ROBINSON, LITTLE AND COMPANY, ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE DEFENDANT MCGILLIVRAY, (PLAINTIFFS) ..... } APPELLANTS;

1907

*June 6.
*June 24.

AND

M. MCGILLIVRAY AND J. W. SCOTT & SON ..... } DEFENDANTS.

AND

J.W. SCOTT & SON, (DEFENDANTS) . (RESPONDENTS).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insolvency—Preferential transfer of cheque—Deposit in private bank—Application of funds to debt due banker—Sinister intention—Payment to creditor—R.S.O. (1897), *c.* 147, *s.* 3(1).

McG., a merchant in insolvent circumstances, although not aware of that fact, sold his stock-in-trade and deposited the cheque received for the price to the credit of his account with a private banker to whom he was indebted, at the time, upon an overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit, McG. gave the banker his cheque to cover the amount of the note. In an action to have the transfer of the cheque, so deposited, set aside as preferential and void.

Held, affirming the judgment appealed from (13 Ont. L.R. 232) that the transaction was a payment to a creditor within the meaning of the statute, R.S.O. (1897) ch. 147, sec. 3, sub-sec, 1, which was not, under the circumstances, void as against creditors.

APPEAL from the judgment of the Court of Appeal for Ontario(1), affirming the judgment of the Divi-

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 13 Ont. L.R. 232, *sub nom. Robinson* v. *McGillivray.*

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sional Court(1), and the judgment of Falconbridge C.J., at the trial, by which the plaintiffs' action to set aside an alleged preferential transfer was dismissed with costs.

The material circumstances of the case are stated in the head-note, and are also referred to in the report of the judgment, on 2nd April, 1907(2), dismissing a motion to quash the appeal.

George C. Gibbons, for the appellants.

Meredith K.C. and *Brewster* for the respondents.

GIROUARD J.—This appeal is dismissed with costs.

DAVIES J. agreed that the appeal should be dismissed with costs.

IDINGTON J.—This appeal is from the Court of Appeal for Ontario upholding a judgment of a Divisional Court of that province and a judgment of the learned trial judge in a creditors' suit to set aside a transfer by the debtor of a cheque received within sixty days from the attack thus made on the transaction.

In the Divisional Court the late Mr. Justice Street dissented and gave some strong reasons to shew that the *primâ facie* presumption created by the Revised Statutes of Ontario (1897), ch. 147, against such assignments by an insolvent or one on the eve of insolvency was not rebutted.

Even if the difficulties in the way of the creditors

(1) 12 Ont. L.R. 91. (2) 38 Can. S.C.R. 490.

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here, arising from the semblance of the transaction to the case of payment, which is not within the statute, could be got over, I fear we cannot, since the case of *Baldocchi* v. *Spada*(1), recently decided in this court, interfere with the judgment of the court below. The comparison seems to me somewhat as follows:

The debtor there was shewn clearly to have been so hopelessly insolvent that, after his estate was depleted by something over $4,100 worth of stock transferred to the preferred creditor, the other creditors would not realize more than a few cents on the dollar.

Here the proof is not so clear. The learned trial judge credited the debtor when he swore that he did not believe he was in fact insolvent at the date of the transaction.

The total debts were small and would have been wiped out by sales of the debtor's real estate, at values for which it had been assessed, and otherwise valued at.

Again, the preferred creditor there was the creditor for money lent and long past due and the guarantor to the bank for his debtor and here the note was past due to the banker.

There the guarantor had been called on to make good his guarantee to the sum of nearly $2,000 and the debtor could not meet his debt but promised he would in a month, just as the debtor here did. In both cases forbearance was shewn for some weeks before the alleged preferential assignments in question were made.

There the creditor was so alarmed that he ad-

(1) 38 Can. S.C.R. 577.

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mitted under oath he had "felt funny and afraid" when default was made.

Here the creditor swears that he did not believe the debtor was insolvent and that he considered him solvent. This he swore to with the knowledge derived from a statement of the debtor's affairs given him some time before, and the debtor who had given this statement was recognized by him and admitted by appellants' counsel at the trial to be an honest man.

The debtor in the other case was the reverse of this and indeed fled just after the alleged preferential transfer and his creditor contented himself with not inquiring though he had felt "funny and afraid" for a month before.

The evidence here may, in the last analysis, rest on rather too sanguine estimates but, beyond that, seems credible.

The usual course of business between the parties was observed here, but there, as between the parties, there was a clear departure therefrom.

The evidence in the *Baldocchi Case*(1) I dealt with in my opinion therein.

As I intimated there, I would have preferred seeing the parties claiming under such preferences held to a different standard.

This case may not be quite satisfactory but the claim of Garborino in the above case having been upheld with much less to rest upon than that of the respondent, I do not see how I can, in view of these features common to both, refuse to uphold this judgment.

I think the appeal must be dismissed with costs.

(1) 38 Can. S.C.R. 577.

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MACLENNAN J.—I agree to dismiss the appeal with costs.

DUFF J.—I agree to the dismissal of the appeal. I think it unnecessary to add anything to the reasons given in the Court of Appeal for Ontario.

Appeal dismissed with costs.

Solicitors for the appellants: *Gibbons, Harper & Gibbons.*

Solicitors for the respondents: *Blewett & Bray.*