

*Privy Council Appeal No. 28 of 1926.*

The Attorney-General of Quebec and the Royal Bank of Canada - *Appellants*

*v.*

Larue and others - - - - - *Respondents*

*and*

The Attorney-General of Canada - - - - - *Intervener*

FROM

THE SUPREME COURT OF CANADA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL DELIVERED THE 19TH JANUARY, 1928.

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*Present at the Hearing :*

THE LORD CHANCELLOR.

LORD BUCKMASTER.

LORD CARSON.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* THE LORD CHANCELLOR.]

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The facts leading up to this litigation are undisputed, and may be very shortly stated. On the 25th March, 1922, the claimant, the Royal Bank of Canada (which will be referred to as "the Bank"), obtained judgment against one Bélanger for \$14,036.44 with interest and costs. On the 6th April, 1922, the Bank caused this judgment to be registered in the Registration Division of Quebec, and at the same time caused to be registered (in accordance with Article 2121 of the Civil Code of Quebec) a notice describing certain real estate of the debtor situate in that Division, so establishing a judicial hypothec upon that property resulting from the judgment. On the 11th April, 1922, the Bank registered a second notice describing other real estate of the debtor situate in the same Division, to be also affected by the judgment and the judicial hypothec thereby created. On the 24th December, 1923—no further steps having in the meantime been taken for enforcing

the judgment and hypothec—Bélanger made an authorised assignment for the benefit of his creditors under the Bankruptcy Act of the Dominion (chapter 36 of 1919), and the respondents, Larue, Trudel and Picher, were shortly afterwards appointed trustees under the assignment. The assignment and appointment were duly registered. The Bank filed a claim with the trustees, asserting a privilege in the nature of a judicial hypothec upon the real estate of the debtor described in the notices of the 6th and 11th April, 1922; but the trustees, on the authority of section 11 (10) of the Bankruptcy Act, rejected the claim of privilege except as regards the costs of the judgment. The Bank appealed against this rejection to the Superior Court of Quebec, which allowed the appeal and declared the Bank entitled to the preference which it claimed; and this decision was affirmed by the Court of King's Bench of Quebec. But, on a further appeal by the trustees to the Supreme Court of Canada, that Court by a majority (consisting of Anglin, C.J., and Duff, Mignault and Newcombe, JJ., Rinfret, J., dissenting) reversed the decision of the Court of King's Bench and confirmed the disallowance by the trustees of the Bank's claim for privilege. The Bank now appeals to His Majesty in Council.

The questions at issue between the parties are two in number, namely (1) whether on the true construction of the Bankruptcy Acts of the Dominion a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under Article 2121 of the Civil Code of Quebec is intended to be postponed to a subsequent authorised assignment by the debtor for the benefit of his creditors, and (2) if on the true construction of the Bankruptcy Acts such a hypothec is intended to be so postponed, whether the Acts are in that respect within the legislative authority of the Dominion Parliament under the British North America Act of 1867. It is only if both these questions are answered in the affirmative that the judgment of the Supreme Court of Canada can stand; and it is convenient to deal with them in the above order.

1. The relevant provisions of section 11 of the Dominion Bankruptcy Act of 1919 as originally enacted were as follows:—

11. (1) "Every receiving order and every authorised assignment made in pursuance of this Act shall take precedence over:

"(a) all attachments of debts by way of garnishment unless the debt involved has been actually paid over to the garnishing creditor or his agent; and

"(b) all other attachments, executions or other process against property, except such thereof, as have been completely executed by payment to the execution or other creditor; but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property; Provided that this paragraph shall not apply to any execution or other process issued against real or immovable property under or by virtue of a judgment registered prior to the coming into operation of this Act, which judgment, as the result of such registration, became, under the laws of the

Province wherein it was entered, a charge, lien or hypothec upon or of such real or immovable property."

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(8) "Every receiving order and every authorised assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate."

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(10) "From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office, or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments."

The coming into force of the above Act had been postponed to the 1st July, 1920, and before it came into force it was amended by chapter 34 of the statutes of that year. By section 6 of the last-mentioned statute the proviso to paragraph (b) of section 11 (1), which excepted from the application of that paragraph judgments registered prior to the coming into operation of the Act, was repealed, and all judgments whether registered before or after the 1st July, 1920, were left to be governed by the general rule. Further, by section 7 of the same Act of 1920 it was enacted as follows:—

"7. Section 11 of the said Act is hereby amended by adding thereto the following sub-section:—

(16) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the Provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a charge, lien or hypothec upon such real or immovable property."

In 1925, this sub-section (16) was amended so as to include judgments registered against real estate in the Province of Quebec prior to the coming into force of the Bankruptcy Act, and this was done by 15-16 George V, chapter 31, section 5, which reads as follows:—

"5. Sub-section (16) of section 11 of the said Act as that sub-section is enacted by section 7 of the chapter 34 of the Statutes of 1920, is hereby repealed and the following is substituted therefor:—

(16) The provisions of sub-sections (1) and (10) of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in any of the provinces of Nova Scotia, New Brunswick or Quebec, prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a lien or hypothec upon such real or immovable property."

Upon a review of these enactments their Lordships are of opinion that they have been correctly interpreted by the Supreme Court as having the effect of postponing a judicial hypothec upon real estate of the debtor to an authorised assignment by the debtor for the benefit of his creditors. Sub-section (1) of section 11 of the Act of 1919 gives to an authorised assignment precedence over all executions against property not completed by payment to the execution creditor; and sub-section (10) carries the process a step further by giving to such an assignment, when duly registered in any district, precedence over all "certificates of judgment, judgments operating as hypothecs, executions and attachments against lands (except such thereof as have been completely executed by payment)" within the district. It was stated by the learned Judges of the Quebec Courts that the words "certificates of judgment, judgments operating as hypothecs" were unknown in the jurisprudence of that Province, and their Lordships of course accept that statement as showing that the precise phrase used in the statute is new to Quebec; but the Quebec Civil Code speaks (in Article 2020) of a judicial hypothec as "resulting from" a judgment and (in Article 2121) of a judgment as "conferring" a hypothec when registered, and the expression "judgments operating as hypothecs" is a not inapt paraphrase of this language. The view taken by Lemieux, C.J., in the Superior Court that the intention of sub-section (10) was only to transfer to the trustee of the assignment the power of realising the property affected by the hypothec, leaving to the hypothecary creditor an effective charge on the proceeds of realisation, does not appear to their Lordships to give full effect to the enactment in sub-section (10) that the assignment is to have precedence over the judgment operating as a hypothec; and their Lordships agree with the opinion of Newcombe, J. (who gave the reasons for the judgment of the majority of the Supreme Court), that the intention of these enactments was that the assignment should have precedence of all judgments operating as hypothecs for all purposes, including the distribution as well as the realisation of the assets. The suggestion, put forward by counsel for the appellants on this appeal, that the sub-section was intended to give the assignment precedence over the judgment only and not over the hypothec following upon the judgment, appears to their Lordships to have no substance; for if a judgment operating as a hypothec is postponed to the assignment, the hypothec which it operates must surely undergo the same process.

This conclusion, which their Lordships would have been disposed to adopt on a reading of the earlier part of section 11 (10) taken by itself, is confirmed by a consideration of the latter part of that sub-section, which reserves to a judgment creditor who has duly registered his judgment a lien on the land for his costs of registration and sheriff's fees; for if the intention of the Legislature had been to leave to the hypothecary creditor his full

charge on the land subject to the hypothec, it would have been unnecessary to preserve his lien for costs. Further, section 7 (16) of the Act of 1920, which excepted from section 11 (10) of the Act of 1919 any judgment registered against real property in Nova Scotia or New Brunswick before the coming into force of that Act which became under the law of the Province a charge, lien or hypothec against such property, carries a plain implication that such a judgment if registered after the coming into force of the Act of 1919 is intended to be affected by section 11 (10) of the Act. The Act of 1925 above cited was passed after the present dispute arose; but section 5 of that Act, which extends the operation of section 7 of the Act of 1920 to Quebec, shows plainly that the Dominion Legislature in 1925 interpreted the Act of 1919 as applying to that Province in the same sense.

For these reasons, which agree in substance with those given by Newcombe, J., on behalf of the majority of the Supreme Court, their Lordships are of opinion that the first of the two questions above set out should be answered in the affirmative.

2. Their Lordships now turn to the second question arising on this appeal, namely whether the enactment of section 11 (10) of the Bankruptcy Act of 1919, as above construed, was within the powers conferred upon the Dominion Parliament by section 91 of the British North America Act, which entrusts to that Parliament exclusive legislative authority over all matters coming within certain classes of subject there enumerated, including "bankruptcy and insolvency," or whether it infringes upon the exclusive power given by section 92 of the same Act to a provincial Legislature to make laws in respect of "property and civil rights" in the Province.

The expression "bankruptcy and insolvency" in paragraph 21 of section 91 of the British North America Act was referred to by Lord Selborne in *L'Union St. Jacques de Montréal v. Bélisle* (1874, L.R. 6 P.C. 31) as "describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent according to the rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation and the effect of its operation." In *The Attorney-General of Ontario v. The Attorney-General for the Dominion of Canada* (L.R. 1894, A.C. 189), Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial Legislature would doubtless be then precluded from interfering with this legislation

inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of paragraph (21) of section 91 of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorised assignment. A creditor who has obtained judgment for his debt and has issued execution upon the debtor's lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor, although (as Newcombe, J., expressed it) he has been "first in the race for execution" but has not yet proceeded upon his execution and become satisfied by payment, shall on the occurrence of bankruptcy or a *cessio bonorum* be reduced to an equality with the general body of creditors. Then is there anything in the nature of a judicial hypothec in the Province of Quebec which exempts it from the possibility of being affected in like manner by the bankruptcy law of the Dominion? In their Lordships' opinion there is nothing in the Quebec law which can have that effect. It is true that judicial hypothec is classed in the Civil Code with legal and conventional hypothecs and is there said to establish a real right; but notwithstanding these provisions the hypothecary creditor remains a judgment creditor, and his hypothec, whether it may or may not be properly called a mode of execution, is at all events closely analogous to that process. Indeed their Lordships were informed that Article 614 of the Code of Civil Procedure of Quebec has been held to require such a creditor to cause the movable goods of the debtor to be realised under the judgment before he can enforce his hypothec against the land. There is nothing therefore in the nature of a judicial hypothec which for the purpose now in question distinguishes it from an execution levied upon land, and Lord Herschell's judgment above cited shows clearly that such an execution may lawfully be postponed by Dominion Act.

The contention that the enactment of section 11 (10) of the Bankruptcy Act infringes the authority of the provincial legislature to deal with property and civil rights is effectively dealt with by Newcombe, J. No doubt it was within the competence of the provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of section 91 of the Act of 1867, then the Dominion statute prevails over the provincial legislation and takes effect according to its tenor. The decisions of this Board relating to what is sometimes called the "unoccupied field" are referred to in the judgment of Newcombe, J., and conclusively establish this point.

The thesis that a postponement or annulment of the rights of creditors who under a provincial law have obtained preferential rights is within the domain of bankruptcy legislation receives support by reference to a series of provincial statutes to which Mr. St. Laurent in an able argument called their Lordships' attention. The Assignments and Preferences Act of Ontario (R.S.O. 1914, c. 134) enacted (by section 14) that an assignment for the general benefit of creditors under that Act should take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution, subject to a lien for the execution creditor's costs. Similar provisions were contained in the Assignments Act of Manitoba (R.S.M. 1913, c. 12, section 8), the Assignments Act of Saskatchewan (R.S.S. 1909, c. 142, section 9), the Creditors' Trust Deeds Act of British Columbia (R.S.B.C. 1911, c. 13, section 14), the Act of New Brunswick respecting Assignments and Preferences by Insolvent Persons (R.S.N.B. 1903, c. 141, section 9), and (except as to lands) the Assignments Act of Nova Scotia (R.S.N.S. 1923, c. 200, section 46). In all these cases the provincial Legislatures when dealing with assignments by insolvents included in their legislation provisions postponing an execution to the general right of an assignee for the benefit of creditors; and it would be difficult to reconcile the course so taken by those Legislatures with the contention that such a postponement is not within the domain of bankruptcy law. It may be added that, since the "unoccupied field" where such priorities are regulated has been occupied by the bankruptcy Acts of the Dominion, most of these provincial enactments have been repealed.

In the result their Lordships find themselves in agreement upon both questions with the reasoning and conclusions of the majority of the Supreme Court of Canada, and they will humbly advise His Majesty that this appeal fails and should be dismissed. The appellants will pay the costs of the respondent trustees.

In the Privy Council.

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THE ATTORNEY-GENERAL OF QUEBEC AND  
THE ROYAL BANK OF CANADA

*v.*

LARUE AND OTHERS

*and*

THE ATTORNEY-GENERAL OF CANADA.

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DELIVERED BY THE LORD CHANCELLOR.

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