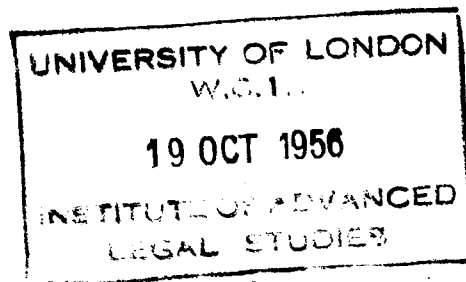


In the Privy Council.

No. 50 of 1893.



44598

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER OF A QUESTION REFERRED BY HIS HONOR THE
LIEUTENANT-GOVERNOR OF ONTARIO IN PURSUANCE OF AN
ORDER IN COUNCIL APPROVED BY HIS HONOR THE 19TH DAY OF
NOVEMBER 1892.

CASE FOR THE ATTORNEY-GENERAL OF ONTARIO.

THE ATTORNEY GENERAL OF ONTARIO

1. This is an Appeal from the judgment of the Court of Appeal for R. pp. 2-11.
Ontario upon a question referred by the Lieutenant-Governor of Ontario
to them for hearing and consideration in pursuance of an Act of Ontario
(53 Victoria, Chapter 13) for expediting the decision of constitutional and other
provincial questions "as to the jurisdiction of the Legislature of Ontario to
"enact the 9th section of the Revised Statutes of Ontario 1887, Chapter 124,
"and entitled 'An Act respecting Assignments and Preferences by Insolvent
" 'Persons.' "

2. The question was referred to the Court of Appeal on the 19th
10 November 1892, and after argument a majority of the judges of the Court
answered it in the negative, thus deciding that the said 9th section was ultra
vires of the Legislature of Ontario.

3. The 9th section is in the words following: "An assignment for the
"general benefit of creditors under this Act shall take precedence of all
"judgments and of all executions not completely executed by payment, subject
"to the lien, if any, of an execution creditor for his costs where there is but
"one execution in the Sheriff's hands, or to the lien, if any, of the creditor for
"his costs who has the first execution in the Sheriff's hands"; and the contention
of the Attorney-General of Canada, which was adopted by the Court of Appeal,
20 was that it fell within the meaning of the words "bankruptcy and insolvency"
in the 21st article of section 91 of the British North America Act 1867, and was
thus within one of the classes of subjects over which the Parliament of the
Dominion of Canada had exclusive legislative authority, and in respect of
which therefore the Legislature of the Province had no jurisdiction.

4. The question raised by this Appeal is whether the 9th section of the Revised Statutes of Ontario, Chapter 124, was within the powers of the Legislature of Ontario.

5. Previous to 1867 the law respecting assignments and preferences was governed by an Act of the late Province of Canada, entitled "An Act for abolishing Arrest in Civil Actions in certain Cases, and for the better prevention and more effectual Punishment of Fraud" (22 Victoria, Chapter 96), the more material sections being sections 18, 19, and 21.

6. Those sections were re-enacted in substantially identical language in the consolidated statutes relating to Upper Canada, entitled "An Act respecting Relief of Insolvent Debtors" (22 Victoria, Chapter 26), section 18 of that statute corresponding with section 19 of the first-mentioned Act. 10

7. Both these sections were in force in 1867 and neither have been repealed abolished or altered by the Parliament of the Dominion of Canada nor save as hereinafter appears by the Legislature of the Province of Ontario.

8. In the year 1875 the Parliament of the Dominion of Canada passed a general Act called "An Act respecting Insolvency" (38 Victoria, Chapter 16); but this Act together with several amendments thereto was wholly repealed in 1880 by an Act 43 Victoria Chapter 1. There has been since that date no general legislation in relation to bankruptcy or insolvency nor any legislation dealing with the matters alleged to be touched by the said 9th section by the Parliament of the Dominion. 20

9. In the year 1877 by the Revised Statutes of Ontario 1877 an Act was passed by the Legislature of the Province of Ontario Chapter 118, entitled "An Act respecting the Fraudulent Preference of Creditors by Persons in Insolvent Circumstances" section 2 whereof re-enacted section 18 of 22 Victoria, Chapter 26.

10. In the year 1884 an Act was passed by the Legislature of Ontario (47 Victoria, Chapter 10), entitled "An Act for further Improving the Administration of the Law," to the 3rd section whereof reference is made. 30

11. In the year 1885 an Act was passed by the Legislature of Ontario on which the Act now in question is founded. This Act is entitled "An Act respecting Assignments for the Benefit of Creditors," whereof the preamble is as follows:—

Whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances or on the eve of insolvency, and it is desirable to remedy the same. Reference is made to sections 1 to 9 and section 20.

12. The Act mentioned in the last paragraph hereinafter referred to as "the principal Act" was amended by the Legislature of Ontario in the year 40

1886 by an Act (49 Victoria, Chapter 25) entitled "An Act to amend the Act respecting Assignments for the Benefit of Creditors," section 2 whereof amended section 9 of the present Act.

The principal Act was also amended by an Act passed by the Legislature of Ontario, in the year 1887, 50 Victoria, Chapter 19, entitled an Act to make further provisions respecting assignments for the benefit of creditors, but this amending Act did not touch section 9.

13. In the same year 1887 by the Revised Statutes of Ontario 1887, Chapter 124, entitled "An Act respecting Assignments and Preferences by Insolvent Creditors," the principal Act, as amended by the Acts mentioned in the preceding paragraphs, was re-enacted.

14. The principal Act has been since 1887 amended four times by the Legislature of Ontario—viz., by 52 Victoria, Chapter 21; 53 Victoria, Chapter 34; 54 Victoria, Chapter 20; 55 Victoria, Chapter 25—but section 9 was not altered by any of these amendments.

15. There have been several cases before the Courts in which the validity of the principal Act has been in question: *Broddy v. Stuart*, reported in *Canadian Law Times*, January 1887, Volume 7, No. 1, p. 6; *Clarkson v. The Ontario Bank*, *Edgar v. The Central Bank of Canada*, *Kennedy v. Freeman*, *Hunter v. Drummond*, all reported in 15 Ontario Appeal Reports, pp. 166–233; *Union Bank v. Neville*, 21 Ontario Reports, p. 152; *Reg. v. The County of Wellington et al.*, 17 Ontario Reports, 615; *Reg. v. County of Wellington*, 17 Ontario Appeal Reports, p. 421. In the Courts of First Instance the general validity of the Act was established. In the Court of Appeal the four judges of that Court were equally divided. The decisions therefore of the Courts below stood, and the Act has consequently been treated as valid. There has been no case in which the validity of section 9 has been separately or specially considered.

16. The judgment of the Court of Appeal in the present case was founded mainly upon a judgment of the Supreme Court of Canada in *Quirt v. The Queen*, decided in 1891 and reported in *The Supreme Court of Canada Reports*, Volume 19, p. 510, the Court considering itself bound by that decision. The substance of the decision was that the Dominion Parliament had jurisdiction to pass two Acts, by the first of which certain trustees to whom the Bank of Upper Canada when it became insolvent had assigned all its property and effects were incorporated, and power given them to carry on the business of the Bank so far as it was necessary for winding up the same; and by the second of which all the property of the Bank vested in the trustees was transferred to the Crown as representing Canada, which became seized of all the powers of the trustees. The Supreme Court was of opinion that the Acts dealt with bankruptcy and insolvency, and was therefore within the jurisdiction of the Dominion Parliament as conferred upon them by section 91 of the British North America Act 1867.

17. For convenience it is intended to lodge a print of the various statutes and reports of decisions referred to in this case.

R. pp. 2-11.

18. The judgments of the Judges of the Court of Appeal in the case now submitted will be found on pages 2 to 11 of the Record.

19. The Appellants submit that the judgment was wrong, and ought to be reversed for the following amongst other

REASONS.

1. Because the section impugned deals with matters which fall fairly within the classes of subjects numbered 13, 14, and 16 in section 92 of the British North America Act 1867, including Property and Civil Rights in the Province; the administration of justice in the Province, including procedure in Civil matters in the Provincial Courts; and generally all matters of a merely local or private nature in the Province. 10

2. Because it does not necessarily fall within the meaning of Bankruptcy and Insolvency as found in section 91, and at any rate until the Parliament of Canada legislates on the subject of Bankruptcy and Insolvency, the powers of the Provincial Legislature exercised in passing the 9th section, more especially those referring to Property and Civil Rights in the Province, are not affected by the general powers of the Dominion to make laws in relation to Bankruptcy and Insolvency, or by any other powers conferred upon the Parliament of Canada. 20

3. Because the earlier sections of the Act in question are re-enactments without change of principle of the original legislation of the late Province of Canada in 1858, and the remaining provisions, including section 9, relate to such procedure as is necessary to carry out the just object of the assignment if and when voluntarily made, viz., to ensure among creditors the distribution of the assets without undue preference being given by debtors.

4. Because the provisions in question do not apply to insolvent persons only, nor do they require any debtor or person in insolvent circumstances to make an assignment, nor do they enable a debtor to obtain a discharge from the obligation of any contract or liability. Nor are they within the sense of article 21 of section 91 Bankruptcy or Insolvency provisions, but they merely define the procedure and provide the results to follow if and when an assignment of a prescribed nature has been made, and the action of the debtor is optional and voluntary; and there is no attempt to legislate with respect to bankruptcy or insolvency in the sense of the 21st article of the 91st clause. 30

5. Because they only carry out the principle of the Act of Ontario known as the Creditors' Relief Act, 43 Victoria, Chapter 10, which abolished priority among execution creditors and established a procedure whereby the Sheriff held for the benefit of creditors claiming within a period rateably, the right to pass which Act in the absence of Dominion legislation has never been and cannot be successfully disputed.

6. Because the effect of the 9th section is merely to prevent the first execution creditor from securing a preference over other creditors.

10 7. Because even if the execution creditor be thus deprived of a privilege it is within the power of the Provincial Legislature, which can give or take away or modify the privileges of execution creditors, so to enact.

8. Because even if certain sections of the Act in question be ultra vires the 9th section is not ultra vires.

9. Because the Court were wrong in considering themselves bound to decide in the way they did by the judgment of the Supreme Court of Canada in *Quirt v. The Queen*, and that case, even if good law, is distinguishable from the present.

EDWARD BLAKE.

R. M. BRAY.

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CASE

FOR THE

ATTORNEY-GENERAL OF ONTARIO.

FRESHFIELDS & WILLIAMS,

SOLICITORS FOR THE ATTORNEY-GENERAL OF ONTARIO.

8, Abchurch Lane, London, E.C. 4.