THE BANK OF HAMILTON (DEFENDANT) ..... } APPELLANT;

AND

J. A. HALSTEAD (PLAINTIFF).....RESPONDENT.

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*Oct. 29.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Banking—Collateral security—R. S. C. c. 120, Schedule "C"—53 V. c. 31, ss. 74, 75—Renewals—Assignments.

An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under the seventy-fourth section of the "Bank Act."

The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152) affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the judgment in the Common Pleas Division of the High Court of Justice (2) which maintained the plaintiff's action with costs.

The plaintiff as assignee for the creditors brought the action to set aside three assignments by Zœllner, an insolvent, upon his stock-in-trade made in form C to the Bank Act, dated respectively the 1st April, 1895, the 29th May, 1895, and the 23rd July, 1895, and purporting to secure the respective sums of $4,000, $4,000 and $3,670. On 5th December, 1894, Zœllner was indebted to the bank and they had obtained from him and then held an assignment purporting to secure $4,000, given to replace a prior security of the same character and amount upon the renewal of the note secured by the prior assignment. A new arrangement was then entered into and that day Zœllner

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard.

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wrote a letter embodying in part the terms of the agreement, as follows:

"MOUNT FOREST, Dec. 5, 1894.

"THE AGENT, Bank of Hamilton, Mt. Forest.

"DEAR SIR,—I hereby authorize you to place the proceeds of all drafts made by me and handed to you for discount or collection to the credit of a special account to be held by you as general collateral security for any advances the Bank of Hamilton have made or may at any time hereafter make to me, and you are further authorized to apply the proceeds at credit of this special account towards the the payment or reduction of any advance or advances as you may from time to time deem expedient."

"Yours truly, E. F. R. ZŒLLNER"

It was part of the arrangement that Zoellner should pay off the debt which the assignment then held by the defendant was intended to secure, and a special account (called account No. 2) was opened in the defendant's books, to the credit of which were placed from time to time the proceeds of drafts or notes which Zœllner discounted or left for collection, and to it were debited the drafts and notes dishonoured at maturity. There then was at the credit of Zœllner in his general account (account No. 1, as it was afterwards called), a balance of $31.49, but he was indebted in a considerable sum, as security for which they held the assignment referred to, and after that date account No. 1 was not drawn on to pay any indebtness of Zœllner to the bank.

On the 24th Jan., 1895, Zœllner wrote a letter authorizing the bank to place ten per cent of the proceeds of drafts handed in for discount and collection, to the credit of a guarantee account to be held as general collateral security for past or future advances

made or to be made, and to be applied as the bank might deem expedient towards the payment or reduction of the account in respect to these advances. This third account was then opened and credited with ten per cent of the bills from time to time discounted or left for collection by Zœllner, and on the 5th of August, 1895, the balance at Zœllner's credit was $2,014.06, and so remained at the time of the assignment to the plaintiff for the benefit of creditors.

The three assignments in question originated as follows:

1st. On the 10th Dec., 1894, $4,000 was placed to the credit of Zoellner, in account No. 1, and he gave the bank his note for $4,000 and an assignment securing it. On the 29th May, 1895, the note was charged to account No. 2, and a new note for $4,000 and a new assignment to secure it were taken from Zœllner, and $4,000 were placed to his credit in account No. 1:—

2nd. On the 4th Feb., 1895, a note for $4,000 and an assignment were received by the bank from Zœllner, and $4,000 placed to his credit in account No. 2. On the 25th June, 1895, he paid the bank $330. On the 23rd July following, the balance of the note was charged to his account, No. 2, and he gave a new note and a new assignment to secure it, on the following day $3,670 being placed to his credit in account No. 1.

3rd. On the 1st April, 1895, Zœllner gave to the bank a note for $4,000 and an assignment to secure it and $4,000 were credited to him in account No. 1. On the following day the amount of Zœllner's note for $4,000 held by the bank and secured by the assignment held when the new arrangement of the 5th Dec., 1894, was charged to his account No. 2.

The result of the new arrangement and the manner of keeping the three accounts that were thus opened

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and kept with Zœllner was that, at the end of March 1895, the general account (No 1) was balanced by the withdrawal by Zœllner of $3, the amount then remaining at his credit, and there was at his credit in the special account (No. 2), $7,961.93, and in the guarantee account (No. 3), $727 85. On the 1st April, 1895, after giving credit for the $4,000 which were on that day entered in account No. 1, there was at the credit of Zœllner in that account $4,000 and on the following day by the debit of the $4,000 and a further debit of $92.80 for interest entered in account No. 2, the balance at his credit in that account which was then $8,215.18 was reduced to $4,122.38. On the 29th May, 1895, after giving credit for $4,000 that day entered in account No. 1, the balance at Zœllner's credit (the debits and credits up to that time being equal to one another), was $4,000, and by the debit of the $4,000 entered in account No. 2 on the same day his then credit balance in that account was reduced from $7,544.01 to $3,544.01. On the 24th July, 1895, after giving credit for the $3,670 on that day entered in account No. 1 (the debits and credits up to that time being equal to one another) the balance at Zœllner's credit in that account was $3,670, and by the debit of the same amount entered in account No. 2, and on the 23rd of that month the balance then at his credit in that account was reduced from $7,820.96 to $4,150.96.

At the time the assignments were made the respective sums, for which promissory notes were taken payable on demand, were placed to Zœllner's credit in account No. 1, but though the amounts of these advances were so credited, and there were sums standing to his credit in accounts Nos. 2 and 3, he was not in a position to draw any part of the moneys, because under his arrangement with the bank the moneys at

the credit of those accounts were held by the bank as security for his indebtedness, and he could draw nothing from account No. 1 unless he brought bills or notes for the amount he desired to obtain. At the date of the assignment to the plaintiff he had nominally $3,228.56 at the credit of account No. 1, $4,454.78 at the credit of account No. 2, and $2,014.06 at the credit of account No. 3, subject to these arrangements with the bank.

The judgment of the trial court declared the three assignments void as against the plaintiff as assignee of the estate of Zœllner and that the defendants had not any lien on the goods mentioned in them. The Bank now appeals from the decision of the Court of Appeal by which the trial court's judgment was affirmed.

John J. Scott for the appellant. The renewal of a note and taking of a new assignment, giving up the old assignment which was good until surrendered is clearly a "negotiating" within the meaning of the Bank Act. *Bank of Hamilton* v. *Noye Manufacturing Co.* (1) at page 637; *Foster et al* v. *Bowes* (2). See also *McCrae* v. *Molsons Bank* (3) per Spragge V. C. at page 522; *In re Carew's Estate Act* (4); and Daniels on Negotiable Instruments (4 ed.) ch. VII. We also refer to *Robertson* v. *Lajoie* (5) at page 199; *Larocque* v. *Beauchemin* (6); *Marthinson* v. *Patterson* (7); *Martin* v. *Sampson* (8); *Merchants Bank* v. *Smith* (9) per Taschereau J. at page 543; *Tallman* v. *Smart* (10); *Banque d'Hochelaga* v. *Merchants Bank* (11).

(1) 9 O. R. 631.
(2) 2 Ont. P. R. 256.
(3) 25 Gr. 519.
(4) 31 Beav. 39.
(5) 22 L. C. Jur. 169.
(6) [1897] A. C. 358.
(7) 19 Ont. App. R. 188.
(8) 24 Ont. App. R. 1.
(9) 8 Can. S. C. R. 512
(10) 25 O. R. 661.
(11) 10 Man. L. R. 361.

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Gibbons Q.C and *Henderson* for the respondent. A security taken in form "C" in order to be valid must be for present advances made at the time it is given. The only actual advance made to the insolvent was at the time of the original assignment in 1893 when the first loan of $5,000 was negotiated. No cash was advanced in consideration of the assignments in force at the time the insolvent assigned to plaintiff for the benefit of creditors. See *Bank of Hamilton* v. *Shepherd* (1). The methods adopted, even for that evasion of the statutes, are wholly inoperative. We refer to *Clarkson* v. *McMaster* (2); and as to the definition of a "discount" see *London Financial Association* v. *Kelk* (3) at page 134.

The judgment of the court was delivered by

GIROUARD J.—The appellants from time to time during the years 1893, 1894, 1895 advanced large sums of money to one Zœllner, furniture manufacturer at Mount Forest, upon what they understood to be security upon all his furniture on hand and the materials procured for manufacture, and also upon the paper of his customers. It is admitted that no money was advanced by the bank at the time the security was taken except at the time the first transaction took place when the first assignment was made for $5,000, but that security was abandoned by several renewals and more particularly three made in 1895, which are alone claimed to be in force. Zœllner has become insolvent and his assignee claims the articles assigned as part of the assets of the estate. The appellant contends that their security is valid under the 74th section of the Bank Act.

Chief Justice Meredith, who tried the case, held that it was invalid in an elaborate and clear opinion both

(1) 21 Ont. App. R. 156. (2) 25 Can. S. C. R. 96.
(3) 26 Ch. D. 107.

as to facts and law, and this judgment was unanimously confirmed by the Court of Appeal for Ontario.

We are likewise of opinion that the Bank Act, secs. 74, 75, contemplates only cash advances made at the time the assignments are acquired, and that a renewal of notes or bills is not a negotiation within the meaning of section 75. The bills or notes may be renewed, but not the security. The Act does not authorize the substitution of one assignment for another. Any assignment made under section 74 for advances already made or to be made is illegal and confers no lien or security. The appeal is therefore dismissed with costs for the reasons given by Chief Justice Meredith as reported in 27 O. R. 435.

Appeal dismissed with costs.

Solicitors for the appellants : *Scott, Lees & Hobson.*

Solicitors for the respondent : *Gibbons, Mulkern & Harper.*