Privy Council Appeal No. 135 of 1913.

Adam Uffelmann - - - - - *Appellant.*

v.

The Stecher Lithographic Company and others - - - - - - *Respondents.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER 1914.

Present at the Hearing:

LORD DUNEDIN. SIR JOSHUA WILLIAMS.
LORD MOULTON.

[*Delivered by* LORD DUNEDIN.]

The Ontario Seed Company, Limited, was in August 1909 indebted to the Merchants Bank of Canada in the sum of $8,254. In respect of this sum Jacob Uffelmann, Secretary-Treasurer of the Company, and brother of the appellant, was liable to the Bank as surety under a bond and as indorser of notes discounted by the Company to the extent of $7,700. The Bank also held as security an assignment of the book debts of the Company.

On 12th August 1909 the Ontario Seed Company executed a chattel mortgage for $8,300 of all their effects, including book debts, in favour of the appellant, in return for which they got from him a cheque for $8,300, which was then paid by them to the Merchants Bank, thus paying off the debt of $8,254.

[91] J. 384. 90.—11/1914. E. & S. A

The respondents were as at that date, and are still, creditors of the Company, and in December 1909 they on behalf of themselves and other creditors raised this action to set aside the chattel mortgage in respect of the provisions of the Statute of Elizabeth and of the Act Ch. 147 of 1897 of Ontario respecting assignments and preferences of insolvent persons.

The action was tried by Mr. Justice Tetzel. It was proved that the whole of the money to honour the cheque given by the appellant was really found by his brother Jacob, and that the whole arrangements were made by him, the appellant being no more than a passive spectator who allowed his name to be used. It was also proved that at the time of the transaction the Company was insolvent to the knowledge of Jacob.

In the circumstances the Trial Judge, who saw the witnesses, found as follows :—

" I find as a fact that, when the chattel mortgage was " executed, the company, through its officers, Otto Herold, " Vice-President, and Jacob Uffelmann, Secretary-Treasurer, " knew that the company was insolvent, and that the " company, through the said officers, when they executed " the chattel mortgage in the name of the company, " intended thereby to defeat, hinder, delay, or prejudice all " the creditors of the company except the Merchants Bank " and Jacob Uffelmann; and further, that it was the " intention of the company, through the said officers, to " defeat the objects of the said Act by raising the money " advanced under the chattel mortgage to pay the claim of " the Merchants Bank, and by paying the same to give an " unjust preference to the bank and Jacob Uffelmann, as " surety."

He also said :—

" I do not think under all the circumstances that the " money could be said to have been given to the company " in good faith."

He accordingly set aside the chattel mortgage but directed that allowance should be made to the amount of the book debts which the Bank had as security at the time of the transaction.

Appeal was taken to the Divisional Court, which affirmed the judgment on the main question, but set aside the rider as to the allowance of book debts. Appeal was then taken to the Court of Appeal which took the same view as the Trial Judge, and finally appeal was taken to the Supreme Court of Canada, which took the same view as the Divisional Court.

The case seems to their Lordships to turn upon a question of fact and of fact alone. Had the present appellant been a third party there can be no doubt that the transaction would have been unimpeachable in spite of the insolvency of the Company. For it is the case that money actually passed; and any person, however insolvent, is entitled to give his property in security for money actually received. As Lord Mansfield said in the case of *Foxcroft* v. *Devonshire*, 2, Burr, " 942, " A notion that lending money to traders, " knowing them to be in dubious, tottering, or " distressed circumstances, upon mortgages or " liens is fraudulent, and consequently the con- " tract, void in case a bankruptcy ensues, would " throw all mercantile dealing into inextricable " confusion." But the moment it is found that the appellant Adam is truly Jacob under another name, a question of fact becomes open for solution; and that question is whether the advance was a *bonâ fide* payment (there is no doubt it was an *actual* payment), or whether it was not a mere device to secure a preference to Jacob (he getting rid of his old liability as surety, and getting hold of the whole assets of the Company), and to hinder other creditors as in a question with the favoured creditor Adam who was merely Jacob under another name. Now as to this question the Trial Judge had no doubt on the evidence as laid before him, and all the members of all the three Appellate Courts have agreed with him. In the face of such a consensus

of opinion on a matter truly of fact their Lordships would require to be clearly convinced that the evidence could not possibly lead to that result before they came to the opposite conclusion. This seems to end the matter; for in other words it is a finding that the circumstances of the case do not bring it within any of the cases set forth in Section 3, Sub-section 1 of the Assignments and Preferences Act. That allows Section 2, Sub-sections 1 and 2 to operate, and the learned Judges below have all held that the transaction falls within the words of both sub-sections.

Their Lordships do not wish to express any opinion as to whether had there not been proved insolvency the transaction could have been avoided under the Statute of Elizabeth. The essence of challenge under that Statute has been held in England to be the possibility of showing that to use the words of Jessel, M.R., in *Middleton* v. *Pollock*, 2 Ch. D. 104, the debtor retains a benefit for himself. The Statute of Elizabeth as it exists in England has been altered so far as Ontario is concerned by certain amendments. But it is matter for consideration whether the amendments have had the result of altering what has been just expressed as the criterion to be applied to transactions alleged to fall within the Statutes.

In the present case their Lordships think for the reasons given that the transaction is impeachable under the Assignments and Preferences Statute; and they see no reason to doubt that the measure of relief is that given by the Supreme Court of Canada. They will therefore humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

ADAM UFFELMANN

v.

THE STECHER LITHOGRAPHIC COMPANY AND OTHERS.

[DELIVERED BY LORD DUNEDIN.]

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1914.