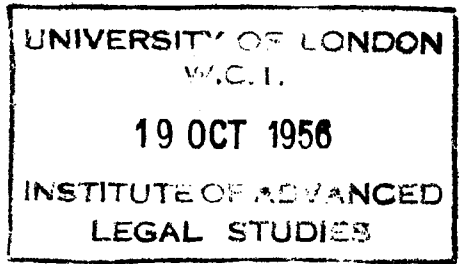


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MR. IRVING'S MEMORANDUM.

MEMORANDUM ON THE APPEAL TO ENGLAND IN THE MATTER OF ASSIGNMENTS AND PREFERENCES.

BY MR. IRVING, OF COUNSEL FOR ONTARIO.

(24th May, 1893.)

[The references to Appendix relate to compilation of Statutes and Cases sent herewith.]

PRELIMINARY.

This is an appeal from the judgment of the Court of Appeal for Ontario, upon a question referred by the Lieutenant-Governor of Ontario, to the said Court of Appeal, for hearing and consideration, in pursuance of an Act of Ontario 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 Act of Ontario respecting Assignments and Preferences by persons in insolvent circumstances." 10

The said Act respecting Assignments and Preferences had been questioned by the Courts of first instance in Ontario, and on Appeal taken to the Court of Appeal in the cases of *Clarkson v. Ontario Bank*, *Edgar v. Central Bank*, *Kennedy v. Freeman*, and *Hunter v. Drummond*, (15 Appeal Reports, 166), the four judges composing that Court were equally divided in opinion on the validity of the said Act; and as the judgments of the Courts of first instance had upheld the validity of the Act, such judgments, being unreversed, were taken thenceforward to be law. *Appendix, pp. 34-75.*

In the judgment of the Court of Appeal, (wherein the judges were divided in opinion), the validity of the said 9th section of the "Act respecting Assignments and Preferences" was not determined.

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 20 "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. 48 V. c. 26, s. 9; 49 V. c. 25, s. 2."

On the question: "Had the Legislature of Ontario jurisdiction to enact the said section 9?" referred to the Court of Appeal on the 19th November, 1892, by the Lieutenant-Governor, the majority of the judges of that Court answered in the negative, and so deciding the same as *ultra vires* of the Legislature of Ontario.

Two of the judges composing the Court, Hagarty, C. J. O., and Osler, J. A., were of opinion that the section was *ultra vires*, and could not be separated from the general effect of the Statute, the same judges having previously adjudged the Act generally to be invalid; while the two other judges, one 30 of whom (Burton, J. A.) had previously held the Act to be valid, determined that but for a recent

judgment of the Supreme Court of Canada, *Quirt v. The Queen*, 19 Supreme Court Reports, 543, the questioned section was within the power of the Provincial Legislature. The other judge, MacLennan J. A., who then pronounced upon the question, and on the validity of the Act, for the first time, was of opinion that the Act, including section 9, was valid. These opinions and reasons of the said judges are contained in the Record of the Case and Certificate of Judgment.

The appellants, the Government of the Province of Ontario, have appealed to the Judicial Committee of the Privy Council on the grounds—

(a) That the question of the validity of the 9th section should have been answered in the affirmative, and consequently that the whole Act is *intra vires*, and

10 (b) That the judgment of the Supreme Court in *Quirt v. The Queen* is not applicable to the question under consideration, and has not the force and effect attributed to it by the Judges of the Court of Appeal for Ontario. Besides, it is contended that that case was not correctly decided.

#### HISTORY OF THE LEGISLATION IMPUGNED, IN RESPECT OF WHICH THE PRESENT APPEAL IS TAKEN.

In the year 1858, the Parliament of the late Province of Canada, passed 22 Vict. c. 96, section 19, and in the same year, as the Consolidated Statute of Upper Canada, chapter 26, section 18, enacted as follows:—“ 18. If any person being at the time in insolvent circumstances or unable to pay  
20 “ his debts in full, or knowing himself to be on the eve of insolvency, shall make or cause to be  
“ made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects, or deliver  
“ or make over, or cause to be delivered or made over, any bills, bonds, notes, or other securities or  
“ property, with intent to defeat or delay the creditors of such person, or with intent of giving one  
“ or more of the creditors of such person a preference over his other creditors, or over any one or more  
“ of such creditors, every such gift, conveyance, assignment, transfer or delivery, shall be deemed and  
“ taken to be absolutely null and void as against the creditors of such person; provided always that  
“ nothing herein contained shall be held or construed to invalidate or make void any deed of assignment  
“ made and executed by any debtor for the purpose of paying and satisfying, ratably and proportion-  
“ ably, and without preference or priority, all the creditors of such debtor their just debts; and provided  
“ further, that nothing herein contained shall be construed to invalidate or make void any *bona fide* sale  
“ of goods in the ordinary course of trade or calling to innocent purchasers.” *Appendix, pp. 3-4.*

30 By section 129 of the B. N. A. Act, it is enacted “ Except as otherwise provided by this Act, all  
“ laws in force in Canada, Nova Scotia, or New Brunswick, at the Union, and all Courts of Civil and  
“ Criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, admin-  
“ istrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia,  
“ and New Brunswick respectively, as if the Union had not been made; subject, nevertheless (except  
“ with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the  
“ Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered  
“ by the Parliament of Canada, or by the Legislature of the respective Province, according to the  
“ authority of the Parliament or of that Legislature under this Act.”

## SINCE CONFEDERATION.

The Parliament of the Dominion of Canada has not "repealed, abolished, or altered," the said section 19 of the 22 Victoria, chapter 96, nor as re-enacted by the late Province of Canada to form section 18 of the Consolidated Statute of Upper Canada, chapter 26.

In the year 1875, the Parliament of Canada passed "An Act respecting Insolvency," 38 Victoria, chapter 16, which Act, together with several amendments thereto, was wholly repealed in 1880, by 43 Victoria, chapter 1, of Canada.

In 1884—there being no law in force in Ontario relating to preferences by persons in insolvent circumstances, other than the Act of 1858, Consolidated Statute of Upper Canada, chapter 26, section 18, as included in the Revised Statutes of Ontario, 1877, chapter 118, section 2—the Legislature of 10 Ontario, by the 47 Victoria, chapter 10, entitled "An Act for further Improving the Administration of the Law," section 3, enacted as follows:—

"Section 2, chapter 118, of the Revised Statutes of Ontario is hereby amended by inserting before the words "every such gift" in said section the words "whereby such one or more of the creditors of such person would obtain a preference over his other creditors or over any one or more of such creditors." *Appendix, p. 7.*

In the year 1885, there being no legislation by the Parliament of Canada in relation to the distribution of the estates of persons in insolvent circumstances in Ontario, and the provisions of the Codes of Quebec, founded on the Civil Law, affording, as regards that Province, some relief to creditors in obtaining fair distribution of the assets of debtors, the Legislature of Ontario passed the 48 Vict. c. 26, entitled, 20 "An Act respecting Assignments for benefit of Creditors," reciting, "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."

The Legislature of Ontario, by the said Act, 48 Victoria, chapter 26, recast the legislation hereinbefore set forth, and with certain subsequent amendments thereto, contained in the Acts of Ontario, 49 Victoria, chapter 25, and 50 Victoria, chapter 19, consolidated the same as the Revised Statute of Ontario, 1887, chapter 124, "An Act respecting Assignments and Preferences by Insolvent Persons" (*Appendix, pp. 7-14*); which said last Revised Act, as afterwards amended by the following Acts of Ontario: 52 Victoria, chapter 21, 1889 (*Appendix, p. 15*); 53 Victoria, chapter 34, 1890 (*Appendix, p. 30 15*); 54 Victoria, chapter 20, 1891 (*Appendix, p. 16*); 55 Victoria, chapter 25, 1892 (*Appendix, p. 17*), stands as follows:—

2.—(1) Subject to the provisions of the third section of this Act, every gift, conveyance, assignment or 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, with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall, as against the creditor or creditors injured, delayed or prejudiced, be utterly void.

(2) Subject also to the said provisions of the third section of this Act every gift, conveyance, assignment or 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 circumstance, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor, with intent to give such creditor an unjust preference over his other creditors, or over any one or more of them, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

10 (a) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall 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 presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

20 (b) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall, if the debtor, within sixty days after the transaction, makes an assignment for the benefit of his creditors, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure. (54 V. c. 20, s. 1.) *Appendix, p. 16.*

[For interpretation of the word "creditor" in section 2, see 55 V. c. 25, sec. 1. *Appendix, p. 17.*]

3.—(1) Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or to another assignee, resident within the Province of Ontario, with the consent of the creditors as hereinafter provided, for the purpose of paying, ratably and proportionately, and without preference or priority, all the creditors of the debtors their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor; nor to any *bona fide* 30 gift, conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as above-mentioned, which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of goods or other property; provided that the money paid, or the goods or other property sold or delivered, bear a fair and reasonable relative value to the consideration therefor.

40 (a) In case of a valid sale of goods, securities or property, and payment or transfer of the consideration, or part thereof, by the purchaser to a creditor of the vendor, under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made. 48 Vict. c. 26, s. 3 (1); 50 Vict. c. 19, ss. 1, 2.

(2) Every assignment for the general benefit of creditors, which is not void under section 2 of this Act, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act, and shall be subject in other respects to the provisions of this Act until and unless a subsequent assignment is executed in accordance with this Act.

(3) In case a payment has been made which is void under this Act, and any valuable security was given up in consideration of the payment, the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of the return of the payment. 50 Vict. c. 19, s. 3.

50 (4) Nothing herein contained is to affect *The Act respecting Wages*, or to prevent a debtor providing for payment of wages due by him in accordance with the provisions of the said Act. Nor shall anything herein contained affect any payment of money to a creditor, where such creditor, by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any

valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor. Nor shall anything herein contained affect the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors. Nor shall anything herein contained invalidate a security given to a creditor for a pre-existing debt, where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full. 48 Vict. c. 26, s. 3 (2); 49 Vict. c. 25, s. 1; (54 Vict. c. 20, s. 2, Appendix, p. 16.)

(5). The debtor may in the first place, with the consent of a majority of his creditors having claims of \$100 and upwards, computed according to the provisions of section 19, make a general assignment for the benefit of his creditors, to some person other than the sheriff and residing in this Province 48 Vict. c. 26, s. 3 (4); 50 Vict. c. 19, s. 4.

(6). No person other than a permanent and *bona fide* resident of this Province shall have power to act as assignee under an assignment within the provisions of this Act, nor shall any such assignee have power to appoint a deputy or to delegate his duties as assignee to any person who is not a permanent and *bona fide* resident of this Province; and no charge shall be made or recoverable against the assignor or his estate for any services or other expenses of any such assignee, deputy or delegate of any assignee who is not a permanent and *bona fide* resident of this Province as aforesaid. (52 Victoria, c. 21, s. 1). *Appendix, p. 15.*

4. Every assignment made under this Act, for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say—all my personal property which may be seized and sold under execution, and all my real estate, credits and effects; or if it is in the words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure, or sale under execution, subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment. 48 V. c. 26, s. 4.

In the Province of Quebec, under their system of Administration of Justice in Civil Cases, analogous provisions for distribution are in existence, of which some may be noticed as follows:—

“The property of a debtor is the common pledge of his creditors, and where they claim together they share its price ratably, unless there are amongst them legal causes of preference. (Code Civil, s. 1981, A.D. 1866.

Code Civil : Procedure : Article 601, 1866 :—

“The moneys seized or levied, after deducting the duties thereon and taxed costs, may be paid by the sheriff to the seizing creditor, if no opposition for payment has been placed in his hands; otherwise he must return them into Court, to await such judgment as to right shall appertain. Consolidated Statutes, Lower Canada, 1861, c. 83, s. 146, s.s. 2.

Article 603, 1866 :—

“When the moneys are returned into Court, as well as in all other cases where moneys of which an account has been rendered into Court, or moneys other than the proceeds of immovables, are to be distributed, and insolvency of the debtor is alleged, the distribution of the moneys cannot take place until his creditors generally have been called in. Con. Stat.L.C. 1861, c. 83, s. 147, s.s. 3.

Article 724, 1866 :—

“Between the sixth and the twelfth day after the sheriff's return certifying that he has levied moneys, the prothonotary is bound to prepare a scheme of collocation or distribution and to report the same.”

The appellants, the Government of Ontario, assert that the legislation contained in sections 2, 3 and 4 of the Revised Statute (1887), chapter 124, as amended, and as hereinbefore set forth in full

with their amendments introduced, and as such sections and their amendments were in force at the time the question was submitted to the Court of Appeal by the Lieutenant-Governor, are :—

1. Re-enactments, without change of principle, of the original legislation of the late Province of Canada, in 1858.
2. And such re-enactments do not contravene the powers of Provincial legislation under the B. N. A. Act, irrespective of the legislation of 1858.
3. And that the remaining provisions of the said Revised Statute, chapter 124, including section 9, relate to such procedure as is necessary to ensure among creditors the distribution of the assets of debtors unable to pay their debts in full, or in insolvent circumstances, without undue preference being  
10 given by such debtors.

The Government of Ontario is not claiming, nor asserting a jurisdiction which the Government of Canada insists the Province does not possess.

The Governor-General of Canada was not advised by his Government to disallow the said Acts when passed by the Provincial Legislature, as would have been done had the same been deemed *ultra vires*, or if of doubtful validity would have recommended repeal or reconsideration, which was not done. And the Government of Canada at the request of the Government of Ontario, instructed counsel to appear at the hearing of the question referred to the Court of Appeal, by which action by the Government of Canada a decision of the question was more immediately obtained.

The judicial opinion which has been expressed by some Provincial judges adversely to the validity  
20 of this Provincial legislation, proceeds on the ground that such legislation deals with bankruptcy and insolvency as expressed in the 21st enumeration of subjects of section 91 of the B. N. A. Act, and thereby encroaches on powers conferred exclusively upon the Parliament of Canada.

The appellants, the Government of Ontario, dispute this position, and claim that the Provincial legislation in question does not necessarily fall within bankruptcy and insolvency, and until the Parliament of Canada has formulated its polity of Bankruptcy and Insolvency by Statute, the powers of the Provincial Legislature—more especially referring to the 13th enumeration of subjects of the 92nd section of the B. N. A. Act, 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 power conferred upon the Parliament of Canada under the B. N. A. Act.

30 The Government of Ontario claim that under the exclusive powers of Provincial Legislatures, their right to legislate in respect of property and civil rights, and the administration of justice, including procedure in civil matters in the Provincial Courts, and all matters of a merely local or private nature in the Province, cannot be affected by the unexpressed definition of that which, under certain circumstances, the Parliament of Canada might lawfully enact; and that the Provincial legislation cannot be limited upon the hypothesis that stipulations, conditions or provisions affecting a breach of contract or disregard of Provincial legislation ancillary to such contracts, can be affected or

diminished by reason that such provisions, stipulations or conditions on breaches of contracts might be such as the Parliament of Canada might at some future day, in its wisdom, declare as circumstances the existence of which would place such matters within the sphere of bankruptcy and insolvency.

The Legislature of Ontario, in the absence of bankruptcy or insolvency legislation by the Parliament of Canada, in the year 1880, by 43 Vict. c. 10, known as "The Creditors' Relief Act," abolished priority among execution creditors, and by that Act established a system of procedure whereby the sheriff, charged with process of execution, seized under that execution, holding for the benefit of creditors, and distributing, for the benefit of creditors who should claim within a period, ratably. The power and right of the Provincial Legislature to pass this Act has never been questioned in the Provincial Courts.

10

The Act, 43 Vict., c. 10, was re-enacted as the Revised Statute of Ontario, 1887, cap. 65. *Appendix, p. 17.*

The Assignment and Preferences Act, now impugned, carries out the same principle. Its provisions do not apply to an insolvent person only, nor in its application, nor by any other Act of the Legislature in connection therewith, can a debtor obtain a discharge from the obligation of any contract; nor do the provisions of any Provincial legislation require any debtor or person in insolvent circumstances, to make an assignment under the provisions of the impugned Act. The action of the debtor is optional and voluntary.

On the question of the validity of the 9th section of the impugned Act, its effect is, that without such provision an assignee under an assignment made by the debtor for the benefit of all his creditors, 20 could not reach unsold property seized and in the sheriff's hands, remaining in the control of the debtor, subject only to the execution debt. In other words, without such provision, the first execution creditor would secure a priority by the action of the debtor making an assignment, and thus, as it were, creating a preference in favour of such execution creditor over other creditors, and so contrary to the policy of the Ontario Legislature, in so far as it can affect the making of contracts and breaches of such contracts, to secure just and equitable distribution among all creditors, in the absence of any system of bankruptcy or insolvency.

The 9th section, therefore, compels the execution creditor to take ratably in the estate with other creditors.

Against this position the argument is raised that the execution creditor having acquired a right 30 under his execution is deprived of such right in favour of the general body of creditors, and that such legislation savours of bankruptcy or insolvency, or of both.

Such argument overlooks the power of the Provincial Legislature over Property and Civil Rights in the Province.

THE DECISION OF THE SUPREME COURT OF CANADA IN *QUIRT* v. *THE QUEEN*.

(19 Supreme Court Reports, 510. Judgment pronounced 16th November, 1891. *Appendix*, p. 105.)

By the opinions of the Judges of the Court of Appeal given on the question referred by the Lieutenant-Governor of Ontario, and forming part of the Record of this case, it appears that the judgment and decision of the Court of Appeal, answering the question in the negative, was in deference to the judgment of the Supreme Court in the above-mentioned case of *Quirt v. The Queen*.

The appellants herein, the Government of Ontario, dispute the applicability of the said judgment of the Supreme Court of Canada, assuming the said judgment to be well decided.

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