

THE ROYAL BANK OF CANADA APPELLANT;

1922

*Oct. 16, 17.

*Dec. 19.

AND

THE EASTERN TRUST COMPANY . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Bankruptcy—Authorized assignment—Railway Co.—Prior assignment of book debts—(D) 9-10 Geo. V, c. 36, s. 30 (1); 10-11 Geo. V, c. 34.

A company incorporated as a railway and mining company entered into an agreement with the purchaser of the property of a similar company under which it operated, for a few months, the short line of railway covered by the purchase. The purchaser having, then, made default in his payments, the former owners resumed possession of the property. Shortly after the company which had so operated, made a voluntary assignment under the Bankruptcy Act.

Held, Idington and Brodeur JJ. dissenting, the said company was not a "railway company" within the meaning of sec. 2 (k) of the Bankruptcy Act and its assignment was authorized under the provisions of that Act.

Shortly before going into bankruptcy the company made an assignment of its book debts which under sec. 30 (1) of the Act was void if the assignor did not comply with the requirements of provincial legislation as to registration, notice and publication thereof.

Held, that the assignment was void as against the trustee in bankruptcy though there was no such provincial legislation.

APPEAL from a decision of the Supreme Court of New Brunswick on a case stated between the parties hereto.

Case stated to the court on the application of The Eastern Trust Company, trustee in bankruptcy of the estate of the Inverness Railway and Collieries Limited.

1. The Inverness Railway & Coal Company is a body corporate, incorporated by special Act of the legislature of Nova Scotia for the purpose of owning and operating a mining undertaking at Inverness and elsewhere in the county of Inverness and for the purpose of owning and operating a railway in said county and the said company had duly built a railway from Canso to Inverness and had

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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operated the same in the carrying of freight and passengers and had operated mines at Inverness up to the 20th day of July, 1920.

2. The National Trust Company, Limited, is a body corporate and the mortgagee of the entire railway and mining undertaking of Inverness Railway & Coal Company and trustee for bondholders under a trust deed.

3. By agreement in writing, which appears in schedule "A" hereto, and which was dated the 16th day of June, 1920, said Inverness Railway & Coal Company, Limited, and the National Trust Company, Limited, agreed to sell the entire undertaking of the said Inverness Railway & Coal Company to Myron E. C. Henderson upon the terms therein expressed and in pursuance of said agreement said Myron E. C. Henderson entered into possession of the properties therein described on the 20th day of July, 1920.

4. The Inverness Railway & Collieries, Limited, is a body corporate, incorporated under the provisions of the Nova Scotia Joint Stock Companies Act on the 28th day of July, 1920, for the purpose of carrying on a mining and railway undertaking. In accordance with the provisions of the Railway Act, Revised Statutes of Nova Scotia, 1900, and amendments thereto, said Myron E. C. Henderson notified, copy of which notice is hereto annexed as schedule "B", the Commissioner of Mines on the 20th day of July, 1920, that he had purchased the said properties, but no notification was ever given the said Commissioner of Mines by or on behalf of the Inverness Railway & Collieries, Limited, of that company's intention to run or operate a railway. On the 21st day of July, 1920, said Myron E. C. Henderson and Inverness Railway & Collieries, Limited, entered into the agreement hereto attached as schedule "C".

5. Said Inverness Railway & Collieries, Limited, as agents of said Myron E. C. Henderson operated the said railway from on or about the 21st day of July, 1920, up to and until the 7th day of February, 1921, when the said Inverness Railway & Coal Company and the National Trust Company re-entered into possession of the properties on default having been made by said Myron E. C. Henderson under his agreement.

6. The Royal Bank of Canada, on the 27th day of December, 1920, received an assignment of book debts from Inverness Railway & Collieries, Limited, and a copy of such assignment is hereto attached as schedule "D".

7. For the purposes of this application only (and not debarring or estopping the trustee of the Inverness Railway & Collieries, Limited, from denying or disputing the fact in any other or subsequent proceeding and specially reserving to the trustee its rights, if any, to set aside said assignment of book debts as having been given without adequate or any consideration) it is admitted the Royal Bank of Canada gave present cash value on taking such assignment of book debts.

8. On the 26th day of February the Inverness Railway & Collieries, Limited, made an assignment under the provisions of the Bankruptcy Act to The Eastern Trust Company, trustee in bankruptcy.

9. Two questions are raised for the consideration of the judge in bankruptcy:

(a) Whether the assignment made by the Inverness Railway & Collieries, Limited, to The Eastern Trust Company was authorized under the provisions of The Bankruptcy Act;

(b) Assuming such assignment be valid, whether the general assignment of book debts to the Royal Bank is void as against the trustee in bankruptcy.

The Judges of the Supreme Court of Nova Scotia were equally divided in opinion as to the answer to be given the first question. The second was answered by the majority in the affirmative.

A. W. Stewart for the appellant. The Inverness Ry. & Collieries Co. was a railway company and not subject to The Bankruptcy Act. See *International Coal Co. v. County of Cape Breton* (1).

Jenks K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal is from a judgment of the Supreme Court of Nova Scotia on a stated case sub-

(1) 22 Can. S.C.R. 305.

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mitted to that court in which two questions were asked as follows:

(a) Whether the assignment made by the Inverness Railway & Collieries, Limited, to the Eastern Trust Co. was authorized under the provisions of the Bankruptcy Act;

(b) Assuming such assignment to be valid, whether the general assignment of book debts to the Royal Bank is void as against the Trustee in Bankruptcy.

The learned judges were equally divided upon the answer to be given to the first question which consequently was not answered. The second question was answered by three of the justices in the affirmative and by Mr. Justice Russell in the negative. I am of the opinion that both questions should be answered in the affirmative.

My brother Anglin in his reasons for judgment has expressed my views and conclusions on both these questions and I have nothing useful to add to those reasons.

Respondent company should have its costs.

IDINGTON J. (dissenting).—This is an appeal from the Supreme Court of Nova Scotia which heard a stated case, submitted by the respondent to the judge in bankruptcy who in turn submitted it to the said Supreme Court, whereby answers were sought to the following questions:—

(a) Whether the assignment made by the Inverness Railway & Collieries, Limited, to The Eastern Trust Company was authorized under the provisions of the Bankruptcy Act;

(b) Assuming such assignment to be valid, whether the general assignment of book debts to the Royal Bank is void as against the Trustee in Bankruptcy.

The said court was equally divided as to the first question and formally declared it to be unanswered, but, by a majority, answered the second question in the affirmative.

The case is brought here by leave consented to by the parties hereto.

For the reasons assigned by Mr. Justice Chisholm in the court below, I would answer said first question in the negative.

It seems to me that in light of such an answer by the majority of this court the second question should not be answered for it ends all possibility of invalidating the

assignment of book debts by virtue of the Bankruptcy Act and there is no other ground pretended before us upon which it can be held to have been void.

I submit, therefore, the appeal should be allowed, with costs, if claimed.

DUFF J.—The judgment of Mr. Justice Mellish presents the considerations governing the disposition of this appeal exactly as I conceive them. I can usefully add nothing to what he has already said.

ANGLIN J.—The material facts of this case are detailed by Mr. Justice Mellish. Upon them I am satisfied that the Inverness Railway & Collieries, Limited, was not a “railway company” within the purview of the exception in the definition of the word “corporation” in the Bankruptcy Act. I also agree with the unanimous view of the learned judges of the Supreme Court of Nova Scotia that the appellant bank is an “other person” within the meaning of that term as used in section 30 (1) of that statute.

On what I may call the main question, I am of the opinion that section 30 (1) clearly avoids, as against the trustee in bankruptcy of the assignor, every general assignment of book debts so far as they remain unpaid at the date of an authorized assignment in bankruptcy by such assignor, except in cases where provision is made by provincial legislation for the registration, notice and publication of such assignments of book debts and there has been compliance therewith. If the intent of the Bankruptcy Act had been to avoid general assignments of book debts only where provincial statutes providing for registration, notice and publication have not been complied with, section 30 (1) would certainly have been expressed in very different terms—if, indeed, it would have found a place in the statute at all. I cannot conceive of Parliament expressing the intent for which the appellant contends in the terms found in subsection 1 of section 30. I entertain no doubt whatever that as against the trustee in bankruptcy of the assignor such a general assignment as that made to the appellant bank is avoided as to all debts

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covered by it which remained unpaid at the date of the authorized assignment in bankruptcy.

The appellant, in my opinion, derives no assistance from section 32, which, as I read it, is expressly subject *inter alia*, to the provisions of section 30 (1) found under the caption "Settlements and Preferences."

Both questions submitted by the special case should be answered in the affirmative.

The respondent is entitled to its costs.

BRODEUR J. (dissenting).—The first question of the stated case is whether the assignment made by the Inverness Railway and Collieries, Limited, to the Eastern Trust Company was authorized under the provisions of "The Bankruptcy Act."

Prior to the 20th July, 1920, the Inverness Railway and Coal Company, a body incorporated by special Act of the Nova Scotia Legislature for the purpose of owning and operating a mining undertaking at Inverness and elsewhere in the county of Inverness and for the purpose of owning and operating a railway in the said county, had duly built a railway from Canso to Inverness and had operated the same in the carrying of freight and passengers, and had also worked a coal mine at Inverness. It had mortgaged its entire railway and mining undertaking to the National Trust Company, Limited, as trustee for bondholders under a trust deed. On the 16th of June, 1920, the Railway Company and the National Trust Company entered into an agreement to sell the entire undertaking of the former company to Myron E. C. Henderson, who took possession of the properties described in the agreement on the 20th July, 1920, the agreement having been approved on the day previous by a judge of the Supreme Court of Nova Scotia.

In accordance with the Nova Scotia Railway Act, section 269, Henderson, on the 20th July, 1920, notified the Commissioner of Public Works and Mines that he had purchased the railway and intended to operate it.

The Inverness Railway and Collieries, Limited, was incorporated under the Nova Scotia Joint Stock Companies

Act on the 28th July, 1920 (this date is inconsistent with the date given as the 21st July, 1920, for the agreement between Henderson and the Inverness Railway and Collieries, limited, but both dates are taken from the record) for the purpose of carrying on a mining and railway undertaking.

On the 21st July, 1920, an agreement was entered into between Henderson and the Inverness Railway and Collieries, Limited, whereby the former conveyed to the latter all his rights, powers and privileges under the agreement of sale to him by the Inverness Railway and Coal Company and the trustees for the bondholders, with power to use the name of the vendor (Henderson), and it was agreed that the Inverness Railway and Collieries, Limited, would assume all Henderson's obligations under the said agreement of sale, that it would pay him \$200,000, which he had paid to his vendors, that Henderson would thereafter hold the railway and any letter of licence which might be issued to him as trustee for the Inverness Railway and Collieries, Limited, and would permit the latter to operate the railway as his agent, and that the parties would promote and endeavour to obtain from the legislature any necessary legislation, the expense thereof to be borne by the company.

The stated case alleges that, as agent for Henderson, the Inverness Railway and Collieries, Limited, operated the railway from the 21st July, 1920, until the 7th February, 1921, when the Inverness Railway and Coal Company and the National Trust Company re-entered into possession of the properties on default having been made by Henderson under his agreement.

On the 26th February, 1921, the Inverness Railway and Collieries, Limited, made an assignment under "The Bankruptcy Act" to the Eastern Trust Company, trustee in bankruptcy.

The question submitted is whether this assignment was authorized under "The Bankruptcy Act."

By section 9 of that Act it is provided that any insolvent debtor, whose liabilities to creditors provable as debts under the Act exceed \$500, may make to an authorized trustee appointed pursuant to section 14 with authority in

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the locality, an assignment of all his property for the general benefit of his creditors, and this assignment is referred to in the Act as an "authorized assignment."

The word "debtor" is defined in the Act (section 2, subsection (o)) as including

any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him, (a) was personally present in Canada, or (b) ordinarily resided or had a place of residence in Canada, or (c) was carrying on business in Canada personally or by means of an agent or manager, or (d) was a corporation or member of a firm or partnership which carried on business in Canada.

And the subsection goes on to say that where the debtor is a corporation as defined by this section, the *Winding-up Act* shall not extend or apply to it.

This definition of the word "debtor" makes it necessary that we should refer to the definition of the word "corporation" (subsection (k)), which is as follows:

"Corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, where-soever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies.

I may merely advert to subsection (aa) stating that "person" includes corporation and partnership. In my opinion, it does not help in this inquiry.

Therefore, to fall under "The Bankruptcy Act" a "corporation" must be a company incorporated or authorized to carry on business by or under an Act of Parliament or of a provincial legislature, or a company wheresoever incorporated having an office or carrying on business within Canada, but must not be, *inter alia*, a "railway company."

The Bankruptcy Act does not define the term "railway companies" which we find in subsection (k). These words therefore should be given their ordinary meaning, and would certainly include a company incorporated for the purpose of carrying on a railway undertaking. It is true that the Inverness Railway and Collieries Co. had two purposes, a mining and a railway undertaking, but the latter purpose was not, we were informed, a subsidiary one. The

railway is some 61 miles in length, it carries freight and passengers. Of course, the other purpose of the company, coal mining, would not take it out of the operation of "The Bankruptcy Act." But, if one may hazard the surmise, the intention of Parliament was probably to prevent the operation of a railway, which is in the the public interest, from being hampered by proceedings under The Bankruptcy Act. And if this company can be said to be a "railway company," notwithstanding its other purposes, it is excepted from the Act.

I have duly considered Mr. Jenks' contention that this company, while having the capacity, has not the authority to operate a railway, under the Nova Scotia Railway Act which, in the case of the sale of a railway, requires that the purchaser, who

has not any corporate powers authorizing the holding and operating thereof,

should give notice to the Commissioner of Public Works and Mines, and thereafter obtain legislative authority to hold, operate and run the railway (sections 269, 270, 271). If I may say so, the construction advocated by Mr. Jenks, and which would restrict the natural meaning of the words "railway companies," appears to me forced and artificial. And, even supposing that section 269 applies to a company incorporated for the special purpose of operating a railway, which seems rather doubtful, would such a company be any the less a "railway company" because it had to give some notice before it operates a railway? A similar construction might take this company entirely out of the definition of a "corporation," for it could be asserted that until it gives this notice it is not a company authorized to carry on business. Surely the character of a company should be determined by reference to its charter of incorporation. I may add that a full consideration of the facts stated here and of the agreements entered into has convinced me that there was operation in fact of the railway, and therefore the carrying on of business as a railway company, with possibly the use of Henderson's name as a shield. But in every way the company appears to have acted as a railway company and no doubt incurred liabilities as such. It there-

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fore was excepted from the operation of "The Bankruptcy Act" and could not make an assignment under section 9 of that Act. I would answer question 1 in the negative.

As to the second question submitted by the stated case it is not necessary for me to answer it. The main question on this appeal, according to my mind, is whether the Inverness Railway and Collieries, Limited, was authorized to make an assignment under the provision of The Bankruptcy Act. As I have come to the conclusion that this company does not come under the purview of the latter Act, it is useless to consider whether some assignment of book debts which the company made to the Royal Bank is valid against the trustees in bankruptcy. This question involves the consideration of an Act which does not apply to this company.

In view of my conclusion on the first question, the second one becomes merely academic.

The appeal should be allowed with costs and the first question answered in the negative.

MIGNAULT J.—I take no part in this judgment.

Appeal dismissed with costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *L. A. Lovett.*
