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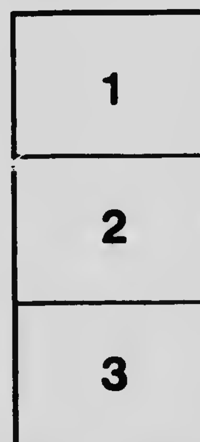

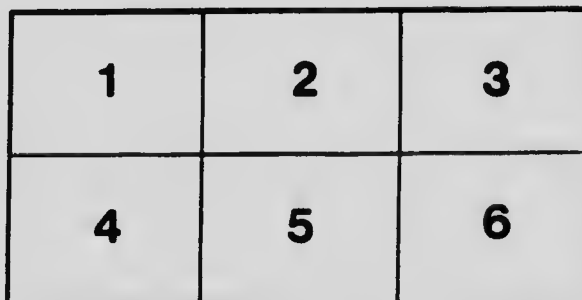

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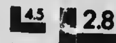

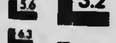
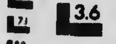

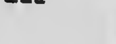

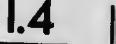

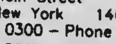
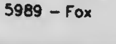

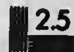
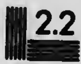
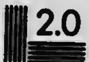

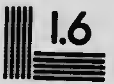

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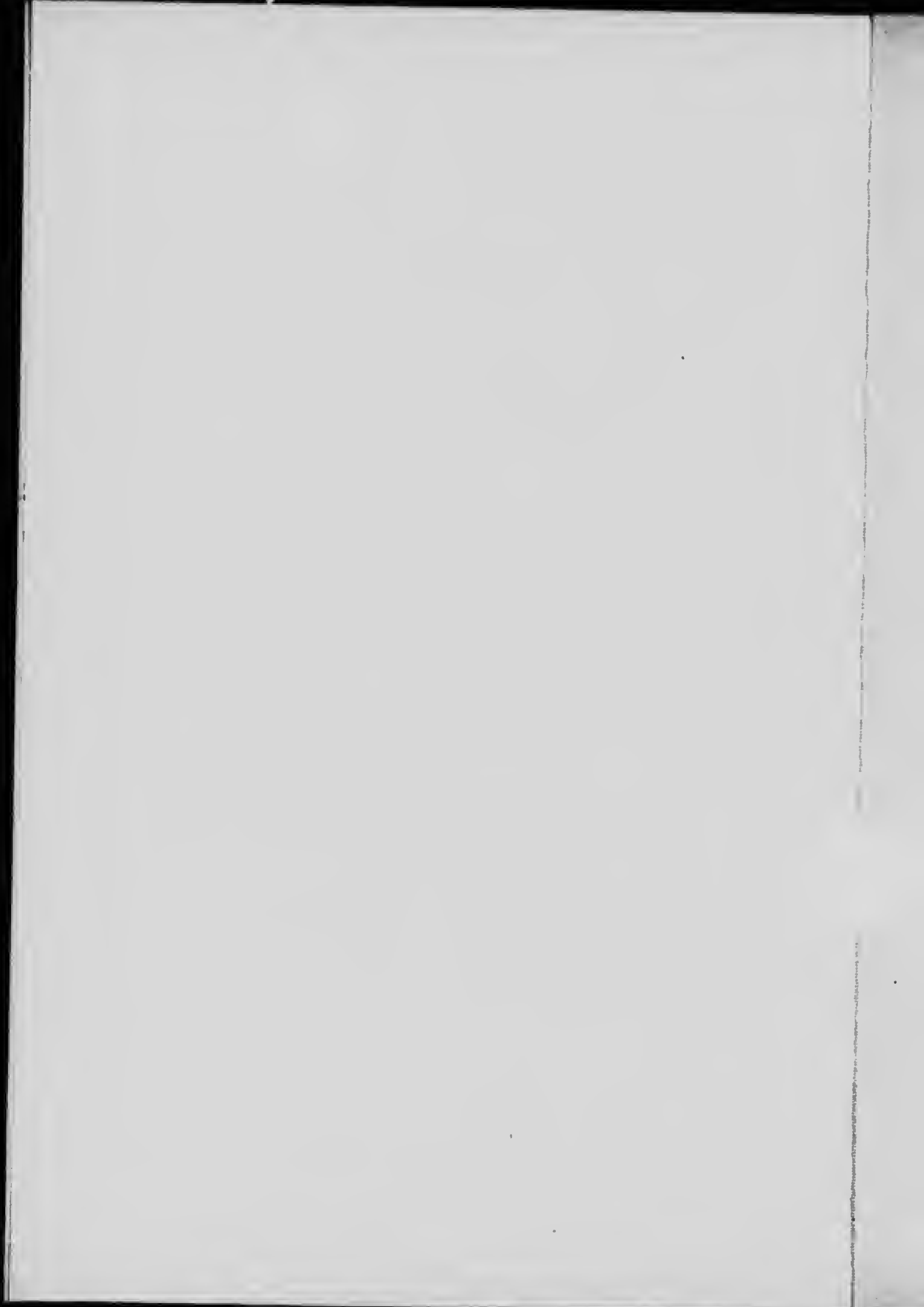

ONTARIO

ASSIGNMENTS ACT

WITH NOTES

BY

R. S. CASSELS, K.C.

FOURTH EDITION

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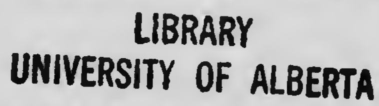

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PREFATORY NOTE

THE publication of the Assignments Act in its revised form affords a convenient opportunity of bringing the notes down to date. A number of cases decided under the analogous Acts of the other Provinces have been referred to, and it is hoped the little book will be found a convenient index to the authorities.

R. S. CASSELS.

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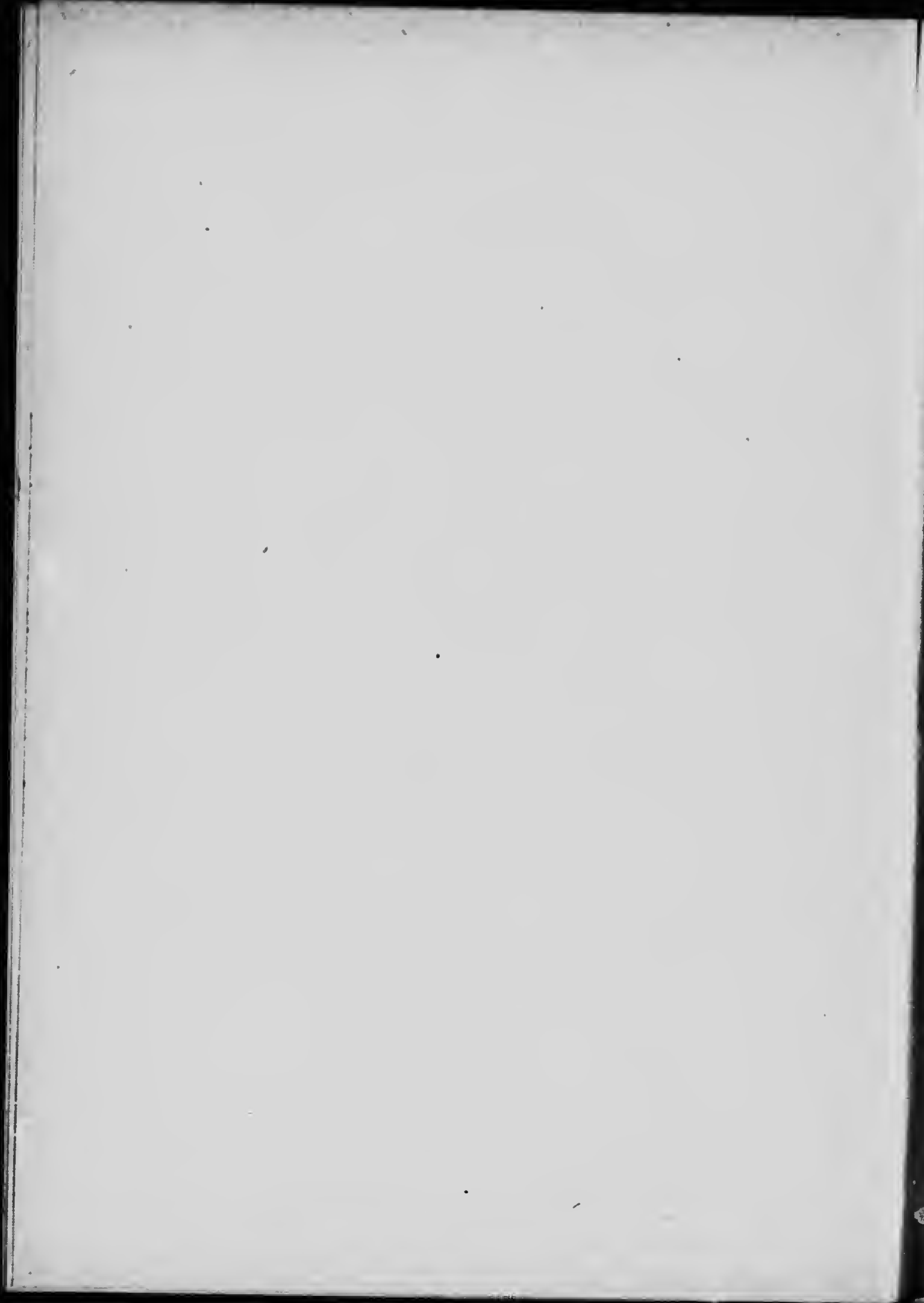


TABLE OF CASES

A.

	PAGE
Aaron Erb, No. 1, In re	136, 178
Aaron Erb, No. 2, In re	136, 178
Abraham v. Abraham	100
Adams v. Bank of Montreal	13, 31
Adams v. Watson Manufacturing Co	87
A. E. Thomas, Limited, v. Standard Bank	22
Alexander v. Wavell	42
Alexandra Oil Co. v. Cook	16
Alice Kerr, Re	164
Allan v. McLean	51
Allan v. McTavish	30, 163
Allen v. Bank of Ottawa	29, 92
Alsager v. Spalding	195
Alston v. Trollope	164
Anchor Elevator Co. v. Heney	88
Anderson v. Glass	43
Andrew v. Stuart	44
Andrews, Re	28, 105
Andrews v. Bank of Toronto	197
Andrews v. Maulson	160
Archer v. Se[illegible]ern	183
Archibald, [illegible]	155
Archibald v. Halden	31
Argles v. McMath	147
Armstrong v. Hemstreet	46
Armstrong v. Johnston	18, 19, 48
Armstrong v. Merchants' Mantle Mfg. Co	72
Ashley v. Brown	11, 31, 139
Assignments and Preferences Act, In re	1
Atkinson v. Casserley	119

PAGE
Atkinson v. Denby 195
Attorney-General of Ontario v. Attorney-General for the Dominion of Canada 1
Attwood v. Pett 145

B.

Bailey v. Bank of Hamilton 6
Baker, Re 72, 132
Baker v. Atkinson 151
Baker v. Dawbarn 76
Baldocchi v. Spada 15
Ball v. Tennant 44, 62, 69, 105
Banks v. Robinson 22
Banner, Ex parte 163
Banque d'Hochelaga v. Beauchamp 198
Barber v. Crathern 89
Barber v. Wills, ... 69
Bardwell v. Lydall 143
Barrett, Re 105
Barrow v. Isaacs & Son 147
Bartels, Shewan & Co. v. Winnipeg Cigar Co 34
Bates v. Cannon 67
Beattie, In re, Beattie v. Beattie 142
Beattie v. Holmes 97
Beattie v. Wenger 13, 53, 54, 92
Beaty, Re 135
Beaty v. Samuel 131
Beavis v. McGuire 36
Beemer v. Oliver 32, 33, 42, 176
Beeton & Co., Limited, In re 55, 56
Belding Lumber Co., In re 68
Bell v. Ottawa Trust and Deposit Co 136
Bell v. Robinson 29, 53
Bell v. Ross 135, 162
Benallack v. Bank of British North America 15
Bence v. Sherman 22

PAGE
Bennett, Ex parte 197
Benning v. Thibaudeau 134
Bentley v. Morrison 19
Bergman v. Armstrong 165
Bertrand v. Canadian Rubber Co. 26
Birkett v. Bissonette 175
Black v. Fountain 36
Blain v. Peaker 71, 110
Blake v. Gale 158
Blake v. Hall 124
Blakely v. Gould 21
Boddam, Ex parte 160
Bolt and Iron Co., In re 123
Boston Deep Sea Fishing Co. v. Ansell 82
Boston Wood Rim Co., In re 107
Boustead v. Shaw 18
Bowerman v. Phillips 6, 163
Box v. Bird's Hill Land Co 133
Boyd v. Glass 52
Boyd v. Mortimer 42
Bracken, In re, Doughty v. Townson 157
Brall, In re 33
Brampton Gas Co., Re 135
Brayley v. Ellis 11, 17
Breese v. Knox 19
Breithaupt v. Marr 6
Briggs v. Sowry 149
Brigham v. Banque Jacques Cartier 118, 123
British Canadian Loan and Investment Co. v. Britnell.. 190
British Gold Fields, In re 140
British North America, Bank of, v. Mallory 158
British North America, Bank of, v. Wood 24
Britten v. Hughes 199
Broadbent v. Thornton 160
Brock v. Cline 81
Brock v. Tew 80, 82, 169, 175, 176

PAGE
Brocklehurst v. Lawe 150
Brooks, Re 102
Brown v. Grove 44, 85
Buchanan v. Smith 85, 198
Buckley v. Taylor 150
Budgett v. Budgett 164
Building and Loan Association v. Palmer 10, 47
Burdett v. Fader 32
Burns v. McKay 10
Burns v. Wilson 51, 99
Butcher v. Stead 45
Butterfield v. Wells 171

C.

Cairney v. Beck 55
Cameron, Re, Mason v. Cameron 157
Cameron v. Cusack 32, 139
Cameron v. Eager 63
Cameron v. Hutchinson 27
Cameron v. Kerr 131
Cameron v. Perrin 33, 34, 53
Cameron v. Stevenson 69
Campbell v. Hally 86, 89, 90
Campbell v. Patterson 50
Campbell v. Roche 46, 50
Canada Woollen Mills, In re 117
Canadian Bank of Commerce v. Davidson 71
Canadian Camera and Optical Co., Re 106
Canadian Pacific R. W. Co. v. Rat Portage Lumber Co. 68
Canadian Port Huron Co. v. Burnett 65, 106
Canning, In re 81
Carey v. Barrett 197, 198
Carl Hirth, In re 25
Carling Brewing and Malting Co. v. Black 155
Carr v. Corfield 30
Carswell v. Langley 140

PAGE
Carter and Kenderdine's Contract, In re 33
Carter v. Lee 166
Carter v. Stone 101
Cartier v. Genser 117
Casserley v. Hughes 28
Central Bank, In re, Lye's Claim 183
Chaffey, In re 73, 132
Chamberlen v. Clark 158
Churcher v. Johnston 54
City Bank v. Smith 46
Clapperton v. Mutchmor 138, 144
Clark v. Hamilton Provident and Loan Society 32
Clarke v. Reid 43, 152
Clarke v. Ritchey 196
Clarkson v. Attorney-General of Canada 110, 142
Clarkson v. Dupré 88
Clarkson v. Fire Insurance Association 166
Clarkson v. McMaster 19, 20, 30, 33, 87
Clarkson v. Ontario Bank 1
Clarkson v. Rothwell 45
Clarkson v. Severs 101
Clarkson v. Sterling 17, 19, 26, 27
Clemmow v. Converse 13
Clinton, Re 107
Codville v. Fraser 14, 16, 18
Codville, Georgeson Co. v. Smart 74
Cole v. Porteous 13, 34
Cole v. Racine 28
Colquhoun v. Seagram 13
Commerce, Bank of, v. Jenkins 200
Commercial Bank of Australia v. Official Assignee of Wilson 133
Conn v. Smith 98
Connolly v. Coon 153
Converse v. Michie 17
Cooling v. Noyes 199

PAGE
Cooper v. Dixon 43
Cotter v. Mason 143
Coursolles v. Fookes 25, 99
Court v. Holland 50, 172
Cox v. Shack 106
Coyne v. Lee 22
Craig v. McKay 14, 86, 106
Crawford v. Magee 33, 92
Crombie v. Young 32
Cross, In re 195
Culhane v. Stuart 141
Curry v. Kirkpatrick 45, 48

D.

Dana v. McLean 14, 15, 25
Darling v. Wilson 101
Dart v. McCullough 171
Darvill v. Terry 50
Dauglish v. Tennent 194
Davidson v. Fraser 46
Davidson v. Ross 13
Davies v. Gillard 12, 31
D'Avignon v. Bomerito 52
Davis' Trust, Re 80
Davis v. Wickson 95
Deacon v. Driffil 135
Deering v. Gibbon 102
Desmarteau v. Dingman 15
Dickinson, Re 82
Diehl v. Wallace 85
Dobson v. Sootheran 147, 148
Doelle, In re 80
Dominion Bank v. Cowan 26
Dominion Linen Mfg. Co. v. Langley 122
Dominion Radiator Co. v. Bull 123, 198
Doner v. Ross 158

PAGE

Douglas v. Hourie 34
Doull v. Kopman 86, 90
Dressler, Ex parte 155
Dueber Watch Co. v. Taggart 123
Duffy v. Duncan 82, 169
Dumbrill, Re 140
Dunn v. Sedziak 57
Dyer v. Evans, In re 100

E.

Eacrett v. Kent ... .149, 150, 151
Eastabrook v. Scott 199
Eastern Trust Co. v. Boston Richardson Mining Co..... 57
Eastman v. Bank of Montreal 131, 134
Eby-Blain, Limited, v. Montreal Packing Co........... 23
Edgett v. Steeves 14
Edison General Electric Co. v. Westminster, etc., Tramway Co. 5
Elgin Loan and Savings Co. v. Orchard 30
Elliott v. Hamilton 104
Ellis v. Ellis .... [illegible]5
Embury v. West .... [illegible]
Empire Sash and Door Co. v. Maranda 16, 26, 34
Erly, Re 149
Eustace, In re 158
Evans and Clarke, In re 88

F.

Fairchild v. Myrum 43
Falls v. Gibb 34
Falls v. Young 34
Farnham, In re 25
Fayne v. Langley 56
Federal Life Assurance Co. v. Stinson 101
Felix Hadley & Co. v. Felix Hadley 22
Ferguson, In re 191

PAGE
Ferguson v. Bryans 19, 24, 97
Field v. Hart 67
Finch v. Gilray 25
Fisher, Ex parte 19, 52
Fisher v. Bradshaw 19
Fisher v. Kowslowski 32, 49, 139
Fleming, Re 183
Fleming v. Ryan 112
Fleury v. Pringle 36
Forrest v. Laycock 36
Foster v. Russell 18
Fowler v. Barnard 140
Fowler v. Perrin 199
Fraser v. McLean 199
Frost and Wood Co. v. Stoddart 73
Frothingham v. Isbister 166
Furnivall v. Hudson 69

G.

Gage v. Douglas 84
Gallard, In re 186
Gallard (No. 2), In re 117
Gamble v. Lee 142
Gardner, Ex parte 144
Gardner v. Brown 70
Gardner v. Kloepfer 43
Garland v. Clarkson 166
Garland, Son & Co. v. O'Reilly 145
Gastonguay v. Savoie 117
Gault Bros. Co. v. Morell 105
Geere v. Mare 196
Gemmill v. Nelligan 70
Gentle v. Faulkner 148
Gibbons v. Darvill 92
Gibbons v. McDonald 12
Gibbons v. Tomlinson 30

PAGE

Gibbons v. Wilson 50, 51
Gibert v. Gonard 142
Gignac v. Iler 13, 21
Gilbey, Ex parte 197
Gillard v. Bollert 87
Gillard v. Milligan 103
Gillespie, Re 74
Gillespie v. Alexander 160
Glanville v. Strachan 134
Glass v. Grant 91
Gonville's Trustee v. Patent Caramel Co.................. 25
Good and Nipisiquit Lumber Co., In re 106
Goodeve v. Manners 44
Gordon, In re 133
Gordon v. Matthews 73, 74
Gordon v. Union Bank 47
Gormley v. Deblois 164
Goulding v. Deeming....................................17, 34, 53
Gower v. Kolchen 19, 34
Graham v. Lang....................................147, 151, 155
Graham v. Toms 172
Grant v. VanNorman 30
Grant v. West....................................139, 153, 164
Gray v. Thompson 176
Greenburg v. Lenz 45
Greig v. Somerville 160
Griffith v. Brown 149, 151
Grundy v. Johnston 114
Guinane, In re 190
Gunn v. Vinegratsky 27, 49, 97
Gurofsky v. Harris 32, 139

H.

Hagar, In re 82
Hague, In re, Traders Bank v. Murray 162
Haight v. Munro 62

PAGE
Hale, Ex parte 150
Hall v. Fortye 43
Hall v. Kissock 50
Hall v. Lannin 75
Hallett & Co., In re 133
Halliday v. Armstrong 167
Halsted v. Bank of Hamilton 87
Halwell v. Township of Wilmot 29, 47, 63
Hamilton, Bank of, v. Anderson 87
Hamilton, Bank of, v. Mervyn 20, 105
Hamilton, Bank of, v. Scott 190
Hamilton, Bank of, v. Tamblyn 24
Hammond v. Bank of Ottawa 87
Hargrave v. Elliot 86
Harper, Ex parte 81, 130
Harper Wilson, In re 73
Harrhy v. Wall 199
Harte and Ontario Express Co., In re 153
Harvey v. McNaughton 47, 95
Harvey v. McPherson 174
Hatton, In re 197
Haverson v. Smith 141
Hawkins, In re 163
Head, In re 75
Healey v. Daniels 88
Heaman v. Seale 6
Heaton v. Flood 19, 87
Hechler v. Forsyth 42
Henderson v. Macdonald 197
Henderson Roller Bearings, Limited, Re 101
Hepburn v. Park 10
Herman v. Wilson 56
Hernaman, Ex parte 198
Hickerson v. Parrington 12
High River Meat Market v. Routledge 24
Hilliard, In re 169

PAGE
Hobbs v. Ontario Loan and Debenture Co.............. 154
Hobbs Hardware Co. v. Kitchen 25
Hogan's Case 107
Holmer v. Viner 199
Honsinger v. Kuntz 27, 34, 98
Hood v. Coleman Planing Mill Co..................... 174
Hope v. Grant 35
Hope v. May 18, 19, 20, 31
Hopkinson v. Lovering 154
Horsey Estate v. Steiger 148
Horsfall v. Boisseau 22
Horton v. Riley 195
Hoskins, In re 149, 150, 151
How v. Kennett 154
Howden v. Haigh 195
Howe v. Reeve 51
Howell, In re 155
Howland v. Grant 200
Hurst, In re 11
Hutchings v. Adams 42
Hutton v. Justin 119
Hyman v. Bourne 44
Hyman v. Cuthbertson 31, 52
Hyman v. Howell 184

I.

Ivey v. Knox 10, 11, 12, 24, 30, 89

J.

Jack v. Greig 31
Jack v. Kearney 49
James O'Malley, In re 80
Jardine v. Wood 164
Jenks v. Doran 105
Jennings v. Hyman 41, 199
Jennings v. Moss 42

PAGE

Jobson v. Palmer 183
Johnson v. Cline 30
Johnson v. Hope 11
Johnston v. Burns 166
Johnston v. Dulmage 84, 85, 184
Johnston v. Henderson 33
Johnston v. Wade 106
Jones, Re 132
Jones v. Kinney 19
Joyner v. Weeks 152

K.

Kalus v. Hergert 52
Keenan v. Richardson 30
Kelcey, In re, Tyson v. Kelcey 18
Kelly, In re 184
Kemp, Ex parte 162
Kennedy, In re, Mason v. Higgins 149
Kennedy v. Macdonnell..........152, 153
Kerr v. Hastings 147, 154
Kerry v. James 17, 29, 35, 53, 105
Keyes v. Kirkpatrick 90
Kibble, Ex parte 163
King v. Duncan 6
King v. Hutton 143
Kitching v. Hicks 22, 34, 85
Klein, In re 56
Kloepfer v. Gardner 43
Knight v. Hunt 194
Knox v. Traver 51
Kuntz Brewery Co. v. Grant 92

L.

Labatt, v. Bixel 6, 22, 95
Lake, In re 29
Lamb, In re 82, 171

PAGE
Lamb v. Young 15
Lane, In re 25
Langley v. Beardsley 49
Langley v. Kahnert 64, 105, 143
Langley v. Meir 152
Langley v. Palter 15, 45
Langley v. Van Allen 89, 108, 195
Lavender v. Langley 56
Lawless v. Crowley 84
Lawson v. McGeoch 13, 17
Lazier v. Armstrong 152
Lazier v. Henderson 149, 154
Lee v. Friedman 57
Leicester v. Rose 194, 196
Lennox, Ex parte 163
Lennox v. Alaska Mercantile Co 87
Lenzberg's Policy, In re 195
Letterstedt v. Broers 81
Levy v. Stogdon 133
Lewis v. Brown 45
Liddell v. Deacon 170
Light v. Hawley 184
Linton v. Imperial Hotel Co 147, 149, 150, 151
London and Westminster Loan and Discount Co. v. London and North-Western R. W. Co 150
London, Bank of, v. Wallace 84
London, City of, v. Citizens Ins. Co 176
London Drapery Stores, In re 64
Long v. Carter 107, 142
Long v. Hancock 11
Lovegrove, Ex parte 184
Lovell v. Beauchamp 69
Lucas, Tanner & Co., In re 192
Lucas v. Tegart 171
Luckhardt, In re 70
Luxton v. Hamilton 79

Mc.

PAGE

McAllister v. Forsyth 22
McCraken, In re 149, 151
McCullough v. Clemow 176
McCullough v. Newlove 176
McDonagh v. Jephson, Re 72
McDonald v. Boice 163
McDonald v. Curran 36, 89
McDonald v. Horan 32, 49
McDonough v. Cook 144
McDougall, In re 160
McEachern v. Gordon 86, 190
McEdwards v. McLean 149
McFarlane v. McDonald 19
McGregor v. Campbell 62, 63
McHenry, In re 197
McIntyre v. Faubert 44
McKenzie v. Fletcher 175
McKewan v. Sanderson 194
McKinnon v. Coffin 34, 44
McLarty, Re 192
McLarty v. Todd 57, 165
McLean v. Garland 41
McMaster v. Clare 45
McPherson v. Copeland 174
McPherson v. Temiskaming Lumber Co 67
McRae, In re 139, 197
McRoberts v. Steinoff 10, 17

M.

Macdonald v. Balfour 74, 84
Macdonald v. Crombie 6
Macdonald v. Georgian Bay Lumber Co 62
Macdonald v. McCall 85, 89, 99
Mackenzie v. Blackburn 176
Mackintosh v. Pogose 45

PAGE
MacTavish v. Rogers 90, 91
Madell v. Thomas 52
Mader v. McKinnon 34
Magann v. Ferguson 139, 149
Magee v. Rankin 147, 154
Magill v. Young 154
Maher v. Roberts 51
Mail Printing Co. v. Clarkson 139, 153, 159
Major v. Mackenzie 84
Maple Leaf Dairy Co., Re 68
Marchant v. Morton Down & Co..... 23
Mardon, In re 82
Martin, In re 82
Martin v. Evans 72
Martin v. Fowler 102
Martin v. McAlpine 5, 95
Martin v. McMullen 130, 131, 134, 143
Martin v. Sampson 92
Mason v. Hamilton 149
Mason v. Macdonald 172
Masuret v. Stewart 96
Matejka, Re 42
Mathers v. Lynch 35
Maulson v. Peck 42
Maulson v. Topping 41
Mcharg v. Lumbers 33, 198
Merchants' Bank v. Clarke 31
Merchants' Bank v. Hancock 98
Merchants' Express Co. v. Morton 95
Meriden Britannia Co. v. Braden.....33, 50, 87, 89
Meriden Silver Co. v. Lee 5, 11
Merrick, In re 176
Metcalfe, In re, Hicks v. May 160
Midgley v. Midgley 164
Miller, Re 145
Miller v. Hamlin 176

PAGE

Miller v. Reid 52, 53, 54
Miller v. Tew 150
Millichamp v. Toronto General Trusts Corporation 160
Milne v. Moore 142
Milner, Ex parte 194, 195
Mimico Sewer Pipe and Brick Manufacturing Co., In re, Pearson's Case 186
Minot Grocery Co. v. Durick 88
Minton, Ex parte 195
Mitchell v. McCauley 148
Molsons Bank v. Cooper 131, 134
Molsons Bank v. Halter 12, 29
Montgomery v. Corbit 18
Montreal, Bank of, v. McTavish 52
Moody v. Canadian Bank of Commerce 172
Moorehouse v. Bostwick 74
Morlock and Cline, Limited, Re 56, 57
Morphy v. Colwell 13, 35
Morris, In re 131
Morris v. Martin 36
Morris v. Morris 20
Morrison v. Watts 33, 116, 118, 119, 176
Morton v. Nihan 31
Munro v. Commercial Building and Investment Society 154
Munro v. Standard Bank 13, 28, 98
Munro v. Waller 148
Music Hall Block, In re, Dumble v. McIntosh 70

N.

Napier, Ex parte 56
National Bank of Australasia v. Morris 28
National Trust Co. v. Trusts and Guarantee Co...20, 23, 106
Neill and Small, In re 132
Nelles v. Maltby 44, 62, 69
Newspaper Proprietary Syndicate, In re 55
New's Trustee v. Hunting 29

PAGE

Newton v. Foley 101
Newton v. Lilly 47
Nisbet v. Hill 102
Nolan v. Donnelly 44, 69
Norman v. Thompson 198
Northern Commercial Co. v. Powell 18, 28
Norton v. Canadian Bank of Commerce 21

O.

O'Brien v. Clarkson 42
Oliver, Ex párte 196
Oliver v. McLaughlin 16, 31, 91
Olson v. Machin 57
Ontario Bank v. Chaplin 73
Ontario Bank v. Lamont 42, 174
Ontario Bank v. Routhier 172
Ontario Copper Lightning Rod v. Hewitt 199
Ontario Forge and Bolt Co., In re 55
O'Reilly v. O'Reilly 145
Orillia Export Lumber Co. v. Burson 81, 171
Osler v. Muter 67
Ottawa, Bank of, v. Newton 135
Ottawa Wine Vaults Co. v. McGuire 16, 27, 30, 36

P.

Pacquette, Re 3, 183
Palmer v. Andrews 154
Palmer v. Mail Printing Co 147
Parker, In re, Morgan v. Hill 144
Parker v. Howe 174
Patching v. Smith 152
Patent Cloth Board Co., Re 132
Pearce, In re 131
Pendlebury v. Walker 196
Perkins, In re, Poyser v. Beyfus 62

PAGE
Perth Flax and Cordage Co., Re 23, 108
Petch v. Belden 170
Phillips, Ex parte 195
Piers, In re 130
Pittsburgh Cobalt Co. and Robbins, Re 142
Poole v. Lefaivre 89
Porterfield v. Hodgins 57
Powell v. Calder 11, 31, 35, 69
Power v. Munro 18, 31
Prittie Trusts, Re 183
Pulsford v. Devenish 155

Q.

Quebec Bank v. Snure 119

R.

Rae v. Macdonald 26
Railton v. Wood 150
Rainey v. Dickson 141
Randall v. Burrows 170
Randall v. Dopp 30
Randolph, In re 72
Randolph v. Randolph 139, 141
Regina v. Henry 37
Regina v. Rawson 120
Regina v. Roche 120
Reinhardt v. Hunter 63, 103
Rennie v. Block 44
Rennie v. Quebec Bank 22, 97
Rex v. Pember 120
Rice v. Rice 31, 145
Rielle v. Reid 25, 32, 52
Ringer v. Cann 154
Risk v. Sleeman 52

PAGE
Ritchie-Hearn Co., Re 55
River Stave Co. v. Sill 11
Roach v. McLachlan 6
Roberts v. Bank of Toronto 106
Robertson v. Holland 95
Robertson v. Thomas 112
Robins v. Clark 18, 29
Robinson v. Cook 12, 141
Robinson v. McCauley 16
Robinson v. McGillivray 48, 172
Robinson v. Mann 144
Robinson v. Wilson 24, 95, 98, 173
Rochon, In re 192
Rodney Casket Co., In re 68
Rogers v. Carroll 19, 51
Rogers and Farewell, In re 173
Ross Brothers v. Pearson 16
Ross, Re 164
Ross v. Dunn 52, 95
Ross v. Elliott 53
Rownson, In re, Field v. White 164
Ruby, In re, Trusts Corporation of Ontario v. Ruby 75
Russell, Re 196
Ryan v. Clarkson 103
Ryan v. Malone 64

S.

Samuel v. Fairgrieve 200
Sandford v. Porter 170, 171
Sanguinetti v. Stuckey's Banking Co 25
Sass, In re 143
Scott v. Griffin 97
Scott v. Swanson 101
Scribner and Wheeler, Re 102
Segsworth v. Anderson 117, 196
Segsworth v. Meriden Silver Plating Co 11

PAGE
Seli v. Smith 35
Selig v. Lion 90
Semi-Ready, Limited, v. Tew 152
S. E. Walker Co., Re 55
Shantz v. Clarkson 117
Sharp v. Jackson 29
Sheard, Ex parte 81, 130
Sheen, Ex parte 53
Shepherd v. Murray 198
Simmons, In re 75
Simpson v. Clafferty, Re 178
Simpson v. Newton 175
Sipprell v. Armstrong 139
Skill v. Lougheed 84
Slater v. Badenach 42
Slater v. Oliver 11
Small v. Henderson 90, 195
Smart v. Dana 44
Smith v. Antipitzky 103
Smith v. Beal 85, 165
Smith v. Commercial Union Ins. Co 58
Smith v. Cuff 195
Smith v. Doyle 91
Smith v. Fair 17
Smith v. Gronow 148
Smith v. Lawrence 24
Smith v. Sugarman 16
Smith v. Wade 148
Smith v. Williamson 84
Snarr v. Badenach 160
Soper v. Littlejohn 148
Soper v. Pulos 102
Spencer v. Slater 41
Spotton v. Gillard 28
Standard Realty Co. v. Nicholson 70
Stecher Lithographic Co. v. Ontario Seed Co 49, 51

PAGE
Stephens v. Boisseau 173
Stephens v. McArthur 12
Stevenson v. Brown 69
Stewart v. Gage 160, 163
Stewart v. Miller 183, 186
Stewart v. Snyder 157
Stoddart v. Wilson 50, 53
Strachan v. Ruttan 186
Stratford Fuel Co., Re 132
Strathy Wire Fence Co., In re.......... 68
Street, Re 135
Struthers v. Henry 131
Stuart v. Thomson 18, 26
Stuart v. Tremain 95
Stubbins, Ex parte 50
Suter v. Merchants' Bank 22
Swansea Bank v. Thomas 155
Sykes v. Soper 86, 102

T.

Tailby v. Official Receiver 22
Tallman v. Smart 87
Temperance Insurance Co. v. Coombe 67
Tennant v. Gallow 96
Tennant v. Macewan 58
Tew v. Routley 123, 147, 153
Tew v. Toronto Savings and Loan Co.......... 151
Thibaudeau v. Garland 172
Thibaudeau v. Paul..........23, 105, 108
Thirkell, Re, Perrin v. Wood 22
Thomas v. Calder 32
Thompson, In re 100
Thompson v. Clarkson 117
Thompson v. Hudson 198
Thompson v. Morrison 45
Thordarson v. Jones 104

PAGE

Thornton v. McKewan 143
Tidey v. Craib 144
Tierney v. Slattery 91
Tillie v. Springer 132, 159
Tillsonburg, Lake Erie and Pacific R. W. Co., In re.... 79
Todd v. Studholme 158
Tooke Bros. v. Brock 2, 19, 28, 84
Toronto, Bank of, v. Hall 72
Totten v. Bowen 11, 145
Townsend, Ex parte 82, 169
Townsend v. Northern Crown Bank 19
Tremeear v. Lawrence 104
Trusts and Guarantee Co. v. Munro 48, 142
Tuck v. Fyson 150
Tucker v. Bank of Ottawa 62
Tudhope v. Northern Bank 15, 18
Turner v. Lucas 6

U.

Union Bank v. Neville 1
Union Bank v. Schecter 51
Unitt and Prott, Re 43, 63, 65
Urquhart v. Aird 88, 91, 92, 97

V.

Vansittart, In re 33
Vars v. Gould 84
Vautin, In re 30
Vere, Ex parte 197
Vine v. Mitchell 199

W.

Wade v. Elliott 20, 27, 29
Wade v. Rochester German Fire Ins. Co 64
Wakefield Rattan Co. v. Hamilton Whip Co 68
Walker, Re 75

PAGE
Warner v. Murray 144
Warnock v. Kloepfer 21, 26
Warren, In re 35
Watson, In re 52
Watson v. Mason 198
W. Blackburn & Co., In re 30
Webb v. Hamilton 32
Webster v. Crickmore 13, 14, 18, 19, 20, 99
Weese v. Banfield 196, 197
Welch v. Ellis 56
Wellbanks v. Heney 22, 24
Wenham, In re, Hunt v. Wenham 164
Western Canada Flour Mills v. Middleboro 143
Western Coal Co., Limited, Re 56
Whidden v. Jackson 165
White v. Elliott 62
White v. Hunt 154
Whiting v. Hovey 68, 112
Whitman v. Union Bank of Halifax 48
Whitney v. Toby 11, 26
William Hamilton Manufacturing Company, Re......23, 108
Williams, In re 82, 107, 141
Wilson, In re 80
Wilson v. Wallani 155
Winslow, In re, Frere v. Winslow 158
Winslow v. Elliott 20
Wm. Hamilton Mfg. Co. v. Hamilton Steel and Iron Co.. 107
Wm. Lamb Mfg. Co., In re............................ 68
Wood v. Barker 196
Wood v. Jagger 108
Wood v. Joselin 100
Wood v. Reesor 32, 107
Woodstock v. Woodstock Automobile Mfg. Co........... 64
Wright v. Hollingshead 168
Wyatt v. Palmer 163
Wyld v. Clarkson 130, 132

Y.

PAGE
Yale v. Tollerton .... 8[illegible]
Young, Re 3, 183
Young v. Smith 150
Young v. Spiers 131, 134, 144
Young v. Ward 163

Z.

Zimmerman v. Sproat 106, 165
Zwicker v. Ross 6

THE REVISED STATUTES OF ONTARIO, 1914

CHAPTER 134.

An Act respecting Assignments and Preferences by Insolvent Persons.

Under the British North America Act the Dominion Parliament has exclusive jurisdiction in respect of the regulation of trade and commerce and in respect of bankruptcy and insolvency: B. N. A. Act, s. 91, clauses 2 and 21; while each Provincial Legislature has exclusive jurisdiction in respect of property and civil rights in the Province: s. 92, clause 13. Soon after the Assignments Act came into force, its validity was much shaken by the decision in Clarkson v. Ontario Bank, 15 A. R. 166, and after some years of doubt it was decided in Union Bank v. Neville, 21 O. R. 152, and In re Assignments and Preferences Act, 20 A. R. 489, that section 9 of R. S. O. (1887) c. 124 (section 14 of the present Act), was invalid. But this decision has been overruled by the judgment of the Judicial Committee in Attorney-General of

Ontario v. Attorney-General for the Dominion of Canada, [1894] A. C. 189, and it has, in effect, been decided that so long as there is no Dominion Insolvency Act in force with which it would conflict, the present Act is valid: Tooke Bros. v. Brock (1907), 3 E. L. R. 270.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as *The Assignments and Preferences Act.* 10 Edw. VII. c. 64, s. 1.

2. In this Act,

"Judge" shall mean a Judge of the County or District Court of the county or district in which the assignment is required to be registered. 10 Edw. VII. c. 64, s. 2.

The place of registration is prescribed by section 17.

The Act of 1897 expressly permitted some applications to be made to a judge of the High Court or to a judge of the County Court or District Court, while the judge to whom some other applications could be made was

not defined, and in practice applications not specially provided for were sometimes made to a judge of the High Court and sometimes to a judge of the County Court or District Court. Now all applications specially authorised by the Act must be made to the judge of the proper county or district. These applications are: removing or appointing an assignee (sec. 11); authorizing a creditor to take proceedings (sec. 12); amending an assignment (sec. 16); compelling publication of notice of assignment and registration of assignment (sec. 19); giving directions with reference to the disposal of the estate (sec. 23); compelling valuation of security (sec. 25); limiting a time for proof of a claim (sec. 26); extending the time within which an action to establish a claim may be brought (sec. 27); allowing the assignor to contest a claim (sec. 28); allowing assets to be removed out of Ontario (sec. 29); distributing moneys and determining claims as if under the Creditors' Relief Act (sec. 34); reviewing the assignee's remuneration (secs. 35, 36); and ordering examinations and committals (secs. 38, 39, 40). In exercising these special statutory powers the judge acts as persona designata and the ordinary rules as to appeals do not apply: Re Pacquette, 11 P. R. 463; Re Young, 14 P. R. 303. But by the Judges' Orders Enforcement Act, R. S. O. 1914, c. 79, a special right of appeal is provided. and the judge is

given the same jurisdiction for enforcing his orders, as to proceedings generally, and as to costs and otherwise, as in matters under his ordinary jurisdiction.

3. Where a Judge is disqualified to act in a matter arising under this Act a Judge of the County or District Court of an adjoining county or district shall have jurisdiction to act in his place. 10 Edw. VII. c. 64, s. 3.

As there are in the case of nearly every county or district in Ontario two or three "adjoining" counties or districts it would no doubt be well in case of the prescribed judge's disqualification, for instance from having acted as counsel or being interested in the estate, to obtain from him a request to one of the other eligible judges to act, or at least to obtain leave from one of those judges before serving notice of an application returnable before him.

NULLITY OF CERTAIN JUDGMENTS AND TRANSFERS.

4. Every confession of judgment, *cognovit actionem* or warrant of attorney to confess judgment given by a 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 with

intent thereby to defeat, hinder, delay or prejudice his creditors wholly or in part, or to give one or more of his creditors a preference over his other creditors, or over any one or more of them, shall be null and void as against the creditors of the person giving the same and shall be ineffectual to support any judgment or execution. 10 Edw. VII. c. 64, s. 4.

"VOLUNTARILY OR BY COLLUSION."—The use of the disjunctive is important. Pressure is sufficient to prevent the transaction from being looked upon as a voluntary one, but even with the most direct pressure the transaction, if collusive, cannot be upheld: Edison General Electric Co. v. Westminster, etc., Tramway Co., [1897] A. C. 193; Martin v. McAlpine, 8 A. R. 675; Meriden Silver Co. v. Lee, 2 O. R. 451; and see the notes to the next section.

"BY COLLUSION."—This means "by agreement:" Edison General Electric Co. v. Westminster, etc., Tramway Co., [1897] A. C. 193.

This section has been strictly construed, and it is only when the transaction in question can be properly described as the giving of a confession of judgment, cognovit actionem, or warrant of attorney to confess judgment, that

it can be impeached, although its effect may be the same. Putting in a defence to one action and allowing a favoured creditor to obtain judgment by default is not conduct that comes within the section: Heaman v. Seale, 29 Gr. 278; Labatt v. Bixel, 28 Gr. 593; nor is withdrawing a defence under section 113 of the Division Courts Act, R. S. O. 1887 c. 51: Bailey v. Bank of Hamilton, 21 A. R. 156; nor is appearing and consenting to an order striking out a defence: Turner v. Lucas, 1 O. R. 623; nor is waiving the right to credit and allowing judgment to be entered by default before the period of credit expires: King v. Duncan, 29 Gr. 113; Macdonald v. Crombie, 2 O. R. 243; 10 A. R. 92; 11 S. C. R. 107; Bowerman v. Phillips, 15 A. R. 679. But a collusive assignment under the Nova Scotia Collection Act was held to be preferential and void: Zwicker v. Ross (1907), 3 E. L. R. 75.

By Rule 397 of the Rules of 1913 the power to give a cognovit actionem has been done away with.

By the Creditors' Relief Act, R. S. O. 1914 c. 81, priority by execution is to a great extent prevented, and a preference cannot now be easily obtained by means of an execution. In view, however, of the construction placed upon the Creditors' Relief Act in Roach v. McLachlan, 19 A. R. 496, and Breithaupt v. Marr, 20 A.

R. 689, a debtor who refuses to make an assignment for the benefit of his creditors, and thus renders it impossible to bring into play the provisions of s. 14 of the Assignments and Preferences Act, may still very much prejudice the position of those creditors who are not entitled to share.

5.—(1) Subject to the provisions of section 6 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 null and void.

(2) Subject to the provisions of section 6 every such gift, conveyance, assignment or transfer, delivery over or payment made by a 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, to or for a creditor with the 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 null and void.

(3) Subject to the provisions of section 6 if such a 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 mentioned in sub-section 2, and to be an unjust preference within the meaning hereof whether the same is made voluntarily or under pressure.

(4) Subject to the provisions of section 6 if such a 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 mentioned in sub-section 2, and to be an unjust preference within the meaning hereof whether the same be made voluntarily or under pressure.

(5) The word "creditor" in the fifth and sixth lines of sub-section 2, in the second and third lines of sub-section 3, and in the second and third lines of sub-section 4, shall include any surety and the endorser 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 endorsement was given, become a creditor of the person giving the preference within the meaning of these sub-sections. 10 Edw. VII. c. 64, s. 5.

With the exception of the words "prima facie" in sub-sections 3 and 4, the first four sub-sections of this section are practically the same as four sub-sections which were in 1891, by 54 V. c. 20, substituted for section 2 of R. S. O. 1887, c. 124. That section was as follows:

"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."

Before the year 1885, when this section was passed, it was necessary, in order to have a transaction set aside as a preference, to show not only an intent by the debtor to give a preference, but also a concurrence in that intent on the part of the creditor: Hepburn v. Park, 6 O. R. 472; Ivey v. Knox, 8 O. R. 635; Burns v. MacKay, 10 O. R. 167; McRoberts v. Steinoff, 11 O. R. 369; Building and Loan Association v. Palmer, 12 O. R. 1; and, by what was known as the doctrine of presure, if it were shown that the debtor was not acting purely voluntarily, but under some influence or threat, exercised or made in good faith by the creditor, or under fear of penal consequences, any presumption of such intent was rebutted. The

result was that only the plainest cases of fraudulent preference could be successfully attacked, for almost any request or demand by the creditor was sufficient to prevent the transaction from being regarded as a purely voluntary one: Brayley v. Ellis, 1 O. R. 119; 9 A. R. 565; Totten v. Bowen, 8 A. R. 602; In re Hurst, 6 P. R. 329; Whitney v. Toby, 6. O. R. 54; Slater v. Oliver, 7 O. R. 158; Segsworth v. Meriden Silver Plating Co., 3 O. R. 413; Meriden Silver Co. v. Lee, 2 O. R. 451; Powell v. Calder, 8 O. R. 505; Ivey v. Knox, 8 O. R. 635; Long v. Hancock, 12 A. R. 137; 12 S. C. R. 532. And the bona fide belief of the debtor that by giving security and getting an extension he would be able to extricate himself from his financial difficultites, negatived any inference of intent: Long v. Hancock, 12 S. C. R. 532.

After some difference of opinion it was for a time settled that under the amendment of the year 1885, it was only necessary, in order to have a transaction set aside, to show that it was entered into while the debtor was in insolvent circumstances, and that by means of it the creditor obtained a preference: River Stave Co. v. Sill, 12 O. R. 557. In Johnson v. Hope, 17 A. R. 10, and Ashley v. Brown, 17 A. R. 500, the Court of Appeal held, however, that knowledge by the creditor, at the time of entering into the transaction, of the insolvent condition of the debtor must also be proved, and that

dealings in good faith with an embarrassed debtor were not within the mischief of the Act. This weakening of the construction of the section was shortly afterwards carried still further by the Supreme Court of Canada, who held that the Ontario Act (and the Manitoba Act of similar import), applied only to voluntary preferences, between debtor and creditor, and that pressure was still effectual to rebut any presumption of fraudulent intent: Molsons Bank v. Halter, 18 S. C. R. 88; Gibbons v. McDonald, 20 S. C. R. 587; even if there was actual knowledge of the insolvent condition of the debtor: Stephens v. McArthur, 19 S. C. R. 446; Hickerson v. Parrington, 18 A. R. 635; Davies v. Gillard, 21 O. R. 431; 19 A. R. 432; so that the law was practically brought back to what it was before the amendment of 1885.

The present more complicated sub-sections have not effected any marked change in the law. They certainly leave transactions entered into before the sixty days' limit as little open to attack as under the former section, and as far as sub-section 2 is concerned the use of the adjective "unjust" may perhaps make an attack even less likely to succeed than before; though it has been said that there is no practical difference between the expressions "unjust preference" and "preference": Ivey v. Knox, 8 O. R. 635; Robinson v. Cook, 6 O. R. 590; and

see Davidson v. Ross, 24 Gr. 22. In this subsection also transactions entered into "for a creditor" are included, but, except in this respect, the clause carries the rights of creditors no further, and where the attack is not made nor an assignment executed, within sixty days, pressure may still be invoked to support the transaction: Beattie v. Wenger, 24 A. R. 72; Webster v. Crickmore, 25 A. R. 97; Gignac v. Iler, 29 O. R. 147; Morphy v. Colwell (1902), 3 O. L. R. 314. The pressure must, of course, be real and not feigned: Clemmow v. Converse (1869), 16 Gr. 547, and the request to give the security must be the moving cause: Colquhoun v. Seagram (1896), 11 Man. L. R. 339; Adams v. Bank of Montreal (1901), 32 S. C. R. 719, affg. 8 B. C. R. 314; Munro v. Standard Bank (1913), 5 O. W. N. 508.

In Cole v. Porteous, 19 A. R. 111, Osler, J.A., in a Division Court appeal, held that a preferential security given by an insolvent debtor to his creditor could not be supported if attacked within sixty days. In Lawson v. McGeoch, 20 A. R. 464, however, the other Judges of the Court of Appeal took a different view; Hagarty, C.J.O., and Burton, J.A., held that the presumption of intent spoken of was a rebuttable presumption, and that the secured creditor's good faith and want of knowledge of the insolvent condition of the debtor were sufficient to rebut the presumption; while

Maclennan, J.A., held that the presumption could not be rebutted by showing pressure.

In the revision of 1897 the revisers inserted in sub-sections 3 and 4, after the word "presumed," the words "prima facie," thus adopting the view of the majority in Lawson v. McGeoch, and these words have been retained in the present Act. The presumption is therefore a rebuttable one: Craig v. McKay (1904), 8 O. L. R. 651; (1906), 12 O. L. R. 121; and the question of the extent of the presumption and what will rebut it has been considered in several cases. It has been settled as far at least as the Provincial Courts are concerned, that where the transaction is attacked, or an assignment made, within sixty days, there is a presumption of invalidity and a shifting of the onus of proof, the attacked creditor not being entitled, in endeavouring to discharge that onus, to avail himself of evidence of pressure: Webster v. Crickmore, 25 A. R. 97; Codville v. Fraser (1902), 14 Man. L. R. 12; Edgett v. Steeves (1906), 2 E. L. R. 131; Dana v. McLean (1901), 2 O. L. R. 466.

But this is, it is submitted, giving the subsections too wide an effect. The giving of an unjust preference is what is intended to be prevented, and having regard to the chief defect in the former law—the absurd length to which the doctrine of pressure had been carried—it

may well be that the presumption intended is limited to the defeat of that doctrine; that is that the attacking assignee or creditor upon proving the insolvency, the preference, and the concurrence of intent, shall not (when the sixty days' limit is not exceeded) be successfully met by a defence of pressure: Benallack v. Bank of British North America (1905), 36 S. C. R. 120.

But even if there is a general presumption of invalidity where there has been an assignment or an attack within sixty days, that presumption will be rebutted by showing the non-existence of any of the factors which had to co-exist to make, under the former law, an attack prima facie successful: for instance, where concurrence of intent is not made out: Benallack v. Bank of British North America (1905), 36 S. C. R. 120 (a case under the Yukon Ordinance of wording slightly different from that of the Ontario clauses): Tudhope v. Northern Bank (1909), 10 W. L. R. 122; Langley v. Palter, 13 O. W. R. 951; or where the creditor did not know and had no reason to believe the debtor was insolvent: Baldocchi v. Spada (1907), 38 S. C. R. 577, 8 O. W. R. 705, 7 O. W. R. 325; Desmarteau v. Dingman (1908), 11 O. W. R. 111; Lamb v. Young (1890), 19 O. R. 104; Dana v. McLean (1901), 2 O. L. R. 466; or where the debtor gave the security in

the honest belief that by so doing he would gain sufficient time to meet his liabilities: Codville v. Fraser (1902), 14 Man. L. R. 12.

Under the Manitoba Act and the Alberta Act the preferential effect is fatal if the assignment is made or the attack is brought within the sixty days: Empire Sash and Door Co. v. Maranda (1911), 21 Man. L. R. 605, 19 W. L. R. 78; Robinson v. McCauley (1913), 24 W. L. R. 617; Ross Brothers v. Pearson (1905), 1 W. L. R. 338, 575; Smith v. Sugarman (1910), 12 W. L. R. 585; 13 W. L. R. 671, 47 S. C. R. 392.

In the case of a voluntary conveyance concurrence of intent need not be made out; fraudulent intent on the part of the grantor is fatal to the validity of the transaction: Oliver v. McLaughlin (1893), 24 O. R. 41; and where a voluntary conveyance was made by a man about to embark in a speculative undertaking, it was set aside at the instance of persons who became his creditors in connection with that undertaking: Alexandra Oil Co. v. Cook (1909), 13 O. W. R. 405, 14 O. W. R. 604; Ottawa Wine Vaults Co. v. McGuire (1911), 24 O. L. R. 591, (1912) 27 O. L. R. 319, (1913) 48 S. C. R. 44.

"WITHIN SIXTY DAYS."—The Interpretation Act provides that if the time limited by an Act for any proceeding, or for the doing of anything under its provisions, expires or falls upon

a holiday, the time so limited shall extend to, and such thing may be done on, the day next following which is not a holiday. The issue of a writ or the taking of a legal proceeding relates back to the beginning of the day on which the writ is issued or the proceeding is taken, and, therefore, no matter at what hour a preferential transfer may have been completed, a writ issued or proceeding taken at any time on the sixtieth day, or next following day which is not a holiday, will be in time. An attachment in insolvency also relates back to the beginning of the day upon which it is issued, as it is a judicial act: Converse v. Michie (1865), 16 C. P. 167, but an assignment for the benefit of creditors is not a judicial act, but a mere voluntary dealing by a debtor with his assets, and in the case of such an assignment it is possible, though by no means probable, that fractions of a day might have to be considered.

If a definite, clearly proved agreement to give security is entered into before the sixty days, the transaction does not fall within subsections 3 and 4: Lawson v. McGeoch, 20 A. R. 464; Embury v. West, 15 A. R. 357; Clarkson v. Sterling, 15 A. R. 234; Goulding v. Deeming, 15 O. R. 201; McRoberts v. Steinoff, 11 O. R. 369; Smith v. Fair, 11 A. R. 755; Kerry v. James, 21 A. R. 338; Brayley v. Ellis, 1 O. R.

119; Robins v. Clark, 45 U. C. R. 369; Stuart v. Thomson, 23 O. R. 503; Boustead v. Shaw, 27 Gr. 280.

While a general charge on all the existing real and personal property of a debtor is (apart from any statutory requisites) good as far as the property can be ascertained at the time of the attempted enforcement of the charge: In re Kelcey, Tyson v. Kelcey, [1899] 2 Ch. 530, a mere promise to a creditor " to give you collateral security" is too indefinite to enable a lien to be declared: Foster v. Russell (1886), 12 O. R. 136; Armstrong v. Johnston (1900), 32 O. R. 15.

The formal carrying out of a previous oral agreement may be upheld: Tudhope v. Northern Bank (1909), 10 W. L. R. 122.

But even if there is not a definite agreement to give security of the kind afterwards given, but merely a promise, made in good faith, not sufficiently definite to support an action for specific performance, that promise may be appealed to on the question of intent to rebut the presumption of invalidity: Hope v. May, 24 A. R. 16; Montgomery v. Corbit, 24 A. R. 311; Webster v. Crickmore, 25 A. R. 97; Codville v. Fraser (1902), 14 Man. L. R. 12; Power v. Munro (1912), 11 E. L. R. 508; Northern Commercial Co. v. Powell (1911), 17 W. L. R. 297.

If the taking of security is deliberately postponed in order to avoid injury to the debtor's credit, or in order to avoid the statutory presumption, the previous agreement avails nothing: Clarkson v. McMaster, 25 S. C. R. 96; Breese v. Knox, 24 A. R. 203; Hope v. May, 24 A. R. 16; Webster v. Crickmore, 25 A. R. 97; Ex parte Fisher, L. R. 7 Ch. 636; Clarkson v. Sterling, 15 A. R. 234; Jones v. Kinney, 11 [illegible]. C. R. 708; Tooke Bros. v. Brock (1907), 3 [illegible] L. R. 270; Armstrong v. Johnston (1900), 32 O. R. 15; Bentley v. Morrison (1910), 9 E. L. R. 135.

Where the transaction attacked is a renewal of or has been entered into in substitution for a transaction which occurred prior to the sixty days limit, the earlier transaction may be relied on: McFarlane v. McDonald (1874), 21 Gr. 319; Fisher v. Bradshaw (1901), 2 O. L. R. 128; (1902), 4 O. L. R. 162; Townsend v. Northern Crown Bank (1912), 26 O. L. R. 291; Ferguson v. Bryans (1904), 15 Man. L. R. 170; Rogers v. Carroll (1899), 30 O. R. 328. But no right of subrogation arises in favour of a chattel mortgagee, whose mortgage has been set aside, to the position of a prior chattel mortgagee whose claim has been paid out of the second loan: Gower v. Kolchen (1910), 14 W. L. R. 1.

Non-registration of a chattel mortgage because of the money lender's dislike to appear

publicly in that capacity has been held not to be a badge of fraud: Morris v. Morris, [1895] A. C. 625; but under the Bills of Sale Act, R. S. O. 1914, c. 135, registration of a bill of sale, or chattel mortgage, or of an agreement to give a bill of sale or chattel mortgage, is essential; and an assignee for the benefit of creditors is entitled to take this objection: see section 2 (b), and compare Clarkson v. McMaster, 25 S. C. R. 96; Hope v. May, 24 A. R. 16; Heaton v. Flood, 29 O. R. 87. Registration is essential even in the case of a chattel mortgage of a partial interest in the goods: Bank of Hamilton v. Mervyn (1909), 14 O. W. R. 132. But an unregistered, and, therefore, invalid, agreement, may be of value on the question of bona fides: Webster v. Crickmore, 25 A. R. 97; Winslow v. Elliott, Divisional Court, 18th February, 1901; and while an agreement not to register a chattel mortgage vitiates it ab initio: National Trust Co. v. Trusts and Guarantee Co. (1912), 3 O. W. N. 1093; the same result does not follow where there is on a sale a bona fide agreement to give a chattel mortgage if the vendor should demand it and later on a bona fide demand is made: Wade v. Elliott (1907), 10 O. W. R. 206, 11 O. W. R. 38.

If the consideration mentioned in the attacked conveyance is shown not to be the true

consideration the onus is on the grantee to prove some other good consideration: Gignac v. Iler, 29 O. R. 147.

" SUBJECT TO THE PROVISIONS OF SECTION 6."—Section 6 protects assignments for the general benefit of creditors, bona fide sales, etc. See the notes to that section.

" EVERY GIFT, CONVEYANCE, ASSIGNMENT, OR TRANSFER, ETC."—The Act applies only to what could at the time of the impeached transaction be made available by a creditor. An assignment of the profits expected to be made, and ultimately realized, out of a pending contract to do certain work, is not impeachable: Blakely v. Gould, 24 A. R. 153; 27 S. C. R. 682. But if the contract has been partly fulfilled and money has been earned under it, the assignment might be preferential: Norton v. Canadian Bank of Commerce (1908), 8 W. L. R. 910; 9 W. L. R. 331. An assignment of book debts is within the Act: Warnock v. Kloepfer, 15 A. R. 324; 18 S. C. R. 701. But the book debts in question in this case were due to the debtor when assigned by him as security, and possibly an assignment of future book debts, which might or might not come into existence, could not be complained of.

Book debts that may hereafter accrue due, or property that may hereafter be acquired, may be assigned as security, and the equitable

right of the assignee attaches as soon as the thing assigned comes into existence: Tailby v. Official Receiver, 13 App. Cas. 523; Horsfall v. Boisseau, 21 A. R. 663; Banks v. Robinson, 15 O. R. 618; Wellbanks v. Heney, 19 O. R. 549; Coyne v. Lee, 14 A. R. 503; Labatt v. Bixel, 28 Gr. 593; Re Thirkell, Perrin v. Wood, 21 Gr. 492; Suter v. Merchants' Bank, 24 Gr. 365; Kitching v. Hicks, 6 O. R. 739; McAllister v. Forsyth, 12 S. C. R. 1.

A cheque or a bill of exchange for a pre-existing debt operates as conditional payment thereof, and an assignment of book debts does not cover debts for which at the time of the making of the assignment the assignor holds cheques or bills of exchange: Felix Hadley & Co. v. Felix Hadley, [1898] 2 Ch. 680; and notice to the maker of the cheque or bill of exchange of an assignment of book debts does not prevent him from paying the holder of the cheque or bill of exchange: Bence v. Sherman, [1898] 2 Ch. 582.

While notice to the debtor of the assignment of the debt is not essential to perfect the assignee's title, his rights will be postponed to those of a subsequent assignee who does give notice: Rennie v. Quebec Bank (1901), 1 O. L. R. 303; (1902), 3 O. L. 541; A. E. Thomas, Limited v. Standard Bank (1910), 1 O. W. N. 379, 548. But if the assignor has been directed

to collect the assigned debts as agent and for the benefit of the creditor to whom they have been assigned, another creditor cannot obtain title to them: Eby Blain, Limited v. Montreal Packing Co. (1908), 17 O. L. R. 292; nor does the doctrine of priority by notice apply in favour of an assignee for the benefit of creditors. He has no higher right than the assignor and does not by giving notice to the debtors of the assignment for the benefit of creditors before the prior assignee of the book debts gives notice of his claim, become entitled to the book debts: Re William Hamilton Manufacturing Company (1910), 1 O. W. N. 61, 421; and must even pay over to the assignee of the book debts moneys collected in respect of them: Re Perth Flax and Cordage Co. (1908), 13 O. W. R. 1140.

An assignment of book debts by one partner in the firm name and under seal is not good as a deed, but is good as an equitable assignment on behalf of the firm: Marchant v. Morton Down & Co., [1901] 2 K. B. 829. A mortgage of "all property real and personal that shall hereafter be acquired and owned by the company" covers book debts which subsequently become due to the company: Re Perth Flax and Cordage Co. (1908), 13 O. W. R. 1140.

An assignment of book debts does not require registration under the Bills of Sale Act: Thibaudeau v. Paul, 26 O. R. 385; National

Trust Co. v. Trusts and Guarantee Co. (1912), 3 O. W. N. 1093; and a creditor who takes such an assignment is not under any obligation to give notice of it to other creditors: Bank of British North America v. Wood, 14 W. L. R. 34.

An assignment, after the loss has occurred, of insurance policies against loss by fire, may be set aside: Ivey v. Knox, 8 O. R. 635; but an assignment of the insurance money after the fire may be supported by an assignment of the policy before the fire: Ferguson v. Bryans (1904), 15 Man. L. R. 170.

A lease by a debtor to his creditor, the debt being paid by the rent, is not a preference: Smith v. Lawrence, 27 C. L. J. 116; nor is the taking of possession by a chattel mortgagee: Robinson v. Wilson (1908), 12 O. W. R. 198, even though the mortgage be void as against creditors owing to non-compliance with the technical requirements of the Chattel Mortgage Act; Bank of Hamilton v. Tamblyn, 16 O. R. 247; nor is supplying materials under an agreement that the property in them is not to pass: Wellbanks v. Heney, 19 O. R. 549; nor is rescinding in good faith an agreement for purchase of land and paying to the vendor an allowance in lieu of rent: High River Meat Market v. Routledge (1908), 8 W. L. R. 259; nor is payment by the debtor to a creditor for the express purpose of reviving a statute-barred debt: In re Lane,

23 Q. B. D. 74. See, however, Finch v. Gilray, 16 A. R. 484, as to the impossibility of reviving to the prejudice of creditors the title to real estate. If goods are sold and delivered they cannot be returned to the vendor by the purchaser when he is insolvent and unable to pay for them: Dana v. McLean (1901), 2 O. L. R. 466.

The substance and not the form of the transaction will be looked at, and a transfer by an insolvent trader of all his assets to a company incorporated to take over his business might be set aside if his creditors are hindered: In re Carl Hirth, [1899] 1 Q. B. 612; Gonville's Trustee v. Patent Caramel Co., [1912] 1 K. B. 599; but a creditor who has seized shares in the company is estopped from afterwards attacking the incorporation: Rielle v. Reid (1899), 28 O. R. 497, 26 A. R. 54.

If there are two mortgages on the same property, and the first is set aside as a preference, this enures to the benefit of the second mortgagee, subject to the payment of the attacking plaintiff's solicitor and client costs of the action: Coursolles v. Fookes, 16 O. R. 691; Sanguinetti v. Stuckey's Banking Company, [1895] 1 Ch. 176; In re Farnham, [1895] 2 Ch. 799.

One partner may take in his own name security for a partnership debt: Hobbs Hardware Co. v. Kitchen, 17 O. R. 363.

"INSOLVENT CIRCUMSTANCES."—The fact of insolvency must in all cases be proved by the attacking plaintiff. After some difference of opinion it has now been settled that "insolvent circumstances," and "unable to pay his debts in full," are co-extensive expressions, and what has to be shown is not a state of insolvency in the strict legal or commercial acceptation of the term, but the debtor's inability to pay his way and meet the demands of his creditors, and his want of means to pay them in full out of his assets realized upon a sale for cash or its equivalent: Warnock v. Kloepfer, 14 O. R. 288; 15 A. R. 324; 18 S. C. R. 701; Clarkson v. Sterling, 14 O. R. 460; 15 A. R. 234; Whitney v. Toby, 6 O. R. 54; Dominion Bank v. Cowan, 14 O. R. 465; Rae v. Macdonald, 13 O. R. 352. See, however, Stuart v. Thomson, 23 O. R. 503, at p. 512. Allowance should also be made for the possibility of the debtor being able to sell his assets on such terms as will enable him to pay the claims as they mature: Bertrand v. Canadian Rubber Co. (1897), 12 Man. L. R. 27. Book accounts cannot, as a rule, be taken at their face value: Empire Sash and Door Co. v. Maranda, 21 Man. L. R. 605, 19 W. L. R. 78. The fact that all his assets are covered by mortgages or warehouse receipts is not in itself sufficient to make the debtor insolvent within the meaning of the Act; in other words equities may be of some value: Dominion Bank v. Cowan, 14 O. R. 465;

nor does the price realized for the debtor's stock in trade after an assignment has been made necessarily fix its value at the earlier period when the impeached transaction was entered into; any temporary causes producing decreases in value must be allowed for: Clarkson v. Sterling, 14 O. R. 460; Wade v. Elliott (1907), 10 O. W. R. 206, 11 O. W. R. 38.

Goodwill may be an element to be considered in deciding as to solvency, but there was, it was held, no goodwill of financial value in a saloon business: Ottawa Wine Vaults Co. v. McGuire (1911), 24 O. L. R. 591; (1912), 27 O. L. R. 319; (1913), 48 S. C. R. 44.

An agent's knowledge of the insolvent condition of the debtor will be imputed to the principal: Honsinger v. Kuntz (1909), 14 O. W. R. 233. And where the same solicitor acted for the grantor and the grantee, his knowledge of the grantor's insolvency was held to be imputable to the grantee, though both the solicitor and the grantee swore that the grantee had not been told of the insolvency: Gunn v. Vinegratsky (1911), 20 Man. L. R. 311, 17 W. L. R. 54. But in Cameron v. Hutchinson (1869), 16 Gr. 526, where mortgagees sold a mortgage with intent to defeat creditors, and one of the mortgagees was a solicitor and as such was employed by the purchaser of the mortgage to act for him, the solicitor's knowledge was held not to be imputable to the purchaser.

If the assets are insufficient to meet the liabilities, the extent of the deficiency is immaterial: Munro v. Standard Bank (1913), 5 O. W. R. 508.

The creditor is not bound to press specially for information when taking security, but should make reasonable inquiry: Cole v. Racine, 4 O. W. N. 1327; Spotton v. Gillard (1911), 18 O. W. R. 510; Northern Commercial Co. v. Powell (1911), 17 W. L. R. 297; and knowledge of the insolvent condition may be implied if knowledge is shown of circumstances from which ordinary men of business would conclude that the debtor was unable to meet his liabilities: National Bank of Australasia v. Morris, [1892] A. C. 287; Re Andrews, 2 A. R. 24; for instance, when the creditor's own claim is growing and small claims are not being met: Tooke Bros. Limited v. Brock & Patterson, Limited (1907), 3 E. L. R. 270. Insolvency at the time of the impeached transaction is sufficiently proved by showing the insolvent condition at the time of the assignment or institution of the action, and the debtor's inability to account for the shrinkage: Casserley v. Hughes (1905), 5 O. W. R. 599, 6 O. W. R. 70. But some allowance should be made for the usual shrinkage of values on realization and the mere fact that a man does not meet his payments promptly at maturity is not sufficient to cast upon a person aware of that fact the onus

of disproving knowledge of insolvency: Wade v. Elliott (1907), 10 O. W. R. 206, 11 O. W. R. 38. And there must be more than mere suspicion of knowledge on the part of the transferee of insolvency, actual or imminent: Allen v. Bank of Ottawa (1908), 11 O. W. R. 148. Security taken by a creditor after getting from the debtor a statement, verified by declaration, which showed a surplus, was upheld in Bell v. Robinson, 13 O. W. R. 676.

"WITH INTENT TO DEFEAT, ETC., CREDITORS. WITH INTENT TO GIVE SUCH CREDITOR AN UNJUST PREFERENCE."—An attack can be made only when the person preferred is a creditor. If it is only in respect of the impeached transaction that the person becomes a creditor at all, the security cannot be set aside: Kerry v. James, 21 A. R. 338; Robins v. Clark, 45 U. C. R. 362. Security given to a co-trustee or to a cestui que trust to secure the repayment of misapplied trust funds cannot be set aside, even though there has been no pressure or request: Molsons Bank v. Halter, 18 S. C. R. 88; New's Trustee v. Hunting, [1897] 1 Q. B. 607; [1897] 2 Q. B. 19; affirmed sub nomine Sharp v. Jackson, [1899] A. C. 419; In re Lake [1901] 1 K. B. 710; or by a municipal treasurer to raise funds to pay the amount due by him to the municipality: Halwell v. Township of Wilmot, 24 A. R. 628; or by a solicitor to avoid the enforcement of an order to strike him off the rolls:

Grant v. VanNorman, 7 A. R. 526; or under an honest even though mistaken belief that there is an obligation to give the security: In re Vautin, [1900] 2 Q. B. 325; Keenan v. Richardson (1902), 1 O. W. R. 333. But there must be something more than a mere desire to avoid causing hardship to the preferred creditor, or to "satisfy the conscience" of the debtor: In re W. Blackburn & Co., [1899] 2 Ch. 725.

The effect of the transaction is not evidence of the intent: Allan v. McTavish, 8 A. R. 440; Randall v. Dopp, 22 O. R. 422; Ivey v. Knox, 8 O. R. 635; Carr v. Corfield, 20 O. R. 218; for there may be unforeseen changes in values and circumstances: Elgin Loan and Savings Co. v. Orchard (1904), 7 O. L. R. 695; and the mistaken belief of the grantor as to his legal liability to make the conveyance, will avail to rebut the inference of fraudulent intent: Carr v. Corfield, 20 O. R. 218 If, however, a debtor conveys land to his wife to defeat his creditors, she cannot as against her creditors support a re-conveyance to him as made in pursuance of a duty to reconvey: Johnson v. Cline, 16 O. R. 129. But see Gibbons v. Tomlinson, 21 O. R. 489. The intent is a question of fact, and all the motives must be considered: Ivey v. Knox, 8 O. R. 635, the finding of the Judge at the trial as to intent and bona fides being in general conclusive: Randall v. Dopp, 22 O. R. 422; Clarkson v. McMaster, 22 A. R. 138; Ottawa Wine

Vaults Co. v. McGuire (1911), 24 O. L. R. 591, (1912) 27 O. L. R. 319, (1913) 48 S. C. R. 44; but the evidence of the parties to the impeached transaction should be acted upon with caution: Morton v. Nihan, 5 A. R. 20; Merchants' Bank v. Clarke, 18 Gr. 594; even if uncontradicted: Rice v. Rice (1899), 31 O. R. 59, (1900) 27 A. R. 121; though if believed it is sufficient: Jack v. Greig, 27 Gr. 6; especially if the inherent probabilities are in favour of its truth: Power v. Munro (1912), 11 E. L. R. 508. The fact that the creditor's claim is not due is of some importance in determining the question of good faith: Powell v. Calder, 8 O. R. 505; but the creditor may take security though the claim is not due and is covered by notes under discount at the time: Hyman v. Cuthbertson, 10 O. R. 443. The fact that all the debtor's assets are covered by the security given is not in itself fatal: Hope v. May, 24 A. R. 16; Davies v. Gillard, 21 O. R. 431; 19 A. R. 432; Archibald v. Haldan (1871), 31 U. C. R. 295; Adams v. Bank of Montreal (1901), 32 S. C. R. 719.

The right of attack is limited to creditors, or to an assignee for the benefit of creditors, and the Act is thus narrower than the statute of Elizabeth: Oliver v. McLaughlin, 24 O. R. 41. A man who has an action for damages for tort pending cannot attack a transaction entered into before his claim is ascertained by judgment: Ashley v. Brown, 17 A. R. 500 (crim.

con.); Cameron v. Cusack, 17 A. R. 489 (seduction); Gurofski v. Harris, 27 O. R. 201; 23 A. R. 717 (defamation); Fisher v. Kowslowski (1913), 25 W. L. R. 417 (defamation—malicious prosecution); nor even when he has recovered a verdict (for defamation) but entry of judgment has been stayed: Burdett v. Fader (1903), 6 O. L. R. 532, (1904), 7 O. L. R. 72. And see Webb v. Hamilton (1907), 10 O. W. R. 192; McDonald v. Horan, 12 O. W. R. 1151.

A mortgagee of land cannot attack as a fraudulent preference a chattel mortgage given by the mortgagor unless it is proved that the land is not of sufficient value to answer the mortgage debt: Clark v. Hamilton Provident and Loan Society (1884), 9 O. R. 177; nor can such a mortgagee attack a conveyance made subsequently by the mortgagor at a time when the land was of sufficient value to answer the mortgage debt: Crombie v. Young (1894), 26 O. R. 194; Thomas v. Calder, 1 O. W. R. 26.

A creditor who has knowingly accepted the benefit of a transaction cannot afterwards impeach it; he cannot take the benefit of the consideration for a transfer and then set the transfer aside: Beemer v. Oliver, 10 A. R. 656; Wood v. Reesor, 22 A. R. 57; Rielle v. Reid (1899), 26 A. R. 54. But a creditor can accept a dividend and yet make the assignee account for the profit made by him by purchasing the trust

estate: Morrison v. Watts, 19 A. R. 622; and yet contend that some real estate sold by the assignee as property of the assignor was in reality the property of the assignor's wife: Beemer v. Oliver, 10 A. R. 656.

"BE NULL AND VOID."—"Void" in Acts of this kind means "voidable": Meriden Britannia Company v. Braden, 21 A. R. 352; and it would seem that a good title can be conferred by a person who holds under what is under the Act a void title: In re Vansittart, [1893] 2 Q. B. 377; In re Brall, [1893] 2 Q. B. 381; In re Carter and Kenderdine's Contract, [1897] 1 Ch. 776; though in Cameron v. Perrin, 14 A. R. 565, it is suggested that the wording of the Act is definite enough to avoid even inter partes a fraudulent transaction. In Crawford v. Magee (1905), 6 O. W. R. 44, a transfer was set aside as preferential, but a mortgage given by the transferee to an innocent lender was upheld. And see Clarkson v. McMaster, 25 S. C. R. 96; Meharg v. Lumbers, 23 A. R. 51, at p. 60. In Johnston v. Henderson, 28 O. R. 25, an auctioneer who, at the instance of the mortgagor, sold goods covered by a chattel mortgage, "void as against creditors," was held to be responsible to the mortgagee.

A security may be upheld as far as a new advance is concerned, and set aside as far as it

secures a pre-existing debt: Falls v. Gibb, Falls v. Young (1906), 8 O. W. R. 397; Mader v. McKinnon, 21 S. C. R. 645; Goulding v. Deeming, 15 O. R. 201; Kitching v. Hicks, 6 O. R. 739; Empire Sash and Door Co. v. Maranda (1911), 21 Man. L. R. 605, 19 W. L. R. 78; Douglas v. Hourie (1909), 10 W. L. R. 67; or upheld as to one claim because concurrence of intent is not made out and set aside as to another claim because in respect of it given voluntarily: Bartels Shewan & Co. v. Winnipeg Cigar Co. (1909), 10 W. L. R. 263; or upheld as to a guaranty and set aside as to a debt due to the guarantor: Honsinger v. Kuntz (1909), 14 O. W. R. 233. But in Cameron v. Perrin, 14 A. R. 565, where there was a sale of goods and a mortgage was given upon these goods and other goods with intent, as far as the other goods were concerned, to protect them from creditors, the mortgage was set aside in toto, and all the goods were held to be subject to an execution against the purchaser.

"Any Action or Proceeding." — An interpleader issue is a "proceeding" within subsection 3: Cole v. Porteous, 19 A. R. 111; McKinnon v. Coffin (1906), 2 E. L. R. 176; Gower v. Kolchen (1910), 14 W. L. R. 1. Where a garnishee summons was issued in the Division Court and an assignee of the debt appeared voluntarily and made claim to it the proceedings were held to have been commenced as far

as he was concerned only when he appeared: Morphy v. Colwell (1902), 3 O. L. R. 314. The registration of a certificate of the bringing of an action to set aside a mortgage as preferential is sufficient notice and an injunction to restrain the mortgagee from parting with his interest is not necessary: Seli v. Smith (1898), 18 C. L. T. Occ. N. 407.

Surety and Indorser.—In Hope v. Grant, 20 O. R. 623, it was held that the accommodation indorser of a note not due was not a creditor of the maker, and that security given to him could not be attacked. Sub-section 5 was thereupon passed: 55 V. c. 25. But a person who takes or agrees to receive security contemporaneously with giving his indorsement is not within the sub-section, for instance where notes for the purchase price of goods are endorsed on condition that the purchaser shall give to the endorser a chattel mortgage on these goods and other goods: Mathers v. Lynch (1868), 27 U. C. R. 244, (1869), 28 U. C. R. 354; Kerry v. James, 21 A. R. 338. But if the endorsement is a mere device to enable security to be indirectly given to the creditor the transaction cannot stand: Powell v. Calder, 8 O. R. 505. Payment of a note to the holder thereof in order to relieve an endorser from liability is not a fraudulent preference of the endorser: In re Warren, [1900] 2 Q. B. 138.

Husband and Wife.—A conveyance of land to a trustee for the grantor's wife in consideration of her barring her dower in other land may be upheld: Beavis v. McGuire, 7 A. R. 704; Morris v. Martin, 19 O. R. 564; even though the claim to dower (if bona fide) is not well founded: Forrest v. Laycock (1871), 18 Gr. 611; McDonald v. Curran (1909), 1 O. W. N. 121. But a grossly excessive allowance cannot stand: Black v. Fountain (1876), 3 Gr. 174; Fleury v. Pringle (1878), 26 Gr. 67; nor a transfer in consideration of an unnecessary bar of dower made at a time when the husband was about to embark in a hazardous business: Ottawa Wine Vaults Co. v. McGuire (1911), 24 O. L. R. 591, (1912), 27 O. L. R. 319, (1913), 48 S. C. R. 44.

Criminal Liability.—The following provisions of the Criminal Code as to fraudulent transfers of property and as to failure to keep, or destruction of, books of account should not be lost sight of:

417. 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, or

(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; or,

(*c*) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full and has not, for five years next before such inability, kept such books of account as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to account for his losses to the satisfaction of the court or judge, and to show that the absence of such books was not intended to defraud his creditors. 55-56 V. c. 29, s. 368; 4 E. VII. c. 7, s. 1.

418. Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document. 55-56 V. c. 29, s. 369.

It was held in Regina v. Henry, 21 O. R. 113, that creditors whose claims are not due might take advantage of the similar provisions of the Act then in force.

ASSIGNMENTS FOR GENERAL BENEFIT OF CREDITORS.

6.—(1) Nothing in the next preceding section shall apply to an assignment made to the sheriff of the county or district 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 25, to another assignee resident within Ontario, for the purpose of paying rateably 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 an innocent purchaser or person; nor to any payment of money to a creditor, nor to any *bona fide* conveyance, assignment, transfer or delivery over of any goods or property of any kind, which is made in consideration of a present actual *bona fide* payment in money, or by way of security for a present actual *bona fide* advance of money, or which is made in consideration of a present actual *bona fide* sale or

delivery of goods or other property where the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

(2) In the case of a valid sale of goods or other 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.

(3) Every assignment for the general benefit of creditors, which is not void under section 5, 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 thereof until and unless a subsequent assignment is executed in accordance therewith.

(4) Where 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.

(5) Nothing herein shall

(*a*) affect The Wages Act, or prevent a debtor providing for payment of wages due by him in accordance with the provisions of that Act,

(*b*) 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 security is restored or its value made good to the creditor,

(*c*) apply 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, or,

(*d*) 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. 10 Edw. VII. c. 64, s. 6.

"NOTHING IN THE NEXT PRECEDING SECTION SHALL APPLY TO AN ASSIGNMENT."—This is an amplification of the saving exception of R. S. O. 1877 c. 118, s. 2, and the decisions under that section would to some extent afford a guide to the construction of the present section. An assignment to be protected must be made in good faith for the general benefit of creditors, and any attempt to impose unreasonable terms upon the creditors or to retain a benefit for the debtor against their will, would render it invalid: Whitman v. Union Bank of Halifax, 16 S. C. R. 410; Spencer v. Slater, 4 Q. B. D. 13; Jennings v. Hyman, 11 O. R. 65; Maulson v. Topping (1859), 17 U. C. R. 183. The accidental omission of a creditor's name from a schedule of creditors referred to in an assignment will not invalidate the assignment, nor deprive the omitted creditor of his right to share: McLean

v. Garland, 13 S. C. R. 366. The assignee may within reasonable limits be empowered to carry on the business of the debtor if it can be better disposed of as a going concern, and to sell on credit: Alexander v. Wavell, 10 A. R. 135; O'Brien v. Clarkson, 10 A. R. 603; Jennings v. Moss, 10 A. R. 696; Slater v. Badenach, 10 S. C. R. 296; Ontario Bank v. Lamont, 6 O. R. 147; and creditors assenting to such an assignment do not become partners in the business: Maulson v. Peck (1859), 18 U. C. R. 113. But the assignee will be personally liable on notes given by him for purchases, even though he adds after his signature the word "assignee": Boyd v. Mortimer (1899), 30 O. R. 290; and also for the price of goods purchased if the business is carried on by the assignor as the assignee's agent: Hutchings v. Adams (1898), 12 Man. L. R. 118; but not if the assignor is carrying it on on his own behalf, even though the assignee has committed a breach of trust in allowing him to do so: Hechler v. Forsyth (1894), 22 S. C. R. 489. And see Re Matejka (1906), 5 W. L. R. 1. But it is well even in the so-called "common law" assignments not to include too definite directions as to the trustee's duties, and it is certainly advisable to follow now the statutory directions and the statutory directions only.

A creditor who accepts payment of a dividend cannot attack the assignment: Beemer v.

Oliver, 10 A. R. 656; nor can a creditor do so who attends a meeting of creditors, assents to his own appointment as inspector, and acts as such: Gardner v. Kloepfer, 7 O. R. 603; but after an unsuccessful attack he may come in under the assignment and rank for his claim: Kloepfer v. Gardner, 10 O. R. 415; 14 A. R. 60; 15 S. C. R. 390.

An assignment under the Act is voluntary in the sense that it is optional on the part of the assignor whether to make it or not, but once made its effect cannot be controlled: Re Unitt and Prott, 23 O. R. 78.

"ASSIGNMENT MADE TO THE SHERIFF, OR WITH THE CONSENT," ETC.—An assignment to a person other than the sheriff and without the consent of creditors is valid, but will be superseded by a subsequent assignment executed with such consent: Anderson v. Glass, 16 O. R. 592; and the consent of the creditors need not be obtained at the time the assignment is made, but may be obtained subsequently: Hall v. Fortye, 17 O. R. 435. But under the Alberta Act to make an assignment to a person other than an official assignee valid the precedent or concurrent assent of creditors is essential: Fairchild v. Myrum (1908), 9 W. L. R. 277. Without the assent, or at least the knowledge, of a creditor, an assignment is revocable: Cooper v. Dixon, 10 A. R. 50; Clarke v. Reid, 27 O. R.

618; Rennie v. Block, 26 S. C. R. 356; Hyman v. Bourne, 5 O. R. 430: Goodeve v. Manners, 5 Gr. 114; Andrew v Stuart, 6 A. R. 495; but where an assignment has been executed at the instance of creditors, or has been acted upon by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor has executed it: Nolan v. Donelly, 4 O. R. 440; Ball v. Tennant, 25 O. R. 50; and assent by a creditor's solicitor on his behalf is sufficient: Nelles v. Maltby, 5 O. R. 263.

"SHERIFF."—If an assignment is made to the sheriff he is not, if he sells land by auction, in the same position as if he were selling under an execution, and is not the agent of a person who bids: McIntyre v. Faubert, 26 O. R. 427. The sheriff takes an assignment as a public officer, and cannot disclaim, and in case of his death his duties and rights as an assignee devolve upon his deputy, and thereafter upon his successor in office: Brown v. Grove, 18 O. R. 311; and commissions received by a sheriff acting as assignee form part of the revenues of his office: Smart v. Dana (1903), 5 O. L. R. 451. And see The Sheriffs' Act, R. S. O. 1914, c. 16.

"THE COUNTY OR DISTRICT IN WHICH THE DEBTOR RESIDES OR CARRIES ON BUSINESS:"—The use of the words "carries on business" does not limit the application of the Act to traders: McKinnon v. Coffin (1906), 2 E. L. R. 176.

"BONA FIDE SALE OR PAYMENT MADE IN THE ORDINARY COURSE OF TRADE OR CALLING."— "Bona fide," or "in good faith," means without notice that any fraud or fraudulent preference is intended: Butcher v. Stead, L. R. 7 H. L. 839; and good faith on the part of the purchaser is sufficient; it is not necessary that both parties should act in good faith: Mackintosh v. Pogose, [1895] 1 Ch. 505.

An actual sale for value may be voidable if made with wrongful intent: McMaster v. Clare (1859), 7 Gr. 550; or merely as a scheme to give a preference: Curry v. Kirkpatrick (1910), 8 E. L. R. 455: (creditor ostensibly buying goods at debtor's auction sale but merely crediting the price on his debt). A sale of a debtor's assets may be made by him en bloc "in the ordinary course of trade or calling," and a purchase of the assets in good faith by a creditor will be upheld: Clarkson v. Rothwell, 11 C. L. T. 67; Greenburg v. Lenz (1905), 2 W. L. R. 64. The provisions of the Bulk Sales Act would have to be complied with in the case of such a sale in the Provinces where legislation of that kind is in force. A creditor may also in good faith buy goods from his debtor and deduct his debt from the purchase money: Lewis v. Brown, 10 A. R. 639; Langley v. Palter (1909), 13 O. W. R. 951; or take in good faith in satisfaction of his claim a conveyance of a a lot owned by the debtor: Thompson v. Morrison (1907),

9 O. W. R. 179. And in City Bank v. Smith (1869), 20 C. P. 93, the giving in the ordinary course of business by the maker of a dishonoured cheque to the holder of it the cheque of a third person to cover the amount was upheld.

"PAYMENT OF MONEY TO A CREDITOR."—The words "bona fide" or "made in the ordinary course of trade" are not to be read into this clause: Campbell v. Roche, 18 A. R. 646. Under the Act as originally passed a payment of money to a creditor was, under certain circumstances, void as against an assignee, but the prohibitive provisions were afterwards struck out, so that now money may be paid to a creditor at any time.

It has been held that handing to a creditor the unaccepted cheque in favour of the debtor of a third person who at the time has funds at his credit to meet it is payment of money within the meaning of this section: Armstrong v. Hemstreet, 22 O. R. 336; but this case was overruled by Davidson v. Fraser, 23 A. R. 439; 28 S. C. R. 272; and a creditor to whom the unaccepted cheque of a third person was endorsed over was made to account for the proceeds. But where a trader in insolvent circumstances sold his stock-in-trade in good faith and the purchaser gave at his request his cheque to the trader's bankers for the amount of their claim against the trader, the transaction was upheld both

because this was a payment of money and also because the cheque never was the property of, or under the control of the insolvent: Gordon v. Union Bank (1899), 26 A. R. 155. So also in Halwell v. Wilmot (1897), 24 A. R. 628, the transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality was upheld, but this was because the duty to make good the wrong protected the transaction. It was also held in this case that the transfer of a cheque posted by the debtor to the creditor's bankers before the assignment for the benefit of creditors was executed but not credited in the bankers' books till after the assignment had been executed, was not revoked by the assignment. And in Newton v. Lilly (1906), 16 Man. L. R. 39, 3 W. L. R. 537, a payment in good faith by the purchaser of stock-in-trade of part of the purchase money to the vendor's chief creditor at the vendor's request was upheld as being in effect a payment by the vendor to the creditor.

Where a debtor, at his brother's instance, sells his stock to a bona fide purchaser and pays the proceeds to the holder of his notes endorsed by his brother, that is also a payment that cannot be impeached: Harvey v. McNaughton, 10 A. R. 616. And the substitution of the purchaser's notes for the vendor's notes in the hands of a banker is also a payment: Building and Loan Association v. Palmer, 12 O. R. 1.

An insolvent sold his stock-in-trade and received the price partly in cash and partly by a cheque and notes payable to his order. He paid the cash to and endorsed the cheque and notes in favour of a person who had endorsed notes for him. This person then discounted the purchase notes and with the cash, cheque, and proceeds of the discounted notes, paid off the endorsed notes. The transfer of the cheque and notes was held to be preferential and the transferee was ordered to pay the proceeds to the assignee, but the payment of cash was upheld: Armstrong v. Johnston (1900), 32 O. R. 15. Robinson v. McGillivray (1906), 12 O. L. R. 91; (1906), 13 O. L. R. 232; (1907), 39 S. C. R. 281, was also a case of sale of stock-in-trade by an insolvent, who received a cheque for the price and in the ordinary course of business deposited it with his bankers, who were also the bankers upon whom it was drawn, and they credited the amount to his overdrawn account, and were held entitled so to do. In Curry v. Kirkpatrick (1910), 8 E. L. R. 455, the debtor sold some land and gave the purchaser's note to the creditor, who returned it to the debtor, and he with the creditor's aid discounted it and paid the proceeds to the creditor. This was held to be a mere scheme and void. See Trusts and Guarantee Co. v. Munro (1909), 19 O. L. R. 480, as to attacking under the Winding-up Act a payment of money to a creditor.

"Bona Fide Conveyance in Consideration of a Present Actual Bona Fide Payment in Money."—While the giving of value is not in itself sufficient to prevent a transaction from being set aside it is of great importance on the question of intent: Stecher Lithographic Co. v. Ontario Seed Co. (1911), 22 O. L. R. 577; 24 O. L. R. 503; (1912), 46 S. C. R. 540; and where valuable consideration has been given by the transferee for a transfer it will not be set aside except upon clear evidence of actual intent to defraud: McDonald v. Horan (1908), 12 O. W. R. 1151; Fisher v. Kowslowski (1913), 25 W. L. R. 417; Jack v. Kearney (1912), 11 E. L. R. 401; even though the transferee knows of the transferor's insolvency: Gunn v. Vinegratsky (1911), 20 Man. L. R. 311, 17 W. L. R. 54; and knows that the transferor intends to use the purchase money to pay some of his creditors to the exclusion of others: Langley v. Beardsley (1909), 18 O. L. R. 67. But in the last mentioned case it was also decided that a payment of purchase money to the debtor, on the understanding, afterwards carried out, that the amount of the purchaser's claim should be paid out of the purchase money, was not a bona fide payment to the debtor, but merely a colourable transaction, and the purchaser was made to repay the amount to the assignee.

"BONA FIDE CONVEYANCE BY WAY OF SECURITY FOR A PRESENT ACTUAL BONA FIDE ADVANCE OF MONEY."—Security given to a person who makes an actual advance of money to an insolvent is valid, even though the insolvent pays the money to a favoured creditor, for the lender is not concerned with what the borrower does with the proceeds of the loan: Campbell v. Roche, 18 A. R. 646; Campbell v. Patterson, 21 S. C. R. 645; Gibbons v. Wilson, 17 A. R. 1; Court v. Holland, 4 O. R. 688; Ex parte Stubbins, 17 Ch. D. 58; Darvill v. Terry, 6 H. & N. 807; or even if the money is borrowed to enable the borrower to leave the country to avoid his creditors: Hall v. Kissock (1853), 11 U. C. R. 9. And see Meriden Britannia Co. v. Braden, 21 A. R. 352. The payment or advance must be in actual cash, and it is not an advance where the money 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 favoured creditor: Stoddart v. Wilson, 16 O. R. 17. In the case just cited the insolvent debtor induced his wife to convey her house to a creditor, who, with her consent, out of the price agreed upon retained his own claim and paid the balance to the debtor, who then gave his wife a chattel mortgage on his stock to secure the full amount. The mortgage was set aside. In Gibbons v. Wilson, 17 A. R. 1, a transaction of much the same kind was upheld, and Stoddart v. Wilson

was questioned. In Burns v. Wilson, 28 S. C. R. 207, however, Gibbons v. Wilson has been in effect overruled, and a chattel mortgage to secure money advanced to pay a creditor's claim, the same solicitor acting for debtor, creditor, and mortgagee, was set aside. Allan v. McLean (1906), 8 O. W. R. 223, 761, was a similar case. A chattel mortgage given by an insolvent trader to a lender of money used to pay a creditor's claim, was set aside, the lender having been procured by this creditor, and having intentionally refrained from making inquiries; and so also was Stecher Lithographic Co. v. Ontario Seed Co. (1911), 22 O. L. R. 577, 24 O. L. R. 503; (1912), 46 S .C. R. 540, where a chattel mortgage was given to relieve an endorser. But see for the distinguishing facts: Maher v. Roberts (1913), 5 O. W. N. 603.

A transfer given with the intention of defeating other creditors and not in good faith to secure the creditor taking it will be set aside: Knox v. Traver (1877), 24 Gr. 477; and so will a chattel mortgage which is merely a scheme: Union Bank of Canada v. Schecter (1908), 13 O. W. R. 231; (1909), 13 O. W. R. 604; but a lien on lumber to secure advances to pay wages was upheld in Howe v. Reeve (1906), 3 W. L. R. 555; as was in Rogers v. Carroll (1899), 30 O. R. 328, a mortgage for the amount of promissory notes paid by the endorser thereof, he having at the time of payment a mortgage to secure him in respect of his endorsement.

PRE-EXISTING DEBT AND ADVANCE.—In several cases the question of the validity of a security given to secure at the same time a new advance and an old indebtedness has been considered. Where a creditor makes in good faith a substantial advance, security taken for the old indebtedness and the new advance will be upheld: Hyman v. Cuthbertson, 10 O. R. 443; Ross v. Dunn, 16 A. R. 552; or where there is the bona fide belief that the new advance will enable the borrower to carry on his business: Risk v. Sleeman, 21 Gr. 250; D'Avignon v. Bomerito (1911), 20 O. W. R. 211, 775. But the smallness of the new advance is strong evidence that the true object was to secure the old debt: Kalus v. Hergert, 1 A. R. 75; Miller v. Reid, 4 A. R. 479; Ex parte Fisher, L. R. 7 Ch. 636; Bank of Montreal v. McTavish (1867), 13 Gr. 395; and it is not an advance to pay off other claims at the debtor's request, taking security for the amount so paid and for the original debt: Boyd v. Glass, 8 A. R. 632; D'Avignon v. Bomerito (1911), 20 O. W. R. 211, 775, 3 O. W. N. 158, 438; and the true nature and not the form of the transaction must be looked at: Rielle v. Reid, 28 O. R. 497; In re Watson, 25 Q. B. D. 27; Madell v. Thomas, [1891] 1 Q. B. 230. A security may however be upheld as to the new advance and set aside as to the old indebtedness: see the cases cited on page 33.

BONA FIDE CONVEYANCE MADE IN CONSIDERATION OF A PRESENT ACTUAL BONA FIDE SALE OR DELIVERY OF GOODS.—Security for the price of goods to be delivered will be upheld: Ex parte Sheen, 1 Ch. D. 560; Goulding v. Deeming, 15 O. R. 201; or where in good faith it is taken to secure the price of new goods and an old indebtedness: Bell v. Robinson (1909), 13 O. W. R. 676.

The sale or delivery must be to the debtor himself, and not to a creditor at the debtor's instance in such a way as to enable that creditor to retain the whole benefit: Stoddart v. Wilson, 16 O. R. 17.

Taking security in the very transaction in respect of which the claim arises is not objectionable: Ross v. Elliott (1861), 11 C. P. 221; Kerry v. James, 21 A. R. 338.

"FAIR AND REASONABLE RELATIVE VALUE" is a question of fact in each case: Cameron v. Perrin, 14 A. R. 565.

"VALUABLE SECURITY GIVEN UP."—The security must be one upon which, if the creditor continued to hold it, he would be bound to place a value: Beattie v. Wenger, 24 A. R. 72; Miller v. Reid, 4 A. R. 479. Therefore, where the creditor who gets security gives up an endorsed note, and the endorser is thus released, the assignee, if successful in an attack on the transac-

tion, is not bound to give the creditor a note endorsed by the same endorser: Beattie v. Wenger, 24 A. R. 72. Drafts made by a creditor upon and accepted by an agent of the debtor who had money of the debtor's in his hands were held in Miller v. Reid, 4 A. R. 479, to be practically the same as acceptances of the debtor himself and not to be " valuable securities " which had to be restored to the creditor before he could be compelled, under the similar but wider provision of the Insolvent Act, to repay the amounts received by him. An agreement in the nature of an equitable lien on the debtor's goods was held in Churcher v. Johnston, 34 U. C. R. 528, to be a valuable security, and as it had been in effect released in consideration of the payment there in question the assignee's attempt to obtain repayment was unsuccessful.

WAGES.—The Wages Act is R. S. O. 1914, c. 143. It provides (section 3) that " where an assignment is made for the general benefit of creditors, of any real or personal property, the assignee shall pay in priority to the claims of the ordinary or general creditors of the assignor, the wages of all persons in the employment of the assignor at the time of the making of the assignment, or within one month before the making thereof, not exceeding three months' wages, and such persons shall rank as ordinary or general creditors for the residue,

if any, of their claims," and (section 2) in the Act "wages shall mean and include wages and salary whether the employment in respect of which the same is payable is by time, or by the job or piece or otherwise." Under the Insolvent Act of 1875 (section 91) "clerks and other persons in the employ of the insolvent" were given priority to a certain extent, but the decisions placed a narrow construction on the words. Under the similar provisions of the English Winding-up Act, and the Canadian Winding-up Act, it has been held that an auditor is not a "clerk or servant" and is not entitled to priority: In re Ontario Forge and Bolt Co., 27 O. R. 230; nor a managing director: Re Ritchie-Hearn Co. (1905), 6 O. W. R. 474; In re Newspaper Proprietary Syndicate, [1900] 2 Ch. 349; even though he acts also to some extent as salesman: Re S. E. Walker Co., Limited (1913), 25 W. L. R. 164; nor a person who acts as secretary of one company and registrar of another: Cairney v. Back (1906), 22 Times L. R. 776; nor persons receiving a fixed annual salary to supply drawings and articles for a periodical as required: In re Beeton & Co., Limited, [1913] 2 Ch. 279. But in the last cited case the editress of a department was held entitled to priority; and so is a secretary and salesman: Re S. E. Walker Co., Limited, (1913), 25 W. L. R. 164; and a man employed to deliver coal to customers with his own

wagon and horses at a rate per ton: Re Western Coal Co., Limited (1913), 25 W. L. R. 26; and clearly also a commercial traveller, who can include moreover in his preferential claim commissions and expenses, if these are chargeable against his employers: In re Klein (1906), 22 Times L. R. 664; Re Morlock and Cline, Limited (1911), 23 O. L. R. 165. A director may also be a clerk or servant: In re Beeton & Co., Limited, [1913] 2 Ch. 279; but in that case his employment must be properly authorized by the shareholders: Re Morlock and Cline, Limited (1911), 23 O. L. R. 165; Fayne v. Langley, Lavender v. Langley (1899), 31 O. R. 254.

The provisions of the Wages Act are much wider than those of the Winding-up Act or the Mining Act (see Welch v. Ellis, 22 A. R. 255, Herman v. Wilson, 32 O. R. 60), and the president and vice-president of a company were in Fayne v. Langley, Lavender v. Langley (1899), 31 O. R. 254, allowed priority for a duly authorized salary.

The limitation as to the time of employment is to be enforced strictly: Ex parte Napier, 3 Pugsley 134; but the preferential lien is not limited to the wages earned during the three months preceding the assignment less the amount, if any, paid for wages during that time, but is the general balance due for wages

not exceeding in all three months' wages: McLarty v. Todd (1912), 4 O. W. N. 172.

The assignee of a claim for wages has the same right as the assignor: Lee v. Friedman (1909), 20 O. L. R. 49; Re Morlock and Cline, Limited (1911), 23 O. L. R. 165; even if he is the assignee of a large number of claims and the assignments have been made before the assignment for the benefit of creditors: Porterfields v. Hodgins (1913), 29 O. L. R. 409; affirmed, 6 O. W. N. 2. But if wages are paid by an agent of the debtor and without taking an assignment, there is no priority: Eastern Trust Co. v. Boston Richardson Mining Co. (1908), 5 E. L. R. 558; nor is there priority for an indebtedness to a boarding house keeper, for boarding men under an arrangement by which the employers were to pay the board of the employees as part of their remuneration: Olson v. Machin (1912), 4 O. W. R. 287.

In the Wages Act of 1897 employment " by the day " was spoken of. A man who is employed at a rate per hour, without any agreement as to the duration of the employment, is not employed "by the day:" Dunn v. Sedziak (1908), 7 W. L. R. 563.

7. No person other than a permanent and *bona fide* resident of Ontario shall be assignee under an assignment within the pro-

visions of this Act, nor shall any assignee delegate his duties as assignee to or appoint as deputy any person who is not a permanent and *bona fide* resident of Ontario; 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 Ontario. 10 Edw. VII. c. 64, s. 7.

When an assignment is made to a person resident in this Province, but the estate is managed and wound up by that person's partner, resident in Montreal, commission cannot be recovered by the assignee, nor can he deduct from the money received by him his expenses and disbursements in connection with the estate: Tennant v. Macewan, 24 A. R. 132.

8. Every assignment made under this Act for the general benefit of creditors, if the property is described in the words "all my personal property which may be seized and sold under execution and all my real estate, credits, and effects," or in words to the like effect, shall vest in the assignee all the real and personal estate, rights, property, credits, and effects, whether vested or

contingent, belonging to the assignor at the time of the assignment, 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* and *The Land Titles Act.* 10 Edw. VII. c. 64, s. 8.

FORM OF ASSIGNMENT.—The form of assignment in common use is as follows:

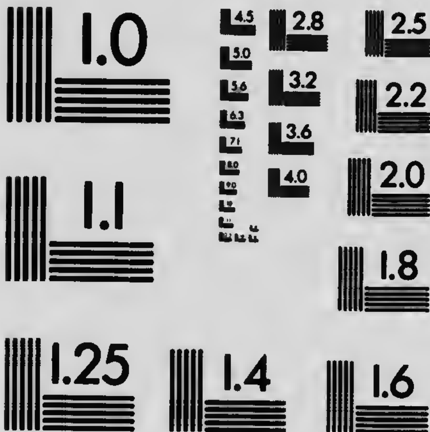
Indenture, made the day of A.D. 1914, in pursuance of the Assignments and Preferences Act, and under every other Law and Statute applicable to Assignments and Conveyances of Real and Personal Property.

Between the "Debtor," of the first part, the "Assignee," of the second part, and the several firms, persons and corporations who are creditors of the Debtor, hereinafter called the "Creditors," of the third part.

Whereas the Debtor hath heretofore carried on business at as and being unable to pay his creditors in full, hath 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.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

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Rochester, New York 14609 USA
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Now this indenture witnesseth that in consideration of the premises and of the sum 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 the same unto the Assignee, his heirs, executors, administrators and assigns, respectively, according to the tenure of the same.

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 heirs, executors, administrators and assigns, shall stand possessed of the moneys derived from the sale of the real and personal estate, and the moneys collected and called in, and other moneys which the Assignee, 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 such remuneration as shall be voted or fixed for 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 and 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 these presents.

And it is hereby declared that if it shall be in the interest of the Creditors so to do the Assignee may sell the book debts or any portion thereof either by public auction or private contract.

And the Creditors hereby assent to this assignment.

In witness whereof, etc.

The declaration in section 5 of R. S. O. 1897 c. 147, that an assignment using the words of the section "shall be valid and sufficient," has been omitted from the Consolidated Act of 1910, and from the present revision, no doubt as not adding anything to the later and more important vesting clause of the section.

At common law a valid assignment might be made by delivery of possession of goods and chattels to a trustee to hold for creditors: Nelles v. Maltby, 5 O. R. 263; and the execution of a statutory assignment by the assignee is not essential to its validity: Haight v. Munro (1860), 9 C. P. 462.

A statutory assignment has no extra-territorial effect: Macdonald v. Georgian Bay Lumber Co., 2 S. C. R. 364; nor will it pass rights of action for personal wrongs, such as slander and alienation of wife's affections: White v. Elliott, 30 U. C. R. 253; or trespass: Smith v. Commercial Union Ins. Co., 33 U. C. R. 529; or injury to credit: Tucker v. Bank of Ottawa, 4 O. W. N. 1189; or deceit on sale of land: McGregor v. Campbell (1909), 19 Man. L. R. 38, 11 W. L. R. 153; nor the benefit of a covenant to indemnify the assignor against payment of a mortgage: Ball v. Tennant, 21 A. R. 602. But see In re Perkins, Poyser v. Beyfus, [1898] 2 Ch. 182.

In Ontario the words," all the real and personal estate, rights, property, credits and effects," are treated as the governing ones, and the words, " except such as are by law exempt from seizure or sale under execution," as defining a limited exception from the general scope of the document: Re Unitt and Prott, 23 O. R. 78; Reinhardt v. Hunter (1905), 6 O. W. R. 421; but in Manitoba it has been held that the Act should be construed in a restricted sense, and that only what can be gotten at under execution (or by other legal proceedings —as is provided in the Manitoba Act), passes under an assignment: McGregor v. Campbell (1909), 19 Man. L. R. 38, 11 W. L. R. 153. But in practice the difference would probably amount to very little.

In Ontario an unascertained interest in the estate of the assignor's father has been held to pass under an assignment: Reinhardt v. Hunter (1905), 6 O. W. R. 421; and a right to revoke a revocable mandate: Halwell v. Wilmot, 24 A. R. 628.

An action by the assignor for a debt or other cause of action, which will pass to the assignee, abates when the assignment is made and must be revived. If it is not revived the defendant should move that it be revived or dismissed: Cameron v. Eager, 6 P. R. 117. If the action is revived by the assignee, he

becomes liable for the costs from the beginning: In re London Drapery Stores, [1898] 2 Ch. 684.

Goods held on consignment for sale do not pass under an assignment, and the owner is not because of the assignment deprived of the right to take back the goods and forced to rank for their value: Langley v. Kahnert (1904), 7 O. L. R. 356; (1904), 9 O. L. R. 164; (1905), 36 S. C. R. 397.

An assignment for the benefit of creditors is not a breach of a condition in a will against "selling or otherwise bequeathing the place:" Ryan v. Malone (1908), 11 O. W. R. 575; nor does it avoid a policy of fire insurance as an assignment without permission, under the statutory condition: Wade v. Rochester German Fire Ins. Co. (1911), 23 O. L. R. 635.

And a provision in a mortgage that upon an assignment for the benefit of creditors by the mortgagor the mortgaged property shall revert to the mortgagee, does not bar the assignee's right to redeem: Woodstock v. Woodstock Automobile Manufacturing Co. (1913), 5 O. W. N. 540.

An assignment by which a debtor "according to his estate and interest therein" assigns all his real estate is not "in words to the like effect" as those in the section and passes only

the limited estate mentioned in it: Canadian Port Huron Co. v. Burnett (1907), 5 W. L. R. 270.

"EXEMPT FROM SEIZURE OR SALE UNDER EXECUTION."—These words refer to the exemptions under the Execution Act, R. S. O. 1914, c. 80: Re Unitt and Prott, 23 O. R. 78, the provisions of which are as follows:

"3. The following chattels shall be exempt from seizure under any writ issued out of any Court, namely:

(*a*) The beds, bedding and bedsteads (including cradles), in ordinary use by the debtor and his family;

(*b*) The necessary and ordinary wearing apparel of the debtor and his family;

(*c*) One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and a shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking-glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin,

one milk jug, one teapot, twelve spoons, two pails, one washtub, one scrubbing brush, one blacking brush, one washboard, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this sub-division enumerated, not exceeding in value $150;

(*d*) All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value $40;

(*e*) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of $100, and food therefor for thirty days, and one dog;

(*f*) Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of $100; but if a specific article claimed as exempt be of a value greater than $100, and there are not other goods sufficient to satisfy the writ, such article may be sold by the sheriff, who shall pay $100 to the debtor out of the net proceeds, but no sale of such article shall take place unless the amount bid therefor shall exceed $100, and the cost of sale in addition thereto.

(*g*) Fifteen hives of bees.

4. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in clause (f) of section 3, elect to receive the proceeds of the sale thereof up to $100, in which case the officer executing the writ shall pay the net proceeds of the sale, if the same do not exceed $100, or if the same exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under clause (f).

5. The sum to which a debtor is entitled under clause (f) of section 3 or under section 4, shall be exempt from attachment or seizure at the instance of a creditor."

The debtor can do what he likes with these exemptions or their proceeds: Temperance In- [illegible]ce Co. v. Coombe, 28 C. L. J. 88; Field v. [illegible], 22 A. R. 449; and a judgment creditor [illegible]ot [illegible]ttach money payable in respect of insurance upon them: Osler v. Muter, 19 A. R. 94; nor will a transfer of them be set aside as preferential: Bates v. Cannon (1908), 18 Man. L. R. 7, 8 W. L. R. 575, for there can be no fraud upon creditors in dealing with property creditors cannot reach: McPherson v. Temiskaming Lumber Co. (1911), 3 O. W. N. 36. (Reversed in the Judicial Committee on the construction of the Execution Act, and therefore also on the

merits, [1913] A. C. 145); and see Canadian Pacific R. W. Co. v. Rat Portage Lumber Co. (1905), 10 O. L. R. 273.

As to chattels "ordinarily used" in the debtor's occupation, see Wright v. Hollingshead, 23 A. R. 1.

Assignment, How Made.—A company incorporated under the Joint Stock Companies' Letters Patent Act, may make an assignment, and this may be done under the authority of the directors without consultation with the shareholders: Whiting v. Hovey, 13 A. R. 7; 14 S. C. R. 515; and where an assignment has been made by a company with the approval of the majority of its creditors, and there are no special circumstances making it advisable to use the machinery of the Winding-up Act, the Court may, in the exercise of its discretion, refuse to make a winding-up order, and allow the administration of the assets to proceed under the assignment: Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107; In re Wm. Lamb Manufacturing Co. (1900), 32 O. R. 243; Re Maple Leaf Dairy Co. (1901), 2 O. L. R. 590; In re Strathy Wire Fence Co. (1903), 2 O. W. R. 834; (1904), 8 O. L. R. 186; In re Belding Lumber Co. (1911), 23 O. L. R. 255. Service on the assignee is not good service of a petition to wind up the company of which he is assignee: In re Rodney Casket Co. (1906), 12 O. L. R. 409.

An assignment may be made by a firm, but one partner cannot assign the firm assets without the consent of his co-partner, and in practice it is always advisable to have such an assignment executed by one of the partners in the firm name, and also by all the partners in their individual names: Nolan v. Donnelly, 4 O. R. 440; Nelles v. Maltby, 5 O. R. 263; Cameron v. Stevenson, 12 C. P. 389; Stevenson v. Brown (1863), 9 L. J. (O. S.) 110; Barber v. Wills, 13 O. W. R. 870. An assignment made by a firm in which there is an infant partner, will not pass the infant's interest: Powell v. Calder, 8 O. R. 505; and see Lovell v. Beauchamp, [1894] A. C. 607.

An assignment executed in their individual names, by partners in a firm, purporting to assign "all their estate," etc., conveys the separate estate of each partner, as well as the partnership estate: Nelles v. Maltby, 5 O. R. 263; Ball v. Tennant, 25 O. R. 50; 21 A. R. 602.

Composition agreements sometimes contain a provision that on default in payment a named person may execute an assignment for the benefit of creditors as attorney for the debtor. This would appear to be proper: Furnivall v. Hudson, [1893] 1 Ch. 335.

Registration of Assignment.—If the assigning debtor owns any lands or any interest in any lands the assignment should at once be

registered in the registry office of the division in which the lands are situate, or in the proper Land Titles Office. If not, the debtor may, notwithstanding the assignment, convey the lands or his interest to a bona fide purchaser, who may thus gain priority over the assignee.

DOWER.—If a man purchases land which is subject to a mortgage and then makes an assignment for the benefit of his creditors the equity of redemption passes to the assignee free from any claim for dower of the assignor's wife: Gardner v. Brown, 19 O. R. 202; In re Luckhardt (1898), 29 O. R. 111. If, however, the land is unincumbered, or if the incumbrance has been created by the assignor, the inchoate right of dower of his wife is not affected by the assignment for the benefit of creditors, and a release of dower should be obtained: Standard Realty Co. v. Nicholson (1911), 24 O. L. R. 46; Gemmill v. Nelligan (1895), 26 O. R. 307. If land is purchased and dealt with for partnership purposes, there is no right to dower: In re Music Hall Block, Dumble v. McIntosh, 8 O. R. 225.

9. Every assignment for the general benefit of creditors whether it is or is not expressed to be made under or in pursuance of this Act, and whether the assignment does or does not include all the real and personal

estate of the assignor, 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 same shall apply to the assignee named in such assignment. 10 Edw. VII. c. 64, s. 9.

An assignment confined in terms to personal property only was held not to be within R. S. O. 1887, c. 124: Blain v. Peaker, 18 O. R. 109; and the principle of this case was carried further in subsequent cases in which it was held that excepting from the assignment the assignor's book debts to even a small amount took it out of the Act. This section was added by 58 V. c. 23, to overcome this difficulty, and to prevent advantage being taken of a non-statutory form of assignment.

But an assignment of specified assets for ratable distribution among specified creditors is not within the Act, and may, therefore (in those Provinces where statutory assignments must be made to official assignees), be made to a person not an official assignee: Canadian Bank of Commerce v. Davidson (1910), 15 W. L. R. 530.

Where an assignment excepted shares not fully paid up and provided that the assignor should hold them as trustee for the assignee it was held that the assignee could not maintain an action against the company to compel the transfer of the shares: Armstrong v. Merchants Mantle Manufacturing Co. (1900), 32 O. R. 387.

10. If an assignor executing an assignment under this Act for the general benefit of his creditors owes debts both individually and as a member of a partnership, or as a member of 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 or others after all the creditors of such other estate or estates have been paid in full. 10 Edw. VII. c. 64, s. 10.

This rule of distribution is that adopted in the administration of estates in insolvency, and under certain circumstances in Chancery. The subject is fully discussed in Robson's Law of Bankruptcy, 7th ed., p. 690, et seq., p. 717, et seq. And see Bank of Toronto v. Hall, 6 O. R. 644, 653; Martin v. Evans, 6 O. R. 238; Re McDonagh v. Jephson, 16 A. R. 107; In re Randolph, 1 A. R. 315; Re Baker, 3 Ch. Ch. 499;

Ontario Bank v. Chaplin, 20 S. C. R. 152; In re Harper Wilson, 2 A. R. 151.

The test of the application of the rule is whether there are joint debts and separate debts, and not whether there are joint assets and separate assets: Frost and Wood Co. v. Stoddart (1908), 12 O. W. R. 230, 688, 1133; and the estate to which recourse may be had, is the estate by which the debt was contracted; it makes no difference which estate was to benefit by the transaction resulting in the debt: Gordon v. Matthews (1909), 18 O. L. R. 340, at p. 344.

Where a creditor has a claim against a partnership and a partner, for instance on the joint and several note of a firm and an individual member thereof, he may prove his claim against either the partnership estate or the estate of the partner: Gordon v. Matthews (1909), 18 O. L. R. 340, 19 O. L. R. 564. Whether he must make his election to prove his claim against only one of the two estates has not been decided under the present Act, but there are obiter dicta in Gordon v. Matthews in favour of the view that he may prove his claim against both estates. A contrary view was taken in In re Chaffey, 30 U. C. R. 64, of the construction of the similar section of the Insolvent Act of 1864, and in Frost and Wood Co. v. Stoddart (1908), 12 O. W. R. 230, 688, 1133, of the

construction of the section of the Assignments Act then in force, so that the point is not settled.

Acting as inspector of the partnership estate is not in itself an election to prove against that estate, for an inspector need not be a creditor; and a claim proved against one estate may be withdrawn and proved against the other, if this is done before a dividend has been declared: Gordon v. Matthews (1909), 18 O. L. R. 340, 19 O. L. R. 564.

The section applies in the case of any ostensible partnership, as for instance, where an infant is held out as a partner: Codville Georgeson Co. v. Smart (1907), 15 O. L. R. 357. But where two men carried on two separate partnership businesses the whole of the assets of both businesses were pooled, and the two businesses wound up as one, all the creditors of each business ranking equally: Re Gillespie (1913), 23 Man. L. R. 5, 23 W. L. R. 45.

The section does not apply unless there is an administration of separate estate and joint estate, so that creditors having claims against an assignor as a partner in a former firm are entitled to rank pari passu with his subsequent creditors: Macdonald v. Balfour, 20 A. R. 404; Moorehouse v. Bostwick, 11 A. R. 76; and a retiring partner may after dissolution of the firm

and payment of its liabilities rank against the estate of the continuing partner for the amount which the latter has agreed to pay him for his interest in the firm: Hall v. Lannin (1879), 30 C. P. 204. Under the similar section of the Insolvent Act it was held that where, after the dissolution of a firm, the business was carried on by one partner, who subsequently became insolvent, the creditors of the partnership were entitled to priority as far as certain assets of the partnership still in existence were concerned: Re Walker, 6 A. R. 169. But where goods are sold to a person who afterwards forms a partnership and brings the goods in as part of the partnership stock, the vendor cannot rank against the partnership: In re Simmons, 20 L. C. Jur. 296.

A solvent partner may prove against the estate of an insolvent partner for the amount due to the former in respect of the partnership transactions: In re Head, [1894] 1 Q. B. 638; and in the administration by the Court of the estate of a deceased insolvent partner, the assignee for the benefit of the creditors of the surviving partner may rank for the balance due to him upon an adjustment of the partnership accounts, in respect of capital contributed and partnership liabilities paid: In re Ruby, Trusts Corporation of Ontario v. Ruby, 24 A. R. 509. So too where a liability has been incurred by a

firm because of the fraud of one partner and has been discharged by two of the partners, the amount is a separate debt payable pari passu with the other separate debts of the fraudulent partner: Baker v. Dawbarn (1872), 19 Gr. 113.

11.—(1) A majority in number and value of the creditors who have proved claims to the amount of $100 or upwards may substitute for the sheriff, or for an assignee under an assignment to which sub-section 3 of section 6 applies, a person residing in the county or district in which the assignor resided or carried on business at the time of the assignment.

(2) An assignee may be removed and another substituted, or an additional assignee appointed by the Judge.

(3) Where an assignee dies a new assignee may be appointed in the manner provided by sub-section 2.

(4) Where a new or additional assignee is appointed the estate shall vest in him or in him jointly with his co-assignee without a conveyance or transfer, and he shall register a verified copy of the resolution of

the creditors or of the order appointing him in the office in which the assignment was registered.

(5) A verified copy of the resolution or of the order may be registered in the proper registry or land titles office and the registration thereof shall have the same effect as the registration of a conveyance. 10 Edw. VII. c. 64. s. 11.

"A MAJORITY . . . MAY SUBSTITUTE."—Before the amendment made in 1890, an assignee could be removed only by the Court upon special application. The creditors now have the matter in their own hands, as to the removal, though the area from which the new assignee may be chosen is limited: see section 7. Only creditors who have proved claims can vote on a motion to change the assignee, and by section 26 (1) when a claim is proved "such vouchers as the nature of the case admits of" must be furnished. Upon other questions a creditor may vote without proving his claim unless his vote is disputed: section 24.

Under similar provisions in insolvent Acts it has been contended that all the claims which have been proved must be taken into consideration and not merely the claims of the creditors present or represented at the meeting at which

the question of the choice or removal of the assignee is dealt with. But sub-sections 4 and 5 of the present section refer to "the resolution of the creditors," and it would seem, therefore, that a majority in number and value of the creditors who have proved claims and are present or represented at a duly constituted meeting can remove the assignee.

It is clear that except upon a motion to remove an assignee the votes of the creditors are calculated upon the basis set out in section 25. This is the basis even in the very analogous case of the consent required under section 6 to make valid an assignment to an assignee other than the sheriff. But upon a motion under the present section there must be a majority in number as well as a majority in value, a provision which safeguards the interests of the creditors having small claims. As far as the "value" of the claims is concerned the basis of section 25 should, it would seem, be followed, though under somewhat similar provisions in other Acts the face amount of the claims has been treated as the basis of voting power. But in practice the number of the claimants is nearly always the deciding factor, and whether the "value" is to be the face amount or the voting value under section 25, is not often of much importance.

Where an assignment has been made of partnership assets and separate assets the partnership creditors ought prima facie to have the right to decide as to the assignee to act for them and the separate creditors as to the assignee to act for them, but there might be, if that is the proper rule, different assignees and possible conflict. The partnership creditors have, however, a secondary interest in the separate assets and are, subject to the prior right of the separate creditors, creditors of the individual partners, and the separate creditors have a secondary interest in the partnership assets. It would seem, therefore, more reasonable that all the creditors, partnership and separate, should be allowed to vote on the question of removal. This was the view taken under the analogous provisions of the Insolvent Act of 1864: Luxton v. Hamilton (1864), 10 L. J. 334.

Difficulty sometimes arises as to the remuneration and expenses of the removed assignee. No provision is made for any summary mode of settling disputes of this kind. The assignee would no doubt have a lien on any assets he could obtain control of, and his claim would have to be paid under protest, and these assets obtained from him, or an account would have to be taken by the Court. See In re Tilsonburgh, Lake Erie and Pacific R. W. Co., 24 A. R. 378.

"AN ASSIGNEE MAY BE REMOVED . . . BY THE JUDGE."—As to the "judge" to whom the application should be made, see the notes to section 2.

An application to the judge under this section can be made by any creditor, a majority of the creditors need not apply: In re James O'Malley, Divisional Court, 16th March, 1900. Notice of the application should be given to the assignee and the assignor: In re Doelle, 12th November, 1897, Meredith, C.J.; and in the notice the grounds of objection should be mentioned: In re Wilson (1903), 6 O. L. R. 564. Upon such an application the ordinary practice does not apply and the assignee cannot be examined in invitum, as a witness in support of the motion for his own removal: ibid. But he could be ordered by the judge to attend for examination: ibid.

Apart from the Act a summary application to remove an assignee would be irregular: Re Davis's Trust, 17 P. R. 187, and instead of proceeding summarily a creditor can bring an action for the removal of the assignee and for administration of the estate by the Court: Brock v. Tew, 5th April, 1898: Falconbridge, J. But some special ground justifying this more expensive procedure would have to be made out or else the plaintiff might be deprived of costs or even made to pay them.

Where an assignee had been restrained from acting, pending the trial of an action to remove him, an additional assignee was appointed, his powers and duties being limited to selling the assets with the Master's approval and paying the proceeds into Court: Brock v. Cline (1906), 8 O. W. R. 144.

The Court has inherent jurisdiction to remove a trustee, and the benefit of the cestuis que trust is the guiding principle: Letterstedt v. Broers, 9 App. Cas. 371. This jurisdiction is exerciseable in the case of an assignee for the benefit of creditors: Robson's Law of Bankruptcy, 7th ed., p. 568; Burrill on Assignments, 6th ed., sec. 419.

No general rule can be laid down as to what is sufficient ground for the removal of an assignee. If he has an interest adverse to that of the creditors, for example, if he is the nominee, and is endeavouring to work for the benefit of a secured creditor: In re Canning, 24th April, 1896; Rose, J.; or is the tool, and is endeavouring to further the interest of the assignor: Ex parte Sheard, 16 Ch. D. 107; Ex parte Harper, 20 Ch. D. 685, he will not be allowed to continue in office. But in Orillia Export Lumber Co. v. Burson, 2 O. W. R. 1110, the removal of the assignee, who was solicitor for the chief creditor, was refused, his appointment having been approved by a majority of

the creditors. And see In re Lamb, [1894] 2 Q. B. 805; In re Mardon, [1896] 1 Q. B. 140; In re Martin, 21 Q. B. D. 29.

If the assignee is guilty of actual misconduct, as for example, using the trust funds for his own purposes, or accepting secret commissions from persons performing services for the estate, he will be removed: Ex parte Townshend, 15 Ves. 470; Duffy v. Duncan, 32 Barb. (N.Y.) 587; Boston Deep Sea Fishing Company v. Ansell, 39 Ch. D. 339; Brock v. Tew, 5th April, 1898: Falconbridge, J.

Death of Assignee. — Sub-section 3 was added in 1904 by 4 Edw. VII. c. 10, s. 32. Prior to that it had been held that upon the death of an assignee the creditors should apply promptly for the appointment of another: In re Williams, 22 A. R. 196, and that the appointment could be made under the provision which is now sub-section 2: In re Hagar, 11th March, 1895, Boyd, C. And see The Trustee Act, R. S. O. 1914, c. 121, s. 4.

Solicitor—Assignee. — The same person cannot act as assignee and solicitor of the estate: Re Dickinson, 2 B. C. Rep. 262.

12.—(1) 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 in violation of this Act.

(2) Where 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 required so to do the creditor shall have the right to obtain an order of the 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 may prescribe, and thereupon any benefit derived from the proceeding 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 obtained, the assignee signifies to the Judge his readiness to institute the 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 belong to the estate. 10 Edw. VII. c. 64, s. 12.

"THE ASSIGNEE SHALL HAVE THE EXCLUSIVE RIGHT OF SUING."—If a creditor, before the assignment, begins proceedings to set aside a fraudulent transaction, the subsequent assignment does not put an end to them, but the assignee may be joined as a party plaintiff or an order obtained by the creditor allowing him to sue for his own benefit: Gage v. Douglas, 14 P. R. 126; Tooke Bros. v. Brock & Patterson (1907), 3 E. L. R. 270; but before the assignee can be joined as plaintiff his consent in writing must be obtained: Bank of London v. Wallace, 13 P. R. 176. And in an action on a judgment the plaintiff's assignee for creditors was held entitled to assign back the judgment to the plaintiff and by so doing to have reconstituted the action properly: Lawless v. Crowley (1909), 13 O. W. R. 358.

The assignee, even if financially worthless, should not be ordered to give security for costs: Vars v. Gould, 8 P. R. 31; Major v. Mackenzie, 17 P. R. 18. But security was ordered, where the action was brought in the name of an assignee having no means by a creditor out of the jurisdiction: Skill v. Lougheed (1912), 3 O. W. N. 647. The assignee is personally liable for the costs of litigation to which he is a party: Macdonald v. Balfour, 20 A. R. 404; Buchanan v. Smith, 17 Gr. 208; 18 Gr. 41; Smith v. Williamson, 13 P. R. 126; Johnston v. Dulmage (1899), 30 O. R. 233; with a right of

indemnity out of the estate if the question is one that it is proper to raise in the interests of the creditors: Yale v. Tollerton, 2 Ch. Ch. 49; Johnston v. Dulmage (1899), 30 O. R. 233; but the creditors are not liable to indemnify the assignee unless there is an agreement to that effect or something in the nature of direct authority: ibid. But there must be no waste of the assets in useless litigation: Smith v. Beal, 25 O. R. 368.

The sheriff takes an assignment as a public officer, and cannot disclaim, and in case of his death his duties and rights as assignee devolve upon his deputy, and thereafter upon his successor in office, and even after the sheriff's death a creditor has no right to attack in his own name a transaction as fraudulent: Brown v. Grove, 18 O. R. 311.

Apart from the Act an assignee for the benefit of creditors has no locus standi to attack as preferential a mortgage made by the assignor before the assignment: Diehl v. Wallace (1905), 2 W. L. R. 24; and so also apart from the Act making an assignment does not deprive creditors of the right to attack a fraudulent transaction: Macdonald v. McCall, 12 A. R. 593; 13 S. C. R. 247; Kitching v. Hicks, 6 O. R. 739; and the section does not apply to the acts of the assignee himself, so that any creditor may, in his own name, attack as fraudulent

a sale by the assignee of the assets of the estate: Hargrave v. Elliot, 28 O. R. 152.

The making of an assignment does not necessarily prevent a judgment creditor from examining the assignor as a judgment debtor, this not being a right which becomes exclusively that of the assignee: McEachern v. Gordon (1899), 18 P. R. 459.

In Craig v. McKay (1904), 8 O. L. R. 651, the assignee sold certain land to a nominee who subsequently reconveyed to him. He went into possession and remained in possession six years and then brought an action to set aside a mortgage of the land made by the assignor a few days before the assignment. It was held that he must still be treated as being assignee and that the action lay.

If the assignee can apart from action in any lawful way obtain possession of property fraudulently transferred by the assignor he is entitled to do so: Sykes v. Soper (1913), 29 O. L. R. 193.

" TRANSACTIONS IN FRAUD OF CREDITORS, OR IN VIOLATION OF THIS ACT."—The " exclusive right " of the assignee is limited to the matters specifically mentioned in the first clause: Campbell v. Hally, 22 A. R. 217; Doull v. Kopman, 22 A. R. 447; but the assignee has also the right, under R. S. O. 1914, c. 135 s. 2 (b), to take

advantage of any technical objection to the validity of instruments within the Bills of Sale Act. See Tallman v. Smart, 25 O. R. 661; Gillard v. Bollert, 24 O. R. 147; Meriden Britannia Co. v. Braden, 21 A. R. 352; Clarkson v. McMaster, 22 A. R. 138, 25 S. C. R. 96; Heaton v. Flood, 29 O. R. 87; Halsted v. Bank of Hamilton, 27 O. R. 435; 24 A. R. 152; 28 S. C. R. 235. Without the special statutory provision he could not do this: Lennox v. Alaska Mercantile Co., 4 W. L. R. 333; In re Canadian Shipbuilding Co., 3 O. W. N. 1476. In the case of a mortgage by a company a liquidator (and therefore an assignee) cannot set up mere irregularities in procedure: Hammond v. Bank of Ottawa (1910), 22 O. L. R. 73. The assignee under this section represents those only who are creditors of the particular persons of whom he is assignee, and therefore, the assignee of a firm of two partners cannot attack a security given by these two partners and a third person when previously in partnership with that third person: Adams v. Watson Manufacturing Co., 15 O. R. 218; 16 A. R. 2. And the assignee cannot sue in respect of property in which he has transferred his interest, e.g., by releasing his equity of redemption: Bank of Hamilton v. Anderson (1904), 8 O. L. R. 153.

The assignee may sue in the Province of Ontario persons residing in the Province of

Quebec to set aside a transfer of goods made in the Province of Ontario: Clarkson v. Dupré, 16 P. R. 521. But in Anchor Elevator Co. v. Heney (1908), 18 Man. L. R. 96, 8 W. L. R. 735, making a chattel mortgage in Manitoba of goods in that Province in favour of a company having its head office in Montreal was held not to be a tort committed in Manitoba so as to enable an action to be brought in that Province. But an action in which all parties are out of the jurisdiction may be brought to set aside a transfer of land which is situated within the jurisdiction: Minot Grocery Co. v. Durick (1913), 23 W. L. R. 270. And an assignor out of the jurisdiction is a proper party to an action against a preferred creditor within the jurisdiction: Urquhart v. Aird (1905), 6 O. W. R. 155, 506.

A creditor who has prima facie been preferred should use all practicable means to free the transaction from suspicion and to give reasonable information as to its real character. If this is not done the creditor may fairly be made to bear his own costs of defending the transaction: Healey v. Daniels, 14 Gr. 633.

"CREDITOR SHALL HAVE THE RIGHT TO OBTAIN AN ORDER."—It was held under the Act of 1897 that the application for an order for leave to sue in the assignee's name should as a rule be made to the County Judge: In re Evans and

Clarke, 26th February, 1897: Meredith, C.J.; and that of course is the proper procedure now: see section 2. The assignee's neglect or refusal to bring the action must be shown, and if an order is obtained the action brought must be such as comes within its terms: Campbell v. Hally, 22 A. R. 217. The validity of the order cannot be disputed in the action: Poole v. Lefaivre, 3rd April, 1900, Divisional Court.

The form of the order is indicated in Barber v. Crathern, 28 O. R. 615, and that case decides that the creditor who is attacked may also join the attacking body, and so preserve his right to share ratably in the event of the security being set aside.

A creditor whose claim is not due may, it seems, sue: Macdonald v. McCall, 12 A. R. 593; 13 S. C. R. 247; Meriden Britannia Co. v. Braden, 21 A. R. 352; Ivey v. Knox, 8 O. R. 635. An execution creditor suing to set aside a transfer of notes as voluntary was not allowed to amend by claiming on behalf of all creditors that the transfer was preferential: McDonald v. Curran (1909), 1 O. W. N. 121, 389. Creditors suing in the assignee's name have no higher right than the assignee would have, and if he would be bound by the transaction attacked so are they: Langley v. Van Allen (1900), 32 O. R. 216; (1901), 3 O. L. R. 5; (1902), 32 S. C. R. 174. The section applies

only to an impeachable transaction which the assignee declines to attack and does not authorize a contestation by one creditor in the assignee's name of the right of another creditor to rank: Small v. Henderson (1899), 27 A. R. 492.

A creditor may bring an action in the assignee's name with his consent without an order, but any recovery will then be for the benefit of the estate: Doull v. Kopman, 22 A. R. 447.

The assignee may in good faith compromise any action or claim, and no creditor can thereafter assert the compromised right: Keyes v. Kirkpatrick, 19 O. R. 572; Campbell v. Hally, 22 A. R. 217; nor can the assignor himself if he obtains a discharge and repurchases the assets: Selig v. Lion, [1891] 1 Q. B. 513. If, however, the assignee has been imposed on, the settlement may be attacked in his name: Campbell v. Hally, 22 A. R. 217, and a creditor may, after an assignment, and after execution of a composition agreement, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment: Doull v. Kopman, 22 A. R. 447.

Acts done by the assignee in his personal capacity do not prejudice the creditors: MacTavish v. Rogers, 23 A. R. 17; and creditors

suing under an order in the assignee's name to set aside a mortgage as fraudulent are not estopped by a final order of foreclosure previously obtained by the mortgagee against the assignee, the reason being that in the mortgage action the assignee, as holder of the equity of redemption, represents the assignor, and could not set up the invalidity of the mortgage: Glass v. Grant, 16 O. R. 233. And e converso the assignee is not estopped by the dismissal of an action brought before the assignment by a creditor to set aside a conveyance: Smith v. Doyle, 4 A. R. 471.

"To the Extent of His Claim and Full Costs."—These words were inserted in the revision of 1897, the view of the Court of Appeal in MacTavish v. Rogers, 23 A. R. 17, being adopted. It was also decided in that case that the attacking creditor cannot, after obtaining an order allowing him to sue in the assignee's name, increase the amount recoverable by him by acquiring the claims of other creditors who have not been willing to take part in the attack. Nor can a creditor suing in the assignee's name obtain judgment against the debtor for the amount of the creditor's claim: Oliver v. McLaughlin, 24 O. R. 41; Urquhart v. Aird, 6 O. W. R. 155, 506; Tierney v. Slattery, 7 O. W. R. 489.

Joining Assignor as Defendant.—In an action by a simple contract creditor to set aside a transfer or conveyance as fraudulent, the transferor or grantor is a necessary party: Gibbons v. Darvill, 12 P. R. 478; Kuntz Brewery Co. v. Grant (1911), 3 O. W. N. 237; but in Beattie v. Wenger, 24 A. R. 72, Osler, J.A., expressed the opinion that in a statutory action by an assignee, the assignor should not be made a party, and this was the view taken in Crawford v. Magee (1905), 6 O. W. R. 44. In some other cases, however, where the costs of joining the assignor as a party have been complained of, the Court has stated that the assignor is, while not a necessary party, a proper one, and has refused to disallow costs occasioned by his presence on the record. And in Urquhart v. Aird (1905), 6 O. W. R. 155, 506, an assignor out of the jurisdiction was held to be a proper party in an action against a preferred creditor within the jurisdiction. If the transferor is a party and the action is dismissed as against the transferee it must also be dismissed as against the transferor: Allen v. Bank of Ottawa (1908), 11 O. W. R. 148. Probably if the attack is a mere technical one, the costs of joining the assignor would not be allowed. See, for example, Martin v. Sampson, 24 A. R. 1.

13.—(1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which 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 debtor, but, where there is no such assignment, to all creditors of the debtor.

(2) Where there is no assignment for the benefit of creditors, and the proceeds are of such a character as to be seizable under execution, they may be seized under the execution of any creditor and shall be subject to the provisions of *The Creditors' Relief Act.*

(3) Where there is no assignment for the benefit of creditors, and whether the proceeds are or are not of such a character

as to be seizable 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 proceeds available for the general benefit of the creditors.

(4) This section shall not apply as against innocent purchasers of the property. 10 Edw. VII. c. 64, s. 13.

By section 8 of 48 V. c. 26 (R. S. O. 1887, c. 124, s. 8), the right to follow proceeds was first given, and the right was amplified by 58 V. c. 23. Section 8 was omitted in the revision of 1897, and some slight changes were made in the wording of the added sections which since then have not had any material alteration made in them. In the first sub-section there is an inconsistency between the first clause which speaks of " a gift, conveyance, assignment or transfer of any property," and the later relative clause where the words are " gift, conveyance, transfer, delivery or payment." " Delivery over or payment " are two varieties of transactions which may come within the prohibition of section 5, but as " delivery over " is not mentioned in section 13 it has been suggested that

in the case of delivery of possession of goods to a chattel mortgagee the proceeds of these goods if sold could not be followed: Robinson v. Wilson (1908), 12 O. W. R. 198.

Apart from the provisions of the original section, the proceeds of fraudulently acquired property could not be followed if they were not ear-marked: Ross v. Dunn, 15 A. R. 552; Robertson v. Holland, 16 O. R. 532; Harvey v. McNaughton, 10 A. R. 16; Stuart v. Tremain, 3 O. R. 190; Davis v. Wickson, 1 O. R. 369. Some of the earlier cases at first sight appear to support a different view. In Martin v. McAlpine, 8 A. R. 675, a creditor who obtained the proceeds of goods sold by the sheriff under his collusive judgment, was ordered to pay over the proceeds to another creditor, who successfully attacked the collusive judgment. Spragge, C.J.O., who delivered the judgment of the Court, puts this right of payment upon the ground that the moneys were wrongfully received by the defendant from the sheriff, and were really the moneys of the plaintiff, and he refers to Merchants Express Co. v. Morton, 15 Gr. 274, as an example of the well-known principle that if the Court can trace money or property, however obtained from the person really entitled to it, into any other shape, it will intervene to secure it for the true owner, or person entitled. In Labatt v. Bixel, 28 Gr. 593,

an assignment of book debts was set aside and the defendant was ordered to account for the moneys collected by him, but in Masuret v. Stewart, 22 O. R. 290, at p. 300, Rose J., states that this was probably on the ground that the moneys were collected after the commencement of the action, and in Tennant v. Gallow, 25 O. R. 56, it was held that where an insolvent debtor conveyed property to a creditor, who sold it, and paid his own claim and some other claims, and gave the balance to the debtor, another creditor had no remedy against the creditor thus paid. Masuret v. Stewart, 22 O. R. 290, where a creditor obtained judgment for the proceeds of the sale against the grantee, who had sold the fraudulently transferred property, is also there referred to as a case standing upon its own special facts, and an examination of the case will show that the transaction was really a mere collusive one, and that the defendant was really a figurehead. The purchase money was in his hands when the action was brought.

It is not necessary to attack the transfer itself; there is a right of action against the person who has received the proceeds. Where, therefore, a quantity of butter had been given by an insolvent debtor to a trustee for certain preferred creditors, the assignee was held entitled to sue each crditor in the Division Court

for the share, within that Court's jurisdiction, received by him: Beattie v. Holmes, 29 O. R. 264; and where, on the other hand, an assignment of an undivided interest in an estate was held void as against the assignor's creditors, the value of the interest as realised was directed to be paid into Court for distribution among the creditors entitled: Urquhart v. Aird (1905), 6 O. W. R. 155.

A single creditor cannot take advantage for his own sole benefit of the special procedure under this section: Rennie v. Quebec Bank (1901), 1 O. L. R. 303; (1902), 3 O. L. R. 541. The action ought to be on its face one on behalf of all creditors, and, in Manitoba, before a recent amendment to the Act, has been treated as having been commenced only when a declaratory amendment of the style of cause was made: Ferguson v. Bryans (1904), 15 Man. L. R. 170; Gunn v. Vinegratsky (1911), 20 Man. L. R. 311, 17 W. L. R. 54.

An execution creditor whose execution has by lapse of time ceased to be a lien upon the real estate of the execution debtor has not the status of an execution creditor in attacking an alleged fraudulent conveyance, but only that of a simple contract creditor: Scott v. Griffin (1906), 7 O. W. R. 441.

"Invalid Against Creditors."—Sub-section 1 is limited to transactions invalid against [cre]ditors qua creditors, and does not apply to transactions invalid for reasons other than those designed to protect creditors, so that a creditor has not the right to attack a pledge as being in violation of the Bank Act: Conn v. Smith, 28 O. R. 629. And see Merchants Bank v. Hancock, 6 O. R. 285.

"Realized or Collected."—These words were inserted in the revision of 1897. In Meharg v. Lumbers, 23 A. R. 51, it had been held, before the revision, with some hesitation, that money collected under an assignment of book debts, before the bringing of an action attacking the assignment, had to be accounted for. Under the section as now worded there would be no question as to this relief. A liberal view has been taken of the right to payment, and a preferred creditor has been made to account for the proceeds of mortgaged goods sold by the mortgagor and re[ce]ived by the creditor: Housinger v. Kuntz (190[illegible]), 4 O. W. R. 233; Munro v. Standard Ban[k] [illegible]), 5 O. W. N. 508.

But the section does not defeat a creditor's right of set-off, and he may apply a surplus realised under a valid mortgage in satisfaction of an unsecured debt: Robinson v. Wilson (1908), 12 O. W. R. 198.

COSTS OF ATTACKING CREDITOR.—In Macdonald v. McCall, 12 P. R. 9, a simple contract creditor suing on behalf of himself and all creditors, was allowed out of the proceeds of the goods in question his solicitor and client costs, over and above the costs recovered from the defendant. This was the rule in fraudulent conveyance cases, and has been acted on by the Supreme Court of Canada in Burns v. Wilson, 28 S. C. R. 97. In Coursolles v. Fookes, 16 O. R. 691, where an execution creditor succeeded in setting aside a second mortgage, he was not allowed priority over the first mortgagee to the extent of the mortgage set aside, but was given, in the nature of salvage, his solicitor and client costs. In Webster v. Crickmore, 25 A. R. 97, the attack was made by an execution creditor on his own behalf, and when the action was brought there were prior executions in the sheriff's hands. The Court allowed the successful plaintiff his solicitor and client costs, in priority to all other claims except the costs and expenses of selling the goods in question.

14. An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment, and orders appointing

receivers by way of equitable execution 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, for his costs of the creditor, who has the first execution in the sheriff's hands. 10 Edw. VII. c. 64, s. 14.

"ATTACHMENTS—GARNISHEE ORDERS."—By 59 V. c. 31, s. 2, the section of the Assignments Act then in force was amended and was made to apply to attachments. Before this it was held that pending attachment proceedings were not affected by an assignment for the benefit of creditors: Wood v. Joselin, 18 A. R. 59; In re Thompson, 17 P. R. 109. Garnishee orders were included first in 1903 by 3 Edw. VII. c. 7, s. 29. And see In re Dyer v. Evans (1899), 30 O. R. 637, where without any opinion being expressed on the merits a motion to prohibit a Division Court Judge from enforcing a garnishee order after an assignment was refused.

"JUDGMENTS."—A judgment for alimony, registered against the lands of the defendant, is not affected by his assignment for the benefit of creditors: Abraham v. Abraham, 19 O. R. 256; 18 A. R. 436.

"EXECUTIONS NOT COMPLETELY EXECUTED BY PAYMENT."—"Executed by payment" means

executed by payment to the sheriff: Clarkson v. Severs, 17 O. R. 592; and where there has been a sale in a mortgage action for sale, and, before execution creditors prove their claims, the mortgagor makes an assignment for the benefit of creditors, the balance of the fund after satisfying the mortgage passes to the assignee: Carter v. Stone, 20 O. R. 340. But if the claims of the execution creditors have been proved and the claim of the mortgagee has been paid by the execution creditors, and a time fixed for redemption, the mortgagor's assignment does not affect the rights of the execution creditors: Federal Life Assurance Co. v. Stinson (1906), 13 O. L. R. 127; affirmed, sub nom. Scott v. Swanson (1907), 39 S. C. R. 229. And see Darling v. Wilson (1869), 16 Gr. 255.

Money paid by the execution debtor to the sheriff after seizure to avoid sale belongs to the execution creditor and does not pass to the execution debtor's assignee: Newton v. Foley (1911), 20 Man. L. R. 519, 17 W. L. R. 105.

An assignment made by the execution debtor after a final order in favour of execution creditors in an interpleader issue between them and a transferee from the execution debtor does not affect the rights of the execution creditors: Re Henderson Roller Bearings, Limited (1910), 22 O. L. R. 306; (1911), 24 O. L. R. 356; affirmed in the Supreme Court, sub

nom. Martin v. Fowler (1912), 46 S. C. R. 119. But the goods in question in this case had been transferred to the claimant by an instrument which while void as to the execution creditors was good as against the execution debtor. In Soper v. Pulos (1913), 4 O. W. N. 1258, an assignment was held not to include goods in respect of which an interpleader issue had been directed between execution crditors and a chattel mortgagee. But in Sykes v. Soper (1913), 29 O. L. R. 193, a wider construction is vigorously contended for, and it is held that an order directing an issue is not enough; there must be at least a judgment or order in favour of the execution creditors before the making of the assignment.

Where goods seized by the sheriff were claimed both by a chattel mortgagee and by the execution debtor's assignee, an issue was directed between the assignee as plaintiff and the execution creditor and the chattel mortgagee as defendants, and, in the event of the assignee's defeat a further issue between the chattel mortgagee and the execution creditor: Nisbet v. Hill (1905), 5 O. W. R. 293, 337, 402.

The section applies to executions registered in the Land Titles Office: Re Brooks (1909), 12 W. L. R. 303; Re Scribner and Wheeler (1910), 14 W. L. R. 524; but not to executions in force before it was enacted: Deering v. Gibbon (1907), 7 W. L. R. 178.

"ORDERS APPOINTING RECEIVERS BY WAY OF EQUITABLE EXECUTION."—While a motion was pending to continue an interim order appointing the judgment creditors receivers of the judgment debtor's interest in his father's estate the judgment debtor made an assignment for the benefit of creditors. It was held that this put an end to the proceedings, but that the judgment creditors were entitled to a lien for their costs: Reinhardt v. Hunter (1905), 6 O. W. R. 421.

"SUBJECT TO THE LIEN OF AN EXECUTION CREDITOR FOR HIS COSTS."—The first execution creditor has a lien for the whole costs for which he obtained judgment, and not for the costs of the execution merely: Ryan v. Clarkson, 16 A. R. 311; 17 S. C. R. 251; and the sheriff is entitled to hold the goods until the costs and his own poundage and possession money are paid: Smith v. Antipitzky, 10 C. L. T. Occ. N. 368. Unless, indeed, the execution is enforced, the execution creditor's right is gone, for he has a lien only and not a preference, except possibly after all preferred claims and expenses have been paid: Gillard v. Milligan, 28 O. R. 645.

The solicitor of an insolvent mortgagor has no lien for the costs of actions brought before the assignment to restrain a chattel mortgagee from selling the mortgagor's stock in trade,

which is then assigned to the assignee: Tremeear v. Lawrence, 20 O. R. 137.

Under the Manitoba Act all execution creditors have a lien for costs, not merely the first execution creditor. In Thordarson v. Jones (1908), 18 Man. L. R. 223, 9 W. L. R. 233, the sheriff was held enittled to seize under an execution for costs notwithstanding an assignment by the judgment debtor; and in Elliott v. Hamilton (1902), 4 O. L. R. 585, the sheriff was held to be entitled to proceed with a sale under execution although an assignment had been made by the execution debtor three days before the time fixed for the sale. The sheriff's costs had not been paid.

Division Court Costs.—Costs in the Division Court are provided for by section 187 of R. S. O. 1914, c. 63, which is as follows: "Where a bailiff has seized property under an execution or attachment, and the action is afterwards settled between the parties, or the defendant makes an assignment for the general benefit of his creditors, the bailiff, until his fees and disbursements are fully satisfied, shall have a lien therefor upon so much of the property as will reasonably satisfy the same, but in the event of a dispute as to the proper amount of the fees and disbursements, the amount claimed therefor may be paid into Court until the proper amount shall be certified by the Judge, and on

such payment into Court the lien shall cease." It will be noticed that this provides only for the bailiff's fees and disbursements, and not for the costs of the suit.

TAXES.—Under section 109 (4) of the Assessment Act, R. S. O. 1914, c. 195, a tax collector may levy taxes which are a lien upon lands by distress upon any goods and chattels on the land, title to which is claimed under an assignment absolute or in trust from the person taxed or from the owner of the lands.

PRECEDENCE OF ASSIGNMENT GENERALLY.—It has been held repeatedly that apart from the special statutory provisions an assignee for the benefit of creditors under the Ontario Act is in no higher position than the assignor, and is subject to all the equities affecting the latter: see, for instance, Kerry v. James, 21 A. R. 338; Ball v. Tennant, 21 A. R. 602; Thibaudeau v. Paul, 26 O. R. 385; and compare such cases as Re Andrews, 2 A. R. 24; Re Barrett, 5 A. R. 206; Jenks v. Doran, 5 A. R. 558.

An assignee is bound therefore by an agreement that title to goods shall not pass: Langley v. Kahnert (1904), 7 O. L. R. 356, 9 O. L. R. 164; (1905), 36 S. C. R. 397; Gault Bros. Co. v. Morrell (1907), 2 E. L. R. 501; even though oral: Bank of Hamilton v. Mervyn, 14 O. W. R.

132. [The general clauses of the Conditional Sales Act protect only subsequent purchasers and mortgagees in good faith, and while the section, which formerly formed part of the Chattel Mortgage Act, dealing with the reservation of title to stock-in-trade, refers to "creditors" also, and has been transferred to the Conditional Sales Act, the interpreting clause of the Chattel Mortgage Act, making "creditors" in that Act include an assignee, has not been adopted in the Conditional Sales Act.] See also Re Canadian Camera and Optical Co. (1901), 2 O. L. R. 677, where as against a liquidator a reservation of title to a machine with a lien on it and other goods which might be purchased was upheld. But under the Manitoba statutes a lien note may be void as against an assignee: Cox v. Shack (1902), 14 Man. L. R. 174; Canadian Port Huron Co. v. Burnett (1907), 14 Man. L. R. 174.

An assignee takes subject to an unregistered mortgage: Craig v. McKay, 12 O. L. R. 121; unregistered debentures: Johnston v. Wade (1908), 17 O. L. R. 372; National Trust Co. v. Trusts and Guarantee Co. (1912), 26 O. L. R. 279; an equitable mortgage by delivery of deeds: Zimmerman v. Sproat (1912), 26 O. L. R. 448; a brickmaker's lien: Roberts v. Bank of Toronto, 25 O. R. 194, 21 A. R. 629; a woodman's lien: In re Good and Nipisiquit Lumber

Co. (1912), 13 E. L. R. 89; a solicitor's lien: In re Boston Wood Rim Co. (1905), 5 O. W. R. 149; a mechanic's lien which has accrued before but is not filed till after the assignment (or winding-up application): Re Clinton, 1 O. W. N. 445; Hogan's Case, 6 E. L. R. 454. [And see the special statutory provision as to mechanics' liens: R. S. O. 1914, c. 140, s. 14.]

The assignee cannot take the benefit of a transaction and at the same time attack it, but he can adopt a fraudulent sale and sue the purchaser for the consideration: Wood v. Reesor, 22 A. R. 57; and under a contract for delivery of goods in instalments a liquidator (and equally so an assignee) cannot compel delivery of future instalments without paying for them and for those already delivered: Wm. Hamilton Mfg. Co. v. Hamilton Steel and Iron Co. (1910), 23 O. L. R. 270.

If an agent purchases goods for his principal with money supplied by the latter there is a trust impressed upon the goods in the principal's favour enforceable against the agent's assignee for the benefit of creditors: Long v. Carter, 23 A. R. 121, 26 S. C. R. 430. And so also under a miller's agreement to grind wheat and deliver the flour to the owner, the miller's assignee will be compelled to deliver over the wheat and the flour if it can be identified: In re Williams, 31 U. C. R. 143.

Insurance money received by an assignee under a policy of insurance taken out by the assignor on mortgaged buildings pursuant to a covenant in the mortgage, must be paid by the assignee to the mortgagee: Wood v. Jagger (1908), 9 W. L. R. 120, the assignee having no higher right than the mortgagor. And so too an assignee cannot recover from one of the assignor's creditors, money paid to that creditor under a composition agreement, the payment having been made at an earlier date than provided in the agreement, and being, therefore, as contended, a fraud on the composition: Langley v. Van Allen (1900), 32 O. R. 216; (1901), 3 O. L. R. 5; (1902), 32 S. C. R. 174.

It has in a number of cases been held that the doctrine of priority by notice, where book debts have been assigned, does not apply in favour of an assignee for the benefit of creditors: see for instance Thibaudeau v. Paul, 26 O. R. 385; and Re William Hamilton Manufacturing Company (1910), 1 O. W. N. 61, 421; and an assignee for the benefit of creditors must even pay to the prior assignee of the book debts, moneys collected in respect of them: Re Perth Flax and Cordage Co. (1908), 13 O. W. R. 1140. But while this curtailment of the rights of the assignee for creditors, is perhaps too firmly established now to be affected by anything less than legislation, there is much to

be said in favour of the view that the decisions are wrong. A later assignee of book debts can obtain priority over an earlier assignee by giving notice to the debtors, even though he knows of the earlier assignment. Why should not the assignee for creditors be able as their representative to obtain priority? At any rate in view of the unfairness of unregistered and undisclosed assignments of book debts this right might fairly be conferred upon assignees for the benefit of creditors. An assignor of book debts is in the absence of notice to the debtors by the assignee, entitled to collect the debts and the assignee has no special right to the proceeds. Why should the assignee for the benefit of creditors be in a worse position?

15. Where the Crown has a claim in respect of estreated bail against the estate of a person who makes an assignment for the benefit of his creditors the Lieutenant-Governor in Council may waive any preference in respect of such claim which the Crown has against such estate by virtue of its prerogative right. 2 Geo. V. c. 17, s. 29.

In the distribution of an estate by a Court of law in winding up or administration proceedings the Crown is entitled to priority if its claim comes into competition with the claims

of equal degree of subjects, but this rule does not apply to the administration of an estate under a voluntary assignment. In such a case the Crown, if it comes in under the trust, must come in on equal terms with other creditors: Clarkson v. Attorney-General of Canada (1889), 16 A. R. 202.

16. No advantage shall be obtained by any creditor by reason 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 the Judge on the application of the assignee or of any creditor of the assignor, and on such notice 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 not so as to prejudice the rights of innocent purchasers. 10 Edw. VII. c. 64, s. 15.

The omission of any reference to real property is not a mistake, defect, or imperfection, which can be remedied under this section: Blain v. Peaker, 18 O. R. 109.

17.—(1) A notice of the assignment shall forthwith, after the delivery thereof to him

or his assent thereto, be published by the assignee at least once in the *Ontario Gazette* and not less than twice in one newspaper having a general circulation in the county or district in which the property assigned is situate.

(2) The assignment or a copy thereof shall also, within five days from the execution thereof, be registered by the assignee, together with an affidavit of a witness thereto of the due execution of the assignment, in the office of the clerk of the County or District Court of the county or district in which the assignor, if a resident in Ontario, resided at the time of the execution thereof, or if not a resident then in the office of the clerk of the County or District Court of the county or district where the personal property so assigned or where the principal part thereof is at the time of the execution of such assignment; and the clerk shall number and enter such assignments and endorse thereon the time of receiving the same, and the same shall be open for the inspection of all persons desiring to inspect the same.

(3) The clerk shall be entitled to the same fees for services as if the assignment had been registered under *The Bills of Sale and Chattel Mortgage Act.*

(4) For the purposes of sub-section 2 the Provisional County of Haliburton shall be deemed part of the County of Victoria. 10 Edw. VII. c. 64, s. 16.

The declaration in the Act of 1897, that no assignment shall be within the operation of the Act respecting mortgages and sales of personal property, has now been transferred to the Bills of Sale Act, R. S. O. 1914, c. 135, s. 3. There had been conflicting views on this point: Robertson v. Thomas, 8 O. R. 20; Whiting v. Hovey, 9 O. R. 314, 13 A. R. 7, 14 S. C. R. 515.

Registration of the assignment in the proper office is sufficient foundation for the renewal of a chattel mortgage by the assignee: Fleming v. Ryan, 21 A. R. 39; R. S. O. 1914, c. 135, s. 21 (9).

The Act respecting mortgages and sales of personal property requires from the mortgagee an affidavit of bona fides. In the case of an assignment for the benefit of creditors this is unnecessary. The fee for registration is fifty cents.

The notice of the assignment here spoken of is the simple notice that the assignment has been made. In practice, however, it is usual to join with this notice a notice to creditors to prove claims and a notice of distribution of the estate. See notes to section 26.

Under the Act of 1897, the official with whom registration had to be effected, varied in different districts. The present procedure is simpler, and at any rate an error in the registration is not of much importance: see section 20.

18.—(1) If the notice is not published as provided by the next preceding section, or if the assignment is not registered within five days from the delivery thereof to the assignee or his assent thereto, the assignee shall incur a penalty of $10 for each and every day during which the default continues.

(2) The burden of proving the time of such delivery or assent shall be upon the assignee.

(3) Where the assignment is made to a sheriff he shall not incur the penalty unless he has been paid or tendered the cost of

advertising and of registering the assignment, nor shall he be bound to act under the assignment until his costs in that behalf are paid or tendered to him. 10 Edw. VII. c. 64, s. 17.

A composition agreement need not be registered, and the points of distinction between an assignment and a composition agreement are pointed out in Grundy v. Johnston, 28 O. R. 147, the essential distinction being that in an assignment all the assets go to all the creditors till they are paid in full, and the surplus, if any, to the assignor, while in a composition agreement the creditors agree, upon receiving a smaller sum in satisfaction of larger claims, to discharge the debtor.

19. If the assignment is not registered, or notice thereof is not published, the Judge may, upon the application of any person interested in the assignment, by order enforce the registration of the assignment or the publication of the notice. 10 Edw. VII. c. 64, s. 18.

20. The omission to publish or register as required by section 17 shall not, nor shall any irregularity in the publication or registration, invalidate the assignment. 10 Edw. VII. c. 64, s. 19.

DUTIES AND POWERS OF ASSIGNEE AND INSPECTOR.

21.—(1) It shall be the duty of the assignee immediately to inform himself, by reference to the assignor and his records of account, of the names and residences of the assignor's creditors, and, within five days from the date of the assignment, to call 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 notice calling the meeting to be held in his office or some other convenient place to be named in the notice not later than twelve days after the mailing thereof, and by advertisement in the *Ontario Gazette.*

(2) All other meetings to be held shall be called in like manner. 10 Edw. VII. c. 64, s. 20.

22.—(1) The creditors at any meeting may appoint one or more inspectors who shall superintend and direct the proceedings of the assignee in the management and

winding up of the estate, and may also at any subsequent meeting for that purpose revoke the appointment of any inspector.

(2) Where the appointment of an inspector is revoked or where an inspector dies, resigns his office or leaves Ontario the creditors at any meeting may appoint another inspector to take his place.

(3) An inspector shall not directly or indirectly purchase any part of the stock-in-trade, debts or other assets of the assignor. 10 Edw. VII. c. 64, s. 21.

Before 1910, when this section was enacted, there was no provision in the Act for the appointment of inspectors. Even now their powers and duties are not fully defined. They have power under section 35 to fix the assignee's remuneration if the creditors do not do so: under section 32 they can order the assignee to declare dividends; and under section 38 they can take proceedings for the examination of the insolvent and his employees. They are so far trustees for the creditors that even without the prohibition of sub-section 3 it had been held that they cannot purchase the trust estate without the creditors' consent: Morrison v. Watts, 19 A. R. 622; or at private sale:

Thompson v. Clarkson, 21 O. R. 421; particularly where they have special knowledge of its value: In re Canada Woollen Mills (1904), 8 O. L. R. 581; (1905), 9 O. L. R. 367; Gastonguay v. Savoie (1899), 29 S. C. R. 613. Under the English Act, which contains a clause prohibiting an inspector from doing certain things, which, if he were treated as a trustee, he could not under the general law applicable to trustees do even without special prohibition, it has been held that a sale in good faith to an inspector's partner might be valid: In re Gallard (No. 2), [1897] 2 Q. B. 8; though in the particular instance the sale was set aside on the ground of collusion, and this after the attacking creditor had waited nearly six years to make his attack. And in Shantz v. Clarkson (1913), 4 O. W. N. 1303, a sale to a person with whom an inspector had an interest was upheld, all the facts being known to the assignee and the other inspectors, and the price being fair.

Inspectors must not in any way make a profit at the expense of the estate: Segsworth v. Anderson, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699. Notes given to an inspector by an insolvent, to obtain his consent to a compromise, are null and void: Cartier v. Genser (1902), 22 C. L. T. Occ. N. 416; and a payment in cash to an inspector to induce him to approve of a proposed sale, avoids the whole transaction, for an

inspector must act with absolute good faith towards the assignee and his co-inspectors: Brigham v. Banque Jacques Cartier (1900), 30 S. C. R. 429.

The inspectors cannot, unless specially authorized by the creditors, dispose of the estate: Morrison v. Watts, 19 A. R. 622; for the disposal of the estate is in the hands of the creditors, and in default in that of the Judge of the County Court: ibid.

23.—(1) 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 25, 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 twelve days after he receives the request, and in case of default the assignee shall incur a penalty of $25 for every day after the expiration of the time limited for calling the meeting until it is called.

(2) In case a sufficient number of creditors do not attend the meeting mentioned in section 21, or fail to give directions with

reference to the disposal of the estate, the Judge may give such directions as he may deem necessary for that purpose. 10 Edw. VII. c. 64, s. 22.

The disposal of the estate is in the hands of the creditors, and if they fail to give directions, the Judge of the County Court may give all necessary directions: Morrison v. Watts, 19 A. R. 622. Where the assignee is also special trustee of property of the debtor a sale under the direction of the Judge of the County Court is of no effect: Hutton v. Justin, 22 C. L. T. Occ. N. 23; C. L. T. Dig. (1900), col. 495; 1 O. W. R. 64. In the absence of special directions, the assignee should realize the assets as quickly and as advantageously as possible: Quebec Bank v. Snure (1869), 16 Gr. 681. He cannot himself purchase, even with the inspectors' consent, at all events not when he at the time knows of and is negotiating with a possible purchaser: Morrison v. Watts, 19 A. R. 622.

Where part of the assigned property was purchased by the assignee in the name of a third person, and resold at a profit, the assignee and the nominal purchaser were held liable for the profit in an action brought by a creditor of the assignor: Atkinson v. Casserley (1910), 22 O. L. R. 527.

It is usual to sell the stock-in-trade and fixtures en bloc by auction as soon as possible, but the assignee or his agent cannot himself sell the stock-in-trade by auction in a municipality where an auctioneer must have a license: Regina v. Rawson, 22 O. R. 467; and he must be careful also not to run foul of transient trader regulations: Regina v. Roche (1900), 32 O. R. 20; Rex v. Pember (1912), 3 O. W. N. 957.

The following form of conditions of sale and agreement to purchase is frequently used:

CONDITIONS OF SALE.

Conditions of sale of the stock-in-trade and fixtures of the estate of

1. The stock-in-trade and fixtures 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 stock-in-trade and fixtures shall be put up at a former bidding.

3. No person shall retract his bid.

4. The assignee 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 ten per cent. of his purchase money to the assignee and sufficient therewith to make one-fourth of the purchase money in five days, and the balance in three equal instalments, secured to the satisfaction of the assignee, at two, four and six months, with interest at six per cent. per annum. And upon the full completion of such purchase, the purchaser shall be entitled to be put into possession.

6. Time shall be considered of the essence of these conditions, and the agreement to purchase, and if the purchaser fails to comply with these conditions or any of them, the deposit shall be forfeited to the assignee, who shall be at liberty to re-sell the goods, without notice to the defaulter; and the deficiency, if any, by such re-sale, together with all charges attending the same, are to be made good by the defaulter.

7. The purchaser shall have five days to check the inventory and stock-in-trade and fixtures free of expense, after which the purchaser is to assume the rent and taxes and other rates, and to arrange with the landlord of the premises as to tenancy.

AGREEMENT FOR PURCHASE.

It is hereby declared and agreed, by and between the vendor of the stock-in-trade and fixtures referred to in the annexed conditions of sale, and that the said has become the purchaser of the said stock-in-trade and fixtures at the rate of cents on the dollar of the inventory value thereof, and that the sum of has been paid by the said to the said by way of deposit and in part payment 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, and be observed and fulfilled by the said and respectively in all things.

As witness their hands this day of

Witness: .

These conditions of sale were under consideration in Dominion Linen Manufacturing Company v. Langley (1909), 1 O. W. N. 262, and it was there held that the clause providing for the adjustment of "shorts and longs," did not cover the case of the (vendor) assignee's inability to deliver certain goods mentioned in the inventory, but was merely intended to allow

a rough and ready way of setting off small over-measurements against small shortgages in measurement. The agreement of the purchaser (clause 7) "to assume the rent" relates to future rent not rent due at the time of the sale: Tew v. Routley (1900), 31 O. R. 358.

A secret benefit to a creditor or to an inspector to obtain approval of a sale avoids the transaction: Brigham v. Banque Jacques Cartier (1900), 30 S. C. R. 429.

An agreement to purchase at a price equal to twenty-five cents in the dollar of the claims, no mode of settling the claims being provided, is too indefinite to be enforced: In re Bolt and Iron Co. (1885), 10 P. R. 437; and see Dominion Radiator Co. v. Bull (1902), 1 O. W. R. 672, for another example of difficulty arising under an agreement to pay a rate in the dollar on creditors' claims.

In Dueber Watch Co. v. Taggart (1899), 26 A. R. 295; (1900), 30 S. C. R. 373, a creditor at the instance of one partner in an assigning firm bought the assets from the assignee, agreeing to pay a rate in the dollar to other creditors and to receive his own claim in full. Afterwards this creditor transferred the assets to this partner, receiving from him his notes for the full amount paid and the full

amount of the creditor's claim. It was held that the original debt had been extinguished by this transaction and that the other partner was no longer liable.

24. 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. 10 Edw. VII. c. 64, s. 23.

Claims ought to be proved by affidavit, though statutory declarations are very commonly accepted, and if the creditor pledges his oath in proof of his claim, he has the right to vote: Blake v. Hall, 19 La. Ann. 49.

In the Act of 1897 there was a special provision that affidavits might be sworn before a Commissioner, Justice of the Peace, or Notary Public. This has been omitted, no doubt as unnecessary, the general provisions to this effect governing the making of affidavits being sufficient.

The following form of affidavit and proxy is sufficient:

AFFIDAVIT OF CLAIM.

In the matter of the Assignments and Preferences Act.

And in the matter of
of the of in the
Province of Ontario, Debtor,
and of the
of in the Province of
Claimant.

I (name in full), of the of
(occupation) make oath and say:

1. I am[1]

2. The above named debtor is justly and truly indebted to the claim... in the sum of
100 dollars,
and the particulars of the said indebtedness are set out in the statement hereto annexed.

3. The claimant holds[2]

1. "The above named Claimant," or "a partner in the above named Claimant firm," or "the duly authorized agent of the above named Claimant."

2. "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."

Sworn before me at the
of in the
Province of the
day of
A.D. 19 .

To be sworn before a Commissioner authorized to take affidavits or before a Notary Public.

PROXY.

above named hereby authorize and empower
to represent
at all meetings of creditors in this matter, and to vote and act for
in this matter, and in all respects to represent
as if were present and acting in the premises.

Dated at the day of
, 191 .

Witness }

It is advisable that a proxy by a limited company should be executed under the common seal though that is probably not essential: see The Companies Act, R. S. C. 1906, c. 79, ss. 32, 160; The Ontario Companies Act, R. S. O. 1914, c. 178, s. 141.

25.—(1) Subject to the provisions of section 11 all questions 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 of or over $500 and not exceeding $1,000, 3 votes.

For every additional $1,000 or fraction thereof, 1 vote.

(2) 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) In case of a tie the assignee or, if there are two assignees, the assignee nominated for that purpose by the creditors or by the Judge if none has been nominated by the creditors, shall have a casting vote.

(4) 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 assignor, or on the estate of a third person for whom the assignor 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 creditor ranking 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) If a creditor's claim is based upon a negotiable instrument upon which the assignor 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 person primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its nonpayment, he shall be entitled to amend his claim and revalue his security.

(6) Where a person claiming to be entitled to rank on the estate 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, upon summary application by the assignee or by any other person interested in the estate, of which application at least three days' notice shall be given to the claimant, may order that, unless a specified value be placed on such security and notified in writing to the assignee within a time to be limited by the order, the 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.

(7) If a specified value is not placed on such security, and notified in writing to the assignee according to the exigency of the order, or within such further time as the Judge may by subsequent order allow, the claim, or the part, as the case may be, shall be wholly barred

as against such estate but without prejudice to the liability of the assignor therefor. 10 Edw. VII. c. 64, s. 24.

"SUBJECT TO THE PROVISIONS OF SECTION 11."—Under section 11 a majority in number and value of the creditors who have proved claims to the amount of $100 or upwards may change the assignee. There must be in favour of the change a numerical majority of the claimants as well as a majority in voting value: see the notes to section 11.

"UNLESS THE ENTIRE CLAIM IS ACQUIRED."—Although there is no specific prohibition against "splitting claims" before the assignment, it is improper to do so: Ex parte Sheard, 16 Ch. D. 107; Ex parte Harper, 20 Ch. D. 685.

"EVERY CREDITOR . . . SHALL STATE WHETHER HE HOLDS ANY SECURITY."—If a creditor holds security of such a nature that he is not required to value it, the omission to refer to it does not make the affidavit defective: Martin v. McMullen, 19 O. R. 230; and if the security cannot be valued when the claim is filed, the creditor should, as soon as the value can be arrived at, amend the claim: Wyld v. Clarkson, 12 O. R. 589. To state that the security is worth nothing is a valuation: In re Piers, [1898] 1 Q. B. 627. Where after a claim had

been filed, a mortgage was rectified by including in it an omitted parcel, a revaluation was directed: Cameron v. Kerr (1876), 23 Gr. 374. The creditor has prima facie the right to value all his securities in one sum, but if there are distinct items with distinct securities separate valuations may be insisted on: In re Morris, [1898] 2 Ch. 413, [1899] 1 Ch. 485. And see In re Pearce, [1909] 2 Ch. 492.

Apart from the statute, one creditor cannot, in the administration of an estate, be compelled to value any securities held by him. He is entitled to rank for the full amount of his claim, and to realize any securities as well, provided he does not receive in all more than 100 cents in the dollar: Beaty v. Samuel, 29 Gr. 105; Eastman v. Bank of Montreal, 10 O. R. 79; Young v. Spiers, 16 O. R. 672; Molsons Bank v. Cooper, 23 A. R. 146. Under this section the creditor need not value security given by a third person for the debtor, e.g., a guarantee, but if the guarantee is a general one, and not for the ultimate balance only, the guarantor, upon payment of the amount of the guarantee, is entitled to rank for the amount: Martin v. McMullen, 19 O. R. 230, 20 O. R. 257, 18 A. R. 559. If the guarantee is a continuing guarantee of the ultimate balance the guarantor cannot relieve himself by paying the amount and cannot rank for that amount unless and until the guaranteed creditor has been paid in full: Struthers v. Henry

(1900), 32 O. R. 365; In re Patent Cloth Board Co. (1903), 3 O. W. R. 373. And see as to the guarantor's right under a special compromise: Re Stratford Fuel Co. (1913), 28 O. L. R. 481.

Under the similar section of the Insolvent Act of 1875, a firm and an individual partner have been treated as distinct persons; and it has been held that security by an individual partner for a firm debt need not be valued, nor security by a firm for a partner's debt: Re Jones, 2 A. R. 626; In re Chaffey, 30 U. C. R. 64; Re Baker, 3 Ch. Ch. 499. It has been held by Chadwick, Co. J., in In re Neill and Small, 18th October, 1897, that this sub-section should be construed in the same way.

Where payment of goods has been guaranteed and both guarantor and purchaser have assigned, and the vendors seek to rank on the guarantor's estate, they must value the liability of the purchaser's estate, his assignment having potentially vested in them a share thereof: Wyld v. Clarkson, 12 O. R. 589; and where a debt was payable to executors and there were vested in them lands in which the debtor had an interest, it was held that this interest must be valued: Tillie v. Springer, 21 O. R. 585. Under the English Bankruptcy Act, where payment of a promissory note was guaranteed and the payee discounted the note and transferred the benefit of the guarantee and then failed, the

transferee was held entitled to rank upon the payee's estate without valuing the guarantee: In re Hallett & Co., [1894] 2 Q. B. 256. It was also held under that Act that where an action is brought to recover a debt and money is paid into Court in satisfaction by the defendant, who then becomes bankrupt, the plaintiff is a secured creditor to the extent of the money in Court: In re Gordon, [1897] 2 Q. B. 516; and that a purchaser who has paid a deposit on account of purchase money is, in the event of the vendor's bankruptcy, a secured creditor to the extent of the deposit: Levy v. Stogdon, [1898] 1 Ch. 478.

The lien of a company on shares of its capital stock held by the assignor, is security which should be valued, but where by inadvertence no mention was made in the claim filed of the lien, it was nevertheless held enforceable against a purchaser of the shares with notice. Failure to value the security does not ipso facto involve the loss of the security: Box v. Bird's Hill Land Co. (1912), 22 W. L. R. 871; (1913), 23 Man. L. R. 415, 24 W. L. R. 706.

If there is an agreement to that effect, guarantors may make payments to a suspense account and the creditor may rank against the coguarantor's estate for the full amount of the claim without giving credit for the amount of this suspense account: Commercial Bank of

Australia v. Official Assignee of Wilson, [1893] A. C. 181; but in the absence of special agreement, a creditor must give credit for all moneys received by him before his claim is filed: Eastman v. Bank of Montreal, 10 O. R. 79; Molsons Bank v. Cooper, 26 S. C. R. 611; Martin v. McMullen, 19 O. R. 230, 20 O. R. 257, 18 A. R. 559; or possibly up to the time a right of action for dividends accrues: see Benning v. Thibaudeau, 20 S. C. R. 110; a Quebec decision declared in Molsons Bank v. Cooper, 26 S. C. R. 611, to be applicable to Ontario. If specific security is given for specific items and the items are paid, even after the claim has been filed, credit must be given: Young v. Spiers, 16 O. R. 672. Questions of this kind would arise only in reference to security upon which the creditor is not bound to place a value.

"SECURITY ON THE ESTATE OF A THIRD PERSON FOR WHOM THE ASSIGNOR IS ONLY SECONDARILY LIABLE."—The question to be determined is whether the debtor is as between himself and the third person only secondarily liable; the liability to the creditor is not the test: Glanville v. Strachan (1908), 29 O. R. 373.

"ASSIGNEE MAY REQUIRE AN ASSIGNMENT OF THE SECURITY."—Under the similar section of the Insolvent Act, it has been held that the creditor holding security may give it up and

prove for the whole claim, or that he may value it and prove for the balance, or that he may keep it and not prove at all: Deacon v. Driffil, 4 A. R. 335; and the same result has been arrived at under the Winding-up Act: Re Brampton Gas Co. (1902) 4 O. L. R. 509, where debenture holders were held entitled to enforce the debentures by independent proceedings and to withdraw a claim in respect of them filed by inadvertence. The creditor cannot keep the security and realize it and then prove for the balance: Re Beaty, 6 A. R. 40; and where the creditor values his security the estate must promptly decide whether it is to be taken over or not, and if it is not promptly taken over the inference is that the creditor is intended to keep it, and he becomes the absolute purchaser of it at the value placed upon it by him, and if he realizes more than this value he is entitled to the excess: Bell v. Ross, 11 A. R. 458; Bank of Ottawa v. Newton (1906), 4 W. L. R. 508. So on the other hand a creditor cannot, after valuing his security and having that value accepted by the assignee, amend his claim by reducing the value: Re Street, 15 C. L. J. 86. If the assignee takes over the security the creditor gets the ten per cent. as a bonus, and need not credit the ten per cent. on the unsecured balance of his claim: Deacon v. Driffil, 4 A. R. 335, at pp. 341, 344.

"CLAIM BASED UPON A NEGOTIABLE INSTRUMENT UPON WHICH THE ASSIGNOR IS ONLY INDIRECTLY OR SECONDARILY LIABLE."—It has been held under the similar section of the Trustee Act, 59 V. c. 22, sec. 1, sub-sec. 1, that where a partner joins as accommodation maker in a note by the firm he is primarily liable, within the meaning of this clause, to the holder, who may rank against his estate without valuing the liability of the firm: Bell v. Ottawa Trust and Deposit Co., 28 O. R. 518.

APPLICATION TO COMPEL CREDITOR TO VALUE SECURITY.—The clauses which now appear as sub-sections 6 and 7 were added by 59 V. c. 31, s. 3, and were intended to remedy the difficulty occasioned by the secured creditor's delay or refusal to value.

It was held under the former Act that the County Court Judge, when dealing with an application of this kind, acted as persona designata and that there was no appeal except by special leave under the Judges Orders Enforcement Act, R. S. O. 1897, c. 76 (see now R. S. O. 1914, c. 79): In re Aaron Erb No. 1 (1908), 16 O. L. R. 594. The proceedings may, however, be brought up by certiorari: In re Aaron Erb, No. 2 (1908), 16 O. L. R. 597.

PROOF OF CLAIM.

26.—(1) Every person claiming to be entitled to rank on the estate shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of.

(2) Where a person claiming to be entitled to rank on the estate 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 the Judge, upon summary application by the assignee or by any other person interested in the estate, of which application at least three days' notice shall be given to the claimant, may order that, unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the claimant shall no longer be deemed a creditor of the estate and shall be wholly barred of any right to share in the proceeds thereof.

(3) If the claim is not so proved within the time so limited, or within such further

time as the 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 assignor therefor.

(4) The two next preceding sub-sections shall not interfere with the protection afforded to assignees by section 56 of *The Trustee Act.*

(5) A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and to 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. 10 Edw. VII. c. 64, s. 25.

"EVERY PERSON CLAIMING TO BE ENTITLED TO RANK."—The claim must be in respect of a debt, either actually due, or payable in futuro, and there is no right to rank for contingent claims or claims for damages: Clapperton v. Mutchmor (1899), 30 O. R. 595. A person, therefore, who at the time of the assignment for the benefit of creditors has commenced an

action to recover damages for malicious prosecution (Sipprell v. Armstrong, 15th February, 1897, Divisional Court; Fisher v. Kowslowski, 25 W. L. R. 417), or crim. con. (Ashley v. Brown, 17 A. R. 500), or slander (Gurofski v. Harris, 27 O. R. 201, 23 A. R. 717), or breach of contract (Grant v. West, 23 A. R. 533), or wrongful detention of premises (Magann v. Ferguson, 29 O. R. 235), or seduction (Cameron v. Cusack, 17 A. R. 489), and after the assignment obtains judgment, is not a creditor within the meaning of the Act, and cannot attack a transfer as fraudulent or rank on the estate. Nor is there any right to rank because of the breach of covenants in a lease to repair and to insure: Randolph v. Randolph (1907), 4 E. L. R. 17. Nor can a claim be made for a sum agreed to be paid to a newspaper for advertising, when no advertisements have been published, and the time for publication has not elapsed, there being in such a case the contingencies of refusal to perform and ceasing of publication: Mail Printing Co. v. Clarkson, 25 A. R. 1, reversing 28 O. R. 326. But where a sum is to be paid upon certain conditions, and before the assignment is made those conditions have been satisfied, that can be shown and a claim made: ibid.; and see In re McRae (1868), 15 Gr. 408, where it was held that on default, before the assignment, in payment of the instalment of a composition, a claim for the full

amount of the original claim could be made. A claim for future instalments of an annuity is contingent and not provable: Carswell v. Langley (1902), 3 O. L. R. 261.

There is no right to rank for costs incurred after the assignment, in respect of proceedings in which the assignor is interested, pending at the time of the assignment: Re Dumbrill, 10 P. R. 216; but for costs incurred up to the time of the assignment a claim might be made if an order for payment were obtained: see In re British Gold Fields, [1899] 2 Ch. 7. Special provision is made in the Dominion Winding-up Act, for the right to rank in respect of contingent claims and claims for damages. And see Burrill on Assignments, 6th ed., p. 531, et seq.; Robson's Law of Bankruptcy, 7th ed., p. 273, et seq.

A creditor who on an extension being agreed to withdraws his claim for a year is entitled to rank, when on default in payment of the extension an assignment is made; Fowler v. Barnard (1908), 7 W. L. R. 624.

Under an agreement to grind wheat and to deliver a barrel of flour of specified quality for a certain number of bushels, a claim for the value of the barrels of flour not delivered at the time of the assignment was held to be liquidated and provable, but a claim for loss because

of the inferior quality of the flour which had been delivered was held to be unliquidated and not provable: In re Williams, 31 U. C. R. 143. The owner of the wheat would in such a case be entitled to any wheat or flour in existence. So too where before the assignment there has been a sale of goods, these goods if they can be identified should be delivered to the purchaser, but if they have not been separated from a larger quantity and cannot be identified, the purchaser has merely a claim for damages which cannot be proved: Haverson v. Smith (1906), 4 W. L. R. 249. And see Randolph v. Randolph (1907), 4 E. L. R. 17; (1908), 6 E. L. R. 381.

A claimant may be estopped as against some creditors from proving a claim and entitled to prove it as against others, e.g., where he has represented to some creditors that he furnished a sum to the debtor as capital: Rainey v. Dickson (1860), 8 Gr. 450.

ASSIGNEE.—If the assignee is a creditor his rights as creditor are not lost or merged: Robinson v. Cook, 6 O. R. 590.

CESTUI QUE TRUST.—A cestui que trust ranks against the estate of his trustee as an ordinary claimant only, unless the trust funds can be traced to an ascertained fund or into specific property: Culhane v. Stuart, 6 O. R.

97. And see Trusts and Guarantee Co. v. Munro (1909), 19 O. L. R. 480.

Crown.—The Crown has no priority: Clarkson v. Attorney-General of Canada, 16 A. R. 202, and see section 15.

Foreign Creditors.—Creditors residing in a foreign country are entitled pari passu with the creditors in this Province: Milne v. Moore, 24 O. R. 456. A foreign judgment obtained by default after winding-up proceedings have been commenced in Ontario is not in itself proof of a claim, but the foreign creditor should not be penalized by ruling out his claim altogether because he proceeded in the foreign court: Re Pittsburgh Cobalt Company and Robbins (1911), 2 O. W. N. 1295.

Principal and Agent.—If money is entrusted to an agent to be used in the purchase of goods, and some of the goods purchased and some of the money are in the agent's hands at the time of his assignment the principal is entitled to the goods and money as against the assignee: Long v. Carter, 23 A. R. 121; 26 S. C. R. 430, and see Gibert v. Gonard, 33 W. R. 302; Gamble v. Lee, 25 Gr. 326. But there must be some specific appropriation or earmarking or else there is merely the ordinary relationship of debtor and creditor: In re Beattie, Beattie v. Beattie (1898), 19 C. L. T. Occ. N. 10. On a running account between a broker

and customer the broker is merely a debtor, not a trustee: King v. Hutton, [1899] 2 Q. B. 555, [1900] 2 Q. B. 504. And goods in the hands of agents for sale on commission must be given up to the owner and to him must be paid the proceeds of accounts outstanding at the time of the assignment in respect of sales of his goods made before the assignment: Cotter v. Mason (1870), 30 U. C. R. 181; Langley v. Kahnert (1904), 7 O. L. R. 356, 9 O. L. R. 164; (1905), 36 S. C. R. 397; Western Canada Flour Mills v. Middleboro (1911), 2 O. W. N. 1379. And see the notes to section 14.

PRINCIPAL AND SURETY.—If a limited guarantee is given for an ultimate balance, the surety cannot rank upon the estate, unless he pays the amount of the guarantee before the creditor proves his claim. If the surety does so pay the creditor must give credit for the sum received, and can prove only for the balance, while the surety ranks for the amount paid by him: Martin v. McMullen, 19 O. R. 230; 20 O. R. 257; 18 A. R. 559; In re Sass, [1896] 2 Q. B. 12; Bardwell v. Lydall, 7 Bing. 489; Thornton v. McKewan, 1 H. & M. 525. And see the notes to section 25. If it is a guarantee for a specific portion of the debt, the surety upon payment is entitled to rank and the creditor's claim must be reduced. One surety paying the full amount

of the debt and obtaining an assignment thereof is entitled to rank against the estate of his co-surety for the full amount paid, though he is not entitled to receive more than the proper proportion of the full amount of the debt: In re Parker, Morgan v. Hill, [1894] 3 Ch. 400. Where accommodation notes held as collateral security are paid by the accommodation maker after the holder has filed his claim, the claim need not be reduced, but the accommodation maker may also rank: Young v. Spiers, 16 O. R. 672. Where notes were made in the creditor's favour and were then endorsed by a proposed guarantor, who made an assignment before the maturity of the notes, it was held in Clapperton v. Mutchmor (1899), 30 O. R. 595, that there was merely a contingent claim against the endorser which was not provable. But see now Robinson v. Mann (1901), 31 S. C. R. 484; McDonough v. Cook (1909), 19 O. L. R. 267.

Relations. — There is no presumption against the validity of claims by relations. As Lord Eldon says, a man is more likely to apply for loans to his relations than to any one else: Ex parte Gardner, 1 V. & B. 45. But where the dealings between relations are suspicious on their face an investigation may be so far justifiable as to lead the Court to refuse costs to the successful defendants: Tidey v. Craib, 4 O. R. 696. A wife may rank against the husband's estate: Warner v. Murray, 16 S. C. R.

720; Totten v. Bowen, 8 A. R. 602; but there must be clear and conclusive evidence to support her claim: Re Miller, 1 A. R. 393; Attwood v. Pett (1907), 9 O. W. R. 173, 178, 748. And a claim under a marriage contract may be enforced: O'Reilly v. O'Reilly (1910), 21 O. L. R. 201; affirmed, sub nomine Garland Son & Co. v. O'Reilly (1911), 44 S. C. R. 197. As to the presumption of loan or gift by wife to husband, see Rice v. Rice (1899), 31 O. R. 59; (1900), 27 A. R. 121; Ellis v. Ellis (1913), 5 O. W. N. 561.

RENT.—The landlord's rights in case of an assignment for the benefit of creditors are defined by section 38 of R. S. O. 1914, c. 155, as follows:

"(1) In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following the execution of the assignment and from thence so long as the assignee retains possession of the premises.

"(2) Notwithstanding any provision, stipulation or agreement in any lease or agreement, in case of an assignment for the general benefit of creditors, or of an order being made for the winding up of an incorporated company, the

assignee or liquidator may within one month from the execution of the assignment, or the making of the winding-up order, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the assignor or company at the time of the assignment or winding-up order, for the unexpired term of any lease under which such premises were held, or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agreement."

Sub-sections to this effect were, by 58 V. c. 26, substituted for sub-section 4 of section 28 of R. S. O. 1887, c. 143, which was the same in effect as section 74 of the Insolvent Act of 1875, and was as follows:—" In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of one year last previous to the execution of such assignment, and from thence so long as the assignee shall retain the premises leased."

In the absence of special restriction, every tenant, except a tenant at sufferance, may assign the term, and the lessor cannot object: Woodfall's Law of Landlord and Tenant, 15th ed., p. 269; but most written leases contain the statutory covenant that the lessee " will not

assign or sublet without leave," and the provision that "If the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the lessee or his assigns, or if the lessee or his assigns shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current quarter's rent shall immediately become due and payable, and the term shall immediately become forfeited and void." Apart from the provisions of the present section, an assignment for the benefit of creditors by a tenant who holds under a lease with this covenant or this provision, gives the landlord the right to eject, and this without preliminary notice of the breach: R. S. O. 1914, c. 155, s. 20 (9); Kerr v. Hastings, 25 C. P. 429; Magee v. Rankin, 29 U. C. R. 257; Barrow v. Isaacs & Son, [1891] 1 Q. B. 417; Argles v. McMath, 26 O. R. 224; 23 A. R. 44; and the assignee becomes an overholding tenant: Dobson v. Sootheran, 15 O. R. 15. Forfeiture does not take place upon the breach of the covenant; there must be an election to forfeit: Linton v. Imperial Hotel Co., 16 A. R. 337; Palmer v. Mail Printing Co., 28 O. R. 656; Graham v. Lang, 10 O. R. 248, and making a new lease to another person is a clear election to forfeit: Tew v. Routley (1900), 31

O. R. 358; and acceptance of payment of arrears due before the making of an assignment is not a waiver of the right of forfeiture: Dobson v. Sootheran, 15 O. R. 15; Soper v. Littlejohn (1901), 31 S. C. R. 572, reversing 1 O. L. R. 172; nor is an indefinite promise not to forfeit of any avail: Smith v. Wade (1902), 1 O. W. R. 549. Such a proviso for forfeiture applies only in respect of the status of the holder for the time being of the term; and therefore the lessor, after a valid assignment of the term has been made, cannot take advantage of the fact that the original lessee has become bankrupt: Smith v. Gronow, [1891] 2 Q. B. 394; nor can the assignee of part of the reversion enforce the right of forfeiture: Mitchell v. McCauley, 20 A. R. 272. But a re-assignment without leave to the original lessee is fatal: Munro v. Waller, 28 O. R. 29. There must be a legal assignment to work a forfeiture; an agreement to assign is not fatal: Gentle v. Faulkner, [1900] 2 Q. B. 267; and a voluntary liquidation by a solvent company for the purpose of re-organization does not come within a provision making a lease to the company void "if the lessee shall enter into liquidation": Horsey Estate v. Steiger, [1899] 2 Q. B. 79. Under this section, however, the assignee is given the right to retain the demised premises upon making his election in the prescribed manner, and the question of the right of forfeiture

is not of much importance. The provision in the Landlord and Tenant Act (R. S. O. 1914, c. 155, s. 23) that leave is not to be unreasonably upheld also modifies the effect of the statutory covenant.

The landlord's right to preferential payment of the rent due at the time of the assignment exists even if there is no formal lease: Re Erly, 2 A. R. 617, but it depends upon the existence of distrainable effects, and if there is nothing upon which a distress can be levied, the landlord ranks only as an ordinary creditor: Magann v. Ferguson, 29 O. R. 235; Linton v. Imperial Hotel Company, 16 A. R. 337; In re Kennedy, Mason v. Higgins, 36 U. C. R. 471; Mason v. Hamilton, 22 C. P. 190, 411; In re Hoskins, 1 A. R. 379; In re McCraken, 4 A. R. 486; Lazier v. Henderson, 29 O. R. 673. It is not necessary that a distress should in fact be made, and making a distress does not give the landlord any higher right, though if before an assignment is made the arrears are recovered by distress, the landlord cannot be compelled to refund the excess over the statutory allowance: Griffith v. Brown, 21 C. P. 12; Mason v. Hamilton, 22 C. P. 190, 411; McEdwards v. McLean, 43 U. C. R. 454; In re McCraken, 4 A. R. 486; Eacrett v. Kent, 15 O. R. 9. For rent accruing due after the assignment the landlord may distrain, as the goods are not by the assignment placed in custodia legis: Briggs v.

Sowry, 8 M. & W. 729; Ex parte Hale, 1 Ch. D. 285; Eacrett v. Kent, 15 O. R. 9; Linton v. Imperial Hotel Company, 16 A. R. 337. The judgment of the Divisional Court in Miller v. Tew (1909), 20 O. L. R. 77, seems scarcely in accord with some of these cases, holding as it does that the landlord had no preferential lien on the insurance money received by the assignee in respect of goods assigned destroyed by fire two days after the assignment.

The statutory restriction on the landlord's rights applies only for the benefit of the assignee as representing creditors: Railton v. Wood, 15 App. Cas. 363; and would not relieve a surety: Tuck v. Fyson, 6 Bing. 321; nor the tenant himself: Young v. Smith, 29 C. P. 109; nor a chattel mortgagee in possession before the assignment: Brocklehurst v. Lawe, 7 E. & B. 176.

While a proviso for acceleration of payment is good as between the parties: London and Westminster Loan and Discount Company v. London and North Western R. W. Co., [1893] 2 Q. B. 49; Buckley v. Taylor, 2 T. R. 600; Young v. Smith, 29 C. P. 109, it has been held, under the Insolvent Act of 1875, that such a proviso would be a fraud upon creditors, and could not be enforced: In re Hoskins, 1 A. R. 379, but a similar view of the effect of sub-section 4 of section 28 of R. S. O. 1887, c. 143:

Baker v. Atkinson, 11 O. R. 735, 14 A. R. 409, has not prevailed: Linton v. Imperial Hotel Company, 16 A. R. 337. It was also held under the Insolvent Act of 1875, that as the assignment protected the goods from distress, and as the accelerated rent did not become due until after the assignment had been made, the landlord, as far as the accelerated rent was concerned, could neither distrain nor rank as a creditor: Griffith v. Brown, 21 C. P. 12; In re McCraken, 4 A. R. 486; In re Hoskins, 1 A R. 397, but under section 28 (4) of R. S. O. 1887 c. 143, it has been held that the accelerated rent either falls due at the same instant that the assignment is made, or at all events while the assignee "retains the premises leased," and that either way the landlord may recover: Baker v. Atkinson, 11 O. R. 735; 14 A. R. 409; Linton v. Imperial Hotel Company, 16 A. R. 337; Graham v. Lang, 10 O. R. 248; Eacrett v. Kent, 15 O. R. 9, and that recovery was not necessarily limited to a year's rent, but to the rent, whatever it might be, falling due during the year previous to the assignment, or during the period of the assignee's possession: Linton v. Imperial Hotel Company, 16 A. R. 337; and the same case decided that the parties to the lease might agree that the section should not apply. See also Tew v. Toronto Savings and Loan Co. (1898), 30 O. R. 76.

It was also decided under section 34 of R. S. O. 1897, c. 170, that the landlord, even where there is no acceleration clause, and whether the assignee retains possession or not, was entitled to rent for at least three months from the time of the assignment: Clarke v. Reid, 27 O. R. 618. But in Langley v. Meir (1898), 25 A. R. 372, this decision was overruled, the majority of the Court holding that the section is a restrictive one, and intended to prevent a landlord, where there is an acceleration clause, from getting rent in advance for an unreasonably long period.

Apart from the right of election given to the assignee, a landlord can claim the accelerated rent, and yet at the same time eject the assignee and re-let the premises: Kennedy v. Macdonnell (1901), 1 O. L. R. 250; Lazier v. Armstrong (1905), 5 O. W. R. 596; Patching v. Smith, 28 O. R. 201; Joyner v. Weeks, [1891] 2 Q. B. 31.

The section does not apply at all to a monthly tenancy, but only to leases of at least a year's duration: Semi-Ready Limited v. Tew (1900), 19 O. L. R. 227; (leave to appeal refused, 14 O. W. R. 576.)

Where the landlord, in default of election by the assignee, exercises the right of forfeiture and makes a new lease to the purchaser

of the stock-in-trade the purchaser's agreement on that purchase "to assume the rent" applies only to future rent and not to arrears and accelerated rent which the assignee has been compelled to pay: Tew v. Routley (1900), 31 O. R. 358. But where the assignee does elect to retain the lease he is in just the same position as the assignor would have been in if the assignment had not been made, and if the assignee pays accelerated rent he can recover back from the landlord rent paid under protest and threat of distress for the same period: Kennedy v. Macdonnell (1901), 1 O. L. R. 250. And if the accelerated rent would cover a period beyond the time the lease has to run the assignee need only pay enough to cover the rent for the unexpired period: ibid.

There has been a difference of opinion as to the right to rank for future rent, but it would seem that such a claim is not tenable: Grant v. West, 23 A. R. 533; Mail Printing Co. v. Clarkson, 25 A. R. 1. See In re Harte and Ontario Express Co., 22 O. R. 510; Connolly v. Coon, 23 A. R. 37.

The right of distress of a mortgagee as quasi landlord is limited to one year's arrears of interest, provided the assignee takes the proper steps to obtain the benefit of the statutory provision dealing with that right: R. S. O.

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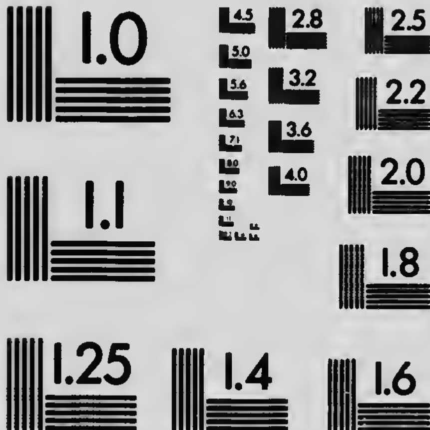

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1914, c. 112, s. 14; Munro v. Commercial Building and Investment Society, 36 U. C. R. 464; Hobbs v. Ontario Loan and Debenture Company, 18 S. C. R. 483.

An assignee for the benefit of creditors under an assignment which is in terms wide enough to effect a transfer of the lease, becomes personally bound to pay rent and perform covenants as assignee of the term, and cannot disclaim, but may assign over and thus put an end to his liability: Lazier v. Armstrong (1905), 5 O. W. R. 596; How v. Kennett, 3 A. & C. 659; Ringer v. Cann, 3 M. & W. 343; White v. Hunt, L. R. 6 Exch. 32; Kerr v. Hastings, 25 C. P. 429; Magee v. Rankin, 29 U. C. R. 257; Hopkinson v. Lovering, 11 Q. B. D. 92; Magill v. Young, 10 U. C. R. 301. A specific reference to the lease in the lessee's assignment for the benefit of crditors is not necessary; such general expressions as "all property of every sort and description"; "all personal estate and effects"; "all goods and chattels and personal estate"; "all property and effects" are, unless the lease is specially excepted, sufficient: Burrill on Assignments, 6th ed., pp. 103, 110; Ringer v. Cann, 3 M. & W. 343; Palmer v. Andrews, 4 Bing. 348; White v. Hunt, L. R. 6 Exch. 32; Magill v. Young, 10 U. C. R. 301. Even though the assignee assigns over before a gale of rent falls due he is personally liable for the period during which the term

has been vested in him: R. S. O. 1914, c. 156, ss. 4, 5; Woodfall's Law of Landlord and Tenant, 15th ed., p. 273; Swansea Bank v. Thomas, 4 Exch. D. 94; Ex parte Dressler, 9 Ch. D. 252; Wilson v. Wallani, 5 Exch. D. 135; Graham v. Lang, 10 O. R. 248; In re Howell, [1895] 1 Q. B. 844.

"WHERE A PERSON DOES NOT FURNISH PROOFS."—If an assignee knows that a creditor has a claim he cannot ignore it because it is not proved; the proper course is to call upon the creditor to prove it: Carling Brewing and Malting Co. v. Black, 6 O. R. 441; otherwise he may be held personally responsible for the amount: Pulsford v. Devenish (1903), 19 Times L. R. 688. The costs of proving a claim before the judge should not be allowed if the proof filed with the assignee was not satisfactory and the assignee acted reasonably in requiring formal proof: In re Archibald (1909), 6 E. L. R. 455.

"PROTECTION AFFORDED BY THE TRUSTEE ACT."—Section 56 of The Trustee Act, R. S. O. 1914, c. 121, is as follows:

"(1) Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative has given such or the like

notices as, in the opinion of the Court, in which such trustee, assignee, or personal representative is sought to be charged, would have been directed to be given by the Supreme Court in an action for the execution of the trusts of such deed or assignment, or in an administration suit for creditors and others to send in to such trustee, assignee, or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate, as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, he may 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 persons entitled thereto, having regard to the claims of which he has then notice, and shall not be liable for the proceeds of the trust estate, or assets, or any part thereof so distributed to any person of whose claim he had not notice at the time of the distribution.

"(2) Nothing in this section shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same."

It is entirely optional with the assignee to give this notice or not, and the nature of the

notice depends very much upon the locality and nature of the business: In re Bracken, Doughty v. Townson, 43 Ch. D. 1. But to afford protection there must be specific warning that the claim will be excluded if not sent in; a mere request that claims be filed is insufficient: Stewart v. Snyder (1898), 30 O. R. 110 (1900), 27 A. R. 423. It is always better to give the notice, however, as liability for unknown claims is then guarded against. The notice under section 17 is a compulsory notice, and must be published in the Ontario Gazette, while this notice need not: Re Cameron, Mason v. Cameron, 15 P. R. 272, but the two may, with advantage, be combined, and it is well to publish the combined notice for at least four weeks in the Ontario Gazette, and for the same time (one insertion a week) in some paper or papers having a general circulation in the locality or localities where claimants are likely to be.

Although the assignee is protected if proper notice is given by him, it would seem that an unpaid creditor has a right to make those creditors who have received a share of the estate make up enough to put him on an equality with them. This is a settled principle in the distribution of the estate of a deceased person, and the statutory provision for ratable distribution in that case is in effect the same as the provisions of an assignment under this Act: Doner

v. Ross, 19 Gr. 229; Bank of British North America v. Mallory, 17 Gr. 102; Chamberlen v. Clark, 1 O. R. 135; 9 A. R. 273; R. S. O. 1914, c. 121, s. 53. This right to enforce contribution is an equitable one, however, and may be barred by lapse of time or acquiescence: Blake v. Gale, 31 Ch. D. 196; In re Eustace, [1912] 1 Ch. 561. If a payment is proper at the time it is made, but owing to a subsequent unexpected depreciation in value the estate cannot pay other beneficiaries at the same rate, re-payment of the excess will not be ordered: In re Winslow, Frere v. Winslow, 45 Ch. D. 249; Todd v. Studholme, 3 K. & J. 324.

The following form of notice is sufficient:

NOTICE TO CREDITORS.

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 the Assignments and Preferences Act 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 day, the , 19 , 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 , 19 , 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.

" CLAIM NOT ACCRUED DUE."—This means " debt owing [illegible] not presently payable ": Mail Printing Co. v. Clarkson, 25 A. R. 1.

A debt payable in futuro in five annual instalments is provable by virtue of sub-section 5; Tillie v. Springer, 21 O. R. 585.

" PROVED BY AFFIDAVIT AND VOUCHERS."—This should always be insisted on, and a memo.

should be made on the vouchers, if they consist of negotiable paper, of the fact of payment of the dividend.

INTEREST.—The making of an assignment does not stop the running of interest: Stewart v. Gage, 13 O. R. 458, there being no restrictive provision as in the Insolvent Act: In re McDougall, 8 A. R. 309; Snarr v. Badenach, 10 O. R. 131.

AMENDMENT OF CLAIMS.—It has been held in administration proceedings that claims may be sent in or amended at any time before the final distribution of the estate; but that dividends actually paid cannot be disturbed: Millichamp v. Toronto General Trusts Corporation (1903), 3 O. W. R. 375; Andrews v. Maulson, 1 Ch. Ch. 316; In re Metcalfe, Hicks v. May, 13 Ch. D. 236; Gillespie v. Alex[illegible] 3 Russ. 130; Greig v. Somerville, 1 R. & [illegible]; Ex parte Boddam, 2 DeG. F. & J. 625 [illegible] bent v. Thornton, 4 DeG. & S. 65; Ho[illegible]sted and Langton, pp. 179, 180, 777. The same doctrine ought to apply under this Act.

27.—(1) 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.

(2) Within thirty days after the receipt of the notice, or within such further time as the Judge may 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 of the 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 or summons served within the time limited the claim to rank on the estate shall be forever barred.

(3) The notice by the assignee shall contain the name and place of business of a solicitor upon whom service of the writ or summons may be made; and service upon him shall be deemed sufficient service. 10 Edw. VII. c. 64, s. 26.

NOTICE OF CONTESTATION. — The following form of contestation of claim may be used:

In the matter of The Assignments and Preferences Act.

And in the matter of the estate of

To

You are hereby notified, pusuant 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 agaist me to establish the said claim and within the same time a copy of the writ or summons 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 summons to enforce the said claim may be made upon my solicitor, A. B., of, etc.

Dated at the day of

Assignee.

Acquiescence.—If there is unreasonable delay in contesting a claim, the right to contest may be lost: Ex parte Kemp, 21 W. R. 450; Bell v. Ross, 11 A. R. 458.

Reasons for Contestation.—It is doubtful how far a claim that has before the assignment passed into judgment can be objected to by the assignee or other creditors. It was held in In re Hague, Traders Bank v. Murray, 13 O.

R. 727, that creditors could not defeat a judgment creditor's claim by showing that the note in respect of which the judgment had been obtained against the deceased as endorser had not been protested. In that case, however, there was nothing in the nature of fraud, and it was an attempt to take advantage of a technicality. In the Imperial Bankruptcy Act special provision is made for attacking judgments, and this seems to be merely a statutory recognition of an equitable doctrine that would apply to an administration under this Act, so that if fraudulently obtained a judgment would be open to objection: In re Hawkins, [1895] 1 Q. B. 404; Ex parte Lennox, 16 Q. B. D. 315; Ex parte Banner, 17 Ch. D. 480; Ex parte Kibble, L R. 10 Ch. 373; McDonald v. Boice, 12 Gr. 48; Bowerman v. Phillips, 15 A. R. 679; Allan v. McTavish, 8 A. R. 440; Young v. Ward, 24 A. R. 147; Wyatt v. Palmer, [1899] 2 Q. B. 106. If a judgment is obtained after the assignment against the assignor for an alleged pre-existing indebtedness it is not even prima facie evidence against the assignee: Stewart v. Gage, 13 O. R 458.

It has been held that an administrator, in the absence of objection by a creditor, is not bound to set up the defence of the Statute of Limitations, but the objection can be taken by one creditor against another in administration proceedings, and the administrator cannot

waive the defence after objection. The doctrine would apply to an assignee, who should, therefore, set up the defence if open to him: Gormley v. Deblois (1912), 11 E. L. R. 575; 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. But where there is a special trust under a will to pay the debts of a named person as a matter of bounty by the testator the statutory bar does not apply: Re Alice Kerr (1911), 2 O. W. N. 1342. There is no right under any circumstances to waive the defence of the Statute of Frauds if that defence is available: In re Rownson, Field v. White, 29 Ch. D. 358.

"WITHIN THIRTY DAYS." — The time for bringing an action cannot be extended after the thirty days have expired: Article, 28 C. L. J. 99.

"ACTION SHALL BE BROUGHT TO ESTABLISH THE CLAIM."—The creditor in his action is confined to the items and quantum of the affidavit of claim: Grant v. West, 23 A. R. 533, and in that case the form in which judgment should be entered is pointed out, viz., a declaration of a right to rank, not a direct recovery.

If a creditor succeeds he is entitled to payment of his costs by the assignee, who, if he

acts under proper authority, may charge the amount, and also his own costs of defence, against the estate, and this without any special direction: Smith v. Beal, 25 O. R. 368; Zimmerman v. Spreat, 26 O. L. R. 448; McLarty v. Todd (1912), 4 O. W. N. 172.

"WRIT OR SUMMONS."—Where a claim is disputed, an action asking a declaration of the right to rank, is an action for equitable relief, and, as such, could not, before the amendment of 1896, be entertained by the County Court: Whidden v. Jackson, 18 A. R. 439. By R. S. O. 1914, c. 59, s. 22, s.-s. 1 (j), it is provided that the County Court shall have jurisdiction in "actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed $500."

The references to a Division Court summons were inserted in the revision of 1897, but it was held in Bergman v. Armstrong (1902), 4 O. L. R. 717, that notwithstanding this an action for a declaration of the right to rank could not be brought in the Division Court. But it was provided by 10 Edw. VII. c. 32, s. 61, s.-s. 1 (e), that the Division Court shall have jurisdiction in " an action or contestation for the determination of the right of a creditor to rank upon an insolvent estate where the claim of the

creditor does not exceed $60," and this provision now appears as sub-section 1 (e) of R. S. O. 1914, c. 63, s. 62.

"THE CLAIM TO RANK ON THE ESTATE SHALL BE FOREVER BARRED."—The sub-section applies only to a right of action against the estate, and failure to enforce the alleged right of action does not bar the right to set off the claim against the purchaser from the assignee of a debt alleged to be due by the claimant: Johnston v. Burns, 23 O. R. 179, 582.

In an action against an assignee to establish a claim, the assignor is a person for whose immediate benefit the action is defended, and he is, therefore, to be regarded as a party for the purpose of examination and discovery: Garland v. Clarkson (1905), 9 O. L. R. 281; Carter v. Lee (1906), 8 O. W. R. 499. So also in an action by an assignee to recover insurance, the assignor is examinable: Clarkson v. Fire Insurance Association (1882), 10 P. R. 462. And where creditors of a firm brought an action to establish the liability of the defendant as a partner, the assignee of the firm, who had instigated the action and was supplying information and papers, was held to be examinable and bound to make production: Frothingham v. Isbister (1891), 14 P. R. 112.

As to venue no special consideration is to be shown to the assignee in an action against

him to establish a claim; in fact if anything he should be treated with the greatest strictness, as he is interested only professionally and defends as part of his business: Halliday v. Armstrong (1904), 3 O. W. R. 285, 410.

28.—(1) If the assignee is satisfied with the proof adduced in support of a claim, but the assignor disputes the same, the assignor 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 after the assignor is notified in writing by the assignee that he is satisfied with the proof adduced, and not afterwards unless by leave of the 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 assignor in writing of the fact, and the assignor may thereupon, and within ten days of his receiving such notice, apply to the Judge for an order requiring the assignee to serve a notice of contestation.

(3) The order shall be made only if, after notice to the assignee, the Judge is of opinion that there are good grounds for contesting the claim.

(4) If the assignor does not make such an application the decision of the assignee shall, as against him, be final and conclusive.

(5) 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.

(6) If an action is brought by the claimant against the assignee the assignor may intervene at the trial, either personally or by counsel, for the purpose of calling and examining or cross-questioning witnesses. 10 Edw. VII. c. 64, s. 27.

29.—(1) No property or assets of an estate assigned under the provisions of this Act shall be removed out of Ontario without the order of the 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 an incorporated bank within Ontario, and shall not be withdrawn or removed without the order of the Judge, except in payment of dividends and charges incidental to winding up the estate.

(2) An assignee or any person acting in his stead who violates the provisions of this section shall incur a penalty of $500.

(3) One-half of the penalty shall go to the person suing therefor and the other half shall belong to the estate.

(4) In default of payment of the penalty and all costs incurred in any action or proceeding for the recovery thereof, within the time limited by the judgment, the Court in which the action is brought may order that such assignee or person may be imprisoned for any period not exceeding thirty days, and such assignee or person shall be disqualified from acting as assignee of any estate while such default continues. 10 Edw. VII. c. 64, s. 28.

"DEPOSITED IN AN INCORPORATED BANK."—While it is not necessary under this Act, as it was under the Insolvent Act, to open a separate account for each estate, still the assignee must at his peril keep the trust funds intact, and unmixed with his own funds: Ex parte Townshend, 15 Ves. 470; In re Hilliard, 1 Ves. 89; Duffy v. Duncan, 32 Barb. (N.Y.) 587; Brock v. Tew, 5th April, 1898: Falconbridge, J.

"PENALTY OF $500."—The procedure to recover the penalty is a summary one, and an action will not lie, and if pending the proceedings the assignee dies, the right to recover is gone: Petch v. Belden, 21 December, 1897: Rose, J.

30. Upon the expiration of one month from the first meeting of creditors, or as soon as may be 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. 10 Edw. VII. c. 64, s. 29.

It is the duty of an assignee to have his accounts ready at all times, to afford all reasonable facilities for their inspection and examination, and to give full information whenever required, and if a creditor lives at a distance he should, if required, give this information by letter, and should also, at the creditor's expense, furnish copies of any accounts which may be asked for: Sandford v. Porter, 16 A. R. 565; Burrill on Assignments, 6th ed., sec. 403; Randall v. Burrows, 11 Gr. 364. And on the other hand before bringing an action for an account every reasonable means of obtaining information should be tried: Liddell v. Deacon, 20 Gr.

70. If the assignee is in default the estate will be administered by the Court and the assignee will be ordered to pay the costs, the plaintiff being entitled to a lien on the fund for these costs if not recoverable from the assignee: Lucas v. Tegart (1903), 2 O. W. R. 548.

The assignee may choose his own solicitor: In re Lamb, 17 C. P. 173; who should be in an independent position as regards creditors who may have possibly conflicting claims: Orillia Export Lumber Co. v. Burson (1903), 2 O. W. R. 1110. This solicitor's bill of costs may be taxed by any of the creditors: Sandford v. Porter, 16 A. R. 565. The assignee must be careful not to make himself personally responsible to the solicitor for the estate: Butterfield v. Wells, 4 O. R. 168.

The insolvent is entitled to call upon the assignee to account: Dart v. McCullough.

31. 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

of this or any other Act respecting frauds or fraudulent preferences. 10 Edw. VII. c. 64, s. 30.

This section is the same in effect as section 107 of the Insolvent Act of 1875, which has been given a liberal construction: Mason v. Macdonald, 45 U. C. R. 113; Court v. Holland, 29 Gr. 19. The subject of set-off is too large to be dealt with here. The main principle is that the claims to be set off must be payable by and owing to a person in the same capacity; thus a debt due by an individual partner cannot be set off against a claim by a partnership estate: Graham v. Toms, 25 Gr. 184. Making an assignment for the benefit of creditors after a verdict for damages has been rendered in favour of the assignor does not prevent the defendant from setting off a debt due by the assignor: Moody v. Canadian Bank of Commerce, 14 P. R. 258; and a purchaser of a stock in trade may set off against the price the full amount of claims against the vendor bought up by him at a discount before the vendor's assignment for the benefit of creditors: Thibaudeau v. Garland, 27 O. R. 391. Bankers are entitled to set off against a deposit at the credit of a deceased insolvent depositor a note of the deceased maturing after his death: Ontario Bank v. Routhier (1900), 32 O. R. 67. And see Robinson v. McGillivray (1906), 12 O. L. R. 91, 13 O. L. R. 232; (1907), 39 S. C. R. 281.

A chattel mortgagee is entitled to set-off an unsecured debt against the claim of the mortgagor's assignee to the surplus proceeds of sale of the mortgaged goods, and if this is not done in pursuance of an agreement between the mortgagor and mortgagee the transaction is not a preference: Stephens v. Boisseau, 23 A. R. 230; 26 S. C. R. 437. Section 13 does not affect this right: Robinson v. Wilson (1908), 12 O. W. R. 198.

Costs of taxation payable to an assignee who taxes a solicitor's bill for services rendered to the insolvent cannot be set-off against the solicitor's claim: In re Rogers and Farewell, 14 P. R. 38.

32. As large a dividend as can with safety be paid shall be paid by every assignee within twelve months from the date of the assignment, 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. 10 Edw. VII. c. 64, s. 31.

In the absence of special difficulties the estate should be wound up within a year; and if distribution is not made within that time the

onus is on the assignee to justify the delay: Ontario Bank v. Lamont, 6 O. R. 147.

Undeclared dividends may be attached: Parker v. Howe, 12 P. R. 351.

A dividend received by a creditor who holds an endorsed note for part of his claim must be credited ratably on the whole claim and not applied wholly on the unsecured portion: Hood v. Coleman Planing Mill Co. (1900), 27 A. R. 203. And proving a claim on a number of notes and an open account and obtaining a dividend does not merge all the items in one sum and does not prevent the claimant from afterwards suing in the Division Court for the pro rata balance due on one note: Harvey v. McPherson (1903), 6 O. L. R. 60.

Where the assets of an insolvent are sold with the concurrence of the creditors the acceptance of a proportionate part of the proceeds does not in the absence of an express agreement to that effect operate as satisfaction of the whole claim: McPherson v. Copeland (1908), 9 W. L. R. 623.

The payment of a dividend by an assignee under a voluntary assignment for the benefit of creditors is not a part payment within the Statute of Limitations and does not make a new starting point for the running of the statute as

against the debtor: Birkett v. Bissonette (1907), 15 O. L. R. 93; McKenzie v. Fletcher (1897), 11 Man. L. R. 540.

33. So soon as a dividend sheet is prepared notice thereof shall be given by registered letter to each creditor, inclosing 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, dividends on all claims not objected to within that period shall be paid. 10 Edw. VII. c. 64, s. 32.

Under the English Bankruptcy Act a summary mode of procedure for the recovery of dividends is provided, and there is no right of action. But it has been held under the Insolvent Act of 1875 that an action lies: Simpson v. Newton, 4 C. L. J. 46, and also under this Act: Brock v. Tew, 5th April, 1898; Falconbridge, J. And see Burrill on Assignments, 6th ed., sec. 448.

It is the assignee's duty to tender payment of the dividend, and he is liable for interest

from the time that payment should have been made; this both on general principles: Burrill on Assignments, 6th ed., sec. 449; Perley on Interest, p. 45; Gray v. Thompson, 1 Johns. Ch. 82; In re Merrick, 1 Ashmead (Pa.) 305; and also under the Judicature Act (R. S. O. 1914, c. 56, s. 35), because there is a statutory duty to pay, and because filing the claim is a demand: Brock v. Tew, 5th April, 1898; Falconbridge, J. See McCullough v. Newlove, 27 O. R. 627; McCullough v. Clemow, 26 O. R. 467; City of London v. Citizens Ins. Co., 13 O. R. 713.

The creditor may take the dividends and then sue the debtor for the balance of the claim: Mackenzie v. Blackburn, Common Pleas Division; 12th February, 1890.

The receipt of a dividend does not deprive a creditor of the right to call the assignee to account, and to make him responsible for profit alleged to have been made by him at the expense of the trust estate: Morrison v. Watts, 19 A. R. 622; Beemer v. Oliver, 10 A. R. 656; but conduct directly conducing to the transaction afterwards attempted to be complained of will be a bar: Miller v. Hamlin, 2 O. R. 103.

34.—(1) The assignee may take the proceedings authorized by section 33 of *The Creditors Relief Act* to be taken by a sheriff,

and in that case sections 33 and 34 of that Act shall apply *mutatis mutandis* to proceedings for the distribution of money and determination of claims arising under an assignment made under this Act, with the substitution of "assignee" for "sheriff"; but this section shall not relieve the assignee from mailing to each creditor the abstract and other information required by section 33 of this Act to be sent to creditors so far as the same is not contained in the list sent by him under section 33 of *The Creditors Relief Act.*

(2) A Judge of the County or District Court of the county or district where the assignment is required to be registered shall be the Judge to whom applications under this section shall be made. 10 Edw. VII. c. 64, s. 33.

This section is in nearly the same terms as section 30 of R. S. O. 1897 c. 147, which was first enacted as section 6 of 59 V. c. 31. It enables the assignee to adopt the contestation procedure of the Creditors' Relief Act, R. S. O. 1914, c. 81. It was held under the former section that the County Court Judge acted as persona designata and that there was no right of appeal:

Re Simpson . Clafferty (1899), 18 P. R. 402. But see The Judges Orders Enforcement Act, R. S. O. 1914, c. 79, and In re Aaron Erb (1908), 16 O. L. R. 594, 597, *ante* p. 136.

Sections 33 and 34 of the Creditors Relief Act read as follows:

33.—(1) Where at the time for distribution the money is insufficient to pay all claims in full the sheriff shall first prepare for examination by the debtor and his creditors a list of the creditors entitled to share in the distribution, with the amount due to each for principal, interest and costs.

(2) The list shall be so arranged as to show the amount payable to each creditor, and the total amount to be distributed; and the sheriff shall deliver, or send by registered post to each creditor or his solicitor, a copy of the list.

(3) If within eight days after all the copies have been delivered or posted, or within such further time as the Judge may allow, no objection is made as provided by this Act, the sheriff shall make distribution forthwith pursuant to such list.

(4) If objection is made the sheriff shall forthwith distribute rateably so much of the money made, and among such persons, as will not interfere with the effect of the objection in case the same should be allowed.

(5) Any person affected by the proposed scheme of distribution may contest the same by giving, within the time mentioned in sub-section 3, a notice in writing to the sheriff, stating his objection to the scheme and the grounds thereof.

(6) The contestant shall within eight days thereafter apply to the Judge for an order adjudicating upon the matter in dispute, otherwise the contestation shall be taken to be abandoned.

(7) The contestant shall, within the time mentioned in the next preceding sub-section, obtain from the Judge an appointment for hearing and determining the matter in dispute.

(8) A copy of the appointment and a notice in writing, Form 7, of the objections stating the grounds thereof, shall be served by the contestant upon the debtor, unless he is the contestant, and upon the creditors or such of them as the Judge may direct.

(9) The Judge may determine any question in dispute in a summary manner, or may direct an action to be brought or an issue to be tried with or without a jury in any Court and in any county for the determination thereof, and may make such order as to the costs of the proceedings as he may deem just, and the provisions of sub-sections 2 and 3 of section 14 shall apply.

[Sub-sections 2 and 3 of section 14 provide that if $400 or over is in question, the issue shall be tried in the Supreme Court.]

(10) Where a claimant is held to be not entitled, or to be entitled to part only of his claim, the money retained pending the contestation, or the portion as to which the claimant shall have failed, shall be distributed among the creditors who would have been entitled thereto as the same would have been distributed had the claim in respect thereof not been made.

(11) Where a debtor has executed a mortgage or other charge, otherwise valid, upon his property or any part thereof after the receipt of an execution by the sheriff and before distribution, such mortgage or charge shall not prevent the sheriff from selling the property under any execution or certificate placed in his hands before distribution as if such mortgage or charge had not been given, nor prevent creditors whose executions or certificates are subsequent thereto from sharing in the distribution; but in distributing the money realized from the sale of such property the sheriff shall deduct and pay to the person entitled thereto the amount of such mortgage or charge from the amount which would otherwise be payable out of the proceeds of such property to such subsequent creditors.

(12) In the case provided for in the next preceding subsection the sheriff shall prepare a separate scheme of distribution of the proceeds of the encumbered property without reference to the mortgage or charge, and, from the dividends payable according to such scheme to subsequent creditors, there shall be deducted the amount of the mortgage or charge and the amount so deducted shall be paid to the encumbrancer.

34.—Where several creditors are interested in a contestation, either for or against the same, the Judge shall give such directions for saving the expense of an unnecessary number of parties and trials, and of unnecessary proceedings, as he may deem just, and shall direct by whom and in what proportions any costs incurred in the contestation, or in any proceedings thereunder, shall be paid, and whether any and what costs shall be paid out of the money levied.

Form 7.

Notice of Contestation of Scheme of Distribution.

The Creditors Relief Act.

In the County Court of the County of .

A. B. Claimant,

—and—

C. D. Debtor.

To C. D., debtor, and F. G. and M. N., claimants.

Take notice that I contest the scheme of distribution prepared by the Sheriff of the County of in respect of the claims of you, the said F. G. and M. N., on the following ground (state distinctly the ground), and a copy of the Judge's appointment to adjudicate upon the matter is served herewith.

Dated, etc.

X. Y.,
Contestant.

35. 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 the creditors fail to provide therefor, subject to review by the Judge upon complaint of the assignee or of any creditor. 10 Edw. VII. c. 64, s. 34.

Under the Insolvent Act of 1875, the assignee was entitled to a commission on the net proceeds of the estate of the insolvent of every kind, of 5 per cent. on the first $1,000, 2½ per cent. on any further sum up to $5,000, and 1¼ per cent. on any further sum. Under the present Act, the assignee's fee is usually five

per cent. on the amount of the receipts (see section 36), but his remuneration ought to be fixed according to the principles regulating the remuneration of ordinary trustees: Re Fleming, 11 P. R. 426; Archer v. Severn, 13 O. R. 316; Re Prittie Trusts, 13 P. R. 19. In the last case the trustee was allowed a commission on rents collected, in addition to a commission paid to an agent. And as to the allowance of commission on accounts set off, see In re Central Bank, Lye's Claim, 22 O. R. 247.

The Judge acts as persona designata, and he can deal only with the question of remuneration, and before the enabling Act, 56 V. c. 13 (R. S. O. 1897, c. 76), he had no power to give costs in an application under this section: Re Pacquette, 11 P. R. 463; Re Young, 14 P. R. 303. And see now the Judges Orders Enforcement Act, R. S. O. 1914, c. 79. If a general investigation of the accounts is desired, an action is necessary; but it is improper to bring an action to settle the question of remuneration: Stewart v. Miller, 22nd November, 1897; Boyd, C.

An assignee is not responsible for loss resulting from the criminal acts of a servant selected and employed by him without negligence: Jobson v. Palmer, [1893] 1 Ch. 71. An assignee who seizes goods subject to a chattel

mortgage, which is upheld, is liable in damages for conversion: Light v. Hawley, 29 O. R. 25.

A solicitor acting as assignee is entitled only to commission: In re Kelly, 17 C. L. T. Occ. N. 65.

An assignee is not entitled to charge against the estate expenses incurred before the assignment is made, when, as it has been expressed, he is "prowling for the assignment." See Ex parte Lovegrove, 3 Dea. & Ch. 763; or costs paid by him of an action, not authorized by the creditors, to set aside a chattel mortgage: Hyman v. Howell, 13 O. R. 400. And the assignee has no right to remuneration except out of the assets of the estate, or by special agreement. There is no implied obligation upon the creditors to pay him: Johnston v. Dulmage (1899), 30 O. R. 233.

36. Where the remuneration of the assignee has not been fixed under the next 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 the Judge; but no application by the assignee to review the allowance shall be entertained unless the

question of his remuneration has been brought before a meeting of creditors competent to decide the same before the preparation of the final dividend sheet. 10 Edw. VII. c. 64, s. 35.

37.—(1) An assignee shall not 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.

(2) An inspector shall not be allowed more than four dollars a day besides actual travelling expenses. 10 Edw. VII. c. 64, s. 36.

The maximum allowance is very ambiguously limited, as it is almost impossible to say how many " days " an inspector should be paid for. A reasonable interpretation would be to allow pay for each day upon which a meeting of inspectors takes place, and the resolution

appointing the inspectors should provide that there be paid to each inspector for each meeting actually attended by him the sum of $, not exceeding for any inspector the sum of $. In the notice calling the first meeting the remuneration of the inspectors should be mentioned as one of the subjects to be brought before the meeting (see p. 159). Under the English Act an inspector cannot without the direction of the Court receive any remuneration, and cannot charge for services rendered by him as solicitor: In re Gallard, [1896] 1 Q. B. 68. The present section does not go so far, and it would seem that an inspector can act as solicitor for the estate: Strachan v. Ruttan, 15 P. R. 109; In re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case, 26 O. R. 289. If the assignee pays inspectors' fees without a resolution, the payment will be disallowed, but a ratifying resolution may be passed afterwards by the creditors: Stewart v. Miller, 22nd November, 1897: Boyd, C.

EXAMINATION OF ASSIGNOR AND OTHERS.

38.—(1) Upon a resolution passed by a majority vote of the creditors present or represented at a meeting of creditors regularly called, or upon the written request of a majority of the inspectors, or upon an

order made by the Judge, the assignee may examine upon oath before a Master, Local Master, Local Registrar, Deputy Clerk of the Crown, Judge of the County or District Court, Special Examiner, Official Referee or any other person named in the order, the assignor or any person who is or has been his agent, clerk, servant, officer or employee of any kind, touching the estate and effects of the assignor, and as to the property and means he had when the earliest of his debts or liabilities 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; and the person examined may be required by the assignee to produce upon such examination any property, book, document or paper in his custody, power or control.

(2) Unless otherwise ordered the examination shall take place in the county or district within which the person to be examined resides.

(3) The Rules and procedure of the Supreme Court as to the examination of a judgment debtor, or any clerk or employee or former clerk or employee of a judgment debtor, shall, so far as may be, apply to an examination held under sub-section 1. 10 Edw. VII. c. 64, s. 37.

The following forms of request by the inspectors for an examination and appointment for examination may be of use:

Request for Examination.

To A. B., Esquire,

In the matter of the Estate of C.D., of the of in the County of , an insolvent, and in the matter of the Assignments and Preferences Act.

As the duly appointed inspectors of the estate of the above named C. D. we hereby request you to have the said C. D. examined under the statute in that behalf touching his estate and effects and as to the property and means he had when the earliest of his debts or liabilities existing at the date of his assignment to you 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.

Dated at Toronto this day of 1914.

Inspectors.

Appointment for Examination.

In the matter of the Estate of C. D., of the of , in the County of , an insolvent, and in the matter of the Assignments and Preferences Act.

I hereby appoint tne day of , 1914, at the hour of o'clock in the forenoon, at my Chambers in the Court House in the Town of for the examination of C. D., the above named insolvent under the Assignments and Preferences Act, touching his estate and effects and as to the property and means he had when the earliest of his debts or liabilities existing at the date of his assignment to A. B. 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.

And I hereby direct the said C.D. to have with him and produce before me all deeds,

books, papers, letters, cheques, bills of exchange, promissory notes, statements of account, invoices, documents and writings whatsoever in his custody or power in any way relating to the subject matter of his said examination and particularly (mention any books, etc., specially required).

Dated at the Town of this day of , 1914.

X. Y. Z.,
Special Examiner of the
Supreme Court of Ontario.

An assignee for the benefit of creditors of a judgment debtor is not examinable as his transferee: British Canadian Loan and Investment Co. v. Britnell, 13 P. R. 310. But the making of an assignment by a judgment debtor does not deprive the judgment creditor of his right to examine him or to obtain a ca. sa. against him: McEachern v. Gordon (1899), 18 P. R. 459; Bank of Hamilton v. Scott, 3 O. W. R. 716, 717.

Where a firm has been dissolved a former employee of the firm may be examined at the instance of the assignee of the separate estate of one of the former partners: In re Guinane (1898), 18 P. R. 208.

Service of a copy of the appointment is sufficient and it is not necessary when effecting

service to shew the original appointment unless this is demanded: In re Ferguson (1908), 17 O. L. R. 576.

39. Any person who 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 assignor, his dealings or property, and who refuses or fails to produce the same for the inspection of the assignee within four days after demand in writing by the assignee, may by order of the Judge be examined before the Judge or any of the officers mentioned in section 38 touching such book, document or paper; and he shall be subject to the same consequences, in the case of neglect to attend or refusal to disclose the matters in respect of which he may be examined or to make such production, as are mentioned in section 41. 10 Edw. VII. c. 64, s. 38.

40. If the assignor does not attend for examination and does not allege a sufficient excuse for not attending or, if attending, he 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 the assignor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Judge may order the assignor to be committed to the common gaol of the county or district in which he resides for any period not exceeding twelve months. 10 Edw. VII. c. 64, s. 39.

Under the corresponding section of R. S. O. 1897, c. 147, it was held that the power of committal could not be exercised by a County Court Judge: In re Rochon (1899), 31 O. R. 122. But see now section 2 of the present Act. It was also held that the power to commit for concealment of or making away with property applied only to acts done after the section in question was first enacted: In re Lucas Tanner & Co. (1900), 32 O. R. 1. The power to commit for not making satisfactory answers or for not attending is not limited as to time: ibid.

The failure to account for the proceeds of goods sold on the day of the assignment and the sending of money by the insolvent to his father to take up notes which had not matured were held in Re McLarty (1908), 12 O. W. R. 1171, to constitute "an exceedingly flagrant case," and the offender was sent to gaol for nine months.

41. Any person other than the assignor liable to be examined shall be subject to the same consequences, in case of neglect to attend or refusal to disclose the matters in respect of which he may be examined or to make production, as a witness in an action in the Supreme Court. 10 Edw. VII. c. 64, . 40.

COMPOSITION AGREEMENTS.

It very frequently happens that after an assignment for the benefit of creditors has been made a composition is arranged, and it may be useful to mention a few of the authorities relating to composition agreements. The most important point to be borne in mind is that all creditors must be dealt with on an equality, and that any advantage or bonus to any creditor to induce him to assent to the agreement will make the agreement void: Dauglish v. Tennent, L. R. 2 Q. B. 49. A general discussion of the subject will be found in Addison's Law of Contracts, 9th ed., p. 82; Kerr on Fraud, 2nd ed., p. 231, et seq.; and Forsyth on Composition, p. 104, et seq. The doctrine is very far-reaching. Any promise made by the debtor or any person on his behalf, to pay the creditor more than the other creditors are to receive, cannot be enforced, and not to disclose is to conceal: McKewan v. Sanderson, L. R. 20 Eq. 65; Knight v. Hunt, 5 Bing. 432; Ex parte Milner, 15 Q. B. D. 605.

Nor can the creditor recover upon a negotiable instrument or other security given by the debtor or any person on his behalf to the creditor for the amount agreed to be paid: McKewan v. Sanderson, L. R. 20 Eq. 65; Leicester v. Rose, 4 East 372.

If such a negotiable instrument or security is transferred to a bona fide holder for value, and payment enforced by him, the debtor can recover back the amount from the creditor. The doctrine of par delictum does not apply; it is oppression on the one side and submission on the other: Smith v. Cuff, 6 M. & S. 160; Horton v. Riley, 11 M. & W. 492; Alsager v. Spalding, 4 Bing. N. C. 407; and the debtor may even recover back money paid to the creditor before he signs: In re Lenzberg's Policy, 7 Ch. D. 650; Atkinson v. Denby, 6 H. & N. 778; 7 H. & N. 934; or set off such payments against future indebtedness: Ex parte Minton, 1 M. & A. 440; 3 D. & C. 688. But see Small v. Henderson (1899), 27 A. R. 492; Langley v. Van Allen (1900), 32 O. R. 216, (1901), 3 O. L. R. 5; (1902), 32 S. C. R. 174.

It matters not whether the preferred creditor signs first or last; the result is the same and the agreement is avoided: Ex parte Milner, 15 Q. B. D. 605; and the penalty is that the preferred creditor cannot recover even the same amount as the other creditors, but loses both the ordinary composition payment and the secret advantage: Howden v. Haigh, 11 A. & E. 1033; 3 P. & D. 661; Ex parte Phillips, 36 W. R. 567; and cannot even claim on the original indebtedness, at any rate not till all other creditors have been paid in full: In re Cross, 4

DeG. & Sm. 364; Ex parte Oliver, 4 DeG. & Sm. 354. But this doctrine does not apply if the creditor has not executed a release and default is made in payment of the composition: Weese v. Banfield, 22 A. R. 489. Notes or securities given in substitution for or renewal of a note originally given to cover a secret advantage of this kind are tainted by the original fraud and cannot be enforced: Geere v. Mare, 2 H. & C. 339.

One creditor cannot, without the knowledge and consent of the other creditors, obtain a bonus or increased payment in consideration of securing to the other creditors payment of the composition, for the other creditors are entitled to exercise the option of foregoing the guarantee and taking a larger composition payment instead: Wood v. Barker, L. R. 1 Eq. 139; though in our Courts an agreement of this kind has been more leniently looked at: Segsworth v. Anderson, 23 O. R. 573, at p. 580; Re Russell, 7 A. R. 767.

The doctrine is not limited to agreements to give the preferred creditor a larger sum than the other creditors. Security secretly given to one creditor to secure the composition payment is void: Leicester v. Rose, 4 East 372; and such a secret agreement effects a release of a guarantor of the composition payment: Pendlebury v. Walker, 4 Y. & C. Exch. 424; Clarke v. Ritchey, 11 Gr. 499.

Payment of a creditor's costs as an inducement to sign has been held to invalidate a composition deed under the Insolvent Act: In re McRae, 1 A. R. 387.

If, however, each creditor is standing on his own rights, and there is no mutual reliance, each may make his own bargain: In re McHenry, [1894] 2 Ch. 428; [1894] 3 Ch. 365; and there is no necessity for disclosing the fact that a creditor already holds security; a general reservation of rights in respect of existing securities is sufficient: Henderson v. Macdonald, 20 Gr. 334; and a composition agreement is not invalidated where one claim is paid in full, that claim being to the knowledge of the creditors in suit, and the payment being made under pressure of this suit: Carey v. Barrett, 4 C. P. D. 379.

It is usual to insert in composition agreements a provision that in default of punctual payment, the original claims shall revive, credit being given for any payments made on account: In re McRae, 15 Gr. 408. But this is an implied condition of such an agreement: Ex parte Bennett, 2 Atk. 527; Ex parte Vere, 19 Ves. 93; Andrews v. Bank of Toronto, 15 O. R. 648; In re Hatton, L. R. 7 Ch. 723; Weese v. Banfield, 22 A. R. 489; and applies even where there is a surety: Ex parte Gilbey, 8 Ch. D. 248; unless the intention to substitute the composition payments for the original debt is

clearly shown: Ex parte Hernaman, 12 Jur. 643; and if there is a reservation of rights as against sureties or in respect of securities the creditor will be entitled to collect from them the balance of his claim: Banque d'Hochelaga v. Beauchamp, 36 S. C. R. 18. Such a condition is not a penalty so far as the original debtors are concerned, but is a penalty and cannot be enforced as against third persons: Watson v. Mason, 22 Gr. 180, 574; Thompson v. Hudson, L. R. 4 H. L. 1; and creditors of a new business are entitled in priority to creditors of an old business who set up that a discharge has been fraudulently obtained: Buchanan v. Smith, 17 Gr. 208, 18 Gr. 41.

It is also usual to insert a condition that the agreement shall be binding only if all creditors having claims above a specified amount execute it, and in the absence of such a condition each creditor who signs is bound: Norman v. Thompson, 4 Exch. 755; Carey v. Barrett, 4 C. P. D. 379. But with such a condition a creditor who signs the agreement and receives payment of the composition may sue for the balance of his claim if the required number of creditors do not sign it: Shepherd v. Murray (1904), 3 O. W. R. 733; Dominion Radiator Co. v. Bull (1902), 1 O. W. R. 672; and a creditor who executes an agreement cannot withdraw until a reasonable time has elapsed for getting other signatures: ibid.

A creditor who signs is bound to the full amount of his claim: Harrby v. Wall, 1 B. & Ald. 103; and cannot wilfully misstate the amount of his claim and afterwards sue for the balance: Britten v. Hughes, 5 Bing. 460; Holmer v. Viner, 1 Esp. 132; Fowler v. Perrin, 16 C. P. 258; Eastabrook v. Scott, 3 Ves. 456.

A composition cannot be forced on an opposing creditor by putting it in the form of a sale to produce a certain price, with a proviso that the ratable share of that price is to be accepted in full: Jennings v. Hyman, 11 O. R. 65.

A false statement by the debtor that other creditors have agreed to sign if the creditor approached signs vitiates the agreement: Cooling v. Noyes, 6 T. R. 263; and so also does any non-disclosure of assets by the debtor: Vine v. Mitchell, 1 Moo. & R. 337; or misrepresentation as to his liabilities, and in that event the creditor may sue for the balance of his claim and reply fraud if the composition agreement is set up: Ontario Copper Lightning Rod Co. v. Hewitt 29 C. P. 491; Fraser v. McLean, 46 U. C. R. 302.

Where there is a compulsory discharge under an insolvent Act the debt remains, though it cannot be enforced, and there is consideration for a promise to pay it; but it is

otherwise where there has been a voluntary release: Samuel v. Fairgrieve, 21 A. R. 418, and cases there cited. (Reversed in the Supreme Court on the question of the effect of the Bills of Exchange Act.)

An agreement by a creditor to accept less than the amount of his debt in satisfaction thereof is binding; signature of a composition deed is not essential: Bank of Commerce v. Jenkins, 16 O. R. 215; Howland v. Grant, 26 S. C. R. 372.

INDEX

ACCOUNTS, assignee's duty to keep, 170
creditor's right to have copies, 170
creditor's right to inspect, 170
ACQUIRING CLAIMS after assignment, 127
before assignment, 130
for purposes of action, 91
ACTION to enforce claim, 160
ADVANCES, what are, 50
when protected, 50
ADVERTISEMENTS, when to be published, 111
where to be published, 111
form of, 153
penalty for not publishing, 113
AFFIDAVIT, before whom to be sworn, 124
form of, 125
AGENT, 142
AGREEMENT to give security, .7
to purchase stock-in-trade, 122
ALIMONY, judgment for, 100
AMENDMENT of assignment, 110
of claim, 160
of valuation of security, 128, 131
ANNUITY, future instalments, 140
APPEALS, from Judge, 3, 136
ASSIGNEE, accounts of, 170
action by, 84
appointment of, 77
attack on bills of sale, 88
change of, 77
claim by, 141
compromise by, 90

ASSIGNEE, death of, 82
delegation of powers, 58
deposit of funds in bank, 168
exclusive right of action, 86.
how far bound by equities affecting assignor, 105.
liability for costs, 84
personal as distinguished from official acts, 90
purchase by, 119
removal of, 76
remuneration of, 182
residence out of jurisdiction, 57
sale by auction by, 120
security for costs, 84
setting up defences by, 163
settlements by, 90
sheriff acting as, 43, 44
solicitor assignee, 82
who may be, 57
wrongful use of assets, 168
ASSIGNMENT, amendment of, 110
attack upon, 42
by company, 68
creditors' consent, 43
defect in, 110
effect of, 58, 62, 70
by firm, 69
form of, 59
by infant, 69
notice of, 110
pending action, effect on, 63
by power of attorney, 69
precedence of, 99, 105
registration of, 69
to sheriff, 43
variations from statutory form, 41
what it passes, 58, 62
when within the Act, 64
who may make, 68

ASSIGNOR, examination of, 186
ATTACHMENT, assignment takes precedence, 99
dividend may be attached, 174
ATTACK upon assignment, 42
AUCTION, 120

B.

BAIL, 109
BONA FIDES, affidavit of, not required, 112
purchaser's, sufficient, 45
what is, 45
BOOK DEBTS, assignment of, may be attacked, 21
assignment of, is not within the Bills of Sale Act, 23
assignment of, effect of assignment for the benefit of creditors upon, 108

C.

CHANGE of assignee, 76
CHATTEL MORTGAGE, agreement for, 20
assignee's right to attack, 86
assignee's right to renew, 112
non-registration of, 19
taking possession under, 24
CLAIMS, action to enforce, 164
acquiring, after assignment, 127
advertisement for, 111, 158
amendment of, 160
barring, 160
compelling proof of, 155
compromise of, 90
contestation by assignee, 160
contestation by assignor, 167
contingent, 138
damages, 138
debtor's right to contest, 167
extension of time for proof, 164
form of affidavit proving, 125

CLAIMS, future, 138, 140, 159
interest on, 160
production of vouchers, 137
proof of, 138
splitting claims, 130
summary procedure for contestation of, 176
COGNOVIT ACTIONEM, 4
COLLUSION, what is, 5
COMPOSITION AGREEMENTS, 114, 194
COMPROMISE of claims, 90
CONCEALMENT of assets, 36
CONCURRENCE of intent, 15
CONDITIONAL SALES, 106
CONDITIONS of sale of stock-in-trade, 120
CONFESSION of judgment, 4
CONSENT to assignment, 43
CONSIGNMENT, goods held on, 105
CONSTITUTIONALITY of the Act, 1
CONTESTATION of claims, 160
action to enforce claim, 164
notice of contestation, 161
summary procedure for contestation, 176
CONTINGENT CLAIMS, 138
COSTS, assignee's liability for, 84
Division Court costs, 104
execution creditor's costs, 103
lien for, 103
security for costs, 84
successful attack on security, 99
taxation of costs payable by estate, 171
CREDITORS, foreign, may rank, 142
notice to, 155
right to use assignee's name, 88
right to attack transactions notwithstanding assignment, 89
who may attack preferential transactions, 31

CREDITORS, who may be attacked, 29
who may claim, 138
CREDITORS' RELIEF ACT, 176
CRIMINAL liability,—
Concealment of assets, 36
defrauding creditors, 36
failure to keep books, 37
falsifying books, 37
CROWN, no priority, 109, 142

D.

DAMAGES, claims for, 139
DEATH of assignee, 76
DEBTOR'S right to contest claims, 167
DECLARATION of right to rank, 164
DESTROYING books, 37
DISPOSAL of estate, 119
DISTRESS, for rent, 149
for taxes, 105
DIVIDEND, declaration of, 173
effect of receipt of, 176
interest on, 175
Limitations Act, 174
notice of, 175
payment may be ordered by inspectors, 173
right of action for, 175
DIVISION COURT, action for right to rank, 165
costs, 104.
DOUBLE PROOF, 73
DOWER, 70

E.

ENDORSER taking security, 35
ESTOPPEL, acceptance of dividend, 32
acting as inspector, 43
attacking assignment, 42
unsuccessful prior attack by creditor, 43

ESTREAT, 109
EVIDENCE of parties to transaction, 31
EXAMINATION, appointment for, 189
  of assignee, 190
  of assignor, 187
  of employees of assignor, 187
  production of books, 189
  request for, 188
EXECUTIONS, effect of assignment, 100
EXEMPTIONS, 65

F.

FAILURE to keep books, 37
FAIR relative value, 53
FALSIFYING books, 37
FINDING of fact, 30
FOLLOWING proceeds, 94
FOREIGN creditor, 142
FORFEITURE of lease, 145
FORMS, affidavit proving claim, 125
  agreement to purchase stock-in-trade, 122
  appointment for examination, 189
  assignment, 59
  conditions of sale of stock-in-trade, 120
  judgment in favour of claimant, 164
  notice of assignment, 155
    of contestation of claim, 161
    to creditors, 155
  order allowing creditor to sue, 89
  proxy, 126
  request for examination, 188
FRAUDS, Statute of, assignee should plead, 163
FRAUDULENT transfer or concealment, 36
FUTURE acquired property, 21

G.

GOODWILL, 27
GUARANTOR, right to rank, 143

H.

HUSBAND and wife, 36, 145

I.

INDORSER taking security, 35
INSOLVENT CIRCUMSTANCES, 26
INSPECTOR acting as solicitor of the estate, 186
appointment of, 115
cannot buy assets, 116
cannot profit at expense of estate, 117
may fix assignee's remuneration, 182
may have assignor and his employees examined, 186
may order payment of dividends, 173
remuneration of, 185
travelling expenses of, 185
INSURANCE, assignment of, 24
effect of assignment on validity of, 64
INTENT, 10, 29
INTEREST on claims, 160
on dividends, 175
deduction of, from claims not due, 138
distress for, 153

J.

JOINT and separate debts, 72
JUDGE, powers of, 3
appeals from, 3, 136
what one may act, 2
JUDGMENT, attacking, 162
confession of, 4
effect of assignment upon, 99
proof by, 162

K.

KNOWLEDGE of insolvency, 27, 28
of claim, 153

L.

LANDLORD—See Lease.
LEASE, accelerated rent, 150
arrears of rent, 149
assignee's liability to pay rent, 154
assignee's right to disclaim, 154
assignee's right to hold, 145
by debtor to creditor, 24
distress for rent, 149
forfeiture of, 145
future rent, 153
interest as rent, 153
LIEN of mechanics, 107
equitable liens, 106
of execution creditor, 103
for rent, 145
LIMITATIONS, Statute of, assignee should plead, 163
dividend is not a payment under, 174

M.

MARRIAGE SETTLEMENT, 145
MECHANICS' LIENS, 107
MEETINGS, how to be called, 115
requisition for, 118
when to be held, 115
where to be held, 115
MISTAKE, 110
MORTGAGEE'S claim for interest, 153

N

NEGOTIABLE INSTRUMENTS, claims under, 128
NOTICE of assignment, 158
of contestation, 161
to creditors, 111, 158
of dividends, 175

NOTICE of meetings, 115, 158
penalty for non-publication, 113
to prove claim. 155
to send in claims, 158
NULL AND VOID, meaning of, 33

P.

PARTIES to action, 92
PARTNER, assignment executed by, 69
claims by, 75
distribution of partnership estate, 72
double proof, 73
security given by, not to be valued, 132
security to, 25
PAYMENT, what is, 46
when protected, 46
POSTPONING the taking of security, 19
PRECEDENCE of assignment, 99, 105
PREFERENCES, assignee's right to attack. 86
creditor's right to attack, 88
effect of setting aside first mortgage, 25
setting aside in part. 33
what are, 21
PRESSURE, 10
PRESUMPTION of intent, 13, 14, 15
PRINCIPAL and agent, 142
PRINCIPAL and surety, 35, 143
PROCEEDING, what is, 34
PRODUCTION at examination, 189
PROOF of claims—See Claims.
PROXY, form of, 126
voting by, 124
PURCHASE by assignee, 119
by inspectors, 116

R.

RECEIVERS, effect of assignment, 103
REGISTRATION OF ASSIGNMENT. 111
  fee for, 112
  omission to register, 113
  places for, 111
RELATIONS, claims by, 144
REMOVAL of assets out of province, 168
  of assignee, 76
REMUNERATION of assignee, 182
RENEWAL of previous security, 19
RENT—See Lease.
REPAYMÈNT by overpaid creditor, 157
REQUISITION for meeting, 118
REQUISITION for examination. 188
RESTORATION of security, 53

S.

SALE of stock-in-trade, 120
SECURITY, compelling valuation. 129
  effect of valuing, 130
  how valued, 130
  restoration of, 53
  setting aside in part, 33
  taking over security, 134
  voting by secured creditors, 128
  what must be valued, 131
SECURITY FOR COSTS, 84
SEPARATE AND JOINT DEBTS, 72
SHERIFF, assignment to, 43
  death of, 44
  deputy acting, 44
  disclaimer by, 85
  expenses of, 113
  sale by, 44
SET-OFF, 171

SOLICITOR, appointment of, 171
    assignee, 82
    taxation of costs, 171
SUBSTITUTION of security, 19
SURETY, claim by, 143
    security to, 35

T.

TAXES, 105
TIME for attacking preference, 16
TRANSIENT trader, 120
TRADERS, Act not limited to, 44
TRUST moneys, no priority for, 141
    unless earmarked, 141

V.

VALIDITY of the Act, 1
VALUING security, 128
VOID, meaning of, 33
    purchaser's rights, 33
VOLUNTARY conveyance, 16
VOTES, casting vote, 127
    how calculated, 126
    proxy, 124
    who may vote, 124, 127
VOUCHERS, 137

W.

WAGES, 54
WARRANT of attorney to confess judgment, 4
WIFE, claim by, 36, 145
WINDING-UP ORDER, refused when assignment made, 68
    service of notice on assignee, 68
WRONGFUL use of assets, 168