THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED as Trustee in Bankruptcy for T. L. Cleary Drilling Company Ltd. (*Defendant*) ..... APPELLANT;

AND

BEAVER TRUCKING LIMITED (*Plaintiff*) ..... RESPONDENT;

AND

THE CALIFORNIA STANDARD COMPANY (*Garnishee*).

1958
*Nov. 12, 13
1959
Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA

Bankruptcy—Garnishment—Monies paid into Court—Rights of garnishor and trustee in bankruptcy—Whether garnishor a "secured creditor"—The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 2(r), 41(1), 42(2), 43(2), 86, 95(2).

Section 41(2) of the *Bankruptcy Act* provides that every receiving order and every assignment "takes precedence over all . . . garnishments . . . except such as have been completely executed by payments to the creditor or his agent, and except also the rights of a secured creditor".

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

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The plaintiff caused to be served a garnishing order upon the garnishee who paid the money into court. The defendant subsequently made a voluntary assignment in bankruptcy, and the trustee in bankruptcy and the plaintiff each claimed the money which was still in court. The trustee's claim was dismissed by a local judge in chambers whose decision was affirmed by a judge of the Court of Queen's Bench. This judgment was in turn affirmed by a majority in the Court of Appeal, which held that the plaintiff was a "secured creditor". The trustee appealed to this Court.

Held: The appeal should be allowed and payment out of the monies in court should be made to the trustee. The plaintiff did not fall within either of the exceptions to s. 41(1) of the *Bankruptcy Act*.

Per Locke J.: The meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms, it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. If the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor, and if such a charge falls within the definition of a secured creditor in s. 2(*r*) of the Act, it must be taken that since the rights of garnishing creditors have already been dealt with they are not included in the expression "the rights of a secured creditor" in the concluding words of s. 41(1). *Galbraith v. Grimshaw*, [1910] 1 K.B. 343.

Per Cartwright, Fauteux, Martland and Judson JJ.: The provisions of s. 41(1) are clear, and even a literal interpretation does not lead to the conclusion reached by the majority in the Court of Appeal. The compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor whose position has already been fully dealt with. The intention is to ensure the distribution of the debtor's property in accordance with the Act and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment. It must be concluded, therefore, that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the Act unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the Act as defined in s. 2(*r*).

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Monnin J. Appeal allowed.

J. S. Lamont, Q.C., and *N. H. Layton*, for the defendant, appellant.

No one appeared for the plaintiff, respondent.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1], pursuant to leave granted by that Court from its judgment dismissing the appeal

[1] (1958), 25 W.W.R. 669, 37 C.B.R. 60.

taken by the present appellant from an order of Monnin J. by which an appeal from an order of His Honour Judge Buckingham, local judge for the Western Judicial District, was dismissed. The Chief Justice of Manitoba, with whom Schultz J.A. agreed, dissented and would have allowed the appeal.

The facts to be considered in dealing with the matter are as follows:—On November 5, 1956, the respondent commenced an action against T. L. Cleary Drilling Co. Ltd. for the recovery of the sum of $2,282.50 and caused to be served a garnishing order upon the California Standard Company, a debtor of the Cleary company. On February 9, 1957, the garnishee paid into the Court of Queen's Bench at Brandon the sum of $2,282.50. On May 13, 1957, default judgment was signed in the action against the Cleary company for the amount claimed and taxed costs. On June 18, 1957, that company made a voluntary assignment in bankruptcy, in the statutory form, to the Canadian Credit Men's Trust Association Ltd.

On November 18, 1957, the trustee applied for payment out of the amount so paid by the garnishee and which was then in court and, contemporaneously, the present respondent made an application for payment out to it and both motions were by consent heard together by the local judge. By an order dated December 16, 1957, the application by the trustee was dismissed and it was ordered that the amount in court be paid out to the Beaver Trucking Co. Ltd.

Proceedings were stayed on this order, pending an appeal to a judge of the Court of Queen's Bench by the present appellant and, as stated, that appeal was dismissed by Monnin J. on February 28, 1958, in a considered judgment. The reasons for judgment of the majority of the Court of Appeal were delivered by Tritschler J.A.

Section 41 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, so far as it is relevant to the present appeal, reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

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(2) Notwithstanding subsection (1), one solicitor's bill of costs, including sheriff's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against the property of the bankrupt.

It is in reliance upon the first of these subsections that the trustee claims that the moneys in court should be paid to it for distribution among the creditors. The position taken by the garnishing creditor is that, by reason of the service of the garnishing order upon the California Standard Company in advance of the assignment in bankruptcy, it is a secured creditor within the meaning of that expression in s. 41 and, as such, has priority over the trustee's claim.

The expression "secured creditor" is defined in s. 2(*r*) of the Act to mean:

a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable.

By Rule 526 of the Queen's Bench Rules, the Court is empowered in the matter of a claim such as that of the present respondent to make an order that all debts, obligations and liabilities owing, payable or accruing due from any person who is indebted or liable to the debtor shall be attached. A form of the order which may be made appears as form 74 in the Appendix to the Rules. The nature of the order, in so far as it might concern the present matter, does not differ from the orders *nisi* authorized by Order 45, Rule 1 of the Rules of the Supreme Court 1883 in England. That rule authorizes the making of an order that all debts owing or accruing due from a third person to the debtor shall be attached to answer the judgment or order.

I refer to these rules since in certain of the cases decided in Manitoba it has been held that a garnishing creditor is, by virtue of the service of a garnishing order, a secured creditor within the meaning of s. 41(1) of the *Bankruptcy*

Act, In re Doyle, (a bankrupt)[1], and on appeal[2], though, as pointed out by Adamson C.J.M., the decision did not turn upon that point.

While, in my opinion, it is unnecessary to decide this question in dealing with the present appeal, I think it should be noted that *Ex parte Joselyne*[3], relied upon in coming to the above conclusion, dealt with a bankruptcy matter under the *Bankruptcy Act 1869,* (Imp.). It was there decided that a judgment creditor who before the filing of the bankruptcy petition had obtained a garnishee order *nisi* attaching debts due to the debtor was a secured creditor within the meaning of ss. 12 and 15 of that Act. Neither in the sections referred to nor elsewhere in the Act of 1869 is there any provision such as that portion of s. 41 which expressly states that an assignment takes precedence over all judicial or other attachments and garnishments and, with great respect, I think the decision does not affect the question to be decided here.

In my opinion, the meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. The moneys were paid into court to the credit of the cause and remain there.

If, as is stated by Farwell L.J. in *Galbraith v. Grimshaw*[4], the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor and, if such a charge falls within the definition of a secured creditor in the *Bankruptcy Act,* it must be taken that, since the rights of garnishing creditors have already been dealt with, they are not included in the expression "the rights of a secured creditor" in the concluding words of the subsection.

If there were ambiguity in the language of the first subsection of s. 41, and I think there is none, it would be necessary for us to construe it in the manner directed by

[1] (1957), 22 W.W.R. 651, 36 C.B.R. 141.
[2] (1958), 23 W.W.R. 661, 36 C.B.R. 134.
[3] (1878), 8 Ch. D. 327, 38 L.T. 661.
[4] [1910] 1 K.B. 339 at 343.

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s. 15 of the *Interpretation Act,* R.S.C. 1952, c. 158, and to give to it such interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. The purpose of the *Bankruptcy Act* and of all bankruptcy legislation in Canada and in England is to assure that, in the case of insolvent debtors, their assets shall be divided fairly among their creditors, having due regard to the position of persons such as mortgagees who, having advanced moneys upon the security of assets of the debtor, are to be afforded the rights of secured creditors, and to those claims which are by statute entitled to preference.

Section 86 and those sections immediately following it declare the position of secured creditors and define the extent to which they are entitled to priority. Subject to such rights and to preferences to which other claims such as those of the Crown may be declared to be entitled and the costs and expenses of the trustee, it is the purpose of the Act that the creditors shall rank *pari passu* upon the estate. The construction of the Act contended for by the respondent in the present matter would mean that a creditor sufficiently alert to bring an action and attach moneys owing to a debtor on the brink of insolvency may thereby obtain preference over other creditors who refrain from bringing actions, for the amount of his claim in full and not merely for his costs, as provided by s. 41(2). This, in my opinion, is directly contrary to the intent and purpose of the *Bankruptcy Act,* and any such contention should be rejected unless the language of the Act should require it in the clearest terms.

I would allow this appeal with costs against the respondent in the proceedings before the local judge and before Monnin J. and the Court of Appeal. In the circumstances, the trustee's costs of this appeal should be paid out of the moneys paid into court by the garnishee and no order for costs be made against the respondent. The balance remaining in court should be paid to the appellant.

The judgment of Cartwright, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—A judgment creditor and the trustee in bankruptcy of the judgment debtor are in competition here for monies in court paid in pursuant to a garnishee order issued by the judgment creditor. When the bankruptcy occurred the plaintiff already had a default judgment, the money had been paid into court by the garnishee but no move had been made for payment out. When the plaintiff moved after the bankruptcy of the judgment debtor, it was met with a counter-motion by the trustee, who claimed that the bankruptcy had precedence over the attachment under the terms of s. 41 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, subs. (1) of which reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

The trustee in bankruptcy is the appellant before this Court from a judgment awarding the money to the judgment creditor.

Until the concluding phrase of the section "and except also the rights of a secured creditor", words could not be plainer. The claim of the trustee prevails over that of the judgment creditor under any of the execution procedures mentioned unless there has been payment to the creditor or his agent. It is not sufficient that the fund may have been stopped in the hands of the garnishee or that it may be in court subject to further order or even subject to payment-out on an order already issued. Nor does it matter when the money was attached or paid into court or what the status of the action may have been when bankruptcy supervened. The only question is—has the execution procedure been completed by payment to the creditor or his agent?

In the judgment under appeal, the Court of Appeal[1] has held that the section has no such operation because a judgment creditor who has caused a garnishee order to

[1] (1958), 25 W.W.R. 669, 37 C.B.R. 60.

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be served is a secured creditor. After specific and clear directions concerning the rights of the garnisheeing creditor and the trustee in bankruptcy, it is held that the section has said nothing because the creditor whose position and rights are defined and limited in the first part of the section is the same creditor who is removed from its scope and put within the exception.

Only the plainest language could compel an interpretation which produces this conclusion and I do not think that this compulsion exists in the present case. With all respect to the majority opinion in the Court of Appeal, I agree with the dissenting opinion expressed by Adamson C.J., that the provisions of the section are clear and that even a literal interpretation does not lead to the conclusion reached by the majority. To me the compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor, whose position has already been fully dealt with. The intention that I find plainly expressed is to ensure the distribution of the debtor's property in accordance with the *Bankruptcy Act* and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment.

There are subsequent sections which carry out this intention and reinforce my conclusion. These sections, also, would be without meaning if the judgment under appeal is correct. Although under s. 41(1) the execution creditor must give way to the trustee in bankruptcy, by the next subsection the one who has first attached by way of garnishment or lodged a writ of execution with the sheriff gets his solicitor's bill of costs paid and this is done in accordance with the priorities established in s. 95(*g*). Next there is provision in s. 42(2) for delivery to the trustee of any property of the bankrupt under execution or attachment, and finally, by s. 43(2), the trustee is enabled to have himself registered as the owner of any land "free of all the encumbrances or charges mentioned in s. 41(1)".

My conclusion, therefore, is that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the *Bankruptcy Act* unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the *Bankruptcy Act* as defined in s. 2(*r*).

The same conclusion is involved in *Royal Bank of Canada v. Larue*[1], which held, affirming a judgment of this Court[2], that a judicial hypothec upon the real property of the bankrupt was postponed to an authorized assignment under the *Bankruptcy Act*. When *Larue* was decided, the exception which has given rise to difficulty in the present litigation had already come into the Act, having been enacted by 1921, 11-12 Geo. V., c. 17, s. 10. I cannot find any distinction between the present s. 41(1) and the legislation upon which the decision in *Larue* was founded, which would in any way impair the authority of that case. There was no suggestion either in the judgment of this Court or in the reasons of the Privy Council that the exception took the Bank as holder of a judicial hypothec outside the scope of the first part of the section. The result was that the priority of the trustee in bankruptcy, established by the section, attached for all purposes, including distribution of the proceeds according to the priorities established by the *Bankruptcy Act*. The recent decision of the Saskatchewan Court of Appeal in *Re Sklar and Sklar (Bankrupt)*[3] upon the present s. 41(1) is to the same effect. These two judgments had to do with the position of a judgment creditor who had issued execution against land but under the terms of the section, there is, in my opinion, no possible distinction between the result that must follow from this procedure and procedure by way of attachment or garnishment of debts.

I am also in respectful agreement with Adamson C.J. that there was no authority in the Province of Manitoba which bound the Court of Appeal to hold that a judgment creditor who had served a garnishee order was a secured creditor under the *Bankruptcy Act*. This finding is based

[1] [1928] A.C. 187.
[2] [1926] S.C.R. 218, 7 C.B.R. 285, 2 D.L.R. 929.
[3] (1958), 26 W.W.R. 529, 15 D.L.R. (2d) 750.

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upon the judgment in *Kare v. North West Packers Limited et al*[1], which was not a bankruptcy case and involved no determination of rights under s. 41(1) of the *Bankruptcy Act*. The contest there was between a garnisheeing creditor and a receiver appointed by a group of bondholders, seeking to enforce a floating charge. The judgment of the Court of Appeal awarded the money to the garnisheeing creditor on the ground that he was a secured creditor under the Queen's Bench rules at the time when the floating charge crystallized.

The next case was *McCurdy Supply Company Limited v. Doyle*[2], affirmed without reasons[3], which gave priority to a judgment creditor who had garnisheed a mortgage debt over a subsequent assignee of the mortgage. Again, no question concerning the effect of s. 41(1) of the *Bankruptcy Act* was involved but this matter did come up when Doyle went into bankruptcy a short time later. There were then three parties competing for the money, the garnisheeing creditor, the assignee of the mortgage and the trustee in bankruptcy of Doyle; *Re Doyle (A bankrupt): McCurdy Supply Company Ltd.*[4] and on appeal[5]. The mortgage had been assigned for full value prior to bankruptcy and no attack was made on the propriety of that transaction. Therefore, whatever the position of the garnisheeing creditor may have been, whether that of secured creditor or not, there was a much more serious obstacle in the way of the trustee in bankruptcy. There was no property to pass to him because the bankrupt had made a complete assignment of the mortgage prior to bankruptcy. As pointed out by Adamson C.J. in his reasons in the present case, anything said about the position of the garnisheeing creditor was *obiter* and unnecessary to the decision, and the prior assignment of the mortgage was a complete answer to the trustee's claim.

In litigation concerned solely with the position of the garnisheeing creditor under s. 41(1) of the *Bankruptcy Act* it is unnecessary to enquire further into the authority

[1] (1955), 63 Man. R. 16, 14 W.W.R. (N.S.) 251, 2 D.L.R. 412.
[2] (1957), 64 Man. R. 289.
[3] (1957), 64 Man. R. 365.
[4] (1957), 22 W.W.R. 651, 36 C.B.R. 141.
[5] (1958), 23 W.W.R. 661, 36 C.B.R. 134.

of *Kare v. North West Packers Limited* as a determination of rights between such a creditor and the holder of a floating charge seeking to enforce his security, and although I express no opinion on this matter, these reasons should not be taken as an indirect affirmation of the principle of that decision.

The appeal should be allowed and an order made directing payment out of the monies in court to the trustee in bankruptcy. In the circumstances, the trustee's costs of this appeal should be paid out of the fund and there should be no order for costs against the respondent. In the Courts below the trustee is entitled to an order for costs against the respondent.

Appeal allowed.

Solicitors for the defendant, appellant: Lamont & Layton, Winnipeg.

Solicitor for the plaintiff, respondent: A. B. Rutherford, Virden.