1885

*May. 19.

*Nov. 16.

WILLIAM D. LONG AND GEORGE H. BISBY (PLAINTIFFS)..... APPELLANTS;

AND

EDWARD H. HANCOCK, J. B. FAIRGRIEVE AND JOHN HALLAM (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Interpleader issue—Insolvent Co.—Chattel mortgage by—Preference over other creditors—Intention to prefer—R. S. O. ch. 118.

A company being indebted to L. & B. in a large amount, and believing that their charter did not allow a mortgage on their property to secure an overdue debt, made an agreement to give such mortgage for an advance of a larger sum, agreeing to return the amount of the debt to the mortgagees. At the time of this transaction the company believed that by getting time from this creditor they would be able to carry on their business and avoid failure. This hope was not realized, however, as the company were subsequently compelled to stop payment, and the above

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

1885

LONG
v.
HANCOCK.

respondents, who were also creditors, obtained judgments and issued executions against the goods secured by the mortgage, and on an interpleader issue brought to try the title to such goods, the chancellor hearing the cause gave judgment for the execution creditors, and the Court of Appeal sustained that judgment by a division of the court. On appeal to the Supreme Court of Canada.

Held, reversing the judgment of the chancellor, that inasmuch as the company *bonâ fide* believed that by giving this mortgage and getting an extension of time for payment of plaintiffs' debt, they would be able to carry on their business, the mortgage was not a preference of this debt over those of other creditors, and not a fraudulent preference under R. S. O. ch. 118.

APPEAL from a decision of the Court of Appeal for Ontario (1), refusing, by a divided court, to set aside a judgment of the chancellor in favor of the respondents.

This was an interpleader issue to try the title to certain goods seized under execution issued on judgments obtained by the respective respondents against the Hamilton Knitting Company. The company being indebted to the plaintiffs in the sum of $4,750, and believing that their charter would not allow them to give a mortgage on their property to secure an overdue debt, entered into an arrangement with the plaintiffs whereby the latter were to advance $5,000, to be secured by a chattel mortgage on the stock and machinery of the company constituting all their available assets, and the company were to return the amount of the debt ($4,750) to the plaintiffs. This arrangement was duly carried out, the mortgage was given as agreed, and the surplus of the $5,000, after returning the amount of the plaintiffs' debt, went into the business of the company. According to the evidence given on the hearing it appeared that the company believed that by giving this mortgage, and being relieved from the present payment of plaintiffs' debt, they would be able to carry on their business and avoid failure; it also appeared that the plaintiffs, previous to the mort-

(1) 12 Ont. App. R. 137. (2) 7 O. R. 154.

1885

LONG v. HANCOCK.

gage, had been urging the payment of, or security for, their debt.

The company failed, however, and the respondents, being creditors, obtained judgments on their respective debts on which executions were issued, and the goods secured by the above-mentioned mortgage were seized under such executions. The plaintiffs then instituted these proceedings to try the title to such goods.

The learned chancellor who heard the cause held that the mortgage was in contravention of the statute relating to fraudulent preferences; that the pressure brought upon the company was too slight to warrant the giving of the mortgage, and gave judgment for the defendants.

The plaintiffs appealed, and the Court of Appeal being equally divided the judgment of the chancellor was sustained.

The plaintiffs then appealed to the Supreme Court of Canada.

Crerar for appellants contended that the chattel mortgage was valid and cited, *inter alia: Johnson* v. *Fesemeyer* (1); *Newton* v. *The Ontario Bank* (2); *Fidgeon* v. *Sharpe* (3); *McCrae* v. *White* (4); *Slater* v. *Oliver* (5); *VanCasteel* v. *Booker* (6); *Mogg* v *Baker* (7); *Ex parte* Hall (8).

Martin Q.C., and *Furlong* for respondent Hancock, and *A. D. Cameron* for respondent Fairgrieve, contended that the transaction by which appellants took security upon all the available assets of their debtors and prevented them from getting credit elsewhere was a sham, and could not, upon the evidence of the case, be upheld. The learned counsel cited in support of the judgment appealed from the following cases: *Smith* v.

(1) 25 Beav. 88; 3 DeG. & J. 13.
(2) 15 Gr. 283.
(3) 5 Taunt. 539.
(4) 9 Can. S. C. R. 22.
(5) 7 O. R. 158.
(6) 2 Ex. 691.
(7) 4 M. & W. 348.
(8) 19 Ch. D. 580.

1885

LONG v. HANCOCK.

Ritchie C.J.

Cannan (1); *Ex parte* Hawker. *In re* Keely (2); *In re* Wood (3); *Parkes* v. *St. George* (4); *Reese Silver Mining Co.* v. *Atwell* (5).

Crerar in reply cited *The Credit Company* v. *Pott* (6).

Sir W. J. RITCHIE C. J.—I can see no evidence of pressure in this case, nor, taking the whole evidence together, can I discover sufficient to lead my mind to the conclusion that the mortgage was given with either the intent to defraud or delay the creditors of the company, or with intent to give one or more of the creditors a preference over the other creditors, or over any one or more of such creditors.

The company was, no doubt, in very straightened circumstances, and when the plaintiffs insisted on a settlement of their claim the position of the company appears to have been fairly discussed between the president and the manager, and the president seems very fairly to have expressed his determination, in the event of the manager arriving at the conclusion that with an extension of time from the plaintiffs the company could not pull through, as he expressed it, then to recommend an assignment for the general benefit of all the creditors, but if, on the contrary, the manager, as the practical business man of the company, should be of opinion that on obtaining such an extension as Parkes considered necessary, the business could be run and the company extricated from its difficulties, he, Parkes, would recommend giving the required security. The manager appears to have required that the dates of payment in the mortgage should be settled to his satisfaction, and if so, the business could be carried on and the company saved. A discussion appears to have taken place between the plaintiffs and Parkes as to the

(1) 2 E. & B. 35.
(2) 7 Ch. App. 214.
(3) 7 Ch. App. 302.
(4) 10 Ont. App. R. 496.
(5) L. R. 7 Eq. 347.
(6) 6 Q. B. D. 295.

1885

LONG
v.
HANCOCK.

Ritchie C.J.

terms of payment to be inserted in the mortgage, as to which the parties appear to have been at variance; finally, the terms on which the manager thought the company could be carried on were agreed to, and Parkes recommended the giving of the security.

I think the evidence shows that if such an arrangement would not enable them to carry the company through the mortgage would not have been given, and an assignment would have been recommended by the president in lieu thereof. The terms having been satisfactorily arranged, a by-law of the company was passed authorizing the giving of the mortgage for $5,000, which was unanimously confirmed by all the stockholders of the company, such sum ($5,000) being an amount sufficient to pay off the indebtedness to the plaintiffs, and a further sum of $156.13, which the company employed in the purchase of wool. The company resumed business and continued until the 25th of June, when the respondent Hancock issued a writ against them on which he obtained judgment, but it is worthy of remark that no portion of this judgment debt had been created at the time when the mortgage in question was given. And as to the respondent Hallam, the lawyer says:

When he knew I had given the mortgage to Long & Bisby, after that I had showed him the books and statements, and gave him an order on Lockhart, he was perfectly well satisfied to let the matter stand and give me all the time needed on the balance of this account.

I cannot think this was a device or scheme to prefer the plaintiffs, nor can I think the president and manager believed the company to be hopelessly insolvent; had they so thought, the evidence leads my mind to the conclusion that the mortgage would not have been given, but a general assignment in lieu thereof; and after the mortgage was given the plaintiffs and the

company had dealings to the extent of about $2,140.

"It was expected, at the time the mortgage was given, that exertions would be made to get the preferred stock taken."

1885

LONG v. HANCOCK.

Ritchie C.J.

While I think there was no pressure in this case, I cannot agree with the chancellor that the transaction was a scheme by the company to give a preference to the plaintiffs over the other creditors, but was an agreement entered into whereby the company hoped to be enabled to continue its business and meet its engagements, and not with the intent of defeating or delaying its creditors, or to prefer the plaintiffs over Hancock, who was not a creditor at the time it was given, or over others who were at that time creditors.

I do not think the evidence justifies me in saying that the whole proceeding was a sham; in other words, a gross fraud entered into by the plaintiffs, the president and manager of the company and the entire body of shareholders, to confer a preference on the plaintiffs and defraud all the other creditors of the company and to prevent an equal distribution of the assets of the company. Before coming to such a conclusion, I think the evidence should be much stronger than it is in this case.

I do not think it is necessary at all to apply the doctrine of pressure to this case. The plaintiffs, no doubt, wanted to secure their debt from a company in, no doubt, very straightened circumstances, and which, had the plaintiffs pressed their claim for immediate payment, would have necessitated the winding-up of the company, but which would be avoided, in the opinion of the president, manager and shareholders, by obtaining a postponement of the time of payment of the debt and thus enable the company to work on and extricate itself from its embarassments, and also to enable it, by the issue of preferential stock,

1885

LONG v. HANCOCK.

Ritchie C.J.

to provide working capital. I think the fair result of the evidence is that the assignment was not a fraud, nor intended to be a fraud, on the creditors, but was considered an arrangement whereby the company could be saved and all the creditors ultimately paid, and it was entered into with this intent.

It is nothing to say, after the subsequent events, that the company was hopelessly insolvent, and quite as little to say, before the happening of these events, that the manager, the president and the whole body of shareholders combined fraudulently to benefit the plaintiff and wrong the other creditors of the company; that the president's consultation with the manager as to the ability of the company to go on if an extension of time was granted, and the statement of the manager that from his knowledge of the position of the company by obtaining the terms he stipulated for he could get through, were false and made with a fraudulent intent; that the discussion as to the terms and the refusal to give the mortgage unless those terms were acceded to, was all a sham; that the president did not believe the statement of the manager but bargained himself with the plaintiffs to give them a fraudulent preference, and that the whole body of shareholders unanimously joined with the president and manager, approved of their doings and so united in committing a gross fraud on their innocent creditors. And for what? What were the manager, president and shareholders to gain by benefitting the plaintiffs and defrauding the other creditors? Before attributing such conduct to any one we should expect to find a motive but I can discover none in this case unless it be that to which I am disposed to attribute the conduct of the parties—a desire to perpetuate the company, to "pull her through" as it is expressed, and so pay everybody. That with an extension of time from the principal

1885

LONG v. HANCOCK.

Ritchie C.J.

creditor this might be done, but without such extension an attempt to carry it on would be hopeless, all parties own. They acted in good faith and I cannot say that it has been made out, beyond all reasonable doubt, that a fraud upon the creditors and upon the act has been made out. Suspicion will not do; fraud must be proved, not presumed.

FOURNIER and TASCHEREAU JJ. concurred.

HENRY J.—I have come to the same conclusion. The defence set up that the chattel mortgage was given to effect a preference to these creditors over others is not sustained by the evidence.

That is the only defence, and I do not think that, under the evidence, this court or any other court should interfere.

GWYNNE J.—This is an interpleader issue in which the question is whether a chattel mortgage executed on the 5th day of May, 1883, by a certain corporation, called the Hamilton Knitting Company, to the appellants, is or not void or against the creditors of the company within the provisions of the revised statutes of Ontario ch. 118 sec. 2. To be void under that statute it must have been executed by the company when in insolvent circumstances or on the eve of insolvency, and with intent to give to the appellants a preference over the other creditors of the company.

That the appellants who were the largest creditors of the company, and whose claim was for a long time overdue, had become, immediately preceding the execution of the mortgage, very urgent for payment of their demand, and were pressing for such payment with threats of instant legal proceedings unless they should be paid or secured, there can, I think, be no doubt upon the evidence, but it is contended that the doctrine

1885

LONG
v.
HANCOCK.

Gwynne J.

of pressure has no application in a case arising under the provisions of the statute in question. In support of this contention we have been referred to the language of the Lords Justices in appeal in *ex parte Hall* (1), and in *ex parte Griffith* (2), and to the language of Mr. Justice Patterson in the Court of Appeal for Ontario in the case of *Brayley* v. *Ellis* (3). In the two former cases the questions arose under the 92nd section of the English Bankruptcy Act of 1869, which declared that every conveyance or transfer of property or charge thereon, and every payment made by any person unable to pay his debts from his own moneys as they become due, in favor of any creditor, or of any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, if the person making such conveyance, &c., &c., become bankrupt within three months after the date of making the same, shall be deemed fraudulent and void as against the trustee in bankruptcy.

In *ex parte* Hall the circumstances of the case as described in the judgment of Sir George Jessel, Master of the Rolls, were as follows (4) :—

> The bankrupt was pressed by the appellant on the 14th February to give him security which he had promised, but he did not give it. On the 17th February Chamberlin (the debtor's brother-in-law) went to see the appellant, and told him that the bankrupt was about to stop payment. Thereupon the appellant went to Leicester to see if he could not get some security from the bankrupt. There he was again told by the bankrupt that he was about to stop. He endeavored to obtain some security from him, but he failed, though he says he told the bankrupt that he should bring an action against him instantly if he did not perform his promise of the 17th January. Then the appellant went back to Leeds, and after he had gone away the bankrupt delivered the two bills to Brown, requesting him to hand them over to the appellant.

Then with reference to this state of facts the learned

(1) 19 Ch. D. 584.
(2) 23 Ch. D. 69.
(3) 9 Ont. App. R. 588.
(4) At p. 585.

master of the rolls proceeds :

Can that delivery of the bills to Brown be said to have been made in consequence of *bonâ fide* pressure on the part of the appellants ? It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor, "I am about to become bankrupt," or "I shall stop payment in a week." The creditor says, "Pay me my debt or I will sue you for it." Can that be called *bonâ fide* pressure by the creditor? When you consider the matter it seems to me that it would be absurd so to call it, and that is exactly what occurred in the present case.

In *ex parte* Griffith the circumstances, as also described in the judgment of the same learned judge, were these. Wilkinson was indebted to his traveller, Griffith, in a large sum of money (1) :—

He is going to stop payment, and writes a letter to Griffith, who was then on a journey, telling him in effect as plainly as possible, "I can't go on, come up to London immediately; "I can't meet my bills, and I cannot pay even the ordinary weekly wages, therefore you must at once come to London." Well, in compliance with that letter Griffith comes to London and he finds that Wilkinson's affairs are in a hopeless state. A discussion appears to have taken place between Griffith and Wilkinson, in which Griffith says: "Can't you give me a preference," (that is what it comes to), and he asks him to assign those debts over to him as security for the amount owing to him. There is no pretence as far as I can find for saying that there was anything more than a request by Griffith for a preference. It is said that Wilkinson refused to comply with the request; I suppose he said: "In the present state of my affairs I can't pay you." But just on the eve of signing his petition, the very day before, he does assign those debts to Griffith. For what purpose? Clearly to give him a preference. I say, sitting as a jury, that the learned registrar was quite right in coming to the conclusion that the mind of Wilkinson was influenced, not by the demand of Griffith for a preference, but by his desire to accede to the demand and to give him a preference. That is within the very words of sec. 92. If the assignment was made with a different view, it would not be within the statute. If it was made with a view to prefer the creditor, and also with some additional view, it may be that it is not within the statute. But the additional motive may have been so trifling that it ought not to be taken into account.

(1) See 23 Ch. D. 82.

1885

LONG
v.
HANCOCK.

Gwynne J.

Lord Justice Lindley in that case says:

> Wilkinson's letter of the 29th of June, 1881, which brought Griffith up to town, throws a flood of light upon the transaction. Taking that letter into consideration and not being led away on a false scent by an enquiry whether there was *bonâ fide* pressure at that time, taking that letter as part of the transaction and bearing in mind its relation to that which took place afterwards, I am driven irresistibly to the conclusion that the security was given by Wilkinson with a view to prefer Griffith.

And Lord Justice Bowen:

> There is no question, in my mind, that this particular assignment was made with a view of giving this creditor a preference. But that, as the master of the rolls has said, may not be enough, and I go further and I say that the assignment was made with the view of preferring this creditor, and to give the *coup de grace* to it, I say, sitting as a juryman, that it was made with the sole view of giving this creditor a preference over every other creditor.

Now if these learned judges had been of the opinion that the doctrine of pressure had no application whatever in a case arising under the 92nd section of the Bankruptcy Act of 1869 it is inconceivable that they should have taken so much pains to point out that it would be absurd to call pressure that which was relied upon as pressure, and that the transactions which were impeached were the voluntary acts of the bankrupts. If they had been of opinion that the doctrine of pressure was wholly inapplicable in view of the provisions of the statute, they would, I have no doubt, have expressed that opinion in equally unequivocal language as that used by Mr. Justice Paterson in *Brayley* v. *Ellis* in relation to this same ch. 118 of the statutes of Ontario now under consideration, and which he has repeated in his judgment in the present case. It is upon the authority of the above cases of *ex parte Hall* and *ex parte Griffith*, and of certain passages in the judgments of the learned judges of the Court of Appeal for Ontario, in *Davidson* v. *Ross* (1), and of the observations of Mr. Justice Patterson in *Brayley* v. *Ellis*, that the contention,

(1) 24 Gr. 22.

that the question of pressure is wholly unimportant in a case arising under ch. 118 of the statutes of Ontario, is rested. This conclusion is not, in my opinion, a fair deduction from what is said in *ex parte Hall* or in *ex parte Griffith*, and as to the passages in *Davidson* v. *Ross* which are relied upon they did not meet with favor in this court in *McCrae* v. *White* (1) where it was also pointed out that those passages were not necessary for the determination of the *res decisa* in *Davidson* v. *Ross* and were, therefore, merely *obiter dicta*. The question of the existence or non-existence of pressure applied by a creditor upon his debtor to enforce payment of, or security for, his debt is one which, in my opinion, is still an important item to be taken into consideration in cases arising under ch. 118 of the Ontario statutes, and I confess I am unable to see how it can be said to be irrelevant or inappropriate unless, upon an enquiry as to the proper inference as to a party's intent in executing a conveyance, we are to exclude wholly from consideration the circumstances surrounding its execution. The statute does not say that all conveyances, &c., &c., executed by a person in insolvent circumstances or on the eve of insolvency, even though executed to procure the cessation of legal proceedings to recover a just debt, and to avert the injurious and probably ruinous consequences attending a judicial sale under an execution in the suit shall be void as against the creditors of the debtor; but that all conveyances, &c., executed by a debtor in insolvent circumstances, &c., and with intent to defeat or delay creditors, or to give one creditor a preference over the other creditors of the debtor, shall be void.

Pressure is therefore an all important item for the proper determination of the question whether the con-

(1) 9 Can. S. C. R. 22.

1885

LONG v. HANCOCK.

Gwynne J.

veyance which is impeached was executed with one of the intents named in the statute as having the effect of invalidating it, or with an intent not prohibited by the statute and which is, therefore, unobjectionable. Now that there was *bonâ fide* pressure applied by the appellants, the creditors in this case, there can, I think, be no doubt, and the proper inference to be drawn from the evidence as to the intent of the mortgagors in executing the mortgage, in my opinion, is that it was executed under the influence of the pressure and with the view, by obtaining time for payment by instalments of the amount secured by the mortgage, to enable the company to recover from the depression in which its affairs then were and eventually to become successful in its business, and not with the intent of giving to the appellants a preference over the creditors of the company.

Whether the expectation of the manager of the company was over sanguine or not it appears to have been honestly entertained by him, and I see no reason to doubt that the president and directors of the company, in executing the chattel mortgage, acted honestly upon the faith of the manager's assurances that with time given as provided in the mortgage, and the arrangements he had made, he would carry the company successfully through its difficulties. It is unnecessary for me to go through the evidence which has been ably reviewed by Mr. Justice Burton with whose view of it I concur. The sole ground for the suspicion which has been cast upon the transaction appears to have arisen from the form in which the mortgage has been drawn, namely, in consideration of a loan of $5,000 then made instead of being stated to be partly in consideration of a past debt and partly of a small further advance then made. But there can I think be no doubt upon the evidence that this form was honestly adopted under an impression,

1885

LONG
v.
HANCOCK.

Gwynne J.

wholly erroneous in my opinion, that the company had no power to execute a chattel mortgage to secure a past debt.

Every trading corporation has the same power that an individual trader has to mortgage his property to secure an overdue debt unless this power be expressly restrained and prohibited by the act incorporating the company, and there is no prohibitory clause of that nature in the act incorporating this company. The erroneous opinion entertained upon this point having been the cause of the adoption of the form which the mortgage has assumed, namely, as security for a loan of $5,000 out of which the old debt of almost $4,700 was paid, it would be unjust to impute to the execution of the mortgage, and as evidenced by its form, an intent fraudulent within this chapter 118, when that form can, upon the evidence, be attributed to a wholly different and honest intent.

The appeal, in my opinion, should be allowed with costs and judgment be ordered to be entered for the appellants, the plaintiffs in the interpleader issue, with costs in all the courts.

Appeal allowed with costs.

Solicitors for appellants: *Crerar, Muir & Crerar.*
Solicitor for respondent Hancock: *E. Furlong.*
Solicitor for respondent Fairgrieve: *A. D. Cameron.*