(Corrected Judgment.)

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thurburn and another v. *Stewart and another, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 26th January*, 1871.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
SIR JOSEPH NAPIER.

THE first question which arises in this Appeal is one of very considerable consequence to the Colony from which the Appeal comes, namely, whether the sixth section of the Placaat of the Emperor Charles of 1540 is or is not in force in the Colony.

Now, in determining that question, their Lordships have nothing whatever to do with the policy of the Placaat, or with the expediency of retaining or not retaining it as part of the law of the country. Their function is only to determine whether it is part of the law at the present time. The sixth section of the Placaat contains provisions which, according to our ideas on the subject, are obviously of a kind entirely adverse to the principles upon which similar laws in this country have been passed. Nothing to us can appear to be more unjust than to make void *bonâ fide* provisions on behalf of a wife and children, entered into before marriage. Nothing to our ideas can be more inconsistent than an ordinance which would make void the provisions made under such circumstances for the wife, and leave those made for the children untouched; nothing, according to our ideas, can be so unnecessary as an ordinance containing provisions of that kind, extending, as it is said this ordinance would extend, to the case of non-traders as well as to the case of traders. But with those considerations we have at present nothing

whatever to do. They are considerations for the Legislature which exists in this Colony, and which has the power, if it is so minded, to put an end to this ordinance, if it is now part of the law of the Colony.

Now the Placaat to which I have referred is one containing a great number of heads; we are told that there are upwards of one hundred heads or divisions in the Placaat. Of the heads which we have seen of the Placaat, some, upon the face of them, have clearly come to an end from their very nature, and are no longer applicable. One of them which has been referred to in the argument has been repealed by a modern statute in the Colony. These heads, however, are distinct in their nature and in their character. The Placaat is more in the nature of a code of law than of a statute upon one particular branch of law. It may well be that the fate which has attended one division of the Placaat may be altogether different from that which has attended or should attend another division of the Placaat. The sixth division provides for the case of settlements made in consideration of marriage. It is not necessary to read it at length, as it has been so frequently read at the bar. Beyond all doubt this sixth division of the Placaat formed a part and a prominent part of the law of Holland at the time of the settlement of this Colony. It is found mentioned and explained in all the institutional writers on the Dutch Roman Law of the greatest authority, beginning with Grotius and ending with Van der Kessel. It had become annexed to, or perhaps I might say, incorporated into the Dutch Roman Law which then prevailed with regard to the *cessio bonorum*, and indeed into any proceeding under that Dutch Roman Law for the administration of assets. It pointed out the mode in which, as regards claims under marriage settlements, the assets of those who had made those settlements ought to be administered.

The question arises then, when the Colony of the Cape of Good Hope was settled, was or was not this sixth section of the Placaat part of the body of Dutch Law carried by the Colonists into their new settlement? Now, that is a question which always is one of difficulty. A passage was read to us from

Mr. Justice Blackstone's Commentaries, which states, with regard to the case of English Colonists, that they carry with them so much of English law as is applicable to their own situation. But upon that statement the observation of Lord Cranworth is well worthy of repetition, where, in the case of *Whicker* v. *Hume*, before the House of Lords in the seventh volume of the House of Lords Cases, he says, "Nothing is more difficult than to know "which of our laws is to be regarded as imported "into our Colonies;" and, adverting to the expression "laws adapted to the situation of the Colony," Lord Cranworth puts this question: "Who "is to decide whether they are adapted or not? "That is a very difficult question." But in this particular case their Lordships consider that the difficulty is not so serious as in many other cases it has been found to be. It is to be borne in mind that the first possession of the Cape of Good Hope by the Dutch was connected with, if not mainly with a view to, the greater enjoyment of their Indian possessions. The Dutch at that time were a commercial nation, and their settlements in the East Indies were of a commercial character. In the middle of the seventeenth century, when the permanent settlement of the Dutch at the Cape of Good Hope was made, and when the Town of Cape Town was founded, it is scarcely possible not to believe that the Dutch anticipated that this Colony would become a commercial station halfway between their own country and their East Indian possessions, and that it would be a place where or from which trade and commerce would be carried on. Under those circumstances it is difficult to imagine that, not enacting in the Colony any new or special Bankrupt Statute of their own, they would do otherwise than intend to carry, and suppose they had carried to the Colony the Bankruptcy Law which they possessed in their own country; and into that Bankruptcy Law, as I have already stated, the sixth provision of the Placaat of the Emperor had of necessity inserted and adapted itself in the administration of the estates of bankrupts.

Their Lordships, therefore, are of opinion that this would be, and was, a part of the law of Holland, carried along with them by the Colonists into

their new settlement. Beyond all doubt this Placaat must have been known from that time forward in the colony. Their Lordships cannot adopt the expressions which have been used, that the sixth division of the Placaat was one that was unknown in the Colony, and never heard of till comparatively modern times. It was, as has been said, referred to by all the Institutional writers which were the Institutional writers in use in the Colony, and appealed to in the Colony upon all questions of Dutch Roman Law. It is especially referred to in one of the latest Dutch Institutional writers, Van der Kessel, in his Book of Theses—a book in use again in the Colony, and it appears reprinted in the Colony for the use of the Colony. Moreover, another portion of the Placaat, as I have already said, was repealed by express Statute in the Colony, and, therefore, the Placaat, as a whole, cannot have been unknown in the Colony.

It is scarcely to be supposed that as regards Institutional writers, if what was laid down by the Institutional writers of Holland in use in the Colony was not accepted in the Colony, and if a different practice obtained with regard to marriage settlements from that which they describe, some trace would not be found of Institutional writing in the Colony, or of some of the Dutch books in the Colony reprinted there, taking notice that this which was referred to by the Dutch Institutional writers, was not accepted in the Colony as part of their practice.

It is said, however, that in point of fact the sixth division of the Placaat has never been applied in the Colony, and that the practice in the administration of assets has been at variance with, and contrary to, that which would have prevailed under that division of the Placaat. Now, it is sufficient to say on that head, that no evidence whatever of those statements has been adduced. It lay upon those who make the assertion to establish it. It is impossible to think that if a contrary practice had prevailed in the administration of assets, some proof could not have been given; and none has been given in this case.

As regards decided cases, their Lordships find that in the year 1856, in the Chiappini case, the sixth division of the Placaat was referred to and made

the ground of decision. From that decision there was no appeal, and it is somewhat remarkable that one of the learned Judges states that that decision created great surprise in the Colony, and great consternation among the mercantile classes in the Colony; and it may, perhaps, be matter of surprise that a settlement executed, as the settlement in the case now before their Lordships was executed in the year 1863, was under those circumstances made, as it appears to have been made, in ignorance of a Statute, of a Placaat, the enforcement of which had created so much astonishment in the Colony.

Their Lordships, therefore, upon this first part of the case cannot do otherwise than arrive at the conclusion at which the majority of the learned Judges in the Colony arrived, that whether this division of the Placaat be, as a matter of policy, expedient or inexpedient, it is (subject to any effect up onit which the Colonial Insolvency Act may have) part of the law of the Colony at the present time.

We have next to consider what is the meaning of this Placaat, and, in the first place, does it include all spouses, no matter where the marriage may have been celebrated, and no matter what the domicil of the spouse at the time of the marriage may have been? As regards the power of any country in the matter of legislation, there is no reason whatever why it should not include all spouses. The Placaat points to a course of distribution of assets in a *concursus* of creditors, and the proper order and priority of distribution of assets is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution. We may remember that in our own country in a Bankruptcy taking place in England, and in the administration in England of assets under a Bankruptcy, we should pay specialty and simple contract debts equally, even although the country in which one of the debts was contracted might recognize the distinction between those two classes of debts, and give a priority to specialty debts over simple contract debts. In like manner, in other cases less important, we give a priority to certain classes of creditors, such as those claiming for wages, those claiming for rent, those claiming on behalf of Friendly Societies—we give to them a

priority over other creditors of the bankrupt, even although those other creditors might be such by reason of contracts entered into in foreign countries, where the domicil of these creditors, and, perhaps, of the Bankrupt might be situated, and where no such priority might be recognized. We take no notice of the origin of the debts of other creditors; we take upon ourselves the right of regulating in those instances which I have mentioned the application of the assets.

Well, then, it being within the customary power possessed by all countries of legislation, are the words of this division of the Placaat large enough to include the case of all spouses? Their Lordships are of opinion that they clearly are sufficiently large. The 6th Section states that "whereas many "merchants take upon themselves to constitute in "favour of their wives large dowers, and excessive "gifts and benefits upon their property, as well in "consideration of marriage, as to secure their pro- "perty, with their aforesaid wives and children, and "afterwards are found to become insufficient to pay "and content their creditors, and wish to have "their wives and widows preferred before all cre- "ditors, to the great injury to the course of com- "merce; we will and ordain that the aforesaid "wives, who henceforward shall contract marriage "with merchants, shall not be entitled to pretend "to have or receive any dower, or any other benefit "on the property of their husbands, or to take part "and share in the acquisitions made *stante matrimo-* "*nio* by the husbands." There is no reason in the ordinary course of legislation why the words should be confined. The words are themselves of the largest and most general description, and their Lordships find no ground upon which they ought to be confined.

It was said, indeed, that there was a stipulation at the end of this division, reserving to wives and widows their right of preference "as the same is "competent to them by reason of their marriage "portion brought by them into the marriage." It was said that that reservation pointed to a right possessed by wives marrying under the Dutch Roman Law, and not possessed by wives marrying under other laws. It may very well be that that is so. Their Lordships express no opinion upon the

point; but, supposing that that is so, the reservation to wives marrying under a particular system of law of a right which they have under that law, would not of itself control the application of the Placaat to wives generally, but would be a reservation to a particular class of the right which that class alone already possessed.

The Placaat, then, being, in their Lordships' opinion, in force originally in the Colony, in force up to a very recent period; and the words of it being large enough to include the case of a marriage, such as took place between the Appellant in this Appeal and his wife,—we have next to consider whether this division of the Ordinance has been repealed, as was argued, by the Colonial Statute of 1843. In order to determine this point we have to assume that immediately before the Ordinance of 1843 was passed, the Placaat was part of the law of the Colony. Now, that Ordinance of 1843 states that it is expedient that a previous Insolvent Statute of the Colony of 1829 should be repealed, and a new ordinance enacted in its stead. It states that, "It is also expedient that all insolvent estates within "in this Colony should be hereafter administered "under one uniform system of law, and, to that end, "that the benefit or relief of cession of goods and "property, commonly called the *cessio bonorum*, now "available to insolvent debtors in this Colony, "should be abolished." It then proceeds to repeal certain ordinances by name of 1805 and 1842; and it proceeds further to repeal "all laws and "customs heretofore in force within this Colony in "so far as the same are repugnant to, or inconsis-"tent with, any of the provisions of this ordinance." The only words, therefore, which can be relied upon are the words repealing the *cessio bonorum* and the words repealing any ordinance, any law or custom, repugnant to or inconsistent with the provisions of the Ordinance of 1843. With regard to the repeal of the *cessio bonorum*, their Lordships take notice that the sixth Section of the Placaat of the Emperor does not refer in terms to the *cessio bonorum*, but is rather a provision incorporating itself with any law which for the time being might prevail with regard to the administration of the assets in any country where the Placaat was to take effect.

Their Lordships have then looked with considerable anxiety to discover whether any of the provisions in the Statute of 1843 are repugnant to or inconsistent with the sixth division of the Placaat. Now the Ordinance of 1843 is one of considerable length. It provides in great detail for the practice in Bankruptcy, and to a great extent for the law applicable in the case of Bankruptcy. If their Lordships had found on the face of this ordinance that it was a complete and exhaustive code existing of the law applicable to cases of Bankruptcy, they would have felt the argument to be one of great force which maintained that any pre-existing law or ordinance must be considered to be swept away, and to be substantially inconsistent with the new, complete, and consolidated ordinance on the subject of Bankruptcy. But, on looking at the ordinance, their Lordships do not find that this is its character. They may refer, in particular, to two sections which were mentioned in the course of the argument, the first of which is Section 106. That deals with the case of the offer of composition made by the insolvent. It provides that a meeting of creditors is to be called; the insolvent is to take a particular oath; the Court may pronounce a discharge of the insolvent; and then it provides "that nothing in this section contained "shall be construed so as to affect the right of any "creditor entitled by law to be paid in preference in "so far as such creditor shall be so entitled, unless "he shall consent to give up his preference, and be "bound by the composition." And in Section 107, the trustee under the composition is to render accounts to the Court, and he is to form a general plan for the distribution of the assets of the estate, "specifying first, such creditors as are preferent by "law in the order of their legal preference; and "secondly, the concurrent creditors, and as nearly as "may be, the probable balance which will remain for "division amongst them."

Now, the provision of the Placaat upon this head, if it is anything, is a provision dealing with the priority, the rank of creditors, and putting certain creditors before one or more certain other creditors. The Ordinance of 1843, therefore, when we look at it, speaks of preferent creditors and of creditors having preference by law, as terms

known to the law—terms, the explanation of which is to be sought for, not in the ordinance itself, but in the law or laws of the country outside the ordinance. Their Lordships are unable to place any limit upon those words, and other words in the ordinance might be found of the same character as those which I have read. They feel referred by those words to the general law of the colony *dehors* the ordinance, and they consider that those words would clearly let in and amalgamate with the Statute of 1843, a law such as that contained in the sixth Section of the Placaat. That section, therefore, in their Lordships' opinion, would not be repugnant to or inconsistent with the ordinance. It might be inserted in the ordinance, and read as it is read upon the Placaat, and would be entirely consistent with the other parts of the argument. That view of the case might be further illustrated in this way. If the Placaat, in the place of the provisions which it contains, had given to the wife a priority, a preference, a preferential right over all other creditors, it is quite clear that the Placaat in that form would have been exactly one of those provisions of the law showing what in that particular case was a preferent claim; and their Lordships are unable to see any difference in the circumstance that the priority is not given to the wife, but given to the other creditors of the husband.

Their Lordships, therefore, on the whole of this part of the case, come to the conclusion that the sixth head of the Placaat was in force in the Colony; that it was not repealed by the Ordinance of 1843, and that, in its terms, it meets the present case, and postpones the claim under the marriage contract as regards the wife until the other creditors of the husband have been paid. What those other creditors are will be considered presently.

We proceed, however, now, to the next subject of the Appeal, namely, the payment of £7000 by Mr. Paterson to the trustees of the settlement, which is impeached upon the ground that within the 84th Section of the Ordinance of 1843 it is an undue preference of one creditor to another. That ordinance enacts, "That every alienation, transfer, "cession, delivery, mortgage, or pledge of any goods "or effects, moveable or immoveable, personal or "real, and every payment made by any insolvent to "any creditor, such insolvent at the time contem-

"plating the sequestration, either voluntary or "otherwise, of his estate, and intending thereby to "prefer directly, or indirectly, such creditor before "his other creditors, shall be deemed to be an undue "preference, and is hereby declared to be null and "void." The majority of the Court below have held that the payment of the £7000 in question was an undue preference within the meaning of this section, and that the claim in reconvention of the assignees of the separate estate ought to prevail, and under it they ordered the money to be paid back. Whether in any particular case a payment impeached in Bankruptcy is a payment by way of undue preference or not, is a question of fact to be considered by a Jury if the case comes before a Jury; by the Court, if the Court performs the function of judging of the facts of the case. And if in this case there had been a conflict of evidence, and questions had arisen with regard to the credibility of witnesses, their Lordships would have been extremely slow to differ from the decision arrived at by the Judges below. There is, however, in this case, no conflict of fact whatever. The evidence as given, so far as it is oral, is upon one side, and is not in any way impeached; so far as it is documentary, it is before the Court, and it is a question of the proper effect of that oral and that documentary evidence. The onus of proof, of course, lies upon those who impeach the payment as having been made by way of undue preference. It is well settled by authorities in this country, which would regulate the construction put upon those words by our Courts, that the mere insolvency of the person making the payment is insufficient. The mere fact that, at the time of the payment, the whole of his property would not be sufficient to pay the whole of his debts, is not sufficient. It is a circumstance, an ingredient in the case, to be considered with all the other circumstances of the case. The payment, however, must be made in contemplation of Bankruptcy, or, in this case, of Sequestration. The words "contemplating sequestration" are words on which, perhaps, some criticism may well be bestowed, but they have received by the construction put upon them the meaning that the tribunal, judging of the fact, must be satisfied that the payment was made in the view of and in the

expectation of a supervening Bankruptcy, and in order to disturb what would be the proper distribution of assets under that Bankruptcy. Whether it was made with that intention or not is not only a question of fact, but, being a question of intention, the intention must be arrived at by considering the probable motives which would arise to influence the person making the payment towards making it or towards retaining the money in his own possession.

Now, there is at the outset an observation to be made in this case, to which their Lordships cannot but attach very great weight. Mr. Paterson, the bankrupt, had executed a settlement before his marriage. He was at that time in what may be termed affluent circumstances. He had in that settlement not only covenanted to pay the sum for supplying an annuity to his wife on his death, and a provision for his younger children, but he had covenanted to give a mortgage upon specific property possessed by him at the Cape, to secure a considerable part of the money he had covenanted to pay. That mortgage he had actually given in the same or in the following year—in the year 1863. He had given it as he thought effectively and well, in the shape of a bond of hypothecation executed in the Colony, to his wife,—a bond of hypothecation of the property which he had agreed to mortgage. That property was of ample value, and so far as it appears, it was not encumbered. Mr. Paterson says, and there seems to be no reason to disbelieve his statement, that he was quite ignorant of the Placaat, that he was under an impression that the mortgage he had given was valid, and that it was given in sufficient form, although nominally given to his wife. Therefore, as regards his other creditors, the position of things was this: Mr. Paterson was a mortgagor who had given one creditor, namely, his trustees, a mortgage of ample value to secure the debt owing to that one creditor. If Bankruptcy had supervened in the view which he took of the law, and of the facts of the case, that creditor was entirely protected; the property would have been sold and he would have been paid in full. There was, therefore, no possible motive in that state of things, and in that view of the case no possible motive that can be attributed to Mr. Paterson, to make a payment to the trustees that would

disturb the position of the other creditors, or to give the trustees a right they would not otherwise have.

Then, as regards the evidence in the case, it is perhaps unnecessary that it should be read at length, as it has been read more than once at the Bar. But it clearly amounts to this :—Mr. Paterson's firm was trading at the Cape of Good Hope. In the year 1865 several persons indebted to them failed. Mr. Paterson was living in London till November, 1865, he then came over to the Cape; he found, as he says, that his partner had paid every creditor except the two banks, the Standard, and the London and South African, and Blaine and Co., and a few small debts to others—Blaine's debt being £650. He waited on the managers of the banks; he thought that the personalty which they had in security, if taken at the price at which it had originally stood, which was probably a higher price than could have been obtained for it, would have been enough to clear him; but that, on going over the value of his landed property, it showed, according to his judgment, between thirty and forty thousand pounds clear, including Mrs. Paterson's bond, and taking the land at ten years' rental. He gave to the banks a full statement of his affairs; and he ultimately, in the month of July in the year 1866, passing over for the moment the intervening transactions, gave to the banks security for £30,000 and upwards, for the purpose of enabling them to realize his property to pay his creditors, including those who were the largest and main creditors at the Cape. He says that that security was given, and indeed it is obvious that it would be given, not with a view to sequestration, but to prevent sequestration, and with an understanding that there was to be no sequestration claimed by his creditors.

Then, with regard to the payment of the £7000, he says that, in September, 1865, he had made a bargain in London with one Joseph for the sale of property, part of which was included in the deed of hypothec under the marriage settlement; that he completed the sale to Joseph as to the property not so included; he could not complete the sale as to the property included without a release on the part of the trustees, and that it was an object to obtain that release.

Now, it is to be remembered that the marriage settlement had provided that, upon paying to the trustees £13,000 as a sufficient sum to meet the obligations of Mr. Paterson for the payment of the annuity to his wife, and £5000 to account of the children's provision, the trustees should execute a release or discharge of the hypothecated land. By depositing this considerable sum with the trustees, he could obtain a release of the hypothecated land. He says that he sent to the trustees £4000 in the first instance, and he afterwards remitted £3000, making in all £7000.

It ought to be added that on the 11th May, 1866, upon making a statement to the Bank of all his separate creditors, he added at the end of this statement, "The trustees of Mrs. Paterson and children claim "to be secured in £18,000, and £5000 additional, "claim not secured. Security bond given for "£13,000 over Port Elizabeth property, and agent "instructed in England to communicate with the "trustees there, and meet us far as possible, from "remittances sent to him, the trustees' demands. "The remittances were, £4000 in February, "£1800 and two bonds, nominal value £1500, in "April." "P.S. The bonds above referred to are "—Bond of Wm. Machin for £1000; bond of J. "Geard for £500. Remitted proceeds to be paid "over to trustees of Mrs. Paterson. £1800 re- "mitted direct to trustees, and £4000 to Captain "Henry Thurburn, to be paid to trustees."

There was, therefore, on the one hand, no motive whatever in the view Mr. Paterson took of the rights of the trustees to prefer creditors who were already very well secured. There was, on the other hand, the obvious motive to liberate the property at the Cape from the hypothec,—property, some of which he was already engaged in selling, and other part of which it would be clearly convenient for him to be able to deal with there. He could not do that without paying the large sum of £13,000 and £5000. It was clearly unlikely that he would be able to pay all that in one sum. The natural course, therefore, would be to make remittances to the trustees from time to time as he was able to do it in satisfaction of their claim, and that appears to have been the course on which he was engaged, a course the propriety of which he was so well satis-

fied of, that at the very first moment of negotiation with the Bank as to their security, he appears to have stated accurately and correctly the facts as they had taken place.

The arrangement, then, was made, as stated, with the Bank, for assigning and hypothecating the property subject to these securities to them; and for many months no proceedings whatever were taken for the purpose of obtaining a sequestration. The arrangements which were made appear to have gone on for some time smoothly, and, if they had been completed, we never probably should have heard of this claim. Something, however (it does not appear exactly what), went amiss in the beginning of the year 1867, and, after a lapse of seven or eight months from the date of the arrangement made with Mr. Paterson, the Banks, or one of them, proceeded to obtain sequestration, and the sequestration issued in February, 1867.

Now, in this state of things, their Lordships are very much impressed by, in the first place, the absence of any motive on the part of Mr. Paterson to have given an unjust or unfair preference to his trustees, for, as he thought, they were already secured. They are very much struck, in the next place, by the clear and reasonable motive there was for his making these payments for the purpose of liberating the land hypothecated; and they are, finally, very much impressed by the course taken in this case by the Banks, who are the authors of the sequestration, and beyond all doubt the substantial Respondents here, who were made aware, in the month of May, 1866, of the whole of this transaction, who did not in any way challenge it then, who proceeded to act upon the arrangement which then was come to,—an arrangement not contemplating that sequestration would take place, but providing that it should not take place,—who continued to act upon that footing till the month of February, 1867; and, taking those facts into their consideration, they cannot but arrive at a conclusion adverse, they regret to say, to the opinion of the Court below, and they cannot avoid believing that this was a payment not made in any way in contemplation of sequestration within the meaning of the Act, but was a *bonâ fide* payment by Mr. Paterson to the trustees.

The result is that their Lordships are prepared

humbly to advise Her Majesty that the portion of the Decree of the Court below which deals with the question of proof should in substance, and with a verbal alteration which will have to be referred to, be affirmed, and that the part of the Decree which on the claim of reconvention ordered the £7000 to be repaid, and declared that it was a payment made in contemplation of sequestration, ought to be reversed. The verbal alteration to which I have referred arises in this way: the Court has declared "That "the Plaintiffs are not entitled to rank either as "preferent or as concurrent creditors in respect of "the value of the annuity provided to Mrs. Pater-"son by the deed of settlement, or under the deed "of hypothecation, in respect of the sum of £13,000 "mentioned in that deed, or of any part thereof, "until after the creditors of Paterson shall have "been paid their debts in full." The present Respondents, the Defendants in the action in the Court below, are the assignees of the separate estate of Paterson, and it may well be that the words just read were intended to point and to be confined to the separate estate, and not to go beyond the separate estate. Their Lordships, however, think that the words are somewhat ambiguous upon the face of them, and that it is necessary to prevent mistake hereafter, more especially as they are informed that there is a joint sequestration against both the partners in the course of prosecution in the Colony. Now, upon this part of the case the Statute of 1843 does appear to their Lordships to have an important bearing as connected with the sixth division of the Placaat. It may be that on a proper interpretation of the sixth division of the Placaat, it ought to be confined to the separate creditors, as we should term it, of the Bankrupt. But, on the other hand, it may be said that the distinction between the administration of the estate of joint and separate creditors is a creature of English law, or of the law of any Colony where it has been introduced. Whether that be so or not, their Lordships find precise provision made in the 34th and 36th Sections of the Statute of 1843, upon this head. The 34th Section provides in substance that where there are joint and separate creditors the estate of the Company shall be first applied in satisfaction of the creditors of the Company; and each separate estate shall be first

applied in satisfaction of the separate creditors of that estate, before the surplus is carried over for the benefit of the joint creditors. And the 36th Section provides that in every case not hereinbefore expressly provided for, and relating to the ranking and priority of the joint creditors of any company in competition with the separate creditors of any of the partners of such company, or relating to the reciprocal claims of any such insolvent estates, in reference to or in relief of each other,—the rule for the time being in respect of the like case, according to the law and administration of Bankruptcy in England shall first be resorted to; and failing any such rule the Common Law of the Colony should be applied. Their Lordships appealed to the Counsel who argued for the Respondents whether any reason could be shown why those sections should not apply to the present case as regards the surplus, after the separate creditors other than the trustees of the separate estate were fully paid, and no reason was pointed out. Their Lordships think that they are compelled by the provision of that Section of the Statute of 1843 to hold, that although the separate creditors, other than the trustees of the marriage settlement, will have the preferential right to be paid, still that the trustees of the marriage settlement are creditors of the separate estate postponed only to the first class of creditors, and that under the express provision of this Ordinance of 1843, they must, as such, be paid before the surplus of the separate estate is carried over for the benefit of the joint estate.

They, therefore, will humbly advise Her Majesty that the verbal alteration should be made in the first passage of the Decree, to the effect that the Plaintiffs are not entitled to rank against the separate estate of Paterson, either as preferent creditors, etc., until after all the separate creditors of Paterson shall have been paid their debts in full.

Then, with regard to costs: what was done in the Court below was that the Plaintiffs were ordered to pay to the Defendants all the costs of the action up to that time. In the view that their Lordships take of the case, the claim of the Plaintiffs in the action would fail, and the claim in reconvention would fail also. Their Lordships think, therefore, that although the claim of the Plaintiffs in the

action should be dismissed—as it was below—with costs, the claim in reconvention should also be dismissed with costs, or, in other words, that the Defendants should pay to the Plaintiffs in the action the costs of their claim in reconvention; and that, as this appeal has resulted in a substantial alteration in favour of the Appellants, but, as on the other hand, they have failed in a substantial part of their Appeal,—there ought not to be any costs of the Appeal on either side.

ALTERATIONS TO BE MADE IN THE DECREE OF THE 12TH MARCH, 1869.

Judgment.	*Proposed Judgment.*
1. The said Court doth now, on this the Twelfth day of March, in the year aforesaid, adjudge and declare that the Placaat of Charles the Fifth is a subsisting operative law within this Colony.	1. Affirmed.
2. That the said deed of Hypothecation, as made *by a husband in favour* of his wife, *stante matrimonio*, is null and void so far as regards the interests in question in the cause.	2. Affirmed.
3. That the Plaintiffs are not entitled to rank either as preferent or as concurrent Creditors in respect of the value of the Annuity provided to Mrs. Paterson by the Deed of Settlement, or under the Deed of Hypothecation, in respect of the sum of £13,000 mentioned in that Deed, or of any part thereof, until after the Creditors of Paterson shall have been paid their debts in full.	*To stand thus.* 3. That the Plaintiffs are not entitled to rank *against the separate Estate of Paterson* either as preferent or as concurrent Creditors in respect of the value of the Annuity provided to Mrs. Paterson by the Deed of Settlement, or under the Deed of Hypothecation, in respect of the sum of £13,000 mentioned in that Deed, or of any part thereof, until after *all the separate* Creditors of Paterson shall have been paid their debts in full.
4. That the Plaintiffs are entitled to rank as concurrent Creditors for the £10,000 secured by the Settlement for the Children of the Marriage as a future and contingent debt—to wit, for the sum of £5500—under the terms of the Insolvent Ordinance in that behalf.	*To stand thus.* 4. That the Plaintiffs are entitled to rank *against the said separate Estate* as concurrent Creditors for the £10,000 secured by the Settlement for the Children of the Marriage as a future and contingent debt under the terms of the Insolvent Ordinance in that behalf.
5. And the said Court doth further adjudge and declare that the two sums of £4000 and £3000 remitted by Paterson to the Plaintiffs, as in the pleadings mentioned, were remitted by him in contemplation of Sequestration, and with the intention of preferring the Plaintiffs over his other Creditors,	5. Reversed.

and this Court doth decree that the Plaintiffs do pay over to the Defendants the said sum of £7000, as part of Paterson's estate, to be distributed among his Creditors; and it is further ordered that no dividends be paid out by the Defendants to the Plaintiffs under their ranking in respect of the said sum of £10,000, until the said sum of £7000 shall have been paid as hereinbefore decreed.

6. And the said Court doth further adjudge that the Plaintiffs do pay to the Defendants the costs of this Action up to this time, and that the Defendants have liberty to apply to the Court, as they may be advised, in case the said sum of £7000 shall not be paid to them as hereinbefore decreed.

To stand thus.

6. *The Plaintiffs are to pay the costs of the action in the Court below, other than the costs of the claim in Re-convention, which the Defendants are to pay, each party paying his own costs of this Appeal.*