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*Mar. 15,16.

*June 19.

JOHN McCRAE (PLAINTIFF).....APPELLANT;

AND

JOHN WHITE (DEFENDANT).....RESPONDENT.

ON APPPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insolvent Act of 1875—*Unjust preference—Fraudulent preference—Presumption of innocence.*

W., the respondent, was a private banker who had had various dealings with one *D.*, and had discounted for him at an exorbitant rate of interest notes received by *D.* in the course of his business. *D's* indebtedness on new transactions amounted to a large sum of money, but, being a man of a very sanguine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of $4,000 or $5,000, upon a representation to the parties supplying such goods that, although without any available capital, he had experience in business.

About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to *W.*, who advanced him $300, part of which was

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

(4) 3 C. P. Div. 32.

applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of *D's.* held by *W.* *D.* executed a mortgage in favor of *W.* and was granted a reduced rate of interest on his indebtedness and was told he would have to work carefully to get through. *D.* became insolvent about four months afterwards. In a suit by *McR.*, as assignee, impeaching the mortgage to *W.* it was

Held,—(Affirming the judgment of the Court of Appeal,) that *McR.* had not satisfied the *onus* which was cast upon him by the Insolvent Act, of shewing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), reversing the decree of the Court of Chancery, which declared a mortgage, executed by one *Depew* in favor of the respondent *Whyte*, void, as being an unjust preference of *Whyte* over the other creditors of *Depew*, and ordering *Whyte* to pay over to the appellant, as the assignee in insolvency of *Depew*, the sum of $465.

Mr. *Robinson*, Q.C., and Mr. *J. H. McDonald* for appellant:

Mr. *Gibbons* for respondent:

The points relied on and the authorities cited appear in the judgments hereinafter given, and in the report of the case in the court below.

RITCHIE, C. J.:

The mortgage which it is alleged was made in contemplation of insolvency, whereby it is claimed defendant obtained an unjust preference, and which is now on that ground sought to be set aside, was made on the 30th October, 1879. The insolvency occurred on the 21st February following.

The defendant was a private banker who had had

(1) 7 Ont. App. R. 103.

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various dealings with the insolvent, discounting notes taken by insolvent from his customers at exorbitant rates of interest, and it would seem almost obvious to any ordinary prudent man of business at rates such as no legitimate business would justify, and it is not at all to be wondered at that the end was insolvency, but this by no means settles the question.

The insolvent is described as a man of a very sanguine temperament, who evidently did not view his business transactions in this light. Mr. Justice *Burton*, in delivering the judgment of the Court of Appeal, states the facts as they appear in the case thus:

At the time of giving the mortgage now in question, the insolvent had ceased to carry on the business in which he had been previously engaged, and had commenced a mercantile business, having purchased goods entirely upon credit from several wholesale houses in *Toronto*.

It appears that when his dealings with *Whyte* commenced, he owned a property in *Morpeth*, subject to a mortgage for $600, the value of which he places at $1,000, but which the defendant places at a larger figure.

This property he exchanged with one *Minnis* for a leasehold property in *Leamington*, containing four and a half acres, and a village lot with a small house upon it. There was a sum of money to be paid to *Minnis* on the exchange, although the parties differ as to the amount; but whatever it was, was advanced by the defendant, and included in a mortgage which was given to him for $1,000 on the 1st March, 1878.

The insolvent acquired, in addition to this property, a farm of about fifty acres, and that known as the *Brown* street. Both the farm and the four and a half acres were subject to mortgages, to one *Setterington*, prior to *Whyte's* mortgage.

And there was a mortgage on the *Brown* street property of $500, prior to that in favour of the defendant. The defendant's mortgage on that property, which is for $1,500, is the one impeached. The last property was, in fact, sold under *Setterington's* mortgage, and realized $465 over and above his incumbrance, which sum the defendant received, and is ordered by this decree to pay over to the plaintiff as assignee of the insolvent's estate.

The account given by the insolvent in reference to what took place on the execution of this mortgage, is given in his evidence

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and shows that an advance was then made by the defendant of $300, the greater portion of which went to pay off interest on the prior mortgages held by *Setterington*, and a balance to retire a note held by the defendant.

It was then arranged that the insolvent should have an extension of two years for the notes due to the defendant at a considerable reduced rate of interest, provided the interest was duly paid upon them as they matured.

And the learned judge again says:

We find then in this case that, some days prior to the execution of the mortgage impeached, the insolvent had embarked in a new business; having been entrusted by his creditors with some $4,000 or $5,000 worth of goods upon a representation that he had no available capital, but that he had experience in business, that he was shortly afterwards threatened with proceedings by *Setterington* which, if persisted in, must have closed his business; and that in this emergency he applied to the defendant, who advanced him sufficient to meet the overdue interest and gave an extension of his own claim at a reduced rate of interest, that the defendant intimated to him at that time that he would have to work very carefully in order to get through, and the learned Chief Justice thinks that this intimation was sufficient to bring home knowledge of his position to the insolvent, even if he did not know it previously, but the insolvent denies this, and says that he did not understand this meaning, but supposed that it was given by way of advice, that he himself thought he would get through if he had time. We have in addition to this, that he was a man of very sanguine temperament.

Having, therefore, but a few days before this transaction succeeded in obtaining $4,000 or $5,000 worth of goods from parties knowing he had no available capital, but believing he had experience in business, and getting a further advance, and an extension of time, and a reduction of the rate of interest from defendant, I think the natural inference would be that a man with such a sanguine temperament would easily delude himself with the idea that certain prospects of success were before him; we have seen him all along doing a business at a ruinous rate of interest, we see him now with that interest reduced, payment of capital postponed and with a large stock of goods purchased on credit to start afresh

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in a new business. I can find nothing in the evidence that would justify me in saying that the insolvent obtained these goods with the wicked intent of defrauding those that furnished them, as would have been the case if, at the time of obtaining them and of giving this mortgage he contemplated insolvency; on the other hand I think the legitimate inference, in view of his sanguine character, and judging him by his previous dealings, and the assistance obtained by the large advance of goods, is that he was not thinking of insolvency, but was rather, in view of the fresh start he was getting, looking forward to a career of business success.

It must be remembered that the insolvency did not occur till nearly four months after the transaction now impeached. Fraud is not to be presumed, but, on the contrary, the burthen is on the plaintiff to show affirmatively that, at the time the transaction was entered into, the insolvent contemplated insolvency; to establish this it is clearly not sufficient to show merely that the trader was insolvent when the transfer was made, for it by no means necessarily follows that a man in embarrassed circumstances contemplates insolvency; many men struggle on in hope of retrieving their affairs and avoiding insolvency long after their affairs become embarrassed, anticipating they may rally and come round. In the absence of any direct evidence I find it impossible to say, judging from the surrounding circumstances and the position and character of the insolvent, that at the time he made this transfer he contemplated that his embarrassments must of necessity terminate in insolvency, and that with a view to that end he made the transfer. In *Gibson* v. *Routts* (1), *Tindal*, C.J., says:

> Contemplation of bankruptcy, I take to mean, where the party believes bankruptcy to be the necessary result of his condition, and

(1) 3 Scott, 236.

such belief is operating upon his mind at the time of making the payment.

On the other hand I think all the circumstances tend to the conclusion that the insolvent then entertained a *bonâ fide* hope or expectation that his property and his new business would extricate him from his difficulties, though I am very free to confess that few prudent business men, judging by his past business career, would be likely to look on his business prospects in the same favorable light. Under all these circumstances, I am not prepared to say that the plaintiff has shown, beyond a reasonable doubt, that when the transfer was made the trader was insolvent, and that he contemplated insolvency.

STRONG, J.:—

The question which we have to decide in this case, purely of one fact, is, whether the respondent took the mortgage of the 12th October, 1879, in contemplation of the insolvency of the mortgagor, and with the intent of obtaining an unjust preference over his other creditors. The insolvency did not occur until the 21st February, 1880, so that the presumption created by the statute against transactions of this kind, occurring within thirty days previously to the insolvency, does not arise, and the burthen of proving the transaction to have been fraudulent lies on the assignee who has impeached the mortgage. I am of opinion that all the surrounding circumstances warrant the conclusion arrived at by the Court of Appeal, that neither the respondent nor the insolvent then contemplated failure, and that, on the contrary, both parties then hoped and anticipated that *Depew*, the insolvent, would eventually be able to surmount the difficulties in which he was admittedly at the time involved. The statute does not provide that every security given by a debtor, when

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in circumstances of pecuniary embarrassment, shall be void, even though those embarrassments afterwards culminate in insolvency. The words of the clause in question are:

> If any sale, deposit, pledge, or transfer, be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor * * * whereby such creditor obtains, or will obtain, an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment, shall be null and void.

All depends upon the intention of the parties, and if it can be shown that the creditor acted in good faith, his security is unimpeachable whatever may be the result of the debtor's embarrassments. Each case must, therefore, be decided upon its particular circumstances, and is not to be determined by the application of any general rules, or presumption of either law or fact, laid down in decided cases. In the present case, it appears to me, that the surrounding facts do not warrant the inference of fraud. I do not found this conclusion on the direct evidence, though this is in favour of the respondent, for it is proved that the insolvent, with the assistance of the respondent's partner *Martin*, did make up a rough statement of his assets and liabilities which showed a surplus. What I proceed upon is, that the conduct of the insolvent at the date of the mortgage, and his situation in regard to his business, was such as to make it impossible to suppose that he then contemplated becoming insolvent. Only a few days before this transaction of the mortgage, he had begun a new business as a retail dry goods merchant, with a large stock of goods, which he had been enabled to obtain from merchants in *Toronto* wholly on his own credit, and from this source he anticipated considerable profits, and such as might have warranted the expectation that, by the time the respondent's debt, which was deferred for two years,

became due, he would, from his store and from the profits of his farm and the sale of village lots, be able to meet his payment to the respondent and in the meantime pay for the goods. It is, therefore, out of the question to say that *Depew* himself supposed he was on the eve of insolvency. On the contrary, it is apparent that he supposed he was entering upon a flourishing business, and that all that was required to make his success certain was the concurrence of the respondent in an arrangement which he proposed as to further time. As regards the respondent himself, he certainly seems to have been more doubtful, but from what is stated to have passed between him and *Depew*, and from the nature of the advice he gave the latter, I think it is evident that he too anticipated that with good management *Depew* might get through his difficulties. As to the new advance which was made, I admit no importance ought to be attached to that, as it seems all to have been applied to the payment of debts in which the respondent was interested. Had it been otherwise applied, that alone would have been sufficient to have repelled any *primâ facie* presumption of fraud. I think, however, the circumstance of the extension of time, the reduction of the rate of interest, the expectations which seem to have been entertained respecting the profits of the new business, the conduct of the respondent, in abstaining from any interference with the stock in trade, are all so many circumstances inconsistent with fraudulent intent and in favor of *bona fides* sufficient to rebut any presumption arising merely from the financial condition of the debtor, and that it would be impossible to say that the respondent supposed *Depew* to have been on the eve of insolvency, and took the security to secure himself an unjust preference. The case, I admit, is a suspicious one, but that is not

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enough to avoid the security. In administering the bankruptcy law the English courts will not avoid transactions of this kind on evidence inducing suspicion merely (1), and the same rule ought to be applied to cases of alleged preference coming under this 133rd clause. In *Newton* v. *Ontario Bank* (2), the affairs of the insolvent as known to the secured creditor, the bank, were in a condition to lead it to suspect his approaching insolvency, but the Court of Appeal nevertheless held the transaction to be valid. I think, therefore, that the decision of the Court of Appeal was the correct conclusion on the evidence, and that we ought to adhere to it.

Another point was argued, that of pressure; it was contended by the respondent's counsel that the mortgage was given under such pressure from the respondent, that it alone was sufficient to rebut all presumption of fraud and to establish that there was no unjust preference within the meaning of the statute, and it was contended that the case of *Davidson* v. *Ross* (3) was not law and ought not to be followed. In the view of the facts already stated, it is unnecessary to consider the question, and I am not prepared to say that the evidence would justify us in holding that the mortgage was given under the influence of pressure, but as the question of law was fully and ably argued, I think it not irrelevant to say that, had we been compelled to decide the point, I should not have been prepared to have acquiesced in the decision arrived at by the Court of Appeal in *Davidson* v. *Ross*. But, opposed as that case is to a long line of authority on the construction of similar enactments in *England*, extending back for more than 100 years, (*Harman* v. *Fisher* (4) was decided by Lord *Mansfield* in 1774),

(1) *Ex. p. Witham Re Berry*, 22 Ch. D. 292.

(2) 15 Grant 283.

(3) 24 Grant 22.

(4), Cowp. R. 117.

and especially in direct conflict with two decisions of the Privy Council upon Colonial statutes, identical in their terms with that under consideration in the present case, I should have felt compelled to dissent from it. And I think it right to add that, not only does the judgment of the Court of Appeal in *Davidson* v. *Ross* appear to me to be at variance with authority, but that, without regard to previously decided cases, it is open to the objection, that it places a construction upon this 133rd section of the statute, and upon the 89th section of the Act of 1869, inconsistent with the very language in which these clauses are expressed; for I am unable to see how it can be said that a creditor, who obtains payment or security as the direct result of the pressure to which he has subjected his debtor, has obtained an unjust preference. The necessary consequence of the decision of the Court of Appeal in *Davidson* v. *Ross* would be that, so soon as a trader, subject to the Insolvent Acts, became unable to meet his engagements, his assets from that time formed a trust fund for the payment of the whole body of his creditors, and no single creditor could obtain by means of pressure an actual payment out of them without being liable to account to the other creditors. This, however, would be a proposition which, so far as I know, has never yet been either embodied in a statutory form or propounded by judicial decision.

The appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J.:

It appears to me the only point to be decided by this court is that which is raised by the allegation that the transfer was made in this case in contemplation of bankruptcy. The mortgage in question not having

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been made within the 30 days referred to in the statute, it is necessary for the party making the allegation to prove it. Now, there is no proof, I take it, offered here that would remove all reasonable doubts from the mind of a judge or jury as to the fraudulent intent of the insolvent. The plaintiff is bound to prove that when the mortgage was given the party did so in contemplation of bankruptcy, or he is bound to prove that it was in some other way a fraudulent transaction. It is, however, only alleged that the transfer was made in contemplation of bankruptcy, and, therefore, under the statute, was void. I must say that if I were called upon to decide as a juror in this case, I would say there was no evidence here that fraud was contemplated, or that the transfer was made in contemplation of bankruptcy. We cannot set aside the agreement of parties merely on suspicion. There may have been on the part of this man an expectation of going into insolvency, but I think the facts in evidence do not show that such was the case. Here was a large stock of goods recently obtained by the insolvent; he was pressed to pay interest on mortgages due to other parties; the defendant had a claim against him which he might enforce at any moment; the insolvent needed funds to pay up the interest on the mortgage. It was necessary, then, to carry out the very object he had in view—obtaining a fresh start in business—to get an advance of money. This property that was assigned had been previously mortgaged to another, and when it was sold it paid but a small portion of the defendant's original debt; after paying the $300 he advanced and interest, there was a very small sum, not exceeding $100, that would go to the credit of the original debt. The defendant gave the insolvent $300, and gave him time for two or three years for the payment of his original debt. He made the advance more for the purpose of assisting the insol-

vent to carry on his business than for the purpose of securing the original debt which he owed him. That is the view which I take of it, and it is a reasonable one under the evidence. I think the party alleging this act to have been done in contravention of the Insolvent Act has totally failed to prove it, and I therefor concur with my learned brothers in saying that the appeal should be dismissed and the judgment of the court below confirmed.

GWYNNE, J. :—

The learned counsel for the appellant contended, that the affirmance of the judgment of the Court of Appeal for *Ontario* in this case would be equivalent to a reversal of the judgment of the same court in *Davidson* v. *Ross*, as reported in 24 *Grant* 22.

There is doubtless much said in the judgments of some of the learned judges, who delivered judgments in *Davidson* v. *Ross*, which, if necessary to be considered in the determination of this case, would, in my judgment, require much further argument and careful consideration before all that is there said could be adopted by this court, but those observations have no application to the present case, which proceeds solely upon the view taken in the court of the matter of fact, whether the mortgage was or not executed in contemplation of insolvency. The court was of opinion that it was not, and I do not see sufficient ground for dissenting from this opinion. Indeed the observations in *Davidson* v. *Ross* to which I have alluded do not seem to have been necessary for the determination of that case, which also proceeded upon the view taken by the learned judges of mere matters of fact. The deed impugned there was executed within thirty days preceding the insolvency attaching, and so under the Act had to be presumed to have been executed in contemplation of

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insolvency. Two of the learned judges were of opinion that the presumption raised by the Act could not be rebutted. Two others were of opinion that it could be, but was not in point of fact, so that the court was unanimously of opinion that the impugned deed was established to have been executed in contemplation of insolvency.

The learned Chief Justice was of opinion that the parties by whom the deed was executed were not debtors of the person in whose favor it was executed, in which case it would have been a deed executed in contemplation of insolvency and without any consideration whatever therefor; the other judges were of opinion that the parties who executed the deed were debtors of the person in whose favor it was executed, but then the consideration clearly was merely an old debt due to the person in whose favor it was executed, and the majority of the court was of opinion that there was no sufficient evidence of the deed having been executed under pressure, which was relied upon, although certainly they say that in their opinion pressure would make no difference, however great the pressure might be, as I read their judgment. Now, the facts thus established constituted precisely what according to the old law had always been known under the legal term of "preferential assignment to a favored creditor," so that the observations of the learned judges who commented largely upon the meaning of the expression "unjust preference" as used in the act seem to be merely *obiter dicta*, the soundness of which will require consideration whenever a case shall arise presenting facts showing a sale or transfer "by way of payment to a creditor" (which is what the section deals with) which can with propriety be said to be "unjust" and a "preference" having any features which distinguish it from what independently of the statute has always been known under

the name of "preferential assignment" to a favored creditor.

Appeal dismissed with costs.

Solicitors for appellant: *Rose, Macdonald, Merritt & Coatsworth.*

Solicitor for respondent: *G. C. Gibbons.*