Osgoode Hall Law Journal

Volume 4, Number 2 (September 1966)

Article 13

Re Robitaille; Holy Rosary Parish (Thorold) Credit Union Limited v. Premier Trust Company, [1965] S.C.R. 503

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CREDITORS RIGHTS

Re Robitaille; Holy Rosary Parish (Thorold) Credit Union Limited v. Premier Trust Company, [1965] S.C.R. 503.

BANKRUPTCY — ASSIGNMENT OF WAGES TO CREDITOR — SUBSEQUENT ASSIGNMENT IN BANKRUPTCY — CREDITOR FAILS TO PROVE CLAIM IN BANKRUPTCY — WHETHER ASSIGNMENT OF AFTER-ACQUIRED WAGES VALID AGAINST TRUSTEE IN BANKRUPTCY.

Premier Trust Company, the trustee in bankruptcy of Robitaille's estate in bankruptcy, made a motion for an order declaring void and unenforceable, a wage assignment to the Holy Rosary Parish (Thorold) Credit Union Limited. The issue on the motion was: could the assignee rather than the trustee in bankruptcy take the wages earned by the bankrupt after his bankruptcy and before his discharge from bankruptcy.

Robitaille borrowed money from the assignee credit union on April 10, 1962 and gave as collateral an assignment of 30% of wages, salary, commissions or other money owing to him or to become owing to him from his employment.[1] Robitaille defaulted in his payments and the assignee credit union notified his employer of the wage assignment.

Robitaille shortly thereafter made a voluntary assignment in bankruptcy. Premier Trust Company was approved as trustee by the creditors of Robitaille. Premier Trust then had the duty to distribute Robitaille's assets to his creditors in order that they might realize a fair portion of their claims. Each creditor must prove his claim. The trustee notified the assignee credit union of the bankruptcy, but the credit union did not prove its claim.

Three months after Robitaille's assignment in bankruptcy, the trustee demanded that Robitaille's employer pay it the funds deducted from the bankrupt's wages to that date.[2] The employer, recognizing the wage assignment to be valid, had been holding 30% of Robitaille's wages for the assignee credit union. The employer agreed to pay this sum to the trustee only if the assignment to the credit union was declared void and unenforceable.

In the Supreme Court of Ontario in Bankruptcy, the assignment was declared void and unenforceable against the trustee. Mr. Justice Smily stated:

> I am of course bound by the judgment in *Lundy v. Niagara Falls Railway Employees Credit Union* and I am of the opinion that it is applicable to the facts of the instant case and not distinguishable therefrom.[3]

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[1] The form of the assignment is shown in *Bye v. Holy Rosary Parish (Thorold) Credit Union* (1965), 7 C.B.R. (N.S.) 182, at p. 183.

[2] Wage assignments have assumed considerable importance in the lending of money. They represent a more convenient form of collecting wages than garnishments. This decision will be significant in determining future loan practices where the risk is high.

[3] [1963] 2 O.R. 401, at p. 404 (Ont. H.C.), 39 D.L.R. (2d) 618, 5 C.B.R. (N.S.) 100.

The Court of Appeal affirmed the judgment without written reasons.

In the Supreme Court of Canada, Mr. Justice Spence, who delivered the judgment of the Court, did what Mr. Justice Smily said could not be done: he distinguished the facts of *Re Robitaille*[4] from those of the *Lundy* case.[5]

In the *Lundy case,*[6] one Lundy assigned his wages, owing or to become owing, as collateral for a promissory note. He later made an assignment in bankruptcy. Unlike the Holy Rosary Parish (Thorold) Credit Union, the Niagara Falls Railway Employees' Credit Union filed a proof of its claim on the bankrupt's estate, voted at the creditors' meetings as an unsecured creditor, and represented its own interest along with other unsecured creditors as sole inspector of the estate.

When Lundy's employer objected to paying the trustee rather than the assignee, the trustee tried to have the assignment of wages declared void and unenforceable. The trustee argued that the assignment of wages was void and unenforceable against a trustee in bankruptcy who on the making of the assignment in bankruptcy, is vested with all the property of the bankrupt. Mr. Justice Laidlaw of the Ontario Court of Appeal, in the *Lundy* case,[7] stated:

> In *Williams on Bankruptcy,* 17th ed., p. 75, it is stated: "At Common Law a document purporting to be an assignment of property thereafter to be acquired by the assignor passes no property to the assignee unless and until there be, besides the acquisition of the property by the assignor, some *actus interveniens,* such as seizure by the assignee; but in equity although a contract engaging to transfer property not in existence as the property of the assignor cannot operate as an immediate alienation, yet if the assignor afterwards becomes possessed of property answering the description in the contract, it will transfer the beneficial interest to the purchaser immediately on the property being acquired, provided it appear therefrom that such is the intention of the parties; but not if it appear that the intention of the parties is that there shall be merely a power to seize after-acquired property as distinguished from an interest therein on its acquirement." That statement of the law must be read with s. 39 of the *Bankruptcy Act.* . . . I can find no ambiguity in the relevant language of that section and no doubt arises therefrom in my mind. The wages earned and falling due to the appellant after he made an assignment in bankruptcy did not form part of his property at the date of the assignment in bankruptcy. He acquired the right to those wages after his bankruptcy and before his discharge. In my opinion, that right became property of the bankrupt appellant and vested in the Trustee in Bankruptcy by virtue of s. 39 of the *Bankruptcy Act.* Therefore . . . the assignment of wages dated February 10, 1956, is unenforceable by the respondent against the appellant and the appellant's employers.[8]

The Supreme Court of Canada distinguished the *Lundy* case[9] on the basis that the creditor had there filed a claim in bankruptcy, and was actively involved in the administration of the bankruptcy.

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4 [1965] S.C.R. 503.
5 *Lundy v. Niagara Falls Railway Employees Credit Union,* [1961] O.R. 65, 26 D.L.R. (2d) 47, 1 C.B.R. (N.S.) 201 (Ont. C.A.).
6 *Ibid.*
7 *Ibid.*
8 *Ibid.,* at p. 65 (O.R.).
9 *Ibid.*

In the *Robitaille* case[10] the claim was not filed and no part was taken by the assignee in the administration of the bankrupt's property. The Supreme Court of Canada found that the Holy Rosary Parish (Thorold) Credit Union relied on its security whereas the Niagara Falls Railway Employees Credit Union did not. To the Supreme Court of Canada it was relevant that the proof of claim against the Lundy estate was filed for the full amount, thus giving up the security of the wage assignment.

Having disposed of *Re Lundy*,[11] the Supreme Court of Canada observed that *Re Hunt*[12] was the only other Canadian authority which has considered the competing interests of the assignee of future wages and the trustee in bankruptcy. This decision of the Saskatchewan Queen's Bench could not be used to bolster the decision of the Supreme Court of Canada, notwithstanding that a wage assignment was upheld against the trustee in bankruptcy, for it was distinguishable on the same basis as *Re Lundy*:[13] there had been a claim filed in bankruptcy by the assignee for the full amount.

There being no Canadian authority dealing specifically with the situation where the proof of claim had not been filed by the assignee of wages, the Court looked to English decisions to bolster its interpretation of s. 39 of the Bankruptcy Act.[14]

> But by the very terms of s. 39(a), the property of the bankrupt shall not comprise property held by the bankrupt in trust for any other person. And the whole import of the cases which I have cited, *supra*, is to the effect that so soon as those after-acquired wages are due to the bankrupt then the assignment operates in equity to transfer the property therein to the assignee.[15]

It is submitted that the application of section 39(2) is to be confined to property *held by* the debtor at the time of bankruptcy. Therefore, the wages earned by the debtor after the date of bankruptcy should go to the trustee in bankruptcy. The Court, by failing to read section 39(2) in its context, has defeated the intention of the Legislature.

The Supreme Court of Canada maintained that the assignor at the time of bankruptcy holds his future wages on trust for the assignee.

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10 *Supra*, footnote 4.
11 *Supra*, footnote 5.
12 (1954), 12 W.W.R. (N.S.) 552, 34 C.B.R. 120 (Sask. Q.B.).
13 *Supra*, footnote 5.
14 R.S.C. 1952, c. 14, s. 39. "The property of a bankrupt divisible among his creditors shall not comprise
(a) property *held by* the bankrupt in trust for any other person, . . .
but it shall comprise
(c) all property wherever situate of the bankrupt at the date of his bankruptcy or *that may be acquired by* or devolve on him before his discharge . . .".
Italics mine. These two subsections read together could be construed as bringing future wages into the bankrupt's property in the trustee's hands.
15 *Supra*, footnote 4, at p. 511.

In *Re Lind*,[16] a son made two assignments of his *spes successionis* in his insane mother's estate to secure two separate loans. He then became bankrupt and later was discharged.[17] Neither assignee proved his claim in the bankruptcy. After his discharge from bankruptcy he made a further assignment of this expectancy. When his mother died and the assignor became entitled to property from her estate, the last assignee claimed priority over the other two assignments. He asserted that the two prior assignees lost their security since discharge from bankruptcy released the debts.

Despite the lack of similarity to the situation in *Re Robitaille*,[18] the Supreme Court of Canada relied on *Re Lind*:[19]

> . . . [T]he assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence.
>
> The *Lind* case was not one of assignment of wages to be earned in the future but was an assignment of property to be acquired in the future and a bankruptcy did follow the assignment.[20]

It is significant that in *Re Lind*[21] the bankrupt was discharged *before* the property was acquired, whereas in *Re Robitaille*[22] the bankrupt earned his wages before discharge. The Court failed to note this distinction. Had an approach like that of *Bye v. Holy Rosary Parish (Thorold) Credit Union Limited*[23] been taken, the discharge from bankruptcy would operate to release the debtor from the obligation which was the basis of the assignment. The assignment would thereupon no longer be of value.

Re Tailby[24] is cited for the proposition that assignments of future property are valid equitable assignments and enforceable in equity when the property comes into the possession of the assignor.

Even if the Court's application of *Re Lind*[25] and *Re Tailby*,[26] in support of the principle that there is a valid equitable assignment and security, is accepted, it does not logically follow that *Re Jones, ex parte Nichols*[27] and a series of cases based upon this decision would not seriously affect the result. A strong argument can be raised that *Re Jones, ex parte Nichols*[28] and *Re De Marney*[29] seriously affect the application of *Re Tailby*[30] and *Re Lind*[31] and undermine the basis of decision in *Re Robitaille*.[32]

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16 [1915] 2 Ch. 345 (C.A.).
17 It is important to note that there was no claim during bankruptcy.
18 *Supra*, footnote 4.
19 *Supra*, footnote 16.
20 *Supra*, footnote 4, at p. 507.
21 *Supra*, footnote 16.
22 *Supra*, footnote 4.
23 *Supra*, footnote 1.
24 *Re Tailby, Tailby v. The Official Receiver* (1888), 13 App. Cas. 523 (H.L.).
25 *Supra*, footnote 16.
26 *Supra*, footnote 24.
27 (1883), 22 Ch. D. 782, 52 L.J. Ch. 635 (C.A.).
28 *Ibid.*
29 [1943] Ch. 126, [1943] 1 All E.R. 275 (Ch. D.).
30 *Supra*, footnote 24.
31 *Supra*, footnote 16.
32 *Supra*, footnote 4.

In support of the interpretation taken by the Supreme Court of Canada, Mr. Justice Spence referred to *King v. Michael Faraday and Partners Ltd.*[33] In that case, the defendant had contracted with the company to act as managing director for life at an annual salary of £3,000. King recovered a judgment of £34,000 against the defendant, who agreed to satisfy it in £1,000 annual instalments to be deducted from his salary by the company. When the company and managing director became bankrupt, King proved in bankruptcy for the balance of the debt and acted on the committee supervising the assets. The court considered it a relevant factor that despite the reduction in the amount actually received by the director, the trustee in bankruptcy did not dispute his entitlement to the entire salary. The assignee's claim failed because the filing of a claim in bankruptcy was interpreted as acceptance of the director's relinquishment of the obligation; by voting in bankruptcy, the security was forsaken, and a condition was implied in the agreement that after the deduction of £1,000 from the salary, there would remain sufficient to support the director and his family. The Supreme Court of Canada interpreted the decision as authority that an assignment of after-acquired wages is valid as against the trustee in bankruptcy. It is submitted that the following remarks of Mr. Justice Atkinson are *obiter dicta*:

> The next point made was that a man cannot charge his personal earnings to be made during a bankruptcy, because such earnings become, so it was said, due not merely to the debtor, but also to the trustee in cases like *Re Jones, Ex p. Nichols* . . . and that class of case upon which reliance was placed. If those cases are analysed, it will be seen that in all of them the earnings in dispute were made not by the bankrupt, but by the trustee. If a trustee permits a debtor to carry on his business, he carries it on as agent for the trustee, and it is true to say that the earnings are really those of the trustee, and not of the debtor. In this case, however, the debtor is carrying on under a personal agreement. He is not carrying on in any sense as agent for the trustee. At any rate, so far as I am concerned, I am not prepared to hold that a man cannot before bankruptcy charge his personal earnings under a personal agreement over and above what is required for the maintenance of himself and his family so as to give good title against his trustee. Therefore, I think that the argument based on *Re Jones, Ex p. Nichols, supra,* fails as well.[34]

Re De Marney[35] is a decision on the precise issue in *Re Robitaille.*[36] Mr. Justice Farwell saw the problem as follows:

> The question is whether, having regard to the terms of the deed of assignment, the trustee in bankruptcy is entitled to be paid the moneys earned by the debtor since the date of the adjudication [bankruptcy]. If this was a charge on the future profits of a business, there would be no doubt that the trustee in bankruptcy would be entitled to them. It is said, however, that this is not a case of future profits of a business, but a charge upon the future proposed earnings of the bankrupt and that in this case different considerations arise.[37]

The Supreme Court of Canada agreed that

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[33] [1939] 2 K.B. 753, [1939] 2 All E.R. 478 (K.B.D.).
[34] *Supra,* footnote 4, quoted at p. 509. See also, *supra,* footnote 33, at p. 760 (K.B.).
[35] *Supra,* footnote 29.
[36] *Supra,* footnote 4.
[37] *Supra,* footnote 29, at p. 276 (All E.R.).

> . . . it is trite law that any property acquired in the conduct of that business becomes the property of the trustee in bankruptcy.[38]

But Farwell J. continued:

> I have looked at the various cases which were cited to me and have considered them with care, and I am quite unable to find sufficient justification for saying that the principle applicable to future earnings of a business does not apply to the present case.[39]

Mr. Justice Spence for the Supreme Court of Canada was unable to accept this terse decision and preferred instead the judgment of Atkinson J. in *King v. Faraday and Partners Ltd.*[40] based as it was on the authority of *Tailby v. Official Receiver*[41] and *Re Lind.*[42]

Re Robitaille,[43] as a decision of the Supreme Court of Canada, represents the law in Ontario. It is a decision on a narrow point in that it fails to deal with wages acquired after the discharge from bankruptcy. Since *Re Robitaille*[44] was decided, the Ontario Court of Appeal dealt with wages acquired after bankruptcy in *Danny Bye v. Holy Rosary Credit Union.*[45] This case states that section 135(1) of the Bankruptcy Act will not allow such assignments of future wages to exist after discharge as all provable claims are extinguished or satisfied as if they were paid.

The Select Committee on Consumer Credit in Ontario may recommend legislation to abolish wage assignments. Many would oppose this. The supporters of wage assignments contend that it is a more flexible security than either chattel mortgages or co-signing. Chattel mortgages have to be registered whereas wage assignments are confidential. Co-signers are perhaps difficult for people to find.

Wage assignments may have some use but to make them binding after bankruptcy is unfair to other creditors as in *Re Robitaille*[46] and to support the assignment afterwards makes it difficult for the honest debtor to be rehabilitated as intended by the Bankruptcy legislation.

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38 *Supra,* footnote 4, at p. 507.

39 *Supra,* footnote 29, at p. 276 (All E.R.).

40 *Supra,* footnote 33.

41 *Supra,* footnote 24.

42 *Supra,* footnote 16.

43 *Supra,* footnote 4. For further discussion, see suggestions in case comment, 7 C.B.R. (N.S.) 177, particularly at p. 181 concerning the Ontario Wages Act, R.S.O. 1960, c. 421, s. 7(1) and (6). This was treated lightly in the *Bye* case, *supra,* footnote 1. See also suggestion as to amending s. 41(1) of the Bankruptcy Act to give receiving orders priority over wage assignments.

44 *Ibid.*

45 *Supra,* footnote 1.

46 *Supra,* footnote 4.

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