ROBERT GIBBONS, ASSIGNEE OF THE ESTATE OF ANDREW MORRISON, AN INSOLVENT (PLAINTIFF)..... APPELLANT;

AND

LEWIS McDONALD AND JOHN C. HEFFERNAN (DEFENDANTS)..... RESPONDENTS.

1891
*Nov. 26, 27.
1892
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Debtor and creditor—Mortgage—Preference by—Pressure—R.S.O. (1887) *c.* 124 *s.* 2.

A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as the result of pressure and for a *bonâ fide* debt and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank* v. *Halter* (18 Can. S.C.R. 88) and *Stephens* v. *McArthur* (19 Can. S.C.R 446) followed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division (2) in favour of the defendants.

The plaintiff was assignee of one Morrison under an assignment for the general benefit of creditors and the action was brought to set aside a mortgage of a farm given by Morrison to the defendant McDonald a month before the assignment. The plaintiff claimed that this mortgage was void as a preference under R. S. O. (1887) ch. 124 sec. 2. The defendant McDonald had, before the action was brought, assigned the mortgage to the defendant Heffernan and plaintiff claimed as an alternative payment from McDonald of the proceeds of the assignment.

The facts proved on the trial were that Morrison was indebted to the defendant McDonald on certain pro-

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 18 Ont. App. R. 159.

(2) 19 O.R. 290.

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missory notes and wishing to leave the province of Ontario and go to Manitoba he proposed to give McDonald a mortgage on his farm for the amount and a further advance, McDonald having previously demanded payment of his debt. This arrangement was carried out. At the time Morrison knew that he was unable to pay his debts in full but as his credit had always remained good McDonald believed him to be solvent.

The action was tried before Mr. Justice Street who gave judgment for the defendants on the ground that McDonald had no knowledge of the insolvent condition of his debtor when he took the mortgage. The Court of Appeal affirmed this decision following *Molsons Bank* v. *Halter* (1) which had, then, just been decided. The plaintiff appealed.

Garrow Q.C. for the appellant. This case differs from *Molsons Bank* v. *Halter* (1) and *Stephens* v. *McArthur* (2) in two respects; there was no pressure and the whole estate of the debtor was assigned to McDonald.

As to what constitutes pressure see *Long* v. *Hancock* (3); *Brayley* v. *Ellis* (4); *Ex parte Griffith* (5). And as to the effect of assigning the whole estate see *Ex parte Fisher* (6); *In re Baum* (7); *Davies* v. *Gillard* (8).

Lash Q.C. for the respondent McDonald and *McDonald* Q.C. for respondent Heffernan cited *Stuart* v. *Tremain* (9); *McMaster* v. *Clare* (10).

Sir W. J. RITCHIE C.J.—I did not take part in the judgment of this court in the case of *Molsons Bank* v. *Halter* (1). I have most carefully read the judgments delivered in that case. Had I been unable to arrive

(1) 18 Can. S. C. R. 88.
(2) 19 Can. S. C. R. 446.
(3) 7 O. R. 154; 12 Can. S. C. R. 532.
(4) 9 Ont. App. R. 565.
(5) 23 Ch. D. 69.
(6) 7 Ch. App. 636.
(7) 10 Ch. D. 313.
(8) 21 O. R. 431.
(9) 3 O. R. 190.
(10) 7 Gr. 550.

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at a conclusion in consonance with that come to by the majority of the court I should have felt myself bound to follow that decision, but I am happy to say, after a careful consideration of the case, that I entirely agree with the reasoning of my brother Strong and the conclusion at which he arrived.

That case disposes of the present in which there was no concurrence of intent, on the one side to give and on the other to accept, a preference over other creditors, inasmuch as there is nothing to show that the defendant was aware of the insolvency of the debtor, and there is nothing in the evidence to suggest any bad faith or collusion between the defendant and his debtor.

STRONG J.—I am of opinion that this appeal should be dismissed with costs, my reasons for this conclusion being that pressure having been proved there was not a preference such as the statute avoids. Having already in the cases of *Molsons Bank* v. *Halter* (1) and *Stephens* v. *McArthur* (2) stated my opinion as to the proper meaning and construction of the statute I do not feel called upon to repeat them again. Moreover I consider the question settled and concluded so far as authority goes by the decisions of this court in the two cases referred to.

TASCHEREAU and GWYNNE JJ. concurred in dismissing the appeal.

PATTERSON J.—The decisions of this court in *Molsons Bank* v. *Halter* (1) and in *Stephens* v. *McArthur* (2) settle the questions of law in this case against the

(1) 18 Can. S.C.R. 88. (2) 19 Can. S.C.R. 446.

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appellant, and it has been found that there was not in fact any intent to prefer. Therefore the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Dickson & Hays.*

Solicitor for respondent McDonald: *F. Holmstead.*

Solicitor for respondent Heffernan: *J. L. Darling.*