Supreme Court of Canada
McKillop and Co. v. Royal Bank of Canada, (1918) 56 S.C.R. 220
Date: 1918-03-05

H. A. Mckillop and Company and others (Plaintiffs) Appellants;

and

The Royal Bank of Canada (Defendant) Respondent

1917: October 10; 1918: March 5.

Present:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Debtor and creditor—Security on crop—Lease of homestead—Family arrangement—Bills of Sale Ordinance, Cons. Ord. N.W.T.c. 43, s. 15.

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G., an insolvent owing a considerable sum to the Royal Bank, leased his homestead to his son, a minor, at a rental of half the crop to be grown thereon. The son took a lease of a neighbouring farm on similar terms and assigned both leases and his interest in the crops to the bank which agreed to advance money for putting in and harvesting the crops, the father and son undertaking that the proceeds from their sale would be applied first to payment of the advances and next of the father's original debt. Later, under a covenant for further assurances in the assignments, bills of sale of the severed crops were given the bank as additional security. Under executions against G. which, to the knowledge of the bank, were in his hands when the lease was given to the son, the sheriff seized the two crops. On appeal from the judgment of the Appellate Division in favour of the bank in an interpleader issue:

Held, per Fitzpatrick C.J., that the transactions with the bank were not fraudulent as against the creditors of G.; that as the bank had notice, before entering into these transactions, of the executions out against G. the creditors were entitled to his share of the crop grown on the homestead; but the rest of the grain, in which G. had no interest, remained as security to the bank under the above mentioned agreements.

Per Idington and Anglin JJ.—That the son, to the knowledge of the bank, was acting throughout for his father with whom the bank was really dealing in taking security for its debt; that so far as the bills of sale of the crops were intended to secure the past debt to the bank they were fraudulent as against creditors and void; and the assignments to the bank were void under sec. 15 of the Bills of Sale Ordinance (Cons. Ord. N.W.T. ch. 43) which makes invalid any security not given for the purchase price of seed grain, which assumes to bind or affect a crop. There was a lawful seizure, therefore, of all the grain grown on the two farms.

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Per Idington J.—The security taken by the bank was a violation of the provisions of sec. 76, s.s. 2 (e) of the Bank Act.

Per Davies and Duff JJ. dissenting.—The appeal should be dismissed. Judgment of the Appellate Division (10 Alta. L.R. 304) reversed in part.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta[1], reversing the judgment at the trial in favour of the plaintiffs.

The facts are fully stated in the head-note.

Nesbitt K.C. for the appellants referred to Kidd v. Docherty[2]; Campbell v. McKinnon[3].
Geo. H. Montgomery K.C. and R. A. Smith for the respondent cited Fredericks v. North West Thresher Co.[4]; Cotton v. Boyd[5]; and Maskelyne and Cooke v. Smith[6].

THE CHIEF JUSTICE.—I agree with the finding of Mr. Justice Beck, delivering the judgment of the Appellate Division, that there was nothing fraudulent about the transaction in question in this case. It was, however, a complicated one and as conflicting interests are involved it becomes necessary to decide the strict legal rights of the parties concerned.

The record before the court is not satisfactory as it contains merely a schedule of the principal exhibits; for such important documents as the assignments of the leases to the respondent we have nothing but an extract contained in one of the factums.

The position of the matter is this: J. T. C. Gwillim made a lease of his homestead farm to his son Wilfred Gwillim for one year reserving rents of $1 and one-half of the crop to be raised that year. The lessee

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assigned the term by way of security to the respondent. Except to receive his rent J. T. C. Gwillim had formally nothing further to do with the matter. That he may have remained on the farm and with his son raised the crop is not a fact that can have any effect on the legal rights of any parties concerned. It is said in the appellants' factum that he assigned his interest in the lease, and in the crop to be grown on the land, to the bank, but I cannot find that he ever purported to do so.

As to the McClure lease taken by Wilfred Gwillim and similarly assigned to the bank as security, J. T. C. Gwillim had nothing to do with this.

Now if there were nothing else in the case, it would be clear that after harvesting the crops Wilfred Gwillim would have to hand over to his lessors the respective proportions of the crops agreed on by way of rental and the rest in each case would be his own property or to be disposed of in accordance with his arrangements with the bank.

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[1] 10 Alta. L.R. 304.
[2] 7Sask. L.R. 137.
[3] 14 Man. R. 421.
[4] 3 Sask. L.R. 280; 44 Can. S.C.R. 318.
[5] 31 West. L.R. 797; 24 D.L.R. 896.
[6] [1902] 2 K.B. 158; [1903] 1 K.B. 671.

It is claimed that the assignments which in terms included his right and interest in the crops to be raised during the term of the leases are invalid under the provisions of section 15 of the Bill of Sale Ordinance, chapter 43 of the Consolidated Ordinances of the North West Territories, which is as follows:—

> 15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereinafter made, executed or created, and which is intended to operate and have effect as a security, shall in so far as the' same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

Even if the assignment were invalid it would not help the appellants if the only result were to leave the property in the balances of the crops, after handing over the rentals, vested in Wilfred Gwillim.

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In my opinion, however, that is not the effect of the section. It has application, I think, only in the case of an attempted assignment of the crop, not in that of an assignment of the land including the crops growing or to be grown upon it. In the case of an ordinary mortgage, the crops, before severance, are of course available to the mortgagee as part of his security.

After the severance of the crops, the bank, for greater security, took from J. T. C. Gwillim and Wilfred Gwillim a bill of sale of the grain on the homestead farm, and a bill of sale from Wilfred Gwillim for that on the McClure farm. The objections offered to these bills of sale are, 1st, that at the time the bank had notice of the writs of execution, and, 2nd, that they were not duly registered as required by sections 6 and 11 of the Bills of Sale Ordinance, ch. 43, Con. Or. N. W. T.

I think the first objection ought to prevail against the claim of the bank to J. T. C. Gwillim's one-half share of the crop on the homestead farm, not certainly on account of Rule 609 of the Alberta Rules of Court, for no rule of court could have any such effect if it were not otherwise the law. The provision has its origin in the Statute of Frauds, 29 Car. II. c. 3, s. 16, and now appears in the English Sale of Goods Act, 1893, 56 & 57 Vict. ch. 71, s. 26. It is unquestionable law.

But as against the rest of the grain, which I have been assuming was the property of Wilfred Gwillim, neither objection could be of any avail for he had no execution creditors

and under the Bills of Sale Ordinance it is only as against creditors that bills of sale are void.

I now come to the consideration which on the above

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facts and their normal consequences have led the trial judge and the Appellate Court to come to opposite conclusions. The trial judge thought that the whole transaction was a sham designed to afford an unfair preference to the bank, one amongst a number of J. T. C. Gwillim's creditors. Mr Justice Beck in the Appellate Division, on the other hand, found no evidence of fraud in the transaction which he thought was a legitimate attempt" to create with the assistance of the bank a valuable asset in the hands of the debtor who in return for such assistance was to allow it to be used after liquidating the advances required for its production in discharge of the bank's existing claim, the balance, if any, being available as an asset in the hands of the then insolvent debtor for his other creditors.

There were certainly underlying motives which do not appear on the face of the transaction, but I think Mr. Justice Beck has taken the correct view and as **I** have already said, I can see nothing fraudulent in the proceeding which did not remove any property of the debtor out of the reach of his creditors, and by which they could not possibly be damaged. I do not see how they can legitimately object to the respondent having the benefit of property which but for its intervention and the arrangement effected, would never have come into existence.

At first sight it undoubtedly appears to be a ground of suspicion that the son Wilfred should admit the existence of a debt due by himself to the bank which he did not owe. This, however, was a family arrangement. The connection between the father of a family living on and working a farm with the aid of his minor sons is a very close one. The incapacity of the father for want of means to work his farm would mean want

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of work for the son as well and destitution for the whole family. I do not think it is fair under such circumstances to say that the son had nothing to gain by the transaction. The interest of the family was a matter of concern to him and one in which his own interest was bound up. He, of course, adventuring nothing, had nothing to lose by the transaction. If the father, owing to his insolvency, was unable to obtain the necessary advances to work his homestead farm, I do not see why the son should not undertake it and in return for the

assistance afforded by the bank accept a liability for his father's debt limited to being discharged out of property to be produced as the result of his operations.

I may add that I think we should strive as far as possible to uphold the transaction. It is a matter of public policy that crops should be raised on the land rather than that it should lie idle. The legislature has recognized this by providing in the "Act respecting seed, grain, fodder and other relief" being ch. 14 of the Statutes of Alberta, 1915, that a charge representing money and interest agreed to be paid in consideration of the advance of seed, grain and fodder for animals shall take priority over all other liens, taxes, charges or other encumbrances.

In the result the appeal should be allowed to the extent of one-half of the crop grown on the homestead farm and judgment entered on the issue that so much of the goods being part of the goods seized under the execution were at the time of the said seizure the property of the said J. T. C. Gwillim.

There will be no costs to either party. The half share of J. T. C. Gwillim of the crop as rental had not been delivered, and was not strictly liable to be taken in execution, and the appellants will therefore pay the sheriff's costs.

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DAVIES J. (dissenting)**—**I would dismiss this appeal with costs.

IDINGTON J.—This is an appeal from the Supreme Court of Alberta holding in an interpleader issue between appellants as execution creditors of J. T. C. Gwillim and the respondent, that the latter was entitled to the crops grown upon a homestead quarter section owned by said Gwillim and upon a half section leased by the infant son of said Gwillim from a third party.

The learned trial judge found, as a fact, that said infant son was but the *alter ego* of the debtor who was insolvent at the time of the making of said lease.

This finding of fact can hardly be disputed under all the surrounding facts and circumstances unless we discard common sense in dealing with the matter. I, therefore, throughout accept the finding as determining so far as it goes the relations and rights of the parties.

The executions against Gwillim had been placed in the sheriff's hands at various times from the year 1910, to the year 1915, and had been kept renewed and in force until

the trial in 1916, covering thus the periods in question when the several transactions took place upon which the respondent's claim is founded, and the seizure by the sheriff.

It is somewhat difficult to understand how a judgment debtor could enter into any transaction whereby he could transfer property as if free from encumbrance within the bailiwick of a sheriff holding such executions.

Yet by reason of some discussion of points of law which I respectfully submit are more or less irrelevant to the business in hand, such seems to have been the

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result of the judgment appealed from, that it is held possible to so transfer. A solution of the problem of whether or not a bargain for the transfer of nonexistent property falls within the Statute of Elizabeth surely has little relation to the real question presented by the facts found herein.

That question is whether or not there can be upheld as against existent executions, an assignment of a lease held by a judgment debtor or his *alter ego,* in the presence of such an array of executions well known to the assignee and in law binding the lease if as found the property of the debtor. For the title of the respondent to the crop as against appellant depends entirely upon the assignment of the lease procured in the son's name.

Such result I submit should not be reached if we pay heed to the peculiar facts and circumstances in this case and the law relative to the effect of executions which we find in No. 609 of the Alberta Rules of Court, as follows:—

> Subject to the provisions of any statute a writ of execution shall bind the goods of the judgment debtor from the time of delivery thereof for execution to the Sheriff of the Judicial District within which the goods are situate, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted.

To understand properly the foregoing and what I am about to express hereafter requires a knowledge of the actual transactions which took place between the parties and are involved in the maintenance of the respondent's claim. The judgment debtor was possessed of a homestead free from liability to seizure. The exemption therefrom, however, did not extend to the crops grown thereon, save the limited quantity exempted for seed and six months' provisions.

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In his insolvent condition he bethought himself of a scheme whereby he might save these crops thus liable from the above mentioned executions. He decided to lease the homestead to his infant son then 17 years of age and made a lease dated 1st March, 1915, purporting to be for one year from said date, for the yearly rental of $1. This was drawn upon a printed form which had inserted at the end thereof a typewriten covenant by the lessee with the lessor to cultivate the land in a good and husbandlike manner, and at the proper season seed the same in wheat or other grain as the lessor might consent to, and harvest and thresh the crops in due season at his own expense, and immediately after threshing deliver in the name of the lessor at the nearest elevator a one-half share in kind as the same came from the machine of all wheat and other grain grown upon the said land, which was to be by way of additional rent to that reserved as above. This was followed by a covenant to furnish the lessee with all grain necessary for the seeding. The lease was assigned on the 20th day of May, 1915, by the said infant son to the respondent, by an assignment which recited the making of the lease; that by the terms thereof the lessee was entitled to one-half of the crop to be raised on the said lands during the said term; that the said lessee was then indebted to the respondent in the sum of $2,513, which represented a past indebtedness of the party hereto of the first part as a customer and that in order to better secure the party of the second part the repayment of the said indebtedness, the said lessee had agreed to execute the assignment.

The instrument proceeds then, in the operative part, to transfer all the interests acquired under the lease, and his said share of the crop, followed by a covenant that he would on request execute such

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further assurance as the respondent might require. That was followed by a proviso that the instrument was only to operate as and by way of collateral and additional security to the said indebtedness, and as soon as the same is fully paid and satisfied should cease and become void and of no further effect. The judgment debtor, though not a party to the instrument, signs as if he were and the signatures are followed by a paragraph which acknowledges this assignment as signified by his signature thereto. This, though clumsily done, no doubt was intended to be, and was, effective only for the purpose of assenting to the assignment by the lessee who was prohibited from assigning without leave.

On the 8th April, 1915, a memorandum was made which provided that Mr. Gwillim (without stating which of them) agreed to lease 250 acres or more of section 15, township

11, range 21, from Mr. Oliver; Gwillim to furnish the seed and do all the necessary work connected with the seeding and harvesting, Oliver to pay one-third of the threshing bills; Mr. Gwillim agreeing to give Mr. Oliver one-third of the crop delivered at the elevator. This informal scrap of paper is signed by Wilfred Gwillim and N. W. Oliver in the presence of one Fletcher.

This lease was assigned on the 19th of May, 1915, by the said Wilfred Gwillim to the respondent by an assignment which recited the making of the said memorandum, the terms thereof, and that the said Wilfred Gwillim was then indebted to the respondent in the sum of $2,513, which represented a past indebtedness as a customer, and that in order to secure the respondent the repayment of the said indebtedness he agreed to execute the instrument. By the operative part of the said assignment, in consideration of the

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said indebtedness, the said Wilfred Gwillim assigned all his rights, titles, estate and interest both legal and equitable in and to the lease and land mentioned and to his share of the crop so to be raised thereon, as aforesaid. The instrument further provided for further assurances such as required and might be necessary in relation to the premises, but that notwithstanding anything to the contrary was to operate merely as and by way of collateral and additional security to the said indebtedness and as soon as the same was fully paid and satisfied these presents should cease and become void. These assignments of leases were drawn by the solicitor of the bank.

The grain now in question in this issue was grown for the greater part on this last mentioned parcel of land. Some of it was the product of farming the homestead. If the two transactions had been kept throughout entirely separate and independent of each other, different considerations possibly might be applied to the resulting effect upon the validity of part of the respondent's claim.

As I understand the facts, however, the assignments though dated on different days were but the result of one agreement which had been made between the respondent and the judgment debtor whereby they were to finance the operations under the said lease, and they had made advances accordingly. I assume for the present that the indebtedness owing by the lessee was that owing by the father. The first question that arises is what titles could pass to the bank by the last mentioned assignment?

These executions bound the term created by the lease from the landlord Oliver to the infant son of the debtor as his *alter ego.*

Of the notice to the respondent of these executions

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there is left no manner of doubt for its agent, who had the business in charge and procured the assignment of that lease, says expressly as follows:—

Q. Then he was in difficulties with other people besides the bank?

A. Oh, yes.

Q. For how long had you known he was in that condition?

A. Quite a long time, I think, in fact back as far as 1912.

Q. Had you any difficulty with his account in any way, by reason of these other creditors trying to attach it or anything of that kind?

A. I don't remember anything of that.

Q. Do you know whether or not they had judgments or executions against him?

A. Oh, yes.

Q. And he was in that condition of having a lot of executions outstanding for a year or two before this transaction took place?

A. Yes.

Q. So that the trust account was opened for that purpose, so that it could not be seized on executions?

A. Yes.

Q. Had the son ever had an account with the bank?

A. No.

It seems absurdly comical to try to rest a claim to these crops grown upon the land leased from Oliver by reason of an assignment of a term which is itself bound by the executions and through the term so bound entitles the execution creditors to all the fruits derivable from the lease.

I will deal with the lease of the homestead to the son presently so far as its peculiar features and all relative thereto suggest a possibility of differentiating them in favour of respondent.

Meanwhile I wish to follow up the other grounds upon which the respondent's claim as a whole is rested.

The respondent was approached by the father who was notoriously insolvent and owed it from $2,000 to $3,000, (possibly the $2,513 referred to in the assignment though not proven), with several suggestions rejected, and finally with this scheme of a lease to his son of the homestead, and that to the son by Oliver being assigned to respondent and it would make ad-

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vances to help carry on the farm and get the crops as security.

The respondent assented to the proposal and made advances accordingly before and after the bank's solicitor had prepared the assignments of the said leases and got them executed.

Mr. Justice Beck says the father and son signed jointly a note to the bank for $2,513 being the amount then owing by the father to the bank, and that the assignments of leases declared they were given to secure that.

I cannot find that in the evidence which is obscure on the point. Possibly the facts were cleared up by admissions of counsel before the court below in a way we were not favoured with, or more probably he only assumed the fact from the recital, which assumption is not borne out by the evidence.

The respondent's agent in his examination seems to indicate that there was a joint note for the old debt as Mr. Justice Beck suggests, but on being shewn the bundle of exhibits failed to identify any such note and pointed to a note for $1,700, dated the very day one of those assignments was given, which destroys the assumption and hence I must deal with that aspect of the case alternatively.

Assuming first Mr. Justice Beck's impression correct, then it is to be observed that there is nothing in the assignments of the leases which secures anything beyond that sum, for they each expressly provide that upon the payment of the said sum then the assignment is void. And neither professes that there is anything secured beyond that sum, or any ulterior purpose to be served by reason of any such assignment.

Yet it is contended that the respondent was in some way secured by said assignment for the advances

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made by respondent for seed wheat for the Oliver place, and other expenses of operating these farms during that season of 1915. On what does it rest?

Clearly it cannot rest on these instruments which are expressly confined to the securing of the old indebtedness to the extent of $2,513.

If they could be upheld as against the execution creditors the proper judgment would be to restrict the claim to that sum and that alone.

The son, however, being but the agent or tool of the judgment debtor father in taking the Oliver lease and, as already pointed out, the same being bound by the executions, that part of the crop cannot be held by respondent even for the old indebtedness.

What then can such claim rest upon?

The agent of respondent many times in course of his examinations says he expected he would get the crops to repay the advances first for 1915 and then have a right to apply so much of the balance as needed to pay the old indebtedness.

I rather think it was a mere expectation that he should be enabled to do so by the goodwill of the father and that the assignment of the leases was but a lever, as it were, which would help in some way to secure a future assignment thereof.

The fact that the assignments made no provision therefor, except in relation to the past indebtedness, and yet were followed in September by bills of sale which respectively pretend to have been made pursuant to a mere covenant for further assurance, is most suggestive.

These bills of sale were apparently prepared as early as August but failed of prompt execution for some unexplained reason.

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The agent of the respondent in his evidence puts the matter of agreement for and nature of title, thus:—

> Q. And you got the son to assign everything to the bank and you considered the son had no further interest in the crop?
>
> A. The agreement that we had, as I said before, was that when the crop was harvested the first money received would go to pay the new debt contracted by the father and son; when that was paid any further moneys would first go to pay the old indebtedness to the bank.

Q. And what would become of the balance?

A. The balance they stated they intended to pay on other liabilities.

Q. Whose?

A. Gwillim's.

Q. Which Gwillim?

A. J. T. C. Gwillim.

Q. Then I am correct in saying that the son had no interest in the crop at all after he had turned these securities over to you?

A. Well, I could not say that; he was doing the work and presume he would get certain pay from it.

Q. What I mean is, as far as the crop itself was concerned, you would consider that any balance would go to pay the father's debts?

A. That's the agreement upon which I—the bank—advanced them the money; first get that paid up and then the old indebtedness, and on that understanding the bank loaned them the money to put the crop in.

Q. You were asked in Toronto (Q. 96): " So far as you were concerned you were treating the whole proceedings of that account as being properly accountable to the father? Answer, Yes."

A. All the proceeds of the crop would certainly go to the trust account of J. T. C. Gwillim, and be disbursed from that account.

Q. The son had no right to sign cheques on that account?

A. No.

Q. He was a minor?

A. Yes.

Q. Now, these assignments and bills of sale were taken by way of collateral security to the indebtedness, not taken as transfers of the crop to you as to the bank?

A. The bill of sale was.

Q. The bills of sale?

A. That's the way I understood it.

Q. But you were to account for any surplus to the trust account?

A. Yes.

Q. The bill of sale was then not really an actual bill of sale as we understand it, but by way of mortgage?

A. Yes, I presume it is. We were not buying the crop.

Q. You have already told us that you had knowledge of the executions that were outstanding at the time?

A. Yes.

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Why did the business take this most circuitous course? Why did the assignments not provide for it all? Can there be a shadow of doubt that it was because the agent and his solicitors were confronted with two well known statutory provisions against such agreements?

In the first place the "Banking Act" by section 76, s.s. 2 (*c*), prohibits that and other like dealings, as follows:—

> 2. Except as authorized by this Act, the bank shall not, either directly or indirectly,—
>
> * * * * *
>
> (*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares or merchandise.

It is apparently assumed by the judgment appealed from that the crops were on the date of these assignments of leases non-existent. If we would apply common knowledge to at least the wheat crops and probably all, they had by 20th May been growing for a long time and were just as assignable and exigible then as ever, but being chattels were goods upon which, under the circumstances, the bank could not advance.

And in the next place there had stood for twenty years an enactment in force in the North West Territories, and in Alberta since its creation, which for good reasons had prohibited any such bargain as might create just such a claim as in question herein.

That enactment is section 15 of the Bills of Sale Ordinance, as follows:—

> 15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereafter made, executed or created and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

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It would be difficult to use more comprehensive language than in this enactment prohibiting bargaining for a

security upon a growing crop or crop to be grown in the future.

Either the share of the crop was within the express words of the operative part of each assignment of the lease in question or it was not.

If it was within them clearly there was an express infringement of the very language of the statute for each of the instruments so assigning the said share of crop was on its face intended to be by way of security only and the evidence of respondent's agent puts that beyond all peradventure.

If it was so intended then I incline to think and submit that each of the assignments of the said leases designed to produce such effect was itself by reason thereof void, for the whole purpose thereof was to procure that forbidden by the law.

When we find that the bank held a second mortgage on the homestead, and a chattel mortgage on the stock not seized, which together according to the agent's evidence, seemed ample, the whole transactions seem designed in truth only to secure the advances for 1915, and thus falling within both statutory prohibitions and hence void.

And if it can be said that this illegal part of each of the objects of the instruments are severable from the legal then, at all events so far as they may have the contravention of the statute in view or be intended to give vitality to a contract declared invalid, they must be held null and void,

I fail to see how the parts are severable, for what you cannot do directly you cannot do indirectly.

If there is no such contract, then there is no foundation for the respondent's claim.

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And if, as I have already observed, these crops were growing (as in all human probability they were) on the date of each assignment, the executions then in the sheriff's hands bound them.

Doubtless it was on account of these manifest objections in law to the assignments and that contained therein, that more explicit provision was not made therein and hope was rested on the peculiar provisions by way of future assurances which was inserted in each and a foundation laid for the bills of sale which on their face are alleged to be made pursuant thereto.

The scheme seems to have miscarried for the respective bills of sale relating to each crop or share thereof which was the only other ground upon which the claim has been rested, was one which the respondent's counsel did not seem disposed in argument here to attempt to rest his client's claim upon.

It is difficult to see how he could, for clearly they were each intended to be instruments which in fact were only mortgages and there was no pretence of any compliance with the statute in such case provided relative to the affidavit to be made.

That statute by section 6, provides as follows:—

> 6. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within thirty days from the execution thereof be registered as hereinafter provided together with the affidavit of a witness thereto of the due execution of such a mortgage or conveyance and also with the affidavits of the mortgagee or one of the several mortgagees or the agent of the mortgagee or mortgagees if such agent is aware of all the circumstances connected therewith and is properly authorized by power in writing to take such mortgage in which case a copy of such authority shall be attached thereto (save as is hereafter provided under section 21 hereof) such last mentioned affidavit stating that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of

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> money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him; and every such mortgage or conveyance shall operate or take effect upon, from and after the day and time of the filing thereof.

There was no pretence of its observance. They were not only vitiated thereby, but as being in fact founded upon what was illegal, were doubly so.

As to the contention that the transfers were preferential it seems hardly necessary to dwell upon that when in my view, as already expressed, the executions well known to the agent of the bank bound everything and prevented any of these several contrivances from having any validity as against the execution creditors now appellants.

Coming to the lease of the homestead from father to son and the question arising peculiar to it, and all implied therein, we find that one-half of that crop belonged by the terms of the lease to the judgment debtor, and there does not appear a tittle of evidence that he ever assigned that to the respondent except by the bills of sale already referred to.

The assignment of the lease by the son to the respondent could not have such effect, and the father's assent to that assignment could not enlarge its operations, but only waive the covenant of the lessee against assignment of the term.

What answer can be made to this I am unable to understand, and hence clearly his half of the crop rightly seized.

All the authorities relied upon cannot and do not help. It is quite clear that a man can assign without impediment, his homestead, absolutely or any part thereof, to a stranger. But, as already stated, the law does not exempt the crops he may grow thereon. And

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a lease cannot help him out of that difficulty. The lease itself, or rather the term created, is chattel property liable to execution against chattels, and need not touch the legal estate in the land.

Again it would be quite competent for the owner of a homestead to bargain for the sale of a part of his crop without offending against the provisions of section 15 of the Bills of Sale Ordinance; and hence many of the cases cited and relied upon are maintainable for that reason.

The share of the crop which the son was to retain by the terms of the lease of the homestead would, but for the peculiarities of the case I am about to advert to, have been at his disposal and for valuable consideration could have been assigned to a purchaser. But that is not what was attempted, nor could it be in the case of a bank by reason of its incapacity to so bargain.

The son owed the bank nothing until he signed as surety for his father cotemporaneously with the assignments of the leases, and how that could be properly termed a past indebtedness so far as he was concerned, puzzles one.

The truth is the whole scheme was framed by the father to defeat his creditors and had created at the moment of putting it in force a term which was properly seizable by sheriff under executions. It seems idle to say there was no present property to be affected, for not only did the term exist when the respondent took an assignment of it, but also the growing crops.

It is not only the Statute of Elizabeth, but also the common law long before it, that forbade the fraudulent transfer of that which was exigible.

And with great respect it seems to me that there is a misapprehension of the scope of the case of *Blakely*

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v. *Gould*[7], which was the assignment of a non-exigible contract that was in question, in assuming that it touches this case where at the very inception of the transaction in question there was the creation of a term which was exigible as were also the growing crops when the respondent knowing the facts and purpose thereof accepted the assignment and still more when it accepted the bills of sale.

It is from these points of view that the purpose of the debtor must be held to have a bearing. And that purpose formed in his own mind until something was done in pursuance of it, could injure no one, but can be looked at and considered when effect is actively given to it in order to affect and transfer that which is exigible and defeat the executions binding same.

However all that may be the many other grounds already fully stated render it unnecessary to pursue the subject.

I think if the advance, about $500, for seed grain made by the respondent could have been, and I imagine it might have been, severed, if at the time and possibly at the trial attention had been given the matter, it ought to have been maintained unless possibly for the offence against the "Banking Act."

The respondents have chosen otherwise. I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting)**—**I am of opinion that this appeal should be dismissed with costs.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

The findings of the learned trial judge, that the lease from J. T. C. Gwillim, the father and execution

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debtor, to Wilfred Gwillim, his minor son, was made with the object of defeating or hindering the creditors of the former; that the lease of the McClure farm was taken by Wilfred for his father; that Wilfred had no real beneficial interest in either property; and that, at all events as against the father's creditors, the lease to the son of the homestead must be looked upon as non-existent and the father must be deemed the lessee of the McClure property, appear to be so fully warranted by the evidence that they cannot be disturbed.

[7] 24 Ont. App. R. 153.

The father's insolvency and the bank's knowledge of it, likewise found, are incontrovertible. However, I accept the finding made by the Appellate Division, although in reversal of that of the trial judge, that there was no intent on the part of the bank manager to defeat, hinder or delay the creditors of J. T. C. Gwillim, and I deal with the case on the assumption that the honest purpose of the bank was by advancing money to J. T. C. Gwillim to enable him to grow and harvest a crop, which he probably otherwise would have been unable to do, from the proceeds of which all parties interested—the bank, Gwillim himself, and his other creditors—might benefit. I am fully satisfied, however, that the bank manager knew that Wilfred was a mere "stool pigeon" for his father, that the latter was the sole beneficial owner, and that the bank's real transaction was with him as such and with him alone.

For a past indebtedness to it of $2,513 (a debt of his father which Wilfred purported to assume) the Royal Bank on the 19th May, 1915, took as security assignments from Wilfred Gwillim of the two leases above mentioned and of the assignor's share in the crops to be grown on the leased premises. These assignments expressly provide that they shall operate

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only as collateral security for the existing indebtedness and that the assignor shall retain possession and deliver his share of the crops, when grown and harvested, to the nearest elevator in the name of the bank. They also contain covenants for further assurance. Strangely enough, however, they make no reference to further advances. Yet it seems reasonably clear that they were intended to secure further advances to be made by the bank to enable J. T. C. Gwillim to produce and harvest the crops. The evidence of the bank manager puts it beyond doubt that he so regarded the assignments and also that it was only upon the crops growing or to be grown that substantial security was to be obtained thereby. The leases themselves, apart from the crops, had no substantial value, as the respondent in its factum very frankly admits.

Whether because he doubted the efficacy of the bank's security on the crops, or because he wished to provide expressly that they should stand as security for the additional advances made after the assignments of the leases were taken, the bank manager, on the 15th of September after the crops had been severed, took from Wilfred Gwillim and J. T. C. Gwillim a bill of sale of the entire crop grown on the Gwillim homestead and from Wilfred Gwillim a bill of sale of his share of the crop grown on the

McClure property, the consideration in each document being stated to be $3,262 then due and owing to the bank.

These instruments contain statements that they are given pursuant to the covenants for further assurance in the assignments of the leases and, although they secure sums of money not mentioned in those assignments, I have no doubt that the fact is that they were so given and were intended to make good, as far as possible, the agreement made in May that the bank

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should have security for its past indebtedness and for the future advances then contemplated on the crops to be grown on the two farms. Otherwise as bills of sale given to secure only a past indebtedness their invalidity on the ground of fraudulent preference would seem incontrovertible. There cannot be the slightest room for doubt that the substantial, if not the sole, purpose of the entire transaction was in the first instance to give the bank security on the crops to be grown and afterwards, if possible, to perfect that security.

By section 15 of the Bills of Sale Ordinance, ch. 43 of the Consolidated Ordinances, N.W.T., it is enacted that:—

> 15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as a security, shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future, in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

That the assignments of the leases to the bank were "intended to operate and have effect as a security" and not otherwise is incontestible. They assume to "comprise" and "bind" "a crop to be grown in future in whole or in part." That was their only real purpose. They were admittedly not given "as a security for the price * * * of seed grain." They were, in my opinion, "assignments" within section 15, and were invalid in so far as they "applied to or affected any growing crop or crop to be grown." Since the subsequent bills of sale expressly purport to have been given in pursuance of the agreement for security on the crops to be grown, in partial fulfilment of which the assignments of leases had been taken, they were tainted with the illegality of the agreement on which they were founded; or, if that agreement,

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because of its invalidity, should be regarded as nonexistent, they were void, as against the creditors of J. T. C. Gwillim, as securities given for past indebtedness which operated as a fraudulent preference.

For reasons which it deemed sufficient the legislature has apparently sought to protect the farmers of Alberta against their own improvidence or the rapacity of some money lenders by preventing the tying up as security of growing or future crops, thus, as far as possible, insuring to the man upon the land the means of subsistence. The policy which underlies this legislation is similar to that which inspired the exemption of homesteads. With its wisdom we are not concerned. That the legislature appreciated its scope and drastic character is apparent from the express exception made in favour of securities taken for the price of seed grain.

In some cases section 15 may operate to the serious disadvantage of the honest and even frugal farmer who has met with misfortune by preventing him from availing himself of the only security he can offer to obtain advances that might enable him to put himself upon his feet again. This may be such a case. But if, influenced by these considerations, or because it appears unassailable on moral grounds, or even positively meritorious, we should permit a transaction such as that before us to stand, section 15 of the Bills of Sale Ordinance would be rendered ineffectual. Care must be taken that legislation is not frittered away by judicial interpretation in "hard cases." That the courts may not do without usurping the province of the legislature and ignoring or brushing aside the wholesome limitation upon their own function—*jus dicere, non jus dare.*

I am for these reasons of the opinion that at the

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time of its seizure by the sheriff the grain in question was as against the Royal Bank the property of J. T. C. Gwillim.

I also incline to think that the assignments of lease were void as against those creditors of J. T. C. Gwillim whose executions were in the sheriff's hands when they were made. The bank manager admits that he had knowledge of these executions when he took the assignments. Indeed he tells us that it was arranged at that time that the account through which future advances were to be made to aid in producing and harvesting the crop should stand in the name of "J. T. C. Gwillim in trust" in order to prevent its being attached by those creditors. The modification of section 16 of the Statute of Frauds made

by Alberta Rule of Court No. 609, if authorized by section 24 of chapter 3 of the Alberta Statutes of 1907, does not help the respondent. The rule reads:—

> Subject to the provisions of any statute a writ of execution shall bind the goods of the judgment debtor from the time of delivery thereof for execution to the sheriff of the Judicial District within which the goods are situate, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted.

So far as the right of the bank to the crops in question depends upon the assignments of leases it would therefore appear to be subject to the executions which were in the sheriff's hands when they were made. Any rights under the bills of sale subsequently taken cannot be higher. I rest my judgment, however, on the applicability of section 15 of the Bills of Sale Ordinance.

Appeal allowed in part