Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tennant v. *The Union Bank of Canada, from the Court of Appeal for Ontario, delivered 9th December* 1893.

Present at the first argument:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.
MR. SHAND.

Present at the second argument:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

Christie Kerr & Co., sawmillers and lumberers at Bradford, in the Province of Ontario, became insolvent in April 1889. The Union Bank of Canada, Respondents in this Appeal, subsequently took possession of and removed a quantity of lumber which was stored in the yard of the firm at Bradford. This action was brought against the Respondents in December 1889, for damages in

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respect of their alleged conversion of the lumber, by Mickle Dyment and Son, personal creditors of the insolvent firm, in the name of James Tennant, as assignee or trustee of the firm's estate, by whom they were duly authorised to sue, in his name, for their own exclusive use and benefit.

Christie Kerr & Co., to whom it may be convenient to refer as the firm, had a timber concession in the County of Simcoe, where, according to the course of their business, the pine wood was felled and cut into logs, which were marked with the letters " C.K.," the initials of the firm. The logs were then conveyed, chiefly by water, to their mill at Bradford, where they were sawn and stored for sale.

In order to obtain funds for carrying on their trade during the season of 1888, the firm, in October 1887, entered into a written agreement with Peter Christie, son of Alexander Christie its senior partner, who agreed to advance the money necessary, upon receiving a lien by way of security upon all the timber cut or manufactured by the firm. On the other hand, the firm undertook to do everything that was necessary in order to make such lien effectual, and for that purpose to execute any documents which might be required.

In pursuance of that agreement promissory notes were granted by Peter Christie, which the Federal Bank of Canada discounted, under an arrangement by which they were to receive warehouse receipts covering all the timber belonging to the firm. Peter Christie assigned to the Bank all right and benefit which he had under the agreement of October 1887. The course of dealing with the Bank was, that the firm granted warehouse receipts to themselves, which they indorsed to Peter Christie, by whom they were indorsed to the Bank.

The Federal Bank went into liquidation

in June 1888, at which date their advances amounted to about $50,000. In order to meet the claim of the liquidator, Alexander Christie applied for accommodation to the Respondents, who agreed to give it, upon terms which were arranged between him and Mr. Buchanan, their manager. The agreement was verbal; and its terms, which are of considerable importance in this case, appear from the following statements made by Alexander Christie in the course of his evidence, which are substantially corroborated by Mr. Buchanan, and are nowhere contradicted:—

"That we and Peter Christie should give his "notes, that Christie Kerr & Co. and A. R. Christie "should endorse them, and that there should "be a warehouse receipt covering all the logs "that they had, and the lumber that was to be "manufactured from them." "The intention "was to give the security of the logs and of "the lumber as it was manufactured." "We "were to give them a receipt at once upon the "whole of the logs, and as the logs progressed "we made a continuation to where they were." "Warehouse receipts were to be furnished until "the debt was paid."

There was not, as in the case of the Federal Bank, any assignment to the Respondents of Peter Christie's rights under the agreement of October 1887. It is clear, from the account which he gives of the transaction, that Alexander Christie dealt with the Respondents, as the representative of his firm, and also as representing his son Peter, from whom he held a power of attorney. Peter Christie took no part, personally, in any of the transactions, either with the Federal Bank or with the Respondents. From first to last, so far as his interests were concerned, all arrangements were made, and all documents connected with them, whether promissory notes, or warehouse receipts, were

executed and subscribed by his father, on his behalf.

Upon the faith of the agreement the Respondents made advances to the amount of $52,600 upon promissory notes of Peter Christie, indorsed to them by his attorney and also by the firm. On the 20th June 1888, they received a warehouse receipt for seventy thousand pine saw logs, marked "C. K.," which were described as then stored in the Lakes St. Jean and Couchiching, *en route* to Bradford mill. These logs represented the whole pine timber which had been cut for transportation to Bradford during the season of 1888; and as they arrived at their destination, and were sawn up, fresh receipts were given to the Respondents, containing a description of the timber in its manufactured state. Portions of the lumber were from time to time sold by the firm, with the consent of the Respondents, and the proceeds applied in reduction of their advances.

The last of the series of receipts deposited as security with the Respondents is dated the 1st January 1889, by which time all the logs covered by the first receipt of the 20th June 1888 had reached Bradford, and had been converted into lumber. It includes the whole of the timber forming the original subject of the security which then remained unsold, and in the possession or custody of the firm. Though not in precisely the same form as the rest, it may be taken as a specimen, because it was not contended that the differences of form were material. It runs thus:—

"The undersigned acknowledges to have "received from Christie Kerr and Company, "owners of the goods, wares and merchandise "herein mentioned, and to have now stored in "the premises known as the Bradford sawmill "yard, adjoining the village of Bradford, in the

" county of Simcoe, the following goods, wares
" and merchandise, viz. :—Five millions eight
" hundred and fifty-three thousand nine hundred
" and twenty-four feet of lumber, one hundred
" and ninety-three thousand of shingles, all
" marked 'C. K.,' and manufactured during
" season 1888 out of saw logs cut in the town-
" ships of Oakley and Hindon, and transported
" to Bradford mill and cut there, which goods
" wares and merchandise are to be delivered
" pursuant to the order of the said Peter
" Christie to be indorsed hereon, and are to be
" kept in store till delivered pursuant to such
" order."

" This is intended as a warehouse receipt
" within the meaning of the Statute of Canada,
" intituled 'An Act relating to Banks and
" 'Banking,' and the amendments thereto, and
" within the meaning of all other Acts and laws
" under which a Bank of Canada may acquire a
" warehouse receipt as a security."

This receipt was, like its predecessors, signed by the firm, and by them indorsed to Peter Christie, and was then indorsed on his behalf by Alexander Christie, and delivered to the Respondents.

It is not matter of dispute that the timber of which the Respondents took possession, after the insolvency of the firm, was included, either as saw logs or as lumber, in all the receipts which they received as security. But it does not appear to their Lordships that these receipts could be regarded as negotiable instruments carrying the property of the timber, if their effect depended upon the provisions of the Mercantile Code which is contained in the Revised Statutes of Ontario 1887.

The Mercantile Amendment Act (Cap. 122 of the Revised Statutes) deals with warehouse receipts and other mercantile documents, which are effectual to transmit the property of

goods without actual delivery. That Statute not only recognises the negotiability of warehouse receipts by custodiers who are not the owners of the goods; it extends the privilege to receipts by one who is both owner and custodier, but that only in cases where the grantor of the receipt is, from the nature of his trade or calling, a custodier for others as well as himself, and therefore in a position to give receipts to third parties. The receipts in question do not comply with the requirements of the Act, because it is neither averred nor proved, that the firm, in the course of their business, had the custody of any goods except their own.

It may also be noticed that cap. 125 of the Revised Statutes enacts that when goods are transferred by way of conveyance or mortgage, possession being retained by the transferor, the deed of conveyance or mortgage, if not duly registered, shall be absolutely null and void as against creditors of the grantor or mortgagor.

In these circumstances, certain provisions of "The Bank Act" which was passed by the Legislature of the Dominion (46 Vict. c. 120) and is specially referred to in the receipts held by the Respondents, become important. Although now repealed, the Act was in force during the whole period of these transactions; and, if competently enacted, its provisions must, in so far as they are applicable, govern the rights of parties in this litigation.

Section 45 provides that the Bank shall not, either directly or indirectly lend money or make advances upon the security or pledge of any goods, wares or merchandise, except as authorised by the Act.

Section 53 (2) authorizes the Bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour, in the course of its

banking business. The document so acquired vests in the Bank "all the right and title of the "previous holder or owner thereof, or of the "person from whom such goods wares or mer- "chandise were received or acquired by the Bank, "if the warehouse receipt or bill of lading is made "directly in favour of the Bank, instead of to the "the previous holder or owner of such goods "wares or merchandise." Sub-section (3) of the same clause provides that if the previous holder of such warehouse receipt or bill of lading is the agent of the owner, the Bank shall be vested with all the right and title of the owner, subject to his right to have the goods retransferred to him, upon payment of the debt for which they are held in security by the Bank.

Section 54, which deals specially with the case of the custodier and owner of the goods being one and the same person enacts that :—

"If any person who grants a warehouse receipt "or bill of lading is engaged in the calling, as "his ostensible business, of keeper of a yard, "cove, wharf or harbour, or of warehouseman, "miller, saw-miller, maltster, manufacturer of "timber, wharfinger, master of a vessel, or other "carrier by land or by water, or by both, curer "or packer of meat, tanner, dealer in wool or "purchaser of agricultural produce, and is at "the same time the owner of the goods, wares "and merchandise mentioned in such warehouse "receipt or bill of lading, every such warehouse "receipt or bill of lading, and the right and title "of the bank thereto and to the goods, wares "and merchandise mentioned therein, shall be "as valid and effectual as if such owner, and "the person making such warehouse receipt or "bill of lading, were different persons."

These enactments go beyond the provisions of Section 16 of the Mercantile Amendment

Act. They omit the limitation of the Provincial Statute which requires, in order to validate a warehouse receipt by a custodier who is also owner, that the trade or calling in which he is ostensibly engaged must be one which admits of his granting receipts on behalf of other owners whose goods are in his possession.

The Chancellor of Ontario dismissed the suit with costs; and the Court of Appeal affirmed his decision. Upon the evidence before them all the learned Judges, with one exception, came to the conclusion that the transaction was substantially one between the firm and the Respondents, and that Peter Christie's position was really that of an intermediary; and consequently that the Respondents had a right, against the firm, to demand and receive warehouse receipts for the timber in security for their advances. Mr. Justice Burton was of opinion that the Respondents must be held to have dealt with Peter Christie alone; that the receipts, in his hands, were not valid either according to provincial law, or under the provisions of the Bank Act, and that his indorsation could not pass any interest in the timber to the Respondents.

In the view which he took of the real character of the transaction, the Chancellor held that the receipts were effectual, mainly on the ground that Peter Christie, in indorsing them, ought to be regarded as the agent of the firm within the meaning of Section 53 (3) of the Bank Act. Chief Justice Hagarty and Mr. Justice Maclennan, who with Mr. Justice Osler constituted the majority of the Appeal Court held that the receipts, having been given directly to the Respondents by the firm, under an obligation to that effect, were made effectual by the provisions of the Bank Act. They also held that, assuming the receipts not to be within the pro-

tection of the Bank Act, Peter Christie had, as between himself and the firm, an equitable lien on the timber which passed to the Respondents; and also that they had the same rights against the trustee of the insolvent firm as they had against the firm itself. Mr. Justice Osler, whilst agreeing that the Respondents dealt directly with the firm, examined the case on the contrary hypothesis, and held that, even in that view, the receipts were validated by the Bank Act, and carried the property of the timber to the Respondents.

In the Courts below, the Appellant pleaded that the provisions of the Bank Act, with respect to warehouse receipts, in so far as they differ from the provisions of the Mercantile Amendment Act, were *ultra vires* of the Dominion Legislature. The plea was not discussed, because it was admittedly at variance with the decision of the Supreme Court of Canada in *The Merchants Bank of Canada* v. *Smith*, (8 S. C. Ca. 512—and 1. Cartwright 828), which was a precedent binding on provincial tribunals. The case was therefore disposed of by the Chancellor and the Appeal Court upon the footing that the provisions of the Bank Act were not open to challenge.

At the first hearing of this appeal, the whole points arising in the case were fully and ably argued by Counsel, with the exception of the plea taken by the Appellant against the validity of the Dominion Act. Further discussion at the time was prevented by the *Labrador* case, which had been specially set down for the consideration of a full Board.

Their Lordships, having considered the argument which had been addressed to them, came to the conclusion that the majority of the learned Judges were right in holding that, notwithstanding the form of the documents by which it was carried out, the arrangement made in June 1888, by Alexander Christie and

Mr. Buchanan, was one between the Respondents and the firm, as well as between them and Peter Christie.

It does not admit of doubt that the advances obtained from the Bank were intended to be for the use and benefit of the firm. Although the promissory notes were signed by his father as representing Peter Christie, it is clear that they were signed for the accommodation of the firm, and that, in any question between him and the firm, Peter Christie was a mere surety. In a question with the Respondents he was no doubt the primary debtor, but the firm, as indorsers of the promissory notes, were also under a direct liability to the Respondents, for which security might be given. And it is a material circumstance that the evidence of Alexander Christie, which has already been cited, is only consistent with the view that the firm undertook to give the Respondents the security of the timber. The whole course of dealing between the parties is also consistent with that view. The advances appear to have been paid over to the firm, and the warehouse receipts for the timber to have been delivered by the firm to the Respondents; and it does not appear that either the money or the receipts ever passed or were intended to pass into the possession of Peter Christie.

Their Lordships also came to the same conclusion with the majority of the learned Judges, that, assuming the provisions of the Bank Act to be *intra vires*, the receipts in question were such as the firm could give and the Respondents could lawfully receive. The obvious effect of Section 54, is that, for the purposes of the Bank Act, a warehouse receipt by an owner of goods who carries on, as the firm did, the trade of a sawmiller is to be as effectual as if it had been granted by his bailee, although his business may be confined to the manufacture of his own

timber. That enactment plainly implies that such a receipt is to be valid not only in the hands of the Bank, but in the hands of a borrower who gives it to the Bank in security of a loan. Their Lordships do not think that the provisions of Section 53 (2), which are somewhat obscure, can be held to cut down the plain enactments of Section 54, especially in a case where the grantor of the receipt himself delivers it to the Bank as a security for his own debt.

It seems clear that the firm, so long as they were solvent, could not have refused to make delivery of all the timber in their possession to the Respondents, although the legal ownership was still with the firm. But on that assumption, and assuming also that their trustee had no higher right than the insolvents, the question remains whether a creditor having an assignment from the trustee could plead the nullity enacted by cap. 125 of the Revised Statutes. Their Lordships, before dealing with these questions, thought it expedient to determine for themselves whether the provisions of the Bank Act, to which the Appellant takes exception, were competently enacted.

The Appellant's plea against the legislative power of the Dominion Parliament was accordingly made the subject of further argument; and, the point being one of general importance, their Lordships had the advantage of being assisted, in the hearing and consideration of it, by the Lord Chancellor and Lord Macnaghten. The question turns upon the construction of two clauses in the British North America Act, 1867. Section 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the Provinces, and also exclusive legislative authority in

relation to certain enumerated subjects, the fifteenth of which is "Banking, Incorporation "of Banks, and the Issue of Paper Money." Section 92 assigns to each Provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the fourteenth of the enumerated classes is "Property and Civil Rights in the Province."

Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts, and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that Province; and the objection taken by the Appellant to the provisions of the Bank Act would be unanswerable, if it could be shown that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the Provincial legislature by Section 92. But Section 91 expressly declares that, "notwith-"standing anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in Section 91, are "patents of invention "and discovery," and "copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects, without affecting the property and civil rights of individuals in the Provinces.

This is not the first occasion on which the legislative limits laid down by Sections 91 and 92 have been considered by this Board. In

Cushing v. *Dupuy*, (5 Ap. Ca. 409) their Lordships had before them the very same question of statutory construction which has been raised in this Appeal. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being *ultra vires*, in so far as it interfered with property and civil rights in the Province; but, inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in Section 91, their Lordships upheld the validity of the Statute. In delivering the judgment of the Board, Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property.

The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank, in the course of the business of banking, are matters coming within the class of subjects described in Section 91 (15), as "banking, "incorporation of banks, and the issue of paper "money." If they are, the provisions made by the Bank Act with respect to such receipts are *intra vires*. Upon that point, their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the Province does not, and cannot, attach to it. It also comprehends "banking," an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

The Appellant's Counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the Bank, of privileges enjoyed by other lenders under the Provincial law, it had no power to confer upon the Bank any privilege as a lender, which the Provincial law does not recognize. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the Bank; but could not enact that a security should be available to the Bank, which would not have been effectual in the hands of another lender. It was said, in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the Province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to Provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would be affected, because he could not avail himself of his property in his dealings with a bank.

But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon Section 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the Province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by Section 91 (15), to legislate in relation to banking transactions, is sufficient to sustain the provisions of the Bank Act which the Appellant impugns.

On these grounds, their Lordships have come

to the conclusion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. The Appellant must bear the costs of this appeal.