R. BALDOCCHI ON BEHALF OF HIMSELF AND OTHER CREDITORS OF D. SPADA (PLAINTIFF) ..... APPELLANT;

1907

*Mar. 20, 21.
*May 7.

AND

D. SPADA AND JOHN GARBORINO (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insolvency—Fraudulent preference—Security to creditor—Knowledge of insolvency—R.S.O. [1897] *c.* 147, *s.* 2, *ss.* 2 *and* 3.

G. had assisted S. with loans and also guaranteed his credit at the Dominion Bank to the extent of $3,000. His own cheque at the bank having been refused payment until the indebtedness of S. of $1,900 was settled the latter promised to arrange it within a month which he did by transferring to G. goods pledged to the Imperial Bank G. paying what was due to both banks. Shortly after S. sold out his stock in trade and absconded owing large sums to foreign creditors and being insolvent. On the trial of a creditor's action to set aside the transfer to G. as a fraudulent preference the manager of the Dominion Bank testified that G.'s cheque was not refused from any doubt of S.'s solvency but because he had heard that S. was dealing with another bank and he wished to close the account.

Held, Idington and Duff JJ. dissenting, that under the evidence produced G. had no reason to suppose, when the goods were transferred, that S. was insolvent and he had satisfied the onus placed upon him by the provincial statute of shewing that he had not intended to hinder, delay or defraud the creditors of S.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the defendants.

The material facts are set out in the above head

*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

1907

BALDOCCHI v. SPADA.

note. The trial judge found that Spada was insolvent when he transferred the goods to Garborino but not to the knowledge of the latter and that the transaction was not a fraudulent preference under the Ontario Act relating to preferential assignments. The Court of Appeal affirmed his judgment Mr. Justice Meredith dissenting.

McKay and *Gideon Grant* for the appellants.

Tytler and *R. G. Smythe* for the respondents.

The judgment of the majority of the court was delivered by:—

MACLENNAN J.—After a full consideration of the evidence and of the arguments which were addressed to us, I am of opinion that we ought not to disturb the finding of the learned judge at the trial, approved by the full bench of the Court of Appeal, one learned judge alone dissenting.

The case depends on whether or not the respondent Garborino, when he entered into the impeached transaction with Spada, knew or had reason to believe that Spada was insolvent or unable to pay his debts in full.

Spada was an Italian and had been in business in Toronto for a number of years, dealing in Italian goods. Garborino was also an Italian, and had been acquainted with Spada for a number of years, and in 1900 had lent him two sums of $500 each, and in 1901 $1,500, upon note, without security, and in 1902 had given the Dominion Bank a bond for $10,000 to secure an account which Spada had opened with that bank. That bond was replaced by one for $3,000 some time

in 1904, and this bond and the loan of $2,500 upon note, continued until the time of the impeached transaction, in July, 1905. Spada's bank account was an active one from $3,000 to $5,000 per month, foreign drafts being presented, which were always paid.

Garborino also had an account in the Dominion Bank, but at a different branch, and having in the beginning of June, 1905, issued a cheque for $1,700 on his account, payment was refused, and upon inquiry he was informed that his cheque would not be honoured until Spada's account for which they held his guarantee was arranged. At that time Spada owed the bank $1,906.25 over and above a sum of $524.75 which was standing at his credit in a savings account in the same bank. He also had an account with the Imperial Bank, with a balance at his credit, the proceeds of a loan of $1,000 made to him upon a warehouse receipt for goods in the possession of a warehouseman named Carrie.

Up to this time, and until the refusal to pay his cheque, there was nothing to suggest to Garborino, or any one else apparently, any doubt of Spada's solvency. He was carrying on his business as usual, with a stock of goods in his store, as he had been doing for years. Nevertheless it was only natural that Garborino should desire to be relieved from the embarrassment occasioned by the refusal of his cheque. He saw Spada about it and the latter promised to arrange the matter in the course of a month. It is not said that Mr. Ross, the Dominion Bank agent, expressed to Garborino any doubt of Spada's perfect solvency, nor that he even entertained any such doubt. The explanation he gave in his evidence at the trial of his action in refusing Garborino's cheque was that

1907

BALDOCCHI v. SPADA.

Maclennan J.

he had heard or suspected that Spada was dealing with another bank, and so he wanted to have his account closed.

Nothing further occurred until the 10th of July, when Spada, as he had promised, proposed to arrange matters with Garborino and the bank by a transfer of the goods in the possession of the warehouseman Carrie to Garborino if the latter would pay the balance due to the bank, the goods to be taken as security for that payment and also for the $2,500 due to him upon his note.

This was agreed to, and they went together to the office of the warehouseman. On their way they went to the Imperial Bank and Spada there obtained a release of the warehouse receipt held by that bank by paying off the charge thereon, and taking it to the warehouseman, had the goods transferred into the name of Garborino, who gave him a cheque for $1,906.25 with which to pay the balance due to the Dominion Bank, and which was paid on the same or the following day.

It is this transaction, whereby Spada gave Garborino security for the sum of $2,500 which was due to him upon his note, and for the $1,906.25 paid to the bank, which is attacked as a fraudulent preference.

Now up to the conclusion of that transaction, so far as appears, there was no knowledge by any one, but Spada himself, of any debts owing by him other than those which the transaction settled. The Dominion Bank was paid, and Garborino was secured. The debtor had his stock of goods in his store, and had a balance of $422 at his credit in the Imperial Bank.

On the following day, however, the 11th of July, Spada sold out his stock and absconded, and then for

the first time it became known that he owed very large sums to persons with whom he dealt in Italy, and was insolvent.

The present action was brought by some of those creditors on behalf of themselves and others, and was brought within sixty days of the transaction impeached, by which under the provincial statute, the onus of proof was cast upon the defendant.

I think the defendant has satisfied the onus cast upon him by the statute, and that his mental condition admitted in his evidence is sufficiently explained by the refusal of his cheque by the bank.

I think the appeal should be dismissed.

IDINGTON J. (dissenting).—This is a creditor's action to recover goods preferentially assigned by an insolvent debtor to a creditor within sixty days before action and, thus, presumed, by virtue of R.S.O. (1897) ch. 147, sec. 2, sub-sections 2 and 3, to have been fraudulent and void as against creditors so suing.

The first question raised is whether or not respondent can, by merely swearing that he accepted the transfer only as security for payment of old debts and did not know of the insolvency or eve thereof, escape the operation of the Act.

His story is that the larger part of this debt was represented by an old promissory note of $2,500, on which interest had accrued and that the transfer was by way of *security* only for that and another debt.

The transfer is only evidenced by a misdated invoice of the goods made out by the debtor, in his shop, and in respondent's presence, charging him with the

1907

BALDOCCHI v. SPADA.

Idington J.

goods at fixed prices in detail as if representing an ordinary sale and that invoice is receipted with thanks.

He swears positively, however, that despite the form of the transaction and his acceptance of this receipted account, it was not a sale but only a security for these debts that was intended.

Courts have been known to hesitate to accept on such an issue the uncorroborated statement, as this is, by a party thereto, that a sale in written form was in fact only intended as security—indeed, it has frequently happened that such statements have been held not proven. This statement does not rest there. The sum named as total of the prices fixed for the goods would not cover the indebtedness sworn to and set forth in the pleadings. It would fall short about three hundred dollars.

Yet the respondent tells, under oath, not only that the transaction was in fact intended as a security, but that the $2,500 note which was designed by the transaction to be secured was on his *getting this receipted invoice given back to Spada and by him torn up.* All this stands uncorroborated by any one or, indeed, in any way. Who ever heard before this of a creditor giving up to be torn up the *very note for which he was getting security when the security, by his own evidence, would fall far short of covering the debt.*

He had no other security for these debts, if his story be true, There was no memorandum of a stated account. He does not pretend there was any, or any accounting and balance struck at this time. He had no voucher to substitute for what this $2,500 note stood for. True, he produces three withdrawal receipts on his savings-bank account some years before

that together amount to $2,500, but nothing appears, save his oath, that they had aught to do with this alleged promissory note—or to connect them with Spada.

He was an intelligent money-lender as well as shopkeeper.

We ask, with respect, what security can creditors have in a statutory presumption created for their protection, if tales so absurd are to be accepted by courts to rebut the presumption?

Sir William Scott said over a hundred years ago, in the case of *The "Odin"*(1).

> It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment.

Of course, there are not many men so intelligent as the one here in question who would venture to swear to such absurdities.

Stress was laid by the learned trial judge and in the court below on the confidence the respondent had placed in his debtor as excusing him.

When we find this giving of security, sale of goods and sham invoice, all carried out between two old friends on the day, indeed at the very hour, and in the place the debtor is arranging for what is admitted to have been a wretched swindle, under the guise of sale of his entire stock, by this same debtor, whereby his other creditors are defrauded, and then the debtor absconds,—how can we be so cruel, so harsh, as disbelieve the man who was so trustful and confiding till the last, as the oath referred to shews?

The confidence began in lending money to, and giv-

(1) 1 C. Rob. 248 at p. 252.

1907

BALDOCCHI v. SPADA.

Idington J.

ing security for his friend and fellow countryman, to the Dominion Bank, which kept a cheque on both by insisting upon the respondent, the wealthier of the two, keeping $2,000 within the bank's reach, in their savings bank branch.

Four years after these loans began and two or three years after the suretyship, which was rather continuous and increasing, had began, the respondent attempted to withdraw $1,700 out of the bank but was refused and was told that the refusal was owing to Spada, the debtor, having overdrawn his account $2,400.

He went to see his solicitor. The solicitor went with him to the bank. The money remained there. The respondent borrowed elsewhere the $1,700 he had needed to complete a loan.

It is quite clear the respondent's money in the bank had become impounded to meet Spada's obligations and so remained.

Spada, when face to face with his banker and surety on this date, 7th or 8th of June, could do nothing. He did not pretend he could then do anything save promise, as he did, that in a month's time he was going to make everything all right.

The result on the mind of the respondent, he states thus:

253.—Q. You understood from that that he couldn't settle then; that he was hard up?

A. I got kind of funny after him.

254.—Q. You got kind of afraid?

A. Yes.

Respondent waited, perhaps nervously, the expiration of that month. Meantime, once or twice, when Spada, who had come to spend most of his time in

New York and Buffalo, was home, the respondent saw him and was again assured by Spada, "he would be all right."

Why, if he had confidence, did he require these re-assurances? Like a shrewd, sensible man, he accepted them, but felt as above quotation describes.

The very day, though a Sunday, the month had expired, we find him, I take the liberty of thinking, still "funny" and "afraid," looking up Spada, telling him "about this account." And he said: "Come in to-morrow and I will settle everything."

No explanation was given of how. But he went and saw him, Monday, 10th of July, and was told as follows:—

> Q. Then did you go to see him?
>
> A. Yes. I went down and saw him at his shop and he told me that, if I lent him about $1,900, he would give me enough of goods to settle everything he owed me; and I said, "all right." He said he would give them to me to be security. He said they were some goods he had down to the storage. I said—"all right, I would do that."

It was arranged, after some delays, that the warehouseman should give a receipt providing for delivery to respondent of all the goods now in question but seventy-five baskets of cheese expected in but not yet in the warehouse, and for those an order was given to respondent by Spada. Then, the same day, they went to the shop of Spada and the transaction took the form of the invoice I have referred to.

The goods were in bond. The duties were unpaid. The first delivery, ex-warehouse, to respondent was on 25th of July. The account for these duties is dated 13th July, charged Spada and so marked paid. Respondent paid them. What do these things mean? Are we to accept the giving up and tearing up of the

1907

BALDOCCHI v. SPADA.

Idington J.

note, if unpaid, and these duties unpaid, as only marks of confidence?

I cannot find a word of evidence to say how the customs dues were agreed to be paid. Nothing explains this custom house part of the dealing. Nothing in it renders the story of giving up and tearing up of the note more credible.

The next day, after exchanging receipted invoice and note as stated above, they went to the bank, and Spada paid $500 cash and respondent $1,906.25 out of money he had in the bank. Several minor errors are made by the learned trial judge in regard to the details of the transaction and customs duties which I pass by.

I, with every respect, venture to suggest that there is error of a radical kind in the learned trial judge's treating the advance out of the impounded money as a fresh loan to Spada and a badge of confidence on respondent's part. It seems to me this false assumption tainted the whole results.

The cheque or form does not alter the real essence of the dealing.

It was, as the banker swears, a substitution. Enforced loans of that kind are not of much value as a mark of confidence in the solvency of one's debtor and much less so when we find them preceded by a month's waiting to get from the debtor what was got here.

It was only after a month, I surmise, of feeling "funny" and "afraid" that the respondent felt constrained to accept such goods as he did not want and could not handle, and make the best of things. How changed from the course of four or five years of dealing without security. Why was there such a change?

This presents a record I regret to see stand to be

accepted as a test of how the presumption in question can henceforth be rebutted.

The following remarks, on pages 290, 291 of the judgment in the case of *The National Bank of Australasia* v. *Morris*(1), are in point.

> Their lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent, * * *. What have the defendants to set against this strong evidence that the insolvency of Braun was apparent to them? First; that Balfour states that he did not believe or suspect that Braun was insolvent. We need not inquire nicely whether Balfour used the term "insolvent," as is suggested by a subsequent passage in his evidence, in a sense compatible with Braun's inability to meet his engagements. It is sufficient that he knew the facts which ought to have shewn clearly enough that Braun could not do so.

The presumption adds force to them.

I think the appeal should be allowed with costs. I would modify somewhat the suggestion of Mr. Justice Meredith as to an allowance he suggests to the respondent, (but as the result is the appeal is to be dismissed, I need not say more), the learned judge who in the court below took substantially the same view as I do of the case.

DUFF J. concurred with His Lordship Mr. Justice Idington.

Appeal dismissed with costs.

Solicitors for the appellants: *Johnston, McKay, Dods & Grant.*

Solicitor for the respondents: *John Tytler.*

(1) (1892) A.C. 287.