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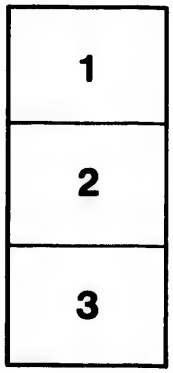

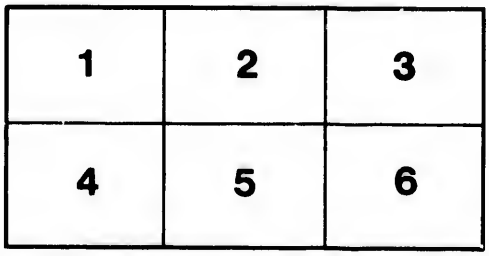

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REVIEW

OF THE

INSOLVENT ACT OF 1864

AND

THE PROPOSED AMENDMENT BILL.

Translated from the French,

WITH ADDITIONS AND EXPLANATORY NOTES.

TOGETHER WITH

THE RULES OF PRACTICE

AND

TARIFF OF FEES

FOR LOWER AND UPPER CANADA.

BY

DÉSIRÉ GIROUARD, B.C.L.

Montreal:
PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET.
1865.

Dedicated,

By Permission,

To

The Honorable J. J. C. Abbott, Q. C., M. P. P.

Professor of Commercial Law, McGill College,

By a former Pupil.

PRELIMINARY REMARKS.

I.

§ 1. At the present moment the country is anxiously watching the constitutional changes sought to be effected by the present administration; and in a political point of view, the past session of our Parliament will not fail to weigh heavily on the future destiny of Canada. If we cast a glance over the statutes promulgated, and consider the numerous and novel dispositions which have been introduced into our hypothecary and judicial system, as well as into our Commercial Law, we may assuredly add that, viewed with regard to legislation, it has been one of the most important sessions.

It is sufficient to mention the marked improvements made in sales by authority of justice, the formation of a Court of Review, which, in many cases, will serve the litigant as a final Court of Appeal, and have the good effect of removing from the Court of Queen's Bench all those ruinous appeals which, under the present system, languish for years on the *Role:* and above all, it is sufficient, we say, to call to mind the Stamp Act, and to notice the great innovation which it introduced into both commercial transactions and law proceedings, to be convinced that the Parliamentary session of 1864 is of great importance in Canadian law.

If we add to all this, that it alone gave us our present bankrupt law, which insolvents, unfortunately too numerous, had looked to for years as their only bulwark against their creditors, and the means of re-establishing their lost credit, we may unhesitatingly state that it shall rank prominently in the history of the country, and I might say, seriously affect its future prosperity.

In bringing under the notice of the public the late Bankruptcy Law, we do not intend to repeat here all those, in our opinion, well-founded objections which were made, when it was first brought

before the House, in the session of 1863. Suffice it to say, that a large number of leading merchants of Montreal petitioned the Legislature at that time, asking for certain reforms in, and additions to, the dispositions of the Common Law of Lower Canada, and not a Bankruptcy Law at once applicable to both sections of the Province. This petition, we believe, was referred to a Committee for consideration, and after a lapse of a year and a half of labor and discussion, reappeared more defective and complicated. Since the first of September, it has been in force as law, to the great satisfaction of insolvents, who cannot fail to invoke its protection, and have already to the number of hundreds made their announcements to the country, but, at the same time, to the great dissatisfaction of a large number of merchants, who do not find in it the guarantee which was promised, or the simple, short, clear and easily understood dispositions which they ought to understand and be able to apply without possessing the skill of its author, a man well known to all as thoroughly conversant with the practical affairs of commerce and with the laws relating thereto.

Their disapointment has been great, and it will be still greater when they are called upon to apply the thirteen sections and one hundred and thirty-one sub-sections of this Act, and to pass, in order to arrive at a result not better, through this series of forms and formalities, turns and torts, which will continually render necessary the assistance of a learned and able lawyer; their disappointment, we say, will perhaps become cruel when they come to pay all the expenses of winding up the insolvent's affairs, the costs of justice, fees to the assignee, Sheriff's commission, Court-House tax, &c., &c.

We should, however, in justice admit that, notwithstanding the great and numerous defects of this law, it affords measures both useful and desirable. It must be granted that the limits given to the exercise of the right of the conservatory process under the articles 176 and 177 of the Custom of Paris, the dispositions with regard to separation as to property, the seizure of Books, notes and other valuable securities, &c., &c., which we shall have occasion to specify hereafter, are such reforms as the commerce of the country demands. Merchants, without doubt, concur in

these alterations, but question whether the new method of settling the affairs of insolvents is adequate to the exigencies. Perhaps amendments to the short and simple provisions of our Common and Statutory Law, would have better met the views and wants of the majority of the mercantile class and of society in general.

Pardon these preliminary remarks. We know to some it may appear inopportune and useless to discuss the utility and wisdom of a law actually in force. We have only faintly touched on the forebodings and fears entertained by many. If the future should prove them to be ill-founded, so much the better. If such be the case, the framer of this law, the Hon. Mr. Abbott, will have a right to lay claim to the gratitude of the country, from the fact that he has given to it a new Bankruptcy system more perfect and more practical than any which has been vainly attempted hitherto among ourselves, or has existed in other countries.

Let us now briefly notice the different clauses of this Act, and by analysing its most striking features attempt to define its effect and operation. No one will dispute that the task is one surrounded with difficulties. We are far from promising that we shall fulfil it satisfactorily, especially in the narrow limits to which we are confined. We know our work will be very incomplete, and may contain errors; but we console ourselves in the outset with the feeling that we certainly are not the first nor shall we be the last to make mistakes, and that, after all, we shall be in good company. We shall however at all times consider ourselves happy if these notes prove of any service.*

* This essay was hastily prepared for, and in part published in a daily French paper, during September last. Since it first appeared, we have been favored with two works in English on the same subject,—the former by the Hon. Mr. Abbott, and the latter by Mr. Edgar, a young lawyer of Toronto. Mr. Abbott, in his commentaries, refers chiefly to the authors which he consulted in framing the Act, without alluding to several of the difficulties to be encountered in its application. Mr. Edgar, who must have thoroughly understood the theory, seems to give particular attention to its practical operation. We shall, in foot-notes, make references to those works, and with a view to public interest, quote them in part. The French copy already published, we shall leave untouched; and the only difference that will exist between it and the English edition will be the foot-marks or annotations.

II.

TRADERS.

§ 2. *Who are considered traders.*—The first section of "The Insolvent Act of 1864," for it is so designated, (clause 13th) declares "that it shall apply in Lower Canada to traders only, and in "Upper Canada to all persons, whether traders or non-traders."

This disposition of the Act brings us very naturally to this question, which we shall answer briefly: "Who is considered a trader?"

We have no formal provision on this point. In the ancient writers and French Ordinances anterior to the establishment of the Superior Council of Quebec, we find certain disconnected rules, but on the whole there is nothing complete. The Ordinance of 1673 is the first which appears to have laid down the requisites which constitute a trader, and those that constitute an act of trade. In this respect the Ordinance is only confirmatory of the ancient Law, and the Code Napoleon has gone no further than to reproduce word for word its articles. We may, therefore, with all certainty, refer to jurisconsults, who have written either under the old regime, or under the new law.

According to these, by the term *Traders* is meant those who make it their business to buy and sell for profit. It is not sufficient, as a general rule, to perform commercial acts to be considered a trader, and consequently to fall within the provisions of the Bankrupt Law; in addition to this, it is necessary that the party be in the habit of trading.*

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* "The qualifying word "habitual" must not, however, be taken in a sense, either too wide or too narrow; as always requiring a constant succession of commercial transactions, or as being always satisfied by the occurrence of a limited number of them. On the one hand a manifest intention to make of commerce a habitual occupation, will constitute a trader, though the acts of commerce really performed are few and infrequent. For instance the opening of a shop for the sale of goods —or of any particular kind of merchandise, will qualify him who opens it as a trader, though his actual sales may be few, or even though he may have failed to effect one. 2 Massé, p. 162,—1 Pardessus, p. 78,—1

Further, the quality of trader is a matter of fact, which must be proved if denied. It is evident that an individual assuming it in contracts and bargains or even in legal proceedings, advertising in the papers, by signs, bills or otherwise, that he intends to carry on a certain business, and who opens a store or other mercantile place, is to be deemed a trader. These facts afford the most ample evidence of his calling. In the absence of such proof, recourse is to be had to the presumptions and special circumstances of the case: public notoriety must also be considered as well as private testimony of individuals, and the Court, taking into consideration the nature and number of the acts, will infer whether they are sufficient or not to establish the character of trader.

The general term *trader*, which in ordinary business language is often used as synonomous with the terms *merchant*, *dealer*, comprises:

The *wholesale merchant*, or he who is engaged in selling in large quantities the merchandise he has purchased from the producer.

The *retail dealer*, who sells to the consumer.

The *manufacturer*, who, with the aid of workmen, converts materials into a new shape and afterwards offers them for sale.

The *mechanic*, who himself, or with the aid of others, turns out a piece of work from his own materials. But if he executes it without supplying the material, he cannot, in general, be considered a trader.

The *contractor* is he who superintends men at work or hires them, and speculates on their salary.

Bankers and exchange brokers, who do business in money and commercial paper.

Brokers and auctioneers, who intervene in the name of their

Boulay Paty, des faillites, pp. 9, 10, 11. On the other hand, a man may do commercial acts, without thereby constituting himself trader—for he may buy double the quantity of provision he requires for his household, with the intention of making a profit by the sale of what he does not want—and may actually sell and make that profit—yet he will not thereby become a trader. 1 Pard. loc. cit.,—1 Massé, p. 161,—Orillard, p. 4,—Bonnin, Leg. Com., p. 5. See also on these points, 1 Toub. vol. 1, pp. 274 and seq., though he strains the law in favor of the consular jurisdictions."—Mr. Abbott's Commentaries, page 7.

principals in commercial transactions, as, for example, in the sale and purchase of merchandise.

Factors and commission merchants, who also intervene in commercial speculations, viz.: in sales and purchases of merchandise, but in their own name, and who, in the eyes of the public, appear to act in their own behalf.

Jurisprudence and the doctrine of writers appear to regard as traders, carriage-makers, shoe-makers, tavern-keepers or hotel keepers, printers, millers, carpenters, ship-builders, when they buy and sell the material which they employ, mariners or ship captains, owners of vessels, carriers by water or by land, insurers and insured.

On the other hand, workmen and all mechanics who only hire out their services, or simply work at their trade, clerks, book-keepers, and other employed servants of traders, comedians and actors, stock-holders of an incorporated mercantile company, and farmers, are considered non-traders.

From these few observations, it will be seen that it is of the highest importance that our jurisprudence should clearly define what is meant by *traders* and *commercial acts*.

It is to be regretted that the legislator, as an indispensable preliminary, did not specially point out the class of persons which he intended to reach. No doubt this omission will cause serious difficulty. To assist the reader to overcome this, we shall take permission to refer to an excellent commentary on this point by Mr. Justice Chabot, published in the third and fourth volumes of the *Revue de Législation et Jurisprudence*. The author there in beginning, sets forth clearly the doctrine of the ancient French Law upon the subject, which he afterwards shows the code of commerce only confirms: and at the close, comparing the French with the English laws and those of other countries, he arrives at the practical conclusion that we cannot too much consult the modern jurisconsults who, like Pardessus, Dolloz, Locré, Chitty, Story and others, have bestowed many pages of their admirable treatise to a learned investigation of the matter.*

* Mr. Abbott's commentaries on 1st section of the Act can be advantageously referred to. Taking as guides to the interpretation of the Act

§ 3. *What of those who have ceased to trade?*—No doubt the Act applies to actual traders, as regards matters which are past as well as those in the future. But does the same hold good in the case of traders, who, in consequence of their failure or for other reasons, have retired from business insolvent? Can they invoke the protection of the Statute, offer, for instance, an assignment of their goods and effects, and in virtue of the Act, claim their discharge? The question reaches no difficulty in Upper Canada, where the Act includes all classes of persons. In Lower Canada it would seem to us unjust and contrary to the intention of the Legislature to refuse to extend the benefit of the new law to a trader whom, doubtless, misfortune alone has driven to embark in a different career. The Act, it is true, is intended for traders only; but is it not commercial transactions which constitute the trader? How then refuse the voluntary or forced liquidation of these same commercial transactions? If it be admitted, as it was universally in England, under a system of

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the legislation and jurisprudence of France from the earliest time to the present day, he considers the following persons as being amongst others within the meaning of the Insolvent Act:

"1. Merchants, viz: persons habitually engaged in the buying and selling of goods, wares, and merchandise, for profit;

"2. Manufacturers of goods, wares, or merchandise for sale;

"3. Bankers and dealers in money and commercial papers and securities.

"4. Factors or Commission merchants;

"5. Brokers;

"6. Auctioneers;

"7. Insurers and underwriters;

"8. Common carriers for hire, whether by land or water;

"9. Hotel and tavern, eating-house, and boarding house keepers;

"10. Warehousemen and wharfingers;

"11. Mechanics and tradesmen, who buy goods, wares or merchandise, either in the forms of raw materials or wholly or partially manufactured, with intent to sell, after having by their labor improved the articles so purchased, or converted them into something else; such as Jewellers, Boot and Shoe Makers, Builders, Merchant Tailors, Hatters and Furriers, Watch and Clock Makers, Shipbuilders, Printers, Butchers, Millers." *Mr. Abbott, page* 8.

bankruptcy analogous to our own, that the trader who, for the future, is going to retire from business, may become a bankrupt (Meggot vs. Mills, 1 Raymond's Rep., 286, per Chief Justice Holt), by what right can we prevent a heretofore merchant from arranging with his creditors as provided for by the Insolvent Act? The law evidently intended to include this class of persons. It will be for the creditors and for the Court to decide whether their good faith gives them the privilege to be released, and if they ought to be permitted to return to business, should they so desire.

§ 4. *Married women being traders, marchandes publiques; minors, &c.*—But does the wife who is a public trader also come under the operation of this Statute? We do not see why she should be excluded therefrom. The Statute in reality speaks of every trader; it excepts no person, not even minors.

In other respects, a woman who consents to become a trader renounces the advantages which the law generally confers on a woman under the power of her husband. She exposes herself, like every other merchant, to the chances of trade as also to all its vicissitudes.*

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* The following are Mr. Edgar's remarks, page 21, as applying chiefly to Upper Canada:—

"The criterion of a *fême covert* being capable of falling under the bankrupt laws appears to be her liability to be sued to execution for the debts she has contracted during coverture. If a married woman is so circumstanced as to be subject to a common law execution, there does not seem to be any reason why she should not likewise be subject to this Statute execution. (Cooke, 40.)

"It is doubtful if our Act respecting the separate property of married women (Con. Stats. U. C., c. 73) will affect the application of this Act to that class of persons. For although, under the provisions of that Statute, a married woman possesses entire control over her property, which is liable to execution for her torts, there is nothing to show that it is liable to execution at law for her contracts, made during coverture. The separate estate may, of course, be reached in equity, but whether that would render it liable to attachment in bankruptcy proceedings is very questionable. It is probable, however, that a woman who has obtained an order protecting her earnings under the above-mentioned Act, may become bankrupt as to that portion of her estate.

§ 5. *Foreigners.*—There appears to be no doubt but that a foreigner who contracts debts in a foreign country and afterwards comes into Canada, cannot come within the meaning of this Act as regards such debts only. The law, in fact, contemplates but the traders of the country, and those who contract with a view of being governed by our law. It was so held in England. (Hitchox vs. Sedgwick, 4 Vernon's cases, 162.)

The case is different as regards a Canadian who may have contracted a foreign debt. He may be declared insolvent by reason of that debt alone. There is nothing in the Act to prevent it, as in the case of *capias ad respondendum*. This further results as a necessary consequence of several clauses of the Statute providing for the safety of foreign creditors.

But what is the inference with regard to a foreigner who, having property in Canada, has also contracted a debt in Canada, and afterwards comes here either momentarily or with the intention of remaining? It seems he may declare himself or be declared to be insolvent. He has in reality traded in the country; he has contracted in contemplation of the law actually in force; he has therefore subjected himself to all the modes of execution and liquidation which the law affords to subjects. As Lord Tenterden observed: "*A person suing in this country must take the law as he finds it; he cannot by virtue of any regulation of his own country, enjoy greater advantages than other suitors; and he ought not therefore to be deprived of any superior advantages which the law of his country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to.*" (De la Vega vs. Vianna, 1 B. & Ad. 284.)

" A lunatic may be a bankrupt provided the act of bankruptcy be committed during a lucid interval. (*Ex parte* Priddey, Cooke, 48; *Ex parte* Stamp, 1 DeG., 345.)"

III.

VOLUNTARY LIQUIDATION.

§ 6. *Who can make an assignment, and in what case?*—The second section enacts that "any person unable to meet his engage-"ments, and desirous of making an assignment of his estate, "or who is required so to do as hereinafter provided, may call a "meeting of his creditors at his usual place of business, or, at his "option, at any other place which may be more convenient for "them." As the Bankrupt Law applies, in Lower Canada, to traders only, it follows that, in Lower Canada, traders alone can be subject to it, which is not the case in Upper Canada. Moreover, it was in order to legislate for both sections of the Province that the legislator, in this clause, as in many others, employs the word "any person," instead of the word "any trader."

But the quality of trader alone is not sufficient to bring a party under the operation of this Act; it is also necessary that he who desires to make an assignment of his estate should be "unable to meet his engagements."*

Voluntary assignment may take place in two cases; in the first place, when the insolvent of his own free will makes the offer, without being requested so to do by his creditors; which is the case provided for by the second section. It may also take place when a demand is made therefor by two or more cred-

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* By insolvency, as here understood, the legislator does not only mean an absolute impossibility to pay, or *déconfiture*, but also stoppage of payment generally, or a continual state of embarrassment in the affairs. Therefore a trader may be insolvent, but not a bankrupt, *en faillite*, within the meaning of this Act, although his assets may be far in excess of his liabilities. We may add that any person unable to meet his engagements may become bankrupt without producing assets.

The right to assign conferred by the Law of Bankrupts has been considered in countries where such laws are in force, so closely connected with the general interest of trade as to be declared inalienable, even with the previous consent of the debtor. (Arrêt of the 22nd November, 1456, reported by *Guy Pape, quest.* 211, and also Arrêt of the 22nd November, 1599.)

itors, as provided for by the third section, paragraphs 2, 3 and 4, which we shall hereafter explain.

§ 7. *Notice of meeting of creditors.*—"And such meeting," continues the same section, "shall be called by advertisement (Form A), stating in such advertisement the object of the meeting." This advertisement must be published two weeks in the *Canada Gazette*, also in Lower Canada, in every issue during two weeks, of one newspaper in English and one in French (section 11). But this is not all: the insolvent must address notices thereof to all creditors and to all representatives of foreign creditors, within the Province, and must mail the same prepaid, at the time of the insertion of the first advertisement (same sect. 11), with a list attached to each notice containing the names of all his creditors, whose claims amount to one hundred dollars and upwards, and the aggregate amount of those under one hundred dollars.

Such is the course which the bankrupt must pursue in order to obtain a meeting of his creditors. The law requires, at least, two weeks' notice, but does not say whether it may not be longer: it does not fix, moreover, any day within which the meeting of the creditors should take place.

Has the debtor himself the choice of this delay? Is it in his power to wait as long as he pleases? If he has the right to assign to his creditors three weeks or a month for meeting, on what grounds can he be prevented from requesting their attendance in two months, or at a still more distant period? And during each of these delays of three or four weeks or more, what may become of the estate of the insolvent—the guarantee of the creditors? The Statute is absolutely silent on this point. Nevertheless it seems to us that the insolvent cannot continue in trade for his own benefit.

An insolvent, indeed, is an interdict as regards his estate, as is taught by all writers both ancient and modern. From the moment that the trader has made known his failure, all his assets pass irrevocably into the hands of his creditors, and become their property, of which he remains simply guardian and depositary until he makes delivery of the same. Up to this time, if the law

permits him to act at all, it is only as *negotiorum gestor*, the agent of his creditors. He ought, therefore, to render an account to them, and that at any time before the nomination of the assignee. They also have the right, if they have any cause to fear, to see themselves to the investment of the income; to demand, for instance, its deposit in a bank.

But, it may be asked, what can a creditor do during the interval between the notice and the meeting or assignment, even against an insolvent, who continues trading fraudulently, for his own account? It seems to us he may have recourse to the compulsory process, as provided for by section 3, paragraph c., or paragraph 4, as the case may be. The Act nevertheless should have been more precise on this important point; and the statute of the *Honorable Attorney-General Cartier*, passed in 1858, appears more satisfactory in this respect, in saying that an insolvent trader, *who continues* trading, and refuses at once to make an assignment of his property, shall be subject to a *saisie arrêt* before judgment, and at the same time to a *capias ad respondendum*. It is also to be regretted, that a short but reasonable time was not fixed and determined upon, within which the meeting should be held. It is difficult to perceive how an insolvent, who cannot be charged with bad faith, should be bound to choose one term of delay more than another, one month rather than two.

§ 8. *Meeting of Creditors.—Statements.*—Upon the day and at the hour fixed upon, the creditors, their clerks or agents, assemble at the appointed place of meeting.* It is understood that the

* "There is no expressed restriction even as to the section of the Province in which the place of meeting may be fixed, provided it be more convenient to the creditors than the locality of the debtor's place of business. Thus the insolvent, being a resident of Montreal, might hold his preliminary meeting at Toronto, if the majority of his creditors resided at or near the latter city. But in such a case, care must be taken that an assignee is appointed who is competent to act. If the creditors decide upon an assignee, there would appear to be no obligation upon them to select one who resides within the County or District in which the insolvent's place of business is situate. But if the debtor is obliged to choose an assignee from among the official

first step to be taken at the meeting of the creditors, is the naming of a president. It is easily seen from the fourth clause, paragraph 5, that the assignee must take and preserve the minutes of the meeting, which he shall sign himself, and cause to be signed and certified by the president or three creditors actually present. It is strange the Statute no where speaks of the nomination of president, of his powers and prerogatives; whether he should act *pro tem.*, or permanently. We must therefore conclude, that the president enjoys only the privilege of any ordinary creditor present, except it be for the certifying of the minutes; we must also conclude that he is only president *pro tem.*, for each meeting, in short, only a chairman; and that a meeting may even be held without a president, in which case the minutes must be signed by three creditors present and the assignee. But by whom will they be signed if there be neither president nor creditors, to the number of three, present? Who especially will take and certify the minutes of the first meeting and of each adjournment of the same, where there is yet no assignee appointed to the bankrupt? Are the creditors sufficiently authorized to choose a secretary *pro tempore?* The Act makes no mention of this; but it seems in accordance with its intent to believe that the creditors have the power to elect a president, who, if an adjournment takes place, will order it in concert with the creditors, and sign the minutes, which, however, in this case will not be authentic.*

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assignees, he must select one who is resident within the same County or District as that in which he carries on his business, § 2, p. 4, § 3, p. 10, § 4, p. 1.

"If the insolvent should, either by error or designedly, select a place of meeting, other than his place of business, and less convenient to his creditors and assign to the assignee named at such meeting, his estate would become liable to compulsory liquidation under §3, p. 1. For this would not be a mere neglect or irregularity covered by p. 5 of §2; but an assignment made otherwise than in the manner prescribed by the act." Mr. Abbott, p. 11.

But will the assignment be vitiated by that neglect? The paragraph 5, sect. 2, declares it is not—*Vide* post, page 24, §10. What would be then the use of a conservatory process?

* "The meeting should be regularly organized. And correct minutes,

At the first meeting, the insolvent should submit a statement to his creditors. The 2nd section enacts as follows: "and at such meeting he shall exhibit statements showing the position of his affairs, and particularly a schedule (Form. B.) containing the names and residences of all his creditors, and the amount due to each, distinguishing between those amounts which are actually overdue or for which he is directly liable, and those for which he is only liable indirectly as endorser, surety or otherwise, and which have not become due at the date of such meeting; and also the particulars of any negotiable paper bearing his name, the holders of which are unknown to him, which schedule shall be sworn to by the insolvent, and may be corrected by him likewise under oath, at the meeting at which it is so produced, also the amount due to each creditor, and statement showing the amount and nature of all his assets; and he shall also produce his books of account and all other documents and vouchers, if required so to do by any creditor."*

§ 9. *Appointment of Assignee.*—If the creditors do not come to an arrangement, for example, if they do not grant him delay or accept security, they must proceed to the appointment of an assignee, into whose hands the assignment may be made; and it is of little consequence whether he be a creditor or not, a resident within the County or District within which the insolvent has his place of business or not.

If the creditors do not all agree upon the appointment, the question is to be decided, not by the majority in number and value, but by the numerical majority of the creditors present, or represented by agents; for by sec. 2, par. 5, every question discussed at the first meeting must be decided by the majority in number. This is an exception to the general rule, laid down in sec. 11, par. 2,

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containing a list of all creditors present or represented, and full details of all the proceedings, should be made at the time and preserved, in order that evidence of proceedings of such meeting may be available if subsequently required. And it would be proper to appoint a chairman or secretary as is usual at ordinary meetings. See Murdoch on Bankruptcy page 289, *in notis*," Mr. Abbott, p. 12.

* See *post*, § 49.

which enacts that all questions discussed at meetings of creditors shall be decided by the majority in number and in value of the creditors, unless the contrary be specially provided by the Statute.

It may be said, no doubt, that such was not the intention of the legislator, that by section 2, par. 5, he meant only to treat of incidental disputes, accessory difficulties, and not of the choice of the assignee. Here is the tenor of the whole clause to the letter. "If any dispute arises at the first meeting of creditors as to the amount which any one of the creditors is entitled to represent in the nomination of an assignee, *or upon any other question which may properly be discussed at such meeting*, such dispute shall be decided by the votes of the majority in number." Is there any *question which may be more properly discussed* than that of nominating an assignee? It is impossible in our opinion, to give to this disposition an interpretation more in conformity with the text.*

* Mr. Abbott entertains a different opinion upon this point. "The majority," he says, page 12, "in number of the creditors for sums above $100, present or represented, will decide if they also represent the majority in value, § 11, p. 2. If the two majorities differ, see *ibid* for the proceedings to be taken. In England the majority in value appoint, 24 and 25 V. 134, § 116. So also in Scotland, S. act, § 181.

"The mode of voting upon the nomination of an assignee, at the preliminary meeting, is not to be confounded with that to be adopted at the same meeting, upon incidental disputes as to the amount of a creditor's claim and the like. The precautions taken for ascertaining and regulating the amount which each creditor may represent, render this plain. For instance, p. 1 not only requires that a statement of liabilities shewing the amount due to each creditor should be produced at this meeting, but also that the liabilities should be divided into two classes, direct, and overdue indirect, and indirect which are not due. And each creditor can only represent the "amount" of his direct and overdue indirect claims. P. 5 also provides that any dispute which arises as to the "amount" which any one of the creditors is entitled to represent in the nomination of an assignee, shall be disposed of by the votes of the majority in number. It is therefore clear, as already stated, that at this as at all other meetings of creditors, the sense of the meeting is taken by a computation of value as well as number, according to the rule laid down in § 11, p. 2. The exceptions as to disputes about the amount

If such is the meaning which should be attached to this paragraph, we must confess that it will not meet the wants of commerce. How could it be, when, in making the most important move, the appointing of an assignee, who is invested with the entire estate of the insolvent, and who is called upon to make distribution of the same, that the majority in number and not the majority in value should rule? From this it will be easily seen that important interests will frequently be at the mercy of a few petty creditors; a thing which could not take place according to the principle of the majority in number and in value laid down by section 11, par. 2, which should govern in all cases, unless otherwise specially provided. This majority is the majority "in number of all creditors for sums above one hundred dollars, present or represented at such meeting, and representing also the majority in value of such creditors." It is, therefore, the majority in number and in value, which affords the most complete safety to all interested, that then decides. If the majority in number do not agree with the majority in value, the creditors may adjourn; and if the adjourned meeting has the same result, the views of each section of the creditors shall be embodied in resolutions, and referred to a judge who shall decide between them (sec. 11, par. 2). This last resort still further confirms us in the opinion, that it is the numerical majority alone which should make choice of the assignee. Section 2, par. 4, indeed, seems to deny the power of referring to a judge, in its

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of claims, and other questions which should probably be held to mean other *similar* questions, are made for convenience, as at the time of the first meeting no regular scrutiny of the claims can have been effected, or can be obtained."

Notwithstanding the respect we entertain for Mr. Abbott's interpretation, we do not perceive anything in his reasoning to induce us to abandon our previous understanding of the Act. We have not to deal with the secret intent of the legislator, but with the text as laid down in his Act; and when he provides for *any dispute* raised at the first meeting of creditors as to the amount of their claims, *or upon any other question which may be properly discussed at such meeting* (sect. 2, p. 5), he is not to be supposed to mean other *similar* questions. If the word *similar* were inserted in the text of the 5th paragraph, there would be little difficulty in agreeing with the author in his remarks.

permitting the insolvent to make an assignment in the hands of his largest creditor, or one of the official assignees, immediately after the adjournment, if there be one.

Each creditor, however, in the vote to be taken upon the nomination of an assignee, can only represent the amount of direct liabilities of the insolvent to him due or to become due, and the amount of indirect liabilities then actually over due (sec. 2, par. 3). If any dispute arises as to the existence, or the amount of any creditor's claim, it is to be decided by the numerical majority, but in that case such creditor has not the right to vote, as being interested. (Sec. 2, par. 5.)

If the votes be equally divided, an adjournment may be made; and if, in the end, no better result is produced, or if the assignee named refuses to act, or if there is no creditor present at the meeting, the insolvent may then assign his estate to any solvent creditor resident within the Province, not related, allied, or of kin to him, and who is creditor for a sum exceeding five hundred dollars; or, if he has no such creditor who will accept the assignment, then to the creditor representing the largest claim, who is solvent and willing to accept such assignment; or he may, in fine, make such assignment to any official assignee, appointed by the Board of Trade, and resident within the district in which the insolvent has his place of business.

§ 10. *What if the insolvent, after the appointment of assignee, delays to make an assignment of his estate?*—The second section, par. 3, says that, "Thereafter the insolvent shall make an assignment of his estate and effects to the assignee so chosen." This word *thereafter* is little satisfactory, and the Act in no other place determines the delay within which the insolvent shall make voluntary assignment. This is certainly not because the drafting of the deed of assignment requires much time; this can be done by a notary in a few minutes. Why then not compel the debtor to sign immediately, without waiting until he has made away with a large part of his estate, after which to fly for the United States, a departure which he must have had ample time to premeditate, seeing that it was at his option to fix the date of the first meeting?

But, you may add, if he runs away, or squanders his estate, the compulsory process may be had recourse to. In reply it may be urged that, when the only remaining resource available to the creditors is the rumor of a sudden departure or a fraudulent making away of estate—which the insolvent always takes care to conceal—the interests of the creditor are greatly in danger, if not utterly lost, as it often occurs.

It is useless to pretend, that, in virtue of section 3, par. 4, the insolvent is bound to complete the assignment within three days after first meeting or its adjournment. This last provision is not intended to meet the case of free and voluntary assignment on the part of the bankrupt; it is only applicable when the assignment is required and asked for. It is also useless to answer, that section 3, par. 4, meets this difficulty by subjecting to *forced liquidation* the trader, who, after having given notice of a meeting of creditors, as required by the second section of the Act, *neglects to proceed further thereunder*. This proviso offers no greater guarantee than the preceding ones; it provides for no time within which the assignment must be made. None of these provisions confers the express power to have recourse to compulsory process to compel the party, against whom fraud or neglect cannot be proved, applicable to the delay to complete the deed of assignment within a certain time; and this is, moreover, confirmed by the reading of the paragraph following (5) of the same clause 3, which declares that no act shall justify forced liquidation, "*after an assignee has been appointed under this Act.*"

What then should the creditor do? We know the case is one which may be rarely met with. It is difficult to perceive how an insolvent, who, of his own free-will, calls a meeting of his creditors, and causes an assignee to be nominated with the view to make an assignment, should, after all, refuse to do so; and here, perhaps, is the reason why the law contains no express enactment on the point in question. Nevertheless, the thing is not impossible, especially with the knowledge we have of the bad faith and fraud of our day. What must then be the recourse? We would advise the compulsory process according to the wants of the case in the name

of the creditors, and not in the name of the assignee, whose power only commences with the making of the assignment.*

On the other hand, it would be, perhaps, preferable in some cases, to proceed under the Act of 1858, and to demand *saisie arrêt* before judgment, *capias ad respondendum*, or even both together, upon an affidavit that the Insolvent continues trading and refuses to make an assignment. The law of 1858 has not been repealed, and its operation is in no wise incompatible with the Insolvent Act. The creditor, therefore, may make choice as to which he will have recourse to. In order to obtain the benefit afforded by the law of 1858, he should make the demand of assignment, not in the form prescribed by the Act of 1864,—for then the insolvent has five days to answer (sec. 3, par. 4),—but he should make it verbally or in writing, mentioning the Act of 1858, as has been the usage up to the present time. Above all, as we have said, the exigency of the circumstance ought to guide in those difficult cases.

Before considering the form and effect of an assignment of

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* "The time within which the assignment must be made is not limited by this clause, the debtor being allowed a certain discretionary latitude in the proceedings he voluntarily commences. But if any delay which occurs be such an unreasonable delay as to constitute a "neglect to proceed," the estate of the debtor becomes liable to compulsory liquidation,—§ 3, p. 4. And if such delay were to be accompanied by suspicious circumstances, such as continuance of trade, realization of assets, and the like, these would constitute other grounds for compulsory proceedings, under § 3, p. b. c."—*Mr. Abbott, page* 13.

Mr. Abbott's remarks do not account for the defects already pointed out. The par. 4, sect. 3 seems to apply only to the *neglect* of the debtor to attend the first meeting. What species of neglect is herein meant? Is it fraud? If such is the case, and there is no other obvious meaning, we are brought back to the common law. Moreover, this par. 4 has no reference to the delay to complete the assignment, when the debtor attends the first meeting at which the assignee is appointed. How could such be really the meaning, when in the very next paragraph it is laid down that no act *or omission would justify forced liquidation, after an assignee has been appointed under the Act.*

On the other hand, if *suspicious circumstances* amounting to fraud are to be proved, the common law affords a safer, speedier, and, we might add, the only remedy, and, it will be admitted, far less complicated.

property, we may be permitted to call attention to the provision of the Act, section 2, par. 5, laid down in the following words: "But no neglect or irregularity in any of the proceedings antecedent to the appointment of the assignee shall vitiate an assignment subsequently made to an assignee competent to receive it under this Act."

Suppose for a moment that the notice given to the creditors is irregular through design, or even from involuntary error; that, for example, no notice is addressed according to law to some one or several of the creditors, important creditors or not; that in consequence, these creditors, thus ill informed or not informed at all, or resident, perhaps, at a distance far from the Insolvent or from the place of publication of the papers containing the notice of the Bankruptcy, do not attend the meeting; that in fine an assignee is appointed and an assignment made at this first meeting. Every one will, no doubt, feel that these absent creditors, who have not been notified and could not be, will have a right to set aside the assignment thus made in open violation of the Statute. Yet they can not do so. They will be assured by the same law that all irregularities and neglect, antecedent to the deed of assignment, are of no consequence. You will vainly reply that you are one of the principal creditors, that your presence certainly should have some weight in the decisions of the meeting. You will again be answered, that these defects in the preliminary proceedings have been legalized by the fact of the assignment having been made *to an assignee competent to receive it under this Act*; and you will thus be compelled to submit to the wishes of an unjust and partial majority, who are less interested than yourself, and, perhaps, even to lose your claim in silence, if the time granted to produce it has expired: you will not even have against the creditors an action to recover your share of the dividend, for such is the good will and advantage of section 2, par. 5, of the Insolvent Act of 1864.*

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* "*No neglect or irregularity.*

"This provision appears to be intended to prevent the grave evil which would result to all parties concerned, if mere irregularities in proceedings antecedent to an assignment would avoid such assignment. The entire unobservance of any proceeding provided for by the Act,

§ 11. *Form of deed of assignment — Registration.* — The assignment must be made in the form C. (section 2, par. 6,) or in any other equivalent form. The deed, therefore, is not subject to any special form. It must be absolute, unlimited and unconditional. In Lower Canada, unless it be for lands held in free and common soccage, (C. S., L. C., chap. 37, sec. 56,) it must be before notaries, if there be assignment of immovables; but if it consists of movables only, it may, as in all other sales of movable property, be made *sous seing privé.* In fine, all the rules relating to the formalities of ordinary deeds of assignment receive in this case their full application. (See sec. 2, par. 6, 9, and 10; sec. 11, par. 13.) It is not necessary in the deed

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would probably render the estate of the debtor liable to compulsory liquidation under § 3, p. 1. But a defective performance of the requirements of the Act in respect of any proceeding, would be cured, under this clause, by subsequent assignment to a competent assignee."—*Mr. Abbott, p.* 13 *and* 14.

"Although no neglect or irregularity in any of the proceedings antecedent to the appointment of an assignee shall vitiate the subsequent assignment, it will probably be held that an omission of any such proceedings would render the assignment one made "otherwise than in the manner prescribed by this Act," and an act of bankruptcy upon which proceedings in compulsory liquidation might be taken by a creditor."—*Mr. Edgar, p.* 25.

The preceding remarks seem to have no bearing on the case.

They refer to the entire unobservance or omission of the requirements or formalities prescribed by the Act. But this defect is not an irregularity; it is a total want of proceeding under the Act, which might render the debtor liable to compulsory process, but do not at all apply to irregularity or neglect not vitiating the deed. How, then, have recourse, as pretended, to the compulsory process, when the statute declares that *no act or omission* shall justify the same *after a voluntary assignment made or an assignee appointed under the Act.* Moreover, what could be the object of such a process, when the Insolvent's estate is already conveyed to and vested in the assignee by the assignment, irregular it is true, but declared by par. 5, not to be vitiated by such irregularity.

We cannot finally refrain from pointing out the word "neglect", which is in par. 5, coupled with the word "irregularity", as immoral in law and tantamount to the approval of fraud. A voluntary neglect, in our opinion cannot be approved or justified in law.

of assignment to enter a description of or to detail the property assigned. A copy of the list of creditors *produced at the first meeting of creditors*, ought to be annexed to it (sec. 2, par. 6). It is to be supposed that, when the Insolvent makes an assignment to his principal creditor or to the official assignee of the Board of Trade, failing the attendance of the creditors at the first meeting, he ought likewise to append to the deed a list *which has thus never been produced.* Still the clause says nothing on this point; it has neglected to provide for the case.

If the Insolvent possesses real estate, the deed of assignment may, upon the simple presenting a copy to the Register,* be

* There would seem to be some very difficult questions likely to arise as to the registration of deeds of assignment under this clause. In the first place, as no particular description or detail of the property or effects assigned need be inserted in such deed, (see above sub-sec. 6 of this section,) it is not easy to perceive that much will be gained by making a search to ascertain if such a deed is registered against a particular lot of land. It may be said that it will be the duty of every one investigating a title to search through every registered assignment in the office, to ascertain whether any person through whom the title has passed has executed such an instrument; but there is no provision made for docketting these registrations, as there was when judgments were registered against lands. The difficulty of these searches may not be much for some years, but unless provisions are made to facilitate them, they will become more troublesome every year.

"Then, in the second place, the assignment must, no doubt, be registered by a memorial under Con. Stat., U. C., chap. 89, sec. 18, in every case but the exceptional one mentioned in this clause, where the deed of assignment has been executed in Lower Canada before notaries. But in sec. 19 of the above mentioned Act, it is provided that every memorial "shall mention the lands contained in the instrument or will, and the city, town, townships or place in the county or riding where the lands are situated in the same manner in which the same are described in the instrument or will, or to the same effect." It is submitted that, although no particular description or detail of the real property need be inserted in the deed of assignment to render it a valid instrument to pass the estate of the assignor, a deed without that description could not be registered."—*Mr. Edgar, p.* 29.

As to Lower Canada, as we have stated above, there is but little doubt that there is no necessity for description of the property in order

enregistered in the Registry office for the county where the real estate is situated. (Sec. 2, par. 9.) "And no subsequent registration," continues this clause, "of any deed or instrument of any kind executed by the Insolvent, or which otherwise would have affected his real estate, shall have any force or effect thereon." It may be said *en passant* that it is difficult to understand the reason of this declaration, for it is a well known principle of the common law, that an assignment subsequently enregistered, cannot operate to the prejudice of a previous acquirer, who has not enregistered, but who has had delivery and is in open and actual possession of the property sold, like what takes place in the case of an assignment to an assignee; and in like manner, a non-proprietor of an immovable, as the assigning Insolvent, can neither hypothecate nor create charges upon such immovables. For these reasons, we do not see the necessity, or even the utility of enregistering the deed of assignment; we only see therein further expense without an object.

§ 12. *Effects of Assignment.*—Paragraph 7, of the same 2nd clause enacts, that "the assignment shall be held to *convey and vest* in the assignee the books of account of the Insolvent, all vouchers, accounts, letters and other papers and documents relating to his business; all moneys and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the Insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and movable and immovable property, debts, assets, and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, excepting only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided."

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to register. In this respect it seems to be an exception to the ordinary rule, abolishing general mortgages. This results from the disposition of the statute (sec. 6.) which enacts that it shall not be necessary to describe the property in the deed of assignment, the registration of a copy whereof is declared by sub-section 9 sufficient to secure all rights thereto. Such is also Mr. Abbott's opinion in his Commentaries, pp. 29, 30.

This 7th paragraph gives rise to several questions which we shall briefly touch upon.

In the first place the Act not only divests, *dessaisit*, the Insolvent of his estate, but it also invests the assignee therewith.

The assignment *shall convey and vest;* and consequently, from the time of its execution, it is no longer the Insolvent, but the assignee who is regarded as proprietor. It is the latter, therefore, alone, and not the former, who is competent to perform all acts of administration and of alienation. To him, therefore, belongs also the right of action relating to this same property (sec. 4, par. 7), regarding which the Insolvent is incompetent to sue—*d'ester en jugement.* Incapacity to administer and to alienate, incapacity to contract, incapacity even *d'ester en jugement* relative to this estate; such, in two words, are the logical consequences of the execution of assignment, which, in all respects, is equivalent to a transfer followed by tradition, for tradition is *de jure*, and takes effect by the operation of law alone. The assignee, therefore, has the power to close the stores of the Insolvent, and to revendicate the property wherever it may be found, in case of neglect or refusal to deliver up the same. It follows also, that all actions must be directed against the assignee, even those which affect the real estate, such as the demands *au pétitoire* and *en déclaration d'hypothèque.*

In like manner, the Insolvent is incapacitated from prosecuting pending suits; these rights of litigation are also transferred to the assignee, and cannot therefore be exercised by any one but him; and it is for this, that section 4, par. 9, authorizes the assignee to take the place of the Insolvent in those cases. We are not in this matter to be governed by the jurisprudence of the provisions of the Bankrupt Law which was abolished in 1849. The provisions of that law in this respect were neither so positive nor so extensive as are those of the Act now in force. Moreover, even at common law, the moment the assignment takes place, and that the assignee is appointed, the Insolvent is divested of his estate and deprived of the right of its administration, and as a consequence, remains *pleno jure* an interdict as to his estate. "One of the most remarkable consequences, says Massé, of the *dessaisissement*

(divesting) declared by the 443rd Art. of the Code de Commerce, is to deprive the Insolvent of the exercise of all actions, which, from the time of the declaratory judgment, cannot be pursued except by the assignees, against whom alone also they must be instituted. *Non ignoro*, says Straccha, *decoctorem qui bonis cesserit, nec agere, nec convenire posse. Curatori personæ decoctæ competunt omnes actiones decocto competentes*, further says Casaregis. The 443rd article of the Code de Commerce, is, therefore, only the literal expression of principles admitted by the ancient doctors. In other respects, it is perfectly logical to refuse the Insolvent, who is deprived of the administration of his property, the right of action to defend or to revendicate the same: this right forms a part of the estate; and he can no more exercise the one, than dispose of the other. *Decoctus non potest agere in judicio et actiones expendere, nec actiones activas et passivas, cum amisit et dominium et proprietatem suorum bonorum, interim pendente judicio concursûs retinere.*" *Massé, Droit Commercial, vol. iii, p.* 238.

It is to be observed, however, that when we say that the Insolvent becomes an interdict, we do not mean that he is generally interdicted to all intents and purposes; he is merely an interdict as regards his estate and the actions relating thereto. Notwithstanding the assignment, the Insolvent always retains the right to exercise all actions which relate to his person, such as proceedings for separation as to body, *separation de corps, capias ad respondendum*, the rights resulting from his quality of tutor, curator, &c., carrying with them imprisonment, *contrainte par corps*, which are not comprised in the assignment, and from which the Insolvent is not released. The Insolvent, in fact, should have the power *d'ester en jugement* for all those purposes, so important to him, and even to perform, in the interest of his creditors, conservatory acts as regards the property assigned.*

* According to the best writers on the common law of France, a bankrupt cannot sue without giving security for costs. This opinion is entertained, amongst others, by Jousse on the Ord. of 1673, and Pigeau, Procédure du Chatelet, vol. i, p. 856, and has been maintained by four different *arrêts* (judgments) of the Parliament of Paris. (Arrêt

The Insolvent, in general, does not lose the right to contract. We are no longer under the empire of those ancient laws of the middle ages, whose reign reduced the Insolvent to a position similar to that of civil death or interdiction. Modern legislation, much milder and more liberal, gives to the assignment only those effects which properly belong to it, and which are necessary to secure the property of the Insolvent, the security of the creditors; in all other respects, it leaves to him the exercise of his natural rights, the capacity to contract in all cases in which the creditors cannot suffer; consequently, he is permitted to carry on business, to engage in new enterprises and speculations, to enter into partnership, under, of course, the condition imposed by the laws, that all he acquires before his discharge, whether by his own industry or even by succession, donation, legacy, or otherwise, shall belong to his creditors.* It is the duty of those parties who deal with him, to secure themselves; they know, or are supposed to know, his want of capacity as regards his creditors, and his ability as regards themselves; they know also that this want of capacity continues up to the time of his discharge; and if they consent during that interval to furnish him either with goods or the means of acquiring them, they ought only to blame their own imprudence

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of 14th April and 20th August, 1598—Bouchel en sa Bibliothèque, vo Cession; Papon, arrêts, liv. 8, tit. 1, note 1st; arrêts of 20th Sept. 1606 and 26th July, 1607.)

Our Provincial Statute, Low. C. Con. St., chap. 83, sect. 68, in demanding security for costs from a party residing out of Lower Canada, does not seem to exclude other cases provided for by the common law.

* "Although all the property acquired by a bankrupt, up to the time of his discharge, passes to his assignees, as well as the right of action respecting it, (see sec. 4, sub-sec. 9,) he may maintain an action for his personal labor performed after the issuing of the writ of attachment, (Chippendale vs. Tomlinson, Cook 428; Silk vs. Osborne, 1 Esp. 140; and see Williams vs. Chambers, 11 Jur., 798,) and he may maintain an action with relation to after-acquired property, (Webb vs. Fox, 7 F. R., 391; Fowler vs. Down, 1 B. and P., 44; Evans vs. Brown, 1 Esp. 170; Leroche vs. Wakeman, Peake, 140,) or sue upon a contract made with him, (Cumming *v.* Boebuck, Holt, 172,) unless the assignees interfere. Kitchen vs. Bartsch, 7 East, 53; Herbert vs. Sayer, 2 Dow and L., 49."—*Mr. Edgar, p.* 27-28.

if these same goods are thereafter claimed by the creditors; they have not even the right to allege their ignorance of the position of their debtor in order to rank with the first creditors; because, once more, all that the Insolvent acquires during the state of insolvency, that is, from the time of the assignment to the moment of his discharge, is the exclusive pledge of his first creditors.

The assignment applies to all property and to all the assets of the Insolvent, *except only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided,** and those which are not personal to the debtor, such as is all the property of which he has the use only, or which he holds by title of usufructuary, tutor, curator, fidei-commissary, or otherwise, in favor of other persons;† but the

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* The bed, bedding, and bedsteads in ordinary use by the debtor and his family; the necessary and ordinary wearing apparel of the debtor and his family; one stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six tea-cups, six saucers, one sugar-basin, one milk-jug, one tea-pot, six spoons, all spinning wheels and weaving-looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing-nets and seine as are in common use; 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 twenty dollars; one cow, four sheep, two hogs, and food therefor for thirty days; tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of thirty dollars. The debtor may select out of any larger number of the same kind, the particular chattels to be exempt from seizure. (L. C. C. S., chap. 85, sect. 3; 24 Vict., chap. 27.)

† "Property which has been placed in the hands of a man for a specific purpose will not pass to his assignee upon his bankruptcy. As where bills of exchange were remitted to bankers in London with permission to discount them for a particular purpose, and they were not, in fact, discounted before the bankruptcy of the banker to whom they were remitted, they were ordered to be delivered up to the assignees. (Ex p. Frowd, Mon. and McA., 262.) Also where a bankrupt was allowed by his assignees to remain in possession of his house and furniture, in order to assist in settling the affairs of the bankrupt estate, and the bankrupt traded and became bankrupt a second time, it was holden that

fruits and revenues of such property, which belong to himself, fall into the assignment.

The exemption from seizure which the Government has attached to the salaries and pensions of its officers, is opposed to the idea of their being included in an act of assignment. There can be no doubt on this point; for this incompetency is declared by our Statutes themselves.

But should the assignment comprise also property which the insolvent holds by the liberality of a donor or testator on the condition that it shall not be liable to seizure? It is true that the Common Law of the country exempts such property from seizure, and thus gives effect to the condition attached to the legacy or donation. But the law relating to insolvency is special and exceptional; and when its provisions are clear and precise, they must not be subordinate to the Common Law, which is modified by them, instead of modifying the same. Now the Act has not excepted such property; it invests the assignee with all the property, except such only as is exempt from seizure by *statute*, in order that the insolvent may not be deprived of the necessaries of life. Such property, therefore, as is exempt only by the Common Law, falls into the general mass of the estate of the Insolvent and is conveyed with it.*

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the furniture, &c., still remained the property of the assignees under the first commission, and did not pass under the second assignment. (Walker vs. Burnell, Doug., 316; and see Mullin vs. Moss, 1 M. and S., 335.)"—Mr. Edgar, pp. 26 and 27.

* But does the assignment comprise property actually under seizure? Under the last Bankruptcy Act, it was held that the assignees of a bankrupt could not stop the execution of a judgment, by alleging the issuing of a commission since the seizure. (1 *Rev. de Jur., p.* 45, *McFarlane vs. Lanctot and Brault, assignee.*) This decision however does not seem to hold that the property seized does not fall into the hands of the assignee, but merely that he cannot prevent the sale by opposition.

We are also inclined to believe that the present Bankrupt Act does not empower the assignee to oppose the sale by alleging the execution of a deed of assignment or his appointment under a compulsory process, because paragraph 7 of section 4 enacts that "all powers vested in any insolvent which he might legally execute for his own benefit, shall rest

§ 13. *Forced assignment.*—The 3rd section, paragraph 2, provides as follows:—" If a trader ceases to meet his commercial

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in and be executed by the assignee in like manner and with like effect." At the time the assignment was made, the Insolvent having no right to oppose the sale, the assignee can have no greater right, the property seized being vested not in the Insolvent, but in the hands of justice, *en justice.*

As however property actually under seizure belongs to the Insolvent, it must be comprised in the assignment under paragraph 7, section 2. As, under the Act, the assignee becomes an officer of justice, authorized to realize the estate, and has consequently concurrent jurisdiction with the Court ordering the sale, the guardian cannot prevent him from effecting it, in case the property seized should become liable to be sold by him before the delay fixed by the Sheriff should have expired. To illustrate our views, we refer to the case of two writs of execution issued against the same defendant and executed on the same property. The point however is raised in a cause now pending in the Superior Court, at Montreal, between John White, assignee, and Gerhard Lomer, guardian. At all events, the plaintiff bringing the property to sale has then the right to be collocated in Bankruptcy by special privilege for the costs of execution.

The section 6 of the " Act to amend the Insolvent Act of 1864," now before the House, declares that Bankruptcy extends to all the effects of the Insolvent under seizure or otherwise, " so long as they are not actually sold by the Sheriff; and section 10 of the said Bill enacts that no seizure shall be issued, made or proceeded with after the appointment of an assignee or the issuing of a compulsory process." We consider section 6 of said Bill as merely declaratory of the principle of the Insolvent Act, although not expressly enunciated, viz: that the assignment comprises goods actually under seizure; but section 10 introduces a new principle putting an end to all executions, and empowering the assignee to oppose.

By the 9th section of the same Bill, the seizing creditor has no privilege for his costs or otherwise by reason of said seizure, unless the writ of execution be issued and delivered to the Sheriff at least thirty days before the assignment or the issuing of a compulsory process.

This last section is manifestly unjust. Why, a creditor who has caused his execution to be made within the thirty days, but before any notice whatever of insolvency was given, and even before it was possible for him to know that the debtor was insolvent, will not be allowed to rank by special privilege for the costs he has incurred for the bene-

liabilities generally as they become due, any two or more creditors for sums exceeding in the aggregate five hundred dollars, may

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fit of all the creditors generally, by preventing the Insolvent from doing away with his estate!

The Act expressly enacts that the assignment shall *convey and vest in the assignee* all the property of the Insolvent, in the most extensive words; but does it also comprise property situate without the Province? As to personal property there is no doubt it does. As laid down by Lord Loughborough, "it is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. Personal property then being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies, proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the Courts of this country have been uniform to admit the title of foreign assignees."—Sill vs. Worswick, 1 H. Bl. 665 (App. 514).

The practical importance of this principle has been ably explained in Phillips *v.* Hunter, A.D. 1795, 2 H. Bl. 402, (App. 521), in the following manner: "In a country, a great part of whose commercial capital is employed abroad, it is peculiarly proper that such capital, over which the trader has a disposing power, although situated out of the kingdom, should be considered as referable to the domicilium of the owner. If the bankrupt laws were circumscribed by the local situation of the property, a door would be open to all the partiality and undue preference which the bankrupt laws were framed to prevent; it being easy to foresee how frequently property would be sent abroad with that unjust

make a demand upon him, (Form E.) requiring him to make an assignment of his estate and effects for the benefit of his creditors."

This demand must be signed by the creditors, and be in accordance with the form prescribed or its equivalent.* It is essential that mention should be made therein, that the demand is made under the Insolvent Act. It may be signified by a bailiff, or by any other person, and personally, if possible.

It is impossible to lay down precise rules for establishing the time when a trader is considered *to cease to meet his liabilities generally as they become due.* Discontinuance of payment, or *continuous stoppage of payment*, is a question which must be judged of according to the facts of each particular case. The difficulties of business in general, the commercial reputation of the trader, the extent of his liabilities, the number of them which he has met, the value of his assets and stock in trade, and public notoriety, are so many circumstances which must be taken into consideration.†

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view, immediately previous to, and in contemplation of an act of bankruptcy. If the personal property of merchants employed in the course of their dealings in foreign countries were to be taken by an individual creditor going from hence for that purpose, such merchants would be materially affected in their credit at home."

As to real property, we see no reason why the same rule should not apply, subject, as a matter of course, to the privileges and mortages already held according to the law of the foreign country. The appointment of an assignee under a compulsory process should have a like effect. According to the best authorities, a commission in bankruptcy operates abroad as a voluntary assignment. Our own Courts have also so decided in Bruce vs. Anderson and Randall et al., assignees, Opp. Stuart's Rep., p. 127.

* It is to be regretted that this form does not show the amount claimed by the creditors. The debtor has interest to see upon the face of the demand, how the parties making it are within the clause of the Statute.

† "The words of the Act seem to constitute merely an expansion or explanation of the usual phrase applicable to such a state of things,—stoppage of payments—*cessation de paiements*. And they embody in a few words, the interpretation given to the 437th article of the Code of Commerce by writers of authority. The phrase "ceases to meet his engagements generally as they become due," would not usually be

In fact, if the trader,* from whom an assignment is required, asserts that the stoppage of payment was neither real nor frau-

satisfied by one or even several protests of negotiable paper, if the debtor continued his business and manifested in no other way any disorder in his affairs. M. Pardessus remarks upon this point with his usual practical sense—*on ne devrait pas toujours voir un signe de cessation de paiements dans un ou quelques protets. Combien de commerçants, même dans les grande villes, mais surtout dans les petites, où les ressources pour réaliser promptement, soit des effets à longs termes, soit des marchandises, sont extrêmement rares, se trouvent avoir leurs magasins et leurs portefeuilles remplis, et sont néanmoins forcés de laisser protester des engagements qu'ils acquittent ensuite!* 4 Pardessus, p. 258, no. 1101. See also 1 Bedarride, des Faillites, No. 18. 2 Massé, 1148; et *de même*, (says M. Renouard, p. 127), *que quelques paiements refusés, pour des motifs spéciaux, ou par suite de contestations particulières, ne constituent pas en faillite le commerçant qui continue à acquitter régulièrement l'ensemble de ses engagements; de même aussi, quelques paiements opérés n'empêchent pas que la faillite ait lieu.* The discretion of the judge or court must be exercised on the decision of each case according to circumstances, for it is plain that the same number of failures to pay, which in one case would be disregarded as affording no evidence of stoppage, might, in another, establish it conclusively. The words of the clause would seem to avoid ambiguity as much as could be anticipated. Payments of commercial liabilities generally must cease, which could not be said of isolated and intermittent instances of non-payment. While it might with propriety be considered to have taken place, though but few cases of non-payment had occurred, where the debts left unpaid were large, and where payment was not resumed.

"It is also made essential that the unpaid liabilities should be commercial, thus constituting the only case in which the jurisdiction created by the Act is both real and personal. This is similar to the rule of the French law, as expressly enacted in the code of 1807, art. 441; and as established by the opinions of the writers upon an amendment of 1838. 2 Massé, p. 307. 1 Bedarride, *des faillites*, p. 27." Mr. Abbott, p. 19-20.

"It must be observed however that the Act does not make the temporary character of the stoppage alone sufficient to relieve the debtor from the obligation sought to be imposed upon him by the demand. If his assets appear to be insufficient to meet his liabilities, and this insufficiency was the cause even of a temporary stoppage; or if the stoppage was for a fraudulent purpose, the proceeding is allowed to go on." (Id., p. 21.)

* The party from whom the assignment is required must be an actual

dulent, but only temporary and accidental, he may, within five clear juridical days from the demand, present a petition to the judge praying that no further proceedings be taken upon such demand. (sec. 3, par. 3.)

He has the same privilege if the claims of the creditors making the demand do not together amount to five hundred dollars,* or if they were procured in whole or in part for the purpose of enabling such creditors to take proceedings under this act, (ibid.) The judge hears witnesses and the parties upon this petition, which he grants or rejects with or without costs, at his discretion. Nevertheless, if the demand for assignment has been made by the creditors merely to enforce payment under color of proceeding under the Act, the judge in such case may condemn them to pay treble costs, (par. 3.)†

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trader. In fact, it has been held in Upper Canada that a trader, who has ceased to trade before 1st September, 1864, cannot be proceeded against under this and the two following sub-sections. (Bagwell vs. Hamilton, 10, U. C. Law Jour., p. 305, also cited by Mr. Edgar, p. 35.) But it is not necessary for the plaintiff expressly to state in his affidavit for the attachment that the defendant was a trader since the Act came into force (same case).

* Paragraph 2 of section 3, empowers creditors "for sums exceeding five hundred dollars" to demand an assignment, whereas paragraph 3 permits the insolvent to complain in the case that the claims do not *amount to five hundred dollars*. The word "exceeding" is omitted in the latter sub-section. It is to be inferred that two creditors *for five hundred dollars* only have a right to proceed under section 3, p. 2.

† "A perfectly solvent person may, no doubt, be very much injured in his business and reputation by malicious creditors making a demand upon him under these clauses. It is true that he may deny the allegation in the demand by a petition, and bring evidence before the court to prove the unfounded nature of the demand. Yet all that the judge is empowered to do, should the petition be substantiated, is to condemn the creditors to pay treble costs. In the English acts, the court is authorized to award satisfaction for the damages sustained by a malicious or unfounded petition being fyled. It is presumed that the fact of a judge awarding treble costs against the creditors would not prevent their being rendered liable in an action of damages for maliciously abusing the provisions of the Act. Before the trader could bring such

Notice of petition is to be given to the creditors by a bailiff, or a literate person, and they should have one clear day's notice, if they reside within fifteen miles from the court; one extra day is allowed for each additional fifteen miles (sec. 2, par. 9).

By paragraph 4, of the 3rd section, the trader is bound, under pain of being liable to compulsory liquidation, to present such petition, or to call a meeting of his creditors within the same delay, and to complete the assignment within three days after the first meeting or the adjournment thereof.

The method of proceeding, in case of forced assignment, is the same as in voluntary assignment by the insolvent, and which we have pointed out above, §6 and following.

The three sub-sections of clause 3, which we have just set forth, need no commentary. We may, however, be permitted to make a practical observation on the 2nd paragraph which we have cited. Why incapacitate two creditors whose claims united amount to four hundred dollars or more, from demanding of the debtor an assignment under the act? It is true that the provision made is sufficient for wholesale merchants, but in petty trade, such as that of small towns and of the country, where it frequently happens that a trader does not owe altogether more than a few thousand dollars divided amongst many creditors, this clause appears to disregard them, and refuses them the benefit of its provision. In such a case, it may be said, recourse can be had to the Statute of 1858. But would not the Insolvent Act of 1864, the efficacy and advantages of which are so highly lauded, be of more use and benefit to small trade? Is it not especially the merchants supplying the greater part of a village or suburb, who feel the want of this pretended simple and economical system? Evidently, if it affords protection, it does not do so equally to all.

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action, it is submitted that he would have to present his petition against further proceedings on the demand, and have the same stayed.

"One very great hardship upon an honest debtor might be occasioned by these demands, inasmuch as he might in many instances have to disclose in his petition, and before action brought, the nature of defences which he may intend afterwards to set up against the claims which he has failed to settle." Mr. Edgar, p. 36.

§ 14. *What if the trader has but one creditor?*—May he be compelled to make an assignment under section 3, par. 2, which requires two creditors? However strange it may appear that a trader should have only one creditor, still this is not a simple question of theory, but one of fact, which cannot fail to present itself in actual practice. It sometimes happens that a trader makes all his purchases and transacts all his business with a single house. How then can protection of the law be refused to this merchant whom his debtor does not and cannot pay? In making advances has not the creditor relied upon the security which the quality of his debtor as trader affords him, and upon the extraordinary means which the law places at the disposition of every creditor of a trader? By what right can such security be done away with? The circumstance that he is the only creditor did not depend on his will. Does he not in every other respect represent the mass of the creditors, and as such has he not as much interest as could have several creditors in having the insolvency declared? It seems to us that in a case so favorable, section 3, par. 2, should suffer an exception.

No doubt the creditor might proceed under the Act of 1858, and the debtor, who had only one creditor, might make a voluntary assignment, and be made subject to a compulsory one for any of the causes mentioned in section 3, par. 1. There is nothing to the contrary in the act, and what the law does not prohibit, it permits.

IV.

COMPULSORY LIQUIDATION.

§15. *In what cases may compulsory process be issued?*—Hitherto we have only considered the mode of voluntary liquidation. We have seen that the insolvent, who wishes to make an assignment, has only to call a meeting of his creditors and make an assignment into the hands of an assignee. But here is not the greatest difficulty. It is readily perceived that, as a general rule, there is no ground for expecting fraud on the part of a trader who freely consents to give all he possesses for the greatest benefit of his creditors. It is when the trader premeditates insolvency that he secretly disposes of his goods, closes his books and converts his debts into negotiable paper; in short, it is when he is dishonest and fraudulent that embarrassments increase, and that the necessity of a law, at once simple, prompt and rigorous, is felt.

According to the old law, an insolvent became subject to *saisie arrêt* and to *capias*, if he made away with his goods, left the Province, or even if, continuing trade, he refused to make an assignment, or a composition with his creditors. The Statute of 1858 reputes the trader, who thus refuses to make an assignment *instanter*, as fraudulent and about to secrete. In such a case all the estate of the insolvent is placed in the hands of justice, and the creditors are notified in the *Canada Gazette*, and receive the dividends in proportion to their claims; and such is still the law, as we have shewn above.

Under the Insolvent Act of 1864, a trader is reputed insolvent, and any one of his creditors for a sum not less than two hundred dollars* (section 3, par. 6), may subject his estate to compulsory liquidation (section 3, par. 1), in any of the following cases:

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* This would seem to be sufficient, even in cases where proceedings have commenced by a demand of assignment which requires two creditors, claiming not less than five hundred dollars. That act of insolvency, once perfected, may therefore be taken advantage of by any creditor who could initiate proceedings upon the occurrence of any other." Mr. Abbott, p. 22.

1. If he absconds, or is about to abscond from this Province, (not Lower Canada only) with intent to defraud any creditor (one is sufficient), or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process (section 3, par. *a*).

2. If he conceals himself with a like intent. (*ibid.*)

3. If he remains out of the Province with a like intent. (*ibid*).

4. If he secretes, or is immediately about to secrete, any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them. (par. *b*.)

5. If he assigns, removes, or disposes of, or is about to assign, remove, or dispose of, any of his property, with intent to defraud, defeat, or delay his creditors or any of them. (par. *c*.)

6. If, with like intent, he procures his property to be seized, under execution or otherwise, for a demand of its nature, proveable under the Act, exceeding two hundred dollars, and does not satisfy the demand. (par. *d*.)†

7. If for a sum of at least two hundred dollars, he has been

[† It has been held in Upper Canada, *in re* Worthington vs. Hamilton, that the procuring property to be taken in execution, does not apply to the insolvent, simply allowing a *bonâ fide* creditor to obtain judgment by default. This, as it was observed by the learned judge, is not a procuring of the debtor's goods to be seized, but there must be some *overt act* of the insolvent himself proved.

"An act of bankruptcy by procuring goods to be taken in execution is not committed till actual seizure, and when so committed is not carried back by relation to an earlier period, (Belcher vs. Gunmow, 11 Jur. 286, Gibson vs. King, 1 Cor. and M. 458). The mere allowing a judgment to go by default, under which judgment the debtor's goods are taken in execution, is in itself no procuring the goods to be taken in execution, so as to constitute an act of bankruptcy. (Gibson vs. King, *ubi supra*.") Mr. Edgar, p. 32.

Mr. Abbott, in his Bill to Amend the Insolvency Act of 1864, sect. 2, suggests the following additions to sub-section *a*: "or if he permits any execution issued against him under which any of his chattels, land, or property are seized, levied upon, or taken in execution, to remain unsatisfied till within forty-eight hours of the time fixed by the sheriff or officer for the sale thereof."

actually imprisoned for more than thirty days, and is still imprisoned, or if he has escaped from prison. (par. *e.**)

8. If he wilfully neglects or refuses to obey any order requiring his appearance to be examined as to his debts under any statute or law in that behalf, (par. *f.*), or commanding him to pay any part of his debts. (par. *g.*)

9. If he has made any assignment of his property for the benefit of his creditors otherwise than in the manner prescribed by the Act. (par. *i.*)†

10. If the petition to quash the demand for assignment be rejected, or if, while it is pending, the debtor continues his trade, or proceeds with the realization of his assets. (section 3, par. 4.)

11. If within [illegible] juridical days from such demand, the debtor fails to present such petition and to call a meeting of his creditors as provided by section 2. (ibid.)

12. If he does not complete such assignment within three juridical days after such meeting or its adjournment. (ibid.)

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* "In order to constitute the act of bankruptcy, there must be an uninterrupted imprisonment for more than thirty days. If a man arrested be bailed out before the expiration of the thirty days, and afterwards render in discharge of his bail, and remain in custody thereafter, the thirty days will begin to run on the day of the render, and not on the day of the original arrest, (*ex parte* Dufresne, 1 Ves. and B. 51; Tribe vs. Webster, Willes, 464)." Mr. Edgar, p. 32.

† "The only creditors who will be in a position to take advantage of this act of bankruptcy in order to enforce compulsory liquidation, are those who have not signed and become parties to the deed of assignment, for the benefit of creditors. It has been recently decided in England that a creditor who has executed such a deed may not afterwards take advantage of the assignment as an act of bankruptcy whereon to found proceedings against the assignor. (*Re a disputed adjudication*, 2 *L. T.* (N. S.) 77 Bank.) If a debtor execute a deed of assignment to trustees for the benefit of creditors, he commits an act of bankruptcy, although the trustees do not assent thereto, and refuse to execute the deed. (*Ex parte* Slann, 6 L. T., (N. S.,) 400 Bank.)

"An assignment intended to be made under the voluntary clauses of this act, might from some entire omission of a prescribed proceeding, be an act of bankruptcy under this paragraph." Mr. Edgar, p. 33. See also above § 10, note, page 24, 25.

13. If, having given notice of a meeting of his creditors, as required by the second section, he neglects to proceed further thereunder. (ibid.)

Compulsory proceedings cannot be commenced unless within three months after the act or omission justifying their adoption,* or after a voluntary assignment has been made, or an assignee appointed under the Act. (see section 3, par. 5.)

As it appears, this long list, apart from the unimportant clauses which are inherent in the very system, contains nothing else but the simple provisions of our common law, set forth in a more imposing form. Our old Statute says that the sudden departure from the Province, or concealing with intent to defraud, justifies the issuing of a writ of *saisie arrêt* and of a *capias ad respondendum;* and the Act of 1864 says nothing more. Under the old law, indeed, it was always allowable to proceed against the debtor who threatens to abscond, or to secrete or dispose of his property with a view to delay the remedy of his creditor; for in that case there is fraud. It is the same as regards him who, with like intent, causes his property to be seized with a view to transfer it to a third party under color of a judicial sale; for here also is fraud. And very recently there was before the Court of Appeals a case of *capias ad respondendum*, the chief ground of which was the allegation of a judicial sale, by means of which the defendant had fraudulently placed his property under his brother's name. It is not in cases of open fraud that difficulties exist under the rule of the old law, but when it is attempted to detect it, to prevent and arrest its effects; and, in this respect, the law of 1864

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* "In order to justify proceedings to place an estate in compulsory liquidation, it would seem that the act of bankruptcy relied upon must have been committed during the existence of the debt of the creditor making the application, (Bailie vs. Grant, 9 Bing. 121: 2 M. and Scott. 193.) If committed, even on the same day that the application is made, it will be sufficient. (*Ex parte* Dufresne, 1 Ves. and B., 51; Hopper vs. Richmond, 1 Stark, 507)." Mr. Edgar, p. 37.

The same will probably be held under the present bankrupt law, for the compulsory process is based upon fraud, intent or presumption of fraud.

has in no way ameliorated the position of commerce; nay more, it has made it worse, by the adding of further formalities and granting delays; such is that of five days allowed the insolvent to deliberate.

It is very hard, it may be said, not to give a trader even a single hour for deliberation, as is the case under the Statute of 1858. It may, perhaps, be rigorous, but this rigor is explained by the fact of the debtor's insolvency. What need, therefore, is there for delay, especially when the assignee has been appointed, and the debtor himself of his own free will has called a meeting of his creditors? Is he not insolvent? Does not his estate belong to his creditors from whom he holds? Why then defer the assignment? It is not sufficient to severely punish fraud once committed; it is especially necessary that prompt and immediate means should be devised to prevent its commission and to seize without delay the property of the insolvent—that only security of the creditors. Now, the execution of a *saisie arrêt*, made immediately on refusal or neglect to make an assignment as permitted by the Act of 1858, is certainly the proper remedy to apply to debtors, too often dishonest, and to compel them to make payment; and to judge from the system itself, there is every reason to believe that before long, experience will teach us that, in all these respects, the Statute of 1858 offers greater guarantees than the Statute of 1864. We ought, however, to add, that one serious obstacle to the realization of this expectation is found in clause 11, par. 16, which declares that the expenses incurred under the Insolvency Act are alone privileged. This unfortunate circumstance may, perhaps, force the creditor to proceed under the Act contrary to his desire; so true it is that, if it did not expressly abolish the old law, it tends to bring it into desuetude.

As we have already observed about two years ago, alluding to the Act, which was then only a bill before the House, and as we here again take the liberty of repeating, we assuredly do not want to render the law too severe. It is not at all our wish to sacrifice the guarantees of humanity, to stifle every feeling of pity and of liberality, and to asperse philanthropy properly understood; it is for this reason that we see with pleasure that the Act of 1864 does

not authorize *capias* but only *saisie arrêt*; in this respect, indeed, the law of 1858 is undoubtedly too rigorous, as it offers at the same time both these remedies against the unhappy debtor who is accused neither of concealing nor of absconding, but simply of being insolvent, and of refusing to make an immediate assignment; for these reasons also, we applaud that part of the Act which we shall hereafter explain, authorizing the majority of the creditors to give a discharge to the insolvent against the will of the rest. But we perceive we are anticipating the clauses of the Statute, and so let us return to the compulsory process.

§ 16. *Is compulsory process available only in case of a commercial debt?*—It may here be asked whether, in order to exercise the right of forced liquidation, in a word, bring a trader into bankruptcy, the debt must necessarily be a commercial one, and whether the trader, who does not meet his non-commercial engagements although he does meet his commercial ones, is liable to be declared a bankrupt. It appears to us that, both by the principles and the text of the Act, this question must be decided in the negative. It is admitted, indeed, that in Lower Canada the Act applies to traders only (sec. 1), and that which constitutes a trader, is commercial acts. How therefore can non-commercial acts, without a violation of the intent of law, bring a party under its operation? As it is justly remarked by Locré, on article 441, No. 4, of the Code de Commerce, the man who devotes himself to trading, unites in himself two qualities which have nothing in common,—the quality of the trader and that of the individual. When acting in the former capacity, he comes under the exceptional legislation that governs trade, and when acting otherwise, that is, when he bargains or binds himself as an ordinary individual, he remains under the common law.*

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* It has been held under the former Statute on Bankruptcy that to give jurisdiction to the Bankrupt court, the debtor must not only be a trader, but that the debt must also be a commercial one. Regnier, bankrupt, and de Lorimier *et ux.*, creditors. 1 *Revue de Jur.*, *p.* 232. This decision was rendered by Mr. Justice C. Mondelet, in the following words: " Comme Regnier est traduit devant cette cour, pour une dette que les créanciers poursuivant font eux-mêmes voir être une transaction

Moreover we cannot deny that sec. 3, par. 2, is conclusive in favor of our view in this respect. There is indeed no stoppage of payment except that of commercial engagements which can authorize a forced assignment of property. Upon what grounds can it be argued that a trader might be declared insolvent on account of non-commercial debts? If, in the other clauses, the legislator has made no distinction, it is because in Lower Canada the Act applies only to traders, and in Upper Canada to all persons without distinction. Desiring to legislate for the two Sections, he could not always place the word *commercial* beside the word engagements, which he employs in par. 2. There he has done so, because he is legislating for traders only in both sections of the Province.

Moreover we must not lose sight of the fact that by commercial debts is to be understood a debt not only commercial in its form,

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de famille, pour éviter des procès, la cour ne fait aucune difficulté des questions qu'on lui a soumises. Il est d'ailleurs une raison qui fait toucher au doigt, la singularité de la prétention des créanciers poursuivant. Ne voit-on pas que si l'on pouvait, par quelque cause ou dette que ce soit, amener le débiteur en cour de banqueroute, pourvu seulement qu'il fut commerçant, l'on pourrait par ce moyen soumettre non seulement au juge en banqueroute, mais à l'action et à l'arbitrage des deux tiers des créanciers, toute affaire quelconque, et par là, contraindre à se soumettre à cette jurisdiction, toute personne qu'on prouverait être marchand et commerçant, et ainsi sacrifier, perdre et détruire des droits de famille, et mille et mille autres? La cour n'hésite aucunement à rendre le jugement suivant:

"La cour, parties ouïes sur l'exception déclinatoire du dit Auguste Regnier, ayant examiné la procédure et la preuve, et sur le tout délibéré: Considérant qu'il n'est aucunement prouvé que le dit Auguste Regnier ait été ou soit marchand ou commerçant, tel que le veut et l'exige la loi, pour le rendre justiciable de cette cour:

"Considérant que la cause de la dette alléguée être due par le dit Regnier au dit Chamilly de Lorimier et son épouse, n'est pas un fait de commerce, mais au contraire, est une transaction de famille, qui ne peut avoir l'effet de faire arracher à ses juges naturels le dit Regnier, pour le soumettre à la rigueur des dispositions exceptionnelles qui ne deviennent le droit commun que pour le commerce.

"Maintient la dite exception déclinatoire, déclare qu'elle, la dite cour, n'a aucune jurisdiction sur le dit Regnier, en la présente matière, et le renvoi absout de la sommation émanée contre lui, avec dépens."

but that also which is such in its cause or its object, although apparently non-commercial. A debt commercial in its cause does not become non-commercial because it has been followed by a deed of obligation or mortgage. Failure to pay such a debt is therefore one of the causes for which the Act authorises compulsory liquidation.

§ 17. *Proceedings in compulsory liquidation.*—It is easy to conceive that it would often be unjust and vexatious to subject a trader to the consequences, always disastrous, of compulsory liquidation or *saisie arrêt* of his property, unless the creditors were bound to make certain preliminary proof, and to establish certain presumptions of fraud. Thus, the Act of 1864, like our old statutes, requires an *affidavit* (Form F) of the creditor or his agent, in which he alleges the particulars of his claim, which must, at the least, amount to two hundred dollars, the insolvency of the debtor, and the facts which, under the Act, justify attachment, taking care to give the reasons in detail (sec. 3, par. 6) as in the case for *capias*.* This affidavit is sworn to like all other affidavits used in the Superior Court, before a commissioner,† and is filed in the office of the Prothonotary of the district where the defendant has his place of business (ibid.); for the Superior Court of such district alone has jurisdiction in matters of compulsory liquidation, and can alone take cognizance of them; in this, there is a derogation from the old rule, which allows proceedings to be taken either before the Court of the district in which the cause of the action arose, or before the Court of the district where the defendant is temporarily, or lastly before that of the district in which the defendant resides.

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* See Rule of Practice 13.

† The Act is silent as to the officer before whom the affidavit is to be sworn to. Mr. Abbott, p. 22, states that the oath is to be taken before "any judge or commissioner for taking affidavits in the Superior Court." We do not see however why an affidavit sworn to before a justice of the peace would be bad—because it is provided by section 13 of the 82nd chap. of the Cons., Statutes for Lower Canada, that "any oath required to be taken under any act, in which no mention is made of the name of the public functionary before whom such oath is to be taken, may be administered by and taken before any justice of the peace or a commissioner."

Upon such affidavit being filed, a writ of attachment (Form G) is issued against the estate and effects of the insolvent addressed to the sheriff of the district (sec. 3, per. 6). The writ is accompanied by the declaration (ibid). It is to be regretted that the Act does not permit it to be produced afterwards at the Prothonotary's office, in accordance with the practice pursued up to the present time under the old law. This is still an additional obstacle to the prompt seizure of the property of the insolvent.

The rules relating to the issuing of the writ, time and mode of service, are the same as those actually followed in the Superior Court; they have not been changed.

§ 18. *Sheriff's Proceedings.*—Upon receiving the original writ of the Court, the Sheriff should give notice thereof, by advertisement, in accordance with form H (par. 8); the Statute having ordained no special manner of giving it, we must suppose sec. 11, par. 1, to be applicable here, and that the notice must be published in the *Canada Gazette*, and in one French and one English newspaper published at or near the place where the Court sits. At the same time, and according to the usual practice in case of ordinary attachment (sec. 3, par. 6), but without procès-verbal, he should proceed immediately to seize all the estate and effects of the insolvent, including his books of account, moneys and valuable securities, and all his business papers, and vouchers of every kind and description, wherever situate, and consequently *sans entiercement* (par. 9).

The Act, with regard to property rendered seizable, introduces a marked amelioration which has been existing in England and elsewhere for several years.

If the Sheriff acts by an agent or messenger, he must establish his authority by addressing to him, by name and description, a copy of the writ of the Court certified under his own hand (par. 9).

§ 19. *Guardians.*—The estate and effects attached generally by the Sheriff are placed in the custody of the official assignee of the Board of Trade of the district, or of the nearest district, and if there be no such assignee, then under the guardianship of any solvent and responsible person willing to act (par. 10).

The guardian thus appointed, and otherwise subject to all the rules which govern ordinary guardians *en justice*, should, without delay, proceed to make an inventory of the estate and effects of the defendant,* and also a statement of his affairs from the books, accounts, and papers attached.

§ 20. *Return of the writ, &c.*—On the return day of the writ, the guardian must file the inventory only (par. 11), and the Sheriff must return the writ to the Court with a report in general terms *under oath* of his action thereon (par. 9).†

By the words under oath, are we to understand the judicial oath or only the *oath of office?* The reason in support of the former is that this paragraph seems here to make an exception, and to require oath to be made before a commissioner, for example. The reason for supposing the contrary is, in the first place, that

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* The Rule of Practice 21 provides as follows:

"The Sheriff to whom the writ of attachment shall be directed, shall not be required to make any detailed Inventory or *procès-verbal* of the effects or articles by him attached under such writ; but a full and complete inventory of the insolvent's estate, so attached by the Sheriff, shall be made by the assignee or person who shall be placed in possession thereof as guardian under such writ; by sorting and numbering the books of account, papers, documents and vouchers of the estate, and entering the same, with the other assets and effects thereof, in detail, in a book for the same, which shall be called "The Inventory of the estate of.....," and which shall be filed by the said assignee or person in possession, on the return day of the said writ, as required by the said Act; and the said inventory shall be open for examination or extract at all times during office hours, *gratis*."

† Mr. Justice Loranger, at Sorel, on the 17th April, 1865, in Johnston v. Kelly, held that the Sheriff is bound to annex a *proces-verbal* to his return, as in ordinary cases of attachment. His reasoning is, that by the common law the Sheriff, in all cases of seizure of movables or immovables, should make a *proces-verbal*, and that the 21st Rule of Practice, doing away with that formality, is null, inasmuch as the Superior Court has no legislative powers and cannot set aside the common law. His Honor further urged that the Rules of Practice in Bankruptcy, not having been registered in the District of Richelieu, could have no application or effect there.

according to paragraph 6, we must, as regards service and return, follow as nearly as possible the rules of the Superior Court. Furthermore, section 11, par. 11, appears conclusive in this last sense, by its declaring that "the *person* charged with such service shall make his return thereof and on oath, or if a sheriff or bailiff in Lower Canada, *may make such return under his oath of office.*

The rules in force in ordinary cases, as to the return, appearance and subsequent proceedings, are to have here *as nearly as possible* their full application; they have been expressly retained by section 3, par. 6. The words *as nearly as possible* are certainly vague. It is evident that the Statute makes a reserve, but

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The ground of non-registration seems strong, since the section 11, par. 17 of the Insolvent Act, requires that the Rules of Practice in Bankruptcy should be "promulgated under or by the same authority and in the same manner as the Rules of Practice of the Superior Court for Lower Canada," which by Section 148, par. 2, chap 83 of the C. S. for L. C., *have full force and effect in each District and Circuit in which they have been so registered.*

As to the other reason, although the Statute is not altogether clear upon the point, we cannot concur with the learned Judge in his opinion however great may be our respect for his decisions generally. It is to be observed that proceedings in bankruptcy are of a special nature and should be assimilated to the ordinary rules of procedure *as nearly as can be*, that is, so far as they may be required to carry out the intention of the legislator. What could be the object of the legislator in compelling the Sheriff to annex a proces verbal to his return, when the same is to be produced by the guardian? The Statute seems to us to relieve the Sheriff from making any procès-verbal whatever, and to transfer that duty to the guardian, inasmuch as the Sheriff is merely ordered to make *a report under oath of his action.* These provisions seem to do away with the ordinary procès-verbal under the Common law, and the 21st Rule of Practice is only declaratory of the meaning of the Statute. Even if it were more than declaratory, we do not see that it implies the exercise of a legislative power, denied the Superior Court by sec. 6, par. 3, chap. 78, of the Con. S. for Lower Canada, but the exercise conferred upon it *for regulating the due conduct of the proceedings under this Act*, (sec. 11, par. 17, of the Insolvent Act; Con. S. for Lower Canada, chap. 83, sec. 148.) The doing away with procès-verbal in compulsory process is nothing more than to *regulate the conduct of the Sheriff in the proceedings under this Act.*

how far is it meant to apply? This is what we shall soon have occasion to point out.

The judge may at his discretion permit amendments in the proceedings, (sec. 11, par. 14).

The costs of compulsory liquidation are privileged, and are taxed according to a new tariff, (sec. 11, par. 16 and 17).

§ 21. *Petition to quash.*—Except in the case where a petition is made to set aside a demand for assignment, as we have explained above, § 13, the defendant may, within five clear juridical days from the return day of the writ, but not afterwards, pray for the setting aside of the attachment made under such writ, on the ground that his estate has not become subject to compulsory liquidation; and the petition is heard and determined by the judge in a summary manner, and conformably to the evidence adduced before him thereon. (sec. 3, par. 12.)

One clear day's notice of this petition is given to the defendant and is served by a bailiff or any literate person, (sec. 11, par. 9; Rule 17).

The paragraph following (par. 13, sec. 3) enacts that in case the defendant *files no such petition to quash or to stay proceedings*, which we shall hereafter notice under § 22, or *if such petition be dismissed*, the judge shall call a meeting of the creditors in the manner hereafter indicated § 23, in order to liquidate the estate through an assignee.

We see from this that the Act confers upon the Court extraordinary and summary jurisdiction. If the defendant must, under pain of being subject to the appointment of an assignee, present his petition *to quash, on the ground that his estate has not become subject to compulsory liquidation*, we must conclude therefrom, that he should allege all the causes of nullity upon which he relies; that such petition is the only proceeding which he can adopt, to establish, for example, either that the debt does not exist, or that it is not sufficient, or that the reasons set forth in the affidavit are false and insufficient, or that the Court has no jurisdiction—the place of his business being outside of the district, and to obtain release from *compulsory liquidation*. It, therefore, does appear

to us that the defendant cannot avail himself of these means of defence by exception *à la forme* or *au fonds*, as in case of attachment under the common law. The proceedings in compulsory liquidation appear to be exceptional. The writ of attachment under the Bankrupt Law is also one of a special and exceptional character; its object is clearly pointed out in section 3, par. 1, and other sub-sections, and seems to be limited to the compulsory liquidation of the estate of the insolvent.*

§ 22. *Petition to stay proceedings.*—Instead of petitioning to quash, the defendant may, within a like delay, petition the judge to suspend further proceedings against him under the attachment, and demand a meeting of his creditors in order to obtain their opinion in the matter (par. 15); but he must annex to such petition "a "schedule of his estate, and "a list of his creditors, with the amount "of his indebtedness to each, and the places of their respective "residences, or places of business, together with particulars of any "negotiable paper on which his name appears, the holders of which "are unknown to him, the whole under oath"; (par. 16).†

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* "There is no provision in the law that would necessarily cause any departure from the ordinary rules of procedure of the Superior Court, until after the return of the writ. Then there is an entire change, as the mode in which the allegations essential to the support of the writ are assailed, is by petition, and not by exception or plea. Post, p. 12. But the proceeding upon the petition would then be conducted in conformity with the usual practice of the Court, as directed by this clause. And after such petition is disposed of, either by proceeding to the appointment of an assignee or by quashing the writ, no further step seems to be required in the case. The reason doubtless is, that no condemnation is sought against the insolvent by the proceeding, the only object being the maintenance of the writ; and therefore the correctness of its issue is tested in the same way as that of a *capias*, the result being conclusive as to the whole proceeding, and rendering pleas unnecessary. Mr. Abbott, p. 22. At p. 25, he says: "This clause (subsection 13) further confirms the view that no plea or exception can be filed, for the only contingencies which can prevent the order being given for the first meeting, are the presentation of a petition to quash, or to stay proceedings."

† Before a Commissioner or a Justice of the Peace—C., S., for L. C., chap., 82, s., 13—see *post*—§ 49, note; *ante* §17, page 47, note†.

Upon the production of the schedule and list of creditors, the judge, by advertisement in the *Canada Gazette* and in two other newspapers, one English and one French, and addressed to all the creditors in the list produced by the petitioner (sec. 11, par. 1), shall summon before him a meeting of the creditors for the purpose of taking into consideration the prayer of such petition, and at such meeting he shall take and record by a writing under his hand the opinion of the creditors thereon (sec. 3, par. 17).

The judge should postpone such meeting if it appear that the creditors have not been properly and reasonably notified, or that important omissions have been made in the creditors' list furnished him (par. 18).

At this meeting, or its adjournment, which is presided over by the judge, the question which the creditors have to decide is: "Shall the debtor be proceeded against under this Act or not?" The majority in number and three-fourths in value of the creditors for above one hundred dollars decides the question (par. 19.) If the decision is in favor of the defendant or petitioner, he cannot, for three months thereafter, be subject anew to compulsory liquidation by reason or on account of *any act or omission of his which took place previous to the institution of the proceedings so stayed*, (ibid.)*

If, on the contrary, the vote be unfavorable to him, the judge at once and at this same meeting proceeds to the appointment of an official assignee (par. 20). All questions respecting the amount

* "This question is 'shall the debtor be proceeded against under this act or not?" and if the decision be in the negative, it is declared that "it shall be in force" for three months thereafter; during which time no other proceedings can be taken against him, based upon anything which occurred previous to the institution of the pending proceedings. The decision in such case would therefore be that the debtor shall not be proceeded against under the Act. The obvious meaning of this provision goes beyond the mere suspension of existing proceedings, if by such suspension, the continuance in force of those already taken be implied. If the debtor is not to be proceeded against, the attachment must be discharged; for to retain it in force, and the guardian in charge would be to continue to proceed against him under the Act, and to act in the very face of the resolution of the creditors." (Mr. Abbott, p. 27.)

of any creditor's claim are decided by the judge, after a hearing of the parties and inspection of the schedule and list filed by the defendant, and of the statement produced by the guardian (par. 21); for the guardian is bound to produce at such meeting the statement of the affairs of the Insolvent, which he prepared immediately after the attachment.

What if at this first meeting the majority in number does not agree with the majority in value? Should the judge order an adjournment in the manner prescribed by section 11, par. 2. It appears not. The provision of paragraph 2, (sec. 11) seems only to apply to meetings of creditors held without the presence of a judge, inasmuch as it orders the views of each section of the creditors to be taken in writing, and to be referred to the judge, *who shall decide between the parties.* Is the judge then of himself to decide whether the compulsory process shall be suspended? It is true, he can receive the creditors' opinions in writing, and can decide also any question which may arise respecting their claims, and order all adjournments in case of insufficient notice; but he is certainly not authorized to give the casting vote in favor of either of the two opposite majorities. What, then, is to become of the petition to suspend? It seems that, in such case, there is room to apply paragraph 20 of section 3, and to proceed to the appointment of an assignee, for it is plain that there is no decision *in the negative*, or favorable to the defendant.

§ 23. *Appointment of official assignee.*—Immediately upon the expiration of five clear juridical days from the return day of the writ, if the defendant does not file a petition *to quash* or *to stay proceedings*, or upon the rendering of judgment rejecting the petition to quash, the judge, upon the application of the plaintiff, or of any creditor intervening, orders a meeting of the creditors to be held before him or any other judge, at a time and place named in such order, and after *due notice thereof*, for the purpose of giving their advice upon the appointment of an official assignee (sec. 3, par. 13).

This notice, like every other public one, must be published in the Canada Gazette and in one English and one French news-

paper, for two weeks; and also it must be sent by mail, postpaid, to each creditor, as we have had already occasion to point out (sec. 11, par. 1). It will, no doubt, be a difficult thing to address this last notice; for at that stage of the proceedings there is as yet before the Court no list of the creditors. The guardian, it is true, is bound to produce an inventory of the property of the insolvent on the return day of the writ, but as to the statement of affairs, it is only at the meeting called to appoint an official assignee, that he is bound to produce it. Whatever may be the means adopted to arrive at a knowledge of the names of the creditors, *due notice* must be given (section 3, paragraph 13), and section 11, par. 1, declares that, in all cases, the assignee or person giving *such notice shall also address notices thereof to all creditors.** If a petition *to stay proceedings* is presented and is not granted by the creditors, the judge should at once, and at the same meeting, proceed to the choice of an official assignee, in the same manner as if such petition had not been presented (sec. 3, par. 20). At this meeting, the judge takes the advice of the creditors present upon oath (Form I); and if they are unanimous, he appoints as official assignee the person chosen; but if they are not unanimous, the judge should then appoint either one of the persons proposed by the creditors, or one of the official assignees named by the Board of Trade (par. 1[illegible]). He can choose no other.

§ 24. *Effects of appointment of official assignee.*—As in the case of voluntary assignment, the appointment of an assignee has the effect to convey, and vest in him all the estate and effects of the insolvent, and which he may become entitled to at any time, by any

* Mr. Abbott, in his remarks on this subject, p. 25, acknowledges himself, that Section 11 seems inapplicable to this special notice, as, he says, no list of creditors is attainable at this stage of the proceedings; and with much ingenuity suggests that section 11 has no application in this case, there being no "assignee or person" calling the meeting. The author cannot deny that this notice is given by somebody, to wit, by the judge or by the Court. According to the interpretation generally given hitherto to the *Interpretation Act*, chap. 5, Sect., 6 of the Con. Statutes of Canada, the word *person* in any Act or Statute includes any body corporate or politic, &c.

title whatsoever, before his discharge is effected, and the guardian is bound to deliver to him the property placed in his custody. (sec. 3, par. 22.) All that we have said respecting the effects of voluntary liquidation has here its full application; same rights, same powers and restrictions (ibid). A copy of the judge's order, appointing an official assignee, and certified by the prothonotary, may be enregistered at full length in any registry office. What we have said on the registration of the deed of assignment applies here. We refer to §11.

V.

ASSIGNEES.

§ 25. *Assignees of the Board of Trade.*—In the preceding articles we have alluded to the proceedings preparatory to the liquidation of the insolvent's estate; we therein saw that in all cases—in voluntary assignment as in the case of compulsory liquidation—we are always brought to the appointment of an agent, designated by the name of *assignee*, and charged with the adjustment of the rights of the parties interested, conformably to the provisions of the Act; we have also shewn how to arrive at the nomination of this important personage in bankruptcy, and on this subject we have frequently mentioned the name of a special assignee, always ready to intervene in bankruptcy. We now refer to official assignees appointed by the Board of Trade.

The legislature foresaw that sometimes the creditors would not be able to agree upon the choice of an assignee, that moreover, questions which might arise, being always submitted to the same persons, would be more ably discussed and decided; for these reasons, it has provided for the appointment of permanent official assignees.

By section 4, par. 1, the Board of Trade at any place, or its council, may name any number of official assignees for the district in which it exists, and in which the assignees reside. Still more, it may name assignees for the nearest adjacent districts, in which there is no Board of Trade (ibid.); and already the Montreal Board of Trade, by various resolutions, has chosen a certain number of persons as official assignees for each district which comes under its control.

A copy of the resolution naming such assignees, certified by the Secretary of the Board, should be transmitted to the Prothonotary of the Court for the district in which they reside (sec. 4, par. 1.)

§ 26. *Security by the assignee.*—The assignee appointed by the Board of Trade cannot act as such without giving security. The Board cannot exercise its discretion on this behalf; when it names the assignees, it must declare what security they shall give (sec. 4, par. 1). On the other hand, the assignee, who is otherwise named, may act without giving security, if not required by the creditors. They have, in fact, the power to demand security from every assignee, official or not, and they may even demand a change in the security bond given to the Board of Trade (sec. 4, par. 6). The nature of the security is left completely to the will of the Board of Trade, or the will of the creditors (sec. 4, par. 1 and 6). If the security does not imply an hypothec, it may be given *sous seing privé;* if, on the contrary, it does, it must be taken before a notary, except as to lands held in free and common soccage, on which hypothecs under seal and before witnesses are permitted.

If the bond is taken by the Board of Trade, it must be by the President, *for the benefit of the creditors of any person whose estate is, or may be in process of liquidation under the Act* (sec. 4, par. 2). If required by the creditors, it must be taken in their favor, in the name of the "Creditors of A.B., an insolvent under the Insolvent Act of 1864" (par. 6). All questions relating to the security bond, or to changes in, or additions thereto, are decided by the majority of the creditors in number and in value (sec. 11, par. 2), unless they arise at the first meeting of the creditors called to accept a voluntary assignment: in which case they must be decided by the majority in number (sec. 2, par 5).

§ 27. *Nature of the office of assignee, his powers.*—The assignee, as constituted by the Act, is an agent of a special nature. He is not a simple agent, inasmuch as he is in sole possession of the estate of the insolvent, which he holds and manages in his own name. Neither is he a simple factor, for in all his transactions his capacity is disclosed.

The assignee appears to us to be, at once, a broker, a simple agent, and also an officer of justice, enjoying many of the powers and privileges of these persons, and at the same time subject to many of their obligations.

As agent and broker, he is charged with the settlement of the affairs of the insolvent, and with the control and management of his estate; as such, he is bound to obey the orders and instructions adopted by the creditors at a special meeting, (sec. 4, par. 2), to take proceedings for the recovery of the security forfeited by a previous assignee, to exercise all the powers and rights properly belonging to the insolvent (par 7), to sue for the recovery of all debts due to the insolvent, and to represent him and intervene in all suits in which the latter is interested (par. 9); as such agent or factor, he is also subject to all the penalties provided for by the criminal law against agents, who embezzle the property of their principals, or render themselves guilty of the other acts of malversation defined in chapter 92 of the Consolidated Statutes of Canada (sec. 12, par. 6).

As an officer of justice, the assignee has the power to sell the movable and immovable property of the insolvent; he is bound to comply with the injunctions of law and of the creditors, and in case of non-compliance, he may be condemned for contempt of Court, and imprisoned in the same manner as the ordinary officers of justice (sec. 4, par. 16).

§ 28. *Duties of the assignee.*—The assignee must—

1. Deposit in the office of the Court of the district in which the proceedings are carried on, a copy of the deed of assignment, accompanied, in case of voluntary assignment, by the list of the creditors which was produced by the insolvent at the first meeting (sec. 2, part 8).

2. Give notice of this assignment (Form D.,) immediately after its execution (sec. 5, par. 1; sec. 10, par. 1; sec. 11, par. 3), or of his appointment as official assignee, (Form K.,) sec. 3, par. 24, requiring] the creditors, in either case, to produce before him, within two months from the first advertisement, their claims and the vouchers in support of the same.*

3. Make at the same time a general inventory and description of all the assets and debts of the insolvent, and also of his books of account, obligations, notes, titles, and other documents,

* See Rule 22.

—which may serve to throw light on his affairs, and to show that his books have been kept in accordance with the usage and rules of trade.

4. Call a meeting of the creditors, whenever required so to do by the written request of five creditors, specifying the object of such meeting; or whenever he is required to do so by the judge, on application of any one creditor, of which application he shall have received one clear day's notice; or whenever he shall himself require instructions from the creditors. In the notice of meeting, the assignee must state the object of the meeting (sec. 4, par. 3).*

5. Assist at all meetings of the creditors, by taking and preserving the minutes thereof, signed by himself, and also signed and certified at the time by the chairman, or by three creditors present; he must also keep a correct register of all his proceedings and of all claims made to or before him (sec. 4, part. 5).†

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* Mr. Abbott, p. 32, says, that this notice must be given in the mode indicated by §11, p. 1. Are we to believe that it must be advertised in the *Canada Gazette* and other public papers during two weeks? It seems to us that the mode indicated by sec. 11, p. 1, has no application to this notice, for it is not required by the Act to be given by advertisement. It is therefore sufficient that the same be left with the party, or mailed, postage paid.

† "The Assignee shall, from time to time, under order of date, and within twenty-four hours after the proceedings had before him, file in the said Clerk's office a clear copy under his signature as such assignee, of such proceedings, together with a copy of the several newspapers and official Gazette, in which he shall have caused notices of such proceedings to be advertised, which said copy and newspapers shall form part of the record of proceedings of the particular case." Rule 25.

"The record of proceedings in each case shall at all times during office hours, be accessible, at the clerk's office, to creditors and others in interest in such cases, for examination or extract therefrom, *gratis*. and in like manner the minutes of meetings of creditors, and the registers of proceedings, together with the claims made and the documents in possession of the Assignee, shall also be accessible to creditors and others in interest in the case, at convenient hours, daily, to be appointed by the said Assignee." Rule 24.

6. Obey all rules, orders and instructions, not contrary to law, which are made for his guidance by the creditors at a meeting called for the purpose. (par. 4.)

7. Deposit weekly, at interest, in the name of the estate, in a bank, at or nearest to his place of business, within fifteen miles, all moneys received by him, until otherwise specially instructed by the creditors (sec. 4, par. 4).*

8. Receive and enter in his register and examine all the claims against the insolvent or his estate, filed by the creditors in manner and form explained in title VI (sec 4, par. 5).

9. Wind up the affairs of the insolvent, by the sale of his movable and immovable property, and by the collection of all debts, in order to divido the proceeds of the same among the creditors, according to the nature of their claims (sec. 4, par. 8), as we shall point out in titles VII. and VIII.

10. Call a meeting of the creditors, by advertisement, immediately upon the expiration of two months from the first notice of assignment, or of his appointment as official assignee, for the public examination of the insolvent (sec. 10, par. 1), or for the ordering of the affairs of the estate generally (sec. 11, par. 3).

11. Render an exact and faithful account of his gestion and administration immediately after the declaration of the final dividend (sec. 4, par. 22), and leave at the bank, where they are deposited, all dividends remaining unclaimed at the time of his application for discharge (sec. 5, par. 17).

§ 29. *Removal or decease of the assignee.*—Before the period at which dividends may be declared, any assignee may be removed

* "The assignee shall, on the third juridical day of each month, after he shall have commenced to deposit estate moneys in a Bank or Bank agency, as required by the said Act, file of record in the case an account of the estate, shewing the balance thereof in his hands, or under his control, made up to the last day of the preceding month. And no moneys so deposited, shall be withdrawn without a special order of the Court, entered in the docket of proceedings in the case, or upon a dividend sheet prepared and notified, as required by the said Act, or unless otherwise ordered by the creditors, under the powers conferred upon them by the said Act." Rule 26.

by the judge, upon proof of fraud or dishonesty in the custody or management of the estate, upon the application of any creditor (sec. 4, par. 17). If the removal takes place, or if the assignee dies, more than fifteen days before the said period, the judge appoints another assignee in the same manner as in compulsory liquidation. But if the assignee is removed, or dies within fifteen days after the said period, the judge calls, by advertisement, a meeting of the creditors for the purpose of appointing another (ibid.). After the period at which dividends may be declared, the assignee may be removed by a simple resolution passed by the creditors present or represented at a meeting duly called for the purpose; and if the removal has been effected by an order of the judge, before this period, or if it takes place after it by the creditors, or if the assignee dies within the fifteen days which precede this period, the creditors have the right to appoint another assignee either at the meeting by which he is removed, or at any other called for the purpose (sec. 4, par. 18).

The assignee so removed remains, nevertheless, subject to the summary jurisdiction of the Court, and of any judge thereof, until he has fully rendered his account (par. 19).

The estate of the insolvent does not descend to the heirs of the deceased assignee, but passes to his successor, and, until such successor is appointed, it remains under the control of the judge (par. 21).

§ 30. *Fees or remuneration of assignee.*—The remuneration of the assignee is fixed by the creditors at a meeting called for the purpose,* but if it is not so fixed before a final dividend is declared, it is put into the dividend-sheet at a rate not exceeding five per cent upon the cash receipts. Any creditor, who alleges that the allowance exceeds the value of the services of the assignee, may object to it in the same manner as he may object to any other item of the dividend-sheet (sec. 4, par. 20).

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* This provision does not require that the notice be by advertisement, and therefore it is sufficient if left with the creditors. See above note, page 60, § 28.

§ 31. *Rendering of the account of the assignee.*—The assignee, like any agent, is bound to render to the creditors an account of his administration. This he may do immediately after the declaration of a final dividend. The final account is prepared by the assignee, and by him kept open for inspection at his office; notice of petition to be discharged from the office of assignee is duly given by advertisement for two weeks in the *Canada Gazette* and in a French and an English newspaper, and mailed to all the creditors, in accordance with the requirements of section 11, par. 1; and on the day and at the hour appointed, the assignee presents his petition to the judge, accompanying it with the papers establishing the regularity of the notice and also with a bank certificate of the deposit of any unclaimed dividends, or of any balance in his hands, and thereupon the judge, after hearing the parties, may refuse or grant, conditionally or unconditionally, the prayer of the petition (sec. 4, par. 22 and 23).

VI.

CLAIMS OF CREDITORS.

§ 32. *Delay within which claims should be filed.*—We have already observed that the assignee is bound to call upon the creditors to furnish him with their claims within two months from the first notice of the assignment or of his appointment as official assignee. This delay is not, however, fatal; it is not fixed by any clause of the Statute, and no mention is made of it, except in the forms of notice. So long as the dividends, or even the final dividends, are not declared, the creditor may file his claim; this further results from clause 5, par. 12.* It is more prudent, however, to file all claims within the delay fixed by the public notice given by the assignee; for immediately thereafter the first dividend must be declared, if possible; and if there is but one dividend, it is clear that the creditor runs the risk of losing his claim.

Clause 11, paragraph 7, contains an exception to this rule; every claim based upon an *hypotheque* or real privilege should, with the deeds and documents in support thereof, be filed with the assignee within six clear juridical days from the day of sale of the property affected thereby; if not, it is not collocated by preference or privilege, unless leave to file the same be afterwards obtained from the judge upon special cause shewn previous to the distribution of the proceeds of the estate, or unless a dividend upon such claim has been reserved by the assignee (section 11, paragraph 7).* If, indeed, it actually

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* And from section 11, paragraph 7, enacting that the privileged or hypothecary creditor having failed to file his claim, "shall not be entitled to any preferential collocation upon the proceeds of such real estate," the legislator undoubtedly meaning thereby that he may then be collocated *pro rata* or *au marc la livre*.

* Mr. Abbott, in his notes, p. 44, on section 5, paragraph 12, observes that the word "hypothecary" to be found in that section, is intended to *mean hypothecary creditors who have not registered*, giving to understand that those whose claims are registered are not entitled to reserved divi-

appears to him from an examination of the books of the insolvent or otherwise, that the insolvent has hypothecary and privileged creditors, or even ordinary creditors, who have not filed their claims, it is his duty to reserve dividends for them according to the nature of the claims, and to notify them of the reserve by letter through the post, addressed to their residences (sec. 5, par. 12). Still, if these reserved dividends are not claimed previous to the declaration of the final dividend, they form a part of that dividend, and the creditor remains without remedy (ibid.).

§ 33. *Form of claims.*—The claims of creditors are furnished under oath to the assignee, and in writing (Form R.) sec. 11, par. 4.* The oath is to be taken before a judge, commissioner, or

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dends, *they having received notice under* §4, *p.* 15. According to the learned gentleman's interpretation, there is no difference here made between an *ordinary* and an *hypothecary* claim.

It has been always understood that an hypothecary claim, be it registered or not, is always such, for the mere reason that it is not the registration of the deed, but the deed itself, which gives rise to it. Such is also the import of the word according to our Registration Act. Con. St. for Lower Canada, chap 37, sec. 117. There is nothing in the Insolvent Act to shew that the word "hypothecary" is not to be taken according to its common and ordinary acceptation; and in referring to section 11, p. 7, we are thoroughly convinced that such is the meaning intended by the Act, inasmuch as hypothecary creditors, whose claims are registered, are thereunder entitled to be collocated, if they have filed their claim, or if *a dividend upon such claim has been reserved by the assignee.* Under what clause of the Statute can the assignee make such reserve, if it is not under section 5, paragraph 12. Mr. Abbott, in his notes on section 11, p. 7, observes that "if no claim be filed *for any debt* which the assignee has reason to believe is due, it is his duty to reserve a dividend upon theam ount of such debt, §5. p. 12." There is no doubt that these remarks apply to registered creditors. What then becomes of Mr. Abbott's note already quoted? "*Hypothecary*—This must mean hypothecary creditors who have not registered."

* All claims shall be entitled: In insolvency for the District of In the matter of Insolvent and Claimant plainly written; and the subject or purpose thereof shall be plainly and concisely stated. They shall also be subscribed by the claimant or by his attorney *ad litem* for him. Rule 6—It is better that they be endorsed with the names of the parties and the general description thereof and with the name of the Attorney *ad litem.*

justice of the peace (sec. 11, par. 5). The writing specifies the particulars of the claim, and the hypothecary or collateral security which the creditor holds from the insolvent, or from his estate, or sets forth the fact that he has no collateral security (sect. 5, par. 5; sec. 11, par. 4 and 7); the creditor also specifies the nature and the amount of such security, and its value under oath. (sec. 5, par. 5.)

§ 34. *Proof of claims.*—The documents and vouchers in support of claims may be filed with them, but no one is bound to do so, except in the case of contestation of a claim or dividend (sec. 5, par. 13); before this stage of the proceedings, no other proof is necessary than the affirmation, under oath, of the claimants or their agents; and the only thing which the assignee can require before preparing a dividend sheet, is the supplementary oath of the creditor, declaring what amount, if any, he has received in part payment of the claim, subsequent to the making thereof, together with the mention of the particulars of such payment; and if the creditor refuse to produce or make such oath before the assignee within a reasonable time after he has been requested to do so, he is not collocated in such dividend sheet (sec. 11 par. 6).

VII.

REALIZATION OF ASSETS.

§ 35. *Sale of movables.*—The assignee, according to the instructions given him by the creditors in the manner prescribed by sec. 4, par. 4, must sell, in a prudent manner, all bank and other stocks, and generally all the movables of the insolvent, except such as are free from seizure (sec. 4, par. 8).

§ 36. *Collection of debts.*—The assignee must also collect the debts of the insolvent, and sue for their recovery in his own name as such assignee (sec. 4, par. 8 and 9), and, if after having acted with due diligence, he finds there remain debts still due, the collection of which would prove more onerous than beneficial to the estate, he should report the same to the creditors duly called at a meeting thereof for the purpose,* and with their sanction, obtain an order from the judge to sell such debts by public auction, after such advertisement as may be required by such order; and pending such advertisement, he must keep a list of the debts to be sold, open to inspection at his office, and give free access to all documents and vouchers explanatory of them (sec. 4, par. 11). These debts may be sold separately or collectively, except such as amount to more than one hundred dollars, which must be sold separately (ibid). Finally, no warrants, except as to good faith, can be given by the assignee, not even that the debt is due. A bill of sale, signed by him should be delivered to the purchaser, (Form L), in order to enable the latter to sue in his own name,

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* *Duly called for the purpose.* Is this meeting to be called by advertisement in the mode indicated by section 11, par. 1. The Statute is here silent, but the word *duly* seems to convey the belief that it should, as also the importance of the meeting. Mr. Abbott, although silent in relation to this clause, (sec. 4, p. 11,) in his observations on par. 13, of section 3, is of opinion that by *due notice* is understood a notice by advertisement.

for the recovery of the debt, as effectually as the insolvent might have done (par. 12).†

§ 37. *Sale of lease.*—If the insolvent holds, under a lease, property having a value above the amount of rent payable under the lease, the assignee must make a report thereon to the judge, containing his estimate of the value of the leased property in excess of the rent; and thereupon the judge orders the rights of the insolvent in such leased premises to be sold, after public notice of sale by advertisement; and at the time and place appointed, the lease is sold upon such conditions, as to the giving of security to the lessor, as the judge may order. The sale is moreover subject to the payment of the rent and of all charges contained in the lease; the purchaser takes the place of the insolvent from the time of the sale, and it is to him alone that the lessor must look for his rent, in the same manner as if the lease had existed between them (sec. 6, par. 1).

The surplus which remains from the sale of the lease, after allowing for over and above the rent of the premises, forms a part of the assets of the insolvent, and is divided among his creditors.

§ 38. *Sale of immovables.*—The assignee must also sell the immovable property of the insolvent, observing the following formalities (sec. 4, par. 13): Before advertising the sale, he must obtain from the Registrar of the county in which the immovables are situate, and at the expense of the estate, a certificate containing the names and residences of the hypothecary creditors entered in the Registry Book, and deposit in the nearest post office, post-paid, a notice addressed to each of such creditors, by the name and to the address contained in the certificate, and also

† Held under the old Bankrupt Law, that in an action by the *cessionnaire* of the outstanding debts of a bankrupt estate, it is necessary to allege in the declaration that the sale was made by the order of the judge, and that the formalities required by the said Act have been complied with, 2 L. C. Rep., p. 452, Warner vs. Mernagh, S. C., Montreal; Smith, Vanfelson, Mondelet, J. See also Murray vs. McCready, 2 L. C., Rep., p. 454, note; Robertson's Digest, p. 39.

a notice addressed to any other person whom the assignee believes to be a hypothecary creditor, as for example, by transfer or any similar title, informing them of the day of the sale, and that they must file their claims within six days from that day (sec. 11, par. 7).

Before the day of sale, he must file in the office of the Court this certificate, with a return thereon under oath as to his doings in respect of such notices (sec. 4, par. 15), the whole under pain of paying any loss and damage sustained in the premises (ibid.).

The sale by the assignee is advertised for the same time and in the same manner as sales by the sheriff (par. 13). He may even extend this delay at his discretion, and by a resolution of the creditors passed at a meeting called for the purpose and approved of by the judge, the delay may be shortened to not less than two months (par. 13).

If the assignee, on the day of the sale, considers the price offered to be too small, he may withdraw the immovable property from the public sale, and sell it subsequently by auction or privately according to such directions as he receives from the creditors (par. 13). He may also grant such terms of credit for the purchase money as may be approved of by the creditors; and, as security for the payment of the same, he is entitled to receive a special mortgage by the deed of sale, executed before Notaries, or before witnesses in places where lands are held in free and common soccage (par. 14).

If there is no reserve of the privilege of *bailleur de fonds*, the deed of sale is made and signed by the assignee under his private seal and signature in accordance with Form M, and has the same effect as sheriff's title.

The assignee must pay to the sheriff of the district in which the immovable is situated one per cent. of the proceeds arising from the sale, to form part of the Building and Jury fund of the district (sec. 12, par. 8).

Such are the formalities required by the Statute in order to bring the insolvent's immovable estate to sale. It is readily seen that the adjudication by the assignee is as effective as that by a sheriff, and also that the sale is advertised in the same manner as a sale by the latter, that is, by public notice for four months in the

Canada Gazette and at the church door. But where is the clause even implied, which authorizes the filing of opposition *afin d'annuler*, or *afin de distraire?* Can this new sheriff under the Act, receive, for instance, any opposition by a third party, claiming the immovable advertised to be sold? And even supposing he could receive it in the same manner as the sheriff, how is he to dispose of it? Is he at the same time to be judge of the questions involved? It is evidently absurd to suppose that the assignee should have power to decide the rights of third parties to the estate, and especially rights so highly important and so frequently complicated as those relating to our real system. Should he submit these difficulties to the Court? But this is an impossibility. The proceedings do not emanate therefrom, and there is nothing in the Statute which invests the Court with the power to take cognizance of this extraordinary case. We cannot conceive how the legislator, who generally details with such pomp the slightest minutiæ of all these numerous formalities and intricacies, has failed to say one word on the important and vital point of the real property and its titles.*

Nevertheless, we see no other course, if there be any, than to file an opposition with the assignee, whose duty it will be to hear the evidence and decide it in a summary manner, *sauf* an appeal from his decision according to section 7.

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* It is to be regretted that Mr. Abbott, in his notes on the Act, has not supplied this deficiency.

VIII.

DISTRIBUTION OF MONEYS.

§ 39. *Dividend sheet, &c.*—The creditors' claims having been filed, and the assets of the Insolvent having been realized, as far as possible, within two months after the appointment of the assignee, by the collection of the debts and the sale of the movables and immovables of the Insolvent, the creditors, quite naturally, are interested in knowing the result of all these operations, and what hopes they may entertain respecting the final liquidation of the Insolvent's estate. It is for this that the Statute obliges the assignee to call a meeting of the creditors immediately upon the expiration of the two months (sec. 10, par. 1), for the public examination of the Insolvent on oath (ibid), and, at the same time, for *the ordering of the affairs of the estate generally*, if it be so stated in the notice calling the meeting (sec. 11, par. 3).

For the same reason, the assignee, upon the expiration of the two months, or as soon thereafter as possible, and afterwards, from time to time, according to circumstances and the progress of the operations, but never at intervals of more than six months, must keep constantly accessible to the creditors, accounts and statements of his doings and of the position of the estate, and prepare all necessary dividends (sec. 5, par. 1).

§ 40. *What debts are collocated?*—All debts, commercial or non-commercial, actually due or not, which the Insolvent owed at the time of the deed of assignment or of the appointment of an assignee, rank upon the estate. The Act makes no distinction between debts actually due and those not yet matured, except only that the latter are subject to such a rebate of interest as may be reasonable (par. 2 and 6).*

We include civil debts, although they are of themselves insuffi-

* Interest ceases to run from the execution of the deed of assignment or the appointment of an official assignee.

cient to bring a trader into bankruptcy. When the insolvency is once declared, it is indivisible; all the debts due by the Insolvent fall under the jurisdiction of the assignee, and are governed by the same general rules.

Any surety, indorser or other person liable for any debt of the Insolvent, and who has subsequently paid the same, stands in the place of the original creditor thus paid, and may himself establish the claim in his own name, if it has not been already proved (ibid.).

If any claim depends upon a condition or contingency which does not happen previous to the declaration of the first dividend, a dividend is reserved by the assignee until the condition is determined (par. 3). If this reserve is of a nature to retain the estate open for an undue length of time, the judge may, unless an estimate of the value of such reserve be agreed to between the claimant and the assignee, order the latter to make an award upon the value of such conditional claim, subject to appeal as all awards upon disputed claims and dividends. In every such case, the value so agreed to or established, ranks as a debt absolutely payable and unconditionally* (ibid.).

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* "The contingency or condition may affect the amount of the debt, as in the case of a *rente viagère* or annuity; or the existence of the debt, as in the case of a debt payable only in the event of the creditor surviving the debtor; or merely the time of payment, as in the case of a debt payable upon the death of another. In such cases, the rule to be applied in estimating the value of the claim would be different, but may be discovered, and a sufficiently accurate result obtained. This provision will most frequently be called into operation by claims made by wives upon their husbands' estates for sums of money settled upon them in lieu of dower, and payable only in case of their surviving their husbands. Unless the judgment in the case of the Bank of Montreal vs. Leslie, and Delisle, opposant, be maintained, deciding that such claims cannot rank at all upon the debtor's estate, the value of such claims will have to be ascertained by a comparison of the value of the lives of the husband and wife, according to life assurance tables or other reliable *data*."—*Mr. Abbott*, p. 40.

According to the maxim of the customary law, *jamais mari ne paya douaire*, it has been held by our own Courts that the wife can bring no claim for dower or other debts of the same nature during the lifetime of her husband. Nevertheless the wife's rights are not done away with, as

The individual debts of the Insolvent are paid, first out of his individual property, and also out of the property of the partnership of which he is a member, but only after the partnership debts have been paid in full (par. 7).

If the claimant holds collateral security, the assignee, under the authority of the creditors, may either allow the creditor to retain such security at the value specified in his claim, or may take an assignment of it from him at an advance of ten per cent. upon the value specified, to be paid by the assignee out of the estate as soon as he has realized such security, which he is bound to do with ordinary diligence; and in either case the creditor can be collocated only for the difference between the value at which the security is retained or assumed and the amount of the claim (sec. 5, par. 4 and 5). If, then, the claimant retains the security, the value set upon it by him is deducted from his claim; and if he gives it up, the creditors become indebted to him for the amount at which it was taken by the assignee. This clause was introduced to prevent frauds and errors, which the creditor, holding the security, might commit by making an unfair estimate of its value. Owing to such authority vested in the assignee, the creditor will be more careful, and find it to be his interest not to set too low a value on the security.

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they cannot be destroyed by a *décrêt*, sheriff's or assignee's sale. As the wife has then no claim whatever upon the property of her husband, she cannot, therefore, make any demand upon the assignee; and as par. 3 of section 5 relates to parties having claims, the assignee cannot make an award on such rights *de survie*. Further, this paragraph seems to apply only to contracts dependent upon a condition or contingency which must necessarily occur, as in the case of *rente viagère* or annuity. It will be easily admitted that it would be difficult, if not impossible, to make an award on a right dependent on conditions that may or may not happen. As to dower, and other matrimonial rights in lieu of dower, the estate cannot otherwise settle them than by special agreement with the wife. A married woman is empowered by section 52, chap. 37 of the Cons. St. for Low. Can., "to release her dower and right to dower in and upon the lands or real estate" of her husband. But this provision does not seem to authorize her to renounce other matrimonial rights *not in lieu of dower*. As to these latter, they are purged by a sheriff's or assignee's title; and *if registered*, the wife has a right to rank upon the proceeds.

The amount due to a creditor upon each separate item of his claim at the time of the assignment or of the appointment of the official assignee, forms a part of the amount for which he ranks upon the estate of the insolvent, until such items, already mentioned, are paid in full, except in cases of deduction of the value of collateral security, if any exists (sec. 5, par. 6). But no claim or part of a claim can be collocated more than once, either in favor of the same or different persons (ibid.). No costs are collocated which have been incurred against the Insolvent after due notice of an assignment or of the issue of a writ of attachment, whether in suits already instituted or in those afterwards taken out. The only costs that a party can rank for are those incurred previous to the notice of assignment or the issue of the writ of attachment (par. 9). On this point the Act has introduced an important equitable modification into the provisions of the common law, which hitherto permitted each creditor to prosecute and crush the Insolvent, by accumulating heavy costs which were always paid with the debt.

§ 41. *Rank and privilege of claims.*—In preparing the dividend sheet, the assignee must have due regard to the rank and privilege of each creditor, conformably to the laws in force and the special provisions of the Act (sec. 5, par. 4). While on this subject, it may not be uninteresting to give a short sketch of these claims that are privileged by the laws in force, and which are confirmed or modified by the Act.

Privileges exist upon movables and immovables, and may comprise the whole or part of the same.

§ 42. *Privileged costs.*—The costs of compulsory process, those of the judgment of confirmation of the discharge of the Insolvent, or of the discharge if obtained directly from the Court, and the costs of winding up the estate, being first submitted at a meeting of the creditors, and afterwards taxed by the Judge, are alone privileged and collocated in preference to all other claims, upon the entire estate of the Insolvent (sec. 11, par. 16). All other costs follow the rank and privilege of the original debt, except such as are incurred after due notice of assignment or writ of attachment which are not allowed at all (sec. 5, par. 9).

But do the costs, incurred in suits entered against the Insolvent before notice of an assignment or of the issue of a writ of attachment, likewise follow, in all cases, the nature of the principal demand. As the Act has not altered the old law respecting privileges and orders of distribution, a distinction should be made. It is admitted, and there are numerous authorities to prove, that the costs of justice are privileged, when incurred for the benefit of the creditors generally. If, therefore, the action was brought in the interest of the creditors, as in the case of *saisie arrêt*, the costs are privileged upon the property seized, and should rank as such in the dividend sheet. If such was not the object of the suit, the costs follow the nature of the debt.*

§ 43. *Privilege of clerks.*—By the old law, clerks and other servants had a special privilege upon the goods and merchandise in the store or ordinary place of business, for all arrears of salary and even for their salaries during the current year. Under the Act, this preference is limited to the payment of arrears of salary for a period not exceeding three months (sec. 5, par. 10). No allowance is made as indemnity for loss of situation in the future; and in all those respects the Statute has introduced a new provision, which will be anything but satisfactory to clerks. To avoid loss, they should stipulate that their salaries should be paid regularly, every three months at least, and see that such agreement should be carried into effect.

§ 44. *Privilege of lessor.*—By the old law, the privilege of lessor extended to all rents due and to accrue under an authentic lease; if the lease was not in an authentic form, the privilege included only three of the terms which had elapsed, and the remainder of the current year; and such is still the law, subject to the following distinction:—If, in consequence of a resolution of the creditors adopted under sec. 6, par. 2, 3 and 4, the lease is cancelled and the premises returned to the lessor, there is no privilege from the time of the cancellation. The lessor's claim, being thereby reduced to a simple claim for damages, is ordinary and not privileged (sec. 6, par. 2, 3 and 4).

* See ante §12, note *, page 33.

§ 45. *Privilege of the vendor.*—By Articles 176 and 177 of the Custom of Paris, the vendor who has not been paid the price of his goods delivered, has always a preference upon the proceeds of the sale over all other creditors, except the lessor and pledgor; he is even preferred to the creditors bringing the goods to sale. By section 12, paragraph 1, the Statute limits the exercise of this privilege, in case of the insolvency of the purchaser, to fifteen days from the delivery of the goods, after which delay the vendor loses his privilege and becomes an ordinary creditor.

§ 46. *Privilege of the allowance to the Insolvent.*—Finally, the Act has introduced a new privilege, that of the allowance made to the Insolvent by the creditors in accordance with section 5 par. 8.

§ 47. *Various other privileges.*—The privileges which have not in any way been modified by the Act are:—

1. Tithes dues to the Roman Catholic clergymen.
2. The claims of the pledge upon the thing pledged (see § 40).
3. Funeral expenses and those of last illness, including the mourning of the widow, payable out of all the movables of the deceased.
4. Municipal taxes.
5. Assessments, repartitions and school taxes.
6. Seigniorial dues.
7. The claims of the Crown against persons accountable for its moneys.
8. The claims of the carrier upon the cargo.
9. The claims of seamen upon the vessel and rigging.
10. The claims of outfitters *dernier équipeur* upon the vessel.
11. The claims of butchers, bakers, and others for necessaries.
12. Finally, the registered claims and privileges in favor of *bailleurs de fonds*, money lenders, builders, minors, married women, and others, as provided for by the Registry Laws.

§ 48. *Declaration and contestation of dividends.*—As soon as a dividend sheet is prepared, notice thereof (Form N.) is given by advertisement; and after a lapse of six juridical days from the day of the last publication of the advertisement, all dividends, which have not been objected to within that period, are paid (sec. 5, par. 11).

If the assignee has reason to believe that there are creditors who have not filed their claims, it is his duty to reserve dividends for such creditors, and to notify them of the reserve, by letter through the post, addressed to each, at his domicile; and if they do not file their claims previous to the declaration of the final dividend, the reserved dividends form part of the last dividend (par. 12).*

If, within the said period of six days, any opposition is made, either by the creditors or by the Insolvent, to any claim or dividend, the assignee must obtain from the creditor whose claim or collocation is disputed, his statements and vouchers in support thereof, and from the contesting party a statement showing his pretensions as to the amount thereof, and having heard the parties and their witnesses under oath, and examined all papers relating to the matter in dispute, he makes an award both as to the merits of the contestation and as to the costs (sec. 5, p. 13).†

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* See above § 32, note *, pp. 64, 65.

† In all appealable matter (v. g. claim or dividend) in dispute, the pretensions of the parties shall be set forth in writing, in a clear, precise and intelligible manner, and the notes of the verbal evidence taken before the assignee shall be plainly written, shall be signed by the witness, if he can write and sign his name, and shall be certified by the assignee as having been sworn before him." Rule of Practice 8.

Contested claims will be governed as to evidence by the English rules of evidence, or by the Ordinance de Moulins and the Ordinance of 1667, according as they are of a mercantile nature or not. 1 *Rev. de Jur., p.* 187, *Bates v. Beaudry and Tuafe, assignees. Bankrupt Court Ct. Montreal; Mondelet, J.*, 1845.

According to these rules, verbal evidence is inadmissible in non-commercial matters exceeding twenty-five dollars, except when there is a *commencement de preuve par écrit.*

In the absence of an allegation of fraud, parol evidence cannot be adduced to add, vary, or defeat notarial documents, without an *Inscription de faux*, whether the facts intended to be proved, had passed before, at the time, or since, the signing of the deeds.

The sale of goods for more than ten pounds sterling, cannot be proved by witnesses, if no part of the goods contracted for has been delivered, nor earnest given, nor any memorandum thereof made in writing, as provided for by the Statute of Frauds.

Parol evidence cannot be adduced to vary, or defeat a contemporaneous commercial contract, for instance, a promissory note; but subsequent agreements respecting the same may be proved by witnesses.

The award is deposited in the Court and is final, unless appealed from within three days from the time it is communicated to the parties (ibid.)

Every signature and writing to, or upon any bill of exchange, promissory note, check or any other act or writing *sous seing privé*, is presumed to be genuine without proof thereof.

A single witness is sufficient to establish a fact.

All relations and connections of a party, except husband and wife, may be witnesses in all civil matters, to depose in favor or against them. *Shall hear and examine the parties and their witnesses under oath*—Mr. Abbott, in his notes on this provision, p. 45, remarks :—

"That is, shall do so in the manner usual in litigation, observing the ordinary and reasonable rules as to evidence, of which the following may be stated as of the highest practical importance, and as requiring to be referred to oftenest in ordinary cases :

1. That the burden of proof shall be upon him who affirms a proposition of fact, rather than upon him who denies it.

2. That the party upon whom is the burden of proof, shall begin.

3. That the party who begins shall have the right to adduce in rebuttal; but that such evidence shall only be such as tends to destroy the case of his opponent, and not such as tends directly to sustain his own.

4. That the party who holds the negative cannot usually adduce evidence in reply to his adversary's evidence in rebuttal.

5. That if the parties are examined, they cannot make evidence for themselves; but that their answers cannot be divided.

6. That the best evidence of which the case is susceptible should be adduced, and that secondary evidence should not be received until proof is made that the best evidence cannot be obtained.

7. That on the examination of a witness in chief, leading questions are not usually permissible; but may be put on cross-examination. This rule, however, may be reversed, if the witness is plainly hostile to the party who produces him, and favorable to his opponent.

"It would be obviously impossible here to enter into a detailed discussion of the law of evidence, but enough has been said to indicate the manner in which the proceedings should be carried on before the assignee. If the dispute be conducted by counsel, the assignee will be called upon to decide questions as to the admissibility of evidence, and as to the propriety of questions put to witnesses, which might raise doubts even in the mind of a judge accustomed to deal with them. In such cases, if the objection be to the admissibility of evidence, it would be better for the assignee to admit it, entering the objection to its admission. If

The costs so awarded may be levied under an order of the judge (par. 14).

The creditors may, by resolution, order the costs of the contestation to be paid out of the estate (par. 15), as for instance, when the contestation is made for all concerned.

Pending the appeal, the assignee reserves a dividend equal to the dividend claimed (par. 16).

All dividends, unclaimed at the time of the discharge of the assignee, remain deposited in the bank, and if at the expiration of three years, they are still unclaimed, they are handed over by the bank, with the interest accrued thereon, to the Provincial Government, and if afterwards claimed by the creditor, they are refunded to him with interest at three per cent. (par. 17).

If any balance remains after the creditors have been paid *in full*, it is paid over to the Insolvent upon his petition to that effect, duly notified to the creditors by advertisement and granted by the judge (par. 18).*

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it be to the propriety of a question, it is better to permit it to be put, if the assignee has any doubt about entering the objection, and if it be an objection to the form of the question, it is always safe to insist that the question shall be so framed as to leave the facts to be related by the witness, and not put into his mouth by the questioner. And the assignee should always recollect that it is easy afterwards to disregard testimony improperly admitted; but that the exclusion of that which ought to have been let in, is not susceptible of so simple a remedy."

* "When the estate of the Bankrupt is sufficient to pay twenty shillings in the pound, and a surplus still remains, interest should be allowed on all debts proved before the assignee, where the debt by express contract, or statutory enactment, bears interest, or where a contract to pay it is to be implied, before the surplus is handed over to the bankrupt, (*Re* Langstoffe, 2 Grant, 165)." Mr. Edgar, p. 61.

Such payment of interest is evidently authorized by section 5, par. 18, for such balance only as will remain out of the estate, *after the payment in full of all debts due by the Insolvent, is payable to him.*

IX.

DUTIES AND PRIVILEGES OF THE INSOLVENT.

§ 49. *Duties of the Insolvent.*—It is the duty of the Insolvent:

1. To make a detailed statement of his affairs, a general statement of his assets, and a list of his creditors under oath. He must produce the same either at the first meeting of his creditors, as provided for by sec. 2, par. 1, or on presentation of a petition to suspend a compulsory process (sec. 3, par. 16).

By the Act, the form of the statement is left to the discretion of the debtor. He should, however, adopt that which is most convenient to himself, and beneficial to his creditors.

The statement may be divided into five different parts, which is the form followed in other countries and generally in use with our merchants; viz: 1. a list of the assets; 2. a list of the debts; 3. a list of the losses; 4. a list of the profits; 5. a list of the expenses. The first two of these lists are to disclose the situation of the Insolvent, and the three last explain the causes of the deficit.

There are two kinds of assets,—material and real. Material assets are composed of all the movable and immovable property of the Insolvent. The simple enumeration of these things suffices to show this species of assets; but it should include not only things corporeal, but also things incorporeal, such as servitudes, the usufruct of an immovable, real rights and actions, claims and rights purely movable and personal or mixed, stocks in banks, in railway or insurance companies, in all financial, commercial and industrial bodies generally.

But, in order to understand thoroughly the position of the Insolvent, it is not enough to set forth his material assets, it is also necessary that the creditors should know their actual value, so that they may compare the resources with the liabilities of the estate. The Insolvent, therefore, at the same time should estimate the value of each of the items which make up his assets. It is especially desirable that he should give the value of the debts due

him; and to this end, he divides them into three classes; the first containing good debts, the second those which are doubtful, and the third those which are bad or of no value.

The list of creditors should make mention of four things; 1, the name of each of them, 2. the sum due him; 3, the collateral security which he may hold; 4, and lastly, the cause of indebtedness. The first furnishes the list or schedule of the creditors; the second shows the true difference between the assets and liabilities, and thus determines his real situation. The third and fourth are useful in checking the claims and in preparing the dividend sheets. Although the declarations of the Insolvent are not available against third parties, still they may assist in tracing the fraud or errors which a creditor, either alone or in concert with the Insolvent, may attempt to commit to the prejudice of the mass, by demanding more, or that which is not due. We have already said that the three lists, of the losses, profits and expenses, have for object to point out the causes and particulars of the failure; they should extend back to the commencement of the debtor's embarrassments.

In those statements, nothing ought to be omitted which may interest the creditors or throw light upon the cause of the bankruptcy. If the Insolvent has received any property from his wife by marriage contract, succession, donation or otherwise, he should in like manner mention the fact. In order to avoid dispute, he ought even to include the sums of money which he may have retained for the support and maintenance of his family since the day of the notice calling the first meeting.

The statement thus completed should be certified by the Insolvent; and if produced in support of a petition to stay forced liquidation, he must further swear to its truth under oath.*

In addition to this statement or general schedule, the Insolvent

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* The Act is silent as to the public officer before whom statements of affairs or lists of creditors should be sworn to. In Lower Canada, this oath, like any other required by the Act, may be taken before a Justice of the Peace or a Commissioner of the Superior Court, sec. 11, p. 5, Cons. Stat., L. C., Chap. 82, Sec. 13; see *ante*, § 17, page 47, note †.

prepares a list or schedule of his creditors, sworn to by him (Form B), and a general statement of his assets, showing their amount and nature, sec. 2, par. 1.

Every declaration made by the Insolvent in these statements or schedules, being judicially made *en justice*, takes the character of a judicial acknowledgment, and consequently, is evidence against him, unless he establishes that it was the result of an error of fact.

It is the duty of the Insolvent also: 2. To keep an exact account of all his transactions between the notice calling the first meeting of creditors and the date of such meeting, and to preserve the proceeds arising therefrom.

3. To make and complete the assignment of his estate on the day of the first meeting, or as soon thereafter as convenient. (sec. 2, par. 3).

4. To deliver, without reserve, to the assignee, all his account books, vouchers, letters and other papers and documents relating to his business, and also all moneys and negotiable paper, stocks, bonds and other securities, and generally all his property both movable and immovable, except such as is exempt from seizure (sec. 2, par. 7).

5. To assist, if so required, at all meetings of creditors, and to answer all questions put to him concerning his business and his estate; and more especially to assist, if summoned to do so, at the meeting called immediately upon the expiration of the two months from the deed of assignment or from the appointment of an official assignee, for the purpose of being examined; to take, on this last occasion, the oath which may be administered to him by the assignee; to answer the questions put to him by any creditor, or the assignee; and lastly to sign his answers, which are reduced to writing by the assignee, and afterwards deposited by him in the office of the court (sec. 10, par. 1).

The Insolvent is entitled to an allowance of not less than one dollar for each time he attends a meeting, when summoned to do so by the creditors (sec. 10, par. 5).

6. To obey every order of the judge, ordering his examination before him, by the assignee or by any creditor, relative to his estate and effects (sec. 10, par. 2).

7. To comply with every *subpœna* issued in any action in which a writ of attachment has been issued against his estate.

8. To answer all questions submitted to him by the assignee, or by any creditor, on his application for a discharge, or for the confirmation or annulling of discharge, or on his presenting a petition to set aside an attachment (sec. 10, par. 3).

9. Finally, to sum up the duties of the Insolvent, he must obey all the commands of the law, and exert himself generally to satisfy all his creditors and to merit his discharge at their hands. It is when the unfortunate trader fails, that he should especially keep in view the strictest principles of honesty; for although *cession n'infame pas*, a failure is not dishonor, as the French adage has it, still in these days of fraud, the public are naturally biassed against Insolvents, whom they indiscriminately style as bankrupts. There are, however, honorable exceptions to this rule; there are Insolvents in good faith; and in their case, the settlement of affairs is an easy matter; their discharge is willingly granted; and if from their old age, or other causes, they are unable to provide for their maintenance, the majority of creditors feel in duty bound to grant an allowance. It is sufficient for an Insolvent to be honest, to save credit, prospects, and, above all, honor. While on this subject, the reader will, perhaps, permit us to quote a few of the wise and practical recommendations of Savary, that eminent merchant and jurist who, to-day, can be looked upon as in the time of Louis XIV, as a model of commercial integrity:—

"Those merchants, he observes, who have been overtaken by misfortune and disgrace, should seek counsel and advice; they must not be ashamed to make their friends acquainted with the state of their affairs, and to consult them how to act; and above all, they ought not to take a single step except in concert with them.

"But it is not enough for a merchant, who knows his affairs to be in a dangerous position, to take advice and to consult with his friends as to what he should do, to rescue himself from the danger in which he finds himself placed; he should especially make choice of his friends; such choice is most important, for upon it depends all his prosperity or misfortune. In my opinion, a good and honest adviser should possess the following qualities:

1. He must have no interest at stake in the concern;

2. He must be a man of ability and experience in commercial matters.

3. He must be discreet and cautious; not too confident nor too timid, nor too hasty in his decisions.

4. He must be an honest man both in the eye of the law and of justice.

"These, in my opinion, are the principal qualities which should be possessed by those from whom advice is asked, especially when the honor, the fortune and property of merchants are at stake. If the adviser is not interested in the business, if nothing is due to him, he will frankly say what he thinks; on the contrary, if he is interested or a creditor, his advice will be dictated by, and subservient to his own interests.

"If the counsel is a man of ability and experience in commercial matters, if many cases alike to the one submitted to him have come under his notice, it is certain that his advice can be relied upon; if, on the contrary, he is without skill or experience, he is sure to mistake one thing for another; and matters are not likely to terminate well.

"The counsel must be prudent and cautious, so as to weigh well every point before giving his opinion; he should not be rash, for rashness borders on temerity, which very often induces us to undertake things so much beyond our reach that, if they turn out well, it is only by chance. He must not moreover be too timid or diffident of every thing; for if he is not firm in his decisions, if he has not sufficient energy and courage, he will create continual apprehensions in the mind of him whom he counsels, which will lead the latter to despondency and unfit him from advantageously carrying out the resolutions he may have formed.

"Finally, it is necessary that the adviser should be an honest man, so as to be able to induce the person seeking his advice to adopt such just and reasonable measures as will result in giving to each what belongs to him; for success cannot afford happiness when the end is not just. It may be said, perhaps, that it will be very difficult to find a man possessing these various qualities; true it is difficult to find such a person, but he whom we consult should

at least be honest and competent; otherwise his advice might lead to great embarrassment. There are numerous instances of merchants who, under slight difficulties, were ruined by the bad advice given them, and who could have retrieved themselves, had they only made choice of an honest adviser, experienced in commercial matters. (*Parfait Negociant, vol.* 1, *pages* 302, 303).

"The insolvent being prepared to account, should call a meeting of his creditors; he should attend the meeting in company with some of his relations or friends. He should not manifest either too much grief or trouble, nor give way to tears, as such conduct would indicate an irresolute and cowardly man, and tend to create prejudice against him; neither should he appear in glowing spirits, or manifest too much independence, for it would excite the indignation of his creditors. His friend should speak for him. It is becoming that the debtor should remain standing. His manner of acting should be polite and courteous. He should be mindful not to take offence at the harshness of his creditors; some of them are so deeply involved that their irascibility can be easily conceived. When interrogated, his answers should not be impolite, as I have seen many whose arrogance prevented them from coming to a friendly settlement. He must not forget that the loss which some of his creditors are obliged to sustain, may ruin their credit and bring them into bankruptcy.

"But, may add the Insolvent, why does not this importune creditor give me an opportunity of explaining my position; I am able to pay what I owe; why then call me a rogue, a bankrupt, and indulge in other injurious epithets. Such reasons ought not to be given; the creditors have reason to complain; and their apparent harshness should be overlooked. The Insolvent should place his statements on the table, and not in the hands of any one of his creditors, lest it might be presumed that he was favorable to him, and thus give rise to suspicion. It is to be observed that at such meetings creditors generally mistrust each other; such mistrust is often not without foundation, as each endeavours to advance his own interests. The Insolvent should moreover submit his books and other papers, so that the statements produced may be verified.

"It is to be borne in mind that, during the examination of the Insolvent's affairs, each creditor does all in his power to get paid in full; his embarrassment gives him ingenuity, and he loses no opportunity to obtain an undue preference over the remainder of the creditors. Some hold out threats of a criminal prosecution, accuse him of fraud, and state that it is easy to prove it. Others represent that by their influence they will prevent him from obtaining a settlement. This one, more cunning, flatters and caresses him, laments his misfortune, endeavors to appear liberal, offers him his purse, declares that he shall never abandon him, that he will do every thing in his power to assist him in getting his discharge; that it is unfair that he should give up every thing, that he has compassion for him and his family; finally, he leaves nothing unturned to soften the heart of his debtor, to obtain an undue preference from him over his other creditors. If the cloak of friendship is without effect, he resorts to rigor, *si la peau d'agneau n'a rien servi il se sert ensuite de celle du lion;* he indulges in all kinds of threats and aspersions towards the unfortunate insolvent, who wavering between hope and fear, is often led to comply with the exactions of these ruthless creditors, so that before he obtains a final settlement, he has already paid a part of his creditors to the prejudice of the others, who otherwise, instead of a half, would have lost but a fourth, had they been all treated alike.

"Such partiality is neither just nor equitable, because in case of bankruptcy a debtor should treat all his creditors alike, without any distinction whatever, not even in favor of his nearest friends. An Insolvent should therefore disregard both threats and promises.

"There is no creditor, however attached to his own interests, who will not yield to such reasons. However fair, nevertheless, they may be, there are creditors who will not accept them in payment, and who, having failed in their attempt to obtain an undue portion of the estate, offer a settlement and discharge, by the Insolvent signing a promissory note payable to the order of one of their friends.* This last effort is often successful. The Insolvent

* Is a note given by an Insolvent to a creditor, under the circumstances alluded to by Savary, that is to say, in view of a deed of composition or discharge, as an exceptional advantage for this creditor, and

should guard against it, because it will inevitably lead him into a second state of insolvency. There are numerous instances of merchants who were not able to meet at the same time the instalments of the composition and the notes so given, and who were consequently brought to a second bankruptcy. Such proposals should, therefore, be strongly resisted.

"After all, what has an honest Insolvent to apprehend from the threats of his creditor, if he renders a true account?

"It may be urged, he is a man of influence; if he is paid in full, he will protect me against the remaining of my creditors and obtain my discharge; if, on the contrary, he is not fully settled with, he will oppose the composition, prompting the creditors to take

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without the knowledge of the other creditors, legal and valid? This question has been decided in the affirmative by the Court of Appeals in thecase of Greenshields v. Plamondon, 8 Jurist, p. 192, Lafontaine, C.J., Aylwin, Duval and C. Mondelet, J.J., reversing the decision of Mr. Justice Badgley in the Superior Court, 3 Jurist, p. 240. The circumstances of this case seem to have been considered as special, the note having been given for a debt due by a *third person*, guaranteed by the Insolvent, and signed on the express agreement that the composition was not to apply to it, and the creditors having been parties to the composition only for the debt directly due to them by the Insolvent. Wherefore members of the Bar are inclined to think that the holding of the Court of Appeals was not a denial of the general principle that note given in view of a composition or discharge is illegal, as being an undue preference over his other creditors and against public order. Nevertheless, the *considérants* of the judgment lead to a different understanding: "The Court, * * * considering that the promissory note signed by the respondent in favor of the appellant, on the eleventh day of December, 1854, and for the recovery of the sum specified wherein this action is brought, was so made and signed, in virtue of an agreement entered into between the appellants and respondent, at the special instance and request of the respondent, and for his benefit and advantage, to facilitate a final settlement then proposed between the respondent and his creditors; considering that such an agreement was not prejudicial to the interests of the said creditors, and that the said creditors have not complained thereof; considering, finally, that the respondent, since the final settlement between him and his creditors, has acknowledged the amount of the said note to be still due and owing to the appellant, and promised to pay the same; and that by reason of

criminal proceedings against me, and although I am an honest man, through his influence I may be compelled to stand my trial on the most frivolous appearance of fraud, and for nothing at all. It is true that a threat of that kind coming from such a person, may shake his resolution, and it is difficult to guard against it. Nevertheless he is in duty bound not to succumb, and should bear in mind that his creditors are to be treated alike, and that a man is not likely to be prosecuted criminally for nothing. He should finally recollect that the creditor, far from putting his threats into execution, will esteem him the more for his honesty, courage and integrity."—*Parfait Negociant*, pp. 339–342.

§ 50. *Privileges and rights of the Insolvent*—Under other heads, we have alluded to certain rights enjoyed by the debtor during his insolvency; we had occasion, in § 12, to point out the effects of an assignment or of the nomination of an official assignee, both as regards the Insolvent and his property; we have seen that he can trade or carry on business, but cannot interfere with the

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the facts above mentioned, fully established by the evidence adduced in this cause, the agreement so entered into between the appellant and respondent was valid and binding upon the respondent, who is now justly indebted to the appellant in the amount specified in the said note, doth reverse, &c., &c." It cannot be denied that numerous English and French authorities can be quoted against this decision Important grounds may be urged also in support of a contrary view of the case, which were ably explained by his Honor Mr. Justice Badgley in the Court below, the learned Judge considering agreements of that description as contrary to public order and the interests of commerce generally. These reasons of justice and honesty induced Mr. Justice Loranger in a more recent case of a like nature to call the attention of the Legislature upon this question. "Those agreements," observed his Honor, "should be declared null by statute, but in the absence of special legislation on the matter, the Court must be governed by the decision of the Court of Appeals." Perrault *vs.* Laurin, 1863, 8 Jurist, p. 196.

It is to be regretted that the Insolvent Act of 1864, like the Imperial Act of 1861, has not supplied this deficiency in our Statutory Law. Such agreements, it is true, are declared to be *an evil practice*, affording a good ground for the annulling of a deed of composition or discharge, sect. 9, par. 6, 13; but as to their validity the Act is silent. We are therefore still to be guided by the ruling of the Court of Appeals.

estate; we have also observed that he can exercise all actions relating to his person, and retain such property as is declared exempt from seizure by our statutory law. But these are not the only rights which he enjoys; the Act confers upon him various other privileges, which we shall here briefly notice.

The majority in number of the non-privileged creditors for one hundred dollars and upwards, representing at least three-fourths in value of the liabilities to be affected by a discharge, have the power to grant three privileges equally important and just: 1st, the allowance; 2nd, the composition and discharge; 3rd, the simple discharge (sect. 5, par. 8; sect. 9, par. 1).

§ 51. *Allowance to the Insolvent.*— The creditors, or such majority of them, as we have just mentioned, have the power by section 5, par. 8, to allow the Insolvent any sum of money or any property they may think proper. The allowance so made is inserted in the dividend sheet, and is subject to contestation, like any other item of collocation therein, but only on the ground of fraud or deceit in procuring it, or the absence of consent by the requisite majority of the creditors.

§ 52. *Composition with the Insolvent.* – A deed of composition and discharge may also be granted by the same majority of creditors upon such terms as they may deem proper, and operates, as to all such creditors, whether parties to it or not, as an ordinary discharge, which we shall refer to hereafter. It may be validly made either before, pending, or after proceedings upon an assignment, or for compulsory liquidation; but it has not the effect of suspending them; for, until the deed of composition has been ratified or finally agreed to, the assignee should continue to act (sec. 9, par. 1).*

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* "A deed of composition and discharge will not operate effectually the discharge of the debtor; or perhaps it would be more correct to say, will not be susceptible of being effectually used as establishing a discharge until after the expiration of the period of two months from the public notice of the appointment of an assignee.

"This construction does not by any means deprive the clause under consideration of a character of great importance to the debtor. The procuring the consent of creditors to a deed of composition and dis-

There is no special form required for the deed of composition.

The Insolvent deposits the deed of composition with the assignee; and public notice of such deposit is by him given by advertisement, in all cases after the expiration of two months from the first insertion of the advertisement giving notice of the appointment of an assignee (par. 2).

If no opposition in writing is made within six juridical days after the last publication of such notice, the composition is considered as finally agreed to, and the assignee should act upon such deed according to its terms; but if such opposition be so filed with him, and is not withdrawn, the assignee must abstain from taking any action upon the deed, until the same has been confirmed, as hereafter provided (ibid).*

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charge, is generally a work of time; and this clause permits that work to be proceeded with while proceedings in insolvency are maturing, and even before they have commenced. So that when the time arrives at which under p. 2, the assignee may give notice of the deposit of the deed, the Insolvent may have already procured its execution in readiness for such deposit. And there seems to be no reason why the application for confirmation should not also be proceeding, provided the debtor is confident that he has succeeded in obtaining the assent to it of the requisite proportion of his creditors."—*Mr. Abbott, p.* 62.

There is nothing in the Act to prevent the creditors from accepting a composition under the common law; but then it is binding only upon the parties to the deed.

* "If by the deed it is agreed that the debtor shall have immediate possession of his estate, the assignee should deliver it to him. And so with any other provision contained in the deed, which falls within the province of the assignee to carry out. It will therefore be necessary in preparing such a deed to make provision respecting everything required to be done. Such, for instance, as the payment of such charges as the assignee may lawfully make, or may be bound to make good; the assumption by the debtor of pending suits; the transfer to him of amounts due the assignee for sales made, and every other matter or thing, the ommission to provide for which could cause embarrassment, in obtaining back the estate.

"If it should afterwards happen that the discharge contained in a deed of composition is annulled by the Court, a question may arise as to the position of the estate in that event, supposing it to have been re-

3.—*Discharge of the Insolvent*:—After an assignment, or a writ of attachment, the same majority of the creditors may consent to the discharge of the Insolvent without composition. This consent absolutely frees him from all liabilities existing at the time of the making of the assignment or the issuing of the writ, and disclosed either by him or by the creditors.

A discharge does not operate any change in the liability of any party secondarily or jointly and severally liable with the Insolvent, either as indorser, guarantor, surety or otherwise, nor does it affect any mortgage, *hypothèque*, lien, or collateral security held by any creditor as security for any debt thereby discharged (par. 4).

A discharge does not apply, without the express consent of the creditor, to any debt for enforcing the payment of which *contrainte par corps* is permitted by the Act, nor to any damage or personal wrongs, or penal condemnation or conviction, nor to any debt due by the Insolvent as assignee, tutor, curator, trustee, executor or public officer, although the creditor of such debts may be collocated in the dividend sheets (par. 5).*

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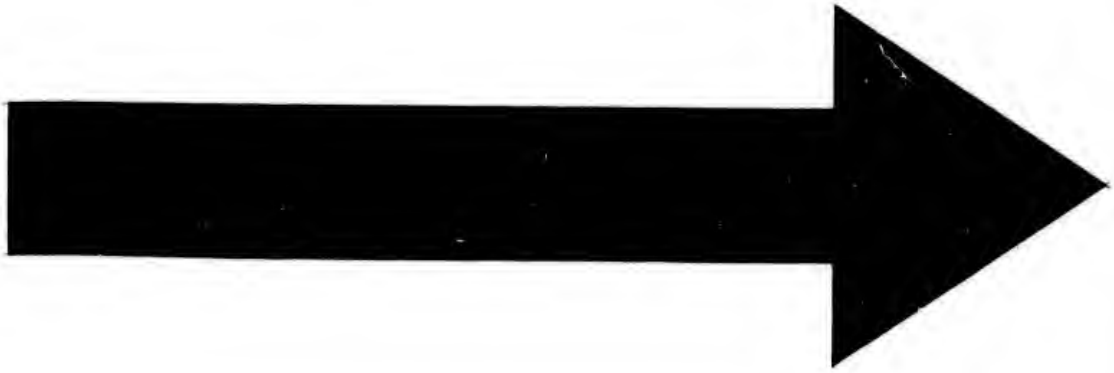
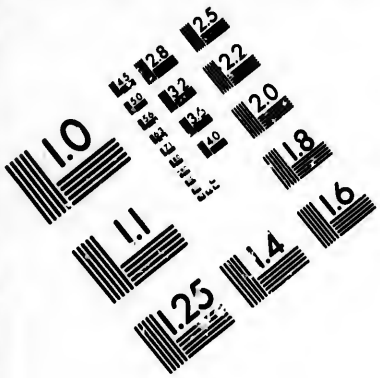
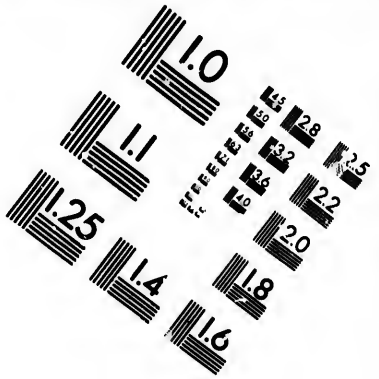
turned to the debtor by the assignee. There is no express provision on this point in the Act, but probably the assignee would be entitled to revendicate the property belonging to the estate; or in cases of compulsory liquidation, to obtain the issue of an *alias* or further writ of attachment in the original case, by a petition founded upon affidavit. The case is not likely to occur, as any creditor having objections to make, would file them in the manner provided for by this section, and thus prevent the estate from passing out of the hands of the assignee.' Mr. Abbott, p. 63.

* The Crown is not barred by a certificate of discharge. *The Atty. Gen. vs. White, Robertson's Digest, p.* 38.

Under the late Bankrupt Act, it has been held in *Ferguson et al. vs. Cairns et al., Robertson's Dig., p.* 38, that a discharge given by the requisite majority of the creditors was not binding upon those of the remaining creditors who had hypothecary claims, and that such creditors had still their personal action against the bankrupt. Under our present law, the contrary would probably be held, for, by sec. 9, par. 1, the discharge is binding upon all creditors, whether present to the deed or not; and by par. 3, the discharge frees the insolvent from all liabilities, except such as are specially excepted in par. 5. This last paragraph does not







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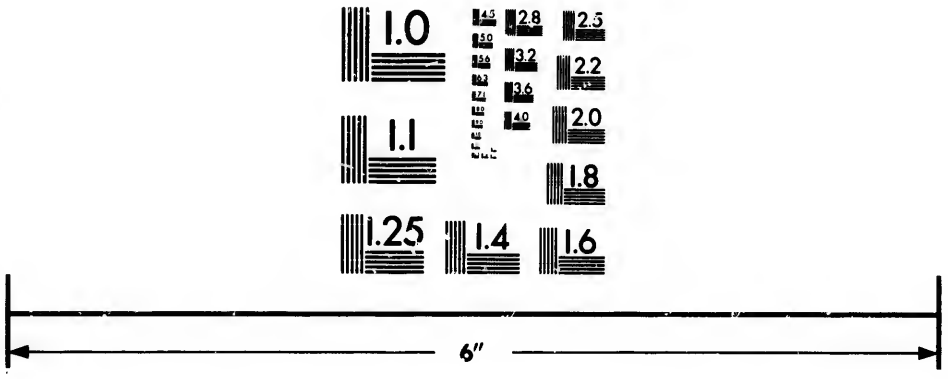

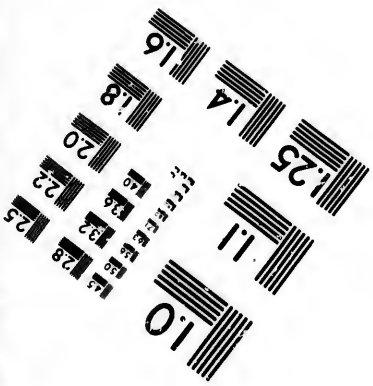

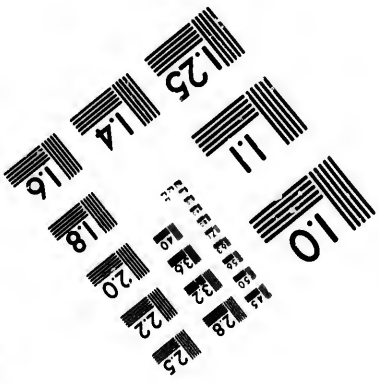

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§ 54.—*Confirmation of discharge.*—In no case is a confirmation requisite, and the Insolvent may avail himself of the privileges contained in a deed of composition or a simple discharge, without even causing the same to be confirmed. A composition has full effect, unless opposition be made to the assignee, as already stated. It is only in case of opposition, or of a demand by a creditor for more than two hundred dollars, to have the discharge set aside (see § 55), that the ratification is required; so far, the only difference is that the discharge is not of itself evidence, nor is it final, while the ratification renders it final and conclusive (par. 8 and 9).

The composition or consent to discharge cannot be ratified until two months after the first insertion of the advertisement giving notice of the appointment of an assignee, and also after notice by advertisement of the depositing of the deed of composition (sec. 7, par. 2 and 3); for a composition or discharge operates upon liabilities for a full discovery of which the two months' delay is requisite by the Statute.

The confirmation is obtained by the petition of the Insolvent addressed to the Superior Court, after depositing with the Prothonotary the consent or deed of composition and notice according to Form O. Such notice should mention the said deposit and the day on which the petition will be presented. The notice must be given by advertisement for two months in the Canada Gazette, and in one French and in one English newspaper published at or nearest the place of business of the Insolvent (par. 6.) *

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except hypothecary or privileged creditors, but simply provides that they shall not be computed in ascertaining the majority of creditors, as regards the value of the security held by them, but only for the amount not covered by such security (sec. 5, par. 4 and 5). Par. 4 does not apply to the debt, but merely to the collateral security, mortgage, *hypothèque* and other lien whatever held by the creditor, and moreover, declares such debt to be thereby discharged; and consequently hypothecary or privileged claims *in se* are extinguished by the discharge as regards the insolvent personally.

* "Notice of this application may be given at any time after the assignee has been appointed, if the Insolvent has procured the requisite

Upon the presentation of such petition, any creditor may appear and oppose the confirmation, either upon the ground of fraud or fraudulent preference within the meaning of the Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or of the insufficiency in number or value of the creditors consenting to the same, or of fraudulent retention or concealment of some portion of the estate, or of evasion, prevarication, or false swearing of the Insolvent upon his examination as to his estate and effects, or upon the ground that, subsequently to the passing of the Act, he has not kept cash book and such other account books as are required by and suitable to his trade, or of his refusal to deliver them to the assignee (par. 6).

§ 55.—*Petition to quash discharge.*—If the Insolvent fails to proceed for a ratification within two months from the time the same has been effected, any creditor for a sum exceeding two hundred dollars, may cause to be served upon him a notice in writing, requiring him to file in the Court the consent or deed of composition and discharge, as the case may be; and may thereupon give notice (Form P.), in the same manner as the Insolvent when applying for a confirmation of discharge, of his intention to apply by petition to the Superior Court for the annulling of the discharge on a day named in the notice (par. 7).

The petition sets forth any of the reasons upon which a confirmation of discharge may be opposed. It is granted *de jure* and without other evidence than that of the service of the notice upon the Insolvent, if he has failed to file the discharge or deed of composition at least one month before the day fixed for the presentation of the petition; but if he has filed the same within that time,

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consent, or deed, as the case may be. For although, as shewn in the note to p. 1, *ante*, the validity of the discharge may not be susceptible of conclusive proof until after the two months allowed for filing claims have expired; there appears to be no reason why the proceedings of the Insolvent preparatory to applying for confirmation of his discharge should not be going on; as before he can actually make his application, all parties will be in a position to judge of the sufficiency in number and value of the creditors who have signed, and to contest it if they think proper."—*Mr. Abbott, p.* 67.

or subsequently upon special application, the Court adjudges upon the petition, and grants or rejects it, absolutely, suspensively, or conditionally (par. 7 & 8). *

An appeal lies from this Judgment *in the manner herein provided for as to appeals from the Court or Judge* (ibid.).†

§ 56.—*Petition for discharge.*—After one year from the date of an assignment or of the issuing of a writ of attachment, the Insolvent may apply for a discharge, by petition to the Superior Court, setting forth therein that he has not obtained from the required proportion of the creditors, a consent to his discharge or a deed of composition and discharge, and that he has not been guilty of conduct amounting to a fraud under the Act and consequently is entitled to it.

Notice of this application (Form Q) ought to be first given in the manner provided for notice of application for confirmation of discharge (par. 10.)

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* "It seems that it is not in the discretionary power of the Court to refuse or suspend the order of discharge, when the bankrupt has not been guilty of conduct amounting to a fraud under this Act.—(See *Ex parte* Udall, re Mew, 6 L. T. [N.S.] 732. ch. on Appeal; *Ex parte* Glass and Elliot re Boswall, 6 L. T. [N.S.] 407.)

"Much the same effect as a refusal of a discharge has been obtained in England by an adjournment of a debtor's examination, *sine die*. Where an Attorney was adjudicated a bankrupt as a bill broker, and on his final examination it appeared that he had lost large sums on horse racing, his examination was adjourned *sine die* with a view to prevent him obtaining his certificate. (Re Parsons, 6 L. T. [N.S.] 61, Bank. Irish.)

It seems to have been the English practice to adjourn the last examination of a bankrupt *sine die* when he had been guilty of an offence, but not such an offence as would justify an absolute refusal of an order of discharge, (*Ex parte* Grummett, 10 L. T. [N.S.] 680); but this decision was reversed by the chancellor in the same case on appeal, (Grummett vs. Grummett, 10 Jur. (N.S., 738,), where it was held that the adjournment of the last examination must be governed by the same rules as the granting of the order of discharge."—*Mr. Edgar, p.* 78, 79.

† There is no appeal under the Statute from judgments of the Court or Judge, see *post* § 50, note *, p. 98, 99. Under the common Statutory Law, such appeal lies to the Court of Review or to the Court of Queen's Bench, for, in all cases provided by the above sub-sections, judgments are rendered not by the Judge, but by the Superior Court. (See ibid.)

Upon such application, any creditor may appear and oppose the granting of the discharge upon any ground upon which the confirmation of a discharge may be opposed, *vide ante* §54 (par. 11).

The Court, after hearing the insolvent and the objecting creditors, and having examined the evidence adduced, may, at discretion, refuse or grant the discharge absolutely, conditionally or suspensively, and such judgment is final, unless appealed from (par. 12).

Every discharge or composition obtained by fraud or fraudulent preference, or by evil practice, such as giving a note to procure a consent or composition, is nuil and void.

§ 57. *Death of the Insolvent.*—The death of the Insolvent, pending the proceedings, does not suspend them; all his rights pass to his heirs, who succeed him (sec. 11, par. 15), but remain liable only as such heirs, according to our common law of succession.

Such are the privileges which the Statute grants to the Insolvent. It is readily perceived that they are as numerous and important as the unfortunate position of the Insolvent may permit. Every one, without doubt, will sanction the clause which provides that a majority in number of the creditors holding the three-fourths in value of the debts, we might almost say the totality of the creditors, shall have the power of reserving to the Insolvent some means of subsistence; and the public will certainly have the opportunity to appreciate the equity of this liberal provision of the Act.

It will also be seen with pleasure that the same majority has the power to discharge the Insolvent. A similar law, equally just and beneficial, has been long needed. Frequently the Insolvent was compelled to give up trade, because some of his miserable petty creditors, from obstinacy, revenge, or other unworthy motives, refused to comply with the reasonable wish of the majority, and to concur in the almost unanimous consent to his discharge.

We are happy to be able to admit these most important reforms; on the other hand, we cannot refrain from stigmatizing that which empowers the Court to grant a discharge, as contrary to equity and pernicious in its consequences. It seems that this

right to discharge ought at all times to lie solely with the majority of creditors, who are most interested therein, and who, knowing the Insolvent better than the Court, are more capable to appreciate the honesty and good faith of the bankrupt. To throw the doors of the Court House open to insolvent debtors to obtain their discharge, is, in our opinion, an inducement held out to fraudulent bankrupts, who, with the assistance of the formalities and rigorous delays, and the favor of the Insolvent Act of 1864, will never be at a loss to find means to be victorious at the end. To them more than to the honest Insolvents, nothing would be so easy as to become bankrupts, and many ones would foresee and contemplate the day of assignment as a day of grace, a day of salvation, when, as by enchantment, they shall soon after be freed from their just debts and delivered from the hands of their importuning creditors.

X.

APPEALS.

§ 58. *Appeal to the Judge.*—Any party aggrieved by the award of the assignee, may appeal to the Judge by summary petition and one clear juridical day's notice thereof served upon the assignee and the opposite party within three days from the date of the communication of such award to the contesting parties; (sec. 5, par. 13, and sec. 7, par. 1); and after the examination of the evidence, books, or proved extracts from books, and of all other documents having reference to the matter in dispute, produced by the assignee upon presentation of the petition,* and after hearing the parties, the Judge confirms the award, or modifies it, or refers it back to the assignee ordering the taking of further evidence, by such order as will satisfy the ends of justice (sec. 7, par. 1).

§ 59. *Appeal to the Court of Review.*—An appeal lies to the Court of Review from any such order of the Judge by the appellant making within eight days thereof in the Prothonotary's office a deposit of $20 in cases under $400, and of $40 if the case exceed $400; and by filing also an inscription and notice of revision, in accordance with the provisions of the 27th and 28th Vict. chap. 39, sect. 20–29 (sec. 7, par. 7).

§ 60. *Appeal to the Court of Queen's Bench.*—An appeal also lies from such order of a Judge, rendered upon petition to reverse the award of an assignee, or from such judgment of the Court of Review, to the Court of Queen's Bench, provided that,

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* The 8th Rule of Practice provides as follows:—"And in the event of an appeal, the Assignee shall make and certify a transcript from his Register, of the proceedings before him in the matter appealed from. And he shall also make and certify a list of the documents composing such proceedings and appertaining thereto, and shall annex such transcript and list to such documents with a strong paper or parchment cover, before producing the record before the Judge, as required by the said Act."

within five days from the date of the order or judgment, the Appellant obtains the allowance of such appeal from the Judge on one clear day's previous notice to the opposite party; 2ndly, that within five days after such allowance, he gives before the Judge two sufficient securities that he will duly prosecute such appeal, and pay all costs incurred by reason thereof by the respondent; 3rdly, that within the same delay, he causes to be served upon the opposite party and upon the assignee, a petition in appeal setting forth the petition to the Judge, and his decision thereon, or the judgment of the Court of Review, as the case may be, and praying for its revision, with a notice of the day on which such petition is to be presented (sec. 7, par. 2 and 3); 4thly, that the petition in appeal is presented on one of the first four days of the term next following the putting in of security and not afterwards (par. 4).

On or before the day of the presentation of the petition, the assignee files in the office of the Court of Appeal, the papers and documents which have been previously produced before the Judge, or the Court of Review, and thereupon the appeal is proceeded with and decided according to the ordinary practice of the Court of Queen's Bench (par. 45).*

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* Section 7, par. 1, declares that "there shall be an appeal to the Judge from the award of an assignee made under this Act, and thereupon the Judge may confirm such award, or modify it." Par. 2 adds that "if any of the parties to such appeal are dissatisfied with *such* order of the Judge, they may appeal from his judgment in Lower Canada to the Court of Queen's Bench;" and it is provided by par. 7 that "any order of a judge made under any of the foregoing sub-sections," that is, every judgment upon an award by an assignee, "shall be subject to the Court of Review." In these sections, nor in any other part of the Act, is there any provision made for an appeal to the Court of Queen's Bench or the Court of Review from a judgment or order pronounced by a Judge, except when adjudicating upon the award of the assignee. Therefore, there is no appeal under the Insolvent Act from a judgment upon a petition to quash a demand of assignment, a writ of attachment, or a petition to stay proceedings.

Is there an appeal in such cases under our common Statutory Law? Section 23 of the Con. St., for Lower Canada, chap. 77, reads as follows: "An appeal shall lie to the Court of Queen's Bench as a Court of Appeal and Error, from any judgment rendered by the Superior Court

Such are the different appeals allowed to the parties disputing before the assignee. On this subject we have only one remark to make relating to the delays.

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for Lower Canada." Consequently, there is no appeal except from judgments of the Superior Court. In order, therefore, to be able to appeal, the Judge's order pronounced in the first instance, as on a petition to quash, must be held to be either a judgment of the Superior Court or tantamount thereto. Proceedings in compulsory process, it is true, issue from and are returnable to the Superior Court, sect. 3, par. 6; sect. 12, par. 4: but after the return, the jurisdiction of the Court seems to be at an end, and a new and special jurisdiction, that of the Judge, to be substituted. It is to the Judge and not to the Court, that the Statute provides that petitions to quash or suspend are to be presented, sect. 3, par. 3, 4, 12, 15; and it is also before him that proceedings subsequent to the return shall be had, sect. 3, par. 13, 14, 20. From this stage, these various clauses seem to give jurisdiction to the Judge and not to the Court, while sect. 3, par. 6 and sect. 9, par. 6, 7, 10, 12, provide that the proceedings therein pointed out, shall be had exclusively before the Court and not before the Judge; and consequently, a judgment of a Judge in the former cases pronounced in open Superior Court and not in bankruptcy, or drawn up like ordinary judgments of the Court, by saying "The Court having heard, &c." instead of "The Judge having, &c." would be null and void. Likewise, at common law, a Judge's order is not a judgment of the Court, unless *in banco*, and that the matter is before the court, and upon this ground the Court of Queen's Bench has already sent the litigants back to the Court below, each party paying his own costs, on appeals from judgments pronounced out of term, at Aylmer, holding plainly that there was no judgment of the Court, but a simple order of a Judge, from which there is no appeal. Therefore, such orders of a Judge in bankruptcy as above referred to, are not judgments of the Court; and neither the Insolvent Act, nor the common law has provided for an appeal therefrom. This defect, the consequences of which cannot fail to be detrimental, has been felt by the Legislature; and a remedy is suggested by the Amendment Act now before the House, sect. 8, which reads as follows: "The right of appeal granted by sub-section two of section seven of the said Act is hereby extended, and shall apply to any order of Judge made upon any of the matters or things upon which he is authorized to adjudicate by the said Act."

Since writing the foregoing, the question has been raised on the 23rd May, 1865, in the case of Johnston *v.* Kelly, and is still *en délibéré* before the Court of Review, at Montreal.

Every possible delay is given to the Insolvent desiring to make an assignment; he is permitted to fix the date of the first meeting at two months or at one month. Every notice by advertisement, even the most insignificant, must be published for at least two weeks; two months are allowed to file claims, and when at last the decisive moment has arrived, that which must finally determine the claims of all the parties, when the question is to obtain the revision of rights frequently complicated and of great consequence, the legislator allows but three days to deliberate and to proceed at the same time. And then, moreover, why are eight days given in case of an appeal to the Court of Review, and only five in an Appeal to the Court of Queen's Bench? Doubtless, it is because this last appeal is comparatively more important, both as regards costs and the preliminary formalities to be observed.

XI.

PROCEDURE GENERALLY.

In the course of the foregoing chapters, the reader must have observed the number of notices, petitions and other proceedings of various kinds which may be adopted in bankruptcy both in voluntary assignment and in compulsory liquidation. We have already pointed out, in almost every instance, the numerous formalities relating thereto, even such as are required by section 11, the general provisions of which we shall now briefly notice, having already mentioned those which are of special interest.

Unless the contrary is specially prescribed by the Act:

§ 61. *Notices of meetings of creditors.*—All notices of meetings of creditors, and all public notices generally required to be given by advertisement, must be published for two weeks in the *Canada Gazette*, and in one English and one French newspaper,* issued at, or nearest to the place where the proceedings are carried on; and in every case, they must also be addressed at the time of the first advertisement thereof, postage paid, to all the creditors and to all representatives of foreign creditors, within the Province (sec. 11).

No special rule regulates any of the notices which may be given to the creditors in the course of the proceedings, and of which the Statute does not require advertisement. As regards such notices, they may be given within a reasonable time, by post, or at domicile, taking care to mention the object thereof (sec. 4, par. 3; sec. 11, par. 1).

§ 62. *Majority in number and in value.*—All questions discussed at any meeting are decided by the majority in number and in value of the creditors for one hundred dollars and upwards; but if the majority in number do not agree with the majority in value, the meeting may be adjourned for a period of not less than fifteen days, of which adjournment notice by advertisement is to be given;

* Under the Amendment Act before the House, s. 11, the publication of notices may be restricted to one language.

and if the adjourned meeting has the same result, the views of each section of the creditors are, in the form of resolutions, referred to the Judge who decides between them (sec. 11, par. 2).

The difference between the value, at which collateral securities are assumed by the assignee or retained by the creditor, and the amount of his claim, or the value of a conditional claim, as settled or agreed to, is the amount for which he is entitled to vote at any meeting (sect. 5, par. 3, 4 and 5).

§ 63. *Affidavits.*—Any affidavit may be made by the party interested, or by his agent having a personal knowledge of the matters therein stated (sect. 11, par. 8), and sworn to before a Justice of the Peace or a Commissioner (sect. 11, par. 5 12).*

§ 64. *Notice of petition, &c., &c.*—One clear day's notice of any petition, motion or rule, is sufficient, if the party, to be served with the same, resides within fifteen miles of the place where the matter is pending; but if he resides at a greater distance, one extra day is allowed for each additional fifteen miles (par. 9.)†

§ 65.—*Service.*—Every service of petition, motion, rule, writ,

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* "All affidavits of indebtedness by a creditor, or by the clerk or agent of a creditor, shall set forth the particulars and nature of the debt, with the same degree of certainty and precision as is required in affidavits to hold to bail in civil process in the Courts of Lower Canada."—Rule of practice 13.

† "No Demand, Petition or Application of which notice is required to be given, either by the provisions of the said Act or by an order of the Judge or Court, shall be heard until after such notice shall have been given, and due return thereof made and filed in the case." Rule 10.

"Except where otherwise limited and provided by the said Act, and upon good cause shewn, the time for proceeding after notice thereof has been given, may be enlarged by the Judge or Court whenever the rights of parties interested may seem to require it for the purpose of justice." Rule 11.

"Whenever a particular number of days is prescribed for the doing of an Act in Insolvency, the first and last day shall not be computed, nor any fractions of a day allowed; and when the last day shall fall upon a Sunday or Holiday, the time shall be enlarged to the next juridical day."—Rule 12.

warrant, or order, must be made according to the ordinary rules in similar cases; and if the person, charged with such service, is a sheriff or bailiff, he may make return of the same under his oath of office par. 11.) *

§ 66.—*Witnesses.*—Any person may be examined upon oath from time to time before the Judge, as to the estate of the Insolvent, upon an order given by the Judge upon petition without notice, setting forth satisfactory grounds (sect. 10, par. 4); and such witness is subject to all the proceedings and penalties to which ordinary witnesses are liable. He may also, on his application, be taxed at the discretion of the Judge (sec. 10, par. 6).†

Commissions rogatoires and others for the examination of witnesses may be issued by the Judge in the same manner as by the Superior Court in ordinary cases.

§ 67.—*Forms.*—The forms appended to the Act, or others equivalent, must be used (sect. 11, par. 13). There is no special mode or form of proceedings; in all cases, it is sufficient to state the facts in a plain, concise and ordinary language: every allegation is sufficiently set forth or *libellée*, provided it is not of a nature to mislead or take by surprise the opposite party (ibid.).

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* "All services of Writs, Rules, Notices, Warrants and proceedings in Lower Canada, except otherwise specially prescribed by the said Act, may be made by a bailiff of the Superior or Circuit Court, whose certificates of service shall be in the form required for service of process in the said Courts; or by any literate person, who shall certify his service by his affidavit; and in either case, the manner, place and time of such service, shall be described in words, and also the distance from the place of service to the place of proceedings". Rule 17.

"All services of Writs, Rules, Notices, Warrants or other proceedings, shall be made between the hours of 8 a.m. and 7 p.m., unless otherwise directed by a Judge or Court upon good cause". Rule 18.

† In a case of *Worthington v. Taylor*, 10 *Up. Can. Law Journal*, *p.* 304, it has been held by Mr. Justice Logie that under the above clause witnesses, summoned to appear in virtue of an order of the Judge, are bound neither to appear nor to be sworn, until their expenses are paid; but that the Insolvent himself cannot claim to be paid any expenses before giving his evidence, and that he may be examined at any time, either before or after the meeting called for his public examination.

§ 68.—*Rules of Practice, Tariffs.*—Rules of practice and a tariff of fees may be made, and altered or amended in the same manner as the Rules of Practice and Tariffs of Fees of the Superior Court.

§ 69.—*Authenticity of deeds, minutes, &c.*—The deed of assignment, or a notarial copy thereof, a copy of an order of the Judge appointing an official assignee or a duly certified extract from the minutes of a meeting of creditors, are *primâ facie* evidence of their contents in all Courts, both civil and criminal. Furthermore, the extract of the minute of a meeting of creditors or of the Judge's order appointing an assignee, is *primâ facie* evidence of such appointment, and of the *regularity of all proceedings at the time thereof and antecedent thereto* (sect. 2, par. 10; sect. 4, par. 5; sect. 12, par. 7).

XII.

FRAUD.

§ 70. *Definition of fraud, etc.*—Chardon, *Traité du Dol et de la Fraude*, vol. 2, page 1, thus defines fraud: "the insidious art of defeating the law, with the appearance of submission to it; of violating obligations whilst appearing to fulfil them; and of deceiving, by apparent honesty, if not those whom they defraud, at least the courts to which they may have recourse.

"Fraud, continues the same author, is always based upon and effected by deceit or *dol*; but less bold, it carries out its purposes in a different manner. Deceit is confined to the person whose property is either in part or in whole coveted, and by the illusions which it holds out, induces him to consent to his own spoliation. It is in the dark, on the contrary, and almost always unknown to its victim, that fraud lays its plots; the most active precaution cannot guard against its snares, while ordinary vigilance affords protection against the aggressions of *dol*. Sometimes, however, the fraudulent party, availing himself of the passions or misfortune of him whom he endeavours to ruin, makes him a party to his guilt, the better to defeat the ends of justice."

"It has always been, says Massé, *Droit Commercial*, *vol* 3, *page* 249, *&c.*, a matter of difficulty to legislators and jurisconsults to determine the effects of bankruptcy on previous transactions, *actes antérieurs*. Two systems have been tried: the one very absolute, extending back from the date of the failure to the moment that the Insolvent first became embarrassed, and holding that during the whole of that time the Insolvent is incompetent to act, declares null and void his doings during that time as well as those subsequent to the bankruptcy; the other, while admitting that the transactions entered into immediately previous to the failure may not altogether be free from fraud, which even then is sometime presumed, does not set them aside except under special circumstances, and owing to their nature and effect.

"Of these two systems, the former had long prevailed, and was

adopted by the ancient Italian jurisconsults. Casaregis, and all the doctors of his time, held as null all acts of a trader on the eve of insolvency, and made no distinction between him and a bankrupt. But it was soon felt that this system, so complete and simple, offering the advantage of a rule at once general, uniform and inflexible, yielding to no circumstances, but forcing circumstances to yield to it, was wrong in that which constitutes its real merit; and that the contrary system, which did not interfere with acts anterior to bankruptcy, except when fraudulent and under special circumstances, although more difficult in its application, led to more equitable results."

§ 71. *Fraud at common law.*—Until the passing of the Insolvent Act, we were governed in this matter by the provisions of the Edict of Henry IV., May 1609, which declares all transfers, assignments, sales and donations of movables or immovables, made in fraud of creditors, either directly or indirectly, to be null and void, and of no effect.

The Edict, therefore, does nothing more than enunciate a general principle of the common law, which contains nothing special relating to bankruptcy, and which creditors may avail themselves of at all times, both in civil and commercial transactions. It is the principle laid down in the Roman law: *Quæ fraudationis causâ gesta erunt, cum eo qui fraudem non ignoverit, de his curatori bonorum, vel ei cui de eâ re actionem dare oportebit actionem dabo. Idque etiam adversus ipsum qui fraudem fecit servabo*, which gives the revocatory action, known as *Actio Pauliana*, to every creditor who proves, 1st. That he was a creditor at the time the fraud was committed; 2nd. That the deed or contract attacked as fraudulent had been made by an Insolvent; 3rd. That the third party was aware that he was an Insolvent; 4th. That he was aggrieved or injured by the deed or contract. But there is nothing in these rules of public order and honesty, adopted by all civilized nations, that presumes fraud; on the contrary, they all require complete proof of it, according to the old maxim: *la fraude ne se présume pas*, fraud is not presumable.

§ 72. *Fraud within the Statute.* — Our Legislature, like the

legislatures of other countries, has introduced provisions which are only the logical consequences of the principles of the common law; it has not altered, but merely completed it by laying down, in cases of bankruptcy, certain presumptions amounting almost to evidence. The principle of common law enables creditors to annul transactions that are fraudulent and detrimental to their rights; the special principle of commercial law places all creditors on an equal footing, and prohibits every diminution in the estate of the Insolvent, as being an undue preference over the mass. From the combination of these two principles, the Legislature declares null or annullable, as the case may be, all doings of the debtor on the eve of his failure, subverting or tending to subvert equality.

§ 73. *Nullity of all fraudulent acts.*—The Act, like the common law, annuls all deeds and contracts whatsoever, made in fraud of the creditors: "All contracts," says section 8, par. 3, "or conveyances made, and acts done by a debtor, with intent fraudulently to impede, obstruct, or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done, and intended with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them, or any of them, are prohibited, and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration or in contemplation of marriage."

This clause, which defines fraud at common law, comprises not only the ordinary acts of life, but even those contracts entered into in contemplation of marriage, and so favorably looked upon by our customary law.

No one has to learn that, in our days, fraud is not to be found alone in commercial circles, but also at the domestic fireside; and it is there that its evils are the most dangerous. The Legislature, by a provision at once mild and just, has endeavored to put a stop to these abuses of the common law; and, without adopting the law of France, which deprives the wife of all her matrimonial rights, only declares them null in case of fraud.

§ 74. *Presumptions of fraud.*—It is not when there is evident proof of fraud that difficulties arise, but when there are only presumptions and probabilities of the bad faith of third parties, when the trader is not a notorious bankrupt, but merely on the eve of insolvency, that the law should afford protection to the creditors; and the Insolvent Act attempts this by holding certain general or special presumptions of fraud to be sufficient evidence.

§ 75. *General presumptions of fraud.* — The general presumptions of fraud are defined in paragraph 1:—"All contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, are presumed to be made with intent to defraud his creditors."

These words, *public and notorious inability*, cannot apply to the public notice of bankruptcy, given after the making of an assignment, or the issuing of an attachment, since then the insolvent is divested of the possession and administration of his estate. Does such inability date back to the notice for the preliminary meeting? It would appear to us that it ought to be reckoned from the time the trader became publicly insolvent, however anterior to the regular and formal declaration of insolvency, under the Statute.

We cannot, moreover, refrain from pointing out this provision of the Act, as contrary to principles and detrimental in its consequences. Under the clause in question, fraud is to be inferred from the supposed knowledge of public and notorious insolvency. But that which is notorious in a city or portion of a city, is it equally so in another? Those who have frequent transactions with the Insolvent, will be presumed to be acquainted with his difficulties; but as to those who live at a distance from him, or are engaged into another branch of trade, and have but few dealings with him, it will be easily seen that the law presuming them to have such knowledge, is ill-founded and arbitrary. Cannot they be deceived by appearances? No doubt they can show their good faith. But how is it to be proved? Can they have recourse to

witnesses to establish such a fact? Any evidence adduced would be limited to certain presumptions, more or less probable, which would be always set aside by the more positive fact of notorious insolvency. It is for the Court, therefore, to weigh the circumstances. Prudence commands us to prefer a wise appreciation of the particulars of each case to a narrow and ingenious presumption.*

Moreover, it is to be remarked that this presumption cannot apply to every case where a third party has a real or supposed knowledge of the insolvency. If the contract has not had the effect to *injure, obstruct* or *delay* the creditors, it cannot be reputed fraudulent, even when the insolvency is public and notorious. It is evident, for instance, that contracts transferring either movable or immovable property for good and valid consideration, cannot be governed by the same rules that apply to those that are injurious to the mass. What undue preference have the creditors in such a case to complain of? Do they not find in the Insolvent's estate an equivalent to that which has been removed? There is no recourse against acts of this kind, even if they took place on the very eve of assignment or attachment. It would be useless to urge that the Insolvent had made away with the equivalent received; he could have equally disposed of what he gave in return. Finally, the good faith of the third party is sufficiently apparent from the regularity of the transaction, and cannot be affected by the secret intent of the debtor. Such has been always the opinion of jurists, even in those remote times when jurisconsults entertained rigorous and narrow views relative to presumptions. It is well understood, however, that such contracts are annullable, in so far as they are injurious to the creditors, who have a right to take possession of the property disposed of, on the full payment of indemnity to the *bonâ fide* third party so dispossessed.

Such are the unlimited presumptions of fraud recognized by the

* We are surprised to find Mr. Abbott, who at page 52 acknowledges the insufficiency of the words *public and notorious insolvency*, introducing them in the first sub-section of section 8, page 54.

Statute. Let us now pass to those that are confined to a particular time.

§ 76. *Particular presumptions of fraud. Gratuitous contracts within the three months.* At Common Law, every gratuitous contract made by an Insolvent is held to be fraudulent; but the Insolvent Act has gone farther by presuming fraudulent, "all gratuitous contracts or conveyances, or contracts or conveyances without consideration, or with a merely nominal consideration, made by a debtor afterwards becoming an insolvent, with or to any person whomsoever, within three months next preceding the date of the assignment or of the issue of the writ of attachment in compulsory liquidation."

In order to prove that a gratuitous contract was entered into in fraud of the creditors, it is sufficient to establish the date at which it was made; for if made within the three months immediately preceding the assignment or attachment, it is null and of no effect, no matter what may have been the Insolvent's position at the time, or in whomsoever behalf it was so made. The Statute makes no exception; whence the inference that donations by marriage contract, come within the same rule.

It would be said to be rigorous that a trader cannot settle upon his wife any permanent and irrevocable advantage. It may be rigorous, but such rigor is easily accounted for, by the insolvency occurring within the three months. No doubt, women are entitled to help and protection from the legislator; on the other hand, commerce must be protected; and the Statute annulling all such gratuitous gifts and donations has done nothing more than to recognize the well-known principle of law and equity, *you shall not grow rich at your neighbor's expense.*

§ 77. *Collateral security within the thirty days.* From the principle that every gratuitous contract is reputed fraudulent, flow many consequences, some pointed out by the letter of the law itself, and others by sound logic. The legislator has rightly assimilated to gratuitous contracts or without consideration, any sale, deposit, pledge or transfer made within the thirty days

before the execution of a deed of assignment, or the issuing of a writ of attachment, by way of security for payment, or by way of payment, to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, and such sales, pledges, etc., are annullable. If any consideration was given for such security or pledge, &c., the creditor is entitled, under par. 2, to be indemnified therefor. It is but just that the creditor so paid or secured should return to the mass of the estate, goods withdrawn therefrom under circumstances at least suspicious, and by which his position is improved, to the detriment of the creditors generally. As to the above preferences, made within the thirty days, fraud is presumed without proof that the creditor had knowledge of the difficulties or intent of the debtor. They are prohibited and declared annullable by paragraph 4, as constituting a gratuitous alienation, as all other such preferences entered in contemplation of insolvency, that is to say, with *a view of an inevitable* bankruptcy, however anteriorly granted.

§ 78. *Payment within the thirty days—Compensation or set off.* It follows from the same principle, and for the same reasons that equality should exist between all the creditors, that every payment made within the thirty days before the assignment or the attachment, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, is null and void, (par. 5); and that also every transfer made within the same time and under similar circumstances with a view to compensate or set off is also null and void (par. 6); but if any value was given for such payment or transfer, the same must be restored to the creditor.

§ 79. *Payment in good faith.* But the same is not to be said of payment made in good faith and in the ordinary way of business. "A creditor, remarks Jousse, who in good faith received from his debtor the amount due him, cannot be called by the other creditors to account, even if such payment was made on the eve of insolvency; because such creditor receives only what legitimately belongs to him, and he cannot be suspected of fraud, as is the case in transfers made within the prohibited delay. Toubeau, in his *Institutions Consulaires*, ed. 3, tit. 12, ch. 3, page 730, is of the

same opinion; and he holds that a payment by a debtor to a creditor within the prohibited delay is good and valid, and cannot be set aside by another creditor, provided at the time of such payment the trader was still carrying on business, and that the insolvency was not publicly known. He quotes several authorities in support of his opinion, and amongst others an *arrêt* of the 9th of June, 1578.

"It is also the opinion of Savary in his Parères (Parères 39, page 301, ed. 1749), where he lays down as a settled principle relative to bills of exchange and promissory notes matured and paid *in specie*, on the very eve of insolvency, that those so paid cannot be compelled to refund to the estate, and that such payments can never be reputed fraudulent."

Our legislation is, in this respect, entirely similar to the doctrine of these commentators, and is, we might say, merely the confirmation thereof. In fact, sect. 8, par. 5, reputes as null only those payments made to a creditor in bad faith. So if the trader, who afterwards becomes insolvent, was carrying on business at the time of the payment, if his insolvency was not notorious, nor even suspected, if, in a word, the creditor was in good faith, the payments made to him on the eve of insolvency are good and valid, and the creditors cannot interfere with them. As to payments made before the thirty days, they cannot be reputed fraudulent on the pretence that the creditor had probable cause to suspect the bad state of the debtor's affairs. Paragraph 1 has no application here; it refers only to contracts.

§ 80. *Payment of debts undue.* The contrary is to be said of debts not yet due and paid shortly previous to the date of insolvency. It is easy to discover in such a case the characteristics of undue preference, because a debt not yet due is not exigible, *qui a terme ne doit rien.* It is only just, therefore, that such a payment should be reputed as null, and that the party so paid should be accountable to the remainder of the creditors. The Statute has no formal provision on this point, but it is easily inferred from its various clauses, and such is the opinion of both the ancient and modern writers.

§ 81. *Bonâ fide onerous contracts within the thirty days annullable.* Finally, from the same principle that every gratuitous appropriation should be returned to the mass of the estate, follow the provisions of paragraph 2, declaring that all onerous contracts, by which the creditors are injured, entered into before the insolvency was publicly known, but within thirty days from the assignment or attachment, although in good faith, are not null *pleno jure*, but are annullable, on condition that the third party be indemnified by the creditors. Such onerous contracts must be considered as gratuitous for the difference in the commodities exchanged.

§ 82. *Mortgage for value received.* A question here arises that will not fail to present itself in practice. Pledge, mortgage and transfer for previously existing debts are prohibited by the Act as conferring an undue preference; but are they also null, when given for cash value? We have already seen that transactions for adequate consideration, are not reputed fraudulent, even if the third party were aware of the insolvency of the debtor. A mortgage given for an adequate consideration, at the time it was given, cannot confer an undue preference. If the estate is lessened by such mortgage, it is on the other hand increased by an amount not only equal, but sometimes more, by the funds advanced during the debtor's embarassments, and which oftentimes tend to save him from ruin. Renouard, *Traité des Faillites,* vol. 1, p. 366, thus expresses himself: " As regards mortgages granted or contracted within the ten days* that precede insolvency, the same reasons do not exist. In the first place, we do not understand how the law, sanctioning the alienation of immovables, could consistently invalidate a mortgage, a partial alienation of real property. The characteristic of a gratuitous donation does not exist; because the consideration given for such mortgage increases the estate. We may also add that, were merchants unable to give a valid mortgage, their real estate would become worthless in their hands. It is the want of funds that compels a party to borrow; the possibility of bankruptcy would naturally occur to the minds of those to whom

* The delays prescribed by the Code are ten days and not thirty.

he would apply. Were money-lenders aware that in case of bankruptcy they would lose their recourse, they would not lend, or they would not transact, except on onerous conditions. A loan on immovables, properly and reasonably made, is an act that may prevent a failure, and the legislator has no reason to apprehend evil consequences therefrom. The general principle that contracts are annullable for fraud, offers a sufficient guarantee against abuses that may occur in particular cases."

§83. *Registration within the ten days.*—The Act contains no provision relating to the registration of mortgages immediately before a failure. But by the Registry Ordonnance C. S. L. C., chap. 37, s. 7, such registration *made within the ten days next before the bankruptcy of the debtor* is of no avail. The word *bankruptcy* means the public and notorious insolvency of the debtor, and not merely the appointment of the assignee.*

Such are, in a word, the nullities pointed out by our Statute, and to be truthful, we must admit that with the exception of the wording, they are borrowed from the French Law. Presumptions of fraud under the code extend to the ten days next before bankruptcy, and the date of the failure is determined by the judgment of the court, *jugement déclaratif.* Under our bankrupt system, a fraudulent debtor can always evade the law, by retarding the date of the assignment or the appointment of an official assignee, and so bring his transactions under the operation of the common law. The Statute, therefore, should have, like the French Code, extended the presumptions of fraud to the ten or thirty days

† This law prohibits the registration of mortgages within the ten days next before bankruptcy, even when the cause of such mortgages is anterior thereto or for cash. It rationally follows that no mortgage whatever can be registered or be available within the ten days. Such a provision is manifestly unjust, and deprives the insolvent of the means of overcoming his embarrassments, as is ably stated by Renouard in his remarks we have already quoted. In such a case, every idea of fraud and collusion disappears; the cause of the mortgage was legitimate and just; why, therefore, prevent its having full effect? It is, it may be urged, to place all the creditors upon a foot of equality. But to be logical, every preference and privilege should be done away with: all mortgages, both old and recent, and all rights legitimately acquired, set aside.

previous to the real insolvency, no matter when said insolvency was rendered publicly known. In the particular cases, however, that may be met with in practice, too much attention cannot be given to the ancient and modern commentators, such as Jousse, Bornier, Savary, Pardessus, Locré, Renouard, Massé and others, who have thoroughly studied questions and presumptions of fraud, with that skill and ability peculiar to the French legists.

§ 84. *Revocatory action.*—The Act, as also the common law, affords a remedy to have those nullities declared, and the amount disappropriated returned to the mass of the estate. Such remedy is the *revocatory action* to be instituted before our ordinary tribunals.

By whom and against whom can such nullities be invoked? Locré, *Esprit du Commerce*, vol. 3, p. 108, has thoroughly discussed the question and his remarks will not be without interest in this connection. "Three classes of persons are interested in the contract —the insolvent, the party with whom he contracted, and the creditors.

"If both kinds of nullities were absolute, they could be urged by all these persons; but as they are created in favor of the creditors only, they alone can avail themselves thereof. Thence follows that the insolvent and those with whom he contracted are always liable both to the creditors and themselves.

"Thus, the insolvent who has made a donation of real property will not be allowed to conceal it under the pretense that it was made within the delay prohibited by law. The same is to be said of an insolvent who gave a mortgage or lien upon his estate within the same period.

"Thus, also, a purchaser of an immovable who regrets his bargain, is not allowed to repudiate it on the ground that it was made in fraud of creditors.

"Thus, finally, a creditor who has already compounded with his debtor, will not be permitted to return the amount received, in order to rank on the estate, unless agreed to by the debtor and his creditors. He ceased thereby to be a creditor, and can no longer

urge such a nullity. Furthermore, no one can avail himself of his own fraud.

"So long as the creditors are silent, every previous act, however fraudulent, must be reputed valid. Nullities belong to them, and it is for them alone to urge them or not. It may be to their interest to leave things as they are, as is instanced by the example already quoted of a payment by anticipation.

"It is also to be observed that the creditors' rights are transferred to their heirs or representatives, and that the debtor's representatives enjoy no greater rights than he did.

"Now, against whom can such nullities be invoked?

"We do not here speak of that semi-nullity that concerns the insolvent alone, and that does not affect third parties, but of that nullity which destroys the contract and may be invoked against all parties.

"Can such nullity be urged against those only who have participated in the fraud, or against those also who have not so participated, but have been benefitted by the contract?

"Law has always grown a wide line of demarcation between him who contests only with a view of avoiding loss, *de damno vitando*, and him who contests with a view to profit, *de lucro captando*.

"The advantages of a third party in good faith are always to be preferred to the interests of the creditors, when the setting aside of the contract would be injurious to him.

"The interests of the creditors should be consulted, when the third party aims at profit."

We have nothing to add to these remarks, except to state that the assignee can bring the revocatory action, as it is especially provided for by the 8th section, par. 4.

Is there any time prescribed for the bringing of such revocatory action? According to the Roman law, *actio pauliana* must be brought within a year from the date of the contract. It is but just to restrict such an action within narrow bounds, in order to do away as soon as possible with the suspicion of fraud, and to give stability to transactions. However, the legislator is silent

on this point; he felt, without doubt, that so soon as the assignee discovers fraud, he will immediately adopt proceedings.

§ 85. *Action en déclaration de fraude.* Under the Act, action for fraud can be instituted not only against third parties. It also gives an extraordinary remedy, viz: imprisonment or *contrainte par corps* for fraud in certain cases. Imprisonment lies against a trader, who, knowing his embarrassments, fraudulently procures goods or money on credit, or who, under false pretences, obtains a delay for the payment of goods or monies advanced on credit. Such fraud has appeared to the legislator to be more odious than undue preference; and he provides that the guilty party be imprisoned for a period not exceeding two years, unless the debt and costs be sooner paid (sect. 8, par. 7). Such imprisonment is obtained by civil suit before the ordinary tribunals, alleging the debt and fraud, and praying that the defendant be declared guilty of fraud and condemned to be imprisoned, unless the sum claimed be sooner paid, in virtue of the statute in such a case made and provided.*

It is not only under the Insolvent Act that a trader so guilty can be submitted to corporal punishment. The criminal laws of the country have also provided therefor, and may be invoked at the will of the party aggrieved. The 73rd section, chap. 92 of the Consolidated Statutes of Canada provides as follows:—"If any person obtains any property whatever, with intent to defraud, such offender shall be guilty of a misdemeanor, and shall be imprisoned for any period not exceeding two years, with or without hard labour."

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* It may be here asked whether a woman, *marchande publique*, (trader) is also intended by such provision? The Insolvent Act has made no exception. Nevertheless, for reasons that can be referred to in an article published in the *Revue Canadienne*, vol. 2, p. 87-94, it would appear to us that a woman cannot be liable to imprisonment under the Insolvent Act, and that the exemption granted her by the Common Statutory Law should here hold good. It is not the first time that this privilege has been questioned under enactments granting *contrainte par corps* without distinction. It has been questioned under the Statute regulating *folle enchère*, but was declared to exist by Mr. Justice Loranger, at Sorel, on

§ 86. *Effects of fraud as to the Insolvent.* Fraud under the Statute authorises,—

1° Attachment and compulsory liquidation (sect. 3);

2° Opposition to the discharge of the insolvent (sect. 9, par. 6, 7 and 11);

3° Opposition to the allowance (sect. 5, par. 8);

4° The annulling of the discharge granted to the insolvent (sect. 5, par. 8);

5° The revocatory action.

Here ends the chapter upon fraud, as defined and punished by the Act; and we cannot but admit that it is incomplete—altogether favorable to the debtor and detrimental to the creditor.

We first say incomplete. No one has to learn the value of the insolvent's books of account, and their importance in case of bankruptcy. It is from such books that the guardian makes up the inventory to be submitted to court; it is by them that the assignee verifies claims, prepares and reserves dividends; it is partly from the insolvent's books that he decides contestations of divi-

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the 16th November, 1864, in the case of the *School Commissioners for the Town of Sorel* vs. *Crébassa* and *Dame Mary Walker, adj. et mise en cause.* Its exisience became also a question under the Ordonnance de Moulins and some other French ordonnances. For a certain time, the silence of the legislator upon the point was construed into a tacit abrogation of the common law, which until then had exempted a woman from imprisonment for any civil cause. The matter first divided jurisconsults, and as reported by one of them, *arrêts* (decisions) followed unfavourable to such exemption. Soon after, however, the contrary opinion gained strength and was finally adopted by the majority of the commentators, and sanctioned by numerous judgments of the highest courts in Paris. Ever since, neither under the Code, nor under the old law, which is our common law, has any attempt been made to introduce a different doctrine, from the fact that the law declaring *contrainte par corps*, made no reserve whatever. As is ably laid down by the eminent jurisconsult, Troplong, (*Contrainte par Corps*, page 237,) "this exemption is universal in civil matters; it survives all subsequent enactments introducing *contrainte par corps*, and which do not specially except women; there is always an exception *de jure*, virtual and implied, that can only be set aside by express provisions."

dends; it is, in a word, the merchant's books that reveal his business, his liabilities and assets, the cause of his failure, and make known his general transactions and his real position; and, strange to say! the non-production of such books or the irregular keeping thereof, only enables the creditors to oppose the insolvent's discharge. It is evident that such punishment is insufficient, and affords no guarantee to the creditors. It avails them little that the insolvent be not discharged, if he has deprived them with impunity of a large portion of his estate, and that no clue can be had thereto in his books. It is obvious that the Statute should have awarded a heavier penalty for the non-production of books and the irregular keeping thereof. Such omission should be reputed as fraudulent. The same should be said of the want of giving a satisfactory account of deficiencies. It often happens that a trader assigns no reasonable cause for his failure, and endeavours to conceal fraud which the creditors have reason to suspect, but are unable to prove. Such defects in the books and in the statements of the insolvents, especially where no explanation is given, should here induce the legislator to infer a presumption of fraud.

We say, in the second place, that the provisions of the Act respecting fraud are altogether in favor of the debtor and not of the creditor; and in this respect the legislator is thoroughly consistent with the general dispositions of the Act. It is not difficult to conceive that, in our days, the nullity of fraudulent contracts is an insufficient barrier against fraudulent transactions. Such nullity affects the third party more than it does the insolvent. Even were his fraudulent attempt unavailable, he has nothing to lose; for were the property so disposed of to remain in his hands, it would fall into the mass of the estate. The apprehension that he will not obtain his discharge is not sufficient to prevent him from carrying out his designs; for, after all, what would be the benefit of a discharge that will not afford the means to start a business, where the fraudulent appropriation would. Moreover, he would flatter himself that his unworthy conduct would not become known, and that, finally, through the influence of his friends and his privileged creditors, he would evade the severity of the law. All these motives are, therefore, insufficient. To prevent fraud it is not suf-

ficient to define it, but to punish it according to the exigencies of circumstances. Fraud ought to be looked upon as a misdemeanor and criminally punished, as it is considered by the French Code, the Imperial Act of 1861, and various laws in force in Europe and America. What! a party is put on his trial for the smallest larceny, and a trader, no doubt because he has failed, can appropriate with impunity a large amount of goods belonging to his creditors! Moreover, why only consider as criminal the act of a trader fraudulently obtaining goods or monies on credit? No matter under what shape or in what manner fraud is perpetrated, is it not always odious and injurious? It is obvious that in all those respects, our laws afford neither justice, equality, protection or consistency. It is astonishing that our Statute, which grants the discharge of the insolvent, and thereby gives a further incentive to fraud, has not also extended protection to the creditors by allowing them a recourse to imprisonment (*contrainte par corps*) to compel the insolvent to be at least honest. Right and necessity compel us to recognise such encroachments on personal liberty. To use the eloquent words of Troplong, they are necessary to deter the fraudulent debtor, to protect public order and individual rights to property. *Ce droit de coaction sur la liberté, par ses dures contraintes, est un effroi nécessaire pour le débiteur frauduleux, une sauvegarde publique, une garantie du crédit et de la propriété.*

XIII.

Partnerships.

§ 87. *Insolvency of firms.* It is an elementary principle that unincorporated firms enjoy the same privileges and advantages as private individuals, and are governed by the same general rules. Whence it follows that they can declare themselves and be declared insolvents. Such is the provision of section 12, par. 5.

The deed of assignment being extraordinary, and, we might say, judiciary, should be agreed to and signed by all the partners. Nothing, however, can prevent an individual partner from signing the deed, leaving to the creditors their extraordinary recourse against the partner who so refused, either by attachment or by *capias ad respondendum*, as the exigencies of the case may require.

The failure of one of the partners dissolves the co-partnership and vests the assignee with all his interests therein.

§ 88. *Distribution of the partnership estate.*—At common law, the creditors of the partnership and the partners individually are often confounded. "We would fall into a grave error, says Troplong, in his *Contrat de Société*, No. 863, page 349, if we imagine that, by reciprocity, the creditors of the firm, who are at the same time creditors of the partners individually in consequence of the necessary falling of the debts of the firm upon the individuals of the partnership, should be superseded upon their estate by their individual creditors, and be referred to exercise their rights upon the estate of the firm. I cannot account for M. Duranton's doubts upon a question so simple and so evident. The creditors of the partnership have upon the individual property of the partners equal rights with all the other creditors. Their recourse is direct and primary. This recourse cannot be modified by preliminary dispositions of the estate of the firm, nor avoided by preferences. This has been clearly understood by M Duvergier."

These principles were not always equitable in their application; for if it be true that the creditors of the firm were at the same

time creditors of the partners individually, it was equally admitted that the creditors of the individual partners were not so of the firm; and in allowing the former to rank with the latter, was to diminish the security of the individual creditors, who had just as much interest as the others in being paid; and since the year 1859, by the 22nd Vict. c. 4, our legislature has departed from the common law rule and established a new order of distribution, more conformable to equity and favorable to the interests of the individual creditors, as follows: 1o. the proceeds of the estate of the firm are applied to the payment of its debts in the first place, and secondly to the payment of those of the partners individually; 2o. the proceeds of the estate of the partners individually are applied firstly to the payment of their individual debts, and afterwards to the payment of their partnership debts (C. S. L. C. ch. 65 sect 6.) This order is adopted by the Insolvent Act; sect 5 par 7.

§ 89. *Partnership liable for the fraud of any one of its members.* It is evident that the fraudulent act of one of the partners, considered as a sufficient ground for the issuing of the *saisie arret*, or the annulling of an opposition to the discharge or of a fraudulent contract or preference, should always be held to be the act of the firm, from the moment that it diminishes the security of the creditors and that the firm profits by the transaction; but it is impossible to hold the copartner responsible and liable to be arrested, *contraignable par corps*, for the personal fraud committed in violation of section 8, part 7. The Act provides that he shall expiate personally, by imprisonment, the fraud of his copartner, who fraudulently obtains for the firm merchandise or money on credit, unless he *proves himself to have been ignorant of the incurring and of the intention to incur such debt.** In our opinion this clause is entirely arbitrary, to say the least of it. The Statute here presumes fraud, as it does in certain acts indicating insolvency. It provides, nevertheless, for the rights of third parties in good faith. Upon the simple question of annulling a fraudulent contract, it throws the burden of proof upon the plaintiff and not

* The French version has the disjunctive "or" instead of the conjunctive "and" to be found in the English one.

upon the defendant; and when the liberty of the trader is at stake, a simple presumption suffices: and what presumption? Merely that resulting from the knowledge of the debt; as if first of all, the knowledge of the insolvency of the firm by the copartner at the time the debt was contracted, should not be the sign and essential mark of connivance and partnership, the only evidence of the fraud common to all the partners, whether parties to the transaction or not. Every one will admit that then, but then only, all the copartners should be equally punished. But when the fraud is committed by one of the firm without the knowledge of his copartner, it is impossible to punish them all equally, in default of proof on the part of the innocent one. The partner, party to the fraudulent transation, can only be convicted upon the fullest evidence of its guilt, whilst the absent partner is bound to establish his innocence, *his ignorance of the debt and of the intention of his copartner.* But how is this proof to be made? Who can prove a negative? The thing is contrary to all established rules of evidence, absolutely impossible. Suppose even we presume that the debt has been contracted with the knowledge of the co-partner, are we thence to infer that he is an accomplice of the fraud. May he not have been ignorant of the insolvency of the firm—a fact the knowledge of which is essential to the guilt of the contracting partner. Again, this provision of the Act works an evident injustice and is an open violation of the rights of the citizen.

§ 90. *Bankruptcy of one of the members of a firm operates a dissolution thereof.* The paragraph 10 of the 4th section enacts as follows: If a partner in an unincorporated trading Company or co-partnership, becomes insolvent within the meaning of this Act, and an assignee is appointed to the estate of such insolvent, the assignee shall have all the rights of action and remedies against the other partners in such Company or co-partnership, which any partner could have or exercise by law against his co-partners after the dissolution of the firm; and may avail himself of such rights of action and remedies, as if such co-partnership or Company had expired by efflux of time."

To dissolve a commercial partnership in virtue of this provision, it is necessary that two conditions concur: 1st. That the partner be insolvent; 2nd, that an assignee should have been named, either in voluntary liquidation or under compulsory process. The consequences of the introduction of this new rule will be numerous and of great importance for commerce. Every one knows the abuses that resulted from commercial firms formed by insolvent parties. At once they put themselves beyond the reach of suit and seizure. Proof of the fraud, when met by oppositions, was the only resource of the creditor who almost always failed, if he dared to undertake the contestation and risk the costs of it. The consequence was that such partnerships were together with *séperations de biens*, separations of property, the great plague of commerce. By the clause of the Act just referred to, in future, the assignee will have a right to demand from the co-partners the portion of the insolvent partner, and even to sue for all that belongs to him, as in case of dissolution of the partnership by the expiration of time. The fraudulent bankrupt will still discover, without doubt, the means of braving and evading the law; he will arrange matters in such ways that nothing or next to nothing will be coming to him by the accounts of the firm, and it will remain only to the creditors to contest them upon the ground of fraud. It will be for the courts to act rigorously in these cases, to ensure the execution of the law.

It is not just, however, to assimilate, as the clause of the Act does, to this bankrupt in bad faith, the partner who, during the partnership, has contracted personal debts which he is unable to meet. In his case there is not even presumed fraud on the part of the firm; there is no conversion of the estate, nor any change of name; it is always the same person with the same rights; and if the merchant finds himself the dupe of the confidence which he has put in the individual solvency of the co-partner, he must blame his imprudence and not the partnership of which he has always been part.

It is still more dangerous to give retroactive effect of the law and to strike at once future partnerships and those which have existed for years. If commercial partnerships, in which there may

be a member personally insolvent, are bound to dissolve, as may be required under this Act, well-established houses would be troubled and even overthrown, to the great detriment of commerce in general. In a word, it is right, as every one admits, to condemn the bankrupt who fraudulently forms a partnership, but it would be very wrong to trouble, without sufficient cause, partnerships formed and conducted with good faith.

XIV.

Married Women.

§ 91.—*Notice of action of separation.*—An abundant source of fraud is separation of property, *séparation de biens*—which an insolvent in bad faith often demands by and in the name of his wife, with the intention of transferring his movable property to her and continuing business in her name; and it is to be feared that these demands may become still more numerous in consequence of that clause of the Act, which dissolves the partnerships formed by an insolvent to evade his creditors. The last resource, then, will be to trust his lot to his wife and to obtain, at all events, a separation of property. It is to be hoped that our tribunals will lay a heavy hand on these demands almost always taken, not to save matrimonial rights, which have no existence, but with the design concerted and almost avowed of transferring to the wife the goods of the community, and consequently defrauding the creditors. Besides, the creditor should interfere in these cases and direct the attention of the Court to the futility and intentions of the action. In order to prevent these separations from being—so to speak—clandestine, the Act, (sec. 12, par. 3,) provides that the institution of every action *en séparation de biens ou en séparation de corps et de biens*, shall be advertised in the *Canada Gazette* and in two newspapers, one French and one English, published in or nearest to the place where the defendant resides.

Every such action is to be commenced in the district where the defendant resides.

Every creditor has the right to intervene in the case, and to examine, without costs, the defendant upon his estate and effects. If he, the creditor, contest the demand, or the judgment, he does so at the risk of paying costs, like any other intervening party.

The separation of property demanded as against a non-trader, does not require publication—the Act has changed nothing in the procedure in this latter case.

These rules, we have said, apply equally to action *en séparation*

de corps et de biens, separation as to body and property; and in this respect, the rigor of the Statute is not required. It would not do to push our zeal for commerce, so far as to prejudice the rights of the wife, and above all, those of a mother of a family. We admit that merchants should have guarantee, that they should be protected from fraud; but every one will admit that the wife, always worthy of the protection of the law, and particularly of our French law, should also find security and assistance at the hands of the legislature. Why oblige the wife, who, for ill-treatment and other shameful abuses, is obliged to sue her husband for separation, to publish her intention so to do? Is it not sufficiently disagreeable, sufficiently painful for her, to be under the necessity of demanding protection from the courts for herself and her children? Why should she be forced to give extra publicity to her suit? Here there can be no fraudulent intent in obtaining a separation of property, which by the law is necessarily incidental to the separation of body; since both take place simultaneously, and cease upon the reconciliation of the parties.

§ 92. *Registration of marriage contracts.*—If in cases of insolvency there are husbands who seek separation of property, there are others who, by precaution, stipulate separation by marriage contract; and at the present day, there are very few traders who neglect to make that stipulation, as they say, for prudential reasons and the wise provisions against the misfortune which may arise in the course of their business. It is not then sufficient that the creditor should be notified of the action for separation, as provided by the Act; he ought also to know who are in the same position by their marriage contract; and it is singular that the Statute has not, like the ordinance of 1673, required the publication of these separations — the secrecy of which is as prejudicial to commerce as that of judicial separations. It is vain to pretend that by the Registry Act, all contracts of marriage should be registered: that registration is required only to preserve to the wife the rank of her matrimonial mortgages; it has no application whatever to the clause of contractual separation, which receives its full effect without publicity and regis-

tration; nor has it any application to stipulations or guarantees purely movable. As to the latter, the Act has introduced new provisions by section 12, par. 2, enacting as follows:—

"In Lower Canada, every trader whom arries, having previously executed a contract of marriage by which he gives or promises to give or to pay, or cause to be paid to his wife, any property or effects, or any sum of money, shall cause such contract of marriage to be enregistered in the registration division in which he has his place of business, within thirty days from the execution thereof; and every trader already married, having such marriage contract with his wife, shall enregister the same as aforesaid, if it be not there already enregistered, within three months from the passing of this Act; and every person, not a trader, but hereafter becoming a trader, and having such a contract of marriage with his wife, shall cause such contract to be enregistered as aforesaid (if it be not previously there enregistered), within thirty days from becoming such trader; and in default of such registration the wife shall not be permitted to avail herself of its provisions in any claim upon the estate of such insolvent for any advantage conferred upon or promised to her by its terms; nor shall she be deprived by reason of its provisions of any advantage or right upon the estate of her husband, to which, in the absence of any such contract, she would have been entitled by law."

This provision affects only marriage contracts of *traders*, and applies to the following cases: 1st, the contract of marriage of a trader about to marry; 2nd, that of a trader already married; 3rd, that of all married men who afterwards become traders. In the first case, the registration is to be made within the thirty days from its execution; in the second, within three months from the passing of the Act, that is to say, from the 30th June 1864, if it has not been already registered; and in the third case, within the thirty days after the party has commenced to trade; and in every case, the registration is to be made in the registry office of the county in which the trader carries on his business.

As we have seen, in cases where real property situated in a county other than that of the business place of the trader, is mortgaged by the contract of marriage, this contract ought to be registered in the registry office of the county where the same

is situated, and at the same time in the office of the county where the trader carries on his trade, if it contains donation of movable property.

Registration anterior to the Act in an office other than that of the county in which the trader carries on his business, is not sufficient. It ought to be registered also in the office of the latter.

If the trader becomes bankrupt, the want of registration of the marriage contract involves, as regards the creditors, the nullity of the stipulation, but not of the contract itself; and in that case, the wife can claim all her matrimonial rights and advantages of survivorship, created by the Law, as if there had been no marriage contract.*

§ 93. *Insolvent's wife a witness.* Finally, it remains under this chapter, only to remark upon the clause 10, par. 4, which reads as follows: "Any other person who is believed to possess information respecting the estate or effects of the insolvent, may also be from time to time examined before the Judge upon oath, etc." The law not even excepting the wife of the Insolvent, the creditor is therefore authorized to produce her to be examined as a witness upon her knowledge of the business-affairs of her husband, of which she is always almost ignorant. Is it not dangerous to allow an exacting and perhaps malicious creditor thus to trouble the domestic hearth, the peace of the family, and the happiness and privacy of husband and wife?

* This provision, it may be remarked, is in direct contradiction with the spirit and letter of the Common Law, which declares absolutely irrevocable, all matrimonial stipulations; and it introduces a state of things entirely subversive of the time-honored principles of our jurisprudence. It leaves the wife to speculate upon the chances as to whether she would be in a better position by the non-registration of her contract. Her husband becoming insolvent, and her contract remaining unregistered, she is at liberty to fall back upon her matrimonial rights at Common Law, which are privileged, and may thus hold all the assets of the Insolvent, to the prejudice of the mass. Thus, the husband, under the Act, obtains his discharge, whilst the wife receives the property; he starts again in business and acquires property; in the meantime the wife registers her contract; the husband fails a second time, and she claims under her registered contract of marriage; and of course, according to the Act in question, again defeats the creditors.

XV.

Conservatory Process.

§ 94. The right to attach merchandise sold and not paid for, given by the articles 176 and 177 of the Custom of Paris is evidently just and frequently resorted to; and it is astonishing that the English law, always so favorable to commerce, has never admitted this privilege beyond the power of *stoppage in transitu.* Nothing is more just or more in conformity with the first notions of law than that the seller, who finds in the possession of the buyer his goods not paid for, should be able to separate them from the mass of the stock of the insolvent. Indeed, no one can be proprietor of a thing until he has paid the price of it. If, then, the goods of the insolvent are the security, *gage*, of his creditors, because they are his, the goods of others conditionally possessed by him cannot afford such security. The legitimate proprietor can then claim them, as being either his property or the security for their price, accordingly as they have been sold for cash or on credit; and to this effect, there are two facts to establish, without preliminary affidavit, to wit: 1stly, His quality of non-paid vendor; and 2ndly, the identity of the merchandise reclaimed, in the entire condition in which it was delivered, *non déballées et portant leurs vieilles marques.*

Just as this principle of privilege and seizure is, bad faith has often made it the means of fraudulent preference as between the creditors. Frequently, in cases of insolvency, the creditors who were relatives or friends of the insolvent, pretended to find in his possession their non-paid merchandise, bearing their old marks, although sold three or fourth months previously, and consequently revendicated them by conservatory process, *saisie conservatoire*— which in most cases led to the fraudulent removal of the greater part of the insolvent's estate, beyond the reach of other creditors, who had given credit and advanced their goods, and which goods the debtor represented as unpacked or sold. Hence the numerous suits and contestations which the exercise of this right of the

vendor has given rise to. Hence the well founded complaints of the non-privileged creditors, who have always borne this as a great injustice and a means of fraud with regard to them. To prevent proceedings so ruinous to commerce in general, the legislator provides in cases of insolvency only, not for the suppression of the right of conservatory process, but for the restriction and limitation of its exercise to the fifteen days immediately following the delivery of the goods. Sec. 12, par. 1, enacts as follows:

"In all cases of sales of merchandise to a trader in Lower Canada subsequently becoming insolvent, the exercise of the rights and privileges conferred upon the unpaid vendor by the one hundred and seventy-sixth and one hundred and seventy-seventh articles of the *Coutume de Paris*, is hereby restricted to a period of fifteen days from the delivery of such merchandise."*

Apart from the case of sales to *traders* subsequently becoming insolvent, the rights and privileges of the vendor remain intact and are regulated by the provisions of the common law alone.

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* How is this clause to apply to a purchaser insolvent at the time he makes the purchase? It would appear to have no application whatever in such case, the Act providing for cases of insolvency arising subsequent to the sale—"in all cases of sales of merchandise to a trader in Lower Canada *subsequently becoming insolvent?*"

XVI.

Books of Account.

§ 95. Section 9, par. 6, says that for the future the failure of the insolvent to *keep or produce an account book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade,* is a valid ground for opposing his discharge.

By this clause, every trader is obliged to keep a cash book and all other books ordinary used in his trade. The legislature has not specified the number, nor the manner of keeping them; it is evident in fact that the contractor and all mechanics in general cannot be subjected to the same rules as the wholesale or retail merchants. The nature and number of the transactions of these latter render necessary a greater number of books, which are generally kept by our merchants according to the Italian method, and comprise:—

1. The Waste Book or Blotter, in which are written pêle-mêle all the transactions of the day, including the personal expenses.

2. The Invoice Book, in which are entered on one side the merchandise sent out, and on the other, those received.

3. The Cash Book, in which are entered from day to day the sums received and paid out.

4. The Bill Book, containing the number and description of notes, bills of exchange, obligations, and other like securities, given and received.

5. The *Day Book* or *Journal*, which is the base of the *Ledger*, and is made up from the Blotter in a more concise and methodical form.

6. The *Ledger*, in which, at intervals, weekly for example, are condensed and entered, *à la grosse*, in the order of debtor and creditor, the contents of all the books.

XVII.

Conclusion.

§ 96. What are we to conclude from the foregoing review of the Insolvent Act of 1864? What are we to say of the system it introduces and of the effects which it will produce? Having examined the clauses of this law, submitted to analysis the different operations which it prescribes, and having weighed their nature and tendency, the answer to this question is not difficult. It is easy to perceive, and we have had more than one occasion to prove it in the course of this essay, that the Insolvent Act of 1864 is incomplete and prejudicial to the commerce of the country in general.

Firstly, it is prejudicial to commerce, because it opens new doors to fraud, affords to the bankrupt new means of deception. What is to be expected from a law which, from the first to the thirteenth clause, and from the first to the hundred and thirty-first paragraph, favors almost always the insolvent and not the creditor? Be it remarked, this assertion is not gratuitous; had we no other proof of it than the fact of all the advertisements and notices of failures, which have crowded, since the coming into force of the Statute, the columns of our newspapers, our position would be fully established. But again, when we glance at the provisions of the Act, the mode, voluntary as well as compulsory, of winding up the affairs of the insolvent; when it is observed that the bankrupt has himself the control of the important delays of the announcement of his failure and the divesting himself of his estate; that he can still with impunity defeat the law and defraud his creditors, obtain, in spite of the latter, a judicial discharge; when it is clear that the hope of such discharge will be for the debtor a powerful motive to induce him to diminish his assets, and afterwards to declare himself in a state of bankruptcy, in order to come out of it enriched with the spoils of the mass; when, we say, we consider all these complications and formalities, which here, as always, serve the debtor and not the creditor; when we remember, in fine, all these delays and costs of liquidation, without forgetting the expenses of the insolvent in obtaining his discharge and attend-

ing the meetings of creditors, for the arrangement of his own affairs, it is easy to see, we say again, that the fact, the evidence of which we invoked, is but the rigorous consequence of the law, the inevitable result of the provisions of the Act.*

§ 97. But it is not only because the Act favors the interests of the insolvent to the detriment of his creditors that it is fatal to the commerce of the country, but because, like every other bankrupt law, it will injure our credit abroad. Great Britain, which herself makes and maintains her credit, can afford that the fluctuations of her great markets should be known to the world; she can even publish her maritime and other commercial reverses; but Canada, whose trade can scarcely count twenty years of existence, has grown and is still growing by foreign capital and resources, Canada cannot take and affect those airs of mercantile independence, placard her losses and failures, without exposing fundamentally the value of her credit. What, for instance, is thought, at the present moment, in England, the United States and elsewhere, upon reading, every day, all these notices of insolvency, which parade before the commercial world, events for the most part insignificant in our eyes, but which in the mind of a stranger would naturally take the proportions of a crisis. It is incontestable that all these reported failures, taken in connection with the real fluctuations of our market, will have the effect of creating in the opinion of the English or American exporter or manufacturer a mistrust of the credit of our merchants, and of injuring thereby the commercial progress of Canada.

* Since the coming into force of the law, the defects above pointed out have been seriously felt by the commercial community; and, as proof of this, it is sufficient to remark that but five or six cases of compulsory liquidation of minor importance can be found upon the books of the Court, forcibly taken under exceptional circumstances; and moreover, as to cases of voluntary liquidation, they are, for the most part, those of bankrupts without assets; but, as to recent failures, where there was in reality an estate to act upon, the creditors have decidedly preferred to arrange with the debtor according to the common law, rather than sacrifice such estate to the complicated and expensive machinery of the Insolvent Act.

§ 98. This is not all. The Act in question will be, even at home, an obstacle to the development of our commerce, and this objection exists without distinction to every bankrupt law, founded upon the same basis. It will be admitted that the life of commerce is credit founded on the personal industry and energy of the trader, and not upon the guarantees of real property, which are perfectly foreign to his capacity and ability. Bankrupt laws destroy this credit; and in proof of this assertion, we will take the liberty of making an extract from a remarkable article published in the *Revue de Législation*, page 242, and written expressly for Canada in 1846, when the bankrupt law of 1843 was in operation:

"The internal commerce of the country, says the anonymous writer, ought to be sober, prudent and limited; the bankrupt laws in assuring before hand the discharge from debts, will render it improvident, hazardous, and rash; first cause of mistrust. The facility of freeing himself from embarrassments and of avoiding his struggle always uncertain, will on the very first difficulty paralyse the energy and determination of the trader: for why struggle to pay debts, when it is so easy not to have any? This is a second cause of mistrust. When the labor and talents of the insolvent were the settled guarantee of his creditors, it was for their interest to make this labor and these talents available: and thence all these aids and encouragements which never failed to the unfortunate, and which assisted him to overcome difficulties and to regain lost ground. Bankrupt laws have put an end to this state of things, and hence a third source of mistrust. When debts were moral obligations, which could be only discharged by payment or remission, the debtor necessarily felt the importance of not contracting debts which he might not be able to pay. Since, without the consent of the creditor, the law liberates the debtor, his conscience is less sensitive and timid, and he is not afraid of incurring liabilities. This is a fourth cause of mistrust. The circumstances which make a man bankrupt are so numerous and of so frequent occurrence, that through the momentary caprice of the debtor, or of one of his creditors, the most prosperous business may be exposed to the action of a bankrupt court. The best proof that these laws have injured credit is to be found in the fact that,

since their introduction, trade between the importer and retailer has been carried on by means of mortgages and securities,—a state of things but too clearly shown by the books of the Registry Office."

§ 99. Since the foregoing lines were written, facts ~~are~~ have not been wanted to confirm their truth. The bankrupt law denounced by this writer in terms so apt and concise, after having produced the great crisis of 1842,* brought about the other commercial difficulties of 1848, which caused, often under the most trifling pretexts, failures so numerous and so prejudicial to commerce, that it became necessary to abolish the law in 1849. Immediately after the repeal, confidence was restored, and ever since, up to a recent period, has maintained itself, even through serious trials and difficulties: and we have seen in 1857, when the tightness of money was universally felt, and public credit suffered considerably in the foreign markets, we have seen, we say, the merchants of Canada and of Montreal in particular, zealous in assisting each other and of thus saving the honor of Canadian credit; and thanks to these generous efforts and perseverance, those even who would not have failed to avail themselves of a bankrupt law, and who regretted the want of one, were finally delivered from an inevitable ruin. And thus by energy and perseverance, not by the protection of bankrupt laws, failures became more rare; the commercial credit of Canada was created, and attained within some years to a state of stability acknowledged by strangers; but now that this credit, so deservedly established, is again submitted to the action of principles which were the cause of its destruction in 1842 and 1848, it is to be feared that by this system new embarrassments may arise to obstruct its course, and that the legislature may too late find out, after an experience which threatens to be more lamentable than the former, that our young country has no more to gain from bankrupt laws than the commercial

* Bankrupt laws were introduced in the country in 1839, and repealed in 1843, when a temporary act, based upon the same principles, was enacted, and continued to 1849.

people of the United States, who abandoned them in 1843, after a short and unsuccessful trial of one year; and we may add, that notwithstanding the pressure brought to bear upon that country by an unprecedented civil war, they have not been adopted.*

§ 100. Finally, we think we do not stretch the truth in affirming that a large number of merchants, if not the greater number, would be satisfied with few amendments and simple additions to the existing laws, for the sole purpose of defining and punishing fraud and giving to the *cession de biens* its proper and necessary effects. Let the Legislature, by rigorous enactments, endeavour to banish fraud; and in order to do so, let it introduce the presumptions of fraud consecrated by the codes of the commercial nations of Europe; let it require from each trader the keeping of regular books of account and authorize the seizure of the same; let it strike without mercy at *séparations de biens* and fraudulent commercial partnerships—the two great plagues of our trade;—let it force the *marchande publique* to carry on business under her own name and not under that of her husband; let it

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* In confirmation of the foregoing remarks, we may note the commercial experience of the past six months. A want of confidence amongst merchants and business men has sprung up on every side. Collections of outstanding debts have decreased millions of dollars, when compared with the amount collected during the same period in 1863 and '64, and relatively considering the amount due. Imports have fallen off nearly one half. The banks look with closer scrutiny at the paper offered for discount. Trade is becoming paralyzed through the caution necessary to its safe transaction; and failures in business are more numerous comparatively than heretofore.

All these unfortunate difficulties seem to have resulted from the want of confidence produced, in a great measure, by the Insolvent Act of 1864.

It is true that the failure of crops, owing to late frosts and droughts of 1863 and '64 in Upper Canada and the north-western United States, has assisted in producing the general business difficulties of the times, by causing a large falling off in the usual trade; yet such a contingency might readily have been bridged over until the coming crops could be brought into market: had that business confidence, which has heretofore existed in Canada, not been impaired by the action of the law which we have reviewed.

limit the right of conservatory process of the non-paid vendor; above all, let every fraud be considered a crime and punished as such, at least to the full extent of modern legislation—all so many rules perfectly distinct and independent of all systems of bankruptcy; and it will be seen that to arrive at the most equitable and easy arrangement of the affairs of the insolvent, it will remain only to define the rules of making a *cession de biens*, voluntary or forced, and the effects thereof, by the creation of the office of assignee and in giving to a certain number of the creditors, say the majority in number and in value, the power to control the minority and to grant, amongst other things, the discharge to the insolvent.

§ 101. Here our review closes. Commenced and written in a hurry for a newspaper, where the first articles appeared, we deemed it right to discontinue that form of publication, in order to give it a wider bearing and to touch upon several important questions, too discursive perhaps for a newspaper communication. We pretend, however, to offer to the public only an analysis, simply a criticism of the Act; and we will feel richly rewarded if our essay prove useful.

We have, by permission, dedicated this *Review* to the author of the law which we have taken the liberty to criticise; and we have done so with high respect for the laborious legislator, the distinguished advocate, and the learned professor who taught us, in the University, the first principles of Commercial Law, and to whom we have often referred since, as our master in the science of Law.

DÉSIRÉ GIROUARD.

Montreal, 1*st June*, 1865.

APPENDIX.

CAP. XVII.

An Act respecting Insolvency.

[*Assented the* 30*th June*, 1864.]

Preamble.

WHEREAS it is expedient that provision be made for the settlement of the estates of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Application of this Act.

1. This Act shall apply in Lower Canada to traders only, and in Upper Canada to all persons whether traders or non-traders.

OF VOLUNTARY ASSIGNMENTS.

Proceedings for voluntary assignment of an insolvent estate; meeting of creditors to be called.

2. Any person unable to meet his engagements, and desirous of making an assignment of his estate, or who is required so to do as hereinafter provided, may call a meeting of his creditors at his usual place of business, or at his option at any other place which may be more convenient for them; and such meeting shall be called by advertisement (Form A), stating in such advertisement the object of such meeting; and at such meeting he shall exhibit statements showing the position of his affairs, and particularly a schedule (Form B), containing the names and residences of all his creditors, and the amount due to each, distinguishing between those amounts which are actually overdue, or for which he is directly liable, and those for which he is only liable indirectly as endorser, surety or otherwise, and which have not become due at the date of such meeting; and also the particulars of any negotiable paper bearing his name, the holders of which are unknown to him,—which schedule shall be sworn to by the Insolvent, and may be corrected by him likewise under

Schedules of creditors, &c.

Attestation.

oath at the meeting at which it is so produced, also the amount due to each creditor, and a statement showing the amount and nature of all his assets; and he shall also produce his books of account, and all other documents and vouchers, if required so to do by any creditor:

Assets, books, &c,

Notice by post.

2. Each notice of such meeting sent by post, as hereinafter provided, shall be accompanied by a list containing the names of all the creditors of the insolvent whose claims exceed one hundred dollars, and the aggregate amount of those under one hundred dollars:

Assignee appointed by creditors.

Votes of creditors.

3. At such meeting, the creditors may name an assignee, to whom such assignment may be made; and if a vote be taken upon such nomination, each creditor shall only represent in such vote the amount of direct liabilities of the insolvent to him, and the amount of indirect liabilities then actually overdue; and thereafter the insolvent shall make an assignment of his estate and effects to the assignee so chosen:

Assignment.

If no assignee be appointed by creditors, insolvent may select one.

4. If no assignee be named at such meeting, or at any adjournment thereof, or if the assignee named refuses to act, or if no creditor attends at such meeting, the insolvent may assign his estate to any solvent creditor resident within this province, not related, allied, or of kin to him, and being such creditor for a sum exceeding five hundred dollars, or if he has no such creditor for so large a sum who will accept such assignment, then to the creditor otherwise competent and willing to accept, representing the largest claim upon him; or he may make such assignment to any official assignee resident within the district or county within which the insolvent has his place of business and nominated for the purpose of this Act by the Board of Trade in such District or County, or if there be no Board of Trade therein, then by the nearest Board of Trade thereto;

Or assign to an official assignee.

In case of dispute at first meeting of creditors, as to votes.

5. If any dispute arises at the first meeting of creditors as to the amount which any one of the creditors is entitled to represent in the nomination of an assignee, or upon any other question which may properly be discussed at such meeting, such dispute shall be decided by the votes of the majority in number of the creditors present, or represented by agents or proxies; but if the dispute have reference to any pretension of any creditor as to the existence or amount of his claim, such creditor shall not vote upon the question; but no neglect or irregularity

in any of the proceedings antecedent to the appointment of the assignee shall vitiate an assignment subsequently made to an assignee competent to receive it under this Act; Irregularity not to vitiate appointment.

6. The deed or instrument of assignment may be in the form C., or in any other form equivalent thereto, and if executed in Upper Canada shall be in duplicate; and a copy of the list of creditors produced at the first meeting of creditors shall be appended to it; and no particular description or detail of the property or effects assigned need be inserted in such deed; and any number of counterparts of such deed required by the assignee shall be executed by the insolvent at the request of the assignee, either at the time of the execution of such deed or instrument, or afterwards, to which counterparts no list of creditors need be appended; Form of deed of assignment, &c. Counterparts of deed.

7. The assignment shall be held to convey and vest in the assignee, the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable paper, stocks, bonds, and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and moveable and immoveable property, debts, assets and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, excepting only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided; Effect of assignment, as to estate of insolvent. Exception.

8. Forthwith upon the execution of the deed of assignment, the assignee, if appointed in Upper Canada, shall deposit one of the duplicates thereof, and if in Lower Canada, an authentic copy thereof, in the office of the proper Court; and in either case the said list of creditors shall accompany the deed or instrument so deposited; Duplicate or authentic copy of assignment to be deposited, and where.

9. If the insolvent possesses real estate, the deed of assignment may be enregistered in the Registry Office for the Registration Division or County within which such real estate is situate; and no subsequent registration of any deed or instrument of any kind executed by the insolvent, or which otherwise would have affected his real estate, shall have any force or effect thereon; and if the real estate be in Upper Canada and the deed of assignment be executed in Lower Canada before Notaries, a Registration of deed of assignment, if the insolvent has real estate. Assignment executed in L. C. or U. C., how registered in the other section of the Province.

copy of the deed certified under the hand and official seal of the Notary or other public officer in whose custody the original remains, may be registered without other evidence of the execution thereof, and without any memorial; and a certificate of such registration may be endorsed upon a like copy; and if the property be in Lower Canada and the deed of assignment be executed in Upper Canada, it may be enregistered by memorial or at full length in the usual manner; but it shall not be necessary to enregister, or to refer on registration in any manner to the list of creditors annexed to the deed of assignment;

Deed executed in U. C. form to have force in L. C., and *vice versâ*.

10. If such deed be executed in Upper Canada, according to the form of execution of deeds prevailing there, it shall have the same force and effect in Lower Canada as if it had been executed in Lower Canada before notaries; and if such deed be executed in Lower Canada before notaries, it shall have the same force and effect in Upper Canada, as if it had been executed in Upper Canada, according to the law in force there; and copies of such deed, certified as aforesaid, shall constitute, before all courts and for all purposes, *primâ facie* proof of the execution and of the contents of the original of such deed without production of the original.

If notarial.

COMPULSORY LIQUIDATION.

In what cases the estate of an insolvent trader shall become subject to compulsory liquidation.

3. A debtor shall be deemed insolvent and his estate shall become subject to compulsory liquidation:

Debtor absconding.

a. If he absconds or is immediately about to abscond from this Province with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process, or if being out of the Province he so remains with a like intent, or if he conceals himself within this Province with a like intent;

Secreting estate

b. Or if he secretes or is immediately about to secrete any part of his estate and effects with intent to defraud his creditors or to defeat or delay their demands or any of them;

Fraudulently assigning.

c. Or if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

Or procuring it to be seized in execution.

d. Or, if with such intent he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under

or by any process or execution, having operation where the debtor resides or has property, founded upon a demand in its nature proveable under this Act, and for a sum exceeding two hundred dollars, and if such process is in force and not discharged by payment or in any manner provided for by law;

e. Or if he has been actually imprisoned or upon the gaol limits for more than thirty days in a civil action founded on contract for the sum of two hundred dollars or upwards, and still is so imprisoned or on the limits; or if in case of such imprisonment he has escaped out of prison or from custody or from the limits; Or being imprisoned in civil action.

f. Or if he wilfully neglects or refuses to appear on any rule or order requiring his appearance to be examined at to his debts under any statute or law in that behalf; Or refusing to appear.

g. Or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or of any part of them; Or to obey orders for payment.

h. Or if he wilfully neglects or refuses to obey or comply with the order or decree of the Court of Chancery or of any of the judges thereof, for payment of money; Or any order or decree in Chancery.

i. Or if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this Act; Or assigning generally, except under this Act.

2. If a trader ceases to meet his commercial liabilities generally as they become due, any two or more creditors, for sums exceeding in the aggregate five hundred dollars, may make a demand upon him (Form E.) requiring him to make an assignment of his estate and effects for the benefit of his creditors; Demand of assignment, trader does not meet his commercial liabilities.

3. If the trader on whom such demand is made, contends that the claims of such creditors do not together amount to five hundred dollars, or that they were procured in whole or in part for the purpose of enabling such creditors to take proceedings under this Act; or that the stoppage of payment by such trader was only temporary, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such trader to meet his liabilities, he may, within five days from such demand, present a petition to the judge praying that no further proceedings under this Act may be taken upon such de- Counter petition denying the truth of the allegations in such demand.

mand; and, after hearing the parties and such evidence as may be adduced before him, the judge may grant the prayer of his petition and thereafter such demand shall have no force or effect whatever; and such petition may be granted with or without costs against either party; but if it appears to the judge that such demand has been made without reasonable grounds, and merely as a means of enforcing payment under color of proceeding under this Act, he may condemn the creditors making it to pay treble costs;

Judge to decide.

If the petition be rejected, or none be presented, &c.

4. If such petition be rejected, or if while such petition is pending, the debtor continues his trade, or proceeds with the realization of his assets; or if no such petition be presented within the aforesaid time, and the insolvent during the same time neglects to call a meeting of his creditors as provided by the second section of this Act; or if he does not complete such assignment within three days after such meeting, or if there be an adjournment thereof, then within three days after such adjournment; or if having given notice of a meeting of creditors, as required by the second section of this Act, he neglects to proceed further thereunder, his estate shall become subject to compulsory liquidation;

Liquidation to be compulsory.

But proceedings must be taken within three months.

5. But no act or omission shall justify any proceeding to place the estate of an insolvent in compulsory liquidation, unless proceedings are taken under this Act in respect of the same, within three months next after the act or omission relied upon as subjecting such estate thereto; nor after a voluntary assignment has been made, or an assignee appointed under this Act;

Proceedings for issue of writ of attachment of debtor's estate, in L. C.

6. In Lower Canada an affidavit may be made by a creditor for a sum not less than two hundred dollars, or by the clerk or other duly authorized agent of such creditor, setting forth the particulars of his debt, the insolvency of the person indebted to him, and any fact or facts which, under this Act, subject the estate of such debtor to compulsory liquidation (Form F), and upon such affidavit being fyled with the Prothonotary of the district within which the insolvent has his place of business, a writ of attachment (Form G) shall issue against the estate and effects of the insolvent addressed to the sheriff of the district in which such writ issues, requiring such sheriff to seize and attach the estate and effects of the insolvent, and to summon him to appear before the court to answer the premises, within such

time as is usual therein for the return of ordinary writs of summons; and such writ shall be accompanied by a declaration setting forth such facts and circumstances as are necessary to be proved to sustain the issue thereof; and shall be subject as nearly as can be to the rules of procedure of the court in ordinary suits, as to its issue, service, return and subsequent proceedings; Declaration to accompany writ

7. In Upper Canada, in case any creditor by affidavit of himself or any other individual (Form F), shows to the satisfaction of the judge that he is a creditor of the insolvent for a sum of not less than two hundred dollars, and also shows by the affidavits of two credible persons, such facts and circumstances as satisfy such judge that the debtor is insolvent within the meaning of this Act, and that his estate has become subject to compulsory liquidation, such judge may order the issue of a writ of attachment (Form G) against the estate and effects of the insolvent, addressed to the sheriff of the county in which such writ issues, requiring such sheriff to seize and attach the estate and effects of the insolvent, and to summon him to appear before the court to answer the premises, within such time as is usual therein for the return of ordinary writs of summons; and such writ shall be accompanied by a declaration setting forth such facts and circumstances as are necessary to be proved to maintain the issue thereof, and shall be subject as nearly as can be to the rules of procedure of the Court in ordinary suits as to its issue, return, and subsequent proceedings; The same in U. C. Declaration to accompany writ

8. Immediately upon the issue of a writ of attachment under this Act, the Sheriff shall give notice thereof by advertisement thereof (Form H); Notice of issue of writ.

9. Under such writ of attachment the Sheriff shall, by himself or by such agent or messenger as he shall appoint for that purpose, whose authority shall be established by a copy of the writ addressed to him by name and description, and certified under the hand of the Sheriff, seize and attach all the estate and effects of the insolvent wherever situate, including his books of account, moneys and securities for money, and all his office or business papers, documents, and vouchers of every kind and description; and shall return, with the writ, a report under oath of his action thereon; How writ shall be executed. Return.

10. If the Board of Trade in the County or District in which is situate the place of business of the debtor, or if there be no

In whose custody property attached shall be placed in L. C.

Board of Trade in such County or District, then the Board of Trade nearest thereto, has appointed official assignees for the purposes of this Act, the sheriff shall place the estate and effects attached in the custody of one of such official assignees, who shall be guardian under such writ; but if not he shall appoint as guardian such solvent and responsible person as may be willing to assume such guardianship;

Duty of such person.

11. The person so placed in possession shall forthwith proceed to make an inventory of the estate and effects of the defendant; and also such statements of his affairs as can be made from the books, accounts and papers attached; And he shall file such inventory in the Court on the return day of the writ; and shall produce such statements at the meeting of creditors called for the appointment of an official assignee;

Inventory, &c.

Petition to set aside attachment.

12. Except in cases where a petition has been presented as provided for by the third paragraph of this section, the alleged insolvent may present a petition to the judge at any time within five days from the return day of the writ, but not afterwards, and may thereby pray for the setting aside of the attachment made under such writ, on the ground that his estate has not become subject to compulsory liquidation; and such petition shall be heard and determined by the judge in a summary manner, and conformably to the evidence adduced before him thereon;

To be decided summarily.

Meeting of creditors for appointment of official assignee.

13. Immediately upon the expiration of five days from the return day of the writ, if no petition to quash or to stay proceedings be filed, or upon the rendering of judgment on the petition to quash, if it be dismissed, the judge upon the application of the plaintiff, or of any creditor intervening for the prosecution of the cause, shall order a meeting of the creditors to be held before him or any other judge, at a time and place named in such order and after due notice thereof, for the purpose of giving their advice upon the appointment of an official assignee;

Who may be appointed official assignee.

14. At the time and place appointed, and on hearing the advice of the creditors present upon oath (Form I,) the judge shall appoint some person to be such official assignee, which person shall be the person proposed by the creditors present, if they are unanimous; and if they are not unanimous, then the judge may appoint either one of the persons proposed by the creditors, or one of the official assignees named by the Board of Trade;

15. Instead of petitioning to quash the attachment, the debtor may, within the like delay, petition the judge to suspend further proceedings against him, and to that end to submit such petition to a meeting of the creditors and the debtor to be called for that purpose, in order that the creditors may determine whether the proceedings against the debtor shall be suspended or not; Debtor may petition for suspension of proceedings.

16. The debtor shall produce with such petition a schedule of his estate, and a list of his creditors with the amount of his indebtedness to each, and the places of their respective residences, or places of business, together with particulars of any negotiable paper on which his name appears, the holders of which are unknown to him; the whole under oath; Schedule to be produced with the petition.

17. Upon the schedule of the estate and the list of creditors being furnished by the debtor, sworn to as aforesaid, the judge, instead of ordering a meeting of creditors to be called for the appointment of an official assignee, shall order a meeting of creditors to be called by advertisement for the purpose of taking into consideration the prayer of such petition, and at such meeting shall take and record by a writing under his hand the opinion of the creditors thereon; Duty of judge in such case. Meeting to be called.

18. The judge shall postpone the meeting so called if it appears that the creditors have not been properly and reasonably notified, or that important omissions have been made in the creditors' list; Postponement of meeting.

19. The judge shall preside at such meeting of creditors, and the question which they shall decide shall be, "Shall the debtor be proceeded against under this Act or not?" And if the decision of the majority in number and three-fourths in value of the creditors for sums above one hundred dollars, present or represented, be in the negative, it shall be in force for three calendar months thereafter, during which time no other proceedings in Insolvency shall be commenced against the debtor, based upon any act or omission of his which took place previous to the institution of the proceedings so stayed by the decision of the creditors; Judge to preside at such meeting. Question to be decided thereat, and how.

20. If the decision at such meeting be not in the negative, the judge shall at once proceed thereat to take the advice of the creditors as to the appointment of an official assignee, and shall appoint such assignee as hereinbefore provided; Proceedings on decision of meeting.

In case of question as to amount of any creditor's claim.

21. If any question arises at such meeting respecting the amount of any creditor's claim, it shall be decided by the judge upon a hearing of the parties, and from an inspection of the schedules and list so sworn to by the debtor, and of the statement of the debtor's affairs prepared and produced at such meeting by the guardian, or person entrusted with the writ of attachment;

Effect of appointment of official assignee.

22. Upon the appointment of the official assignee, the guardian shall deliver the estate and effects attached, to the official assignee; and by the effect of his appointment, the whole of the estate and effects of the insolvent, as existing at the date of the issue of the writ, and which may accrue to him by any title whatsoever, up to the time of his discharge under this Act, and whether seized or not seized under the writ of attachment, shall vest in the said official assignee, in the same manner and to the same extent, and with the same exceptions as if a voluntary assignment of the estate of the insolvent had been at that date executed in his favor by the insolvent;

Effect of registration of order of appointment.

23. An authentic copy or exemplification, under the hand of the proper officer of the Court, of the order of the judge appointing an official assignee, may be registered at full length in any registry office, without any proof of the signature of the officer and without any memorial; and such registration shall have the same effect as to the real estate of the insolvent and in all other respects, as the registration of a deed of assignment under this Act;

Notice of appointment.

24. Immediately upon his appointment, the official assignee shall give notice thereof by advertisement (Form K), requiring by such notice all creditors of the insolvent to produce before him their claims, and the vouchers in support thereof.

OF ASSIGNEES.

Boards of trade may name official assignee.

Security.

Notice of nomination.

25. The Board of Trade at any place, or the Council thereof, may name any number of persons within the County or District in which such Board of Trade exists, or within any County or District adjacent thereto, in which there is no Board of Trade, to be official assignees for the purposes of this Act, and at the time of such nomination shall declare what security for the due performance of his duties, shall be given by each of such official assignees before entering upon them; and a copy of the resolution naming such persons, certified by the Secretary of the Board,

shall be transmitted to the Prothonotary or Clerk of the Court in the District or County within which such assignees are resident; Notice of nomination.

2. Such security shall be taken in the name of office of the President of such Board of Trade, for the benefit of the creditors of any person whose estate is, or subsequently may be, in process of liquidation under this Act; and in case of the default of any such assignee in the performance of his duties, his security may be enforced and realized by the assignee who shall be appointed his successor, who may sue in his own name as such assignee upon such security; Security to be given by assignee.

3. The assignee shall call meetings of creditors, whenever required in writing so to do by five creditors, stating in such writing the purpose of the intended meeting; or whenever he is required so to do by the Judge, on the application of any creditor, of which application he shall have notice; or whenever he shall himself require instructions from the creditors; and he shall state succinctly in the notice calling any meeting, the purposes of such meeting; Meeting of creditors, when to be called by assignee.

4. The assignee shall be subject to all rules, orders and directions, not contrary to law, or to the provisions of this Act, which are made for his guidance by the creditors at a meeting called for the purpose; and until he receives directions from the creditors in that behalf, if there be a Bank or agency of a Bank in the County in which the insolvent has his place of business, or within fifteen miles of such place, he shall deposit weekly, at interest, in the name of the estate, all moneys received by him, in the Bank or Bank agency in or nearest to the place where the insolvent so carries on business; Assignee to be subject to certain rules. Deposit of moneys.

5. The assignee shall attend all meetings of creditors, and take and preserve minutes of such meetings, signed by himself, and signed and certified at the time by the chairman, or by three creditors present at the meeting; and copies of, and extracts from, such minutes, certified by the assignee, shall be *primâ facie* evidence of the proceedings purporting to be recorded in such minutes; and he shall also keep a correct register of all his proceedings, and of all claims made to or before him; To attend all meetings of creditors. And keep minutes, &c.

6. The assignee shall give such security and in such manner as shall be ordered by a resolution of the creditors, and shall conform himself to such directions in respect thereof, and in Security to be given to creditors.

respect of any change or modification thereof, or addition thereto, as are subsequently conveyed to him by similar resolutions; and

The bond.

in every case except where the security has been taken in the name of the President of the Board of Trade, and is not required to be changed, the bond or instrument of security shall be taken in favor of the creditors, by the name of the "Creditors of A. B. an insolvent, under the Insolvent Act of 1864," and shall be

How kept.

deposited in the office of the Court, and in case of default by, the assignee on whose behalf it is given, may be sued upon by any assignee who shall be subsequently appointed, in his own name as such assignee;

Powers of insolvent vested in assignee.

7. All powers vested in any insolvent which he might legally execute for his own benefit, shall vest in, and be executed by the assignee, in like manner and with like effect as they were vested in the Insolvent, and might have been executed by him; but no power vested in the insolvent or property or effects held by him as trustee or otherwise for the benefit of others, shall vest in the assignee under this Act;

Winding up affairs.

8. The assignee shall wind up the affairs of the Insolvent, by the sale, in a prudent manner, of all bank and other stocks, and of all movables belonging to him, and by the collection of all debts; but in all such respects shall be guided by the direction of the creditors, given as herein provided;

Assignee's right of action, &c.

9. The assignee, in his own name as such, may sue for the recovery of all debts due to the insolvent, and may take, both in the prosecution and defence of suits, all the proceedings that the insolvent might have taken with respect to the estate, and may intervene and represent the Insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment, and on his application may have his name inserted therein, in the place of that of the Insolvent;

When the insolvent is a partner in a trading company, &c.

10. If a partner in an unincorporated trading Company or co-partnership, becomes insolvent within the meaning of this Act, and an assignee is appointed to the estate of such insolvent, the assignee shall have all the rights of action and remedies against the other partners in such Company or co-partnership, which any partner could have or exercise by law against his co-partners after the dissolution of the firm; and may avail himself of such rights of action and remedies, as if such co-partnership or Company had expired by eflux of time;

As to doubtful debts due estate, sale may be ordered.

11. After having acted with due diligence in the collection of the debts, if the assignee finds there remains debts due, the attempt to collect which would be more onerous than beneficial to the estate, he may report the same to the creditors at a meeting thereof duly called for the purpose; and with their sanction he may obtain an order of the judge to sell the same by public auction, after such advertisements thereof as may be required by such order; and pending such advertisements, the assignee shall keep a list of the debts to be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts; but all debts amounting to more than one hundred dollars shall be sold separately;

Proviso.

Rights of purchaser of debt.

12. The person who purchases a debt from the assignee, may sue for it in his own name as effectually as the Insolvent might have done, and as the assignee is hereby authorized to do; and a bill of sale (Form L.,) signed and delivered to him by the assignee, shall be *primâ facie* evidence of such purchase without proof of the handwriting of the assignee; and no warranty, except as to the good faith of the assignee, shall be created by such sale and conveyance, not even that the debt is due;

Sale of insolvent's real estate: notice.

13. The assignee may sell the real estate of the Insolvent, but only after advertisement thereof, for the same time and in the same manner as is required for the actual advertisement of sales of real estate by the sheriff in the district or place where such real estate is situate, and to such further extent as the assignee deems expedient; but the period of advertisement may be shortened to not less than two months by a resolution of the creditors passed at a meeting called for the purpose, and approved of by the judge; and if the price offered for any real estate at any public sale duly advertised as aforesaid, is, in the opinion of the assignee, too small, he may withdraw such real estate, and sell it subsequently under such directions as he receives from the creditors;

Power to withdraw: and sell afterwards.

Effect of sale of real estate by assignee in U. C. and L. C. respectively.

14. The sale of real estate in Upper Canada so made by the assignee, shall have the same effect as if the same had been made by a Sheriff in Upper Canada, under a writ of execution issued in the ordinary course; and in Lower Canada, such sales shall have the same effect as if made by a sheriff under a similar writ; and the deed of such sale, which the assignee executes (Form M.,) shall have precisely the same effect as a Sheriff's deed has in that part of the Province within which the real

Credit for purchase money.

estate is situate; but he may grant such terms of credit as he may deem expedient, and as may be approved of by the creditors for any part of the purchase money; and if no previous

Reserving mortgage therefor.

hypotheque or mortgage remains upon such real estate, he shall be entitled to reserve a special hypotheque or mortgage by the deed of sale, as security for the payment of such part of the purchase money; and such deed may be executed before witnesses, or before notaries, according to the exigency of the law of the place where the real estate sold is situate;

Duty of assignee selling real estate in L. C.

15. In Lower Canada, before advertising any sale of real estate the assignee shall procure, at the expense of the estate, from the registrar of the County wherein such real estate is situate, a certificate containing the names and residences as shewn by the

Notice to registered incumbrancers.

Registry books of all persons enregistered as hypothecary creditors upon such real estate; and he shall himself deposit in the nearest post office a notice with the postage paid thereon, addressed to each of such creditors by the name and to the address contained in such certificate, and also a notice addressed to each creditor at any other place where the assignee has reason to

And other hypothecary creditors.

believe such creditor to be then resident, and also a notice addressed to any other person whom the assignee has reason to believe to be then the creditor of such hypothecary claim,—informing the creditors of the day fixed for the sale of the real estate, and of the time within which the hypothecary creditors are required to file their claims under this Act; and before the

Certificate of register to be filed.

day of sale he shall file in the office of the Court the Certificate of the registrar with a return thereon under oath as to his doings

Liability of assignee for neglect.

in respect of such notice; and the assignee shall be directly liable for any neglect of the duty imposed upon him by this section, to any party suffering damage in consequence of such neglect;

Assignee to be subject to summary jurisdiction of the court

16. The assignee shall be subject to the summary jurisdiction of the Court or judge in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction, and the performance of his duties may be enforced by the judge on summary petition in Vacation, or by the Court under penalty of imprisonment, as for contempt of Court, whether such duties be imposed upon him by the deed of assignment, by instructions from the creditors validly passed by them under this Act and communicated to him, or by the terms of this Act;

17. Before the period at which dividends may be declared, any assignee may be removed by the judge, upon proof of fraud or dishonesty in the custody or management of the estate, upon the application of any creditor; and if such removal takes place, or if the assignee dies more than fifteen days before the said period, the Judge may appoint another assignee in the same manner as he can appoint an assignee to an estate in compulsory liquidation; but if the assignee is removed or dies within fifteen days of the said period, the judge shall order a meeting of creditors to be held for the purpose of appointing another assignee, and shall cause notice of such meeting to be given by advertisement; Removal of assignee by a judge for misconduct. Appointment of another.

18. Any assignee may be removed after the period at which dividends may be declared, by a resolution passed by the creditors present or represented at a meeting duly called for the purpose; and if the removal has been effected by an order of the judge, or if the assignee dies within fifteen days before the said period, or if the removal is effected by the creditors after the said period, they shall have the right of appointing another assignee, either at the meeting by which he is removed, or at any other called for the purpose; Removal of assignee by creditors. Appointment of another.

19. The assignee so removed shall, nevertheless, remain subject to the summary jurisdiction of the Court, and of any judge thereof, until he shall have fully accounted for his acts and conduct while he continued to be assignee; Assignee removed to remain accountable.

20. The remuneration of the assignee shall be fixed by the creditors at a meeting called for the purpose; but if not so fixed before a final dividend is declared, shall be put into the dividend sheet at a rate not exceeding five *per centum* upon the cash receipts, subject to objection by any creditor as exceeding the value of the services of the assignee, in the same manner as any other item of the dividend sheet; Remuneration of assignee.

21. Upon the death of an assignee, the estate of the insolvent shall not descend to the heirs or representatives of the assignee, but shall become vested in any assignee who shall be appointed by the creditors in his place and stead; and until the new assignee is appointed, the estate shall be under the control of the judge; What shall be done with the estate in the event of his death.

22. After the declaration of a final dividend the assignee may

How assignee may obtain his discharge.

prepare his final account, and after due notice by advertisement may present a petition to the judge for his discharge from the office of assignee; and from the time of the first advertisement thereof, to the time of the presentation of such petition, he shall keep such final account open for inspection at his office;

Assignee to file a certificatewith his petition for discharge.

23. The assignee shall produce and file with such petition a bank certificate of the deposit of any dividends remaining unclaimed, or of any balance in his hands, and thereupon the judge after hearing the parties, may refuse, or grant conditionally or unconditionally, the prayer of such petition.

OF DIVIDENDS.

Accounts to be kept and dividends prepared by assignee.

5. Upon the expiration of the period of two months from the first insertion of the advertisements giving notice of an assignment, or of the appointment of an official assignee, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than six 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 at similar intervals shall prepare dividends of the estate of the Insolvent;

What debts may rank for payment out of insolvent's estate, and how.

2. All debts due and payable by the Insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this Act, and all debts due but not then actually payable, subject to such rebate of interest as may be reasonable, shall have the right to rank upon the estate of the Insolvent; and any person then being as surety or otherwise liable for any debt of the insolvent who subsequently pays such debt, shall stand in the place of the original creditor, if such creditor has proved his claim on such debt; or if he has not proved shall be entitled to prove against and rank upon the estate for such debt, to the same extent and with the same effect as such creditor might have done;

Sureties of insolvent paying for him.

Contingent claims, provision for payment of.

3. If any creditor of the Insolvent claims upon a contract dependent upon a condition or contingency, which does not happen previous to the declaration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it be made to appear to the judge that such reserve will probably retain the estate open for an undue length of time,

he may, unless an estimate of the value thereof be agreed to between the claimant and the assignee, order the assignee to make an award upon the value of such contingent or conditional claim, and thereupon the assignee shall make an award after the same investigation, and in the same manner and subject to a similar appeal, as is hereinafter provided for the making of awards upon disputed claims and dividends, and for appeals from such awards; and in every case the value so established or agreed to shall be ranked upon as a debt payable absolutely; In certain cases judge may order estimate of value to be made

4. In the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor, which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the provisions of this Act; but no dividend shall be paid to any creditor holding collateral security from the Insolvent for his claim, until the amount for which he shall rank as a creditor on the estate as to dividends therefrom, shall be established as hereinafter provided; and such amount shall be the amount which he shall be held to represent in voting at meetings of creditors, and in computing the proportion of creditors, whenever under this Act such proportion is required to be ascertained; Preparation of dividend sheet. Creditors holding collateral security.

5. A creditor holding security from the Insolvent, or from his estate, shall specify the nature and amount of such security in his claim, and shall therein on his oath put a specified value on such security; and the assignee, under the authority of the creditors, may either consent to the retention of such security by the creditor at such specified value, or he may require from such creditor an assignment and delivery of such security, at an advance of ten per centum upon such specified value, to be paid by him out of the estate so soon as he has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the security is retained or assumed and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid; Duty of such secured creditors, and power of assignee.

6. The amount due to a creditor upon each separate item of his claim at the time of the assignment, or of the appointment of the official assignee, as the case may be, shall form part of the amount for which he shall rank upon the estate of the insolvent, until such item of claim be paid in full, except in cases of deduction of the proceeds of collateral security as hereinbefore How creditors shall rank for payment of claims.

provided; but no claim or part of a claim shall be permitted to be ranked upon more than once, whether the claim so to rank be made by the same person or by different persons;

In case insolvent owes individually and as co-partner.

7. If the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him 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;

Allowance to insolvent.

8. The creditors, or the same proportion of them that may grant a discharge to the debtor under this Act, may allot to the Insolvent by way of allowance, any sum of money, or any property they may think proper; and the allowance so made shall be inserted in the dividend sheet, and shall be subject to contestation like any other item of collocation therein, but only on the ground of fraud or deceit in procuring it, or of the absence of consent by a sufficient proportion of the creditors;

No costs in suits against insolvent allowed after notice.

9. No costs incurred in suits against the Insolvent after due notice of an assignment or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of this Act, shall rank upon the estate of the insolvent, but all the taxable costs incurred in proceedings against him up to that time, shall be added to the demand for the recovery of which such proceedings were instituted; and shall rank upon the estate as if they formed part of the original debt;

How clerks and servants shall rank for wages.

10. Clerks and other persons in the employ of the Insolvent in and about his business or trade, shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of a deed of assignment or of the issue of a writ of attachment under this Act, not exceeding three months of such arrears;

Notice of dividend sheet.

11. So soon as a dividend sheet is prepared, notice thereof, (Form N) shall be given by advertisement, and after the expiry of six juridical days from the day of the last publication of such advertisement, all dividends which have not been objected to within that period shall be paid;

Provision in case it appears that all the creditors have not filed claims.

12. If it appears to the assignee on his examination of the books of the insolvent or otherwise, that the insolvent has ordinary, hypothecary or privileged creditors who have not filed

claims before such assignee, it shall be his duty to reserve dividends for such creditors according to the nature of the claims, and to notify them of such reserve, which notification may be by letter through the post, addressed to such creditor's residence as nearly as the same can be ascertained by the assignee; and if such creditors do not file their claims and apply for such dividends previous to the declaration of the last dividend of the estate, the dividends reserved for them shall form part of such last dividend;

Case of objections to or disputes concerning dividends provided for.

13. If any dividend be objected to, within the said period of six days, and any dispute arises between the creditors of the insolvent or between him and any creditor, as to the correct amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon such dividend sheet, the assignee shall obtain from the creditor whose claim or ranking is disputed, his statements and vouchers in support thereof, and from the Insolvent or opposing creditor, a statement showing his pretensions as to the amount thereof, and shall hear and examine the parties and their witnesses under oath, which oath the assignee is hereby empowered to administer; and shall take clear notes in writing of the parole evidence adduced before him, and shall examine and verify the statements submitted to him, by the books and accounts of the insolvent and by such evidence vouchers and statements as may be furnished to him; and shall make an award in the premises, and as to the costs of such contestation, which award shall be deposited in the Court and shall be final, unless appealed from within three days from the date of its communication to the parties to the dispute;

Assignee's duty to examine, &c.

Execution of his award.

14. The award of the assignee as to costs, may be made executory by execution in the same manner as an ordinary judgment of the Court, by an order of the judge upon the application of the party to whom costs are awarded made after notice to the opposite party;

Costs of contesting any claims, &c.

15. The creditors may, by resolution, authorize and direct the costs of the contestation of any claim or any dividend to be paid out of the estate, and may make such order either before or pending any such contestation;

Pending appeal.

16. Pending any appeal, the assignee shall reserve a dividend equal to the amount of dividend claimed;

Unclaimed dividends,—how dealt with.

17. All dividends remaining unclaimed at the time of the discharge of the assignee shall be left in the bank where they are deposited for three years, and if still unclaimed, shall then be paid over by such bank with the interest accrued thereon, to the Provincial Government, and if afterwards duly claimed, shall be paid over to the persons entitled thereto, with interest at the rate of three per centum per annum from the time of the reception thereof by the Government;

Balance of estate after payment of debts.

18. If any balance remains of the estate of the insolvent, or of the proceeds thereof, after the payment in full of all debts due by the insolvent, such balance shall be paid over to the insolvent upon his petition to that effect, duly notified to the creditors by advertisement and granted by the judge.

OF LEASES.

How unexpired leases held by the insolvent, shall be dealt with if the rent be less than the value of the premises.

Sale of his interest.

19. If the insolvent holds under a lease property, having a value above and beyond the amount of any rent payable under such lease, the assignee shall make a report thereon to the judge, containing his estimate of the value of the estate of the leased property in excess of the rent; and thereupon the judge may order the rights of the insolvent in such leased premises to be sold, after notice by advertisement of such sale; and at the time and place appointed such lease shall be sold, upon such conditions, as to the giving of security to the lessor, as the judge may order; and such sale shall be so made subject to the payment of the rent and to all the covenants and conditions contained in the lease; and all such covenants and conditions shall be binding upon the lessor and upon the purchaser, as if the purchaser had been himself lessee and a party with the lessor to the lease;

Unexpired leases not within the preceding section.

2. If the insolvent holds under a lease extending beyond the year current under its terms at the time of his insolvency, property which is not subject to the provisions of the last preceding section, or respecting which the judge does not make an order of sale, as therein provided, the creditors shall decide at any meeting which may be held more than three months before the termination of the yearly term of the lease current at the time of such meeting, whether the property so leased should be retained for the use of the estate, only up to the then current, or if the conditions of the lease permit of further extension, also up to the end of the next following yearly term thereof, and their decision shall be final;

3. From and after the time fixed for the retention of the leased property for the use of the estate, the lease shall be cancelled and shall from thenceforth be inoperative and null; and so soon as the resolution of the creditors as to such retention has been passed, such resolution shall be notified to the lessor, and if he contends that he will sustain any damage by the termination of the lease under such decision, he may make a claim for such damage, specifying the amount thereof under oath, in the same manner as in ordinary claims upon the estate; and the assignee shall proceed forthwith to make an award upon such claim, in the same manner, and after similar investigation, and with the same right of appeal as is herein provided for in the case of claims or dividends objected to; Cancelling the lease, and right of the lessor in such case.

4. In making such claim, and in any award thereupon, the measure of damages shall be the difference between the value of the premises leased when the lease terminates under the resolution of the creditors, and the rent which the insolvent had agreed by the lease to pay during its continuance; and the chance of leasing or of not leasing the premises again, for a like rent, shall not enter into the computation of such damages; and if damages are finally awarded to the lessor he shall rank for the amount upon the estate as an ordinary creditor. Measure of damages to lessor.

OF APPEAL.

7. There shall be an appeal to the judge from the award of an assignee made under this Act, which appeal shall be by summary petition, of which notice shall be given to the opposite party and to the assignee; and the assignee shall attend before the judge at the time and place indicated in such notice, and shall produce before him all evidence, notes of evidence, books, or proved extracts from books, documents, vouchers or papers having reference to the matter in dispute; and thereupon the judge may confirm such award, or modify it, or refer it back to the assignee for the taking of further evidence, by such order as will satisfy the ends of justice; Proceedings in appeal from award of assignee.

2. If any of the parties to such appeal are dissatisfied with such order of the judge, they may appeal from his judgment in Lower Canada to the Court of Queen's Bench for Lower Canada on the Appeal Side thereof, and in Upper Canada to either of the Superior Common Law Courts or to the Court of Chancery, or to any one of the judges of the said Courts; first obtaining And on appeal from decision of the judge.

Appeal must be allowed.

the allowance of such appeal in Lower Canada by a judge of the Superior Court, and in Upper Canada by a judge of any of the Courts to which such appeal may be made; and in either case the judge shall be guided in allowing the same by the amount to which the assets of the estate may be effected by the final decision of the question at issue, as well as by his opinion upon the pretensions of the appellant; but any appeal to a single judge in Upper Canada may in his discretion be referred, on a special case to be settled, to the full Court, and on such terms in the meantime as he may think necessary and just;

As to appeal to a single judge in U. C.

Notice of appeal must be given within a certain period.

3. Such appeal shall not be permitted unless the party desiring to appeal applies for the allowance of the appeal, with notice to the opposite party, within five days from the day on which the judgment of the judge is rendered, nor unless within five days after the allowance thereof, he causes to be served upon the opposite party and upon the assignee a petition in appeal setting forth the petition to the judge, and his decision thereon, and praying for its revision, with a notice of the day on which such petition is to be presented, and also within the said period of five days causes security to be given before the judge by two sufficient sureties, that he will duly prosecute such appeal, and pay all costs incurred by reason thereof by the respondent;

And security.

Presenting of petition in appeal.

4. The petition in appeal, when the appeal is to a Court, shall be presented on one of the first four days of the term next following the putting in of the security in appeal, and shall not be thereafter received; and when the appeal is to a judge, the petition shall be presented within ten days after putting in security, and shall not thereafter be received; and on or before the day of the presentation of the petition, the assignee shall file in the office of the Court of Appeal, or of the Court to which the judge appealed to belongs, the evidence, papers, and documents which had been previously produced before the judge, and thereupon the appeal shall be proceeded with and decided according to the practice of the Court;

Filing documents.

In case petition is not presented in due time.

5. If the party appellant does not present his petition on the day fixed for that purpose, the Court or judge selected to be appealed to as the case may be, shall order the record to be returned to the assignee, and the party respondent may on the following or any other day during the same term produce before the Court or within six days thereafter before such judge, the copy of petition served upon him, and obtain costs thereon against the appellant;

6. The costs in appeal shall be in the discretion of the Court or of the judge appealed to, as the case may be; Costs in appeal.

7. In Lower Canada any order of a judge made under any of the foregoing sub-sections, shall be subject to review under the provisions of any Act passed during the present Session, in the same manner and upon the same conditions as judgments of the Superior Court for Lower Canada; and in such cases the provisions respecting appeal to the Court of Queen's Bench hereinbefore made, shall apply to the judgments of the Court of Review. Decision of one judge in L. C. to be subject to review.

OF FRAUD AND FRAUDULENT PREFERENCES.

8. All gratuitous contracts or conveyances, or contracts or conveyances without consideration, or with a merely nominal consideration, made by a debtor afterwards becoming an insolvent with or to any person whomsoever, within three months next preceding the date of the assignment or of the issue of the writ of attachment in compulsory liquidation, and all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, are presumed to be made with intent to defraud his creditors; What shall be deemed fraudulent contracts or conveyances.

2. A contract or conveyance for consideration, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, and before it has become public and notorious, but within thirty days next before the execution of a deed of assignment or of a writ of attachment under this Act, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court may order; Contracts or conveyances made by insolvent voidable in certain cases.

3. All contracts or conveyances made and acts done by a debtor, with intent fraudulently to impede, obstruct, or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done, and intended with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding, obstructing, or delaying the creditors in their remedies, or of injuring Fraudulent contracts or conveyances by insolvent void.

them, or any of them, are prohibited, and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration or in contemplation of marriage;

In what case preferential sales, &c., shall be deemed fraudulent.

4. If any sale, deposit, pledge, or transfer, be made by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any goods, effects, or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment, shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any Court of competent jurisdiction; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under this Act, it shall be presumed to have been so made in contemplation of insolvency;

When payments shall be deemed fraudulent.

5. Every payment made within thirty days next before execution of a deed of assignment, or the issue of a writ of attachment under this Act, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, is void, and the amount paid may be recovered back by suit, in any competent Court, for the benefit of the estate; provided always that if any valuable security be given up in consideration of such payment, such security or the value thereof, shall be restored to the creditor before the return of such payment can be demanded;

Proviso.

Transfer of debts due by insolvent, to be void in certain cases.

6. Any transfer of a debt due by the insolvent, made within thirty days next previous to the execution of a deed of assignment, or the issue of a writ of attachment under this Act, or at any time afterwards, to a debtor knowing or having probable cause for believing the insolvent to be unable to meet his engagements, or in contemplation of his insolvency, for the purpose of enabling the debtor to set up by way of compensation or set-off the debt so transferred, is null and void as regards the estate of the insolvent; and the debt due to the estate of the insolvent shall not be compensated or affected in any manner by a claim so acquired; but the purchaser thereof may rank on the estate in the place and stead of the original creditor;

Certain other frauds defined, as regards L. C.

7. Any trader in Lower Canada, and any person whosoever in Upper Canada, who purchases goods on credit or procures

advances in money, knowing or believing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person, or who by any false pretense obtains a term of credit for the payment of any advance or loan of money, or of the price or any part of the price of any goods, wares or merchandize, with intent to defraud the person thereby becoming his creditor, and who shall not afterwards have paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid; and if such debt or debts be incurred by a trading company, then every member thereof who shall not prove himself to have been ignorant of the incurring, and of the intention to incur, such debt or debts, shall be similarly liable; provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding;

Punishment.

Proviso.

8. In Upper Canada in every such suit or proceeding whether the defendant appear and plead, or make default, the plaintiff shall be bound to prove the fraud charged, and upon his proving it to the judge who tries the suit or proceeding shall immediately after the verdict rendered against the defendant for such fraud (if such verdict is given) adjudge the term of imprisonment which the defendant shall undergo; and he shall forthwith order and direct the defendant immediately to be taken into custody and imprisoned accordingly; but such judgment shall not affect the ordinary remedies for the revision thereof, or of any proceeding in the case.

As to like case in U. C.

OF COMPOSITION AND DISCHARGE.

9. A deed of composition and discharge executed by the majority in number of those of the creditors of an insolvent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of liabilities of the insolvent subject to be computed in ascertaining such proportion, shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him, and upon them, as if they were also parties to it; and such a deed may be validly made either before, pending, or after proceedings upon an assignment, or for the compulsory

When and to what extent a deed of composition shall be binding.

When such deed may be made.

liquidation of the estate of the insolvent; and the discharge therein agreed to shall have the same effect as an ordinary discharge obtained as hereinafter provided;

Notice, and time within which opposition to composition must be made.

2. If the insolvent procures a deed of composition and discharge to be duly executed as aforesaid, and deposits it with the assignee pending the proceedings upon a voluntary assignment or for compulsory liquidation, the assignee, after the period hereinbefore fixed as that after which dividends may be declared has elapsed, shall give notice of such deposit by advertisement; and if opposition to such composition and discharge be not made by a creditor, within six juridical days after the last publication of such notice, by filing with the assignee a declaration in writing that he objects to such composition and discharge, the assignee shall act upon such deed of composition and discharge according to its terms; but if opposition be made thereto within the said period, or if made, be not withdrawn, then he shall abstain from taking any action upon such deed until the same has been confirmed, as hereinafter provided;

If none be so made.

Effect of consent of creditors to debtor's discharge.

3. The consent in writing of the said proportion of creditors to the discharge of the debtor after an assignment, or after his estate has been put in compulsory liquidation, absolutely frees and discharges him from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and proveable against his estate, which are mentioned and set forth, in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent, previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee, whether such debts be exigible or not at the time of his insolvency, and whether direct or indirect; and if the holder of any negotiable paper is unknown to the insolvent, the insertion of the particulars of such paper in such statement of affairs, with the declaration that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of this section;

If the holder of any negotiable paper is unknown.

Effect of discharge as regards persons as secondarily liable for debts of insolvent.

4. A discharge under this Act shall not operate any change in the liability of any person or company secondarily liable for the debts of the insolvent, either as drawer or endorser of negotiable paper, or as guarantor, surety or otherwise, nor of any

partner or other person liable jointly or severally with the insolvent for any debt, nor shall it affect any mortgage, *hypothèque*, lien or collateral security held by any creditor as security for any debt thereby discharged;

Certain debts excepted from operation of discharge.

5. A discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for personal wrongs or as a penalty for any offence of which the insolvent has been convicted, or as a balance of account due by the insolvent as an assignee, tutor, curator, trustee, executor or public officer; nor shall such debts, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have done, or consented to any act, matter or thing under this Act; but the creditor of any debt due as a balance of account by the insolvent as assignee, tutor, curator, trustee, executor or public officer, may claim and accept a dividend thereon from the estate without being in any respect affected by any discharge obtained by the insolvent;

But the creditor may accept the dividend.

Proceedings to obtain confirmation of discharge.

6. An insolvent who has procured a consent to his discharge or the execution of a deed of composition and discharge, within the meaning of this Act, may file in the office of the Court the consent or deed of composition and discharge, and may then give notice (Form O) of the same being so filed, and of his intention to apply by petition to the Court in Lower Canada, or in Upper Canada to the judge, on a day named in such notice, for a confirmation of the discharge effected thereby; and notice shall be given by advertisement in the *Canada Gazette* for two months, and also for the same period, if the application is to be made in Upper Canada, in one newspaper, and if in Lower Canada in one newspaper published in French, and in one newspaper published in English, in or nearest the place of residence of the insolvent; and upon such application any creditor of the insolvent may appear and oppose such confirmation, either upon the ground of fraud or fraudulent preference within the meaning of this Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or their execution of the deed of composition and discharge, as the case may be, or of the insufficiency in number or value of the creditors consenting to or executing the same, or of the fraudulent retention and concealment by the insolvent of some portion of his estate and effects, or of the

Creditors may oppose, and on what grounds.

evasion, prevarication or false swearing of the insolvent upon examination as to his estate and effects, or upon the ground that subsequent to the passing of this Act the insolvent has not kept an account-book shewing his receipts and disbursements of cash and such other books of account as are suitable for his trade, or if, having at any time kept such book or books, he has refused to produce or deliver them to the assignee;

If confirmation be not demanded within two months, proceedings may be taken to annul the discharge.

7. If the insolvent does not apply to the Court or judge for a confirmation of such discharge within two months from the time at which the same has been effected under this Act, any creditor for a sum exceeding two hundred dollars, may cause to be served a notice in writing upon the insolvent requiring him to file in the Court the consent, or the deed of composition and discharge, as the case may be; and may thereupon give notice (Form P) as hereinbefore provided, with regard to applications for confirmation of discharge of his intention to apply by petition to the Court in Lower Canada, or in Upper Canada to the judge, on a day named in such notice, for the annulling of the discharge; and on the day so named may present a petition to the Court or judge, in accordance with such notice, setting forth the reasons in support of such application, which may be any of the reasons upon which a confirmation of discharge may be opposed; and upon such application, if the insolvent has not at least one month before the day fixed for the presentation thereof, filed in the office of the Court the consent or deed under which the discharge is effected, the discharge may be annulled without further enquiry, except as to the service upon him of the notice to file the same; but if such consent or deed be so filed, or if upon special application, leave be granted to him to file the same at a subsequent time, and he do then file the same, the Court or judge, as the case may be, shall proceed thereon as upon application for confirmation of such discharge;

Petition for annulling and proceedings consequent thereon.

Power of court or judge.

8. The Court or judge, as the case may be, upon hearing the application to confirm or to annul the discharge, the objections thereto, and any evidence adduced, shall have power to make an order, either confirming the discharge absolutely, suspensively, or conditionally, or annulling the same; and such order shall be final, unless appealed from in the manner herein provided for as to appeals from the Court or judge;

Effect of confirmation.

9. Until the Court or judge, as the case may be, has confirmed such discharge, the burden of proof of the discharge being com-

pletely effected under the provisions of this Act, shall be upon the insolvent; but the confirmation thereof, if not reversed in appeal, shall render the discharge thereby confirmed, final and conclusive; and an authentic copy of the judgment confirming the same shall be sufficient evidence, as well of such discharge as of the confirmation thereof;

When insolvent may apply to the court or judge for discharge.

10. If, after the expiration of one year from the date of an assignment made under this Act, or from the date of the issue of a writ of attachment thereunder, as the case may be, the insolvent has not obtained, from the required proportion of the creditors, a consent to his discharge, or the execution of a deed of composition and discharge, he may apply to the Court in Lower Canada, or to the judge in Upper Canada by petition to grant him his discharge, first giving notice of such application, (Form Q) in the manner hereinbefore provided for notice of application for confirmation of discharge;

Opposing such application.

11. Upon such application any creditor of the insolvent may appear and oppose the granting of such discharge upon any ground upon which the confirmation of a discharge may be opposed under this Act;

Judgment of court.

12. The Court or judge, as the case may be, after hearing the insolvent, and the objecting creditors, and any evidence that may be adduced, may make an order either granting the discharge of the insolvent absolutely, conditionally, or suspensively, or refusing it absolutely; and such order shall be final, unless appealed from in the manner herein provided for appeals from the Court or judge;

Discharge, &c., obtained by fraud to be void.

13. Every discharge or composition, or confirmation of any discharge or composition, which has been obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment of such creditor of any valuable consideration for such consent, shall be null and void.

EXAMINATION OF THE INSOLVENT AND OTHERS.

When and how insolvent may be examined before the assignee.

10. Immediately upon the expiry of the period of two months from the first insertion of the advertisement giving notice of an assignment, or of the appointment of an official assignee, the assignee shall call a meeting, by advertisement, of the creditors for the public examination of the insolvent, and shall summon him to attend such meeting; and at such meeting the insolvent

may be examined on oath, sworn before the assignee, by or on behalf of any creditor present, in his turn; and the examination of the insolvent shall be reduced to writing by the assignee, and signed by the insolvent; and any questions put to the insolvent at such meeting which he shall answer evasively, or refuse to answer, shall also be written in such examination, with the replies made by the insolvent to such questions; and the insolvent shall sign such examination, or if he refuse to sign the same, his refusal shall be entered at the foot of the examination, with the reasons of such refusal, if any, as given by himself; and such examination shall be attested by the assignee and shall be filed in the office of the Court;

Examination to be reduced to writing.

Signing and attesting it.

Examination of insolvent before the judge.

2. The insolvent may also be from time to time examined as to his estate and effects upon oath, before the judge, by the assignee or by any creditor, upon an order from the judge obtained without notice to the insolvent, upon petition, setting forth satisfactory reasons for such order—and he may also be examined in like manner upon a *subpœna* issued as of course without such order, in any action in which a writ of attachment has been issued against his estate and effects; which *subpœna* may be procured by the plaintiff, or by any creditor intervening in the action for that purpose, or by the assignee;

Examination by assignee or creditor on application for discharge, &c.

3. The insolvent may also be examined by the assignee or by any creditor, on the application of the insolvent for a discharge or for the confirmation or annulling of a discharge, at any stage of such proceeding or upon any petition to set aside an attachment in the proceedings for the compulsory liquidation of his estate;

Other persons may be examined.

4. Any other person who is believed to possess information respecting the estate or effects of the insolvent, may also be from time to time examined before the judge upon oath, as to such estate or effects, upon an order from the judge to that effect, which order the judge may grant upon petition, setting forth satisfactory reasons for such order, without notice to the insolvent or to the person to be so examined;

Insolvent to attend meetings of his creditors.

5. The insolvent shall attend all meetings of his creditors, when summoned so to do by the assignee, and shall answer all questions that may be put to him at such meetings touching his business, and touching his estate and effects; and for every such attendance he shall be paid such sum as shall be ordered at such meeting, but not less than one dollar;

6. Any person summoned for examination or under examination under this Act shall be subject to proceedings and punishments similar to those which may be taken against or inflicted upon ordinary witnesses; and on application the judge may at his discretion order an allowance to be made to persons so examined, of a like amount to that allowed to witnesses in civil cases, and order them to be paid such allowance out of the estate or otherwise. Conduct of witnesses. Their costs.

OF PROCEDURE GENERALLY.

11. Notice of meetings of creditors and all other notices herein required to be given by advertisement, without special designation of the nature of such notice, shall be so given by publication thereof for two weeks in the *Canada Gazette*, also in Lower Canada in every issue during two weeks of one newspaper in English and one in French, and in Upper Canada, in one newspaper in English, published at or nearest to the place where the proceedings are being carried on, if such newspapers are published within ten miles of such place; and in any case the assignee or person giving such notice shall also address notices thereof to all creditors and to all representatives of foreign creditors, within the Province, and shall mail the same with the postage thereon paid, at the time of the insertion of the first advertisement; Notices under this Act, how to be given.

2. All questions discussed at meetings of creditors shall be decided by the majority in number of all creditors for sums above one hundred dollars, present or represented at such meeting, and representing also the majority in value of such creditors, unless herein otherwise specially provided; but if the majority in number do not agree with the majority in value, the meeting may be adjourned for a period of not less than fifteen days, of which adjournment notice by advertisement shall be given; and if the adjourned meeting has the same result, the views of each section of the creditors shall be embodied in resolutions, and such resolutions shall be referred to the judge, who shall decide between them; Decision of questions at meetings of creditors.

3. If the first meeting of creditors, which takes place after the expiry of the period of two months from the date of the deed of assignment or of the appointment of an official assignee, be called for the ordering of the affairs of the estate generally, and it be so stated in the notices calling such meeting, all the matters and things respecting which the creditors may vote, resolve or What may be done at first meeting of creditors if called for ordering affairs generally, &c.

order, or which they may regulate under this Act, may be voted resolved or ordered upon, and may be regulated at such meeting without having been specially mentioned in the notices calling such meeting, notwithstanding anything to the contrary in this Act contained, due regard being had, however, to the proportions of creditors required by this Act for any such vote, resolution, order or regulation;

Claims of creditors; form of.

4. The claims of creditors (Form R) shall be furnished to the assignee in writing, and shall specify what security, if any, the creditor holds for the payment of his claim, and when required by this Act, shall also contain an estimate by such creditor of the value of such security; and if the creditor holds no security, then it shall also be so therein stated;

How to be attested.

5. The claims shall be attested under oath, taken in Canada before any judge, Commissioner for taking Affidavits, or justice of the peace, and out of Canada before any judge of a Court of Record, any commissioner for taking affidavits appointed by any Canadian Court, the chief municipal officer for any town or city, or any British consul or vice-consul, or before any other person authorized by any statute of this Province for taking affidavits to be used in this province;

Supplementary oath in certain cases.

6. Before the preparation of a dividend sheet, the assignee may require from any creditor a supplementary oath declaring what amount, if any, such creditor has received in part payment of the debt upon which his claim is founded, subsequent to the making of such claim, together with the particulars of such payment; and if any creditor refuses to produce or make such oath before the assignee within a reasonable time after he has been required so to do, he shall not be collocated in such dividend sheet;

Claims secured by *hypothèque* or *privilège* in L. C.

Documents to be filed, &c,

7. If, in Lower Canada, any claim be secured by *hypothèque* upon the real estate of the insolvent, or if it consists of any *hypothèque* or *privilege* upon such real estate or any part thereof, the nature of such *hypothèque* or *privilege* shall be summarily specified in such claim; but unless such claim be filed with the assignee, with the deeds and documents in support thereof, within six days from the day of sale of the property affected thereby, or if not, unless leave to file the same be afterwards obtained from the judge upon special cause shewn, previous to the distribution of the proceeds of such real estate, or unless a

dividend upon such claim has been reserved by the assignee, such claim shall not be entitled to any preferential collocation upon the proceeds of such real estate;

Who may make affidavits under this Act.

8. Any affidavit required under this Act may be made by the party interested, or by the agent in that behalf having a personal knowledge of the matters therein stated;

Notices of proceedings.

9. One clear day's notice of any petition, motion, or rule, shall be sufficient, if the party notified resides within fifteen miles of the place where the proceeding is to be taken, and one extra day shall be sufficient allowance for each additional fifteen miles of distance between the place of service and the place of proceeding, and service of such notice shall be made in such manner as is now prescribed for similar services in that section of the Province within which the service is made;

Commissions for examination of witnesses.

10. The judge shall have the same power and authority in respect of the issuing and dealing with commissions for the examination of witnesses, as are possessed by the ordinary Courts of Record in the section of the Province in which the proceedings are being carried on;

Rules, &c., may be served in any part of this Province.

11. All rules, orders, and warrants, issued by any judge or Court in any matter or proceeding under this Act, may be validly served in any part of this Province upon the party affected or to be affected thereby; and the service of them or any of them may be validly made in such manner as is now prescribed for singular services in that part of the Province within which the service is made; and the person charged with such service shall make his return thereof and on oath, or if a sheriff or bailiff in Lower Canada, may make such return under his oath of office;

Certain ss. of caps. 79 and 80, Con. Stat. of Canada to apply

12. The fourth, fifth, seventh, eighth, ninth, tenth, eleventh and thirteenth sections of chapter seventy-nine of the Consolidated Statutes of Canada shall apply to proceedings under this Act; and the whole of chapter eighty of the said Consolidated Statutes shall also apply to proceedings under this Act, in the same manner and to the same extent as to proceedings before Courts of Record in Upper and Lower Canada;

Forms appended to be used.

13. The forms appended to this Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided; but in every petition, application, motion, contestation, or other pleading under this Act, the parties may state

In other cases ordinary language to be sufficient.

the facts upon which they rely in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life shall apply; and no allegation or statement shall be held to be insufficiently made, unless by reason of any alleged insufficiency, the opposing party be misled or taken by surprise;

Amendment of proceedings.

14. The rules of procedure as to amendments of pleadings, which are in force at any place where any proceedings under this Act are carried on, shall apply to all proceedings under this Act; and any judge before whom any such proceedings are being carried on shall have full power and authority to apply the appropriate rules as to amendments, to the proceedings so pending before him; and no pleading or proceeding shall be void by any reason of any irregularity or default which can or may be amended under the rules and practice of the Court;

Effect of death of insolvent, pending proceedings.

15. The death of the insolvent, pending proceedings upon a voluntary assignment or in compulsory liquidation, shall not affect such proceedings, or impede the winding up of his estate; and his heirs or other legal representatives may continue the proceedings on his behalf to the procuring of a discharge, or of the confirmation thereof, or of both;

Costs to compel compulsory liquidation.

16. The costs of the action to compel compulsory liquidation shall be paid by privilege as a first charge upon the assets of the insolvent; and the costs of the judgment of confirmation of the discharge of the insolvent, or of the discharge if obtained direct from the Court, and the costs of winding up the estate, being first submitted at a meeting of creditors, and afterwards taxed by the judge, shall also be paid therefrom;

Rules of practice and tariff of fees in L. C.

17. In Lower Canada rules of practice for regulating the due conduct of proceedings under this Act before the Court or judge, and the tariff of fees for the officers of the Court, and for the advocates and attorneys practising in relation to such proceedings, shall be made forthwith after the passing of this Act, and when necessary repealed or amended, and shall be promulgated under or by the same authority and in the same manner as the rules of practice and tariff of fees of the Superior Court for Lower Canada, and shall apply in the same manner and have the same effect in respect of the proceedings under this Act, as the rules of practice and tariff of fees of the Superior Court apply to and affect the proceedings before that Court; and bills of costs upon proceedings under this Act, may be taxed

Taxation of costs.

and proceeded upon in like manner, as bills of costs may now be taxed and proceeded upon in the said Superior Court;

Rules and tariff in U. C.

18. In Upper Canada the judges of the Superior Courts of Common Law, and of the Court of Chancery, or of any five of them, of whom the Chief Justice of Upper Canada, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one, shall have power to frame and settle such forms, rules and regulations as shall be followed and observed in the proceedings on insolvency under this Act, as they may deem to be necessary, and to fix and settle the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attornies, solicitors, counsels, officers of courts, whether for the officer or for the Crown, as a fee for the fee fund or otherwise, sheriffs, assignees, or other persons whom it may be necessary to provide for.

GENERAL PROVISIONS.

Rights of unpaid vendor under *Coutume de Paris*, restricted

12. In all cases of sales of merchandize to a trader in Lower Canada subsequently becoming insolvent, the exercise of the rights and privileges conferred upon the unpaid vendor by the one hundred and seventy-sixth and one hundred and seventy-seventh articles of the *Coutume de Paris*, is hereby restricted to a period of fifteen days from the delivery of such merchandise;

In L. C. marriage contracts of traders to be registered within a certain period.

2. In Lower Canada, every trader who marries, having previously executed a contract of marriage by which he gives or promises to give, or to pay, or cause to be paid to his wife, any property or effects, or any sum of money, shall cause such contract of marriage to be enregistered in the registration division in which he has his place of business, within thirty days from the execution thereof: and every trader already married, having such marriage contract with his wife, shall enregister the same as aforesaid, if it be not there already enregistered, within three months from the passing of this Act; and every person not a trader, but hereafter becoming a trader, and having such a contract of marriage with his wife, shall cause such contract to be enregistered as aforesaid (if it be not previously there enregistered), within thirty days from becoming such trader; and in default of such registration the wife shall not be permitted to avail herself of its provisions in any claim upon the estate of such insolvent for any advantage conferred upon or promised to her by its terms; nor shall she be deprived by reason of its pro-

Provision in default of such registration.

visions of any advantage or right upon the estate of her husband, to which, in the absence of any such contract, she would have been entitled by law;

Judgment in actions *en séparation de biens*, to be rendered only on certain conditions.

3. No judgment shall be rendered against any trader in Lower Canada in any action against him by his wife *en séparation de biens* or *en séparation de corps et de biens*, unless the institution of such action is advertised continuously for one month in the *Canada Gazette*, and in two newspapers published in or nearest to the place of residence of such trader, one in French, the other in English; nor unless such action be brought in the district within which the defendant has his domicile; and any creditor of the defendant in any such suit may intervene therein for the purpose of examining such debtor respecting his estate and effects, without becoming liable for any costs either to the plaintiff or to the defendant, and may also intervene therein, and oppose the demand of the plaintiff, or subsequently contest the validity of any judgment rendered therein, subject to the ordinary rule as to costs;

Creditors may intervene.

Interpretation.

"Before notaries."

"Judge."

"Court."

4. The words "before notaries" shall mean executed in notarial form according to the law of Lower Canada; the words "the judge" shall, in Lower Canada, signify a judge of the Superior Court for Lower Canada, having jurisdiction at the domicile of the insolvent; and in Upper Canada a judge of the County Court of the county or union of counties in which the proceedings are carried on, and the words "the Court" shall, in Lower Canada, signify the said Superior Court, and in Upper Canada the County Court, unless it is otherwise expressed or unless the context plainly requires a different construction: but the twenty-fourth and twenty-fifth sections of the seventy-eighth chapter of the Consolidated Statutes for Lower Canada, including subsection number two of the said twenty-fifth section shall apply in Lower Canada to the proceedings under this Act;

Certain provisions to apply.

"Assignee."

"Day."

"Creditor."

5. The word "Assignee" shall mean the official assignee appointed in proceedings for compulsory liquidation as well as the assignee appointed under a deed of voluntary assignment; the word "day" shall mean a juridcial day; the word "Creditor" shall be held to mean every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety; but no debt shall be doubly represented or ranked for, either in the computation for ascertaining the numbers and

proportion of creditors, or in the allotment or payment of dividends; the word "collocated" shall mean ranked or placed in the dividend sheet for some dividend or sum of money; and all the provisions of this Act respecting traders, shall be held to apply equally to unincorporated trading companies and co-partnerships; and the chief office or place of business of such unincorporated trading companies and co-partnerships shall be their domicile for the purposes of this Act; "Collocated." Application of act to companies, &c.

6. Every assignee to whom an assignment is made under this Act, and every official assignee appointed under the provisions of this Act, is an agent within the meaning of the forty-third, forty-fourth, forty-sixth, forty-eighth and forty-ninth sections of the ninety-second chapter of the Consolidated Statutes of Canada; and every provision of this Act, or resolution of the creditors, relating to the duties of an assignee or official assignee, shall be held to be direction in writing, within the meaning of the said forty-third section of the said chapter; and in an indictment against an assignee or official assignee under any of the said sections, the right of property in any monies, security, matter, or thing, may be laid in "the creditors of the insolvent (*naming him*), under the Insolvent Act of 1864," or in the name of any assignee subsequently appointed, in his quality as such assignee; Assignees to be agents within the meaning of the Cons. Stat. Canada, cap. 92, sec. 43, &c.

7. The deed of assignment, or an authentic copy thereof, or a duly authenticated copy of the order of the judge appointing an official assignee, or a duly certified extract from the minutes of a meeting of creditors, according to the mode in which the assignee or official assignee is alleged to be appointed, shall be *primâ facie* evidence in all courts, whether civil or criminal, of such appointment, and of the regularity of all proceedings at the time thereof antecedent thereto; Deed of assignment, &c., to be *primâ facie* evidence.

8. One per centum upon all moneys proceeding from the sale by an assignee, under the provisions of this Act, of any immoveable property in Lower Canada, shall be retained by the assignee out of such moneys, and shall by such assignee be paid over to the sheriff of the district, or of either of the counties of Gaspé or Bonaventure, as the case may be, within which the immoveable property sold shall be situate, to form part of the building and jury fund of such district or county; Per centage for Building and Jury Fund in L. C.

9. The Governor in Council shall have all the powers with respect to imposing a tax or duty upon proceedings under this Power to impose a tax on proceedings in L.C.

Act, which are conferred upon the Governor in Council by the thirty-second and thirty-third sections of the one hundred and ninth chapter of the Consolidated Statutes for Lower Canada, and by the Act intituled: *An Act to make provision for the erection or repair of Court Houses and Gaols at certain places in Lower Canada*, (12 Vic., cap. 11[illegible].)

Short title.

13. This Act shall be called and known as "The Insolvent Act of 1864," and shall come into force and take effect on and after the first day of September next.

FORM A.*

INSOLVENT ACT OF 1864.

The creditors of the undersigned are notified to meet at in on the *th* day of at *(eight)* o'clock for the purpose of receiving statements of his affairs, and of naming an assignee to whom he may make an assignment under the above Act.

(*Domicile of debtor, and date.*)

(*Signature.*)

(*The following is to be added to the notices sent by post.*)

The creditors holding direct claims and indirect claims, maturing before the meeting, for one hundred dollars each and upwards, are as follows: (*names of creditors and amount due*) and the aggregate of claims under one hundred dollars is $

(*Domicile of debtor, and date,*)

(*Signature.*)

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* The Amendment Act, now before the House, that the following forms pointed out in the footnotes, be substituted for the forms appended to the Act now in force, until the said Amendment Act become law, the latter alone must be used.

INSOLVENT ACT OF 1864.

The creditors of the undersigned are notified to meet at , in on , the th day of at o'clock , to receive statements of his affairs, and to name an assignee. (*Domicile of debtor and date.*)

(*Signature*).

The following is to be added to the notices sent by post:

The creditors holding direct claims and indirect claims, maturing b the meeting, for one hundred dollars each and upwards, are as follo (*names of creditors and amounts due*) and the aggregate of claims und one hundred dollars, is $. (*Domicile of debtor and date*). (*Signature*).

FORM B.

INSOLVENT ACT OF 1864.

In the matter of A. B., an insolvent.

Schedule of Creditors.

1. Direct Liabilities.

Name.	Residence.	Nature of Debt.	Amount.	Total.

2. Indirect liabilities, maturing before the day fixed for the first meeting of creditors.

Name.	Residence.	Nature of Debt.	Amount.

3. Indirect liabilities, maturing after the day fixed for the first meeting of creditors.

Name.	Residence.	Nature of Debt.	Amount.

4. Negotiable paper, the holders of which are unknown.

Date.	Name. of Maker.	Names liable to Insolvent.	When due.	Amount.

PROVINCE OF CANADA, }
DISTRICT (*or County*) } INSOLVENT ACT OF 1864.

I, A. B., the above named insolvent, being duly sworn, depose and say :

1. That to the best of my knowledge and belief, and according to my books, the above schedule contains a true and correct list of my liabilities, according to its purport, and that each of such liabilities is correctly classified therein.

2. That all of the above-mentioned liabilities are honestly due by me and that none of them were created or have been increased with the intention of giving to the creditor thereof any advantage either in voting at meetings of creditors, or in ranking on my estate. And I have signed.

Sworn before me at this day of 186 .

FORM C.

INSOLVENT ACT OF 1864.

This assignment made between of the first part, and of the second part, witnesses,

(*or*)

On this day of before the undersigned notaries came and appeared of the first part, and of the second part, which said parties declared to us Notaries.

That under the provisions of "The Insolvent Act of 1864" the said party of the first part, being insolvent, has voluntarily assigned and hereby does voluntarily assign to the said party of the second part, accepting thereof as assignee under the said Act, and for the purposes therein provided, all his estate and effects, real and personal, of every nature and kind whatsoever.

To have and to hold to the party of the second part as assignee for the purposes and under the Act aforesaid.

And a duplicate of the list of creditors exhibited at the first meeting of his creditors, by the said party of the first part, is hereto annexed.

In witness whereof, &c.

or

Done and passed, &c.

FORM D.

INSOLVENT ACT OF 1864.

In the matter of

A. B. (*or* A. B. & Co.)
an Insolvent.

The creditors of the insolvent are notified that he has made an assignment of his estate and effects, under the above Act, to me, the undersigned assignee, and they are required to furnish me, within two months from this date, with their claims, specifying the security they hold, if any, and the value of it; and if none, stating the fact; the whole attested under oath, with the vouchers in support of such claims.

(*Place* *date*)

(*Signature of Assignee.*)

FORM E.

INSOLVENT ACT OF 1864.

To (*name* *residence* *and description* of Insolvent.)

You are hereby required to make an assignment of your estate and effects under the above Act, for the benefit of your creditors.

Place *date*

(*Signature of creditor.*)

FORM F.

INSOLVENT ACT OF 1864.

PROVINCE OF CANADA, }
DISTRICT OF }

A. B———, (*name, residence and description.*)
Plaintiff.

vs.

C. D———, (*name, residence and description.*)
Defendant.

I, A. B———, (*name, residence and description*) being duly sworn, depose and say:

1. I am the plaintiff in this cause (*or one of the plaintiffs, or the clerk, or the agent of the plaintiff in this cause duly authorized for the purposes hereof;*

2. The defendant is indebted to the plaintiff (*or as the case may be*) in the sum of dollars currency for, (*state concisely amd clearly the nature of the debt*) ;

3. To the best of my knowledge and belief the defendant is insolvent within the meaning of the Insolvent Act of 1864, and has rendered himself liable to have his estate placed in compulsory liquidation under the above mentioned Act; and my reasons for so believing are as follows : (*state concisely the facts relied upon as rendering the debtor insolvent, and as subjecting his estate to be placed in compulsory liquidation.*)

And I have signed ; (*or* I declare that I cannot sign,) this day of 186 .

and if the deponent cannot sign, add—*the foregoing affidavit having been first read over by me to the deponent.*

FORM G.

INSOLVENT ACT OF 1864.

PROVINCE OF CANADA, *District of Quebec.* } VICTORIA, *by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.*

To the Sheriff of our District (*or* County) of

No. GREETING :

WE command you at the instance of to attach the estate and effects, moneys and securities for moneys, vouchers, and all the office and business papers and documents of every kind and nature whatsoever of and belonging to if the same shall be found in (*name of district or other territorial jurisdiction*) and the same so attached, safely to hold, keep and detain in your charge and custody, until the attachment thereof, which shall be so made under and by virtue of this Writ, shall be determined in due course of Law.

We command you also to summon the said to be and appear before Us, in our Court for at in the County (or District) of on the day of then and there to answer the said

of the plaint contained in the declaration hereto annexed, and further to do and receive what, in our said Court, before Us, in this behalf shall be considered; and in what manner you shall have executed this Writ, then and there certify unto us, with your doings thereon, and every of them, and have you then and there also this Writ.

In Witness Whereof, We have caused the Seal of our said Court to be hereunto affixed, at aforesaid , this day of in the year of our Lord, one thousand eight hundred and sixty- in the

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FORM H.*

Insolvent Act of 1864.

A. B.,
Plff.
C. D.,
Deft.

A writ of attachment has issued in this cause, of which all persons interested in the estate of the defendant, and all persons having in their possession, custody, or power, any portion of the assets of the defendant, or who are in any way indebted to him, are required to take notice.

(*Place.* *Date*)

(*Signature*)
Sheriff.

FORM I.

Insolvent Act of 1864.

I swear that I (*or, the firm of which I am a member, or A. B. of of whom I am the duly authorized agent in this behalf,*) am (or *is*) a creditor of the insolvent, and that I will give my advice in the appointment of an assignee to his estate, honestly and faithfully, and in the interest of his creditors generally.

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* FORM H.—(*To be substituted*).

Insolvent Act of 1864.

A. B., Plaintiff.
C. D., Defendant.
A Writ of Attachment has issued in this cause.
(*Place.* *Date*).

(*Signature.*)
Sheriff.

FORM K.*

INSOLVENT ACT OF 1864.

In the matter of

A. B. (*or* A. B. & Co.),

an insolvent.

The creditors of the insolvent are notified that I the undersigned (*name and residence*) have been appointed official assignee of his estate and effects: and they are required to produce before me, within two months from this date, their claims upon the said estate under oath, specifying the security they hold, if any, and the value of it; and if none, stating the fact, with vouchers in support of such claims.

(*Place.* *Date.*)

(*Signature*).

Official Assignee.

FORM L.

INSOLVENT ACT OF 1864.

In the matter of

A. B.,

an insolvent.

In consideration of the sum of $ whereof quit; C. D., assignee of the insolvent, in that capacity hereby sells and assigns to E. F. accepting thereof, all claim by the insolvent against G. H. of (*describing the debtor*) with the evidences of debt and securities thereto appertaining, but without any warranty of any kind or nature whatsoever.

C. D., *Assignee.*

E. F.

FORM M.

This deed, made under the provisions of the Insolvent Act of 1864, the day of &c., between A. B. of &c., in

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* FORM K.—(*To be substituted.*)

INSOLVENT ACT OF 1864.

In the matter of A. B., (*or* A. B. & Co.), an insolvent.

The undersigned has been appointed assignee in this matter, and requires claims to be filed within two months from this date.

(*Place.* *Date.*)

(*Signature,*)

Assignee.

his capacity of assignee of the estate and effects of an insolvent, under a deed of assignment executed on the day of at in Canada, (*or under an order of the judge made at on the day of*) of the one part, and C. D., of &c., of the other part, witnesseth: That he, the said A. B., in his said capacity, hath caused the sale of the real estate hereinafter mentioned, to be advertised in the *Canada Gazette* from the day of to the day of inclusive, and hath adjudged and doth hereby grant, bargain, sell, and confirm the same, to wit; unto the said C. D., his heirs and assigns for ever, all (*in Upper Canada insert "the rights and interests of the insolvent in"*) that certain lot of land, &c., (*insert here a description of the property sold*): To have and to hold the same, with the appurtenances thereof, unto the said C. D., his heirs and assigns for ever. The said sale is so made for and in consideration of the sum of $ in hand paid by the said C. D., to the said A. B., the receipt whereof is hereby acknowledged (*or* of which the said C. D. hath paid to the said A. B. the sum of the receipt whereof is hereby acknowledged) and the balance or sum of $ the said C. D. hereby promises to pay the said A. B., in his said capacity, as follows, to wit—(*here state the terms of payment*)—the whole with interest payable and, as security for the payments so to be made, the said C. D. hereby specially mortgages and hypothecates to and in favour of the said A. B., in his said capacity, the lot of land and premises hereby sold. In witness,

A.B. [L.S.]

Signed, sealed, and delivered in the presence of C.D. [L.S.]

E.F.

FORM N.*

INSOLVENT ACT OF 1864.

In the matter of A. B. (*or* A. B. & Co.,) an insolvent.

The creditors of the insolvent are notified that a dividend sheet has

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*FORM N.—(*To be substituted.*)

INSOLVENT ACT OF 1864.

In the matter of A. B. (*or* A. B. & Co.,) an insolvent
A dividend sheet has been prepared, subject to objection until the day of , (*Date*).

Assignee.

been prepared, and will remain open to inspection and objection at my office (*describing it*) every day between the hours of ten and five o'clock until the day of after which the dividends therein allotted will be paid.

FORM O.*

INSOLVENT ACT OF 1864.

PROVINCE OF CANADA } In the (*name of Court*)
District (*or County of*) } In the matter of A. B. (*or* A. B. & Co.), an insolvent.

Notice is hereby given that the undersigned has filed in the office of this Court, a consent by his creditors to his discharge (*or a deed of composition and discharge, executed by his creditors*), and that on the day of next, at ten of the clock in the forenoon, or as soon as counsel can be heard, he will apply to the said Court (*or to the judge of the said Court, as the case may be*) for a confirmation of the discharge thereby effected in his favor, under the said Act.

(*Place.* *Date.*)

(Signature of insolvent, or of his attorney *ad litem*).

FORM P.

INSOLVENT ACT OF 1864.

PROVINCE OF CANADA, } In the (*name of Court*)
District (*or County*) of } In the matter of A. B., an insolvent.

Notice is hereby given that the undersigned creditor of the insolvent has required him to file in the office of this Court, the consent of his

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* FORM O.—(*To be substituted*).

INSOLVENT ACT OF 1864.

PROVINCE OF CANADA }
District (*or* County, of }

In the (*name of Court*).

In the matter of A. B. (*or* A. B. & Co.), an insolvent.

The undersigned has filed in the office of this Court, a consent by his creditors to his discharge (*or* a deed of composition and discharge, executed by his creditors), and on the day of next, at ten of the clock in the forenoon, or as soon as counsel can be heard, he will apply to the said Court (*or* to the judge of the said Court as the case may be) for a confirmation thereof.

(*Place.* *Date*).

(Signature of insolvent, or of his attorney *ad litem*).

creditors, or the deed of composition and discharge executed by them under which he claims to be discharged under the said Act; and that on the day of next, at ten of the clock in the forenoon, or as soon as counsel can be heard, the undersigned will apply to the said Court (*or* to the Judge of the said Court, *as the case may be*) for the annulling of such discharge.

(*Place* *date*)

(Signature of insolvent, or of his attorney *ad litem*.)

FORM Q.*

INSOLVENT ACT OF 1864.

PROVINCE OF CANADA, } In the (*name of Court*)
District (*or County*) of } In the matter of A. B. (or A. B. & Co., an insolvent.

Notice is hereby given, that on the day of next, at ten of the clock in the forenoon, or as soon as counsel can be heard, the undersigned will apply to the said Court, (or the judge of the said Court, *as the case may be*) for a discharge under the said Act.

(*Place.* *Date.*)

(Signature of the insolvent, or his attorney *ad litem*).

FORM R.

INSOLVENT ACT OF 1864.

In the matter of
A. B.,
An insolvent, and
C. D.,
Claimant.

I, C. D., of , being duly sworn in depose and say:

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* FORM Q.—(*To be substituted*).

INSOLVENT ACT OF 1864.

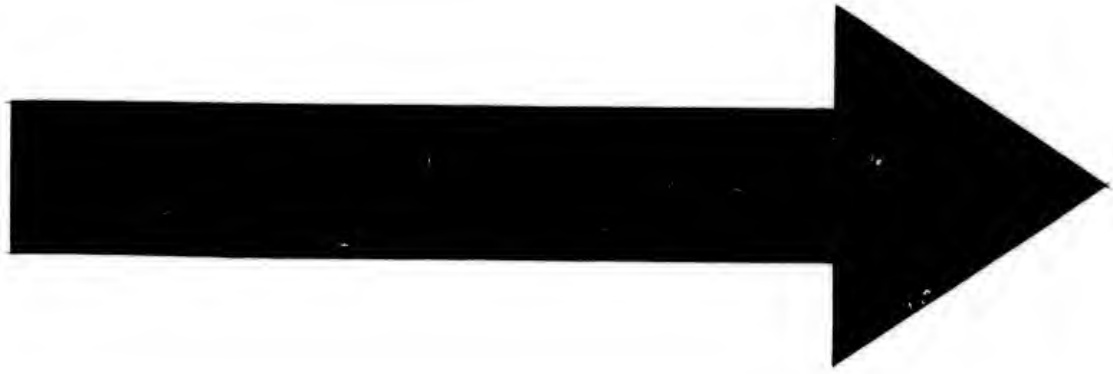
PROVINCE OF CANADA, } In the (*name of Court*)
District (*or County*) of }

In the matter of A. B., (*or* A. B. & Co.), an insolvent.

In the day of next, at ten of the clock in the forenoon, or as soon as counsel can be heard, the undersigned will apply to the said Court (*or* the Judge of the said Court, as the case may be) for a discharge under the said Act.

(*Place.* *Date.*)

Signature of the insolvent, or his attorney *ad litem*.



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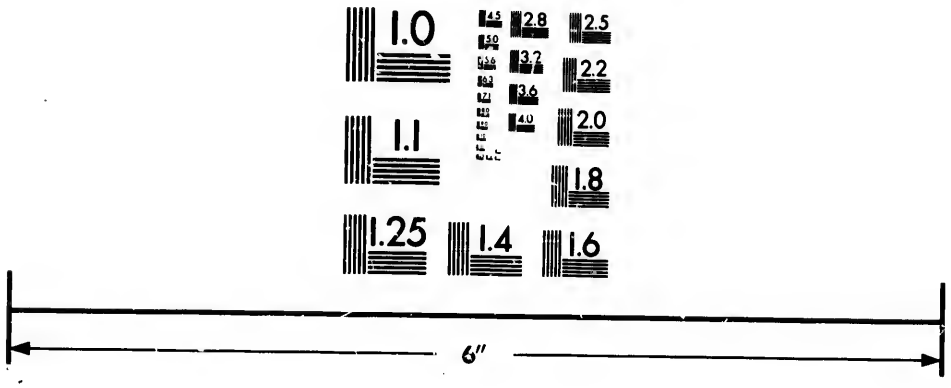
TEST TARGET (MT-3)



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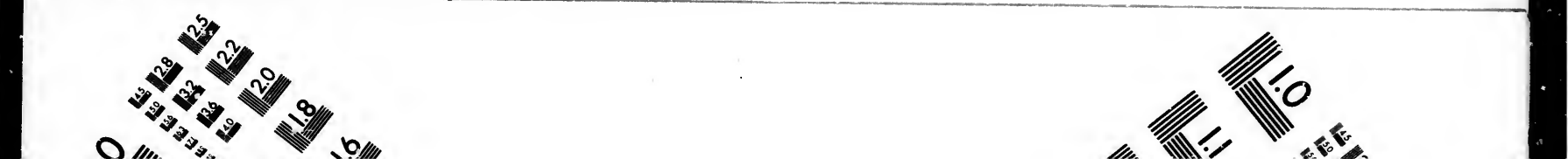
Sciences
Corporation

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



1. I am the claimant (or *the duly authorized agent of the claimant in this behalf, and have a personal knowledge of the matter hereinafter deposed to*, or *a member of the firm of* claimants *in the matter, and the said firm is composed of myself* and *of E. F. of*)

2. The insolvent is indebted to me (or *to the claimant*) in the sum of dollars, for (*here state the nature and particulars of the claim, for which purpose reference may also be made to accounts or documents annexed.*)

3. I (or *the claimant*) hold no security for the claim, (or *I* or *the claimant holds the following, and no other security for the claim, namely*; (*state the particulars of the security.*)

To the best of my knowledge and belief, the security is of the value of dollars.

Sworn before me at
this day of } And I have signed.

RULES AND ORDERS

AND

TARIFF OF FEES.

MADE BY THE JUDGES OF THE SUPERIOR COURT FOR LOWER CANADA, UNDER AND BY VIRTUE OF THE STATUTE 27 AND 28 VICT., CAP. 17, INTITULED: "AN ACT RESPECTING INSOLVENCY."

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1. There shall be assigned in the Court House of each Judicial District at which the sittings of the Superior Court are held, two rooms for matters in Insolvency, one in which the sittings of the Judge shall be held, and the other for the Office of the Clerk in Insolvency.

2. All judicial proceedings in Insolvency shall be had and conducted in the said Court Room alone, and not elsewhere; and the sittings of the Judge shall commence at 11 A.M., or at such other hour as the Judges or Judge in each District shall hereafter appoint, and shall continue till the business of the day shall be completed, or until the Judge shall adjourn the same.

3. The Clerk's Office shall be kept open every juridical day, from 9 A.M. to 4 P.M., and shall be attended during that time by a Clerk appointed by the District Prothonotary, and who shall be known as "The Clerk in Insolvency."

4. To ensure regularity of proceedings at the sittings of the Judges, the business shall be conducted in the following order:

1. Meetings of Creditors;
2. Motions;
3. Rules Nisi;
4. Petitions, except as hereinafter mentioned;
5. Proceedings on applications for discharge of Insolvents;
6. Proceedings on applications for discharge of Assignee;
7. Appeals.

5. Proceedings before a Judge or Court may be conducted by the Insolvent himself, or by any party having interest therein, or by their Attorney *ad litem*, admitted to practice in Lower Canada, and by no other person.

6. All Motions, Petitions and Claims, and all papers in the nature of pleadings in Insolvency shall be intituled: In Insolvency, for the District of.....In the matter of .....Insolvent, and..... Claimant, Petitioner or Applicant, as the case may be, and they must be plainly written without interlineations or abbreviations of words; and the object or purpose thereof shall be plainly and concisely stated. They shall also be subscribed by the Petitioner, Applicant or Claimant, or by his Attorney *ad litem* for him. And they shall be subject to the ordinary rules of procedure of the Superior Court in respect of similar papers, as regards the names and designations of the parties, and the mode in which they shall be docketed and filed.

7. No paper of any description shall be received or filed in any case, unless the same shall be properly numbered and intituled in the case or proceeding to which it may refer or belong; and be also endorsed with the general description thereof, and with the name of the party or his Attorney *ad litem* filing the same.

8. In all appealable matter in dispute, the pretensions of the parties shall be set forth in writing, in a clear, precise and intelligible manner, and the notes of the verbal evidence taken before the Assignee shall be plainly written, shall be signed by the witness, if he can write and sign his name, and shall be certified by the Assignee as having been sworn before him. And in the event of an appeal, the Assignee shall make and certify a transcript from his Register, of the proceedings before him in the matter appealed from. And he shall also make and certify a list of the documents composing such proceedings and appertaining thereto, and shall annex such transcript and list to such documents with a strong paper or parchment cover, before producing the record before the Judge, as required by the said Act.

9. All proceedings before a Judge or Court shall be entered daily, in order of date, in a docket of proceedings, to be kept by the Clerk for each case; and shall, from time to time, and until the close of the Estate, be fairly transcribed in Registers suitable therefor, which shall be kept and preserved by the Prothonotary, in the same manner as the Registers of proceedings of the Superior Court.

10. No Demand, Petition or Application of which notice is required to be given, either by the provisions of the said Act or by an order of the Judge or Court, shall be heard until after such notice shall have been given, and due return thereof made and filed in the case.

11. Except when otherwise limited and provided by the said Act, and upon good cause shewn, the time for proceeding after notice

thereof has been given, may be enlarged by the Judge or Court whenever the rights of parties interested may seem to require it for the purposes of justice.

12. Whenever a particular number of days is prescribed for the doing of an Act in Insolvency, the first and last day shall not be computed, nor any fractions of a day allowed; and when the last day shall fall upon a Sunday or Holiday, the time shall be enlarged to the next juridical day.

13. All affidavits of indebtedness made by a creditor, or by the clerk or agent of such creditor, shall set forth the particulars and nature of the debt, with the same degree of certainty and precision as is required in affidavits to hold to bail in civil process in the Courts of Lower Canada.

14. All Writs of Attachment issued under the said Act, shall, as issued, be numbered and entered successively by the Clerk in a Book, to which there shall be an Index, and to which access for examination or extract shall be had *gratis*, at all times during office hours.

15. Every such Writ shall describe the parties thereto, in the same manner as they are described in the said affidavits of debt; and the Declaration accompanying the said Writ, shall be similar in its form to the Declarations required to be filed in ordinary suits in the Superior Court.

16. No such Writ shall issue until after the affidavit of debt upon which the Writ is founded, shall have been duly filed in the Clerk's Office.

17. All services of Writs, Rules, Notices, Warrants and proceedings in Lower Canada, except otherwise specially prescribed by the said Act, may be made by a Bailiff of the Superior or Circuit Court, whose certificates of service shall be in the form required for service of process in the said Courts; or by any literate person, who shall certify his service by his affidavit; and in either case, the manner, place and time of such service shall be described in words, and also the distance from the place of service to the place of proceeding.

18. All services of Writs, Rules, Notices, Warrants or other proceedings, shall be made between the hours of 8 A.M. and 7 P.M., unless otherwise directed by a Judge or Court upon good cause shewn.

19. Writs of Attachment need not be called in open Court, but shall be returned on the return day into the Clerk's Office, and shall be there filed for proceedings thereon, as may be advised or directed.

20. Every day, except Sundays and Holidays, shall be a juridical day for the return of said Writs, and for judicial and Court proceedings.

21. The Sheriff to whom the Writ of Attachment shall be directed, shall not be required to make any detailed Inventory or *procès-verbal* of the effects or articles by him attached under such Writ; but a full and complete Inventory of the Insolvent's Estate, so attached by the Sheriff shall be made by the Assignee or person who shall be placed in possession thereof as guardian under such Writ; by sorting and numbering the books of account, papers, documents and vouchers of the Estate, and entering the same, with the other assets and effects thereof, in detail, in a book for the same, which shall be called "The Inventory of the Estate of .....," and which shall be filed by the said Assignee or person in possession, on the return day of the said Writ, as required by the said Act; and the said Inventory shall be open for examination or extract at all times during office hours, *gratis*.

22. Immediately upon the execution of the voluntary deed or instrument of assignment to the Assignee, he shall give notice thereof by advertisement in the form D of the said Act, requiring, by such notice, all Creditors of the Insolvent to produce before him, within two months from the date thereof, their claims, specifying the security therefor, with the vouchers in support of such claims, as required by such notice.

23. The Clerk shall prepare for the Judge or Court, a list of matters pending, or ready and fixed for proceeding on each day, following therein the order of procedure prescribed by the 4th Rule, which list shall be communicated to the Judge on the previous day.

24. The record of proceedings in each case shall, at all times during office hours, be accessible, at the Clerk's Office, to Creditors and others in interest in such cases, for examination or extract therefrom, *gratis*. And in like manner the minutes of meetings of Creditors, and the registers of proceedings, together with the claims made and the documents in possession of the Assignee, shall also be accessible to Creditors and others interested in the case, at convenient hours, daily, to be appointed by the said Assignee.

25. The Assignee shall, from time to time, under order of date, and within twenty-four hours after the proceedings had before him, file in the said Clerk's Office, a clear copy under his signature as such Assignee, of such proceedings, together with a copy of the several Newspapers and Official Gazette, in which he shall have caused notices of such proceedings to be advertised, which said copy and newspapers shall form part of the record of proceedings of the particular case.

26. The Assignee shall, on the third juridical day of each month, after he shall have commenced to deposit Estate moneys in a Bank or Bank Agency, as required by the said Act, file of record in the case an account of the Estate, shewing the balance thereof in his hands, or under his control, made up to the last day of the preceding month. And no moneys so deposited, shall be withdrawn without a special order of the Court, entered in the docket of proceedings in the case, or upon a dividend sheet prepared and notified, as required by the said Act, or unless otherwise ordered by the Creditors, under the powers conferred upon them by the said Act.

27. Every want of compliance with these rules in proceedings shall be *a peine de nullité*, and the proceeding in which the irregularity has occurred if objected to, on the ground of such want of compliance, shall be null and have no effect.

MONTREAL, 10th October, 1864.

(Signed)

EDWARD BOWEN, CH. J. S. C.
J. SMITH, J. S. C.
E. SHORT, J. S. C.
W. BADGLEY, J. S. C.
J. T. MCCORD, J. S. C.
A. LAFONTAINE, J. S. C.
A. POLETTE, J. S. C.
J. A. BERTHELOT, J. S. C.
S. C. MEIKS, A. J. S. C.
J. T. TACHEREAU, A. J. S. C.

TARIFF OF FEES IN INSOLVENCY.

IN PROCEEDINGS FOR COMPULSORY LIQUIDATION.

ON BEHALF OF PLAINTIFF,

IF NOT CONTESTED:

	$ cts.
To the Prothonotary for Writ of Attachment	1 80
Do Copy of Writ	0 30
Sheriff for Warrant	2 50
Copies of Warrant, each	0 50
All proceedings by the Sheriff or his Agent or Messenger in the seizure and return, exclusive of Mileage	2 00
Guardian, per day	1 00
Do Making up Inventory and Statements, to be subject to taxation by the Judge:	
To the Prothonotary on return of Writ	5 00
Crier's Fee on Return	0 80
To the Prothonotary for copy of order for meeting	0 50
To the Prothonotary for meeting	1 00
To the Prothonotary for each copy of judgment appointing Official Assignee	0 50
Attorney's Fee for conducting proceedings to appointment of Official Assignee	30 00

IF CONTESTED, ADDITIONAL FEES:

To the Prothonotary on Inscription	2 00
To the Prothonotary on every Witness examined for Plaintiff, exceeding two in number	0 30
And for each subsequent deposition exceeding 400 words in length, for every 100 words	0 10
Attorney's Fee, additional	20 00
Counsel Fee at Enquête, additional	10 00

ON BEHALF OF DEFENDANT,

IF NOT CONTESTED:

Attorney's Fee for appearance	10 00

	$ cts.
IF CONTESTED, ADDITIONAL FEES:	
To the Prothonotary on filing Petition in contestation	6 00
On every Witness examined for Defendant, exceeding two in number	0 30
And for each subsequent deposition exceeding 400 words in length, for every 100 words	0 10
Attorney's Fee, additional	20 00
Counsel Fee at Enquête	10 00
ON VOLUNTARY ASSIGNMENTS:	
To the Prothonotary for filing and entering Deed	2 00
ON PETITIONS, OTHER THAN PETITIONS IN APPEAL, IN CONTESTATION OF PROCEEDINGS FOR COMPULSORY LIQUIDATION.	
To the Petitioner's Attorney on every Petition, not contested	5 00
If contested, without Enquête	10 00
If contested, with Enquête	15 00
To the Respondent's Attorney—	
If contested, without Enquête	8 00
If contested, with Enquête	12 00
To the Prothonotary—	
Filing Petition	2 00
Copy of Order	0 50
If contested, on filing Contestation	2 00
If there be an Enquête, for every deposition	0 30
For all words over 400 in any deposition, per 100	0 10
ON PETITIONS IN APPEAL TO A JUDGE:	
To the Assignee for transcript of record and making up record and attendance before the Judge	5 00
To the Prothonotary—	
Filing Petition	2 00
Remission of Record	1 00
To the Attorney for the Petitioner—	
If not contested	10 00
If contested	20 00
To the Attorney for the Respondent	15 00
ON CLAIMS:	
To the Attorneys—	
For every chirographary claim, without security	1 00

For every chirographary claim, with security	2 00
For every hypothecary claim, if not contested	5 00
On every claim contested, without Enquête—	
Additional—To Claimant's Attorney	10 00
To Contestant's Attorney	10 00
With Enquête—	
To Claimant's Attorney	25 00
To Contestant's Attorney	20 00
To the Assignee—	
On every chirographary claim and hypothecary claim, not contested	0 10
For every witness examined on the contestation of a claim	0 25
On inscription of contestation for argument	2 00
On Contestations of Dividend Sheets—	
The same fees and disbursements to Counsel and to Assignee as on Contestation of Claim.	
On application for discharge by the Court, for confirmation of discharge, or for annulling discharge :	
To the Applicant's Attorney—	
If not contested	15 00
If contested, without Enquête	25 00
If contested, with Enquête	35 00
To the Respondent's Attorney—	
If contested, without Enquête	15 00
If contested, with Enquête	25 00
To the Prothonotary—Filing Application	2 00
Every Deposition	0 30
All words over 400 in each Deposition, per 100	0 10

MISCELLANEOUS.

To the Attorneys, Prothonotaries and Bailiffs, Fees and disbursements on all Rules, Motions, Copies of Rules, Judgments and Orders, Commissions *rogatoires*, and other incidental matters according to the same rates as are allowed by the present Tariff in first class actions in the Superior Court.

GENERAL ORDER OF DECEMBER, 1864,

AND

TARIFF OF FEES.

For Insolvency proceedings in Upper Canada, promulgated by the Judges of the Superior Courts of Common Law, and of the Court of Chancery, under 27 and 28 Victoria, c. 17.

ORDER.

Whereas it is provided by the Insolvent Act of 1864, amongst other things, that the Judges of the Superior Courts of Common Law, and of the Court of Chancery in Upper Canada, or any of them of whom the Chief Justice of Upper Canada, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one, shall have power to fix and settle the costs, fees, and charges which shall be had, taken, or paid, in all cases and proceedings under the said act, by or to attorneys, solicitors, counsel, officers of Courts, whether for the officers or for the Crown, as a fee for the fee fund, or otherwise, sheriffs, assignees, or other persons, whom it may be necessary to provide for;

And whereas the Chief Justice of Upper Canada, and the Judges of the Superior Courts of Common Law and Equity, at Toronto, have assumed the duty so imposed upon them;

In pursuance, therefore, of the power so contained in the Insolvent Act of 1864, the following table of costs has been framed by the Chief Justice and Judges, and it is hereby declared, determined and adjudged that all and singular the costs and fees mentioned in the said table, and no other or greater, shall be allowed on taxation, or taken or received, by any counsel or attorney, sheriff or officer, respectively, for any services rendered under the said Insolvent Act of 1864.

Toronto, December , 1864.

TARIFF.

Fees to solicitor or attorney, as between party and party, and also as between solicitor and client:

Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the statute expressly requires a petition, or for brief, where matter is required to be

argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal	$2 00
Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, declarations, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words, or under	0 20
Making other copies when required	0 10
When more than *five* copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies, drawing schedule, list, or notice of liabilities, per folio, when the number of creditors therein does not exceed twenty	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words over twenty	0 10
Every common affidavit of service of papers, including attendance	0 50
Every common attendance	0 50
Every special attendance on judge	2 00
For every hour after the first	1 00
To be increased by the judge at his discretion.	
Every special attendance at meetings of creditors, or before assignee, acting as arbitrator	1 00
Fee on writ of attachment against estate and effects of insolvent, including attendance	2 00
Fees on rule of Court or order of judge	1 00
Fee on sub ad test, including attendance	1 00
Fee on sub duces tecum, including attendance	1 25
And, if above 4 folios, then for each additional folio, over such 4 folios	0 10
Fee on every other writ	1 00
Every necessary letter	0 50
Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary cases, where no dispute	1 00
Costs of solicitor of petitioning creditor, for examining claims filed up to appointment of assignee, for each claim so examined	0 50
Cost of assignee's solicitor for examining each claim required by assignee to be examined	0 50
Preparing for publication advertisements required by the statute, including copies and all attendances in relation thereto	1 00

Preparing, engrossing, and procuring execution of bonds or other instruments of security	2 00
Mileage for the distance actually and necessarily travelled—per mile	0 10
Bill of Costs, engrossing, including copy for taxation, per folio	0 20
Copy for the opposite party	0 50
Taxation of costs	0 50

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same, as for like proceedings, as in the tariff of the Superior Courts.

COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

FEE FUND.

Every warrant issued against estate and effects of insolvent debtors	$1 00
Every other warrant or writ	0 30
Every summary rule, order, or fiat	0 30
Every meeting of creditors before judge	0 50
If more than an hour	1 00
If more that one on same day, $2.00 to be apportioned amongst all.	
Every affidavit administered before judge	0 20
Every certificate of proceedings by judge of County Court for transmission to a Superior Court or a judge thereof	0 50
Every bankrupt's certificate	0 50
Every taxation of costs	0 15

FEES TO CLERK.

Every writ, or rule, or order	0 50
Filling every affidavit or proceeding	0 10
Swearing affidavit	0 20
Copies of all proceedings of which copy bespoken or required, per folio of 100 words	0 10
Every certificate	0 30
Taxing costs	0 50
Taxing costs and giving allocatur	0 64
For every sitting under commission, per day	1 00
If more than one on same day, £2.00 to be apportioned amongst all.	

Fee for keeping record of proceedings in each case.....	1 00
For any list of debtors proved at first meeting, (if made).....	0 50
For any list of debtors at second meeting.....	0 50
Any search.....	0 50
A general search relating to one bankruptcy, or the bankruptcy of one person or firm.....	0 50

SHERIFF.

Same as on corresponding proceedings in Superior Courts.

WITNESSES.

Same as in Superior Courts.

We cannot refrain from remarking the moderation of the tariff, no item exceeding $2.00, whilst that for Lower Canada presents an array of tolerably high figures, such as thirty and thirty-five dollars. Is it to this cause that the upper section of the province owes its superiority—in the number of its published failures? This state of things may account for the humble fees provided for by this ungrateful tariff. Some compensation, however, may be found in the fact that this law, yielding so modest direct profits to the members of the bar, affords them sanctuary in cases of distress; a refuge denied to their brethren of the inferior section.

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