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JOHN J. MACDONALD.....APPELLANT;

Jan. 26 & 29.

AND

*June 3rd.

THE GEORGIAN BAY LUMBER COMPANY, } ..RESPONDENTS.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Foreign Bankruptcy—Assignment thereunder—Lands in Canada.

D., a naturalized British subject, who owned lands in *Canada*, resided and carried on business in partnership with *H. & S.*, in the State of *New York*. In November, 1873, the firm of *D., H. & S.* became insolvent. On the 14th February, 1874, the said firm, under the Bankruptcy Act of the *United States* (s. 5,103, Rev. Stat. *U. S.*,) executed a deed purporting to "convey, transfer and deliver all their and each of their *estate* and effects" to one *C.*, as trustee for the creditors. On the 26th Sept., 1874, a writ of execution against *D's* lands in *Canada* was placed in the hands of the proper Sheriff by the Respondents, who had in the mean time recovered judgment against him. Subsequently *D.*, by way of

*PRESENT:—Sir William Buell Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

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further assurance, and in pursuance of the deed of the 14th Feb'y, 1874, granted to *C.*, the trustee, his lands in *Canada*, specifying the different parcels.

M., the Appellant, was afterwards substituted to *C.* as trustee, and, as such, filed a Bill in the Court of Chancery to obtain a declaration that the lands specified in the bill were not liable to the operation of the writ of execution of the Respondents.

Held,—That a bankrupt assignment, made under the provisions of an Act of the Congress of the *United States of America*, will not transfer immoveable property in *Canada*.

Also,—That the deed of the 14th February, 1874, was not effectual, either as a deed of bargain and sale, or a deed of grant to pass any legal title or interest in the lands of *D.* in *Canada*.

APPEAL from a judgment of the Court of Appeal for *Ontario* by the Plaintiff in a cause in the Court of Chancery, in which the present Appellant was Plaintiff and the *Georgian Bay Lumber Company* were Defendants.

The Plaintiff's bill was filed in the Court of Chancery on the 18th day of May, 1876, in order to obtain a declaration that the Writ of Execution against the lands of *Anson G. P. Dodge*, placed by the Defendants in the hands of the Sheriff of the County of *York*, did not operate to bind certain lands in that County described in the bill. The answer of the Defendants was filed on the 23rd day of September, 1876.

Issue having been joined, the case came on to be heard at the sittings of the Court of Chancery at *Toronto*, on the 8th day of November, 1876, before The Honorable Vice-Chancellor *Proudfoot*.

Judgment was delivered by the Vice-Chancellor on the 10th of January, 1877, in favor of the Plaintiff, and a decree was thereupon drawn up and entered in accordance with the prayer of the bill.

The Defendants subsequently appealed from this decree to the Court of Appeal for *Ontario* and that Court, on the 18th day of June, 1877, gave judgment in favor of the Defendants, reversing the decree of the Court of

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Chancery with costs and ordering that the bill be dismissed with costs.

The present appeal to this Court was brought in order to reverse the order of the Court of Appeal and restore the decree of the Court of Chancery. The facts material to a decision may be stated as follows:—

On the 1st of November, 1873, a petition was filed in the District Court of the *United States* for the Southern District of *New York*, under the provisions of an Act of the Congress of the *United States of America*, entitled: "An Act to establish a uniform system of bankruptcy throughout the *United States*," approved March 2nd, 1867, against *Anson G. P. Dodge*, *W. J. Hunt* and *Samuel Scholefield*, praying that they might be adjudicated bankrupt; and on the 15th November, 1873, they were duly adjudicated bankrupt.

On the 14th February, 1874, an order of the same Court was made in the matter of the Bankruptcy whereby it was ordered that the said *A. G. P. Dodge*, *W. J. Hunt* and *S. Scholefield* should forthwith convey, transfer and deliver all their and each of their property or estate to *John L. Cadwalader*, as trustee, by deed in a form which was set out *in extenso* in the body of the order, and which was afterwards followed in the deed of the same day, the purport and terms of which are next stated.

On the same day *John L. Cadwalader* was duly appointed trustee of the estates of the bankrupts, and on that day the bankrupts executed and delivered to the trustee a deed purporting to "convey, transfer and deliver all their and each of their estate and effects to" the trustee, "to have and to hold the same in the same manner, and with the same rights in all respects as" the bankrupts, "or either of them would have had or held the same if no proceedings in bankruptcy had been taken against them or either of them, the same to be ap-

plied for the benefit of the creditors of the" bankrupts in like manner as if they had been at that date duly adjudged bankrupts, and the said trustee had been appointed assignee under the Act of Congress.

On the 24th September, 1874, the bankrupt *Dodge*, being seized in fee of a large quantity of lands in *Canada*, granted and conveyed by way of further assurance, and in pursuance of the said Act and of the said deed of the 14th February, 1874, to the said *Cadwalader*, in trust for the said creditors, the said lands, specifying the different parcels.

Cadwalader resigned his office of trustee, with the sanction of the Court, and on the 7th December, 1874, the Plaintiff was duly appointed by the Court trustee of the said estates in the stead of the said *Cadwalader*, and by indenture, dated the 25th January, 1875, *Cadwalader* conveyed the lands in *Canada* to the Plaintiff, as such trustee for the said creditors, and the Plaintiff immediately went into possession of them.

The Defendants, on the 26th September, 1873, sued out a writ of summons in the Court of Queen's Bench for *Ontario* against *Dodge*, who was a naturalized British subject, then residing out of the jurisdiction; and such proceedings were thereon had that judgment was signed on the 30th June, 1874, for $13,254.18 debt and costs; and on the 26th August, 1874, a writ of execution against the lands of *Dodge* was placed in the hands of the proper Sheriff, which was renewed on 23rd August, 1875.

The Plaintiff, in his bill, charged that this writ is void and of no effect against the lands, but is retained by the Defendants in the Sheriff's hands, and forms a cloud upon the title of the Plaintiff, who had applied to the Defendants to have the same removed, but which they had refused to do

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Mr. *Cattanach* for Appellant:—

The conveyance of the 14th of February, 1874, was prior to the writ of execution; and the law here as well as in England is that the execution only affects such an interest as the debtor has at the time the writ is placed in the Sheriff's hands. *Parke* v. *Rielly* (1); *Wickham* v. *The New Brunswick and Canada Railway* (2); *Beaven* v. *Lord Oxford* (3). The registry laws do not effect the question. *McMaster* v. *Phipps* (4). The real question, then, involved in this appeal is, whether after the conveyance referred to, there was any estate or interest left in the debtor which could be affected by a writ of execution.

The Appellant admits that the bankruptcy proceedings in *New York*, could not affect lands in this country without a conveyance sufficient to pass real estate according to our laws—the *lex loci rei sitæ* applying (5); but he contends that the deed of 14th February is sufficient to pass the bankrupt's estate, or at any rate amounts to an equitable contract or assignment which would be equally efficacious having been followed by the deed of September which conforms to our laws, and by possession.

Foreign bankruptcy proceedings are recognized in *England* by comity; and the Courts will aid in giving effect to them. *In re General Company for Promotion of Credit* (6); affirmed on Appeal under the title of *Princess of Reuss* v. *Bos* (7). Our Courts have adopted the same rule, *Howell* v. *Dominion Oils Company* (8); *Barned's Banking Company* v. *Reynolds* (9). English

(1) 3 Grant's E. & A. 215.
(2) L. R. 1 P. C. 64.
(3) 6 DeG. M. & G. 492.
(4) 5 Grant 253.
(5) Robson on Bankruptcy, 393.
(6) L. R. 5 Chy. 380.
(7) L. R. 5 H. L. 176.
(8) 37 U. C. Q. B. 487
(9) 36 U. C. Q B. 256.

Courts have even gone to the length of appointing Receivers, who have no estate at all in lands, for real property in foreign countries, *Hinton* v. *Galli* (1); and the Court of Chancery of *Ontario* has recognized and given effect to such appointments, *Louth* v. *Western of Canada Oil Company* (not reported.) If, therefore, the deed of 14th February, did not effectually accomplish the intention of the parties, our Courts would, if necessary, give effect to the intent in the same way as if the transaction were entirely within the jurisdiction.

In the absence of any thing else to shew what was intended a certain form of words is necessary in a deed, I admit. But when it appears on the face of the deed and from the surrounding circumstances that the grantor is parting with his entire interest, I submit that by estoppel, if not otherwise, the deed would operate. Now here, the deed shews on its face that the grantors were conveying all their estate for sale and distribution among their creditors. It would be a fraud on their part to attempt to limit the effect of the deed to a life estate, and much more so to say they had not conveyed anything. And then the deed says that the grantees are to have and hold " in the same manner and with the same rights in all respects " as the grantors would have done if they had not become bankrupts. What does this mean, unless it means an estate in fee or as large an estate as the grantors had to give?

Justice *Patterson* in the Court below held the deed to be sufficient in form, and the only difficult there was as to whether it could be intended that these lands were to pass.

It is altogether a question of intention to be gathered from the deed and the surrounding circumstances. It is not necessary to describe lands specifically in a deed,

(1) 24 L. J. Chy. (N. S.) 121.

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and parol evidence is often admissible; and the surrounding circumstances always explain what is meant if there is any ambiguity. Here the circumstances necessarily shew that the bankrupts were giving up all they had. *Dodge* had been, up to this time, a resident of *Canada*. His head office was there; he did a large business there; and it was notorious that he owned and lived on the very property in question; and, in fact, for aught that appears in the record, he owned no property in the *U. S.* Is it possible then that the parties could have had in contemplation only property in *N. Y.*, when they knew, as we must assume them to have known, that we would recognize and aid their bankruptcy proceedings.

And in *Wheaton*, on International Law (1), it is stated that by comity real estate in a foreign country can be reached. The Court, it is true, cannot directly enforce its decrees, but it may do so *in personam* and by the aid of foreign Courts. *Bump*, p. 297, and cases before cited.

The true interpretation to be given to the Judge's order is, that the bankrupts must, so far as they are concerned, divest themselves of everything they possess in the world, and that the Court will, so far as it can, administer the estate, wherever it is. Suppose the Canadian lands had been specifically mentioned in the deed, and that the deed was unquestionably in proper form could it be contended that the lands did not pass because the Judge who made the order had no power to deal with these lands? So the case comes down to the deed itself and the surrounding circumstances, irrespective altogether of the order, which is a mere matter of procedure.

Mr. *Dalton McCarthy*, Q. C., for Respondent:—

(1) Edition of 1864, pp. 283-4.

The deed of the 24th February, 1874, is a statutory deed, deriving its force and validity from s. 5,103 of the Revised Statutes of the *United States of America*, and cannot have effect as a deed passing by its own force the real estate in *Ontario* now in dispute in this suit. The proceedings in this case clearly shew that it was not the intention of the petitioners or of the debtors, when possession of the joint and separate estates of the estates was given to the trustee, that they contemplated a conveyance of any property that was not subject to the restraining order of the *United States* Court, there being no power in the Courts of a foreign State to enforce their decree or order in bankruptcy here; and no legislative body will be presumed to exceed its legitimate jurisdiction. Moreover, the operative words used, "convey, transfer and deliver," have no operation in passing real estate here, either at common law or by statute.

With this view of the case all the decided American cases agree, shewing that this is a deed, not a contract, and one which passes to the trustee just so much as, and no more than, would have passed to the assignee in insolvency by order of the Court, and without any deed under the hand and seal of the bankrupt. *Re Williams* (1); *Bump's* Law of Bankruptcy (2); *Osborn* v. *Adams* (3); *Holmes* v. *Remsen* (4); *Lee* on Bankruptcy (5); *Ford* v. *Beech* (6).

The assignee derives his title from a conveyance executed by the Judge or Registrar, which takes effect by operation of law, sec. 14; and if the assignment had been made by him, it is conceded it would not affect the property, but, because it was made by the insolvent, it is contended that if the words are wide

(1) 2 Bank. Reg. 79.
(2) P. 682, and notes to sec. 5,103.
(3) 18 Pick. 245.
(4) 4 Johnson, 460.
(5) Pp. 110-111.
(6) 11 Q. B. 866.

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enough, the Courts in *Canada* will give effect to the deed. But the deed cannot be said to be a deed poll or an indenture. A clear statement of what is intended to pass is as necessary in an agreement as in conveyance. Here there is no word shewing that an inch of land in *Ontario* was ever intended to be conveyed. The language of the instrument itself, and the proceedings in bankruptcy, shew that the intention of the parties was most certainly confined to the dealing with such property as would have passed to the assignee had not the creditors superseded the bankruptcy by appointing a trustee.

Mr. *Cattanach* replied :—

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RITCHIE, J. :—

Defendants issued an execution against the lands of one *Anson G. P. Dodge*, and placed the same in the hands of the Sheriff of *York*. Plaintiffs by their bill seek to obtain a declaration that such execution did not operate to bind certain lands in that county, but that a certain deed, dated 14th February, 1874, executed by said *Dodge*, passed the title to *Dodge's* said lands, so as to prevent the Defendants execution, subsequently issued, from being levied thereupon.

The Vice-Chancellor decided in favor of Plaintiff, which decree on appeal was reversed and judgment was given by the Appellate Court in favor of Defendants.

The present appeal is taken with a view to reverse the latter decision.

The Plaintiff is trustee of the bankrupt estate of said *Dodge*, *Hunt* and *Scholefield*, all of and in the *United States of America*.

On the 1st November, 1873, a petition was filed in the District Court of the State of *New York*, *U. S.*, in accordance with the Act of Congress, entitled: "An

* The Chief Justice was absent when judgment was delivered.

Act to establish a uniform system of bankruptcy throughout the *United States*, against *Dodge*, *Hunt* and *Scholefield*, praying they might be adjudicated bankrupts, and on the 15th November, 1873, they were duly adjudicated bankrupts.

On the 14th February, 1874, *Cadwalader* was duly appointed trustee of the estates of the bankrupts and they made and delivered to *Cadwalader*, as such trustee, the deed of the 14th February, 1874, entitled: "In the District Court of the *United States* for the Southern District of *New York*—in Bankruptcy. In the matter of *Anson G. P. Dodge*, *William Jay Hunt* and *Samuel Scholefield*, bankrupts, Southern District of *New York*, [S.S.]," and whereby they did convey, transfer and deliver all their and each of their estate and effects to *John L. Cadwalader*, as trustee absolutely, to have and to hold the same in the same manner and with the same rights in all respects as the said bankrupts, or either of them, would have had or held the same, if no proceedings in Bankruptcy had been taken against them or either of them; the same to be applied and administered for the benefit of the creditors of said bankrupts in like manner as if said *Dodge*, *Hunt* and *Scholefield*, had been at the date thereof duly adjudged bankrupts, and *Cadwalader*, trustee, had been appointed Assignee in Bankruptcy, under the Act of Congress; which deed was in the exact form prescribed in an order of Court, on proof that three-fourths in value of the creditors of the bankrupts had resolved to supersede Bankruptcy proceedings by arrangement under section 43; which order, after stating that the certificate of the Registrar in Bankruptcy had been read and filed, and resolutions therein referred confirmed, ordered that the said bankrupts should forthwith convey, transfer and deliver all their and each of their property or estate to *Cadwalader*, as trustee, by

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deed on the following form, to wit, &c.: (the form which was adopted.)

Cadwalader subsequently on the 20th June, 1874, with the sanction of the District Court of the *U. S.*, for the Southern District of *New York*, resigned his office of trustee, and on the 7th December, 1874, Plaintiff was duly appointed by said Court trustee instead of said *Cadwalader*. On the 24th September, 1874, *A. G. P. Dodge* and wife executed a deed, reciting the petition in bankruptcy under the Act, entitled: "An Act to establish, &c.," the adjudication thereon, the appointment of *Cadwalader* as trustee, the execution of the deed of the 14th February, 1874, setting it out verbatim, and that the estate and effects comprised lands in the Province of *Ontario*, Dominion of *Canada*, being individual property of *Dodge*, and thereafter particularly described, and that said lands are vested in said trustee by force of said Act and deed of 14th February, 1874, and that it had become necessary that the then present deed should be executed by way of further assurance, in order that, under the Registry Laws of *Ontario*, the title of said trustee in said lands might be registered. The deed witnessed that, in consideration of the premises, and by way of further assurance, and in consideration of $5, *Dodge* granted, &c., to *Cadwalader*, as such trustee, his heirs, &c., the lands, &c., set out in the plaintiff's bill, in trust for the creditors of the said bankrupts.

Cadwalader, by deed, dated 7th December, 1874, after reciting his appointment as trustee, and the deed of the 14th February, 1874, and his resignation as trustee, and its acceptance, and the order directing the execution and delivery of the deed, conveyed, &c., to *John Macdonald*, the Plaintiff, "all and each of the estates, real and personal, and all the property and effects, both joint and separate, of said *Dodge*, *Hunt & Scholefield*, wheresoever situate, both in the *United States* and in *Canada*," which

were conveyed by said recited deed to hold the same, as trustee, in the same manner, and with the same powers and duties relative thereto, as he, *Cadwalader*, now has, or held the same and as bankrupts, or either of them, would have held them, if no proceedings in bankruptcy had been taken against them, and to be applied for the benefit of their creditors in like manner as if they, at the date thereof, had been duly adjudged bankrupts, and said trustee had been appointed assignee, &c.

And on 25th January, 1875, *Cadwalader*, by deed of that date, between himself, as trustee of said bankrupts, and Plaintiff, as trustee, after reciting, as the first two recitals of the deed of 24th September, 1874, and that the estate and effects included certain lands in *Ontario*, being the individual property of *Dodge*, which were vested in *Cadwalader*, as trustee, by force of the said Act of Congress and deed of 14th February, 1874, which deed was registered in the registry office N. R. County of *York*, at 10.50 a.m., 13th October, 1874 ; and that *Cadwalader* had resigned his office of trustee, and his resignation had been accepted, and that by order of the District Court of *New York*, on 7th December, 1874, Plaintiff had been appointed trustee in place of *Cadwalader*, with same rights, &c., and that said lands were then vested in Plaintiff, as trustee, by force of said Act of Congress and orders and decrees of said District Court, and that it had been deemed necessary that the then presents should be executed by way of further assurance, and in order that under the Registry Laws of *Ontario* the title of Plaintiff, trustee to said lands, might be registered, conveyed as *Dodge* had conveyed to *Cadwalader*.

On 25th August, 1874, Defendants caused a writ of execution to be issued against the lands and tenements of *Dodge*, and on the 26th of the same month, it was placed in the hands of the Sheriff of *York*, for $13,201.61

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debt and $52.57 costs, which writ was renewed on 25th August, 1875, and which, at the time of filing of Plaintiff's bill, remained in the Sheriff's hands unsatisfied, and in full force and effect.

This writ Plaintiff claims is void, and of no effect against said lands, but operates as a cloud on his title; that he has had an opportunity of selling the lands, but is prevented by reason of the retention by Defendants of said writ in Sheriff's hands.

The deed under which it is claimed the property passed, or by which it is alleged an equitable interest in the real estate of *Anson G. P. Dodge* in the Dominion of *Canada* was created, was not a voluntary conveyance, but a statutable assignment, the grantor having been adjudicated a bankrupt. He was adjudged by a Court of competent jurisdiction in the *United States* to make a statutable conveyance of his property in a certain prescribed form. This was, in my opinion, an involuntary legal conveyance, intended to convey only the property over which the Legislature had assumed the disposition, *in invitum*, and consequently with which alone the Court had power to deal, and was intended to have, and had, no other or greater effect than if the Legislature had declared that the property of the bankrupt should pass to the assignee or trustee without conveyance by operation of law. In either of which cases the only property that would be affected by the deed or declaration would be the property, or the subject matters of the bankrupt, within the control of the Legislature, or upon, or over which, it could operate, and which clearly would not include lands in a foreign country; for the principle is too well established to be now questioned, that real estate is exclusively subject to the laws of the government within whose territory it is situate. Mr. *Story* says, so firmly is this principle established, that in cases of bankruptcy, the real estate

of a bankrupt, situate in a foreign country, is universally admitted not to pass under the assignment.

That real estate is exclusively subject to the law of the Government within whose territory it is situate, see *Sills* v. *Worswick* (1); *Phillipps* v. *Hunter* (2); *Hunter* v. *Potts* (3); *Selkrig* v. *Davies* (4); *Brodie* v. *Barry* (5); *Birthwhistle* v. *Vardill* (6); and American cases cited in *Story's* Conflict of Laws, sec. 428.

In sec. 425, after stating the principle as laid down by foreign Jurists, *Story* says:—

> The universal consent of the tribunals, acting under the common law, both in *England* and in *America*, is, in a practical sense, absolutely uniform on the same subject. All the authorities in both countries, so far as they go, recognize the principle in its fullest import, that real estate or immoveable property is exclusively subject to the laws of the Government within whose territory it is situate.

I think, therefore, the Court of the State of *New York* must be presumed to have intended to do only what it had the right to do, and intended the deed it directed the bankrupt to execute to pass only the property with which the Court had a right to deal, and there is nothing whatever on the face of the deed to indicate a contrary intention, and we have no right to assume the Court of *New York* did or attempted to do any more than it had the legal power to accomplish.

In *Elliot* v. *North Eastern Railway Company* (7) it was held, that a deed of conveyance made under the authority of an Act of Parliament must be read as if the sections of the Act were incorporated in it. At p. 335 Lord *Chelmsford* says:—

> The conveyance to the Company was made in the form prescribed

(1) 1 H. Bl. 665.
(2) 2 H. Bl. 402.
(3) 4 T. R. 182.
(4) 2 Dow. 230.
(5) 2 Ves. & Beames 130.
(6) 5 B. & C. 438; Bell's Comt. 690, 4th Edition.
(7). 10 H. L. C. 333.

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by the Act and must be read as if the sections applicable to the subject matter of the grants and its incidents were inserted in it.

So in this case must the deed be read by the light of the Bankrupt Act of the *United States* and the proceedings had thereunder.

Had the Court in the State of *New York* ordered the bankrupt to convey the lands in *Canada*, I do not think it would have been of any avail, for I think it is well established that foreign lands cannot be affected by the administrative Act of any Court, nor can the person be obliged to supply the defects of such administrative Act. See *Selkrig* v. *Davies* (1). The House of Lords held that only a moral obligation to convey to assignees was imposed, which might be justly enforced by withholding the bankrupt certificate till he complied. But in a later case, *Cockerell* v. *Dickens* (2), Lord *Wensleydale* denied that even the certificate can be properly withheld on this ground. I am therefore of opinion that the deed of the 14th February, 1874, was not effectual to pass any title or interest in the lands of *A. G. P. Dodge* in *Canada*, and therefore, I think the judgment of the Court of Appeal should be confirmed.

STRONG, J.:—

The first point argued before this Court was one which seems to have been held to be untenable by all the learned Judges of the Court of Appeal, as well as by the Vice-Chancellor. This was the contention, that the jurisdiction of the foreign Bankruptcy Court extended to lands in this country, or that it, at least, imposed upon the bankrupts a personal obligation so to deal with lands here as to bring them under the control of the foreign bankruptcy, an obligation which, upon princi-

(1) 2 Dow. 230. (2) 3 Moo. P. C. C. 134.

ples of international comity, it was said, our domestic tribunals would enforce.

An almost universal consent of authorities, that of Courts and Judges, as well as of text writers, is against both these propositions. For the proposition that bankruptcy proceedings have any extra-territorial operation as regards immoveables, there is no English or American authority, judicial or otherwise, which can be quoted, though some of the continental jurists—*Savigny*, in particular, as appears from passages in the 8th volume of his work on Roman Law, translated by Mr. *Guthrie*—appear to favor such a doctrine, not so much, however, as a principle of international law actually recognized, but rather as one, the adoption of which is commended by a liberal spirit of comity, or which ought to be made the subject of treaty stipulations. The Courts and jurists of no nation appear to have gone so far in excluding the extra-territorial operation of bankruptcy proceedings as those of the *United States*. They have applied the rule, not merely to immoveables, but also to moveable property having its *situs* in their territory (1). In *England* (2), on the other hand, the more liberal rule has been adopted, of treating moveables as subject to a bankruptcy in the foreign domicile of the owner. The latest American writer on Private International Law (3) states both the rule and the reason for it, thus, distinctly:

> In the *United States* the law is, that a foreign bankrupt assignment will not be permitted to transfer property, whether moveable or immoveable, as against domestic attaching creditors. This result is sometimes based on the position that compulsory conveyances in bankruptcy are the creatures of local law, and should not be extra-territorially extended, and sometimes on the priority which every State, in case of collision, should give to its own subjects. But the true ground is, that property, personal as well as real, is subject to

(1) Story's Conflict of Laws, sec. 420.

(2) *Sills* v. *Worswick*; 1 Hy. Bl. 665, Wharton Conflict of Laws, sec. 389.

(3) Wharton Conflict of Laws, secs. 391-392.

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the local laws of its site; and if the owner locally incurs obligations on the faith of such property, it is but fair that it should primarily bear the burden of such debt. The forced application of the law of the *lex domicilii* to such case would operate to extend oppression and fraud.

This rule is recognized in the English cases of *Selkrig* v. *Davies* (1), and *Cockerell* v. *Dickens* (2), cited in the judgment of the learned Vice-Chancellor, and is beyond dispute (3).

The other ground adverted to is equally without foundation, for the House of Lords determined in *Selkrig* v. *Davies*, already quoted, that English Courts will not interpose to compel a bankrupt to convey his foreign lands to the assignees, although there might be a moral obligation requiring him to do so (4); and in *Cockerell* v. *Dickens* (5) it was held to be improper to compel such a conveyance even by the indirect pressure of withholding the certificate. Mr. *Westlake* (6) points out that the true ground for non-interference in such cases is, that if the Courts were, by acting on the bankrupt *in personam*, to compel a conveyance of the foreign immoveables, they would be indirectly doing that which they had no jurisdiction to do directly; and he shews the distinction between interference in such cases and the jurisdiction exercised by Courts of Equity to compel specific performance of contracts relating to foreign lands. I have stated the law on these points more fully than I should otherwise have done, from consideration for the earnest and able arguments of Mr. *Cattanach* on this part of the case, on which, however, I have to express my entire concurrence with the

(1) 2 Dow. 230.

(2) 3 Moo. P. C. C. 98.

(3) See also Wharton's Conflict of Laws, secs. 845 to 850; Kent's Comment. Vol. 2, p. 406; Westlake's Private International Law, secs. 67-283; Story's Conflict of Laws, sec. 428; Phillimore's International Law, Vol. 4, p. 593.

(4) Archbold's Law of Bankruptcy, Vol. 1, p. 393.

(5) Ubi Sup.

(6) Private International Law, sec. 67.

opinions of all the learned Judges in the Courts below.

The learned Vice-Chancellor based his decree upon the effect of the deed of the 14th February, 1874, regarded as a conveyance sufficient to pass these lands, independently of the bankruptcy proceedings. I cannot gather very satisfactorily from the language of the judgment whether the learned Judge considered the deed a good conveyance at law, sufficient to pass the legal estate, or whether he relied on it as operating only in equity, or as a defective conveyance, which a Court of Equity would aid. The only forms of original conveyance appropriate for transferring a legal estate in possession in freehold lands between strangers are, of course, those of feoffment, lease and release, bargain and sale, and a statutory deed of grant.

The deed of the 14th February, 1874, cannot operate as a deed of bargain and sale, as no consideration is mentioned in the deed sufficient to raise a use. It cannot take effect as a deed of grant, for the use of the word "grant" is indispensable to the operation of such a deed; and feoffment and lease and release are both out of the question. It is plain, therefore, that no legal estate passed by the instrument under consideration.

The remaining question relates to the Appellant's rights to invoke the aid of a Court of Equity to perfect the deed, or to have it carried into execution by a legal conveyance. Without stopping to enquire whether the words of description contained in this deed, "all their estate and effects," would, if used in an ordinary purchase deed, be sufficient to pass all the grantor's lands —a point on which I express no opinion—it appears to me that there are decisive objections to supporting this deed as an efficient instrument in equity. The execution of this indenture was compelled by the order of the District Court, which I have before stated, made

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on the same day, and which ordered the bankrupts to execute the deed, being the ordinary statutory form of assignment prescribed by the Act of Congress. It is therefore a part of the proceedings in the bankruptcy. Now, in view of the prevalent doctrine of American Courts and jurists already alluded to, that it is a rule of private international jurisprudence, founded on reasonable and sound principles, not to give extra-territorial effect to bankruptcy jurisdiction, it must be assumed that Congress, in passing the Act, did not intend to attach any wider meaning to the general words used, "estate and effects," than, according to the recognized doctrine of the *United States* Courts, it had power effectually to do; and that, therefore, immoveables in foreign countries were not intended to be comprised. The order of the Bankrupt Court could only directly affect lands in the *United States*, and it is not to be presumed that either the legislation of Congress, or the act of the Court, was intended to bring that indirectly within the jurisdiction of the Court which could not be reached by its direct process. There can be no objection here to our putting a construction on this deed by means of which it is sought to affect lands within our jurisdiction. It is no infringment of the rule which requires foreign law to be established as matter of fact by skilled witnesses; for instruments affecting lands must be construed and governed by the law of the situation of such property, and moreover questions of construction, dependent on presumption, are questions of fact rather than questions of law.

But granting that it was intended to compel the bankrupts to execute an assignment including lands in *Canada*, and assuming that the deed of the 14th February, 1874, comprises these lands as effectually as if they had been specifically mentioned in it, I am still of opinion that the assistance of a Court of Equity could

not be claimed by the assignee. When the jurisdiction of equity is exercised to enforce specific performance, or to aid or perfect a defective assurance between parties who are strangers in blood, a valuable consideration is an indispensable element in the transaction which is sought to be executed or aided. In the present case there is not only a total absence of valuable consideration, but the deed does not even possess the character of a free disposition, having been executed, as it was, under the compulsion of the process or order of the District Court. Further, if the deed is to be construed, on the hypothesis last assumed, as comprising these lands, a Court of Equity, in giving effect to it, would be doing nothing short of enforcing a foreign bankruptcy; it would be recognizing extra-territorial legislation, and aiding the jurisdiction of a foreign Court against lands in this Province; for, in signing and sealing the indenture, the bankrupts did but submit themselves to the power of the law, and were mere instruments of the Court. To deny to foreign Courts of Bankruptcy direct jurisdiction over property situated here, and at the same time to assist them when they attempt to evade this same rule of law (which they apply to the protection of their own citizens) by compelling the execution of an assignment, is too great an inconsistency to be legally possible. The objection to the direct exercise of such a jurisdiction is equally applicable to its indirect exercise. Mr. *Westlake* recognizes this position, for he says :—

> But that a Sovereign should claim to affect foreign land generally through the compulsory intervention of the owner, merely on the ground of such owner's status, as fixed by his ordinary authority over him, does not differ perceptibly from a claim to affect it directly (1).

The refusal to give equitable relief cannot be condemned as harsh or wanting in comity, since reciprocity is the foundation of all comity, and the American Courts

(1) Westlake, Private International Law, sec. 67.

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themselves would, in a like case, act upon a similar rule. The justice of the rule itself which withholds lands from the operation of foreign bankruptcy in favor of the local creditors, is well stated and defended in the passage already quoted from Dr. *Wharton's* work on the conflict of laws.

The result is that the appeal fails and must be dismissed with costs.

TASCHEREAU, J., concurred.

FOURNIER, J. :—

Dodge et *Cie.* furent déclarés en faillite, le 15 novembre 1873, par la cour de district du "Southern District of New-York," en vertu de la loi de banqueroute des *Etats-Unis*, qui autorise un tel procédé. Le 10 novembre suivant, les créanciers décidèrent d'opérer par arrangement la liquidation des affaires des faillis, au lieu de la continuer par le mode compulsoire qu'ils avaient d'abord adopté. Ce procédé (1) consiste à substituer au syndic un fidéicommissaire choisi par les créanciers, et à remplacer le contrôle de la Cour sur les actions du syndic par la surveillance d'un comité de créanciers aussi nommé par eux pour surveiller et diriger les affaires en liquidation. Le fidéicommissaire et le syndic ont à peu près les mêmes attributions.

C'est en vertu de cette sec. (5103) que les créanciers firent choix de *John L. Cadwalader*, comme fidéicommissaire, et de cinq autres personnes pour composer le comité de surveillance. Un ordre du juge en date du 14 février 1874, confirmant leur résolution à cet effet, enjoignit en même temps aux faillis de céder et transporter au dit fidéicommissaire tous leurs biens par un acte dont la formule insérée dans le jugement est la même que celle donnée par le Statut. Cette

(1) Sec. 5103, Stat. Revisés des Etats-Unis.

cession fut exécutée par l'ordre du juge et dans les termes voulus par la loi, par *indenture* en date du même jour, 14 février 1874, entre *Dodge* et ses associés, d'une part,—et le fidéicommissaire *Cadwalader*, de l'autre. Cette cession est ainsi conçue : "Witnesseth, that the "said *Anson G.P. Dodge*, *W.F. Hunt* and *Samuel Schole-*"*field* aforesaid, hereby convey, transfer and deliver all "their and each their estate and effects to *John L. Cad-*"*walader*, as trustee absolutely, to have and to hold the "same in the same manner and with the same rights in "all respects as the said *Anson G. P. Dodge*, *William* "*Foy Hunt* and *Samuel Scholefield*, or either of them, "would have had or held the same if no proceedings "in bankruptcy had been taken against them or "either of them, &c., &c."

Plus tard, le 30 juin 1874, *Cadwalader* demanda à être relevé de sa charge de fidéicommissaire et obtint, le 7 décembre 1874, après avoir accepté la cession ci-après mentionnée, en date du 24 septembre 1874, un ordre à cet effet, nommant en même temps *John J. Macdonald*, l'appelant, comme son successeur, lequel reçut, le même jour de *Cadwalader* une cession et transport des biens des faillis, au même effet que celle faite à *Cadwalader*.

Le 13 juin 1874, les Intimés avaient obtenu jugement dans la Cour du Banc de la Reine, province d'*Ontario* contre *A. P. G. Dodge*, l'un des faillis, pour $13,201.61 et $52.57 pour frais ; en vertu de ce jugement ils firent émaner un bref d'exécution qui fut remis au shérif de *York*, le 25 août de la même année. Ce n'est qu'après que le shérif fût devenu porteur de ce bref d'exécution que *Dodge* et sa femme firent, le 24 septembre 1874, une autre cession à *Cadwalader* des immeubles situés dans la province d'*Ontario*, appartenant personnellement au dit *Dodge*, en les désignant d'une manière spéciale et en déclarant que bien que le

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dit fidéicommissaire en fût déjà saisi en vertu de la cession du 14 novembre 1874, il était cependant devenu nécessaire, pour plus grande sûreté (*by way of further assurance*) et pour se conformer aux lois d'enregistrement de la province d'*Ontario*, d'en faire cession de nouveau. Cette fois la cession en est faite dans les termes qui, d'après les lois d'*Ontario*, sont nécessaires pour transporter la propriété absolue des immeubles, savoir: "hath granted, bargained, sold, aliened, demised, releas-"ed conveyed, assured and confirmed."

L'Appelant, comme fidéicommissaire remplaçant *Cadwalader*, se prétend en cette qualité propriétaire des biens des faillis en vertu des actes ci-dessus cités, et les réclame à l'encontre de l'Intimé dont il veut faire annuler l'exécution contre les propriétés des faillis situés dans *Ontario*.

Ces faits soulèvent la question de savoir si une cession compulsoire en vertu de la loi de faillite des *Etats-Unis* peut affecter les biens d'un failli situés dans la la province d'*Ontario*.

D'après le principe que la propriété immobilière est réglée par la loi du lieu où elle est située, la cession faite en vertu des procédés en faillite ne peut avoir d'effet au-delà du territoire dans lequel elle est faite. "Real estate is governed by the *lex loci rei sitæ*, and if a bankrupt is entitled to real estate situate abroad, it will not pass to the trustee unless he acquires a title to it by the law of the country where it is situate."

Sur ce point, il ne peut y avoir de difficulté ; les deux parties sont d'accord sur ce principe. Mais l'Appelant prétend que les termes de l'acte du 14 février 1874 sont suffisants pour transférer le titre de propriété des immeubles de *Dodge*, sans distinction, et que par conséquent ceux situés dans *Ontario* sont compris dans la cession faite à *Cadwalader*. Comme il est dit plus haut, cet acte du 14 novembre a été fait par ordre du juge, en

vertu de la loi de faillite et ne peut par conséquent comprendre que les biens qui peuvent être affectés par la loi de faillite des *Etats-Unis*. Les propriétés situées dans *Ontario* ne pouvant pas l'être n'ont donc pu être ainsi transportées; elles ne peuvent être censées avoir été transportées au moyen d'un acte qui avait pour but restraint et limité de saisir le fidéicommissaire des biens du failli soumis à l'effet de la loi de banqueroute des *Etats-Unis*. Rien ne fait voir dans cet acte qu'il y eût de la part du failli une intention de faire un transport plus ample que celui que le juge pouvait, d'après la loi, lui ordonner de faire.

Les propriétés de *Dodge*, situées dans *Ontario*, formant une partie importante de ses biens, si c'eût été son intention d'en faire cession, il les aurait sans doute spécialement mentionnées. Loin de là, quoiqu'il dût faire le transport sous serment de n'en rien omettre, on voit qu'il s'est soustrait à cette formalité voulue par la loi et ordonnée par le juge. Si son but en agissant ainsi n'était pas légitime, il montre du moins qu'il n'avait pas l'intention de faire plus que la loi ne pouvait lui ordonner, et repousse nécessairement l'idée d'une intention de comprendre dans sa cession les biens situés en *Canada*.

D'ailleurs, cette cession est insuffisante d'après les lois du *Canada* pour opérer le transport du tître de la propriété réelle, parce qu'elle n'est pas faite dans les termes particuliers dont l'usage est nécessaire pour transférer la propriété immobilière d'après les lois de la province d'*Ontario* "grant, bargain, sell, &c." Il est de principe que le transport de la propriété immobilière située en pays étranger doit, pour y avoir effet, être fait dans la forme voulue par les lois de ce pays (1).

No. 555.—The grounds upon which the exclusive jurisdiction is maintained over immoveable property are the same, upon which

(1) Story, p. 745, Conflict of laws.

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the sole right to establish, regulate and control, the transfer, descent and testamentary disposition of it has been admitted by all nations. The inconveniences of an opposite course would be innumerable, and would subject immoveable property to the most destressing conflicts arising from opposite titles, and compel every nation to administer almost all other laws except their own, in the ordinary administration of justice.

No. 556.—It is universally admitted and established that the forms of remedies, and the modes of proceeding and the execution of judgments, are to be regulated solely and exclusively by the laws of the place when the action is instituted or as the civilians uniformly express it, according to the *lex loci.*

Si l'acte du 14 février est valable d'après la loi des *Etats-Unis*, il ne l'est pas d'après celle de la Province d'*Ontario*, comme il doit être exécuté ici, on ne peut invoquer l'autorité de nos tribunaux pour faire mettre à effet un transport de propriétés, nul d'après la loi d'*Ontario.*

Cette difficulté a été bien sentie par les parties intéressées qui ont essayé d'y remédier par l'acte du 24 septembre 1874, cité plus haut, dans lequel ils ont fait usage des termes sacramentels qui doivent être employés d'après la loi d'*Ontario* pour transférer la propriété foncière. Mais cet acte ne peut leur servir pour deux raisons : 1o. Parce qu'étant fait pour parvenir à l'exécution de celui du 14 février 1874, il n'est aussi qu'un transport de propriété immobilière fait en vertu de la loi de faillite, comme le premier auquel il a pour but de remédier ; 2o. Parce qu'ayant été fait après la remise entre les mains du shérif de *York* d'un bref d'exécution dirigé contre ces même propriétés, l'Intimé avait acquis un privilége qu'un acte postérieur de son débiteur ne pouvait lui faire perdre.

Pour ces raisons, je suis d'opinion que le jugement de la Cour d'Appel d'*Ontario* renvoyant le bill en chancellerie doit être confirmé avec dépens.

HENRY, J. :—

This action was commenced by a bill of complaint in

the Equity Court in *Ontario*, filed on the 18th of May, 1876, in order to obtain a declaration that a writ of execution against the lands of *Anson G. P. Dodge*, at the suit of the present Respondents, and placed by them in the hands of the Sheriff of the County of *York*, did not operate to bind lands in that county of the execution debtor. After hearing, a decree was made by Vice-Chancellor *Proudfoot*, in favor of the Appellant, but that decree was reversed by the Court of Appeal, and from the latter judgment it comes by a second appeal to this Court.

Dodge was a member of the firm of *Dodge*, *Hunt* and *Scholefield*, residents respectively of *New York*, *Jersey City* and *Philadelphia*, in the *United States* of *America*, and which firm, as shewn by the evidence in this suit, carried on business in several places in that country. The firm became insolvent in 1873, and in the Southern district of *New York* made an assignment, under "An Act to establish a uniform system of Bankruptcy throughout the *United States*," to one *John L. Cadwalader* as a trustee for their creditors under that Act. That assignment is dated the 24th February, 1874, and forms part of the evidence herein. Subsequent thereto, on the 26th of August, 1874, the Respondents placed the execution for $13,201.60 debt and $52.57 costs, in the Sheriff's hands, and the same was renewed on the 23rd of August, 1875, and remained in full force in the Sheriff's hands unsatisfied up to the bringing of this suit.

Dodge, being the owner in fee simple of lands in *Ontario* bound by the execution and liable to be seized and sold to satisfy it, after the delivery of it to the Sheriff, that is to say, on the 24th September, 1874, made a conveyance by deed to the said *John L. Cadwalader*, in confirmation, as is alleged, of the previous assignment to him.

Cadwalader resigned his trusteeship on the 30th of

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June, 1874, and by course of law, which we may assume to be valid under the evidence, the Appellant was, on the 7th December, 1874, appointed trustee in place of *Cadwalader*—and the latter, by indenture bearing date the 25th of January, 1875, conveyed the said lands to the Appellant, as such trustee, in trust for the creditors of the said bankrupt firm. This deed was registered on the 27th April, 1875. On the part of the Appellant it is contended that the general assignment to *Cadwalader* covered and conveyed the lands of *Dodge* in question, but if not, that the subsequent deed to him from *Dodge* will operate as a confirmation of the assignment and relate back to the date of the latter, so as to have precedence of the execution at the suit of the Respondent company.

I have considered all the binding authorities as to both propositions, and can find none to sustain them. A general assignment, under the bankruptcy laws of the *United States*, cannot affect or cover lands in this country, although, as to moveable property, the law may be different. An assignment in bankruptcy in another country will not affect lands in the *United States*—neither will it in *England*. No reason has been given why we should hold differently here. The rule seems firmly established that in a contract concerning real or immovable property the law *rei sitæ*, and not that of the place of contract, should prevail. By the law here the assignment can have no operation merely as one made in bankruptcy in the *United States*. A general assignment under our own bankrupt laws would be good, but it is so only by Statute which does not apply to the former. Independently therefore of that question, is the first assignment valid between the parties to it so as to cover the lands? or, if it should be so declared, how, under the registry law, could it affect the execution in the Sheriff's hands. By the law of *Ontario* the

placing of the execution in the Sheriff's hands with directions to levy bound the lands of *Dodge* in the County of *York*. At that time there was no registry of any incumbrance thereon, the first conveyance to *Cadwalader* not having been registered, but that unrecorded assignment might, if a good conveyance, affect the rights of the Respondents under the execution. Suppose *Dodge* had given a deed *bonâ fide*, with every requisite necessary to a perfect conveyance, but it was never registered, as at present advised, I should say the execution claim would be affected by that deed, under the provision of sec. 7 of the Statutes of *Canada* of 1861, chap. 41, which provides that when no memorial of a deed is registered it should be deemed effectual according to the priority of time of execution. The execution only authorizes the sale of the interest of *Dodge* at the time it was placed in the Sheriff's hands. The previous assignment therefore, if valid, would leave no interest in *Dodge* to be sold under the execution. In this way, then, I think that, under the law of *Ontario* and the registry Acts, the assignment, if a valid one, would intervene to render the levy under the execution void. The decision of the case depends, in my judgment, altogether on the validity of the assignment.

Registry is not necessary to the validity of a conveyance of land in *Ontario*. Neither can a judgment creditor since 1861, secure a lien upon lands by registry; he can only make his judgment available by a levy upon, and sale of, the debtors lands. By the late registry Act of 1868, I think a judgment might be registered, but that Act (sec. 64) makes a previous unregistered instrument void only as against *a subsequent purchaser or mortgagee* for valuable consideration and therefore it would be of little benefit to register a judgment. As respects the first conveyance to *Cadwalader*, the registry Acts were not utilized; and the execution in the Sheriff's

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hands bound the property as against the debtor, but the previous unregistered conveyance, if valid in other respects, would prevail against it by the terms of section seven, before mentioned. Be that, however, as it may, the main question is, as I before stated, as to the validity of the conveyance of the lands, by the assignment as between the parties irrespective of the question of bankruptcy although unregistered. I am inclined to agree with the learned Vice-Chancellor that the trust expressed in the assignment was a sufficient consideration; and the question as to the *extent* of the trust beyond the right of the trustee *to hold* the lands to be subsequently "applied and administered for the benefit of the creditors," does not here arise.

The assignment does not mention lands—the words are "hereby convey, transfer and deliver all and each of their estate and effects." "Estate" in law, in regard to its use in conveyances, is properly defined to mean a property which one possesses, especially property in land. It is also understood as defining the *nature* and *quantity* of interests in lands, &c. In the conveyance under consideration, I think it may be fairly construed to mean and include, not only personal property, but lands; if, in other respects, the instrument is valid. "Effects" could not properly include lands; it means "results," "consequences"; but is often applied to "goods," "movables," "personal estate." There is no *localization*, however, in reference to the lands; no description, in a word, of the "estate" in the document in question. There is no pointing to anything by which the lands could in any way be ascertained—nothing to shew the intention of the grantor as to the lands to be conveyed—nothing to which the maxim quoted by the learned Vice-Chancellor, *id certum est quod certum reddi potest*, can be applied. In all his citations from 4 *Cruise's Dig.* 269, *pl.* 55, there are reference to localities and

other means of ascertaining the lands intended to be conveyed as to "all that the estate in the tenure of *J.S.*," or "all that estate which descended to the grantor from *J. S.*," or "all the grantors lands in the *Co. of B.*" In each of the three cases, there is given a reference limiting the inquiry and pointing to the mode of making it. In the present case there is no reference (and the deed itself must contain it) to anything to which the maxim could be applied. A deed may refer to other documents, or to matters in pais, to define the land intended to be conveyed, but it must either describe the lands so as by itself to indicate them, or contain references to something else by which the description, not being sufficient in itself, may be made so. I consider, therefore, the absence of any reference of the kind mentioned is fatal to the validity of the assignment as a conveyance of *Dodge's* interest in the lands in question. The title to the lands being in *Dodge* when the execution was delivered to the Sheriff, I consider they became thereby bound, and the subsequent deed to *Cadwalader* conveyed only subject to the lien of the execution. It is argued that, as the latter is but such a confirmation as a Court of Equity would enjoin *Dodge* to give of his previous assignment, the lien by the execution was subject to the equitable right of the Appellant. I know of no legal or equitable doctrine to sustain that proposition. Independently of the doubt that I entertain that the equity courts of this Dominion would necessarily be required to enjoin *Dodge* to make such a confirmation under the circumstances and nature of the assignment in bankruptcy in a foreign country, no Court of Equity could, or would, enjoin him to make such a confirmation when the lien under the execution intervened. Each of the two conveyances must in this suit stand upon its own legal merits. The first, I consider defective for the reasons given, and the

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second is, I think, inoperative against the previous lien by the execution.

I think, therefore, the appeal should be dismissed with costs and judgment entered in favor of the Respondents.

Appeal dismissed with costs.

Solicitors for Appellant: *Crooks, Kingsmill & Cattanach.*

Sollicitors for Respondents: *McCarthy, Boys & Pepler.*