1932

CLARENCE L. DOWSLEY (PLAINTIFF) ....APPELLANT; *Oct. 11, 12. *Dec. 23.

AND

BRITISH CANADIAN TRUST COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Construction—Claim, under agreement, to possession and control of theatre property—Claimant suing his assignors' trustee in bankruptcy for damages for dispossession by trustee—Nature, purpose and effect of the agreement, and extent of claimant's rights and security thereunder—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 64, 54—"Change of possession" of chattels (Bills of Sale Act, Alta., 1929, c. 12, s. 2 (b)).

Appellant, claiming that he was entitled to possession and control of theatre property under an agreement with B. & H., and that respondent, to whom B. & H. had made an assignment under the *Bankruptcy Act*, had wrongfully dispossessed him, sued respondent for damages.

Held (affirming, Crocket J. dissenting, the judgment of the Appellate Division, Alta., 26 Alta. L.R. 393): On construction of the agreement, appellant's personal interest in the equitable interest assigned by the agreement to him was, at most, to hold it as his security for the 5% of the gross receipts which he was to receive for his wages as man-

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

1932

DOWSLEY v. BRITISH CANADIAN TRUST COMPANY.

ager. His contract for services as manager ended with the assignment in bankruptcy. He would have no right to retain possession of the property to enforce a contract for personal services (*Stocker* v. *Brockelbank,* 20 L.J. Ch. 401; *Frith* v. *Frith,* [1906] A.C. 254); his only remedy being an action for damages for breach of contract (*Ogden* v. *Fossick,* 4 DeG. F. & J. 426). (As to provision made in the agreement for the payment of a debt of B. & H. to one Hoar (who was not a party to the agreement or the action)—it was very doubtful if that provision made the property in appellant's hands a security for that debt. Appellant, who was suing only for his own personal damages, could not rely on any rights of Hoar. Moreover, if the agreement and transfer was to secure Hoar's account, it was for that purpose fraudulent and void as against respondent). Appellant, after the assignment in bankruptcy, had no personal right to possession, either of the realty or chattels. Further, as to the chattels, there was not such a "change of possession" as defined by the *Bills of Sale Act,* Alta.; moreover, respondent was protected by the provisions of s. 54 of the *Bankruptcy Act.*

Per Crocket J. (dissenting): The agreement was not essentially a contract for personal services. Its terms, as well as the whole evidence as to the acts and conduct of the parties under it, indicated rather that its main purpose was to vest in appellant all the title and interest of B. & H. in the property, and to transfer to him the actual possession and complete control thereof, in order that the business might be placed on a profitable basis in the interest and for the benefit of both parties. If appellant was in any sense an agent of B. & H. under the agreement, it was an agency created to secure some benefit to him beyond his mere remuneration as agent, and therefore an agency irrevocable until its purposes were fulfilled. B. & H. had no right to interfere with appellant's possession and control until completion of the payments on Hoar's account (for which appellant was personally liable) and the fulfillment in other respects of the agreement; (*Frith* v. *Frith, supra,* and *Ogden* v. *Fossick, supra,* distinguished); nor, unless the agreement was impeachable as a fraud upon creditors, had respondent any right so to interfere. (*Ex parte Holthausen; In re Scheibler,* L.R. 9 Ch. App. 722, at 726). The agreement was not impeachable under s. 64 of the *Bankruptcy Act,* as no intent to hinder, delay or defeat creditors or to give a preference could properly be imputed. S. 54 of said Act did not apply.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing his appeal from the judgment of Ewing J. dismissing his action for damages for dispossessing him of certain theatre property. The material facts of the case

(1) 26 Alta. L.R. 393; [1932] 2 W.W.R. 601; [1932] 4 D.L.R. 97; 14 C.B.R. 53.

are sufficiently stated in the judgments now reported. The appeal was dismissed with costs, Crocket J. dissenting.

J. B. Barron for the appellant.

O. M. Biggar K.C. and *M. B. Gordon* for the respondent.

The judgment of the majority of the court (Rinfret, Lamont, Smith and Cannon JJ.) was delivered by

SMITH J.—James A. Booth and Cecil J. Hughes owned and were operating a motion picture theatre at Macleod, Alberta, under the firm name of Booth & Hughes.

Business became bad, and they were running without making any profit, and were unable to pay their debts. They had purchased from the Canadian Orchestraphone Limited, of which the appellant was manager, a sound equipment called a Talkatone on a conditional sale agreement which had been assigned to and discounted with one C. M. Hoar, on which there was a balance unpaid of $970.

Under these circumstances they opened negotiations with the appellant, an electrical engineer engaged in the motion picture business at Calgary and having an interest in a circuit of some thirty theatres, giving him, as he claims, apart from his personal experience and ability, the advantage of a large buying power and facilities for the economical and effective operation of theatres. On October 24, 1931, the appellant visited Booth and Hughes at their request, when they arrived at an agreement which the appellant, on his return to Calgary, reduced to typewriting, dating it 25th October, 1931, and sent by letter, Exhibit 2, dated 25th October, 1931, to Booth and Hughes, requesting them to sign and return it, stating that on receipt of it he would sign and return to them their copy. This letter has the following paragraph:

> Referring to subsection 6 of paragraph 6 of the agreement and paragraph 7, you will retain the full amount, this letter being your authority, but in accordance with our conversation, do not let the film companies know of this.

The date on the agreement was altered to 4th November, 1931, and signed by Booth and Hughes and returned to Dowsley, who says he received it on the 2nd November.

1932

DOWSLEY
v.
BRITISH
CANADIAN
TRUST
COMPANY.

Smith J.

The following is the agreement, Exhibit 3:

AGREEMENT

"J.A.B." "E.J.H."

THIS AGREEMENT MADE this ~~25th~~ 4th day of ~~October~~ November, 1931

Between:

BOOTH & HUGHES theatre operators, of the Town of Macleod, in the Province of Alberta, of the Party of the First Part, hereinafter called

"BOOTH & HUGHES"

and

C. L. DOWSLEY, of the City of Calgary, in the Province of Alberta, the Party of the Second Part, hereinafter called,

"THE MANAGER."

WHEREAS Booth & Hughes, operating the Empress Theatre in the Town of Macleod, in the Province of Alberta, are indebted to C. M. Hoar, of the City of Calgary, for certain amounts owing on talking picture equipment, which amount is now all in arrears, and whereas Booth & Hughes are unable to pay any of this money at the present time, and whereas Booth & Hughes are purchasing the said Empress Theatre under an Agreement of Sale, there being considerable balance still owing on said Agreement of Sale and to avoid being forced out of business by seizure which might be forced by the said C. M. Hoar, with the consequent loss of all money invested to date in the Empress Theatre by Booth & Hughes, it is agreed as follows:

1. Booth & Hughes hereby assign their complete equity in the said Empress Theatre Building and Equipment to C. L. Dowsley, Manager, Party of the Second Part.

2. Date of possession of the said theatre by the manager shall date from November 4th, 1931, at which time the manager shall assume complete control.

3. The manager shall not be responsible for any debts contracted by Booth & Hughes nor shall he assume any film contracts made by Booth & Hughes.

4. Upon completion of payments on C. M. Hoar's account and fulfillment of all other terms of this agreement, but in no event under three years, the manager then agrees to make a new agreement with Booth & Hughes, returning to them their equity in the Empress Theatre as transferred to C. L. Dowsley, the manager, by this Agreement.

5. Proceeds from sale of Amusement Tax tickets shall be deposited daily in separate account "In Trust for Amusement Tax Return."

6. Gross receipts from the operation of the theatre exclusive of amusement tax will be deposited daily in trust account to the credit of the Empress Theatre, and withdrawals from this account will be made as follows:

1. In payment of film, express and advertising.
2. In payment of electric service, water and heat.
3. Payment of $50 per month to C. M. Hoar.
4. Payment of 5% of gross receipts to the manager.

5. Payment of other expenses, such as taxes, interest, licences, payments on property and equipment and miscellaneous theatre expense.

6. Balance divided equally between Booth & Hughes and the Manager.

7. Booth & Hughes will give their services to the Empress Theatre for one year, without any additional charge other than amounts they may receive under subsection 6 of this agreement.

8. This agreement has been made in consideration of the sum of One Dollar ($1.00) in hand paid, by each party hereto to the other party hereto, receipt whereof is hereby acknowledged, and in consideration of the premises and covenants hereinbefore set forth.

"J. A. BOOTH"
"E. J. BOOTH"
BOOTH & HUGHES.

Witness:
"C. H. Cooney"

"C. L. DOWSLEY"
C. L. DOWSLEY.

"F. D. Cook"
(As to signature of C. L. Dowsley).

Before signing and returning this agreement to Dowsley, Booth & Hughes, on 28th October, 1931, executed a transfer of the theatre property to one Augustus T. Leather, in which the consideration is stated to be $7,582, made up by the transferee, Leather, assuming two mortgages on which there was owing $4,576 and $2,080 respectively, and an amount of $926 for insurance, taxes and other charges assumed by the transferee.

They also made a bill of sale to Leather, bearing date the 31st day of October, 1931, of the equipment in the theatre, reciting that all of the lot, buildings and equipment had been sold as a going concern by Booth and Hughes to Leather for $8,882. These documents were duly registered.

On the 28th day of October, 1931, Leather made a lease to Booth and Hughes of the land, theatre and equipment for a term of one year and three days from the 28th day of October, 1931, at a yearly rental of $1,200.

The appellant was not informed of this sale to Leather and lease to Booth and Hughes, and therefore did not realize that the change of date in the agreement from 25th October, 1931, to 4th November, made the agreement subsequent to these transactions with Leather. He therefore claims that this sale and lease was a fraud upon him and also a fraud on creditors. He is, however, not in a position

1932

DOWSLEY v. BRITISH CANADIAN TRUST COMPANY.

Smith J.

to ask relief here upon these claims, because he has not sued to set aside the transaction, either on his own behalf or on behalf of creditors, and Leather is not a party.

On learning of the transactions with Leather, on the 4th December, 1931, the appellant drew a rider to agreement of 4th November, Exhibit 9, and had same signed by Booth and Hughes. This rider reads as follows:

MACLEOD, ALTA., December 4th, 1931.

RIDER TO AGREEMENT DATED NOV. 4th, 1931, made between Booth & Hughes, of Macleod, Alta., and C. L. Dowsley of Calgary, Alta.

(a) C. L. Dowsley shall have the right to cancel this agreement at any time without prior notice, and shall be entitled to withdraw from all active operation or interest in the Empress Theatre, and shall not be liable for any debts from the operation of the said theatre, except for monies received over and above the amount of expenditures made.

(b) C. L. Dowsley shall have the right to make arrangements for the installation of sound-on-film reproducing equipment on a rental basis, and it shall be understood that Booth & Hughes shall have no interest in this equipment whatsoever and that it may be removed at any time, without prior notice, either by C. L. Dowsley or the Installing Company, or by both.

(c) All monies expended by C. L. Dowsley on account of the operation of the Empress Theatre, either in operation repairs or maintenance, over and above the monies received in receipts, shall constitute a direct debt on the part of Booth & Hughes to C. L. Dowsley.

(d) This RIDER shall be read and construed as being part of, and forming part of the above mentioned agreement between Booth & Hughes and C. L. Dowsley, dated Nov. 4th, 1931.

Booth & Hughes
Per: "J. A. Booth."

Witness:
"C. Cooney," Macleod.

On 22nd December, 1931, Booth and Hughes made an assignment under the Bankruptcy Act to the respondents. On the same day, Mr. Leather went to the theatre and took possession of the cash on hand from the cashier, Mrs. Cook, and gave a receipt for it on behalf of one Kirk; but the evidence shows that neither Leather nor Kirk had any authority to act for the respondents at that time. Notice of their appointment as Custodians was first received from the Official Receiver on the morning of the 23rd, and, after this, on the same day, Shearer, for respondents, notified Kirk to take possession of the property of the assignors on their behalf, which was done.

After the respondents had received notice of their appointment as Custodians, and before telephoning Kirk to take possession, the appellant demanded from them possession of the property, claiming to be entitled to same under the agreements cited above. This was refused, and appellant sues, on his own behalf, the respondents in their capacity as a legal entity, and not as liquidators, for damages caused to him by what he claims to have been wrongful dispossession by the respondents.

His right to possession, if any, rests entirely upon the terms of the written contract as modified by the letter, Exhibit 2, and the rider, Exhibit 9, set out above. By these documents, Booth and Hughes purported to assign their complete equity in the Empress Theatre building and equipment to the appellant, the date of possession being from 4th November, 1931, at which time the manager (appellant) is to assume complete control.

It is argued on behalf of the appellant that, by virtue of section 4 of the agreement, he held the equitable interest in the theatre assigned to him as security for the payments to Hoar and fulfilment of all other terms of the agreement. The appellant is suing for his own personal damage, and must base his action on his own personal rights under the contract. He does not, by the contract, agree to advance any moneys, and if he did advance moneys, as he claims, they became, as provided by the rider, a direct debt of Booth and Hughes to him; but there is no provision that the equitable interest assigned to him is to be held as security for repayment of such advances.

If the appellant, as he claims, holds the equitable interest assigned to him as security for any personal interest that he has under the contract, that interest is the five per cent. of gross receipts that he is to receive for his wages as manager, and which is made the fourth charge on these gross receipts. The first and second charges are for the expenses of running the theatre, for which Booth and Hughes alone were liable. The third charge is for the payment of $50 per month to Hoar; the fifth is again for payment of other expenses connected with the theatre, for which Booth and Hughes alone were liable; the sixth is for the balance of gross receipts, all of which, by appellant's letter, Exhibit 2, were to go to Booth and Hughes.

1932

DOWSLEY v. BRITISH CANADIAN TRUST COMPANY.

Smith J.

At most, therefore, the appellant's interest in the equitable interest assigned to him was to hold it as his security for his wages as manager; that is, for the five per cent. of gross receipts. His contract for services as manager came to an end with the assignment, and, as pointed out by Mr. Justice Clarke in his reasons, the cases of *Stocker* v. *Brockelbank* (1), and *Frith* v. *Frith* (2), show that the appellant would have no right to retain possession of the property to enforce a contract for personal services. He would be left to his action for damages for breach of the contract as his only remedy. *Ogden* v. *Fossick* (3).

When Mr. Justice Clarke remarks that the contract was simply one of hiring and of service, he is no doubt referring to the contract so far as it concerned the appellant's personal interest. It is argued, however, that the contract amounts to more than a mere contract of hiring and service. This argument is grounded on the provision made for payment of Hoar's account. The appellant, by the contract, was to be a manager in complete control, so that he was to receive, and to be accountable for, the receipts; and the contract simply provides for the order in which he was to disburse these receipts. It is very doubtful if the provision, that in the third place $50 a month was to be paid to Hoar, made the property in the appellant's hands a security for Hoar's debt. Hoar is not a party to the agreement, and the appellant is not suing to enforce the security on Hoar's behalf; he is suing for his own personal damages, and cannot rely on any rights of Hoar, who is not a party to the action. Moreover if, as appellant contends, the agreement and transfer of the property of the bankrupts was to secure Hoar's account, the terms of the document itself show that it was for that purpose fraudulent and void as against the liquidator.

The appellant therefore, as has been found by the learned trial judge and the majority of the judges in the Appellate Division, had no personal right to possession after the assignment was made.

As to the assignment to the appellant of the chattels belonging to Booth and Hughes, the same rule would apply, and in addition it is evident, as pointed out by Mr. Justice

(1) (1851) 20 L.J. Ch. 401. (2) [1906] A.C. 254.
(3) (1862) 4 De G.F. & J. 426, 45 E.R. 1249.

Clarke, that there was not such a change of possession as is defined by the *Bills of Sale Act,* namely, such change of possession as is open and reasonably sufficient to afford public notice thereof. Again, the respondents are protected by the provisions of sec. 54 of the *Bankruptcy Act.*

The appeal is therefore dismissed, with costs.

CROCKET J. (dissenting).—With all deference, I find myself unable to agree with the interpretation which the judgment appealed from places on the agreement entered into between the appellant and Booth & Hughes, viz: that it was essentially a contract for personal service. In my opinion, its terms—as well as the whole evidence regarding the acts and conduct of the parties under it—indicate rather that its main purpose was to vest in Dowsley all Booth & Hughes's title and interest in the theatre property and its equipment, and to transfer to him the actual possession and complete control thereof, in order that the business might be placed on a profitable basis in the interest and for the benefit of both parties. No doubt the taking over of possession and complete control had the effect of conferring managerial powers on Dowsley, as the learned trial judge put it, but not, I think, as a mere agent for Booth & Hughes, with no other interest than the securing of five per cent. of the gross receipts for his wages as manager.

Although, as pointed out by our brother Smith, Dowsley did not expressly agree by the contract to advance any moneys, it is apparent that it contemplated that substantial sums of money should be advanced by him, as the evidence shews substantial sums were, in fact, advanced by him in the few weeks which elapsed between the date of the agreement and rider and December 23, when the respondent company went into possession under the bankruptcy assignment, in addition to the personal responsibility he assumed for the installation of the new sound-on-film equipment and the future supply of films, amounting together to over $4,000. It is true that paragraph 3 of the agreement of November 4th provided that Dowsley should not be responsible for any debts contracted by Booth & Hughes, nor for any film contracts made by them, but it is clear that the intention was, once Dowsley took over the possession and control, he and not they would provide

1932

DOWSLEY v. BRITISH CANADIAN TRUST COMPANY.

Crocket J.

the films. It is also true that clause (*c*) of the rider of December 4, which was executed after Dowsley discovered the deception the firm had practised upon him by conveying their equity to Leather in all the theatre property, and taking back from the latter a lease for one year and three days, provided that all moneys expended by Dowsley on account of the operation of the theatre over and above the moneys received in receipts, should constitute a direct debt on the part of Booth & Hughes to him, but it is none the less significant for that reason of the intention that Dowsley was to make advances of money for these purposes.

These considerations, in my opinion, in themselves shew that it was not intended that Dowsley should go into possession as a mere agent or servant of Booth & Hughes. There is no mention in the agreement of Dowsley himself undertaking to render any personal services, any more than there is of his undertaking to advance any money for operating expenses, or to pledge his credit for the supply of future films—nothing beyond his description as "the manager." While these words, no doubt, designate him as manager of the Empress Theatre, they do not necessarily import that he was to become manager merely as Booth & Hughes's servant and agent. As a matter of fact, the only specific mention of personal services in the agreement is found in clause 7 of paragraph 6, where Booth & Hughes agree to "give their services to the Empress Theatre for one year," without any additional charge other than the amounts they may receive under clause 6—that is, from any balance that might be left after payment of the sums indicated in clauses 1, 2, 3, 4 and 5, which items cover, not only all operating and miscellaneous expenses and Dowsley's commission, but capital payments on property and equipment and $50 per month on the C. M. Hoar lien note indebtedness of $970, on which Dowsley was personally liable.

Apart from the question, however, as to whether Dowsley bound himself by the agreement to advance any moneys or credits, which, as I have pointed out, the evidence shews he did in fact do, the agreement unquestionably did provide for the payment of the Hoar indebtedness, for which he was personally liable, and is thus distinguish-

able from the agreement dealt with in *Frith & Frith* (1), which is so strongly relied upon by the respondent. In addition to this, clause 6 of paragraph 6 of the agreement provides for the equal division of the net profits after payment of the sums indicated in clauses 1 to 5, between Booth & Hughes and Dowsley. It is true, that for some reason or other Dowsley had, before the execution of the agreement, promised to waive his right under this clause and to allow Booth & Hughes the whole balance, on the understanding that they were not to let the film companies know. The motive for the insertion of the clause in the agreement is doubtful, but it would appear from the terms of the letter to be found in the dealings of one or other of the parties with the film companies. The fact remains, however, that, notwithstanding the statement in the letter, both parties afterwards executed the agreement. Whether, in the circumstances, clause 6, as it appears in the executed agreement, or the letter, fixes the rights of the parties in respect of the "balance" referred to, the letter clearly demonstrates, not only that there was no thought of Dowsley acting under the agreement as the mere servant and agent of Booth & Hughes, but that he was the dominant authority, who controlled even the terms of the agreement itself. Moreover, the agreement must, I think, be interpreted in the light of the admitted and indisputable fact that Dowsley was an electrical engineer, who had been engaged for many years in the moving picture business and owned, operated or had an interest in an extensive circuit of moving picture theatres throughout the provinces of Alberta and Saskatchewan, and that this fact was well known to Booth & Hughes. This would itself point to the unlikelihood of his entering into an agreement to serve Booth & Hughes's interest solely for the remuneration provided—five per cent. of the gross proceeds. It will be noted in this connection that clause 6 of the rider provided that Dowsley should have the right to make arrangements for the installation of sound-on-film reproducing equipment, and that Booth & Hughes should have no interest whatsoever in this equipment.

(1) [1906] A.C. 254.

1932

DOWSLEY v. BRITISH CANADIAN TRUST COMPANY.

Crocket J.

In my opinion, if Dowsley is to be regarded in any sense as an agent of Booth & Hughes, under the terms of the agreement, it was an agency which was created for the purpose of securing some benefit to him beyond his mere remuneration as such agent, and an agency which was, therefore, irrevocable within the meaning of the passage quoted and approved by Lord Atkinson from Story on Agency in *Frith* v. *Frith* (1), until its purposes were fulfilled.

With regard to the case of *Ogden* v. *Fossick* (2), referred to in the judgments of both Clarke and Mitchell JJ.A., it is to be observed that in that suit, which was one for specific performance, the defendant was the party who, in the agreement, had both engaged his services and covenanted to grant the lease of the coal wharf. In the case at bar the agreement itself purported at least to assign Booth & Hughes's whole equity to Dowsley, who, it is claimed, was the party who had covenanted to render the personal service, and he was in actual possession and complete control of the theatre under the terms of the agreement and already had, as pointed out by McGillivray, J.A., all that a decree for specific performance could have given him. It is not a question of whether he could have succeeded in maintaining a suit against Booth & Hughes for specific performance of their agreement to give him possession and control of the theatre, had they refused to do so, but a question of whether, he having gone into possession and assumed control, under the terms of the agreement, Booth & Hughes, if they had not assigned, could have rightly ejected him, failing any breach of the agreement on his part.

If the view I have intimated be the correct view of the agreement, Booth & Hughes had no right to interfere in any way with Dowsley's possession and control of the theatre property, until the completion of the agreed payments on C. M. Hoar's account and the "fulfillment of all other terms of the agreement" at least. The question directly involved here is as to whether the trustee in bankruptcy had any legal right to oust him of that possession and control. As to this, the dictum of James L.J., in *Ex parte*

(1) [1906] A.C. 254, at 259-260. (2) (1862) 4 De G.F. & J. 426.

Holthausen; In re Scheibler (1), quoted by McGillivray J.A., enunciates the governing rule of law as follows:

> If a bankrupt or a liquidating debtor, under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself.

So that, unless the agreement here in question is impeachable as a fraud upon Booth & Hughes's creditors, the respondent company as custodian in bankruptcy would have no more right to interfere with Dowsley's possession and control of the theatre than Booth & Hughes themselves would have.

Regarding the contention that the agreement was fraudulent and void under the Statute 13 Elizabeth and sec. 64 of the *Bankruptcy Act*, whatever may be said of the conveyances which were arranged between Booth & Hughes and Leather behind Dowsley's back before the execution of the Booth & Hughes-Dowsley agreement, I am of opinion that no intent to hinder, delay or defeat other creditors can properly be imputed to the latter, nor any intent to give Hoar an undue preference over other creditors. Unlike the conveyances to Leather, which made no provision for any other creditor than Leather himself, the whole scheme of the Dowsley agreement was to place the Empress Theatre business on a paying basis so that the debts of Booth & Hughes might be paid, not Hoar's alone, as contended, but payments made as well on property and equipment. The preamble of the agreement itself, which it is said indicates the purpose only to give Hoar a preference, mentions as well the balance owing on the agreement of sale of the theatre itself.

In any event, before this or any court would be justified in holding the agreement fraudulent under the provisions of sec. 64 of the *Bankruptcy Act*, it must be satisfied that it was made "with a view of giving such creditor (Hoar) a preference over the other creditors" of Booth & Hughes. For the reasons already indicated, I do not think that any such finding is warranted. The provision that $50 a month was to be applied out of the receipts on account of the Hoar note, secured as it was by a

(1) (1874) L.R. 9 Ch. App. 722, at 726.

1932

DOWSLEY v. BRITISH CANADIAN TRUST COMPANY.

Crocket J.

right of seizure, whereby Hoar could force the firm out of business at any moment, was clearly one which gave Hoar no advantage over his existing security.

Section 54 of the *Bankruptcy Act* has no application, I think, to a case of this kind, where the debtor had wholly divested himself of his equity and possession and control of the property involved.

For all these reasons, some of which have been discussed more fully by McGillivray J.A., in his dissenting judgment, I have come to the same conclusion as he upon the whole case, and would therefore allow the appeal with costs, set aside the judgment with costs and refer the action back to the trial judge to assess damages with or without further evidence as he may decide.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Barron.*

Solicitors for the respondent: *Hogg & Menzie.*