H. S. STEPHENS, ASSIGNEE OF THE ESTATE OF STEPHEN W. GILES, INSOLVENT (PLAINTIFF)..... APPELLANT;

AND

EDWARD BOISSEAU (DEFENDANT)..... RESPONDENT.

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*May 21.

*June 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Debtor and creditor — Payment by debtor — Appropriation—Preference— R. S. O. [1887] *ch.* 124.

A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B. who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B. who received, out of the proceeds of the sale of the goods under an order of the court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock which payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. [1887] ch. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under sec. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment for the plaintiff at the trial.

The facts of the case are thus stated by Mr. Justice Maclennan in the Court of Appeal:—

"The defendant held a chattel mortgage, dated 6th February, 1893, on two different stocks of goods belonging to one Giles, in the city of Hamilton, The mortgage was made to secure indorsements made by the defendant for Giles on a composition with the creditors, and also advances in cash and goods to the amount of $4,000 to set him up again in business. The composition notes, dated 1st February, 1893, were duly made and indorsed at six and eight months, and the defendant advanced to the mortgagor goods to the amount of $4,982.37, and paid accounts at his request to the amount of $673.22, instead of the $4,000 named in the mortgage, an excess of $1,655.59. On the 11th of August the mortgagor was in default, not only for the goods and cash advances, but also for $856.49 of composition notes overdue and which the defendant had been obliged to pay, and there were composition notes amounting to $1,454 still current and which would not be due until the 4th of October.

"On the 11th of August, therefore, the total indebtedness of the mortgagor to the defendant was about $7,970—of which about $6,516 was past due. On that day a sale was made by the defendant, with the concurrence of the mortgagor, of one of the mortgaged stocks *en bloc* to one Huston, and the defendant ac-

(1) 23 Ont. App. R. 230.

cepted the purchaser's notes for the price at 4, 5 and 6 months date, indorsed by Giles. These notes were accepted by the mortgagee as cash, deducting a discount for the time they had to run, and they amounted, less discount, to $5,640.89. The defendant applied this money generally upon that part of his debt which was overdue, other than the composition notes, and the effect was that thereby his debt, including the $1,655.59, was satisfied and discharged except the composition notes due and to grow due, amounting to $2,324.20 and a small sum of $14.70, in all $2,338.90. The way the plaintiff puts it in his statement of claim is that the defendant deducted out of the proceeds of the notes the sum of $4,000, being the amount of a certain chattel mortgage on the stock sold to Huston, and for the price of which the notes were given, and applied the balance or sum of $1,655 in payment of a past due and unsecured indebtedness of Giles to him. The plaintiff's counsel also put in as evidence at the trial the defendant's account, showing the application of the purchase notes as cash by him in the manner above mentioned; and there is no doubt that Giles, the debtor, approved of, or acquiesced in, that application of the purchase money. A few days afterwards, that is on the 17th of August, Giles made an assignment of his estate to the plaintiff for the benefit of his creditors. There is no doubt whatever that on the 11th of August, when the sale of the first stock was made, the debtor was quite insolvent, and the defendant must have been well aware that he was so. The present action was brought on the 11th of June, 1894, and it is for the purpose of recovering from the defendant the sum of $1,655.59, being a sum equal to the unsecured part of the defendant's debt which he satisfied out of the proceeds of the sale of the first stock of goods, and

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which the plaintiff contends was a fraudulent preference.

"It seems that just before the assignment was made the defendant had seized the second stock of goods comprised in his mortgage and was in possession. An execution was also about the same time placed in the sheriff's hands against the mortgagor, and the sheriff made a seizure of that stock as belonging to the mortgagor. The assignee having also claimed the goods the sheriff interpleaded. Upon the return of the summons on the 16th of September, 1893, the plaintiff's claim as assignee was barred, and an issue was directed between the execution creditor and the defendant, which was ultimately tried and decided in favour of the defendant. *Horsfall* v. *Boisseau* (1).

"The goods were sold under the order of the court and by order dated the 21st of March, 1894, the defendant was declared to be entitled to receive out of the proceeds the sum of $2,239.54, being the balance still remaining due upon his mortgage."

On these facts Mr. Justice Meredith gave judgment for the plaintiff, and the question is whether that judgment is right.

The judges in the Court of Appeal were unanimous in their opinion that Mr. Justice Meredith's judgment was wrong and it was reversed. The assignee then appealed to this court.

Gibbons Q.C. for the appellant referred to *Mader* v. *McKinnon* (2); *Kitching* v. *Hicks* (3); *Cameron* v. *Perrin* (4).

Kappele for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts are fully stated in the judgment of Mr. Justice Maclennan and I need not repeat them.

(1) 21 Ont. App. R. 663.
(2) 21 Can. S. C. R. 645.
(3) 6 O. R. 739.
(4) 14 Ont. App. R. 565.

Unless the appellant can show that some statutory provision has been contravened by the respondent he cannot possibly be entitled to any relief, inasmuch as at common law preferential payments are unimpeachable.

Then how can it be maintained that there was in the case before us any transaction between Giles and the respondent which offended against the provisions of the 2nd section of Revised Statutes of Ontario, ch. 124? The validity of the mortgage itself was not questioned. The sale to Huston was made at the instance of the respondent and could not have been carried out without his assent. Had all the debt which the mortgage was given to secure, that is to say the $4,000 for new goods, the $2,338 for the composition notes as well as the $1,165 unsecured debt, been due, and had there been one sale including both stocks of goods for an amount equal to or in excess of the $7,970, the aggregate debt secured and unsecured, the case would have presented the same question of law as that which has actually arisen. It would have been quite within the respondent's rights in the supposed case, as I think it was in the present, that he should have sold all the mortgaged goods and received the proceeds. Then as regards the surplus which would have been lawfully in his hands, he could have properly appropriated a due proportion to the payment of his secured debt, leaving in his hands a balance equal to or exceeding the unsecured debt. What would there have been in that case to have disentitled the respondent if sued by the assignee for the balance to the benefit of section 23 of the Revised Statutes of Ontario, chapter 124? This section provides that:

The law of set-off shall apply to all claims made against the estate and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent

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as if the assignor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this or any other Act respecting frauds or fraudulent preferences.

The Chief Justice.

It would have been out of the question to have said that there was in the case actually before us any agreement or arrangement bringing it within the exception of cases of fraud contained in this section.

Then, the case put, in all its legal aspects, is indistinguishable from the present, and that being so the same consequences must follow here as in that supposed.

The only way in which the right which was acquired by the respondent, by reason of his having to realize his security by sales of the mortgaged property, could have been obviated, was by redemption by Giles or his assignee before the sales which would have deprived the respondent of the benefit of the set-off under the 23rd section, by means of which he has, without in any way infringing the law against preferences, gained an advantage over the other creditors. The appellant not having chosen to exercise this right of redeeming must abide by the consequences.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Mulkern & Harper.*

Solicitors for the respondent: *Laidlaw, Kappele & Bicknell.*