

UNIVERSITY OF LONDON  
W.C.1.  
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INSTITUTE OF ADVANCED  
LEGAL STUDIES

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No. 31 of 1896.

In the Privy Council.

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 OPPEN-  
HEIMER, AND BENJAMIN DOUGLAS - - - - *Respondents.*

CASE FOR APPELLANTS.

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RECORD.

1. This is an appeal from the Judgment of the Supreme Court of British Columbia in the Full Court, dated January 30th, 1896, which affirmed the judgment of the Supreme Court of British Columbia (Honourable Mr. Justice Crease), dated February 11th, 1895. R. 150. R. 106.

20 2. The suit was brought by the appellants, who were plaintiffs in the Court below, suing on behalf of themselves and all other creditors of the Westminster and Vancouver Tramway Company, against the respondents, to set aside a judgment obtained by the respondents, the Bank of British Columbia, against the respondents, the Westminster and Vancouver Tramway Company, and the executions issued thereon, and for a declaration that a judgment obtained by the appellants against the said Tramway Company was a first charge on the lands of the said Tramway Company and for consequential relief. The appellants' claim was based on the grounds that the judgment which the Bank obtained against the Tramway Company was null and void under Section 1, c. 51, of the Consolidated Statutes of British Columbia (Fraudulent Preference Act), which is as follows. "In case any person being at the time, in insolvent

[79989]

APPELLANT'S CASE.

RECORD. " 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 10  
 " ineffectual to support any judgment or writ of execution," and also that the  
 said judgment was null and void under 13 Eliz., c. 5.

R. p. 5. 3. The appellants, by their Statement of Claim, stated that they had  
 recovered judgment in the Supreme Court of British Columbia on December  
 29th, 1893, against the respondents, the Tramway Company, for the sum of  
 \$18,470.12 for debt and costs to be taxed, and that on January 8th, 1894,  
 such costs were taxed at \$33.84; that on January 13th, 1894, a summons was  
 obtained by the Tramway Company to set aside the said judgment of the  
 appellants, and that all proceedings on their said judgment were stayed by the  
 said summons; that the said judgment of the Bank against the Tramway Com- 20  
 pany was obtained on an order of a Judge of the Supreme Court of British  
 Columbia on a written consent signed by a solicitor on behalf of the Tramway  
 Company, and the said consent and order were given and made prior to entry  
 of appearance to the said writ of summons on January 17th, 1894; that all  
 documents and proceedings connected with the said judgment were entered on  
 the morning of the day on which the said summons of January 13th, 1894,  
 was disposed of, except the writ of summons on January 17th, 1894; that on  
 January 24th, 1894, a certificate of the judgment of the Bank against the Tram-  
 way Company was registered in the office of the District Registrar of Deeds for  
 the Westminster and Vancouver Land Registry Districts; that on January 31st, 30  
 as soon as the said stay of proceedings was removed, the plaintiffs issued and  
 delivered to the Sheriff of the County of Vancouver and to the Sheriff of  
 the County of Westminster writs of *feri facias* against the goods of the  
 Tramway Company under their said judgment of December 29th, 1893,  
 and the said Sheriffs informed the appellants that the Tramway Company had  
 not in their respective bailiwicks any goods or chattels, whereof they could  
 cause to be made, the amount of the said judgment, or any part thereof, and  
 the said judgment is still in force and wholly unpaid; that on the said January  
 31st, 1894, as soon as the said stay of proceedings was removed, a Certificate  
 of the said judgment of December 29th 1893, was duly registered; that the said 40  
 judgment of the Bank against the Tramway Company, was recovered by collusion  
 with the Tramway Company; that on January 24th, 1894, the Tramway Company,  
 being at the time, in insolvent circumstances, and unable to pay their debts in  
 full, as the Bank well knew, by their Solicitor voluntarily, and by collusion with  
 the Bank at that time a creditor of the Tramway Company, gave a confession of

judgment with intent thereby to defeat and delay the appellants, and with intent thereby to give the bank a preference over the appellants, and the other creditors of the Tramway Company, and by reason of such confession, the Bank, entered their said judgment for \$261,217.67, debt and costs, taxed and allowed at \$32.50, on the said January 24th, 1894, against the Tramway Company; that by reason of such confession of judgment the Bank was enabled to enter their said judgment, and to have particulars of such judgment registered prior to the registration of the appellants' certificates of judgment, whereby the appellants lost the benefit of their said judgment, and have been delayed in realising the amount due thereon; that the respondents, David Oppenheimer and Benjamin Douglas, are registered owners of certain lands, in which they have no beneficial interest, but which they hold in trust for the Tramway Company. The appellants, by their said statement of claim, claimed (1) that the judgment of the Bank against the Tramway Company be declared null and void, and that the executions issued thereon, and the certificates thereof registered as a charge against the lands, of the Tramway Company, be set aside and cancelled; (2) that the plaintiffs' judgment be declared a first charge on the lands of the Tramway Company; (3) that the lands of the said Tramway Company be ordered to be sold, and the proceeds applied in satisfaction of the plaintiff's judgment; (4) that the said David Oppenheimer and Benjamin Douglas be declared to be trustees of the said lands, and that the said lands be ordered to satisfy the appellants' judgment. A copy of the statement of claim will be found on pp. 5-8 of the Record. R. pp. 5-8.

4. The respondents, the Tramway Company, by their defence denied that the said judgment of the Bank was obtained by collusion between the Tramway Company, and the Bank, but that the Tramway Company consented to the said judgment owing to the pressure which the Bank put upon the Tramway Company to satisfy a debt of \$261,217.67, which on January 17th, 1894, and for a long time prior thereto, was due to the Bank. A copy of this Defence will be found on page 8 of the Record. R. p. 8.

5. The Defence of the respondents, the Bank of British Columbia, was to the same effect as the Defence of the Tramway Company. A copy of this Defence will be found on page 9 of the Record. R. p. 9.

6. The respondents, David Oppenheimer and Benjamin Douglas, by their Defence objected that the Statement of Claim disclosed no cause of action against them. A copy of their Defence will be found on page 10 of the Record. R. p. 10.

7. The action was tried on the 5th, 6th, 7th and 8th days of December, 1894, in the Supreme Court of British Columbia, before the Honourable Mr. Justice Crease. The facts admitted or proved at the trial are as follows:—

8. On December 29th, 1893, the appellants obtained judgment for \$18,470.12 against the respondents, the Westminster and Vancouver Tramway Company, for debt, and \$31.84 for costs. A copy of the said judgment will be found on R. p. 95.

## RECORD.

R. pp. 95, 96. pp. 95 and 96 of the Record. As the Tramway Company alleged there was a defect  
 R. pp. 60, in some machinery furnished by the appellants to the Tramway Company  
 61. execution was not immediately issued by the appellants on their said judgment,  
 but the same was delayed pending a settlement of the amount of the credit (if any)  
 to which the Tramway Company might be entitled.

R. pp. 89, 90, 91, 92, 93, 94, 95. 9. The Bank had not commenced any proceedings against the Tramway  
 Company to recover the sum for which the Bank subsequently obtained judgment  
 until after the Bank's advisers had heard of the said judgment which the  
 appellants had obtained against the Tramway Company, nor does it appear that  
 up to that time, any such proceedings were contemplated by the Bank. As soon, 10  
 however, as the manager of the Bank heard of the appellants' said judgment,  
 communications and negotiations were opened up by the Bank with the Tramway  
 Company knowing as he and the Bank did that the Tramway Company was in  
 insolvent circumstances or unable to pay its debts in full with the object of the  
 Bank obtaining judgment against the Tramway Company, by this means gaining  
 priority and preference over the appellants and defeating and delaying the appel-  
 lants, and for this purpose it was arranged between the Bank and the Tramway  
 Company that the Tramway Company would allow the Bank to obtain judgment.  
 In order to attain this object, it was necessary to prevent the appellants from  
 taking any proceedings on their said judgment until the Bank had obtained 20  
 judgment against the Tramway Company and issued execution thereon.

R. pp. 91, 92, 93, 94. 10. On January 13th, 1894, after the said communications and negotiations  
 had taken place between the Bank and the Tramway Company, a summons was  
 taken out by the Tramway Company to set aside the appellants' said judgment,  
 with a stay of all proceedings on the appellants' said judgment, until January  
 23rd, 1894, the return day of the summons. The said summons was issued, and  
 the said stay was granted by the leave of Mr. Justice Walkem. A copy of this  
 summons will be found on p. 96 of the Record. Copies of the affidavits used on  
 the application for the said summons and on the subsequent hearing thereof, will  
 be found on pp. 125-137 of the Record. On January 23rd, 1894, the hearing 30  
 of the said summons was adjourned until January 24th, 1894. The appellants  
 were, therefore, prevented from acting on their said judgment until after the said  
 summons had been heard on January 24th, 1894.

R. pp. 98, 99. 11. On January 17th, 1894, during the above mentioned stay of proceedings,  
 the Bank issued a writ against the Tramway Company for \$261,217.67. A copy  
 will be found on pp. 98 and 99 of the Record.

R. pp. 11, 12. 12. On January 24th, 1894, early in the morning, the Tramway Company  
 entered an appearance to the said writ issued by the Bank as aforesaid, and gave  
 a written consent to an order being made giving the Bank leave to sign judgment  
 for the amount claimed on the writ. A copy of the said appearance and of the 40  
 said consent will be found on p. 100 of the Record. It was at first arranged  
 between the Bank and the Tramway Company that the Tramway Company would  
 allow judgment to go by default, but finding that the summons to set aside the

R. p. 100.

- appellants' judgment would be heard before the expiration of the time for appearance the Tramway Company in order to facilitate the Bank obtaining judgment against the Tramway Company dispensed with the Bank taking out a summons for judgment and consented to judgment as hereinbefore stated. Early on the same day and before the summons to set aside the appellants' judgment was heard, the Bank on the said written consent of the Tramway Company obtained from the Judge in Chambers judgment against the Tramway Company for the sum of \$261,217.67 debt and costs. A copy of the said judgment will be found on pp. 100 and 101 of the Record. This judgment
- 10 was obtained from the learned Judge in Judge's Chambers and not in open Court without the learned Judge being informed that the summons for setting aside the appellants' judgment was then pending, and that there was a stay of all proceedings in the appellants' said judgment until the hearing of the said summons. Immediately after the said Bank had obtained judgment as aforesaid and before the said summons to set aside the appellants' judgment was heard, the Bank entered the documents and proceedings (except the writ) connected with the said judgment in the Registry Office, Vancouver. Early on the same day writs of execution upon the said judgment were placed in the hands of the Sheriffs for the Counties of Vancouver and New Westminster.
13. On January 24th, 1894, the said summons of the Tramway Company to set aside the said judgment of the appellants came on for hearing in the Chambers Court, before Mr. Justice Walkem, when the learned Judge reserved judgment. On January 27th, 1894, the learned Judge delivered judgment, dismissing the Tramway Company's said summons with costs. A copy of Mr. Justice Walkem's judgment will be found on p. 97 of the Record.
14. On January 31st 1894, a writ of *fi fa* was issued to the Sheriffs of Vancouver and New Westminster under the appellants' said judgment of December 29th, 1893, but as the writs of the Bank under the Bank's said judgment were then in the hands of the said Sheriffs, the said Sheriffs made a return of *nulla bona* on the said writs issued by the appellants and the appellants' said judgment remains wholly unsatisfied. By reason therefore of the said Bank having obtained judgment against the Tramway Company under the circumstances hereinbefore mentioned, and by reason of all proceedings under the appellants' said judgment of December 29th, 1893, having been stayed as aforesaid, the appellants have been wholly deprived of the fruits of their said judgment, and the appellants have lost the priority to which they are entitled.
15. It was admitted at the trial of the said action that the sum of \$18,470.12 was due from the said Tramway Company to the appellants, and that the Tramway Company had no defence to the appellants' said claim; it was proved that the said Tramway Company had no means to pay the appellants, and that the said Tramway Company had, from time to time, up to the issue of the writ by the Bank of British Columbia put off the appellants. When the appellants obtained judgment against the said Company, viz., on December 29th, 1893, it was insolvent.

R. pp. 33,  
34, 35, 36,  
37.R. pp. 100,  
101.R. pp. 18,  
19, 36, 37,  
40.

R. p. 33.

R. pp. 11,  
12.

R. p. 20.

R. p. 97.

R. p. 20.

R. pp. 25, 71.

R. pp. 71,  
72, 94, 95.

## RECORD.

16. The Tramway Company, in consenting to judgment in the said action brought by the said Bank of British Columbia, and in taking out the summons to set aside the appellants' said judgment, afforded every facility to the said Bank to defeat, delay and postpone the appellants. The said Bank of British Columbia could not have obtained judgment and issued execution so as to deprive the appellants of the benefit of their judgment, but for the co-operation and assistance of the Tramway Company, which was so rendered to the said Bank as aforesaid.

R. pp. 5-  
106.

17. A print of the pleadings and the evidence which was produced and given at the trial will be found in the Record together with the documents put in at the hearing, at pp. 5-106.

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R. p. 25.

18. At the conclusion of the appellants' case Mr. Justice Crease non-suited the appellants in their claim as against the respondents David Oppenheimer and Benjamin Douglas.

R. pp. 106-  
123.

19. On February 11th, 1895, the Honourable Mr. Justice Crease gave judgment, dismissing the appellants' claim. A copy of the judgment will be found in the Record, pp. 106-123.

R. pp. 124,  
125.

20. From this judgment the appellants appealed to the Supreme Court of British Columbia in the Full Court. A copy of the Notice of Appeal will be found in the Record at pp. 124, 125.

R. pp. 137-  
149.

21. The appeal was heard by the Full Court, composed of the Chief Justice and Justices McCreight and Drake, on the 15th, 16th, and 17th days of July, 1895. After hearing counsel for the appellants and counsel for the respondents the Bank of British Columbia, no one appearing on behalf of the other respondents, the court reserved judgment. On January 30th, 1896, the Court made an order by which it affirmed the judgment appealed from, dismissed the appeal, and condemned the appellants to pay the costs of the respondents, the Bank of British Columbia. The Judgments of the Chief Justice and of Justices McCreight and Drake will be found at pp. 137-149 of the Record.

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22. The learned Chief Justice held that it was clear that the Tramway Company was insolvent when the Bank obtained judgment against the Tramway Company, and that what took place between the Tramway Company and the Bank amounted to confession of judgment, but that the said judgment was given by the Tramway Company under pressure from the Bank and that there was no intention to defeat or delay creditors, or to give a preference to one creditor within 13 Eliz., c. 5, or within Section 1 of c. 51 of the Consolidated Statutes of British Columbia, and that therefore the appellants' action failed.

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Mr. Justice McCreight held that there ought to be a new trial, the parties to be at liberty to amend their pleadings on the ground that the case had not been worked out on the true lines, and that evidence of importance had been improperly excluded. Mr. Justice Drake delivered judgment to the same effect as the Chief Justice.

23. The appellants submit that the judgments are erroneous and ought to be reversed or varied for the following among other

## REASONS.

- 10 (1.) Because the judgment obtained by the Bank against the Tramway Company was obtained by means of an agreement or understanding between the Bank and the Tramway Company that the Tramway Company being as the Bank knew in insolvent circumstances should assist the Bank to obtain a judgment prior to the appellants' judgment, and such judgment so obtained was a confession of judgment given voluntarily and by collusion with the Bank with the intention in giving the same to defeat or delay the appellants and to give the Bank preference over the appellants within the meaning of Section 1 c. 51 of the Consolidated Statutes of British Columbia, and was therefore null and void under that section.
- 20 (2.) Because the Bank could not have obtained the judgment against the Tramway Company in priority to the appellants but for the assistance and co-operation which the Tramway Company rendered to the Bank with the object and result of postponing the appellants' judgment to that of the Bank and of preferring the said Bank to the appellants.
- 30 (3.) Because the Tramway Company being as the Bank knew in insolvent circumstances consented to the Bank obtaining judgment and such consent was not by reason of pressure but was the result of a collusive agreement between the Bank and the Tramway Company within the meaning of Section 1 c. 51 of the Consolidated Statutes of British Columbia.
- (4.) Because the Tramway Company was desirous of preventing or delaying the appellants from realising upon their judgment and by taking out a summons to set aside the appellants' said judgment by getting a stay of all proceedings on such judgment until the hearing of the said summons they prevented the appellants from realising upon their said judgment, and this

was done for the purpose of defeating or delaying the appellants and of enabling the Bank to obtain priority over the appellants.

- (5.) Because the judgment of the Bank of British Columbia is void within 13 Eliz. c. 5.
- (6.) Because the judgments appealed from are erroneous.

EDWARD BLAKE.

JOHN D. CRAWFORD.



In the Privy Council.

ON APPEAL FROM THE SUPREME COURT  
OF BRITISH COLUMBIA.

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BETWEEN

EDISON GENERAL ELECTRIC  
COMPANY - - - *Appellants,*

AND

WESTMINSTER AND VAN-  
COUVER TRAMWAY  
COMPANY, BANK OF  
BRITISH COLUMBIA, AND  
OTHERS - - - *Respondents.*

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CASE FOR APPELLANTS.

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J. CORNELIUS WHEELER,  
*6, New Inn, Strand, W.C.*