EXPLANATION OF PROPOSED AMENDMENTS IN THE BILL TO AMEND THE BANKRUPTCY ACT.

FORMAL—only correcting mistake in Act. Sec. 2, p. 1, line 12.

To meet a difficulty which has occurred through the omission of the words. Line 14.

There is no reason for the insertion of this exception, which is inconsistent with section 19 (1) of the Principal Act. 16.

All these matters are now practically dealt with by the Registrar alone under delegation. P. 2, line 1.

These words were copied from the English Act, and are absurd under our Act, which only allows of arrangement after Bankruptcy. P. 2, line 6.

This is important. Trustees are often very valuable to aid the Official Assignee, but endless difficulties arise where an Official Assignee is displaced, and in these days of regular quarterly audits by the Treasury, further confusion is likely to arise. It is always open to creditors to have an estate wound up under a Trust Deed, but when the estate is once in Court, proper control can only be exercised where it is in the hands of an officer of the Court. P. 2, line 8.

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There is no reason in confining this most valuable power to examinations under Section 30. It is often as much required at the public examination of bankrupt. P. 2, line 17.

Formal mistake in the Act. Sec. 2, p. 2, line 21.

Necessary.—The Registrar as a rule deals with the granting of certificates in the first instance under delegation. P. 2, line 23.

There is no justification in staying the hand of a landlord against goods which may not be the property of a bankrupt, but which he has a legal right to levy on. Line 25.

The words "against him" have raised a difficulty owing to an English decision on the meaning of these words as to whether the section applies to voluntary sequestrations, notwithstanding the earlier words of the section. Line 27.

"Three months" is probably a mistake. The object is to make the bankruptcy commence with the earliest available act of bankruptcy, and that is within six months from the date of the presentation of the petition.

This is to meet a difficulty which might arise if the Respondent, in proceedings against him under Sec. 130, were to prove an act of bankruptcy prior to the date of the goods coming into the order and disposition of the bankrupt. (See Lyon *v.* Weldon, 2 Bing 334.) Line 32.

This is most important. Under the old insolvency laws "payments" did not come within "actual preferences," under Sec. 8 of 5 Vic. No. 7, but were dealt with by Sec. 12, as amended by 25 Vic., Secs. 1 and 2. This latter Act appears to have been lost sight of by the framers of the Bankruptcy Act and payments were included in Sec. 56, and made void if actual preferences. And the words "and preferences," which originally occurred in Sec. 57, prevented the application of that Section to protect *bonâ fide* payments. The confusion arose in this way:—The section in the English Act corresponding with our Sec. 57 was all that could be desired, because the English preceding section referred only to fraudulent preferences. It was thought that the difficulty could be remedied by the omission of these words, "and preferences," and this was done by the Amendment Act of 1888, but no proper consideration was given to all the other cases under Sec. 56, and the result was that transactions which the Legislature had declared to be absolutely void were protected if the transferee had no notice of an act of bankruptcy at the time. This difficulty I dealt with (in *ex parte* Rogers) by holding that where an intent was shown to exist on the part of the bankrupt to defeat or delay creditors by the impeached transaction it became an act of bankruptcy, and therefore not within the protection of Sec. 57. This, however, is a most undesirable condition in which to leave the matter, and after much consideration I am asking the Legislature to put the whole matter on a sound basis by re-inserting the words in Sec. 57, and passing Sec. 17 of the amending Bill. The effect of this will be that payments *bona fide* made to a creditor who has no notice of an act of bankruptcy will be excluded from Sec. 56, and be good, unless impeachable on some other ground than "actual preference," *i.e.*, fraudulent preference, or intent to defeat or delay. All other transactions will be bad so far as they are actual preferences, but good so far as any present advance is concerned, provided there is no notice of any act of bankruptcy, and that it is *bona fide*; that is to say, if the transaction itself is not an act of bankruptcy. To illustrate the position:—A, the bankrupt, gives B, a creditor, security over certain property, in consideration of a present advance and also a past debt. That transaction can, in any event, only stand to secure B for his present advance, but if it appears that the present advance was of such a trifling amount in comparison as not to amount to a real consideration within the meaning of the numerous English cases on the subject, then the whole transaction will be set aside as "with intent to defeat and delay creditors." Line 35.

This is, I submit, a great improvement on our old law, under which every transaction was set aside, even where there was a substantial advance, if any portion of the consideration was a past debt.

P. 2, line 38. Formal.

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The second amendment is to make sense of this clause, the words proposed to be omitted being senseless.

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P. 2, line 51. This is necessary, as the Chief Clerk in Equity is not the taxing officer of the Equity Court.

53. This is most desirable, and the practice was recognised and recorded by Mr. Slattery, when Minister of Justice, on the appointment of Mr. Giblin; but it should be put beyond question. The Official Assignees are not Civil Servants, but essentially Officers of the Court, and are under the direction and control of the Court (sec. 6 subs. 1) and may be removed by the Judge for cause (sec. 88 subs. 2). Under these circumstances, the Judge ought to have the "approval" of any appointment, though it is quite right that the actual appointment should be with the Executive.

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Section 3, The limit of fourteen days is often inconvenient and involving adjournments.

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Line 26. This is most desirable, practically providing for a re-hearing instead of an appeal.

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Sec. 5. This is simply to enable the Registrar to sign the certificates as to who is the Official Assignee in any estate. It is purely an office matter, and should never come before the Judge at all.

Sec. 6. Taken from the English Act of 1890, and to enable the assignee of a judgment creditor to issue a bankruptcy notice.

Section 7. This is following the English Act of 1883, and to meet the difficulty pointed out by Mr. Salisbury in his Notes to our Act, and avoid a clashing with Secs. 51 and 52, as actually happened a short time ago.

Sec. 10, subs. (1) passes the property of the bankrupt which he had *at the time of the first act of bankruptcy on which the Petition is founded*, whereas Sec. 52 speaks of the property as that held at the *commencement of the bankruptcy*, which by Sec. 51 may be at the time of an act of bankruptcy three months prior to the date of the presentation of the Petition.

The proviso is new, and was intended to settle the law as to after-acquired real estate, the words used being those in which Brett, M.R., states the law in the case of Cohen *v.* Mitchell, 25 Q.B.D. 267. (See, however, *In re* New Land Development Association (1892), 2 Ch., 147.)

At present there are these two decisions of the Appeal Court in England apparently at variance on this point, though in the latter the matter was not necessary for the decision of the case. The whole question was thoroughly thrashed out in an article in a recent *Quarterly Review*, and it would appear that there can be no reason, in this country at all events, for any distinction between real and personal estate, as there is here no distinction whatever in cases of Intestacy.

The last paragraph is to meet a hardship involved in a recent decision, by which real estate, or indeed any estate after-acquired, no matter when (with reference to which there has been no dealing, of course), passes to the Official Assignee of a first bankruptcy, though the estate may have been sequestrated twice or even three times. (See *In re* Clark *ex parte* Beardmore (1894.) (2 Q. B.)

This is to legalise the present practice, and will prevent surprise in proving an earlier act of bankruptcy during the hearing of a case under Sec. 130, while it will still be open to anyone to dispute the act. Sec. 8.

Sec. 16 (2 and 3) of the Act of 1887.—Is very involved when taken into consideration with other sections, and this amendment will simplify the law and be just. Sec. 9.

This is quite new, but fair, and can only be done now in a roundabout way. It often happens that certain creditors bear the whole brunt of an action to recover assets, while others simply refuse to join in an indemnity to the Official Assignee, and stand in the position of "Heads I win, tails you lose." It is considered that the indemnifying creditors should have some benefit if the assets are recovered. Sec. 10.

(*a*.) Taken from the English Act of 1890. Sec. 11.

(*b*.) This is, I believe, also in the English Act, but in any event is most proper, as often an incredible amount of injury is done by these unregistered bills.

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This is really only declaratory, to make the section plain as it stands, and without any reference to any other part of the Act. The original was taken from the English Act of 1883, and in England insolvency was unknown. Sec. 12.

The earlier part of this section is taken from the English Act of 1883, and it is incomprehensible how it was omitted from our Act. It is all in favour of bankrupts and justice. Sec. 12.

The latter part is to prevent frivolous applications for the review of an order suspending or refusing a certificate. Under the present law, a man whose certificate has been refused may, after two years, with the consent of a bare majority of proved creditors, apply for a reconsideration, and an idea has gained ground that a man has a sort of right to get his certificate after two years, whereas certificates are often suspended for three years, and in England the minimum suspension is two years unless the bankrupt can pay 10s. in the £.

Under the proposal a man can apply at any time, with the consent of a majority in number and value of his creditors, for a review, and after five years, without any such consent.

In any event subsec. 7 is absurd, as the application must be made to the Full Court, the fact being that the framers of the Act put in the rider to 10 Vic. No. 19, and forgot that a later Act had been passed, transferring the power from the Full Court to the Chief Commissioner of Insolvent Estates. If the Commissioner was considered the proper person to review his own decision in this particular case why should not a Supreme Court Judge?

At present orders under sec. 61, *i.e.*, for payments out of salary, can only be made to last during bankruptcy, and they cease therefore on the certificate being granted; but it very often happens that a man in receipt of a good salary has done nothing to prevent the issue of his certificate, and it may still be unfair that he should not contribute to the payment of his debts. Sec. 14.

The latter portion is the law of England and here, but appears only in two separate Acts. The exception is new, and I submit desirable.

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This has already been fully dealt with in remarks to section 1, p. 2, line 35. Sec. 17.

(1.) This seems an improvement on the old section, which is obscurely worded, and is framed so that the "Chief Officer of the Department" is practically the person who makes the order and not the Judge. Sec. 18.

(2.) This was clearly a mistake in the original section.

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This is with a view to bringing Official Assignees more directly under the control of the Treasury, so far as their accounts are concerned, and substituting a Treasury for a Court audit. Sec. 20.

This is taken, though not in the same words, from the English Act of 1890, and is strongly urged as desirable. Sec. 21.

This was suggested by a paragraph in the money article in the *Daily Telegraph* some time ago, pointing out the desirability of notice being given to the public of Deeds of Assignment. There are a large number of these Assignments at Common Law which are to a certain extent recognised by the Act, although 5 Vic. No. 9 was repealed thereby; and the result of this will be that all such deeds, unless registered, will be capable of being treated as acts of bankruptcy, and will not be recognised in Bankruptcy. Sec. 22.

Sec. 23. (I). This section does not alter the general law as to bills of sale, except as to their validity against an Official Assignee; but it will, no doubt, compel registration and re-registration, as suggested. There is, and has been, a great amount of litigation in consequence of bills of sale not being registered, and there can be no doubt that the general public must be misled where there is no registration. The main object of insisting on renewals is to enable the relief to be given to the mercantile community proposed by section 25.

At the present the law is very unsatisfactory. A merchant, *bona fide*, advances money to a trader, and takes a bill of sale, which he registers. If, however, before he can take possession, the debtor commits an act of bankruptcy, as for instance by informing his creditor that he cannot carry on, the security is lost, because of the "order and disposition" clause, and the seizure being with notice of an act of bankruptcy; and there are many and just complaints on this head. It seemed to me, therefore, that it would be only fair to make this common class of security a good one, if proper protection could be given to the general body of creditors. The scheme proposed is to insist on due registration in the first instance, and to require an annual renewal as provided by Sec. 24, *i.e.*, by the filing of an affidavit that the security is still existing, and stating the amount due thereunder. With this regular notice of the security the public cannot complain if they continue to give credit, as they cannot pretend that credit was given on the faith of apparent ownership of the goods included in the bill of sale.

(II). There is no more difficult matter to deal with than this question of prior promise, and it is a very easy fraud to set up and maintain. It is startling to think how the old equitable principle of a prior promise could ever have been applied to bills of sale. If there is any valid reason why a bill of sale should not be drawn out and executed on account of shortness of time, or on any ground, this can be no reason why the promise, which can be sworn to now in a few words, should not be put into writing and registered. But here again the general law will only be affected should bankruptcy ensue.

Sec. 24, lines 5-6. (See note on Sec. 23.)

Sec. 27. This is a matter which often wants attending to in a hurry, and the power is very necessary.

Sec. 28. At the present time Official Assignees have to hire rooms simply to keep useless books and papers.

Sec. 29. This is very desirable. Under the law, as it at present stands, a negligent creditor can come in and disturb an approved plan of distribution at the last moment, thereby causing additional expense to the estate, trouble to the Official Assignee, and great delay to diligent creditors.

Sec. 30. This is practically re-enacting a section of the old Insolvency Act and is very necessary. It was originally a misdemeanour, but there is no necessity for going as far as that, and the provision requiring the warrant to be issued only by the Judge or Registrar, will be sufficient to protect parties from abuse of the power.

Sec. 31. This was drawn on the suggestion of the Minister of Justice, to meet the case of a prisoner in gaol on civil process, who will not file his schedule and thereby obtain release, but prefers to be supported by the Crown.

Amendments new clause 32. A recent case has shown the necessity of allowing the use of further evidence on appeals, which can only be done if they are treated as rehearings.

New clause 7. This is to meet a difficulty which sometimes arises in cases where a married woman has separate estate against which no *fi. fa.* can issue at law.

New clause 8. To meet an English decision construing the word "judgment" very strictly.

Clause 17, line 14. See remarks on page 1, line 35.

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This was suggested by a paragraph in the money article in the *Daily Telegraph* some time ago, pointing out the desirability of notice being given to the public of Deeds of Assignment. There are a large number of these Assignments at Common Law which are to a certain extent recognised by the Act, although 5 Vic. No. 9 was repealed thereby; and the result of this will be that all such deeds, unless registered, will be capable of being treated as acts of bankruptcy, and will not be recognised in Bankruptcy. Sec. 22.

Sec. 23. (I). This section does not alter the general law as to bills of sale, except as to their validity against an Official Assignee; but it will, no doubt, compel registration and re-registration, as suggested. There is, and has been, a great amount of litigation in consequence of bills of sale not being registered, and there can be no doubt that the general public must be misled where there is no registration. The main object of insisting on renewals is to enable the relief to be given to the mercantile community proposed by section 25.

At the present the law is very unsatisfactory. A merchant, *bona fide*, advances money to a trader, and takes a bill of sale, which he registers. If, however, before he can take possession, the debtor commits an act of bankruptcy, as for instance by informing his creditor that he cannot carry on, the security is lost, because of the "order and disposition" clause, and the seizure being with notice of an act of bankruptcy; and there are many and just complaints on this head. It seemed to me, therefore, that it would be only fair to make this common class of security a good one, if proper protection could be given to the general body of creditors. The scheme proposed is to insist on due registration in the first instance, and to require an annual renewal as provided by Sec. 24, *i.e.*, by the filing of an affidavit that the security is still existing, and stating the amount due thereunder. With this regular notice of the security the public cannot complain if they continue to give credit, as they cannot pretend that credit was given on the faith of apparent ownership of the goods included in the bill of sale.

(II). There is no more difficult matter to deal with than this question of prior promise, and it is a very easy fraud to set up and maintain. It is startling to think how the old equitable principle of a prior promise could ever have been applied to bills of sale. If there is any valid reason why a bill of sale should not be drawn out and executed on account of shortness of time, or on any ground, this can be no reason why the promise, which can be sworn to now in a few words, should not be put into writing and registered. But here again the general law will only be affected should bankruptcy ensue.

Sec. 24, lines 5-6. (See note on Sec. 23.)

Sec. 27. This is a matter which often wants attending to in a hurry, and the power is very necessary.

Sec. 28. At the present time Official Assignees have to hire rooms simply to keep useless books and papers.

Sec. 29. This is very desirable. Under the law, as it at present stands, a negligent creditor can come in and disturb an approved plan of distribution at the last moment, thereby causing additional expense to the estate, trouble to the Official Assignee, and great delay to diligent creditors.

Sec. 30. This is practically re-enacting a section of the old Insolvency Act and is very necessary. It was originally a misdemeanour, but there is no necessity for going as far as that, and the provision requiring the warrant to be issued only by the Judge or Registrar, will be sufficient to protect parties from abuse of the power.

Sec. 31. This was drawn on the suggestion of the Minister of Justice, to meet the case of a prisoner in gaol on civil process, who will not file his schedule and thereby obtain release, but prefers to be supported by the Crown.

Amendments new clause 32. A recent case has shown the necessity of allowing the use of further evidence on appeals, which can only be done if they are treated as rehearings.

New clause 7. This is to meet a difficulty which sometimes arises in cases where a married woman has separate estate against which no *fi. fa.* can issue at law.

New clause 8. To meet an English decision construing the word "judgment" very strictly.

Clause 17, line 14. See remarks on page 1, line 35.