1879 DONALD MILLOY.....APPELLANT;

*June 18, 19.

AND

1880 JOHN KERR *et al*.....RESPONDENTS.

*Feb'y. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Warehouse receipts*—34 *Vic., ch.* 5 *D—Right of property.*

At the request of the Consolidated Bank, to whom the *Canada* Car Company owed a large sum of money, *M.* consented to act as warehouseman to the company for the purpose of

*PRESENT—Sir W. J. Ritchie, C.J.; and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

(1) Since this case has been printed, information has been received that the Judicial Committee of the Privy Council have reversed the decision of the Supreme Court of Canada.

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storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted *M.* a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of $5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he therefore issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank.

It appeared that *M.* was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt.

In February, 1877, an attachment in insolvency issued against the company, and *K. et al.*, as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. *M.* then sued *K, et al.* in trespass and trover for the taking.

*Held*, per *Strong, Taschereau* and *Gwynne*, JJ., (affirming the judgment of the Court of Appeal, and that of the Court of Queen's Bench,) that *M.* never had any actual possession, control over, or property in, the goods in question, so as to make the receipt given by *M.*, under the circumstances in this case, a valid warehouse receipt within the meaning of the clauses in that behalf in the Banking Act.

[*Per Ritchie*, C.J., and *Fournier* and *Henry*, JJ., *contra*, that *M. quoad* these goods was a warehouseman within the meaning of 34 *Vic.*, ch. 5 D, so as to make his receipt endorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business] (1).

APPEAL from a judgment of the Court of Appeal for *Ontario*, affirming a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the plaintiff. The pleadings and facts fully appear in the reports of the case in 43 U. C. Q. B. 78, and 8 Ont. App. R. 350 and in the judgments hereinafter given.

(1) The Court being equally divided the appeal was dismissed without costs.

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Dr. *McMichael*, Q. C., and Mr. *J. K. Kerr*, Q.C., for appellant:

The following, among other authorities, were relied on by counsel for appellant: *R. C. Bank* v. *Ross* (1); *Kough* v. *Price* (2); *Burke* v. *McWhirter* (3); *Watson* v. *Henderson* (4); *Union St. Jacques Montreal* v. *Dame Julie Belisle* (5); *Browne's* Actions at Law (6); *Bauerman* v. *Radenius* (7); *Smith's* Leading Cases (8); *Philips* v. *Bateman* (9); *Re Coleman* (10).

Mr. *Robinson*, Q.C., and Mr. *George Kerr*, jr., for respondent.

The learned council cited the following authorities: *Bump* on Bankruptcy (11); *Clarke* on Insolvency (12); In *re Butler* (13); *Borland* v. *Phillips* (14); *Coates* v. *Joslin* (15); *Mathers* v. *Lynch* (16); *Newton* v. *Ontario Bank* (17); *Davidson* v. *Ross* (18); *Gordon* v *Harper* (19); *Owen* v. *Knight* (20); *Bradley* v. *Copley* (21); *Smith* v. *Miller* (22); *Great Western Railway Company* v. *Hodgson* (23); *Deady* v. *Goodenough* (24); *Glass* v. *Whitney* (25); *Paice* v. *Walker* (26); *Royal Canadian Bank* v. *Miller* (27); *Todd* v. *Liverpool, London and Globe Insurance Company* (28); *Bank of British North America* v. *Clarkson* (29).

(1) 40 U. C. Q. B. 466; 34 *Vic.*, ch. 5, s. 46 & 47.
(2) 20 U. C. C. P. 313.
(3) 35 U. C. Q. B. 1.
(4) 25 U. C. C. P. 562.
(5) L. R. 6 P. C. 31.
(6) P. 90.
(7) 7 T. R. 667.
(8) 6th Ed. 2nd vol. 362.
(9) 16 East 372.
(10) 36 U. C. Q. B. 559.
(11) Pp. 808-810, 814-817, 831-834.
(12) P. 312.
(13) 4 Bankruptcy Register, 303.
(14) 2 Dillon 383.
(15) 12 Grant 524.
(16) 27 U. C. Q. B. 244.
(17) 15 Grant 283.
(18) 24 Grant 22.
(19) 7 T. R. 9.
(20) 4 Bing. N. C. 54.
(21) 1 C. B. 685.
(22) 1 T. R. 480.
(23) 44 U. C. Q. B. 187.
(24) 5 U. C. C. P. 163.
(25) 22 U. C. Q. B. 290-294.
(26) L. R. 5 Ex. 173.
(27) 29 U. C. Q. B. 266.
(28) 20 U. C. C. P. 523.
(29) 19 U. C. C. P. 182.

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RITCHIE, C. J.:—

This was an action in which plaintiff alleges that defendants broke and entered certain lands of the plaintiff and took and carried away and converted to their own use goods, railway car wheels and pig iron, &c. of plaintiffs. The defendants claim the property in dispute as joint official assignee of the estate of the *Toronto* Car Wheel Company.

These goods originally belonged to that company, and plaintiff's contention is, that he being a warehouseman, and the said company wishing to have the said goods warehoused with him, and not wishing to incur the expense and inconvenience of transferring the goods from where they then were, on the company's property, to plaintiff's usual place of business on *Front* street, at the foot of *Yonge* street, in the city of *Toronto*, by indenture made on the 15th Dec., made and executed under the seal of the company, in consideration of the rents and covenants therein contained, demised and leased to the plaintiff, his executors and administrators and assigns, all that certain parcel or tract of land forming part of the premises presently occupied by the said lessors, and situate at the north-west corner of *Front* and *Cherry* streets, in said city, and which may be described as follows: "Commencing at the south-east corner of the premises of one *Huggard*, thence easterly along the north side of *Front* street eighty feet, thence northerly and parallel with the east limit of said *Huggard's* premises one hundred and fifty-four feet three inches, thence westerly parallel with *Front* street eighty feet to premises of said *Huggard*, thence southerly along the east limit of said *Huggard's* premises to *Front* street;" for the term of one year, from the 15th December, 1876, paying therefore yearly $5 at the expiration of the term with certain covenants not material to be noticed; upon which property the goods in question were.

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This property was staked off, and plaintiff entered into the possession thereof and of these goods, and granted to the said company a warehouse receipt as follows:

Received in store in the yard or place near the corner of *Front* and *Cherry* street, *Toronto*, fourteen hundred car wheels and three hundred and fifty tons pig iron from the *Toronto* Car Wheel Company of *Toronto*, to be delivered pursuant to the order of the said *Toronto* Car Wheel Company to be endorsed thereon.

This is to be regarded as a receipt under the provisions of statute 34 *Vic.*, ch. 5 of the Statutes of *Canada*, intituled "An Act relating to Banks and Banking." The said car wheels and pig iron are separate from, and will be kept separate and distinguishable from other grain, wares, manufactures or merchandize.

*Donald Milloy.*

Dated *Toronto*, Dec. 20th, 1876.

The object of giving this lease and getting the warehouse receipts, the manager of the company says, was to raise money.

It was for the purpose of raising money to take up our paper as it became due with the Consolidated Bank. This receipt was endorsed over to the Standard Bank of *Canada*.

The evidence of plaintiff's foreman shows that he went down to see that the iron was there, and he says:

There were stakes put there, and a place squared off; I went down to see that the iron was there; I went down also when I had an order to deliver any; I was disposing of it, or some of it, the same as I would at our own place when I got an order; I was aware that a lease had been granted to Mr. *Milloy*, and from it I exercised control over the place; I know the quantities delivered to the *Toronto* Car Wheel Company; 30, 10, 20, and 10; and two loads of iron, 5 tons in each lot; the first order is dated the 27th December, and was for 30 car wheels; January 10th, 10 car wheels; January 15th, 20 wheels; February 20, 10 wheels; and 5 tons of iron on same date; the day I delivered the stuff, I put the figures down in my book; on the 27th, 5 tons of iron were delivered; these were all the deliveries; I never counted them; I went to count them twice but there was so much on the wheels, I could not see them; there was a large quantity there; all that was there was taken away by the defendants; I don't know the number myself;

*Cross-Examined.*—I am in the employ of Mr. *Milloy*; where I am

principally, is *Yonge* street wharf; this place he had; I don't know that he had any other place leased for that purpose that I am aware of; I have been with him I suppose about nine years; I went down many times there; I was down early in December, about the time the lease was made; the first entry is a delivery of iron; that is my book, in which, when the orders were given, through my hands, I put an entry when I delivered; I asked Mr. *Milloy* if I would keep an account of my time going down there; that is wholly my writing there; that across the page was all put there on the second of January; I had been down several times before that; our deliveries are before that; I have put in ink over that—1876; on January 25th I went and measured the yard of the *Toronto* Car Wheel Company leased by *Milloy*—83 by 132 feet, and found it correct; that was the first time I measured it and the last; I did not measure it when I first went down; I went down by Mr. *Milloy's* orders; it might be the day previous he ordered me to go down; it was about January 25th, 1877, I measured the piece of the yard that was leased; I went down previously, but I had no memorandum; I was down, on Mr. *Milloy's* instructions; I did not think of keeping any time until I was losing time delivering car wheels; I had to stop there while they were taking the loads away; he first told me about measuring the land about the time it is entered there, I went and did that; I could go out and in then at all times; I went into the office or in at the gate if it was open; I was in the office at all times when I went there, except when I went down to move the wheels; we had to go in at the gate; that part of the property is embraced exactly in the lease.

*Donald Milloy*—I am plaintiff in this case; I am a wharfinger and steamboat agent, carry on business on *Front* street, and at the foot of *Yonge* street; I have carried on my business on *Front* street for a number of years; that is the only place I have been carrying on my business as a warehouseman outside of this transaction; Mr. *Turnbull* came to me first and spoke to me; I do not remember his christian name; he was in the Consolidated Bank at that time; I think he was cashier, but I am not certain.

*Examination resumed*—In consequence of what Mr. Turnbull said to me I got this lease; I think he came himself first, and then afterwards Mr. *Gartshore* came with him; that lease was then taken; I don't know who drew the lease out; I don't remember who brought it to my office; I never saw the lease until left in my office all ready prepared and executed; I was never asked to sign that lease; I forgot the time the lease was left at my office; it was some time in December, I think, of the year 1876; I think the lease will show the date; I do not remember any discussion with *Gartshore* or *Turnbull* as to the

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terms of the lease; I understood a part of the property was to be staked out; it was to be the part this property was stored on; there was no particular discussion as to the land to be leased; I think it was $5.00 rent I paid; the land is described in the lease; I got it for $5.00—80 by 154; I don't know that that was a very cheap lease; it depends on what you can do with the property; I paid them that $5,00 by cheque; that is the cheque that I gave, payable to *John Gartshore*, dated 19th December; I charged that $5.00 in the books; I have got my book here; I produce it; I have my ledger here also; I turn up the account of the *Toronto* Car Wheel Company; the book-keeper charged the Consolidated on December 19th with $5.00; on the day after I got cash, $50.00; it was a cheque; he was at the office when I came in; I really forget who gave the cheque; I suppose it came from the *Toronto* Car Wheel Company; I see the book-keeper has balanced it by profit and loss; he never asked me what to charge; that is an entry of his own; that is the only ledger account I have with the Car Wheel Company; March 31st, profit and loss, $45; when I took that lease I got a letter of guarantee from the Consolidated Bank, guaranteeing the property being there, and being forthcoming; that is the letter I got, dated 20th December, 1876 (Exhibit 5); as a warehouseman, I do not remember ever taking such a guarantee before as that; the property was so far away; this was a special transaction; Mr. *Turnbull* told me the Car Wheel Company wanted to raise some money; I don't know who got the warehouse receipt; I signed it, left it with the book-keeper in the office, and some one called and got it; perhaps the book-keeper took it to the bank; I don't know; my man went down at the time I got the lease, to see that the car wheels and the pig iron was there; I do not know whether I got the letters the same day that I gave the warehouse receipts or not.

*Cross-examined by Mr. Cameron*—I really do not remember who suggested the lease in the first place, whether Mr. *Turnbull* or myself, I cannot say; when I was applied to for a warehouse receipt I told them the property was too far, and suggested the removal of the property up to *Yonge* street, but they preferred doing it in this way, to save double handling and the costs that would be incurred; the lease was suggested at this time; I know I would not have granted a warehouse receipt unless I had the lease; when it was so far away, I desired something more than the goods guaranteed; we generally receive ten cents a ton a month for storing iron; I had no commission other than the $50; that was all I received.

I think the plaintiff had the legal title to and was legally in possession of the land under this lease, and

had a right to carry on his business of a warehouseman on these premises so leased to him, and having, by his foreman, entered and taken actual possession of the goods on the land, the land and the goods were in fact and in law under his control as a warehouseman; he was in a position to give the warehouse receipt, and, when he so gave it, he became responsible for the property to those to whom he gave the receipt, or to whomsoever the same might be duly indorsed, and that he was not limited to carry on his business of a warehouseman to one place of business more than another; that he had a right to carry on his business in the place or places most suitable and convenient therefor, so long as the premises on which such business was carried on were in his possession and the goods in his custody and under his control, and I can see nothing in the fact of his having a guarantee from a third party for the safety of the goods in the place in which they were stored, and for their being forthcoming, that can in any way invalidate his liability as a warehouseman to the *bonâ fide* holder of the receipt.

The point of this case then, it seems to me, turns simply upon the question: was there such an indebtedness of the *Toronto* Car Wheel Co'y to the Standard Bank as could be secured by the indorsement of a warehouse receipt? I may say at the outset, that I can discover nothing whatever in the evidence to show that, so far as the Standard Bank is concerned, there was any infringement of any of the provisions of the Insolvent Act, or that the security was in any way invalidated or injuriously affected by that Act, or that there was anything collusive or fraudulent, illegal or improper in the transaction, either with reference to the *Toronto* Car Wheel Company or their creditors. As I read the evidence, the Car Company were indebted to the Consolidated Bank, who held what they, for a time, considered a valid warehouse

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receipt for these goods, but which was either not a valid security, or the party giving it would not continue to hold the goods, or both. That the position of the dealings between the Consolidated Bank and the company was such that the company could not give a good security to the bank by means of a warehouse receipt, by reason of the past indebtedness of the claim of the bank against the company; that the bank was desirous of obtaining a settlement, and payment of all claims due or not due from the company to the bank, and, f r the accomplishment of this, was anxious they (the company) should obtain a new loan from other parties to whom they might be able to give a valid security. I can see no impropriety in the bank rendering the company assistance by advice, or recommendation, or by asking another bank to make a loan to the company to enable them to obtain means to discharge their indebtedness. So far as the Standard Bank is concerned, I cannot discover from the evidence that they were in any way informed or knew the nature and particulars or state of the transaction between the Consolidated Bank and the company, or had any information to lead them to suppose the company were in insolvent circumstances; on the contrary, they seem to me to have accepted in good faith the recommendation of the Consolidated Bank; and on estimating the value of the securities and finding the security ample, and believing the transaction was a safe and good one, took it up in the usual and orderly course of banking business. The evidence on this point seems very clear and conclusive.

The indebtedness, for the security of which the warehouse receipt was indorsed over to the Standard Bank, *Stevens* the discount clerk of the Standard Bank says, was on a note dated 20th December, same day as the warehouse receipt for $21,400, which he says

was discounted by the Standard Bank in the ordinary course of business on the credit of that receipt.

*Cross-examined*—My duty in the bank is discount clerk; that note was brought to me and discounted; Mr. *Brodie*, the cashier of the bank, brought me the note; I discounted it for the *Toronto* Car Wheel Company; I gave $20,999.27; I gave the money to the manager of the *Toronto* Car Wheel Company, Mr. *Gartshore;* I know nothing at all about it, beyond the handing of the note to me by Mr. *Brodie;* I know nothing about the warehouse receipts; all I know is the note was handed to me, and I discounted it; the money was paid in bills; I don't know where the money went after that; I don't know if the Consolidated Bank had discounted any paper with us.

The cashier of the Standard Bank, says:

*John L. Brodie*—I am cashier of the Standard Bank; it was Mr. *Turnbull* called to see me; he asked if I was open to take up a transaction which they would recommend; I said I would see; he stated the nature of the security; as our Vice-President, *W. F. Cowan*, would know something about the value of these things, I asked to leave it until I would see him; after seeing him, and estimating the value of the securities, as we had a friendly feeling to the Consolidated Bank, and they asked us to take it up, we, finding the security ample, took it up; I did not take it up without consulting the Vice-President and the President also, I do not know anything but that they recommended the transaction as safe and good; when a bank recommends to another, there would be an honourable understanding, I think, to the effect not to allow them to suffer loss; the securities were recommended as perfectly good, by the Consolidated Bank; we loaned the money in the usual way.

Q. You knew that the *Toronto* Car Wheel Company kept their account with the Consolidated Bank? A. Very likely I knew that.

Q. Did they tell you their solicitors had recommended them to get through you? A. They did not tell me anything of the kind.

His Lordship: Was any representation made to you by Mr. *Turnbull* he would wish you to do this as a convenience to them? A. He never made any such representation, but I may have inferred so.

Q. Were you to stand in the place of the Car Company that the Consolidated Bank stood in? A. I don't know that; I did it at the request of the Consolidated Bank, but I did it only because I was satisfied the security was good.

Mr. *Turnbull*, of the Consolidated Bank:

Q. State what the arrangement was between you and the bank?

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A. We went to Mr. *Brodie*, and told him the Car Company wanted to raise money; we did not tell him for what purpose; they would be prepared to give Mr. *Milloy's* warehouse receipts; we told him the security would be good, to our own knowledge, and there was ample margin, and requested him to make the discount, which he did.

Q. Did you tell Mr. *Brodie* anything further? A. I don't know that I did; I do not think it; there was nothing further, to my recollection; we told him he was to advance upon the security of the stuff; we did not say anything about seeing them harmless; that was not understood between us.

Q. When one bank comes to another, and recommends them to make a discount, is it not understood between them the one will see the other all right? A. It would be certainly understood, after the representation I made as to the nature of the security, that we should see they did not lose by it; I have not considered this as a matter of our own all along; I think Mr. *Gartshore* himself asked me to go with him to the Standard Bank, seeing I had been with him previously, to ask them to authorize Mr. *Milloy* to deliver certain wheels to the Northern Railway Company, on getting the Northern Railway Company's acknowledgment to pay the Standard Bank; I do not recollect any instruction; it was a matter for Mr. *Brodie's* consideration; Mr. *Brodie* was getting value for all his money; I may have gone on a second occasion; I am sure as to one occasion, but not as to two; I am not sure I went a second time.

The Consolidated Bank certainly had a perfect right to close their transaction with the Car Company and to render the Car Company assistance to raise the necessary funds to enable them to discharge their indebtedness. If the Standard Bank made the loan to the Car Company, as *Brodie* says, in the usual way ("we loaned the money in the usual way"), and because they found the security ample, though done on the recommendation and at the request of the Consolidated Bank, but as *Brodie* says: "only because he was satisfied the security was good," and as Mr. *Turnbull* says "nothing was said and it was not understood between us as to the Consolidated Bank seeing the Standard Bank harmless, and the discount clerk says the note was discounted by the Standard Bank in the ordinary course of

business on the credit of that receipt," I cannot see how it can be considered otherwise than a pure *bonâ fide* independent dealing of the Standard Bank with the Car Company in the course of their business, even though the transaction was accomplished, through the instrumentality of the Consolidated Bank, and there may, in consequence of the representation and recommendation made by that bank to the Standard, be a sentimental or honourable feeling that the Consolidated Bank should see they did not lose by it. No doubt the Consolidated Bank were deeply interested in the Car Company getting the money from the Standard, because it was to discharge their indebtedness to them, and very possibly they were the more anxious because the Car Company could not secure them as they had been heretofore secured, or thought themselves secured. But as it does not appear that the dealings or the transactions of the Consolidated Bank and the Car Company were communicated to the Standard Bank, or that they were in any way cognizant of them, why should the Standard Bank be affected thereby? I think it may fairly be inferred, that but for the intervention of the Consolidated Bank, the Standard Bank would not have advanced the money to the Car Company, but if it was a fair loan in the usual course of business made on the security of this warehouse receipt offered by the Car Company, I cannot see why the Standard Bank should be injuriously affected because the Consolidated Bank were benefited by their debtors being placed in a position to discharge their indebtedness, nor can I discover upon what pretence the Car Company could repudiate their lease to the plaintiff or the validity of this warehouse receipt. If there has been nothing in this transaction at variance with the provisions of the Insolvent Act and no collusive or fraudulent conduct on the part of the Standard with a view

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to defeat or defraud creditors, I cannot discover upon what principle the defendants as the assignees of the Car Company can assail the lease or security so given by those they represent in good faith to the bank, which lease or transaction the Car Company could not infringe. As then I think there is no evidence to establish that this transaction was a fraudulent preference to or had any legal connection with the Consolidated Bank, but was an entirely new and distinct transaction between the Standard Bank and the company, the question in my opinion, in the case is:—was the plaintiff, *quoad* these goods, a warehouseman within the letter and spirit of the Banking Act, so as to make his receipt indorsed effectual to pass the property to the Standard Bank for the security of a loan made to the company in the usual course of banking business? and as I think he was, I think the appeal should be allowed, and judgment given for plaintiff.

STRONG, J., gave a written judgment in favor of affirming the judgment of the Court of Appeal (1).

FOURNIER, J., concurred with the Chief Justice.

HENRY, J.:—

This is an appeal from the judgment of the Appeal Court of *Ontario*. A verdict was found for the appellant, but set aside, and an order was made for one to be entered for the respondents by the Court of Queen's Bench. From that order the plaintiff appealed to the Appeal Court of *Ontario* who sustained the judgment of the Court of Queen's Bench, and hence his appeal to this court.

There are three counts in the declaration:—

1st. In trespass, for seizing and taking away the plaintiff's goods and converting them to their own use.

(1) The learned judge, having mislaid his judgment, directed the reporter to report the case without it.

2nd. For trespass to lands of plaintiff and for *asportavit* and conversion of plaintiff's goods.

3rd. For conversion of plaintiff's goods.

The defendants pleaded thereto :—

1st. A denial of the trespass and conversion.

2nd. To the first count denying the plaintiff's property in the goods.

3rd. To the second count denying the plaintiff's property in the land and goods.

4th. That the land was the freehold and the goods the property of the defendants as joint official assignee of the *Toronto* Car Wheel Company, insolvents, under the provisions of the Insolvent Act of 1875.

5th. That the plaintiffs right to the land and goods was only under a lease from the *Toronto* Car Wheel Company, and by a pretended delivery to him by that company of the goods as a warehouseman or agent of the company. That the plaintiff subsequently gave to the company certain paper writings purporting to be warehouse receipts for the goods to be delivered pursuant to the order of the company, and the company thereupon endorsed the same to the Standard Bank of *Canada* as agents and trustees of the Consolidated Bank of *Canada*, merely for the purpose of securing a large amount of indebtedness of long standing of the company to the last mentioned bank. It then alleges the then insolvency of the company, and that the plaintiff and the Consolidated Bank knew or had probably cause for believing such to exist, and that the inability of the company to meet its engagements was for a long time theretofore public and notorious. The plea then alleges that the solvency of the company was attacked by a notice from some of the creditors to the company of an application for an attachment under the Insolvent Debtors Act served over thirty days from the endorsement of the warehouse receipts to the company, and that

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about a month after, a writ of attachment against the company was issued and delivered for execution to the defendants, and in about a month thereafter, at a meeting of the creditors, defendants were appointed joint assignee of the company's estate in insolvency. That at the time of the issue and delivery to the defendants of the writ of attachment, the company was not in possession of the goods and land, and that such possession was transferred to the defendants, who thereupon took possession of the same as part of the property and estate of the company, and that as such joint assignee, they, the defendants, were entitled to retain the said lands and goods.

6th. The sixth plea is pretty much like the fifth, but is varied by an allegation, "that the said lease was executed and the said goods so delivered to the plaintiffs, and the said receipts so indorsed to the said Consolidated Bank, with intent fraudulently to impede, obstruct, and delay the creditors of the said company in their remedies against it, with intent to defraud its creditors or some of them, and the same was so done and intended with the knowledge of the plaintiff and the said Consolidated Bank of *Canada*."

7th. The seventh varies from the preceding two pleas by an allegation, "that the deposit, pledge, or transfer of the said premises by lease, and the delivery of the said goods and the endorsation of the said receipts to the Standard Bank were made by the said company in contemplation of insolvency by way of security for payment to the Consolidated Bank of *Canada* for a debt then and for a long time due and owing to the said last mentioned bank, * * * * the same being at the time of the issue and delivery of the writ of attachment to the defendants in the possession of the company. That the defendants were in March, 1877, appointed assignees of the said company's estate and

effects, and under the provision of the Insolvent Act, 1875, were then entitled to retain the said lands and goods for the benefit of the company's estate."

The plaintiff by replication, first took issue on all the pleas. By a second replication to that part of the fourth plea which alleges that the time of the committing of the alleged trespasses, the said land was the freehold of the defendants as joint assignee of the company's estate and effects, the plaintiff says, "that before the time when, etc., and before any proceedings in insolvency had been taken against the company," the company "by an indenture of lease duly executed under their corporate seal demised the land to the plaintiff" for one year from the fifteenth day of December, 1876, which demise was "at the said time when, etc., in full force and effect and undetermined," and that "the said plaintiff was in the actual possession of the said land under and by virtue of the said demise."

To the latter replication there were three rejoinders to which it is necessary also to refer.

1st. The first alleges there was only a nominal consideration for the lease, which is alleged to be dated the fifteenth of December, 1876. That the company was then a debtor, subject to the provisions of the Insolvent Act of 1875. That on the 20th of January, 1877, a notice of an application to be made for a writ of attachment was served on the company and the writ issued on the 21st of February, 1877. That at a meeting of the creditors in March following, the defendants were appointed joint assignee of the estate; that at the time of the issue and delivery of the writ of attachment to the defendants, the company were in possession of the lands and that such possession was transferred to the defendants, who therefore took possession of the same as part of the property and estate of the company, and as such joint assignee were then (at the time of the

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pleading) entitled to retain the said lands for the benefit of the company's estate.

2nd. The second rejoinder, with the same descriptive averments as in the first, alleges that the lease was executed to secure a debt due to the Consolidated Bank. That the lease was made with intent fraudulently to impede, obstruct, and delay the creditors of the company in their remedies, or with intent to defraud its creditors, and that the same was so made, done, and intended with the knowledge of the plaintiff and the said bank (the Consolidated).

3rd. The third rejoinder, with the same descriptive averments as in the other two, alleges that the lease was made in contemplation of insolvency by way of security for payment to the Consolidated Bank of a previous debt whereby the bank obtained an unjust preference. That the land at the time of the issue and delivery of the writ of attachment to the defendants was in possession of the company, that the defendants were subsequently appointed joint assignee of the estate, and as such entitled to retain the said lands and goods for the benefit of the estate.

In order that my views should be the more readily understood in regard to the special pleas, the second replication and the three rejoinders thereto, I have felt it necessary to recite them at the risk of the charge of unnecessary prolixity.

I must now see how far they are founded on the Insolvent Act referred to.

Section 131 provides that:

A contract or conveyance for consideration respecting either real or personal estate by which creditors are injured, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has become notorious, but within thirty days next before a demand of an assignment or the issue of a writ of attachment under this act or at any time afterwards, whenever such demand shall have

been followed by an assignment or by the issue of such writ of attachment, is voidable, and may be set aside by any court of competent jurisdiction upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court may order.

It is obvious the pleas in question as far as they relate to the lease and warehouse receipts are not under that section, nor could they be under the circumstances in evidence for many reasons which are so palpable that I need not state them.

Section 132:

All contracts or conveyances made and acts done by a debtor respecting either real or personal estate with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done, and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited and are null and void, &c.

I need not refer specifically to the special pleas before mentioned, or to the subsequent pleadings as to them, but may say that I think they contain substantially allegations sufficient to justify the reception of evidence under the provisions of the last recited section.

Section 133 is, I think, also applicable:

If any sale, deposit, pledge, or transfer be made of any property real or personal by any person in contemplation of insolvency by way of security for payment to any creditor, or if any property real or personal, moveable or immoveable, goods, effects, or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee in any court of competent jurisdiction.

With the addition that if within the prescribed thirty days or afterwards:

It shall be presumed to have been made in contemplation of insolvency.

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The seventh plea is the only one alleging a defence under this latter section. It alleges in substance that the deposit, pledge, or transfer of the premises by the lease, the delivery of the goods and the endorsation of the receipts, were made and given by the company in contemplation of insolvency, and that the warehouse receipts were assigned to the Standard Bank as the agents and trustees of the Consolidated Bank. These allegations bring the plea, in my opinion, within the provisions of the act; for if it were all done to make payment of a previous debt or liability to the Consolidated Bank, or to secure the payment of it by having it made to the Standard Bank as mere agents or trustees of the Consolidated Bank, it would in law be the same as if the transfer were direct to the latter. No other provision of the act is, in my opinion, applicable. Section 130 refers to gratuitous contracts or conveyances, but in none of the special pleas is the ground broadly taken that the lease and transfer of the goods were gratuitous and without consideration. The sixth and seventh pleas do not in any way refer to the matter of the consideration for the lease. The fifth, however, alleges that the lease was given "for a merely nominal consideration," but another part of the plea shews there was a consideration by plaintiff agreeing to take possession of and safely keep goods of the company, and to give therefor accountable receipts to deliver the same to the company or their order. The lease could not be held to have been a "gratuitous conveyance" and "without consideration within the meaning of that section." I will now consider the substance of the two sections and will then turn to the evidence to see how far the issues on both sides have been sustained. To set aside a conveyance under section 132 requires proof;

1st. Of a fraudulent intent to impede, &c., a creditor in his remedies, or to defraud his creditors.

2nd. That the conveyance was so made and that the fraudulent intent was known to the party to whom the conveyance was made.

I have read over the evidence repeatedly with much care and such evidence is conspicuous only by its entire absence. The proof of the two issues was on the defendants, and proof of both were necessary to constitute a defence. On the contrary the evidence clearly negatives both allegations. The history of the whole transaction shows an honest debt due tothe Consolidated Bank. That that institution had previously held the same goods as collateral security, but difficulties having arisen which prevented a renewal of their security under the Warehousing Act, through *Conger* who had acted as warehouseman, it decided to renew that security by the means adopted and now complained of. The Consolidated Bank under the circumstances of its advances on the security of the goods had, in my opinion, such an equitable lien on the goods as collateral security for its advances, as might have been enforced in equity, as between it and the company, although the security by means of the warehouse receipts given by *Conger* had failed. I cannot, therefore, conclude that even had the transfer of the receipt from the plaintiff been directly to the Consolidated Bank, it would have been within either of the fraudulent intents referred to in the section under consideration. The evidence as to the advances in question is not, it is true, very satisfactory as shewing they had been originally made on the security of the goods, but if not, the onus of shewing that the security was not given for a then subsisting debt, and that at the time the company was in such an embarrassed position as to have made the transfers *ab initio* void was upon the Respondents. There is no pretence, from the evidence, that such was the case, and in the absence of proof to the contrary we are bound to presume nothing against

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the validity of the original security so often renewed by the warehouse receipt of *Conger*. The company would be estopped both at law and in equity from questioning the validity of those receipts signed by *Conger*; and if they were valid when given the subsequent insolvency a year after could not affect the right of the bank. Admitting, however, my conclusions thus expressed are wholly wrong, where is the evidence of the other requirement of the section? What is there to show the guilty knowledge of the plaintiff when he took the lease and gave the warehouse receipt? I may answer emphatically nothing. We have no evidence on the point at all, except his own, and he distinctly and positively swears to the contrary, and no jury would be justified in finding in opposition to his statement in the absence of proof of circumstances inconsistent with it; and none such are in evidence here. The learned judge who found the verdict for the plaintiff has so far thereby shown credence in the evidence of the plaintiff, and I cannot but approve his having done so.

I will now consider the issues under the provisions of section 133.

A defence under that section requires, first, proof that the transfer was made in contemplation of insolvency to a creditor, and with the addition of one or other of two objects, either to secure payment for a debt then and previously existing or in actual payment of that debt. It must be to a creditor, or, what is the same thing, to his agent or trustees, as in the special pleas in this case is alleged.

To arrive at the true meaning of this section, it is necessary to define in the first place the term "in contemplation of insolvency." A variety of definitions of the term have been given, but from the researches I have been enabled to make, I am inclined to the opinion that the decision must, to a great extent, be affected by

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the circumstances of each case. It is often a question of great uncertainty, so far as the evidence of the fact goes. The abstract meaning of the term is what, however, I am now more particularly considering; the construction I feel disposed to adopt is this: In contemplation of insolvency, I take to apply to the case of a man who reflectively considers himself in such a position financially that he cannot meet his engagements and must bring his business to an early close—that his assets are insufficient to meet his liabilities. The "contemplation" is, no doubt, intended to be personal to the party making a transfer in such a case to one of his creditors; but it might in some cases be a question of evidence whether his contemplation, although not so, should have resulted in the conviction that he occupied such a position, as by law, prevented him from securing or paying one or more of his creditors to the injury of the others. The policy of the law is, no doubt, to require every one placed in circumstances of reasonable doubt of being able to pay all his creditors not to make any preference. I take it, therefore, that a preference so given is void. There are, however, cases where a person fairly and reasonably believes himself well able to pay all his liabilities, and has assets more than enough to pay all his debts and anticipates no immediate interruption of his business; and if to enable him to discharge debts due to others and to keep his business going, he obtains further time for payment of a debt due to one or more creditors by giving them security on his real or personal estate, it cannot, in my opinion, be said he did so "in contemplation of insolvency" within the provisions of the section. The question is, to my mind, a mixed one of law and fact.

In the report of the trial, I find the learned judge decided, that when the note was given to the Standard Bank the company was insolvent, but that the bank

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was not aware of that fact. I presume he meant in view of the act, and although he does not distinctly say that the transfer was made in contemplation of insolvency, I think that was what he meant. Having seen the witnesses and heard their evidence, he was better able to decide that point, and apart from any view I might from the evidence be otherwise inclined to adopt, I will adopt his finding as the correct one, although I think the evidence hardly sustains it. I am, however, decidedly of the opinion that the defendants wholly failed to established the fact that the transfer was made to the Standard Bank as the agents and trustees of the Consolidated Bank, and that, therefore, the pleas not having in that respect been proved, the defence must fail.

When the trespasses and conversion took place, the appellant was in the lawful possession of the land and goods. That possession was given to him by the then owners of both. He had a title by lease to the land, and his possession of the goods was uncontrollable by any one except the Standard Bank—to whose order he held the goods. His man had immediate charge of them and he, the appellant, exercised acts of possession and control over them inconsistent with any right of the company to interfere with them or control him in regard to them. He had become answerable for their safe keeping to the Standard Bank, and was in a position to bring trespass or trover for any injury to conversion of them against any person but one having a superior right or title. His position as bailee threw upon him responsibility which he could only relieve himself from by keeping his contract, and to enable him to do so the law gave him a remedy to protect him from loss and injury. He is, therefore, entitled to recover in this action unless the defendants can avoid the transfer to him on the grounds taken in the pleas.

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Bearing in mind the allegations in all of the three special pleas, dispute the validity of the transfer of the lands and goods on the ground that the transfer was made to the Standard Bank as the agents and trustees of the Consolidated Bank, let us consider the evidence referring to that transfer.

The appellant alleges that he signed and delivered the warehouse receipt to the company ignorant as to what bank it would be endorsed. Witnesses from the directing and managing staff of both banks were examined, and they all swear positively the discount of the company's note was solely on the collateral security of the goods. It is true it was done at the request of the cashier or manager of the Consolidated Bank, with which institution the Standard Bank was on terms of friendly commercial relations, but that is nothing, as all the other evidence sustains this position and there is nothing to contradict it. It is the evidence given by the respondents and brought out of their own witnesses by their own counsel. How could any court or jury reject it *in toto*, and set up in opposition to it some fanciful ideas that the case was otherwise. The respondents, by producing such evidence on the trial, and substantiating the testimony of one witness by others to corroborate it, I maintain, are completely estopped from taking a position founded on the presumption that such evidence was unreliable or untrue. Courts and juries cannot make evidence—their duty is to decide according to the evidence produced—to reconcile conflicting evidence if possible, and, if not, to decide according to the weight of it, but certainly, where the evidence is all in one direction, not to allow their imaginations to furnish antagonistic conclusions. Nothing in the administration of justice would be more dangerous than the admission of such a rule. Once leave the controlling and guiding cardinal point, and the chances are a hun-

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dred to one that injustice would be done in the great majority of cases. It is true that injustice results from false and improper relations of facts, but the main object is to secure the greatest amount of success in dealing judicially with existing legal controversies.

Taking then the whole evidence, it would be an unnecessary waste of time and words to point out in detail how essentially and effectually it negatives the allegation that the Standard Bank took the transfer as the agents and trustees of the Consolidated Bank. When the whole transaction between the company and the Standard Bank was concluded by the discount of the note and the payment over of the proceeds to the company, what relation of agency or trusteeship, I would like to be told, existed between the two banks? The discount was obtained through the aid of the representative of the Consolidated Bank, but that was all. No, even verbal, promise of indemnity is pretended to have been given and the only relation remaining between the two banks was that of a supposed honorable, but not binding, implication of liability not to allow one bank to lose who discounted for a third party on the recommendation of the other. No such position was spoken of or relied on in making the discount, and if it were it would be unavailable in case of loss Suppose, however, a binding contract for indemnity had been given, would that destroy the lien on the goods? Would it in the slightest degree legally affect it? If a man on a mortgage as security on another man's land lend him money, and takes at the same time a bond for further security from a third party, no one would contend the taking of the latter would avoid the mortgage. Suppose the money went to pay a debt to the party to the bond, could it in such a case be said that the mortgagee was the agent or trustee of such party? No authority would sustain such a doctrine, and still the

respondents rest their defence on that, to my mind, absurd proposition. Admitting, however, as correct the construction of the evidence, as the defendants counsel suggest, I must differ from those who conclude thereupon in favor of the defendants. If one man owes another a debt for the payment of which he is pressing, but from pressure for funds himself, or from any other cause, no matter what, he cannot give further indulgence, or take such security as the debtor could offer him, and he, for the purpose of recovering his debt, induces another to advance the required funds on such security, I can conceive no law or principle which would invalidate the security, or make one party a trustee for the other. There is no one provision or principle contained in the Insolvent Act that in the slightest degree refers to such a transfer *bonâ fide* made, which I, in this case, have no reason to doubt was the case; but on the contrary, am bound by the evidence to decide was the case. There is no doubt that the Consolidated Bank was anxious for the settlement of its claim, and took the measures the evidence shows for the purpose of getting in the debt, but why should their anxiety and measures affect the *bona fides* of the transaction on the part of the Standard Bank? I cannot see upon any principle why such should be the decision.

I have, therefore, only to add that in my deliberate judgment the defence under the special pleas has wholly failed.

For the same reasons I must decide in favor of the appellant on the other issues.

I have attentively considered all the judgments delivered in the Queen's Bench and the Court of Appeal, and was struck with the divergence as to the controlling points which they relatively exhibit.

Mr. Justice *Wilson*, the learned present Chief Justice of the Queen's Bench, in his judgment says:

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The lease cannot be said to have been a gratuitous lease or contract. It was a beneficial one to and for the company; and if it cannot be impeached on other grounds it cannot, in my opinion, be held to be invalid because it is gratuitous.

For the reasons already given, as well as for those given by him, I entirely approve of his ruling on that point.

He says, too, he can see no reason for avoiding the lease on account of the purpose for which it was given—"even although it was made to meet or effectuate a single transaction." This, of course, not to touch any question of fraud or improper dealing, "and as honestly meant as it was honestly acted upon."

I have considered the legal question involved and the statutes applicable to it, and I have no difficulty in arriving at the same conclusion; and I feel justified in adopting his reasoning as to those parts of the case. His lordship also approves as legal the endorsement of the warehouse receipt; and also decides that the plaintiff was properly in court and not bound to seek relief by a petition to the judge of the Insolvency Court I concur with his decision of these two points. His lordship's judgment was therefore in favor of the plaintiff upon all the points, except that in reference to the relative position of the two banks. He assumed the position that, had the receipt been transferred to the Consolidated Bank it would have been void, and from the evidence he held, that the Standard Bank was acting solely in the interest and as the mere instruments of the other bank as a cover.

For the reasons I have already given I differ from the first of these two latter conclusions, and I think the evidence as wholly against the latter one.

After the argument of the appeal at *Toronto* judgments at length were given by the learned Chief Justice of *Ontario* and Mr. Justice *Patterson*

The former says :—

Upon this statement of facts I am of opinion that the plaintiff was not a warehouseman of these goods within the meaning of the acts and (consequently) that the endorsement of the receipt given by him did not transfer any property to the bank. In coming to this conclusion I disregard the circumstances which are effectively dealt with by Mr. Justice *Wilson* for the purpose of showing that the Standard Bank was really the Consolidated Bank in the whole affair. I should have much difficulty in holding, if the warehouse receipt had been given by a warehouseman in the ordinary course of business, that the transaction was proved to be in its essence a fraudulent preference to the Consolidated Bank. I might not have been able to free my mind from grave suspicions that this was its true character; but I should have thought that this was a question upon which there ought to be a finding by the judge or jury who had the opportunity of hearing the witnesses. But I cannot bring myself to the conclusion that the plaintiff was in this transaction a warehouseman or that his receipts come within the fair meaning of the acts which enabled this mode of dealing with property to be equivalent under certain circumstances to a chattel mortgage.

Upon all the other points there is a concurrence of opinion in favor of the plaintiff, but as regards the two questions the one judgment is opposed diametrically to the other.

Mr. Justice *Patterson* rules against the finding that the transfer to the plaintiff was made "in contemplation of insolvency." He says :—

The first fact, therefore, viz : the comtemplation of insolvency has to be established and no such fact is found.

I think, however, it was found by the judge on the trial, and, therefore, am led to believe that what was meant was that it had not been proved.

He is of opinion also that under the circumstances the alleged preference to the Consolidated Bank was not unjust. After referring to the previous warehouse receipts held by the Consolidated Bank, and upon which they depended for security, he says :

That the change from one warehouseman to another which an accident made necessary, while it restored the property for an

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instant to the control of the car company, might not touch the justice of the bank's claim to be secured in preference to creditors the dates or particulars of whose debts we know nothing of. We have not the materials for a decision, even if it was properly our province to decide, that the preference was unjust. The onus of establishing these facts was upon the defendants, and therefore the uncertainty in which they are left affords no ground for setting aside the plaintiff's verdict.

Referring to 34 *Vic.*, ch. 5, sec. 47, he says:

Upon this it is argued that as the transfer to the Standard Bank was, in reality, to secure an antecedent debt of the Consolidated Bank, it was forbidden by the statute. I do not take that view of it. I think that, although the two Banks were so identified, that the interest of the one might, under the provisions of the Insolvent Act, vitiate a transaction which, in form, was affected by the other, yet the Standard Bank, having really advanced its money, had a right to take the security in question, under the terms of the Banking Act, even though the money was to go to pay the old debt of the other Bank: and I do not perceive that this is affected by the circumstance that the bank which was benefitted agreed to save the other harmless.

I entirely agree with this view of the law.

He therefore concurs with Chief Justice *Moss* in reversing the judgment of Chief Justice *Wilson* upon the only point on which the judgment of the latter was against the appellant, and as the learned justices *Burton* and *Morrison* concurred in the two judgments so delivered, the judgment of the Court of Queen's Bench was on that point overruled.

Apart then from any question of fraud or unjust preference, the decision of Mr. Justice *Patterson* was based on the want of legal title of the plaintiff. He says:—

I am unable to hold that the Insolvent Act avoids the transaction without drawing inferences of fact which should properly have been drawn by the judge at the trial, and he has not drawn them.

As affecting the legal title and possession of the plaintiff, the learned judge thinks the evidence is insufficient "that he had no actual possession or control of the goods, but that it was not in contemplation that he should

have it. The guarantee he required from the bank for the forthcoming of the goods, while sufficient evidence of this, is only one fact in a consistent series." I have read and considered the evidence as to this point very carefully, and I feel bound to decide in the opposite direction. The goods were in an open yard some distance removed from the ordinary warehouse of the plaintiff, and in the absence of some guarantee of their safety would entail extra loss of time and more vigilance than he might have felt he should incur. His taking an indemnity would or could not affect his liability to the owner or his endorsee. His liability to them would be the same, and as a merely legal proposition I cannot see how the fact of the indemnity can in any way affect the question of possession. On the contrary taking the whole transaction together, it is rather evidence of the possession being in him. That his possession and control should be complete, the right to hold the land was given him by the company. His right to take possession of the goods was also given him by the company. They substantially said to him: We will make you, for the time, the legal owner of the land upon which the goods are deposited, and you shall have them in your possession and under your control as warehouseman on your giving us a warehouse receipt for them. He accepted the offer, and in pursuance of its terms assumed the necessary responsibility and gave the required receipt. By the terms of it he became responsible for the safety of the goods. To enable him to perform his part of the contract the possession and control of the goods was absolutely necessary.

The company would be estopped from disputing his right to that possession, and as soon as the company endorsed that receipt over to another party, their right to the property in, and the possession of, the goods ceased subject, however, to any right of redemption of

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them, if any, as between them and their endorsee. Independently, however, of this legal proposition there is abundant evidence that the plaintiff had the actual possession and manual control of the goods. After the transfer of the warehouse receipt to the Standard Bank; which took place immediately after it was signed, the plaintiff received and executed orders from that bank for several lots of the goods. His man went to the yard on each occasion and delivered the goods so ordered and kept a detailed account of what he delivered. The company never interfered with his possession or disposal of them under the orders of the bank or otherwise. They were not on land then in possession of the company and how could it be contended that the goods were actually or constructively in the possession of the company? If not, then, they were not only actually but in contemplation of law in possession of the plaintiff.

It may however be contended that although the company could not have claimed or taken possession of them the right of the assignees is different. If the transfer was not affected by the provisions of the Insolvent Act the right and title of the assignee is identical with those of the insolvent. His legal engagements and contracts are those which the assignee is bound by, and estoppels against the insolvent are equally so against his assignee. By operation of the Insolvent Act the assignee is put in the place of the insolvent with power in certain cases to avoid contracts, made in violation of the act. It was very properly decided by Chief Justice *Wilson* in *re Coleman* (1) that the assignment does not, however, "pass to the assignee any property which was not the property of the insolvent nor any greater estate or interest in his property than he himself had in it. An equitable mortgage good as against the

(1) 36 U. C. Q. B. 582.

insolvent would be good against his assignee in insolvency, and so also would an equitable assignment of a debt or other appropriation of his estate good against him be good also against his assignee." If such be the law, and I have no doubt of it, the assignee of the company occupied no higher ground than the company itself did, and he is equally with them estopped from disputing the legal title and possession of the plaintiff of the land and goods. The respondents admit having entered upon the land and taken the goods. If their act was not a justifiable one they were trespassers on the land of the appellant held and possessed under his lease and for taking and converting his goods.

In the judgments delivered by Chief Justice *Moss* and Mr. Justice *Patterson*, they appear to have been grounded principally or wholly upon the conclusion that the plaintiff was not a warehouseman of the goods in question within the meaning of the acts; and the latter quotes my learned brother *Gwynne* in a judgment of his in *Ontario Bank* v. *Newton* (1). I have read that judgment, and with all deference, I must contend the principle there decided does not touch this case. In that case, the party who signed the receipt had never been a warehouseman, and his only act as such was in signing the receipt, then the subject of consideration, and it was decided that he could not by such an act make himself a warehouseman for the purpose of or under the acts. How that decision can affect this case, where the fact of the plaintiff having been a regular warehouseman is not only not denied, but admitted, I confess myself unable to discover. A distinction, however, is attempted to be drawn in this case from ordinary ones, because the goods were not stored in the usual warehouse or yard of the plaintiff. I have considered the point and cannot sustain that distinction.

(1) 29 U. C. C. P. 258.

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Is a warehouse keeper to be limited to one warehouse or yard, or would a warehouse keeper be disqualified to open a warehouse yard apart and at a distance from his warehouse, or would he be limited to one warehouse or one yard? I can see no restriction in the acts. The act does not require the warehouseman to be the keeper of any particular kind of warehouse, but provides for the giving effect by endorsement to the receipt of any person who is a warehouseman. The acts give effect to the receipt of a warehouseman "for cereal grains, goods, wares or merchandise stored or deposited * * * in any warehouse, mill cove or other place within the province, and from the date of the endorsement vests "all the right and title of the indorser to or in such cereal grains, goods, wares or merchandise, subject to the right of the indorser to have the same retransferred to him if such bill, note, or debt be paid to him when due" A warehouseman, or yard keeper, is not the less so because he has more than one warehouse or yard, and as the acts only require the receipt to be from a warehouseman, a receipt given by one having more than one warehouse satisfies the requirement of the act certainly as fully as, if not more fully, than if he had but one. A man could hardly be the less called a hotel keeper if he kept two or three hotels instead of but one. Nor are the means he takes to obtain one or more of the warehouses a necessary inquiry to validate the receipts of a warehouseman or yard keeper. Suppose a warehouseman becomes the tenant of a warehouse in which goods of a third party are stored, and he, after taking a lease from the owner with the understanding that thereby he is to have possession of the goods to hold them for the owner, and he subsequently signs a warehouse receipt for them, which is endorsed to a bank, would it not be monstrous to hold that in case of any informality in the lease or otherwise, the bank should lose its

advances. The only enquiry the acts require is to ascertain that the party is a warehouseman, and that he has signed the receipt. To require such an inquisitorial and often impracticable inquiry as would be otherwise necessary, would defeat the whole object and purposes of the act. In a great many cases goods are deposited hundreds of miles from the banks making the advances, and the time and trouble necessary to make such inquiries would paralyze the beneficial operation of the Acts. Such I claim could not have been intended, and I feel bound to say such is not the true construction of them.

We are told, however, that attention should be given to the Chattel Mortgage Acts which require registry. The object of those Acts is not altogether to give publicity to transfers, but to secure titles to parties for debts existing or for advances by which the owners would be accommodated and benefited. The object was, to prevent frauds from secret transfers, and whilst such were allowed to prevail, no one felt safe in advancing upon chattel security any more than he would be inclined to do in case of land security in the absence of registry regulations. The main object I take as to both was to enable a man as well with regard to personal as real estate to go to the registry office and satisfy himself in respect of either that there was no previous assignment or incumbrance in his way. Subsequent to the enactment in question Parliament, which is invested with the power to legislate in regard to the regulation of Trade and Commerce, thought proper to provide that a party might obtain a lien on goods in another way, and prescribed the mode by which it could be so obtained. Under the latter the plaintiff, as a warehouseman, received the goods, signed a warehouse receipt for them, which was endorsed to the Standard Bank. If the proceeding throughout was

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according to the late enactments (which virtually repealed the former Acts to that extent) what right have we to consider at all the previous Chattel Mortgage Acts? If they at all conflict we must give weight to the later enactments. The later Acts provide for no registry; and the beneficial operation of them would have been frustrated if they had done so. Parliament, for wise commercial considerations, has dispensed with any registry in cases provided for, and it is not the province of courts to set themselves up against the policy of acts—a jurisdiction the constitution has not given to them. In reference to the case before us Parliament has spoken in amply plain and binding terms, and it is not for us to say it did not mean what those terms explicitly express. After making the necessary provisions and conditions, the legislature has plainly said that if those provisions and conditions are complied with and fulfilled, the endorsement of the warehouse receipt shall convey to the endorsee a good title or lien. The appellant has brought himself within such provisions by complying with them. Within the terms of the statute he was in possession lawfully of the goods, and I cannot conceive how, under the circumstances the alleged policy of the Chattel Mortgage Acts can be invoked as a set-off to rights legally acquired under the other acts. As the principles involved are commercially so important and affect trade throughout the whole Dominion, I have gone more into detail than might have been necessary for the decision of the present case.

Having fully given my views upon the legal questions involved and the evidence adduced on the trial, I have now only to add that I think the judgment against the appellant should be reversed, that the appeal should be allowed and judgment given for him with costs.

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TASCHEREAU, J.:—

I am of opinion to dismiss this appeal. That *Conger's* warehouse receipts were utterly illegal and void in law seems undenied. That *Milloy's* receipts were but the continuation of transactions of the same nature as those with *Conger* appears to me plain and evident. The parties attempted to give *Milloy's* receipts more of an appearance of legality, but the whole transaction was as fictitious and colourable as the one with *Conger*. *Milloy* was never in the actual possession required by law of the goods in question to authorize him to give a warehouse receipt on them. The shadow of a lease which the Car Company granted to him was not even signed by him and the nominal rent of five dollars was paid by the bank; even in the present suit, *Milloy* is only a nominal plaintiff. He so little had the possession of the goods, that he required from the bank a guarantee that they would be forthcoming when required. For these reasons, I am of the opinion that the unanimous judgments of the two *Ontario* courts in this case should be confirmed and this appeal dismissed with costs.

GWYNNE, J.:

I have been unable to read the evidence in this case without arriving at the conclusion that the transaction, in virtue of which the plaintiff had executed to him by the car company the instrument called a lease, and in virtue of which the plaintiff signed the document which has been called "a receipt under the provisions of statute 34 *Vict.*, ch 5 of the statutes of *Canada*, intituled 'An Act relating to Banks and Banking,'" was devised and contrived wholly by the Consolidated Bank.

The evidence also satisfies my mind that (if it were necessary for the determination of this case to establish

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this, which I do not think it is), the object of the Consolidated Bank in designing this contrivance was to endeavour to secure payment to themselves of a large debt due to them by the car company (which company the bank well knew to be in insolvent circumstances) in preference to the other creditors of the company, and that this contrivance was devised in preference to a chattel mortgage, because it was well known, both to the car company and to the bank, that a chattel mortgage would be publicly known and would precipitate the impending insolvency.

But, whatever may have been the motive of the bank, it is quite apparent to my mind that, to carry out the transaction devised, the plaintiff was introduced into it wholly as the agent of the bank, and that he only consented to act in it by their procurement, in their interest, upon their guarantee, and in short as their agent; that in this character it was that he accepted the document called "the lease," and that he signed the document called "a warehouse receipt." Personally, he never had possession of the property mentioned in the receipt and in his character of warehouseman he never in reality contemplated assuming possession of the property, or any control over it, or responsibility for it. The fair conclusion from all the evidence appears to me to be that he took no part in the transaction whatever, otherwise than by the direction of, upon the guarantee of, and as the agent of, the bank, in which latter character also the fair conclusion is, that the present action is brought. Under the circumstances appearing in evidence it is, in my judgment, an abuse of terms to call the receipt given by the plaintiff a receipt within the meaning of the clauses in that behalf in the Banking Act, or to say that the plaintiff ever had any actual possession, control over, or property in, the goods mentioned in the receipt,

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or in fact, to regard him in the transaction in any other capacity than that of an agent of the Consolidated Bank. To decide otherwise would, as it appears to me, open the door to a ready mode of nullifying the Chattel Mortgage Act, and of successfully perpetrating those transactions which the Insolvent Act pronounced to be frauds upon creditors. If it were necessary (but for the reasons already given I do not think it is) to trace the connection of the Standard Bank with the transaction, I think the fair inference warranted by the evidence is that they also interfered only in the interest of and at the request of the Consolidated Bank, and upon the implied undertaking of the latter bank to indemnify them against loss in the event of their advancing the money which they did advance, an undertaking which most probably has been fulfilled or the Standard Bank would naturally be the plaintiffs here, and that they knew or had sufficient information from which they could and should have known, and may, therefore, be inferred to have known, the infirmity attached to the receipt upon which they were asked to advance the money. But whatever may have been the conduct of the Standard Bank in the transaction, whether they were the dupes or the coadjutors of the Consolidated Bank in endeavoring to perfect the contrivance of the latter, it is plain, to my mind, that for the reasons given above and in the Court of Appeal from whose judgment this appeal comes that plaintiff cannot succeed in this action.

*Appeal dismissed without costs.*

Solicitors for appellant: *McMichael, Hoskin & Ogden.*

Solicitors for respondents: *Kerr & Akers.*