purchasers or the mortgagees subject to the execution. If it is then sold under the execution, it is sold not as the property of the debtor, but as that of the purchaser or mortgagee, and executions which come in subsequent to the mortgage cannot be entitled to share in the proceeds of the sale, for the first execution, being a charge on the property to the full amount of it, the creditor is entitled to enforce it so long as anything remains due thereon. And, therefore, whether the property has been sold or merely mortgaged, if subsequent execution creditors are entitled

(*l*) (1892) 19 A.R. 496.
(*m*) (1893), 20 A.R. 689.
(*n*) At pp. 500-1.

to share *pari passu* in the proceeds of the sale under the first execution, it becomes necessary in order to satisfy it to sell more than would have been required for that purpose had there been no other executions. Every dollar which is applied on such other execution is so much taken from the purchaser or mortgagee, and where the property is, say, of sufficient value to meet the first execution and the mortgage, it is easy to see that by this process subsequent executions are being placed in the same position as the first execution creditor, and gain a priority over the purchaser or the mortgagee which they never had, and which the Acts referred to do not give them. They have no interest in anything but the equity of redemption, and if they wish to reach that they must pay off the first execution and the mortgage, or confine their claim to so much of the proceeds of the sale under the first execution as may represent it."

Collusive Judgments Generally.—Collusive judgments which do not fall within the provisions of the Provincial Acts as preferential may be attacked under the provisions of the Statute 13 Elizabeth, chap. 5, which provides that all writs, judgments and executions made for the purpose and intent of delaying, hindering or defrauding creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, etc., shall be taken to be utterly void, frustrate, and of none effect, any pretence, color, feigned consideration, or any other matter or thing to the contrary notwithstanding(*o*).

Judgment as a Protection.—The provisions of this section might be invoked in the not uncommon case of a party colluding for and procuring a judgment to be obtained against himself with the intention of protecting himself from other creditors or judgments. A case of this kind was

(*o*) See various titles under Part I., *supra*. See *Commercial Bank of U. C.* v. *Wilson* (1868), 14 Gr. 473.

Girdlestone v. *Brighton Aquarium Co.*(*p*). In that case an action was brought to recover a penalty, and while it was pending another action was commenced and carried through to judgment by the intervention of a solicitor employed by the defendants. This was found to be for the purpose of protecting the defendants from any action brought or to be brought in respect of the penalty, and it was held that the judgment recovered was not a bar to an action for the same offence by a different plaintiff. Cotton, L.J., in giving judgment, said: "I am of the opinion that to make an agreement covinous there must be something in it which in the view of the law is deceit. Now, in an action for penalties the plaintiff is ordinarily and in the absence of an agreement between him and the defendant, a person independent of and adverse to the defendant seeking to obtain a judgment as a means of enforcing for his own benefit payment of the penalty. If in such an action, though the plaintiff is apparently independent of the defendant, he has by agreement with the defendant allowed his name to be used as plaintiff and authorized the defendant or his solicitor to instruct a solicitor to act for him, the plaintiff, and there is an agreement or understanding that judgment in an action shall not be enforced, but used as a protection to the defendant against other actions, either already brought, or which may be brought to recover a penalty given by statute, then the action is one in which the company was in substance both plaintiff and defendant, and this agreement or arrangement is an agreement or arrangement that the position of the parties to the action apparently hostile shall be friendly; that the action and judgment which purport to be an attack shall in fact be a protection to the defendant; and agreement that the reality shall be different from what is represented. This is, in my opinion, even in the absence

(*p*) (1879), 4 Ex. D. 107.

of any intent to defraud, deceit, and in my opinion, though the agreement or arrangement be not legally binding, the judgment confessed or obtained under it will have been obtained by covin and collusion, and cannot be relied on by the defendant as an answer to an action in respect of the same matter brought by any other person."

Judgment Fraudulent in Part.—Where a judgment is fraudulent in part as against creditors it is regarded as void against such creditors *in toto*(*r*). This is different from the rule of construction applied to the Assignment and Preferences Act of Ontario. In the case of *Campbell* v. *Patterson*(*s*), it was held that if any part of the consideration in a chattel mortgage is a *bona fide* one, and a part such as would make the transfer void against creditors, the mortgage is not void as a whole, but may be upheld to the extent of the *bona fide* consideration(*t*).

(*r*) *Commercial Bank* v. *Wilson* (1868), 14 Gr. 473; 3 E. & A. 257.

(*s*) (1893), 21 S.C.R. 645.

(*t*) See title "Effect of Setting Aside Transfer."

CHAPTER XV.

INTENT IN PREFERENTIAL TRANSACTIONS.

Concurrence of Intent.—The weight of authority preponderates to the view that in order to work a fraudulent preference to the creditor there must be a concurrence of intent on the part of both debtor and creditor, that is, an intent by the debtor to give, and the creditor to get a preference, and the rule of the Court is not to act on mere suspicion, in the absence of direct affirmative evidence of fraud, but only on controlling circumstantial evidence leading to that conclusion(*e*). This has been said to be on the principle that if the person taking security be innocent of any fraudulent intent, he cannot be affected by the fact, if it be a fact, that there was a fraudulent intent unknown to him in the mind of the borrower(*f*).

Johnson v. Hope.—In *Johnson* v. *Hope*(*g*) this question was fully discussed. The Court considered that the statute 13 Elizabeth, chap. 5, sec. 6, saves from its operation conveyances, etc., made upon good consideration and *bona fide* to persons not having at the time any notice or knowledge of the fraud or covin. They considered it to be remarkable that there is no similar general provision in the Ontario Act saving transactions entered into without notice or knowledge of the fraud or covin. But in sec. 3 (I) of the Ontario Act, and similar provisions in other Provinces, an exception is extended to persons who are described as

(*e*) *Burns* v. *Mackay* (1885), 10 O.R. 167; *Hepburn* v. *Park* (1884), 6 O.R. 472; *McRoberts* v. *Steinhoff* (1886), 11 O.R. 369; *Ivey* v. *Knox* (1885), 8 O.R. 635; *Lancey* v. *Merchants Bank*, noted in 10 O.R. 169.

(*f*) *Hepburn* v. *Park* (1884), 6 O.R. 472.

(*g*) (1890), 17 A.R. 10.

"innocent purchasers or parties," which, of course, must mean persons without notice or knowledge.

Further, the words *bona fide* are used throughout, and it would seem to follow that the Legislature did not intend to involve persons having neither knowledge nor notice in the disabling and penal consequences of the acts thereby forbidden. They said that it would paralyze trade and mercantile business altogether if transactions entered into in all honesty and good faith and for valuable consideration. with persons apparently solvent and prosperous were liable to be undone upon its being afterwards discovered and proved that such persons were at the time in embarrassed circumstances, or unable to pay their debts in full. Such a construction of the Act would make it a trap and a snare, instead of an enactment salutary and beneficial to the mercantile community. It has always been the policy of the law to protect, as far as possible, persons acting *bona fide* and without notice of fraud or other wrong doing. The Court also laid down that a person who deals *bona fide* with an embarrassed debtor, *i.e.*, without notice that he intends to give a preference, and who at the time of the dealing has no knowledge or notice of his embarrassed condition, is safe from all the consequences enacted by the statute. They said it was hard to imagine how a transaction could be otherwise than *bona fide* with reference to what is forbidden in this statute, if it has been entered into without knowledge or notice of the embarrassments of the debtor. They held finally that the Provincial Statutes are in *pari materia* with 13 Elizabeth, chap. 5, and the 6th section of that Act may be held as applicable to the Provincial Acts so as to protect persons not affected with notice or knowledge of the fraud or covin(*h*).

(*h*) *Johnson* v. *Hope* (1890), 17 A.R. 10; and see *Dana* v. *McLean* (1901), 2 O.L.R. 466; *Gibbons* v. *McDonald* (1890), 19 O.R. 290; *Davies* v. *Gillard* (1891), 21 O.R. 431; (1892), 19 A.R. 432;

Lewis v. Brown.—In *Lewis* v. *Brown*(*i*) it is said that if the jury came to the conclusion either that the debtor was not insolvent, or that the defendant did not know that he was, they would not have much difficulty in finding, and properly finding, that the transfer was not made, to the defendant's knowledge or intent, with intent to defeat or delay creditors; and unless there was knowledge of insolvency, the intent to obtain a preference over other creditors was wanting.

Gibbons v. McDonald.—In *Gibbons* v. *McDonald*(*j*), Street, J., said the principle of this case was that unless notice of the insolvency of the transferor is brought home to the transferee, the transfer is not avoided, thus ignoring the necessity for notice of the *intent* of the transferor. In *Ashley* v. *Brown*(*k*), the Court of Appeal said that as there was in the evidence no proof of notice or knowledge on the part of the creditor of the debtor's insolvency, or of any fraudulent intent on his part, in that respect the principle of *Johnson* v. *Hope* was applicable, and the transaction could be supported.

In *Gibbons* v. *McDonald* (*l*), Chief Justice Hagarty of the Ontario Court of Appeal cast doubt on the decision of *Johnson* v. *Hope* and said the Court did not there intend to adopt the view that want of notice to the creditor of insolvency of the debtor was sufficient to support a preferential transaction. He further said that he did not consider that

Ashley v. *Brown* (1890), 17 A.R. 500; *Hickerson* v. *Parrington* (1891), 18 A.R. 635; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446; *Emerson* v. *Bannerman* (1890), 1 N.W.T. R., part 2, 35. In *Lamb* v. *Young* (1890), 19 O.R. 104, this view was criticized by Armour, C.J., as an "Amendment of the Act made by the Court of Appeal in *Johnson* v. *Hope*."

(*i*) (1884), 10 A.R. at p. 644.
(*j*) (1890), 19 O.R. at p. 293.
(*l*) (1891), 18 A.R. 159.
(*k*) (1890), 17 A.R. at p. 504.

that case called for any decision on that point. His remarks, however, were not expressly concurred in by any of the other Judges.

Gibbons v. *McDonald* was carried to the Supreme Court and the judgment of the Court of Appeal affirmed on the ground that the preference had been induced by pressure. Ritchie, C.J., said, however, that the case of *Molsons Bank* v. *Halter*(*m*), disposed of the present one in which there was "no concurrence of intent on the one side to give, and on the other to accept, a preference over other creditors," inasmuch as there was nothing to show that the defendant was aware of the insolvency of the debtor, and nothing in the evidence to suggest any bad faith or collusion between the defendant and his debtor.

Dana v. McLean.—The most recent Ontario case on the point is *Dana* v. *McLean*(*n*). There a transaction which had the effect of giving a preference by a debtor in insolvent circumstances was under the Ontario Act *prima facie* invalid, as the debtor had within sixty days made an assignment for the benefit of his creditors. The point was thus presented fairly for decision and the Court of Appeal held as the creditors had taken the transfer in perfect good faith and without knowing or believing, or without any reason to know or believe that the debtors were insolvent, the presumption was rebutted and the transaction could not be set aside.

Notice of "Insolvency."—If the creditor then had notice or knowledge of *insolvency*, but acted in good faith, receiving his preference without any participation in the intent of the debtor, the transaction will in Ontario be considered valid. If the creditor has assisted in bringing about the transfer by pressing the debtor, it is clear that he might

(*m*) (1890), 18 S.C.R. 88.
(*n*) (1901), 2 O.L.R. 466.

well be acting and taking the security in good faith(*o*). But if the creditor received a preference from a debtor whom he had not pressed for payment or security, and of whose insolvency he had notice or knowledge, one would think that he must be taken to know or perceive the debtor's intent to prefer him, and that under such circumstances knowledge of insolvency would be almost tantamount to knowledge of intent. Or to put it another way, if the creditor had notice or knowledge of the insolvency he must have known the security voluntarily offered him would have the effect of giving him a preference and so he could not reasonably be acting in good faith in accepting it.

Manitoba Opinion.—This view has not, however, been adopted in Manitoba, and it is not even regarded as necessary to show notice to the transferee of the debtor's insolvent condition. If the transferee had such a knowledge of the debtor's financial position that an ordinary business man would conclude from it that the debtor was unable to meet his liabilities, constructive notice of the insolvency should be imputed to him *prima facie*, he being at liberty to rebut it(*p*).

Inferring Insolvency.—And knowledge of insolvent circumstances may be readily inferred(*q*). The Insolvency Act of New South Wales provided that every payment made by a person before the sequestration of his estate to any creditor on account of any just debt due at the time of the payment shall be deemed a valid payment provided that such creditor shall not at the time of payment have known that the debtor was then insolvent.

(*o*) See *Stephens* v. *McArthur* (1891), 19 S.C.R. at p. 456. And see *Tombins* v. *Seffery* (1877), 3 A.C. p. 236.

(*p*) *Schwartz* v. *Winkler* (1901), 13 Man. R. 493; *Stephens* v. *McArthur* (1890), 6 Man. R. 496; *Colquhoun* v. *Seagram* (1896), 11 Man. R. 339. But see also "Intent in Transfers for Value," *supra*.

(*q*) *National Bank of Australasia* v. *Morris* (1892), 66 L.T. 240; 61 L.J.P.C. 32, [1892] A.C. 287.

The Privy Council construed this by saying that if the creditor who received payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows within the meaning of the Act that the debtor is insolvent.

It appeared that not only had the creditors cause to believe the trader to be insolvent, but that they were seriously uneasy about his debt to them. They had written to their branch office advising that the account should be gradually reduced, and later wrote the debtor requiring him to pay off his debts by instalments.

The local agent of the creditors set up that he did not believe or suspect the debtor to be insolvent, but the Court said that it was sufficient that he knew facts which ought to have shown him clearly enough that the debtor could not but be insolvent(*r*).

(*r*) See also *Segsworth* v. *Meriden Silver Plating Co.* (1883), 3 O.R. 413.

CHAPTER XVI.

Statutory Presumption of Invalidity.

Impeaching Transaction Within 60 Days.—It is provided in most of the Provinces that every transfer of any property of any kind, 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 to or for a creditor, *with intent* to give such creditor an unjust preference over other creditors, shall be void as against the creditors who are injured, delayed, prejudiced or postponed by such transfer, and if any such transfer made to or for a creditor *has the effect of* giving such creditor a preference over other creditors, it shall, with respect to any proceeding taken to impeach the transfer within sixty days thereafter, or if the debtor within sixty days after the transfer makes an assignment for the benefit of creditors, be presumed *prima facie* to have been made with the intent aforesaid, and to be an unjust preference within the meaning of the Act, whether the transfer be made voluntarily or under pressure(*ww*).

In order to fully understand the effect of these provisions and the present state of the law it will be necessary to refer shortly to the course of legislation and decisions on the point.

Preferential Transfers Avoided.—In 1885 the Ontario Legislature passed the Act Respecting Assignments for the benefit of Creditors and included in it the following section, at the same time repealing the Act Respecting Fraudulent Preferences(*x*).

(*ww*) R.S.O. (1897) cap. 147, sec. 2; N.S., 61 Vict. cap. 11, sec. 2; P.E.I., 61 Vict. cap. 4, sec. 3 (a,; N.B., 58 Vict. cap. 6, sec. 2 (a). But see R.S.M. (1903), cap. 8, sec. 41; and see p. 109 *supra*.

(*x*) R.S.O., 1877, cap. 118.

"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."

The main alteration was the addition of the words in italics, "or which has such effect." Under the former enactment it had been held that a concurrence of intent must be shown on the part of debtor and creditor to invalidate the transaction and the doctrine of pressure had been applied in its most rigorous form. The result was that it was a very difficult matter to attack a fraudulent preference with success. The Legislature apparently conceived the idea of making the effect of a transaction the test of its validity, and hence the insertion of the words noted. The old principles were, however, too firmly rooted to be destroyed in this manner. It was at first held by the Courts that it was only necessary to show the insolvency of the debtor and that a preference had been obtained to avoid a transfer(*y*).

Doctrine of Pressure Revived.—The decisions of *Johnson* v. *Hope*(*z*) and *Molsons Bank* v. *Halter*(*a*) soon followed, and the law was practically brought back to where it was before. The former case decided that concurrence of intent

(*y*) *River Stave Co.* v. *Sill* (1886), 12 O.R. 557.
(*z*) (1890), 17 A.R. 10.
(*a*) (1890), 18 S.C.R. 88.

must still be shown, and the latter that the words " or which has such effect " had little or no meaning and made no change in the law(*b*).

Act Modified.—The Ontario Legislature then passed the Act 54 Vict. cap. 20, substituting the present enactment with the omission of the words " *prima facie* " in the third and fourth sub-sections. If transactions had the effect of giving a preference and were impeached, or if an assignment was made within sixty days the transaction was *presumed* to be void, whether made voluntarily or under pressure. If the Legislature intended by this to make the effect the test of validity within the sixty days they were not fortunate in their choice of words. The desired effect would have been produced by saying that the transaction should be void instead of saying it should be presumed to be void. Or if the word had been " deemed " there would have been no difficulty(*c*). It is true that the presumption was at first regarded as an irrebuttable one(*d*) but the most authoritative pronouncement in Ontario is to the contrary. In *Lawson* v. *McGeoch*(*e*) it was said that the intention of the Legislature merely was in that class of cases to cast the burden of proof on the defendant who had thereby gained an advantage and to a limited extent to do away with the doctrine of pressure.

As most of the Provincial Legislatures have now inserted the words *prima facie*, the question is no longer of practical interest.

(*b*) And see *Roe* v. *Massey* (1892), 8 Man. R. 126.

(*c*) *Nunes* v. *Carter*, L.R. 1 P.C. 342. And see judgment of Wilson, C.J., in *Campbell* v. *Barrie* (1871), 31 U.C.R. 279; and also *Davideon* v. *Ross* (1876), 24 Gr. 22.

(*d*) *Cole* v. *Porteous* (1892), 19 A.R. 111.

(*e*) (1893), 20 A.R. p. 474.

Nova Scotia Act.—In the Nova Scotia Act, R.S.N.S., cap. 145, sec. 4, the words *prima facie* have been omitted and the view appears to have been recently adopted by the Supreme Court of that Province that the presumption is an irrebuttable one(*f*).

It need hardly be said the presumption is limited entirely to the case of preferences and does not apply to that part of the Acts dealing with transfers made with intent to defeat, delay or prejudice creditors.

Defence of Pressure.—It has been said in a recent Ontario case that " the object of the Legislature in enacting these amendments was to abolish the application of the doctrine of pressure in support of any transaction having the effect of a preference made within sixty days before an action to impeach it, or an assignment under the Act, but to leave the law untouched as regarded transactions not coming within the sixty days limit.

" It is in substance declared that as regards any transactions with or for a creditor, which has the effect of giving that creditor a preference over other creditors, it shall, if within the sixty days limit, be presumed to have been made with intent to give an unjust preference, and to be an unjust preference although it may have been made under pressure.

" There is, in effect, a declaration that the same presumption shall be made in the case of a transaction made under pressure as in the case of a transaction shown to be

(*f*) *Shediac Boot Co. v. Buchanan* (1903), 35 N. S. 511. The Court there said:—The last words remove from our consideration all the questions so fully discussed in Ontario and in the Supreme Court of Canada in relation to what is known as "pressure" in dealing with such conveyances. When most of these decisions were given the Ontario Act was not similar to ours, but it has since been amended, and they are now almost alike. The words "*prima facie*" which in the Ontario Act precede the word "presumed," have been omitted from ours, and the argument that the "intent" has been made irrebuttable materially strengthened.

But see R.S.M. (1903), cap. 8, sec. 42.

the outcome of the voluntary or spontaneous act of the debtor.

"The presumption is to be made notwithstanding the impeached conveyance, or transfer, was made under pressure. A transfer to a creditor made voluntarily, and a transfer to a creditor made under pressure, are put upon the same footing as regards presumption of intent. The element of pressure is eliminated from the latter transaction as it always is from the voluntary transfer by the very nature of the case. The statute declares pressure to be as nothing against the presumption in the prescribed circumstances.

"The effect of the legislation is that in seeking to displace the intent and to negative unjust preference in a transaction coming within the conditions of these sub-sections pressure is to be left out as a factor"(*g*).

Dana v. McLean.—The statute and case law in Ontario on the point have been summed up by Armour, CJ.O., in *Dana* v. *McLean*(*h*). He says:—"When the transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, if the debtor within sixty days after such transaction makes an assignment for the benefit of his creditors, this circumstance of itself alone raises an implication that the transaction was made with intent to give such creditor a preference over his other creditors or over any one or more of them, but this implication is merely a *prima facie* one arising from that fact alone and may be rebutted by evidence from which the conclusion may be drawn that there was no such intent, but not by evidence that the transfer was made under pressure, and this, in my opinion, is the proper consideration to be placed upon the statute."

(*g*) *Webster* v. *Crickmore* (1898), 25 A.R. 97.
(*h*) (1901), 2 O.L.R. page 470.

Defences When Presumption is Raised.—It being permissible to raise any defence other than pressure within the sixty days, it remains to consider what other defences there are. Reference may be had to the Title "Pressure" in order to see more fully what is included in it, and what evidence can no longer be given if the statutory presumption arises(*a*).

Transfer by Defaulting Trustee.—Thus it is doubtful whether it could be shown in rebuttal that a defaulting trustee had restored trust property actuated by the fear of prosecution, for this has generally been stated to be a species of pressure—the pressure of circumstances, and a proper definition of pressure would include such cases(*i*).

Establishing Another Intent.—Viewed in another light, however, it may be said that all that is sought to be shown in such a case is that the debtor had another intent, namely, to protect himself from disgrace and punishment, and that the question of pressure in the strict sense is not raised. This question has yet to be considered by the Courts.

The same reasoning would apply to cases like *Grant* v. *Van Norman*(*j*), where a solicitor restored clients' moneys to avert being struck off the rolls.

Pre-Existing Agreement.—The creditor may, of course, show that the transfer was in pursuance of a pre-existing agreement(*jj*) clearly made out, if the taking of security has not been postponed to avoid injury to the debtor's credit or to avoid the statutory presumption(*k*).

(*a*) And see title "Preferences Generally," p. 109 *supra*.

(*i*) See this title and *Sharp* v. *Jackson*, [1899] A.C. 419; *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88; *Halwell* v. *Township of Wilmot* (1897), 24 A.R. 628.

(*j*) (1882), 7 A.R. 526.

(*jj*) See this title.

(*k*) *Webster* v. *Cricksmore* (1898), 25 A.R. 97; *Breese* v. *Knox* (1897), 24 A.R. 203.

And the defendant may show that the security was given in the hope that the debtor might thus be able to continue his business(*kk*).

Transferee Having No Notice of Insolvency.—The statutory presumption of the invalidity of the preferential transfer may also be rebutted by evidence that the transaction was entered into and consummated by the transferees in perfect good faith without knowing or believing and without any reason to know or believe that the transferors were at the time in insolvent circumstances, even though they were hopelessly insolvent(*l*).

It has been successfully raised as a defence to rebut the presumption, that a mortgage attacked as a preference was in reality given in substitution for a former one instead of renewing it(*m*).

Defences Where Not Attacked Within Sixty Days.—The doctrine of pressure, of course, may still be invoked to support a transaction impeached as a preference when it is not attacked within sixty days or when an assignment for the benefit of creditors is not made within that time. And where the facts admit of this application the Court is bound to give the creditor the benefit of it where honest pressure has been exercised by him for the settlement of his claim(*n*).

Is the Presumption General?—It does not appear to be clear whether the presumption raised by these enactments is a general one or whether it is limited to cases of pressure.

In *Lawson* v. *McGeoch*(*o*), Maclennan, J.A., took the latter view and said that the presumption was aimed solely

(*kk*) *Codville* v. *Fraser* (1902), 14 Man. 12. And p. 136 *supra*.
(*l*) *Dana* v. *McLean* (1901), 2 O.L.R. 470.
(*m*) *Rogers* v. *Carroll* (1899), 30 O.R. 328. See further Title "Preferences Generally" as to what are not preferences.
(*n*) *Beattie* v. *Wenger* (1897), 24 A.R. 72.
(*o*) (1893), 20 A.R. 464.

at the doctrine of pressure and does not arise where the transaction may be supported on some other ground or in other words that there would be no onus on a creditor seeking to support a transaction on some other ground when it is attacked within the sixty days.

Osler, J.A., in the same case, holds that the presumption is general and that the onus is shifted in every case where the attack or assignment is made within the sixty days. If the presumption is a general one it may presumably be rebutted by showing the non-existence of one or more of those elements which must necessarily have been shown to be present by an attacking plaintiff when the onus was upon him(*p*).

Proceedings, What Are.—The statutes providing for a presumption of intent arising if "proceedings" are taken within a certain time are given a liberal construction.

In *Cole* v. *Porteous*(*a*), it was held that an interpleader issue to determine the rights of a claimant under a chattel mortgage and an execution creditor is a proceeding taken to impeach the mortgage(*b*). And it has been said in Nova Scotia that a levy by the sheriff is the most usual and effective way of testing the validity of a bill of sale of personal property, and is a "proceeding had or taken," within the meaning of the statute, these being very comprehensive words(*c*).

(*p*) To hold the presumption is a limited one is to construe the section as if it read "to be an unjust preference within the meaning hereof if the same be made voluntarily or under pressure but not otherwise."

(*a*) (1892), 19 A.R. 111.

(*b*) And see *Morphy* v. *Colwell*, 3 O.L.R. 314; *Re Perras* v. *Keefer*, 22 O.R. 172.

(*c*) *Shediac Boot Co.* v. *Buchanan* (1903), 35 N.S. 511. See also *Gignac* v. *Iler* (1898), 29 O.R. 147. As to what are proceedings, see also *Re Perkins Co.*, 7 Ch. D. 371; *Daily* v. *Burke*, 28 Ala. 328; *Queen* v. *London, Etc. R. Co.*, L.R. 3 Q.B. 170; *Morewood* v. *Miller*, 7 N.Y. p. 320; *Wilson* v. *Allen*, 3 How. Pr. 369; *Hine* v. *Belden*, 27 Conn. 384; *Hogan* v. *Hoyt*, 37 N.Y. 300; *Gordon* v. *The State*, 4 Kans. 421; *Cooper v. Garesche*, 21 Mo. 151; *Bonesteel* v. *Orvis*, 31 Wis. 117.

Now it is a settled rule of construction that the statute like the Statute of Elizabeth is to be given the most liberal exposition in the suppression of fraud(*d*). It might be said, however, that a seizure is certainly not an action"(*e*). Nor is it a proceeding to "set aside" a transfer, for no matter how many seizures may be made and carried through to their legitimate conclusion by sale of the assets and disposal among creditors, the transfer must still be a subsisting one and the sheriff would remain liable to an action for damages, provided the parties injured have not waived their rights by acquiescence.

In other words a proceeding to set aside the transaction can only be a proceeding of such a nature that the transaction might or could be set aside in such proceeding. The same reasoning might apply, though perhaps not so strongly to proceedings to " impeach," *i.e.*, call in question the transfer. Further it may be said that a seizure does not call in question but rather ignores the transfer. In regard to the words "had or taken" it might be said that it cannot be sensibly argued that they are apt words applicable to seizure; a seizure is not " had or taken " but " made," though goods are of course commonly said to be " taken " in execution.

Another aspect of the matter is that the Act would not it might be supposed contemplate a proceeding of which the person most vitally interested might be in complete ignorance and of which he is certainly not entitled to any notice. It would be contrary to natural justice that a proceeding to set aside or impeach the title to goods could be taken without notice to the party most deeply interested, viz., the holder of the paper title(*f*).

(*d*) See p. 3 *supra*.

(*e*) See *Lott* v. *Meville*, 9 Dowl. 822.

(*f*) See also as to the application of the *ejusdem generis* rule to this provision, *Ex p. Lloyd*, [1891] 2 Q.B. 231; *Re Jones*, 7 Exch. 586; *R.* v. *Brown*, 17 Q.B. 833.

CHAPTER XVII.

THE DOCTRINE OF PRESSURE.

Pressure.—The operation of the doctrine of pressure has been restricted in some of the provinces by the legislation regarding transactions impeached within sixty days(*o*). These enactments have not yet been fully worked out, but it seems clear that pressure can no longer be raised as a defence where proceedings are taken or an assignment made within sixty days from the date of the transfer. At one time it was thought that the intent to prefer must be the sole motive prompting the transfer, and pressure, no matter how desperate the circumstances of the debtor might be, to the knowledge of the creditor, would validate the transaction. The doctrine of pressure had thus well nigh eaten away the substance of the law against preferences.

Not Available Now as Formerly.—This view as will be seen has been modified by recent decisions, and for these reasons the doctrine of pressure does not occupy a position of the same importance now as formerly.

1. *Various Principles.*

General Principles.—It has always been considered as necessary to constitute a preference that the transfer by the debtor or insolvent should be a voluntary one. The actuating or governing or dominant motive must be the debtor's wish to benefit one creditor at the expense of the others. If then the transfer can properly be referred to or is the result of some other motive, it cannot be regarded as a preference. If a creditor acts in pursuance of a contract or otherwise under such circumstances that he cannot have

(o) See Title "Statutory Presumption."

a choice his transfers or payments cannot be said to be the result of preference(*p*).

Where Pressure, Not Voluntary.—If then the debtor merely yields to the more or less urgent request of his creditor for payment or security, it is clear that his act is not a "voluntary" one in the accepted sense. In such a case the preference is said to result from "pressure." The term pressure is not perhaps a felicitous one and has led to a host of decisions as to what is or is not sufficient pressure, although the only question is one of fact, namely, whether the insolvent did or did not act voluntarily(*q*). The effect of pressure is merely to rebut the presumption of an intention to prefer. And whether the preference was due to the demand of the creditor or was voluntarily given by the insolvent is a pure question of fact(*r*).

(*p*) *Vacher* v. *Cocks* (1830), 1 B. & Ad. 145. "Voluntary" is defined as proceeding from or affected by the will in any sense of the word; resulting from or brought about by free will or unrestricted choice; unconstrained by any extraneous force or influence; freely or willingly done; resulting from or done with deliberation and purpose; purposed; intentional; volitional without compulsion. It includes more than volition, it comprehends every spontaneous exercise of the mind.—*Standard Dictionary*. The word "voluntary" comprises a wide range of meanings. It is not necessary, on the one hand, in preferential transactions, that there should be coercion nor is it necessary, on the other hand, to show absolute spontaneity. Compare the question to be determined in each case with that in the law of Contributory Negligence, where it is necessary to arrive at the *causa causans*. Speaking of this, Beven says (2nd ed., p. 175): "Much of the difficulty in fixing the meaning of contributory negligence arises from the ambiguous use of the phrase 'contributing to the injury.' This may indicate any of the whole set of antecedents necessary to produce the effect or that one of them which marks their final completion, and the actual calling into being of the effect. The *causa sine qua non* of an accident is not that upon which depends the legal imputability of the accident. The liability depends not upon that but upon the *causa efficiens*." See also J. S. Mill, Logic, Book 3. chap. 5, title, Universal Causation. And see also judgment of Brett, L.J., *Chartered Mercantile Bank* v. *Netherlands, Etc., Co.*, (1883), 10 Q.B.D. at p. 531. See also *Tomkins* v. *Saffery* (1887), 3 A.C. p. 225; judgment of Cairns, L.J., "I will accept for this purpose the statement of the law that it is the pressure you are to take as the *causa causans* of the payment and not any intention of giving a preference to particular creditors."

(*q*) See *Johnson* v. *Fesemeyer* (1858), 3 DeG. & J. at p. 25.

(*r*) *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88.

If the act was spontaneous on the part of the debtor, and there are no circumstances to rebut the presumption which arises from the act having been purely voluntary on his part, the jury should be told to infer that the preference thus given was fradulent and wrongful. But if there are circumstances by which the presumption may be rebutted, these circumstances, whatever they may be, are for the consideration of the jury, and cannot properly be withdrawn from them(*s*).

Underlying Principle.—As every creditor has a right to go to his debtor and get his debt, if he does so *bona fide*, the law regards a transfer made in consequence of his importunities as induced by a desire to satisfy a just demand, and not by a wish to defraud other creditors(*t*).

The ground of all the decisions respecting pressure appears to be that a transaction is not voluntary when it originates in the will of the creditor at whose instance it is done, and not in the will of the debtor who only yields to the solicitation of his creditor, and it is not done with intent to prefer, etc. If the motive is to escape the pressure which is exercised or even to comply with a *bona fide* demand there is no intent to prefer one creditor to another even though that may be the necessary and obvious effect of what is done(*u*).

(*s*) *Bills* v. *Smith* (1865), 6 B. & S. p. 321.

(*t*) *Strachan* v. *Barton* (1856), 11 Ex. 647.

(*u*) *Per* Patterson, J., *Davidson* v. *Ross* (1876), 24 Gr. at 64.; approved of in *Whitney* v. *Toby* (1854), 6 O.R. 54. And see generally *Royal Canadian Bank* v. *Kerr* (1870), 17 Gr. 47, 55; *McWhirter* v. *Thorne* (1869), 19 C.P. at 309; *Marsh* v. *Sweeney* (1875), 2 Pugs. 445; *Campbell* v. *Barrie* (1871), 31 U.C.R. 279; *Archibald* v. *Haldan* (1871), 31 U.C.R. 295; *McFarlane* v. *McDonald* (1874), 21 Gr. 319; *Keays* v. *Brown* (1875), 22 Gr. 10; *Payne* v. *Hendry* (1873), 20 Gr. 142; *Clemmow* v. *Converse* (1869), 16 Gr. 547; *Davidson* v. *McInnis* (1875), 22 Gr. 217; *Newton* v. *Ontario Bank* (1868), 15 Gr. 283; *City Bank* v. *Smith* (1869), 20 C.P. 93; *Rowe* v. *Smith* (1868), 15 Gr. 344; *Allan* v. *Clarkson* (1870), 17 Gr. 570; *Adams* v. *McCall* (1866), 25 U.C.R. 219; *Tuer* v. *Harrison* (1864), 14 C.P. 449; *Harman* v. *Fishar* (1774), 1 Cowp. 117; *Hunt* v. *Mortimer* (1829), 10 B. & C. 44; *Vacher* v. *Cocks* (1830), 1 B. & Ad. 145; *Bills* v. *Smith*

Degree of Pressure Necessary.—By a long series of decisions it has been settled that no particular degree of pressure is required. A mere honest request if proved to have operated on the debtor's will is sufficient(*v*).

Pressure by Member of Class.—Where a transfer is made or a preference given to such creditor together with certain other creditors being only part of those having claims against the insolvent, the pressure will not inure to the benefit of such class, but only to the creditor who actually made the demand(*w*).

Similarly in *Ex p. Saffery*(*x*), it was held that an

(1865), 6 B. & S. 314; 34 L.J.Q.B. 58; *Alderson* v. *Temple*, 4 Burr. 223; *De Tastet* v. *Carroll* (1815), 1 Stark. 88; *Thompson* v. *Freeman* (1786), 1 T.R. 155; *Cosser* v. *Gough*, *ib.* 156; *Ex p. Scudamore* (1796), 3 Ves. 85; *Stevenson* v. *Wood* (1805), 5 Esp. 200; *Mavor* v. *Croome* (1823), 1 Bing. 261; *Rust* v. *Cooper* (1777), Cowp. 629; *Hartshorn* v. *Slodden* (1801), 2 B. & P. 582; *Smith* v. *Payne* (1795), 6 T.R. 152; *Crosby* v. *Crouch* (1809), 11 East 256; *Morgan* v. *Brundrett* (1833), 5 B. & Ad. 289; *Fidgeon* v. *Sharpe* (1814), 5 Taunt. 539. See *Troup* v. *Brooks* (1830), 4 C. & P. 320; *Wainwright* v. *Clement* (1838), 4 M. & W. 385; *Mogg* v. *Baker* (1838), 4 M. & W. 348; *VanCasteel* v. *Booker* (1848), 2 Exch. 691; *Belcher v. Prittie* (1834), 10 Bing 408; *Johnson* v. *Fesemeyer* (1858), 3 DeG. & J. 13; *Strachan* v. *Barton* (1856), 11 Exch. 647 See also *Ex p. Mackenzie* (1873), 42 L.J. Bank. 25; 28 L.T. 486; Ex p. *Trickett* (1873), 21 W.R. 842; 29 L.T.N.S. 73; *Ex p. Winter* (1875), 44 L.J. Bank. 107; 33 L.T. 62; 24 W.R. 68; *Cook* v. *Rogers* (1831), 7 Bing. 438; 5 Moo. & P. 353; *Cook* v. *Pritchard* (1843), 5 M. & G. 329; *Brown* v. *Kempton* (1850), 19 L.J.C.P. 169; *Edwards* v. *Glyn* (1859), 2 El. & El. 29; 5 Jur. N.S. 1397; *Smith* v. *Timms* (1863), 1 H. & C. 849; 9 Jur. N.S. 1285; 32 L.J. Exch. 215; *Pennell* v. *Heading* (1862), 2 F. & F. 744; *Graham* v. *Candy* (1862), 3 *ib.* 206; *Kinnear* v. *Johnson* (1862), 2 *ib.* 753; *Smith* v. *Pilgrim* (1876), L.R. 2 Ch. D. 127; *O'Brien* v. *Johnston*, 2 N. W. Terr. R. 195; *Re McKay*, 1 P.E.I. 278; *Re Ball*, 1 P.E.I. 301.

(*v*) *Davidson* v. *Ross* (1876), 24 Gr. 22; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446; *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88; *Long* v. *Hancock* (1885), 12 S.C.R. 532; *Slater* v. *Oliver* (1882), 7 O.R. 158; *Beattie* v. *Wenger* (1897), 24 A.R. 72. (See further *infra*, p. 192).

(*w*) *Morgan* v. *Horseman* (1810), 3 Taunton 241; *Pulling* v. *Tucker* (1821), 4 B. & Ald. 382; *Tomkins* v. *Saffery* (1877), 3 A.C. 213.

(*x*) (1876), 4 C.D. 555

assignment of part of the property of a man who was unable to meet his engagements to a trustee for a special class of creditors is not prevented from being a fraudulent preference by any amount of pressure.

Dominating Motive.—The question whether the preference was due to the *bona fide* pressure of the creditor, or was a voluntary one, or, to put it in other words, the question of what was the dominating or governing motive impelling the transfer, is one of fact, and where the matter is tried by a jury it is for the jury and not for the Judge to determine(*y*).

The rule was stated by Cockburn, C.J., in the case of *Bills* v. *Smith*(*z*): "If the act was spontaneous on the part of the debtor and there are no circumstances to rebut the presumption from the act having been purely voluntary on his part, the jury should be told to infer that the preference thus given was fraudulent and wrongful; but if there are circumstances by which the presumption may be rebutted, these circumstances, whatever they may be, are for the consideration of the jury and cannot properly be withdrawn from them.

Co-Existence of Pressure and Desire to Prefer.—The mere fact that there has been pressure will not render valid an otherwise invalid transaction if it appears that the preference was given not on account of pressure but rather from a desire on his part to prefer that particular creditor(*a*). And conversely even though the debtor be desirous

(*y*) *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88; *Ex p. Taylor* (1886), 18 Q.B.D. 295; *Long* v. *Hancock* (1885), 12 A.R. 137; *Brayley* v. *Ellis* (1884), 9 A.R. 565; *Bank of Toronto* v. *McDougall* (1865), 15 C.P. 475.

(*z*) (1865), 6 B. & S. 314.

(*a*) *Cook* v. *Pritchard* (1843), 5 M. & G. 329; *Marshall* v. *Lamb* (1843), 5 Q.B. 115; *Vancasteel* v. *Booker* (1848), 2 Ex. 691; *Cook* v. *Rogers* (1831), 7 Bing. 438; *Kinnear* v. *Johnston* (1862), 2 F. & F. 753; *Thornton* v. *Hargreaves* (1806), 7 East 544.

of preferring a particular creditor, if in making the transfer he was not acting as a free agent, or if there was some other dominant motive, the transaction can be impeached. And if the transfer was clearly given with reluctance on the part of the debtor, who only consented after continuous pressure on the part of the creditor it is clear that the intention was not to prefer, but rather to escape the creditor's importunity(*b*). In short although there is pressure there may still be fraud and resulting invalidity in the transaction, and even though there is no pressure, that in itself is not conclusive evidence of fraud(*c*).

Debt not Due.—Pressure may be validly exercised, although the debt has not yet matured or become due, and the fact that it is not due is only a circumstance to be taken into consideration by the jury in determining the dominating motive or the *bona fides* of the pressure (*d*).

In *Powell* v. *Calder*(*d*), it was said that the fact that the debt was not all due when security was taken was a fact which of itself might not invalidate the security, but taken in connection with other facts gave strong ground for questioning the good faith of the transaction.

Pressure by Surety.—Pressure may be sufficient to support a transaction although it does not proceed from the immediate creditors themselves, but from sureties or guarantors of the debtor. A request by a surety or guarantor that the money for the payment of which he is ultimately responsible may be paid over by the debtor to the creditor,

(*b*) *Brown* v. *Kempton* (1850), 19 L.J.C.P. 169; *Crosby* v. *Crouch* (1809), 11 East 256; *Graham* v. *Candy* (1862), 3 F. & F. 206; *Slater* v. *Oliver* (1882), 7 O.R. 158.

(*c*) See *Cook* v. *Rogers* (1831), 7 Bing. 438; and *Bills* v. *Smith* (1865), 6 B. & S. 314.

(*d*) *Cook* v. *Rogers* (1831), 7 Bing. 438; *Roe* v. *Smith* (1868), 15 Gr. 344; *Crosby* v. *Crouch* (1808), 11 East 256, at p. 260; *Powell* v. *Calder* (1885), 8 O.R. 505; *Clemow* v. *Converse* (1869), 16 Gr. 547; *Strachan* v. *Barton* (1856), 11 Ex. 647.

prevents such payment by the debtor from being a voluntary payment, just as much as the request by the creditor himself(*e*). And it is not necessary that the surety himself should be threatened by proceedings on the part of the creditor in order to justify pressure by the surety(*f*).

Pressure by Director of Company.—A director while he holds office as a director cannot properly exercise pressure. Who is he to press? He has really to press himself to pay himself. The matter does not admit of being stated. The only way in which a director can exercise pressure is by ceasing to be a director, and then when he has done that he may require the directors to pay his money and press them to do so(*g*).

Pressure Intervening.—It was held in one of the earlier cases that, where pressure intervened before a debtor had carried out his intention of preferring a creditor, the transaction being afterwards completed could not be regarded as a preference(*h*).

This decision, however, could hardly be considered good law in the light of recent decisions in regard to the question of dominant motive (*i*).

Situation of the Debtor.—The motives and intentions of the insolvent may be material or immaterial, or, to speak accurately, may be more or less material according to his situation, to the nature of the threat and the degree of urgency by the creditor(*j*).

(*e*) Per Lord Campbell, in *Edwards* v. *Glyn* (1859), 2 El. & El. p. 46.

(*f*) *Thompson* v. *Freeman* (1786), 1 T.R. 155; *Morphy* v. *Colwell* (1902), 3 O.L.R. 314.

(*g*) Per Lord Romilly, in *Gas Light Improvement Co.* v. *Terrell*, L.R. 10 Eq. 176.

(*h*) *Bayley* v. *Ballard* (1808), 1 Camp. 416.

(*i*) For which see *infra*, p. 198. And see also *Cook* v. *Rogers* (1831), 7 Bing. at p. 446.

(*j*) *Cook* v. *Rogers* (1831), 7 Bing. at 449.

Threats on the part of a creditor are strong circumstances to show that the payment ensuing is not voluntary; but if the party be not placed in a better situation by yielding to the threats, or if he disclose such a reason for the preference that the threats could obviously have produced no perceptible effect upon his mind, those are circumstances which afford a strong inference the other way(*k*).

Inquiry With Which Party Arrangement Originated.—In considering whether the act in question is voluntary, it may be material to see from which party the proposition originated, whether from the insolvent or from the creditor.

Where the act is required to be done by the creditor, it is not upon any fair interpretation of the words referrable to any supposition of favor and preference exercised on the part of the insolvent, but to urgency and importunity implied on the part of the person obtaining the security(*l*).

The fact that the first proposition of preference originates with or proceeds from the debtor shows an inclination on his part which may give rise to a strong inference of intent (*m*).

(*k*) *Cook* v. *Rogers.*

(*l*) Per Lord Ellenborough, *Crosby* v. *Crouch* (1808), 11 East 260. And see *Amherst Boot Co.* v. *Sheyn*, 2 N.B. Eq. 236.

(*m*) See *Singleton* v. *Butler* (1800), 2 B. & P. 283; *Whitney* v. *Toby* (1884), 6 O.R. 54. In this latter case the question of whether the inquiry originated with the debtor or with the creditor was discussed. The debtor went to a creditor and asked him to procure discounts which the creditor agreed to do on condition that he should be allowed to retain part of the proceeds of the paper and apply it to the indebtedness to himself and several other creditors whom he represented. This arrangement was carried out, and certain security on chattels was transferred as part of the arrangement to the creditor. The transfer of the securities was impeached as a fraudulent preference, but it was held that inasmuch as the idea of the transfer was proposed by the creditor, and he and not the debtor was the originator of the scheme resulting in a preference, the transfers were not made voluntarily and with intent to give such creditors a preference over the other creditors, and accordingly could not be set aside. The principle of this case does not appear to have been widely adopted, nor in fact does the decision seem to warrant its general adoption.

If, on the other hand, it be established that the scheme originated in the will of the debtor, then the transaction may be generally invalidated, even though the idea were taken up and pressed to its ultimate conclusion by the creditor(*m*).

Tomkins v. Saffery.—The case of *Tomkins* v. *Saffery* (*o*) might be considered in this connection. There the debtor, as a member of the Stock Exchange had, in pursuance of the rules of the Stock Exchange, and as was necessary on the part of any one becoming a member of that Exchange, agreed to hand over his assets in the event of his insolvency, to his stock exchange creditors, thus giving them a preference.

Lord Cairns considered that even in a case of pressure it was clear that the payment by the debtor was a part of the machinery set in motion by himself, when he announced, in compliance with the rules of the stock exchange, that he was a defaulter, and also in accordance with those rules made his stock exchange creditors the persons to judge of the disposition of his property, and surrendered the sum which they required him to pay (*p*).

In *Campbell* v. *Barrie* (*q*) the negotiations were begun by a letter from the creditor to the insolvent to call and arrange matters the next time he was in. The negotiations resulted in a security being given, and it was held that the insolvent could not be said to have acted voluntarily.

In certain cases it may appear that the debtor was the originator of the scheme but on examination that this is so only in a qualified sense.

(*o*) (1877), 3 A.C. 213.

(*p*) See p. 225. See also *Clarkson* v. *Toronto Stock Exchange* 13 O.R. 213; *Singleton* v. *Butler* (1800), 2 B. & P. 283; *Mogg* v. *Baker* (1838), 4 M. & W. 348; *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88; *Ex p. Hall* (1882), 19 C.D. 580.

(*q*) (1871), 31 U.C.R. 279.

Thus, where there has been ineffectual pressure, and subsequently the debtor informs the creditor that he will shortly stop payment, any preference following a renewal of the pressure will be regarded as valid(*r*).

And where a debtor gave notice to one person of his pending insolvency, in consequence of which he is called on for payment by another creditor, it was held that the payment given may be properly regarded as made under pressure(*s*).

Relationship of Parties—Solicitor.—In appeal, in *Johnson* v. *Fesenmeyer* (*t*), the question was raised that the relation of solicitor and client, which existed between the parties rendered the transaction altogether void. The counsel for the assignee insisted that if the defendant intended to act in his character of creditor, he ought to have separated himself from his relation as a solicitor.

The Court said, however, that these principles are applicable only to cases of voluntary agreements, in which the client is dealing with his solicitor under the influence of that confidence which he has reposed in him, and upon which he relies for his protection in the transaction. They never could apply to a case where the solicitor assumes the hostile attitude of an urgent and pressing creditor, and where the parties are thus put at arms length. The Court should perhaps scrutinize the transaction more closely where the parties to it are in the relation of solicitor and client, or any other relation of confidence; for greater opportunities are afforded in such cases for colorable transactions.

Friend or Relative.—On the other hand it must be admitted that a slight act on the part of a friend or relative

(*r*) *Re Cooper* (1882), 19 Ch. D. 580.
(*s*) *Belcher* v. *Jones* (1837), 2 M. & W. 258.
(*t*) (1858), 25 Beav. 98.

may be as strong an intimation of what will happen if security is not given as the strongest threat on the part of a stranger (*u*).

The debtor in this case was the father of the pressing creditor. The Court said that there was not the importunity or pressure that a total stranger might make on the father by the son, but every parent would be much more likely to yield to the requests of a son. Urgency depends upon the situation in which each party stands, and a very little act on the part of a son would be as strong towards a father as if a stranger had threatened to arrest him (*v*).

2. *Statement of Doctrine.*

General Statement of Doctrine.—The rule as to pressure may be stated as follows:—Where there is a *bona fide* application for payment or security on the part of some person having the right to apply and the act proceeds from such demand, the desire to satisfy which is the governing motive, the transfer is not voluntary, and therefore not a fraudulent preference. Further, circumstances alone without any demand may constitute pressure, if they are of such a nature as to control the debtor's volition (*w*).

(a). *A Bona Fide Demand.*

Bona Fide Demand.—The pressure must of course be real, not a feigned contrivance between the debtor and creditor, to wear the appearance of pressure, while the real desire and intention is to give a preference (*x*).

(*u*) See *Belcher* v. *Prittie* (1834), 10 Bing. 408.

(*v*) And see *Brayley* v. *Ellis* (1882), 1 O.R. 119.

(*w*) Mr. Justice Osler has said in regard to pressure: "Whenever it is available to support an instrument attacked as being an unjust preference, I consider the law thereon in Ontario to be as it is stated in such cases as *McCrae* v. *White* (1883), 9 S.C.R. 22; *Long* v. *Hancock* (1885), 12 S.C.R. 532; *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88; and *Slater* v. *Oliver* (1884), 7 O.R. 158." See *Webster* v. *Crickmore*, 25 App. R. p. 100.

(*x*) *Clemmow* v. *Converse* (1869), 16 Gr. 547.

But it is a question of fact for the jury to determine whether the pressure was real or only colourable (*y*).

And where the pressure is pre-arranged, simulated, or is a mere sham or piece of collusion, it is absolutely unavailing to support the transaction (*z*).

So where a debtor went to his creditor and told him he was insolvent, and the creditor thereupon brought pressure to bear upon him to pay the claim, it was held that the payment made in consequence was void as a fraudulent preference (*a*).

The case of *Ex p. Reader* (*b*) affords a good illustration of this principle. In that case the creditor suggested to his debtor that the latter should buy goods on credit from other persons, and should, with the proceeds of their sale, pay off the debt due to the firm. The debtor adopted this suggestion, and purchased goods from other parties.

At the time the creditor made the suggestion, he had also said that his firm must have immediate payment of their account. The debtor having procured the goods and sold them, made several payments on account of the debt.

The Court strongly negatived any *bona fide* pressure on the part of the creditors. Bacon, C.J., in giving judgment, said: "The transaction in effect was this, that the creditor said, 'you are in a failing condition; you owe us money, and you cannot pay us; go and rob or cheat someone else, and with the proceeds of your cheating pay us.'"

The pressure must then, be *bona fide* to secure a just claim, and if it is made by the creditor merely with a view

(*y*) *Graham* v. *Candy* (1862), 3 F. & F. 206.

(*z*) *Ex p. Hill* (1883), 23 Chy.D. 695; *Ivey* v. *Know* (1885), 8 O.R. 635; *McPherson* v. *Reynolds* (1857), 6 C.P. 491.

(*a*) *Singleton* v. *Butler* (1800), 2 B. & P. 283; *Strachan* v. *Barton* (1856), 11 Exch. 647.

(*b*) (1875), L.R. 20 Eq. 763.

of obtaining preference over other creditors, it will not validate a security(*c*).

Effect of Knowledge of Insolvency by Creditor.—The doctrine of pressure and the dogma that no preference can be treated as fraudulent unless made by the debtor *ex mero motu*, as will be seen below, have been carried by the cases to their legitimate conclusion that a mere request by the creditor, if acted on by the debtor, is sufficient to take away from the preference any fraudulent character, and that without regard to the condition, however desperate, of the affairs of the debtor at the time, or to the knowledge of the creditor of the state of the debtor's affairs; the principle being that so long as the debtor maintains property he may prefer one creditor to another, by transferring a portion of it to him, provided he does not do so fraudulently, of his own mere notion, with intention to prefer(*d*).

But while the fact that the debtor is insolvent to the knowledge of the creditor does not conclusively negative *bona fide* pressure to secure payment, it may afford evidence that the pressure is collusive or is merely to secure a preference over other creditors(*e*).

Thus pressure by a creditor after the debtor had announced to him that he was hopelessly insolvent and contemplated filing a liquidation petition, was held to be insufficient to protect the transaction from being a fraudulent preference(*f*).

(*c*) *Powell* v. *Calder* (1885), 8 O.R. 505.

(*d*) *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88; 3 DeG. & J. 13; *Davison* v. *Robinson* (1857), 3 Jur. N.S. 791; *Davidson* v. *Ross* (1876), 24 Gr. at pp. 64 and 83 *et seq.*; *Ex p. Topham* (1873), L.R. 8 Ch. 614; *Slater* v. *Oliver* (1882), 7 O.R. 158; *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213; *Long* v. *Hancock* (1886), 12 S.C.R. 532; *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88.

(*e*) *Davies* v. *Gillard* (1892), 19 A.R. 432; and see *Powell* v. *Calder* (1885), 8 O.R. 505; *Ivey* v. *Knox* (1885), 8 O.R. 635; *Meriden Silver Co.* v. *Lee* (1883), 2 O.R. 451; *Beattie* v. *Wenger* (1897), 24 A.R. 72.

(*f*) *Ex p. Hall* (1882), 19 C.D. 580.

It has been contended, indeed, that the doctrine of pressure does not apply at all where the debtor is on the eve of insolvency at the time when pressure is brought to bear. It was said, however, in *Davies* v. *Gillard*, that in all cases cited to support such a principle, the pressure was a mere sham, and not acted on by the debtor(*g*).

And if the fact of insolvency being known to the creditor were to invalidate a transaction of this description, there are very few cases where a security is obtained from a man in difficulties which could stand, because, in fact, when a man is in perfectly good credit and is supposed to be in no difficulties, his creditors are very indifferent about the matter. It is the first creditor who hears that he is in difficulties that immediately applies for security(*h*).

It might possibly now be held, in view of the recent cases on the question of dominant motive, that pressure when the debtor is known by the creditor to be in desperate circumstances would not be sufficient to negative the intent to prefer being the dominant view of the debtor. Notwithstanding that the transfer might not have been made but for the demand of the creditor, it must still be regarded as a preference if it is also the fact that the transfer would not have been made but for the wish to prefer; and the desire to prefer may be the substantial view operating on the will of the debtor, notwithstanding the demand. And if he were in desperate circumstances it would seem reasonable that he would have little to gain by acquiescing in the demand from the standpoint of saving himself, but might be substantially influenced by a feeling of friendliness or

(*g*) See *Davies* v. *Gillard* (1892), 21 O.R. at p. 436; and see *Ex p. Hall* (1882), 19 Ch. D. 580; *Ex p. Griffith* (1883), 23 Ch. D. 69; *Ex p. Hill* (1883), 23 Ch. D. 695; *Ivey* v. *Knox* (1885), 8 O.R. 635; *Long* v. *Hancock* (1882), 7 O.R. 154.

(*h*) Per Romilly, M.R., in *Johnson* v. *Fesenmeyer* (1858), 25 Beav. at p. 94.

for other reasons to give the creditor a preference(*i*).

Use of Name Pressure.—Formerly it was supposed that in order to prevent a transaction being void, as a substantial preference, it was necessary to show something like coercion or oppression on the part of the creditor, and a reluctant yielding on the part of the debtor. The term pressure has been retained, although it is now only calculated to mislead, for, as has been seen, the only question in a case of this description is whether the act is voluntary on the part of the bankrupt(*j*).

(b). *Nature of the Demand.*

The Demand.—It has been said to be impossible to declare the minimum of language or conduct on the part of the creditor which will be strong enough to remove the volition of the debtor(*k*).

A request by a creditor is sufficient, and it is not necessary that there should have been coercion by the creditor or an apprehension by the debtor that he would be in a worse condition by his not making the payment or otherwise complying with the creditor's request. It is enough if the moving cause were the solicitation of the creditor and not the desire of the debtor himself to defeat the general disposition of his property(*l*).

As was said by Bacon, C.J., in *Ex parte Craven*(*m*), a demand or request made by a creditor although not accom-

(*i*) See *Sharp* v. *Jackson*, [1899] A.C. 419; *Re Bell*, 10 Morrell 15; and see also *Ex p. Reader* (1875), L.R. 20 Eq. 763.

(*j*) Per Chelmsford, L.C., in *Johnson* v. *Fesemeyer* (1858), 3 DeG. & J. 24; and see *Strachan* v. *Barton* (1856), 11 Exch. at p. 651; *Davison* v. *Robinson* (1857), 3 Jur. N.S. 791; *Davidson* v. *Ross* (1876), 24 Gr. at pp. 64 and 83 *et seq.*; *Ex p. Topham* (1873), L.R. 8 Ch. 614; *Slater* v. *Oliver* (1882), 7 O.R. 158; *Tomkins* v. *Saffery* (1817), 3 App. Cas. 213; *Long* v. *Hancock* (1886), 12 S.C.R. 532; *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88.

(*k*) *Campbell* v. *Barrie* (1871), 31 U.C.R. 279.

(*l*) *Campbell* v. *Barrie.*

(*m*) (1870), L.R. 10 Eq. 648.

panied by any threat or expressed in anger, or even in urgent terms may still be sufficient to deprive the act of the voluntary character. And Alderson, B., said in *Strachan* v. *Barton*(*n*), "where the application for security is *bona fide* on the part of the creditor, he is not bound to threaten legal proceedings or to use any urgency of a disagreeable nature."

In the case of *Doll* v. *Hart*(*o*), it was said that the pressure must be something more than a request for security in order to render a debt given by way of security valid. It must impress on the debtor the fact that the creditor is in earnest, and that legal steps to enforce payment will be the necessary result of any refusal on his part. This statement, however, is not borne out by the authorities already referred to.

Threat of Suit.—The ordinary case of pressure, however, is a threat by the creditor to take legal proceedings if the debt is not satisfied, and the books are full of illustrations of this kind(*p*).

It has been held in a British Columbia case that the principle does not apply where the legal proceedings, if taken, would not benefit the creditor, as where the debtor would be able to retain the greater part of his estate under a Homestead Act(*q*).

But it is clear that as the debtor might be very injuriously affected by legal proceedings taken in such a case, the demand might still afford a very convincing reason why he should comply rather than allow his insolvency to become public.

(*n*) (1856), 11 Exch. 647, at p. 650.

(*o*) (1890), 2 B.C.R. at p. 34. And see *Brown* v. *Jowett* (1894), 4 B.C.R. 44.

(*p*) See *Brayley* v. *Ellis* (1882), 1 O.R. 119; *Segsworth* v. *Meriden Co.* (1883), 3 O.R. 413; *Slater* v. *Oliver* (1882), 7 O.R. 158; *Cascaden* v. *McIntosh* (1892), 2 B.C.R. 268.

(*q*) See *Doll* v. *Hart* (1890), 2 B.C.R. 32.

Demand Need Not Contemplate Immediate Compliance.—It is not necessary that the demand should contemplate an immediate compliance. In the case of *Reynard* v. *Robinson*(*r*), the demand by the creditor was that he should have his money in a few weeks, and he stated that if this were not arranged he would certainly put it into the hands of an attorney to get it. It was contended that there was no immediate pressure, but the Court said that it was clear the creditor intended to have recourse to legal proceedings, that his letter was calculated to excite the debtor's apprehensions, and that the money being paid in consequence of this letter, was not a voluntary payment.

Postponing Proceedings.—A similar rule will be followed where a creditor has made a demand, but has postponed proceedings for a time. So, where a creditor threatened to wind up a company, but postponed his proceedings in the belief that it would be reconstructed and that payment would in this way be arranged for him, it was held that a transfer made after the reconstruction had proved abortive could be supported on the ground of the previous demand(*s*).

Mistaken View of Creditor's Intention.—And the fact that the debtor was mistaken as to the intentions of the creditor will not make the transfer a voluntary one(*t*). This was the decision of Lord Mansfield, and in giving judgment. he said: "If the debtor under fear of legal process gave a preference, it is evident that he does not do it voluntarily. and although the defendant in this case had taken no steps to secure himself, yet the bankrupt, acting from mistake. was under the same apprehensions of legal process as if the

(*r*) (1833), 9 Bing. 717.

(*s*) *Edison, etc., Co.* v. *Bank of British Columbia* (1896), 4 B.C.R. 460.

(*t*) *Thompson* v. *Freeman* (1786), 1 T.R. 155.

defendant actually had threatened her. So that her executing the warrant of attorney was not a voluntary act, but an act of fear, however groundless that might be."

Threat of Levying Distress.—The threat of levying distress is a sufficient demand to support a transfer made to secure or pay the rent due(*u*).

And it would seem that a *fortiori* the transaction would be good if the creditor had not only made a demand, but had actually proceeded to enforce it by legal process before the preference was given.

Keays v. Brown.—The case of *Keays* v. *Brown*(*v*) seems to be on the border line between a spontaneous act on the part of a debtor and the case of pressure inducing security. There the debtor was purchasing further goods from his creditor, and learned that these goods would not be shipped until the creditor had been interviewed in regard to the state of his overdue account. The debtor thereupon took a list of certain book debts with him, and called upon the creditor, who called his attention to the fact that a large amount was owing, and asked him if he was prepared to pay in cash. The debtor told him that he was not, but had brought certain accounts and notes with him which he was willing to assign.

The Court considered that the facts were sufficient to warrant the debtor in thinking that the goods would not be shipped to him without a payment or reduction of account; and this, coupled with the enquiry as to whether he was prepared to pay in cash or not was regarded as sufficient to

(*u*) *Stevenson* v. *Wood* (1805), 5 Esp. 200; *Mavor* v. *Croome* (1823), 1 Bing. 261.

(*v*) (1875), 22 Gr. 10.

constitute pressure, sufficient to relieve the assignment from the imputation of fraud(*w*).

A demand for payment or security is sometimes accompanied by threats of a criminal prosecution. This, of course, is pressure of the most rigorous description(*ww*).

Origin of Scheme.—If there is a demand or something equivalent to a demand proceeding from the creditor, it is pertinent to enquire how the demand came about, and with whom the scheme originated, for as has been seen, the demand must be *bona fide* made.

(c). *The Right to Apply.*

Right to Apply.—The demand for payment of security must, to be of any avail, proceed from a person who has some right to make it, or his authorized agent(*x*).

Debt not Due.—But the fact that the debt is not due and payable will not be sufficient to invalidate a demand and prevent it affording a defence and being sufficient to

(*w*) *Keays* v. *Brown* (1875), 22 Gr. 10. And see *Troup* v. *Brooks* (1830), 4 C. & P. 320. There a debtor was being sued by two different creditors with whom he wished to compound. The attorney whom he instructed to defend the actions refused to go on unless his costs were paid in cash. It was held that the payment of costs was not a voluntary payment, as the attorney would not go on without it.

(*ww*) For an example of coercion on the part of a creditor see *Tidey* v. *Craib* (1884), 4 O.R. 696. And see also *Brayley* v. *Ellis* (1882), 1 O.R. 119; *Totten* v. *Bowen* (1882), 8 A.R. 602. As to what circumstances constitute sufficient pressure under the present English Bankruptcy Act see *Ex p. London and County Banking Co., Re Brown* (1873), L.R. 16 Eq. 391; *Ex p. Topham* (1873), *Re Walker*, L.R. 8 Ch. 614; *Ex p. Kevan, Re Crawford* (1874), L.R. 9 Ch. 752; *Ex. p. Hodgkin, Re Softley* (1875), L.R. 20 Eq. 746; *Smith* v. *Pilgrim* (1876), 2 Ch. D. 127. As to what is not sufficient pressure, see *Ex p. Halliday, Re Liebert* (1873), L.R. 8 Ch. 283; *Tomkins* v. *Saffery* (1877), 3 A.C. 213; *Re Grimes* (1881), 45 L.T. 80.
And see *infra*, p. 202.

(*x*) *Bannatyne* v. *Leader* (1839), 10 Sim. 230; *Strachan* v. *Barton* (1856), 11 Eq. 647; *Belcher* v. *Prittie* (1834), 10 Bing. 407: and see *Dixon* v. *Baldwin* (1804), 5 East 175; *Edwards* v. *Glyn* (1859), 2 El. & El. 29.

constitute pressure. It is not essential that there should be an immediate power to carry into execution a threat of legal proceedings(*y*).

The fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preferences, and, taken in connection with other facts, may give strong ground for questioning the good faith of the transaction(*z*).

And even although the pressing creditor might not be strictly entitled as of right to enforce his claim, it has been held that security given to him, where the debtor might be seriously embarrassed or injured by the delay or protracted litigation, could be supported on the ground of the pressure exercised(*a*).

McFarlane v. McDonald.—In this case, the creditor claiming the security had certain property of the debtor stored in his warehouse, which he refused to give up until his claim was paid. It was important to the insolvent to gain immediate possession of the grain, and security was given to procure its release.

The Court said that they did not think it material that the warehouseman claimed to hold the grain for certain sums for which possibly he could not legally make it answer. He had certain claims against it, and had possession of it; time was of vast moment to the insolvents, and it might prove better to them to satisfy his claim, even although they might be entitled to the grain before paying for it in full, rather than await the determination of their strict rights by legal proceedings.

(*y*) *Strachan* v. *Barton* (1856), 11 Ex. 647; *Thompson* v. *Freeman* (1786), 1 T.R. 155; *Hartshorn* v. *Slodden* (1901), 2 B. & P. 582; *Crosby* v. *Crouch* (1809), 11 East 256; *Singleton* v. *Butler* (1800), 2 B. & P. 283; *Ex p. Seals* (1864), 10 L.T.N.S. 315.

(*z*) *Powell* v. *Calder* (1885), 8 O.R. 505.

(*a*) *McFarlane* v. *McDonald* (1874), 21 Gr. 319.

(d). *Preference Induced by Demand.*

Actually Inducing Preference.—It is not sufficient to show pressure if it be not also shown that the transfer was induced by the pressure(*b*). If the debtor would not have made the transfer without the creditors coming, he cannot be said to have done it by way of fraudulent preference(*c*). So where previous demands had been made without result and later the insolvent without further solicitation and apparently not as a consequence of the former pressure, made a transfer it was set aside(*d*).

But the existence of an interval between the demand and the giving of security does not necessarily show the transfer to be a voluntary one(*e*).

In the case cited there was an interval of six weeks between the demand and the execution of the bill of sale, and it was held that the interval could not of itself make it a fraudulent preference, unless it could be inferred that the creditor had ceased in his demand.

Whether the preference was given as a result of the pressure or not, is, as has been stated before, a question of fact, a matter which has sometimes been overlooked(*f*).

(e). *The Dominant Motive.*

Governing or Dominant Motive to Prefer.—The motives of men are usually mixed. There is in most cases one dominant motive, but it must be a rare case where an action can be referred to a sole motive. The former doctrine was that unless it can be made clearly apparent to the satisfaction

(*b*) *Van Casteel* v. *Booker* (1848), 2 Exch. 691.

(*c*) *Strachan* v. *Barton* (1856), 11 Exch. 647; *Long* v. *Hancock* (1885), 12 A.R. 137.

(*d*) *Ex p. Halliday* (1873), L.R. 8 Ch. 283.

(*e*) *Ex p. Mackenzie* (1873), 28 L.T.N.S. 486.

(*f*) *Brayley* v. *Ellis* (1884), 9 A.R. 565; *Bank of Toronto* v. *McDougall* (1865), 15 C.P. 475; *Long* v. *Hancock* (1885), 12 A.R. 37; *Ex p. Craven* (1870), L.R. 10 Eq. 648.

of the Court that the debtor's sole motive was to prefer the creditor being paid to the other creditors, the payment cannot be impeached, even although it be obviously in favor of the creditor(*g*). The act of the debtor alone was to be considered; the object and purpose for which the payment was made alone being enquired into, and although it was perfectly legitimate, and in all cases recognized that the surrounding circumstances should be completely investigated, yet if the act could possibly be referred to some other motive or reason than that of giving the creditor a preference over other creditors, the transfer was not regarded as a fraudulent preference(*h*).

Sole Motive of Debtor.—A statement of the old law is that in *McFarlane* v. *McDonald*(*i*),—"unless it can be made clearly apparent and to the satisfaction of the Court which has to decide that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favor of a creditor. The act of the debtor is alone to be considered. The object and purpose for which the payment is made can alone be enquired into, and, although it is perfectly legitimate in all cases requisite that all the attending circumstances should be completely investigated, yet if the act can properly be referred to some other motive or reason than that of giving a creditor paid a preference over the other creditors, then I conceive neither the statute nor any principle of law or policy will justify a Court of law in holding that the payment is fraudulent or void."

In *Bank of Montreal* v. *McTavish*(*j*), the opinion is expressed by Mowat, V.C., that it need not be made out that

(*g*) *Harman* v. *Fishar* (1774), 1 Cowp. 117.
(*h*) *Ex p. Topham* (1873), L.R. 8 Ch. 614.
(*i*) (1874), 21 Gr. at p. 324.
(*j*) (1867), 13 Gr. 395.

the intent to prefer was the debtor's sole intent, or even principal motive in making the assignment, if it was one intent of the debtor. This appears to be the other extreme of the view.

Ex parte Hill.—The case of *Ex parte Hill*(*k*) determined, however, that on a reasonable construction of section 92 of the English Bankruptcy Act it is not necessary to show that the debtor's sole motive was to give a preference to the creditor, the words being, "with a view of giving such creditor a preference over the other creditors." Bowen, L.J., said: "There are only three conceivable meanings which these words can have. (1) They may conceivably mean the case where the debtor has present to his mind, as one view among others, the giving of a preference to the particular creditor. I do not think that this is the true interpretation of the words; (2) Another possible construction of the words is to read them as equivalent to "with the view"—the real, effectual, substantial view of giving a preference to the creditor, the word *a* being equivalent to *the*. I think that this is the correct interpretation; (3) The other conceivable construction is to treat them as equivalent to 'with the sole view or sole motive,' I should prefer keeping to the word 'view,' instead of 'motive,' though in nine cases out of ten the two words may come to the same thing. Is then the expression 'with a view' convertible into 'with the sole view.' My answer is that the latter words are not in the Act, and I do not wish to lay down that the mean the same thing as the words which are in it. It is an exceedingly difficult thing to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced

(*k*) 1883), 23 C.D. 695.

him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It is a very difficult matter to prove that the dominant motive was the sole motive, and I think the true test under section 92 is this: (1) Had the debtor a view of giving a preference to the creditor? and (2) Was that the operative effectual view"?

Sharp v. Jackson.—Lord Shantz said in *Sharp* v. *Jackson*(*l*), in speaking of the dominant motive: "It seems to me that by a stream of authority it has now been settled, whatever may have been the case a number of years ago, that it is necessary to consider what was the dominant or real motive of the person making the preference, and I think the dominant or real motive which led to the granting of this deed was that the bankrupt intended to protect himself."

Re Lake.—And similarly in *Re Lake*(*m*) Rigby, L.J., says: "It is necessary to make out the governing motive in the mind of the bankrupt in the transaction, and to shew that it was to prefer one creditor before the others." (*n*).

Accepted View.—This view has been accepted in England, and notwithstanding the different wording of our Provincial Acts, the English view may be regarded as generally applicable here.

And if the substantial view with which the insolvent entered into the transaction was to prefer a creditor, the transaction would be void, notwithstanding that his motive may have been to do what he thought right(*p*).

(*l*) [1899] A.C. 419.

(*m*) [1901] 1 Q.B. at p. 716.

(*n*) And see *Ex p. Griffiths* (1883), 23 Ch. D. 69; *Smith* v. *Pilgrim* (1876), 2 Ch. D. 127.

(*p*) *Re Fletcher*, 9 Morrell 8.

(f). *Pressure of Circumstances.*

Pressure of Circumstances.—Further, the volition of the insolvent may be controlled by circumstances imperilling his liberty or position; these may as effectually dominate him as the most urgent demands, and have been deemed to constitute pressure even in the absence of any demand by the creditor. And it is even laid down by the highest authority that if a bankrupt under fear of legal process gives a preference it is not regarded as voluntary, no matter how groundless the fear may have been (*p*).

Threat of Criminal Prosecution.—There can be no doubt whatever that a transfer induced by a direct threat of criminal prosecution is not voluntary (*q*).

Mere Fear of Prosecution.—But as to whether a transfer induced by the mere fear of a criminal prosecution was good in the absence of actual threats on the part of any creditor to prosecute was at one time considered doubtful. It was, in fact, held by the Court of Appeal in Ireland that the mere apprehension of criminal consequences would not validate the transfer where the other facts of the case were sufficient to constitute it a preference. In *Ex p. Hibernian Bank* (*r*), Blackburne, L.J., said: "The law necessarily deals with his acts and with his motives only so far as they tend to evince his intention; but I think that the fears or hopes that form the bankrupt's reasons for his resolution cannot alter or qualify its effect, or show the absence of volition in the act which the law holds to be fraudulent. So far from doing so they show his reasons and motives for the illegal act which he has determined to commit." Bu

(*p*) *Sharp* v. *Jackson*, [1899] A.C. 419.

(*q*) *Ex p. Caldecott* (1876), 4 Chy. D. 150; *Clemmow* v. *Converse* (1869), 16 Gr. 547; *Ivey* v. *Know* (1885), 8 O.R. 635. And see *Bank of Toronto* v. *McDougall* (1865), 15 C.P. 475.

(*r*) (1863), 14 Ir Ch. 113.

the law may now be considered as settled, and it certainly seems reasonable to say that if a debtor is acting under the compulsion of exposure to a criminal prosecution, and is above all desirous of protecting himself, he can hardly be held to be intent on preferring his creditor. In other words, he is clearly trying to save himself, and not his creditor.

It was held in *Ex p. Stubbins* (*s*) that if a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anyone else, and does restore the money, it is impossible to hold that such a payment can be treated as a substantial preference of a creditor.

And in the case of *Ex p. Taylor* (*t*) it was said that the substantial motive of the debtor must be looked at. If the substantial motive was to prefer the creditor the payment is a fraudulent preference. If, however, the substantial motive is reparation for a past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference (*u*).

In *Re Prance & Garrard's Trustee* v. *Hunting* (*v*) it was said by Lord Esher, M.R., that it appeared to him obvious that the debtor was not actuated by any feelings of bounty towards those in whose favour the debt was made. He was doing what he did for his own benefit. He wanted to render those particular persons disinclined to proceed to extremities against him. He knew that what he had done must be discovered very shortly; and those persons had a hold upon him, because if they chose to proceed against him the consequences to him might be very serious. He thought that if he put them, as far as he could

(*s*) (1881), 17 Ch. D. at p. 69.
(*t*) (1886), 18 Q.B.D. 295.
(*u*) See *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88.
(*v*) [1897] 2 Q.B. 19.

into the same position as if he had not committed the breaches of trust, that might go in mitigation of the consequences to himself. That being so, it is clear the transfer was made not with the "intention" or "view" or "object" or whatever it might be called of preferring those persons, but for the sole purpose of shielding himself.

Molsons Bank v. Halter.—This view has been adopted by the Canadian Supreme Court, and is clearly and concisely put in the judgment in *Molsons Bank* v. *Halter* (*w*). The Court there says:—"It is held that a mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer or mortgage the character of an unjust preference, and if the pressure of the creditor is thus sufficient to show that such a transaction is not a voluntary preference, how much more effectual for that purpose should be the pressure caused by the consciousness of the trustee, that if he fails to make good his abstractions from the fund he will be subject himself to penal consequences.

In such a case it would never be said that the act of restoration, if impeached as a preference, was voluntary or spontaneous, or made otherwise than under the weight of the heaviest pressure to which the defaulter could be subjected. As I have said, pressure by the creditor in the case of a common debt, divests a transfer of any fraudulent color, and in the case of the trustee, such as we have here, the law itself, by recognizing the restitution of a trust fund as a higher duty enforced by a higher statutory sanction than the payment of an ordinary debt, exerts the pressure which takes away from the transaction the character of a voluntary preference."

And where there was no demand, but as a matter of fact the bankrupt, from a mistaken sense of what was going to be done, thought that legal proceedings of some kind

(*w*) (1890), 18 S.C.R. 88.

were going to be taken, and it was that mistake that induced her to do the thing, it is not a voluntary act; and the word "preference" here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers. Though a creditor has taken no steps to secure himself, yet the bankrupt, acting from mistake, may be under the same apprehensions of legal process as if the defendant had actually threatened proceedings; so that executing a transfer would not be a voluntary act, but the effect of fear, however groundless that might be. It is in fact idle to suggest that you must have an actual threat or the actual pressure of a creditor as a *sine qua non*(*x*).

These cases, it will be noted, are all instances of the wish to avoid penal consequences, but the rule is not to be limited in this way.

So where an order had been made against a solicitor to strike him off the rolls for default in non-payment of clients' moneys, and he subsequently gave securities for the amount, it was held that the existence of the order was a sufficient pressure to prevent the assignment being considered as a preference (*y*).

It is also sometimes apparent that although there is no express threat of resorting to legal remedies on the part of the creditor, it is yet his intention to take proceedings if settlement or security is not given. This may constitute pressure(*z*).

Other Instances.—And if a person in insolvent circumstances executes a deed conveying a portion of his property to one of his creditors in order to get the remainder of his

(*x*) *Sharp* v. *Jackson*, [1899] A.C. 419. See also *Halwell* v. *Township of Wilmot* (1897), 24 A.R. 628.

(*y*) *Grant* v. *VanNorman* (1882), 7 A.R. 526.

(*z*) For examples of pressure of this nature, see *Reed* v. *Ayton* (1817), Holt 503; *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88; *Ex p. Craven* (1870), L.R. 10 Eq. 648; *De Tastet* v. *Carroll* (1815), 1 Stark 88.

property released from the operation of an execution in the sheriff's hands against his property generally, or if in a suit in Chancery by one of his creditors to compel specific performance of a contract relating to a portion of his property, the insolvent should be decreed specifically to perform such contract by conveying to such creditor the particular property in question, in neither of those cases could a creditor of the insolvent assail successfully the conveyance as constituting a preference of one creditor over his other creditors, for the reason that such deeds must be regarded as having been executed by compulsion of the law and for good consideration, and not for the purpose of effecting a voluntary disposition of any part of the grantor's property as a benefit conferred upon one of his creditors over the others(*a*).

(*a*) Per Gwynne, J., *Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88. Gwynne, J., also said that he saw no reason why the English decisions upon a similar question arising under the Bankruptcy Acts were not applicable to the determination of the question under the Ontario Statutes.

PART III.

REMEDIAL PROCEEDINGS.

CHAPTER XVIII.

PROCEEDINGS TO IMPEACH THE TRANSFER.

The Plaintiff.—The creditor if he sue on his own behalf merely must be an execution creditor with an execution in the sheriff's hands(*aa*); and it is well settled that where a creditor brings his action to set aside a fraudulent conveyance without first obtaining judgment and execution against his debtor he must issue his writ on behalf of himself and all other creditors of his debtor(*b*); and in such case his relief in the action will be confined to setting aside the fraudulent conveyance, leaving him to take some independent proceedings if he wishes to have execution against the property fraudulently conveyed(*c*). These proceedings to recover the debt may, of course, be contemporaneous and the two claims may apparently, since the Judicature Acts, be joined in one action(*d*).

(*aa*) *McCall* v. *McDonald* (1885), 13 S.C.R. 247; *Smith* v. *Railroad*, 99 U.S. 401.

(*b*) *Whiting* v. *Lawrason* (1859), 7 Gr. 603; *Longeway* v. *Mitchell* (1870), 17 Gr. 190; *Turner* v. *Smith* (1879), 26 Gr. 198; *Colver* v. *Swayze* (1879), 26 Gr. 395; *Morphy* v. *Wilson* (1879), 27 Gr. 1; *Abell* v. *Morrison* (1876), 23 Gr. 109.

(*c*) *Longeway* v. *Mitchell* (1870), 17 Gr. 190; *Reese Silver Mining Co.* v. *Atwell* (1869), L.R. 7 Eq. 350; *Parkes* v. *St. George* (1884), 10 A.R. 496; *Goldsmith* v. *Russell* (1855), 5 DeG. M. & G. 547; *Oliver* v. *McLaughlin* (1893), 24 O.R. 41. As to the effect of registering a certificate of a decree which when registered gives a charge on the lands see *Credit Foncier* v. *Schultz* (1895), 10 Man. R. 417.

(*d*) *Building and Loan Association* v. *Palmer* (1886), 12 O.R. 1.

A simple contract creditor may also sue on behalf of himself and all other creditors except the defendants in the action(*e*), and that too notwithstanding that the claim is not matured.

Practice in Ontario.—Where the claim is due and payable the practice in Ontario is to give judgment for the recovery of the debt, and to further provide that an account be taken of the claims of all creditors and in default of payment of such claims the property may be sold one year after the date of judgment(*f*).

The same rule applies to proceedings brought under the preference sections of the Provincial Acts as to proceedings under the Statute of Elizabeth(*g*).

Style of Cause.—It is as a matter of form proper that the writ and claim should state that the plaintiffs are suing on behalf of themselves and all other creditors, but this may be done by amendment(*h*). Whether the action be or be not in terms on behalf of all, the Court will see to it that the proper decree is made for the benefit of all creditors(*i*).

Where there has been an assignment for the benefit of creditors, it has in general been provided by the Provincial Acts that the assignee shall have the exclusive right of suing to rescind all agreements, deeds, or transactions in fraud of creditors, or in violation of those Acts(*ii*).

Penalties.—The Statute of Elizabeth provides certain penalties in case of a fraudulent transfer of assets. A claim

(*e*) *McDonald* v. *McCall* (1885), 12 A.R. 593; 13 S.C.R. 247.

(*f*) See *Porte* v. *Irwin*, 8 P.R. 40.

(*g*) *Rae* v. *McDonald* (1886), 13 O.R. 352.

(*h*) *Scane* v. *Duckett* (1883), 3 O.R. 370; *Worraker* v. *Pryer* (1876), L.R. 2 Ch. D. 110; *Re Royle* (1877), L.R. 5 Ch. D. 540.

(*i*) *Wooldridge* v. *Norris* (1868), L.R. 6 Eq. at p. 414; *Hooper* v. *Smart* (1875), L.R. 1 Ch. D. 90.

(*ii*) See Title "Assignee."

by a party aggrieved to recover the moiety of the penalty may be joined with a claim to set aside a fraudulent transfer under that Act. Under that statute the plaintiff is not bound to sue *qui tam*, as he may enter the action in his own name and recover and receive his own moiety of the penalty (*a*).

Joinder of Claims.—That being so there seems, therefore, no reason why a claim by a party aggrieved might not well be joined with a claim to have the transfer declared void. Indeed, it has been held that it is highly convenient that it should be so joined, for it would not be in accordance with the spirit of recent legislation that the same facts should be considered in two separate actions because two remedies are given by the statute upon such state of facts(*j*).

The Grantor.—The grantor is now regarded as a proper party defendant to proceedings to impeach a transfer. Under the Judicature Acts a different practice prevails to that acted upon previously(*jj*). Now all persons interested should be parties, and the record is such that the whole matter may be disposed of at one time. It is no longer correct for a creditor to bring an action against an alleged fraudulent grantee alone, claiming to set aside the conveyance; the debtor and grantor should also be a party(*k*).

Where, however, the action is brought by an assignee for the benefit of creditors to set aside an alleged preferential transfer, the insolvent is not regarded as a proper party(*l*).

(*a*) See R.S.O. (1897), chap. 334, sec. 6; R.S.B.C. (1897), chap. 86, sec. 5.

(*j*) *Millar* v. *McTaggart* (1891), 20 O.R. 617. And see *Bagley* v. *Curtis* (1865), 15 C.P. 366; *Drake* v. *Preston* (1873), 34 U.C.R. 257.

(*jj*) See *Longeway* v. *Mitchell* (1870), 17 Gr. 190.

(*k*) *Gibbons* v. *Darvill* (1888), 12 P.R. 478. But see *Faulds* v. *Faulds*, 17 P.R. 480.

(*l*) *Beattie* v. *Wenger* (1897), 24 A.R. 72; *Leacock* v. *Chambers* (1886), 3 Man. R. 645.

Onus of Proof.—The onus of proof is, of course, on the attacking party in the absence of special enactment. In a number of the provinces, as has been seen, it has been provided that where the transaction is impeached within sixty days, or an assignment for the benefit of creditors is made within the same time, the transaction is presumed to be made with the prohibited intent. The effect of these provisions is to shift the onus of proof from the attacking party to the supporting party(*n*).

It will be necessary for the plaintiff to prove in addition to his judgment and execution, which he must of course prove if he sue as an execution creditor, the nature of the original indebtedness at the time of the impeached transaction(*m*).

Collateral Attack.—In addition to a substantive action at law or in equity to set aside the transfer, it may be attacked collaterally in an action for trespass against a sheriff who has seized and sold under the execution of a creditor(*o*).

The question of validity may also be decided on an interpleader proceeding(*p*).

Or in Ontario by a summary application to the Court under Consolidated Rule 1015(*q*).

Jurisdiction of Inferior Courts.—As to the jurisdiction of inferior Courts in interpleader proceedings it may be said that it does not matter what the value of the goods

(*n*) See title "Statutory Presumption of Invalidity."

(*m*) *Zimmerman* v. *Kemp* (1899), 30 O.R. 465; *Young* v. *Ward* (1897), 24 A.R. p. 150; *Allan* v. *McTavish* (1883), 28 Gr. 539; 8 A.R. 440.

(*o*) *Shediac* v. *Buchanan* (1902), 35 N.S. 511.

(*p*) *Cole* v. *Porteous* (1892), 19 A.R. 111; *Re Thomson* v. *Stone* (1902), 4 O.L.R. 333.

(*q*) See also sec. 202 of the Ontario Division Courts Act. As to evidence of parties see *Morton* v. *Nihan* (1880), 5 A.R. 20; *Merchants Bank* v. *Clarke* (1871), 18 Gr. 594.

seized or the amount claimed may be. Wherever the only process in the sheriff's hands is issued from the inferior Court, the application may be made to the Judge of that Court in which the process was or is to be executed(*r*).

Thomson v. Stone.—In the case of *Re Thomson* v. *Stone*(*y*) the plaintiff had recovered judgment for $92.05 against the defendant in the Division Court of Ontario, and brought an action in the County Court to set aside, as fraudulent as against him, a chattel mortgage for $520. The County Courts of Ontario have jurisdiction in actions by any person seeking equitable relief in respect of any matter whatsoever where the subject matter involved does not exceed $200. The question was presented, the mortgage being for a greater sum than $200 and the value of the goods covered by it being shown to be more than $200, whether the County Court had jurisdiction or not. It was held, however, that the subject matter in an action such as this must be taken to be the amount due on the judgment in respect of which such equitable relief is sought(*z*).

Injunction—General Rule.—As a general rule a simple contract creditor who has no lien on the property cannot enjoin his debtor from selling it, nor will he be allowed to go into equity to invoke its interference to preserve the property until a judgment can be obtained(*a*).

If the property of an honest, struggling debtor could be tied up by an injunction upon mere unadjusted legal

(*r*) *Isbister* v. *Sullivan* (1888), 16 O.R. 418; *Finlayson* v. *Howard* (1850), 1 P.R. 224; *Hunter* v. *Vanstone* (1882), 7 A.R. 750.

(*y*) (1902), 4 O.L.R. 333, affirmed 585.

(*z*) See also *Forrest* v. *Laycock* (1871), 18 Gr. 611; *Dominion Bank* v. *Heffernan* (1886), 11 P.R. 504; *Re Lyons* (1884), 10 P.R. 150. As to right of a creditor to redeem a fraudulent mortgagee, see *Stephens* v. *Boisseau* (1896), 23 A.R. p. 234.

(*a*) *Hepburn* v. *Patton* (1879), 26 Gr. 597; Waite on Fraudulent Conveyances, 3rd Ed., p. 100. And see *Abell* v. *Morrison* (1879), 23 Gr. 109.

demands, he might be constantly exposed to the greatest hardships and grossest frauds, for which the law would afford no adequate remedy; it would deprive him of the means of payment or of defending himself against vexatious litigation, and force him into unconscionable compromises to prevent the ruin of his business pending the controversy(*c*).

Another statement of the rule is that unless a party seeking the extraordinary power of the Court of Equity to grant an injunction has prosecuted his claim to judgment and execution, neither an injunction nor a receiver will be granted at his instance to prevent the alienation of the property by his debtor(*e*).

Exceptions.—Certain exceptional cases, however, appear to have been recognized, as, for instance, where it was charged that there existed a fraudulent intention on the part of the debtor summoned as trustee and an attempt to dispose of his property and put it beyond the reach of creditors for the purpose of defeating the plaintiffs in the collection of any judgment that might be obtained by them in a suit at law(*f*).

And where a bill charged insolvency in the debtor, and averred that he had fraudulently transferred his goods to a third person who was implicated in the fraud, and that the debtor had purchased the goods with intent to defraud the plaintiffs, a receivership was allowed before judgment(*g*).

If there is danger that the property may be removed

(*c*) *Shufeldt* v. *Boehm*, 96 Ill. 560; *Wiggins* v. *Armstrong*, 2 Johns. Ch. (N.Y.) 145.

(*e*) *Uhl* v. *Dillon*, 10 Mo. 500.

(*f*) *Moore* v. *Kidder*, 55 N.H. 488.

(*g*) *Cohen* v. *Meyers*, 42 Ga. 46.

from the jurisdiction of the Court, an injunction will sometimes be granted at the suit of a simple contract creditor (*h*).

Also where goods are sold on credit and such credit has been obtained by false representations and concealment of insolvency, such as would entitle the vendor to rescind, he is not considered as being an ordinary creditor in the United States, but he may disaffirm and obtain an injunction against the disposal of the goods (*i*).

In *Robinson* v. *Pickering*(*j*), Jessel, M. R., refused to continue an injunction granted by Vice-Chancellor Malins in an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate before the creditor had established his right by obtaining a judgment, the injunction having restrained her from dealing with such separate estate.

In *Mills* v. *Northern Railway of Buenos Ayres Co.*(*k*) Lord Chancellor Hatherly said of such a case, that the only remedy for a creditor is to obtain his judgment and take out execution, and that he cannot interfere, as by a bill to keep the assets of his debtor in a proper state of security for the payment of his debt whensoever the time arrives for its payment.

Where, however, a company in voluntary liquidation was alleged to be distributing assets amongst its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under a lease, an injunction was granted on motion by the lessor to restrain the company from so doing(*l*).

(*h*) *Cauffman* v. *Van Buren*, 136 N.Y. 252.
(*i*) Waite, 3rd ed., p. 104.
(*j*) (1881), 16 Ch. D. 660.
(*k*) (1870), 5 Ch. 621.
(*l*) *Gooch* v. *London Banking Association* (1885), 32 Ch. D. 41.

Second Transfer Restrained.—If it is proven that the property has been transferred fraudulently, the Court will enjoin further transfers of it. This principle has been recognized as well in the United States as in Canada. Thus, where the petition alleged that an action was pending by the plaintiff against one of the defendants in which the transfer of certain real estate, which had previously been fraudulently conveyed to another defendant, was attacked, and the defendants were about to dispose of such real estate for the purpose of defeating the plaintiff's claim, it was decided that a temporary injunction, restraining such a sale, was properly continued to the final hearing, notwithstanding the filing of an answer denying all fraudulent intent(*m*).

The Court will anticipate the further alienation of the property and keep it in the hands of the grantee under the impeached conveyance until the plaintiff can obtain a declaration of its invalidity and a recovery of the judgment for the amount claimed(*n*).

And a defendant has been restrained pending suit from encumbering shares of stock sought to be reached by a creditor(*o*).

So also an injunction may in general issue to prevent the wasting of the subject matter of the litigation(*p*).

If there is danger that a negotiable instrument fraudulently or improperly or illegally obtained, or which ought not to be negotiated, will get into the hands of a *bona fide* holder without notice and for valuable consideration to the prejudice of the maker or acceptor, the Court will interfere to restrain the negotiation, assignment or endorsement of the instrument, and will order it to be delivered up(*q*).

(*m*) *Joseph* v. *McGill*, 52 Iowa 127.
(*n*) *Campbell* v. *Campbell* (1881), 29 Gr. at p. 255.
(*o*) *Mackaye* v. *Soule*, 25 N.Y. Supp. 798.
(*p*) *Tessier* v. *Wyse*, 3 Blands Ch. Md. 29.
(*q*) *Hood* v. *Aston* (1826), 1 Russ. 412.

Criminal Liability.—In addition to the civil remedy of setting aside a transaction fraudulent against creditors, and the remedy of proceeding for the recovery of the penalty provided by the Statue of Elizabeth, creditors may also take advantage of the Criminal Code and prosecute their debtor, if he has defrauded them.

Section 368 of the Criminal Code provides as follows: "Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who (a) with intent to defraud his creditors, or any of them;

(i) Makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property;

(ii) Removes, conceals, or disposes of any of his property; or (b) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property."

This section is a re-enactment of sec. 22 of 22 Vict. (Can.), chap. 96.

Having regard to the nature and history of this criminal enactment, which may be traced back to the Statute of Elizabeth, it would seem to be an obvious and complete test of its applicability to inquire whether the transaction in connection with which the criminality is charged is one which would stand an attack in a civil suit, as being fraudulent under the Statute of Elizabeth(*a*).

To enable a creditor to proceed under this section it has been held that it is not necessary that his claim should be due and payable(*b*).

In a Nova Scotia case of *The Queen* v. *Shaw*(*c*) it was said that this section evidently contemplated such an

(*a*) *R.* v. *Shaw* (1899), 31 N.S. at p. 542.
(*b*) *R.* v. *Henry* (1891), 21 O.R. 113.
(*c*) (1899), 31 N.S. 534.

abstraction or doing away with the property as if carried out would completely rob the creditors, or any of them, of any benefit whatever.

It is a difficult matter to draw the line precisely, and to say where or under what circumstances fraudulent dealing with property becomes an offence under this statute, but the Court felt justified in arriving at this conclusion, that an assignment to a trustee, even with preferences such as would practically cut out all but those preferred from getting any benefit, was not a violation of the statute; and the fact that it was made by the debtor in breach of prior agreements to prefer other creditors, made no difference.

In *Reg.* v. *Potter*(*d*) the transfer was made by a debtor to his creditor, who accepted the same in full satisfaction and discharge of his debt, and it was held that the evidence was properly left to the jury to say whether the defendant put the property out of his hands for the purpose of defrauding his creditors.

This case seems to be of questionable authority in the view of the long line of decisions holding that a transfer made to a creditor is not within the Statute of Elizabeth, no matter how strong the intent of the debtor was to defraud his other creditors(*e*).

Defences.—The ground of complaint in setting aside a conveyance rests on statutory tort, which has been defined as a wrong independent of contract.

The question of just or unjust preference has been commonly tried by a jury at law(*f*), and there is nothing in the cause of action arising on this statute which renders it of an inherently equitable character(*g*). But while the

(*d*) (1859), 10 C.P. 39.

(*e*) *Holbird* v. *Anderson* (1793), 5 T.R. 235, and other cases cited *supra* following that leading decision. See also *Shorey* v. *Jones* (1888), 15 S.C.R. 598.

(*f*) *Ex p. Bolland* (1871), L.R. 7 Ch. 24.

(*g*) *Clarkson* v. *Dupre* (1895), 16 P.R. 521.

rights conferred on creditors by these statutes are legal rights the Courts of Equity have always exercised a concurrent jurisdiction with the Courts of common law on the Statutes of Elizabeth on fraudulent conveyances. The principles of decision at law and equity must be taken to be the same(*h*).

The right of a creditor to set aside a transfer under 13 Elizabeth, chap. 5, being a legal right, though the Courts of Equity have always exercised concurrent jurisdiction(*i*), and unless the right to recover the debt is barred by the Statute of Limitations, the legal right to avoid the transaction exists (*j*).

Laches.—Laches is accordingly no defence to an action if the delay has not continued long enough to bar the legal right (*k*). Cases where relief has been sought on merely equitable grounds are not in point. In *Re Maddever*(*l*) the action was not brought for ten years after the death of the grantor. The plaintiff in the action had been aware of the facts during the whole of the time, and had no reason justifying the delay. Baggallay, L.J., said in giving judgment: "I do not see how the right can be lost by mere delay to enforce it unless the delay is such as to cause a statutory bar." These words might lead one to suppose that fraudulent transactions of this nature were within the Statute of Limitations, but as has been said in an Ontario case, they refer to such delay on the part of a plaintiff as

(*h*) May, p. 531; *Hungerford* v. *Earle* (1692), 2 Vern. 261; *Bates* v. *Graves* (1793), 2 Ves. 295; *Russell* v. *Hammond* (1738), 1 Atk. 131; *Hobbs* v. *Hull* (1788), 1 Cox 445; *Adames* v. *Hallett* (1868), L.R. 6 Eq. 468. The defendant may, of course, show that the plaintiff is not a "creditor." See title "Creditors."

(*i*) May, p. 531.

(*j*) *Struthers* v. *Glennie* (1887), 14 O.R. 726.

(*k*) *Trites* v. *Humphreys* (1898), 2 N.B. Eq. 2; *Re Maddever*, 27 Chy. D. 523.

(*l*) *Supra*.

would bar his right to a judgment for the debt, and do not imply that a deed which is by the statute fraudulent as to creditors is validated because it may not be attacked for ten or twenty years; if it is a fraudulent deed it remains so to the end of time, although it might not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors have been barred or extinguished by lapse of years (*m*).

And a subsequent creditor may not only lose his right to impeach the transaction by his debt being barred, but if he has to rely on the existence of a debt which was in existence at the time of the transfer he may lose his right of action by that debt being barred (*n*).

Impeaching Creditor having had Knowledge of Circumstances.—Where a creditor seeking to set aside a transaction was himself cognizant of all the circumstances in regard to it prior to his becoming a creditor, he cannot succeed. He knew that the property transferred was not available to satisfy any liability which might be created (*s*).

And if the deed complained of has been made with the knowledge and assent of a creditor and under his advice, he cannot be heard to complain of it; he is not defrauded by it, and it is binding upon him and upon the grantor, and can only be set aside as against creditors who are defrauded (*t*).

Nor can a creditor take the benefit of the consideration for a conveyance and at the same time attack the convey-

(*m*) *Boyer* v. *Gaffield* (1886), 11 O.R. 571.

(*n*) *Struthers* v. *Glennie* (1887), 14 O.R. 726.

(*s*) *Ferguson* v. *Ferguson* (1884), 9 O.R. 218. See also *Sagitary* v. *Hide* (1688), 2 Vern. 44; *Olliver* v. *King* (1856), 8 DeG. M. & G. 110; *Golden* v. *Gillam* (1881), 46 L.T. 222.

(*t*) *Blackley* v. *Kenny* (1889), 16 A.R. 522; *Gordon* v. *Proctor* (1890), 20 O.R. 53.

ance as fraudulent (*u*). And so, where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company, it was held that they could not attack the conveyance (*v*).

An execution creditor who purchases and takes a transfer of a fraudulent mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgagor, that the grantor was not the owner of the property in question, and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter (*w*).

Certificate of Title.—A somewhat unique case arose in Manitoba where it was sought to take advantage of a certificate of title which by statute was in general conclusive as to the ownership of the property.

Certain lands had been purchased at the tax sale by a judgment debtor with his own money and placed in his niece's name. The niece procured a certificate of title under the Real Property Act of Manitoba, and it was claimed that these certificates were conclusive as to the title of the niece.

The Act, however, provided that a certificate of title is subject to the right of any person to show fraud wherein the registered owner has participated or colluded, the onus of proving such fraud being placed on the person alleging it..

The purchase in the name of the niece being regarded as fraudulent by the Court, she was held to be

(*u*) *Wood* v. *Reesor*, 22 A.R. 57; *Beemer* v. *Oliver*, 10 A.R. 656; *Miller* v. *Hamlin*, 2 O.R. 103.

(*p*) *Rielle* v. *Reid* (1899), 26 A.R. 54.

(*w*) See also on this point *Beemer* v. *Oliver* (1884), 3 O.R. 523; *Peers* v. *Carrall* (1860), 19 U.C.R. 229; *Wakefield* v. *Lynn* (1856), 5 C.P. 410. As to the effect of a misstatement of consideration given by a purchaser, as an estoppel, see *McCarty* v. *McMurray* (1871), 18 Gr. 604.

guilty of constructive fraud as participant in the transaction, and thus brought within the exceptions provided by the statute (*x*).

Settlement of Action.—It is well settled that in an action by a creditor on behalf of himself and all other creditors to set aside a fraudulent conveyance the actual plaintiff may before judgment settle the action on any terms he thinks proper. He may discontinue it, or he may dismiss it, but no other creditors can complain. But after judgment, it enures to the benefit of all. The defendant cannot get rid of it by paying or settling with the actual plaintiff alone. If he should do so any other creditor would be entitled to obtain an order for the carriage of the judgment and to have it enforced according to its terms.

Before judgment no other person of the class is bound to rely on the diligence of the plaintiff in the suit, but may sue on his own behalf. After a decree, however, no second suit is permitted(*y*). If two suits are pending at the same time to impeach the same transaction they may be consolidated or one of them may be stayed to abide the result of the other.

Inferior Courts.—A County Court judgment establishing or setting aside a transaction being the decision of an inferior tribunal of limited jurisdiction cannot act as a bar in respect to the possibility of a subsequent action in a Superior Court (*z*).

(*x*) *Merchants Bank* v. *McKenzie* (1900), 13 Man. 19. See also *Re Massey & Gibson* (1890), 7 Man. R. 172; and *Harris* v. *Rankin* (1887), 4 Man. R. 115; *Merchants Bank* v. *Clarke* (1871), 18 Gr. 594.

(*y*) *Canadian Bank of Commerce* v. *Tinning* (1893), 15 P.R. 401.

(*z*) *Davies* v. *McMillan*, Supreme Court of Canada, May 1st, 1893, Coutlee Dig. p. 113. See also *Fox* v. *Symington* (1886), 13 A.R. 296; *Schamehorn* v. *Traske* (1870), 30 U.C.R. 543. See also *Smith* v. *Doyle* (1879), 4 A.R. 471; *Hanford* v. *Storie*, 2 Sim. & Stu. 196; *York* v. *White* (1845), 10 Jur. 168; *Gillies* v. *How* (1872), 19 Gr. 32.

Right of Action Lost.—The remedies of a person defrauded under the statutes of Elizabeth to elect and avoid a debt as fraudulent may also be barred in either of the following ways:—

(1) By the deed having become for value by a consideration arising *ex post facto* before any steps are taken by that person to impeach it.

(2) The voluntary grantee may have divested himself of the property by a *bona fide* transfer of it for value to a *bona fide* purchaser for value without notice of fraud (*a*).

(*a*) May on Fraudulent Conveyances, 2nd ed., p. 325; *Tennant v. Gallow* (1894), 25 O.R. p. 61, and see next chapter.

CHAPTER XIX.

FOLLOWING THE PROCEEDS WHERE THERE HAS BEEN A SECOND TRANSFER.

Following Proceeds.—It may be said to be a general principle that if the Court can trace money or property, wrongfully obtained, from the party really entitled to it into any other shape, it will intervene to secure it for the true owner or party entitled (*b*).

In the case cited money had been stolen, and the true owner of it was held entitled to a leasehold, furniture and other chattels purchased with the stolen money, and an injunction was granted to restrain the disposition of such property until the hearing.

The principle has been usually applied to the case of trust moneys, but the Courts in this case seemed to consider it applicable to other moneys and other property (*c*).

Common Law Rule.—Where a transferee from a debtor in fraud of creditors has realized the property transferred and received the proceeds in a shape that cannot be earmarked, the general rule before statutory modifications were made was that a creditor who had been thereby defrauded could not make the fraudulent transferee account for the proceeds (*a*). The equitable right of the plaintiff

(*b*) *Martin* v. *McAlpine* (1883), 8 A.R. 675. See also *Merchants Express Co.* v. *Morton* (1868), 15 Gr. 274.

(*c*) See also *Ross* v. *Dunn* (1889), 16 A.R. 552; *Cummings* v. *Taylor* (1898), 28 S.C.R. 337. In the recent English case of *Re Mouat*, [1899] 1 Ch. 831, an insolvent debtor transferred a policy of life insurance with intent to defraud his creditors. The transferee collected the moneys secured by the policy and invested them. It was held that the creditors of the insolvent might reach the moneys so invested.

(*a*) See Statutory Changes, p. 227, *infra*.

in this class of cases was to have any impediment removed or declared invalid which impeded the operation of his writs of execution. So long as the property of his execution debtor remained distinguishable, and so long as no purchaser for value without notice intervened, so long the Court might award relief against that property in the hands of fraudulent or voluntary holders. But where the first holder had sold the property obtained from the debtor and received the proceeds in a shape that could not be ear-marked, there was no jurisdiction beyond the further remedy which the Statute of Elizabeth prescribes, namely, that all parties to fraudulent conveyances or assignments thereunder shall forfeit a year's value of the lands and the whole value of the goods, whereof one half shall go to the Crown and one half to the party aggrieved to be recovered (*d*).

In *Stuart* v. *Tremain*(*e*) the Court said: "The statute declares that the transfer by way of fraudulent preference shall be null and void as against the creditors of the transferor. That means, as is well settled, that the transaction is good as between the parties to it, and is voidable only at the election of creditors. Before the plaintiff is in a position to question the validity of the transfer, the assets have been *bona fide* alienated to a purchaser for value against whom he has no relief. Under the statute the plaintiff's remedy is to have any obstruction removed which impedes the operation of his writs of execution.

"We do not see that the statute entitles him to any further relief, or, indeed, enables the Court to grant any.

(*d*) *Davis* v. *Wickson* (1882), 1 O.R. 369; *Cascaden* v. *McIntosh* (1892), 2 B.C.R. 268. See also *Morwood* v. *South Yorkshire Railway Co.* (1858), 3 H. & N. 798; *Totten* v. *Douglas* (1871), 18 Gr. 341; *Rose* v. *Dunn* (1889), 16 A.R. 552; *Harvey* v. *McNaughton* (1884), 10 A.R. 616.

(*e*) (1883), 3 O.R. 190.

His pursuit of the assets exigible under execution fails when a *bona fide* sale takes place." (*f*)

Where the transferee disposes of the assets in the ordinary course of his business buying new stock in place of the old the property is no longer distinguishable, and usually in such a case the proceeds could not be said to be ear-marked (*g*).

And where a debtor sold his stock in trade to a third party who gave his note for the purchase money and the debtor endorsed the note in favour of a favoured creditor who discounted it with the bank, it was held that as the note had been disposed of to a *bona fide* holder for value no relief could be given (*h*).

The same rule would of course apply if the voluntary transferee had made a settlement in consideration of marriage (*l*).

Labatt v. Bixel.—In the case of *Labatt* v. *Bixel* (*i*) the transferee of certain book debts had made collections, and on the transfer being set aside he was ordered to account for the moneys received in this way. In *Robertson* v. *Holland* this case was criticized as being not in accord with other authorities on the subject. It was said that "no authority is cited in *Labatt* v. *Bixel*, and no case has been cited to us as following it." In *Masuret* v. *Stewart* (*j*) the Court said that the Chancellor who decided *Labatt* v. *Bixel* may have proceeded upon evidence which showed that the

(*f*) And see also *Labatt* v. *Bixel* (1881), 28 Gr. 593; *Martin* v. *McAlpine* (1883), 8 A.R. 675; *Merchants Express Co.* v. *Morton* (1868), 15 Gr. 274.

(*g*) *Rielle* v. *Reid* (1899), 26 A.R. p. 62.

(*h*) *Robertson* v. *Holland* (1888), 16 O.R. 532.

(*l*) *Prodgers* v. *Langham*, 1 Siderfin 134; *Gibson* v. *Bruce* (1843), 5 M. & Gr. 399; *Huguenin* v. *Baseley* (1807), 14 Ves. 273.

(*i*) (1881), 28 Gr. 593.

(*j*) (1892), 22 O.R. p. 300.

collection of the book debts in question there was made after the institution of the suit, and if so, such decision might not be in conflict with any of the other cases.

The attacking creditor has no right to call upon the purchaser for value from the transferee to account for any money still remaining due by him to the fraudulent grantee(*k*).

Masuret v. Stewart.—The case of *Masuret* v. *Stewart*(*m*) has been regarded as a departure from the general principle. In this case the Court really proceeded on the ground that the sale to the first transferee was merely a feigned and colorable one and a scheme entered into when the debtor was to the knowledge of the transferee in insolvent circumstances, and carried out with intent on the part of both to defeat the creditors of the debtor. The trial Judge also found it impossible to reach the conclusion that the transaction was a fair one and intended to pass the property for valuable consideration. The Court in giving judgment said that it appeared that part at least of the specific moneys, the proceeds of the sale by the fraudulent transferee, were in the hands of such transferee at the time of issue of the writ, and ordered the transferee to pay the money into Court forthwith, and failing obedience to such order, that the creditor be at liberty to issue execution so as to enforce the payment of that money into Court to be distributed among the creditors.

Other Cases.—In the case of *Tennant* v. *Gallow*(*n*) *Masuret* v. *Stewart* was discussed and it was said that the Court dealt with that case as an exceptional one, and expressly endeavoured to avoid a conflict with the line of cases holding that the proceeds in the shape of money of a *bona*

(*k*) *Union Bank* v. *Barber* (1898), 12 Man. 166.
(*m*) (1892), 22 O.R. 290.
(*n*) (1894), 25 O.R. 56.

fide subsequent sale cannot be reached by an action. Where it was the intention of the parties that the property should pass, and a subsequent sale was made by the grantee, the property does pass, and under such transmission a *bona fide* purchaser takes and holds it. It is only as against creditors that the transaction is declared void, that is, it is voidable if attacked before the property has so passed to a *bona fide* purchaser.

Cornish v. *Clark*(*o*) has been cited as authority to show that the proceeds of a *bona fide* sale may be followed and reached by creditors, but that was not a case of following the proceeds of such a sale, it was the case of a father in effect settling all his property upon his children in fraud of creditors. There was nothing new in a decree reaching monies so settled or paid in fraud of creditors (*p*).

A distinction has also been drawn between the case where a grantee has transferred the goods for value to a third person before the transaction was impeached, and where they have been transferred after the proceedings have been taken to impeach the transaction. In the latter case the fraudulent transferee is accountable for the proceeds (*q*).

However, if the purchase from the voluntary transferee be not *bona fide* and for value, the transaction may still be set aside (*r*). So, where a person who was insolvent made a voluntary deed to his daughter with the intention of preventing the creditors realizing out of the property, and the daughter subsequently transferred the property to a third party who had full notice of the circumstances, it was held that the whole transaction could be set aside by the father's creditors (*s*).

(*o*) (1872), L.R. 14 Eq. 184.
(*p*) *Tennant* v. *Gallow* (1894), 25 O.R. p. 60.
(*q*) *Osborne* v. *Carey* (1888), 5 Man R. 237.
(*r*) *Buchanan* v. *Dinsley* (1865), 11 Gr. 132.
(*s*) *O'Connor* v. *Bernard*, 2 Jones (Ir. Exch.) 654.

And notice to the transferee that proceedings to impeach the grant to his vendor as a fraudulent conveyance are pending will be sufficient (*t*).

The fact that a grantee of fraudulently conveyed lands has sold part of them to a *bona fide* purchaser will not prevent a decree being made setting aside the conveyance as to the other lands (*u*).

Provincial Acts.—These principles have been altered by some of the Provincial Acts in cases governed by those Acts. In Manitoba, New Brunswick and Prince Edward Island it has been provided that if the person to whom any gift, conveyance, assignment, transfer, delivery or payment invalidated by the statute has been made, shall have sold or disposed of the property which was the subject of such gift, conveyance, assignment, transfer, delivery or payment, or any part thereof, the moneys or other proceeds realized therefor, may be seized or recovered in any actions to set aside the transaction by the assignee as fully and effectually as the property if still remaining in the possession or control of such person could have been seized or recovered (*v*).

The original of these enactments appears to be 48 Vict. (Ont.), chap. 26, sec. 8. These provisions only apply where there has been an assignment, so that if a debtor's assets had been transferred a second time, and he refused to make an assignment, there would be no redress.

The question was raised in the case of *Meharg* v. *Lumbers* (*w*) whether the words "disposed of" are sufficient to describe the collection of book debts, and the Court held that they were. They said that if the transferee were asked

(*t*) *Forman* v. *Hodgson* (1865), 12 Gr. 150.

(*u*) *Leacock* v. *Chambers* (1886), 3 Man. R. 645.

(*v*) R.S.M. (1903), cap. 8, sec. 49; N.B., 58 Vict. cap. 6, sec. 8; P.E.I., 61 Vict. cap. 4, sec. 11.

(*w*) (1896), 23 A.R. 51.

how he had disposed of the book debts he might properly answer that he had collected them.

Accordingly it was held that where an assignment of book debts is set aside as a preference in an action by an assignee for the benefit of creditors, the preferred creditor must pay to the assignee moneys collected by him under the preferential security before the attack upon it. The effect of setting aside the assignment of book debts is that the assignment becomes and is utterly void, and that being so, it follows that the moneys collected by the transferee are the proceeds of part of the property vested in the assignee by force of the assignment, and he is entitled to treat the transferee as holding them in trust for him.

Ontario Act.—A much more comprehensive enactment has been passed in Ontario. It provides that:—

"(1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made shall have sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but in case there is no such assignment, shall exist in favor of all creditors of such debtor(x).

"(2) Where there has been no assignment for the benefit of creditors, and the proceeds are of a character to be seizable under execution, they may be seized under the

(x) 58 Vict., chap. 23, sec. 1.

execution of any creditor, and shall be distributable amongst the creditors under The Creditors' Relief Act or otherwise (*y*).

"(3) Where there has been no assignment for the benefit of creditors, and whether the proceeds realized aforesaid are or are not of a character to be seized under execution, an action may be brought therefor by a creditor (whether an execution creditor or not), on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the said proceeds available for the general benefit of the creditors (*z*).

"(4) This section shall not apply as against innocent purchasers of the property." (*a*)

Beattie v. Holmes.—The construction of this enactment was discussed in *Beattie* v. *Holmes*(*b*). In that case, within sixty days of the making of an assignment for the benefit of creditors, the insolvent transferred to a person in trust for certain of his creditors, a quantity of butter, which was sold, realizing $1,800, and the proceeds were distributed amongst such creditors in proportion to their claims, whereby they acquired a preference. The assignee then sued one of the creditors to recover back the moneys paid him as his share, the amount so sought to be recovered being within the jurisdiction of the Division Court. It was held that the transfer was divisible into as many parts as there were shares, and the Division Court had jurisdiction to entertain the action.

The Court said:—"This sec. 10 of the Ontario Act gives to the plaintiff in his capacity of assignee the right to sue for the proceeds of any of the property of the debtor which has passed into the hands of a third party from one who

(*y*) 58 Vict., chap. 23, sec. 2.
(*z*) 58 Vict., chap. 23, sec. 3.
(*a*) R.S.O. (1897), chap. 147, sec. 10.
(*b*) (1898), 29 O.R. 264.

has obtained from the debtor a transfer of property, if the transfer be invalid against creditors under the provisions of the Act. As applied to a transaction similar to the one in question here, it provides that if the property so transferred is so disposed of or realized or collected by the person to whom the transfer is made, the money or other proceeds may be seized or recovered in any action by any person who would be entitled to seize or recover the property had it remained in the custody of the debtor, and that such right to seize and recover shall belong not only to the assignee for the general benefit of creditors, but in case there is no such assignment shall exist in favor of all the creditors of the debtor.

"Nothing is said about first setting aside the transfer, but the right to recover is given to any one who would be entitled to recover the property if it had remained in the possession or control of the debtor himself.

"The transaction is always invalid as against a creditor choosing to treat it as invalid against him. The invalidity arises not from a judgment of a Court, but from the statute which makes the transaction invalid. The Court merely decides whether the plaintiff in the action is a person who can treat it as invalid, and whether it is a case within the provisions of the enactment. The Court neither makes nor unmakes a contract, it decides upon its existence or non-existence, validity or invalidity. The assignee *sues for money* which, if the transaction is invalid, he is entitled to recover. The question is one between him and the person who has the money or goods."

Conn v. Smith.—In the case of *Conn* v. *Smith* (c) it was sought to extend the provisions of these sections as to following proceeds to the case of a transaction attacked under the Bank Act. It was alleged that certain pledges had been made in respect of which there had been no con-

(c) (1897), 28 O.R. 629.

temporaneous advances, and that the pledges were invalid under sec. 75 of the Bank Act. The Court, however, held that the words "invalid against creditors" should be treated as limited to transactions invalid as against creditors *qua* creditors, and not extended to transactions declared invalid for reasons other than those designed to protect creditors.

The Court said that in interpreting the clause under consideration regard must be had to the context, and to the specific objects of the legislation, of which it forms a part; these are the prevention of fraud upon creditors and the prevention of unjust preferences of one creditor over another by insolvent persons. That is to say, the provisions of these Acts are directed against the acts of persons in insolvent circumstances who may be endeavoring to prevent the proper and equal distribution of their estates amongst their creditors. To seek to extend the provisions of this class of legislation to the Bank Act and to make it applicable to transfers of property which are invalid or voidable for reasons in which the rights of creditors as such are not in any degree involved, is not logical.

CHAPTER XX.

Effect of Setting Aside the Transfer.

Where an order is made setting aside a transfer under the statute, the property becomes subject to claims of all creditors, including the fraudulent transferee, and subsequent creditors participate *pro rata*(*n*).

This doctrine has been arrived at by a liberal construction of the words of the statute, by which transactions are declared void only as against a person whose actions are, shall or might be disturbed, hindered, delayed or defrauded.

As a general rule, where there is more than one mortgage or charge on property, and the first is set aside, the effect of such an order is to accelerate subsequent encumbrancers generally (*o*).

But where there are two mortgages attacked by a creditor as fraudulent, and he succeeds in setting aside the first mortgage, the second being declared valid, there is no right of subrogation, and he is not entitled to priority over the second mortgagee. In such a case, however, he may be allowed his costs as a first charge on the fund in the nature of salvage (*p*).

Doctrine of Subrogation.—The doctrine of subrogation does not apply in favor of a party who has not paid any sum of money or given any other thing in satisfaction or extinguishment of a security claim or demand, or partly so.

(*n*) *Beaumont* v. *Thorpe* (1747), 1 Ves. Sr. 27; *Gugen* v. *Sampson* (1866), 4 F. & F. 974; *Strong* v. *Strong* (1854), 18 Beav. 408.

(*o*) *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176; *Re Farnham*, [1895] 2 Ch. 799; [1896] 1 Ch. 836.

(*p*) *Coursolles* v. *Fookes* (1889), 16 O.R. 691.

There may be exceptions to the rule, but the case of a creditor setting aside a first mortgage is not one of them(*q*).

In the United States it has been held that there is a distinction between constructive and actual fraud as affecting the repayment of money advanced by a purchaser where the transaction is set aside. If there has been fraudulent intent on the part of the debtor of which the transferee has had knowledge or notice, and the transaction is set aside, it is set aside absolutely, and is not permitted to stand as a security for any indemnity to the transferee, nor are his rights considered in the matter at all (*r*).

As was said in one case, the law does not protect the perpetrator of the fraud to the extent of his investment (*s*).

Constructive Fraud.—Where, however, the deed is obtained under inequitable circumstances, and is merely constructively fraudulent as if the consideration is entirely inadequate, the transferee has been allowed to hold it as security for the amount actually paid (*t*).

Void in Part—Void in Toto.—The rule seems to be followed in all jurisdictions that a transaction void under the statutes of Elizabeth in part is void in every respect(*u*). The unlawful design is regarded as vitiating the entire instrument, and the designs of the parties cannot be confined to one particular parcel of property(*v*).

(*q*) *Coursolles* v. *Fookes* (1889), 16 O.R. 691.

(*v*) See *Baldwin* v. *Short* (1891), 125 N.Y. 553; *Boyd* v. *Dunlap*, 1 Johnson Ch. N.Y. 478; *Shand* v. *Henley* (1877), 71 N.Y. 319; *Briggs* v. *Merrill* (1873), 58 Barbour N.Y. 389.

(*s*) *Sands* v. *Codwise* (1803), 4 Johnson N.Y. 536.

(*t*) *Boyd* v. *Dunlap*, 1 Johns. Ch. N.Y. 478.

(*u*) *Totten* v. *Douglas* (1871), 18 Gr. 341; *Twyne's Case*, 2 Co. Fol. 80 b, p. 212; Saunders 66 Note 4; *Russell* v. *Winne* (1868), 37 N.Y. 591; *Roberts* v. *Victor* (1892), 130 N.Y. 585.

(*v*) *Baldwin* v. *Short* (1891), 125 N.Y. 553.

In *Commercial Bank* v. *Wilson* (*w*) it was held that a judgment fraudulent against creditors as to part of the same included therein is altogether void as against such creditors. The statute makes the transaction "utterly void," and it was said that the Court will not condescend to go into the consideration whether any and what part may not have been founded in a just and legal demand (*x*).

This principle was followed in *Totten* v. *Douglas* (*y*), and it was said that a mortgage must stand in this respect in the same position as a judgment, and that a mortgage fraudulent in part must be void *in toto*.

Not Under Provincial Acts.—Under the Provincial Statutes a different rule is followed. These Acts contain provisions excepting "*any* assignments of any goods of *any* kind made by way of security for *any* present actual *bona fide* advance of money." This provision was considered in *Mader* v. *McKinnon* (*z*) to be sufficient to validate an assignment, etc., to the extent of any present actual *bona fide* advance, to secure which the assignment was given, though as to the residue of the amount covered by the security it could not be maintained.

The general rule as to validity of contracts void in part is that "if you cannot sever the illegal from the legal part of the contract, the whole is void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad and retain the good"(*a*).

(*w*) (1868), 14 Gr. 473.

(*x*) And see *Twyne's Case*, 2 Co. Fol. 80 b, p. 212; Saunders 66 Note 4.

(*y*) (1871), 16 Gr. 243. See S.C. in 18 Gr. 341.

(*z*) (1892), 21 S.C.R. p. 653.

(*a*) *Kitching* v. *Hicks* (1884), 6 O.R. p. 752; *Goulding* v. *Deeming* (1887), 15 O.R. p. 212; *Pickering* v. *Ilfracombe Ry. Co.* (1868), L.R. 3 C.P. p. 250. But see *Cameron* v. *Perrin* (1887), 14 A.R. 565.

Redemption.—It should not be overlooked that a judgment creditor may, instead of attacking the mortgage, ask to redeem it, and this might prove an advantageous course where the consideration is inadequate (*b*).

Validity Inter Partes.—A transfer, whether based on consideration or not is valid as between the immediate parties and those claiming under them, no matter how fraudulent the intent as against creditors(*c*). Such a transaction will also be supported against those creditors who have been privy to it, or assented to it(*d*).

Extent to Which Set Aside.—If set aside, a transfer will only be avoided to the extent necessary to satisfy creditors(*e*). And the covenant in a mortgage to defeat creditors may be enforced, though the mortgage is set aside as against creditors(*g*). This is within the express provision of the Statute of Elizabeth, which provides that conveyances are void "only as against that person or persons, his or their heirs, successors, executors, administrators or assigns" who shall or might be anywise disturbed, hindered, delayed or defrauded.

(*b*) See generally Fisher on Mortgages, 5th ed., pars. 1452-1455; *Stephens* v. *Boisseau* (1896), 23 A.R. 230; *Dickinson* v. *Duffill* (1863), 10 Gr. p. 83; *Earl of Cork* v. *Russell* (1871), 13 Eq. 210; *Mildred* v. *Austin* (1869), L.R. 8 Eq. 220; *Halifax Banking Co.* v. *Matthew* (1880), 16 S.C.R. 721; *Christian* v. *Field* (1842), 2 Hare 177; *Exton* v. *Greaves* (1682), 1 Vern. 138; *Acton* v. *Peirce* (1704), 2 Vern. 480.

(*c*) *Burns* v. *Davidson* (1892), 21 O. R. p. 550; *Scoble* v. *Henson* (1862), 12 C.P. 65; *McLeod* v. *McGuirk* (1874), 15 N.B. 238; *Curtis* v. *Price* (1806), 12 Ves. 89; *Smith* v. *Cherrill* (1867), L.R. 4 Eq. 390; *Tanqueray* v. *Bowles* (1872), L.R. 14 Eq. p. 157; *Hawes* v. *Leader*, Cro. Jac 270; *Luff* v. *Horner* (1862), 5 F. & F. 480.

(*d*) *Olliver* v. *King* (1856), 8 DeG. M. & G. 110; *Steel* v. *Brown* (1808), 1 Taun. 381.

(*e*) *French* v. *French* (1855), 6 DeG. M. & G. p. 103.

(*g*) *Scoble* v. *Henson* (1862), 12 C.P. 65. And compare *Kitching* v. *Hicks* (1883), 6 O.R. 739.

Fraudulent Purpose Not Effected.—In *Symes* v. *Hughes* (*e*), it was laid down that if the purpose for which a fraudulent assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee, who has given no consideration for it.

Mundell v. Tinkis.—This case was examined in *Mundell* v. *Tinkis*(*f*), and it was affirmed as a general principle that the Court never assists a person who has placed his property in the name of another to defraud his creditors, and it does not signify whether a creditor has actually been defeated or delayed(*g*). In that case the plaintiff brought his action to redeem a certain property conveyed by him in a deed absolute in form, and it appeared that the deed in question which he now sought to cut down to a mortgage had indeed been executed by him for the purpose of securing a debt due to the mortgageee, but that the main object of the transaction was to protect the property from the results of an anticipated action for breach of contract. After saying that the language of the Court was too broad in the case of *Symes* v. *Hughes*, the Court went on to say that it remained to determine what is carrying out the illegal purpose, and up to what period is repudiation possible. The answer to this is an affirmation that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of Court or by the aid of the Court. The transferee is guilty only of a breach of honor, and not of legal obligation in not reconveying. To say that the illegal purpose is not carried

(*e*) L.R. (1870), 9 Equity 475.

(*f*) (1884), 6 O.R. 625.

(*g*) See *Phelan* v. *Fraser* (1857), 6 Gr. 336.

out unless it is proved that some creditor has actually been defeated or delayed, is imposing an unsatisfactory test, because the act and conduct of the grantor are not affected by the subsequent course of third parties.

So far as he is concerned, the illegal purpose is complete, he has violated the law, and should not be allowed to resort to the law for protection. The Court said:—"When a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of a grantee, during his whole life, to make, at his pleasure, the illegal use of the gift originally intended, he deserves all the consequences attached to the illegality of his act. If the crime is not complete, the merit is not his, and, therefore, in such a case, I should not think myself bound to relieve him against the heir of the grantee. The plaintiff asks for equity, and does not come with clean hands to receive it. I cannot understand upon what principle it can be contended that a person who intends to commit a fraud shall not have relief is he succeeds in his attempt, but shall be relieved if he fails or hesitates to proceed because he fears a failure. His intention is as fraudulent in one case as the other"(*h*).

But where there is neither in law or in fact a change of property, but the transfer is only a semblance, the rule does not apply(*i*).

Necessity of Disclosing Illegality.—Where the plaintiff cannot make out his case without necessarily disclosing

(*h*) *Johnson* v. *Cline* (1888), 16 O.R. 129. See also *Bowes* v. *Foster* (1358), 2 H. & N. 779; *Platamone* v. *Staple* (1815) Coop. 251. *Barnard* v. *Sutton*, 7 Jur. 685; *Groves* v. *Groves* (1829), 3 Y. & J. 163; *Brackenbury* v. *Brackenbury* (1820), 2 J. & W. 391; *Scoble* v. *Henson* (1862), 12 C.P. 65; *Rosenburgher* v. *Thomas* (1852), 3 Gr. 635; *Langlois* v. *Baby* (1863), 10 Gr. 358; 11 Gr. 21; *Emes* v. *Barber* (1869), 15 Gr. 679.

(*i*) *Taylor* v. *Bowers* (1875), 1 Q.B.D. 291.

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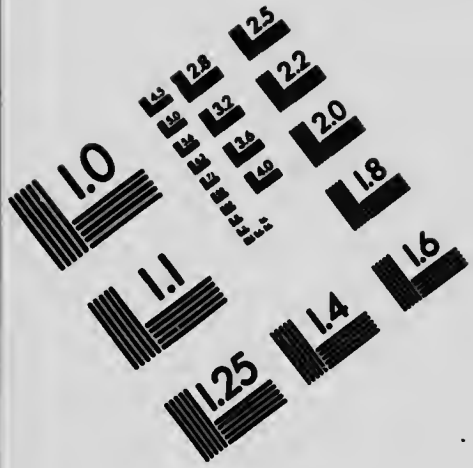

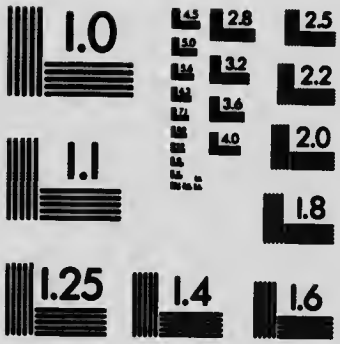

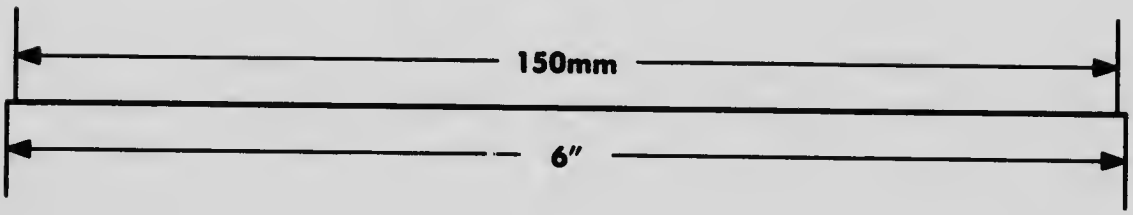

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the unlawful purpose of the transaction, he cannot succeed(*j*).

But if the plaintiff can prove his case without proving any illegality, as by a deed of conveyance aparently good, he can succeed(*k*). And in such a case the defendant will not be allowed to show as a reason why the plaintiff should not recover the fraud in which he himself participated(*l*).

Specific Performance.—The Court will not specifically enforce an agreement by the fraudulent grantee to reconvey the property to the debtor(*m*). And "if a defendant wishes to set up an answer to an action to declare him a trustee of land, the defence that the land was conveyed to him for a fraudulent purpose, he must in his pleadings specifically say so, and admit his own criminality in joining in a criminal act. He must clearly put forward his own scoundrelism if he means to reap the benefit of it" (*n*).

Meaning of "Void."—As a necessary corollary to the validity of a transaction between the immediate parties to it, it would seem to follow that until it was successfully attacked by a creditor, it was good to all intents and purposes. In other words that it was "voidable" and not "void." And that is the usual interpretation put on the word "void" in acts of the nature under consideration(*o*).

If this construction of the Acts is correct and a transaction must be regarded as being voidable merely as against creditors, it follows that a sale of mortgaged goods by the

(*j*) *Begbie* v. *Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491.

(*k*) *Ex p. Hall* (1882), 19 Ch. D. 580; *Roberts* v. *Roberts* (1819), 2 B. & Ald. 367. But see *Neville* v. *Wilkinson* (1782), 1 Bro. C.C. 547.

(*l*) *Day* v. *Day* (1889), 17 A.R. 157; *Montefiori* v. *Montefiori* (1762), 1 W. Bla. 363.

(*m*) *Tyler* v. *Tyler*, 126 Ill. 525.

(*n*) *Day* v. *Day* (1889), 17 A.R. 158. See also *Haigh* v. *Kaye* (1872), L.R. 7 Ch. 469; *Knowles* v. *Adams* (1863), 10 N.B. 415.

(*o*) *Meriden* v. *Braden* (1894), 21 A.R. 352.

mortgagee before an election is made by the creditors commencing proceedings to attack the mortgage cannot be impeached(*p*).

In *Clarkson* v. *McMaster*(*q*), Chief Justice Strong said, speaking of the words "absolutely null and void" in the Ontario Chattel Mortgage Act:—"I am not impressed with the soundness of the construction which reads the terms 'absolutely null and void' as 'voidable.' So to cut down the words of the Act is, I venture to say, in direct conflict with the manifest policy of the Legislature."

This statement has cast a certain amount of doubt on what had previously been regarded as the settled rule of construction(*r*).

In *Meharg* v. *Lumbers*(*s*), Mr. Justice Burton, in discussing *Clarkson* v. *McMaster*, said:—"I am not clear whether the Chief Justice means anything further than that it did not require a judgment before a transaction can be avoided. That the transaction was void as against any creditor whenever that creditor elected to avoid it. But the language of the Chief Justice goes further, whatever he may have intended, and declares that the transaction impeached is not voidable, but void. This is not a matter of opinion in which I need say that I should not care to set up my opinion against that of the learned Chief Justice, but the matter is so clearly settled by authority that I think there must be some mistake in the copy of the judgment. The point was settled many years ago by the House of Lords, and has been uniformly acted upon ever since.

"The proper distinction appears to me to be very clear, and it is this: Whenever a transaction is declared to be void as against a class of persons, such as creditors or

(*p*) *Meriden* v. *Braden*, 21 A.R. at p. 352. And see p. 222, *supra*.
(*q*) 25 S.C.R. 96.
(*r*) And see *Heaton* v. *Flood*, 29 O.R. at p. 94.
(*s*) 23 A.R. at p. 60.

others, it is of necessity voidable only, because it may be that those persons for whose sole benefit the enactment was made may never choose to avail themselves of it, and it would be most unreasonable, therefore, that a creditor who had obtained a security impeachable only by those persons should be deprived of it unless they elected to avoid it. On the other hand, where a security is declared to be void, not only as against any particular class of persons, but generally, or, as it is sometimes expressed, absolutely void to all intents and purposes, the other construction prevails. In conclusion I would say that the language ought to be very clear in a case like the present before the word "void" should be construed as absolutely null. Take the case of a chattel mortgage given to secure a just and meritorious debt, but open to some objection, *e.g.*, the use of the word creditor instead of creditors in the affidavit of *bona fides*. Such a mortgage, according to the decisions, is void against creditors or an assignee for creditors, but if those creditors for some good reason decide not to avoid it, why should the secured creditor, notwithstanding be deprived of his security."

In the most recent English cases, it has been held that under section 47 of the Bankruptcy Act of 1883, transfers are not void as against the transferor's trustee in bankruptcy from the date of the transfer, but only as against the trustee from the time when his title accrues, so that if before that time the property comprised in the settlement has been sold *bona fide* to a purchaser for value, the title of the purchaser will be good as against the trustee(*t*).

(*t*) *Re Carter & Kenderdine*, [1897] 1 Ch. 776; *Re Brall*, [1893] 2 Q.B. 381; *Re Holden*, 20 Q.B.D. 43; *Re Vansittart*, [1893] 2 Q.B. 377.

In *Johnston* v. *Henderson*(*u*), owing to defect in the affidavit of *bona fides*, a chattel mortgage would undoubtedly have been held void as against creditors, had it been attacked. Before any attack had been made on it, the mortgagor had the goods sold by auction, and it was held that the auctioneer was liable in damages for conversion to the mortgagee.

(*u*) 28 O.R. 25.

CHAPTER XXI.

CONFLICT OF LAWS.

General Principles.—It sometimes happens that a conveyance by a debtor includes property in provinces or countries other than the one where the remedy is sought, and it then becomes necessary to ascertain by what law the transaction is governed. Similar questions arise on the winding up of an insolvent estate.

It may be laid down as a general rule that the validity of an assignment of personal property must be determined by the law of the domicile, and if an assignment is good where made, it must be good everywhere(*a*). But this rule has many exceptions. The theory is that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and the theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns, wherever it may be located. But this fiction is by no means of universal application, and yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined. There is no absolute right to have such a transfer respected at all; it is only by a principle of comity that it is ever allowed, and that principle always yields when the laws and policy of the State where the property is have prescribed a different rule of transfer from that of the State where the owners live(*b*).

But every State has jurisdiction over all property, personal as well as real, within its own territorial limits,

(*a*) *Black* v. *Moore* (1900), 2 N.B. Eq. page 104.
(*b*) *Green* v. *VanBuskirk* (1866), 6 Wallace 307.
And see *Guillander* v. *Howell* (1866), 35 N.Y. 657.

and the laws of the State may control its sale and transfer, and all rights which may be affected thereby. If a foreigner or citizen of another State send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate. And if two persons in another State choose to bargain concerning property which one of them has in a chattel not within the jurisdiction of that State, they cannot expect that the rights of persons in the country where the chattel is will be permitted to be affected by the contract(*d*). On this principle a company incorporated in Michigan made a mortgage upon chattels in Ontario, which was attacked as preferential, and it was set aside by the Ontario Court, notwithstanding that the mortgage might have been held valid by the laws of the State of Michigan, and that the mortgagors and mortgagees were both domiciled there(*e*).

Onus of Proof.—If it be established that the transaction should be governed by the foreign law, the onus of proving its validity by that law is upon the defendant, and in the absence of such proof it must be assumed that the foreign law is the same as the law of the forum(*f*).

Foreign Bankruptcy.—Where the general property of the debtor has been taken from him by the operation of a

(*d*) *Clark* v. *Torbell*, 58 N.H. 88; approved in *River Stave Co.* v. *Sill* (1886), 12 O.R. page 570.

(*e*) See also *Peck* v. *Shields* (1881), 6 A.R. 639; *Marthinson* v. *Patterson* (1890), 20 O.R. 125; *Rice* v. *Courtis* (1860), 32 Vermont 460; *Milne* v. *Morton*, 6 Binney. Penn. 361; *Green* v. *VanBuskirk* (1866), 6 Wallace 307.

(*f*) *Black* v. *Moore* (1900), 2 N.B. Eq. page 107; *Smith* v. *Gould* (1842), 6 Jur. 543; *Re O'Brien* (1883), 3 O.R. 326; *Topence* v. *Martin* (1876), 38 U.C.R. 411; *Langdon* v. *Robertson* (1887), 13 O.R. 497; *Graham* v. *Canandaigua Lodge* (1893), 24 O.R. 255; *Re Central Bank* (1891), 21 O.R. 515.

foreign Bankruptcy Act or Law, the only property affected is that within control of the Legislature(*ff*).

Situs of Personal Property.—As to certain personal property, cattle and tangible chattels and the like, there is an actual local position. As to other kinds, such as debts and choses in action, the property is intangible. It does not possess in strictness locality, but a legal situs is attributed to it by a substantial legal fiction by connecting it in different ways with a particular place or country(*g*). Lord Field in *The Commissioner of Stamps* v. *Hope*(*h*), says:—"A debt *per se*, although a chattel, and part of the personal estate which the Probate Court has authority to administer, has, of course, no absolute local existence, but it has long been established in the Courts of the country, and is a well-settled rule that a debt does possess an attribute of locality arising from and according to its nature. And the distinction drawn and well settled has been, and is, whether it is a debt by contract or a debt by specialty. In the former case the debt, being merely a chose in action, money to be recovered from the debtor and nothing more, could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held, therefore, to be *bona notabilia* within the area of the local jurisdiction within which he resided."

Debts.—And where a debt may be regarded as having a locality, an assignment of it must be one that would be recognized by the law of its situs(*i*). In the case cited a company had charged all its assets, including a debt in France, in favor of its debenture holders. English creditors of the company took proceedings in France for the purpose of at-

(*ff*) See pp. 249, 255, *infra*.
(*g*) *Attorney-General* v. *Newman* (1899), 31 O.R. 340.
(*h*) [1891], A.C. at p. 481.
(*i*) *Re Maudslay*, [1900] 1 Ch. 602.

taching the debt due to the company from the French firm. It was held that the debt due from the French firm must be treated as being situated in France and subject to French law, and that the debenture holders would not be prevented from taking proceedings in France for recovering their debt out of France, and that the attachment which alone was recognizable by the law of France ought to prevail over the title of the debenture holders.

Lands.—So far as foreign lands are concerned, the validity of the transaction must depend on the *lex rei sitae*, and a Canadian Court cannot entertain an action to set aside a mortgage on foreign lands where it is not proven that the law of the foreign country where the lands are situated corresponds to the law of the Province where the action was brought (*j*).

And an action will not lie to set aside a conveyance of lands situate in a foreign country where the creditor has no remedy there, although the parties all reside in the Province where the action is sought to be brought (*k*).

Shares in a Foreign Company.—Shares are locally situate where the head office of the Company is, and accordingly shares in a foreign Company are not subject to the ordinary forms of execution, which apply only to property within the respective provinces. Hence a transfer of such shares will be beyond the scope of the local Acts respecting frauds on Creditors. (*a*) But where by the endorsation of a power of attorney in blank the shares

(*j*) *Purdom* v. *Pavey* (1896), 26 S.C.R. 412. And see *Henderson* v. *Bank of Hamilton* (1894), 23 S.C.R. 716.

(*k*) *Burns* v. *Davidson* (1892), 21 O.R. 547.

(*a*) See the various Provincial Execution Acts, and *Re Ontario Bank* (1879), 44 U.C.R. 247; *Nickle* v. *Douglas* (1875), 37 U.C.R. 51; *Attorney-General* v. *Higgins* (1857), 2 H. & N. 216; *American Branch India Tea Co.* v. *Hudson*, H.C.J. Ont. Nov. 7th, 1900.

had become transferable by delivery, it was held in England that they had sufficient locality there to be iable to probate duty. (*b*)

Action on Contract.—As to all questions touching the remedy to be allowed on contract, and the proper course of enforcing it, these are to be determined by the law of the place where suit is brought. And so where a share in the annual income of an estate in Ireland payable under a will through the hands of an executor living in New Brunswick to a beneficiary living and domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts, as was alleged, in fraud of creditors, it was held that the money could undoubtedly be reached by proper process of execution in New Brunswick, and that the creditors were prejudiced by the assignment, and it was set aside(*l*).

(*b*) *Stern* v. *The Queen* (1896), 1 Q.B. 211; *Attorney-General* v. *Bowens* (1838), 4 M. & W. 171.

(*l*) *Black* v. *Moore* (1900), 2 N.B. Eq. page 107. Where an action is brought by a creditor to set aside a conveyance of land in Ontario as fraudulent he may serve the writ of summons out of the jurisdiction, under the provisions of the Ontario Rule 271 (b) which provides for service whenever any act, deed, contract, obligation or liability affecting land or hereditaments situate within Ontario is sought to be construed, rectified, set aside or enforced in the action. *Livingstone* v. *Sibbald* (1893), 15 P.R. 315. And see *Clarkson* v. *Dupré*, 16 P.R. 521.

And see Burrill, par. 276.

PART IV.

ADMINISTRATION OF THE INSOLVENT'S ESTATE.

CHAPTER XXII.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Assignment Generally.—An assignment for the general benefit of creditors has long been known to the jurisprudence of Canada, and has its force and effect at Common Law quite independently of any system of bankruptcy or insolvency, or of any legislation in regard to such subjects. It has never been regarded as an essential part of the insolvency law, when there was an insolvency law in force, but such an assignment was made an act of insolvency on which an adjudication might be founded.

Further, the operation of an assignment for the benefit of creditors is precisely the same, whether the assignor is or is not insolvent. It is open to any debtor who may deem his solvency doubtful, and who desires in that case that his creditors should be equitably dealt with, to make an assignment for their benefit, and the validity of the assignment and its effect in no way depend on the insolvency of the assignor.

Assignment Voluntary.—The feature which in the main distinguishes the Provincial Acts from an insolvency law, is that the assignment is a voluntary act on the part of the debtor. On the other hand, it is a feature common to all systems of bankruptcy and insolvency, that the enactments

are designed to secure the rateable distribution of the assets of the insolvent amongst his creditors, whether he is willing that they should be distributed or not(*h*).

When Irrevocable.—An assignment which is not assented to by any creditor or communicated to him is revocable by the assignor(*i*). But as soon as the fact of an assignment for the benefit of creditors has been communicated to a creditor who, though he may not execute it, does not repudiate it, a binding irrevocable trust is made(*j*). And whether a conveyance for the benefit of creditors has or has not ceased to be revocable, depends on the character of the representation made to the creditors as to its existence, and the manner in which such representation has been acted upon. And even though the deed be registered, that does not necessarily imply delivery to a creditor(*k*).

Consent of Creditors.—An assignment executed without the consent of the necessary number of creditors to a person other than the sheriff, or official assignee, will have the same effect as if it had been executed with such consent, until it is superseded by an assignment executed with the necessary consent(*l*).

In other words, it is not necessary that the consent of the majority of the creditors should be obtained by the debtor before he makes the assignment to some person other than the sheriff. It is sufficient if the consent is obtained at any time before the assignment is executed, complying with the Assignment Act(*m*).

(*h*) *Attorney-General of Ontario* v. *Attorney-General of Canada* [1894] App. Cas. 189; *Anderson* v. *Glass* (1889), 16 O.R. 592.

(*i*) *Cooper* v. *Dixon* (1884), 10 A.R. 50.

(*j*) *Bertrand* v. *Parkes* (1892), 8 Man. R. 175; *Nolan* v. *Donnelly* (1884), 4 O.R. 440; *Nelles* v. *Maltby* (1883), 5 O.R. 263; *Re Unitt & Prott* (1892), 23 O.R. 78.

(*k*) *Leacock* v. *Chambers* (1886), 3 Man. Rep. 645.

(*l*) *Anderson* v. *Glass* (1888), 16 O.R. 592.

(*m*) *Hall* v. *Fortye* (1889), 17 O.R. 435.

Form of Assignment.—The Provincial Acts in general have in effect provided a simple form of assignment. All that is necessary to pass the entire assets of the insolvent is to state in the assignment that it transfers all the personal property of the debtor which may be seized and sold under execution, and all his real estate, credits and effects, or words to that effect. If these words are in the assignment, the Act operates to pass to the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution. A saving clause is also usually inserted in regard to the provisions of the Registry Laws, as to registration of the assignment, where the assignment transfers an interest in lands(*mm*).

At Common Law an assignment might be made by mere delivery or possession of goods and chattels to a trustee to hold for creditors(*n*). But after the enactment of the Acts respecting bills of sale and chattel mortgages, it became necessary to register the instruments so far as chattels were affected, as provided by those Acts, with the usual affidavits of execution and *bona fides*. Now, however, the affidavit of *bona fides* is no longer necessary, and an affidavit of execution is usually stated to be sufficient.

Property Passed by Assignment.—It may be said in general that the assignment will pass every species of property exigible under every form of execution(*o*).

Lands in Foreign Country.—In regard to lands situated in a foreign country, it may be said in general that a con-

(*mm*) See R.S.O. (1897), cap. 147, sec. 5; B.C., 1 Ed. VII. cap. 15, sec. 4; R.S.M. (1903), cap. 8, sec. 6; N.S., 61 Vict. cap. 11, sec. 4; N.B., 58 Vict. cap. 6, sec. 4; P.E.I., 61 Vict. cap. 4, sec. 5.

(*n*) *Nelles* v. *Maltby* (1883), 5 O.R. 263.

(*o*) See Title "Property," p. 21, *supra*.

veyance by operation of law, such as a bankruptcy order or a statutory assignment, does not operate to transfer them, or, in other words, has no extra-territorial effect(*p*).

In the case of *MacDonald* v. *The Georgian Bay Lumber Co.*(*pp*), a British subject owning lands in Canada, but residing in the State of New York, executed a deed under the American Bankruptcy Act, purporting to convey all of his estate and effects to a trustee for creditors. The lands having been seized under execution in Ontario, the question was squarely presented for decision as to how far, if at all, the deed under the American Bankruptcy Act was operative to transfer the lands in Ontario. The Supreme Court of Canada held that it was entirely ineffective, deciding that it was, in their opinion, an involuntary legal conveyance intended to convey only the property over which the Legislature had assumed control, and had no other or greater effect than if the Legislature had declared that the property of the bankrupt should pass to the assignee or trustee without any conveyance, but merely by operation of law. In either of those cases the Court considered that *the only property which would be affected would be the property within the control of the Legislature,* or upon which or over which it could operate, and that clearly lands in a foreign country would not be included in this category. The principle is well established that real estate is exclusively subject to the laws of the Government within whose territory it is situate(*q*).

If the Court of the State of New York had ordered the bankrupt to convey the lands in Ontario, it would have been of no avail, for a foreign land cannot be affected by the

(*p*) See Title "Conflict of Laws," p. 242, *supra*.

(*pp*) (1878), 2 S.C.R. 364.

(*q*) See also *Sill* v. *Worswick* (1791), 1 H. Bl. 665; *Phillips* v. *Hunter* (1795), 2 H. Bl. 402; *Hunter* v. *Potts* (1791), 4 T.R. 182; *Selkrig* v. *Davies* (1813), 2 Dow. 230; *Brodie* v. *Barry*, 2 V. & B. 127; *Elliot* v. *North Eastern Ry. Co.* (1863), 10 H.L.C. 333.

administrative act of any Court(*r*). Such an order, however, might impose a moral obligation on the insolvent to convey by a Common Law Conveyance to the assignee, and this might be enforced by the Court *in personam* by withholding his discharge until he had complied(*s*).

Form of Assignment Not Optional.—While an assignment by a debtor of all his estate for the benefit of his creditors is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not, the form in which it is made and the effect of such a form are not optional, and in this sense it is not voluntary(*t*).

Other Species of Property.—The words of the statute, "all the personal estate, rights, property, credits and effects," are quite sufficient to include a benefit to be derived from a fund in a benefit or benevolent society but where the benefit is governed by a statutory provision that it shall be free from all claims by the creditors of a member of the Association, it has been held that an assignment for the benefit of creditors will not pass such benefit to the assignee (*t*).

It has also been held in Ontario that the benefit of a covenant by a third person to indemnify the assignor of a mortgage against a mortgage made by him does not pass to his assignee for the benefit of creditors, at all events not where there has been no breach of covenant before the making of the assignment(*w*).

So far as such a covenant is a covenant of indemnity, it is clearly not an asset, and what was intended to pass by the statute are assets which could be realized for the bene-

(*r*) *Selkrig* v. *Davies* (1814), 2 D. & w, 230.

(*s*) *Elliott* v. *North Eastern Ry Co.* (1863), 10 H.L.C. 333. But see *Cockerell* v. *Dickens* (1840), 3 Moore P.C.C. p. 134.

(*t*) *Re Unitt & Prott* (1892), 23 O.R. 78.

(*w*) *Ball* v. *Tennant* (1894), 21 A.R. 602.

fit of the insolvent's debts(*x*). If the covenant were regarded as a covenant to pay, if it passed to the assignee, the money when collected would be the money of the mortgagee and not of the creditors.

The words used in the Statutes "except such as are by law exempt from seizure or sale under execution," refer clearly to the chattels declared to be exempt from seizure by the various Execution Acts(*u*).

Effect of Assignment.—The assignment, like any other assignment by operation of law, passes the rights of the debtor precisely in the same plight and condition as he possessed them, even where a complete legal title vests in the assignee, and there is no notice of any equity affecting it. And it still is subject to whatever equity the insolvent was liable to; in other words, the assignee is not regarded as a purchaser for valuable consideration in the proper sense of the word(*z*).

It has also been held that an assignee is entitled to the benefit of all contracts entered into by the insolvent which are *in fieri* at the time of the insolvency, and that he may elect to adopt or reject such contracts according as they were likely to be beneficial or onerous to the estate(*a*).

Onerous Property.—It must be remembered that what may be termed onerous property will be passed by the statutory assignment as well as other species of the property; for instance, shares in a company not fully paid up would vest in the assignee under an assignment, and might bring with them a liability for the amount remaining unpaid.

An assignee should also remember that shares in a chartered bank involve a double liability, and, although they are paid up, if the bank is wound up, the holder is liable for

(*x*) *Ball* v. *Tennant* (1894), 21 A.R. 602.
(*u*) *Re Unitt & Prott* (1892), 23 O.R. 82.
(*z*) *Mitford* v. *Mitford* (1803), 9 Vesey. 87.
(*a*) *Gibson* v. *Carruthers* (1841), 8 M. & W. 321.

a further amount equal to the par value of the stock held by him. Similarly, a transfer of a lease would involve a liability on the part of the assignee for the rent and performance of other covenants(*b*).

In view of these principles, a properly drawn deed of assignment should contain a clause excepting onerous property, and, of course, adequately describing it, and in lieu of the transfer a covenant or trust, binding the debtor to deal with such property as the assignee shall direct(*c*).

Right to Disclaim.—At Common Law an assignment would without any actual acceptance by the assignee clearly pass to him the interest in such property, though, of course, if he had not executed the assignment, he would be entitled to disclaim. Under the English Bankruptcy Act it has been considered that, notwithstanding the vesting in the assignee of the bankrupt's general estate, he may refuse a lease which he regards as a burden rather than a benefit, and is not taken to have accepted it unless he does some act which unequivocally testifies his acceptance(*d*).

Onerous Property in English Bankruptcy Act.—The English Bankruptcy Act of 1883 enables the assignee in bankruptcy to disclaim onerous property; it enacts that where part of the property of the bankrupt is of an onerous nature, such as leaseholds or shares of stock in companies or unprofitable contracts, a trustee may, notwithstanding that he has endeavored to sell or has taken possession of the property or exercised any act of ownership in relation to it, disclaim by a writing signed by him at any time within three months after his appointment. The British Columbia Act contains similar provisions (*m*).

(*b*) See *White* v. *Hunt* (1870), L.R. 6 Exch. 32. On the question of the passing of rights of action, see *Re Perkins*, [1898] 2 Chy. 182, and *Rose* v. *Buckett*, [1901] 2 K.B. 449. See also cases in Clarke's Insolvent Acts, p. 95.

(*c*) *Re Hughes*, [1893] 1 Q.B. 595.

(*d*) *White* v. *Hunt* (1870), L.R. 6 Ex., per Channell, B., p. 34.

(*m*) B.C., 1 Ed. VII. cap. 15, sec. 55.

The effect of this is declared to be to determine from the date of the disclaimer the rights, interests and liabilities of the bankrupt, and his property in respect of property disclaimed, and also to discharge the trustee from all personal liability in respect thereof as from the date when the property vested in him.

Prior to this enactment and similar enactments of an earlier date, it had been regarded that the assignee of a bankrupt were not bound to take property of an onerous nature. They were in this respect in a different position from executors, the latter claimed title through the administrator, and were bound to perform his obligations to the extent of his assets(*n*).

Rights of Action.—In general it may be said that rights of action pass to the assignee, except actions for damages to his person; thus he may recover debts owing to the insolvent, whether they are legally or equitably vested or contingent(*f*).

The assignee, however, should on taking the assignment, give notice to all debtors of the assignment, and request payment to be made to himself.

The general principle, however, will not apply where the contract or consideration is an illegal one(*g*).

Nor will right of action for debt pass where there was no consideration(*h*).

Rights of action for damages pass to the assignee, and that whether they are liquidated or unliquidated(*i*).

But where personal injury to the assignor and not loss to the estate of the insolvent is the primary and substantial

(*n*) See *Levi* v. *Ayers* (1878), 3 App. Cas. 842.
(*f*) *Lane* v. *Smith* (1851), 14 Beav. 49.
(*g*) *Tenant* v. *Elliott* (1797), 1 B. & P. 3.
(*h*) *Willis* v. *Freeman* (1810), 12 East 656.
(*i*) *Wright* v. *Fairfield* (1831), 2 B. & Ad. 727; *Porter* v. *Vorley* (1832), 9 Bing. 93.

cause of action, right of action will not pass to the assignee, as in cases of assault or slander(*j*).

But if the action in *tort* is one for injury to the chattels or property of the insolvent, it will pass to the assignee(*k*).

A right of action on a breach before insolvency of a contract of employment will not apparently pass to the assignee(*l*).

And the assignee may claim the benefit of personal contracts where the personal skill of the insolvent is essential, if the insolvent will co-operate to carry out the contract(*m*).

If an action is pending at the time of the assignment, it must be revived by the assignee(*c*).

Public Office.—Income derived from an office of a public character, which is not legally saleable, does not pass to the assignee(*o*).

This is on the principle that it would be contrary to public policy to allow the dignity of the State to be in any measure impaired by permitting such emoluments to be assigned to third parties(*p*).

Property Situated in a Foreign Country.—According to Robson the personal estate out of England of a bankrupt

(*j*) *Finlay* v. *Chirney* (1887), 20 Q.B.D. 494; *Crofton* v. *Poole* (1830), 1 B. & Ad. 568; *Brewer* v. *Dew* (1843), 11 M. & W. 625; *Howard* v. *Crowther*, 8 M. & W. 601; *Beckham* v. *Drake* (1841), 8 M. & W. 846; *Rogers* v. *Spence* (1844), 13 M. & W. 571.

(*k*) *Turner* v. *Hardcastle* (1862), 11 C.B.N.S. 683; *Wetherell* v. *Julius* (1850), 10 C.B. 267; *Hodgson* v. *Sidney* (1866), L.R. 1 Exc. 313; *Castelli* v. *Boddington* (1852), 1 E. & B. 66. But see also *Morgan* v. *Steble* (1872), L.R. 7 Q.B. 611; *Ex p. Vine* (1878), 8 Ch. D. 364; *Wadling* v. *Oliphant* (1875), 1 Q.B.D. 145.

(*l*) See *Wadling* v. *Oliphant* (1875), 1 Q.B.D. 145.

(*m*) *Beckham* v. *Drake* (1841), 8 M. & W. 846.

(*c*) See *Cameron* v. *Eager* (1873), 6 P.R. 117.

(*o*) See *Ex. p. Butler* (1749), 1 Atk. 210; *Palmer* v. *Vaughan* (1818), 3 Swan. 173.

(*p*) *Barwick* v. *Reade* (1791), 1 Hy. Bl. 627; *Litterdale* v. *Montrose* (1791), 4 T.R. 248.

in England will vest in his trustee, subject, nevertheless, to any lien upon it acquired by the law of the country where the property is situated prior to the bankruptcy(*q*).

Our Courts will recognize the bankrupt laws of other countries in giving effect to a transfer by operation of law so far as regards the debtor's personal estate, and as a general rule the personal property here of a person becoming bankrupt in a foreign country will vest in his trustee, subject, nevertheless, to our law as to the rights or equities of creditors in respect of such property acquired before the foreign bankruptcy(*r*).

As to real estate, see *Macdonald* v. *The Georgian Bay Lumber Co.*(*s*).

Trustee.—Property held by the insolvent in trust for any other person is not, of course, assets, so far as the assignor's creditors are concerned, and does not pass to the assignee(*t*).

Exemptions.—The debtor may apparently deal with the statutory exemptions as he sees fit, he is not required to keep them in possession in order that they may retain the character of exemptions. If they are sold, he is entitled to the proceeds in money, which he can deal with as he likes(*u*).

And if the chattels have been destroyed by fire, the insurance moneys payable in respect of the statutory ex-

(*q*) Robson, p. 486; *Hunter* v. *Potts* (1791), 4 T.R. 182; Storey's Conflict of Laws, 7th Ed., 509.

(*r*) *Solomons* v. *Ross* (1764), 1 H. Bl. 131; *Re Hooper* (1880), 27 W.R. 856; 5 App. Cas. 161; *Ex p. Wilson* (1872), L.R. 7 Ch. 490.

(*s*) *Supra;* and also Storey's Conflict of Laws, 7th Ed., 532; *Callender* v. *Davies,* [1891] App. Cas. 460; *Re Levy* (1885), 30 Ch. D. 119; *Waite* v. *Bingley* (1882), 21 Ch. D. 674; *Re Alywin* (1873), L.R. 16 Eq. 585. And see Title "Conflict of Laws."

(*t*) *Winch* v. *Keeley* (1787), 1 T.R. 619.

(*u*) *Field* v. *Hart* (1895), 22 A.R. 449; *Temperance Ins. Co.* v. *Coombe* (1892), 28 C.L.J. 88.

emptions are in the same position, and do not pass to the assignee(*v*).

And while tools and implements ordinarily used in the occupation of the assignor are exempted, the principle does not apply where he has changed that occupation prior to the assignment to one in which the tools and implements in question are not ordinarily used(*w*).

Registration of Assignment.—It has been provided in the Provincial Acts that the assignment or a copy shall be registered within a specified period(*x*).

It is usual to provide that the assignment must be registered as if it were a bill of sale, and must also be first registered in the Land Registry Office, if lands are comprised in the conveyance. At the same time it is generally provided that the assignment shall not be within the operation of the Bills of Sale and Chattel Mortgage Acts(*y*).

Prior to this enactment there had been some difference of opinion on the point(*z*).

But an assignment whereby a debtor transfers all his assets to the assignee for the purpose of paying a fixed sum on the dollar to the creditors, and of securing the debtor the enjoyment of the residue, is an arrangement by way of composition and not an assignment within the meaning of of the Act, although stated to be in the instrument made pursuant to that Act, it accordingly does not require registration(*b*).

(*v*) *Osler* v. *Muter* (1892), 19 A. R. 94.

(*w*) *Wright* v. *Hollingshead* (1895), 23 A.R. 1.

(*x*) See R.S.O., 1897, cap. 147, sec. 13, sub-sec. 2; B.C., 1 Ed. VII., cap. 15, sec. 8; R.S.M. (1903), cap. 8, sec. 12; N.S., 61 Vict. cap. 11, sec. 13; N.B., 58 Vict. cap. 6, sec. 12 (2); P.E.I., 61 Vict. cap. 4, sec. 14 (2).

(*y*) See R.S.O., 1897, cap. 147, sec. 13, sub-sec. 1; B. C., 1 Ed. VII., cap. 15, sec. 7; R.S.M. (1903), cap. 8, sec. 11; N.B., 58 Vict. cap. 6, sec. 12 (1).

(*z*) See *Whiting* v. *Hovey* (1885), 9 O.R. 314; 13 A.R. 7; 14 S. C.R. 515; *Robertson* v. *Thomas* (1885), 8 O.R. 20.

(*b*) *Gundry* v. *Johnston* (1896), 28 O.R. 147.

Affidavit of Bona Fides.—It will be noticed that an affidavit of *bona fides* is not required under the Assignment Acts, while it is in general demanded as a prime essential to the validity of a bill of sale or chattel mortgage(*a*).

Right to Distrain.—Taking of possession by the assignee does not have the effect of placing the property *in custodia legis*.

The Act does not take away from the landlord the right of distress where the assignment is executed before the distress is made before the sheriff or assignee takes possession under the assignment, or even after the assignee has gone into possession of them under such assignment(*c*).

The landlord has a right which has been called a preference lien, and this right has not been impaired by the statute(*d*).

Assignment by Company.—It may now apparently be regarded as settled that a limited company may make an assignment under the Provincial Acts for the benefit of its creditors(*e*).

It might have been thought the Dominion Parliament, having exercised its jurisdiction to enact an insolvency law in respect of companies, that any provision of the Provincial Legislature providing any measure of insolvent legis-

(*a*) See R.S.O., 1897, cap. 147, sec. 13, sub-sec. 2; B.C., 1 Ed. VII., cap. 15, sec. 8; R.S.M. (1903) cap. 8, sec. 12; N.S., 61 Vict. cap. 11, sec. 13; N.B., 58 Vict. cap. 6, sec. 12 (2); P.E.I., 61 Vict. cap. 4, sec. 14 (2).

(*c*) *Eacrett* v. *Kent* (1888), 15 O.R. 9; and see *Briggs* v. *Sowry* (1841), 8 M. & W. 729; *Newton* v. *Scott* (1842), 9 M. & W. 434.

(*d*) *Eacrett* v. *Kent* (1887), 15 O.R. 9; and see also *Mason* v. *Hamilton* (1872), 22 C.P. 190, 411; *McEdwards* v. *McLean* (1878), 43 U.C.R. 545; *Re McCracken* (1879), 4 A.R. 486; *Wyld* v. *Clarkson* (1886), 12 O.R. 589.

(*e*) *Whiting* v. *Hovey* (1886), 13 A.R. 7; 14 S.C.R. 515.

lation applicable to companies which might be considered as inconsistent with the Dominion Act, would be *ultra vires*(*f*).

This view has not, however, been adopted. And the assignment may be made by the directors of the company without the consent of its shareholders(*g*).

Such an assignment may be regarded as an admission of insolvency, and it is a good ground for making a winding up order under the Dominion Act(*h*).

Assignment by Partner.—There is no implied power in one partner to make an assignment for the benefit of creditors on behalf of the firm. If, however, the assignment is made by one partner in the partnership name, and at the special request of the other partner, it will be sufficient(*i*).

In practice it is best to have the assignment executed by all partners individually as well as by one of them in the partnership name.

Implied Agency.—The implied agency of one partner to bind the others in matters connected with the carrying on of the partnership business will not support an act, the effect of which is to put an end to the business altogether(*j*).

And though in general authority to execute a deed must be by a deed, such authority will not apparently be neces-

(*f*) See *Attorney-General of Ontario* v. *Attorney-General of Canada* (1894), App. Cas. 189.

(*g*) *Whiting* v. *Hovey* (1886), 13 A.R. 7; 14 S.C.R. 515.

(*h*) See R.S.C. 1886, cap. 129, sec. 5 (*g*). As to when the Court will grant and when refuse a Winding-Up Order where there has been an assignment, see *Wakefield* v. *Hamilton Whip Co.* (1893), 24 O.R. 107; *Re Maple Leaf Co.* (1901), 2 O.L.R. 590; *Re William Lamb Manufacturing Co.* (1900), 32 O.R. 243.

(*i*) *Nolan* v. *Donnelly* (1884), 4 O.R. 440.

(*j*) *Cameron* v. *Stevenson* (1862), 12 C.P. 389; *Nelles* v. *Maltby* (1884), 5 O.R. at p. 271.

sary in case of the execution of an assignment by one of the partners where there is ample evidence that the act was authorized by the remaining partner or partners(*k*).

Power of Attorney.—An assignment for creditors may be executed by an attorney under a properly drawn power, and a provision is frequently inserted in a composition deed authorizing certain parties to execute a general assignment for the benefit of creditors on default in payment(*l*).

All Assignments Subject to the Statutes.—It was formerly held in Ontario that an assignment which by its terms was confined to personal property only was not within the Statute, and that the omission of reference to real estate was not a mistake, defect or imperfection which could be remedied under the provisions of the statute in that behalf by the Court. To remedy the difficulty created by this and similar cases, it has been generally provided that all assignments for the benefit of creditors, whether or not they are expressed to be made under or in pursuance of the statute, and whether the debtor has or has not included all his real and personal estate, shall be subject to all the provisions of the statute, and shall vest the estate, whether real or personal, or partly real and partly personal, which is assigned by the instrument, in the assignee for the general benefit of creditors(*m*).

Fraudulent Assignments.—Most of the Provincial Acts provide that their invalidating provisions shall not apply to any assignment made in accordance with their provisions to a sheriff, official assignee or other assignee permitted by the Act for the purpose of paying, rateably and propor-

(*k*) *Nelles* v. *Maltby* (1884), 5 O.R. 263.

(*l*) See *Furnivall* v. *Hudson*, [1893] 1 Chy. 335.

(*m*) See R.S.O., 1897, cap. 147, sec. 6; R.S.M. (1903), cap. 8, sec. 7; N.S., 61 Vict. cap. 11, sec. 10; N.B., 58 Vict. cap. 6, sec. 3 (1); P.E.I., 61 Vict. cap. 4, sec. 4 (1).

tionately and without preference or priority, all the creditors of the debtor their just debts(*a*).

Assignment Must be Made in Good Faith.—The assignment must be made in good faith and for the general benefit of all creditors. If it is attempted to retain a benefit for the debtor, or to prefer a creditor, or to impose unreasonable terms upon the general body of creditors, the assignment will be invalidated. Assignments of this description had previously been held to be void as contrary to the policy of the Statute of Elizabeth. The leading case on the subject was that of *Spencer* v. *Slater*(*b*). In that case a debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees in trust to carry on his business or to get in and realize his estate in the manner they might deem expedient, and apportion the residue of the proceeds after payment of expenses, etc., according to an equal rate in the pound among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed, and that if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustee to the debtor. The deed also provided that the executing and dissenting creditors should indemnify the trustee against any personal loss or risk they might sustain, otherwise than by their own wilful neglect or default by reason of their proceedings under the deed. The deed was held void, because its effect was to delay creditors, and because there was a resulting trust in favor of the debtor in respect of sums due to creditors who refused to execute the deed (*c*).

(*a*) See R.S.O., 1897, cap. 147, sec. 3, sub-sec. 1; R.S.B.C. (1897), cap. 87, sec. 3; R.S.M. (1903), cap. 8, sec. 44; N.S. 61 Vict. cap. 11, sec. 5 (2); N.B. 58 Vict. cap. 6, sec. 3 (1); P.E.I., 61 Vict. cap. 4, sec. 4 (1).

(*b*) (1878), 4 Q.B.D. 13.

(*c*) *Spencer* v. *Slater* (1878), 4 Q.B.D. 13. And see also *Taylor* v. *Cummings*, 27 S.C.R. 589; *Cummings* v. *Taylor*, 28 S.C.R. 337; *Whitman* v. *Union Bank of Halifax* (1889), 16 S.C.R. 410.

Or Benefit Assignor.—So where an assignment purporting to be for the benefit of creditors is in reality a mere pretext or cover in order to protect the property for the benefit of the debtor, it will be set aside (*e*). Apart from legislation respecting preferences a creditor may be preferred by a valid deed or transaction, but where a deed of assignment containing preferences also contains provisions indicating a fraudulent intention as regards creditors, and the deed is set aside on that ground as fraudulent and void as against creditors, a preference must also fail (*f*).

Provincial Acts.—Under the provisions of the Provincial Acts an assignment containing any preference is, of course, void (*g*).

Terms Which Invalidate Assignment.—Where the operative part of a deed of assignment for the benefit of creditors is restricted to certain scheduled creditors, the deed was held void (*h*). But the accidental omission of a creditor's name from the schedule will not invalidate the assignment (*i*).

The assignor must not attempt to impose any unreasonable terms upon the creditors, and a stipulation for his

(*e*) *Hayward* v. *White* (1843), 4 N.B. 304. And see *Burnham* v. *White* 4 N.B.; *Balkwell* v. *Beddome*, 16 U.C.R. 203.

(*f*) *Cox* v. *Worrall*, 26 N.S. 366; *Boldero* v. *London Discount Co.*, 5 Ex. D. 47.

(*g*) As to assignments stipulating for preference, see also *Kirk* v. *Chisholm*, 26 S.C.R. 111; *Moss* v. *Brown*, 31 N.B. 554; *Bank of Toronto* v. *Eccles*, 2 E. & A. 53; *Thorne* v. *Torrance*, 16 C.P. 445; 18 C.P. 29; *Squire* v. *Watt*, 29 U.C.R. 328; *Union Bank* v. *Whitman*, 20 N.S. 194.

(*h*) *McLean* v. *Garland*, 32 C.P. 524. See also *Watts* v. *Howell*, 21 U.C.R. 255; *Andrew* v. *Stuart*, 6 A.R. 495; *Graham* v. *Bell*, 5 N. S. 90. And see *Farratt* v. *Sawyer*, 1 Thom. (N.S), 1st Ed., 20; 2nd Ed., 46. And see *Ex p. Dollar*, 8 M.B.R. 157.

(*i*) *McLean* v. *Garland*, 13 S.C.R. 366.

release by all creditors executing the deed is an unreasonable condition (*j*).

The assignee may be given power to carry on the business for a limited or reasonable time so that it may be sold as a going concern(*k*). But a direction to carry on the business indefinitely will not be permitted(*l*). A direction that the assignee may sell on reasonable credit will not invalidate the assignment(*m*).

And a provision for the employment of the assignor at a reasonable remuneration has been held not to invalidate the assignment (*n*).

Partnership Debts.—Where an assignment is made by partners which provides for the payment of partnership debts, only, it is void as against creditors and parol evidence is not admissible to prove that the object of the parties in making the assignment was to provide for the payment of separate as well as partnership creditors (*p*).

(*j*) *Crapper* v. *Patterson*, 19 U.C.R. 160; *Clarkson* v. *Archibald*, 20 N.S. 194. And see *Wilson* v. *Kerr*, 17 U.C.R. 168; 18 U.C.R. 470; *McDonald* v. *Putnam*, 7 Grant, 395; *Maulson* v. *Topping*, 17 U.C.R. *Burritt* v. *Robertson*, 18 U.C.R. 555; *Bank of Toronto* v. *Eccles* 2 M. 183; *Howard* v. *Mitchell*, 11 U.C.R. 625; *Taylor* v. *Mabley*, 9 Gr. 570 & A. 53; *Darling* v. *McIntyre*, 19 U.C.R. 154; *Mulholland* v. *Hamilton*, 10 Gr. 45; *Jennings* v. *Hyman*, 11 O.R. 65.

(*k*) *Slater* v. *Badenach*, 10 S.C.R. 296; *O'Brien* v. *Clarkson*, 10 A.R. 603.

(*l*) *Gallagher* v. *Glass*, 32 C.P. 641; and see *Alexander* v. *Wavell*, 10 A.R. 135. See also *Ontario Bank* v. *Lamont*, 6 O.R. 147; *Taylor* v. *Whittemore*, 10 U.C.R. 440; *Jennings* v. *Moss*, 10 A.R. 696; *Crapper* v. *Patterson*, 19 U.C.R. 160; *Hendry* v. *Harty*, 9 C.P. 520; *Metcalf* v. *Keefer*, 8 Grant, 392; *Feehan* v. *Lee*, 10 C.P. 385; *Cornwall* v. *Gault*, 23 U.C.R. 46.

(*m*) *Ontario Bank* v. *Lamont*, 6 O.R. 147; *O'Brien* v. *Clarkson*, 10 A.R. 603; *Slater* v. *Badenach*, 10 S.C.R. 296.

(*n*) *Metcalf* v. *Keefer*, 8 Grant 392; and see *Cornwall* v. *Gault*, 23 U.C.R. 46; *Maulson* v. *Peck*, 18 U.C.R. 113. As to power of sale on such terms as the assignee shall deem proper, see *Henry* v. *Glass*, 2 Man. Rep. 97. As to power to purchase stock to sort up existing stock, see *Robinson* v. *Huston*, 4 Man. Rep. 71; and see also *Leacock* v. *Chambers*, 3 Man. Rep. 645.

(*p*) *Mills* v. *Kerr*, 7 A.R. 769; and see *McKitrick* v. *Haley*, 46 U.C.R. 246.

But an assignment of partnership assets only by a firm upon trust to pay the joint debts only is good (*q*). And where an assignment for creditors by a firm provided that the assets were to be sold and the proceeds divided among all the creditors of the parties of the first part, but words of distribution such as "or either of them" were omitted, it was held that the effect of the assignment was to provide only for the payment of the joint creditors and not the separate creditors of the partners, and the deed must be set aside as constituting a preference (*r*).

Change in Firm.—There is authority for the proposition that where there has been a change in the firm by the retirement of one of the partners, and prior to his retirement of the original firm had given a preference to creditors of the original firm, the creditor of the original firm and not the creditors of the new firm, are those only against whom a fraudulent preference by the original firm can be declared void(*s*).

Creditor Estopped From Attacking.—While an assignment may be voidable on one or more of the above grounds, a creditor by his own conduct may be estopped from attacking it; as if he accepts payment of a dividend under it(*t*), or attends a meeting of creditors and assents to his own appointment as inspector, and acts as an inspector(*u*).

(*q*) *Eastman* v. *Pemberton*, 7 B.C.R. 459. See also *Ewart* v. *Stuart*, 12 A.R. 99.

(*r*) *Cuningham* v. *Curtis*, 5 B.C.R. 472.

(*s*) *Adams* v. *Watson Manufacturing Co.*, 15 O.R. 218; 16 A.R. 2; *Whitman* v. *Union Bank of Halifax*, 16 S.C.R. 410.

(*t*) *Beemer* v. *Oliver*, 10 A.R. 656.

(*u*) *Gardner* v. *Kloepfer*, 10 O.R. 415; 14 A.R. 60; 15 S.C.R. 390.

CHAPTER XXIII.

THE ASSIGNEE.

Assignee a Trustee.—An assignee for the benefit of creditors is a trustee not only for the creditors, but also for the debtor. It is his duty to make the most of the estate and pay the debts, but it is the debtor's estate all the time, and when the debts are paid, it is his duty to restore the surplus or what is not required for the payment of the debts, if there be any, to the debtor. The assignee is accountable to the debtor for his dealings with the estate, and, if he is guilty of any wrong-doing or breach of trust, or if he neglects or refuses to do any duty in respect of the estate, he can be held to his duty and compelled to perform it at the debtor's instance (*c*).

Official Assignees.—Preference is given to the sheriff or official assignee by the statutes, and an assignment to another person without the consent of creditors, while it is valid, will be superseded by a subsequent assignment executed to the sheriff, official assignee or another assignee with the consent of the creditors.

An assignment for the benefit of creditors made to the sheriff has been said in Ontario to be made to him as a public functionary, and on his death the care and administration of the estate assigned develops upon his deputy, and thereafter upon his successor in office (*d*).

But it has been in general provided that the sheriff is not compelled to act under the assignment until the neces-

(*c*) *Per* Maclennan, J.A., *Ball* v. *Tennant* (1894), 21 A.R. 610.
(*d*) *Brown* v. *Grove*, 18 O.R. 311.

sary disbursements under the statute are paid or tendered to him(*e*).

A private person, however, may in general disclaim.

The Assignee.—It is provided by most of the Provincial Acts that the assignee shall be a permanent and *bona fide* resident of the Province in which the assignment is made, and that he shall not have power to delegate his authority or appoint as deputy any person who is not a permanent and *bona fide* resident of the Province. The only effect of his having such a deputy apparently is, that he will be deprived of his fees (*a*).

Partner of Assignee Outside the Province.—And where the assignment is made to an assignee within the Province, but all the work in connection with the assignment is done by a partner residing out of the Province, it has been held that the assignee cannot recover or retain out of the estate any commission or expenses. It was thought that the provision had been enacted in order to prevent persons not residing in the Province from acting as assignees and keeping the assets of the estate in some other Province. The Courts, however, have taken the view that, as the assignee within the Province in such a case personally does none of the work, and incurs none of the expenses and performs none of the duties cast upon him by the acceptance of the assignment, he cannot recover; the partner residing out of the Province could not have been an assignee or joint assignee with him, because he is not a resident of the Province. It is impossible, therefore, so far as the Assignment Acts are concerned, that there should be a partnership in which one of the partners resided out of the Province; or,

(*e*) See R.S.O. (1897), cap. 147, sec. 14, sub-sec. 4; R.S.M. (1903), cap. 8, sec. 13 (c); N.S., 61 Vict., cap. 11, sec. 14 (4); N.B., 58 Vict., cap. 6, sec. 13 (4); P.E.I., 61 Vict., cap. 4, sec. 15 (4).

(*a*) See R.S.O., 1897, cap. 147, sec. 4.

in other words, the Act will not recognize this kind of arrangement. The foreign assignee must have done the work as agent, delegate or deputy of the nominal assignee, which is within the prohibition of the enactment(*b*).

Assignee—Costs.—The fact that an unsuccessful litigant is an assignee does not absolve him from the payment of costs; he may be ordered to pay costs just as any other unsuccessful litigant may be ordered to pay them. A distinction has sometimes been made with regard to an official liquidator who sues in the name of a company, but even he may be ordered to pay costs in the first instance personally. The assignee who is ordered to pay costs may have a case for recovery out of the estate if there are funds, or may look to the creditors for indemnity at whose instance the action was brought (*g*).

Removal of Assignee.—It is generally provided that the assignee may be removed and another substituted, or an additional assignee appointed by the Court. A majority of the creditors also are given the right to substitute for an assignee someone of their own choice, but in such case the assignee must reside within the county in which the debtor resided or carried on business at the time of the assignment (*h*).

It is further provided that in case of the appointment of a new or additional assignee, the estate shall forthwith vest in him without any conveyance or transfer. The assignee, however, must file an affidavit of his appointment

(*b*) *Tennant* v. *Macewan* (1897), 24 A.R. 132.

(*g*) *Macdonald* v. *Balfour* (1893), 20 A.R. 404; *Pitts* v. *Lafontaine* (1880), 6 App. Cas. 482; *Ferrao's case* (1874), L.R. 9 Ch. 355; *Ex p. Angerstein*, L.R. (1874), 9 Ch. 479. And see p. 272, *infra*.

(*h*) See R.S.O. (1897), cap. 147, sec. 8, sub-sec. 1; B.C., 1 Ed. VII., cap. 15; R.S.M. (1903), cap. 8, sec. 16; N.S., 61 Vict., cap. 11, sec. 18.

in the office or offices in which the original assignment is registered, and where there are lands, in the office where the assignment is registered.

So far as removal by the Court is concerned, an action may be brought to remove the assignee, or he may be removed on a summary application.

Apparently the Court will not remove the assignee on a summary petition or otherwise than in an action where the proceedings are *in invitum*(*i*).

Grounds of Removal.—Good grounds must be shown, and apparently any grounds which are regarded as sufficient for the removal of a trustee, as misfeasance, failure to act impartially, insolvency, or absence from the country will be sufficient. And if the assignee has an interest adverse to that of the creditors generally, or is endeavoring to work for the benefit of any creditor or of the assignor, he should be removed (*j*). And such an assignee runs the risk of being penalised in costs (*k*). And a creditor should not be an assignee of the estate where there is likely to be a conflict between his interest as a creditor and his duty as assignee (*l*). So where the assignee is an accounting party to the estate, and he will have as trustee to investigate his own acount, he should be removed (*m*). All the facts of the case must be considered, and if they appear antagonistic to the impartial performance of the duties of the assignee, he should not be allowed to act. And where a solicitor was acting as assignee, and it appeared that there

(*i*) *Re Davis' Trust*, 17 P.R. 87; and see *Re Doelle* (unreported), H.C.J. Ont., 12th Nov., 1897.

(*j*) *Ex p. Sheard*, 16 Ch. D. 107; *Ex p. Parker*, 20 Ch. D. at p. 691.

(*k*) *Ex p. Parker*, 20 Ch. D. at p. 691.

(*l*) *Re Lamb*, [1894] 2 Q.B. 805.

(*m*) *Re Mardon* (1896), 1 Q.B. 140.

was a divergence between his personal interest and his duty as assignee, he was removed(*n*).

If the assignee use the funds of the estate for his own purpose, or fail to keep proper accounts, or accept secret commissions, these are misfeasances on his part, and he will be removed (*o*).

So the insolvency of an assignee or his leaving the country in debt to reside in a foreign country is a sufficient ground for removing him (*p*).

As the majority of the creditors have the matter in their own hands, and know their own interests best, it is probable that the Court would be slow to remove an assignee on the application of a single creditor, or a minority of creditors.

Lien of Assignee for Costs.—Where an assignee is removed in either of these methods, he will have a lien on the assets under his control for his fees and proper charges. He is a trustee, and the lien given to trustees by law in such a case could be taken advantage of by him (*r*).

Death of Assignee.—In case of the death of the assignee the proper step is to summon a special meeting of creditors for the purpose of appointing a new assignee, or to procure an expression of choice of a new assignee in some other manner from them(*q*). Or an application may be made to the Court under the Trustee Acts or under the provisions of the Assignment Acts for such appointment.

Carrying on the Business.—The assignee may in general carry on the business where to do so is clearly beneficial to

(*n*) *Re Dickinson*, 2 B.C.R. 262. As to costs against assignee, see also *Re Mardon*, [1896] 1 Q.B. 146.

(*o*) *Ex p. Townshend*, 15 Vesey, 470.

(*p*) *Gray* v. *Hatch*, 18 Grant 72; *Re Barker*, 1 Ch. D. 43; *Bainbrigge* v. *Blair*, 1 Beav. 495.

(*q*) *Re Williams*, 22 A.R. 196; *Re Hagar*, unreported, H.C.J. Ont. 11th March, 1895. And see p. 265, *supra*.

(*r*) See *Re Tilsonburg, Etc. Ry. Co.*, 24 A.R. 378; *Fraser* v. *Murdock*, 6 App. Cas. at p. 872; *Life Association of Scotland* v. *Walker*, 24 Grant 293.

the estate, as in the case of filling profitable orders already booked, or of completing goods in the process of manufacture(*m*). The business may also be carried on if the creditors so direct(*n*) and in all cases it is wise to procure the creditors' sanction.

Right of Assignee to Set Aside Agreements.—It has been provided by the Provincial Acts that the assignee shall have an exclusive right of suing for the rescission of agreements, deeds or instruments or other transactions made or entered into in fraud of creditors or in violation of those Acts (*a*).

At common law it had been held that an assignee for creditors, although in the right of the debtor he took merely such interest as the debtor was beneficially entitled to, yet represented the creditors also for the purposes, and if any fraud existed against the creditors in a transaction to which the insolvent was a party, the assignee might take advantage of it (*b*). The assignee was regarded as having all the equities possessed by the creditors, and might impeach transactions which the insolvent himself could not impeach (*c*).

Under the Provincial Statutes it has been said by the Supreme Court of Canada that the assignee undoubtedly represents the creditors just as much as does in England an assignee in bankruptcy (*d*).

The provision, then, empowering the assignee to sue effects no great change. The object of the Legislature

(*m*) *Miller* v. *Mulford*, 31 N.J. Eq. 661.

(*n*) *Mussey* v. *Noyes*, 26 Vt. 462.

(*a*) See R.S.O., 1897, cap. 147, sec. 9, sub-sec. 1; B.C., 1 Ed. VII., cap. 15, secs. 51, 52; N.S., 61 Vict., cap. 11, sec. 20; R.S.M. (1903), cap. 8, sec. 48; N.B., 58 Vict., cap. 6, sec. 7; P.E.I., 61 Vict., cap. 4, sec. 10.

(*b*) *Doe d. Grimsby* v. *Ball*, 11 M. & W. 531; *Butcher* v. *Harrison*, 4 B. & Ad 129; *Sims* v. *Thomas*, 12 A. & E. 536.

(*c*) *Acraman* v. *Corbett*, 1 J. & H. 410; *Tarleton* v. *Liddell*, 17 Q.B. 390; *Anderson* v. *Maltby*, 2 Ves. Jun. at p. 255. See the opposite view in *Coats* v. *Kelly*, 15 A.R. 81.

(*d*) *Clarkson* v. *McMaster*, 25 S.C.R. per Strong, C.J., at p. 104.

was to remedy the inconvenience which arose from numerous actions being brought by creditors to void transactions entered into by the insolvent debtor (*e*).

These provisions apply, however, only to transactions made or entered into by an insolvent, and a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale by the latter of the assets of the estate as fraudulent (*f*). If, however, a creditor has begun proceedings to impeach a transaction prior to the assignment, the making of the assignment will not terminate them (*g*). The assignment has not the effect under the statute of transferring the existing cause of action to the assignee. The effect of the statute is to give the assignee of the insolvent debtor the sole right of action to vacate transactions in fraud of creditors. Prior to this statute each creditor prejudicially affected had an independent right of action, though such creditor suing on behalf of all might be defeated, that did not prevent the like action of another creditor for the same purpose (*g*).

In the absence of a statutory provision giving the assignee the exclusive right of suing, the making of an assignment does not deprive the creditors of their right to impeach the fraudulent transaction (*h*).

The sections may be read so as to apply to pending litigation instituted by the assignee or into which he has been introduced. It is not necessary to discontinue pending proceedings when begun and sue *de novo* in the name of the assignee as sole plaintiff under the authority of a Judge's

(*e*) *Hargrave* v. *Elliott*, 28 O.R. 152; *Reid* v. *Sharpe*, 28 O.R. 156.

(*f*) *Hargrave* v. *Elliot*, 28 O.R. 152.

(*g*) *Gage* v. *Douglas*, 14 P.R. 126.

(*h*) *Kitching* v. *Hicks*, 6 O.R. 739; *Macdonald* v. *McCall*, 12 A. R. 593; 13 S.C.R. 247.

order; that order may be granted so as to avail for the preservation and prosecution of a pending action(*i*).

The assignee may be joined as a plaintiff, but in such case his consent in writing should be procured where the Provincial rules of practice require the assent to the joinder of a plaintiff(*j*). In case of his consent being refused the creditor will have the right to proceed to obtain an order and bring a new action in the name of the assignee, to which his consent would not be necessary.

Costs.—The assignee is liable for the costs of litigation (*k*). If the question is one that is properly raised, the assignee will, of course, have the right of indemnity out of the estate (*l*).

In *Smith* v. *Beal*(*m*) the general question was discussed whether the assignee must pay personally the costs of litigation arising out of disputed claims in which he turns out to be ultimately unsuccessful, his action being at the instance of the majority of the creditors and inspectors. The general rule was stated to be that the trustee in the absence of misconduct should be recouped his costs, charges and expenses against the trust estate even in the case of unsuccessful litigation (*n*). And even if the trustee proceeds without the sanction of the Court in the case where he might have so protected himself, costs will be allowed out of the estate if it appears that the continuance of an

(*i*) *Gage* v. *Douglas*, 14 P.R. 126. As to form of judgment and question of costs as between solicitor and client being payable, see *Reid* v. *Sharpe*, 28 O.R. 156, where a sale of land was set aside and the land was directed to be resold and the money paid into Court and costs as between solicitor and client paid to the plaintiff.

(*j*) *Bank of London* v. *Wallace*, 13 P.R. 176.

(*k*) *McDonald* v. *Balfour*, 20 A.R. 404; *Smith* v. *Williamson*, 13 P.R. 126; *Buchanan* v. *Smith*, 17 Grant, 208.

(*l*) *Yale* v. *Tollerton*, 2 Ch. Ch. 49.

(*m*) 25 O.R. 368. And see p. 267, *supra*.

(*n*) *Pitts* v. *Lafontaine*, 6 App. Cas. 482.

action would have been authorized had prior application been made (*o*).

The English and Irish cases are strong against allowing a trustee to charge the costs of an unsuccessful appeal against the trust estate (*p*).

Contestation of Claims.—The Provincial Acts in general presuppose contestations of claims filed against the insolvent estate, and provide that the assignee may give notice of contestation. And if an assignee has information as to the claim of any claimant shewing that it is reasonably liable to contestation, that is, that there appear to be good and reasonable grounds for saying that such a claim should not rank upon the estate, or be paid out of the estate without contestation, it would appear to be his duty to advise with the inspectors and other creditors, and if need be to give notice of contestation. If this is done and an action is brought by the claimant, the assignee becomes involved in litigation on behalf of the estate in his hands, and in such a case is responsible for seeing the interest of the estate properly protected. Further, there are no provisions requiring the assignee to demand or obtain from those desiring such contestation security or indemnity against the costs of the contestation of a claim before giving the notice. Accordingly, where the assignee acts with the approval of the inspectors, and after consulting the creditors, and on the opinion of counsel, it is proper that his costs should be paid out of the estate (*q*). The right to contest may be lost by unreasonable delay (*r*).

An assignee would be bound by a judgment obtained against the debtor before the assignment unless fraudu-

(*o*) *Re Beddoe*, [1893] 1 Ch. 557.

(*p*) *Re Walters*, 34 Sol. Jour. 564; *Dillon* v. *Arkins*, 17 L.R. Ir. 636.

(*q*) *Smith* v. *Beal*, 25 O.R. 368.

(*r*) *Ex p. Kemp*, 2 W.R. 450; *Bell* v. *Ross*, 11 A.R. 458.

lent (*s*). A judgment obtained after assignment is of no effect as against the assignee (*t*).

An assignee may not pay a debt barred by the Statute of Limitations if any creditor objects to his so doing (*u*). He of course has never any right to waive the defence of the Statute of Frauds (*v*). A motion to extend time for commencing the action should be made within the thirty days (*w*). A judgment in favour of creditor merely gives him the right to rank (*x*).

In an action to establish his contested claim a creditor is confined to the quantum and items set out in his affidavit of claim (*y*). In the case cited the proper form of judgment in an action to establish a right to rank is explained.

Costs.—The assignee is entitled to his costs out of the estate where creditor establishes his claim provided the assignee act under proper authority (*z*). The rule is based on the ground that the assignee is a trustee, and a trustee in the absence of misconduct shall be reimbursed his costs, charges and expenses against the trust estate even in the case of unsuccessful litigation (*a*).

Inferior Courts.—The action lies in the Ontario County Court if claim under $400 (*b*). But an action for a declara-

(*s*) *Re Hague, Traders' Bank* v. *Murray* (1887), 13 O.R. 727; *In re Hawkins* (1895), 1 O.L.R. 404; *Ex p. Lennox*, 16 Q.B.D. 315; *Ex p. Banner*, 17 Ch. D. 480; *Ex p. Kibble*, L.R. 10 Ch. 373; *McDonald* v. *Boice*, 12 Gr. 48; *Bowerman* v. *Phillips*, 15 A.R. 147.

(*t*) *Stewart* v. *Gage*, 13 O.R. 458.

(*u*) *In re Wenham, Hunt* v. *Wenham*, [1892] 3 Ch. 59; *Budgett* v. *Budgett*, [1895] 1 Ch. 202; *Midgley* v. *Midgley*, [1893] 3 Ch. 282; *Alston* v. *Trollope*, L.R. 2 Eq. 205; *Jardine* v. *Wood*, 19 Gr. 617; *Re Ross*, 29 Gr. 385.

(*v*) *In re Rownson, Field* v. *White*, 29 Ch. D. 358.

(*w*) *Kennedy* v. *Purcell* (1888), 28 Ch. J. 99.

(*x*) *Grant* v. *West*, 23 A.R. 533.

(*y*) Per Meredith, J., *Grant* v. *West* (1896), 23 A.R. 533.

(*z*) *Smith* v. *Beal*, 25 O.R. 368.

(*a*) *Pitts* v. *La Fontaine*, 6 A.C. 482, and *vide* Burrill, 6th ed. 360.

(*b*) R.S.O. cap. 55, sec. 23 (14).

tion of the right to rank is not within the jurisdiction of the Ontario Division Court (*c*). But where monies of an estate have been improperly distributed so as to give certain creditors a preference and the amounts individually are within jurisdiction of the Division Court, the assignee may sue to recover any one part in the Division Court (*d*).

Failure to Contest.—Failure to contest simply bars the right as against the estate (*e*). The right to set-off the claim so barred in an action against the claimant by the assignee of the estate or any one claiming through him is not affected (*e*).

Creditors' Right to Take Proceedings.—If creditors are desirous of having any proceedings taken by the assignee which in their opinion would be for the benefit of the estate, it has been provided by the Provincial Acts that they may have the right to contest the question under certain terms, if the assignee, acting under the authority of creditors or inspectors, refuses or neglects to take such proceeding after being duly required to do so, the creditor affected may obtain an order from the Court authorizing him to take proceedings in the name of the assignee upon indemnifying the latter; such proceedings, however, are at the risk of the creditor suing, and the amount of the indemnity is fixed by the Court. Should the creditor be successful, any benefit derived from the proceedings belongs exclusively to him to the extent of his full claim and costs. If, on the other hand, the assignee signifies his readiness to institute the proceedings for the benefit of creditors before an order has been made authorizing the individual creditor to do so,

(*c*) *In re Bergman* v. *Armstrong* (1902), 4 O.L.R. 717.

(*d*) *Beattie* v. *Holmes*, 29 O.R. 264.

(*e*) *Johnston* v. *Burns* (1893), 23 O.R. 179, 582.

he may be authorized to proceed by the order, and in such a case the advantage derived f[illegible] the proceeding belongs to the estate(*a*).

The sections apply to cases in which there is an impeachable transaction alleged to be made or entered into in fraud of creditors which certain creditors desire to contest while the assignee declines to take proceedings to impeach the transaction. If the assignee is satisfied with the claim sought to be proved on, the creditor may still be heard to dispute it, and may apply to the Judge for an order requiring the assignee to serve a notice of contestation; but the Judge shall only make such order, if after notice to the assignee, he is of opinion that there are good grounds for contesting the claim, or, if the claimant consents in writing, the Judge may in a summary manner decide the question of its validity (*b*). Where neither the assignee nor the debtor nor the general body of creditors desires to contest the claim the Court has no jurisdiction to make an order (*b*). And where a creditor obtains an order under this provision enabling him to bring an action in the assignee's name, the action brought must be such as is justified by the scope of the order(*c*). The order should thus provide for all the relief which is or may be sought by the creditor in the action (*d*).

(*a*) R.S.O., 1897, cap. 147, sec. 9, sub-sec. 2; R.S.M. (1903), cap. 8, sec. 48; N.S., 61 Vict., cap. 11, sec. 20; N.B., 58 Vict., cap. 6, sec. 7; P.E.I., 61 Vict., cap. 4, sec. 10; B.C., 1 Ed. VII., cap. 15, secs. 51, 52.

(*b*) *Small* v. *Henderson*, 27 A.R. 492.

(*c*) *Campbell* v. *Hally*, 22 A.R. 117.

(*d*) The following is the Form or Order generally made under this section:

It is provided that the applicants may and they are hereby authorized to take and continue proceedings heretofore commenced for the purpose of attacking certain assignments and chattel mortgages, the securities held by the said [illegible] at their own expense and risk upon giving indemnity to the assignee to his satisfaction against the costs of such proceedings. And this Court further orders that

Should the creditors by arrangement with the assignee and by his consent bring an action in his name to impeach a transaction, the recovery, if any, would be for the general benefit of the estate in the absence of an order under the statutory provision (*e*). And when proceedings have been taken by a creditor on behalf of himself and all those who within a limited time should come in and contribute to the risk and expense of an action to set aside security held by another creditor, the latter may while defending his security join with the attacking creditor in indemnifying the assignee, so that in the event of his failure to retain his security he may participate in the fruits of the litigation (*f*) This is on the principle that a creditor is none the less a creditor because his security is attacked. If, however, there should be fraud or collusion on the part of a creditor whose security was impeached in joining in the attack, the Court would remedy the matter (*f*).

It should be noted that the creditor cannot recover more than the full amount of his claim with interest and costs. There was formerly some doubt on this point, but it was decided by the Ontario Court of Appeal in this way, and has since been incorporated into the statutory provisions (*g*).

Preserving Assets in Province.—It is generally provided that no property or assets of an estate assigned under the provisions of the Act shall be removed out of the Province without the order of a Judge, and the proceeds of the sale of any such property or assets, and all moneys received on account of any estate shall be deposited by the assignee in

all benefit derived from the proceedings aforesaid shall belong exclusively to the applicants and such other creditors as may within four days after notice to them of this order agree to contribute to the expense and risk of such litigation, and shall in writing signify such agreement. *Barber* v. *Crathern*, 28 O.R. 615.

(*e*) *Doull* v. *Kopman*, 22 A.R. 447.

(*f*) *Barber* v. *Crathern*, 28 O.R. 615.

(*g*) See *McTavish* v. *Rogers*, 23 A.R. 17.

one of the incorporated banks within the Province, and shall not be withdrawn or removed without the order of such Judge, except in payment of dividends and other charges incidental to the winding up of the estate.

Any assignee or other person acting in his stead or on his behalf violating the provisions of this section shall be liable to a penalty which may be recovered summarily before a Judge; and one-half of the said penalty shall go to the person suing therefor, and the other half shall belong to the said estate; but in default of payment of the said penalty and all costs which may be incurred in any action or proceeding for the recovery thereof, such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be disqualified from acting as assignee of any estate while such default continues.

The penalty mentioned is recoverable in summary proceedings. It is the duty of the assignee to keep the trust fund entirely separate and distinct from his own moneys. If the funds are deposited in a bank they should be paid into a separate account and in the name of the assignee as such. If the assignee mingles the trust funds with his own he commits a breach of trust (*a*). And in such a case the assignee will be chargeable with interest at the legal rate(*a*).

Remuneration of Assignee.—It has been generally provided that the assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the county in which the assignment is registered or the Judge thereof, if complained of by the assignee or

(*a*) *Duffy* v. *Duncan* (1860), 32 Barb. (N.Y.) 587; *Utica Insurance Company* v. *Lynch* (1845), 11 Paige 530; *Raphael* v. *Boehm* (1805), 11 Ves. 92; *Ex p. Townshend* (1809), 15 Ves. 470.

any of the creditors. In case the remuneration of the assignee has not been fixed before the final dividend, the assignee may insert in the final dividend sheet, and retain as his remuneration, a sum not exceeding *five* per cent. of the cash receipts, subject to review by the Court or Judge as hereinbefore provided; but no application by the assignee to review the said allowance shall be entertained, unless the question of his remuneration, previous to the preparation of the final dividend sheet has been brought before a meeting of creditors competent to decide the same.

Inspectors.—Inspectors are in the position of quasi-trustees under the various Acts, but their powers and duties have not as yet been fully defined. An inspector may act as solicitor for the estate and receive his costs therefor (*a*). But he will not be allowed to purchase from or make any profit out of the estate since he is a quasi-trustee (*b*).

The Ontario Act limits the remuneration of an inspector to $4 per day. While in British Columbia inspectors are not entitled to any remuneration.

Examination of Assignor.—Where there has been an assignment for the benefit of creditors the assignee, or assignees, upon resolution passed by a majority vote of the creditors present or represented at a meeting of the creditors of the assignor regularly called, or upon the written request or resolution of the majority of the inspectors of the estate, may without an order examine the assignor or any person who is or has been an agent, clerk, servant, officer or employee of any kind of the assignor, upon oath, touching the estate and effects of the assignor, and as to the property and means he had when the earliest of the

(*a*) *Strachan* v. *Ruttan* (1892), 15 P.R. 100.

(*b*) See *Morrison* v. *Watts* (1892), 19 A.R. 622; *Thompson* v. *Clarkson* (1891), 21 O.R. 421; *Segsworth* v. *Anderson* (1893), 23 O. R. 573; 21 A.R. 241; 24 S.C.R. 699; *Pearson's Case*, 26 O.R. 289.

debts or liabilities of the assignor existing at the date of the assignment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability, and as to any and what debts are owing to him.

The examination is conducted like an examination of a judgment debtor, and may be very searching and far reaching, going back to the date of the oldest claim existing at the time of the assignment and covering all after acquired property and its disposal. The provision will be liberally construed and it has been held that a former servant of a dissolved firm may be examined(*a*).

Where a judgment debtor attends for examination, but refuses to be sworn, he will be ordered to attend, take the oath, and submit to be examined at his own expense; if he makes default process of contempt may issue (*b*).

The Judge hearing the examination has the right to commit the debtor because of the insufficiency of his answers, without having given him an opportunity of being heard (*c*). A Judge having informed the debtor that unless he assigned certain property to the plaintiffs he would make an order for his committal, did so after ten days without further notice to debtor. It was held that the order was valid nor was it necessary to issue such an order at time of the examination (*d*).

Examination of Assignee.—In an action by creditors an assignee who was interested in the success of the action, had instigated its being brought and was providing material in the way of documents to the plaintiffs for its efficient prose-

(*a*) *Re Guinane* (1898), 18 O.R. 208.
(*b*) *Uhrig* v. *Uhrig* (1884), 15 P.R. 53.
(*c*) *Ponton* v. *Bullen* (1864), 2 E. & A. 379.
(*d*) *Baird* v. *Story* (1864), 23 U.C.R. 624.

cution was compelled to produce all documents in his possession and be examined for the purpose of such production (*e*).

Satisfactory Answers.—The broad test to be applied in guaging the character of the answers in order to determine whether they are satisfactory is:—Having regard to the circumstances of each case are the answers sufficient to satisfy the mind of a reasonable person that full and true disclosure has been made (*f*). The examination should not be so conducted as to try to entrap the debtor (*f*). Answers are not unsatisfactory merely because they do not account for the application of the debtor's assets in a proper manner (*g*). Answers to be satisfactory must be so not only in form but in substance, that is, the account given of the property must shew the transactions respecting the same "to be satisfactory and not merely full and truthful" (*h*). The debtor must have contumaciously refused to answer or so equivocated as to render his answer no answer at all before he can be said to have given unsatisfactory answers (*i*).

It is the duty of a debtor to furnish such an explanation as will place his dealings in an intelligible shape and not to leave his creditors to find out as best they may, what is the business of the debtor to make clear (*j*). Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he have the means at hand to qualify himself to explain (*j*). The words "deemed satisfactory" (in sec. 9 R.S.O. ch. 81)

(*e*) *Fotheringham* v. *Isbister* (1891), 14 P.P. 112.
(*f*) *Graham* v. *Devlin* (1889), 13 P.R. 245.
(*g*) *Hobbs* v. *Scott* (1864), 23 U.C.R. 619.
(*h*) *Crooks* v. *Stroud* (1883), 10 P.R. p. 133.
(*i*) *Lemon* v. *Lemon* (1874), 6 P.R. 184.
(*j*) *Foster* v. *Van Wormer* (1888), 12 P.R. 597.

mean "if the debtor fully and credibly gives the information called for by the *viva voce* question" (*k*). A married woman may be committed (*l*).

A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of (*m*). As the proceedings under this Act are of a penal nature, and imprisonment is awarded on the principles of punishment, it is only to be inflicted upon a clear offence being shewn. If there be a ground for reasonable doubt the defendant is entitled to the benefit of it (*n*). A County Court Judge has no jurisdiction to commit for unsatisfactory answers (*o*).

(*k*) *Peoples' Loan Etc., Co.* v. *Dale* (1899), 19 C.L.T. 82.

(*l*) *Metropolitan, Etc., Co.* v. *Mara* (1880), 8 P.R. 355.

(*m*) *Foster* v. *Van Wormer* (1888), 12 P.R. 597.

(*n*) *Hobbs* v. *Scott* (1864), 23 U.C.R. 619; *Lemon* v. *Lemon* (1874), 6 P.R. p. 186.

(*o*) *In re Rochon*, 31 O.R. (1899), 122.

CHAPTER XXIV.

RANKING OF CLAIMS.

The Provincial Acts have provided that every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of.

In case a person claiming to be entitled to rank on the estate assigned does not within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claims, the Judge of the County Court of the county wherein the debtor at the time of making the assignment resided or carried on business, may, upon a summary application by the assignee, or by any other person interested in the debtor's estate (of which application at least three days notice shall be given to the person alleged to have made default in proving a claim as aforesaid), order that unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person so making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and if the claim is not so proved within the time so limited, or within such further time as the said Judge may by subsequent order allow the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor (*a*).

(*a*) See R.S.O. (1897), cap. 147, secs. 20 & 21; R.S.M. (1903), cap. 8, sec. 29; N.S., 61 Vict., cap. 11, secs. 32, 33; N.B., 58 Vict., cap. 6, sec. 20; P.E.I., 61 Vict. cap. 4, sec. 22; B.C., 1 Ed. VII., cap. 15, secs. 17, 30.

Nature of Claims Which May Rank.—There are no specific provisions in these Acts as to what classes or kinds of claims are to be permitted to rank. It has, however, been decided that there is no right to rank for contingent claims or claims for damages (*b*).

Contingent Claims—Damages.—The Act relates to the estate of an insolvent person who is unable to pay his "debts" in full. He is spoken of throughout as the "debtor," and the person who claims upon the estate as the "creditor." A claim for damages is nowhere mentioned, and wherever the claimant is referred to the language seems to point to a claim against one who is a debtor; claimants in respect of commercial demands due, or accruing due, whether the liability therefor is contested or not. The Acts provide also that where the claim is not accrued due a deduction shall be made for interest, a provision that certainly could not contemplate unadjudicated claims for damages (*b*).

In *Grant* v. *West* (*b*) the person seeking to rank was claiming damages against the assignor for breach of contract, and it was held that he could not after the assignment bring an action to ascertain the damages or to rank for the amount of the estate in the hands of the assignee. It was also laid down in that case by the trial Judge that a creditor is confined in an action to establish his contested claim to the quantum and items set out in the affidavit of claim filed with the assignee (*c*).

The claim for damages against an overholding tenant for double the yearly value of the land has also been held an unliquidated claim, and therefore not provable against the estate in the hands of an assignee for creditors (*d*).

(*b*) *Grant* v. *West* (1896), 23 A.R. 533.

(*c*) See also in this case the proper Form of Judgment in an action establishing a right to rank on the estate.

(*d*) *Magann* v. *Ferguson* (1898), 29 O.R. 235.

In *Carswell* v. *Langley*(*dd*), the claimant was seeking to rank on a covenant by the insolvent to pay an annuity of $100 a quarter for the balance of her natural life. This was held to be in the nature of a contingent debt, and following *Grant* v. *West*, she was held disentitled to recover. Nor can a claim be made for a sum payable under a contract for work not done at the time of the assignment, the time for the work also not having elapsed. There are in such a case the contingencies of refusal to perform and similar contingencies (*e*).

Guarantor.—In *Clapperton* v. *Mutchmor*(*f*) the insolvent was liable as a guarantor on certain notes which did not mature until after he had made an assignment for the benefit of his creditors. The holder of the notes sought to rank against his estate, but it was held that he could not do so. The Court said there was no debt in this case at the time of the assignment, there could be no debt until the notes matured and default arose in their payment by the maker, and although the time may have elapsed at the date when the claim was filed and all the notes became due and be unpaid, still the fact of the status of creditor being acquired after the assignment does not entitle the holder of the notes to rank with those who are creditors at the date of the assignment. The estate transferred was for the benefit of those then creditors, and not of others who might become so by changed conditions in the future. This must be distinguished from the case where the assignor is the endorser of

(*dd*) (1902) 3 O.L.R. 261.

(*e*) *Mail Ptg. Co.* v. *Clarkson* (1898), 25 A.R. 1. See also *Ashley* v. *Brown* (1890), 17 A.R. 500; *Gurofski* v. *Harris* (1896), 27 O. R. 201. Compare, however, *Tillie* v. *Springer* (1892), 21 O.R. 585, where it was held that a debt payable in five annual instalments might be proved. Compare the provisions of the Winding-Up Act, R.S.C. cap. 129, sec. 56, which give a right to rank for damages; and see *Re Dumbrill* (1884), 10 P.R. 216.

(*f*) (1899), 30 O.R. 595.

notes which are not mature or exigible, in which case it is expressly provided by the Acts that a creditor may rank.

And where a guarantee is given for an ultimate balance of account the surety will not be permitted to rank unless he has paid the amount of guarantee before the claim is proved (*g*).

Where there are two sureties, and one has paid the full amount of the debt and obtained an assignment from the other, he is entitled to rank against the estate of his co-surety for the full amount paid(*h*).

Cestui Que Trust.—The ordinary rule in regard to a *cestui que trust* is that unless the trust funds can be traced into specific property, he ranks only as an ordinary claimant.

In the case of *Cullhane* v. *Stuart* (*i*) the insolvent had wrongfully converted certain moneys to his own use and employed them in his own business to pay his trading debts, but there did not appear to be any identity or connection with the stock-in-trade which passed under the assignment, and the beneficiary was allowed to rank merely as an ordinary creditor.

In *Long* v. *Carter* (*j*) an agent purchased goods for his principal with money supplied by the latter. It was held that there was a trust impressed upon the goods in the principal's favor, and this trust was enforceable against the agent's assignee for the benefit of creditors even though the agent had while purchasing goods for the principal also purchased goods of the same kind for himself, and had

(*g*) *Martin* v. *McMullen* (1890), 19 O.R. 230; 18 A.R. 559.

(*h*) *Re Parker*, [1894] 3 Ch. 400; and see *Young* v. *Spiers* (1889), 16 O.R. 672.

(*i*) (1887), 6 O.R. 97.

(*j*) (1896), 23 A.R. 121; 26 S.C.R. 430.

not set aside the specific portions of the goods to answer the principal's claim (*k*).

Crown.—The Crown is not entitled to any priority, and if it elects to come in under the assignment, it is bound by the terms thereof, and can take only ratably and proportionately with the other creditors (*l*).

Foreign Creditors.—In the winding up of an Ontario estate of an insolvent domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors (*m*).

Relation.—A wife in the present state of the law is in the same position considered a creditor of her husband as a stranger (*n*). But clear and convincing evidence of the *bona fides* of the claim by a wife or a near relation and of the actual creation of the debt should be given (*o*).

Amending Claims.—By analogy to procedure in administration it may be presumed that claims may be amended at any time before the final distribution of the assets(*p*).

Notice of Claims.—An assignee is not exonerated by the statutes if he had actual notice of a claim before distribution, even though he may have sent out a notice to the creditor to prove his claim and received no response to it. In such a case, if he had failed to pay the claim, he will be liable to the creditors for their proper dividend on the estate (*q*).

(*k*) See also *Harris* v. *Truman* (1882), 9 Q.B.D. 264; *Gamble* v. *Lee* (1878), 25 Gr. 326.

(*l*) *Clarkson* v. *Attorney-General of Canada* (1889), 16 A.R. 202.

(*m*) *Milne* v. *Moore* (1894), 24 O.R. 456.

(*n*) *Warner* v. *Murray* (1889), 16 S.C.R. 720.

(*o*) *Re Miller* (1877), 1 A.R. 393; and see p. 70, *supra*.

(*p*) As to amending claims, see *Re Metcalfe* (1879), 13 Ch. D. 236; *Ex p. Boddam* (1860), 2 DeG. F. & Jones 625; *Greig* v. *Somerville* (1830), 1 R. & M. 338.

(*q*) *Carling Brewing Co.* v. *Black* (1884), 6 O.R. 441.

Interest.—In regard to interest on claims, it has been held that interest continues to run notwithstanding the making of an assignment (*r*).

Preferred Claims.

Preferred Claims—Landlord.—The landlord's lien for rent is by the statutory provisions (*s*) restricted to arrears due during the period of one year last previous to and for three months following the execution of the assignment, and for the further period of occupancy by the assignee of the premises leased.

His right to a lien for arrears of rent depends on the existence of assets subject to distress, and if there are none on the premises which he could seize, the landlord will rank only as an ordinary creditor (*t*).

Acceleration Clauses.—Leases commonly contain a clause providing that if the term thereby demised, or the goods on the demised premises shall at any time be seized or taken in execution or attachment by any creditor of the lessee, of if the lessee shall make any assignment for the benefit of his creditors, or being insolvent, take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or in case of default being made by the lessee in any of the covenants or conditions therein, the then current quarter's rent and the next succeeding quarter's rent shall immediately become due and payable, and may be distrained for, but in other respects the term shall immediately become forfeited, and the lessors shall thereupon be entitled to enter upon the said premises or any part thereof

(*r*) *Stewart* v. *Gage* (1887), 13 O.R. 458.

(*s*) See R.S.O., 1897, cap. 170, sec. 34, and similar provisions in other provinces.

(*t*) *Magann* v. *Ferguson* (1898), 29 O.R. 235; and see *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. 337.

in the name of the whole to re-enter, and the same to have again, repossess and enjoy as if the lease had not been executed, or some provision to the same effect.

The effect of such a covenant as this in the absence of the statutory provision is to permit the landlord to eject the assignee on an assignment being made (*u*). But by statute the assignee may now elect to retain the premises (*uu*).

But there must be an election on the part of the lessor to forfeit the term; the lease does not become void because of an assignment, but only voidable. The right, however, to claim accelerated rent does not depend on the lessor's election to forfeit the term, but upon the fact of an assignment having been made (*v*).

And where the assignee has given notice of an election to retain the premises for the unexpired term of the lease, the landlord cannot claim the penalty and also occupation rent, but is merely entitled to the full amount of rent for that period and no more. And where it has been paid under protest it may be recovered back (*vv*).

Proviso is Divisible.—The provision for accelerated rent of the nature above set out is divisible, and the lessor may distrain for rent so long as he has not elected to forfeit the term; if he elects to do that he loses his remedy by distress, and is perforce driven to recover the rent in some other manner, for where the term has been determined in consequence of forfeiture and not by effluxion of time, it would seem that the Statute of Anne is inapplicable (*w*).

(*u*) *Magee* v. *Rankin* (1869), 29 U.C.R. 257.

(*uu*) *Kennedy* v. *MacDonell* (1901), 1 O.L.R. 250.

(*v*) *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. 337. And see *Graham* v. *Lang* (1886), 10 O.R. 248; *Palmer* v. *Mail Ptg. Co.* (1897), 28 O.R. 656.

(*vv*) *Kennedy* v. *MacDonell*. And see *Tew* v. *Routley* (1900), 31 O.R. 358.

(*w*) *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360.

And if the term is gone, the landlord being unable to distrain as at common law or by virtue of the statute, the power of distress specially mentioned in the lease can only be regarded as a personal license to be executed on the tenant's own goods and not on the property which is passed to the assignee (*x*).

Condition is Personal to Lessor.—A condition in a lease such as that set out above is personal to the original lessor and lessee, and does not run with the land, and it has been held in Ontario that it cannot be taken advantage of by a grantee of part of the reversion (*a*).

Distress After Assignment.—Goods on the premises and in the possession of the assignee are not *in custodia legis* so as to protect them from distress. And the landlord may distrain as well after as before an assignment.

In *Wyld* v. *Clarkson* (*y*) it is true that the estate in the hands of the assignee is spoken of as being *in custodia legis* protected from judgments and executions and available for creditors in due course of law. Those observations, however, were not directed to a case of this kind. Where an assignee for creditors is the assignee of a lease he is subject to the exercise of the lessor's ordinary remedies (*z*).

"Arrears of Rent."—The expression "arrears of rent where due for three months following the execution of such assignment" means arrears of rent becoming due during the three months following the execution of such assignment, and the landlord is therefore entitled, in addition to

(*x*) *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. 337.

(*y*) (1886), 12 O.R. 589.

(*z*) *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. 337; *Eacrett* v. *Kent* (1888), 15 O.R. 9. As to forfeiture see also *Smith* v. *Gronow* (1891), 2 Q.B. 394; *Munro* v. *Waller* (1897), 28 O.R. 29; *Dobson* v. *Southeran* (1888), 15 O.R. 15.

(*a*) *Mitchell* v. *McCauley* (1892), 20 A.R. 272.

the current quarter's rent, to the quarter's rent payable in advance on the quarter day next after the assignment(*b*).

Preferential Lien.—The expression "the preferential lien of the landlord for rent" in sec. 34 of the Ontario Landlord and Tenant Act has the same meaning that it had under the Insolvent Acts, and the landlord is entitled to be paid the amount found due to him as a preferred creditor out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress although there be no actual distress (*c*).

Distress for Taxes.—And where the lease in addition to the provisions under discussion contains a clause that the current year's taxes shall immediately become due and payable as rent in arrear and recoverable as such, it has been held that on the lessee making an assignment the lessor is entitled to recover and has a preferential lien for in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment, the rent of the current quarter in which the assignment was made which was also due and in arrear, as well as a further quarter's rent, together with the taxes for the current year.

In *Langley* v. *Meir* (*e*) it was said that sec. 34 of the Ontario Landlord and Tenant Act is a restrictive provision and limits the landlord's lien, even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and that it does not give to the landlord an absolute right to three

(*b*) *Lasier* v. *Henderson* (1898), 29 O.R. 673.

(*c*) *Ibid.*

(*d*) *Tew* v. *Toronto Savings & Loan Co.* (1898), 30 O.R. 76. But see *Tew* v. *Routley* (1900), 31 O.R. 358.

(*e*) (1898), 25 A.R. 372.

months' rent upon an assignment for the benefit of creditors being made (*f*).

Wages.—The Ontario Act respecting wages (R.S.O. 1897, chap. 156), provides that "whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of the making of such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims," and the Act applies to wages or salary "whether the employment in respect of which the same shall be payable, be, by the day, by the week, by the job or piece or otherwise (*g*).

Judgments, Executions, Etc.—It is generally provided that an assignment for the general benefit of creditors 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 (*h*).

Attached Debts.—Where a debt has been attached, it has been held that the assignment does not take precedence of the attachment, and the words of the New Brunswick

(*f*) See, however, *Clarke* v. *Reid* (1896), 27 O.R. 618. See also *Baker* v. *Atkinson* (1886), 11 O.R. 735; 14 A.R. 409; *Graham* v. *Lang* (1886), 10 O.R. 248.

(*g*) And see similar provisions in other Provinces. *Welch* v. *Ellis*, 22 A.R. 255; *Re Ontario Forge & Bolt Co.* (1896), 27 O.R. 230.

(*h*) R.S.O. (1897), cap. 147, sec. 11; N.B., 58 Vict., cap. 11, sec. 9; B.C., 1 Ed. VII., cap. 15, sec. 14.

and the British Columbia Acts do not apply to attachments. The Ontario Act has, however, been amended in this respect (*i*).

Completely Executed by Payment.—The words "completely executed by payment mean voluntary or involuntary payment to the sheriff (*j*).

Lien for Costs.—The costs for which the execution creditor has a lien are the costs not of the execution only, but all the usual costs which could be recovered from the debtor under an execution (*k*).

And the lien of a plaintiff for costs by virtue of sec. 9 of the Ontario Act and similar provisions is not superseded by an assignment, and the sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so, and the plaintiff loses his lien, it has been held that he is not entitled to rank on the insolvent's estate as a preferential creditor, or if he is so entitled, that it could only be on the net funds available for payment of the proper charges incurred in the management of the estate (*l*).

Alimony.—The precedence given over all judgments and executions not completely executed by payment does not, however, extend to a judgment for alimony in Ontario which has been registered against the lands of the debtor

(*i*) See *Wood* v. *Joselin*, 18 A.R. 59; *Re Thompson*, 17 P.R. 109. R.S.O., 1897, cap. 153, sec. 13 (1), provides for priority of a mechanic's lien. In *Roberts* v. *Bank of Toronto* (1894), 21 A.R. 629, a brick-making lien was given priority as against an execution creditors and the assignee for creditors. An execution is "completely executed by payment when the sheriff receives the money (1889), 17 O.R. 592.

(*j*) *Sinclair* v. *McDougall*, 29 U.C.R. 388; *Clarkson* v. *Severs*, 17 O.R. 592

(*k*) *Ryan* v. *Clarkson*, 16 A.R. 311; 17 S.C.R. 251.

(*l*) *Gillard* v. *Milligan*, 28 O.R. 645.

prior to an assignment by him, and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant (*m*).

Individual and Partnership Claims.

Individual and Partnership Claims.—It has been generally provided in the Provincial enactments that if any assignor or assignors executing an assignment under the Act for the general benefit of creditors has debts both individually and as a member of the partnership or of different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates shall be paid in full (*n*).

General Principles.—These provisions are declaratory of the principles adopted in most bankrupt laws. The joint creditors are to be paid first out of the co-partnership or joint estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate over and above what will be sufficient to pay the joint creditors, it is to be applied to pay the separate creditors. If, on the other hand, there is a surplus of the separate estate beyond what will be sufficient to pay the separate creditors, it is to go to supply any deficiency that may remain as to the joint creditors (*a*).

Different Firms.—And the bankruptcy law is similar where there are several persons members of different

(*m*) *Abraham* v. *Abraham* (1890), 19 O.R. 256; 18 A.R. 436. See also *Roberts* v. *Bank of Toronto*, 25 O.R. 194; 21 A.R. 629.

(*n*) N.B., 58 Vict. cap. 6, sec. 5; R.S.O. (1897), cap. 147, sec. 7; P.E.I., 61 Vict., cap. 4, sec. 7; B.C., 1 Ed. VII., cap. 15, sec. 20; R.S.M. (1903), cap. 8, sec. 27; N.S., 61 Vict., cap. 11, sec. 28.

(*a*) *Ex p. Cook*, 2 P. Wms. 500; *Ex p. Clay*, 6 Vesey 813; *Ex p. Taitt*, 16 Vesey 193. And compare section 40, sub-sec. 3 of the English Bankruptcy Act of 1883.

firms, all of which are insolvent; distinct accounts will be taken of the estates of the respective firms, as well as of of the separate estate of each bankrupt, and each estate will have to pay its own debts (*b*).

What Are Firm Assets?—All the property which at the beginning of the partnership was partnership assets, and all subsequent additions and accounts owing to the partnership, form part of the partnership assets (*c*). So in case of property which has been purchased for the purposes of the partnership (*d*). And the fact that the property is paid for out of partnership moneys gives rise to the presumption that it was purchased for the partnership (*e*). Property acquired by one of the partners by taking advantage of his position as a partner, such as obtaining the renewal of a lease to himself, would be regarded as partnership property (*f*).

Determining Nature of Property.—The nature of the property, however, may be changed by mutual agreement between the partners, and it may be converted into separate property by them at any time, provided that the arrangement is *bona fide* and not made with fraudulent intent, and the property will be distributed according to the character it bears between the partners themselves at the time of the assignment (*g*). But if the partners are insolvent, and the

(*b*) *Ex p. Marlin*, 2 Brown C.C. 15; and see generally, *Ontario Bank* v. *Chaplin*, 20 S.C.R. 152; *Re Baker*, 3 Ch. Ch. 499; *Re Chaffey*, 30 U.C.R. 61; *Bank of Toronto* v. *Hall*, 6 O.R. 644; *Re McDonagh* v. *Jephson*, 16 A.R. 107; *Martin* v. *Evans*, 6 O.R. 238; *Re Randolph*, 1 A.R. 315; *Re Harper Wilson*, 2 A.R. 151.

(*c*) *West* v. *Skip*, 1 Ves. Sr. 456.

(*d*) *Fereday* v. *Wightwick*, 1 R. & M. 49.

(*e*) *Smith* v. *Smith*, 5 Vesey, 193; *Morris* v. *Barrett*, 3 Y. & J. 384.

(*f*) *Clements* v. *Hall*, 2 DeG. & Jones, 173.

(*g*) *Ex p. Manchester Bank*, 12 Ch. D. 917; 13 Ch. D. 465; *Ex p. Ruffin*, 6 Vesey 119.

transaction was made with intent to defraud the joint creditors, it will be set aside (*h*).

Partnership and Separate Estates.—Where the assignor is carrying on business by himself, but was formerly a partner in a firm, creditors having claims against him for goods sold to that firm, have been held entitled to rank against his estate ratably with the creditors having claims against the assignor alone (*j*).

The statutory provision has been said not to apply to such cases, but only to the case of the assignor who has both separate estate and joint estate which are being administered together (*k*).

It has been held that the rule of preferring partnership property for the payment of partnership debts is for the benefit of the partners themselves, and that they may waive it. Accordingly a partnership may execute a mortgage on partnership property to secure the individual debts of one of the partners, and such a transaction has been upheld in a contest by a joint creditor to set it aside (*i*).

If the debt accrues before the formation of the partnership against one of the partners, the creditor cannot subsequently rank against the partnership (*l*).

In the administration by the Court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him,

(*h*) *Ex p. Mayou*, 11 Jur. N.S. 433; *Re Kempiner* (1869), L.R. 8 Eq. 286.

(*j*) *Macdonald* v. *Balfour*, 20 A.R. 404.

(*k*) *Macdonald* v. *Balfour*, 20 A. R. 405. See *Moorehouse* v. *Bostwick*, 11 A.R. 76; *Re Simpson*, L.R. 9 Ch. 572; *Re McRae*, 25 Ch. D. 16; *Kendall* v. *Hamilton*, 4 App. Cas. 504; *Ex p. Williams*, 11 Ves. 5; *Re Walker*, 6 A.R. 169.

(*i*) *Kirby* v. *Schoomaker*, 3 Barb. (N.Y.) Ch. 46.

(*l*) *Re Simmons*, 20 L.C. Jur. 296.

when, apart from his claim, there would be no surplus available for partnership creditors(*m*).

The rule when administering assets which precludes one partner from proving and ranking as a separate creditor with his co-partner was established not so much with reference to the separate creditors as for the advantage of joint creditors, because the joint creditors have the right to come in on the separate estate of the one partner after his separate creditors are paid in full, and if the other partner were allowed to prove on a separate claim against his co-partner, it would tend to reduce the amount of the possible assets available for the joint creditors. This being so, there can be no objection to one partner proving for a separate debt against the separate estate of his co-partner in competition with his separate creditors (*m*).

And a partner seeking to prove against the estate of his co-partner will only come in competition with the joint creditors who are, of course, his own creditors, in cases where the separate estate will yield a surplus, and he may so prove against the separate estate of his co-partner when it is plain there is no surplus of such separate estate to distribute amongst the joint creditors (*n*).

Where a partnership is insolvent and proof is tendered by a solvent partner against the separate estate of his insolvent partner in respect to a separate debt, it is no objection to such proof that the dividend to be received from the insolvent's separate estate will swell the surplus, which will eventually come from the solvent partner's estate to pay the joint debts of the partnership(*o*).

(*m*) *Re Ruby*, 24 A.R. 509.

(*n*) *Per* Vaughan Williams, J., in *Re Head* (1894), 1 Q.B. 638, at p. 640; see also *Ex p. Hind*, 62 L.T.N.S. 327.

(*o*) *In re Head* (1894), 1 Q.B. 638.

The Valuation of Securities.

Valuing Securities.—The Acts of all the Provinces have provided that every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of a debtor or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon, and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value, to be paid out of the estate as soon as the assignee has realized the security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor, shall be the amount for which he shall rank and vote in respect of the estate.

It is further provided that if a creditor holds a claim based upon a negotiable instrument upon which the debtor is only indirectly or secondarily liable and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of the section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment he shall be entitled to amend and revalue his claim.

The Acts further provide a procedure to be adopted in case of failure to value the security, in order to compel the creditors to put a value on his security(*p*).

And if the creditor is unable to place a value on his claim in filing his affidavit, he should, as soon as he can

(*p*) See R.S.O., 1897, cap. 147, sec. 20, sub-secs. 4, 5 and 6; B. C., 1 Ed. VII., cap. 15, sec. 30; R.S.M. (1903), cap. 8, secs. 29, 30, 31; N.S., 61 Vict., cap. 11, secs. 29, 30; N.B., 58 Vict., cap. 6, secs. 19, 20; P.E.I., 61 Vict., cap. 4, sec. 21.

arrive at the value, file a new affidavit of claim, containing the valuation(*r*). If the creditor's security is of such a nature that he is not properly called on to value it, it is obvious that the failure to place a valuation on it does not make his affidavit of claim defective or prevent him from voting at the meeting(*s*), and to set out in the affidavit that the security is worthless has been held to be a valuation(*t*).

Common Law Rule.—Apart from statutory provision a creditor cannot be compelled to value a security held by him. He is in general entitled to prove for the full amount of his claim, and also to realize any securities which he may hold, provided that he does not receive altogether more than the full amount of his claim(*q*).

Partnership Debts.—Where a creditor holds security on the estate of a partnership for the indebtedness of one of the individual partners, he is entitled to prove against the separate estate without putting a value on such security.

It is a general principle of the law of bankruptcy that the creditor is not bound to value a security held on the estate of a third person. He is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether realize more than one hundred cents on the dollar (*u*). And a guarantee given by a third person for the debtor need not be valued (*v*).

(*r*) *Wyld* v. *Clarkson*, 12 O.R. 589.

(*s*) *Martin* v. *McMullen*, 19 O.R. 230.

(*t*) *Re Piers* (1898), 1 Q.B. 627.

(*q*) *Molsons Bank* v. *Cooper*, 23 A.R. 146; *Young* v. *Spiers*, 16 O.R. 672; *Beaty* v. *Samuel*, 29 Gr. 105; *Eastman* v. *Bank of Montreal*, 10 O.R. 79; Burrill, paragraph 393.

(*u*) *Re Plummer*, 1 Phil. 56; *Re Jones*, 2 A.R. 626; *Re Chaffey*, 30 U.C.R. 64; *Re Baker*, 3 Ch. Ch. 499.

(*v*) *Martin* v. *McMullen*, 19 O.R. 230; 20 O.R. 257; 18 A.R. 559.

In *Re Wyld* v. *Clarkson*(*x*), a trader was supplied with goods on the guarantee of a third person. The latter made an assignment for the benefit of his creditors and the trader assigned shortly after. The creditor proved his claim for the full amount on the guarantor's estate, and set out in his claim that he held as security his claim against the trader's estate, but did not value it. The trader effected a composition with his creditors and gave composition notes therefor. The question arose as to whether or not the creditor should value the security held on the trader's estate, and it was decided that by the assignment of the latter his estate was placed *in custodia legis*, protected from judgments and executions and made available for the creditors, who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmuted into a claim *in rem*, and so could fairly be regarded as in the nature of a security which the creditor was bound to value under the statute.

Holder of Bill of Exchange.—The holder of a bill of exchange or a note may at common law prove against all parties liable on it (*y*), and may receive a dividend from each of the estates against which he proves, provided he do not receive in all more than 100 cents on the dollar(*z*).

If after filing his claim he receives dividends from other parties, they will not be deducted from the amount of his claim, and he will be entitled to receive dividends on the full amount until the debt is satisfied(*a*).

(*x*) 12 O.R. 589.

(*y*) *Alsager* v. *Curry*, 12 M. & W. 751; *Starey* v. *Barnes*, 7 East 435.

(*z*) *Beaty* v. *Samuel*, 29 Gr. 105; *Eastman* v. *Bank of Montreal*, 10 O.R. 79; *Young* v. *Spiers*, 17 O.R. 672.

(*a*) *Ex p. Wyldman*, 2 Ves. 103.

Molsons Bank v. Cooper.—In *Molsons Bank* v. *Cooper*(*b*) the debtors were allowed a line of credit by their bankers, to be secured by a deposit of customers' notes. The bank advanced moneys on the notes of the firm, who then deposited from time to time their customers' notes as collateral security. The debtors suspended payment and the bank sued upon all the overdue notes of the firm which they held, giving credit for money already received from the collateral. Judgment was recovered for a large amount and execution was issued. The amount realized under execution was insufficient to pay the full amount of the judgments obtained against the debtors, and the sheriff proceeded to a *pro rata* distribution under the Ontario Creditor's Relief Act.

The unsecured creditors claimed that the bank's claim should be reduced by the amount of moneys subsequently received by the bank on the collateral securities. The Court decided that the bank's claim need not be reduced. The bank then brought a second action for the balance of their claim and recovered judgment, although the moneys collected on their collaterals exceeded the amount sued for. After passing through the various Ontario Courts, the Supreme Court of Canada decided that the second action should be dismissed and laid down that if a merchant obtains from a bank a line of credit on terms of depositing his customers' notes as collateral security, the bank is not obliged, so long as the paper so deposited remains uncollected, to give any credit in respect of it, but when any portion of the collateral is paid it operates at once as payment of the merchant's debt, and must be credited to him.

This judgment was affirmed by the Privy Council(*c*).

(*b*) 26 O.R. 575.

(*c*) See 26 S.C.R. 611; 26 A.R. appendix, p. 571.

Lord Halsbury, in delivering the judgment of the Privy Council, said:—"The things which were handed over as securities for the debt were realized and turned into money, and when the creditor is suing his debtor for the amount of his indebtedness which exists at that time, the amount the creditor has received in money in respect of these matters clearly must be taken from the debt, because at that moment the debt has been to that extent paid, as between these two persons, and for that amount and that amount only ought judgment to have been recovered(*d*).

Retainer by Executor.—If a debt be payable to executors and there are vested in them lands to which the debtor is beneficially entitled, the executors have been said to hold security for their claim, as they had the right to impound the debtor's share under the will, as against his debt to the estate, and that this was a proper security to value(*f*).

Debtor Secondarily Liable.—In regard to the provision that if the security of the creditor is on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon, it has been decided that this means that if between the debtor and the third party the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value on his security. It matters not if, according to the form of the transaction the debtor and third party are both primarily liable to the creditor, if as between themselves the third party is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value on his security, for in such case the third party is the party "for whom the debtor is only secondarily liable."

(*d*) The cases of *Eastman* v. *Bank of Montreal* and *Young* v. *Spiers* were decided before the Ontario Act respecting Assignments and Preferences came into force. They have been said to be no longer law. See *Molsons Bank* v. *Cooper*, 26 O.R. at p. 584.

(*f*) *Tillie* v. *Springer*, 21 O.R. 585.

The form of the transaction is not to be looked at, but the substance of it, in order to ascertain whether the third party is the party primarily liable for the claim, and if it be found that he is, the debtor is then only secondarily liable for the claim within the meaning of the provision.

The reason and object of the provision was to prevent the estate of a debtor being burdened by claims for which the debtor was only secondarily liable to a greater extent than was necessary for the protection of a creditor, and to augment his estate as much as possible(*g*).

Options of Secured Creditor.—A creditor holding security may assume any one of three positions: He may either give up his security and prove as an unsecured creditor, or he may value his security and prove for the whole debt, less the value, or he may, outside of insolvency proceedings, realize his security in any manner authorized by law(*h*); but if he holds security at the time of the insolvency, he cannot realize on it and prove on the estate for the balance(*i*).

Accepting Creditor's Valuation.—Where the secured creditor has valued his security for the purpose of proof, the decision of the assignee in regard to accepting or rejecting it should be promptly made, and a formal resolution of the assignee allowing the creditor to retain the property is not necessary(*j*). If the security is taken over by the assignee at the ten per cent. advance, the creditor need not give credit for the ten per cent(*k*), and where the value

(*g*) *Glanville* v. *Strachan*, 18 C.L.T. 221; *Re Turner*, 19 C.D. 105. See also *Levy* v. *Stogdon*, [1898] 1 Ch. 478; *Re Gordon*, [1897] 2 Q. B. 516; *Re Hallett*, [1894] 2 Q.B. 256.

(*h*) *Deacon* v. *Driffil*, 4 A.R. 335.

(*i*) *Re Beaty*, 6 A.R. 40; and see *Re Hurst*, 31 U.C.R. 116.

(*j*) *Bell* v. *Ross*, 11 A.R. 458.

(*k*) *Deacon* v. *Driffil*, 4 A.R. 335.

put on a security by a creditor has been accepted by the assignee it cannot afterwards be reduced by the creditor(*l*).

Accommodation Maker.—If a partner joins as accommodation maker in a note by a firm, he is primarily liable, and the holder may rank against the estate without valuing the liability of the firm(*m*).

(*l*) *Re Street*, 15 C.L.J. 86.
(*m*) *Bell* v. *Ottawa Trust Co.*, 28 O.R. 519.

PART V.

CHAPTER XXV.

COMPOSITION DEEDS.

A composition deed is a deed made between the debtor and his creditors whereby the creditors agree to abandon their claims in consideration of receiving a composition on their debts, that is, a smaller sum, bearing an agreed proportion to the amount of their respective debts, or in consideration of receiving a negotiable security for such composition. And it is further usually provided that the creditors shall not sue the debtor until he makes default in performance of his part of the agreement. While in an assignment for the benefit of creditors all the assets go to the creditors till they are paid in full, and the surplus to the assignor, in a composition deed the creditors agree on receipt of a smaller sum to discharge their debtor(*a*).

It is often desirable to include in the composition deed provisions for carrying on or winding up the debtor's business under the supervision of the creditors or the trustee. In this way the creditors' interests are protected during the period within which the debtor must carry out the composition arrangement and complete his payments.

Composition deeds frequently contain an irrevocable power of attorney to execute an assignment for creditors, which may be exercised by the trustee in the event of the debtor failing to carry out his obligations under the agreement.

Registration of the deed as an assignment is not necessary(*a*).

(*a*) *Gundry* v. *Johnston* (1897), 28 O.R. 147.

The Consideration.—The consideration in a composition deed to each creditor is the forbearance of the other creditors to enforce their claims(*aa*).

In *Couldery* v. *Bartrum* (*b*), it was said that according to the English common law a creditor might accept anything in satisfaction of the debt except a less sum of money(*c*). He might take a horse or a canary, if he chose, and that was accord and satisfaction, but he could not take 19s. 6d. on the pound. That was *nudum pactum*. That being so, there came a class of arrangements between creditors and traders by which a debtor who was unable to pay in full offered a composition of something less than a pound. It became necessary then to bind the creditors, and it was felt desirable to bind them in a sensible way, as by saying that if they all agreed there should be consideration imported from the agreement constituting an addition to the dividend so as to make the agreement no longer *nudum pactum*, but an agreement made for a valuable consideration (*b*).

When Are Creditors Bound.—It is sometimes a difficult matter to determine whether a creditor has rendered himself bound by the provisions of the creditors' agreement, and whether he is entitled to the benefit of such agreement.

No persons are bound by a creditors' agreement unless they receive benefit under it, and on the other hand, no one can claim to partake of the benefit of the agreement unless he submits to its conditions(*d*).

If, however, a creditor has remained strictly passive and has done nothing to render himself bound by the agreement,

(*aa*) *Re McHenry*, [1894] 2 Ch. 428.

(*b*) (1880), 19 Ch. D. 394.

(*c*) See *Foakes* v. *Beer* (1884), 9 A.C. 605. As to Ontario law see *Bank of Commerce* v. *Jenkins* (1888), 16 O.R. 215.

(*d*) *Forbes* v. *Limond* (1854), 4 DeG. M. & G. 298.

and, on the other hand, has not acted contrary to its provisions, he may subsequently claim to be admitted to its benefit(*e*).

Necessity of Execution.—It is not absolutely necessary that the creditor should execute the deed, if he has assented to it, or if he has acquiesced in it, or acted under its provisions and complied with its terms and on the other side expressed no dissatisfaction, he is entitled to its benefits. The mere fact of his signature is not required(*f*).

It is the constant course in equity that if creditors act under such a deed and thereby treat it as valid, although they have not executed it, a Court of Equity will also act under it and treat it as valid, whether such creditors have signed it or not(*g*).

A creditor, accordingly, who has verbally agreed with the other creditors to accept a composition, cannot by a subsequent refusal to execute the deed relieve himself of his prior agreement(*h*).

And where in pursuance of the arrangement the debtor has denuded himself of all assets, creditors who have acquiesced in the arrangement will not be allowed to withdraw on the ground that their withdrawal would be a fraud on the debtor(*i*).

Failure to Accede to Deed.—Unless the deed requires the peremptory exclusion of all creditors who do not accede to it and become parties to it within a specified time, the Court will not regard accession by the creditors within such

(*e*) *Forbes* v. *Limond* (1854), 4 DeG., M. & G. 298.

(*f*) *Field* v. *Lord Donoughmore* (1841), 1 Dr. & War. 227. And see *Bank of Commerce* v. *Jenkins* (1888), 16 O.R. 215, as to retraction by a corporation where its seal had not been affixed.

(*g*) *Spottiswoode* v. *Stockdale* (1815), G. Coop. 102.

(*h*) *Bradley* v. *Gregory* (1810), 2 Camp. 383.

(*i*) *Cork* v. *Saunders* (1817), 1 B. & Ald. 46. And see *Bank of Commerce* v. *Jenkins*, *supra*.

time as strictly essential. And even where the deed requires the peremptory exclusion of those not acceding within the time, the Court will relieve against accidental omission to do so(*j*).

Effect of Acceding.—Having assented to or become a party to a composition deed, a creditor will be unable to maintain an action against his debtor on the original account until he has been remitted to his rights by the debtor's default; and this rule applies whether the agreement contains an express release of debts and covenant not to sue, or an agreement to accept the provisions of the new arrangement in satisfaction of the debt(*k*).

Agreement Alone as a Defence.—The creditor may accept the mere promise or trust of the new agreement in satisfaction of his claim, and the agreement alone without performance would then be a sufficient defence to an action brought by a creditor for his original debt(*l*).

Where Performance Necessary.—Where, however, the performance of the new arrangement is the consideration, the intention of the parties is that the creditors shall forbear from suing until the time fixed for performance, but the debtor's original liability is not discharged until the agreement is fulfilled by actual payment(*m*).

Pleading in Bar.—A common provision of the agreement is after setting out a covenant not to sue for a limited period, that the deed may be pleaded and allowed as

(*j*) *Watson* v. *Knight* (1854), 19 Beav. 369. See also *Jennings* v. *Hyman* (1886), 11 O.R. 65.

(*k*) *Dews* v. *Jeffreys*, Cro. Eliz. 352; *Good* v. *Cheeseman* (1831), 2 B. & Ad. 328.

(*l*) *Good* v. *Cheeseman*. 2 B. & Ad. 328; *Dueber* v. *Taggart* (1899), 26 A.R. 295; 30 S.C.R. 373.

(*m*) *Re Hatton* (1872), L.R. 7 Ch. 723.

a bar and in discharge of an action brought against a debtor contrary to the true intent and meaning of the agreement, and in such case the deed may be pleaded as a bar(*n*).

Voidable Release.—Creditors may also be prevented from suing by embodying in the deed a release voidable by a condition subsequent(*o*).

Restraining Actions.—And where the contract or covenant is simply not to sue for a certain time, a Court of Equity would interfere by injunction to restrain the breach of the covenant(*p*).

Debtor's Performance.—The debtor having entered into an arrangement with his creditors, must comply with its terms to the letter. If a time is fixed within which he is to make payments or perform other acts, he must perform them within the time limited. If no time be fixed, a reasonable time will be allowed him(*q*).

And in such a case the creditors will be remitted to their original rights(*r*).

Strict Performance Necessary.—In composition and extension agreements, the terms of agreement usually are that the creditors shall accept payment at a specified time of a certain composition in full of their claims. To obtain the benefit of this provision the debtor must establish that he paid or tendered the composition within the specified time, or, if no time were fixed, within a reasonable time(*s*). And

(*n*) *Walker* v. *Nevill* (1864), 3 H. & C. 403.

(*o*) See *Newington* v. *Levy* (1870), L.R. 5 C.P. 607; and compare *Ford* v. *Beech* (1848), 11 Q.B. 872.

(*p*) *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604; *Keyes* v. *Elkins* (1864), 34 L.J.Q.B. 25.

(*q*) *Oughton* v. *Trotter* (1833), 2 N. & M. 71.

(*r*) *Oughton* v. *Trotter, ibid.; Walker* v. *Seaborne* (1809), 1 Taunt. 526.

(*s*) *Ex p. Bateson*, 4 Jurist 994.

it is not sufficient that the debtor was ready and willing to pay(*t*). The principle applies to each and every creditor who is not paid or tendered his money (*u*). And the onus is on the debtor to prove the payment or tender (*v*). Where the default of the debtor in paying or tendering the composition money arises from a mistake on his part, a Court of Equity has in some cases relieved him (*x*).

Foreign Creditor.—If, however, a creditor is in a foreign country, the debtor need not follow him out of the jurisdiction in order to pay or tender him the money(*w*).

Statute of Limitations.—Arrangements with creditors by which they are bound not to sue, do not in general prevent the Statute of Limitations running against the creditors during the period when they are so bound(*y*).

Nor is an admission of the existence of a debt in an agreement coupled with a declaration of inability to pay it or a provision for the acceptance of a smaller sum, sufficient acknowledgment to take the debt out of the Statute of Limitations, and that, too, whether a payment is made under the agreement or not(*z*).

It may then become important to ascertain whether the effect of the agreement is to remit the creditor to his original rights. An example of this was given by Lord Bramwell in a case of *Slater* v. *Jones*(*a*). He said:—"Supposing

(*t*) *Cranley* v. *Hillary* (1813), 2 M. & S. 120.

(*u*) *Cranley* v. *Hillary* (1813), 2 M. & S. 120.

(*v*) *Ex p. Hemmingway* (1872), 26 L.T.N.S. 298.

(*x*) See *Newington* v. *Levy* (1870), L.R. 5 C.P. 607. And see *Ex p. Bennet* (1743), 2 Atk. 527; *Sewell* v. *Musson* (1683), 1 Vern. 210; *Leigh* v. *Barry* (1747), 3 Atk. 583; and see *Newell* v. *VanPraagh* (1874), L.R. 9 C.P. 96.

(*w*) *Fessard* v. *Mugnier* (1865), 18 C.B.N.S. 286.

(*y*) *Fuller* v. *Redman* (1859), 26 Beav. 614.

(*z*) *Davies* v. *Edwards* (1851), 7 Ex. 22; *Ex p. Topping* (1865), 34 L.J. Bank. 44.

(*a*) (1873), L.R. 8 Ex. 186.

a creditor accepts a composition on a debt four years old, payable at the end of two years, and then the debtor makes default, is the creditor to be bound to sue on his original debt? If so, he will fail, for the Statute of Limitations would be a good defence, whereas if there is a new agreement by the debtor at the date of the composition resolution, the creditor's remedy would be preserved"(*b*).

Lord Bramwell here suggested that there would be an implied term in such an agreement that in case the debtor failed to pay the composition at the time agreed on, he would pay the whole debt.

Although the creditor may be barred as to his original debt, he may sue on the promise to pay the composition amount(*c*).

Accession of Creditors a Condition.—It is commonly provided in a composition agreement that it shall not become binding until a certain proportion of the creditors has acceded to it. This is a valid condition, and if the specified portion do not accede, the creditor will not be bound (*d*). Parol evidence, however, will not be admitted to show the intention of the parties in this respect (*e*). Where the agreement provided for its avoidance in case creditors should "refuse to execute," it was held that the non-execution of the deed was not evidence of a refusal; and that a positive refusal must be shown (*f*).

On the other hand, a provision that the deed shall be void if not executed by all the creditors within a given time will be satisfactory if the creditors accede or assent to the deed so as to become bound by it, although they do not

(*b*) See *Hemp* v. *Garland* (1843), 4 Q.B. 519.
(*c*) *Lynn* v. *Bruce* (1794), 2 Hy. Black. 317.
(*d*) *Reay* v. *Richardson* (1835), 2 C. M. & R. 422.
(*e*) *Lewis* v. *Jones* (1825), 4 B. & C. 506.
(*f*) *Holmes* v. *Love* (1824), 3 B. & C. 242.

actually execute it (*g*). A provision that the deed shall be "void" is usually contrued to mean voidable at the election of each individual creditor as regards himself (*h*).

Good Faith Necessary.—The strictest good faith must be observed in a composition agreement, and if there has been any fraud or misrepresentation, the parties will not be bound by it, but will be restored to their original rights (*i*). Though the failure of a representation made to an individual creditor and not to the body of creditors, would not necessarily have this effect (*j*).

Secret Advantage to a Creditor.—Anything that is a fraud on the general body of creditors can be taken advantage of by any one of them. The most common example of this is in the case where there is some secret arrangement between the debtor and a particular creditor, who nominally is a party to the composition, by which the latter is to obtain an advantage over the other creditors. The creditors become parties to the arrangement on the understanding that all are to be placed on the same footing, and if it is proved that there is a secret arrangement contravening this implied term, any creditor who has signed on this understanding will be released(*k*). On grounds of public policy, the Court will relieve in such a case(*l*). And the onus lies on the party alleging fraud to show that the agreement was in fact unknown to the other creditors(*m*).

(*g*) *Spottiswoode* v. *Stockdale* (1815), Geo. Coop. 102.
(*h*) *Hyde* v. *Watts* (1843), 12 M. & W. 254.
(*i*) *Britten* v. *Hughes* (1820), 5 Bing. 460.
(*j*) *Mallalieu* v. *Hodgson* (1851), 16 Q.B. 689.
(*k*) *Douglish* v. *Tennent* (1866), L.R. 2 Q.B. 49.
And see *McCalmont* v. *Bailey*, 6 N.B. 573.
(*l*) *Howden* v. *Simpson* (1839), 10 A. & E. 793; *The Earl of Chesterfield* v. *Janssen* (1750), 2 Ves. Sr. 124.
(*m*) *Davidson* v. *McGregor* (1841), 8 M. & W. 755.

Where, however, it is known to the creditors signing that any one or more of them have consented to the arrangement only on the condition of having a preference, this rule will not apply(*n*).

Nature of Benefit Immaterial.—It is immaterial what the benefit stipulated for may be. If it is the payment of a larger composition than the other creditors obtain or giving security for the balance of the debt(*o*); or retaining of an existing security(*p*); or furnishing him with a better security than the other creditors for the composition payment(*q*); or paying his costs(*r*); the principle will apply, as the other creditors will be misled(*s*). And the rule applies although the negotiations for a composition are not carried out(*t*).

This rule was held to apply where a creditor consented to become surety for the payment of the composition in consideration of his receiving the full amount of his own debt(*u*), or made a profit for so doing(*v*).

Results of Rule.—The results which follow from the general rule are very far-reaching. In the first place the creditor cannot enforce the agreement(*w*); nor can he enforce any bill of exchange, promissory note or other security obtained under the arangement(*x*), and a subsequent

(*n*) *Jackman* v. *Mitchell* (1807), 13 Ves. 581. And see *Carey* v. *Barrett* (1879), 4 C.P.D. 379.
(*o*) *Pfleger* v. *Browne* (1860), 28 Beav. 391.
(*p*) *Stock* v. *Mawson* (1798), 1 B. & P. 286.
(*q*) *Ex p. Sadler* (1808), 15 Ves. 52.
(*r*) *Re McRae*, 1 A.R. 387.
(*s*) *Small* v. *Henderson* (1900), 27 A.R. 492.
(*t*) *Wells* v. *Girling* (1819), 1 Br. & Bing. 447.
(*u*) *Wood* v. *Barker* (1865), L.R. 1 Eq. 139.
(*v*) *Segsworth* v. *Anderson* (1893), 23 O.R. 573; 21 A.R. 242; 24 S.C.R. 699. And see *Re Russell* (1882), 7 A.R. 777.
(*w*) *Jackson* v. *Lomas* (1791), 4 T.R. 166.
(*x*) *Coleman* v. *Waller* (1829), 3 Y. & J. 212.

promise by the debtor to pay them will be regarded as being made without consideration(*y*).

Further, the creditor who is a party to the fraud cannot even enforce payment of the composition(*z*).

Where Executed.—And if the bargain has been carried out by the debtor, and he has paid a creditor or transferred a security to procure the assent of the creditor, he may recover the amount or security back from the creditor(*a*).

Atkinson v. Denby.—A leading case on the subject was *Atkinson* v. *Denby*(*b*). There, the plaintiff being indebted to the defendant and others, offered a composition of 5 shillings on the pound. The defendant at first refused to accept less than the full amount of the claim, but he finally agreed to accept the composition, the plaintiff agreeing to give him a bill of exchange for £108, and also the sum of £50 in cash. The transaction was carried out and the cash and bill transferred to the creditor, who signed the composition deed. The composition was paid to the defendant and the other creditors, and the plaintiff then brought the action to recover back the £50 from the creditor, and it was held that he was entitled to do so, the judgment being affirmed on appeal(*c*).

If, however, the payment may be regarded as not having been made under coercion of any kind, it is voluntary and cannot be recovered(*d*). In *Wilson* v. *Ray* an action was brought to recover money paid to take up a renewal of a note given to procure the creditor's signature. The Court

(*y*) *Constantein* v. *Blanche* (1786), 1 Cox. 284.

(*z*) *Knight* v. *Hunt* (1829), 5 Bing. 432; *Howden* v. *Haigh* (1840), 11 A. & E. 1033; *Higgins* v. *Pitt* (1849), 4 Ex. 312.

(*a*) *Smith* v. *Cuff* (1817), 6 M. & S. 160; *Horton* v. *Riley* (1843), 11 M. & W. 492.

(*b*) (1861), 6 H. & N. 778.

(*c*) 7 H. & N. 934.

(*d*) *Wilson* v. *Ray* (1839), 10 A. & E. 82.

said that the debtor might have successfully defended a suit on the original note, but having given a second note and paid it, the payment must be regarded as voluntary and could not be recovered back.

Further Consequences.—A further consequence of the fraud is that where the creditor has concealed the full amount of his debt, and in reality accepted a composition on and released a portion of it, he cannot afterwards sue for the balance(*e*).

And if the debtor in such case fails to carry out his part of the arrangement and make the composition payment, the creditor who under the secret arrangement has received more than the amount of the composition payable under the deed, will not be remitted to his original rights(*f*).

In fact, it is doubtful whether he can in any case take advantage of the debtor's default in payment of the composition(*g*).

There is nothing, however, to prevent a debtor after a valid composition has been entered into with his creditors, subsequently paying any particular creditor in full, provided it were not done under any prior arrangement; and he may also, under such circumstances, give the creditor security for the balance of the debt, and such security will be valid(*h*).

(*e*) *Britten* v. *Hughes* (1829), 5 Bing. 460.
(*f*) *Ex p. Oliver* (1851), 4 DeG. & Sm. 354.
And see *Howland* v. *Grant*, 2 N.W.T.R. part 1, 99.
(*g*) See *Howden* v. *Haigh* (1840), 11 A. & E. at p. 1039.
(*h*) *Cockshott* v. *Bennett*, 2 T.R. 765.

PART VI.

FORMS.

ASSIGNMENT OF BOOK DEBTS.

To Secure Existing Debt and Present Advance.

THIS INDENTURE, made the day of , 19 , between , of , and , of (merchants), trading in co-partnership, under the name, style and firm of and Company hereinafter called the assignors, of the first part, and , of , hereinafter called the assignee, of the second part.

Whereas the assignors are now carrying on and intend to carry on business in partnership at number street, in the (town) of as (merchants).

And whereas the assignee has heretofore at different times made cash advances as loans to the assignors amounting in the aggregate to the sum of dollars and the assignors are at present indebted to the assignee in the (said) sum of dollars.

And whereas the assignors have applied to the assignee for a further advance in cash, and the assignee has agreed to advance to them the further sum of dollars in cash upon the execution of these presents as collateral security for the said past and present advances (hereinafter called the said indebtedness) in order to assist the assignors in their said business.

Now this indenture witnesseth that in consideration of the said indebtedness (the amount whereof is hereby acknowledged) the assignors do hereby assign, transfer and

set over unto the assignee, his executors, administrators and assigns, firstly, all the debts, claims and demands now due or owing or accruing due and owing to the assignors trading as aforesaid out of their said business as , the accounts whereof are now mentioned in the ledgers or other account books of the said business. Secondly, all the debts, claims or demands which may at any time hereafter become due and owing to the assignors trading as aforesaid arising out of their said business as , the accounts whereof may hereafter be mentioned in the ledger or other account books in connection with the said business.

And the assignors for themselves, their and each of their executors and administrators, covenant and agree with the assignee, his executors, administrators and assigns that they will at any time upon the demand or request of the assignee furnish a true and correct list and schedule of the said debts, claims and demands, and also that they will upon every reasonable request of the assignee make, do and execute all such further and other assurances by acts, deeds and instruments which may be requisite for more perfectly and absolutely assigning, transferring and assuring the said debts, claims and demands hereby assigned and transferred, or intended so to be, and every part thereof unto the assignee, his executors, administrators and assigns.

And the assignors do hereby assign, transfer and set over unto the assignee, his executors, administrators and assigns all deeds, books of account, vouchers, promissory notes, bills of exchange and all other documents or evidences of the said debts, or any of them, or any part thereof, together with all books of account, in which there are, or hereafter may be, any entries of the particulars of the said debts.

And the assignors hereby irrevocably nominate, constitute and appoint the assignee, his executors, administrators and assigns, their true and lawful attorney or attorneys, to ask, demand, sue for and recover the said debts, claims and demands, and every of them, and to give effectual receipts and discharges therefor, together with full power to compromise the said debts, or any of them,

which may seem bad or doubtful, and to give time for payment thereof with or without security.

And it is hereby understood and agreed that these presents are given as collateral security only for the due payment of the said indebtedness, and that the execution hereof shall not in any way suspend or affect the present or future rights and remedies of the assignee in respect of the said indebtedness, or any part thereof, nor shall it affect any securities which he now holds, or hereafter may hold, in respect of the said indebtedness, or any part thereof.

In witness, etc.

Signed, sealed, etc.

ASSIGNMENT OF BOOK DEBTS.

For Existing Debt and Future Advances.

WE and Company, of , (merchants), hereby assign, transfer and set over to of his executors, administrators and assigns, all book debts, accounts, choses in action, now due, or accruing due to us in connection with our business as (general merchants); and also all book debts, accounts and choses in action, which may at any time hereafter become due and owing to us in connection with our business; and also all deeds, books, vouchers, promissory notes, bills of exchange and other documents or evidences of the said debts, accounts and choses in action, or any of them or any part thereof or in any manner relating to or containing entries of the said book debts, accounts, choses in action, or any of them, to be held by the said as a collateral security to the present and all future indebtedness of us to the said .

We hereby covenant and agree on demand at any time to prepare and deliver to the said , his heirs, execu-

tors, administrators or assigns, a full list of all accounts due or accruing due to us, and to execute such further assurances or assignments as may be necessary to complete their title and to prepare and deliver to them all deeds, books, vouchers, promissory notes, bills of exchange and other documents or evidences of the said debts, accounts and choses in action, or any of them or any part thereof, and to furnish all information necessary to enable them to collect the said debts, accounts and choses in action, or any of them or any part thereof, and to furnish all information necessary to enable them to collect the said debts, accounts and choses in action, and we hereby authorize them whenever necessary to sue for and collect the said accounts, debts and choses in action.

This assignment is executed as a continuing security collateral to our indebtedness to the said whether the said indebtedness has been already contracted or may be hereafter contracted, and the execution hereof shall not in any way suspend or affect the present or future rights and remedies of the said in respect of the said indebtedness or any part thereof, nor shall it affect any securities which they now or hereafter may hold in respect of the said indebtedness or any part thereof.

(If it is intended to limit the security to a fixed amount add: Provided, however, that this assignment shall be limited to the extent of thousand dollars, but shall be considered as a continuing security to that extent.)

The understanding on which this security is given is that the said shall accept payment of our present overdue indebtedness as follows: dollars in days from this date and the balance in (weekly) payments of dollars thereafter until paid.

In witness, etc.

Signed, sealed, etc.

AFFIDAVIT OF CLAIM.

CANADA: Province of , (County) of , to wit;

In the matter of an Act respecting assignments and preferences by insolvent persons being R.S.O. (1897), chap. 147. And in the matter of of the of in the (County) of , and Province of , debtor and , of the of in the County of , claimant.

I, (name in full), of the , of , in the (County) of , make oath and say:

1. I am the above-named claimant (or a member of the above-named firm of claimants, or the duly authorized agent of the above-named claimant);

2. The above-named debtor is justly and truly indebted to me (or the above-named claimant) in the sum of dollars for (goods supplied to the said debtor at his order, and for promissory notes, bills of exchange, or money lent, etc.), that is to say (or and particulars of the said indebtedness are set out in the statement hereto annexed):

3. I hold (or the said claimant holds) no security whatever for the said claim or any part thereof (or the following security, that is to say, , which is of the value of dollars).

Sworn, etc.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Short Form.

THIS INDENTURE made the day of , in pursuance of the Revised Statutes (of Ontario (1897) chapter 147) being an act respecting Assignments and Preferences by Insolvent Persons, between , of the of , in the county of , , hereinafter called the debtor, of the first part; of the of , in the county of , , hereinafter called the assignee, of the second part; and the

several persons, firms and corporations who are creditors of the debtor, hereinafter called the creditors of the third part.

Whereas the debtor has heretofore carried on business at the of , in the county of , as a , and being unable to pay his creditors in full has agreed to convey and assign to the assignee all his estate, real and personal, for the purpose of paying and satisfying the claims of his creditors, ratably and proportionately and without preference or priority.

Now this indenture witnesseth that in consideration of the premises and of one dollar, the debtor doth hereby grant and assign to the assignee, his heirs, executors, administrators and assigns, all his personal property which may be seized and sold under execution and all his real estate, credits and effects.

To have and to hold unto the assignee, his heirs, executors, administrators and assigns, respectively, according to the tenure thereof.

Upon trust that the assignee, his heirs, executors, administrators and assigns, shall sell and convey the real and personal estate and convert the same into money, and collect and call in the debts dues and demands of the debtor.

And it is hereby declared that the assignee, his executors, administrators and assigns, shall stand possessed of the moneys derived from the sale of the real and personal estate, and of the moneys collected and called in, and all other moneys which the assignee, his heirs, executors, administrators and assigns, shall receive for or on account of the premises hereinbefore granted and assigned.

Upon trust, firstly to pay the costs of and incidental to the preparation and execution of these presents; secondly, to deduct and retain such remuneration as shall be voted or fixed for him, the assignee, under the provisions of the said Act; and thirdly, to pay the debts and liabilities of the debtor to the creditors, respectively, ratably and proportionately and without preference or priority, and the surplus after payment of all claims, costs, charges and expenses in full to hand over to the debtor.

The debtor appoints the assignee, his heirs, executors, administrators and assigns his lawful attorney irrevocable in his name to do all matters and things, make, sign, seal and execute all deeds, documents and papers necessary to more fully perfect in him the title to the lands, premises, goods, chattels, debts dues and demands hereby assigned or intended so to be, and to do all other acts, matters and things necessary to enable the assignee to carry into effect the intents of these presents.

In witness whereof the parties hereto have hereunto set their hands and seals this day of , 190 .

Signed, sealed and delivered
In the presence of.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Partnership.

THIS INDENTURE made the day of , one thousand nine hundred , between , hereinafter called the debtors of the first part, of the , hereinafter called the Trustee of the second part, and the several persons, firms and corporations respectively, creditors of the said debtors or either of them hereinafter called the creditors of the third part. Whereas the said debtors have been and still are carrying on business under the name of at as .

And whereas the said debtors in the course of their said business have contracted debts to a large amount which the said debtors are unable to pay in full and have in consequence agreed to assign all their and each of their estate of whatever nature or kind soever unto the said trustee upon the trust and for the purpose of paying and satisfying the claims of their and each of their creditors ratably and proportionately, and without preference or priority, and so that their respective separate estates shall be first applied in or towards payment of their respective

separate creditors, and their joint estate first applied in or towards payment of their joint creditors. Now this indenture witnesseth that in consideration of the premises, and of one dollar now paid by the said trustee to them, the receipt whereof is hereby acknowledged, they, the said debtors, according to their and each of their estates and interests therein, and as fully and effectually as they lawfully can or may by these presents do and each of them doth hereby grant, bargain, sell, assign, transfer, convey and assume unto the said trustee, his heirs, executors, administrators and assigns forever, all and singular, the real estate, lands, tenements and hereditaments of the said debtors and each of them whatsoever and wheresoever of or to which they or either of them is now seised or entitled or of or to which they or either of them may have any estate right, title or interest of any kind or description with the appurtenances, including the real estate mentioned in Schedule "A" hereunto annexed. Provided that leasehold estates shall not vest until accepted by the trustee and notice in writing given to the lessor or lessors. And also all and singular the personal estate and effects, policies of insurance stock in trade goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action and shares of stock the property of the debtors. Provided that shares of stock not fully paid up or subject to a double liability shall not vest until accepted by the trustee.

And all other personal estate whatsoever and wheresoever and whether upon the premises where the said debtor's business is carried on or elsewhere, and which the said debtors or either of them are possessed of or entitled to in any way whatsoever, including among other things the property mentioned in Schedule "B" hereunto annexed, save and except such portions of the personal estate as are exempt by law from seizure under execution. To have and to hold the same unto the said trustee, his heirs, executors, administrators and assigns respectively, according to the tenure of the same upon trust that the said trustee, his heirs, executors, administrators and assigns shall sell and convey the real and personal estates of the said debtors and each of them and convert the same into money and collect and call in the debts, dues and demands of the said debtors and each of them. It is hereby declared that the

said trustee, his executors, administrators and assigns shall stand possessed of the moneys derived from the sale of the real and personal estates and in the moneys collected and called in and all other moneys which the said trustee, his heirs, executors, administrators and assigns shall receive for or on account of the premises hereinbefore assigned upon trust in the first place to pay the costs of and incidental to the preparation and execution of these presents; secondly, to deduct and retain the expenses and disbursements incurred by the trustee in and about the execution of the trusts hereof, and the proper remuneration of the trustee, such costs, expenses, disbursements and remuneration to be distributed and borne by the partnership and separate estates in just and equitable proportions; and thirdly, to pay the debts and liabilities of the said debtors and each of them to the said creditors respectively, ratably and proportionately, and without preference or priority having regard to the rights of the partnership and individual creditors respectively, with respect to the respective estates hereby conveyed, assigned and transferred, and so that the proceeds of the respective separate estates be first applied in or towards payment of the respective separate creditors, and the proceeds of the partnership estates be first applied in or towards payment of the partnership creditors, but having regard also to the privileged claim of any creditor and the balance which shall then remain over either in money or in the state in which such balance shall then be in the discretion of the said trustee to pay to the said debtors. The said debtors and each of them appoint and appoints the said trustee, his executors, administrators and assigns their and his lawful attorney and attorneys irrevocable in their and each of their names to do all matters and things make, sign, seal and execute all deeds, documents and papers necessary to more fully perfect in him the title to the lands, goods, chattels, debts, dues and demands hereby assigned or intended so to be, and to collect and receive all accounts, debts and sum of money due and owing to them, the said debtors and each of them, and to execute such deeds and conveyances, and to do all other acts, matters and things necessary to enable him, the said trustee, to carry into effect the intents of these

presents. It is hereby declared that if in the opinion of the said trustee it shall be in the interest of the creditors so to do he, the said trustee, may sell the book debts or any part thereof either by public auction or private contract. And the said parties of the third part who execute this indenture hereby assent to this assignment and direct that it shall be made to the said instead of to the sheriff of the County of .

In witness, etc.

Signed, sealed, etc.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Individual.

THIS INDENTURE made the day of one thousand nine hundred , between , hereinafter called the debtor of the first part , of the , hereinafter called the trustee of the second part, and the several persons, firms and corporations respectively creditors of the said debtor hereinafter called the creditors of the third part. Whereas the said debtor has been and still is carrying on business on his own account at , as a .

And whereas the said debtor in the course of the said business has contracted debts to a large amount which the said debtor is unable to pay in full, and has in consequence agreed to assign all his estate of whatever nature or kind soever unto the said trustee upon trusts and to and for the intents and purposes hereinafter mentioned. Now this indenture witnesseth that in consideration of the premises and of one dollar now paid by the said trustee to him the receipt whereof is hereby acknowledged. He, the said debtor, according to his estate and interest therein and as fully and effectually as he lawfully can or may by these presents doth hereby grant, bargain, sell, assign, transfer,

convey and assure unto the said trustee, his heirs, executors, administrators and assigns for ever. All and singular the real estate, lands, tenements and hereditaments of the said debtor whatsoever and wheresoever of or to which he is now seised or entitled or of or to which he may have any estate right title or interest of any kind or description with the appurtenances including the real estate mentioned in schedule "A" hereunto annexed provided that leasehold estates shall not vest until accepted by the trustee and notice in writing given to the lessor or lessors and also all and singular the personal estate and effects policies of insurance stock in trade goods chattels rights and credits fixtures book debts notes accounts books of account choses in action, provided that shares of stock not fully paid up or subject to a double liability shall not vest until accepted by the trustee.

And all other personal estate and effects whatsoever and wheresoever and whether upon the premises where said debtor's business is carried on or elsewhere and which the said debtor is possessed of or entitled to in any way whatsoever including among other things the property mentioned in schedule "B" hereunto annexed save and except such portions of the personal estate as are exempt by law from seizure under execution TO HAVE AND TO HOLD the same under the said trustee his heirs executors administrators and assigns respectively according to the tenure of the same upon trust that the said trustee his heirs executors administrators and assigns shall sell and convey the real and personal estate and convert the same into money and collect and call in the debts dues and demands of the said debtor.

And it is hereby declared that the said trustee his executors administrators and assigns shall stand possessed of the moneys derived from the sale of the real and personal estate and in the moneys collected and called in and all other moneys which the said trustee his heirs executors administrators and assigns shall receive for or on account of the premises hereinbefore assigned upon trust in the first place to pay the costs of and incidental to the preparation and execution of these presents secondly to deduct

and retain the expenses and disbursements incurred by the trustee in and about the execution of the trusts hereof and the proper remuneration of the trustee and thirdly to pay the debts and liabilities of the said debtor to the said creditors respectively rateably and proportionately and without preference or priority but having regard to the privileged claim of any creditor and the balance which shall then remain over in money or in the state in which such balance shall then be in the discretion of the said trustee to pay to the said debtor. The said debtor appoints the said trustee his executors administrators and assigns his lawful attorney and attorneys irrevocable in his name to do all matters and things make sign seal and execute all deeds documents and papers necessary to more fully perfect in him the title to the lands goods chattels debts dues and demands hereby assigned or intended so to be and to collect and receive all accounts debts and sums of money due and owing to him the said debtor and to execute such deeds and conveyances and to do all other acts matters and things necessary to enable him the said trustee to carry into effect the intents of these presents it is hereby declared that if in the opinion of the said trustee it shall be in the interest of the creditors so to do he the said trustee may sell the book debts or any part thereof either by public auction or private contract and the said parties of the third part who execute this indenture hereby assent to this assignment and direct that it shall be made to the said (trustee) instead of to the sheriff of the county of

In witness, etc.

Signed, sealed, etc.

COMMON LAW ASSIGNMENT OF PERSONAL ESTATE FOR BENEFIT OF CREDITORS WITH RELEASE.

This indenture made the day of , between (debtor), of, etc. (hereinafter called the debtor), of the first part (trustee), of, etc. (hereinafter called the trustee of the second part) and the several persons, firms and companies whose names and seals and the amounts of whose debts are subscribed, affixed and entered in the schedule hereto, and all the other creditors of the debtor who shall in writing or otherwise signify their assent to these presents (hereinafter called the creditors) of the third part.

Witnesseth that in consideration of the release hereinafter contained the debtor as beneficial owner hereby assigns unto the trustee all that the personal estate of the debtor whatsoever or wheresoever (excepting only leasehold property) to hold the said property hereby assigned unto the trustee upon and subject to the trusts and conditions hereinafter contained.

1. The trustees shall as soon as possible call in and collect and if necessary sell and convert the said property into money, but in such way and by such means and at such times as the trustee may in his absolute discretion deem best, with power, however, to divide into specie according to its estimated value any property which in the opinion of the trustee cannot be readily or advantageously sold.

2. The trustee shall stand possessed of the net proceeds collected and realized and arising from such sale and conversion (hereinafter referred to as the trust fund) in trust to pay and apply the same as follows:—

(a) In payment of all costs and charges and expenses of and incidental to the preparation, execution and carrying out of these presents, and of the investigation of the debtor's affairs and realization of the said property, including therein the disbursements and fair charges and remuneration of the trustee (but provided that such charges

and remuneration shall not exceed in all the sum of $) and the salary or the remuneration of such person or persons as the trustee may think fit to employ to assist him in the realization of the debtor's estate, and lastly, any allowance not exceeding per week which the trustee may think fit to allow the debtor for similar assistance.

(b) In payment of all claims and demands which would be payable in priority as preferential claims if the debtor had made an assignment for the benefit of creditors.

(c) In payment to the creditors by such dividends and at such times as the trustee shall deem expedient of all such debts and claims of the creditors as would be applicable under the said law of bankruptcy, and after such payments as aforesaid to pay over the surplus (if any) to the debtor, his executors, administrators or assigns.

3. The trustee may in the case of any debt not exceeding $ in his discretion, and in case of any debt exceeding that sum with the consent of creditors representing not less than in amount of the total debts pay in full or settle or compound for at a higher rate than the other creditors or give security in respect of or otherwise deal with the debt of any creditor or creditors who shall stand out and refuse to take the benefit of these presents.

4. The trustee shall be entitled in his absolute discretion to require any creditor, although he may have executed or assented to these presents and his name and the amount of his debt may appear in the schedule thereto, to furnish him with detailed particulars of his debts, and in case the trustee shall think necessary to prove his debt and the amount thereof and the consideration therefor to the satisfaction of the trustee by statutory declaration or otherwise. Provided that if the trustee and any creditor cannot agree as to the claim of such creditor to prove or as to the amount of such proof the same shall be submitted to a chartered accountant or any arbitrator nominated by him.

The said arbitrator shall be supplied by the trustee and by the creditor respectively with a concise statement in writing of their case and with all documents and writings in relation thereto within one week, and the said arbitrator shall give his award which shall be final within one month of his appointment and without summoning the parties or taking any further evidence unless he shall think fit to do so, and the costs of such arbitration shall be in the discretion of such arbitrator who shall award a lump sum for the same. Any costs so awarded against a creditor shall be payable by him to the trustee forthwith, and any costs awarded against the trustee shall be payable out of the trust fund (unless in the opinion of the arbitrator the trustee shall have acted unreasonably).

5. The trustee shall have full power to give time for payment of any debts due to the debtor and to compound compromise, release and abandon any such debts or to accept payment for the same in kind or by instalments or by bills, notes or other negotiable instruments, or in any other way which he may deem most advantageous for the debtor's estate (including the allotment of fully paid shares in any company) and likewise to bring or defend and compromise or refer to arbitration all actions, disputes or other proceedings or matters arising out of or in relation to or in respect of the debtor's estate. But the trustee shall not institute any action, suit or other legal proceeding in respect of any matter exceeding $ except with the assent of a majority of the creditors given in writing or at a meeting summoned by the trustee for that purpose, of which meeting seven days notice by letter sent to his last known address shall be given to every creditor.

6. The debtor hereby covenants with the trustee and the creditors and each of them that he will at all times give the trustee all the information and assistance in his power in order to enable him to get in and realize the debtor's estate, and for that purpose will execute and do all such assurances and things as may be required by the trustee.

7. The debtor hereby appoints the trustee to be his attorney on his behalf and in his name or otherwise to make, execute and sign any deed or document or other

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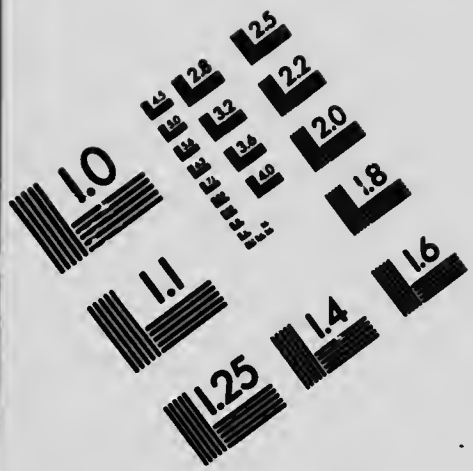

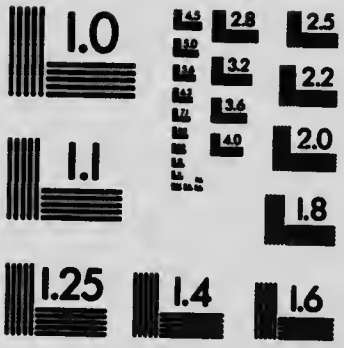

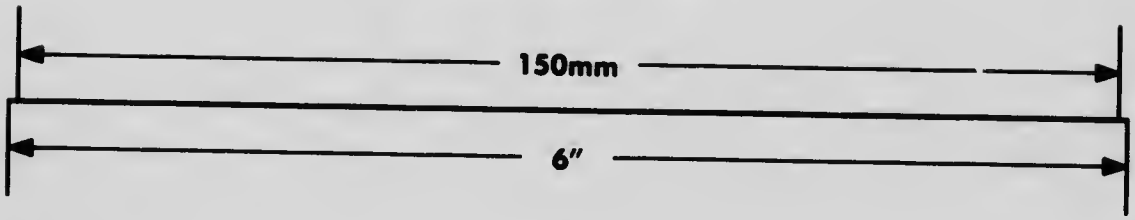

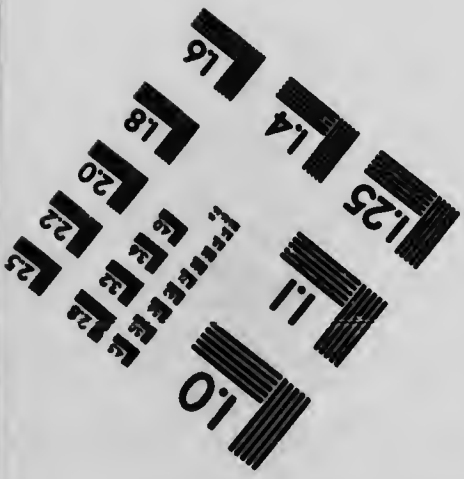

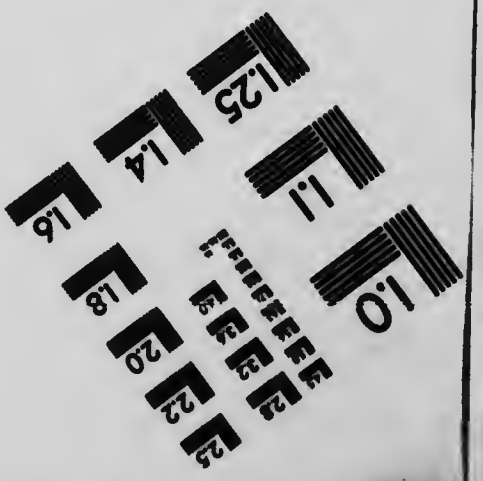

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instrument which he may think necessary for more effectually carrying into execution these presents.

8. In consideration of the assignment hereinbefore contained the creditors do and each one of them doth hereby release and discharge the debtor from all debts dne from the debtor to them or any of them, and from all actions, suits, claims, demands or other proceedings whatsoever in respect thereof.

9. The foregoing release shall be entirely without prejudice to the rights of the creditors against third persons, and all rights and remedies of the creditors against any surety or sureties for the said debts are hereby expressly reserved, and nothing herein contained shall operate to hinder or prevent the creditors or any of them from enforcing or otherwise obtaining the full benefit of any mortgage, lien, charge or other security which they now hold on any property credits or effects of the debtor.

10. Any creditor who may have any such mortgage, charge, lien or other security as aforesaid on or against the property of the debtor shall be entitled to vote and receive dividends hereunder on or in respect of the balance of his claim only after realizing or allowing for or valuing and dednoting the valne of such mortgage, charge, lien or other security, and any creditor who shall neglect to realize or valne such mortgage, charge, lien or other security prior to voting or receiving dividends hereunder shall be taken to have abandoned such mortgage, charge, lien or other security, and the same shall be forfeited to the trustee and become part of the trust fund.

11. In case the trustee shall resign or go abroad or become insolvent or die or shall refuse to act or from any cause whatever become nnfit to act or incapable of acting in the premises or in case the creditors shall desire to remove the trustee, the creditors shall have power to appoint a new trustee of these presents in his place by a majority of the creditors at a meeting convened by the trustee or by any two or more creditors whose debts exceed $ in value by a seven days notice sent by letter to all the creditors at their last known address, or if there be no record

of such addresses by advertisement inserted in any local newspaper, and in either case the costs shall be paid out of the trust fund.

In witness, etc.

(Signatures and seals of debtor and trustee).
(Signatures and seals of creditors and the amounts of their debts).

[NOTE.—*As to the validity of this form of assignment see Title "Assignments," supra.*]

DEED OF CONVEYANCE OF REAL ESTATE FOR BENEFIT OF CREDITORS.

Upon Trust to Pay Debts in Full out of the Rents and Profits, with Power of Sale and Trust for Re-Conveyance.

THIS INDENTURE, made the day of , (debtor), of, etc. (hereinafter called the debtor), of the first part, (trustee), of, etc. (hereinafter called the trustee) of the second part, and the several persons, firms and companies executing these presents being creditors of the debtor whose names and seals are hereunto subscribed and affixed, and the amounts of whose debts appear in the schedule hereto, and all other creditors of the debtor who shall in writing or otherwise accede to these presents (hereinafter called the creditors) of the third part.

Witnesseth as follows, that is to say:—

1. In consideration of the release by the creditors hereinafter contained the debtor as beneficial owner hereby conveys unto the trustee all that the real estate of the debtor whatsoever and wheresoever to which the debtor is now or may during the continuance of these presents hereinafter become entitled whether in possession, remainder, reversion or expectancy. To hold the said real estate hereinbefore conveyed unto and to the use of the trustee in fee simple, but subject to and upon the trusts hereinafter

declared concerning the said real estate (hereinafter referred to as the trust property).

2. The trustee shall immediately upon the execution of these presents take possession of the trust property and enter into receipt of the rents, profits and income thereof, including therein any arrears of rent which now are or may hereafter become due and payable to the debtor with full power to superintend and manage the trust property to repair any part or parts thereof, and to effect insurances thereon, and to make allowances to and arrangements with the tenants or occupiers for the time being of any part of the trust property, and accept surrenders of leases and tenancies, and generally to deal with the trust property as if the trustee were absolute owner thereof.

3. The trustee may for the purposes of carrying out the trusts of these presents employ such agent or agents (including the debtor himself) as he may think necessary, and may pay for their services as part of the expenses of management such sums as he may think reasonable whether by way of a lump sum or of commission upon moneys collected or otherwise.

4. The debtor hereby covenants with the creditors and each of them that upon the request of the trustee he will do all such things and execute all such documents and sign all such notices to tenants, agents and others as the trustee may think necessary in order to enable him or any agent or agents employed by him the more effectually to collect and get in the rents, profits and income of the trust property.

5. The trustee shall stand possessed of the rents, profits and income of the trust property upon trust to pay and apply the same for the following purposes:—

(a) In payment of all costs, charges and expenses of and incidental to the preparation and execution of these presents, including therein the costs of investigating the debtor's affairs.

(b) In payment of the costs and expenses incurred in or about the management of the trust property, including all outgoings and the charges and expenses incurred by the trustee in the exercise of

any of the powers aforesaid or otherwise in respect of the premises, including therein the remuneration of the trustee calculated upon the basis of · per cent. on the net amount distributed among the creditors.

(c) To pay and discharge in full, but by such dividends and at such times as he in his absolute discretion shall think fit, all the just debts and claims of the creditors of the debtor.

6. It shall be lawful for the trustee, notwithstanding that any creditor may have executed or assented to this deed and that the alleged amount of his debt may be inserted in the schedule hereto, to insist upon any creditor proving his debt with such particulars as the trustee may require as to the nature and amount thereof to his satisfaction, and if necessary by statutory declaration, and in case of disagreement the same shall be referred to arbitration.

7. The trustee shall have power to compromise, and in case of dispute to refer to arbitration all debts, claims and liabilities whether present or future, certain or contingent, liquidated or unliquidated, existing or supposed to exist between the debtor and any person who may have incurred any liability to the debtor upon such terms as the trustee may deem expedient, including power to renounce, disclaim or abandon the same or any of them.

8. The trustee shall have full power in his discretion to bring, defend and prosecute all actions or proceedings at law or in equity or otherwise in reference to the trust property or the carrying into execution of the trusts of these presents and to compromise and abandon the same and to submit to arbitration in such manner as he may think fit any difference or dispute with respect to any claim arising out of or incidental to the trust property or the carrying into execution of the trusts of these presents or made or capable of being made on the trustee by any person or by the trustee on any person.

9. The trustee shall have full power to do all such things as may be necessary in order to make arrangement with any person or persons holding or entitled to any mortgage, pledge, lien or charge upon the trust property for the purpose of redeeming, transferring or discharging such

mortgage, pledge, lien or charge or releasing the equity of redemption of the trust property or of any part thereof, and out of the trust fund to keep down from time to time any interest payable in respect of any such mortgage, pledge, lien or charge.

10. The debtor hereby appoints the trustee his attorney in his name and on his behalf so long as any of the trusts of these presents remain unexecuted to demand, sue for, collect and receive and give discharges for all the rents, profits and income now due or which may hereafter become due in respect of the trust property, and to enforce payment thereof by distress ejectment or otherwise, and to commence prosecute and defend all actions, suits, claims, demands and proceedings with reference to the trust property or the estate interests and rights of the debtor or of his tenants therein or with reference to any thing or matter in which the debtor or his real estate may be in any way interested or concerned, and to do all things and execute all deeds and documents which may be reasonably necessary for more effectually carrying out the trusts of these presents.

11. If within months (or years) the debts of the debtor have not been paid in full either under the trusts of these presents or otherwise, and the debtor on receiving months notice from the trustee shall fail to pay or cause to be paid or secured to the satisfaction of the trustee the balance still owing upon the said debts then in such the trustee shall have full power to sell forthwith either the whole or any part or parts of the trust property either by public auction or private contract and upon such terms and in such manner and subject to such conditions as to payment or otherwise as he may in his absolute discretion think fit, and the receipt of the trustee for the purchase money of such of the trust property as may be sold under the power aforesaid shall be a good and effectual release and discharge to the purchasers for such purchase money and from all claims or demands in respect thereof.

12. The trustee shall hold and apply the net proceeds of such sale after payment of all expenses of and incidental to the same upon the life trusts and for the same purposes as have been hereinbefore declared concerning the rents,

profits and income of the trust property, and shall pay the surplus (if any) to the debtor.

13. If at any time the said debts and all other the costs, charges and expenses which are payable under or by virtue of the powers and provisions of this deed shall be paid in full either under the operation of the trusts hereinbefore contained or otherwise howsoever, the said trustee shall thereupon forthwith peaceably yield up possession of the said premises and shall at the expense of the debtor reconvey the trust property (except such parts as may have been sold under the power in that behalf hereinbefore contained) to the debtor freed and discharged from all the said debts and shall pay over to the debtor, or as he may direct, the surplus (if any) of the rents, profits and income of the trust property remaining in his hands, and thereupon the trustee shall be released and discharged from the trusts hereinbefore declared and indemnified by the debtor from all claims or demands whatsoever in respect of the trust property and of his dealings therewith or with the tenants thereof.

14. In consideration of the premises and of the conveyance hereinbefore contained the creditors do and each of them doth hereby release and discharge the debtor from all debts due from the debtor to the said creditors or any and each of them and from all actions, claims, demands or other proceedings whatsoever in respect thereof.

15. Provided always that the foregoing release shall be without prejudice to the rights and remedies of the creditors against third persons, and that all rights and remedies against any surety or sureties in respect of the said debts are hereby expressly reserved. And provided also that such release shall not prevent the creditors from enforcing and taking the full benefit of any mortgage, charge, lien or other security which they or any of them now hold or are entitled to on or over the property of the debtor or any part therof.

16. [Also clause for appointment of new trustee.]

In witness, etc.

(Signatures and seals of debtor and trustee.)

(Signatures and seals of creditors a .. the amounts of their debts).

ASSIGNMENT BY PARTNERS.

To Trustees for Benefit of Joint and Separate Creditors; Release of Debts.

THIS INDENTURE is made the day of between (individual partners) of, etc., carrying on the business of in partnership under the style or firm of & Co., at, etc. (hereinafter called the debtors), of the first part (trustees) of, etc. (hereinafter called the trustees), of the second part, and the several persons, firms and companies being creditors of the debtors whose names and seals are subscribed and affixed, and the amount of whose debts are set out in the schedule hereto, and all other creditors of the said (individual partners) or of the said firm of & Co., who shall assent to or agree to be bound by these presents or undertake to execute the same (all of which persons, firms and companies are hereinafter referred to as the creditors) of the third part.

Whereas, the debtors are jointly and severally indebted to the creditors in the third part of the schedule hereto and are respectively severally indebted to the creditors in the first and second parts of the schedule hereto in the amounts set opposite their respective names.

And whereas, the debtors are unable to pay either their joint creditors or their respective separate creditors their debts in full and have agreed to convey and assign to the trustees the property hereinafter expressed to be hereby conveyed and assigned on condition of being released from the said debts as hereinafter appear.

And whereas, the creditors have agreed to accept the said proposal and to take such conveyance and assignment in discharge and satisfaction of their respective debts, and to grant to the debtors the joint and separate releases hereinafter contained.

Now this indenture witnesseth as follows:—

1. In pursuance of the said agreement and in consideration of the premises, the said (partners) do and each of them doth as beneficial owner hereby convey and assign to

the trustees all the real and personal estate whatsoever and wheresoever of the debtors or either of them and whether in possession, reversion, remainder or expectancy, excepting leaseholds, shares in companies or other property which by reason of its subjecting the holder to the performance of any onerous covenant or obligation the trustees may think fit at any time within the three months of the date of the execution of these presents by the debtors by writing under their hand to disclaim (all of which property hereinbefore expressed to be hereby conveyed and assigned is hereinafter referred to as the trust property). To hold the trust property as to such part thereof as consists of real estate unto and to the use of the trustees in fee simple and as to such part thereof as consists of personal estate unto the trustees absolutely but as to all the trust property subject to the trusts, powers and provisions hereinafter contained.

3. In further pursuance of the said agreement and in consideration of the premises the said (partners) do and each of them respectively doth hereby declare that they, the debtors, do and and each of them respectively doth stand possessed of all the said property excepted from the operation of the conveyance and assignment hereinbefore contained and of all the rents, profits and income thereof and therefrom upon trust for the trustees and hereby covenant to assign, transfer, make over and give the benefit of such excepted property and of any such rents, profits and income to the trustees or as and when and to whom they may direct to be held by the trustees upon the same trusts and subject to the same provisions as are hereinafter declared and contained concerning the trust property hereinbefore conveyed and assigned and that in the meanwhile they will not deal with or incumber such excepted property or any part thereof whether by way of sale, mortgage, lien, pledge or otherwise howsoever.

4. The trustees shall at such times and in such manner as they think fit call in, collect, compel payment of and receive such part of the trust property as is outstanding, and sell and convert into money such part thereof as does not consist of money.

5. It shall be lawful for the trustees if they shall be of of opinion that it would be more advantageous to the credi-

tors to divide in specie among the creditors or among such of them as are willing to take the same any part or parts of the debtor's property, and for that purpose to estimate and put upon such property such value as in their opinion it is worth.

6. The trustees shall pay and apply the net proceeds of such sale and conversion and all other moneys which may come to their hands under or by virtue of the trusts of these presents as follows:—

(a) In payment of all the costs, charges and expenses of and incidental to the preparation and execution of these presents, including the investigation of the debtor's affairs separately and as a firm and of preparing statements of affairs of the debtors separately and of their firm and of the several meetings held by the creditors whether separate or joint or both (and of all expenses of any actions, investigations, inquiries, reports or other proceedings in the or abroad or of any agents or other persons employed in reference thereto) and of realizing and managing the trust property or administering the trust funds, and every part thereof or otherwise relating to or arising out of the trusts of these presents including therein the remuneration of the trustee as hereinafter provided.

(b) In payment of all such debts as would by the law be payable in full or in priority.

(c) In payment to the creditors by such dividends and at such times as the trustees shall think fit of all such debts and claims as would be entitled to rank for dividend against the trust property if the same were being administered and distributed under the Assignments Act and in such priorities and in accordance with such rules and equities as are applicable to the administration and distribution of joint and separate estates.

(d) The surplus (if any) of the trust funds shall be paid to the debtors respectively or as they shall direct in writing according to their respective rights and interests therein.

7. It shall be lawful for the trustees if they shall think fit to postpone the sale and conversion of any part of the trust property for such period as they shall th'nk fit (but not exceeding months without the consent of the creditors) and until such sale and conversion to manage, lease, repair, let on hire, insure or otherwise deal with the same as they may deem best, and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage the business of the debtors and employ the debtor or either of them or any other person or persons in carrying on the said business and winding up the same or in realizing and disposing of any of the trust property or otherwise in or about the premises and to pay to the debtors or such other persons a reasonable remuneration for such services and also to make a weekly allowance to the debtors or either of them by way of maintenance for themselves and their families (but not exceeding without the consent of the creditors).

8. The trustees shall be entitled to retain by way of remuneration a sum equal to per cent. upon the amount distributed in dividend among the creditors, and so long as the said business is being carried on as aforesaid the trustees shall be entitled to receive the sum of per month on account of such remuneration.

9. If the trustees (or either of them) shall so require the creditors or any of them notwithstanding that they or he may have executed or assented to these presents and the amount of their or his debts or debt may be stated in the schedule hereto shall prove their debts or his debt with such particulars and in such manner as the trustees may in their discretion think fit to require.

10. The trustees may if they shall deem it expedient pay in full or compound for at a higher rate or give security for or otherwise settle any debt not exceeding of any separate creditor or of any joint creditor who may refuse to come in under and take advantage of these presents.

11. The trustees shall have power to compromise and in case of dispute to refer to arbitration of all debts, claims and liabilities whether present or future, certain or contingent, liquidated or unliquidated, existing or supposed to

exist between the debtors and any person who may have incurred any liability to the debtors upon such terms as the trustees may deem expedient, including power to renounce, disclaim or abandon the same or any of them.

12. The trustees shall have power to make such arrangement with any person having any mortgage, lien, charge or other security on the trust property as the trustees may deem expedient for the purpose of paying off, redeeming, transferring or releasing the equity of redemption of such mortgage, lien, charge or other security and may keep down all interest payable thereon from time to time.

13. The debtors do and each of them doth hereby appoint the trustees their and his lawful attorney in their name and in the name of each of them and of the said firm of & Co., and on their behalf and on behalf of them and of the said firm of & Co. to do all such acts and things and to make and execute all such deeds, instruments and documents as in the opinion of the trustees may be necessary or expedient for any of the purposes aforesaid and generally for more effectually executing the trusts of these presents.

14. In further pursuance of the said agreement and in consideration of the premises the creditors do and each of them doth hereby release the debtors and each of them from the said debts both joint and separate and from all actions, claims, demands or other proceedings by the creditors or any of them in respect thereof.

15. The foregoing release shall in no way affect such rights and remedies as the creditors or any of them may be entitled to in respect of the said debts against third persons and all rights and remedies of the creditors against any surety or sureties are hereby expressly reserved.

16. It shall be lawful for any creditor who holds any mortgage, lien, charge, pledge or other security on or over any joint or separate property of the debtors or either of them to take the full benefit of such mortgage, charge, lien, pledge or other security subject to the provisions of the statutes respecting such securities.

17. If any creditor shall prove hereunder against the joint estate for a debt in respect of which such creditor holds any security against the separate estate of the debtors

or either of them such creditor shall only be entitled to receive dividend out of the joint estate upon condition of dealing with such security upon the same footing as if it were a security against the joint estate.

18. The trustees may at such times and in such manner as they may think fit call a meeting of the joint or of the separate creditors or of both combined and shall call such meetings or meeting if so requested by not less than in number (representing in value) of the joint or of the separate creditors or of the two combined, and the trustees shall have regard in the administration of the trusts hereby declared to the directions given by such joint or separate or joint and separate creditors by resolution at such meetings or meeting. Such resolutions shall not, unless the same are unanimously passed by separate resolutions at separate meetings of both joint and separate creditors specially summoned for the purpose, contravene the provisions hereinbefore contained for the administration of the joint and separate estates according to the law.

19. The trustees shall have full power in their absolute direction to apportion the costs, charges and expense (including their own remuneration) of the realization and distribution of the trust property and trust fund and of exercising any of the powers conferred on them by and in executing any of the trusts of these presents between the joint and separate estates.

In witness, etc.

(Signatures and seals of partners and trustees.)

SCHEDULE.

Part I.

(Signatures and seals of the separate creditors of one partner and the amounts of their debts.)

Part II.

(Signatures and seals of the separate creditors of the other partner, and the amounts of their debts.)

Part III.

(Signatures and seals of the joint creditors of the partnership and the amounts of their debts.)

ASSIGNMENT BY PARTNERS

Of all their Property to a Trustee for the Benefit of all their Creditors, the Blended Joint and Separate Estates to be Administered as One Fund Equally between both Joint and Separate Creditors.

THIS INDENTURE, made the day of (partners) carrying on business (place of business) under the style or firm of (name of partnership firm) of the first part (trustees) of, etc. (hereinafter called the trustee) of the second part, the several persons, firms and companies who are or claim to be creditors of the said firm of (name of partnership firm) whose names and seals are entered and affixed in the first part of the schedule hereto (hereinafter referred to as the joint creditors) of the third part, and the several persons, firms and companies who are or claim to be separate creditors of one or other of the said (partners) and whose names and seals are entered and affixed in the second and third part of the schedule hereto (hereinafter referred to as the separate creditors) of the fourth part.

Whereas the said (partners) in the course of carrying on their business of at under the name of (name of partnership firm) have become indebted to the joint creditors in the amounts set opposite their respective names in the first part of the schedule hereto.

And whereas the said (one partner) is indebted to the separate creditors in the amounts set opposite their names in the second part of the schedule hereto.

And whereas the said (other partner) is indebted to the separate creditors in the amounts set opposite their names in the third part of the schedule hereto and the

majority of such debts have been incurred by the said (partner) in carrying on a business under the name of (name of business carried on by partner separately) which business the said (partner) alleges to be a separate business distinct from the said firm (name of partnership firm).

And whereas owing to cross and complex dealings between the said firm of (name of partnership firm) and the said business carried on by the said (partner) under the name of (name of business carried on by partner separately) and between the said (partners) individually and in partnership disputes have arisen between the said (partners) and also between their joint and separate creditors as to what are partnership assets and partnership liabilities and what are separate assets and separate liabilities.

And whereas the said (partners) are unable in any case to pay either their joint or separate creditors their debts in full and in order to avoid the estate and the assets being wasted in litigation between the joint and separate creditors the said (partners) have proposed that they should convey and assign all their property, credits and effects whether joint or separate to the trustee for administration and distribution among all their creditors whether joint or separate rateably and without preference or priority as if in all respects the said property, credits and effects were the property, credits and effects of a single debtor and the creditors were creditors of a single debtor.

And whereas at a meeting of the creditors both joint and separate of the said (partners) present either in person or by proxy a resolution was passed accepting the said proposal and agreeing in consideration of such conveyance and assignment to grant the said (partners) the release hereinafter contained.

Now this indenture witnesseth

1. The said (partners) as beneficial owners jointly as a firm do and each of them separately for himself doth hereby convey and assign unto the trustee all the joint and separate property, credits and effects of them as a firm and of each of them individually both real and personal and whether in possession, reversion, remainder or expect-

ancy together with the goodwill of the said business of carried on by them jointly at under the style and firm of (name of partnership firm) and also the goodwill of the business carried on at under the name of (name of business carried on by partner separately) to hold the same as to such part thereof as consists of real estate unto and to the use of the trustee in fee simple and as to such part thereof as consists of personal estate to the trustee absolutely and upon the trusts and conditions hereinafter declared and contained.

2. The trustee shall, as soon as may be, sell and convert the said real and personal property both joint and separate and dispose of the said businesses as going concerns or otherwise whether by public auction or private contract and upon such terms and subject to such conditions as the trustee may in his absolute discretion think expedient with full power to postpone the said sale and conversion if it shall seem expedient to the trustee in the interests of the creditors to do so for any period not exceeding months.

3. The trustee shall pay and apply the net proceeds of such sale and conversion as follows:—

(a) In payment thereout of all the costs, charges and expenses of and incidental to the investigation of the affairs of the said (partners) separately and of the affairs of the said firm of (name of partnership firm) and of the business carried on by the said (partner) in the name of (name of business carried on by partner separately) and of and incidental to the meetings of creditors of the said (partners) both separate and joint and the preparation and execution of these presents.

(b) In payment to all the separate creditors of the said (partners) and to all the creditors of the said firm of (name of partnership firm) and of the said business of (name of business carried on by partners separately) of all such claims and demands as would be payable in priority as preferential claims if the said creditors were creditors of a single debtor and the estate were being administered as the estate of a single debtor.

(c) In payment to all the creditors of the said (partners) whether separate or joint of dividends upon the amount of their respective debts in the same manner and in the like priorities in all respects as if the trustee were administering the estate of and the joint and separate creditors were creditors of a single debtor and, subject to the special provisions of these presents, in accordance with the rules applicable to the administration and distribution of the property of insolvent debtors.

(d) In payment of the surplus (if any) to the said (partners) respectively according to their respective interests in the said partnership firm of (name of partnership firm) as if the whole thereof were the proceeds of the property of that firm.

4. It shall be lawful for the trustee in his discretion to pay in full or compound at a higher rate or to give security for or partly in one way and partly in another to settle or compromise any debt or claim of any creditor of the said (partners) whether separate or joint or claiming to be separate or joint whose debt does not exceed $ (but any such claim exceeding the said sum of $ shall only be settled with the consent of the creditors given at a meeting by resolution passed by in number (representing $ in value) of the creditors present at a meeting summoned for that purpose).

5. In consideration of these presents the creditors of the said (partners) both separate and joint do and each of them doth hereby absolutely release and discharge the said (partners) and each of them from all the debts both joint and separate now owing by them or either of them to the said joint and separate creditors or either or any of them and from all actions, claims, demands or other proceedings whatsoever in respect thereof.

(Add reservation of rights against sureties and such other usual clauses as may be desired).

In witness, etc.

(Signatures and seals of debtors and trustees.)

SCHEDULE.

Part I.

Joint creditors of (name of firm).

Part II.

Separate creditors of (one partner).

Part III.

Separate creditors of (other partner).

ASSIGNMENT OF JUDGMENT.

THIS INDENTURE, made the day of in the year of our Lord one thousand nine hundred

BETWEEN

of the first part; and of the second part;

Whereas the said part of the first part on or about the day of one thousand eight hundred and eighty recovered a judgment in the Court of against the sum of damages and costs, making together the sum of

And whereas the said part of the first part ha agreed to assign the said judgment and all benefit to arise therefrom either at law or in equity unto the said part of the second part in manner hereinafter expressed:

Now this indenture witnesseth that in pursuance of the agreement and consideration of the sum of of lawful money of Canada to the said part of the first part in hand well and truly paid by the said part of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged the said part of the first part ha granted, bargained, sold, assigned, transferred and set over, and by these presents

do grant, bargain, sell, assign, transfer, and set over unto the said part of the second part executors, administrators and assigns.

All that the said hereinbefore mentioned judgment, and all and every sum and sums of money now due, and hereafter to grow due by virtue thereof, for principal, interest, and costs, and all benefit to be derived therefrom, either at law or in equity, or otherwise howsoever:

To have, hold, receive, take and enjoy the same, and all benefit and advantage thereof unto the said part of the second part executors, administrators and assigns, to and for and their own proper use and as and for and their own proper moneys and effects absolutely.

And the said part of the first part hereby constitute and appoint the said part of the second part executors and administrators, to be the true and lawful attorney and attorneys in the name of of the said part of the first part, or otherwise, but at the proper costs and charges of the said part of the second part executors and administrators, to ask, demand and receive of and from the said executors or administrators, the said judgment debt and premises hereby assigned, and on non-payment of the same or any part thereof, to obtain any execution or executions, or bring, commence and prosecute any action or actions, suit or suits, as well as at law in equity, for the recovery of the same, and to use all such other lawful remedies, ways and means, as the said part of the first part could or might have used or taken for the recovery of the same, and on receipt or recovery thereof to sign and give good and effectual receipt or receipts for the same, with full power from time to time to appoint a substitute or substitutes for all or any of the purposes aforesaid.

And the said part of the first part do hereby agree to ratify and confirm whatsoever the said part of the second part executors or administrators, shall lawfully do or cause to be done in or about the premises,

And the said part of the second part hereby cove-

nant to indemnify and save harmless the said part of the first part from all loss, costs, charges, damages and expenses by reason or on account of any such proceedings as aforesaid.

In witness whereof, etc.

Signed, sealed, etc.

ASSIGNMENT BY DEBTOR OF HIS BUSINESS BY WAY OF SALE TO HIS PRINCIPAL CREDITOR.

THIS INDENTURE is made the day of between (debtor), of, etc. (hereinafter called the vendor), of the one part, and (directors of the company), of, etc. (hereinafter called the purchasers), of the other part.

Whereas the vendor for some time past and down to the date of the execution of these presents has carried on business as a at the above mentioned premises in , of which he is the lessee for the residue of a term of years from the day of and is possessed of the goodwill, goods, chattels, moneys, credits, debts and assets generally of the business so carried on by him and is subject to liabilities incurred by him in carrying on such business and otherwise amounting at the present date to the sum of $.

And whereas it has been agreed between the vendor and the purchasers that the vendor shall sell and the purchasers shall purchase the vendor's said business, including in such purchase an assignment of the lease of the said premises and the goodwill of the said business with the sole right to use the name of the vendor for the purpose of carrying on the same and the goods, chattels, moneys, credits, debts and assets generally of the said business for the agreed purchase consideration and on and subject to the terms hereinafter expressed.

And whereas in part performance of the said agreement the vendor has delivered to the purchasers and the purchasers have received possession of all the goods, chat-

tels, stock in trade and other movable assets of the vendor belonging to or at the said premises (as the purchasers hereby acknowledge) which movable assets are of the estimated value of $

Now this indenture witnesseth as follows:—

1. The vendor hereby as beneficial owner assigns to the purchasers—

(a) Firstly all of the goodwill of the said business with the exclusive right to use the name of (debtor) for the purpose of carrying on the said business and to represent and to use any words that may be thought expedient in order to represent the said business as being a continuation of the business carried on by the vendor as

(b) Secondly, all the fixtures, fittings, plant, office and other furniture and other effects to which the vendor is entitled in connection with the said business.

(c) Thirdly, all the book and other debts due to the vendor in connection with the said business and the full benefit of all securities for the said debts.

2. The vendor agrees that he will as from the date hereof stand possessed of the lease of the said premises aforesaid in trust for the purchasers and that he will convey and assure the same as the purchasers may from time to time direct.

3. The vendor hereby appoints the purchasers and each of them to be his true and lawful attorneys or attorney in the names of them or either of them or the vendor's name to collect, give receipts and discharges for, and to demand and take proceedings at law or in equity or in bankruptcy for the recovery of all the debts due or growing due to the vendor and hereby assigned and undertakes to ratify whatever acts the vendors or either of them may lawfully do under the power hereby conferred.

4. As the consideration for the said sale to and purchase by the purchasers of the said business and assets the purchasers undertake to pay, satisfy and fulfil all the debts,

liabilities and contracts and engagements of the vendor in relation to the said business and to indemnify the vendor against all proceedings, claims and demands in respect thereof and further to employ the vendor as manager of the said business upon the terms embodied in the agreement, a copy of which is contained in the schedule hereto and to give him the option to repurchase the said business contained in the following clause.

5. The vendor shall at any time within the period next hereinafter mentioned have the right to repurchase the said business and its assets as then existing, including the goodwill and right to use the said name and other rights and benefits which are the subject of these presents for a purchase consideration consisting of—

(a) Such sums as an accountant to be nominated by the purchasers shall in writing certify to be sufficient to pay and satisfy all the debts which on the date of the completion of the said purchase by the vendor (hereinafter referred to as the date of repurchase) may be due by the purchasers in respect of the said business and then unpaid other than debts due by the purchasers to the Company, Limited.

(b) Interest at the rate of 5 per cent. per annum on all sums of money which on the date of repurchase may be due by the purchasers to the Company, Limited, for advances of money made for the purposes of the said business and for the price of goods supplied on credit to the purchasers by the Company, Limited, in respect of which a period of more than six months' credit has been taken and allowed by the purchasers and

(c) The amount which at the date of repurchase may be due to the Company, Limited, from the vendor on his private account with such company.

6. The vendor shall not be entitled to exercise the right of repurchase conferred by the preceding clause unless he gives to the purchasers not less than three months' notice in writing of his intention to exercise such rights and unless such notice is given before the expiration of the period ending the day of , and the said purchase consideration to be paid forthwith on receipt by the vendor of the certificate fixing the same.

In witness, etc.

(Signatures and seals of all parties.)

SCHEDULE.

COMPOSITION DEED.

THIS INDENTURE, made the day of , one thousand nine hundred , between (hereinafter called the debtor), of first part, and the several persons, firms and corporations who are creditors of the said debtor (hereinafter called the creditors), of the part,

Whereas the said debtor has become involved and unable to pay liabilities in full, and creditors have agreed with for a composition and discharge upon the terms hereinafter mentioned.

Now therefore this indenture witnesseth that in consideration of indebtedness and of the discharge hereby given the said debtor covenant and agree with creditors collectively and severally, that will pay to them and each of them respectively a composition of cents in the dollar of their respective claims against in manner and at the times following, that is to say: cents in the dollar in . And that will give to each of the said creditors promissory notes for such composition payments

bearing date on the said day of , 190 , and payable as aforesaid.

And the said debtor further covenant and agree to pay the charges incidental to the composition and discharge hereby effected.

And in consideration of the said creditors do and each of them doth hereby release and discharge unto the said debtor all their respective claims against provided always that nothing herein contained shall operate any change in the liabilities of any person secondarily liable to the creditors, or any of them, for the debts of the debtor either as drawer or endorser of negotiable paper, or as a guarantor, surety or otherwise, nor of any partner or other person liable jointly or severally with the debtor to the creditors, or any of them, for any of said debts; nor shall it affect any mortgage, hypothec or lien on the estate or property of the debtor or on any portion thereof, nor shall it affect any collateral security held by any of the creditors as security for any debt hereby discharged.

And the said creditors do hereby direct and authorize the trustee of the estate of the said debtor to deliver up and convey to the said debtor all estate and effects upon this deed of composition and discharge being executed by the creditors, and upon the debtor depositing with him the composition notes for the creditors as aforesaid, and paying the said expenses and privileged claims. Provided that the said trustee may waive the execution of this deed by .

In witness whereof, etc.

Signed, sealed, etc.

(Signatures of witnesses.)

(Signatures of creditors and parties.)

AGREEMENT TO ACCEPT COMPROMISE OF ACCOUNT IF PAID PROMPTLY.

MEMORANDUM OF AGREEMENT made, etc.

Between of the first part, and of the second part.

Whereas the party of the second part is indebted to the parties of the first part for principal money and interest up to the date hereof in the sum of $10,000, the said amount being made up as follows:—

It has been agreed between the parties hereto as follows:—

(1) That the party of the second part shall give to the parties of the first part his four promissory notes for $1,000 each bearing date payable respectively at two, four, six and eight months from the day of with interest thereon from said date.

(2) That the said notes shall be held by the parties of the first part as collateral security to the said indebtedness of $10,000.

(3) Provided the said four notes are duly paid by the party of the second part as they respectively become due the parties of the first part will accept such payment by the party of the second part of said four notes in full satisfaction and discharge of said indebtedness. Time to be strictly of the essence of this agreement.

(4) Should default be made in the payment of said notes or any of them when they respectively become due, the amounts if any, paid on account or in respect of said notes or any of them shall be credited on said sum of $10,000, and the balance shall be payable by the party of the second part to the parties of the first part on demand.

(5) It is distinctly understood and agreed between the parties hereto that it is only in the event of the said four notes being promptly paid at maturity by the party of the second part, that he the party of the second part shall be entitled to any benefit from this agreement.

In witness, etc.

Signed, sealed, etc.

DEED OF COMPOSITION.

Payment by Instalments—Joint and Several Covenant to Pay by Debtor and a Guarantor Covenant Not to Sue.

THIS INDENTURE made the day of

Between (debtor) of, etc. (hereinafter called the debtor) of the first part (guarantor) of, etc., of the second part and the several persons firms and companies being creditors of the debtor, whose names and seals and the amount of whose debts are inscribed affixed and set out in the schedule here (hereinafter referred to as the creditors) of the third part.

Whereas the debtor is unable to pay the creditors their debts in full and has proposed to pay a composition to the creditors on their said debts of cents on the dollar by instalments of the amount and in the manner hereinafter appearing.

And whereas the said (guarantor) has agreed to join in these presents for the purpose of guaranteeing to the creditors the due payment of the said composition.

And whereas the creditors by a resolution passed on the day of resolved to accept the said composition in full discharge and satisfaction of their respective debts and claims against the debtor on the conditions and subject to the provisions hereinafter contained.

Now this indenture witnesseth as follows:—

1. The debtor and the said (guarantor) jointly and severally covenant with the creditors and each of them to pay to the said creditors and each of them a composition of cents on the $ upon the amounts of their respective debts by equal quarterly payments of cents each, the first of such payments to be paid to each of the said creditors on the day of and each of the subsequent payments at intervals of three calendar months from that date.

2. The said (guarantor) shall not be released from his liability under this guarantee by reason of time being given

or indulgence granted to or by reason of any compromise or composition with the debtor by the creditors or any of them.

3. In consideration of the premises the creditors do and each of them doth hereby covenant that if and so long as the debtor or the said (guarantor) shall pay to them and each of them the said instalments of the said composition in accordance with their covenant in that behalf hereinbefore contained the creditors will not bring or prosecute any pending action or legal proceeding whatsoever against the debtor nor attach molest or impede the debtor in his person, goods or estate for or on account of any of the debts or claims of the creditors in respect whereof the creditors are entitled to receive the said composition hereunder and these presents may be pleaded as an estoppel or by way of a defence to any such action or other legal proceeding which may have been or may hereafter be brought or prosecuted against the debtor his person goods or estate for or on account of any such debt or claim.

4. If and when the said composition shall have been duly paid to the creditors respectively then the debtor and his heirs executors and administrators and his estate and effects shall be released and discharged from the several debts and liabilities now owing from or incurred by the debtor to the creditors respectively, and from all claims and demands in respect or on account of.

5. All rights and remedies of the creditors respectively against any surety or sureties or parties other than the debtor liable to the creditors or any of them are hereby expressly reserved.

6. The foregoing release shall be without prejudice to any mortgage charge lien pledge or other security which any of the creditors now hold or are entitled to the benefit of for or in respect of their respective debts and it shall be lawful for such creditors to realize and enforce any such security as fully and freely in all respects as if they had not executed these presents.

7. If the debtor and the said (guarantor) make default in payment of any instalment of the said composition in accordance with their covenant in that behalf hereinbefore

contained the foregoing release shall be void and of no effect and the creditors and each of them respectively shall be remitted to and be entitled to exercise as regards their respective debts all such rights and remedies as they and each of them would have been entitled to exercise if these presents had never been executed subject only to giving credit for any instalment or instalments of the said composition already paid (but without prejudice in any way to the rights of the creditors against the said (guarantor) or to his liability under the covenant by him hereinbefore contained).

In witness, etc.

(Signatures and seals of debtor and guarantor.)

SCHEDULE.

(Signatures and seals of creditors and amounts of their debts.)

COMPOSITION DEED BY PARTNERS.

Payment of One Composition to Both Joint and Separate Creditors Secured by Promissory Notes of Partners and a Surety Assignment by Partners of Their Stock in Trade and Firm Business to Surety—Trust of Leasehold Business Premises.

THIS INDENTURE made the day of between (names of partners) of etc., carrying on business under the style or firm of (firm name) (hereinafter called the debtors) of the first part (surety) of etc., of the second part and the several persons firms and companies whose names and seals are set out and affixed in the schedule hereto and who are respectively creditors of the debtors jointly or of one or other of them separately and all the other joint and separate creditors of the debtors who shall execute or

in writing or otherwise assent to or agree to take the benefit of these present (hereinafter referred to as the creditors) of the third part.

Whereas the debtors are indebted to their creditors either jointly or severally in the several sums set opposite their respective names in the schedule hereto, and being unable to pay the same in full have proposed to the creditors to pay to each of them a composition of cents on the dollar on the amount of their joint and several debts and that such composition shall be accepted by the creditors in full satisfaction and discharge of the said debts such composition to be paid by equal instalments of each the first of such instalments to be paid at the expiration of months from the date hereof and the second at the expiration of months from the date hereof and that the payment thereof should be secured by the joint and several promissory notes of the debtors and the said (surety) as surety and the creditors have agreed to such proposal and to accept such composition.

And whereas the joint and several promissory notes of the debtors and the said (surety) as their surety as aforesaid have been delivered to the creditors of the debtors.

And whereas in consideration of the said (surety) becoming surety for the debtors for the payment of the said composition and of the covenant by the said (surety) with the creditors hereinafter contained the debtors have consented and agreed to execute the assignment hereinafter appearing.

Now this indenture witnesseth as follows:—

1. The said (surety) hereby covenants with the creditors and with each of them that he the said (surety) will pay or cause to be paid to them the said composition of cents on the $ on the amount of their several and respective debts in the manner and by the instalments hereinbefore mentioned.

2. The creditors do and each of them doth hereby absolutely release and discharge the debtors from all the said debts both joint and separate, and from all actions claims demands or other proceedings at law or in equity or otherwise in respect thereof.

3. If the said (surety) shall make default in payment of either of the said instalments or if the debtors either jointly or separately or the said (surety) shall suffer any proceeds of execution whether legal or equitable or if they or either of them or the said (surety) shall make any other arrangement or composition with their or his creditors or any of them, the foregoing release shall be void and of no effect and the creditors shall be at liberty to enforce their rights and remedies in respect of their said debts against the debtors or either of them as fully and freely as if these presents has never been executed subject only to accounting for any instalment received in respect of such debt.

4. The foregoing release shall not affect the rights or remedies of the creditors in respect of the said debts against any person or persons other than the debtors and the rights of the creditors against any surety or sureties for the debtors or either of them in respect thereof are hereby expressly reserved.

5. Any creditor who holds any mortgage lien pledge charge or other security over the property, whether joint or separate of the debtors or either of them shall within days of his execution of these presents give notice in writing to the said (surety) that he intends to surrender his security and take the notice to the said (surety) of the value at which he estimates his security, and the said (surety) shall be entitled to redeem such security or not if such creditor so values his security he shall only be paid the said composition upon so much of his debt as shall remain after deducting therefrom such assessed value. If such creditor fails to give such notice as aforesaid of his intention to surrender his said security or the value at which he estimates the same he shall at the option of the said (surety) be absolutely debarred from taking the benefit of these presents.

6. In consideration of the premises and of the covenants by the said (surety) hereinbefore contained the debtors do and each of them as beneficial owner doth hereby assign and transfer unto the said (surety) all their stock in trade goods chattels and effects in or upon their premises or used and employed by them or in connection with the said busi-

ness, together with the good will of the said business and the right to use and carry on the same under the name or style of (firm name) at To hold the same unto the said (surety) absolutely.

7. The debtors hereby declare that they will stand possessed of the leasehold business premises at and of the rents and profits thereof and therefrom in trust for the said (surety) and the debtors hereby jointly and severally covenant to assign the same to the said (surety) or as he shall in writing request and that in the meanwhile neither they nor either of them will deal with or incumber the said leasehold premises in any way.

In witness, etc.

(Signatures and seals of debtors and surety.)

SCHEDULE.

(Signatures and seals of creditors and amounts of their debts.)

DEED OF COMPOSITION

With Creditors by a Debtor Who Has Turned His Business into a Limited Company, Payment of Debts in Full by Instalments, Company Joining as Guarantors Deposit of Shares and Debentures in Company by Certain Shareholders as Security—Release.

THIS INDENTURE, made the day of between (debtor) of etc., (hereinafter called the debtor) of the first part (trustee) of etc., of the second part (guaranteeing company) carrying on business of (description of business) at (registered office) (hereinafter called the guaranteeing company) of the third part (shareholders) of etc. (hereinafter called the concurring shareholders) of the fourth part and the several persons firms and companies whose names and the amounts of whose debts and claims are set out in the first schedule hereto or who being creditors of the debtor shall assent to or agree to be bound by

the provisions of these presents or undertake to execute the same (all of which persons firms and companies are hereinafter called the creditors) of the fifth part.

Whereas the debtor was lately engaged in the business of (description of business) at but has recently transferred his said business to the guaranteeing company.

And whereas the debtor is indebted or liable to the creditors in and for the sums of money set out in the said first schedule hereto which he is at present unable to pay in full.

And whereas the debtor has proposed to the creditors that the debts due to them shall be paid in full by instalments equal to cents on the $ on the amounts of such debts, such instalments to be payable at intervals of three months as hereinafter provided and all such instalments to be secured in manner hereinafter appearing.

And whereas the creditors have agreed with the debtor to accept the said composition in discharge and satisfaction of their debts and to enter into the covenants hereinafter contained.

And whereas the guaranteeing company has agreed to join in these presents and enter into the covenant and give the security hereinafter contained and provided for and the concurring shareholders have also agreed for the purpose of affording additional security for the payment of the stipulated composition to make the transfer of shares and enter into the covenants on their part hereinafter contained.

Now this indenture witnesseth as follows:—

1. The debtor and the guaranteeing company jointly and severally covenant with the said (trustee) or other the trustee for the time being of these presents (hereinafter called the trustee) that they or one of them will pay to the trustee in trust for the creditors such a sum as shall be sufficient to pay to each of the creditors the amount in full of the debt due to such creditors by the debtor or for which the debtor is liable to such creditor by equal instalments each amounting to cents on the dollar on such amount the first of such instalments to be paid on the day of next and each of the ensuing

instalments to be paid at the expiration of three months from the date on which the last preceding instalment was payable.

2. The debtor and the guaranteeing company further jointly and severally covenant with the trustee that they or one of them will on demand in writing by the trustee pay all costs charges and expenses of or incidental to the investigation of the affairs of the debtor including those in connection with the preparation of the account and balance sheet of the debtor's business at the day of last and all costs charges and expenses of or incidental to the preparation and execution of these presents and the carrying of the same into effect including such remuneration to the trustee for his services in relation to the trusts thereof as shall from time to time be awarded by any committee appointed by the creditors or if no such committee be appointed as may be sanctioned by the creditors.

3. The debtor having deposited with the trustee debentures for $ each in the guaranteeing company and a certificate for shares of $ each fully paid in the guaranteeing company which the debtor hereby states to be his own unincumbered property hereby covenants with the trustee that he will forthwith on the request of the trustee duly execute a proper transfer or proper transfers of such shares to the trustee and give all such notices and execute and do all such documents and things as shall at any time be necessary to vest in the trustee a complete legal unincumbered title to the said shares and debentures and to enable him to obtain registration as holder of such shares and debentures in the register of the guaranteeing company.

4. Each of the concurring shareholders having deposited in the hands of the trustee the certificates of the shares in the guaranteeing company held by them the amount and number of which certificate is set opposite the name of each concurring shareholder in the second schedule hereto and which shares of the concurring shareholders amount in all to shares of $ each fully paid hereby covenants with the trustee that he will forthwith on the request of the trustee duly execute a proper transfer

of his said shares to the trustee and give all such notices and execute and do all such documents and things as shall at any time be necessary to vest in the trustee a complete legal unincumbered title to the said shares and to enable him to obtain registration as holder of such shares in the register of the guaranteeing company.

5. The guaranteeing company hereby covenants with the trustee that so long as the debts or any part of the debts due to the creditors remain unpaid and until all the instalments hereinbefore made payable have been fully paid, the company will not issue any further debentures in addition to those already issued or in any way charge or incumber or attempt to charge or incumber the undertaking or property of the company on which the said debts are a security or any part thereof or dispose of or deal with the property or undertaking of the company otherwise than in the ordinary course of business.

6. The guaranteeing company and the debtor hereby jointly and severally covenant with the trustee that during the continuance of these presents the guaranteeing company will permit the trustee and the committee of inspection appointed by the creditors or any person authorized by him or them in writing at all reasonable times to examine and inspect the books of account of the company and all other books papers and writings including the minute book in the custody or power of the company or the debtor on the company's behalf relating to the business and undertaking of the company and to take copies thereof or extracts therefrom.

7. So long as the debtor and the guaranteeing company shall punctually pay the amounts required for payment of the said composition by the instalments and at the times and in the said manner hereinbefore prescribed and shall perform and fulfil all their respective obligations under these presents and make no default therein the trustee shall not sell the shares and debentures hereby covenanted to be transferred to him or compel payment of the said debts or any of them or enforce the security hereby created.

8. If the debtor and the guaranteeing company shall fail punctually to pay to the trustee the amount of any in-

stalment hereby made payable to him at the time and in the manner hereinbefore prescribed or shall fail to perform or fulfil any of their respective obligations under these presents and make default therein then and in each of such cases:—

(a) The whole of the instalments under these presents shall forthwith become immediately payable to the trustee.

(b) Notwithstanding anything to the contrary contained in the said debentures or any trust deed relating thereto the principal moneys thereby secured shall immediately become payable and the trustee may immediately enforce the security created by the said debentures in the manner therein prescribed and provided.

(c) The trustee may sell the said shares and debentures or any of them at such times and in such manner as he shall think fit.

9. All moneys received by the trustee under or in exercise of any of the powers conferred upon him in these presents (including any dividends and interest from time to time received by him on the said shares and debentures) shall after retention by the trustee of the expenses of realization collection and administration be applied by the trustee in and towards payment of the sums of money payable under these presents by the debtor and the guaranteeing company and any surplus shall be held by the trustee in trust for the debtor or the guaranteeing company as the caes may be.

10. The creditors hereby respectively release the debtor from their respective debts the amounts whereof are specified in the first schedule hereto and from all other debts (if any) owing from the debtor to the creditors respectively subject nevertheless to the provisos hereinafter contained.

11. Nothing herein contained shall prevent the creditors or any of them from suing any person or persons other than the debtor who may be liable to pay to any of the creditors all or any part of their respective debts and all rights of the creditors against any surety or sureties for the said debts or any of them are hereby expressly reserved.

12. Any creditor who holds any mortgage lien pledge charge or other security on or over any property of that debtor shall be entitled to enforce or otherwise obtain the full benefit of such mortgage lien pledge charge or other security provided that any such creditor shall be entitled to receive the said composition in respect of the balance only of such debt after realizing and allowing for or valuing and deducting the value of such mortgage charge lien pledge or other security as aforesaid and provided also that any creditor neglecting to realize or value any such security prior to receiving the said composition shall be taken to have abandoned the same.

13. If by reason of the death of the trustee or his going permanently abroad or becoming incapable of acting or refusing to act or from any other cause a vacancy shall arise in the office of trustee hereunder the committee of inspection or if there be no committee of inspection the creditors may by resolution appoint a new trustee in place of the trustee who has so vacated his office.

14. The creditors shall have power to elect a committee of inspection not exceeding creditors for not less than $ each of whom shall form a quorum and any resolution may be carried by a majority of the members of the committee present in person or by proxy.

15. The trustee shall in acting under and executing the trusts of these presents observe the directions and be under the control of the committee of inspection or of the creditors if there be no committee of inspection and any resolution of the creditors shall override any direction of the committee of inspection (if any).

16. The trustee or committee of inspection or creditors whose debts amount to not less than $ may call a meeting of the creditors and any resolution passed at such meeting by a majority in number (representing $ in value) of the creditors present thereat in person or by proxy shall be valid and binding.

In witness, etc.

(Signatures and seals of debtor, trustee, guaranteeing company and concurring shareholders).

SCHEDULE I.

(Signatures and seals of creditors and amounts of their debts.)

SCHEDULE II.

Name of Shareholder.	Date of Certificate.	Number of Shares.

DEED OF EXTENSION.

THIS INDENTURE made this day of 190 . Between of the of in the County of of the first part: and the several persons firms and corporations whose names are hereto annexed, creditors of the said part of the first part. of the second part:

Whereas the part of the first part ha become involved and unable to pay liabilities as they mature, and ha requested creditors to extend the time for the payment thereof, which they have agreed to do in consideration of these presents.

Therefore it is mutually agreed between the parties hereto, that the times for payment of the sums due by the said part of the first part to said creditors shall be extended and that the same shall become due and payable in equal instalments at months from with interest at per centum per annum, in lieu of the terms of payment heretofore existing.

Provided that the said part of the first part will at once give promissory notes for such extended payments dated as aforesaid, and made payable at the respective places of business of the said creditors.

That the said part of the first part will from the date hereof keep books of account in which shall enter daily as they occur, the different transactions of business and that who is hereby appointed the agent of the several parties hereto, may at all times inspect such books and investigate the affairs of the said part of the first part generally.

That upon default being made in the payment of any of the extended amounts or upon judgment being obtained against or in the event of the said part of the first part disposing of stock or other assets other than in the ordinary course of business, by retail, or in the event of the stock or premises of the said part of the first part being injured or destroyed by fire, or in the event of the business of the said being in any way neglected, or depreciated, then the balance of the claims of the creditors shall at once become due and payable, and may enter into possession of the assets of the said part of the first part for and on behalf of the creditors of the said part of the first part, who hereby nominate, constitute and appoint the said attorney irrevocable for the purpose of executing in name a legal assignment to himself of all the assets of the said part of the first part in trust for the benefit of creditors.

And the said part of the first part declare the within statement of affairs represents correctly and truly the condition of affairs.

It is intended that this deed of extension shall be executed by all the creditors of the part of the first part, and that it shall be held by the said as an escrow until so executed, but the said can nevertheless waive execution by not more than of such creditors, if he thinks it in the interest of the creditors to do so.

In witness, etc.

EXTENSION AGREEMENT.

(Short Form.)

In the matter of of the (town) of merchant).

We the undersigned creditors of the above named do hereby respectively agree to accept payment of our claims against him in (18) equal consecutive monthly instalments payable on the day of each month, commencing on the day of 190 without interest. The said payments to be covered by the promissory notes of the said in favor of the creditors respectively.

This extension is subject to the following conditions:—

1. All creditors of the said having claims against him of more than (fifty) dollars are to consent hereto within (ten) days from this date.

2. The said is to insure and keep insured his stock-in-trade to the amount of its full insurable value and is to transfer the said insurance within (ten) days from this date to as trustee for the creditors agreeing to this extension.

3. The said is not to alienate or encumber his business or stock-in-trade or assets and is not to sell or deal with his business or stock-in-trade or assets except in the ordinary course of retail business.

4. This extension is not to in any way affect or prejudice the rights or remedies of the creditors and each of them against any person other than the said or against or in respect of any surety or security.

5. The said is within (ten) days from this date to pay all expenses incurred in connection with the taking of stock and the carrying out of this extension.

6. If any default whatsoever be made in payment or in the observance of any of the provisions of this agreement or if any proceedings be taken against the said the original claims of the creditors shall at once revive and be immediately payable with interest credit being given for any sums paid on account.

Dated this day of 190 .

In witness, etc.

EXTENSION AGREEMENT.

With Special Clauses.

THIS AGREEMENT, made the day of 190 between of the of in the county of hereinafter called the debtor of the first part; the several persons, firms and corporations who are creditors of the debtor, hereinafter called the creditors, of the second part, and of hereinafter called the trustee of the third part.

Whereas the debtor has heretofore carried on business at the of , and has become indebted to divers creditors (whose names and particulars of whose claims are set forth in the schedule hereto annexed).

And whereas the debtor has requested the creditors to extend the time for the payment of the said indebtedness, which they have agreed to do in consideration of these presents.

Now this agreement witnesseth that it is agreed between the parties hereto that the times for payment of the sums due by the debtor to his creditors shall be extended and that the said sums shall become due and be paid in equal consecutive (monthly) instalments on the day of each month, with interest at per cent. per annum, in lieu of the terms of payment heretofore existing, the first of such (monthly) payments to be made on the day of 190 ; and in consideration of such extension of time the debtor covenants with the debtors respectively that he will pay to the creditors respectively the said payments as and when they become due; and also the charges and expenses of and incidental to the preparation and execution of these presents and of carrying out and completing the extension and discharge hereby effected or to be effected.

Provided that the debtor will forthwith give his promissory notes for such extended payments, dated as aforesaid which notes shall be made payable at the respective

places of business of the creditors, and the said notes shall be given and received by the creditors as collateral security to the said indebtedness.

And the debtor will insure and keep insured until the creditors have been fully paid, his stock-in-trade in the sum of dollars at least, and will assign and transfer to the trustee all such policies of insurance and all monies payable thereunder as collateral security for the payment of the said indebtedness to the creditors respectively.

And that the debtor will from the date hereof keep books of account in which he shall enter daily as they occur the different transactions of his business, and that the trustee who is hereby appointed the agent of the several parties hereto may at all times inspect such books and investigate generally the affairs of the debtor.

And that upon default being made in payment of any of the extended amounts, or upon judgment being obtained against the debtor, or in the event of his disposing of his stock or other assets other than in the ordinary course of business by retail, or in the event of the stock or premises of the debtor being injured or destroyed by fire, or in the event of his business being in any way neglected or depreciated, then the balance of the claims of the creditors shall at once become due and be payable and the trustee may enter into possession of the assets of the debtor for and on behalf of the creditors who hereby nominate constitute and appoint the trustee their attorney irrevocable for the purpose of executing in their name a legal assignment to himself of all the assets of the debtor in trust for the benefit of the creditors.

And the debtor hereby appoints the trustee his true and lawful attorney, for him and in his name, to execute such assignments and do such other acts as may be necessary to vest the estate and effects in the trustee for the purposes aforesaid.

Provided that nothing herein contained shall prejudice or affect any security held by any creditor or any rights and remedies which any creditor may have against any person or persons other than the debtor for or in respect of his

debt or any part thereof, or release or discharge any person or persons liable to the creditors or any of them as surety, guarantor or otherwise.

And the debtor further covenants with the creditors respectively that until the due payment of his said indebtedness to them he shall not nor will convey, part with or encumber his real or personal estate, or any part thereof whether now the property of the debtor or hereafter acquired, except in the ordinary and usual course of retail business, or assign or pledge any debts or sums of money which are now or hereafter may be due or owing to him.

And that he shall and will in case of default in payment of the said sums or any part thereof hereby covenanted to be paid, forthwith assign and transfer all his said real estate and effects both real and personal of which he shall then be seized, possessed or entitled, and all moneys then due or owing to him, to the trustee in trust for the creditors to collect and realize the same, and divide the proceeds thereof ratably and proportionately between the creditors. And the debtor declares the within statement represents correctly and truly the condition of his affairs.

And the trustee may in his discretion, pay in full or make any compromise or arrangement which he shall think proper with any creditor, whether secured or not, who shall refuse to execute these presents for the payment of the claim of such creditor, and may pay the costs of any such creditor who may institute any proceedings against the debtor to recover the amount of his claim.

Provided and it is hereby agreed that if any of the said notes shall not be paid at the time when they respectively become due, or if there shall be default made in the performance of any covenant on the part of the debtor herein contained, then in such case any creditor in respect of whom such default shall have been made may elect that these presents shall subject to the agreements hereinafter contained, be void but without prejudice to anything theretofore done in pursuance hereof.

This agreement shall take effect and become operative only when it has been executed by all creditors having

claims of dollars and upwards within days from this date.

It is intended that this agreement of extension shall be executed by all the creditors of the debtor and that it shall be held by the trustee as an escrow until so executed, but the trustee may nevertheless waive execution by not more than of such creditors if he thinks in in the interest of the creditors to do so.

In witness, etc.

Signed, sealed, etc.

DEED OF INSPECTORSHIP.

License to Carry on Business and Covenant Not to Sue—
—Determination Certain Events—Wide Power to Settle With Dissentient Creditors—Assignment Delivered as an Escrow.

THIS INDENTURE, made the day of ,between (debtor) of, etc. (hereinafter called the debtor) of the first part (inspectors) of, etc. (who and the survivor of them and the executors and administrators of such survivor or other the person or persons for the time being inspectors or inspector under these presents are hereinafter referred to as the inspectors) of the second part and the several persons firms and companies being creditors of the debtor whose names and seals are subscribed and affixed to these presents and all other creditors of the debtor who shall assent to or agree to be bound by or undertake to execute these presents (all of which persons, firms and companies are hereinafter referred to as the creditors) of the third part.

Witnesseth as follows, that is to say:—

1. In consideration of the covenants by the debtor hereinafter contained the creditors do and each of them doth hereby grant unto the debtor full and perfect liberty and license to carry on his trade of business of subject

only to the conditions hereafter contained and the creditors do and each of them doth hereby covenant with the debtor his heirs executors and administrators that they the several creditors respectively will not during the continuance of these presents bring or prosecute any action or other legal proceeding at law in equity or otherwise or arrest, attach or molest the debtor or his estate or effects for or on account of any debt or demand from or upon the debtor and these presents may be pleaded as a defence to any such action or other legal proceeding.

2. In consideration of the premises the debtor shall carry on his said business as a with all diligence and to the best of his ability under the direction inspection and control of the inspectors and shall in carrying on the same at all times and in all matters apply for and act upon and attend to the advice and directions of the inspectors.

3. The debtors shall allow of, etc., or such other person or persons as the inspectors may from time to time appoint including if they shall think fit the debtor himself to collect and receive all debts and moneys and all bills notes cheques or other securities now due or hereafter accruing in respect of the said business and its property credits and effects.

4. The debtor shall allow the said or such other person as aforesaid after payment out of all such moneys coming to his hands of the current business expenses of the debtor in and with reference to his said business of a including therein all rents rates taxes assessments interest on mortgages and other necessary outgoings and particularly salaries and wages and all trade accounts for new materials or other goods necessary for successfully carrying on the said business to pay over the balance of such moneys weekly to the inspectors or as they shall from time to time direct.

5. The inspectors may from time to time make advances to the debtor to enable him to carry on the said business and for that purpose may raise money upor the security of the said business its property credits and effects to such amount and in such manner as they may think fit and the debtor will execute and do all such assurances and things as the

inspectors may require in order to enable them to raise such money but the debtor except as aforesaid will not mortgage pledge charge or otherwise incumber the said business or its property credits and effects.

6. The debtor will not enter into any new contracts or engagements without the consent of the inspectors and the inspectors may if they think it for the benefit of the debtor's estate require the debtor to determine and put an end to any existing contract and the debtor shall thereupon determine such contract accordingly.

6. The inspectors shall apply all moneys received by them under and by virtue of these presents in payment of the costs of and incidental to these presents and the carrying out of the provisions thereof and in payment to the debtor weekly of such sum as the inspectors may from time to time think fit by way of maintenance for himself and his family and subject thereto in paying rateably to all the creditors the respective amounts owing to them by the debtor without preference or priority at such times and in such manner as the inspectors shall determine and shall pay the surplus if any to the debtor.

8. The debtor in addition to all the books of account usual and proper in the said business shall keep such other books and accounts as the inspectors may think fit to direct and the debtor will at all times give the inspectors or anyone appointed by them full access to and liberty to inspect examine and take extracts from such books and all other papers documents and correspondence in connection therewith and will also give all such information and explanations as the inspectors may desire, and will if and when required allow any person appointed by the inspectors to keep and make all necessary and proper entries in such books and for that purpose to keep and retain possession of such books for such time as may be necessary.

9. The debtor will from time to time and at such times as the inspectors may appoint render or cause to be rendered to the inspectors such balance sheets and profit and loss or other accounts as the inspectors may require.

The rights of the creditors against any surety or sureties for the debts due to them and against all persons other than

the debtor and all the rights of any creditor or creditors in respect of any security or securities which they or any of them may hold for their said debts or claims are hereby expressly reserved.

11. If any creditor or creditors shall refuse to take the benefit of and assent to these presents the inspector shall have full power to pay or to authorize the debtor to pay in full compound give security for or otherwise discharge settle satisfy or arrange for the debt claim or demand of such creditor or creditors and for the purposes aforesaid the inspectors may put in force the provisions of clause 5 hereof.

12.—If any writ shall be served or any other legal proceedings be commenced against the debtor he will forthwith give notice to and inform the inspectors thereof and have regard to any directions which the inspectors may give as to the course to be adopted by the debtor in reference to such writ or proceeding.

13. If the debtor shall fail to perform any of his covenants hereinbefore contained or if the debtor shall enter into any arrangement or composition with his creditors or any of them or shall suffer anything whereby his goods or effects or any part thereof shall be taken in execution whether legal or equitable or if at any time the inspectors shall certify that in their opinion it is in the interest of the creditors that these presents should determine, then and in every such case the license hereinbefore granted shall cease and determine subject to anything lawfully done hereunder the creditors shall be at liberty to exercise their rights and remedies against the debtor in respect of their said debts as fully and freely as if these presents had never been executed.

In witness, etc.

(Signatures and seals of debtor and inspectors.)

SCHEDULE.

(Signatures and seals of creditors.)

DEED OF SALE AND RELEASE.

(Short Form.)

THIS INDENTURE, made the day of 190 between trustee of the estate of of the of in the County of hereinafter called the trustee of the first part; of the of in the County of hereinafter called the purchasers of the second part; and the several creditors of whose names are hereto subscribed, hereinafter called the creditors of the third part.

Whereas the said , being unable to pay liabilites, assigned assets for the benefit of creditors to the said trustee by deed dated .

And whereas the said purchaser, in consideration of the discharge of the said as hereinafter provided, ha agreed to purchase the assets mentioned in the annexed schedule.

Therefore, this agreement witnesseth that the said trustee agrees to sell and the said purchaser agree to purchase all the right, title and interest of the said trustee in the said assets for subject to the liens and incumbrances, if any, existing thereon, which the purchaser hereby assumes and agrees to pay.

The said purchase money shall be payable cash, and the balance in equal instalments at and months from the date hereof, with interest at seven per cent. per annum, secured to the satisfaction of the trustee and inspectors, and upon the full completion of such purchase the purchaser shall be entitled to be put in possession.

The purchaser shall proceed to check the said inventory at once, and continue until completed.

Time shall be considered the essence of these conditions and the agreement to purchase, and if the purchaser fail to comply with these conditions, or any of them, all payments made shall be forfeited to the trustee, who shall be at liberty to re-sell the assets by public auction or private

sale, without notice to the defaulter, and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

The purchaser agree also to pay in cash the preferred claims against the said estate in full, the trustee's remuneration, and the sums expended by him in connection with his trust.

Shorts and longs in the said schedule of assets are to be adjusted at inventory prices before settlement of purchase. If the trustee is not able to deliver any of the said assets, the sale shall not thereby be annulled, but the purchase money shall be reduced proportionately.

In consideration whereof the said creditors hereby release and discharge the said from all their respective claims against saving and reserving and without prejudice to any claim the said creditors may have against any other person, or in respect of any security held by them or any of them.

In witness, etc.

DEED OF SALE AND RELEASE.

(Another Form.)

THIS INDENTURE, made (in duplicate) the day of , 190 .

Between of in the County of assignee of the estate and effects of of the of in the County of (hereinafter called the assignee of the first part.

The said (hereinafter called the debtor) of the second part, of the of in the Coun y of (hereinafter called the purchaser) of the third part.

And all and every of the creditors of the debtor (hereinafter called the creditors) of the part.

Whereas the said debtor, being unable to meet liabilities in full, did on the day of 190 by an indenture bearing the said date duly grant, assign, transfer and set over all property and effects to the said assignee for the benefit of the creditors pursuant to the provisions of the statutes and law in that behalf.

And whereas the purchaser ha offered to purchase the whole of the said estate, property, assets and effects for a sum equal to cents on the dollar of the liabilities of the said debtor entitled to rank on estate, payable as hereinbefore mentioned, and, in addition, to pay the charges and expenses of and incidental to the said assignment, and the preferential claims upon the said estate in full, upon the terms hereinafter mentioned.

Now this indenture witnesseth that the said assignee hereby sells to the purchaser , and the purchaser hereby buy from the said assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, which belonged at the time of said assignment to the said debtor , and which, by virtue of the said assignment became vested in him as such assignee, as the said property now stands, subject to the liens and incumbrances, if any, existing thereon at the time of said assignment, which the purchaser hereby assum and agree to indemnify the assignee against, upon the terms following, viz.:—

The purchaser to deposit with the said assignee for the respective creditors of the said debtor

The purchaser also to pay to the assignee, or the assignee to deduct from the moneys which may come to his hands belonging to said estate a sum sufficient to enable him to pay in full all the privileged claims upon the said estate, the assignee's remuneration, and the charges and expenses of and incidental to the said assignment to him, and to the preparation and execution of these presents, and to the carrying out and completion of the sale hereby effected.

Possession of the estate hereby sold and purchased to be delivered over to the purchaser upon depositing

the purchase moneys and considerations hereinbefore mentioned, and all formal assignments and conveyances which may be requisite to vest the said property, assets and effects in the purchaser to be then executed.

The creditors, the parties hereto of the part, do hereby respectively assent to the foregoing, and do accept the said purchase moneys and considerations aforesaid in full of their respective claims, and do hereby respectively release and discharge the said debtor from all their respective claims against .

Provided always that the creditors hereby expressly reserve their rights and remedies against persons, other than the debtor; and nothing herein contained shall operate any change in the liability of any person secondarily liable to the creditors, or any of them, for the debts of the debtor, nor of any other person liable jointly or severally, with the debtor to the creditors, or any of them, for any of said debts, nor shall it affect any mortgage, lien, or security upon the estate or property of the debtor, or on any portion thereof, except as hereinafter provided, nor shall it affect any collateral or other security held by any of the creditors against persons, other than the debtor, as security for any debt hereby discharged; but, nevertheless, if any such security shall be held, or enforceable against the estate, or effects of the debtor, or on the estate of a third party, for whom such debtor is only secondarily liable, then, and in that case, such creditor (unless he shall consent to abandon his said security) shall be entitled to receive payment of his secured debts under these presents, upon so much only of his so-secured debt, or debts, as may remain after such security shall have been realized, valued or dealt with pursuant to the Statutes in that behalf, or as the law may direct.

These presents shall become operative and take effect when the same have been executed by all the creditors of the said debtor, but not before.

Provided also that the said assignee may, if he thinks fit, waive the execution hereof by any creditor or creditors, and carry out the provisions hereof.

In witness whereof the parties hereto have hereunto set their hands and seals in the presence of the witness whose name is set opposite the signature of each party respectively.

Signatures of Witnesses.	Signatures of Creditors and Parties.	Seals.	Signatures of Witnesses.	Signatures of Creditors and Parties.	Seals.

RECONVEYANCE BY TRUSTEE TO DEBTOR.

THIS INDENTURE, made the day of 190 , between of hereinafter called the trustee of the one part and of hereinafter called the debtor of the other part.

Whereas by indenture of assignment dated the day of 190 , made between the debtor, of the first part, the trustee of the second part, and the creditors of the debtor of the third part, the debtor granted and conveyed to the trustee, as trustee for the creditors, all his personal property which might be seized and sold under execution and all his real estate credits and effects upon the trusts in the said indenture of assignment mentioned the said real estate including among other lands

And whereas by an agreement dated the day of 190 , made between the debtor, of the first part of therein called the surety of the second part, and the creditors of the third part, the creditors authorized the sale and transfer to the debtor of the said property, estate, credits and effects so assigned as aforesaid in consideration of the payment by him of cents on the dollar of the respective claims of the creditors.

And whereas the debtor has deposited with the trustee notes for such composition payments endorsed by the

surety or has otherwise satisfied the trustee of his having settled with the creditors in accordance with the terms of the said agreement, or otherwise to the satisfaction of the creditors, and has requested the trustee to transfer and assign to him the debtor, the said property estate credits and effects.

Now this indenture witnesseth that in consideration of the premises and of the sum of one dollar now paid by the debtor (the receipt whereof is hereby acknowledged) the trustee according to his estate and interest therein, doth hereby grant, bargain, sell, assign, transfer and set over unto the debtor his heirs, executors, administrators and assigns forever, all and singular the personal property, stock-in-trade, goods, chattels and shop furniture, book debts, accounts, bills, bonds, notes, choses in action, rights, credits, effects and other assets whatsoever, and also the real estate, lands, tenements and hereditaments granted, bargained, sold, assigned, transferred and set over to the trustee by the said indenture of assignment including among other lands

To have and to hold the said property, estate, credits and effects, real and personal hereby assigned or intended so to be, with their appurtenances, unto and to the use of the debtor, his heirs, executors, administrators and assigns forever.

Provided however, notwithstanding anything herein contained the trustee shall not be taken by these presents or by any other act, deed, matter or thing, to give or make any assurance, warranty or covenant, either for title or the condition of the said property, estate, credits or effects, real or personal, or any part thereof, or for or in respect of any other matter or thing connected therewith being declared and agreed to be the true meaning and intent of these presents to grant, re-assign and transfer to the debtor the rights in respect of the said property, estate, credits and effects real and personal, conferred upon and assigned to the trustee by the said indenture of assignment of the day of 190 , subject to such changes with reference thereto as have taken place since the making of the said indenture of assignment, either by the sale or disposal of any

of the said property, estate, credits or effects or otherwise however, so as that the trustee shall be absolutely freed and discharged from liability and obligation in respect of the said property and every part thereof, and of and from all and every obligation or liability in respect of the trusts created by the said indenture of assignment and these presents, or otherwise pertaining, in anywise to the said property, estate, credits and effects, or to the trusts created or intended so to be by the said indenture of assignment.

In witness, etc.

Signed, sealed, etc.

SALE OF BOOK DEBTS.

(By Trustee for Creditors.)

Know all men by these presents that I of the of in the County of , the trustee for the creditors of the estate and effects of (debtor) under a certain deed of assignment dated the day of 190 , in consideration of the sum of dollars the receipt whereof is hereby acknowledged, do hereby sell and assign to of the of in the County of accepting thereof all my right, title and interest as such trustee to the claims and demands set out in the schedule hereto annexed, marked with the letter A, of the said (debtor) against the parties whose names are set out in the said schedule but without any warranty representation or assurance whatsoever of any kind, not even that the debts are due.

As witness my hand and seal this day of 190 .

Signed, sealed, etc.

CONDITIONS OF SALE OF GOODS.

In the matter of conditions of sale of goods and chattels belonging to the estate of by trustee .

1. The goods and chattels mentioned in the inventory produced, are sold at a rate upon the dollar of the inventory value thereof, without reduction or abatement, except as regards shorts and longs in quantities, which are to be adjusted by inventory prices before settlement of purchase.

2. The highest bidder shall be the purchaser, and if any dispute arises as to the last or highest bid, the goods, etc., shall be put up at a former bidding.

3. No person shall retract his bid.

4. The trustee reserves the right to one bid.

5. The purchaser shall at the time of sale sign the annexed agreement for purchase, and shall pay down a deposit of on account of his purchase money to the trustee, and shall pay the remainder as follows: cash (less the deposit) and the balance in equal instalments at and months from the day of the sale, with interest at 7 per cent. per annum, the whole secured to the satisfaction of the trustee and upon the full completion of such purchase, the purchaser shall be entitled to be put in possession. No title shall pass to the purchaser until he has settled forthwith for his purchase money.

The purchaser shall proceed to check the said inventory forthwith, and continue until completed.

6. Time shall be considered the essence of these conditions and the agreement to purchase, and if the purchaser fail to comply with these conditions, or any of them, the said deposit shall be forfeited to the trustee, who shall be at liberty to re-sell the goods by public auction or private sale, without notice to the defaulter, and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

7. The purchaser shall have day to check the inventory and goods, free of expense, after which the pur-

chaser is to assume the rent and taxes and other rates, and to arrange with the landlord of the premises as to the tenancy.

Auctioneer.

It is hereby declared and agreed by ar between the vendor of the goods and chattels mentioned in the annexed conditions of sale, and that he, the said become the purchaser of such goods and chattels, in the said conditions described, at the sum of cents on the dollar of the inventory value thereof, and that the sum of dollars has been paid down by the said to the said by way of deposit, and in part of said purchase money, and that the particulars and conditions of sale shall be taken as the terms of agreement for the said sale and purchase respectively, in all things.

As witness their hands this day of A.D. 190 .

In witness, etc.

CONDITIONS OF SALE (LANDS).

By of the lands and premises mentioned in the particulars hereto annexed.

1. The property will be put up in lot subject to a reserved price.

2. The highest bidder shall be the purchaser, and if any dispute shall arise between two or more bidders, the property in dispute shall be put up again. No person shall advance at any bidding less than dollars, and no bidding shall be retracted.

3. purchaser shall, immediately after the sale, pay to the Vendor, a deposit of the amount of his purchase money and sign an agreement to complete the purchase according to these conditions.

4. The remainder of the purchase money shall be paid as follows, that is to say: on the

day of at the office of the vendor's solicitor . And the purchase of shall, on the said day of be completed at the said office. And in case, from any cause whatsoever, the purchase of shall not be completed on the said day of the purchaser thereof shall pay interest at the rate of per cent. per annum on the whole unpaid purchase money from that date until the completion of the purchase.

5. The purchaser shall be entitled to possession from and after .

The vendor will pay out of the purchase money all taxes up to the thirty-first day of December last, and the taxes for the current year.

6. The vendor will demand, such demand being made in writing within days after the sale, deliver to the purchaser or his solicitor a abstract of title to the property sold and if such demand be not so made, the purchaser shall be deemed to have accepted the title. The purchaser shall send his objections and requisitions (if any) in respect to the title to the office of the vendor's said solicitor in writing within days from the delivery of the abstract, and in default of such objections and requisitions (if none) and subject only to such (if any) shall be deemed to have accepted the title, and any answer to any such or subsequent objection or requisition, shall, within days from the delivery of such answer, be replied to by a statement in writing, transmitted to the said office, and if not so replied to and accepted in so far as so replied to shall be considered satisfactory, and the objection or requisition to which such answer shall have been made shall be considered as waived, and time shall be considered the very essence of this condition.

7. If any objection or requisition shall be made and insisted on which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty (notwithstanding any intermediate negotiation on the subject of such objection or requisition or attempts to remove or comply with the same) by notice in writing to the purchaser making the same, to rescind the sale, in which case such

purchaser shall receive back the amount paid on account of purchase money, with interest at per cent. per annum in full satisfaction of all claims.

8. The vendor shall not be called upon to produce nor shall any covenant be required for the production of any documents or evidence of title not in the vendor's possession, and the expense of the production and examination, and of making and furnishing abstracts of all documents and evidences of title (if any) not in the vendor's possession, and of obtaining, making and producing all copies of or extracts from any records, registers or documents, whether in the vendor's possession or not, and of registering any documents which the purchaser shall require to be registered, and of all declarations and other evidence, and of all journeys, searches and inquiries made or required for verification or completion of the abstract, or the inspection or obtaining of any documents or evidences of title or otherwise shall be borne by the purchaser requiring the same.

9. Upon the completion of the purchase at the time and place aforesaid, the vendor will execute a proper assurance to the purchaser of the premises purchased, such assurance to be prepared by the vendor's solicitor the expense thereof to be borne by the purchaser, a draft of such assurance is to be ready at the office of the vendor's solicitor not less than days before the day for the execution thereof, for examination and approval by the purchaser's solicitor.

10. The vendor is a selling under a power of sale in a and shall not be required to enter into any covenant other than a covenant that the vendor has not encumbered the property.

11. The description of the property in the particulars is believed to be correct, but if any error be found therein, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof.

12. It shall not be necessary for the vendor to tender a conveyance in any event.

If purchaser shall fail to comply with the above conditions, the said deposit money shall be forfeited to the vendor, and the vendor may thereupon, with or without notice to such purchaser, and either by public auction or private contract resell the property in such manner as the vendor shall think fit, and any deficiency in price which may happen on, and all charges and expenses attending such resale shall be borne by such purchaser at the present sale, and shall be recoverable by the vendor as and for liquidated damages. And it is hereby agreed that the amount of said deposit and the deficiency (if any) on, and the expenses attending such resale shall be the amount of the liquidated damages to which the vendor shall be entitled.

Memorandum—At the sale by auction, made at this day of A.D., 190 , of the property comprised in the foregoing particulars, person whose name is subscribed in the first column of the schedule hereunder written was the highest bidder for, and was declared the purchaser of the parcel set opposite his name in the second column thereof, at the price set opposite the same in the third column thereof, and has paid the sum set opposite the same in the fourth column thereof by way of deposit, and in part payment of the purchase money, and such person hereby agrees to complete the purchase according to the above conditions and the vendor on behalf of the vendor confirms sale and acknowledges the receipt of deposit by signing his name opposite the signature of purchaser, in the fifth column of said schedule.

SCHEDULE ABOVE REFERRED TO.

1 Signature of Purchaser.	2 Parcel Purchased	3 Price.	4 Deposit.		5 Signature of Vendor.
			$	c.	

NOTICE TO CREDITORS.

To File Claims.

In the matter of .

Notice is hereby given that of the of in the County of carrying on business as at the said of , has made an assignment under R.S.O., 1897, chap. 147, of all his estate, credits and effects, to of the of for the general benefit of his creditors.

A meeting of his creditors will be held at the office of , in the of on , the 190 , at the hour of o'clock in the noon, to receive a statement of affairs to appoint inspectors and fix their remuneration, and for the ordering of the affairs of the estate generally.

Creditors are requested to file their claims with the assignee, with the proofs and particulars thereof required by the said Act, on or before the day of such meeting.

And notice is further given that after the day of 190 , the assignee will proceed to distribute the assets of the debtor amongst the parties entitled thereto, having regard only to the claims of which notice shall then have been given, and that he will not be liable for the assets or any part thereof, so distributed, to any person or persons of whose claim he shall not then have had notice.

Assignee.

NOTICE OF CONTESTATION OF CLAIM.

In the Matter of an Act Respecting Assignments and Preferences by Insolvent Persons, R.S.O., 1897, Chap. 147.

And in the matter of the estate of .

To .

You are hereby notified, pursuant to the provisions of the above Act and under the authority and direction of the creditors and inspectors of this estate, that I dispute your right to rank on the estate of the above-named insolvent for $, the amount of your claim filed with me, or for any part thereof.

And you are hereby further notified, that unless within thirty days after the receipt by you of this notice, or within such further time as may be allowed on application to the proper Judge in that behalf, an action is brought against me to establish the said claim and within the same time a copy of the writ or process is served upon me or my solicitor herein named, your claim to rank upon the estate shall be forever barred.

And you are hereby further notified that service of any writ or process to enforce the said claim may be made upon my solicitor, A. B., of, etc.

Dated at the day of .

Assignee.

BOND OF INDEMNITY.

Know all men by these presents, that held and firmly bound unto in the penal sum of of lawful money of Canada, to be paid to the said or to certain attorney, executors, administrators or assigns, for which payment well and truly to be made bind heirs, executors and administrators, and every of them, for ever, firmly by these presents,

Sealed with seals, Dated this day of in the year of our Lord one thousand nine hundred and .

The condition of the above written bond or obligation is such, that if the above bounden heirs, executors and administrators, do and shall, from time to time, and at all times hereafter, well and truly save, defend and keep harmless and fully indemnified, the said heirs, executors, and administrators, and his and their lands and tenements, goods, chattels and effects of, from and against all loss, costs, charges, damages and expenses which the said heirs, executors, administrators or any of them may at any time or times hereafter bear, sustain, suffer, be at, or be put unto, for or by reason, or on account of or anything in any matter relating thereto .

Then the above written bond or obligation to be void, otherwise to be and remain in full force, virtue and effect.

Signed, sealed, etc.

BOND TO CONVEY.

Know all men by these presents, that held and firmly bound to in the penal sum of to be paid to the said or to certain attorneys, executors, administrators or assigns, for which payment well and truly to be made bind heirs, executors and administrators, firmly by these presents. Sealed with seal and dated this day of in the year of our Lord one thousand nine hundred and .

Whereas the above bounden ha contracted and agreed to sell, and also to convey to the said in fee simple absolute the following lands and hereditaments, namely in consideration of the sum of .

And the said has agreed to purchase from the said the said lands upon the conditions aforesaid.

Now the condition of this obligation is such, that if the above bounden shall at the request of the said heirs or assigns, on or before the day of in the year of our Lord one thousand nine hundred and absolutely convey to the said heirs or assigns, or to such person or persons as the said shall direct or appoint, the said hereditaments hereinbefore mentioned, conformably to the said agreement.

Provided the said shall have duly paid the sum of in the manner hereinbefore mentioned in the said agreement, then this obligation shall be null and void; otherwise to remain in full force, virtue and effect.

Signed, sealed, etc.

*APPOINTMENT OF AN ATTORNEY OR AGENT TO TRANSACT INLAND REVENUE BUSINESS.

Canada.

Know all men by these presents, that have appointed and do hereby appoint to be true and lawful Attorn and Agent for , for and in name , to transact all business which may have with the Collector of Inland Revenue for the Inland Revenue Division of or relating to the excise in the said Inland Revenue Division, and to execute, sign, seal and deliver for and in name all bonds, entries and other instruments in writing relating to any such business as aforesaid, hereby ratifying and confirming all that said Attorn and Agent shall do in the behalf aforesaid.

In witness whereof, have signed these presents, and sealed and delivered the same as act and deed, at this day of one thousand nine hundred and .

*In case of certain businesses such as tobacco it may be necessary for the assignee to have this authority.

PART VII.

STATUTES.

13 ELIZ. CAP. 5, A.D. 1570.

AN ACT AGAINST FRAUDULENT DEEDS, GIFTS, ALIENATIONS, ETC.

For the avoiding and abolishing of feigned, covinous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, as well of Lands and Tenements as of Goods and Chattels more commoniy used and practised in these Days than hatn been seen or heard of heretofore; which Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions have been and are devised and contrived of Malice, Fraud, Covin, Coliusion or Guiie, to the End, Purpose and intent, to delay, hinder or defraud Creditors and others of their just and lawful actions, Suits, Debts, Accounts, Damages, Penaities, Forfeitures, Heriots, Mortuaries and Reliefs, not only to the Let or Hindrance of the due Course and Execution of Law and Justice but aiso to the overthrow of ail true and plain dealings, Bargaining and Chevisance between Man and Man without which no Commonweaith or Civil Society can be maintained or continued.

II. Be it therefore deciared, ordained and enacted by the Authority of this present Pariiament, That all and every Feoffment, Gift, Grant, Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chatteis or any of them, or of any Lease, Rent, Common or other profit or charge out of the same Lands, Tenements, Hereditaments, Goods and Chattels or any of them by Writing or otherwise and ali and every Bond, Suit, Judgment and Execution at any Time had or made since the beginning of the Queen's Majesty's Reign, that now is, or at any time hereafter to be had or made, to or for any intent or Purpose before deciared and expressed shail be from henceforth deemed and taken (oniy as against the Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns and every of them, whose Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeiture, Heriots, Mortuaries and Reiiefs by such guiieful covinous or fraudulent Devices and Practices, as is aforesaid, are, shali or might be in any way disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect any Pretence, Colour, feigned Consideration, expressing of Use, or any other matter or Thing to the contrary notwithstanding.

III. And be it further enacted by the Authority aforesaid that aii and every the parties to such feigned covinous or fraudulent Feoffment, Gift, Grant, Aiienation, Bargain, Conveyance, Bond, Suits, Judgments, Executions and other Things before expressed, and being privy and knowing of the same or any of them; which at any time

after the Tenth day of June next coming, shall wittingly and willingly put in Ure, avow, maintain, justify or defend the same, or any of them, as true simple and done had or made *bona fide* and upon good consideration; or shall alien, assign any the Lands, Tenements, Goods, Leases or other Things before mentioned, to him or them conveyed as is aforesaid or any part thereof; shall incur the penalty and forfeiture of one Year's value of the said Lands, Tenements, and Hereditaments, Leases, Rents, Commons or other Profits, of or out of the same; and the whole value, of the said Goods and Chattels and also so much money as are or shall be contained in any such covinous and feigned Bond; the one Moiety whereof to be to the Queen's Majesty, her Heirs and Successors and the other Moiety to the Party or Parties grieved by such feigned and fraudulent Feoffment, Gift, Grant, Alienation, Bargain, Conveyance, Bonds, Suits, Judgments, Executions, Leases, Rents, Commons, Profits, Charges, and other Things aforesaid to be recovered in any of the Queen's Courts of Record by Action of Debt, Bill, Plaint or information wherein no Essoin, Protection or Wager of Law shall be admitted for the Defendant or Defendants; and also being thereof lawfully convicted shall suffer Imprisonment for one Half Year without Bail or Mainprise.

IV. Provided always and be it further enacted by the Authority aforesaid That whereas sundry common Recoveries of Lands, Tenements and Hereditaments have heretofore been had, and hereafter may be had against Tenant in Tail or other Tenant of the Freehold, the Reversion or Remainder or the Right of Reversion or Remainder, then being in any other Person or Persons that every such common Recovery heretofore had, and hereafter to be had, of any Lands, Tenements or Hereditaments, shall as touching such Person and Persons which then had any Remainder or Reversion, or Right of Remainder or Reversion, and against the Heirs of every of them, stand, remain, and be of such like Force and Effect, and of none other, as the same should have been if this Act had never been made.

V. Provided always, and be it further enacted by the Authority aforesaid, That this Act or any Thing therein contained shall not extend to make void any Estate or Conveyance by reason whereof any Person or Persons shall use any Voucher in any Writ of Formedon, now depending or hereafter to be depending, but that all and every such vouchers in any Writ of Formedon shall stand and be in like Force and Effect, as if this Act had never been made; any Thing before in the Act contained to the contrary notwithstanding.

VI. Provided also, and be it enacted by the Authority aforesaid That this Act or any Thing therein contained shall not extend to any Estate or Interest in Lands, Tenements, Hereditaments, Leases, Rents, Commons, Profits, Goods or Chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which Estate or Interest is or shall be upon good Consideration and *bona fide* lawfully conveyed or assured to any Person or Persons or Bodies Politick or Corporate, not having at the time of such conveyance or Assurance to them, made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as is aforesaid; any Thing before mentioned to the contrary hereof notwithstanding.

VII. This Act to endure unto the End of the First Session of the next Parliament.

Made perpetual 29 Eliz. c. 5, s.s. 1 and 2; and see 27 Eliz. c. 4.

See re-enactments in R.S.O. (1897), cap. 334, and R.S.B.C. (1897), cap. 86. See also R.S.O. (1897), cap. 115, and R.S.M. (1891) cap. 61.

BRITISH COLUMBIA FRAUDULENT PREFERENCE OF CREDITORS ACT.

R. S., B. C., 1897, CAP. 87.

CONFESSIONS OF JUDGMENT.

Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. This Act may be cited as the "Fraudulent Preference of Creditors Act."

2. *Confessions, or warrants to confess judgments given by insolvents to defeat or delay creditors, or to give one preference over the other to be void.*—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, 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. C.S. 1888, cap. 51, sec. 1.

3. *Assignments, transfers, etc., made by insolvents to defeat creditors or to give preference shall be void.*—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, makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, chattels, or effects, or delivers or makes over, or causes to be delivered or made over, any bills, bonds, notes, or other securities or property, with intent to defeat or delay the creditors of such person or with intent to give 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 null and void as against the creditors of such person, but nothing herein contained shall invalidate or make void any deed of assignment made and 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; and nothing herein contained shall invalidate or make void any *bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers. C.S. 1888, cap. 51, sec. 2.

BRITISH COLUMBIA.

CREDITORS TRUST DEEDS ACT.

AN ACT RESPECTING ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

(1 Ed. VII. chap. 15.)

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. *Short Title.*—This Act may be cited as the "Creditors' Trust Deeds Act, 1901."

2. *Interpretation.*—In this Act, unless the context otherwise requires:

(a) "*Assignment under this Act.*"—The expression "assignment under this Act," means any assignment of property made by a debtor for the benefit of his creditors generally, and not made under the authority of any Act of the Parliament of Canada respecting bankruptcy or insolvency.

3. *Assignment for the benefit of creditors to be deemed valid if its construction and effect accord with its purpose.*—Every instrument executed after the 26th day of April, 1890, whereby any property shall be expressed to be conveyed, assigned, or otherwise transferred by any person to an assignee for the purpose of paying and satisfying, ratably and proportionately, and without preference or priority, all the creditors of such person their just debts, shall be deemed to be and be a good, valid and subsisting conveyance, if its construction and effect shall accord with its expressed purpose, and shall not be set aside or defeated on any account whatsoever except actual fraud, notwithstanding any statute or law to the contrary.

4. *Description of property.*—Every assignment under this Act shall be valid and sufficient if it describes the property intended to be affected thereby in the words following, that is to say: "All my personal property, real estate, credits and effects, which may be seized and sold under execution," or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the debtor, except such as are by law exempt from seizure or sale under execution or certificate of judgment, subject, however, as regards lands, to the provisions of the "Land Registry Act," and the "Torrens Registry Act, 1899."

5. *Dating assignment.*—No assignment under this Act shall be dated after the execution thereof by the assignor.

6. *Amendment of assignment by Judge.*—No advantage shall be taken or gained by any creditor of or by any mistake, defect or imperfection in any assignment under this Act, if the same can be amended or corrected, and if there be any mistake, defect or imperfection therein, the same shall be amended by any Judge of the Supreme Court of British Columbia on application by any creditor of the assignor or on application by the assignee, on such notice being given to the other parties concerned as the Judge shall think reasonable, and such amendment, when made, shall have relation back to the date of said assignment, but no such amendment shall be made so as to prejudice the rights of any innocent purchaser.

7. *Notice of assignment.*—No assignment under this Act shall be within the operation of the "Bills of Sale Act," but notice of the assignment shall be published by the assignee in one issue of the British Columbia Gazette and in one issue of one newspaper having a general circulation in the county in which such assignment is registered. Such notice shall be published in the regular issue of said British Columbia Gazette and said newspaper issued first after ten days from the date of the assignment. Such notice shall contain the date of the assignment, the name, residence, and occupation of the debtor and assignee.

8. *Assignment to be registered.*—A counterpart of every such assignment shall also, within twenty-one days from the date thereof, be registered, together with an affidavit of a witness thereto of the due execution of such assignment in the office of any County Court Registrar in which a bill of sale of the personal property or any part thereof so assigned should be registered; and such Registrar shall file all such instruments presented to him for that purpose, and shall endorse thereon the time of receiving the same in his office, and the same shall be kept there for inspection by all persons interested therein. The said Registrar shall number and enter such assignments, and shall collect the same fees as if such assignments had been registered under the "Bills of Sale Act."

9. *Penalty against assignor for neglecting publication or registration.*—If the said notice is not published in the regular number of the British Columbia Gazette and in such newspaper as aforesaid, which shall respectively be issued first after twenty-one days from the date of the assignment, or if the assignment is not registered, as aforesaid, within twenty-one days from the execution thereof, the assignor shall be liable to a penalty of ten dollars for each and every day which shall pass after the issue of the number of the Gazette or newspaper in which the notice should have appeared until the same shall have been published, and a like penalty for each and every day which shall pass after the expiration of twenty-one days from the date of the assignment until the same shall have been registered.

10. *Penalty against assignee for neglecting publication or registration.*—The assignee shall be subject to the like penalty as in section 9 hereinbefore provided for each and every day which shall pass after the expiration of twenty-one days from the delivery of the assignment to him, or of twenty-one days after his assent thereto until the assignment is published and registered as aforesaid.

11. *Recovery of above mentioned penalties.*—Such penalties may be recovered summarily before a Judge of the Supreme Court or of the County Court of the county in which the assignment ought to be published or registered. One-half of the penalty shall go to the party suing, and the other half for the benefit of the estate of the assignor.

12. *Compelling publication and registration.*—In case the assignment be not registered and notice thereof published, an application may be made by any one interested in the assignment to a Judge of the Supreme or County Court to compel the publication and registration thereof, and the Judge shall make his order in that behalf, with or without costs, or upon the payment of costs, by such person as he may, in his discretion, direct to pay the same.

13. *Assignment not invalidated by omission to publish.*—The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment.

14. (1) *Effect upon land of registration of assignment.*—Every such assignment, when registered in any Land Registry Office, or under the provisions of the "Torrens Registry Act, 1899," shall take precedence of all certificates of judgments and executions and attachments against land not completely executed by payments, subject to a lien for the costs of such judgment creditors: Provided, however, that this section shall not interfere with any priorities given by section 9 of chapter 11 of the "Revised Statutes, 1897," but such priorities shall apply only to judgments registered prior to the coming into force of this Act.

(2) *Precedence of assignment.*—Every such assignment shall take precedence of all judgments of all executions against goods, and of all attachments of debts not completely executed by payment subject to a lien in favor of such execution creditors for their costs.

15. *Assignee to call meeting of creditors.*—It shall be the duty of the assignee immediately to inform himself, by reference to the debtor and his record of accounts, of the names and residences of the debtor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the giving of directions with reference to the disposal of the estate, by mailing, prepaid and registered, to every creditor known to him, a circular calling a meeting of creditors to be held at some convenient place to be named in the notices, not later than fourteen days after the mailing of such notice, and by advertisement in the British Columbia Gazette and all other meetings shall be called and held in like manner, except that no advertisement shall be required.

16. *Voting at creditors' meetings.*—At any meeting of creditors a creditor may vote in person or by proxy, authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit or declaration in proof of his claim, stating the amount and nature thereof.

17. (1) *Proof of claim.*—Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim, proved by affidavit or declaration, and such vouchers as the nature of the case admits of. A creditor proving his claim shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount not exceeding five per centum. on the net amount of his claim, which he may have agreed to allow for payment in cash.

(2) With regard to claims not bearing interest, creditors shall be entitled to add to such claims interest from the time the same were payable to the date of the assignment, at the legal rate.

18. *Creditor may prove claim not due.*—A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at the meeting of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due.

19. *Set off against claims.*—The law of set-off shall apply to all claims made against the estate, and also to all suits instituted by the assignee for the recovery of debts, due to the assignor, and in the same manner and to the same extent as if the assignor were plaintiff

or defendant, as the case may be, except in so far as any claim or set-off shall be affected by the provisions of any Act respecting frauds or fraudulent preferences: Provided, however, that there shall be no set-off allowed of any claim against the estate acquired after the date of the assignment as against a claim made by the estate against the person so acquiring any such claim against the estate.

20. *Personal and partnership debts.*—If any assignor executing an assignment under this Act for the general benefit of his creditors, owes debts both individually and as a member of a co-partnership or co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted and shall only rank upon the others after all the creditors of those others have been paid in full.

21. *Calculation of votes.*—Except with regard to the provisions of section 23 of this Act, all subjects discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:—There shall be allowed

(a) For every claim of or over twenty-five dollars, and not exceeding one hundred dollars, one vote, and
(b) For every claim of over one hundred dollars, and not exceeding three hundred dollars, two votes; and
(c) For every claim over three hundred dollars and not exceeding six hundred dollars, three votes; and
(d) For every claim over six hundred dollars, and not exceeding one thousand dollars, four votes; and
(e) For every additional one thousand dollars, or portion thereof, one vote:

Provided, however, that in case any question arises respecting the claims of any creditor, or respecting the securities held by any creditor, such creditor shall not be allowed to vote on such question.

22. *Casting vote.*—In case of a tie the assignee, or if there are two assignees, then the assignee nominated for that purpose by the creditors, shall have a casting vote.

23. *Resolution at first meeting of creditors requiring assignee to transfer estate.*—At the first meeting of creditors, or at any subsequent meeting, a majority in votes of the creditors present in person or by proxy may pass a resolution requiring the assignee to transfer the estate to some other person named in such resolution as assignee, then and in such case the said original assignee shall forthwith deliver over to such person the property and effects belonging to the estate, and execute all conveyances, assignments and transfers necessary to vest the said estate in said assignee, and thereupon such person so named shall become and be the assignee of such estate under the provisions of this Act.

24. *Remuneration of original assignee upon transfer of estate.*—Said original assignee shall, in case of such change, be entitled to be paid such remuneration as the creditors may at the meeting at which such change is made decide, subject to an appeal to the District Registrar of the Supreme Court for the district in which the assignment is registered. In case the creditors do not settle the said remuneration as aforesaid, then such District Registrar shall have power to do so on application by the original assignee on notice to the new assignee.

25. *Verification of resolution requiring change of assignee.*—A copy of said resolution mentioned in section 23 signed by the chairman or other presiding officer of the meeting and verified by an affidavit of some person present at the meeting, setting forth the names of the creditors present in person or by proxy at said meeting, and the result of the vote on the resolution may be registered in any Land Registry Office, and when so registered shall have the effect of vesting in such new assignee all the real estate situate in the district of such office which the debtor vested in the original assignee by virtue of the deed of assignment, and such resolution so verified may be registered in any office provided for the registration of bills of sale, and when so registered shall have the effect of vesting in such new assignee all the personal property situate in the county of such office which the debtor vested in the original assignee by virtue of the assignment.

26. *Removal of assignee by Judge of Supreme Court.*—Any Judge of the Supreme Court may, on the application of any creditor of the debtor, made by petition, supported by the affidavit of the applicant remove any person who for the time being shall be entitled to act under any trust declared in or created by any such assignment as aforesaid, from the office of assignee, and appoint another person as assignee in place of the person so removed, and also, with the consent of the majority in number representing three fourths in value of the creditors of the debtor, expunge from any such assignment any condition or stipulation therein contained, or with the like consent alter or vary any trust in or by the assignment declared or created, and the costs of and incidental to any such application shall be a charge on and paid out of the trust estate, unless otherwise ordered by the Judge.

27. *Mode of transfer where assignee neglects or refuses to transfer.*—In case any such assignee refuses or neglects to deliver over to such new assignee so appointed by the creditors, or a Judge, any of the property of the estate, or refuses or neglects to execute any document required for the purpose of vesting such property in such new assignee, a Judge of the Supreme Court of British Columbia may, on the application of such new assignee, or of any creditor of such estate for one hundred dollars or more, make an order calling upon such assignee to deliver over such property, or to execute such document or documents, and pay the costs of such application, and failure to obey such order shall be punished by committal.

28. *Publication of resolution for transfer.*—The resolution, referred to in section 23, shall be published in one issue of the British Columbia Gazette as soon as it conveniently can be after being passed.

29. *Verified copy of resolution as evidence.*—The production of a resolution of the creditors, verified as aforesaid, shall in all Courts of Justice be taken as *prima facie* evidence of the vesting of the debtor's estate in the assignee.

30. *Application to certain assignments executed before 17th April, 1896, and to all assignments executed after that date.*—The provisions of this section shall apply to all assignments executed after the 17th day of April, 1896, and to any estate which on the 17th day of April, 1896, remained undistributed in the hands of any assignee under any assignment theretofore executed; but the said provisions shall not be deemed to refer to any estate which had been

partially distributed, or affect or prejudice any act done, or any payment or distribution of assets made, by any such assignee, prior to the said 17th day of April, 1896:—

(a) *Statement of security in proof of claim.*—Every creditor in his proof of claim shall state whether he holds any security for his claim, or any part thereof, and if such security is on the estate of the debtor or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon and the assignee, under the authority of the creditors, may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at the specified value, to be paid, together with interest thereon at the legal rate from the date of filing the claim until payment, out of the estate as soon as the assignee has realized such security, and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate. Before assigning such security such creditor shall be entitled to receive security from such assignee for the value of such security so to be assigned. In case of any dispute a Judge of the Supreme or County Court may settle the same on a summary application.

(b) *Negotiable instruments.*—If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security of the payment thereof, but after the maturity of such liability and its non-payment he shall be entitled to amend and re-value his claim;

(c) *Judge may order claim to be proved within certain time.*—In case a person claiming to be entitled to rank on the estate assigned does not, within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim as provided by this Act, a Judge of the Supreme or County Court may, upon the summary application by the assignee, or by any other person interested in the debtor's estate (of which application at least three days' notice shall be given to the person alleged to have made default in proving a claim as aforesaid), order that unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and if the claim is not so proved within the time so limited, or within such further time as a Judge may by subsequent order allow, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor;

(d) *Saving effect of "Trustees and Executors Act."*—The preceding sub-section is not intended to interfere with the protection afforded the assignee by the "Trustees and Executors Act";

(e) *Contest of claim by assignee.*—At any time after the assignee receives from any person claiming to be entitled to rank on the

estate proof of his claim, notice of contestation of the claim may be served by the assignee upon the claimant.

Procedure.—Within thirty days after the receipt of the notice, or such further time as a Judge of the Supreme or County Court may on application allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action served on the assignee; and in default of such action being brought and writ served within the time aforesaid the claim to rank on the estate shall be forever barred;

(f) *Address for service of writ.*—The notice by the assignee shall contain the name and place of business of one of the solicitors of the Supreme Court, upon whom service of the writ may be made; and service upon such solicitor shall be deemed sufficient service of the writ;

(g) *Claims for interest.*—Except as provided in sub-section (a) hereof, no creditor shall be entitled to rank upon the estate for or in respect of any claim for interest for any period subsequent to the date of the assignment, until after all claims for principal money, and all claims for interest on such principal money (where interest is by law payable thereon) calculated down to the date of the assignment, have been fully paid and satisfied.

31. *Assignee to call meeting upon request.*—In case of a request in writing, signed by a majority of the creditors having claims, duly proved or admitted, of fifty dollars and upwards, computed according to the provisions of section 21 of this Act, it shall be the duty of the assignee, within two days after receiving such request, to call a meeting of the creditors, for a day not later than fourteen days after such request is received.

32. (1) *Remuneration of assignee.*—The permanent assignee shall be entitled to such remuneration as may be voted to him by the creditors, subject to an appeal to a District Registrar of the Supreme Court. In case no remuneration is voted by the creditors, or at the meeting at which such permanent assignee is appointed, such remuneration shall be settled by a District Registrar on notice to the Inspectors. There shall be an appeal from the decision of the District Registrar either by the assignee or the Inspectors, or any creditor on behalf of the creditors to a Judge of the Supreme Court. Notice of such appeal must be given within four days after the decision of the District Registrar.

(2) Such remuneration shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realized and the other part on the amount distributed in dividends.

(3) The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the debtor's estate or to the creditors in respect of any expenses which the remuneration is expressed to cover.

(4) An assignee shall not, under any circumstances whatever, make an arrangement for, or accept from the assignor or any solicitor, auctioneer, or any other person that may be employed about an assignment, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration paid by the creditors and payable out of the estate, nor shall he make any arrangement for giving up, or give up, any part of his remuneration, either as assignee, manager, or trustee, to the assignor or any solicitor or other person that may be employed about an assignment.

33. *Inspectors.*—At the first or any subsequent meeting the creditors may appoint one or more of their number, but not exceeding three, as Inspectors, who shall superintend the proceedings of the assignee and the management and winding-up of the estate, and they may also revoke the appointment of any or all of the Inspectors, and upon such revocation or in case of the death, resignation or absence from the Province of an Inspector, may appoint another in his stead, and anything to be done by the Inspectors may be done by the majority, or by the sole Inspector if there is only one. The Inspectors shall not be entitled to any remuneration.

34. *Application of "Trustees and Executors Act."*—The provisions of the "Trustees and Executors Act" relating to:—

(a) The payment of debts and claims, the accepting of any composition, or of any security, real or personal, for any debts; the allowing of time for payment of debts, and the submission to arbitration of any matters affecting a trust or trust estate;

(b) The distribution of assets after due notice given, without liability to creditors having claims of which no notice has been received; and

(c) The right to apply to a Judge of the Supreme Court for opinion and advice in the management of the trust estate shall apply to and shall be construed so as to include an assignee acting under assignments under this Act: Provided, however, that such assignee must obtain the approval of the creditors before acting.

35. *Registration of order by Judge appointing new assignee.*—In the case of the appointment by a Judge of a new assignee a copy of the order may be registered as provided in section 25 and with the same effect.

36. *Wages.*—Whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to all claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such persons at the time of making such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary general creditors for the residue, if any, of their claims.

37. *Application of preceding section.*—The preceding section shall apply to wages or salary, whether the employment in respect of which the same shall be payable be by the day, by the week, by the job, or piece, or otherwise.

38. *Compromising debts.*—The assignee may with the approval of the creditors compromise all debts and liabilities capable of resulting in debts, and all claims whether present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist both to and by the debtor upon the receipt of payment of such sums, payable at such times and generally upon such terms as are agreed upon.

39. *Deposit of moneys received by assignee.*—All moneys received by the assignee on account of the estate shall forthwith be paid by him into a chartered bank, to be named by the creditors, to the credit of a special account for the estate, and at every meeting of the creditors the bank book shall be produced by the assignee and shall

be open to inspection by the Inspectors or any creditor. The assignee shall not in any case pay any money received by him on account of the estate into his private account at any bank.

40.—*Payment by debtor made 30 days before execution of assignment void.*—Every payment made within ten days next before the execution of an assignment under this Act by the debtor on account of a pre-existing debt shall be void, and the amount so paid may be recovered back from the person to whom it was paid by the assignee by suit in any Court of competent jurisdiction, but if any valuable security was given up in consideration of such payment such security or the value thereof must be restored or credited to the creditor: Provided, however, that no payment for wages (not exceeding three months) or for rent, taxes, or water rates, which are a lien on the property of the debtor, shall be affected by this section.

41. *Solicitor to estate.*—At any meeting of creditors a resolution may be passed directing the assignee to employ a person or firm named in the resolution as solicitor or solicitors to the estate, and thereafter no other solicitor shall be employed by the assignee. Such appointment of solicitor may be changed at any meeting of the creditors by resolution. No such solicitor, after his appointment, shall act in any way for the debtor as long as he continues to act as solicitor for the estate.

42. *Qualifications of assignee and his deputies.*—No person other than a permanent and *bona fide* resident of this Province shall have power to act as an assignee under this Act, nor shall an assignee under this Act have power to appoint as deputy or delegate his duties as assignee to any person who is not a permanent and *bona fide* resident of this Province, and no charge shall be made or recoverable against the assignor or his estate for any services or expenses of any such assignee, deputy or delegate of any assignee, who is not a permanent and *bona fide* resident of this Province.

43. *Vesting effect of assignment.*—Every assignment hereafter executed for the general benefit of creditors, whether the assignment is or is not expressed to be made under or in pursuance of this Act, and whether the debtor has or has not included all his real and personal estate, shall vest the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of this Act, and the provisions of this Act shall apply to the assignee named in such assignment.

44. *Assignee's accounts.*—Upon the expiration of one month from the date of assignment, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare, and keep constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of such estate.

45. *Dividends.*—From time to time, whenever there is sufficient money on hand for that purpose, the assignee shall declare and pay a dividend of ten per cent. or more on the claims of creditors. Before any dividend is paid, a dividend sheet shall be prepared, showing all claims allowed and all claims (if any) objected to, and showing an abstract of receipts and disbursements, and such dividend sheet shall be certified to by the assignee and the inspectors (if any).

46. All sums received by the assignee for interest on moneys belonging to the estate shall belong to the estate.

47. (1) *Debtor to give information to assignee.*—The debtor shall give such information to the assignee or inspectors respecting his estate and affairs, attend at such times on the assignee or inspectors and at such meetings of his creditors, execute at the expense of the estate such powers of attorney, conveyances, deeds and instruments, and generally do all such acts and things in relation to his property and to the distribution of the proceeds thereof amongst his creditors as are reasonably required by the assignee or inspectors; and he shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds thereof among his creditors.

(2) *Compensation to debtor for his servcies.*—The assignee may from time to time, with the consent of the creditors, make such allowance as he thinks just to the debtor out of the estate as compensation for his services in connection with the winding-up of his estate.

48. (1) *Examination of debtor.*—The creditors or the inspectors may direct the debtor to be examined upon oath before the assignee, or before such Judge of the Supreme or County Court as they may name, touching his estate and effects, assets and liabilities, the conduct and management of his business, the causes of his insolvency, and his affairs generally, and such assignee or Judge may administer any necessary oath.

(2) *Time, place and adjournment of examination.*—Such examination shall take place at such time and place as is appointed by the Judge on application by the creditors, or by the Inspectors, and it may be adjourned from time to time; but a Judge of the Supreme or County Court may, on the application of any person interested, and on being satisfied that the affairs of the debtor have been sufficiently investigated, make an order directing that the examination be concluded by such time as is named in the order.

(3) *Examination may be by counsel.*—Such examination may be conducted by counsel or by such persons as are appointed by the creditors or inspectors, and notes of the evidence given at such examination, which may be taken in shorthand, shall be deposited with the assignee and shall be open to inspection without charge, by any creditor or by the duly authorized representativee of any creditor.

(4) *Committing debtor for refusing to appear or to answer questions.*—In case the debtor neglects or refuses to appear or to be sworn, or to answer any proper question, a Judge of the Supreme or County Court may, on the application of the assignee or of any person interested, order that the debtor be committed as for a contempt of court, and may make such order as to the payment of the costs of any application under this section as to him seems right.

49. (1) *Examination of persons other than debtor touching estate.*—A Judge of the Supreme or County Court may, on the application of the assignee, or of a creditor having an unsecured claim of one hundred dollars or upwards, summon before him any person, including the husband or wife of the debtor, known or suspected to have in his possession any of the estate or effects of the debtor, or any person who is represented to such Judge as capable of giving

information concerning the debtor, his dealings or property, and such Judge may require any such person to produce any documents in his custody or power, or under his control, relating to the debtor, his dealings or property.

(2) *Apprehension of such persons refusing to attend.*—If the person so summoned, after having been tendered the ordinary witness fees allowed in suits before the Court, without reasonable excuse refuses to come before the Judge at the time appointed, the Judge may, by warrant, cause him to be apprehended and brought before him.

(3) *Procedure upon such examination.*—Such persons may be examined upon oath concerning the debtor, his dealings or property, by or before the Judge, or by or before such person and in such manner as the Judge directs, and such Judge or person may administer any necessary oath; and notes of the evidence given at any such examination, which may be taken in shorthand, shall be deposited with the assignee and shall be open to inspection, without charge, by any creditor, or the duly authorized representative of any creditor; and the Judge may make such order as to the payment of the costs of any such examination as to him seems right.

(4) *Ordering such persons to deliver up property belonging to estate.*—If on such examination such person admits that he has in his possession any property belonging to the debtor, and to which the assignee is legally entitled, the Judge may order him to deliver to the assignee such property, or any part thereof, at such time, in such manner, and on such terms as seems just.

(5) *Committing such persons for contempt.*—In case of refusal to appear, or to be sworn, or to answer any questions that may lawfully be asked touching the debtor, his dealings or property, or to produce any document which he is required to produce, or to obey any order of the Judge made under and by virtue of this section, the person so refusing may be committed as for a contempt of court.

50. *Arrest of debtor.*—A Judge of the Supreme or County Court may, at any time after the execution of an assignment under this Act, on the application of the assignee or any creditor having a claim for one hundred dollars or more against the assignor, by warrant to the sheriff of the county, or other proper officer, cause the debtor to be arrested, and any books, papers, moneys, and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the Judge orders, if such facts and circumstances are shown by affidavit as satisfy the Judge.

(a) *Affidavit leading to order for arrest.*—That there is good and probable cause for believing that the debtor is about to abscond and conceal himself to avoid appearance at any meeting of his creditors at which he is required to appear, or to avoid examination in respect of his affairs, or otherwise to avoid, delay, or embarrass any proceedings against him under this Act; or

(b) That there is good and probable cause for believing that he is about to remove his goods with intent to prevent or delay possession being taken of them by the assignee, or that he has concealed or destroyed, or is about to conceal or destroy, any of his goods or money, or any books, documents, or writing which might be of use to his creditors in the course of the proceedings under this Act; or

(c) That, without good cause shown, he has failed to attend any meeting or examination which he was required to attend under the provisions of this Act.

51. *Rescission of contracts in fraud of creditors.*—Where there is any assignment under this Act the assignee, save as herein otherwise provided or implied, shall have an exclusive 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 or any other Act.

52. *When and how creditors authorized to sue.*—If at any time any creditor desires to cause any proceedings to be taken which in his opinion would be for the benefit of the estate, and the assignee refuses or neglects to take such proceedings after being duly required so to do, such creditor so desiring shall have the right to obtain an order of the Judge aforesaid authorizing him to take such proceedings in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe, and thereupon any benefit derived from such proceedings shall belong exclusively to the creditor instituting the same for his benefit; but if before such order is granted the assignee shall signify to the Judge his readiness to institute such proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from such proceedings, if instituted within such time, shall appertain to the estate.

53. *Disposal of estate.*—The creditors may at any meeting pass any resolution or order directing the assignee how to dispose of the estate, or any part thereof, and in default of their so doing he shall, subject to the directions, order and instructions he may from time to time receive from the inspectors (if any) with regard to the mode, terms and conditions on which he may dispose of the whole or any part of the estate, sell and dispose of the same in such manner as seems to him most advantageous in the interests of the estate, subject always to the provisions of this Act; but the assignee, or any inspector or the solicitor of the estate, shall not purchase, directly or indirectly, any part of the stock in trade, debts or any assets of any description of the estate.

54. (1) *Leases.*—If the debtor, at the date of the assignment is a tenant of property, the assignee shall, notwithstanding any condition, covenant or agreement that such tenancy shall determine in case of the bankruptcy or insolvency of the tenant, have the right to hold and retain such property for a period not exceeding three months from the date of the assignment, or until the expiration of the tenancy, whichever shall first happen on the same terms and conditions as the debtor might have held such property had no assignment been made.

(2) If the debtor at the date of the assignment is a tenant of property, the tenancy of which is not determined by his insolvency, the assignee, under the authority of the creditors, may give notice in writing to the lessor of his wish to determine the same at the expiration of three months from the giving of such notice, and such tenancy shall terminate at the expiration of such three months; but nothing herein shall prevent the assignee, under the authority of the creditors, from selling, transferring or otherwise disposing of any lease or leasehold premises, or any interest of the debtor therein.

for the unexpired term thereof, or any party thereof, to as full an extent as could have been done by the debtor had an assignment not been made; and if there is any covenant, condition or agreement that the lessee or his assigns should not assign or sub-let the property without the leave or consent of the lessor, or other person, such covenant, condition or agreement shall be of no effect in case of such sale, transfer, sub-lease or disposition of the lease or leasehold property as aforesaid, if a Judge of the Supreme Court, on the application of the assignee, and after notice of such application to the lessor or other person whose leave or consent is required, approve of the sale, transfer, sub-lease, or disposition so made of the lease or leasehold property.

(3) The lessor may, in the event of the tenancy being determined by the assignee by notice in manner hereinbefore provided, file a claim against the debtor's estate for the damages (if any) sustained in consequence of such termination, which claim shall be proved in a similar manner to ordinary claims against the estate; and in his proof of claim he shall set forth the amount of damages claimed and how such amount is arrived at; and any such claim may be objected to in the same manner as herein provided in regard to claims made against the estate; and the lessor, on his claim being established or allowed, shall have all the rights of voting and otherwise enjoyed by ordinary unsecured creditors who have proved claims against the estate.

(4) In estimating such damages, regard shall be had to the rental payable under the tenancy so determined, and to the yearly value of the property at the time of such termination, and regard shall also be had to the additional value given to the property by any buildings, fixtures, or improvements placed thereon by the debtor, or those through whom he claims, but no regard shall be had to the chance of leasing the property at a greater or less rent than that payable by the debtor or his estate at the time of the termination of the tenancy.

(5) The lessor shall have a privileged claim against the estate of the debtor for arrears of rent due or accruing due in respect of the six months next preceding the date of the assignment, together with all costs of distraint properly made before the date of assignment in respect to the rent or any part of the rent hereby made a privileged claim, but for all other arrears of rent he shall have a claim provable against the estate as an ordinary creditor. He shall also have a privileged claim against the estate for all rent accruing due after the date of assignment during the period the property and premises are held by the assignee.

(6) The lessor shall not be entitled to distrain upon the goods of the assignee after they become vested in the assignee, and all goods then distrained upon shall, on demand, be delivered by the person holding them to the assignee, but the lessor shall not by reason of such delivery be deprived of any lien or rights in reference to such goods which he may have acquired by such distress, should the goods be claimed by and be delivered to any person other than the assignee.

(7) The lessor shall not be entitled to any further or other rent from the debtor or from his estate than as set forth in this section.

55. (1) *Disclaimer of liability for shares, stocks, etc.*—When any part of the property of the debtor consists of shares or stock in companies or unprofitable contracts, or of any other property that is not saleable or readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of a sum of money, the assignee may, with the authority of the creditors, by writing under his hand, disclaim such property at any time within six months from the date of his appointment, notwithstanding that he has endeavored to sell, or has taken possession of such property, or has exercised any act of ownership in relation thereto: Provided that when any such property has not come to the knowledge of such assignee within six months after his appointment he may disclaim such property at any time within six months after he first became aware thereof.

(2) Such disclaimer shall operate to determine as from the date thereof, the rights, interests, and liabilities of the debtor and his property in or in respect of the property disclaimed, and shall also discharge the assignee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the debtor and his property and the assignee from liability, affect the rights or liabilities of any other person.

(3) The assignee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the assignee, by any person interested in the property, requiring him to decide whether he will disclaim or not, and the assignee has, for a period of one month after the receipt of such application, or such extended period as may be allowed by a Judge of the Supreme Court, declined or neglected to give notice whether he disclaims the property or not; and in the case of a contract, if the assignee, after such application as aforesaid, does not, within the said period or extended period, disclaim the contract, he shall be deemed to have adopted it.

(4) A Judge of the Supreme Court may, on the application of any person who is, as against the assignee, entitled to the benefit or subject to the burden of a contract made with the debtor, make an order rescinding the contract, on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Judge may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt provable under this Act against the estate of the debtor.

(5) A Judge of the Supreme Court may, on application by any person either claiming an interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as he thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Judge thinks just; and on any such vesting order being made the property comprised therein shall vest accordingly in the person named therein in that behalf without any conveyance or assignment for the purpose.

(6) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the debtor to the

extent of the injury, and may prove the same as a debt provable under this Act against the estate of the debtor.

(7) The provisions of this section shall not extend to leases or leasehold property.

56. *Dividends at time of discharge of assignee.*—All dividends remaining unclaimed at the time of the discharge of the assignee shall be paid over to the Minister of Finance, and if afterwards claimed shall be paid over to the person entitled thereto.

57. *Balance of estate after payment of claims.*—If any balance remains of the estate of the debtor, or of the proceeds thereof, after the payment in full of all his debts and liabilities and the cost of winding-up his estate, such balance shall be paid or transferred to the debtor.

58. *Discharge of assignee.*—After the declaration of the final dividend the assignee shall prepare his final account and make application to a Judge of the Supreme Court for his discharge, giving at least ten days' previous notice of such application to the debtor, and to the inspectors (if any) and to the creditors by circular; and he shall produce and file, in such application, a bank certificate of the deposit of any dividends remaining unclaimed, and of any balance in his hands, and also a statement, under oath, showing the nominal and realized value of the assets of the insolvent, the amount of claims proved, dividing them into classes according to the nature thereof, the amount and rate upon the dollar of dividends paid to the creditors, and the entire expense of winding up the estate. The Judge may, after causing the accounts of the assignee to be audited by the inspectors, or by such creditor, or by such competent person as he may name, and after hearing all parties interested, grant, conditionally or unconditionally, the application for discharge or refuse it, and may make any order as to costs which he thinks proper.

59. *Retention by debtor of any portion of estate after assignment.*—If after the date of the assignment the debtor retains or receives any portion of his estate or effects, or of any moneys, securities for money, business papers, documents, books of account or evidences of debt, belonging or appertaining to his business or estate, and retains and withholds the same from the assignee, without lawful right, the assignee may apply to a Judge of the Supreme or County Court for an order for the delivery thereof to him, and in default of delivery in conformity with such order the debtor may be imprisoned in the common jail until the same are delivered, or for such time, not exceeding one year, as the Judge may order; but nothing herein shall interfere with or diminish any other penalty to which, under this Act, he may be subject in consequence of the non-delivery of such property, effects, documents or money.

60. *Time and place of creditors' meetings.*—The creditors may, at any meeting, determine where subsequent meetings shall be held, but in default of their so doing all such meetings, after the first meeting, shall be held at the office or place of business of the assignee.

61. (1) *Procedure at creditors' meetings.*—At all meetings the creditors may appoint the chairman, and in default of such appointment the assignee shall be chairman.

(2) The chairman shall decide all disputes or questions that may be raised at such meetings as to the eligibility of a creditor to vote or as to the amount on which he should vote, or any other question of procedure at such meetings.

(3) The chairman shall cause to be kept full minutes of all proceedings, resolutions and decisions at such meetings, and shall include therein an accurate list of the creditors present or represented, which minutes shall be signed by him and shall be filed with and kept by the assignee, and on the final discharge of the assignee, shall be deposited with the District Registrar of the Supreme Court as ordered by the Judge granting such discharge.

62. (1) *Voting.*—A creditor shall be entitled to vote at any meeting of creditors in respect of and to the extent of his claim against the estate as determined by this Act, but such creditor shall not be entitled to vote at any meeting of creditors until he has proved his claim in manner hereinbefore provided, and if his claim is dependent upon a condition or contingency, or for other reason does not bear a certain value, not until the value of such claim has been ascertained in manner hereinbefore provided.

(2) In the case of contested claims the creditor shall, until such contestation is decided or an agreement between such creditor and the assignee is arrived at, be considered as a creditor for the amount admitted by the assignee (if any).

(3) Persons purchasing claims against the estate after the date of assignment shall not be entitled to vote in respect of such claims, but shall in all other respects, unless otherwise specially provided, have the same rights as other creditors.

(4) The assignee, his partner, agent, clerk or employee, or any person in the employ of a partnership or company of which he is a member, shall not be entitled to vote upon any resolution affecting the remuneration or removal from office or the conduct of the assignee, or the security to be given by him, but on all other questions, if creditors, they may vote as such creditors.

63. *Proxies.*—Except as herein otherwise provided, no creditor shall vote at any meeting unless present personally or represented by some person having written authority, which may be by power of attorney, letter, post card, or telegraphic message, such authority to be filed with the assignee. Such authority may be either general or limited, but in no case shall the assignee, his partner, or any one in his employ, or in the employ of a partnership or company of which he is a member, act for or represent any creditor of the estate.

64. *Assignee subject to summary jurisdiction of Court.*—Every assignee shall be subject to the summary jurisdiction of the Supreme or County Court in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction, and the Court may compel him to perform his duties, or may restrain him from taking or continuing proceedings which are not in the interest of the estate, or of the creditors generally, and obedience by the assignee to any order of the Court may be enforced by the Court under the penalty of imprisonment as for contempt of Court, and by removal from his office.

65. *Application to Judge to rescind resolution passed at creditors' meeting.*—Any one or more creditors whose claims in the aggregate exceed ten per cent. in value of all claims ranking against the

estate, who are entitled to vote, and who are dissatisfied with any resolution adopted, or orders made by the creditors or the inspectors, or with any action of the assignee for the disposal of the estate, or any part thereof, or for the disposal of the same, or with reference to any matter connected with the management or the winding-up of an estate, or with any decision of the chairman of a meeting, may, within two days after the adoption of the resolution, or the making of the order or decision, or the performance of the action complained of, give to the assignee notice that he or they will apply to a Judge of the Supreme or County Court on the day and at the hour fixed in such notice, not being later than two days after such notice has been given, or as soon thereafter as the parties may be heard before such Judge, to rescind such resolution or order or to reverse such decision, or for such order as is indicated in such notice, and the Judge, after hearing the inspectors, the assignee and creditors present at the time and place so fixed, may approve of, rescind, or modify the said resolution or order, decision, or action, or make such order in the premises as to him seems proper. In case of the application not being proceeded with, or being refused, the parties appealing shall pay all costs occasioned thereby, otherwise the costs and expenses shall be at the discretion of the Judge.

66. *Delegation of power to Inspectors.*—The creditors may generally or for a special occasion delegate to the inspectors any of the powers conferred upon them by sections 30, sub-section (a), 38, 44, and 55, sub-section (2).

67. *Reference to Judge for discretion as to matters not provided for.*—If any matter arises in connection with any assignment under this Act not provided for herein, such matter may be referred summarily to a Judge of the Supreme or County Court by the assignee, or the inspectors, or by any creditor for an amount of one hundred dollars or more, and upon such application such Judge may give such directions as to notifying other parties and as to other matters as he may think proper, and may make such order as he may think fit, including the costs of the application.

68. *Security by assignee.*—At any time after an assignment is executed, the debtor, the inspectors or any creditor for one hundred dollars or more, may apply to a Judge of the Supreme or County Court to fix the security to be given by the assignee for the faithful performance of his duties as such assignee, and for accounting for all moneys and property coming to his hands. If such order as is made by such Judge is not carried out by such assignee, such Judge may remove him and appoint some other person in his place, and such order appointing a new assignee may be registered as provided in section 25 for the registration of a resolution of creditors, and with the same effect.

69. *This Act not to interfere with insolvency laws.*—This Act is not intended to interfere with the insolvency laws which may from time to time be in force in this Province, but this Act is intended to be subject to such laws.

70. *Repeal.*—Chapter 11 of the Revised Statutes, 1897, being the "Creditors' Trust Deeds Act," and Acts amending the same, are hereby repealed.

71. *Commencement.*—This Act shall not come into force until proclaimed by the Lieutenant-Governor-in-Council.

72. *Registration, how effected.*—The registration of an assignment under the provisions of section 14 and of a copy of a resolution of creditors under the provisions of section 25, shall be effected by filing said documents in the respective offices mentioned in said sections.

73. For the registration of an assignment in a Land Registry Office, or Land Titles Office, there shall be charged a fee of two dollars and for the registration under section 25 of a copy of the resolution of creditors requiring the assignee to transfer the estate there shall be charged a fee of two dollars.

MANITOBA ASSIGNMENTS AND PREFERENCES ACT.

REVISED STATUTES OF MANITOBA, 1903.

CHAPTER 8.

AN ACT RESPECTING ASSIGNMENTS AND PREFERENCES BY INSOLVENT PERSONS.

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His Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

SHORT TITLE.

1. *Short title.*—This Act may be cited as "The Assignments Act," 1 and 2 Ed. 7, c. 2, s. 42.

OFFICIAL ASSIGNEES.

2. *Appointment of official assignee.*—The Lieutenant-Governor in Council may appoint one person in each judicial district of this Province to be an official assignee under this Act. 1 and 2 Ed. 7, c. 2, s. 1.

3. *Security to be given by official assignee.*—No official assignee shall accept any assignment or trust, or execute any duties under this Act, unless and until he has given security to the satisfaction of the Lieutenant-Governor in Council, by bond or bonds or otherwise, to His Majesty, His heirs and successors, in the sum of ten thousand dollars for the due accounting and payment over of all moneys received by him as such assignee. 1 and 2 Ed. 7, c. 2, s. 40.

4. *Expense of furnishing bond.*—An official assignee may charge up to each estate which comes into his hands the sum of five dollars to re-imburse himself the expense incident to the furnishing of said bonds. 1 and 2 Ed. 7, c. 2, s. 41.

ASSIGNMENTS.

5. *General assignment not in accordance with Act, when void.*—Every assignment for the general benefit of creditors which is no void under any of the sections of this Act numbered from thirty-eigh to forty-two, inclusive of both such numbers, but is not made to an official assignee, nor to any other person with the consent of the pro portion of creditors prescribed by the forty-fourth section of this Act, shall be absolutely null and void to all intents and purposes 1 and 2 Ed. 7, c. 2, s. 3, s-s. 3.

6. *Form of assignment for general benefit of creditors.*—Every assignment made under this Act for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say:—"All my personal property and all my real estate, credits and effects, which may be seized and sold under execution," or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, ex ept such as are by law exempt from seizure or sale under execution or other legal proceedings, subject, however, as regards lands, to the provisions of "The Registry Act" and "The Real Property Act" as to the registration of the assignment. 1 and 2 Ed. 7, c. 2, s. 5.

7. *All assignments for general benefit of creditors to be subject to this Act.*—Every assignment hereafter executed in accordance with this Act for the general benefit of creditors, whether the assignment is or is not expressed to be made under or in pursuance of this Act, and whether the debtor has or has not included all his real and personal estate, shall vest the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of this Act, and the provisions of this Act shall apply to the assignee named in such assignment. 1 and 2 Ed. 7, c. 2, s. 6.

8. *Assignments to take precedence of judgments, executions, etc.*—An assignment for the general benefit of creditors under this Act shall take precedence of all attachments of debts by way of garnishment where the money has not been actually paid over to the garnishing creditor, as well as of all other attachments and of all judgments and registered certificates of judgments and of all executions not completely executed by payment, subject to the lien, if any, of execution or attaching creditors for their costs. 1 and 2 Ed. 7, c. 2, s. 11.

9. *Sheriff to hand over property seized.*—In case a deed of assignment as aforesaid has been duly executed and registered, the sheriff or bailiff of a County Court having seized property of the assignor under execution or attachment shall, upon receiving a copy of the assignment, duly certified by the clerk of the County Court in the office of which it is registered, forthwith deliver to the assignee all the estate and effects of the execution debtor in his hands, upon payment by the assignee to the sheriff or bailiff of his fees and charges and the costs of the execution creditor or creditors who has or have a lien as above provided. If the sheriff or bailiff has sold the debtor's estate or any party thereof, he shall deliver to the assignee the moneys so realized by him, less his fees and the said

execution creditor's costs. The assignee shall have the same power to enforce a return and the same remedies for failure or neglect to return that an execution creditor has under "The King's Bench Act," or "The County Courts Act," or otherwise. 58 and 59 V. c. 6, r. 695a, *part*.

10. *Amendment of assignment by Judge.*—No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection in any assignment under this Act for the general benefit of creditors, if the same can be amended or corrected; and any such mistake, defect or imperfection shall be amended by any Judge of the Court of King's Bench or of the County Court in the office of which it is registered or by this Act required to be registered. Such amendment may be made on application of the assignee or of any creditor of the assignor, on such notice being given to other parties concerned, as the Judge shall think reasonable; and the amendment, when made, shall have relation back to the date of the assignment, but so as not to prejudice the rights of innocent purchasers. 1 and 2 Ed. 7, c. 2, s. 12.

11. *Notice of assignment to be published.*—No assignment made for the general benefit of creditors under this Act shall be within the operation of "The Bills of Sale and Chattel Mortgage Act," but a notice of the assignment shall, as soon as conveniently possible, be published at least once in *The Manitoba Gazette* and not less than twice in at least one newspaper having a general circulation in the judicial district in which the property assigned is situate. 1 and 2 Ed. 7, c. 2, s. 13, s-s. 1.

12. *Assignment to be registered.*—A counterpart or copy of every such assignment shall also, within ten days from the execution thereof, be registered (together with an affidavit of a witness thereto of the due execution of such counterpart or of the assignment of which the copy filed purports to be a copy) in the office of the clerk of the County Court of the judicial division where the assignor, if a resident in Manitoba, resides at the time of the execution thereof, or, if he is not a resident, then in the office of the clerk of the County Court of the judicial division where the personal property so assigned is or where the principal part thereof (in case the assignment includes property in more judicial divisions than one) is at the time of the execution of such assignment; and such clerks shall file all such instruments presented to them respectively for that purpose and shall indorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter such assignments, and be entitled to the same fees for services in the same manner as if such assignments had been registered under "The Bills of Sale and Chattel Mortgage Act." 1 and 2 Ed. 7, c. 2, s. 13, s-s. 2.

13. *Penalty for neglecting publication or registration.*—If the said notice is not published in the regular number of *The Manitoba Gazette* and in such newspaper as aforesaid within ten days from the execution of the assignment by the assignor, or if the assignment is not registered as aforesaid within ten days from the execution thereof, the assignor shall be liable to a penalty of twenty-five dollars for each and every day which shall pass after the issue of the number of the newspaper in which the notice should have appeared until the same shall have been published; and a like penalty

for each and every day which shall pass after the expiration of ten days from the execution of the assignment by the assignor until the same shall have been registered.

(*a*). The assignee shall be subject to a like penalty for any such delay for each and every day which shall pass after the expiration of ten days from the delivery of the assignment to him, or of ten days after his assent thereto. The burden of proving the time of such delivery or assent shall be upon the assignee.

(*b*). Such penalties may be recovered summarily with costs before any Judge of the Court of King's Bench, and one-half of the penalty shall go to the party suing and the other half for the benefit of the estate of the assignor.

(*c*). *Liability of official assignee.*—In case of an assignment to an official assignee, he shall not be liable for any of the penalties imposed in this section unless he has been paid or tendered the cost of advertising and registering the assignment a reasonable time before the time required for so advertising and registering, nor shall he be compelled to act under the assignment until his costs in that behalf are paid or tendered to him. 1 and 2 Ed. 7, c. 2, s. 14.

14. *Compelling publication and registration.*—In case the assignment is not registered and notice thereof published within the time hereinbefore prescribed, an application may be made by any one interested in the assignment to a Judge of the Court of King's Bench to compel the registration of the assignment and publication of such notice; and the Judge shall make his order in that behalf, and with or without costs, or upon the payment of costs by such person as he may in his discretion direct to pay the same. 1 and 2 Ed. 7, c. 2, s. 15.

15. *Assignment not invalidated by omission to publish, etc.*—The omission to publish or register as aforesaid, or any irregularity in the publication or registration shall not invalidate the assignment. 1 and 2 Ed. 7, c. 2, s. 16.

CREDITORS' ASSIGNEE.

16. *Appointment of substituted assignee.*—A majority in number and value of the creditors who have proved claims to the amount of one hundred dollars or upwards may at their discretion substitute any other person for an assignee to whom an assignment has been made. 1 and 2 Ed. 7, c. 2, s. 8, s-s. 1.

17. *Rights and duties of the substituted assignee.*—Where a new assignee is substituted or appointed as in the last preceding section provided, the estate shall forthwith vest in the new or additional assignee, without a conveyance or transfer, and he shall register an affidavit of his appointment in the office in which the original assignment was filed. Such an affidavit may also be registered under "The Registry Act," or filed under "The Real Property Act," and such registration or filing shall have the same effect as the registration of a conveyance or filing of a transfer. 1 and 2 Ed. 7, c. 2, s. 8, s-s. 2.

MEETINGS OF CREDITORS.

18. *Assignee to call meeting of creditors.*—It shall be the duty of the assignee immediately to inform himself, by reference to the debtor and his records of account, of the names and residences of the debtor's creditors, and, within five days from the date of assignment, to convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate, by mailing prepaid and registered to every creditor known to him a circular calling a meeting of creditors to be held in his office, or some other convenient place to be named in the notices, not later than twelve days after the mailing of such notice; and he shall also publish such notice by advertisement in *The Manitoba Gazette* in the first issue after the expiration of such period of five days. 1 and 2 Ed. 7, c. 2, s. 17.

19. *Meeting of creditors by request of majority thereof.*—In case of a request in writing signed by a majority of the creditors having claims duly proved of one hundred dollars and upwards, computed according to the provisions of the twenty-second section of this Act, it shall be the duty of the assignee, within two days after receiving such request, to call a meeting of the creditors at a time not later than twelve days after the assignee receives the request. In case of default, the assignee shall be liable to a penalty of twenty-five dollars for every day after the expiration of the time limited for the calling of the meeting until the meeting is called. 1 and 2 Ed. 7, c. 2, s. 18, s-s. 1.

20. *Judge to give directions in case creditors do not attend.*—In case a sufficient number of creditors do not attend the meeting mentioned in the last preceding section, or fail to give directions with reference to the disposal of the estate, any of the Judges aforesaid may give all necessary directions in that behalf. 1 and 2 Ed. 7, c. 2, s. 18, s-s. 2.

21. *Voting at meeting.*—At any meeting of creditors the creditors may vote in person, or by proxy authorized in writing; but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim, stating the amount and nature thereof. 1 and 2 Ed. 7, c. 2, s. 19.

22. *Scale of votes.*—Subject to the provisions of the sixteenth and twentieth sections hereof, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:—

For every claim of or over one hundred dollars, and less than two hundred dollars, one vote.

For every claim of or over two hundred dollars, and less than five hundred dollars, two votes.

For every claim of or over five hundred dollars, and less than one thousand dollars, three votes.

For every additional one thousand dollars, or fraction thereof, one vote.

(*a*). *Upon claims acquired after assignment.*—No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(b). *Casting vote.*—In case of a tie the assignee, or, if there are two assignees, then the assignee nominated for that purpose by creditors (or by the Judge if none has been nominated by the creditors), shall have a casting vote. 1 and 2 Ed. 7, c. 2, s. 20, s-ss. 1-3.

CREDITORS' CLAIMS.

23. *Proof of claim.*—Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim, proved by affidavit and such vouchers as the nature of the case admits of. 1 and 2 Ed. 7, c. 2, s. 21, s-s. 1.

24. *Limiting time for proof of claim.*—In case a person claiming to be entitled to rank on the estate assigned does not, within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim, as provided by this and the preceding sections of this Act, a Judge of the Court of King's Bench may, upon a summary application by the assignee or by any other person interested in the debtor's estate (of which application at least three days' notice shall be given to the person alleged to have made default in proving a claim as aforesaid), order that, unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person so making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and, if the claim is not so proved within the time so limited, or within such further time as the said Judge may by subsequent order allow, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor.

(a). *Not to interefere with Trustee Act.*—This section is not intended to interfere with the protection afforded to assignees by the fortieth and forty-first sections of "The Manitoba Trustee Act." 1 and 2 Ed. 7, c. 2, s. 21, s-ss. 2, 3.

25. *Creditor may prove claim not due.*—A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due. 1 and 2 Ed. 7, c. 2, s. 21, s-s. 4.

26. *Set off.*—The law of set-off shall apply to all claims made against the estate and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions respecting frauds or fraudulent preferences of this or any other Act. 1 and 2 Ed. 7, c. 2, s. 26.

27. *How claims are to rank where different estates.*—If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors owes or owed debts both individually and as a member of different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full. 1 and 2 Ed. 7, c. 2, s. 7.

28. *Workmen's wages not exceeding three months privileged claims under assignment for benefit of creditors.*—In case of an assignment under this Act, the assignee shall pay, in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employ of such person at the time of the making of such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, such wages or salary to be for arrears only and not for any unearned portion, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims for arrears of such wages or salary. The provisions of this section shall apply to wages or salary, whether the employment in respect of which the same may be payable be by the day, week, month or year. 1 and 2 Ed. 7, c. 2, s. 4.

29. *Creditors to value securities.*—Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon; and the assignee, under the authority of the creditors, may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate. 1 and 2 Ed. 7, c. 2, s. 20, s-s. 4.

30. *Right to revalue in certain cases.*—If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of the last preceding section, and shall put a value on the liability of the party primarily liable theeron as being his security for the payment thereof; but after the maturity of such liability and its non-payment he shall be entitled to amend and re-value his claim. 1 and 2 Ed. 7, c. 2, s. 20, s-s. 5.

31. *When creditor holding security fails to value same.*—In case a person claiming to be entitled to rank on the estate assigned holds security for his claim or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security, a Judge of the Court of King's Bench may, upon summary application by the assignee or by any other person interested in the debtor's estate, of which application three days' notice shall be given to such claimant, order that, unless a specified value shall be placed on such security and notified in writing to the assignee within a time to be limited by the order, such claimant shall, in respect of the claim or the part thereof for which the security is held, in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate; and if a specified value is not placed on such security, and notified in writing to the assignee according to the exigency of the said order, or within such further time as the said Judge may by subsequent order allow, the said claim or the said part, as the case may be, shall be wholly barred

as against such estate, but without prejudice to the liability of the debtor therefor. 1 and 2 Ed. 7, c. 2, s. 20, s-s. 6.

32. *Contestation of claim.*—At any time after the assignee receives from any person claiming to be entitled to rank on the estate proof of his claim, notice of contestation of the claim may be served by the assignee upon the claimant. Within thirty days after the receipt of the notice, or such further time as a Judge of the Court of King's Bench may on application allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the statement of claim in the action, or summons in case the action is brought in a County Court, shall be served on the assignee; and, in default of such action being brought and statement of claim or summons served within the time aforesaid, the claim to rank on the estate shall be forever barred.

(*a*). *Service of process on solicitors.*—The notice by the assignee shall contain the name and place of business of one of the solicitors of the Court of King's Bench for Manitoba, upon whom service of the statement of claim or summons may be made; and service upon such solicitor shall be deemed sufficient service of the statement of claim or summons. 1 Ed. 7, c. 2, s. 22.

33. *Procedure where assignee is satisfied with proof of claim and debtor desires to dispute same.*—In case the assignee is satisfied with the proof adduced in support of a claim, but the debtor disputes the same, such debtor shall do so by notice in writing to the assignee, stating the grounds upon which he disputes the claim; and such notice shall be given within ten days of such debtor being notified in writing by the assignee that he is satisfied with the proof adduced as aforesaid, and not afterwards unless by special leave of a Judge of the Court of King's Bench.

(*a*). If upon receiving such notice of dispute the assignee does not deem it proper to require the claimant to bring an action to establish his claim, he shall notify the debtor in writing of this fact, and the debtor may thereupon, and within ten days of his receiving such notice, apply to the said Judge for an order requiring the assignee to serve a notice of contestation. The Judge shall only make such order if, after notice to the assignee, the Judge is of opinion that there are good grounds for contesting the claim. In case the debtor does not make an application as aforesaid, the decision of the assignee shall as against him be final and conclusive so far as regards the distribution of the assigned estate.

(*b*) If upon the application the claimant consents in writing, the Judge may, in a summary manner, decide the question of the validity of the claim.

(*c*). If an action is brought by the claimant against the assignee, the debtor may intervene at the trial, either personally or by counsel, for the purpose of calling and examining or cross-examining witnesses. 1 and 2 Ed. 7, c. 2, s. 23.

DIVIDENDS.

34. *Dividends, when to be paid.*—As large a dividend as can with safety be paid shall be paid by every assignee under this Act within six months from the date of any assignment made hereunder, and

earlier if required by the inspectors; and thereafter a further dividend shall be paid every six months, and more frequently if required by the inspectors, until the estate is wound up and disposed of. 1 and 2 Ed. 7, c. 2, s. 28.

35. *Notice of dividend sheet.*—So soon as a dividend sheet is prepared notice thereof shall be given by letter posted to each creditor inclosing an abstract of receipts and disbursements, showing what interest has been received by the assignee for moneys in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and, after the expiry of eight days from the day of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid. 1 and 2 Ed. 7, c. 2, s. 29.

ADMINISTRATION OF ESTATE.

36. *Assets not to be removed out of the Province, and moneys to be deposited in a bank.*—No property or assets of an estate assigned under the provisions of this Act shall be removed out of the Province without the order of a Judge of the Court of King's Bench; and the proceeds of the sale of any such property or assets and all moneys received on account of any estate shall be deposited by the assignee in one of the incorporated banks within this Province, and shall not be withdrawn or removed without the order of such Judge, except in payment of dividends and other charges incidental to the winding up of the estate, which shall include rent, wages, mortgages, secured and preferred and partly secured and preferred claims.

(*a*). *Penalty.*—Any assignee or other person acting in his stead or on his behalf violating the provisions of this section shall be liable to a penalty of five hundred dollars, which may be recovered summarily with costs before any of the Judges aforesaid, and one-half of the said penalty shall go to the person suing therefor and the other half shall belong to the said estate; but, in default of payment of the said penalty and all costs which may be incurred in any action or proceeding for the recovery thereof, such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be disqualified from acting as assignee of any estate while such default continues.

(*b*). *Application of section limited.*—This section shall not apply to any assignment executed before the first day of March in the year one thousand nine hundred and two, or to any proceedings thereunder. 1 and 2 Ed. 7, c. 2, s. 24.

37. *Accounts to be kept accessible.*—Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare, and keep constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate. 1 and 2 Ed. 7, c. 2, s. 25.

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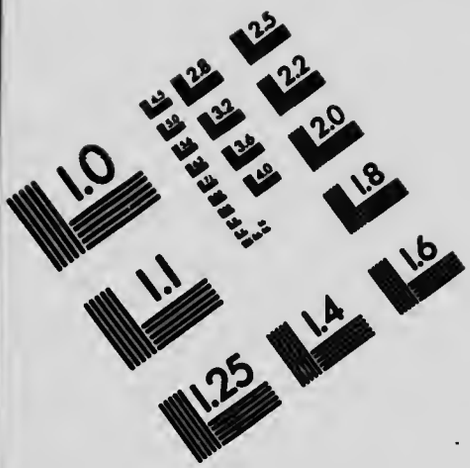

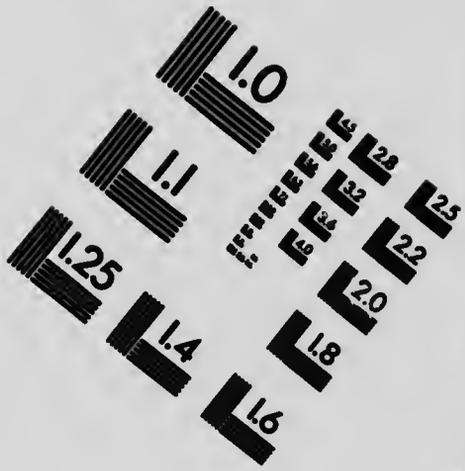

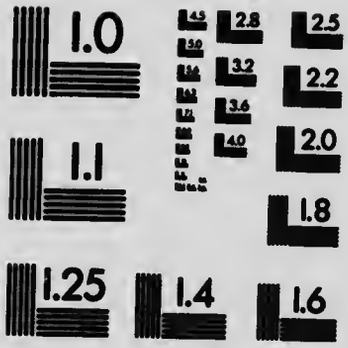

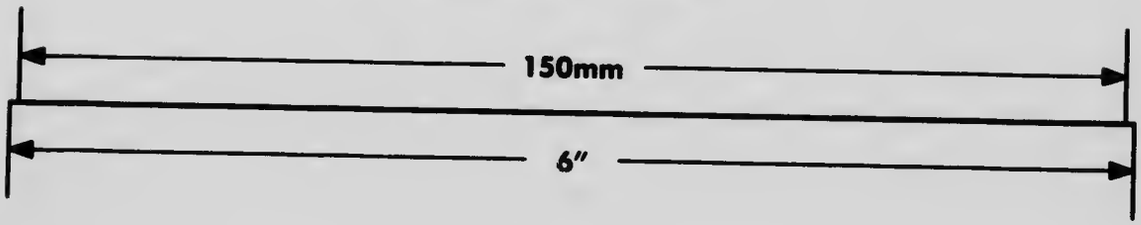

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FRAUDULENT OR PREFERENTIAL TRANSFERS.

38. *Gifts, transfers, etc., made by insolvents which defeat or prejudice creditors to be void.*—Subject to the provisions of the forty-fourth, forty-fifth, forty-sixth and forty-seventh sections of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or 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, hinder, delay or prejudice his creditors, or any one or more of them, shall, as against the creditor or creditors injured, delayed or prejudiced, be utterly void. 1 and 2 Ed. 7, c. 2, s. 2, s-s. 1.

39. *Transfers with intent to prefer creditors.*—Subject to the provisions of the forty-fourth, forty-fifth, forty-sixth and forty-seventh sections of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or 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, to or for a creditor, with intent to give such creditor preference over his other creditors, or over any one or more of them, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void. 1 and 2 Ed. 7, c. 2, s. 2, s-s. 2.

40. *Transfers having effect of preference void, if attacked within sixty days.*—Subject to the provisions of the forty-fourth, forty-fifth, forty-sixth and forty-seventh sections of this Act, every such gift, conveyance, assignment or transfer, delivery over or payment as aforesaid, made to or for a creditor by a person at any 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, and which has the effect of giving such creditor a preference over the other creditors of the debtor, or over one or more of them, shall, in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be utterly void as against the creditor or creditors injured, delayed, prejudiced or postponed. 1 and 2 Ed. 7, c. 2, s. 2, s-s. 3.

41. *Or if assignment made within sixty days.*—Subject to the provisions of the forty-fourth, forty-fifth, forty-sixth and forty-seventh sections of this Act, every such gift, conveyance, assignment or transfer, delivery over or payment as aforesaid, made to or for a creditor by a person at any 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, and which has the effect of giving such creditor a preference over the other creditors of the debtor or over one or more of them, shall, if the debtor, within sixty days after the transaction, makes an assignment for the benefit of his creditors, be utterly void as against the assignee or any creditor authorized to take proceedings to avoid the same under the forty-eighth section hereof. 1 and 2 Ed. 7, c. 2, s. 2, s-s. 4.

42. *What transactions to be deemed preferential. Intent or motive immaterial. Pressure or want of knowledge on part of creditor not to save the transaction.*—A transaction shall be deemed to be one which has the effect of giving a creditor a preference over other creditors within the meaning of the two last preceding sections, if by such transaction a creditor is given or realizes, or is placed in a position to realize, payment, satisfaction or security for the debtor's indebtedness to him, or a portion thereof, greater proportionately than could be realized by or for the unsecured creditors generally of such debtor, or for the unsecured portion of his liabilities, out of the assets of the debtor left available and subject to judgment, execution, attachment or other process; and such effect shall not be deemed dependent upon the intent or motive of the debtor or upon the transaction being entered into voluntarily or under pressure; and no pressure by a creditor, or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, shall avail to protect the transaction, except as provided by the forty-fourth and forty-seventh sections hereof. 1 and 2 Ed. 7, c. 2, s. 2, s-s. 5.

43. *"Creditor" for certain purposes to include surety and indorser.*—When the word "creditor" or "creditors" occurs in any of the four last preceding sections, such word shall be deemed to include any surety and the indorser of any promissory note or bill of exchange who would, upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into or such indorsement was given, become a creditor of the person giving the preference within the meaning of said subsections, and such word shall include a *cestui que trust* or other person to whom the liability is equitable only. 1 and 2 Ed. 7, c. 2, s. 2, s-s. 6.

44. *Assignments for benefit of creditors and bona fide sales, etc., protected.*—Nothing in the six last preceding sections shall apply to any assignment made to an official assignee, or, with the consent of a majority of the creditors having claims of one hundred dollars and upwards, computed according to the provisions of the twenty-second section of this Act, to any other person, for the purpose in each of the said cases 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* 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 therefor. 1 and 2 Ed. 7, c. 2, s. 3, s-s. 1.

45. *Transfer to creditor of consideration for sale invalid.*—In case of a valid sale of goods, securities or property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor, under circumstances which would render void such a payment or transfer by the debtor personally and directly, the

payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made. 1 and 2 Ed. 7, c. 2, s. 3, s-s. 2.

46. *Security given up upon void payment to be returned.*—In case a payment has been made which is void under this Act, and any valuable security was given up in consideration of the payment, the creditor shall be entitled to have the security restored or its value made good to him before, or as a condition of, the return of the payment. 1 and 2 Ed. 7, c. 2, s. 3, s-s. 4.

47. *Payment of wages protected—Exchange of securities protected; certain assignments to be valid.*—Nothing herein contained shall affect the priority of a claim for wages or salary under the twenty-eighth section of this Act, or shall prevent a debtor providing for payment of wages or salary due by him in accordance with the provisions of the said section. Nor shall anything herein contained affect any payment of money to a creditor where such creditor, by reason or on account of such payment, has lost or been deprived of or has in good faith given up any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor, nor the substitution in good faith of one security for another security for the same debt, so far as the debtor's estate is not thereby lessened in value to the other creditors. Nor shall anything herein contained invalidate a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the *bona fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full. 1 and 2 Ed. 7, c. 2, s. 3, s-s. 5.

48. *Rights of action of assignee.*—Except as is hereinafter otherwise provided, the assignee shall have an exclusive 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.

(*a*). *Creditor may proceed in certain cases, if assignee refuses.*—If at any time a creditor desires to cause any proceedings to be taken which, in his opinion, would be for the benefit of the estate, and the assignee, under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of a Judge of the Court of King's Bench authorizing him to take the proceedings in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe; and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same for his benefit; but if, before such order is granted, the assignee shall signify to the Judge his readiness to institute the proceedings for the benefit of the creditors the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall belong to the estate.

(*b*). *Creditors suing for rescission of void transactions for benefit of creditors generally.*—Where there is no valid assignment for the benefit of creditors, one or more creditors may, for the benefit of creditors generally, or for the benefit of such creditors as have

been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of or to have declared void agreements, deeds, instruments or other transactions made or entered into in fraud of creditors or in violation of this Act or thereby declared void; and in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the fortieth section hereof.

(*c*). *Delivery over and sale of property affected.*—In any action under this section the Court may direct delivery of any property in question to the assignee or a sheriff or a receiver, and may order a sale thereof and such distribution of the proceeds as may seem equitable, either through the assignee or through a sheriff or receiver or otherwise as may seem proper.

(*d*). *Distribution of proceeds of property amongst creditors pro rata.*—In case of a transaction void under this Act as entered into with intent to give a preference or having the effect of giving a preference, the subject matter shall not be seizable or attachable or liable to sale for the satisfaction, according to priorities otherwise prevailing, of judgments, attachments or other process, except executions; but where not realized under executions so as to be distributable by a sheriff or bailiff among creditors, the Court shall have and exercise jurisdiction to realize the same for the benefit of all the creditors, and to distribute the proceeds, among them rateably and proportionately. 1 and 2 Ed. 7, c. 2, s. 9.

49. *Following proceeds of property fraudulently transferred.*—In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made shall have sold or disposed of, realized or collected, the property or any part thereof, the money or other proceeds or the amount thereof, whether further disposed of or not, may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but, in case there is no such assignment, shall exist in favor of all creditors of such debtor.

(*a*). *Taking proceeds under execution.*—Where there has been been no valid assignment for the benefit of creditors, and the proceeds are of a character to be seizable under execution, they may be seized under the execution of any creditor, and shall be distributable ratably amongst the creditors under "The Executions Act" or "The County Courts Act" or otherwise.

(*b*). *Creditor suing on behalf of himself and other creditors.*—Where there has been no valid assignment for the benefit of creditors, and whether the proceeds realized as aforesaid are or are not of a character to be seized under execution, an action may be brought therefor or to recover the amount thereof by a creditor (whether a judgment creditor or not) on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the said proceeds or the amount thereof available for the general benefit of the creditors.

(*c*). *Protection of innocent purchasers.*—This section shall not apply as against innocent purchasers of any such property. 1 and 2 Ed. 7, c. 2, s. 10.

EXAMINATION OF ASSIGNORS AND OTHERS.

50. *Examination of assignor or employees.*—Where there has been an assignment for the benefit of creditors the assignee or assignees, upon resolution passed by a majority vote of the creditors present or represented at a meeting of the creditors of the assignor regularly called, or upon the written request or resolution of the majority of the inspectors of the estate, may, without an order, examine the assignor or any person who is or has been an agent, clerk, servant, officer or employee of any kind of the assignor, upon oath, before a master or local master or a special examiner of the Court of King's Bench, or before a deputy clerk of the Crown of the Court of King's Bench, or before the Judge of the County Court of the judicial division within which such assignor resides, or may, by the order of a Judge of any Court aforesaid, examine the assignor on oath before any other person to be specially named in such order, touching the estate and effects of the assignor, and as to the property and means he had when the earliest of the debts or liabilities of the assignor existing at the date of the assignment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability, and as to any and what debts are owing to him. 1 and 2 Ed. 7, c. 2, s. 33.

51. *Procedure upon examination of an assignor.*—The rules and procedure from time to time in force in the Court of King's Bench for the examination of judgment debtors shall, as far as may be, apply to an examination under this Act of an assignor in all respects as if the assignor were a judgment debtor. 1 and 2 Ed. 7, c. 2, s. 34.

52. *When assignor does not attend or refuses to answer questions.*—In case such assignor does not attend as required by any appointment or appointment and order, as the case may be, served on him and does not allege a sufficient excuse for not attending, or, if attending, refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or, if it appears from such examination of the assignor that such assignor has concealed or made away with any part of his property in order to defeat or defraud his creditors or any of them, any Judge of any of the Courts aforesaid may order the assignor to be committed to the common gaol of the judicial district in which he resides for any term not exceeding twelve months. 1 and 2 Ed. 7, c. 2, s. 35.

53. *Service of appointment.*—Any person liable to be examined under the fiftieth section of this Act may be served with an appointment signed by the Judge or officer mentioned in the fiftieth section of this Act, or a copy thereof, and, where the examination is to take place under an order, also with a copy of the order; such service to be made at least forty-eight hours before the time appointed for the examination; and the person to be examined is to be paid the same fees as a witness. 1 and 2 Ed. 7, c. 2, s. 36, s-s. 1.

54. *Conduct of examination.*—The examination under the fiftieth section of this Act shall be conducted in the same manner as in the case of an oral examination of an opposite party, in a suit or action. 1 and 2 Ed. 7, c. 2, s. 36, s-s. 2.

55. *Compelling attendance and production of books.*—Any person liable to be examined under the fiftieth section hereof may be compelled to attend and testify and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness in an action in the Court of King's Bench. 1 and 2 Ed. 7, c. 2, s. 37.

56. *Calling upon persons having information as to assignor's affairs to give evidence and produce documents, etc.*—In case any person has, or is believed or suspected to have, in his possession or power any of the assignor's property, or any book, document or paper of any kind relating in whole or in part to the assignor, his dealings or property, such person may, upon resolution passed by a majority vote of the creditors present or represented at a regularly called meeting of the creditors of the assignor (exclusive of such person, if he is a creditor), or upon the written request or resolution of the majority of the inspectors of the estate, be required by the assignee to produce such books, documents or papers for the information of such assignee, or to deliver over to him any such property of the debtor.

(*a*). *Examination of person failing to produce documents or to deliver property.*—In case such person fails to produce the said book, document or other paper, or to deliver over such property, within four days of his being served with a copy of the said resolution and a request of the assignee in that behalf, or in case the assignee or the majority of the inspectors is or are not satisfied that full production or delivery has been made, the assignee may, without an order, examine the said person before any of the officers mentioned in the fiftieth section of this Act touching any such property or document or other paper which he is supposed to have received.

(*b*). *Enforcing attendance and production.*—Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness in an action in the Court of King's Bench. 1 and 2 Ed. 7, c. 2. s. 38.

REMUNERATION OF ASSIGNEE AND INSPECTORS.

57. *Remuneration of assignee.*—The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the inspectors in case of the creditors failing to provide therefor, subject to the review of a Judge of the Court of King's Bench if complained of by the assignee or any of the creditors. 1 and 2 Ed. 7, c. 2, s. 30.

58. *Where remuneration not fixed before the final dividend.*—In case the remuneration of the assignee has not been fixed under the last preceding section before the final dividend, the assignee may insert in the final dividend sheet and retain as his remuneration a sum not exceeding five per cent. of the cash receipts, subject to review by a Judge as hereinbefore provided; but no application by the

assignee to review the said allowance shall be entertained unless, previous to the preparation of the final dividend sheet, the question of his remuneration has been brought before a meeting of creditors competent to decide the same. 1 and 2 Ed. 7, c. 2, s. 31.

59. *Remuneration of inspectors.*—The assignee may pay or allow to each inspector appointed under this Act a reasonable charge or sum for the due performance of his duties as such inspector, but no such payment or allowance to an inspector in any estate shall exceed the sum of twenty-five dollars. 1 and 2 Ed. 7, c. 2, s. 32.

AFFIDAVITS.

60. *Affidavits.*—Any affidavit authorized or required under this Act may be sworn before any person authorized by "The Manitoba Evidence Act" to administer affidavits, or before a justice of the peace, or, if sworn out of Manitoba, before a notary public or other functionary authorized to administer oaths outside of this Province under any statute thereof. 1 and 2 Ed. 7, c. 2, s. 27.

NOVA SCOTIA ASSIGNMENTS ACT.

(61 Vict. chap. 1.)

1. *Short title.*—This Chapter may be cited as "The Assignments Act."

INTERPRETATION.

2. *Interpretation.*—In this Chapter, unless the context otherwise requires:

(*a*). "*Insolvent person.*"—The expression "insolvent person" means any person who is in insolvent circumstances, or is unable to pay his debts in full, or knows himself to be about to become insolvent;

(*b*). "*Transfer.*"—The expression "transfer" includes gift, conveyance, assignment, delivery over, or payment of property;

(*c*). "*Property.*"—The expression "property" means goods, chattels, or effects, bills, notes or securities, shares, dividends, premiums, or bonus in any bank, company, or corporation, and every other description of property, real and personal.

(*d*). "*Judge.*"—The expression "Judge" means a Judge of the Supreme Court, or the Judge of the County Court for the county in which an assignment under this Chapter is registered.

CONFESSION OF JUDGMENT, ASSIGNMENT, ETC., IN FRAUD OF CREDITORS.

3. *Confessions of judgment in fraud of creditors made void.*—If any insolvent person, 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 the same,

(*a*). To defeat or delay his creditors wholly or in part; or

(*b*). Thereby to give one or more of his creditors 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 person giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution. 1898, c. 11, s. 1.

4. (1) *Preferences made void.*—Every transfer of property made by an insolvent person,

(*a*). With intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them; or

(*b*). To or for a creditor with intent to give such creditor an unjust preference over other creditors of such insolvent person, or over any one or more of such creditors.

shall as against the creditor or creditors, injured, delayed, prejudiced or postponed, be utterly void.

(2) *When transfer deemed to give an unjust preference.*—If any such transfer to or for a creditor has the effect of giving such creditor a preference over the other creditors of such insolvent person, or over any one or more of them, such transfer shall,

(*a*). In and with respect to any action or proceeding which is brought, had or taken to impeach or set aside such transfer within sixty days after the giving of the same; or

(*b*). If such insolvent person makes an assignment for the benefit of his creditors within sixty days from the giving of such transfer,

be presumed to have been made with intent to give such creditor an unjust preference as aforesaid, and to be an unjust preference, whether such transfer was made voluntarily or under pressure.

(3) *"Creditor" includes surety.*—Where the word "creditor" in this section indicates the creditor to whom a preference is given over the other creditors of the insolvent person such word shall be deemed to include any surety, and the indorser of any promissory note or bill of exchange, who would upon payment by him of the debt, promissory note or bill of exchange, in respect to which such suretyship was entered into or such indorsement given, become a creditor of the person giving the preference within the meaning of this section. 1898, c. 11, s. 2.

ASSIGNMENTS FOR GENERAL BENEFIT OF CREDITORS AND BONA FIDE TRANSACTIONS PRESERVED.

5. (1) *Certain transactions not affected.*—Nothing in the next preceding section shall apply,

(*a*). To any assignment made to any official assignee for the county in which the debtor resides or carries on business for the purpose of paying ratably and proportionately, and without preference or priority, all the creditors of the debtor their just debts; or

(*b*). To any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; or

(*c*). To any payment of money to a creditor; or

(*d*). To any *bona fide* gift, conveyance, assignment, transfer or delivery over of any property 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 property; provided that the money paid, or the property sold or delivered, bears a fair and reasonable relative value to the consideration therefor. 1898, c. 11, s. 3; 1899, c. 53, s. 1.

6. *Assignment not to official assignee made void.*—"Every assignment for the general benefit of creditors not made to the official assignee shall be void." 1 Ed. VII., c. 34, s. 1.

7. *Transfer of consideration.*—In case of a valid sale of goods, securities or property, and payment or transfer, of the consideration or part thereof, by the purchaser to a creditor of the vendor under circumstances which would render void such a payment or transfer,

by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made. 1898, c. 11, s. 3 (1).

8. *Security given upon void payment restored.*—If a payment has been made which is void under this Chapter, and any valuable security was given up in consideration of such payment, the creditor shall be entitled to have such security restored, or its value made good to him before, or as a condition of, the return of the payment. 1898, c. 11, s. 3 (3).

9. *Payment where security given up not affected.*—Nothing in the preceding provisions shall affect,

(*a*). Any payment of money to a creditor, where such creditor, by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor; or

(*b*). Any substitution in good faith of one security for another for the same debt as far as the debtor's estate is not thereby lessened in value to the other creditors. 1898, c. 11, s. 3 (4).

WHAT SHALL CONSTITUTE SUFFICIENT ASSIGNMENT.

10. *Form, etc., of assignment.*—Every assignment made under this Chapter for general benefit of creditors shall be valid and sufficient if it is made to an official assignee and is in the words following, that is to say, "all my personal property which may be seized and sold under execution, and all my real property, credits, and effects," or if it is in words to like effect; and an assignment so expressed shall vest in the assignee all the real and personal property, rights, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution; subject, however, as regards land to the provisions of "The Registry Act." 1898, c. 11, s. 4.

11. *Mistake, etc., not to vitiate.*—No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection, in any assignment under this Chapter for the general benefit of creditors if the same can be amended or corrected, and if there is any mistake, defect or imperfection therein, the same shall be amended by a Judge on any application of the assignee, or of any creditor of the assignor, on such notice being given to other parties concerned as the Judge thinks reasonable, and the amendment, when made, shall have relation back to the date of such assignment. 1898, c. 11, s. 11.

PUBLICATION AND REGISTRATION OF ASSIGNMENT.

12. *Notice of assignment.*—A notice of any assignment made for the general benefit of creditors under this Chapter shall, as soon as conveniently may be after the execution thereof, be published at least twice in *The Royal Gazette*, and not less than twice in one newspaper at least having a general circulation in the county in which the property assigned is situated. 1898, c. 11, s. 13 part.

13. (1) *Registration of assignment.*—A counterpart or copy of every assignment made under this Chapter, together with an affidavit of a witness thereto of the due execution of the assignment of which the copy filed purports to be a copy, shall within five days from the execution thereof be filed,

(*a*). If the assignor at the time of the execution of such assignment is a resident of Nova Scotia, in the registry of deeds for the registration district in which he resides; or

(*b*). If the assignor is not such a resident, in the registry of deeds for the registration district in which the personal property assigned is situated or if such property is in more than one such district then in the registry of deeds for the district in which the principal part of such property is situated.

(2) The registrar of deeds shall file all such assignments presented to him for that purpose, and shall number and enter the same in a book to be kept for that purpose, and shall indorse upon each assignment the time the same was received by him, and such assignments shall be kept in such registry for the inspection of all persons interested therein.

(3) The registrar shall be entitled to receive a fee of fifty cents for filing such assignment and affidavit and for making all proper indorsements in connection therewith. 1898, c. 11, s. 13 (2).

14. (1) *Penalties for failure to publish notice and register.*—If the said notice of the assignment is not published in the regular number of *The Royal Gazette*, and of such newspaper as is by this Chapter directed, which are respectively issued first after five days from the execution of the assignment by the assignor, or if the assignment is not registered as directed within five days from the execution thereof, the assignor shall be liable to a penalty of twenty-five dollars for every day which passes after the issue of the number of the newspaper in which the notice should have appeared until the same has been published; and a like penalty for every day which passes after the expiration of five days from the execution of the assignment by the assignor, until the same has been registered.

(2) The official assignee shall be subject to a like penalty for failure to publish notice of and to register any assignment for every day which passes after the expiration of five days from the delivery of the assignment to him, or of five days after his assent thereto, the burden of proving the time of such delivery or assent being upon the assignee.

(3) One half of any such penalty when recovered shall go to the person suing therefor and the other half for the benefit of the estate of the assignor.

(4) The official assignee shall not be liable for any of the penalties imposed in this section unless he has been paid or tendered the cost of advertising and registering the assignment, nor shall he be compelled to act under the assignment until the costs in that behalf are paid or tendered to him. 1898, c. 11, s. 14.

15. *Judge may direct publication and registration.*—If the assignment is not registered, and notice thereof published, an application may be made by any one interested in the assignment to a Judge to compel the publication and registration thereof, and the

Judge shall make an order in that behalf, with or without costs, or upon payment of costs by such person as in his discretion he directs to pay the same. 1898, c. 11, s. 15.

16. *Failure to publish, etc., is not to vitiate.*—The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment. 1898, c. 11, s. 16.

DISPOSITION OF ESTATE.

17. (1) *Estate not to be removed out of Province.*—No property or assets of an estate assigned under the provisions of this Chapter, shall be removed out of Nova Scotia without the order of a Judge.

(2) *Moneys to be deposited.*—The proceeds of the sales of such estate and any part thereof, and all moneys received on account thereof, shall be deposited by the assignee in an incorporated bank within the Province, and shall not be withdrawn or removed therefrom without the order of a Judge, except in payment of dividends and charges incidental to the winding up of the estate.

(3) *Penalty.*—Any assignee or other person acting in his stead, or on his behalf, who violates the provisions of this section, shall be liable to a penalty of four hundred dollars, and one half of the said penalty shall go to the person suing therefor, and the other half shall belong to the estate of the assignor, and in default of payment of the said penalty and all costs which are incurred in any action or proceeding for the recovery thereof, such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be liable to forfeit his office of official assignee. 1898, c. 11, s. 5.

CHANGE OF ASSIGNEE.

18. (1) *Creditors may change assignee.*—A majority in number and value of the creditors who have proved claims to the amount of one hundred dollars or upwards, may at their discretion substitute for the official assignee a person residing in the county in which the debtor resided or carried on business at the time of the assignment.

(2) An assignee may also be removed and another assignee may be substituted, or an additional assignee may be appointed by a Judge. 1898, c. 11, s. 8; 1899, c. 53, s. 2.

19. *Estate, how vested on change of assignee.*—Where a new assignee is appointed the estate shall forthwith vest in him without a conveyance or transfer and he shall register an affidavit of his appointment in the registry of deeds for the registration district in which the original assignment was filed, and the registration of such affidavit shall have the same effect as the execution and registration of a conveyance from the original assignee. 1898, c. 11, s. 8 (2).

RECOVERY OF ESTATE.

20. (1) *Assignee, power of to sue.*—Except as in this section is otherwise provided, the assignee shall have the exclusive 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 Chapter.

(2) *Creditor may take proceedings.*—If at any time any creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the assignee under the authority of the creditors refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of a Judge authorizing him to take the proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge prescribes; and thereupon any benefit derived from the proceeding shall belong exclusively to the creditor instituting the same for his benefit; provided that if, before such order is granted the assignee signifies to the Judge his readiness to institute such proceeding for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall appertain to the estate. 1898, c. 11, s. 9.

(3) After an assignment under this Chapter has been made the assignee shall have the right to be substituted for any party who has commenced proceedings under any of the provisions of this Chapter for the rescission of agreements, deeds and instruments or other transactions made and entered into in fraud of creditors or in violation of this Chapter, upon such terms as the Court or a Judge orders.

21. *Money may be recovered as property.*—If any person to whom any transfer of property declared to be void by this Chapter has been made, has sold or disposed of the property which was the subject of such transfer or any part thereof, the moneys or other proceeds realized therefor may be seized or recovered in any action under the next preceding section as fully and effectually as the property, if still remaining in the possession or control of such person, could have been seized or recovered. 1898, c. 11, s. 10.

WAGES AND SALARIES.

22. *Wages, etc., of employees, priority of.*—Whenever an assignment is made of any real or personal property for the general benefit of creditors under the provisions of this Chapter, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salaries of all persons in the employment of such person at the time of making such assignment or within one month before the making thereof, not exceeding three months' wages or salary; and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims. 1898, c. 11, s. 7.

MEETINGS OF CREDITORS.

23. *First meeting of creditors, how called.*—It shall be the duty of the assignee immediately upon the execution of the assignment to inform himself, by reference to the assignor and his records of account, of the name and residences of the assignor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the giving of directions with reference to the disposal of the estate, by mailing prepaid and registered to every creditor known to him a circular calling a meeting of creditors to be held

at a convenient place to be named in the notice not later than twelve days after such notice and by advertisement in *The Royal Gazette;* and all other meetings to be held shall be called in like manner. 1898, c. 11, ss. 17, 18 (2).

24. *Judge may direct as to meeting.*—If a sufficient number of creditors do not attend such meeting, or fail to give directions with reference to the disposal of the estate, the disposal of the same shall be in the discretion of the assignee. 1 Ed. VII., c. 34, s. 2.

25. (1) *Creditors may compel calling of meeting.*—If a request in writing, signed by a majority of the creditors having claims duly proved of one hundred dollars and upwards, computed in the manner hereinafter directed, is made upon the assignee, he shall within two days after receiving such request call a meeting of the creditors at a time not later than twelve days after the receipt by him of such request.

(2) If the assignee fails to call such meeting when so requested he shall be liable to a penalty of twenty-five dollars for every day after the expiration of the time limited for the calling of the meeting until the meeting is called, 1898, c. 11, s. 18.

VOTING AT MEETINGS.

26. *Voting at meetings, how regulated.*—At any meeting of creditors any creditor may vote in person, or by proxy authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim, stating the nature and amount thereof. 1898, c. 11, s. 19.

27. (1) *Calculation of votes.*—Except for the purpose of making a change of assignee all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:

For every claim of or over $100, and not exceeding $200, one vote.

For every claim of or over $200, and not exceeding $500, two votes.

For every claim of or over $500, and not exceeding $1,000, three votes.

For every additional $1,000, or fraction thereof, one vote.

(2) No person shall be entitled to vote on a claim which he has acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(3) In case of a tie, the assignee, or, if there are two assignees, then the assignee appointed by the creditors or by the Judge, if none has been appointed by the creditors, shall have a casting vote. 1898, c. 11, s. 20.

RANKING AND PROOF OF CLAIMS.

28. *Individual and partnership estates, ranking upon.*—If any assignor executing an assignment under this Chapter for the general benefit of his creditors owes debts both individually and as a member of a partnership, or as a member of two different partnerships, the claims shall rank first upon the estate by which the debts they

represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full. 1898, c. 11, s. 6.

29. *Secured claims.*—Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon, and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value, to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect to the estate. 1898, c. 11, s. 20 (4).

30. *Negotiable instruments, ranking in respect to.*—If a creditor holds a claim based upon a negotiable instrument, upon which the insolvent is only secondarily liable, and which has not matured at the time of proving the claim, such creditor in his proof of claim shall set a value upon the liability of the person primarily liable thereon, and the difference between such value and the amount of the claim shall, until the instrument matures, be the amount at which the claim shall be calculated for the purpose of voting at meetings and other purposes, except the payment of dividends thereon, or collocation in the dividend sheets; but after the maturity of such instrument, the claim shall be calculated for all purposes at the full amount, less any sum paid on account thereof by the person primarily liable on such negotiable instrument. 1898, c. 11, s. 20 (5).

(a) In case a person claiming to be entitled to rank on the estate assigned holds security for his claim or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security, a Judge may, upon summary application by the assignee or by any other person interested in the debtor's estate, of which application ten days' notice shall be given to such claimant, order that unless a specified value shall be placed on such security, and notified in writing to the assignee within a time to be limited by the order, such claimant shall in respect of the claim or the part thereof for which the security is held in case the security is held for part only of the claim be wholly barred of any right to share in the proceeds of such estate; and if a specified value is not placed on such security and notified in writing to the assignee according to the exigency of the said order, or within such further time as the said Judge may by subsequent order allow, the said claim, or the said part as the case may be, shall be wholly barred as against the said estate, but without prejudice to the liability of the debtor therefor.

31. *Set-off.*—The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the assignee, for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plaintiff or defendant, as the case may be, except in so far as any claim is affected by

the provisions of this Chapter or any other enactment respecting frauds or unjust preferences. 1898, c. 11, s. 24.

32. *Particulars of claim.*—Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim, proved by affidavit, and such vouchers as the nature of the case admits of. 1898, c. 11, s. 21 (1).

33. *Proofs of claim, compelling furnishing of.*—"If any person claiming to be entitled to rank on the estate assigned does not within a reasonable time after receiving notice of the assignment, and of the name and address of the assignee, furnish to the assignee particulars and proofs of his claim as provided by this Chapter, the assignee may issue a final notice by registered letter mailed to such person requiring him within a time stated in the notice to furnish such particulars and proofs of his claim on penalty of being debarred from participation in the proceeds of the estate; and if the particulars and proofs of such claim are not furnished within the time stated in such notice, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor. The time stated in such notice shall in the case of creditors resident within the Province be not less than thirty days, and of those resident without the Province, not less than sixty days." 1 Ed. VII., c. 34, s. 3.

34. *Claims not accrued due.*—A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due. 1898, c. 11, s. 21 (3).

CONTESTATION OF CLAIMS.

35. (1) *Contestation of claims.*—At any time after the assignee receives from any person claiming to be entitled to rank on the estate proof of his claim, notice of contestation of the claim may, at the request of any creditor, be served by the assignee upon the claimant. Within thirty days after the receipt of the notice, or such further time as a Judge on application allows, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action served on the assignee; and in default of such action being brought and writ served within the time aforesaid, the claim to rank on the estate shall be forever barred.

(2) The notice by the assignee shall contain the name and place of business of one of the solicitors of the Supreme Court upon whom service of the writ may be made, and service upon such solicitor shall be deemed sufficient service of the writ. 1898, c. 11, s. 21 (4), (5).

DIVIDENDS.

36. *Accounts to be kept.*—Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period, but not more than three months thereafter, and afterwards from time to time at intervals, of not more than three months, the assignee shall prepare and keep, constantly

accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate. 1898, c. 11, s. 22 (part).

37. *Dividends, duty of assignee to pay.*—As large a dividend as can with safety be paid by every assignee under this Chapter, within twelve months from the date of any assignment made thereunder, and earlier if required by vote of the creditors, and thereafter a further dividend shall be paid every six months, and more frequently if required by the creditors, until the estate is wound up and disposed of.

38. *Dividend sheets.*—So soon as a dividend sheet is prepared, notice thereof shall be given by letter mailed, postage prepaid, to each creditor, enclosing an abstract of receipts and disbursements, showing what interest has been received by the assignee for money in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and after the expiry of eight days from the date of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid. 1898, c. 11, s. 23.

OFFICIAL ASSIGNEES.

39. *Appointment of official assignees.*—The Governor-in-Council may in each county appoint one or more persons to be official assignees, who shall perform the duties and exercise the powers imposed by this Chapter. 1898, c. 11, s. 27.

40. (1) *Their remuneration.*—The assignee shall receive such remuneration as is voted to him by the creditors at any meeting, subject to the review of a Judge, if complained of by the assignee or any creditor.

(2) If no remuneration is voted to the assignee by the creditors, the amount thereof shall be fixed by a Judge, not exceeding five per cent. on the gross proceeds of the estate. 1898, c. 11, s. 12; 1899, c. 53, s. 7.

41. (1) Where there has been an assignment for the benefit of creditors the assignee or assignees, upon resolution passed by a majority vote [illegible] creditors present, or represented at a meeting of the cred[illegible] the assignor regularly called, may without an order examine [illegible] assignor or any person who is or has been an agent, clerk, servant, officer or employee of any kind of the assignor, upon oath before a master of the Supreme Court or before a Judge or before any official referee or may by the order of the Court or of such Judge examine the assignor on oath before any other person to be specially named in such order, touching the estate and effects of the assignor and as to the property and means he had when the earliest of the debts or liabilities of the assignor existing at the date of the assignment was incurred and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability and as to any and what debts are owing to him.

(2) The rules and procedure from time to time in force in the Supreme Court for the examination of judgment debtors shall as far

as may be apply to an examination under this Act of an assignor in all respects as if the assignor were a judgment debtor.

(3) In case such assignor does not attend as required by the said appointment or appointment and order, as the case may be, and does not allege a sufficient excuse for not attending or if attending refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such assignor has concealed or made away with his property in order to defeat or defraud his creditors, or any of them, the Court or a Judge may order the assignor to be committed to the common gaol of the county in which he resides for any term not exceeding twelve months.

42. (1) Any person liable to be examined under the next preceding section of this Act may be served with an appointment signed by the Judge or officer, or a copy thereof, and where the examination is to take place under an order also, with a copy of the order; such service to be made at least forty-eight hours before the time appointed for the examination; and the person to be examined is to be paid the same fees as a witness is paid in cases in the Supreme Court.

(2) The examination shall be conducted in the same manner as in the case of an oral examination of an opposite party.

43. Any person liable to be examined under section 41 of this Act may be compelled to attend and testify and to produce books and documents in the same manner and subject to the same rules of examination and the same consequences of neglecting to attend or refusing to disclose the matters in respect to which he may be examined as in the case of a witness in an action in the Supreme Court.

44. (1) In case any person has or is believed or suspected to have, in his possession or power any book, document or paper of any kind, relating in whole or in part to the debtor, his dealings or property, such person may upon resolution passed by a majority vote of the creditors present or represented at a regularly called meeting of the creditors of the assignor, exclusive of such person (if he is a creditor) be required by the assignee to produce such statement or statements for the information of such assignee.

(2) In case such person fails to produce the said book, document or other paper within four days of his being served with a copy of the said resolution, and a request of the assignee in that behalf, or in case the assignee is not satisfied that full production has been made, the assignee may without an order examine the said person before any of the officers mentioned in section 41 of this Act, touching any book, document or other paper which he is supposed to have received.

(3) Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he is liable to produce in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness in an action in the Supreme Court.

ONTARIO ASSIGNMENTS ACT.

R.S.O. (1897), chap. 147.

AN ACT RESPECTING ASSIGNMENTS AND PREFERENCES BY INSOLVENT PERSONS.

Confessions of Judgment, Cognovits, etc., in Fraud of Creditors to be void, s. 1.
Assignments, etc., in prejudice of creditors, to be void, s. 2.
Recovery of proceeds where property sold, s. 10.
Assignments for benefit of creditors, ss. 3-6.
How claims are to rank, s. 7.
Appointment and rights of assignee, ss. 8-10.
Assignments to take precedence of executions, s. 11.
Amendment by Court, s. 12.
Assignment to be registered and notice thereof published, ss. 13-16.
Meeting of creditors, ss. 17, 18.
Voting, ss. 19, 20.
Proof of claim, s. 21.
Contestation, ss. 22, 23.
Assets to be retained in Province, s. 24.
Accounts and statement, s. 25.
Set-off, s. 26.
Affidavits, s. 27.
Dividends and dividend sheet, ss. 28-30.
Assignee's remuneration, ss. 31, 32.
Inspector's remuneration, s. 33.
Examination of Assignor, etc., ss. 34-39.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. *Confessions or warrants to confess judgment given by insolvents to defeat or delay creditors or to give one preference over the other, to be void.*—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. R.S.O. 1887, c. 124, s. 1.

2. (1) *Gifts, transfers, etc., made by insolvents which defeat or prejudice creditors to be void.*—Subject to the provisions of section

3 of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or 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, hinder, delay or prejudice his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced be utterly void.

(2) Subject to the provisions of section 3 aforesaid, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or 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, to or for a creditor with intent to give such creditor an unjust preference over his other creditors or over any one or more of them, shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

(3) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed *prima facie* to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof whether the same be made voluntarily or under pressure.

(4) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of his creditors, be presumed *prima facie* to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure. 54 V., c. 20, s. 1.

(5) *"Creditor" for certain purposes to include surety and endorser.*—Where the word "creditor" occurs in the eighth and ninth lines of sub-section 2 of this section, and in the second and third lines of sub-section 3, and in the second and third lines of sub-section 4, such word shall be deemed to include any surety and the indorser of any promissory note or bill of exchange, who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into or such indorsement was given become a creditor of the person giving the preference within the meaning of said subsections.

Pending proceedings, not affected.—This sub-section shall not affect any action, suit or proceeding pending on the 14th day of April, 1892, but the same shall be adjudicated upon and determined as if this sub-section had not been passed. 55 V., c. 25, ss. 1, 2.

3. (1) *Assignments for benefit of creditors and bona fide sales, etc., protected. Proviso.*—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 with the consent of a majority of his creditors having claims of $100 and upwards computed according to the provisions of section 20, to other assignee resident within the Province of Ontario, for the purpose in each of the said cases 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* 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 therefor.

(2) *Transfer to creditor of consideration, for sale invalid.*—In case of a valid sale of goods, securities or property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor, under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made. R.S.O. 1887, c. 124, s. 3 (1, 5).

(3) *General assignment not in accordance with Act, when voidable.*—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.

(4) *Security given up, upon void payment, to be returned.*—In case a payment has been made which is void under this Act, and any valuable security was given up in consideration of the payment the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of, the return of the payment. R.S.O. 1887, c. 124, s. 3 (2, 3).

(5) *Rev. Stat. c.* 156. *Payment of wages protected. Exchange of securities protected. Certain assignments to be valid.*—Nothing herein contained shall affect the Act respecting Wages, or shall prevent a debtor providing for payment of wages due by him in accordance with the provisions of the said Act. Nor shall anything herein contained affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor. Nor to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors. Nor shall anything herein contained invalidate a security

given to a creditor for a pre-existing debt where by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full. R.S.O. 1887, c. 124, s. 3 (4); 54 V., c. 20, s. 2.

4. *Assignee must reside in the Province.*—No person other than a permanent and *bona fide* resident of this Province shall have power to act as assignee under an assignment within the provisions of this Act made after the 23rd day of March, 1889, nor shall any such assignee have power to appoint a deputy or to delegate his duties as assignee to any person who is not a permanent and *bona fide* resident of this Province; and no charge shall be made or recoverable against the assignor or his estate for any services or other expenses of any such assignee, deputy or delegate of any assignee who is not a permanent and *bona fide* resident of this Province as aforesaid. 52 V. c. 21, s. 1.

5. *Form of assignment for general benefit of creditors.*—Every assignment made under this Act, for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say—all my personal property which may be seized and sold under execution and all my real estate, credits and effects—or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure, or sale under execution, subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment. R.S.O. 1887, c. 124, s. 4

(As to the preferential lien of a landlord, see cap. 170, sec. 34.)

6. *All assignments for general benefit of creditors to be subject to this Act.*—Every assignment hereafter executed for the general benefit of creditors, whether the assignment is or is not expressed to be made under or in pursuance of this Act, and whether the debtor has or has not included all his real and personal estate, shall vest the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of this Act, and the provisions of this Act shall apply to the assignee named in such assignment. 58 V. c. 23, s. 5.

7. *How claims are to rank where different estates.*—If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors owes or owe, debts both individually and as a member of a co-partnership, or as a member of different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full. R.S.O. 1887, c. 124, s. 5.

8. (1) *Appointment of substituted assignee.*—A majority in number and value of the creditors who have proved claims to the amount of $100 or upwards may at their discretion substitute for the sheriff, or for an assignee under an assignment to which subsection 3 of section 3 of this Act applies, a person residing in the county in which the debtor resided, or carried on business at the

time of the assignment. An assignee may be removed, and another substituted, or an additional assignee appointed by a Judge of the High Court, or of the County Court where the assignment is registered. R.S.O. 1887, c. 124, s. 6 (1); 53 V. c. 34, s. 1.

(2) *Estate to vest in substituted assignee. Rev. Stat. c.* 136.—Where a new or additional assignee is appointed the estate shall forthwith vest without a conveyance or transfer, and he shall register an affidavit of his appointment in the office in which the original assignment was filed, such an affidavit may also be registered under The Registry Act. The registration of the affidavit under The Registry Act shall have the same effect as the registration of a conveyance. R.S.O. 1887, c. 124, s. 6 (2).

9. (1) *Rights of assignee.*—Except as in this section is hereinafter provided, the assignee shall have an exclusive 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.

(2) *Creditor may proceed in certain cases if assignee refuses.*—If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the assignee under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of the Judge authorizing him to take the proceedings in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs belong exlusively to the creditor instituting the same for his benefit, but if, before such order is granted, the assignee shall signify to the Judge, his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall belong to the estate. R.S.O. 1887, c. 124, s. 7.

10.—(1) *Following proceeds of property fraudulently transferred.*—In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made shall have sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but in case there is no such assignment, shall exist in favour of all creditors of such debtor. 58 V. c. 23, s. 1.

(2) *Taking proceeds under execution. Rev. Stat. c.* 78.—Where there has been no assignment for the benefit of creditors, and the proceeds are of a character to be seizable under execution, they may be seized under the execution of any creditor, and shall be distributable amongs the creditors under The Creditors' Relief Act or otherwise. 58 V. c. 23, s. 2.

(3) *Creditor suing on behalf of himself and other creditors.*—Where there has been no assignment for the benefit of creditors, and whether the proceeds realized aforesaid are or are not of a character to be seized under execution, an action may be brought therefor by a creditor (whether an execution creditor or not), on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the said proceeds available for the general benefit of the creditors. 58 V. c. 23, s. 3.

(4) *Protection of innocent purchasers.*—This section shall not apply as against innocent purchasers of the property. 58 V. c. 23, s. 4.

11. *Assignments to take precedence of judgments and executions.*—An assignment for the general benefit of creditors under this Act shall take precedence of all attachments, 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. R.S.O. 1887, c. 124, s. 9; 59 V. c. 31, s. 2.

12. *Amendment of assignment by Judge.*—No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection in any assignment under this Act for the general benefit of creditors if the same can be amended or corrected, and any such mistake, defect or imperfection shall be amended by any Judge of the High Court, or of the County Court aforesaid, on application of the assignee or of any creditor of the assignor, on such notice being given to other parties concerned as the Judge shall think reasonable, and the amendment, when made, shall have relation back to the date of the assignment, but so as not to prejudice the rights of innocent purchasers. R.S.O. 1887, c. 124, s. 10; 60 V. c. 3, s. 3.

13.—(1) *Notice of assignment to be published. Rev. Stat. c.* 148.—No assignment for the general benefit of creditors under this Act shall be within the operation of The Act respecting Mortgages and Sales of Personal Property; but a notice of the assignment shall, as soon as conveniently may be be published at least once in the Ontario Gazette and not less than twice in one newspaper at the least, having a general circulation in the county in which the property assigned is situate.

(2) *Assignment to be registered. Rev. Stat. c.* 148.—A counterpart or copy of every such assignment shall also within five days from the execution thereof be registered, (together with an affidavit of a witness thereto of the due execution of the assignment or of the due execution of the assignment of which the copy filed purports to be a copy) in the office of the Clerk of the County Court of the county or union of counties where the assignor if a resident in Ontario, resides at the time of the execution thereof, or if he is not a resident then in the office of the Clerk of the County Court of the county or union of counties where the personal property so assigned is or where the principal part thereof, (in case the assignment includes property in more counties than one) is at the time of the execution of such assignment; and such clerks shall file all such instruments presented to them respectively for that purpose and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter

such assignments, and be entitled to the same fees for services in the same manner as if such assignments had been registered under the Act respecting Mortgages and Sales of Personal Property. R.S.O. 1887, c. 124, s. 12 (1, 2).

(3) *Where assignments to be filed in certain districts and in Haliburton.*—In the Districts of Muskoka, Parry Sound, Nipissing, Algoma, Manitoulin, Thunder Bay and Rainy River, and in any other district which may be hereafter formed, and in the provisional county of Haliburton the counterpart or copy of the assignment shall be filed in the same office and within the same time respectively as by the law at the time of the assignment in force mortgages and bills of sale of personal property are required to be filed in such districts, and provisional county respectively, and the clerk in whose office the same is filed shall perform the like duties and be entitled to be paid the like fees as clerks acting under the preceding subsection. 59 V. c. 31, s. 1.

14.—(1) *Penalty for neglecting publication or registration.*—If the said notice is not published in the regular number of the Ontario Gazette, and of such newspaper as aforesaid, which shall respectively be issued first after five days from the execution of the assignment by the assignor, or if the assignment is not registered as aforesaid within five days after the execution thereof, the assignor shall be liable to a penalty of $25 for each and every day which shall pass after the issue of the number of the newspaper in which the notice should have appeared until the same shall have been published; and a like penalty for each and every day which shall pass after the expiration of five days from the execution of the assignment by the assignor until the same shall have been registered.

(2) The assignee shall be subject to a like penalty for each and every day which shall pass after the expiration of five days from the delivery of the assignment to him, or of five days after his assent thereto. The burden of proving the time of such delivery or assent shall be upon the assignee.

(3) Such penalties may be recovered summarily before a Judge of the High Court, or of the County Court of the county in which the assignment ought to be published or registered; one-half of the penalty shall go to the party suing, and the other half for the benefit of the estate of the assignor.

(4) *Liability of sheriff.*—In case of an assignment to the sheriff, he shall not be liable for any of the penalties imposed in this section, unless he has been paid or tendered the cost of advertising and registering the assignment, nor shall he be compelled to act under the assignment until his costs in that behalf are paid or tendered to him. R.S.O. 1887, c. 124, s. 13.

15. *Compelling publication and registration.*—In case the assignment is not registered, and notice thereof published, an application may be made by any one interested in the assignment to a Judge of the High Court, or of the County Court aforesaid, to compel the registration of the assignment and publication of such notice; and the Judge shall make his order in that behalf, and with or without costs, or upon the payment of costs by such person as he may in his discretion direct to pay the same. R.S.O. 1887, c. 124, s. 14.

16. *Assignment not invalidated by omission to publish, etc.*—The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment. R.S.O. 1887, c. 124, s. 15.

17. *Assignee to call meeting of creditors.*—It shall be the duty of the assignee immediately to inform himself, by reference to the debtor and his records of account, of the names and residences of the debtor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate, by mailing prepaid and registered to every creditor known to him, a circular calling a meeting of creditors to be held in his office or some other convenient place to be named in the notices not later than twelve days after the mailing of such notice, and by advertisement in the Ontario Gazette; and all other meetings to be held shall be called in like manner. R.S.O. 1887, c. 124, s. 16.

18.—(1) *Meeting of creditors by request of majority thereof.*—In case of a request in writing signed by a majority of the creditors having claims duly proved of $100 and upwards, computed according to the provisions of section 20 of this Act, it shall be the duty of the assignee within two days after receiving such request, to call a meeting of the creditors at a time not later than twelve days after the assignee receives the request. In case of default the assignee shall be liable to a penalty of twenty-five dollars for every day after the expiration of the time limited for the calling of the meeting until the meeting is called.

(2) *Judge to give directions in case creditors do not attend.*—In case a sufficient number of creditors do not attend the meeting mentioned in section 17 of this Act, or fail to give directions with reference to the disposal of the estate, the Judge of the County Court may give all necessary directions in that behalf. R.S.O. 1887, c. 124, s. 17.

19. *Voting at meeting.*—At any meeting of creditors the creditors may vote in person, or by proxy authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim stating the amount and nature thereof. R.S.O. 1887, c. 124, s. 18.

20.—(1) *Scale of votes.*—Subject to the provisions of section 8, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:—

For every claim of or over $100, and not exceeding $200....1 vote
For every claim of or over $200, and not exceeding $500....2 votes
For every claim or over $500, and not exceeding $1,000....3 votes
For every additional $1,000, or fraction thereof.....1 vote

(2) *Upon claims acquired after assignment.*—No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(3) *Casting vote.*—In case of a tie the assignee, or if there are two assignees, then the assignee nominated for that purpose by creditors, or by the Judge, if none has been nominated by the creditors, shall have a casting vote.

(4) *Creditors to value securities.*—Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate.

(5) *Right to revalue in certain cases.*—If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim. R.S.O. 1887, c. 124, s. 19.

(6) *When creditor holding security fails to value same.*—In case a person claiming to be entitled to rank on the estate assigned holds security for his claim or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security, the Judge of the County Court of the county wherein the debtor at the time of making the assignment resided or carried on business, may, upon summary application by the assignee or by any other person interested in the debtor's estate, of which application three days' notice shall be given to such claimant, order that, unless a specified value shall be placed on such security and notified in writing to the assignee within a time to be limited by the order, such claimant shall, in respect of the claim, or the part thereof for which the security is held, in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate; and if a sepcified value is not placed on such security, and notified in writing to the assignee according to the exigency of the said order, or within such further time as the said Judge may by subsequent order allow, the said claim, or the said part, as the case may be, shall be wholly barred as against such estate but without prejudice to the liability of the debtor therefor. 59 V. c. 31, s. 3.

21.—(1) *Proof of claim.*—Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of.

(2) *Limiting time for proof of claim.*—In case a person claiming to be entitled to rank on the estate assigned, does not within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim as provided by this and the preceding sections of this Act, the Judge of the County Court of the county wherein the debtor at the time of making the assignment resided or carried

on business, may, upon a summary application by the assignee or by any other person interested in the debtors' estate (of which application at least three days' notice shall be given to the person alleged to have made default in proving a claim as aforesaid), order that unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person so making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and if the claim is not so proved within the time so limited, or within such further time as the said Judge may by subsequent order allow, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor.

(3) *Not to interfere with Rev. Stat. c. 129.*—The preceding subsection is not intended to interfere with the protection afforded to assignees, by section 38 of The Trustee Act.

(4) *Creditor may prove claim not due.*—A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due. R.S.O. 1887, c. 124, s. 20 (1, 4).

22.—(1) *Contestation of claim.*—At any time after the assignee receives from any person claiming to be entitled to rank on the estate, proof of his claim, notice of contestation of the claim may be served by the assignee upon the claimant. Within thirty days after the receipt of the notice, or such further time as a Judge of the County Court of the county in which the assignment is registered may on application allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action or summons in case the action is brought in a Division Court shall be served on the assignee; and in default of such action being brought and writ of summons served within the time aforesaid, the claim to rank on the estate shall be forever barred.

(2) The notice by the assignee shall contain the name and place of business of one of the Solicitors of the Supreme Court of Judicature for Ontario, upon whom service of the writ of summons may be made and served upon such solicitor shall be deemed sufficient service of the writ. R.S.O. 1887, c. 124, s. 20 (5).

23.—(1) *Procedure where assignee is satisfied with proof of claim and debtor desires to dispute same.*—In case the assignee is satisfied with the proof adduced in support of a claim, but the debtor disputes the same, such debtor shall do so by notice in writing to the assignee, stating the grounds upon which he disputes the claim; and such notice shall be given within ten days of such debtor's being notified in writing by the assignee that he is satisfied with the proof adduced as aforesaid, and not afterwards unless by special leave of the said Judge.

(2) If upon receiving such notice of dispute the assignee does not deem it proper to require the claimant to bring an action to establish his claim, he shall notify the debtor in writing of this fact, and the debtor may thereupon, and within ten days' of his receiving such notice, apply to the said Judge for an order requiring the

assignee to serve a notice of contestation. The Judge shall only make such order if after notice to the assignee the Judge is of the opinion that there are good grounds for contesting the claim. In case the debtor does not make an application as aforesaid the decision of the assignee shall as against him be final and conclusive.

(3) If upon the application the claimant consents in writing, the Judge may, in a summary manner, decide the question of the validity of the claim.

(4) If an action is brought by the claimant against the assignee the debtor may intervene at the trial, either personally or by counsel, for the purpose of calling and examining or cross-examining witnesses. 59 V. c. 31, s. 4.

24. (1) *Assets not to be removed out of the Province and moneys to be deposited in a bank.*—No property or assets of an estate assigned under the provisions of this Act shall be removed out of the Province without the order of the Judge of the County Court of the county in which the assignment is registered, and the proceeds of the sale of any such property or assets, and all moneys received on account of any estate shall be deposited by the assignee in one of the incorporated banks within this Province, and shall not be withdrawn or removed without the order of such Judge, except in payment of dividends and other charges incidental to the winding up of the estate.

(2). *Penalty.*—Any assignee or other person acting in his stead or on his behalf violating the provisions of this section shall be liable to a penalty of $500, which may be recovered summarily before a Judge of the High Court or before the Judge of the County Court of the county in which the assignment is required to be registered; and one-half of the said penalty shall go to the person suing therefor, and the other half shall belong to the said estate; but in default of payment of the said penalty and all costs which may be incurred in any action or proceeding for the recovery thereof, such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be disqualified from acting as assignee of any estate while such default continues. 52 V. c. 21, s. 2.

(3). *Application of section limited.*—This section shall not apply to any assignment executed before the 23rd day of March, 1889, or to any proceedings thereunder. 52 V. c. 21, s. 3.

25. *Accounts to be kept accessible.*—Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare, and keep constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate. R.S.O. 1887, c. 124, s. 21.

26. *Set off.*—The law of set-off shall apply to all claims made against the estate and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions respecting frauds or fraudulent preferences of this or any other Act. R.S.O. 1887, c. 124, s. 23.

27. *Affidavits.*—Any affidavit authorized, or required, under this Act may be sworn before any person authorized to administer affidavits in the High Court, or before a Justice of the Peace, or, if sworn out of Ontario, before a Notary Public. R.S.O. 1887, c. 124, s. 24.

28. *Dividends when to be paid.*—As large a dividend as can with safely be paid shall be paid by every assignee under this Act within twelve months from the date of any assignment made thereunder, and earlier if required by the inspectors; and thereafter a further dividend shall be paid every six months, and more frequently if required by the inspectors until the estate is wound up and disposed of. 59 V. c. 31, s. 5.

29. *Notice of dividend sheet.*—So soon as a dividend sheet is prepared, notice thereof shall be given by letter posted to each creditor, inclosing an abstract or receipts and disbursements, showing what interest has been received by the assignee, for moneys in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and after the expiry of eight days from the day of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid. R.S.O. 1887, c. 124, s. 22.

30.—(1) *Distributing moneys and determining claims as provided by Rev. Stat. c. 78.*—The assignee may, if he deems it advisable so to do, take the proceedings authorized by section 32 of The Creditors' Relief Act to be taken by a sheriff, and in that case sections 32 and 33 of the said Act shall apply to proceedings for the distribution of moneys and determination of claims arising under an assignment made under this Act, with the substitution of "assignee" for "sheriff" where it occurs in said section 32; and the substitution of "according to law" for "as directed by this Act," where these words occur in said section 32; but this section shall not be construed to relieve the assignee from mailing to each creditor the abstract and other information required by section 29 of this Act to be sent to creditors, so far as the same is not contained in the list sent by him under section 32 aforesaid.

(2) The Judge of the County Court of the county wherein the debtor at the time of the assignment resided or carried on business shall be the Judge to whom applications under this section shall be made. 59 V. c. 31, s. 6.

31. *Remuneration of assignee.*—The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the county in which the assignment is registered or the Judge thereof, if complained of by the assignee or any of the creditors. R.S.O. 1887, c. 124, s. 11 (1).

32. *Where remuneration not fixed before the final dividend.*—In case the remuneration of the assignee has not been fixed under the preceding sub-section before the final dividend, the assignee may insert in the final dividend sheet, and retain as his remuneration, a sum not exceeding five per cent. of the cash receipts, subject to review by the Court or Judge as hereinbefore provided; but no

application by the assignee to review the said allowance shall be entertained, unless the question of his remuneration, previous to the preparation of the final dividend sheet has been brought before a meeting of creditors competent to decide the same. 59 V. c. 31, s. 8.

33. *Remuneration of inspectors.*—No assignee shall make any payment or allowance to an inspector beyond his actual and necessary travelling expenses in and about his duties as inspector, except under the authority of a resolution of the creditors passed at a meeting regularly called, fixing the amount thereof, and in the notice calling the meeting the fixing of the remuneration of the inspectors shall be specially mentioned as one of the subjects to be brought before the meeting. No inspector shall be allowed more than four dollars a day besides actual travelling expenses, but may be allowed less. 59 V. c. 31, s. 7.

34. *Examination of assignor or employees.*—Where there has been an assignment for the benefit of creditors the assignee, or assignees, upon resolution passed by a majority vote of the creditors present or represented at a meeting of the creditors of the assignor regularly called, or upon the written request or resolution of the majority of the inspectors of the estate, may without an order examine the assignor or any person who is or has been an agent, clerk, servant, officer or employee of any kind of the assignor, upon oath before a master or local master or a special examiner of the Supreme Court of Judicature, or before a local registrar or deputy clerk of the Crown of the High Court or before the Judge of the County Court of the county within which such assignor resides, or before any official referee, or may by the order of the Court or a Judge examine the assignor on oath before any other person to be specially named in such order, touching the estate and effects of the assignor, and as to the property and means he had when the earliest of the debts or liabilities of the assignor existing at the date of the assignment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability and as to any and what debts are owing to him. 58 V. c. 23, s. 6; 59 V. c. 31, s. 9.

35. *Procedure upon examination of an assignor.*—The rules and procedure from time to time in force in the High Court of Justice for the examination of judgment debtors shall, as far as may be, apply to an examination under this Act of an assignor in all respects as if the assignor were a judgment debtor. 58 V. c. 23, s. 11.

36. *When assignor does not attend or refuses to answer questions.*—In case such assignor does not attend as required by the said appointment, or appointment and order, as the case may be, and does not allege a sufficient excuse for not attending, or if attending, refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such assignor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Court or Judge may order the assignor to be committed to the common jail of the county in which he resides, for any term not exceeding twelve months. 58 V. c. 23, s. 10.

37.—(1) *Service of appointment.*—Any person liable to be examined under section 34 may be served with an appointment signed

by the Judge or officer, or a copy thereof, and where the examinatlon is to take place under an order, also with a copy of the order; such service to be made at least 48 hours before the tlme appointed for the examination; and the person to be examined is to be pald the same fees as a witness. 58 V. c. 23, s. 8.

(2) *Conduct of examination.*—The examination shall be conducted in the same manner as in the case of an oral examlnation of an opposite party. 58 V. c. 23, s. 9.

38. *Compelling attendance and production of books.*—Any person liable to be examined under section 34 may be compelled to attend and testify and to produce books and documents, in the same manner and subject to the same rules of examination and the same consequences of negiecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness ln an actlon in the High Court of Justlce. 58 V. c. 23, s. 7.

39.—(1) *Calling upon persons having information as to assignor's affairs to give evidence and produce documents, etc.*—In case any person has or is believed or suspected to have in his possession or power any book, document or paper of any klnd relating in whole or ln part to the debtor, his deallngs or property, such person may, upon resolution passed by a majorlty vote of the creditors present or represented at a regularly called meeting of the creditors of the asslgnor exclusive of such person (if he ls a creditor) or upon the written request or resolutlon of the majority of the inspectors of the estate, be required by the assignee to produce such statement or statements for the lnformation of such asslgnee.

(2) In case such person fails to produce the said book, document or other paper within four days of hls being served with a copy of the said resolutlon and a request of the assignee in that behalf, or in case the asslgnee or the majorlty of the inspectors is or are not satlsfied that full productlon has been made, the assignee may without an order examine the said person before any of the officers mentioned in sectlon 34 of this Act touching any book, document or other paper which he is supposed to have received.

(3) Any such person may be compelled to attend and testify and to produce upon his examinatlon any book, document or other paper whlch under this sectlon he ls llable to produce ln the same manner and subject to the same ruies of examinatlon and the same consequences of neglectlng to attend or refuslng to dlsclose the matters in respect of whlch he may be examlned as ln the case of a witness ln an actlon in the High Court of Justlce. 59 V. c. 3i, s. 10.

R.S.O. (1897), CHAPTER 170.

34.—(1) *Lien of landlord for rent.*—In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent due durlng the period of one year last previous to, and for three months following, the executlon of such asslgnment and from thence so long as the asslgnee shall retain possession of the premlses leased.

(2) *Right of assignee to retain possession of rented premises.*—Notwithstandlng any provision, stipulation or agreement ln any

lease or agreement contained, in any case of an assignment for the general benefit of creditors, or in case an order is made for the winding-up of an incorporated company, being lessees, the assignee or liquidator shall be at liberty within one month from the execution of such assignment or the making of such winding-up order by notice in writing under his hand given to the lessor to elect to retain the premises occupied by the assignor or company as aforesaid at the time of such assignment or winding-up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit upon the terms of such lease and paying the rent therefor provided by said lease. 58 V. c. 26, s. 3.

R.S.O. (1897), CHAPTER 206.

Trust Company May Be Appointed Assignee.

8. (1)—Where a trust company incorporated under a special Act or under the Ontario Companies Act, or the said chapter 157 of the Revised Statutes of Ontario, 1887, is authorized to execute the office of executor, administrator, trustee, receiver, assignee, guardian of a minor or committee of a lunatic, then in case the Lieutenant-Governor in Council approves of such company being accepted by the High Court as a Trusts Company for the purposes of such Court, the said Court or any Judge thereof, and every other Court or Judge having authority to appoint such an officer, may, with the consent of the company, appoint such company to exercise any of the said offices in respect of any estate, or person, under the authority of such Court or Judge or may grant to such company probate of any will in which such company is named an executor; but no company which has issued, or has authority to issue, debentures shall be approved as aforesaid.

(2) A trust company so approved of may be appointed to be a sole trustee, notwithstanding that, but for this Act, it would be necessary to appoint more than one trustee and may also be appointed trustee jointly with another person.

(3) Such appointment may be made whether the trustee is required under the provisions of any deed, will or document creating a trust, or whether the appointment is under the provisions of The Act respecting Trustees and Executors and the Administration of Estates, or otherwise.

(4) Notwithstanding any rule of practice or any provision of any Act requiring security, it shall not be necessary for the said company to give any security for the due performance of its duty as such executor, administrator, trustee, receiver, assignee, guardian or committee, unless otherwise ordered.

(5) The Lieutenant-Governor in Council may revoke the approval given under this section, and no Court, or Judge, after notice of such revocation, shall appoint any such company to be an administrator, trustee, receiver, assignee, guardian, or committee, unless such company gives the like security for the due performance of its duty as would be required from a private person. 60 V. c. 37, s. 8.

R.S.O. (1897), CHAPTER 129, SECTION 38.

Power To Distribute Assets After Notice To Send In Claim.

Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such or the like notices as in the opinion of the Court in which such trustee, assignee, executor or administrator is sought to be charged would have been given by the High Court in an action for the execution of the trusts of such deeds or assignment, or an administration suit (as the case may be), for creditors and others to send into such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate (as the case may be), the trustee, assignee, executor or adminstrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate or the assets of the testator or intestate (as the case may be), or any part thereof amongst the parties entitled thereto, having regard to the claims of which the trustee, assignee, executor or administrator has then notice, and shall not be liable for the proceeds of the trust, estate, or assets (as the case may be), or any part thereof, so distributed to any person of whose claim the trustee, assignee, executor or administrator had not notice at the time of the distribution thereof or a part thereof (as the case may be), but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets (as the case may be), or any part thereof, into the hands of the person or persons who may have received the same respectively. R.S.O. 1887, c. 110, s. 36.

R.S.O. (1897), CHAPTER 156.

Priority of Claims for Wages.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act shall apply to wages or salary whether the employment in respect of which the same shall be payable be, by the day, by the week, by the job or piece or otherwise. R.S.O. 1887, c. 127, s. 4.

2. Whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of the making of such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims. R.S.O. 1887, c. 127, s. 1.

3. In distributing the assets of a company under the provisions of The Joint Stock Companies Winding-up Act the liquidator shall

pay in priority to the claims of the ordinary or general creditors of the company the wages or salary of all persons in the employment of the company at the time of the making of the winding-up order, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors of the company for the residue, if any, of their claims. R.S.O. 1887, c. 127, s. 2.

4. All persons who are at the time of the seizure by the sheriff, or who within one month prior thereto have been in the employment of the execution debtor, and who shall become entitled to share in the distribution of money levied out of the property of a debtor within the meaning of The Creditors' Relief Act, shall be entitled to be paid out of such money the wages or salary due to them by the execution debtor not exceeding three months' wages or salary, in priority to the claims of the other creditors of the execution debtor, and shall be entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims. R.S.O. 1887, c. 127, s. 3; 55 V. c. 27, s. 1.

5. All persons in the employment of an absconding debtor at the time of a seizure by the sheriff under The Act respecting Absconding Debtors or within one month prior thereto, shall be entitled to be paid out of any moneys realized out of the property of such debtor, by such sheriff the wages or salary due to them by the absconding debtor not exceeding three months' wages or salary in priority to the claims of the other creditors of the absconding debtor and shall be entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims. 55 V. c. 27, s. 2.

6. In the administration of the estate of any person dying on or after the 13th day of April, 1897, any person in the employment of the deceased at the time of his death or within one month prior thereto, who is entitled to share in the distribution of the estate shall be entitled to his salary or wages not exceeding three months thereof in priority to the claims of the ordinary or general creditors of the deceased, and such person shall be entitled to rank as an ordinary or general creditor of such deceased person for the residue, if any, of his claim. 60 V. c. 23, ss. 1, 2.

7.—(1) No debt due or accruing to a mechanic, workman, labourer, servant, clerk or employee, for or in respect of his wages or salary, shall be liable to seizure or attachment, unless such debt exceeds the sum of $25, and then only to the extent of such excess.

(2) Nothing in the preceding sub-section contained shall affect or impair the right or remedies of any creditor whose debt has been contracted before the first day of October, 1874. R.S.O. 1887, c. 64, s. 8.

8. This Act is not intended to apply to an assignment made under the provisions of any Act of the Parliament of Canada relating to or respecting bankruptcy or insolvency. R.S.O. 1887, c. 127, s. 5.

(As to wages payable to employees of contractors for public works, see Cap 155.)

AN ORDINANCE RESPECTING PREFERENTIAL ASSIGNMENTS.

CONSOLIDATED ORDINANCES (1898), N.W.T. CHAPTER 42.

The Lieutenant-Governor, by and with the advice and consent of the Legislative Assembly of the Territories, enacts as follows:—

1. Every gift, conveyance, assignment, or transfer, delivery over or payment of goods, chattels or effects, or of bonds, bills, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, made by any person at any 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 or 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. R.O. c. 49, s. 1.

2. Every such gift, conveyance, assignment, transfer, delivery over or payment whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying or prejudicing creditors or giving one or more of them a preference shall as against the other creditors of such debtor be utterly void. No. 38 of 1897, s. 21.

3. Nothing in this Ordinance shall apply to any deed of assignment made and executed by a debtor for the purpose of paying and satisfying ratably and proportionately, and without preference or priority, all the creditors of such debtor, their just debts or any *bona fide* sale of goods or payment made in the ordinary course of trade or calling to innocent purchasers or parties. R.O. c. 49, s. 2.

AN ORDINANCE RESPECTING ASSIGNMENTS FOR THE GENERAL BENEFIT OF CREDITORS.

N.W.T. (1900), CHAPTER 11.

[*Assented to May 4, 1900.*]

The Lieutenant-Governor, by and with the advice and consent of the Legislative Assembly of the Territories, enacts as follows:—

1. The assignment for the general benefit of creditors shall be valid or effectual as a transfer, assignment or conveyance of the property therein mentioned and described unless such assignment is made to some person or persons residing in the Judicial District within which the assignor resides or carries on business.

PROVISIONS OF QUEBEC CODE OF CIVIL PROCEDURE RESPECTING INSOLVENCY.

853. *Who can make an abandonment of property and who can demand it.*—The following persons may make a judicial abandonment of their property for the benefit of their creditors.

1. A debtor who has been arrested upon capias ad respondendum as provided in the chapter thereon;

2. A trader who has ceased his payments and upon whom a demand of abandonment has been made by any creditor whose claim is unsecured for a sum of two hundred dollars or upwards. C.P.C. 763, 763a amended; R.S. 5952, 5953 (C.P. 15, 8, 926).

854. *The demand of abandonment and its formalities.*—The demand required by paragraph 2 of the preceding article must be signed by the creditor or by his agent specially authorized in that behalf; and in the case of a corporation, by its president, general manager, or local agent for the district where the abandonment should be made or by the specially authorized agent of such corporation.

Any demand made by virtue of a special power of attorney must mention the fact. New.

855. The service of the demand on a person in the Province is subject to the same rules as ordinary summons. New.

856. The demand must be filed at the office of the Court, together with a claim under oath accompaniel by vouchers, and the special power of attorney, if any, under which the demand has been made. C.P.C. 763a, in part, amendment; R.S. 5953; 55-56 V., c. 43, s. 1.

857. *Contestation of the demand of abandonment.*—The demand may be contested by petition which must be filed within two days after the service of the demand and be served upon the demanding party as soon as possible.

The contesting party may within the same delay file a motion to stay the proceedings until a power of attorney or security for costs is furnished by the party who made the demand, whenever the latter is not resident in the Province. New (C.P. 15, 8, 177, 2 & 7).

858. *Declaration of abandonment statement and accompanying fomalities.*—The abandonment consists of the filing of the declaration and of the deposit of the statement as hereinafter provided. New C.P.C. 764 in part; R.S. 5944.

859. If the debtor does not contest the demand, he must within two days after it has been served upon him file at the place where by law the abandonment must be made, a declaration that he consents to abandon all his property to his creditors; and he must deposit his statement within four days from such service.

If there is a contestation or a morion for a power of attorney or for security for costs the delays are computed from the judgment thereon.

The Judge may extend the delays for filing the declaration or for depositing the statement. New, in part, C.P.C. 763a, 55-56 V., c. 43, s. 1 (C.P. 895, s. 3; 931, s. 2).

860. If one or more of the members of a partnership is dead or absent from the Province, the declaration and statement may be signed by the surviving partners or by the resident partners, but the abandonment does not then affect the private property of the dead or absent partner. New.

861. The statement must be sworn to by the debtor and shew:

1. All the movable and immovable property liable to seizure on his possession.

2. The names and addresses of his creditors, the amount of their respective claims, and the nature of each claim, whether private hypothecary or otherwise.

Unless a declaration has been made by the debtor in conformity with article 859, the statement must be accompanied with a declaration by the debtor that he consents to abandon all his property to his creditors. C.P.C. 764 amended in part; R.S. 5954; 55-56 V., c. 23, s. 2 (C.P. 598, 599).

862. The declaration and the statement are filed in the office of the Superior Court for the district where the debtor has his principal place of business, and in default of such place, where he is domiciled. C.P.C. 764, in part; R.S. 5954 (C.P. 850, 851, 928, 929).

863. *Effects of the abandonment of property.*—The abandonment of property deprives the debtor of the enjoyment of such of his property as is liable to seizure as well as of the possession of his books of account and titles of debt; and gives his creditors the right to have such property sold and realized for the payment of their respective claims. C.P.C. 778; R.S. 5904.

After the abandonment any proceeding by way of seizure, attachment for rent or seizure in execution against the movable property of the debtor is suspended and the guardian of the curator has a right to take possession of the goods so seized upon serving by a bailiff a notice of his appointment upon the seizing creditor or upon his attorney, or upon the bailiff intrusted with the writ.

The costs upon such seizure incurred after the notice or in the absence of such notice, incurred by a creditor after he had knowledge of the abandonment, either personally, or by his attorney, or by the bailiff, and in all cases the costs of seizure incurred eight days after the notice given by the curator, cannot be collocated upon the property of the debtor the proceeds of which are distributed in consequence of the abandonment.

The Judge may, however, permit the continuance of proceedings already commenced upon such terms as are deemed proper. New in part; C.P.C. 769; R.S. 5952; C.P. 890, 891. The abandonment of his property discharges the debtor from his debts to the extent only of the amount which his creditors have been paid out of the proceeds of the sale of such property. C.P.C. 779.

864. Immediately after the filing of the declaration that the debtor consents to abandon whether it is accompanied by the statement or not, the prothonotary appoints a provisional guardian whom he, as far as possible, selects from the most interested creditors who,

either personally or by a person whom he delegates for that purpose, takes immediate possession of all the property liable to seizure and of the books of account and titles of debt of the debtor.

The guardian may summarily dispose of any perishable goods and may make conservatory measures, under the direction of the Judge, or, in the absence of the latter, of the prothonotary. C.P.C. 768, in part amended; R.S. 5956; 55-56 V., c. 43, s. 4 (C.P. 854—C.C. 1825 *et seq.*).

865. Within five days after the filing of the statement the provisional guardian must give notice of the abandonment.

1. By inserting an advertisement to that effect in the Quebec Official Gazette;

2. By a registered letter posted to the address of each of the creditors, setting forth the day of the filing of the statement, and the amount and the nature of each claim.

In default of such notices being given by the provisional guardian within the prescribed delay, the debtor or any creditor may give them. C.P.C. 765 amended; R.S. 5955.

866. For the purpose of advising as to the appointment of a curator and inspectors, a meeting of the creditors is called before the Judge by a registered notice posted to the address of each of them, and also inserted in a newspaper published in the district if there be one in the district.

Such meeting must be held between the fifth and the fifteenth day after the publication of the notice calling it. C.P.C. 768, in part amended; R.S. 5956; 55-56 V., c. 43, s. 4.

867. The Judge must appoint as curator and inspectors the persons chosen by the majority in number and in value of the creditors present or represented at the meeting who have filed sworn claims.

If the majority in number does not agree with the majority in value, the Judge decides between them as he thinks proper. C.P.C. 768, in part; R.S. 3056; 55-56 V., c. 43, s. 4 (C.P. 15, s. 8; C.C. 347, 347a).

868. *Rights of the creditors when a capias cannot be executed.*—The Judge may also appoint a guardian and a curator in any of the following cases:—

1. When a capias cannot be executed by reason of the absence of the defendant, or because he cannot be found.

2. When the debtor is a trader who has ceased his payments and has left the Province or no longer resides therein.

3. When the demand has been served upon a trader of the age of seventy years or upwards or upon a woman who is a public trader and has not been complied with. C.P.C. 780 in part amended, 763a; R.S. 5965; 55-56 V. c. 43, s. 1 (C.P. 15, s. 8, 890, 895, 896, 931).

869. Such appointment is made on the petition of the plaintiff or of a creditor whose claim is unsecured for a sum of two hundred dollars or upwards.

The powers and obligations of the provisional guardian and of the curator so appointed are, in so far as may be, the same as in cases of abandonment.

The Judge may prescribe the observance of such formalities and the filing of such public notices as he deems necessary. New in part; C.P.C. 780 in part; R.S. 5965.

870. The curator takes possession of all the property mentioned in the statement, as well as of the debtor's book of account and titles of debt and administers the property until it is sold or realized in the matter hereinafter mentioned.

He has, in like manner, a right to receive, collect and recover any other property belonging to the debtor which the latter has failed to include in his statement except such as is by law exempt from seizure. C.P.C. 771, 772, in part amended; R.S. 5960; 52 V., c. 51, s. 1.

871. After the abandonment, any proceeding by way of seizure, attachment for rent or seizure in execution against the movable property of the debtor is suspended; and the guardian or the curator has a right to take possession of the goods so seized, upon serving, by a bailiff, a notice of his appointment upon the seizing creditor, or upon his attorney, or upon the bailiff intrusted with the writ.

The costs upon such seizure, incurred after the notice or, in the absence of such notice, incurred by a creditor after he had knowledge of the abandonment, either personally, or by his attorney, or by the bailiff, and in all cases the costs of seizure incurred eight days after the notice given by the curator, cannot be collocated upon the property of the debtor, the proceeds of which are distributed in consequence of the abandonment.

The Judge may, however, permit the continuance of proceedings already commenced, upon such terms as are deemed proper.

872. The curator must make his appointment known by an advertisement in the Quebec Official Gazette and by a registered notice posted to the address of each creditor.

In such notice, the curator calls upon the creditors to file their sworn claims with him within a delay of thirty days. C.P.C. 770, amended; R.S. 5958.

873. If subsequently to the abandonment, and before the curator has rendered his final account the debtor acquires any additional property he may be required by a new demand to abandon it also.

Immediately upon the abandonment being made the curator takes possession of such property, and proceeds to the sale and distribution of the moneys as in ordinary cases; but is bound to reimburse the expenses incurred by any creditor through whose diligence the property is rendered available.

Such demand may be made by the curator with the authorization of the inspectors, or by any creditor competent to demand an abandonment.

874. The curator appointed may be required to give security, the amount whereof is fixed by the Judge.

The security may be given in favour of the creditors of the debtor generally without mentioning their names.

The Judge may, whenever it becomes necessary, appoint a curator *ad hoc* to enforce any such bond against the parties liable. New in part, C.P.C. 770a in part; R.S. 5959.

875. The curator is subject to the summary jurisdiction of the Judge. C.P.C. 770a in part; R.S. 5959.

876. Any property not belonging to the debtor, which is in the curator's possession by virtue of the abandonment, may be recovered by the person thereto entitled upon a petition to the Judge. New.

877. The curator may with the leave of the Judge upon the advice of the creditors or inspectors, exercise all the rights of action of the debtor and all the actions possessed by the mass of the creditors. C.P.C. 772 in part amended; R.S. 5960; C.P. 890.

878. The curator may sell the movable and immovable property of the debtor in the manner indicated by the Judge upon the advice of the parties interested or of the inspectors. C.P.C. 772 amended in part; R.S. 5960 (C.P. 830; C.C. 1565 as modified by 53 V., c. 16).

879. Upon the application of the curator authorized by the inspectors or upon the application of an hypothecary creditor, after notice to the debtor, the Judge may authorize the curator to sell the immovables of the latter in such manner and after such notices as the Judge may please to order; he may also authorize or command the curator to issue his warrant to the sheriff competent to act requiring the latter to seize and sell such immovables. The sheriff executed such warrant without making any service upon the debtor but by otherwise observing the same rules as in the case if an execution against immovables; and all subsequent proceedings are bad in the Superior Court.

The moneys realized from the sale made by the sheriff remain in his hands to be paid by him to the privileged and hypothecary creditors in accordance with the report of distribution which shall be made by the prothonotary to the Superior Court in the usual way, and the surplus shall be remitted to the curator upon an order of the Judge for its distribution among the chirographory creditors by means of a dividend sheet prepared in accordance with the following article. 61 V., c. 47, s. 7.

880. The moneys realized by the curator or by the sheriff from the property of the debtor must be distributed by the curator among the creditors by means of dividend sheets prepared after the expiration of the delays to file creditors' claims.

Notice of their preparation must be given by an advertisement in the Quebec Official Gazette.

A copy of the dividend sheets with a notice of the date at which they are payable, must also be posted by registered letter to the addresses of each of the creditors who have filed their claims, or whose names appear in the statement.

The dividend sheets are payable fifteen days after the observance of these formalities. C.P.C. 772a in part amended; R.S. 5961; 53 V. c. 60, s. 1; 54 V. c. 41, s. 2 (C.P. 872).

881. The claims or dividends may be contested by any party interested or by the curator at the expense of the estate, if he is so instructed by the inspectors.

The contestation for such purpose is filed with the curator who is bound to transmit it immediately to the prothonotary of the Superior Court, for the district in which the proceedings upon the abandonment are then depositied, or for such other district as the parties interested in the contestation may agree upon; and the contestation is proceeded with and decided summarily by the Judge.

The Judge may allow the payment in whole or in part of any claims or dividends which are not contested upon being satisfied that

a sufficient sum is retained to meet the contestation. New in part; C.P.C. 772a in part amended; R.S. 5961; 53 V. c. 1; 54 V. c. 41, s. 2 (C.P. 15, s. 10).

882. And creditor, at any time after the filing of the statement or the curator with the authorization of the inspectors, may summon the debtor to appear before the Judge or the prothonotary, and examine him on oath concerning the statement and the condition of his affairs.

883. Upon application by any creditor at any time after the filing of the statement or by the curator with the authorization of the inspectors, the Judge may order the production of any book or document relating to the matters mentioned in the preceding article, and the examination of the consort of the debtor and of any other persons whom he deems capable of furnishing information in regard to such matters.

884. The rules relating to the summoning and examination of witnesses and the taking of evidence govern cases provided for in the two preceding articles, in so far as they apply.

Any person summoned who refuses to appear or to answer or to produce any book or document may be condemned by the Judge to imprisonment for a term not exceeding one year. If any dispute arises during the examination, the parties are sent before the Judge to have it decided.

885. *Contestation of the statement.*—The curator authorized by the inspectors, or any creditor may contest the statement by reason.

1. Of the frauduient omission to mention property of the value of one hundred dollars.

2. Of frauduient misrepresentations therein with respect to the number of the creditors, or the nature or amount of their claims.

3. Of secretion by the debtor, within the year immediately preceding the filing of the statement or since of any portion of his property with intent to defraud his creditors. C.P.C. 723 amended; R.S. 5962; 55-56 V. c. 43, s. 6 (C.P. 15, s. 8).

886. The contestation of the statement must be made within four months from the day on which the advertisement of the curator's appointment appears in the Quebec Official Gazette.

887. The contesting party is also bound, within the same delay to prove his allegations by all legal means. The Judge may, however, prolong the delay for making such proof, but not beyond two months.

The Judge may, when satisfied that the delay is due to the fault of the debtor, allow, from time to time, a further delay of two months. New in part, C.P.C. 774, amended.

888. If the contesting party establishes any one of the offences mentioned in article 885, the Judge may condemn the debtor to be imprisoned for a term not exceeding one year.

The rules contained in articles 838, 839, 840, 841 and 842 apply, in so far as may be to proceedings in execution of the condemnation. C.P.C. 776 in part amended; R.S. 5963.

889. If the statement is not contested within the required delay, or if the contestation is not proved within such delay the Judge may order the discharge of the debtor, and the latter is exempt from arrest or imprisonment by reason of any cause of action which

existed before the making of such statement, without prejudice to cases where he has been already arrested under a capias, or is imprisoned for any debt of the description mentioned in articles 833 and 834; and in case of such imprisonment or arrest, he may obtain his liberation from the Judge upon petition and sufficient proof. C.P.C. 777 amended; C.C. 2275.

890. Judgments and orders rendered in virtue of articles 866, 867, 868, 871, 874, 877, 879, 882 and 883 are not subject to review or to appeal.

891. The abandonment of his property discharges the debtor from his debts to the extent only of the amount which his creditors have been paid out of the proceeds of the sale of such property.

892. The curator must keep a register containing the names and description of the debtor, the date of the abandonment, the amount of the proceeds of the property, the amount of each claim, the amount paid to each creditor, the number of dividends, and the amount of his fees and disbursements.

The register may be consulted by any creditor during reasonable hours at the curator's place of business.

Within two months after the date when the last dividend sheet is payable the curator must deposit the register in the office of the Court to which it appertains.

The curator must also within the same delay, unless the Judge otherwise orders under penalty of all costs and damages, prepare a certificate of all his proceedings and file it in the office of the Superior Court with all papers and documents relating to his management; and the complete record thus returned forms part of the records of such Court. New.

893. *Capias and respondendum.*—In the cases provided for by the following chapters a plaintiff may have the person or the property of his debtor, or the object in dispute, placed in judicial custody, or may otherwise obtain provisional relief, subject to a right of action by the latter to recover damages upon establishing a want of reasonable and probable cause in resorting to any such extraordinary remedies. C.P.C. 796, amended (C.P. 15, s. 8).

Section I.

894. *Issue of the capias.*—The Superior Court only has jurisdiction in matters of capias. C.P.C. 808.

895. The plaintiff may obtain a writ of summons and arrest against the defendant whenever a personal debt amounting to fifty dollars or upwards is due him and such debt has been created or is made payable within the limits of the Provinces of Quebec and Ontario in any case wherein the defendant:

1. Is immediately about to leave the Provinces of Quebec and Ontario with intent to defraud his creditors in general or the plaintiffs in particular and the plaintiff will thereby be deprived of his recourse against the defendant, or

2. In secreting or making away with, has secreted or made away with, or is immediately about to secrete or make away with his property, with intent to defraud his creditors in general or the plaintiff in particular, and the plaintiff will thereby be deprived of his recourse against the defendant, or

3. Is a trader who has ceased his payments, and has refused to make a judicial abandonment of his property for the benefit of his creditors although duly required to do so. C.P.C. 797, in part, 799, in part amended 806; R.S. 5966 (C.P. 859).

806. Except in the cases mentioned in articles 833 and 834, a writ of capias cannot issue:

1. Against priests or ministers of any religious denomination whatever.

2. Against septuagenarians.

3. Against women. C.P.C. 803 amended (C.P. 835, 919, s. 4).

897. The writ of capias may be joined with the writ of summons or may be issued afterwards as an incident in the cause. In the latter case, it must be accompanied with a summons to hear it adjudged that the writ be joined with the principal demand and be declared valid.

The writ may also issue after judgment has been obtained for the recovery of the debt. C.P.C. 802 amended.

898. The writ of capias is obtained upon an affidavit of the plaintiff, his bookkeeper, clerk, or legal attorney setting forth, besides the required personal indebtedness, the existence of any one or more of the grounds for which capias lies.

The affidavit must be drawn up in accordance with the forms contained in schedule R in the appendix to this Code, or any others to the same effect. New in part; C.P.C. 798 in part; R.S. 5966 (C.P. 119).

899. If the demand is founded upon a claim for unliquidated damages the affidavit must also state the nature and amount of the damages sought, and the facts which gave rise to them, and must be submitted to the Judge, without whose order the writ cannot issue.

In granting leave to issue the writ the Judge must fix the amount of the bail upon giving which the defendant may be released. C.P.C. 801 amended (C.P. 904, 910, 513).

900. The affidavit may be made by one person only, or by several persons, each of whom swears to a portion of the necessary facts. C.P.C. 807 in part.

901. Any affidavit founded upon information or belief must state the grounds of such belief and the sources of such information. New.

902. The writ is issued by the prothonotary or by the clerk of the Circuit Court who, in such case, acts as an officer of the Superior Court, and drawn up the writ as though it were issued by the prothonotary. New in part; C.P.C. 797 in part; 810 in part, 811 in part.

903. Before issuing the writ, the officer to whom the application is made must be satisfied that the allegations of the affidavit are sufficient. New R.S.L.C. c. 87, s. 1.

904. The writ is signed by the issuing officer; it must bear an indorsement stating the names of the person who made the affidavit, the amount for which the capias issued, and in the case of article 899 the amount of the bail fixed by the Judge. C.P.C. 807 in part, 803 amended.

905. The writ is addressed in the manner prescribed by artiele 601 C.P.C. 809, 810 amended; R.S. 5967 (C.P. 116).

906. *Execution of the capias.*—If the writ of capias is addressed to the sheriff he is bound to execute it or cause it to be executed by his officers. C.P.C. 817 (C.P. 125, 126, 868).

907. If the writ of capias is addressed to a bailiff he arrests the defendant and delivers him over, together with the writ, to the sheriff, who thereupon becomes responsible for the defendant.

908. The sheriff is bound to keep the defendant in the common gaol of the district until the latter gives security or is released from confinement.

909. It is sufficient to leave a copy of the declaration either with the defendant or at the office of the Court within three days after the service of the writ.

Within the same delay a copy of the affidavit must be served upon the defendant or left at the office of the Court. New in part; C.P.C. 804 (C.P. 939, 942, 948, 954).

910. *Provisional release under bail.*—Before the last day of the delay allowed for appearance a defendant arrested upon capias may obtain his provisional release from confinement by giving good and sufficient sureties to the sheriff, to the satisfaction of the latter, that he will pay the amount of the judgment that may be rendered upon the demand in principal interests and costs, or in the case of artiele 889, the amount of the judgment to the extent of the sum fixed by the Judge should he fail either to give bail pursuant to artiele 913, within ten days after the day upon whicn he must appear or to surrender himself within sueh delay into the eustody of the sheriff.

The sureties offered must, if the plaintiff or sheriff so requires, justify their sufficiency on oath, but need not justify on real estate. New in part; C.P.C. 828 amended (C.C. 1938, 1939, 1940, 1962, *et seq.*).

911. The sheriff is in sueh case responsible only for the sufficiency of the sureties at the time when the bail was given. C.P.C. 829.

912. He may free himself from any further liability by offering an assignment of the bail bond taken by him.

This assignment may be effected by simply endorsing his name on the bail bond. C.P.C. 830 amended.

913. The defendant may obtain his release from confinement upon giving good and sufficient sureties to the satisfaction of the Judge or prothonotary, that he will make an abandonment of his property for the benefit of his creditors within thirty days after the rendering of judgment maintaining the capias, and also that he will surrender himself into the custody of the sheriff when required to do so by an order of the Judge, within thirty days after service of such order upon him or his sureties, and that in default of such abandonment and surrender, or of either, sueh sureties will pay to the plaintiff the amount of the judgment to the extent of the sum fixed by the Judge. C.P.C. 776, s. 2; 825, in part amended (C.P. 559 *et seq.*, 926 C.C. 1938 *et seq.*, 1962 *et seq.*).

914. The release may be obtained in the manner prescribed by the preceding article at any time before judgment. C.P.C. 825 in part.

915. Such bail is offered after one day's notice containing a description of the sureties proposed, served upon the plaintiff or his attorney. C.P.C. amended.

916. The sureties offered must, if the plaintiff so requires, justify their sufficiency on oath, but need not justify on real estate. C.P.C. 827 (C.P. 561; C.C. 1939).

917. The sureties, or any of them, may themselves arrest the defendant and deliver him to the sheriff; or may obtain without notice from the prothonotary an order commanding the sheriff or a bailiff to make the arrest. The execution of such order is governed by the rules contained in articles 906, 907 and 908 C.P.C. in part amended.

918. When the sureties have themselves arrested the defendant the sheriff is not bound to receive him without a written requisition signed by the sureties or by one of them or by their authorized attorney.

The requisition must contain the title of the Court, the names of the parties to the suit and of the sureites, and must require the sheriff to take the debtor into his custody. It is the duty of the sheriff to give the sureties a certificate of such surrender. C.P.C. 832 amended.

919. Upon a petition presented to a Judge the defendant may have the capias quashed in the following cases:—

1. Whenever he shews that the allegations of the affidavit upon which the capias is founded are insufficient.
2. Whenever he shews that he is exempt from arrest.
3. Whenever the plaintiff fails to establish the truth of the essential allegations of the affidavit. C.P.C. 819 amended (C.P. 15, s. 8, 895, 896).

920. In order to decide upon this incidental proceeding the Judge may order the immediate return of the writ of capias and the proceedings had upon it; but the delays for pleading to the action are computed only from the date on which the return would otherwise have been made. C.P.C. 820 amended.

921. If the contestation is merely as to the sufficiency of the allegations of the affidavit the Judge may dispose of it after hearing the parties. C.P.C. 821 in part.

922. If the contestation is founded upon the falsity of the allegations or upon the defendant's being exempt from arrest, issue must be joined upon the petition of the defendant independently of the contestation upon the principal demand.

The contestation is subject to the same rules and delays as summary matters. C.P.C. 821 in part amended (C.P. 1156 and s).

923. A defendant whose application to be released from confinement is rejected may appeal to the Court of Review or to the Court of Queen's Bench. C.P.C. 822 amended (C.P. 529).

924. If the Court or the Judge quashed the capias, the plaintiff may obtain a suspension of the judgment by declaring immediately that he intends to take the decision to review or to appeal.

In the former case he must serve the inscription and deposit the amount required by article 1196 before the expiry of the next juridical day, after the rendering of judgment, and in the latter case, must serve the inscription within the same delay and give security in the ordinary way.

If the plaintiff is entitled to appeal from the judgment in review he must immediately declare his intention of so doing, file the inscription in appeal before the expiry of the next juridical day after the rendering of judgment in review and give security in the ordinary way.

If the plaintiff fails to comply with these formalities the defendant is released. C.P.C. 823 amended; 54 V. c. 41, s. 3 (C.P. 1209).

925. *Effect of capias.*—Upon the petition by the plaintiff the debtor against whom a capias has been maintained, and who has been released upon bail, may be condemned by the Court to imprisonment for an indeterminate time.

The order decreting the imprisonment may be rendered as soon as judgment has been pronounced maintaining the capias, but it is executory only thirty days after its service.

In other respects it is applied for, contested and executed in the same manner as coercive imprisonment. New; C.P.C. 776 part (C.P. 837 *et seq.*).

926. Saving the responsibility incurred by the sureties whenever the defendant has not made an abandonment of his property within thirty days after judgment maintaining the capias, the debtor may make such abandonment at any time. New part; C.P.C. 766, s. 1; R.S. 5963 (C.P. 853, s. 1, 913).

927. Abandonments conseqnent upon capias are governed by the rules contained in articles 854 to 892 inclusively, except in so far as special provisions are contained in this section. New.

928. The abandonment is made by filing the declaration and the statement in the office of the Superior Court for the district in which the capias issued. C.P.C. 764 in part amended; R.S. 5954 (C.P. 850, 862).

929. After the appointment of the curator, the record of the proceedings upon the abandonment is transmitted to the prothonotary of the Superior Court for the district where the debtor has his place of business, or, in default of such place, where he is domiciled.

Nevertheless if the debtor has no place of business or domicile in the Province the record remains in the office of the Court where the abandonment is made. New in part; C.P.C. 768 in part amended; R.S. 5056 (C.P. 851).

930. The statement may, apart from the cases mentioned in article 885, be contested by reason of any secretion which preceded the capias and was the cause of its being maintained, unless the things secreted are included in the abandonment; and if it is proved that such things are not therein included the debtor is subject to the penalty imposed by article 888. New in part; C.P.C. 773 in part amended (C.P. 852).

931. *Attachment before judgment.*—A creditor may before obtaining judgment procure a writ to attach the goods and effects of his

debtor in case wherein the defendant is personally indebted to the plaintiff in a sum exceeding five dollars.

1. In the case of a *dernier equipeur*.

2. When the defendant (a) is immediately about to leave the Province with intent to defraud his creditors in general or the plaintiff in particular, and the plaintiff will thereby be deprived of his recourse against the defendant; or

(b) Is secreting or making away with, has secreted or made away with or is immediately about to secrete or make away with his property, with intent to defraud his creditors in general or the plaintiff in particular, and the plaintiff will thereby be deprived of his recourse against the defendant; or

(c) Is a trader who hase ceased his payments and has refused to make an abandonment of his property for the benefit of his creditors, although duly required to do so. C.P.C. 834 amended; R.S. 5970 (C.P. 15, s. 8, 612, 895, 940).

932. *Simple attachment.*—The writ of simple attachment is addressed and executed in the manner prescribed by article 601.

It commands the sheriff or bailiff to attach the movable property of the defendant, and to summon the latter to appear and answer the demand and to hear the attachment declared valid. C.P.C. 836 in part, 849 in part amended; R.S. 5971.

933. The writ is obtained upon an affidavit of the plaintiff, his bookkeeper, clerk, or legal attorney, setting forth, in the case of the *dernier equipeur*, the existence of the required indebtedness, and in other cases besides the required indebtedness the existence of any or more of the other grounds for which attachment before judgment lies.

934. The writ is issued by the prothonotary or by the clerk of the Circuit Court, as the case maye be, and is clothed with the formalities of ordinary summons.

It may also be issued for the Superior Court by the clerk of the Circuit Court, who in such case acts as an officer of the Superior Court and draws up the writ as though it were issued by the prothonotary. C.P.C. 838, 839 amended; 840 in part.

935. The seizure of the property of the defendant and the nomination and powers of guardians and depositaries are subject to the rules governing the execution of judgments.

The seizing officer may make the seizure in another district if the debtor has conveyed his property there or has withdrawn there himself. C.P.C. 841, 851 amended.

936. A copy of the writ of attachment must be served upon the defendant as soon as the seizure is completed. C.P.C. 850, in part.

937. If the defendant is absent from the Province or conceals himself so as to prevent the service of the writ of attachment or the minutes of seizure, the Judge may upon a return to that effect, prescribe the method of service. C.P.C. 852 amended; (C.P. 145, 146).

938. A defendant whose effects have been seized may have them restored to him by the seizing officer, within three days from the service of the minutes of seizure;

1. By depositing with the seizing officer the amount indorsed on the writ together with interest and costs or such amounts only if it is for unliquidated damages or,

2. By giving the seizing officer, who is bound to accept them, goods and sufficient sureties who justify under oath to the amount indorsed upon the writ, with interest and costs, or to such amount only if it is for unliquidated damages, that he will satisfy the judgment that may be rendered.

In default of his doing so within the specified delay the effects remain under seizure to satisfy the judgment unless the Judge orders otherwise. C.P.C. 853 amended.

939. The issue of the writ of attachment, its form, execution and contestation, are governed in so far as may be by the provisions of Articles 899, 900, 901, 903, 904, 909, and 919 to 924 inclusively. New C.P.C. 835, 837, 854; (C.P. 52, 640).

ATTACHMENT BY GARNISHMENT.

940. In all the cases where a writ of simple attachment may be granted a creditor may also attach any movable property belonging to his debtor which may be in the hands of third persons and also whatever sums they may owe him. C.P.C. s. 855, amended; (C.P.C. 15, s. 8, 677, 931, 1152).

941. This attachment is effected by means of a writ addressed and executed in the manner provided by Article 601, commanding the garnishees not to dispossess themselves of the movable property belonging to the debtor which is in their possession and of such moneys or other things as they owe him or will have to pay him, until the court has pronounced upon the matter and ordering them to appear on a day and at an hour fixed to declare under oath what property they have in their possession belonging to the defendant and what sums of money or other things they owe him or will have to pay him, and summoning the defendant to appear on the day fixed and answer the demand of the plaintiff and to hear the attachment declared valid.

In seizing salaries and wages, the writ must also state the defendant's place of residence, and the nature and place of his occupation. New in part C.P.C. 856 amended 860; R.S. 5972 (C.P. 678).

942. The writ is clothed with all the formalities required for ordinary summons and is subject to the provisions of Articles 899, 900, 901, 903, 904, 909, 933 and 934, in so far as they can apply. C.P.C. 858, 859.

943. The provisions contained in Articles 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 690, 691, 692, 693, 694, 695, 696, 697 and 698, are also applicable to attachment by garnishment. C.P.C. 860, 862, 863, 864 amended.

944. If the declaration of the garnishee is not contested the Judge in rendering upon the principal demand adjudicates also upon the attachment and the declaration of the garnishee.

945. The contestation of the attachment by the defendant and any appeal from the judgment upon the petition to quash are governed by the rules contained in Articles 919 to 924 inclusively. C.P.C. 865.

ATTACHMENT IN REVENDICATION.

946 Whoever has a right to revendicate movable property may obtain a writ for the purpose of having it attached upon production of an affidavit setting forth his right and describing the property so as to identify it.

This right of attachment in revendication may be exercised by the owner, the pledgee, the depositary, the usufractuary, the institute in substitutions and the substitute. C.P.C. 866. (C.P. 15, s. 8, 112, 119, 876, 1022, 1103, 1152; C.C. 459, 947, 956, 1543, 1998, 1999, 2268).

947. The writ of attachment in revendication orders the seizure of the effects revendicated and that they be placed in the hands of guardians until judgment is rendered upon revendication.

The name of the person upon whose affidavit the writ issues is indorsed upon the writ. C.P.C. 867.

948. The formalities prescribed in Articles 909, 932, 934, 935, and 936, are observed in attachment in revendication in so far as they can apply. C.P.C. 868, amended 872.

949. The defendant may have the effects returned into his possession upon giving good and sufficient sureties that he will produce them when required which he is in such case bound to do the same manner as a judicial sequestrator.

Nevertheless the Judge may, according to circumstances, grant possession of the effects to the plaintiff subject to the same conditions. C.P.C. 869, amended. (C.P. 833, s. 2; C.C. 1823, *et seq.*)

950. Before the effects are delivered to the party applying for them, the other party may require an inventory thereof to be made establishing the condition of the effects, their description and their value, in order to settle the amount of the security to be given, which is done by experts named in the ordinary course of procedure. C.P.C. 870. (C.P. 392, *et seq.*)

951. If neither of the parties applies for the effects seized, they remain in the custody of the guardian appointed; or at the request of either of the parties, the Judge may, if they are of a nature to produce fruits, order them to be placed in the hands of a sequestrator. C.P.C. 871. (C.P. 973, *et seq.*)

CONSERVATORY ATTACHMENT.

955. If there is no other remedy equally convenient, beneficial and effectual, the plaintiff may obtain a conservatory attachment upon producing an affidavit showing:

1. That he is entitled to reclaim the possession of movable property sold by him with a term for the payment of its price;

2. That he is entitled to rank by preference upon the price of movable property and that it is being dealt with in such a manner as to defeat his remedy;

3. That he is entitled by reason of some provision of law, to have movable property placed under judicial custody in order to assure the exercise of his rights over it. New C.P.C. 834, 866, amended; C.C. 1543, 1998, 1999; R.S. 5811, 5837; 34 Vict. c. 39, ss. 1 and 2. (C.P. 15, s. 8).

1998. The unpaid vendor of a thing has two privileged rights:—1. A right to revendicate; 2. A right of preference upon its price. In the case of insolvent traders, these rights must be exercised within thirty days after the delivery. (R.S.Q. art. 5827). 1890, 54 Viet. c. 39, sec. 2, S.Q.

1999. The right to revendicate is subject to four conditions:—1. The sale must not have been made on credit. 2. The thing must still be entire and in the same condition. 3. The thing must not have passed into the hands of a third party, who has paid for it. 4. It must be exercised within eight days after the delivery; saving the provisions concerning insolvent traders contained in the last preceding article.

956. proceedings upon conservatory attachment are subject to the rules governing attachment before judgment in so far as they can apply. New.

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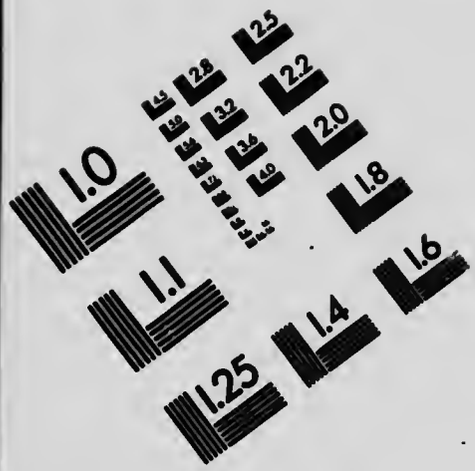

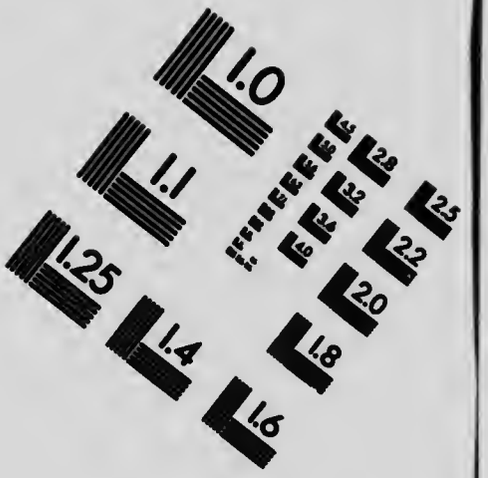

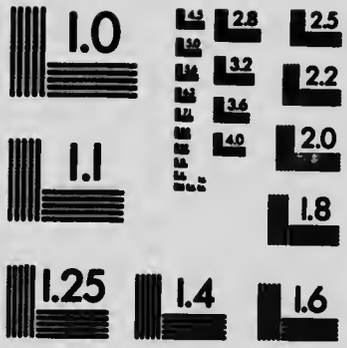

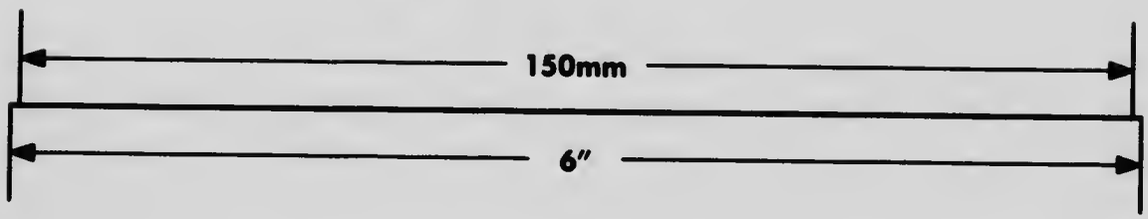

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