In the Privy Council.

No. 31 of 1896.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

EDISON GENERAL ELECTRIC COMPANY . . . *Appellants*

AND

WESTMINSTER AND VANCOUVER TRAMWAY COMPANY, BANK OF BRITISH COLUMBIA, DAVID OPPENHEIMER AND BENJAMIN DOUGLAS *Respondents.*

CASE FOR THE RESPONDENT

THE BANK OF BRITISH COLUMBIA (hereinafter called "the Respondent Bank").

RESPONDENT'S CASE.

RECORD.

1. This is an Appeal from a judgment or order of the Supreme Court of British Columbia, given on the 30th January 1896, dismissing with costs the appeal of the Appellants from the judgment of the Honourable Mr. Justice Crease at the trial of the action, dismissing with costs the action brought by the Appellants against the Respondents.

2. The Appellants were the Plaintiffs in the action, purporting to sue on behalf of themselves and all other creditors of the Respondents the Westminster and Vancouver Tramway Company (hereinafter called "the Tramway Company"), and by their Amended Statement of Claim they alleged that they had on the 29th December 1893 recovered judgment against the Tramway Company for the sum of $18,470.12 and costs to be taxed, and they had been deprived of the fruits of that judgment by a judgment obtained on the 24th January 1894 by the Respondent Bank against the Tramway Company for $261,217.67 and costs, and that such judgment had been given by the Tramway Company, then in insolvent circumstances, voluntarily and by collusion with the Respondent Bank with intent to defeat and delay the Appellants and to give the Respondent Bank a preference over the Appellants and the other creditors of the Tramway Company, and they claimed (1) that the judgment so obtained by the Respondent Bank should be declared null and void, and the executions issued thereon and the certificates thereof registered as a charge p. 5.

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against the lands of the Tramway Company should be set aside and cancelled, and (2) that the Appellants' judgment should be declared a first charge on the lands of the Tramway Company with consequential relief against all the Respondents.

pp. 6-8. 3. Separate Defences were put in on behalf of the Tramway Company, the Respondent Bank and the Respondents Oppenheimer and Douglas. In effect and so far as material hereto they admitted the two judgments, but denied that the judgment obtained by the Respondent Bank was given voluntarily or collusively and with the intent alleged, and alleged that on the contrary such judgment was given for a debt justly due by the Tramway Company to the Respondent Bank, and under pressure exercised by the Respondent Bank upon the Tramway Company.

p. 123. 4. The action was tried before Mr. Justice Crease without a jury on the 5th, 6th, 7th and 8th December 1894, and by the direction of the learned judge judgment was entered on the 7th March 1895 for the Respondents, the Defendants in the action, and the Appellants were ordered to pay the costs of the Respondent Bank.

p. 124. 5. On the 11th April 1895 notice of appeal to the Supreme Court was given by the Appellants to the Respondents.

6. The Appeal was heard before the Supreme Court on the 15th, 16th and 17th July 1895, and judgment was given on 30th January 1896 in favour of the Respondents, dismissing the Appeal with costs to be paid by the Appellants to the Respondent Bank.

7. The evidence given on behalf of the Appellants at the trial consisted of the proceedings in the two actions above mentioned, viz. the action brought by the Appellants against the Tramway Company and the action brought by the Respondent Bank against the Tramway Company some vivâ voce evidence given by the officers of the Court as to the exact time when judgment was obtained in the action by the Respondent Bank against the Tramway Company, and portions of the depositions of William Murray, the manager of the Respondent Bank at Vancouver, and David Oppenheimer, the president of the Tramway Company. These witnesses had apparently been examined on behalf of the Appellants before the trial.

8. The evidence on behalf of the Respondents consisted of the evidence given vivâ voce of the following witnesses: E. A. Jenns, the Solicitor of the Tramway Company; A. J. McColl, a practising barrister and solicitor and standing counsel for the Tramway Company; E. A. Wyld, manager of the branch bank of the Respondent Bank at New Westminster; W. C. Ward, superintendent of the British Columbia branch; William Murray and David Oppenheimer, the same gentlemen whose depositions had been put in by the Appellants.

9. These gentlemen were the persons who had conducted on behalf of the Tramway Company and the Respondent Bank the various arrangements made and had advised the steps taken in the proceedings. Their evidence was entirely uncontradicted, and the question for the Judge was whether their evidence was to be believed and what were the proper inferences of fact to be drawn from their evidence. The following is a short summary of the admitted facts and of the evidence given.

10. The Tramway Company was a company operating a tramway between the cities of New Westminster and Vancouver in the province of British Columbia, and in the autumn of 1893 they were admittedly in financial difficulties. They were indebted to the Appellants in the sum of about $18,400 for electrical machinery sold to them. They were also indebted to the Respondent Bank on overdraft and current account in a sum of about $261,200. The Respondent Bank had acted as the Tramway Company's bankers ever since the incorporation of the Tramway Company, some three or four years prior to this time, and they held as collateral security for the above-mentioned indebtedness nearly all the debenture bonds of the Tramway Company which had been issued, and these bonds were secured by a trust deed or mortgage covering practically the whole of the Tramway Company's property. It did not appear that there were any other creditors of the Tramway Company.

11. The Tramway Company were at this time attempting through a syndicate a reconstruction, which, if successful, would as they hoped enable them to pay off their debts and put the concern on a good paying basis; but they were entirely at the mercy of the Respondent Bank, who were in a position to take possession as mortgagees, or wind them up, or refuse further advances and thus at once prevent the carrying through of the proposed reconstruction. The Bank were continuously pressing for payment of the overdraft and threatening proceedings, but they did not in fact commence any proceedings until 17th January 1894 under the circumstances hereinafter mentioned. There appears to have been an understanding between the Respondent Bank and the Tramway Company that the Bank should have immediate notice of any proceeding taken by any other creditor of the Tramway Company, so that the Bank might be in a position of obtaining the first judgment. The Bank had insisted upon this as a condition of their continuing to make advances and not taking immediate proceedings.

12. In October and November there were negotiations between the Appellants and the Tramway Company, and the Tramway Company alleged that the Appellants had undertaken not to take any proceedings against them in consideration of the Tramway Company agreeing to abandon a cross claim for damages and paying a sum of $1,625 on account, and this payment was in fact made, but the Appellants denied that they had given any undertaking not to take proceedings.

13. On 27th November, 1893, the Appellants issued a writ against the Tramway Company for the said debt of $18,100, and the Tramway Company alleged that on 30th November 1893 a definite arrangement was made that the Appellants should not sign judgment, and the Bank were informed that this arrangement had been made.

14. On 29th December 1893, the Appellants signed judgment against the Tramway Company for the $18,470.12 and costs for default in delivering defence, in breach as the Tramway Company alleged, of the undertaking which had been given. The Appellants did not then take further proceedings upon their judgment, and the Tramway Company did not become aware of the fact that judgment had been signed until some days later; but afterwards, becoming aware of it, they issued a summons by special leave of

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the Judge on 13th January 1894, to set aside the judgment on the ground, amongst others, that the signing judgment was a breach of faith. The
p. 96. summons was made returnable on the 23rd day of January. The summons concluded as follows : "In the meantime let all proceedings be stayed. By "special leave, GEO. A. WALKEM, J."

15. Up to this point the Respondent Bank had not heard of judgment having been signed by the Appellants, and it was clearly proved by the officers and advisers of the Tramway Company and the Repondent Bank that the summons to set aside the judgment had been issued without the privity or knowledge of any person on behalf of the Bank.

p. 98. 16. On the 17th January 1894, the Bank, having become aware of the judgment obtained by the Appellants, issued a writ against the Tramway Company for $261,217.67, the debt admittedly owing by the Tramway Company to the Bank.

17. The summons of the Tramway Company to set aside the Appellants' judgment was in the Judge's list for hearing on the 24th January at 10.30, and the Bank insisted upon having judgment in their action against the Tramway Company before that summons was heard. There were several interviews between the representatives of the Bank and the Tramway Company before 24th January; the Bank threatening that if the Tramway Company did not consent to judgment they would stop all further advances or payments, take possession as mortgagees, and wind up the Company. The Tramway Company under this pressure was obliged to agree that the Bank should have judgment, and with a view of insuring that this judgment should be signed before the summons was heard, the solicitors of the Tramway Company and the Bank attended at Chambers on the morning of the 24th January, when an appearance was entered for the Tramway Company, and a consent given for an order for judgment under Order 14 of the Rules of the Supreme Court, which corresponds with Order 14 of the Judicature Rules in the English Courts, giving leave to the Bank to sign judgment, and the parties went before the Judge before he heard the summons in the Appellants' action, and the Judge at once made the order accordingly. Judgment was thereupon at once signed by the Bank for the $261,217.67 and costs, and the judgment was registered and execution issued; all this being done before the summons in the Appellants' action was heard.

18. The same morning the summons to set aside the Appellants' judgment was heard by the same judge who had made the consent order in the other action. Affidavits were used on either side, the Tramway Company setting up the agreement which they alleged to have been made and the Appellants denying the agreement. The judge reserved his decision until
p. 97. 27th January, when he made an order dismissing the application of the Tramway Company with costs, declining to find in the conflict of evidence that the agreement had been proved.

19. The Appellants had not taken any step up to the 24th January by way of issuing execution, or by registering their judgment or otherwise, although they undoubtedly could have done so between 29th December 1893 and the 13th January 1894, and probably also between the 13th and 27th January. They issued execution however on the 24th January, but withdrew

the writ, and again issued execution on the 31st January, when they were met by the Bank's mortgage, and the sheriff did not further proceed with the levy and ultimately returned nulla bona. They also registered their judgment on the 31st of January.

pp. 20 to 22. p. 108.

20. The contention of the Appellants was entirely founded upon section 1 of chapter 51 of the British Columbia Consolidated Statutes 1888 which was in the following terms:—

British Columbia Consolidated Statutes 1888, cap. 51, s. 1.

"1. In case any person being at the time in insolvent circumstances or "unable to pay his debts in full or knowing himself to be on the eve of "insolvency voluntarily or by collusion with a creditor or creditors gives a "confession of judgment, cognovit actionem or warrant of attorney to confess "judgment, with intent in giving such confession, cognovit actionem or warrant "of attorney to confess judgment to defeat or delay his creditors wholly or in "part or with intent thereby to give one or more of the creditors of any such "person a preference over his other creditors or over any one or more of such "creditors, every such confession, cognovit actionem or warrant of attorney to "confess judgment shall be deemed and taken to be null and void as against "the creditors of the party giving the same and shall be invalid and ineffectual "to support any judgment or writ of execution";

and they claimed that they had proved that the consent order for judgment was a confession of judgment, that it was given by the Tramway Company by collusion with the Respondent Bank and with intent to defeat or delay their creditors or with intent to give the Respondent Bank a preference over the Appellants, and that consequently the judgment so obtained was null and void.

21. The Respondents contended that the consent order was not a confession of judgment, and that if it was it was not given by the Tramway Company voluntarily or by collusion or with either of the intents alleged, but solely as the result of the pressure which the Bank were in a position to put and put on the Tramway Company and that the action of the Tramway Company was consequent upon this pressure, and was not due to any desire on the part of the Tramway Company to benefit the Bank at the expense of the Appellants or any other of their creditors. They contended that the evidence was all one way as to this, and that the Judge must find in their favour unless he was prepared to disbelieve the whole of the witnesses.

22. The learned Judge, Mr. Justice Crease, in giving judgment dealt exhaustively with the evidence and with the points raised as to the construction of the statute, and he summed up his findings as to the law and facts in the following words:—

"I have gone through all the evidence, the authorities and the arguments "of Counsel with a close analysis and care suited to the importance of the "subject, and the interests involved, and have also had the advantage of "studying the demeanour of the witnesses.

"They were all gentlemen of unquestioned honour and veracity, and "though there was occasional weakness in the evidence of Oppenheimer arising "from a double difficulty, that of not understanding English legal questions "and natural inability to make the idiom in which he gave his answers easily

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"understood by his hearers, he gave his testimony in all material matters in "such a clear and substantial manner as to convince me as a jury that he was "an intelligent witness of the truth.

"It was stated in the argument of Plaintiffs' Counsel that the summons "to set aside judgment and obtain a stay of proceedings was simply a "continuation of a scheme—it was all a scheme got up between all the "Defendants.

"But this is contradicted by the evidence of Ward, Wyld, Jenns, "Oppenheimer and Marshall, who all say positively in positive language that "the pressure was exercised, and the Bank and its officers and solicitors knew "nothing of such a stay of proceedings as was made here until after it had "been made. After such conclusive testimony there is nothing more to "be said.

"After a full and impartial consideration of the facts and law of the "matter, I have come to the following conclusions:—

"1. I find from the evidence that *bonâ fide* pressure was exercised by the "Bank of British Columbia on the Tramway Company, and that the consent of "the Company to the proceedings of the Bank throughout this case was by "reason of that pressure.

"2. I also find that pressure, *bonâ fide* pressure, is a good defence in law "to Section (one) 1, Chapter 51, the Fraudulent Preference Act, B.C. "Consolidated Statutes 1888.

"3. I also find that the proceedings taken by the Bank to secure their "judgment do not constitute a confession of judgment within Section 1, "Chapter 51.

"4. I also find—although it is a branch of my first finding—that the "judgment obtained by the Bank from the debtor was neither collusive, nor "voluntary, nor a fraudulent preference within Section 1, Chapter 51.

"And I give judgment generally in favour of the Defendants, but inasmuch "as I am not clear that the question which has come up in its present shape "is not somewhat new in our B.C. Courts, I reserve the question of costs; so "also the costs of the non-suit which I declared during the trial."

Eventually he ordered that the Appellants should pay the Respondent Bank their costs of defence to be taxed; he made no order as to any other costs.

p. 124. 23. The grounds taken by the Appellants in their notice to appeal were shortly as follows: (1) that the judgment was against the evidence, and against the weight of evidence; (2) that the evidence showed that the judgment was given with intent to give the Bank preference over the Appellant, (3) that the judgment was obtained by collusion, and that the intent to prefer was conclusively shown by the fact of collusion (4) that in order to uphold the transaction it must be shown that the Tramway Company were compelled against their will to enter into the agreement to prefer the Bank, (5) that the onus of proving the pressure was upon the Bank and that they had not discharged such onus, (6) and (7) that the consent order for judgment was a confession of judgment within the section, (8) that the Judge should have set aside the judgment of the Bank on the ground that the consent had not been filed pursuant to s. 137 of the Imperial Statute 12, 13 Vict. c. 106.

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24. In the Supreme Court Davie, C.J., and Drake, J., affirmed the judgment of Crease, J., upon the ground that, although in their opinion the consent and order was a confession of judgment, the result of the evidence was to show that there was neither intent to defeat or delay creditors nor to prefer and that the consent was given, not voluntarily or by collusion, but as the result of pressure, and in the belief that they would be able to reconstruct the Company and to pay all their creditors and in answer to a contention raised by the Appellants that the Bank had committed an actionable wrong by persuading the Tramway Company to break a contract they had made with the Appellants that the Appellants would have the first judgment, they said that such point was not open to the Appellants, that it had not been raised in their pleadings, nor in the Court below; but in the order for judgment it was expressly stated that it was without prejudice to any fresh action that the Appellants might be advised to institute against any of the Respondents, but not so as to raise any cause of action based on the Statute of Elizabeth or the section in question.

p. 137 *et seq.*
p. 145 *et seq.*
pp. 141 and 148.

25. Mr. Justice McCreight differed from the rest of the Court and said that he thought there ought to be a new trial as the case did not seem to have been worked out on the true lines, and evidence had been ruled out which he considered important; but he said he should avoid making further comment as the case might have to be tried again. He did not specify the evidence which he referred to as having been ruled out, and it did not form one of the grounds of the Appellants' appeal that any evidence had been wrongly rejected. The learned Judge then went on to make some further comments upon the evidence, but the grounds of his judgment did not further appear except that he thought that the evidence showed that the Bank had persuaded the Tramway Company to break an agreement they had made with the Appellants to the detriment of the Appellants.

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26. The Respondents the Tramway Company, Messrs. Oppenheimer and Douglas, did not appear upon the hearing of the Appeal, and will not, it is believed, appear upon the hearing of the present Appeal.

The Respondent Bank submit that the judgment of the Supreme Court was right and should be affirmed for the following, amongst other

REASONS:

1. That assuming that the Tramway Company were insolvent, and that the consent order was a confession of judgment, there was no collusion or intent to defeat or delay creditors, or to give the Bank preference over the Appellants within the meaning of Section 1 of the Statute.
2. That the evidence showed that the judgment was a bonâ fide judgment, and that the consent was given not voluntarily but in consequence of the pressure put by the Bank upon the Tramway Company.

3. That the object of the Tramway Company was not to injure the Appellants in any way, but that they consented to giving judgment to the Respondent Bank as the only means of carrying the re-construction through, and so putting themselves into the position to pay all their creditors.
4. That the onus was upon the Appellants to prove one or other of the intents mentioned in the statute; that the learned judge who tried the case and who heard the witnesses give their evidence, and observed their demeanour, declined to find either of such intents; that his findings were confirmed by the majority of the judges of the Supreme Court, and that this Court ought not to interfere with findings which are findings of fact.
5. That the findings of the learned Judge at the trial were abundantly justified by the evidence, and that his findings were not against the weight of evidence.
6. That the Appellants are not entitled to ask for a new trial upon the point not raised by them either by their pleadings or by their arguments before the learned judge who tried the case, or in their notice of appeal.
7. That there was no evidence upon which the Judge at the trial could properly find the Respondent Bank had procured the Tramway Company to break any agreement they had made with the Appellants.
8. That no material evidence was ruled out at the trial, and that the Appellants are not entitled to raise any such contention.
9. That there was no confession of judgment within the meaning of the statute.

R. M. BRAY.

In the Privy Council.

No. 31 of 1896.

On Appeal from the Supreme Court of British Columbia.

BETWEEN

EDISON GENERAL ELECTRIC COMPANY . . . . *Appellants*

AND

WESTMINSTER AND VANCOUVER TRAMWAY COMPANY, BANK OF BRITISH COLUMBIA AND OTHERS . . . . . *Respondents.*

CASE FOR THE RESPONDENT

THE BANK OF BRITISH COLUMBIA.

FRESHFIELDS & WILLIAMS,

Solicitors for the Respondents the Bank of British Columbia.