1929
*Feb. 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LTD. (AUTHORIZED TRUSTEE) ..... PETITIONER;

AND

HOFFAR LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy—Constitutional law—Conflict between Dominion and provincial enactments—Dominion enactment prevailing—Bankruptcy Act, R.S.C., 1927, c. 11, s. 64; Fraudulent Preferences Act, R.S.B.C., 1924, c. 97, s. 3 (2)—Leave to appeal to Supreme Court of Canada refused —Bankruptcy Act, s. 174.

S. 64 (1) of the *Bankruptcy Act*, R.S.C., 1927, c. 11, provides that a transfer made by an insolvent person "with a view of giving" a preference, shall, if the insolvent makes an authorized assignment within three months thereafter, be deemed fraudulent and void as against the trustee in bankruptcy; and s. 64 (2) provides that if a transfer by the insolvent has the effect of giving a preference "it shall be presumed *prima facie* to have been made" with such view. S. 3 (2) of the *Fraudulent Preferences Act*, R.S.B.C., 1924, c. 97, provides (subject as

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therein stated) that a transfer made by a person in insolvent circumstances which has the effect of giving a preference shall "if the debtor, within 60 days after the transaction, makes an assignment for the benefit of his creditors, be utterly void" as against the assignee, etc.

Held: There is a conflict between said enactments, and the Dominion enactment prevails; so, in the case of a transfer by an insolvent person having the effect of giving a preference, where the fraudulent intent (*prima facie* presumed under s. 64 (2) of the *Bankruptcy Act*) has been rebutted, the transfer, though made within 60 days before the assignment in bankruptcy, cannot be attacked.

Att. Gen. of Ontario v. *Att. Gen. of Canada*, [1894] A.C. 189, at p. 200; *La Compagnie Hydraulique de St. François* v. *Continental Heat & Light Co.*, [1909] A.C. 194, at p. 198; *Royal Bank of Canada* v. *Larue*, [1928] A.C. 187, referred to.

Judgment of the Court of Appeal of British Columbia, [1929] 1 W.W.R. 557, to above effect, held to be clearly right, and leave to appeal therefrom (applied for under s. 174 of the *Bankruptcy Act*) refused.

PETITION by the trustee of a bankrupt estate, under s. 174 of the *Bankruptcy Act*, R.S.C., 1927, c. 11, for special leave to appeal from the judgment of the Court of Appeal of British Columbia (1) reversing the judgment of W. A. Macdonald J.

The trustee moved for an order setting aside a transfer by the insolvent to the respondent of the sum of $4,053.95 due him by the Government of Canada. The transfer was made less than sixty days before the assignment under the *Bankruptcy Act*, and it was attacked on two grounds: (1) that it was utterly void as against the trustee by virtue of s. 3 (2) of the *Fraudulent Preferences Act*, R.S.B.C., 1924, c. 97; and, alternatively, (2) that it was fraudulent and void as against the trustee by virtue of s. 64 of the *Bankruptcy Act*.

Section 64 of the *Bankruptcy Act*, R.S.C., 1927, c. 11, reads as follows:

64. Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorized assignment.

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2. If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

3. For the purpose of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor.

Section 65 of the Act contains provisions protecting from invalidation payments, conveyances, etc., made under certain conditions.

Section 3 of the *Fraudulent Preferences Act*, R.S.B.C., 1924, c. 97, reads as follows:

3. (1.) Subject to the provisions of section 4, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels, or effects, or of bills, bonds, notes, or securities, or of shares, dividends, premiums, or bonus in any bank, company, or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, shall:—

(*a.*) If made with intent to defeat, hinder, delay, or prejudice his creditors or any one or more of them, be, as against the creditor or creditors injured, delayed, or prejudiced, utterly void; and

(*b.*) If made to or for a creditor with intent to give such creditor preference over his other creditors or over any one or more of them, be, as against the creditor or creditors injured, delayed, prejudiced, or postponed, utterly void.

(2.) Subject to the provisions of section 4, every such gift, conveyance, assignment, or transfer, delivery over or payment as aforesaid, made to or for a creditor by a person at any time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference over the other creditors of the debtor or over one or more of them, shall

(*a.*) In and with respect to any action or proceeding which, within sixty days thereafter, is brought, had, or taken to impeach or set aside such transaction, be utterly void as against the creditor or creditors injured, delayed, prejudiced, or postponed; and

(*b.*) If the debtor, within sixty days after the transaction, makes an assignment for the benefit of his creditors, be utterly void as against the assignee or any creditor authorized to take proceedings to avoid the same.

3. [Provides as to when a transaction shall be deemed to be one which has the effect of giving a creditor a preference within the meaning of subs. 2.]

4. ["Creditor" or "creditors" in subss. 1, 2 and 3, to include a surety or endorser who would upon payment by him become a creditor of the person giving the preference, and to include a cestui que trust or other person to whom the liability is equitable only.]

Section 4 of the Act contains, among other things, provisions protecting from the application of s. 3 payments, conveyances, etc., made under certain conditions.

W. A. Macdonald J. found that the debtor was insolvent, within the meaning of the law, at the time the transfer was made, that it had the effect of giving the respondent a preference over the other creditors of the debtor, but that it was not made with a view of giving the respondent a preference; and that, if the trustee were confined solely to s. 64 of the *Bankruptcy Act,* the presumption created would have been destroyed by the evidence; but he held that the trustee was entitled to the benefit of the provincial statute, and that under it the transfer was void.

The Court of Appeal (1) set aside this judgment on the ground that there was here a conflict between Dominion and provincial legislation, and that the Dominion enactment should prevail; and that, as the presumption of fraudulent intent had been rebutted, the attack on the transfer failed.

From this judgment the trustee sought leave to appeal. The petition was dismissed with costs.

N. G. Larmonth for the petitioner.

R. W. Ginn for the respondent.

MIGNAULT J.—This is a petition by the trustee of the bankrupt estate of S. R. Wallace, under section 174 of the *Bankruptcy Act* (R.S.C., 1927, c. 11), for special leave to appeal from the unanimous judgment of the Court of Appeal of British Columbia (1) reversing the judgment of Mr. Justice W. A. Macdonald.

The litigation arose in connection with a motion of the trustee for an order setting aside a transfer by the insolvent to the respondent of the sum of $4,053.95 due him by the Canadian Government. The transfer was made less than sixty days before Wallace's assignment under the *Bankruptcy Act,* and it was attacked on two grounds: 1, that it should be deemed fraudulent and void against the trustee under section 64 of the *Bankruptcy Act;* 2, that it was utterly void under section 3 of the provincial statute, the *Fraudulent Preferences Act,* R.S.B.C., c. 97.

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The difference between the two statutory enactments, both of which deal with fraudulent preferences, is that subsection 2 of section 64 of the *Bankruptcy Act*, when the transfer, made within three months of the assignment in bankruptcy, has the effect of giving any creditor a preference over other creditors, creates merely a *prima facie* presumption that the transfer was made with a view to give the creditor such a preference; whereas section 3 of the provincial statute renders the transfer, having the effect to give a creditor preference over other creditors, utterly void as against the assignee or any creditor authorized to take proceedings when it was made within sixty days before an assignment by the debtor for the benefit of his creditors. Under the former statute the presumption of a fraudulent intent can be rebutted, under the latter it cannot.

The learned trial judge, upon consideration of section 64 of the *Bankruptcy Act*, found that the presumption of a fraudulent intent had been successfully rebutted, but he annulled the transfer under section 3 of the provincial statute, which he held established an irrebuttable presumption of fraudulent intent from the mere fact that the transfer, made less than sixty days before the assignment in bankruptcy, had the effect of giving the creditor a preference over the other creditors.

The Court of Appeal (1) set aside this judgment for the reason that there was here a clear conflict between Dominion and Provincial legislation, and that the Dominion enactment should prevail. Inasmuch, therefore, as the fraudulent intent had been rebutted, the court held that the transfer could not be attacked.

The petitioner now seeks leave to appeal from this judgment. In my opinion, the decision of the Court of Appeal is clearly right. The learned judges base their judgment on the decision of the Judicial Committee in *La Compagnie Hydraulique de St. François* v. *Continental Heat & Light Co.* (2), where it was held that when

> a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict.

(1) [1929] 1 W.W.R. 557.

(2) [1909] A.C. 194, at p. 198.

The decision of the Privy Council in *Attorney General of Ontario* v. *Attorney General of Canada* (1) is, moreover, directly in point. The question there was as to the effect of a similar provincial statute, "An Act respecting assignments and preferences by insolvent persons" (R.S.O., 1887, c. 124), which had been enacted at a time when no Bankruptcy Act of the Dominion was in force. After discussing features common to all systems of bankruptcy and insolvency, Lord Herschell, speaking on behalf of their Lordships, said at p. 200:—

> In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

The recent pronouncement of the Judicial Committee in *Royal Bank of Canada* v. *Larue* (2) is also in point

The advisability of granting special leave to appeal to this Court from a judgment of a Court of Appeal, which is final and conclusive unless such special leave to appeal be obtained, is left to the discretion of the judge of this Court to whom the application for special leave is made (s. 174, *Bankruptcy Act*). I think that were leave to appeal granted in this case to the petitioner, the latter would not have a fairly arguable case to submit to this Court. Under these circumstances I would not be justified in retarding the liquidation of the insolvent estate by allowing a further appeal on this question of conflict between Dominion and Provincial legislation, which I must regard as settled beyond peradventure.

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The petition is therefore dismissed with costs.

Petition dismissed with costs.

Solicitors for the petitioner: *Griffin, Montgomery & Smith.*

Solicitor for the respondent: *R. W. Ginn.*