JOHN MACDONALD & CO. (Plaintiffs)..APPELLANTS;

AND

ARCHIBALD CROMBIE & JOHN R. STEWART (Defendants)..... } RESPONDENTS.

1884
*Dec. 4
1885
*May. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Facilitating the recovery of judgment—Fraudulent preference, whether—Rev. Stats., Ont., ch. 118, secs. 1 and 2.

On the 28th March, 1882, a writ was issued by C. *et al* (respondents) against one M. for the recovery of the sum of $32,155.33, and said writ was duly endorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the re-respondents for the said sum of $32,155.33 on an account previously stated and settled between C. *et al* and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. *et al* (appellants), creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued.

The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to the respondents, who were the highest bidders.

On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether the judgment of the latter was void for fraud, and as being a preference; and whether respondents' executions were void as against appellants' execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favor of the appellants. That judgment was reversed by the Queen's Bench Division of the

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

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High Court of Justice of Ontario, whose judgment was affirmed by the Court of Appeal for Ontario. On appeal to the Supreme Court of Canada;

Held (affirming the judgment of the Court of Appeal),—That what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O., ch. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity.

APPEAL from a judgment of the Court of Appeal for Ontario, rendered on the 28th of March, 1884, confirming that of the Queen's Bench Division of the 10th of March, 1883, which set aside a judgment of the Hon. Mr. Justice Armour in favor of the present appellants.

The facts of the case sufficiently appear in the head note and in the report of the case in the Ontario Appeal Reports (1).

J. J. McLaren for appellants contended: 1st. That the respondents' execution was a nullity because it was issued on the same day judgment was signed and before the expiration of eight days from the last day of appearance. He cited Rule 72, O. J. A. Code L. 5, De Leg., t. 14; *Montreal Bank* v. *Burnham* (2); *Kerr* v. *Douglass* (3); *Brooks* v. *Hodgkinson* (4).

2nd. That the judgment upon which it was issued, under the circumstances was a fraudulent preference and void against the appellants, citing and commenting on Rev. Stat. Ont., ch. 118, ss. 1 and 2; *Sharpe* v. *Thomas* (5); *Doe Mitchinson* v. *Carter* (6); *Billiter* v. *Young* (7); *Hurst* v. *Jennings* (8); *White* v. *Lord* (9); Maxwell on Statutes, (10); Hardcastle on Statutes, (11); and authorities cited by the Hon. Mr. Justice Armour in the court below.

Thomson for respondent contended that the judg-

(1) 10 Ont. App. R. 92.
(2) 1 U. C. Q. B. 131.
(3) 4 Ont. P. R. 106.
(4) 4 H. & N. 712.
(5) 6 Bing. 420.
(6) 8 T. R. 300.
(7) 6 El. & Bl. 1, & 8 H. L. Cas. 682.
(8) 5 B. & C., 650.
(9) 13 U. C. C. P., 289.
(10) P. 92.
(11) P. 24.

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ment recovered by the respondents against the said Gideon Morrison was clearly unimpeachable under R S. O., cap. 118, sec. 1. It was not founded on a confession of judgment, warrant of attorney, or *cognovit actionem*. *Holbird* v. *Anderson* (1) ; *Young* v. *Christie* (2) ; *Mackenzie* v. *Harris* (3) ; *McKenna* v. *Smith* (4) ; *Labatt* v. *Bixel* (5) ; *King* v. *Duncan* (6) ; *Heamen* v. *Seale* (7) ; *Davis* v. *Wickson* (8) ; *Turner* v. *Lucas* (9) ; and that the judgment and executions of the respondents against Morrison, the sale of the goods by the Sheriff, and the purchase thereof by the respondents, are not, nor any of them, impeachable under the second section of the said act. They did not constitute an assignment or transfer by the debtor within the meaning of section 2 of the act.

As to the premature issue of the execution of the respondents, the learned counsel contended it was only an irregularity, which could be waived by the judgment debtor, and could be objected to by him alone. It was never open to the appellants to complain of such irregularity. *Avison* v. *Holmes* (10); *Farr* v. *Arderly* (11); *Perrin* v. *Bowes* (12) ; *Holmes* v. *Russell* (13) ; *Bank of Upper Canada* v. *Vanvochis* (14); *Weedon* v. *Garcia* (15); *Blanchenay* v. *Burt* (16) ; Archibold's Practice, (17) ; O. J. A., rule 473.

RITCHIE, C.J. :—

I think the language of chapter 118 R. S. O. too clear and explicit to admit of any doubt as to its

(1) 5 T. R., 235.
(2) 7 Grant, 312.
(3) 10 U. C. L. J., 213.
(4) 10 Grant, 40.
(5) 28 Grant, 593.
(6) 29 Grant, 113.
(7) 29 Grant, 278.
(8) 1 O. R., 369.
(9) 1 O. R., 623.
(10) 7 Jur. N. S. 722.
(11) 1 U. C. Q. B., 337.
(12) 5 U. C. L. J., 138.
(13) 9 Dowl. 487.
(14) 2 Ont. P. R. 382.
(15) 2 Dowl. N. S. 64.
(16) 12 L J.N.S. 291, & 4 Q.B.707.
(17) 13 Ed. P. 1193.

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legitimate construction. The legislature has in unmistakable terms declared that if any insolvent, &c., "voluntarily or by collusion with a creditor or creditors gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment with intent, &c, to defeat or delay his creditors, &c., or to give a creditor a preference * * * every such confession, &c., shall be deemed void as against creditors (1)."

And by sec. 2. Any insolvent making any gift, conveyance, assignment, or transfer of any of his goods, &c, with intent to defect or delay creditors, or to give a creditor a preference, every such gift shall be void as against creditors. Not to invalidate assignments for satisfying rateably, &c., creditors, or to invalidate a *bonâ fide* sale in ordinary course of trade to innocent purchasers.

The insolvent in this case gave no such confession, cognovit or warrant of attorney,—instruments well known to and understood in the law,—nor any instrument, document or writing whatever, which by the most strained construction of any language can, in my opinion, be tortured into a confession, cognovit or warrant of attorney, nor can I understand how anything the debtor did in this case can be held to operate as a gift, conveyance or transfer of goods or effects, when, in fact, no gift, conveyance or transfer was made, nor anything done which, either at law or in equity, can be held to amount to a gift, conveyance or transfer. In buying the goods at the sheriff's sale the defendants were in the position of ordinary bidders, the goods became theirs, not by gift, conveyance or transfer from the debtor, but simply because they bid higher than any one else; how could this have any bearing on the transaction to make it good or bad, any

(1) Ch. 118, R. S. Ont. sec. 1.

more than if any outsider had purchased and the proceeds in cash had been paid over to defendant by the sheriff? But, in fact, the goods were sold under other executions as well as that of the defendants and prior to defendants' execution. Considering the case in the strongest manner that Mr. Justice Armour presents it, and that the parties intended just what he suggests, the question still is, (however desirable it may be that such a transaction should be prohibited) has the legislature, by the 118 ch. of the Revised Statutes, made the transaction illegal? It nowhere prohibits a party from admitting an immediate indebtedness and foregoing a credit on getting, in accordance with the terms of the original indebtedness, 5 per cent. discount in lieu thereof, as in this case, and the debt becoming thereby immediately payable; and where is there any law prohibiting the creditor from suing to recover his debt, or to prohibit the debtor from suffering judgment by default when he could have no defence to the action, or to prohibit the creditor, having obtained a regular judgment, from issuing execution and levying on the debtor's goods with the obvious intent to secure his debt? For, so far as the creditor is concerned it could be done with no other intent than to get payment in preference and priority to the other creditor. The transaction was no more, then, than saying to the debtor: "You cannot secure by a cognovit, &c, or by gift, conveyance or transfer, but if I can get a judgment against you in regular course and an execution in the sheriff's hands before other creditors, that not being prohibited, the law will give me a priority."

It is, in my humble opinion, quite wrong to say this is putting a narrow construction on the words of the statute, it is putting the only construction on the language that the words will bear. To adopt any other construction is to go outside of the words and extend

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the effect of the statute beyond the terms, and so to ignore instead of interpret the language of the statute, and so to legislate rather than to adjudicate.

The issuing of the execution was a mere irregularity and not open to objection by plaintiff.

STRONG, J.:—

I entirely agree with the Court of Appeal and the majority of the Court of Queen's Bench. Were we to hold that judgments come within the enactment against preferences contained in the 2nd sec. of R. S. O. ch. 118, we should either be legislating or otherwise determining that "judgment" is included in the words "gift, conveyance, assignment or transfer," neither of which I am prepared to do, though I entirely agree with the observations of Mr. Justice Armour showing how very ineffectual the law is to prevent the frauds at which it is aimed, when construed as, I think, we are bound to construe it.

As regards the 1st sec. I am not prepared to overrule *Young* v. *Christie*(1), which could only have been decided as it was, unless judgments by default were held to be included in the words "*cognovit actionem* or warrant of attorney," which could not be done without violating the rules of construction laid down in modern cases, decided by courts of high authority and by which we are bound.

The appeal should be dismissed with costs.

FOURNIER, J.—I concur.

HENRY, J.:—

I am of opinion that the statute does not provide for the case of a party shortening the credit for payment by a deduction of five per cent. None of the prohibitory

(1) 7 Gr. 312.

provisions of the statute are shown to have been contravened. Under the circumstances I think we are to take the execution as good, and, I therefore, concur with the Chief Justice that this appeal should be dismissed.

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TASCHEREAU, J., concurred.

Appeal dismissed with costs.

Solicitors for appellants: *MacLaren, MacDonald, Merritt and Shepley.*

Solicitors for respondents: *Thomson and Henderson.*