Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Edison General Electric Company v. *the Westminster and Vancouver Tramway Company, the Bank of British Columbia, and others, from the Supreme Court of British Columbia; delivered* 21*st November* 1896.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The suit in this case was brought by the Appellants in the Supreme Court of British Columbia against the Respondents to have a judgment obtained by the Bank of British Columbia against the Westminster and Vancouver Tramway Company declared null and void and the executions issued thereon and the certificates thereof, registered as a charge against the lands of the Tramway Company, set aside and cancelled.

It was dismissed with costs by the Judge of the Supreme Court before whom it was heard and on appeal by the Plaintiffs to the Full Court the appeal was dismissed with costs. At the hearing of that appeal and also of the present appeal the Bank of British Columbia alone appeared and defended the appeal.

The suit was founded upon Section 1 of c. 51 of the Consolidated Statutes of British Columbia which is as follows:—

"In case any person being at the time in "insolvent circumstances or unable to pay his

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" 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."

It was not disputed that the Tramway Company was insolvent on the 29th of December 1893 and that the Appellants and the Bank were its principal creditors. On that day the Appellants obtained a judgment against the Tramway Company for $18,470. 12 and costs. On the 13th of January 1894 a summons was taken out by the Tramway Company to set aside this judgment with a stay of proceedings till the 24th of January 1894 the return day of the summons. On the 17th of January 1894 the Bank issued a writ of summons against the Tramway Company for $261,217. 67 and costs. On the 24th of January the Tramway Company entered an appearance and before the hearing of the summons to set aside the Appellants' judgment on the application of the solicitors of the Bank with the written consent of the Tramway Company's solicitor judgment was given by the Judge sitting in chambers for the Bank for $261,217. 67 debt and costs. Afterwards on the same day the summons to set aside the Appellants' judgment came on for

hearing in Court before the same Judge and on the 27th he gave judgment dismissing it with costs. On the 31st of January a writ of *fieri facias* on the Appellants' judgment was issued to the Sheriff and a return made of *nulla bona*.

The material facts with regard to the validity of the judgment for the Bank are to be found in the evidence of the Defendant Oppenheimer the President of the Tramway Company, of Mr. William Murray the Manager of the Bank and Mr. E. A. Jenns, the solicitor for the Tramway Company. In his evidence Mr. Jenns said that he was solicitor for the Tramway Company from the middle of 1893 to the then present date; that he first heard of the judgment for the Appellants having been signed on the 5th of January 1894, that about the 20th of January he had a conversation with Mr. Davis (the senior partner of the firm who were solicitors for the Bank) and spoke to him about the Company having decided to allow the Bank to take judgment. Mr. Davis said he would prefer to wait and take judgment by default. Mr. Jenns thought he first heard on the 24th that the judgment was to be by consent, and even on the 24th he understood that the arrangement was that the Bank was not to sign judgment in the event of "the Edison "judgment" being set aside. It had been arranged by him with Mr. Davis on the instructions he got from the Company, that he was to consent to judgment; his instructions were to consent to judgment. As their Lordships are satisfied that there was pressure by the Bank it is not necessary to refer to his evidence on that matter, or to his evidence about the summons to set aside the Appellants' judgment. It was not proved that the Bank or their solicitors in any way caused the summons to be issued. Mr. Murray

the Manager of the Bank at Vancouver in his evidence said that on hearing of the Appellants' judgment he asked Mr. Davis's advice on the subject and then sent for Mr. Oppenheimer and told him that they would have to get in ahead of the Edison judgment, that they must have the first judgment. The arrangements were left with the solicitors. Mr. Oppenheimer said that having received from Mr. Murray and Mr. Ward (the Superintendent of the Vancouver branch of the Bank) the intimation that the Bank insisted upon having judgment prior to the Edison Company he gave instructions to the solicitor to give the Bank first judgment. He was cross-examined at some length as to the reasons for taking out the summons to set aside the judgment. It is not necessary as before observed to refer to this part of his evidence. Mr. Oppenheimer was also asked as to the reason for giving the Bank the first judgment and his evidence as to this may be summed up in one of his answers; he said that the controlling reason was to give the Company time to make financial arrangements. It is apparent to their Lordships on the evidence that the Bank did not intend immediately to enforce the judgment. The object both of the Bank and the Company was to protect the latter against the claim of the Appellants so that an attempt might be made to reconstruct the Company and raise money to meet its liabilities. Mr. Ward in his evidence said that the object of the Bank in trying to obtain priority for their judgment was that they should be able to protect the Company so as, if possible, to carry it on.

If the Appellants' case had only been that there was a fraudulent preference of the Bank, the pressure by the Bank might have been an answer to it; but their Lordships do not see how pressure alone can be an answer to a case

which alleges collusion. The statute is in the alternative. The confession of judgment may be given either voluntarily or by collusion with a creditor. In either case, if there is the intent to defeat or delay creditors or to give a preference over other creditors the confession is made null and void against creditors. In *Gill* v. *The Continental Gas Compang* L. R. 7 Ex. 337 Lord Bramwell said that the word collusion only signified agreement. In their Lordships' opinion "collusion" in this section means agreement or acting in concert. It is plain from the evidence that there was an agreement between the Tramway Company and the Bank the effect of which was that the Bank should have a judgment, and that their judgment should have priority to the Appellants' judgment, the object being, as Mr. Ward said, that the Bank should be in a position to protect the Company, if possible, so as to carry it on. The case comes within the provision in the section. It has been argued for the Respondents that the confession must be fraudulently given. The section does not use that word, but the giving a judgment by confession by a person in insolvent circumstances voluntarily or by collusion with a creditor with intent to defeat or delay his creditors or to give a preference to one of them over the others is treated by the statute as a fraudulent act. Their Lordships approve of the decision of the Court of Appeal for Ontario in *Martin* v. *McAlpine* 8 Ontario Appeals 675.

Their Lordships are of opinion that the statute makes the Bank's judgment null and void as against the creditors of the Tramway Company. They will therefore humbly advise Her Majesty to reverse the decree and order of the Supreme Court on the trial and on the appeal and to declare the judgment of the Bank against the Tramway Company to be null and void and

to order the executions issued thereon and the certificates thereof registered as a charge against the lands of the Company to be set aside and cancelled with costs of the suit, including costs of the appeal to the Supreme Court, but with liberty for the Appellants to apply to the Supreme Court for any consequential relief for the purpose of enforcing their judgment. The Respondents the Bank of British Columbia must pay the costs of this appeal.