[HIGH COURT OF AUSTRALIA.]

TRONSON . . . . . APPELLANT;

AND

WHITE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1919.

SYDNEY, *Dec.* 9, 11.

Isaacs, Gavan Duffy and Rich JJ.

Insolvency—Fraudulent preference—Debt due to two creditors jointly—Payment to one of them having knowledge of debtor's financial circumstances—Payment by that creditor to the other—Transfer of realty diminishing property divisible among creditors—Insolvency Act 1874 (*Qd.*) (38 *Vict. No.* 5), *secs.* 44, 105, 107, 108, 109.

An insolvent had been indebted to A and B jointly in the sum of £200, and he had paid that sum to A in circumstances making the transaction a fraudulent preference under sec. 107 of the *Insolvency Act* 1874 (Qd). A immediately paid £100 to B.

Held, that A was rightly ordered to repay to the trustee for the insolvent the whole £200.

Sec. 109 of the *Insolvency Act* 1874 provides that every conveyance or transfer made by any debtor unable to pay his debts as they become due from his own moneys and the effect whereof is to diminish the property to be divided amongst his creditors shall, if a petition for adjudication of insolvency be presented against the debtor within six months thereafter and adjudication of insolvency be made thereon, be deemed fraudulent and void as against the trustee unless there is proof by the party alleging the validity of the transaction that the conveyance was made in good faith.

The insolvent transferred realty to A within the period above mentioned for £1,500; it was worth at least £1,650, and the insolvent was then unable to pay his debts as they became due from his own moneys.

Held, that the difference in value placed on A the onus of showing good faith, which, on the evidence, she had not discharged.

Decision of the Supreme Court of Queensland: *In re Tronson*; *White* v. *Mary Tronson*, (1919) S.R. (Qd.), 250, affirmed.

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APPEAL from the Supreme Court of Queensland.

On 25th November 1918 Thomas Bleakeley Tronson assigned his estate for the benefit of his creditors, and on 11th December 1918 a petition for adjudication of insolvency was presented by one of his creditors, based on the assignment as an act of insolvency. On 20th December 1918 an adjudication of insolvency was made on this petition, and on 3rd January 1919 Thomas Edward White was appointed by the creditors trustee of the property of the insolvent. Prior to these events Mary Tronson (the insolvent's daughter-in-law) and one Albert Wessling had been associated in the working of a farm, which was owned by Mary Tronson and was worked by Wessling under an arrangement whereby Mary Tronson received one-half the proceeds as rent and Wessling received the balance for his work on the farm. Part of the proceeds of the farm were from time to time sold to the insolvent, and he became indebted to Mary Tronson and Wessling in the sum of £208, in respect of which he, about May 1918, gave Mary Tronson a promissory note payable on demand for £200. In November 1918 insolvent was in financial difficulties, and was pressed by Mary Tronson for payment of the note. Consequently insolvent on 4th November drew a cheque for £200 payable to "Tronson and Wessling," which he handed to Mary Tronson's husband, by whom it was cashed and the proceeds were handed to Mary Tronson. She immediately paid £100 to Wessling. Previous to 7th November the insolvent was the owner of certain real estate which was mortgaged to the Queensland National Bank for an advance of £1,410, and on that date he transferred the property to Mary Tronson for £1,500. The transaction was carried out by an arrangement by Mary Tronson with the Bank to pay off £410, give a mortgage for the balance of £1,000, and pay insolvent £90. The payment was made to the Bank, and the mortgage was executed. In the proceedings mentioned below there was a good deal of evidence as to whether the £410 paid to the Bank and the £90 (which was alleged to have been paid to the insolvent) belonged to the insolvent or to Mary Tronson.

On behalf of Thomas Edward White, the trustee of the insolvent,

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an application was made on motion before *Chubb* J. for a declaration that the payment to Mary Tronson of £200 was a fraudulent preference, and that the transfer of realty mentioned was a fraudulent preference, and that both transactions were void, and for an order directing repayment of the £200 and a transfer of the realty to the trustee. The insolvent had since died, and it was admitted by counsel for Mary Tronson, the then respondent, that the insolvent on 4th and 7th November was unable to pay his debts as they became due from his own moneys. *Chubb* J. found on the evidence that at the time of the transaction in question the respondent knew of the insolvent's inability to pay his debts, that the payment of the £200 was fraudulent and void, and that, assuming the £410 and £90 to have been the respondent's property (which he doubted), there was not a reasonable and sufficient consideration for the purchase of the realty, and that its effect was to diminish the property to be divided among the creditors, since the evidence was that the realty was worth at least from £150 to £200 more than it was sold for. He made the declaration and order as asked.

Mrs. Tronson appealed to the Full Court of the Supreme Court against the order for payment of the £200 in respect of the £100 paid by her to Wessling, and against the order for transfer of the realty. The Full Court affirmed the decision of *Chubb* J.: *In re Tronson*; *White* v. *Mary Tronson* (1).

Mrs. Tronson now appealed to the High Court against the decision of the Full Court.

Power, for the appellant. The appellant should not be ordered to pay back the £100 paid to Wessling, from which she got no advantage. The act of paying Wessling was innocent at the time it was done. As regards the realty, the appellant is liable on her personal covenant in the mortgage to the Bank, and she loses the £500 paid by her for the land.

Graham, for the respondent.

The following cases were referred to during argument: *Stewart & Walker* v. *White* (2); *Bank of Australasia* v. *Hall* (3); *Re*

(1) (1919) S.R. (Qd.), 250.
(2) 5 C.L.R., 110.
(3) 4 C.L.R., 1514, at pp. 1546, 1550.

Grigg & Co. (1); *Re Orr* (2); *Re Myers*; *Ex parte Myers* (3); *Re Gomersall* (4); *Ex parte Edwards*; *Re Chapman* (5); *Ex parte Helder*; *Re Lewis* (6); *Chapman* v. *Michaelson* (7); *Lodge* v. *National Union Investment Co.* (8).

Cur. adv. vult.

Dec. 11.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

This is an appeal from a judgment of the Full Court of Queensland. That Court, consisting of *Cooper* C.J., *Real* J. and *Lukin* J., unanimously upheld the decision of *Chubb* J. sitting in insolvency jurisdiction, whereby that learned Judge held (1) that the present appellant, Mary Tronson, was bound to pay to the trustee of Thomas Bleakeley Tronson's insolvent estate £100 ultimately retained by one Wessling, and (2) that a transaction between her and Thomas Bleakeley Tronson of sale and purchase of land was fraudulent and void against the trustee. The grounds upon which the judgment of the Full Court (read by *Lukin* J.) proceeded were not in all respects identical with those of *Chubb* J., but the conclusions arrived at were the same.

As to the £100, we see no reason for disturbing the conclusion of the Supreme Court. The appellant was the owner of a farm, but she jointly with one Wessling worked the farm, raised produce, and disposed of it to various persons including the insolvent, who was her father-in-law. She says that on 4th November 1918 the insolvent owed to her and Wessling jointly a sum of £200, a debt which had existed for some considerable time. She, living in the same house with her father-in-law, a storekeeper, and knowing of his financial embarrassments, requested him to pay the debt. He gave the appellant's husband a cheque for £200; the husband at the appellant's request presented the cheque at the Bank, got the money, brought it to the appellant, who took half, and in her presence the

(1) 8 Qd. L.J., 99.
(2) 15 V.L.R., 590.
(3) (1908) 1 K.B., 941.
(4) 1 Ch. D., 137.
(5) 13 Q.B.D., 747.
(6) 24 Ch. D., 339.
(7) (1908) 2 Ch., 612, at pp. 620-621.
(8) (1907) 1 Ch., 300.

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husband handed the other £100 to Wessling. The transaction was a joint one, in which the appellant and Wessling were jointly concerned in the whole payment. The division of the money was not a matter for the debtor, the insolvent: it was not that he owed two separate sums of £100 each; but he owed one indivisible debt of £200, and when it was paid it was, so far as the insolvent was concerned, paid to both of the creditors jointly. The appellant, therefore, is as much responsible for the Wessling £100 as for her own £100 —the division between them being a matter for their mutual concern.

Neither in the primary nor in the appellate Court was any reference made to the question whether the payment of the £200 was made by Tronson "with a view" of giving the two creditors a preference, so as to satisfy the requirements of sec. 107 of the Act. This essential circumstance may have been assumed by the parties or the Court; but in any case, reading the facts for ourselves, we think it is clear—particularly having regard to the proviso as to "pressure"—that the insolvent did make the payment with that view. The appellant, as found by *Chubb* J., affirmed by the Full Court, and, we think, sustained by the evidence, was fully aware of the circumstances of the insolvent, and cannot be said to have been a payee in good faith within the meaning of sec. 107. She therefore fails as to the £100.

With respect to the land, the matter stands thus:—The notice of motion in insolvency undoubtedly attacked the transfer of the land simply as "a fraudulent preference," adding a consequential claim that the lands were recoverable from the appellant by the respondent. That would, strictly speaking, not include any reference to sec. 109, which does not deal with fraudulent preferences. But it appears that the matter proceeded before *Chubb* J., and his Honor dealt with it, on the footing that sec. 109 as well as sec. 108 was relied on, and in the Full Court the same attitude was observed, and so we must deal with it. We agree with the Full Court that the question arises under sec. 109, since the transaction was between the insolvent and the appellant, not as creditor, but in the separate character of purchaser. The transfer by the insolvent was held to "diminish the property to be divided amongst his creditors." No

doubt these words in sec. 109 must be read reasonably with regard to the circumstances, and the diminution must be a substantial one in relation to the circumstances which will call into operation the drastic provisions of the section. But the difference in value found by *Chubb* J. as a minimum difference is fully supported by the evidence, and is sufficiently substantial to call upon the appellant to discharge the burden put upon her by the section of establishing good faith in relation to the transaction. If it be a correct view of the facts that the £500 was really money belonging to the insolvent, the appellant of course fails. Further, if she leaves the matter in such a position that the Court is not satisfied that she *bonâ fide* paid that sum out of her own money, as distinguished from the insolvent's money, she equally fails to sustain her statutory burden. That is the case here in our opinion. The transfer, therefore, must be deemed fraudulent and void against the trustee (sec. 109) and an act of insolvency (sec. 44), and absolutely void against the trustee (sec. 105). The trustee has a legal right—legal, because statutory—to the land, subject to the Bank's rights, and those rights are conserved by the order made. The Court, by sec. 22 of the Act, has full power to make any order in the matter "for the purpose of doing complete justice," and, if the appellant could establish any equity or just reason for qualifying the order for transfer, the Court could require it to be satisfied. But as she is, on the one hand, protected by the implied covenant for indemnity enacted by sec. 66 of the *Real Property Act* so far as the registered mortgage is concerned, and as, on the other hand, she has failed to satisfy the Court that the £500 was her own money, she also fails to establish any equity or qualification which ought to be attached to the order for transfer.

Learned counsel for the respondent undertook not to raise in any subsequent proceeding the defence of *res judicata* as to the £500, should the appellant either attempt to prove for it or to recover it in any other way. We therefore guard our expression as to that sum by saying that she has failed in this proceeding to prove affirmatively that it came out of her money and not out of the insolvent's money.

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Appeal dismissed with costs, except so far as the costs were increased by the transfer of the appeal from Brisbane to Sydney, the respondent to pay to the appellant the amount of such increase, the one amount to be set off against the other.

Solicitors for the appellant, *Atthow & McGregor*, Brisbane.

Solicitors for the respondent, *Chambers, McNab & McNab*, Brisbane.

N. McT.

[HIGH COURT OF AUSTRALIA.]

STANDARD PAINT COMPANY . . . APPELLANT;
OPPONENT,

AND

HALES LIMITED . . . . . RESPONDENT.
APPLICANT,

H. C. OF A. 1920.

MELBOURNE, *March* 1.

KNOX C.J., ISAACS, GAVAN DUFFY AND RICH JJ.

Trade Mark—Registration—Similarity to registered trade mark—Likelihood of deception—Trade Marks Act 1905-1912 (*No.* 20 *of* 1905—*No.* 19 *of* 1912), *secs.* 25, 33, 114.

An application by the respondent for the registration of the word "Superoid" as a trade mark in class 17 in respect of roofing, flooring, damp course and waterproof cement was opposed by the appellant, which was the registered proprietor of a trade mark consisting of the word "Ruberoid" and registered in class 17 in respect of similar goods.

Held, on the evidence, that the respondent had not discharged the onus of establishing that the use of the word "Superoid" as a trade mark was not likely to deceive, and therefore that the word should not be registered as a trade mark.