Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Parker v. *Kenny and others, from the Supreme Court of Nova Scotia, in the Dominion of Canada; delivered November 20th*, 1885.

Present:

LORD FITZGERALD.
LORD MONKSWELL.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THEIR Lordships do not think it necessary to hear Counsel for the Respondents (Defendants in Court below).

This is an Appeal from a decision of the Supreme Court of Nova Scotia, dated the 26th April 1884, dismissing the Appellant's appeal and affirming the decision of the Equity Judge on the primary hearing. The character in which the Plaintiff sues is as assignee of one Edward Morrison, an insolvent.

Now the object of bankruptcy and insolvency—"insolvency" is the word used in the Canadian Act, though in fact it would be rather referable to the English notion of bankruptcy—is to prevent any sacrifice of the assets, and to enforce a great principle of equity by securing an equal distribution; and with that view, upon the appointment of an assignee, the law vests in him, as such, all the property, estate, effects, and rights of property, of the insolvent, of whatever nature or kind they may be. But he takes no greater right than the insolvent had, save where some additional right is, by the statute law, given to him or to the creditors,

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to be put in force by him for their benefit. If a contract or dealing has been entered into with a view to defraud creditors generally,—not to injure a particular creditor, but to defraud creditors generally,—the assignee, in his character as such, may institute a proceeding to annul that fraudulent contract or transaction.

A supplemental bill was filed on the 7th July 1879, which stated the title of the Plaintiff and the partnership of the firm of Edward Morrison and Co. under articles of the 1st January 1871, between Morrison and the Defendants, in the Market Wharf concern, of which Morrison had the sole management; the expiration of that partnership by effluxion of time on the 1st January 1873, and the deed called the deed of dissolution of the same date. The bill also contained the various other allegations which are succinctly summed up in the Judgement of the Equity Judge, Mr. Justice James, at page 190 and the following pages of the printed record, to which, for conciseness, their Lordships will refer instead of recapitulating them. The bill specifically alleges that the notes given by Morrison to the Defendants for the capital which they had in the concern were obtained by the Defendants in order to gain an unjust preference and an undue advantage over the other creditors of Morrison. Mr. Eaton admitted, and correctly, that the "other creditors" there alluded to meant the creditors who were such at the time of the expiration of the partnership, and who were also creditors of the Defendants. The Defendants, being members of the firm of Edward Morrison and Co., would have to pay those creditors if Morrison did not. Morrison, in fact, paid them all off subsequently and in due course. Fraudulent preference means some transaction by which a debtor, in contem-

plation of impending insolvency, voluntarily gives to a creditor money, goods, or security, with intent to prefer him to the other creditors. The mere statement of the proposition alone shows its inapplicability to the case before their Lordships.

The supplemental bill further charges a fraudulent conspiracy between Morrison and the Defendants to cheat and defraud the creditors, and contains a very complicated statement of the fraudulent scheme by which Thomas Kenny was to procure a false credit for Morrison so as to enable him to pay off the creditors of the firm, but at the expense of persons who might become creditors of Morrison, but might not become such creditors for many years afterwards. The bill then prayed that an account might be taken of the partnership business, and also of all sums, securities, and property paid to, received by, or deposited with, the Defendants, and all sums received by, or paid to, or for them, or by virtue of the notes and acceptances referred to, and that all the payments made to the Defendants for the purposes aforesaid should be decreed to be fraudulent, and that the Defendants should be decreed to pay and make good the said deficiency and the said losses, and also pay the costs of the suit.

Two views of the case were presented, and first, irrespective of the question of fraud. It may be doubted whether that was permissible; for where the substance of the case made is a case of fraud, upon that case of fraud the parties ought to stand or fall. However, their Lordships heard the argument upon the supposition that Morrison had not become insolvent and was himself the Plaintiff, and that he had now instituted a suit for the purpose of overriding the transactions of 1872 and March 1873, that is to say, the payment out to Defendants of their capital, the deed of dissolution, and the bargain

by which all the property was transferred to him at his own solicitation to enable him to carry on the business and make it, as he alleged he would make it, a successful business, and the transactions of March 1873. In the course of that argument their Lordships pointed out to Mr. Eaton that such a suit could not be maintained; that no fraud or imposition had been practiced upon Morrison; that he had much more information upon the affairs of this concern than Thomas Kenny or either of his partners; that he, Morrison, was the party to account; and that he knew whether the transactions of the firm were likely to result in profit or in loss. It seems to their Lordships to be impossible to come to the conclusion, if Morrison were suing here alone, that he could be relieved from transactions which appear, as between the partners at least, to have been fair and *bonâ fide*, and the result of which was, at Morrison's solicitation, to vest in him all the property, real and personal, the stock-in-trade, the rights, credits, and good-will of this partnership, so as to enable him to take his chance by a continuance of business to make that which had been a paying concern still a paying and profitable concern, for his benefit and for his benefit alone. Their Lordships do not entertain a doubt that if Morrison himself had been Plaintiff here, he never could have been heard in a suit to set aside these transactions of 1872 and 1873 after what had taken place between the partners, and after his own letters written in March 1873. Therefore, the case resolves itself into a question whether the case of fraud had been made out.

Their Lordships desire not to express any opinion as to whether, if the allegations contained in the bill had been proved, the Plaintiff, as assignee of Morrison, would have been entitled to the relief he seeks. They desire further to point

out that where fraud is alleged as the foundation for equitable relief it must be put forward with particularity, and should be established and proved substantially as alleged before that relief is granted. Fraud is never to be presumed. Their Lordships have come to the conclusion that the supposed conspiracy between Morrison and the Defendants, and the most material allegations of subsequent fraudulent acts in pursuance of such conspiracy, have not only not been proved, but have been disproved, and the case for the Plaintiff wholly fails.

The decision at which their Lordships have arrived on these two branches of the case relieves them from the necessity of expressing any opinion upon the technical but substantial question which occupied the time of the Supreme Court of Nova Scotia very much, and which was to some extent the foundation of the decision of the majority of that Court, namely, the question as to the title of the Plaintiff as assignee; but at the same time, [whilst they hold it unnecessary to express any opinion upon it,] they wish to state that nothing that has fallen from them in the course of the present Judgement is to be construed as being adverse to the title of the Plaintiff to sue as assignee.

Their Lordships do not consider it necessary to go into any minute examination of the evidence on either side. It has been fully brought before their Lordships, and in great detail, and moreover a sufficient summary of it is to be found in the printed report of the Judgement of Mr. Justice James.

Their Lordships feel it only necessary to advert to a portion of the Judgement of Mr. Justice Weatherbe, containing some propositions of law which their Lordships would consider not to be well founded unless taken with the qualification which has already been pointed out in the

course of the arguments. For instance, he says he "thinks that a partner cannot withdraw from an "insolvent firm, or one that has been engaged "in adventures which end afterwards in loss." That proposition is not well founded unless it be qualified in this way: that he cannot withdraw so as to get rid of his liability to the existing creditors of the firm. The same may be said of the second proposition:—"That it is "immaterial whether at the time of withdrawal "he is aware of the insolvency." His withdrawal does not affect his liability to the creditors, and he remains liable to the creditors as such, notwithstanding that withdrawal. These propositions were probably taken from some rather loose language used in the case of *Anderson* v. *Maltby*. That case is by no means satisfactory or easy to understand, but in it there was a fraudulent agreement, a fraudulent account, and the withdrawal of a partner and his capital upon the fraudulent agreement and fraudulent account. The same partner afterwards came forward to prove upon the bankrupt estate of his former co-partners, on the footing of that fraudulent agreement and account, and so to interfere with the rights of the creditors, and it was determined that an account should be taken, and the matter investigated, to see whether anything, and what, was really due to him. *Anderson* v. *Maltby* depends on its own special circumstances, and their Lordships say no more about it. The other case that has been referred to, before Vice-Chancellor Malins, their Lordships do not find it necessary to make any observations upon, save to point out that the Vice-Chancellor there determined that the money, which was the money of the firm, had not reached the possession of the outgoing partner, and that the assignees of the bankrupt partner were entitled to interfere and to lay hold of that money,

which had, as a fact, reached their hands as still continuing part of the assets of the firm. It is obvious that the authority of that decision does not affect the present case.

On all these grounds their Lordships are of opinion that the Judgement of Mr. Justice James, the Equity Judge, as originally given in the primary Court, was correct upon the facts and upon the law, and they will therefore humbly advise Her Majesty that this Appeal should be dismissed. The Appellants will pay the costs of the Appeal.