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*April 7.
*May 2.

HOWARD BENALLACK AND EDWARD LAFRANCE (PLAINTIFFS) ..... } APPELLANTS;

AND

THE BANK OF BRITISH NORTH AMERICA, EDWARD O. FINLAISON AND CHARLES BOSSUYT (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Preferential assignment—Debtor and creditor—Pressure—Knowledge of insolvency—Yukon Con. Ord. 1902, *ch.* 38, *ss.* 1 *and* 2.

The effect of the second section of the Yukon ordinance, chapter 38, Consolidated Ordinances, 1902, is to remove the doctrine of pressure in respect to preferential assignments and, consequently, all assignments made by persons in insolvent circumstances come within the terms of the ordinance.

In order to render such an assignment void there must be knowledge of the insolvency on the part of both parties and concurrence of intention to obtain an unlawful preference over the other creditors. *Molsons Bank* v. *Halter* (18 Can. S. C. R. 88); *Stephens* v. *McArthur* (19 Can. S. C. R. 446); and *Gibbons* v. *Mclonald* (20 Can. S. C. R. 587) referred to.

APPEAL from the judgment of the Territorial Court of the Yukon Territory, *in banco*, affirming the judgment of Dugas J., at the trial dismissing the plaintiffs' action with costs.

The case is stated as follows, by Mr. Justice Craig, in delivering the judgment appealed from:

"This is an action brought by the plaintiffs to set aside several instruments as being void against creditors under chapter 38 of the Yukon Consolidated Ordinances, and also asking that the defendant bank be declared a trustee for Bossuyt of the property covered by the mortgage and assignments mentioned;

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

that Finlaison be declared a trustee of certain property conveyed to him; that the bank be ordered to account for all the goods mortgaged or transferred and the moneys or proceeds realized by said bank under those various assignments; and a general account.

"The case has two main branches, one in which the plaintiffs attack the chattel mortgage, assignment of book accounts and notes, the other attacking the rate of interest charged by the bank and asking for an account of that interest and an allowance of the same, taken over seven per cent, for the benefit of the creditors.

"The pleadings set out that the plaintiffs were execution creditors on the 28th June, 1902, and simple contract creditors for a long period before that date; that the defendant Bossuyt was insolvent in October, 1901; that on the 1st of November, 1901, Bossuyt made a chattel mortgage to the bank to secure a past due debt of $41,550; that the bank took immediate possession of that property and disposed of it, this property consisting mainly of butchers meats; that land transferred to Finlaison, who was acting manager of the bank, was transferred to him as trustee to secure the same debt; that Bossuyt assigned debts in April and May, 1902, in all amounting to $20,000; that he indorsed and transferred promissory notes amounting in all to about $12,000 to secure the same debt; that no consideration was given but security for prior debts; that since October, 1898, Bossuyt borrowed from the bank moneys at 24 per cent per annum and afterwards at 18 per cent per annum, and that the bank wrongfully collected interest over and above the rate allowed by the Banking Act of 7 per cent; that during this time Bossuyt was insolvent to the knowledge of the bank and that assignments were made voluntarily and with intent to defeat the plaintiffs and other creditors and were taken by the bank with such intent and to give

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a preference and had the effect of giving a preference to the bank over other creditors; that the assignments were made fraudulently for the purpose of defeating creditors and had that effect and are void; that if the assignments were good an account should be taken of the interest, and only 7 per cent allowed.

"The defendants deny these allegations generally, alleging that the book debts of Bossuyt, chattel mortgages, etc., and other assignments were taken as extra precaution and additional security; that the notes and book debts were transferred as collateral in the ordinary course of business; that the interest paid was settled and the account closed and the interest over and above the legal rate was voluntarily paid by Bossuyt long before action; and they allege that the execution creditors have no status to ask for an account, there being no privity between them and the bank in the matter of the interest; that the plaintiffs are not creditors within the meaning of the Act respecting preferential assignments.

"The evidence, I think, shews the following facts: That Bossuyt, the judgment debtor, in 1898 and 1899, was owing the plaintiffs a balance of $28,200; that the balance remains unpaid to date; that Bossuyt also owed Davies $9,000, secured by warehouse receipts before the assignment was made, and that he also owed one VanRass $500; and, further, that he owed Lafrance $17,000 in the fall of 1901; that from 1899 down he continued to borrow large sums of money from the bank amounting in all on the 1st of November, 1901, to about $41,000, there being a current note then matured of about $5,000 which was unpaid, not included in the then security; that on the 1st of November he gave a chattel mortgage to the bank covering stock of meat and fowl situate in Dawson; that between that time and April and May,

1902, the bank made other advances to him, and that additional security was taken by assignment of book debts and promissory notes. After the taking of the chattel mortgage in November Bossuyt was allowed to sell the meat. For about a month he took it away without the leave of the bank. The bank manager observing this required the book-keeper, one Peck, who was acting in the service of Bossuyt, to keep check of the meats and pay over the proceeds to the bank, which was done. Bossuyt had a great deal of other meats in his warehouse; the meat of one Burns, about $8,000 worth or more, for which the bank advanced the money on the purchase; also the meat which was covered by a warehouse receipt to Davies, all of which was sold and turned into the general account of Bossuyt without any distinction or ear-marking. Bossuyt, clearly in fraud of Davies, disposed of the entire stock of meat which Davies held as security for his advance and deprived him entirely of his money, without any knowledge on the part of the bank, however, and this money was paid over along with the other money realized from the sale of the meat which was purchased from Burns with the $8,000 advanced by the bank. During this time I take it that Lafrance was well aware (at least I draw that inference from the evidence) that Bossuyt was dealing with the bank; he never mentioned to the bank the Bossuyt indebtedness to him even on the occasion when he indorsed a $9,000 note for Bossuyt in the fall of that year, which the bank discounted and paid over to him, although at that time it is quite clear from the evidence that the manager of the bank informed the plaintiff, Lafrance, that he had advanced up to the limit of Bossuyt's credit and assets, yet Lafrance never mentioned to the bank anything of his debt. It is also absolutely clear from the evidence

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that Bossuyt never in any way informed the bank of his other liabilities and the bank had no knowledge whatever in any way of the liabilities of Bossuyt beyond that to themselves. The manager of the bank in March, 1902, became aware of the Davies note of $9,000. It is quite clear that the bank charged 24 per cent interest on all the advances made up to December, 1901, and then the rate was reduced to 18 per cent. It is also in evidence that Bossuyt did not tell Lafrance of his large debt to the bank and Lafrance, it appears, never inquired although he knew that Bossuyt had dealings with the bank and that the bank required his indorsement before advancing $9,000.

"That the bank was ignorant of the financial condition of Bossuyt is quite apparent from this, that the manager swears that if he had been requested he would have loaned Bossuyt the further $9,000 to pay off the Davies note upon the security of the assets which he believed Bossuyt had. Bossuyt's evidence is not at all satisfactory, but this can be clearly drawn from it that he never informed the bank of his position and that the bank was ignorant of his real position; that he anticipated being able to pull through at the time of giving the chattel mortage; that he went into a statement of his effects with the bank at that time, with the manager, and together they estimated he had about the sum of $95,000, and in view of what the bank knew of his position from that statement and otherwise, and being aware only of their own debt, Bossuyt was clearly not insolvent to the knowledge of the bank. Bossuyt carried on his business until June 28th, selling his meat. as I have already recited, mixing all the moneys from the various sources of supply in the one general account. The bank certainly at that time became anxious about the large advances they were making and felt they should have

security. The stock as valued by Bossuyt and the bank was taken at wholesale prices. Bossuyt to-day cannot give any very clear estimate of what he had, but he does not deny going over his stock with the manager of the bank and that the estimate that the bank manager now gives must be taken to be what was arrived at at that time. Bossuyt admits that Lafrance knew he was borrowing from the bank in the fall of 1901 to pay for meat, and in that fall Bossuyt bought a very large consignment of meat from Lafrance, about $27,000 worth, on which he paid Lafrance $17,000 in cash borrowed from the bank, the balance being paid by a note discounted by Bossuyt and indorsed by Lafrance which is the note I previously referred to. Some considerable losses, which are not very clearly sworn to, but certainly losses which seriously affected Bossuyt, occurred in the winter of 1901 and 1902. Bossuyt says that so far as the bank knew he was solvent in 1901. Bossuyt admits signing the cheque monthly for the interest, as called upon, or otherwise. He says generally the cheques were written in the bank by the manager and he signed them. These cheques, as appears by the exhibits, ran from June 29th, 1901, on to February 8th, 1902, the first cheque being for $6,054, and being ear-marked "Interest on notes to 30 June", and so on at various dates monthly from that time on cheques were given to the bank on themselves and paid out of the general account which Bossuyt had whenever money was on hand. Some of the book debts assigned certainly were proceeds of the meat mortgaged and some of the notes the same, as well as other book debts contracted during the carrying on of Bossuyt's business.

Lafrance was called and his evidence was just about as I have given it summarized. He did not learn of Bossuyt's mortgage to the bank until February, 1902.

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He knew of several shipments all paid through the bank; he admits telling Finlaison that Bossuyt was all right, and that he never mentioned to the bank manager any claim of his against Bossuyt.

"The action was based upon the law contained in chapter 38 of our Ordinance which I had better give in full. Section 1 says:—'Every gift, conveyance, assignment or transfer, delivery over of payment of goods, chattels or effects or of bonds, bills, notes, securities or of shares, dividends, premiums, or bonuses in any bank, company or corporation made by any person at any time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the verge of insolvency, with intent to defeat or delay or prejudice his creditors, or to give to one or more of them a preference over his other creditors or over any or more of them, or which has such effect, shall, as against them be utterly void.' Section 2: 'Every such gift, conveyance, assignment, transfer, delivery over or payment, whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying or prejudicing creditors or giving one or more of them a preference, shall, as against the other creditors of such debtor, be utterly void.' The title of the Bill is an 'Ordinance respecting Preferential Assignments', and the marginal note to section 1 is: 'Fraudulent and Preferential Assignments' and the marginal note to section 2 is the word 'Pressure' at the foot. That section 2 was passed after the decision of *Molson's Bank* v *Halter* (1)."

Ewart K. C. for the appellants.

Shepley K. C. and *Christie* for the respondents.

The judgment of the court was delivered by

(1) 18 Can. S. C. R. 88.

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Idington J.

IDINGTON J.—It is urged by the appellants that the amendment by sec. 2 of ch. 38 of the Yukon Ordinances consolidated (1902) is such as to distinguish this case from the cases of *Molsons Bank* v. *Halter* (1), followed by *Gibbons* v. *McDonald* (2), that interpreted the R S. O. 1887, ch. 124, and *Stephens* v. *McArthur* (3), that interpreted the Manitoba Act 49 Vict. ch. 45, sec. 3, where the words used are identical with those of the Ontario Act.

The Yukon Ordinance before its amendment in question was almost identical with those of the Ontario and Manitoba statutes upon which these cases were respectively decided. The amendment now in question consists in adding to the 1st section the following as sec. 2 :

2. Every *such* gift, conveyance, assignment, delivery over or payment whether made *owing to pressure* or *partly owing to pressure or not*, which has the effect of *defeating, delaying,* or *prejudicing creditors* or *giving one or more of them a preference* shall *as against the other creditors of such debtor be utterly void.*

This was passed after the decision in *Molsons Bank* v. *Halter* (1).

Does it do more than remove the question of pressure out of consideration in arriving at a proper conclusion in a case falling within the first section which was practically passed upon by the decisions referred to? I think not. "Every *such* gift, &c." evidently means that class or those classes designated by the preceding section.

Take the doctrine of pressure out of the question by force of this amendment as it was taken by the facts in the case of *Gibbons* v. *McDonald* (2) and we have nothing left to distinguish this case from that. There the whole of the debtor's assets had been assigned as it is alleged by the appellants is the case here.

(1) 18 Can. S. C. R. 88. (2) 20 Can. S. C. R. 587.
(3) 19 Can. S. C. R. 446.

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I cannot read this amending section 2 of the Yukon Ordinance as doing more than striking at the doctrine of pressure. If the words "whether made owing to pressure or partly owing to pressure" had been inserted in the first section just after the word "intent" the same legal effect would have been produced.

The only other thing in this amending section is a repetition of the words "which has such effect." That repetition adds nothing to the force of the words in the first section if we are to be governed, as I think we must, by the interpretation given by the cases I have referred to and the reasoning which lead to their decision. I need not refer at length to that reasoning. It is clearly set forth in the judgments of Mr. Justice Strong, especially at pp. 452 & 453 of *Stephens* v. *McArthur* (1). It would seem as if there the removal of the doctrine of pressure, as an element of the reasoning leading to the conclusion reached, had been anticipated. It was, therefore, not necessary when the case of *Gibbons* v. *McDonald* (2) arose, without any fact in it upon which the doctrine of pressure could rest, to repeat this reasoning, and the same learned Justice simply contented himself with referring to his former judgment and the majority of the court concurred therein. It was there shown that the preference prohibited was a voluntary preference and hence a fraudulent preference.

And if a fraudulent preference to whom is the having such a purpose to be attributed?

Is it enough to shew that the assignor may have had such an intent?

Must not the assignee as well as the assignor be a party to the fraudulent intent?

(1) 19 Can. S. C. R. 446. (2) 20 Can. S. C. R. 587.

Such would seem to be the result of a long line of decisions upon which the commercial world has had a right to act for a long time past. And though there may not have been any express decision of the point upon this legislation in this court the late Chief Justice, Sir William Ritchie, in *Gibbons* v. *McDonald* (1), at page 589 indicates that in his view there must be

> a concurrence of intent on the one side to give and on the other to accept a preference over other creditors.

Counsel for the appellants properly conceded that the evidence here did not show knowledge on the part of the bank such as would enable us to find this concurrence of purpose.

Until the legislature obliterates the element of intent in such legislation and clearly declares that, quite independently of intent, the preferential result or effect of the transaction impeached is to govern, it will be exceedingly difficult to arrive at any other conclusion in cases of this kind. The results that might flow from such legislation ought not to be brought about without such purpose being most clearly expressed by the legislature.

The appellants as execution creditors only, (not suing for all creditors), assert some rights of a novel character which, in the view I take, it is unnecessary to dispose of or pass upon.

I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *R. L. Ashbaugh.*

Solicitors for the respondents: *Pattullo & Ridley.*

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(1) 20 Can. S. C. R. 587.