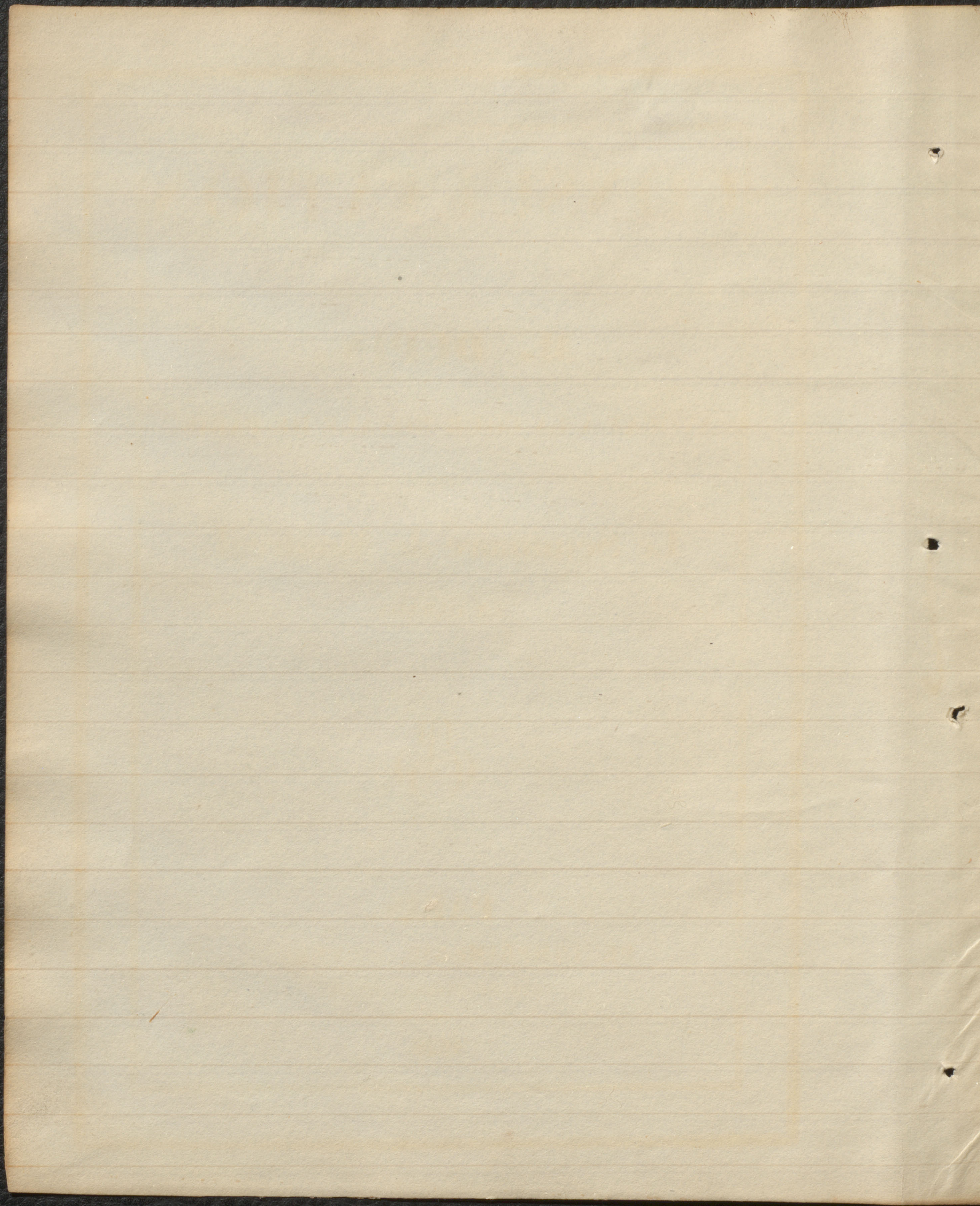
McGillivray Case

1826



Case

The Deed of Assignment executed in ~~England~~ February last by Simon McGillivray of the Estate belonging to himself and to his late Brother The Honorable William McGillivray, to Trustees for the benefit of their Creditors, sets forth - That Messrs William and Simon McGillivray were respectively holders to a large, and therein stated, amount of Hudson's Bay Stock. Part of which Stock is set off in the Schedules annexed to the Assignment to pay certain debts in full, and the remainder is thereby assigned, to the Trustees for the benefit of the other Creditors of the firms of McTavish McGillivrays & Co and McGillivrays Thain & Co.

Upon Mr. Simon McGillivray's return to England from Canada in April last he found that a considerable part of the reserved Hudson's Bay Stock had been appropriated, after the execution

of the deed of Assignment, by Mr. Fraser and Mr. Ellice his Attornies by procuration and during his Absence, and what remained of it he transferred to two of his Creditors who by the Assignment were to be paid in full -

It is presumed that the Attornies of Mr. Simon McGillivray, Mr. Fraser and Mr. Ellice, at the time they so appropriated the Hudson's Bay Stock did Know of the Assignment by Mr. Simon McGillivray and it is also presumed that no notice of the assignment was given in the London Gazette -

The President and Directors of the Bank of Montreal require to Know if the said Appropriation of the Hudson's Bay Stock made by the Agents of Mr. Simon McGillivray during his absence from England is legal and valid and therein that the opinion of Counsel be taken on the following questions -

1st What is the effect of the Assignment

in Canada as being or not being an Act of Bankruptcy in England? –
2nd – What is the effect of the Assignment as vesting or not vesting a legal title to the said Hudson's Bay Stock in the Trustees for the general benefit of the Creditors?
3rd. In the supposition that the Assignment is not an Act of Bankruptcy – what in that case is the legal effect of the Act of the Agents of Mr Simon Mc-Gillivray in the appropriation of the Hudson's Bay Stock as regards the persons receiving the same in case they had, as is presumed, a Knowledge of the Assignment in Canada? –
4th. What is the effect of the appropriation by the agents in case they did not know of the Assignment and acted with good faith? –
5 – What is the effect of the Appropriation and transfers to persons for a valuable consideration, who were without knowledge

of the Assignment or Insolvency of Messrs
William and Simon McGillivray?
6 What is the effect of the appropriations
and transfers to Creditors of Messrs W. and
Simon McGillivray, or of the several
Copartnerships to which they were parties
who were or were not acquainted with
the Assignment having been made
or of the Insolvency of those Gentlemen?
Legal answers to the following additional
queries are also required.
7th If the transfers of Hudson's Bay Stock
made by Mr. Simon McGillivray after
his return to England to the persons
designated in the Schedules are legal
and valid? -
8th If it would be in the power of the
Creditors who have not accepted and
ratified the Assignment of Mr. Simon
McGillivray to cause the proceeds of
the whole of the Hudson's Bay Stock to
be returned to the Mass of the Estates of
Mr. Simon McGillivray and if so by

what course of proceedings is that object to be effected? —

Opinion

First. On the effect of the Assignment in Canada as being or not being an Act of Bankruptcy in England.

We enter on the discussion of this question with diffidence, having learnt that by the opinion of one or more eminent Counsel in England, (which we have not however had the advantage of perusing) the Assignment made in Lower Canada cannot be construed to be an Act of Bankruptcy in England; but it is our opinion which is called for, and we proceed to the performance of our duty - if wrong that we may be the more easily set right. in compliance with the wish of the Board communicated to us, to know the legal grounds of our decision, we not only readily, but, without that, would preferably, give the authorities on which we think

ourselves founded.

We suppose that the opinion of Counsel in England must be founded in part on the law of the case of Inglis and others Assignees of Campbell a Bankrupt, against Grant, decided in the year 1794, of which we give an Extract from the Report -

The Action was for monies had and received. The Plaintiffs were Assignees under a Commission of Bankrupt against Campbell, who long before the 14 September 1782, and from thence to his coming to England in the latter end of 1783, or beginning of 1784) was resident in Calcutta in the East Indies, at which place he and one Anderson were before and after the said 14th day of September, and until Andersons death, Copartners in trade and Brokers, Merchants, and Insurance brokers there.

The Defendant was a trustee under certain Deeds dated respectively at Calcutta on the said 14th day of September

1782 and 1st January 1783, and executed respectively by the Defendant, and some of the sole creditors of Campbell the Bankrupt, and some of the joint Creditors of Campbell and Anderson in India, and by Campbell himself after Anderson's death at Calcutta; and by some of the Creditors in England. The Deed of 14th September 1782 was a partial Assignment of Campbell's right to certain Bills of Exchange drawn by one Chevallier and others in trust to pay the debts of certain creditors in the order therein mentioned

In the other deed of 1st January 1783 there was a recital among other things that from the year 1774 to 1777 Campbell and Anderson at several times borrowed on their joint accounts of several persons residing in Bengal sums of money to a large amount, for the purpose of repaying part in England at a certain rate of Exchange, and executed bonds for the performance

of the Agreement, and also drew Bills on Messrs Mayne & Co, Bankers in England at the rate of Exchange agreed on - and that to enable the said Bankers to pay the said Bills Campbell and Anderson indorsed and transmitted to them certain French Bills payable in London which were dishonoured &c &c And after stating the different sets of Creditors, and the manner in which their respective debts were to be discharged, Campbell assigned all his Estate and effects to the Defendant in trust for all his Creditors as well in England as in India.

On the 3d of July 1784, after Campbell's arrival in England, a Commission of Bankrupt issued against him on the Petition of a Creditor on a bond made and dated in Calcutta, and the Act of Bankruptcy on which the Commissioners proceeded was a denial to this Creditor on the 18th June 1784 at a house in London where Campbell then lodged - It is then stated that certain

sums of money of Campbell's Estate and effects had been received by the Defendant under the trust Deeds in India and in England, and that Campbell was still indebted to them in certain considerable sums. The question submitted to the Court was whether the Plaintiffs were entitled to recover the whole or any part of the sums which were proved to have come to the hands of the Defendant under the Trust Deeds

When the case was first mentioned to the Court, several questions were stated as being likely to arise out of it. 1st Whether there was a sufficient trading in this case within the meaning of the Bankrupt laws whereon to found a commission of Bankrupt and support the right of the Plaintiffs to sue: on which the Court said there could be no doubt and the point was conceded by the Defendants Counsel. 2ly - Whether the Deeds of the 14th September and the 1st of January

did not of themselves amount to acts of Bankruptcy, being Assignments of all the Bankrupt's effects to certain Creditors for the purpose of a peculiar distribution by which certain Creditors were favoured more than others? Upon this point also the Court said that no argument could be maintained, inasmuch as the Deed having been executed in India could not be considered as an act of Bankruptcy –

The Plaintiff's counsel thereupon confined himself to the remaining points and argued 3rdly – That the Deeds though not amounting to an act of Bankruptcy were fraudulent and void as against the Creditors, and that the money received by the Defendant under them might be recovered by the Assignees, and applied to the general mass of Creditors under the Commission – that the Bankrupt clearly intended to prefer one set of Creditors to another &c &c

Lord Kenyon Chief Justice

said on rendering Judgment - This case is too clear for further discussion - The facts are that Campbell before any act of Bankruptcy in England, and during his residence in India con=veyed all his property in trust for all his Creditors according to the several proportions agreed upon by all par=ties there - the transaction was per=fectly fair at the time, and without any fraudulent intention, and Campbell acted honestly in executing the deeds. It is therefore too much to con=tend that a Commission of Bankrupt which issued subsequently upon an act of Bankruptcy committed after he came to England can have a retros=pect, or overhaul an act done fairly and honestly at the time by Campbell who was not then in a situation in which the Bankrupt laws of this country could have operation either upon him or upon his property.

Now if there be no distinction between this case and that of Mr. Simon McGillivray and as in 1824 the decision of ~~Lord~~ Kenyon remained unattacked by other decisions as we are led to believe from a publication in that year, and the new Bankrupt act had not been passed, the Answer to the first question would necessarily be in the negative, that the Assignment in Canada was not an Act of Bankruptcy in England; but to us it appears that there are manifest distinctions in law and fact between the two cases.

One very material for consideration as regards the law is, that the Assignment was made under the old bankrupt laws, by which provision was made only ~~under~~ against fraudulent conveyances whereas the new Bankrupt act, as we shall presently shew, embraces all general Assignments made by merchants and traders if not clothed with certain formalities.

That in point of fact Mr Simon Mc

McGillivray was a London Merchant aswell as being a partner in a com=-mercial house in Canada trading with England - that his residence was in England and the largest part of his property there also, and when he made the Assignment he was on a visit to Canada.

One of the reasons for the Judgment in the case cited, given by Lord Kenyon was that at the time Campbell made his Assignment, he was in a situation that the Bankrupt laws of England could not have any operation upon his person, or upon his property -

We have not seen the new Bankrupt Act 6th George IV, cap. 16 - but we have had abstracts of it - from which we make some extracts -

"Acts of Bankrupcy described in the following sections"

Sect. 3rd - Departing the realms, remaining abroad, departing the dwelling house

or otherwise absenting himself" &c &c

But not

" Sect 4th. "Trust conveyance of all his
"property for the benefit of Creditors, unless
"a Commission issue within six Months
"Provided - 1st. That the Deed be executed
"by Trustees within fifteen days after the
"execution by the Trader - and 2d. That
"notice be given in the London Gazette
"and in Certain Newspapers"

Taking this abstract to be the complete sense of the section - the first observation is the latitude of the expression made use of -

Reeves law of Shipping pp. 265 - 266

"In expounding Acts of Parliament
"when words are express plain and
"clear they ought to be understood ac-
-cording to their genuine and natural
"signification, unless by such exposition
"a contradiction or inconsistency
"would arise from whence it might
"be inferred the intent of the Act was
"otherwise"

Bacons. Abridg. vol. 4. p. 645	"A Statute ought upon the whole to be
Showers Repts.	"so construed, that if it can be prevented
108	"no clause sentence or word shall be
	"superfluous, void, or insignificant"
3 Cokes Repts	"For the true interpretation of Statutes
p. 7 –	"certain things are to be considered" &c
	among them "What was the mischief
	"or defect not provided for by the Common
	"law" and "the reason of the remedy" or as
1st Blacks. Comm.	Blackstone says "there are three things
p. 87 –	"to be considered, the old law – the mischief
	"and the remedy – and when the signi-
	"fication of a Statute is manifest, no
Ib. p. 90	"authority less than that of parliament
	"can restrain its operation"

Now the terms of the Statute as they appear from the abstracts are express plain and clear – read it thus – A Trust conveyance of all his (the debtors) property for the benefit of creditors (unless a commission issue within six months shall not be an act of Bankruptcy – provided 1st That the Deed be executed by Trustees

"within fifteen days after execution by
"the trader and 2^{ly}. That notice be given
"in the London Gazette and in certain
"newspapers"
whereas by the wording of the old
bankrupt laws to make an act of Bank-
-ruptcy, the conveyances by the Bankrupt
must have been in all cases fraudulent
The Legislature in 1825 thought this a
defect in the law, and the Statute makes
trust conveyances of all the property
of the Assignor without the performances
of certain requirements acts of Bankruptcy
and one requirement enacted by proviso
is that the Assignment shall be published
in the London Gazette and certain other
newspapers. It is true however as
Justice Gross said in the case of Tappenden
and others, Assignees &c. against Burgess
decided in the Kings Bench - The Bank-
-rupts themselves had done an act to divest
them of all their property which by all
the cases is an act of Bankruptcy"

4. East. Rep^{ts}
p. 230 - to 237
Hammonds Digest
Vol. 1. p. 115.

And in that case were cited three cases
Harman vs Fisher - Cowper's Reports 125 -
Bamford vs Baron - 2 Term Reports 594
in the note - and Eckhardht vs Wilson
8 Term Repts. 140 - establishing that
principle - but that principle of
decision was denied in Chancery in
the case of Hassel and another assignees
of Jackson a bankrupt against Simpson
Hence another ground for the inter=
=ference of the Legislature -

Browns Chancery Repts. p. 99 -

The reason of the remedy is to
give publicity to the fact, and provide
that no act of the debtor shall prevent
the equal distribution of his Estate
among all his Creditors

It may be objected that Mr. Simon
McGillivray's assignment was made
by him as one of the Copartners of the
firms of McTavish McGillivrays & Co
and McGillivrays Thain & Co. who carried
on business in Lower Canada and
that the act of Bankruptcy ought to be

local i.e. in England - but it must be admitted that those Copartnerships traded to England - that Mr Simon McGillivray's residence was in England and that the greater part of his Estate was there - Many decisions put it out of question that Merchants trading from a foreign country to England may be bankrupts

"A Gentleman of the Temple went "from thence to Lisbon where he turned "factor and traded to England and broke "It was insisted upon that the Statutes of "Bankrupts did not extend to persons out of "the realm - but the court held him a Bank-"rupt, by reason of his trading thither "and back again which gained him credit "here"

Bacon's Abridgt - Tit Bankrupts Vol 1. p. Salkeld's Rep. p. 110 - cites Ld Raymd. Rep. p. 375 - 2 Jones Rep. p.p. 141-2 - Vernon's Rep p. 161 -

"A man buys in England and "sells in Ireland - he may be Bankrupt, "for many merchants buy beyond sea and "sell in England only and others buy here "and sell beyond sea, for it is trading that

"makes a man capable of being a Bankrupt"

Further on the point of a person trading to England being subject to the Bankrupt laws and also on that of a ~~man~~ the Act of Bankruptcy being local in England which last we admit was necessary under the old Statutes - we will refer to the case of Alexander agt. Vaughan decided before Lord Mansfield in 1776

Hammond Dig. Vol. 1 - p. 112 - Cowp. 398.

Lord Mansfield in reporting the case from Nisi Prius on Motion for a new trial stated the Question to be - Whether by the English Statutes against Bankrupts a person to come within the meaning and description of a trader there named must not be a resident trader - that is - Whether as the Act of Bankruptcy must be local in England, the trading should not be so likewise, or whether a person coming occasionally to England is liable to the English laws against Bankrupts

And on rendering Judgment his Lordship referring to the decisions

herein before cited, said "I think we are
"bound by authorities on this subject —
"The first goes a great way — The Court there
"says, 'though it be found that the bankrupt
"bought and sold but once in England,
"it is not necessary that he should do so
"for many merchants do only buy beyond
"sea and sell here, it is trading that makes
"a man capable of being a bankrupt.'
"The case of Sedgwick vs Bird is much
"stronger, because the bankrupt in that
"case never did any act of trade in
"England — But the most material au-
"thority of all is the case ex parte Smith
"in 1737 upon the Bankruptcy of One
"Ashby who was never resident in England
"and who came over on purpose to get
"the Commission taken out against him"

That there has been a sufficient
trading by Mr. Simon McGillivray to
become a Bankrupt either jointly with
his partners or alone will not be
denied — We have said that under

the old Bankrupt laws the Act of Bank-
-ruptcy must be local in England - but
under them no provision was made
for rendering a conveyance of all the
Debtor's Estate an act of Bankruptcy
in the manner enacted by the New
Bankrupt Act - which says in terms
express plain and clear - that persons
making trust conveyances of all
their effects without giving notice
in the London Gazette commits an act
of Bankruptcy - this must apply to
every person, subject or foreigner, a-
-menable to the Bankrupt laws, for its
conveyance is to deprive at once the
Debtor of all his Estate - and can it
matter in the interpretation of the Statute
whether an English Merchant resident
in England and trading in and to En-
-gland as Mr. Simon McGillivray did
should make an assignment in trust in
that country, or whether he goes from
England to another and makes there

the conveyance which is to deprive him of all his Estate and property?

Will not the mischief contemplated by the law be as great to his Creditors in England and else where in the world as if the conveyance had been made in England? and does not the enactment of the new statute thus unequivocally form an exception to the decisions given under the old Bankrupt laws on the necessity of the act of Bankruptcy being local in England?

We will say nothing of a house in London, of which at least Mr. Simon McGillivray was a Copartner, for we are ignorant of its connection with the Canadian firms.

But it is said that a Commission of Bankruptcy did not issue in Six months after the execution of the Assignment, and the Deed was executed by the Trustees within the fifteen days - on the other hand no notice of

the Deed of Assignment was given in the London Gazette and other Newspapers and without the performance of this last requirement the Statute makes the Assignment an Act of Bankruptcy –

It also seems that the Assignment in Question is one of which the greatest publicity should have been given, as it assumes to dispose of the Estates in part by payments in preference to some Creditors –

Should it be said that it is in Chancery that this question is to be determined, which would decide the Assignment not to be an act of Bankruptcy. In answer – we have to say that equity will not give relief against a provision by act of Parliament in general cases, though if a new Act of Parliament is made to alter the law, and the Judges are formal in adhering to rules of law and will not construe according to the words and intentions

Cases in Chan. 227. cited in Com. Digest. vol. 2 p. 475

Basset v Basset 1744 – 3 Atkyns 203

of the Act, equity will give a remedy.

But the usual method of deciding the question of Bankruptcy is by trial in a common law court —

Bacon's Abridg. vol. 1 - p. 249 Tit. Bankrupt

Bacon says "Upon these Statutes "which describe a Bankrupt, there have "been several resolutions especially in "the Common law Courts - the Judges "being the proper expositors of all "Acts of Parliament - And therefore "the usual method when bankruptcy "is denied is for my Lord Chancellor "to order it to be tried in a Common law "Court on an issue Bankrupt or No".

There is indeed no difference in the manner of interpreting the laws in the Courts of Common law and those of Equity - Sir William Blackstone speaking of Courts of Equity says "Equity in its "true and genuine meaning is the "soul and spirit of all law - positive "law is construed and rational law is "made by it - But the very terms of a

3 Blackstone's Comt. p. 429

"Court of Equity and a Court of law
"as contrasted to each other are apt to
"confound and mislead us; as if the
"one judged without equity, and the
"other was not bound by any law—
"whereas every definition or illustration
"to be met with which now draws a
"line between the two jurisdictions, by
"setting law and equity in opposition
"to each other will be found either totally
"erroneous or erroneous to a certain
"degree".

It. Ib
p. 431

"Each (court) endeavours to fix
"and adopt the true sense of the law in
"question neither can enlarge dimi=
"=nish or alter that sense in a single
"tittle"

Ib. Ib. 433

"The System of Jurisprudence
"in our Courts, both law and equity
"are now artificial systems founded
"on the same principles of justice and
"positive law"

It. Ib. 434

The rules of interpretation in both

"Courts are or should be exactly the same"

B. B. p. 436 "The rules of decision are in both "Courts equally apposite to the subjects "of which they take cognizance."

Such being the case of Courts of law and equity in their interpretation and construction of law - What would be the interpretation of the Statute in this case? - It requires that the Assignment shall be published in the London Gazette - Is this to be observed rigorously or would it be permitted in a Court of law or Equity - to the person making an Assignment of all his property, to substitute any other modes of making it public? for not only the Creditors of the Assignor are interested in the actual state of his affairs, but the commercial world at large.

When a Merchant therefore becomes a Bankrupt in England it is announced in the London Gazette

and what means of giving publicity to any transaction are so good and extensive as the Gazette and other newspapers. suppose them to be those of the place where the person party to the transaction resides -

The words in the abstract "that "notice ~~should~~ shall be given in the "London Gazette and in certain newspapers" are positive; and if the requirements of the law are to be dispensed with the Courts would constantly be occupied in hearing evidence and deciding on the sufficiency of the Notice given of the Assignment - Whereas by adhering to the words of the Statute, the intention to give the greatest publicity to the act of the debtor will be found to have been ~~found~~ fulfilled in most if not in all cases -

We would remark further that the clause enacting that notice be

	given in the London Gazette is introduced
2 Cokes Repts.	with a proviso which in deeds is a
70.	condition on the performance whereof
2 Litt. abridg.	the validity of the deed depends - so in
399	an Act of Parliament where a proviso
Comyn's Digest	is directly repugnant to the ~~[illegible]~~ purview of
vol. 3. p 83. cites	the Statute, the proviso will stand and
Coke Lyttleton 201	be a repeal of the purview, as it speaks
Viners abridgt. vol. 19. p 552	the last intention of the makers -
	We should add that there is a great
	difference between insolvency and bank-
	-ruptcy in the English law; "A Man
Long on Sales	"may ~~[illegible]~~ be insolvent without becoming
p. 209. Title	"a bankrupt which can only be done by com-
Bankruptcy	"-mitting one of the Acts of Bankruptcy enu-
	"-merated in the Statutes concerning
	"bankrupts - he may possess funds to
	"pay more than the full amount of all his
	"debts"
Id. Ib.	"And whether any particular transac-
p. 215	"-tion has taken place in contemplation of
	"bankruptcy is a question for the jury to
	"decide; and it is not enough that the act has

"the effect of contravening the bankrupt
"laws; it must be done with intent
"to contravene them and in contempla-
-tion of bankruptcy otherwise the trans-
-action will not be invalidated."

These were decisions under the old
bankrupt laws, they apply to a man
going out of the realm, or leaving his
house or denying himself; there may
be sufficient reasons for his doing
either without intending to contravene
the bankrupt laws — but reverting
again to the new bankrupt law, its
enactments appear to us to be positive
and that the nonperformance of the
requirements of the Statute, of giving
notice in the London Gazette and
certain other Newspapers would be
evidence of the intention of and would
be given as such to the Jury —

We cannot say what Mr. Simon Mc-
Gillivray's intentions were - we would
rather suppose that they were against

becoming a bankrupt - but we conceive that the neglect of giving notice of the Assignment as required would be a legal presumption against him - more especially as it was frequently decided in the way we have already mentioned under the old bankrupt laws, that for a person to divest himself of all his property though for the benefit of his creditors in general, was void and an act of Bankruptcy - This doctrine was founded, as was agreed by Erskine and Gurney, and assented to by the Court upon the consideration that such a deed exhibits one of those decisive indications of insolvency which shews that the person is no longer capable of carrying on his trade —

4 East Rep[ts] Tappenden & others vs Burgess.

To sum up what has been said on the case —

The old Bankrupt laws required the conveyance by the Debtor to be proved to have been fraudulent and the act of

~~and the act of~~ Bankruptcy to be local in England - In Inglis & Grant it was declared not to have been fraudulent Campbell was not in a situation in which the Bankrupt laws of England could have operation either upon his person or upon his property -

The new bankrupt law presuming fraud in conveyances of all the property of the debtor without the performance of certain accompanying requirements has enacted that they shall be acts of Bankruptcy as to persons (it must be understood) who are amenable to the Bankrupt laws such an act, wheresoever done being alike injurious in its effects to all those interested in ~~with~~ the debtor's affairs cannot be local, being not only indicative of insolvency but in itself an act of Bankruptcy - Further a trading to as well as from England will render a person liable to the Bankrupt laws -

Now, not only the residence of Mr. Simon McGillivray but the property referred to was in England at the time of the Assignment –

We think we have demonstrated that there are clear and material distinctions in the case of Campbell and that an Assignment of all a man's estate of necessity cannot be a local act – its effects are immediate and universal and must have been so in the contemplation of the legislature – And we hesitate not in declaring on the case stated to us that our opinion is that the Assignment of Mr. Simon McGillivray, assuming the form of the conveyance to be legal, was an Act of Bankruptcy in England

On the second Question – What is the effect of the Assignment &c

The decision in Eckhardt against Wilson was "That an Assignment by Deed by traders of all their effects, unless

8 Term Repts p. 142 (140)

Hammond Dig. 1. p. 324 –

all their creditors concurred, was not only fraudulent and void as against those creditors – who did not concur, but was an act of Bankruptcy – If the commission of bankruptcy should be sued out the whole ~~would~~ estate would be vested in the assignees under the commission and supersede the power of the trustees named in Mr. S. McGillivrays Assignment supposing that to be an act of Bankruptcy – If not sued out, and that the form of the Assignment is sufficient in law, the trustees right to the Hudson's Bay Stock, or to the proceeds in case it should have been sold, would date from the execution of the Assignment – As to the form of the Assignment a Notarial copy of a Deed passed in Canada would not be Evidence before the Common law Courts in England – the Original ought to be before it; but we conceive that a Commission to prove by witnesses the Signatures of the parties to the Original Deed in the Notaries hands might

be obtained - the cases speak of Deeds of Assignment, which are writings under seal but in the case of Steinman against Magnus it was decided - that if the agreement is founded on a sufficient consideration, as the Assignment of the Debtors effects in trust to secure payment, for his goods debts and effects, it will be good though the agreement is not under seal -

East's Repts vol. 11 - p 390
Hammond's Digest Vol. 1 - p. 322 -

On the Third Question

In the supposition that the Assignment be &c -

We are of opinion that in case the persons in whose favour the appropriation of the Hudson's Bay Stock was made had a knowledge of the Assignment having been made the appropriation, understanding this to mean payment of debts, to those persons, would be void - and that either in case of the Assignment being declared valid or that it should be held to be an act of bankruptcy — The 81 Sect. of the

New Bankrupt Act provides that all conveyan-
-ces contracts &c. made two Calendar months
before the commission shall be valid &
the 82d sect. as it is in the Abstract, provides
that "all payments bona fide made by and
to the bankrupt without notice &c are
valid notwithstanding the Act of
Bankruptcy - if therefore ~~the~~ conveyance
contract or payment should be made
with Knowledge it would be also mala
fide which would invalidate such
transactions -

On the Fourth Question
What is the Effect &c ?

We are of Opinion that if the Agents
acted without Knowledge of the Assignment
their Act as regards themselves would entail
no responsibility on them - if the contrary
or if they should have acted by collusion
not only their act would be void, but if
Damage arose therefrom to the creditors
they would be liable to the extent of the
loss they may have occasioned

On the Fifth Question

What is the effect &c —

It appears by the Abstract of the New Statute that the 86th Sect. ~~of the New Bankrupt law~~ provides, that "bona fide purchasers from bankrupts shall be safe "although having notice of an act of "Bankruptcy, unless such an act shall "have been followed by a Commission "within twelve Calendar months" and the purchasing from persons vested with power from the principal without notice would protect them in their purchases —

On the Sixth Question

What is the effect &c ?

In case the Assignment should not be accepted by all the creditors, and it should be held to be an act of bankruptcy, the persons receiving the benefit of the Appropriations and transfers, understanding these to mean payment to Creditors who were acquainted with the Assignment, having

been made, would be excluded from the protection given by the 82d section of the new Bankrupt law before referred to which holds to be valid all payments bonâ fide made by or to the Bankrupts without notice, notwithstanding the Act of Bankruptcy. and the contrary if the appropriations and transfers were made with notice –

On the Seventh Question

If the transfers of Hudson's Bay Stock &c

If the Assignment is an Act of Bankruptcy by reason that notice was not given in the London Gazette. and that it was not accepted by all the Creditors on these grounds the transfers giving a preference to any set of Creditors cannot be legal or valid.

On the Eighth Question

If it would be in the power &c –

Proceedings in England – we know of no other method of causing the proceeds of the Hudson's Bay Stock to be returned to the

* Note. No Commission of Bankruptcy can be taken out against an executor

Bacon's Abridg. Tit. Bankrupt vol. 1. p. 250 —

Mass of the estate of Wm. S. McGillivray than by suing out a commission of Bankruptcy against Wm. S. McGillivray and in his own name and right only* in which case except in cases provided for by the new bankrupt law, relation would be had back to the period referred to in the Statute and herein before noticed. And in such case the assignees of the Bankrupt would recover back all the monies illegally paid by actions for money had and received but this Action will not lie for the transfer and receipt of Bank or other public Stock, unless converted into money. 5 Burrows Repts. 2589 2 Black. Repts. 684 — 1 East's Repts. 1 — Comyn on contracts — 2 vol. p. 20 —

Evans Pothier's oblig. vol. 1. p. 4

The authorities on which our opinions on the acts of the Agents, are founded in reason — and is the basis of the law of contracts throughout the civilized world — Thus Pothier and writers on the English law agree on questions respecting the validity of the

Long on sales p.225 - Tit. Sales by Agents

Acts of ~~the~~ Agents - that Long says "It is "always in the power of the principal to "withdraw a bare authority with which "has intrusted an agent - and he will "not be liable on any transaction entered "into by the Agent who has knowledge that "his Authority is revoked with any person "possessed of the same knowledge - but "when the Agent lives at a distance and "acts under ~~the~~ a power of Attorney from "his principal, a question may arise on "the validity of transactions by the Agent "after the principal has in fact revoked his "Authority, but before the knowledge of such "revocation has reached the Agent - It seems "in such case the principal could not "avoid the acts of his Agent done bonâ "fide if they were to his disadvantage"

It is not required in opinion that the advocates should go beyond the questions put to them but we believe there is a point in this case of moment which is untouched namely, the funds out of which the

appropriations and transfers were made that is - to whom they belonged and to what class of creditors they were made - on the right understanding of which facts much depends in making a right decision

Montague on Partnership p. 198 - 199 - 100

Montague treating on this subject says "No joint creditor except the petitioning "Creditor can prove against the separate "Estate in competition with the separate "creditors when there is either a joint "estate or a solvent partner"

"Joint assignees have been refused permission "to be creditors upon the separate estate for "the ballance of a long account due from "a partner to a partnership".

"The rule is inflexible whatever may be "the amount of the estate"

"A joint creditor who issues a separate "commission may prove against a separate "estate"

"Joint creditors cannot be creditors upon "the separate estate in competition with the "separate creditors unless the partner fraudulently

"took the joint estate with intent to augment
"his separate estate".

"Any taking not by virtue of contract is a
"fraudulent taking within the meaning
"of this rule".

"Joint creditors cannot prove in competi-
"tion with separate creditors when there
"is a partner who alledged to be insolvent
"is not a bankrupt"

We are aware that it would be said
that in submitting the consideration of
legal authorities to the Board we have gone
out of the line generally adopted by professional
men but it will be remembered that we were
requested so to do. and we have indeed done
it to the letter on every point which appeared
to us to bear upon the case. it will also be
observed that we are consulting on parts of
the English law rarely if ever submitted to the
consideration of a Canadian advocate, and
we have given the law as we understand it
and leave to the Board in their discretion
to act as to rigid right or expedience to

them shall seem most meet —

Montreal 14th November 1826.

Sewell & Griffin.

Further Authorities —

Burn's J.P. Vol. 1 — p. 160

Atkyn's Rep. of ye Ct of Chancery 67. 138. 227 —

5 East's Rep. p. 175 — Dixon vs. Assignees to Baldwin del —

Hitchcock vs. Sedgwick vs. — Vernon's Rep. p. 156 —

Wood's Inst. p. 235 — (proviso — condition)

Dig. Mod. Rep. in Chan: tit. Equity p. 184 — No. 11 —

Bunbury Rep. p. 174 — Birchall vs. Smethurst —

The following corroborates the opinion given on the first question — It is taken from Mr. S. McGillivray's letter to his Creditors dated "London 26th February 1827" (p. 16) published in London Feb. 1827 — "The Bankrupt laws of England has recently undergone considerable "modifications. The last Act "to amend the laws relating to Bankrupts (6 Geo. 4 cap. 16) "passed 1st May 1825 commences by repealing 21 former Acts of Parliament, from which certain "clauses are there reenacted as new provisions — some with, some without amendments & as "Acts of Parliament are sometimes obscure in their provision and imperfect in their con= "struction, & until cases arise by which their operation may be construed different "counsel may construe the difficulty, & it may remain doubtful which of the learned "gentlemen is right. This appears to have been the case with some of the questions put "to counsel by Mr. Ellice & myself on the one side, & by the Hudson's Bay Compy. on ye other &c &c "In consequence of ye opinion so given to ye Hudson's Bay Co. that my Assignment was or "may be held to have been an Act of bankruptcy, & therefore that it would not be safe for ye "Company to transfer my Stock otherwise than under ye sanction of a Court of Equity, the "Governor & Committee have given me notice that they will not permit the transfer of ye H.B. Stock "standing in my brother's name & assigned by me to the trustees. —

Case.

The late house of Messrs Maitland Garden & Auldjo, of whom the Bank of Montreal were Creditors to the amount of £45000 - were at the time of contracting that debt, and still are Stockholders of the following numbers of Shares, on which they have paid the several sums of money hereinafter stated.

Maitland Garden & Auldjo	20 Shares	paid in	£ 750
William Maitland	104 do	do	3900
George Garden	20 do	do	750
George Auldjo	10 do	do	375
			£ 5775

of which Stock no transfer has been made to the Bank in part payment or collateral security or for any other purpose. It is required to know -

1st Whether or not the above Stock can be taken & held in part payment of the debt owing by the house of M. G. & A. ~~by~~ to the Bank of Montreal.

2d In what way can the ~~Stock~~ Corporation make good its pretensions of holding the said Stock in case an Action is brought by any other Creditor of that house.

3rd What is the process under the charter or otherwise

for securing the said Amount of Stock to the Corporation under the above circumstances, & for obtaining an unquestionable investment of it in behalf of the Bank – at the same time preserving its transferable quality.

Opinion

To elucidate the subject it will be right first to consider the nature & legal extent of the security with which the Legislature has invested the Bank of Montreal in the particular case alluded to.

The 10th fundamental Article of the Bank contained in the 9th Section of the Charter is as follows – "No "assignment or transfer (of the Stock of the Corporation) "shall be valid or effectual unless such transfer or "Assignment be entered or registered in a Book or books "to be kept by the Directors for that purpose – nor until "the person or persons making the same shall previously "discharge all debts actually due by him her or them "to the said Corporation which may exceed in Amount the "remaining Stock belonging to such person or persons" –

Here then we find that no transfer of Stock shall be effectual until the Stockholder making such transfer shall previously have discharged all debts

actually due by him to the Corporation which may exceed in amount the remaining Stock belonging to such Stockholder. This language is very general, and gives, at the least, a right well known in the English and French law, termed in the former a lien - which signifies an obligation tie or claim attaching a property, without the satisfying of which the property cannot be demanded by the owner - and in the latter law known by the term Privilege - which is a right granted in certain cases to Creditors to be paid out of the property of their debtors their demands in preference to all other creditors, as in the case of Innkeepers - "hoteliers" under the 175th Article of the Custom of Paris - (quod vide - Ferriere adds - "La raison est "que l'hotelier est censé avoir engagé et en sa possession "les meubles &c des passans & pelerins." "Aubergiste est "privilegié sur l'argent trouvé après le deces de celui "qu'il a logé et nourri" - Lacombe Vol. 2. p. 80. verbo Privilege.)

Bell's Dictiony. of ye Law of Scotland 1805 and Tomlins' Law Dicty. in verbo. "Lien":

In the case of pawns (pledges) the pawning creates of itself a lien for loans made at the time or subsequent (not prior) to the loan. Espinasse N.P. - p. 583.

Now this right is given to the Bank as a security for the discharge of all debts due by a Stockholder exceeding his remaining Stock. To establish this position with certainty - viz. that the security applies to all debts - that is - debts contracted at the Bank by Stockholders - we have only to refer to the

11th fundamental article of the Charter, whereby a specific penalty is affixed on the non payment of instalments of Stock — and a particular provision is made for the sale of Stock which may be specially pledged in a summary way, without any judgement of a Court of justice first obtained, which by law must be had in all other cases of pledges.

These provisions for a penalty and reducing the forms & expences to obtain the sale of Stock actually pledged shews clearly that the Legislature in the case of Stock not specially pledged, meant to create in favor of the Bank in the case referred for our opinion not more than a right of lien or privilege.

Having made this Statement we cannot hesitate in declaring our opinion on the first question — not that the said Stock can be taken & held in part payment of the debt due by the house of Mess.rs Maitland Garden & Auldjo — but that no transfer of the same can be made, even under execution sued out against the same by another Creditor of M. G. & A. — until the Bank is satisfied their demand, because, what the debtor himself cannot effect cannot be done by his creditor, who certainly can be in no better situation

than the debtor in this respect where the rights of others are concerned. —

On the Second question — we are of opinion that in case a suit should be brought by any Creditor, & under a Judgment obtained against Messrs. M. G. & Co. (which must be by one who has not accepted the Assignment) the Stock in question should be taken in Execution under the 11th. Article of the Charter — the Bank may maintain its right by opposition to the sale of the same, unless such sale take place subject to its lien or privileged right — There can be no difference between this case of the Bank, and that of the Innkeeper or hotellier before referred to —

On the third question — we have stated one mode in which the avails of the Stock of Messrs. M. G. & Co. may be made applicable to the part discharge of their debt to the Bank — We are strongly inclined to think that another mode exists — namely — by a suit to obtain a Judgment of the Court fixing a period for the sale of the Stock if the debt should not then be paid — (Mais le créancier a un privilége sur la chose, qui fait qu'il n'en peut être dépaissi qu'il n'en soit payé — et s'il ne l'est

Denisart. Marçon de Lannes Vol 2. p. ~~272~~. 305. —

pas dans le temps convenu, ou dans le délai fixé par le juge il a droit de la faire vendre pour être payé sur le prix de ce qui lui est dû – Il ne peut faire cette vente de son autorité privée*)

The Bank indeed cannot be invested with the Stock but these proceedings would secure to the Corporation the sum of Money which the sale of the same would produce – & thus preserve in the hands of the purchaser its transferable quality – but as to their being an unquestionable investment of the Stock in behalf of the Bank, preserving its transferable quality, we are of opinion that it cannot be effected under the provisions of the Charter – (Ferriere in his Grand Coutume Vol. 2. p. 1309 – on the Art. 175 regarding Innkeepers says – No. 1 – "Par cet acte l'hôtellier est preféré à "tout autre creanciers sur les biens et chevaux qui "sont dans son hôtellerie &c – "La raison est que l'hô:"tellier est censé avoir en gage" &c – and again – "Si quelque autre créancier les vouloit enlever, il peut "s'opposer pour lui être preferé & faire ordonner par le "juge du lieu que les meubles &c seront vendus pour "être payé sur le prix preferablement à tout autre")

We would add that it is a principle of

Davis v. Bowker 5 Term Rep. 488 - Scott v. Franklin 15 East 428 -

the English law founded on the nature of banking transactions that a banker has a lien for his balance upon all securities in his hands - and for his general balance upon all money securities paid in on the running account, and this is the principle we suppose which the Legislature had in view in framing the 10th fundament Article of the Charter -

Montreal 3rd March 1827.

Sewell & Griffin.

Other authorities

Dict. de droit - in verbo Privilege - passim

Rep. de Jurisp. — Gap. vol 7. p. 694 - passim

Instructions sur les conventions on Gap

Jannes — D.

Espinasse's Nisi prius - on Lien -

Mr. Sim. McGillivray in his letter to his creditors 26 Feb. 1827 printed in London states that the right of the Bk of Montreal to be paid by priviledge so much of the debt owing by Messrs McG. T. & Co. to be unquestionable this applies to Messrs McG & A. equally -

To John Fleming Esq.
Pres.t of the Bank of Montreal } Montreal 25 April 1831.

Sir,

On the following question submitted to us for our opinion by the Bank of Mont.l - viz. "In the event of the "trustees of Mess.rs Maitland Garden & Auldjo not having it in "their power to complete the payment of the 6/8 in the £ to all the "creditors of that Estate, & the Court ordering restitution from the "creditors who have received 6/8 - Can the Bank under the "arrangement entered into with the ~~Cr~~ trustees & with the personal "security be compelled to return the monies rec.d, or in any way "be made to suffer a loss upon said arrangement" -

We remark, that the answer thereto must be given, 1.st in relation to the insolvent Estate & the mass of Creditors of Mess.rs M. G. & A. - & 2.nd in relation to the security which has been given by the Hon: J. Richardson - & Mess.rs Gates, Bancroft, Jones, Leslie, & Forsyth to the Bank.

In relation to the estate of insolvents, the rule of law is clear & precise - that as soon as the insolvency can be shewn to have taken place, no act of the insolvents can give an advantage to one over all or any the other creditors; but when the insolvents have given security by third persons who

have

have become bound for them to pay to any individual creditor the whole or part of his debt, be this security given before or after the insolvency, such security will be held liable for the performance of the obligation which he has entered into in all cases which are personal to the principal debtor, exceptiones in personam but not in rem, as in the debt itself.

Evans' Pothier. Vol. 1. p. 237. No. 380.

For instance — if fraud or violence had been used, or that the debt did not exist by reason of a judgment absolving the debtor. These are exceptions in rem, for in truth there existed no legal debt. On the other hand, if the exception to the payment of the debt so secured by caution is personal to the principal debtor, as in the case of Messrs. M. G. & Co. with the Bank, whose insolvency & incapacity to pay the whole of the B/8 (should the Bank be compelled to divide with other creditors of those gentlemen a portion of the B/8 received) would leave a balance owing to the Bank, in such case the persons who became security for them to that amount would be obliged to make the same good to the Bank — so if the principal debtor is a minor, & for that cause is discharged from the performance of his contract, those who may have become cautions for him would not thereby be relieved from the performance of their obligation, notwithstanding that the minor's contract should

be

be declared null, because however he may be exempted by law from the performance of his contract, a debt does really exist, and that being the case, his securities must pay the same for him.

We would only add that the contract between a caution & a creditor is not one of the class of contracts of bien-faisance, for the creditor receives no more than his due; he merely becomes secured in the payment of his demand without which he would not have entered into any agreement with his debtor. Viewing the case in relation to the perfect security given by Mess. M. G. & A., we are of opinion that no loss can, by any probability, be incurred by the Bank upon the arrangement therein referred to respecting the dividend of B.B. In like manner we are of opinion that all the other objects of the agreement are fully guaranteed to the Bank.

We have the honor &c

Jew W. O. Griffin.