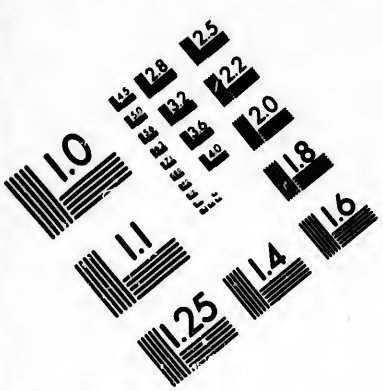

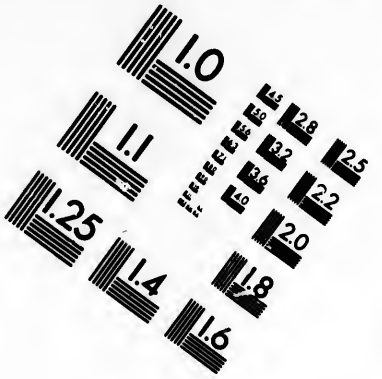

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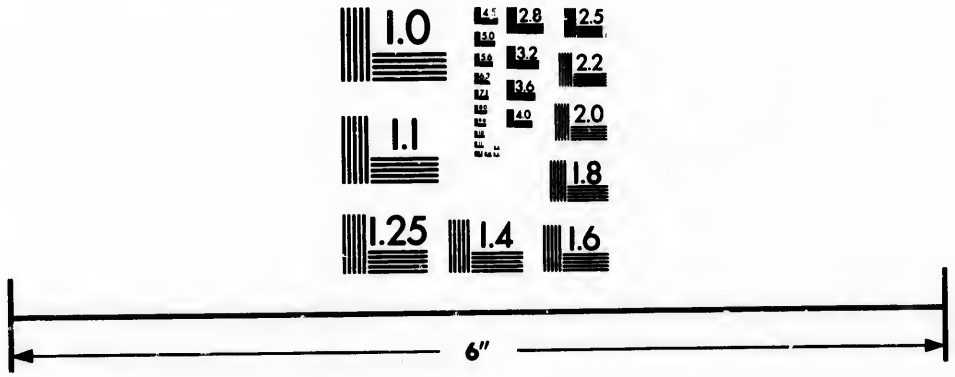

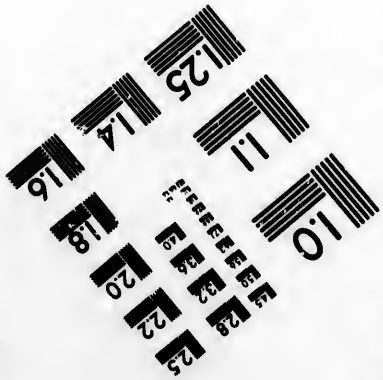

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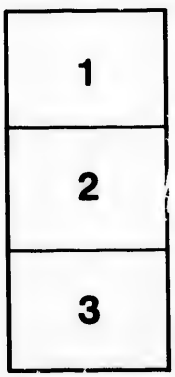

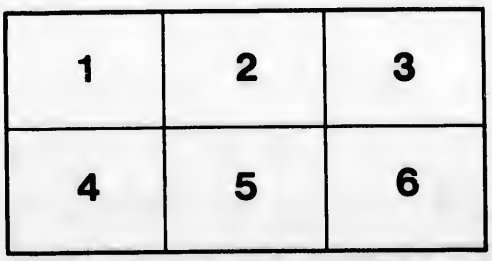

ASSIGNMENTS

AND PREFERENCES

UNDER THE LAWS OF THE PROVINCE
OF ONTARIO.

COMPILED BY

ARTHUR C. Canson McMASTER

[redacted]

TORONTO.

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PREFACE.

Feeling that merchants intrusting their business to an assignee would find satisfaction in the use of a book containing a short and clear statement of the law relating to assignments and preferences, by which they might not only be advised of their own rights but have the means of judging whether the assignee is acting strictly in accordance with legal requirements and in the interest of the estate intrusted to his care, I have requested Mr. A. C. McMaster, Barrister-at-law of the legal firm of McMaster, Scott & Geary, to prepare the following work which I am confident will be found accurate and of considerable service to those requiring to use it.

DAVID BLACKLEY.

Toronto, 5th of April, 1895.

ASSIGNMENTS AND PREFERENCES.

UNDER THE LAWS OF ONTARIO.

CHAPTER 1.

THE ASSIGNMENT.

When the phrase Assignment for Benefit of Creditors, or Assignment under the Statute is used, the assignment referred to is one presumed to be made in accordance with the provisions of Sec. 4 of Cap. 124 R.S.O. 1887, which section is in the following words:—

"Section 4. Every assignment made under this Act for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say; "All my personal property which may be seized and sold under execution, and all my real estate, credits and effects" or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution; subject however, as regards lands, to the provisions of the Registry Law as to the registration of the assignment. 48 V., c. 19, S. 4."

The assignment may be in the words given in the above section, or in words to the like effect, but an assignment confined in terms to personal property only is not within the Act. (Blain V. Peaker, 18 O.R., 109.) And it appears that if the assignment omits any part of the debtor's property in such a way or to such an extent that the intention to reserve a part of his estate is apparent, it will not be within the Act. McLean V. Garland, 13 S. C. R. 336. The more recent authorities are not yet reported.

A safe form of assignment under the Act is as follows:—

"**This indenture** made the day of in the year of our Lord one thousand eight hundred and ninety in pursuance of the Revised Statutes of Ontario, 1887, chap. 124, being an act respecting assignments and preferences by insolvent persons.

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 said Debtor, hereinafter called the Creditors, of the Third Part.

Whereas the said Debtor has heretofore carried on business at as and being unable to pay Creditors in full has agreed to convey and assign to the said Assignee all estate, real and personal, for the purpose of paying and satisfying the claims of Creditors rateably and proportionately, and without preference or priority.

Now this indenture witnesseth, that in consideration of the premises and of the sum of One Dollar the said Debtor doth hereby grant and assign to the said Assignee, his heirs, executors, administrators and assigns, all personal property which may be seized and sold under execution, and all real estate credits and effects TO HAVE AND TO HOLD the same unto the said Assignee, his heirs, executors, administrators and assigns, respectively, according to the tenure of the same.

Upon trust that the said 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 said Debtor.

And it is hereby declared that the said Assignee, his executors, administrators and assigns, shall stand possessed of the moneys derived from the sale of the real and personal estate, and of the moneys collected and called in, and all other moneys which the said 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 an incidental to the preparation and execution of these presents; Secondly, to deduct and retain such remuneraton as shall be voted or fixed for him, the said Assignee, under the provisions of the said Act, and thirdly, to pay off the debts and liabilities of the said Debtor
to the said Creditors, respectively, rateably 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 said Debtor.

The said Debtor appoint the said Assignee, his executors, administrators and assigns, lawful Attorney irrevocable in 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 said 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 him, the said Assignee, to carry into effect the intents of these Presents.

And the said parties of the Third Part, being a majority of the Creditors, hereby assent to this Assignment and direct that it be made to in the place and stead of the Sheriff of the County of

In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered }
In the presence of }
County of } I,
To Wit; } make oath and say:—

1. That I was personally present and did see the within

Instrument and Duplicate thereof duly signed, sealed and executed by

the parties thereto.

2. That the said Instrument and Duplicate were executed at

3. That I know the said part

4. That I am a subscribing witness to the said Instrument and Duplicate.

Sworn before me at the
of in the
of this
day of in the year
of our Lord 189

A COMMISSIONER FOR TAKING AFFIDAVITS IN H.C.J.

The Affidavit of Execution, as any other Affidavit under the Act, may be made before any person authorized to administer affidavits in the High Court, or before a Justice of the Peace, or, if sworn out of Ontario, before a Notary Public.

Where an assignment is to be made by a firm, the better practice is to have it executed in the firm name, and also by each member of the firm in his own name, for one partner cannot assign the assets of the firm without the consent of his co-partner. It is not probably, necessary for one partner, executing in the firm name, to have authority by deed from his co-partners so to sign, but an express request will be sufficient. (Nolan V. Donelly, 4 O.R., 440.) At any rate, it would be sufficient as far as the assignment affected goods of which the assignee had taken actual possession. Nelles V. Maltby, 5 O.R., 263.

It seems that the directors of an incorporated company may authorize an assignment for benefit of creditors without consulting the shareholders of the Company. Whiting V. Hovey, 13 A. R., 7; 14 O.R., 515.

The property which will pass under the assignment *includes* "rights vested or contingent." A right of action, therefore, passes to the Assignee, but if an action is actually pending at date of assignment, it will require to be revived if the Assignee desires to carry it on, and if he does so, he will be liable for the costs. The defendant may move for an order that such an action be revived or dismissed.

It appears that a mere covenant of indemnity as to which there had been no breach at the time of the assignment, and so no cause of action at that time, would not pass unless the Assignee did some act to shew an election to take the benefit of it; or, if it did pass, would be a mere legal interest and would not prevent the debtor suing as equitably entitled in the absence of active interference on the part of the Assignee. See Ball V. Tennant, 21 A.R., 602.

As to after acquired property, and as to rights to the benefit of contracts, see Herbert V. Sayer, 5, Q.B. 965, Gibson V. Carruthers, 8 M. & W., 321.

But does not include, goods exempt from execution under R.S.O., 1887, Cap, 64, Sections 2 and 3 which are as follows:—

Sub-Sec. 1. The bed bedding and bedsteads (including a cradle) in ordinary use by the debtor and his family.

"Sub-Sec. 2. The necessary and ordinary wearing apparel of the debtor and his family:

Sub-Sec. 3. 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 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 spoons, twelve saucers one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash board, 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 the sum of $150."

(S.S.4) 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 the sum of $40.

(S.S.5) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of $75, and food therefor for thirty days, and one dog.

(S.S.6) Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of $100.

(S.S.7) Bees reared and kept in hives to the extent of fifteen hives.

Sec. 3. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in sub-division 6 of section 2 of this Act, 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 such sale if the same shall not exceed $100, or, if the same shall exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said sub-division 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor.

Sec. 4. The chattels so exempt from seizure as against a debtor, shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor, shall be entitled to the exempted goods and the goods so exempt shall not be liable to seizure under attachment against the debtor as an absconding debtor.

Sec. 5. The debtor, his widow or family, or, in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure.

Sec. 6. Nothing herein contained shall exempt any article enumerated in sub-divisions 3, 4, 5, 6 and 7 of section 2 of this Act from seizure in satisfaction of a debt contracted for the identical article.

The assignment also *includes lands*, but subject to the provisions of the Registry Laws. Hence it is necessary to register the Assignment with the Registrar of Deeds for the proper County or Registration Division, otherwise a bona fide purchaser for value might gain priority over the Assignee.

Section 3, SS. I, amongst other things, provides as follows: "Nothing in the preceding section shall apply" (i.e., as avoiding the assignment etc.) "to any assignment made to the Sheriff of the County in which the debtor resides or carries on business, or to another assignee, resident within the Province of Ontario, with the consent of the creditors as hereinafter provided, for the purpose of paying rateably and proportionately, and without preference or priority, all the creditors of the debtor their just debts."

The purpose should be the rateable payment of all

liabilities generally, and if this be the purpose or intent, an accidental omission of creditors names from the schedule would not invalidate nor take the assignment out of the Statute. See McLean V. Garland, 13 S.C.R., 336 nor, it seems, would accidental omission of some property.

The assignee may be given authority to run the business for a time so as to sell as a going concern. See Slater V. Badenach, 10 S.C.R., 296, and cases there referred to.

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

The consent of creditors, in case of an assignment other than to the Sheriff is prescribed by S.S.5. "The debtor may, in the first place, with the consent of a majority of the creditors having claims of $100 and upwards, computed according to the provisions of Sec. 19, make a general assignment for the benefit of his creditors to some person other than the Sheriff, and residing in this Province." This consent may be obtained subsequently to the time of the assignment, and in practice the usual course is to have the assignment ratified, and the assignee confirmed in his position, at the first creditors' meeting.

In Anderson V. Glass, 16 O.R., 592, the meaning and effect of the above sub-section is discussed, and it seems that an assignment made under this Act, executed without the consent of the requisite number of creditors, has the same effect as if it were so executed, unless and until superseded by an assignment executed with that consent, or made to a Sheriff, and a Sheriff who seizes goods the subject of an assignment defective for want of consent only, is not justified in refusing to give them up to the assignee under it, there being no subsequent assignment to supersede it under the Statute.

Section 9 of the Statute provides, that "An assignment for the general benefit of creditors under this Act

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

A judgment for alimony, in spite of the words "all judgments" used in the Act, is not within this section. See Abraham V. Abraham, 19 O.R., 256.

The first execution creditor's lien extends to the entire costs of the action, and is not limited to the costs of his execution as was contended. See Regan V. Clarkson, 16 A.R., 311.

The words "in the Sheriff's hands" excluded executions in the Division Court from the benefit of this section, being in the bailiff's hands, but this is provided for by the Division Court Act; so that where the defendent in an action in that Court "makes an assignment for general benefit of his creditors" the bailiff will, until his fees and disbursements upon the writ of execution are fully paid and satisfied, have a lien therefor upon so much of the goods as will reasonably satisfy the same, but in the event of a dispute as to the proper amount of said 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 said lien shall cease and determine.

Garnishee proceedings in the Division Court are not superseded by Section 9, and the Garnishee must pay the primary creditor who obtains judgment, not the assignee, the words "all judgments" in this section meaning all judgments against the debtor. Wood V. Joslin, 18 A.R., 59.

See Clarkson V. Severs, 17, O.R., as to the meaning of "executed by payment," being executed by payment to the Sheriff.

The assignee is the proper person to distribute funds realized in a Mortgage action where creditors had not proved their claims before the Master at the date of assignment. Carter V. Stone, 20 O.R., 340.

No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection in any assignment under this Act for the general benefit of credi-

tors if the same can be amended or corrected, and if there be any mistake, defect or imperfection therein, the same shall be amended by any Judge of the High Court or of the County Court aforesaid, on application of any creditor of the assignor, or of the assignee, on such notice being given to other parties concerned as the Judge shall think reasonable, and the amendments, when made, shall have relation back to the date of the assignment.

That the assignment only extends to personal property is not such a mistake as can be corrected under above section. See Blain V. Peaker, 18 O.R., 109. See McLean V. Garland as to omission of creditors' names.

An Assignment under this Act is not rendered voidable by reason of non-filing with Clerk of County Court See section 15, which is as follows :—

"Sec. 15. The omission to publish or register as a foresaid, or any irregularity in the publication or registration, shall not invalidate the assignment."

See also section 12, which takes it out of Act respecting mortgages and sales of personal property, but the filing of the assignment and publication of the notice is enforced by penalty. See Chapter as to assignee's duties.

CHAPTER 2.

DUTIES OF ASSIGNEE, ETC.

An assignment, as we have already seen in the preceding chapter, may be made to a Sheriff of the County in which the debtor resides, or to a private individual, with the requisite consent of creditors, but Sec. 3, S.S. 6 limits the right to act as assignee as follows :—

Sec. 3, S.S.6 No person other than a permanent and bona fide resident of this Province, shall have power to act as assignee under an assignment within the provisions of this Act, nor shall any such assignee have power to appoint a deputy, or to delegate his duties as assignee to any person who is not a permanent and bona fide resident of this Province; and no charge shall be made or

recoverable against the assignor, or his estate, for any services or other expenses of any such assignee, deputy or delegate of any assignee, who is not a permanent and bona fide resident of this Province.

(a). The property and assets of any such estate shall not be removed out of the Province without the order of the County Court Judge of the County in which the assignment is registered, and the proceeds of the sale, and all moneys received on account of any estate, shall be deposited by the assignee in one of the incorporated banks within this Province, and shall not be withdrawn or removed without the order of such County Court Judge, except in payment of dividends and other charges incidental to the winding up of the estate, and any assignee or other person acting in his stead, or on his behalf, violating the provisions of this section, shall be liable to a penalty of $500, which may be recovered summarily before a Judge of the High Court or of the County Court of the County in which the assignment is by the said Act required to be registered, and one-half of the said penalty shall go to the person suing therefor, and the other half shall belong to the estate of the assignor; but in default of payment of the said penalty, and all costs which may be incurred in any action or proceeding for the recovery thereof, such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be disqualified from acting as assignee of any estate while such default continues."

It is the duty of the assignee, having received an assignment, to register a copy of it, within five days, in the office of the Clerk of the County Court of the County in which the assignor resides, and also, as soon as conveniently may be, to publish at least once in the Ontario Gazette, and in a newspaper having a general circulation in the County in which the

property assigned is situated a notice of such assignment not less than twice."

As we have seen before, the omission to so record the assignment does not invalidate it, as in the case of a chattel mortgage or bill of sale, but, under section 12, renders the assignee liable to a penalty. The provisions of Section 12 are as follows:—

"Sec. 12. S.S.1. No assignment made for the general benefit of creditors under this Act shall be within the operation of the Act respecting mortgages and sales of personal property, but a notice of the assignment shall, as soon as conveniently may be, be published at least once in the Ontario Gazette, and in one newspaper at least having a general circulation in the County in which the property assigned is situate, not less than twice.

S.S.2. A Counterpart or copy of every such assignment shall also within five days from the execution thereof, be registered (together with an affidavit of a witness thereto of the due execution of the assignment, or of the due execution of the assignment of which the copy filed purports to be a copy) in the office of the Clerk of the County Court of the County, or union of Counties, where the assignor, if a resident in Ontario, resides at the time of the execution thereof; or, if he is not a resident, then in the office of the Clerk of the County Court of the County, or union of counties, where the personal property so assigned is, or where the principal part thereof (in case the same includes property in more Counties than one) is at the time of the execution of the assignment, and such Clerks shall file all such instruments presented to them respectively, for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein. The said Clerks, respectively, shall number and enter such assignments, and

be entitled to the same fees for services, in the same manner, as if such assignments had been registered under the Act respecting Mortgages and Sales of personal property.

S.S.3. In provisional judicial districts and territorial districts and in the temporary judicial district of Nipissing, the counterpart or copy of the assignment shall be filed in the same offices and within the same time, respectively, as mortgages and other instruments are directed to be filed in such districts, under the provisions of the Act respecting Mortgages and Sales of personal property, and the Clerk shall perform the same duties, and have the same fees as Clerks acting under the preceding sub-section."

Under the above sub-section, the time in which the counterpart or copy of the assignment should be registered is extended to the time required by the Act respecting Mortgages and sales of personal property for chattel Mortgages in provisional judicial districts, that is to say, ten days; and the places of registration are respectively as follows; Algoma, Clerk of the District Court at Sault Ste. Marie, under R.S.O., 1887, Cap. 125, Sec. 21; Haliburton, Clerk of the Division Court at Minden, under R.S.O., 1887, Cap. 6, Sec. 23; Manitoulin, Deputy Clerk of Manitoulin, Gore Bay, 54 V., c. 21; Muskoka, Clerk of the Division Court at Bracebridge, R.S.O., 1887, Cap. 125, Sec, 22; 51 V., cap. 13, Sec. 12; Nipissing, Clerk of Division Court at North Bay, 51 V., Cap. 18; Parry Sound, Clerk of Division Court at Parry Sound, R.S.O., 1887, Cap. 125, Sec. 22; 51 V., Cap. 13, Sec. 12; Rainy River, Clerk of Division Court at Rat Portage, R.S.O., 1887, Cap. 125, Sec. 21; Thunder Bay, Clerk of District Court at Port Arthur, R.S.O., 1887, Cap. 125, Sec. 21.

The notice required by Section 12 to be inserted in the Gazette and local paper is a mere notice of the fact of an assignment having been made, but it is usual for the assignee to include in such notice a notice to the creditors to file proofs of their claims with him before a certain date, and that after that date he will proceed to distribute the estate without regard to any claims of which he shall not then have had notice. A good form of such notice is as follows:

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 R.S.O., 1887, Cap. 124, and Amending Acts,
of all his estate, credits and effects, to
of the of for the
general benefit of creditors. A meeting of creditors will be
held at the office of in the
of on the day
of 189 , at the hour of o'clock in the
noon, to receive a statement of affairs. to appoint inspectors,
and for the ordering of the affairs of the estate generally.
Creditors are requested to file their claims with the said Trustee,
with the proofs and particulars thereof required by the said
Acts, on or before the day of such meeting.

And notice is further given that after the day of
189 , the said trustee will proceed to distribute the
assets of the said 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."

The object of the last clause of this notice is, to protect the assignee from liability to account for the estate to any person of whose claim he was not advised at the time of distribution. This secures him the protection of the Act respecting Trustees and Executors, R.S.O., 1887, Cap. 110, Sec. 36, which is as follows :

"Where a trustee, or assignee, acting under the trusts of a Deed or Assignment for the benefit of creditors generally, or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such, or the like notices, as in the opinion of the Court in which such trustee, assignee, executor or administrator is sought to be charged, would have been given by the High Court in an action for the execution of the trusts of such deed or assignment, or an administration suit (as the case may

be), for creditors and others, to send into such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate (as the case may be), the trustee, assignee, executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate, or the assets of the testator or intestate (as the case may be), or any part thereof, amongst the parties entitled thereto, having regard only to the claims of which the trustee, assignee, executor or administrator had notice at the time of the distribution thereof or a part thereof (as the case may be) but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets (as the case may be), or any part thereof, into the hands of the person or persons who may have received the same respectively."

This protection, however, will not extend to save the assignee from liability for a claim of which he has notice, or is aware, although it may not be formally proved. He should call upon the creditor to prove it. (See Carling Brewing & Malting Co. V. Black, 6 O.R., 441.)

A creditor who sends in his claim after the payment of the first dividend, but before the estate is wholly distributed, is entitled to be paid out of the balance, so far as it goes, as much per cent. on his claim as has been paid to other creditors before any further distribution is made to the creditors whose claims have been received in due course; and a creditor who has delayed putting in his claim until the whole estate is distributed, although he has no recourse against the assignee if he has given the proper notices may yet call upon each of the creditors who have been paid to contribute a pro rata amount sufficient to make up the share to which the said creditor is entitled. See Chamberlin V. Clark, 9 A.R., 273.

Section 13 provides a penalty for both assignor and assignee in case of omission to give the proper notice, or record the assignment in proper time, and is as follows:—

"Sec. 13, (S.S.1). If the said notice is not published in the regular number of the Ontario Gazette, and of such newspaper as aforesaid, which shall respectively be issued

first after five days from the execution of the assignment by the assignor, or if the assignment is not registered as aforesaid within five days from the execution thereof, the assignor shall be liable to a penalty of $25 for each and every day which shall pass after the issue of the number of the newspaper in which the notice should have appeared until the same shall have been published; and a like penalty for each and every day which shall pass after the expiration of five days from the execution of the assignment by the assignor until the same shall have been registered.

(S.S.2). The assignee is to be subject to a like penalty for each and every day which shall pass after the expiration of five days from the delivery of the assignment to him, or of five days after his assent thereto, the burden of proving the time of such delivery or assent being upon the assignee.

(S.S.3.) Such penalties may be recovered summarily before a Judge of the High Court, or of the County Court of the County in which the assignment ought to be published or registered; one-half of the penalty to go to the party suing, and the other half for the benefit of the estate of the assignor.

(S.S.4). In case of an assignment to the sheriff, he shall not be liable for any of the penalties imposed in this section, unless he has been paid or tendered the cost of advertising and registering the assignment, nor shall he be compelled to act under the assignment, unless his costs in that behalf are paid or tendered to him.

Sec. 14. In case the assignment be not registered, and notice thereof published, an application may be made by any one interested in the assignment to a Judge of the High Court, or of the County Court aforesaid, to compel the publication and registration thereof; and the

Judge shall make his order in that behalf, and with or without costs, or upon the payment of costs by such person as he may in his discretion direct to pay the same."

The next duty of the assignee is to inform himself, as far as possible, of the creditors, and to notify them of the date of the creditors' meeting, as provided by the following section:

"Sec. 16. It shall be the duty of the assignee to immediately inform himself, by reference to the debtor and his records of account, of the names and residences of the debtor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate, by mailing pre-paid and registered to every creditor known to him, a circular calling a meeting of creditors, to be held in his office, or other convenient place to be named in the notices, not later than twelve days after the mailing of such notice, and by advertisement in the Ontario Gazette; and all other meetings to be held shall be called in like manner."

Under Section 17 the assignee may be required to call a special meeting, as provided in sub-section one.

(S.S.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 19 of this Act, it shall be the duty of the assignee within two days after receiving such request, to call a meeting of the creditors at a time not later than twelve days after the assignee receives the request. In case of default the assignee shall be liable to a penalty of $25 for every day after the expiration of the time limited for the calling of the meeting until the meeting is called.

(S.S.2). In case a sufficient number of creditors do not attend the meeting mentioned in section 16 of this

Act, or fail to give directions with reference to the disposal of the estate, the Judge of the County Court may give all necessary directions in that behalf."

"Sec. 21. Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare and keep, constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate; and he shall declare dividends of the estate whenever the amount of money in his hands will justify a division thereof, and also whenever he is required by the inspectors."

As a general rule, trustees are not obliged to prepare copies of accounts for parties interested, but only to have their accounts ready, and to afford all facilities for their inspection; though, where a creditor lives at a distance from where the trust affairs are being carried on, it would be the duty of the trustee to give all reasonable information by letter, and, if requested, but at the expense of the creditor, even to prepare and transmit accounts and statements. See Sanford V. Porter 16 A.R., on this point, and also on the creditors' right to tax the bill of costs rendered by the assignee's solicitors; although the assignee is entitled, as appears from in re-Lamb, 17 C.P,. 173, to choose his own solicitor.

"Sec. 22. So soon as a dividend sheet is prepared, notice thereof shall be given by letter posted to each creditor, enclosing an abstract of receipts and disbursements, shewing what interest has been received by him for moneys in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and after the expiry of eight days from the day of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid.

Sec. 23. 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."

The law of set-off would not permit a debt due by an individual partner to be set-off against a claim by a partnership estate, for the debt must be payable and owing to a person in the same capacity; so a debt owing to a person as trustee could not be set off against a debt owing by him in his private capacity. See Graham V. Toms, 25 G.R., 184, and Moody V. Canadian Bank of Commerce.

The assignee, when distributing the estate, will of course do so pro rata, except as to certain claims known as privileged or preferential claims, which, apart from the priority for costs provided for by section "9" are chiefly as follows:

(1st.) Rent. R.S.O., 1887, Cap. 143, Sec. 28, (S.S.4.)

"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."

Under this section the landlord has not got a preferential claim strictly so-called, as many persons suppose, but merely a lien on the goods of the insolvent debtor, if there are any, so that if the goods had been removed from the premises prior to the execution of the assignment, the landlord would stand in no better position than any other creditor. See Linton V. The Montreal Hotel Co., 16 A.R., 337; and in re-McCraken, 4 A.R., 486.

(2ndly.) Wages. R.S.O., 1887, Cap. 127, Sec. 1.

"Whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of the

making of such assignment, or within one month before the making thereof, not exceeding three month's wages or salary, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims."

All wages or salary are to come under this section, whether the employment in respect of which the same shall be payable be by the day, by the week, by the job or piece, or otherwise.

Section 5 makes special provision as to partnership and individual debts, as follows:

"Sec. 5. If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors, owes or owe debts, both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full."

See Bank of Toronto V. Hall, 6 O.R., 644; McDonogh V. Jefferson, 16 A.R., 107, and Kenyon V. Hamilton.

But creditors of a partnership a member of which subsequently carries on the business alone are entitled to rank equally with the creditors of that member in the winding up of his estate.

It is the duty of the assignee to contest any claim which he believes is being improperly or fraudulently preferred against the estate of his assignor, and provision is made by sub-section 5 of section 20 for such a case.

"(S.S.5). At any time after the assignee receives from any person claiming to be entitled to rank on the estate, proof of his claim, notice of contestation of the claim may be served by the assignee upon the claimant. Within thirty days after the receipt of the notice, or such further time as a Judge of the County Court of the County in which the assignment is registered may on application allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action served on the assignee; and in default of such action being brought and writ

served within the time aforesaid, the claim to rank on the estate shall be forever barred.

(a) The notice by the assignee shall contain the name and place of business of one of the solicitors of the Supreme Court of Judicature for Ontario, upon whom service of the writ may be made; and service upon such solicitor shall be deemed sufficient service of the writ."

The following is a form of the notice of contestation required as above:

"**In the matter of** an Act respecting Assignments and Preferences by Insolvent persons, being R.S.O., 1887, Cap. 124, and In the matter of the Amending, Acts, and In the matter of the estate of

To

You are hereby notified, pursuant to the provisions of the above Acts, 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 (or for $ being a part of your claim filed with me.)

And you are hereby further notified that unless within thirty days after the receipt by you of this notice, or within such further time as may be allowed on application to the proper Judge in that behalf, an action is brought against me to establish your claim, and within the same time a copy of the writ or process is served upon me, or my solicitor herein named, your claim to rank upon the estate shall be forever barred.

And you are hereby further notified, that service of any writ or process to enforce your said claim, may be made upon my solicitor,

Dated at the day of A.D., 189 ."

Section 20 requires all claims against an estate to be verified by affidavit and vouchers, and makes provision for the barring of any claims which are not proved satisfactorily within a reasonable time after notice of the assignment.

"Sec. 20. (S.S. 1). Every person claiming to be entitled to rank on the estate assigned shall furnish to the

assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of.

(S.S.2). In case a person claiming to be entitled to rank on the estate assigned does not within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim as provided by this and the preceding sections of this Act, the Judge of the County Court of the County wherein the debtor at the time of making the assignment resided, or carried on business, may, upon a summary application by the assignee, or by any other person interested in the debtor's estate (of which application at least three days' notice shall be given to the person alleged to have made default in proving a claim as aforesaid), order that unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person so making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and if the claim is not so proved within the time so limited, or within such further time as the said Judge may by subsequent order allow, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor.

(S.S.3). The preceding sub-section is not intended to interfere with the protection afforded to assignees by section 36 of the Act respecting Trustees and Executors, and the Administrators of Estates.'"

By section 7 it is provided as follows:

"Sec. 7. (S.S.1). Save as provided in the next succeeding subsection, the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and

instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of this Act.

For the cases in which a creditor is entitled to sue, see the chapter on the rights of creditors.

An assignee may compromise any action which he has brought, or adjust any claim, in good faith, and no creditor will thereafter be permitted to assert the right which has been settled by the assignee.

The remuneration of the assignee is provided for as follows in Section 11.

"(S.S.1). The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the County in which the assignment is registered, or the Judge thereof, if complained of by the assignee or any of the creditors.

(S.S.2). In case no remuneration is voted to the assignee by the creditors or the inspectors, the amount shall be fixed by the said Judge."

The assignee's fee is generally about five per cent., that being the remuneration of ordinary trustees, and it is to be presumed that the Judge on being applied to to settle the amount of the assignee's remuneration, would be governed by that allowed an ordinary trustee.

Under Section 6 an assignee may be removed and another appointed, as follows:—

"Sec. 6, (S.S. 1)—A majority in number and value of the creditors who have proved claims to the amount of $100 or upwards, may at their discretion substitute for the sheriff or for an assignee under an assignment to which S.S. 2 of Sec. 3 of this Act applies, a person residing in the County in which the debtor resided, or carried on business at the time of the assignment. An assignee may

also be removed, and another assignee may be substituted, or an additional assignee may be appointed by a Judge of the High Court or of the County Court where the assigment is registered.

(S.S. 2)—When a new assignee is appointed the estate shall forthwith vest in him without a conveyance or transfer. The new assignee may register an affidavit of his appointment in the office in which the original assignment was filed. Such affidavit may also be registered under the Registry Act. The registration of the affidavit under the Registry Act shall have the same effect as the registration of a conveyance."

A special case of unfitness for his position would require to be made out in order to induce the Court to remove an assignee, but a majority of the creditors may, as appears from the above section, remove the assignee in their sole discretion without any cause assigned and appoint another in his place, in whom the property will, by the mere appointment, vest under the above sections without any conveyance or transfer, but the assignee, in order to avoid the risk of the former assignee dealing with the property, must record the affidavit provided for in S.S. 2, as to personalty, with the County Court Clerk, and as to realty, in the Registry Office.

It should, however, be noted that although the creditors are unlimited as to their right to remove an assignee, yet they can only appoint in his place some person residing in the County in which the debtor resided or carried on business at the time of the assignment; whereas, if the assignee is removed by the Court, on cause shown, the Court may in its discretion appoint any person in the Province as trustee of the estate.

CHAPTER 3.

RIGHTS AND POWERS OF CREDITORS.

We have seen in the preceding chapter that creditors may under section 6 of this Act change the assignee if they are dissatisfied with the person to whom the debtor has assigned his estate. If however, the creditors have confidence in the person to whom the assignment has been made, they will proceed to file their claims with him as required by the notice to creditors, and will see that they are duly verified by affidavit so as to entitle them to vote at the creditors' meeting. They may also, in case it is inconvenient to attend the meeting in person. appoint a representative by proxy, in writing, under section 18, which provides as follows :—

"Sec. 18. 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."

It will be seen from the above that a Statutory Declaration is not sufficient proof of claim, the Act requiring an Affidavit, which may be in the following form :—

AFFIDAVIT OF CLAIM.

In the matter of an Act respecting Assignments and Preferences by Insolvent persons, R.S.O., 1887, Cap. 124, and Amending Acts, and
In the Matter of of the
of
in the County of Debtor,
and of of the
of in the County of
Claimant. I,
of the of
in the County of ,
make oath and say :—

(a)

I. I am

2. The above named debtor is justly and truly indebted to the said claimant in the sum of $

3. The particulars of the said indebtedness are set out in the Statement hereto annexed marked "A."

[a] The above named "Claimant, or a partner in the above named Claimant's firm or the duly authorized agent of the above named Claimant."

[b] "No security whatever for the said claim, or any part thereof, or the following security, that is to say, xxxx which is of the value of $."

(b)

4 The claimant holds

Sworn before me at the
of in the
of this
day of
A.D. 189 .

This Affiidavit should be sworn before a Notary Public, or Commissioner authorized to take Affidavits, or before a Justice of the Peace in Ontario. If taken before a Commissioner outside of the Province of Ontario, he must be one authorized to take Affiidavits for use in Ontario.

The following is a sufficient form of Proxy:—

PROXY.

We, the above named Claimants, hereby authorize and empower to represent us at all meetings of creditors of the estate of and to vote and act for us at such meetings in respect to our claim in the above affidavit set out, and in all respects to represent us as if we were present and acting in the premises.

Dated at this day of A.D. 189 .

Signed in the presence of }

Having duly proved his claim in this manner, the creditor, or his representative, will be entitled to vote, as provided in the following Section, No. 19:—

"Sec. 19. (S.S.1). Subject to the provisions of section 6, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:

For every claim of or over

$100,	and not	exceeding	$ 200,	1 vote
200,	"	"	" 500,	2 votes
500,	"	"	" 1,000,	3 votes

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

(S.S.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.

(S.S.3). In case of a tie, the assignee, or if there are two assignees, then the assignee appointed by the

creditors, or by the Judge if none has been appointed by the creditors, shall have a casting vote.

(S.S.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 debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon, and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value, to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate."

(S.S.5). If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability, and its non-payment, he shall be entitled to amend and re-value his claim.

Formerly, a creditor, as long as he did not ultimately obtain more than one hundred cents on the dollar of his claim, might retain his security and still rank on the estate of the debtor for the whole debt. This was considered to work unfairly to the other creditors, and, under the present section, if the creditor desires to retain his security without valuing it, he must forego his right to share in the estate. This provision is not unfair, as the creditor is entitled to place his own value

on his security, and the assignee must pay ten per cent. over that value if he desires to acquire the security; and it has been held that the assignee must act without delay if he intends to take over the security, as otherwise the creditor will be entitled to consider himself the absolute purchaser of it, and that his, so to speak, statutory offer to sell had been refused. See Bell V. Ross, 11 A.R., 458. The security of a third person for the debtor need not be valued, and such guarantor could not, and cannot now, rank on the estate as a creditor until he has actually paid the debt, so as to, in effect, substitute himseif for the original creditor, and formerly such a guarantor, not having made a payment, was not considered a creditor so as to debar him from taking a valid security from an insolvent debtor, even though it were clearly apparent that he would ultimately be called upon for a payment under his guarantee. This anomaly has now been remedied by 55 Vic., Cap. 25.

The personal guarantee of an individual member of a firm is in the same position as a stranger's, and therefore need not be valued. See re-Jones, 2 A.R., 626.

It appears that if a creditor were to obtain from a debtor customers' notes, payable, say, to bearer, or otherwise, so that the debtor did not endorse them, it would be very doubtful, reading sub-sections 4 and 5 together, whether the creditor would be compelled to value them or not.

Sub-section 2 of Section 7 provides, that, "If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the trustee under the authority of the creditors or inspectors refuses or neglects to take such proceedings, after being duly required so to do, the creditor shall have the right to obtain an order of the Judge authorizing him to take the proceedings in the name of the trustee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge may prescribe, and thereupon any benefit derived from the proceedings shall belong exclusively to the creditor instituting the same for his benefit,

but if, before such order is granted, the assignee shall signify to the Judge his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall appertain to the estate."

This is a qualification of the first sub-section of section 7 which, as we saw in the preceding chapter, provided that the assignee should have the sole and 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 the Act. If a creditor had begun proceedings before the assignment to set aside a fraudulent transaction, they would not abate by reason of the assignment, but the assignee should be joined as a party plaintiff, or else an order should be obtained allowing the creditor to sue for his own benefit. See Gage V. Douglas, 14 P.R., 126.

It should be remembered that no person can be joined as a plaintiff in an action without his consent, and the assignee's consent in writing should therefore be obtained.

Section 8 provides, that "If the person to whom any gift conveyance, assignment, transfer, delivery or payment as in section 2 of this Act is mentioned, has been made shall have sold or disposed of the property which was the subject of such gift, conveyance, assignment, transfer, delivery or payment, or any part thereof, the moneys or other proceeds realized therefor, may be seized or recovered in any action under the last preceding section as fully and effectually as the property if still remaining in the possession or control of such person could have been seized or recovered."

See Harvey V. McNaughton, 10 A.R., 616, and Ross V. Dunn, 16 A.R., 552. Also see Masuret V. Stewart, 22 O.R.. 290, in which money arising from a feigned sale which was fraudulent and void against creditors was at the time of the

commencement of the action in the hands of a nominal purchaser, and he was ordered to pay it into Court for distribution amongst those properly entitled.

The words "fraudulent and void as against creditors" have been extended by 55 Vic., Cap 26, Sec. 2, so as to include simple contract creditors suing on behalf of themselves and other creditors, and to the assignee under the Statute, who can now attack securities which do not comply with the requirements of Chapter 37 of 57 Victoria.

Prior to this extension, such an action could only be brought by an execution creditor. It has been recently held in Tallman V. Smart, 15 O.R., p. 661, that this extension would not be sufficient to entitle an assignee to attack a chattel mortgage, on the ground that it had not been renewed in accordance with the requirements of the Statute, and therefore apparently only extends to enable a simple contract creditor suing as above, or an assignee, to attack a security which has not, in the first instance, complied with the requirements of the Act.

CHAPTER 4.

PREFERENCES.

Advantages gained by one creditor over others by means of collusive proceedings are sought to be put an end to by section 1 of the Statute under consideration. The following are the words of the section :—

"Sec. 1. In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors, gives a confession of judgment cognovit actionem or warrent of attorney to confess judgment with intent, in giving such confession, cognovit actionem or warrant of attorney to confess judgment, to defeat or delay his creditors wholly or in part, or with intent thereby to give one or more of the creditors of any such person a preference over his

other creditors, or over any one or more of such creditors, every such confession, cognovit actionem or warrent of attorney to confess judgment shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution."

For an instance of such an advantage, see Herman V. Seale, 29 Grant 278.

Since the Creditor's' Relief Act came into force but little advantage can be gained under ordinary circumstances by confessions of judgment or other collusive proceedings, as under that Statute all execution creditors are to share equally.

Sec. 4 of the said Act, being Cap. 65 R.S.O., 1887, is as follows:—

"Sec. 4. (S.S.1). In case a sheriff levies money upon an execution against the property of a debtor, he shall forthwith enter in a book to be kept in his office, open to public inspection without charge, a notice stating that such levy has been made, and the amount thereof; and the money shall thereafter be distributed ratably, amongst all execution creditors and other creditors whose writs, or certificates given under this Act, were in the sheriff's hands at the time of the levy, or who shall deliver their writs or certificates to the said sheriff within one month from the entry of notice; subject, however to the provisions hereinafter contained as to the retention of dividends in the case of contested claims, and to the payment of the costs of the creditor under whose writ the amount was made.

(S.S.2). The notice shall state the day upon which it was entered, and may be in form A given in the schedule hereto.

(S.S.3). Where proceedings are taken by the sheriff or other officer for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute pro rata (in proportion to the amount of their executions or certificates) to the expense of contesting any adverse claim, shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates. The Court or Judge may direct that one creditor shall have the carriage of the interpleader proceedings on

behalf of all creditors interested, and the costs thereof, as between solicitor and client shall be a first charge upon the moneys or goods which may be found by the proceedings to be applicable upon the executions or certificates.

(S.S.4). In case the sheriff shall, subsequently to the entry of the notice, but within the month, levy a further amount from the property of a debtor, the same shall be dealt with as if such amount had been levied prior to the entry of the notice, but if after the month a further amount is levied a new notice shall be entered; and the distribution to be made of the amount so levied and of the further amount levied within a month of the entry of the last mentioned notice shall be governed by the entry thereof in accordance with the foregoing provisions of this section; and so on from time to time."

It is far more likely now that creditors will endeavor to obtain a preference by the means intended to be covered by the following sections:

"Sec. 2. (S.S.1). Subject to the provisions of the 3rd. section of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property real or personal made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced be utterly void.

(S.S.2). Subject also to the said provisions of the 3rd. Section of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other

property real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor with intent to give such creditor an unjust preference over his other creditors, or over any one or more of them, shall as against the creditor or creditors injured, delayed prejudiced or postponed be utterly void.

(a) Subject to the provisions of Section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall in or with respect to any action or proceeding which within 60 days thereafter, is brought, had or taken to impeach or set aside such transaction be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

(b) Subject to the provisions of Section 3 aforesaid if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall, if the debtor within 60 days after the transaction makes an assignment for the benefit of his creditors, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure."

The first Statute to be referred to in relation to fraudulent conveyances or preferences is, of course, 13 Eliz. (although now practically superseded by our present, so to speak, broader, and, more extensive Act). 13 Eliz. affected all property real and personal which was subject to execution, and as the constant tendency of the law has been to increase the classes of property so exigible, the Statute of Elizabeth has consequently expanded also. Under this Statute it was held that if an adequate valuable consideration was given it mattered nothing though all parties entered into the transaction for the very purpose of defeating the creditors of the Grantor. See Dalgleish V. McCarthy, 19 G.R., 578.

Our legislature, probably induced by this decision, enacted a Statute dealing with fraudulent conveyances and preferences, which was first consolidated in C.S.U.C., Cap. 26, then in R.S.O., 1877, Cap. 18, and again, with certain amendments, in Sections 1 & 2 of R.S.O., 1887, Cap. 124. The section in question as it appears in R.S.O., 1887, Cap. 124, is as follows: "Every gift, conveyance, assignment or transfer or 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 this section was passed in 1885 it was necessary to show, in order to have a transaction voided as a preference, not only that the debtor intended to prefer the creditor to the detriment of his other creditors, but also that the creditor so preferred was, so to speak, a party to the fraud, colluding with the debtor, and any presumption of such collusion was held to be rebutted if the debtor acted in any way under what was called pressure; e.g., if he made the transfer in view of the creditor's threat to take proceedings, or in view of an intimation that his purchases would not otherwise be shipped, or, in fact, unless his act was absolutely voluntary, or as the phrase was, ex mero motu.

As to this, see Meriden V. Lee, 2 O.R., 451; Davidson V. Ross, 24 G.R., 64; Brayley V. Ellis, 9 A.R., 565; Long V. Handcock, 12 A.R., 137.

For a time after the passing of the Statute of 1885, which was subsequently R.S.O., 124, it was held that it was only necessary to show two things; (1) That the debtor was insolvent when the transaction took place; (2) That the creditor by means of the transaction gained a preference; and that the transaction must thereupon be avoided.

But this was soon departed from, and in Johnson V. Hope, 17 A.R., 10, the Court of Appeal decided that the knowledge by the creditor at the time of the transaction of the debtor's insolvency must be proved. Then followed Gibbons V. Macdonald, 18 A.R., 159, and Molson's Bank V. Halter, 18 S.C. R., 188, reinstating the doctrine of pressure, and Chief Justice Armour in Davies V. Gillard, 21 O.R., 431, and 19 A.R., 432, said, these cases seem in their logical result to have effectually repealed R.S.O., 1887, Cap. 124, Sec. 2, except as to cases which have never yet arisen, and he there declined to set aside a mortgage on the sole ground, that it was given under pressure, although all parties knew that the mortgagor was insolvent and that the necessary effect of the mortgage would be to prejudice and delay the creditors of the mortgagor, and to give the mortgagee a preference over the other creditors.

Immediately after the case last referred to, 54 Vic., Cap. 20 was passed, amending Cap. 124. Sections 1 & 2 are given above as amended by this Act. An interesting article on the probable effect of this amendment will be found in 11 C.L.T. at page 61. It seems that, apart from S.S. (a) and (b) affecting transactions within the 60 days limit, there are only two changes requiring notice.

(1) The word "preference" is qualified by the word "unjust," which instead of strengthening the clause would appear almost to weaken it. (2) The section is made to extend not only to transfers to a creditor, but to transfers made for a creditor, meaning, probably, at the instance of a creditor with the intent to give him a preference, and being directed against such cases as Gibbons V. Wilson, 17 A.R.I., where a debtor, at the instance of his creditor, mortgaged his stock to a third person, the money being paid to the creditor. It is now, therefore, more than doubtful, in case of such a mortgage or sale, even though the mortgage money, or purchase money, were handed to the debtor, and then by him to the creditor, whether the transaction could be supported as a mere payment of money if the two payments are in fact one transaction, the creditor in

any degree keeping the debtor under his control at the time. The effect of sections (a) and (b) is probably only to shift the onus of proof as to the validity of the transaction in question on to the person seeking to support it; the presumption which these sections give rise to being rebuttable, or, at any rate, being rebuttable in all cases except those sought to be supported on the ground of the doctrine of pressure solely. See Lawson V. McGoech. 20 A.R., 464. And it was held in the above case, that a mortgage given within sixty days, and having the effect of prefering the creditor, was not open to attack when it was proved to be made in pursuance of a prior agreement made more than sixty days before it was questioned, at which time the mortgagee had no notice of the debtor's insolvency.

It should also be noted in considering these sections, that they do not apply to transactions having the effect of defeating, delaying or prejudicing creditors, but only to those which have the effect of preferring a creditor, the words used being that it shall be "presumed to be an unjust preference." To set aside a transaction by a person in insolvent circumstances, at any rate, after the sixty day limit is passed, it is necessary to show that the creditor had actual notice of the insolvency. See Ashley V. Brown, 17 A.R. In Hope V. Grant, 20, O.R., 623, it was held that a surety who had not paid the debt for which he was surety was not a creditor within the meaning of the Statute, and that a security given to him could not be a preference within the Act. As this would have left an opening for an ingenious method of avoiding the Statute, 55 Vic., Cap. 25 was passed to meet the case, and provides as follows:—

"Sec. 1. Where the word "creditor" occurs in the ninth line of sub-section (2) of section 2 of the Act, respecting Assignments and Preferences by Insolvent Persons, as the said Act is amended by the Act passed in the 54 year of Her Majesty's reign chaptered 20, and in the second and third lines of clause (a) of said sub-section and in the second and third lines of clause (b) of said sub-section, the same shall be deemed to 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 given become a creditor of the person giving the preference within the meaning of said sub-section 2.

In case of a first mortgage being set aside as a fraud upon creditors, or as giving a preference to a creditor, the advantage would accrue for the benefit of a second mortgagee.

As to agreements to give security, see, in addition to Lawson V. McGoech referred to above, Embury V. West, 15 A.R., 357, in which it was decided that where an advance is made upon the faith of an absolute promise to give security, it is to be considered as a present actual advance on the security of the mortgage. In a mortgage to secure future advances, the advance need not be a pecuniary one, but can be made in goods or otherwise. See Golding V. Deeming, 15 O.R., 201. In Smith V. Lawrence, 27 C.L.J., 116, it was held, that the giving of a lease by the debtor to his creditor was not a preference, even though the debt was agreed to be repaid by the rent; and it appears that a debtor may properly make a payment to a creditor for the very purpose of reviving a Statute barred debt. re-Lane, 23 Q.B.D., 74.

A bona fide sale or payment in the ordinary course of trade is not a preference nor a payment of money to a creditor, nor a bona fide transfer of any goods or other property made in consideration of a present actual bona fide payment in money. Provided that the property sold and the consideration for it bear a reasonable relative value.

Where the debtor handed his creditor a third persons cheque upon a Bank in the place where the creditor lived the maker of the cheque having funds there to meet it. Held a payment of money. See Armstrong V. Hemstreet, 22 O.R., 336.

The Criminal Code makes provisions for taking criminal proceedings against a debtor in certain cases of fraud, as follows:—

"55-56 Vic. (Dom.), Cap. 29.

"Sec. 368. 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,

" (1) makes, or causes to be made, any gift, convey- "ance, assignment. sale, transfer or delivery, of his pro- "perty:

" (2) 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.

"Sec. 369. 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."

It will be seen that both these sections extend to third persons who are parties to fraudulent transactions either by receiving the property or by conniving at or making false entries in the books, etc. Section 368 is a re-enactment of the former Statute, and the decision in Reg. V. Henry, 21 O.R. 113, that a creditor whose debt is not due might take advantage of the former Statute, would apply to the present one. It is to be noticed that section 369 increases the punishment for the offences therein referred to to ten years; a very considerable increase, the former punishment having been only six months.

CHAPTER 5.

RECOVERY OF DEBTS.

In Ontario all proceedings for the recovery of debts can with great facility be conducted in Toronto. In all cases in the High Court and County Court, actions can be commenced and carried on there, and execution can thereupon issue to any Sheriff in the Province. There are three courts having jurisdiction in such cases, the High Court, the County Court and the Division Court. The jurisdiction of the Division Court is limited to cases where the debt is not over $100, except where it is ascertained by the signature of the defendant, as in the case of an accepted draft or a promissory note, in which case the jurisdiction would be increased to $200; the jurisdiction of the County Court is similarly limited to $200 and $400; and actions for larger demands must be brought in the High Court. It will be found much more satisfactory to take proceedings in the High Court where that can be done, as in that case the plaintiff is enabled to recover from his debtor the amount of his solicitor's charges as well as the mere disbursements. In the Division Court the jurisdiction is to some extent limited to

the residence of the defendent, but if the claim be over $100 and payable by the contract of the parties at a particular place action may be brought in the court holden for the Division in which the place of payment is situated, and the defendant cannot then have it removed to his place of residence or to any other Court without giving notice of his intention to object to the jurisdiction, and shewing a bona fide defence to the action, within eight days. It should be noted that in case an assignee disputes a creditor's claim to be entitled to recover on an estate, the action for a declaration of the right to rank must be brought in the High Court, as it is an action for equitable relief. See Whidden V. Jackson, 18 A.R., 439.

In very few cases where the claim is a mere money demand is it found necessary to go down to trial, provided the writ of summons issued be properly endorsed, as the practice gives great facility for obtaining speedy judgment in case of dispute on serving notice of a motion for that purpose and proving the claim by affidavits; and in case the defendant files an affidavit contradicting that of the plaintiff, the motion may be enlarged for the purpose of cross-examining him upon his affidavit, and the plaintiff may then subsequently move for judgment upon the admissions obtained on such cross-examination.

When judgment is obtained, it may be enforced by issuing execution against the goods and lands of the judgment debtor, and, if thought advisable, the creditor may examine the judgment debtor upon oath as to the means which he had at the time of contracting the debt, as to his subsequent disposition of them, and as to what means he now has to enable him to pay the same. Since the recent Statute relating to executions, by which it is provided that they shall remain in force for three years without the expense of renewing them, it is often satisfactory, in view of the small expense of obtaining judgment, to take judgment for the purpose of issuing the execution, and keep it in the Sheriff's hands, so that in case it is at any subsequent time discovered that the defendant is possessed of property which might not have been known to the judgment creditor at the time he obtained his judgment, it may be seized without delay. It often happens that within a few years after a judgment has been obtained the judgment debtor will be found to have gone into business, thinking that his creditors have abandoned all intention of proceeding further against him, and the creditor who then has an execution can make his debt.

In case the creditor's claim amounts to $100 or more, and the debtor can be shewn to be about to leave the province with intent to defraud his creditors, he may be arrested as an absconding debtor.