PAUL CAMPBELL, ASSIGNEE OF DANFORD ROCHE & CO. AND S. F. McKINNON & CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

BRADFORD PATTERSON (DEFENDANT) ..... } RESPONDENT.

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*Oct. 25, 26, 27, 28, 31.
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*Feb. 20.

WILLIAM MADER (DEFENDANT) .....APPELLANT;

AND

S. F. McKINNON & CO. AND PAUL CAMPBELL, ASSIGNEE OF ROCHE & CO. (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute—Application—R. S. O. (1887) *c.* 124 *ss.* 2 *and* 4—*Chattel mortgage—Preference—Bonâ fide advance—Mortgage void for part of consideration—Effect on whole instrument.*

Section 2 of R. S. O. [1887] c. 124 which makes void a transfer of goods, etc., by an insolvent with intent to, or having the effect of, hindering delay or defeating creditors or giving one or more creditors a preference over the others, does not apply to a chattel mortgage given in consideration of an actual *bonâ fide* advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any intention on his part to defeat, delay or hinder his creditors.

If part of the consideration for a chattel mortgage is a *bonâ fide* advance and part such as would make the conveyance void as against creditors the mortgage is not void as a whole but may be upheld to the extent of the *bonâ fide* consideration. *Commercial Bank* v. *Wilson* (1) decided under the statute of Elizabeth, is not law under the Ontario statute. Decision of the Court of Appeal following that case overruled, but the judgment sustained on the ground that it was proved that no part of the consideration was *bonâ fide.*

*PRESENT:—Strong C. J., and Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancellor in the first case and affirming his judgment in the second case.

The following statement of facts is taken from the judgment of the court delivered by Mr. Justice Gwynne:—

"On the 28th of January, 1890, the plaintiff, S. F. McKinnon, in the name of S. F. McKinnon & Co., commenced an action by a writ issued from the Queen's Bench Division of the High Court of Justice for Ontario against Danford Roche and the above appellant, Bradford Patterson.

"On the 3rd February following the said Danford Roche, at the pressing instance and request of the plaintiff Campbell acting on his own behalf as a creditor of the said Roche, and also on behalf of the plaintiffs McKinnon & Co., other creditors of the said Roche, executed a deed of assignment of all the real and personal estate, effects and choses in action of him the said Roche, for the benefit of his creditors. Upon the 20th of the said month of February the said S. F. McKinnon & Co. filed their statement of claim in the said action, whereby they claimed, on behalf of themselves and of all other creditors of the said Danford Roche, the right to have avoided and declared null a chattel mortgage on a stock of goods of the said Roche in a store of his at Barrie executed by the said Roche to the appellant Patterson, bearing date the 24th of December, 1889, for securing payment to the said Patterson of the sum of $5,000 with interest as therein mentioned, which chattel mortgage was duly registered as required by the statute in that behalf. Such right was claimed upon the allegation and charge that the said chattel mortgage was voluntary and that it was made by the said

(1) 18 Ont. App. R. 646 *sub nomine Campbell* v. *Roche* and *McKinnon* v. *Roche*.

Roche when in insolvent circumstances and unable to pay his debts in full, with intent to defeat, delay and prejudice his creditors or to give to one or more of them a preference over his other creditors or over one or more of them, and that the said chattel mortgage had the effect of defeating, delaying and prejudicing the creditors of the said Roche.

To this statement of claim the defendants Roche and Patterson pleaded separately but substantially to the same tenor and effect. The appellant in his statement of defence averred that the said chattel mortgage was given for a present actual, *bonâ fide* advance of money, namely, $5,000, paid by the said Patterson to the said Roche for the purpose of helping and assisting the said Roche in his business and not for the purpose or with intent to defeat, delay or defraud the creditors of the said Roche, and that since the action was commenced, to wit on or about the 5th day of February, 1890, the said Roche had executed an assignment for the general benefit of creditors under ch. 124 of the Revised Statutes of Ontario, and thereupon the said Patterson submitted that the said plaintiff McKinnon had no right of action in the matter.

Issues were joined on these pleadings and afterwards the above statement of claim was amended by the said Campbell being added as a co-plaintiff with the said McKinnon & Co.

In other respects the pleadings remained as before, and the case was brought down for trial before the Chancellor of Ontario, together with another action similarly framed between the same parties as plaintiffs and the said Danford Roche and one William Mader as defendants, for the purpose of setting aside another chattel mortgage upon other property executed by the said Roche to the said William Mader.

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The learned Chancellor in the case of *Campbell and McKinnon* v. *Roche and Patterson* pronounced judgment as follows: "This court doth declare that the chattel mortgage given by the defendant Roche to the defendant Patterson is fraudulent and void as against the plaintiffs and doth order and adjudge the same accordingly, and it appearing that pending the trial of this action the goods covered by the said mortgage had been sold with the consent of all parties and $2,500, portion of the proceeds of such sale, had been paid to the defendant Patterson to abide the result of this action, this court doth order and adjudge that the said defendant Patterson do forthwith pay to the said Paul Campbell the said sum of two thousand five hundred dollars with interest from the 14th day of March, 1890, to be dealt with by him as part of the estate of the said Danford Roche, and it appearing that a further sum of $2,500, portion of the said proceeds of said sale, has been deposited to the joint credit of the plaintiff Campbell and said defendant Patterson, this court doth order that the said defendant Patterson do join in all necessary cheques to obtain payment of the same to the plaintiff Campbell, to be dealt with by him in like manner and that the said Campbell do forthwith after receiving the same pay the said several sums of money and interest as aforesaid into court to the credit of this action to abide further order. And this court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of this action forthwith after taxation thereof."

From that judgment the defendant Patterson appealed to the Court of Appeal for Ontario, which court, by the unanimous judgment of all the judges, allowed the said appeal with costs, and adjudged that the action against the appellant, Patterson, should be dis-

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missed with costs. From that judgment appeal is taken.

In the case of *McKinnon* v. *Roche* (*Mader* v. *McKinnon* in this court) the Chancellor found as a fact that for part of the consideration given by Mader for his chattel mortgage the same could not be upheld against creditors and that the mortgage was, therefore, void as a whole. The Court of Appeal affirmed the decision of the Chancellor following *Commercial Bank* v. *Wilson* (1). The defendant Mader appealed.

McCarthy Q.C., and *McDonald* Q.C., for the appellants in *Campbell* v. *Patterson*.

In determining the validity of a chattel mortgage under the Ontario Act only the statutory definition of preference can be considered and not preference generally. *Ex parte Griffith* (2); *Ex parte Hill* (3); Yate-Lee and Wage on Bankruptcy (4).

As to intent see *Gottwalls* v. *Mulholland* (5); *Boldero* v. *London and Westminster Discount Co.* (6); In *re Johnson* (7); and as to the expression "*bonâ fide*," see *Tomkins* v. *Saffery* (8).

The learned counsel referred also to *Ex parte Taylor* (9), following *Ex parte Stubbins* (10), and *Atterbury* v. *Wallis* (11).

Moss Q.C., and *Thomson* Q.C. for the respondents. Proof of intent to prefer cannot be inferred. *Nobel's Explosives Co.* v. *Jones* (12). See also *Ex parte Official Receiver*. In *re Mills* (13); In *re Mapleback* (14).

In *Mader* v. *McKinnon* *Moss* Q.C. and *Thomson* Q.C. for the appellants referred to *Pickering* v. *Ilfra-*

(1) 3 E. & A.Rep. 257.
(2) 23 Ch. D. 69.
(3) 23 Ch. D. 695.
(4) 3 ed. p. 424.
(5) 3 E. & A. Rep. 194.
(6) 5 Ex. D. 47.
(7) 20 Ch. D. 389.
(8) 3 App. Cas. 213.
(9) 18 Q. B. D. 295.
(10) 17 Ch. D. 58.
(11) 8 DeG. M. & G. 454.
(12) 17 Ch. D. 721.
(13) 58 L. T. N. S. 871.
(14) 4 Ch. D. 150.

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combe Railway Co. (1); *Goodeve* v. *Manners* (2); *Kerrison* v. *Cole* (3); *Taylor* v. *Whittemore* (4).

McCarthy Q. C., and *McDonald* Q. C., for the respondents.

The judgment of the court was delivered by

GWYNNE J.—In the judgment of the Court of Appeal for Ontario I entirely concur, and for the reasons given by Justices Burton and Osler. There was no evidence which would justify the imputation to Patterson of knowledge that Roche entertained, if he did entertain, any intent, by means of the transaction entered into with Patterson, to defeat, delay or prejudice his creditors. There was no evidence sufficient to impute to Patterson knowledge of the insolvency of Roche when the mortgage which is impeached was executed. The imputation of his having had such knowledge seems to rest upon the fact that he was married to a sister of Roche's mother. There is no evidence that Patterson knew that Roche entertained any intent to apply the money advanced by Patterson in any way that would be a fraud upon or prejudicial to his creditors, or by way of preference of one or more over others, if Patterson's knowledge of such intent could avoid the mortgage. In *Ex parte Stubbins* (5), it was held by the Court of Appeal that even under the Bankruptcy Act of 1869, a sale of goods made for money actually paid could not be impeached as a fraud against creditors, upon the ground that the vendees knew that the motive and intent of the vendor in making the sale was to use the purchase money in making a payment to a preferred creditor. *Johnson* v.

(1) L. R. 3 C. P. 235.
(2) 5 Gr. 114.
(3) 8 East 231.
(4) 10 U. C. Q. B. 440.
(5) 17 Ch. D. 58.

Hope (1) is to the like effect in the case of a chattel mortgage executed to secure an actual present loan.

In short, there is no evidence, in so far as Patterson can be affected, that the mortgage was executed for any other purpose or with any other intent than that it should operate *bonâ fide* by way of security for a present actual, *bonâ fide* advance of money made by Patterson. Such a transaction never was avoided under the law as it stood prior to the passing of ch. 124 R. S. O. (1887) the second section of which, under which the chattel mortgage in the present case is assailed, is almost a transcript of the law as it then was; however, *ex majori cautelâ* as it would seem, the third section of the same ch. 124 declares such a transaction to be one to which the preceding section, number two, has no application, and which therefore could not be impeached by reason of anything contained in that section.

What Roche's intent was in entering into the transaction with Patterson appears from the use made by him of the money advanced by Patterson, and the evidence admits of no doubt that the whole of that money was applied by Roche in payment, *pro tanto*, of the claims of creditors, and four-fifths of the amount in payment of claims of S. F. McKinnon & Co. themselves. Money so paid to creditors, although paid before the date at which the claims became exigible at law, could be assailed, if assailable at all, only as preferential payments to one or more of Roche's creditors over others, but this section three of the same ch. 124 enacts that nothing in section number two shall apply to "any payment of money to a creditor."

Now, whether this provision in the act did or did not, in point of law, authorize a debtor in insolvent circumstances to mortgage his chattel property to raise

(1) 17 Ont. App. R. 10.

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money for the purpose of enabling him to pay one or more of his creditors in preference to others, the evidence, I think, shows that Roche believed that it did. He does not appear to have concealed anything from the plaintiff Campbell when, upon the 6th of January, 1890, he was urging Roche to make an assignment for the benefit of his creditors. He told Campbell all about the chattel mortgage already executed, and the purpose for which it had been executed, and of the manner in which the money raised upon the security of it had been applied, and that he was endeavouring to effect another loan upon a mortgage of other chattels for the purpose of paying his mother money which he owed her for a loan made by her to him; but whatever may have been his belief as to the construction of the act, and whether that belief was well or ill-founded, and whatever may have been his intent, and whatever the character attached by the law to such intent, none of these considerations can operate to deprive the appellant of a security given to him for an actual present advance of money *bonâ fide* made by him, which the Court of Appeal for Ontario, and in my opinion correctly, have found the money received by the mortgage which is impeached to have been.

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If this case must necessarily turn upon the question whether, where a chattel mortgage is given as security for a sum of money a part of which only was an actual present advance made *bonâ fide* by the mortgagee, and the balance was in respect of a transaction for which the mortgage could not be sustained against creditors impeaching it, such mortgage could or could not be sustained as good for this *bonâ fide* advance, I should be obliged to say that, in my opinion, such a case was not governed by the judgment in the *Commercial Bank* v. *Wilson* (1). That was the case of a judgment by de-

(1) 3 E. & A. Rep. 257.

fault recovered under the Common Law Procedure Act for an amount exceeding the sum of $2,800, of which sum $2,000 was the amount of a promissory note long previously made, and the balance was in respect of matters for which the judgment could not be maintained, and it was held, under the statute of Elizabeth, that as the judgment could not be sustained for a portion of the amount for which it was recovered it must be held to be wholly void as against the plaintiffs who were judgment creditors impeaching it as a fraud against them. But the statute of Elizabeth upon which that case was decided contains no such exception as that contained in the 3rd sec. of ch. 124, R.S.O., which enacts that nothing in sec. no. 2 of the act shall apply to "*any* assignment, &c., &c., of *any* goods or property "&c., &c., of any kind made by way of security for "*any* present actual, *bonâ fide* advance of money." This language appears to me to be sufficient to validate an assignment, &c., &c., to the extent of *any* present actual, *bonâ fide* advance to secure which the assignment, &c., &c., was given, although as to the residue of the amount covered by the security it could not be maintained. If, then, any portion of the amount to secure which the chattel mortgage in the present case was given could be held to have been a present actual, *bonâ fide* advance of money made by the mortgagee, William Mader, I should be of opinion that to such extent the mortgage would be good and valid, although as to the residue it could not be sustained, and that such a case was quite distinguishable from the *Commercial Bank* v. *Wilson* (1); but I can see no sufficient ground for holding that the transaction involved *any* actual, *bonâ fide* advance made by the mortgagee William Mader, who appears to have placed himself wholly as a puppet in the hands of his brother to be dealt with as the latter pleased, for the

(1) 3 E. & A. Rep. 257.

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purpose of effecting a matter in which William Mader in reality had not and was not intended to have any *bonâ fide* interest and in respect of which he was not intended to be subject to any real obligation but to be simply a tool in the hands of his brother, as the learned Chancellor has, and not without sufficient reason, found him to have been. In truth the money obtained from the bank on Pierson's endorsement of the note which Julien Mader procured his brother William to sign as maker was obtained wholly upon the security of Pierson. It was not the money of William Mader. He never had nor did his brother ever intend that he should have any actual possession and control of the money. It is impossible to hold that William Mader ever did, in truth, make any actual *bonâ fide* advance upon the security of the mortgage. In so far as his name was used in the transaction it is all a sham.

I have arrived at this conclusion apart from all consideration of the question whether Mrs. Roche was or was not a *bonâ fide* creditor of her son Danford; that is a question which I do not think it at all necessary to be decided in the present case, and which, therefore, cannot be concluded by the judgment herein.

The appeals in both cases must, in my opinion, be dismissed with costs.

No question was raised in the present cases, and for that reason none has been considered by me in the judgment which I have formed, as to whether the provisions of ch. 124 R.S.O., which profess to vest in an assignee under a voluntary assignment for the benefit of creditors made by a person unable to pay his debts in full, and so in insolvent circumstances, the power of maintaining an action to avoid, and of avoiding, as fraudulent against creditors a deed which the debtor had previously executed and which he himself could

not avoid, are or are not provisions relating to "Bankruptcy and Insolvency."

And whether such legislation by the legislature of the province of Ontario does or does not constitute an encroachment upon the exclusive legislative authority in relation to bankruptcy and insolvency which by the constitution of the Dominion is vested in the Dominion Parliament.

And whether, therefore, such provisions in the said ch. 124 are or are not *ultra vires* of the provincial legislature. The judgment in the present cases must not be considered as affecting in any way such questions if they should be raised in any future cases.

Appeals dismissed with costs.

Solicitors for appellants and respondents respectively: *Bain, Laidlaw & Kappele.*

Solicitors for respondents and appellants respectively: *Thomson, Henderson Bell.*