HOLY ROSARY PARISH (THOROLD) CREDIT UNION LIMITED..... ..APPELLANT;

1965
Feb. 9
Apr. 6

AND

THE PREMIER TRUST COMPANY, Trustee of Estate of Herbert Léger Robitaille, a bankrupt ..... .RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Assignment of wages to creditor—Subsequent assignment in bankruptcy—Whether assignment of after-acquired wages valid as against trustee in bankruptcy—Bankruptcy Act, R.S.C. 1952, c. 14.

On April 10, 1962, one R borrowed certain funds from the appellant credit union and on that date gave to the credit union an assignment of 30 per cent of his wages. Default having occurred in a payment of the instalments of indebtedness due by R to the credit union, the credit union notified his employer (E Co.) on November 27, 1962, of the assignment of wages. On January 8, 1963, R made an assignment in bankruptcy to the respondent company and its position as trustee was subsequently confirmed by a meeting of creditors. The credit union was notified by the trustee of the fact of the assignment and was supplied with a proof of claim form but never filed any proof of claim or appeared in the bankruptcy.

On March 14, 1963, the trustee notified E Co. that it required the said company to pay to it the funds deducted from R's wages up till that date. E. Co. took the position that it would hold the money pending an order of the Court declaring the assignment of wages to be void and unenforceable. An application for that declaration was made on behalf of the trustee on March 29, 1963, and it was so declared on May 6, 1963. The judgment of the lower Court was confirmed, on appeal, by the Court of Appeal, and the credit union by special leave further appealed to this Court.

Held: The appeal should be allowed and judgment should issue dismissing the application of the trustee for a declaration that the assignment of wages made by the bankrupt to the appellant was unenforceable against the trustee of the estate.

Under s. 39(*a*) of the *Bankruptcy Act,* R.S.C. 1952, c. 14, the property of the bankrupt did not comprise property held by the bankrupt in trust for any other person. So soon as the after-acquired wages were due to the bankrupt then the assignment operated in equity to transfer the property therein to the assignee. *Lundy v. Niagara Falls Railway Employees Credit Union* (1960), 1 C.B.R. (N.S.) 201; *Re Jones, Ex p. Nichols* (1883), 22 Ch. D. 782, distinguished; *In re Hunt* (1954), 34 C.B.R. 120; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *In re Lind, Industrials Finance Syndicate v. Lind* (1915), 84 L.J. Ch. 884; *Niagara Falls Railway Employees Credit Union v. International Nickel Co. Ltd.,* [1960] O.W.N. 42; *King v. Faraday & Partners Ltd.,* [1939] 2 All E.R. 478, referred to; *Re De Marney, Official Receiver v. Salaman,* [1943] 1 All E.R. 275, disapproved.

*PRESENT: Cartwright, Judson, Ritchie, Hall and Spence JJ.

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APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Smily J. Appeal allowed.

L. W. Houlden, Q.C., and *D. E. Baird*, for the appellant.

R. H. Frayne, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal by special leave from the judgment of the Court of Appeal for Ontario pronounced on September 12, 1963. The judgment of that Court confirmed that of the Honourable Mr. Justice Smily pronounced May 6, 1963, in which he declared

> that the assignment of wages made by the said bankrupt, Herbert Léger Robitaille, to the Holy Rosary Credit Union dated the 10th of April 1962, and presently filed with the Empire Rug Mills Limited, employer of the said bankrupt, on the 27th day of November 1962, is void and unenforceable as against the said The Premier Trust Company, Trustee of the estate of the said bankrupt, and it is ordered and adjudged accordingly.

On April 10, 1962, the said Herbert Léger Robitaille borrowed certain funds from the Holy Rosary (Thorold) Credit Union Limited and on that date gave to the Credit Union an assignment of 30 per cent of all the wages, salary, commission, or other moneys owing to him or thereafter to become owing to him, or earned by him in the employ of the Empire Rug Mills Limited, or any other person, firm or corporation by whom he might thereafter be employed. Default having occurred in a payment of the instalments of indebtedness due by the said Robitaille to the Credit Union, the Credit Union notified his employer, Empire Rug Mills Limited, on November 27, 1962, of the assignment of wages.

On January 8, 1963, the said Robitaille made an assignment in bankruptcy to the Premier Trust Company Limited and its position as trustee was confirmed by a meeting of creditors held on January 22, 1963. The appellant Credit Union was notified by the trustee of the fact of the assignment and was supplied with a proof of claim form but never filed any proof of claim or appeared in the bankruptcy.

On March 14, 1963, the trustee by letter notified the Empire Rug Mills Limited that it required the said company to pay to it the funds deducted from Robitaille's wages up till that date. The Empire Rug Mills Limited took the position that it would hold the money pending

an order of the Court declaring the assignment of wages dated April 10, 1962, to be void and unenforceable. An application for that declaration was made on behalf of the trustee on March 29, 1963, and Smily J. so declared on May 6, 1963.

On May 23, 1963, the bankrupt Robitaille applied for and obtained his unconditional discharge from the bankruptcy.

No reasons in writing were delivered by the Court of Appeal but Smily J. in giving judgment said:

> I am, of course, bound by the judgment in the *Lundy v. Niagara Falls Railway Employees Credit Union* case, [1960] O.W.N. 539, 1 C.B.R. (N.S.) 201, 26 D.L.R. (2d) 47.

There are two distinctions between that decision and the present case. In the first place, in the *Lundy v. Niagara Falls* case, the only notice of the assignment to the employer was given after the bankruptcy. This was relied upon by the Credit Union in the present case in the argument before Smily J. but in this Court counsel for the Credit Union placed no reliance at all on such distinction. Secondly, in the *Lundy v. Niagara Falls* case, the creditor filed a claim in bankruptcy and although it did not value its security its manager was nominated as the sole inspector of the estate and actively engaged in the administration of the bankruptcy. As I shall point hereafter, that circumstance might well have determined the action in favour of the trustee as it would appear that in so doing the Credit Union had released its security.

The only other authority in Canada dealing with the issue as between the assignee of future wages and the trustee in bankruptcy which was cited to us or which I could discover would seem to be *In re Hunt*[1], in which Graham J. held in the Court of Queen's Bench of Saskatchewan that such assignment was valid as against the trustee despite the creditor's failure to notify the employer until after the bankruptcy occurred, and despite the fact that the creditor had filed a claim in the bankruptcy. *In re Hunt* does not seem to have been referred to in the consideration in the Court of Appeal of the *Lundy v. Niagara Falls* case, *supra*.

[1] (1954), 34 C.B.R. 120, 12 W.W.R. (N.S.) 552.

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The definition of "property" in s. 2(*o*) of the *Bankruptcy Act*, R.S.C. 1952, c. 14, reads as follows:

> (*o*) "property" includes money, goods, things in action, land, and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property.

Disregarding for the moment the assignment of the wages, there is no doubt that in Canada after-acquired wages or salaries of a bankrupt, subject to a fair and reasonable allowance to the debtor for maintenance of himself and his family, go to the trustee as property of the bankrupt: *In re Tod, Clarkson v. Tod*[1], and *Industrial Acceptance Corporation and T. Eaton Co. Ltd. of Montreal v. Lalonde*[2].

In my opinion, it is equally well established that an assignment for valuable consideration of property to be obtained in the future is a valid equitable assignment and one which is enforceable in equity so soon as the property comes into the possession of the assignor: *Tailby v. Official Receiver*[3].

In re Lind, Industrial Finance Syndicate v. Lind[4], Swinfen Eady L. J. said at p. 895:

> It is clear from these authorities that an assignment for value of future property actually binds the property itself, directly if it is acquired, automatically on the happening of the event, and without any further act on the part of the assignor, and does not merely rest in and amount to a right in contract giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for.

Phillimore L. J., said at p. 897:

> But, notwithstanding these allusions to the specific performance of contracts, it is, I think, well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract, that the assignment creates an equitable charge, which arises immediately upon the property coming into existence. Either then no further act of assurance from the assignor is required, or, if there be something necessary to be done by him to pass the legal estate or complete the title, he has to do it, not by reason of a covenant for further assurance, the persistence of which, through bankruptcy, it is unnecessary to discuss, but because it is due from him as trustee for his assignee.

[1] [1934] S.C.R. 230, 15 C.B.R. 253, 2 D.L.R. 316.
[2] [1952] 2 S.C.R. 109, 32 C.B.R. 191, 3 D.L.R. 348.
[3] (1888), 13 App. Cas. 523, 58 L.J.Q.B. 75.
[4] (1915), 84 L.J. Ch. 884.

Bankes L. J., said at p. 902:

> It appears to me to be manifest from these statements of the law that equity regarded an assignment for value of future-acquired property as containing an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign. It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, and the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence.

The *Lind* case was not one of an assignment of wages to be earned in the future but it was an assignment of property to be acquired in the future, and a bankruptcy did follow the assignment.

Indeed, the valid and enforceable character of the assignment as an equitable assignment was upheld by the Court of Appeal for Ontario in *Niagara Falls Railway Employees Credit Union v. International Nickel Co. Ltd.*[1] In that Court, the argument that such an assignment was contrary to public policy was also disposed of. Such an argument was suggested in this Court upon the present argument but it was not relied upon. If the assignment of the wages to be acquired thereafter is a valid, equitable assignment and creates a valid, equitable security, there is no reason why the property of the debtor in those after-acquired wages should not pass to the trustee subject to such security. In my view, such result is not affected materially by the decisions in a series of cases exemplified by *Re Jones, Ex. p. Nichols*[2]. In those cases, the debtor with the permission of the trustee continued to carry on a business after his bankruptcy. Of course, it is trite law that any property acquired in the conduct of that business becomes the property of the trustee in bankruptcy.

There are two interesting decisions in the English Courts in fairly late years. The first is *King v. Michael Faraday and Partners Ltd.*[3], which was a decision of Atkinson J. There the debtor had been the managing director of a company under agreement which assured him a very large salary until 1941. In 1933 a judgment for £34,000 odd was awarded against him and to avoid proceedings upon the judgment he assigned certain insurance policies to his creditor and also assigned to him £1,000 per annum to be

[1] [1960]O.W.N. 42, 23 D.L.R. (2d) 215.
[2] (1883), 22 Ch. D. 782, 52 L.J. Ch. 635.
[3] [1939] 2 A11 E.R. 478.

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paid out of his salary for a period of ten years. To effect the latter assignment, the debtor signed an irrevocable request and authority to the company to make such payments to the creditor. In 1938, after payment had been made for five years, the company was obliged to reduce the debtor's salary to £1,000 per annum and at about the same time a receiving order was made against the debtor. The trustee in bankruptcy allowed the debtor to retain his salary of £1,000 per annum for the maintenance of himself and his family. The personal representative of the original creditor proved in the bankruptcy for the whole amount of the debt without ever giving credit for or without valuing any security. The creditor's solicitor was a member of the committee of inspection, attended meetings and voted in respect of the full amount of £24,000 for which she had filed her proof of claim. The creditor then took action to enforce as an equitable assignment the claim against the debtor's salary. The case was set down to be argued as a preliminary issue of law under Ord. 25, r. 2, in English Practice. Atkinson J. gave effect to what he described as "three much more formidable defences". The first of these was frustration by the reduction of the debtor's salary to £1,000 per year which, at any rate, in the opinion of the trustee, was merely sufficient to permit him to maintain himself and his family. The second was that by proving in the bankruptcy for the full amount of her judgment the plaintiff, the creditor, had elected to take her remedy in the bankruptcy rather than by the enforcement of her security. The third was that the assignment was, under the circumstances, contrary to public policy. It may be noted that the second defence to which Atkinson J. gave effect was sufficient to dispose of the case of *Lundy v. Niagara Falls Railway Employees Credit Union, supra,* and that no such situation maintains in the present case where the creditor has not proved in the bankruptcy. It should be further noted that the respondent in the present case could, by virtue of s. 108 of the *Bankruptcy Act,* have required the secured creditor to file his claim, and by virtue of s. 87(1) of the same statute have demanded that the secured creditor value his security. Had the secured creditor done so, it would have been subject to having the claim redeemed by the trustee.

The third defence to which Atkinson J. gave effect, i.e., the bar of public policy, has been disposed of in *Niagara Falls Railway Employees Credit Union v. International Nickel Co. Ltd., supra.* Moreover, by s. 7(6) of *The Wages Act,* R.S.O. 1960, c. 421, effective on March 29, 1961, any contract made thereafter which provided for the assignment by the debtor to the creditor of a portion of not more than 30 per cent of the wage earner's wages to be earned in the future was not invalid. The assignment of wages in the present case was made on April 10, 1962. However, in *King v. Faraday Ltd., supra,* Atkinson J., before dealing with those three defences, all of which he sustained, considered the question of whether an assignment of after-acquired wages was valid as against a trustee in bankruptcy. At p. 484, he said:

> The next point which was made was this. It was argued that a man cannot charge his personal earnings to be made during a bankruptcy, because such earnings become, so it was said, due not merely to the debtor, but also to the trustee in cases like *Re Jones, Ex. p. Nichols* (1883), 22 Ch. D. 782, and *Wilmot v. Alton,* [1897] 1 Q.B. 17, and that class of case, upon which reliance was placed. If those cases are analysed, it will be seen that in all of them the earnings in dispute were made, not by the bankrupt, but by the trustee. If a trustee permits a debtor to carry on his business, he carries it on as agent for the trustee, and it is true to say that the earnings are really the earnings of the trustee, and not of the debtor. In this case, however, the debtor is carrying on under a personal agreement. He is not carrying on in any sense as agent for the trustee. At any rate, so far as I am concerned, I am not prepared to hold that a man cannot before bankruptcy charge his personal earnings under a personal agreement over and above what is required for the maintenance of himself and his family so as to give good title against his trustee. Therefore, I think that the argument based on *Re Jones, Ex. p. Nichols, supra,* fails as well.

In *Re De Marney, Official Receiver v. Salaman*[1], Farwell J., in the Chancery Division, considered this situation. A debtor by a deed made before bankruptcy undertook to pay to the trustee under the arrangement one-half of all earnings less income tax. Thereafter, he was adjudged bankrupt. The question to be determined was whether the trustee in bankruptcy was entitled to the bankrupt's earn-

[1] [1943] 1 All E. R. 275.

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ings after the date of adjudication, having regard to the terms of the deed of arrangement. Farwell J., in a very brief judgment, stated:

> The question is whether the trustee in bankruptcy is entitled to be paid the moneys earned by the bankrupt since the date of the adjudication, having regard to the terms of the deed. If this was a charge of future profits of a business, there would, I think, be no doubt that the trustee in bankruptcy would be entitled to them. It is said, however, that this is not a case of the future profits of a business, but a charge upon the future proposed earnings of the bankrupt and that in this case different considerations arise. I have looked at the various cases which were cited to me and have considered them with care, and I am quite unable to find sufficient justification for saying that the principle applicable to future earnings of a business does not apply to the present case.

I am unable to accept this terse decision and I prefer the very carefully reasoned judgment of Atkinson J. in *King v. Faraday Ltd., supra,* based as the latter judgment is on the authority of *Tailby v. Official Receiver, supra,* and *Re Lind, supra.*

Laidlaw J.A., in giving the judgment for the Court of Appeal in *Lundy v. Niagara Falls Railway Employees Credit Union, supra,* quoted Williams on Bankruptcy, 17th ed., at p. 75, as follows:

> At common law a document purporting to be an assignment of property thereafter to be acquired by the assignor passes no property to the assignee unless and until there be, besides the acquisition of the property by the assignor, some *actus interveniens,* such as seizure by the assignee; but in equity, although a contract engaging to transfer property not in existence as the property of the assignor cannot operate as an immediate alienation, yet, if the assignor afterwards becomes possessed of property answering the description in the contract, it will transfer the beneficial interest to the purchaser immediately upon the property being acquired, provided it appear therefrom that such is the intention of the parties; but not if it appear that the intention of the parties is that there shall be merely a power to seize after-acquired property as distinguished from an interest therein on its acquirement.

And continued:

> That statement of law must be read with s. 39 of the Bankruptcy Act, quoted *supra.* I can find no ambiguity in the relevant language of that section and no doubt arises therefrom in my mind. The wages earned and falling due to the appellant after he made an assignment in bankruptcy did not form part of his property at the date of the assignment in bankruptcy. He acquired the right to those wages after his bankruptcy and before his discharge. In my opinion, that right became property of the bankrupt appellant and vested in the trustee in bankruptcy by virtue of s. 39 of the Bankruptcy Act.

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But by the very terms of s. 39(*a*), the property of the bankrupt shall not comprise property held by the bankrupt in trust for any other person. And the whole import of the cases which I have cited, *supra,* is to the effect that so soon as those after-acquired wages are due to the bankrupt then the assignment operates in equity to transfer the property therein to the assignee.

I am, therefore, of the opinion that the appeal should be allowed and that judgment should issue dismissing the application of the trustee for a declaration that the assignment of wages made by the bankrupt to the Holy Rosary Credit Union dated April 10, 1962, is unenforceable against the trustee of the estate. The effect of the discharge of the bankrupt upon the appellant's right to obtain a portion of the wages earned by the bankrupt after his discharge is not an issue in this appeal, and I express no view thereon. Pursuant to the terms imposed when leave to appeal to this Court was granted there will be no order as to costs in the Courts below and the appellant will pay to the respondent its party and party costs in this Court.

Appeal allowed.

Solicitors for the appellant: Young & McNamara, Thorold.

Solicitors for the respondent: Freeman & Frayne, St. Catharines.