Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William H. Parsons and others v. *The Sovereign Bank of Canada, from the Court of Appeal for Ontario; delivered the 30th October* 1912.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.

[DELIVERED BY THE LORD CHANCELLOR.]

The Appellants are paper merchants, and the Respondents are bankers. The Imperial Paper Mills Company was incorporated under Ontario law in 1903. It has carried on the business of paper manufacture at Sturgeon Falls in Ontario, and has had numerous business contracts with the Appellants from a date prior to 27th October 1906. A Receiver and Manager of the Paper Mills Company was then appointed by the Court in a debenture-holders' Action, but the business relations with the Appellants continued. On 14th September 1906 the Paper Mills Company had made an agreement with certain parties who included the Respondents, under which the Respondents and others, being already creditors, were to make certain advances for assisting the business of the company on the terms that the accounts for goods sold by the company should be hypothecated, and a certain supervision of the business should be

ablished. On the 27th October 1906, under the Order already referred to, John Craig was appointed Receiver and Manager with liberty to continue the business in accordance with this agreement. By another Order of the 9th January 1907 George Edwards was appointed Receiver and Manager along with Craig, and they were given liberty to continue the business but not to act as Managers after 1st June 1907 without the leave of the Court.

At the date of the first appointment of the Receiver and Manager there were contracts for the supply of paper which were current between the Appellants and the Paper Mills Company. These contracts were for the supply, periodically, of quantities of paper, and the contracts extended over considerable periods. The Appellants' practice was from time to time to send directions to the Paper Mills Company for the delivery of paper under the contracts. By notice in writing on the 17th June 1907 the Receivers and Managers declared the contracts cancelled. Prior to this date, on the 14th June, the Receivers and Managers had assigned amounts due from the Appellants for paper delivered to them to the extent of upwards of $15,000 to the Respondents. Notice of this assignment was for the first time given to the Appellants on 27th July. The Respondents claimed these sums as due to them. The Appellants replied that the Company had broken its contracts, and that the Appellants had suffered heavy loss, the amount of which they claimed to set against the sums due to the Respondents. It appears to have been agreed in the Courts below that if the Appellants were justified in this claim the amount of their damages exceeded what was due to the Appellants. The question in this Appeal is whether the claim of the Appellants to set off the damages they had suffered was

a good one. The answer to this question depends upon whether the Appellants are able to establish that the goods delivered to them were delivered under the old contracts with the Company, and not under new contracts made with the Receivers and Managers; for on the latter footing the debt assigned would not be a debt due to the Company, and it could be assigned free from any claim for damages for breach by the Company of its contracts. The Ontario Statute which enables assignment of choses in action is in substantially the same terms as is s. 25 of the English Judicature Act, 1873, and enables such assignments to be made, but only subject to equities. No doubt a claim for damages for breach would be such an equity if it arose under the same contract, and the point in the case is therefore whether the Appellants took the deliveries in respect of which the sums assigned were claimed under new and single contracts made with the Receivers and Managers, as to which there could be no such question of breach, or under the original contracts with the Company for delivery over fixed periods, contracts which had undoubtedly been repudiated, and for breach of which the Company was responsible.

In order to answer this question it will be convenient in the first place to look at the position in point of law of the Receivers and Managers. A Receiver and Manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the Company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The Company remains in existence, but it has lost its title to control its assets and affairs,

with the result that some of its contracts, such as those in which it stands to an employee in the relation of master to servant, being of a personal nature, may, in certain cases, be determined by the mere change in possession, and the Company may be made liable for a breach. But it does not follow that all the contracts of the Company are determined even, to put the highest case, when a mortgagee acting under a power in his mortgage assumes control of the business of the mortgagor. The mortgagee may be in a position to say that he has authority to carry out in the name of the mortgagor contracts with a third person—*e.g.* for the manufacture and delivery of goods; and the third person may have no right to allege a breach on the ground of mere change of those who actually manufacture and deliver the goods for the Company. Such a contract usually involves no stipulation as to the identity of those by whom the work of the company is to be performed, and the legal *persona* of the Company may continue to subsist. In the present case the Receivers and Managers were by the terms of the orders of the Court obviously intended to carry on the actual business of the Company with as little breach of continuity as possible; and there was no reason why they should not use the name and powers of the Company for the purposes of fulfilling existing orders. It is no doubt true that *primâ facie* any new contracts they made would ordinarily be made by them personally in reliance on their right of indemnity out of the assets, as happened in the recent case before the House of Lords of The Moss Steamship Co., Ld. *v.* Whinney, 1912, A.C. 254, where a new contract made by the Receiver was held, as matter of construction, to have been entered into by him personally. But in the present case the contracts were contracts entered into before the

Receivers and Managers were appointed, and had been entered into in the ordinary course of the business of the Company in manufacturing and delivering paper; and there is, in their Lordships' opinion, no ground for presuming that the Receivers and Managers intended to act otherwise than in the name of the Company to carry to a conclusion the business which was current, or that they meant to repudiate the obligations of the Company. In the absence of a liquidation the *persona* of the contracting Company remained legally intact though controlled by the Receivers and Managers.

When their Lordships turn to the evidence it appears to them that the course taken was to carry out the old contracts in this fashion. Mr. Craig states in his cross-examination the course of business: Q. " Then at the time you " were appointed Receiver and Manager on the " 27th of October you found these other con- " tracts " (being those the subject of the Appeal) " that you have mentioned here in " existence there in the books of the Company?" —A. "I found them there."

Q. "And you continued to ship paper under " these as you had done before ? "—A. "There " were certain orders that were there at the time " which we filled, and then we received fresh " orders from Parsons Brothers." The position of Mr. Craig must be borne in mind. He had been the Managing Director of the Company, and under the financial agreement of 14th September 1906 already referred to he had been one of the three members of the Committee of Supervision and Management. By the Order appointing the Receiver and Manager he had been appointed on behalf of the debenture-holders, whose security included the entire undertaking and assets, but with liberty to continue the business pursuant to and in accordance with the agreement of 14th September, and to

borrow money for this purpose. It was apparently contemplated that the business should be carried on without change, and Mr. Craig himself took this view. For, replying to an inquiry from one of the Appellants, he wrote on 3rd November 1906:—"The appoint-
" ment of Mr. Tait and myself as Receivers was
" made in a friendly application, and was for
" the purpose of carrying through the reorgani-
" sation scheme. This was done with a view
" to prevent any creditor or bondholder from
" intervening and perhaps upsetting the
" arrangement unless he were bought out, and
" was done in the interests of the general
" body of bondholders and the creditors.
" There is not only no likelihood of the
" mills being shut down, but in this appoint-
" ment every assurance that the mills will be
" run. The agreement made with the banks
" under which the mills have been running
" since the 15th September was confirmed by the
" Court and instructions given me to continue
" to act under it so long as seemed suitable
" to the Receiver."

Mr. Craig's action was entirely in accordance with this view. He continued to treat the current contracts as in existence and to accept from the Appellants a series of orders which specifically referred to these contracts and were based on the conditions as to price and delivery fixed by them. On 10th January 1907 Mr. Craig wrote a letter in which he raised the point that he was not bound to accept or fulfil the contracts of the Company. But he intimated that he was unwilling to act on this view. He probably had in mind that if he did so the Company might be wound up and the business destroyed. In a letter of 23rd March he again refers to this power which, as in possession of all the assets, he doubt-

less possessed. On the 1st of April he defined the position still more precisely. He wrote that the Receivers were not bound by any engagement prior to the Order of 27th October 1906, and that they had accepted the Appellants' subsequent orders only as single orders, and that the contracts made prior to that date were null. He asked for a remittance on account and threatened that if it were not made the Appellants' orders would not be fulfilled. To save the situation the Appellants, without in terms accepting his view, made a remittance, and the placing of orders continued. The Receivers wrote again on the 6th of April 1907 that "regarding the position of contracts "with us, we are filling the contracts "simply and solely as single orders as they "come in, and, while not legally bound to "accept any more, we feel equally that we are "not morally bound to do so in respect of our "having filled some parts of them during the "past few months. We certainly cannot possibly "agree to confirm them subject to a four or six "months' notice. The situation is such that we "cannot guarantee to accept another specification. "Each specification as it comes in will be "accepted or rejected as if it were a new order "independent of any contract. Further than "this we cannot go. We may say that morally "we do not feel at all bound to continue these "contracts, as, had you been acting as agents "for the mills and studied the mills' interests at "the time these contracts were placed, and pre- "vious, we should have been in such a position "with regard to orders that we should not have "been asked by you to take them at all, nor "would we have taken them had we been asked. "As you are well aware we were forced into "these contracts against our will. These con- "tracts are now being considered by one of my

" co-receivers with a view to ascertaining what is " the exact return to the mill. We do not seem " to be getting the net return which was proposed " to us, and on faith of which we, relying on " your statements accepted them as a Company. " If the general run of these shew out, by reason " of your deductions and debits, to be less to the " mill than the figures we supposed we were " getting when the contracts were originally " accepted, you may be perfectly certain that " the balance of the orders will be cancelled. " Your action in sending forward claims has " had the effect of bringing this question up for " consideration." On the 29th May, Mr. Craig again wrote enclosing a formal letter in which the Receivers asked to know what price the Appellants would take to relieve the mill of certain of the current contracts, and adding that the suggestion was entirely without prejudice to the Receiver's right of cancelling these contracts without paying any compensation whatever. In the covering letter, Mr. Craig wrote that he thought it would be good policy on the part of the Appellants to relieve the mill of these contracts, and that he had been advised that it was not incumbent on the Company to continue them beyond such time as would suffice to give the Appellants reasonable notice, and that steps were likely to be taken to terminate these contracts not later than August 1st.

The construction which their Lordships place on the correspondence is that the Receivers and Managers had intended to carry on the existing arrangements as long as possible without break in continuity, but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the Company and the Appellants. That such a breach would give rise to claims for damages against

the Company which might lead to its winding up, or to counterclaims, although the Claimants could not get at the assets in the hands of the Receivers, was sufficient reason for the Receivers and Managers not desiring to put their powers in force. The inference is that as between the Company and the Appellants the contracts continued to subsist. The Receivers and Managers were exercising the powers of continuing the business given to them under the orders of the Court by taking no actual steps to determine the relations between the Company and the Appellants. The state of matters was one totally different from that in Reid *v.* The Explosives Company, Ld., 19 Q.B.D. 264, where the appointment by the Court of Receivers and Managers was held, having regard to the character of the contract in that case which was one of personal service, to have put an end to it. As Fry, L. J., however, points out in his judgment at p. 269, even in the case of contracts of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The Company remained in legal existence, and

so did its contracts, until put an end to otherwise.

Their Lordships think that the first repudiation that was made by the Receivers and Managers took place when the letter was written to the Appellants on 17th June 1907, declaring the contracts cancelled. As the result, a right arose to counterclaim against the Company damages for breach, and neither the Company nor its assignees could sue for the price of the paper delivered excepting subject to this counterclaim which was in existence when the notice of assignment to the Respondents was given some time later, on the 30th July. It was agreed that if this view was the true one, there could be nothing due to the Respondents, by reason of the amount of the damage recoverable against the Company exceeding the amount of the claim. Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, and the Action dismissed. The Respondents must pay the costs here and in the Courts below.

In the Privy Council.

WILLIAM H. PARSONS AND OTHERS

v.

THE SOVEREIGN BANK OF CANADA.

DELIVERED BY
THE LORD CHANCELLOR.

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