

CANADA / JUDGMENT

McGuire v. Ottawa Wine Vaults Co.

(1913) 48 SCR 44

COURT

Supreme Court of Canada

DECIDED

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Judges

Fitzpatrick, Charles; Davies, Louis Henry; Idington, John; Duff, Lyman Poore; Anglin, Francis Alexander; Brodeur, Louis-Philippe

On appeal from

Ontario

Subjects

Family law

Decision Content

Supreme Court of Canada

McGuire v. Ottawa Wine Vaults Co., (1913) 48 S.C.R. 44

Date: 1913-05-06

John L. McGuire and Hattie McGuire (Defendants) Appellants;

and

The Ottawa Wine Vaults Company and Another (Plaintiffs) Respondents.

1913: April 16; 1913: May 6.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fraudulent conveyance—Statute of Elizabeth—Husband and wife—Voluntary settlement—Evidence.

In August, 1908, M. and his brother bought a hotel business in Ottawa for \$8,000, paying \$6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed, a hotel property in Madoc to his wife subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal. Held, affirming the judgment of the Court of Appeal (27 Ont. L.R. 319), Davies J. dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was made to protect the property conveyed against his future creditors and is, therefore, void as against them.

APPEAL from a decision of the Court of Appeal for Ontario[1], reversing the judgment of a Divisional Court[2], and restoring that of the trial judge in favour of the plaintiffs.

The facts are sufficiently stated in the above head-note.

F. B. Proctor for the appellants. The Court of Appeal rested its judgment against the appellants on the cases of Crossley v. Elworthy[3], and Mackay v. Douglas[4]. But the principle of those cases is, that where a person makes a voluntary settlement on the eve of engaging in trade the onus is on him to prove that he was in a position to make it. That proof has been made by the appellants in this case. And see French v. French[5]; Buckland v. Rose[6]; In re Lane-Fox[7], at page 513.

In Collard v. Bennett[8], Vice-Chancellor Spragge upheld a voluntary settlement under conditions very similar to those in the present case.

Mrs. McGuire gave valuable consideration for the Madoc property. The release of a supposed right of dower is sufficient. May on Fraudulent Conveyances (3 ed.) 226.

Hogg K.C. for the respondents referred to Jackson v. Bowman[9]; Campbell v. Chapman[10]. THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J. (dissenting).—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the judgment of the Divisional Court (Chief Justice Falconbridge dissenting), and restoring the judgment of the trial judge, Chief Justice Mulock, setting aside a conveyance made by the appellant John L. McGuire to his wife of the former's equity in a hotel property in the Village of Madoc, on the ground that such conveyance was fraudulent and void as against the grantor's creditors under the statute 13 Elizabeth.

The debts due the creditors of McGuire at the time of the execution of the impeached conveyance, outside of the mortgage debt secured upon the property conveyed, were contracted some time subsequent to the conveyance. Only two creditors gave evidence respecting the debts due them and it shewed that their debts were contracted long after the impeached settlement was made. There was no evidence that any of McGuire's debts which were due at the date of the settlement remained unpaid at the date of the insolvents' assignment.

The mortgage debt was one secured upon property much more than sufficient to pay it and may, therefore, for the purposes of this action, be disregarded. Jenkyn v. Vaughan, in 1856[11].

It may be conceded as established by the cases that the statute extends to subsequent creditors. They have the same right to set aside an alienation made with intent to delay, hinder or defraud them, as creditors whose debts were due at the date of the alienation, but they have a more difficult task in proving a fraudulent intent on the part of the grantor in the case of a voluntary settlement. In such case they must prove either an express intent to delay, hinder or defraud creditors or that after the settlement the grantor had not sufficient means or reasonable expectation of being able to pay his then existing debts. 15 Halsbury's Laws of England, page 88 par. 180. The cases there cited I think support that proposition.

The courts below have all found that the impeached settlement was a voluntary one and I shall deal with the case on that finding, though I am bound to say I should have some difficulty in reaching it on the evidence.

There is no pretence for saying that any fraudulent intent under the statute was proved and the single question left was whether the grantor after the settlement was left without sufficient means or reasonable expectations of being able to pay his then existing debts and so that a fraudulent intent might be inferred.

As to the financial condition of McGuire at the time he made the settlement, I think the statement embodied by Riddell J. in his judgment a fair and proper one. It omits the Madoc property, the settlement of which is in question, and the mortgage upon it, and subject to which the property was conveyed to Mrs. McGuire, and aside from that shews McGuire to have been left with assets of the value of \$14,180 and liabilities amounting to \$3,947.

Amongst the assets was included \$8,500 which he had paid for the Ottawa business and chattels, including the “good will.” I agree that looking at McGuire’s financial position from a business stand point there is no reason in the world why its value should not be taken into consideration. But when you are considering that financial position with respect to a settlement made by the man upon his wife of part of his property, and determining the “intent” with which it was made, to omit the value of such good will from your consideration would be, to my mind, most unfair.

The learned trial judge in his statement of McGuire’s financial condition at the time of the making of the settlement, including the Madoc property in the assets and the mortgage secured upon it in the liabilities, shewed the latter to have been \$14,711, while the assets he estimated at \$26,754.

Deducting from these assets the \$15,000 estimated value of the Madoc property, he reduced them to \$11,754. But the learned Chief Justice, while deducting the whole value of the Madoc property from the assets, omitted at the same time to deduct the amount of the mortgage upon that property from the liabilities. This, I think, was a manifest mistake on his part as the mortgage debt of \$3,250 being secured upon a property of the agreed value of \$15,000, should in such a statement as was being prepared have been omitted from the liabilities.

But in addition to that the learned judge omits any allowance for the good will of the Ottawa business and only allowed \$1,134.23 for the chattel property in that business which was valued at \$3,500. The reason assigned for this large reduction was that the \$1,134.23 represented the actual cash, \$571.23, which McGuire’s estate received at a much later date when the insolvency took place as the result of a forced sale by the landlord of the chattels. The landlord when McGuire assigned had distrained under the terms of the lease upon the goods and chattels for three months advance rent, and these \$571.23 were the net proceeds of the sale. The balance of the \$1,134 consisted of \$563 received from the insurance company for a part of the property burnt in a fire which occurred before McGuire’s assignment. But even with these reductions which I cannot accept as fair, there was added to the above assets of \$11,754 (without the Madoc property), \$4,634.23, namely, cash in bank, \$1,500, stock on hand \$2,000, and chattels property \$1,134.23. Thus an apparent surplus of only \$1,134.23 of assets over liabilities was shewn which, if the error I have pointed out of counting the mortgage debt as part of the liabilities while excluding the property on which it was secured from the assets, was corrected, would leave a surplus of \$4,877.23. No allowance was made for the hotel license or the lease, or the good will of the business. The hotel license was valued in the consideration McGuire had paid at from \$3,000 to \$5,000.

On the facts as he found them and formulated in this statement the learned Chief Justice drew the inference that the settlement was fraudulent and void under the statute.

I have already stated why I accept Mr. Justice Riddell’s statement of McGuire’s financial position at the time he made the settlement as correct. It shewed McGuire to have had a very handsome surplus of assets over debts and quite justified the settlement he made upon his wife. His business in Ottawa had continued prosperous from the time he bought it and remained so for six

or eight months afterwards. The firm's obligations seem to have been met with reasonable promptness as they matured and to McGuire the outlook was promising. There was no indication or anticipation by either defendant that the venture was likely to prove a failure. My conclusion is that McGuire was clearly solvent when he made the settlement. He made that settlement in consequence of a promise given by him to his wife when at his solicitation she joined with him in the conveyance of some property he owned in Toronto. He and she both thought she had a dower interest in that property. They may have been wrong in their belief, but from their evidence both husband and wife believed she had. She thought she had a moral claim at any rate to the Madoc property as she had done as much if not more to build it up and make it what it was as her husband had done. He admitted that to be so. She was apparently living in Toronto with her two invalid daughters and the settlement seems to have been made when their home there was broken up and a very short time after she signed away whatever rights she had in the Toronto property. It was made at a time when, if the statement of his financial condition I accept is correct, he was undoubtedly entitled to make it. Even if the onus of proving that is cast upon him on the assumption of the settlement being a voluntary one, I think he has discharged it.

What, then, if this story is true, brought about the insolvency? A perusal of the evidence satisfies me that it was brought about by causes which could not have been foreseen or anticipated when he made the impeached settlement.

In the summer of 1909, McGuire Bros. were compelled by the License Commissioners to move their bar from the corner of Bank and Sparks Streets, a great thoroughfare, to the upper side of Bank Street. This change necessitated extensive alterations being made claimed to have cost about \$4,000. This, of course, was not, and could not have been, anticipated in November, 1908. To make these necessary changes good paying tenants of theirs were dispossessed and their rentals lost. In the early part of 1910 the fire took place causing further damage to their business and much loss. McGuire states in his evidence that the direct loss in the receipts of the bar from the change compelled by the License Commissioners was 25%. The rentals of the tenants they had to dispossess so as to make room for the new bar amounted to \$110 per month, and McGuire says they were not able to get a tenant for the corner they vacated. Then the municipality brought into effect a by-law to reduce the number of licenses in the city and that made it impossible for them to sell out. Reverses began about June, 1909. They struggled from that date under the adverse circumstances I have above stated from the evidence, to meet their obligations until December. Then followed the plaintiffs' suit and the assignment followed by the landlord's distress for three months' advance rent and the sale under the distress with its usual pitiful returns.

In all of these facts as stated in evidence, I see nothing to justify the conclusion that the insolvency could have possibly been foreseen in November, 1908. The proper inference is that it was brought about by causes which could not have been reasonably foreseen at that time or for many months afterwards, and so forms an exception to the general rule respecting voluntary conveyances preceding insolvency. It was said that this case was governed by that of *Mackay v. Douglas*[12]. I do not think so. The broad ground upon which that case was decided is stated by

the Vice-Chancellor at page 122 to be that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations. The facts of the two cases are not analogous. McGuire was not like a man “going into trade” for the first time when or immediately after he made the settlement. He appears to have been for the greater part of his life in the hotel business, and he did not, as I have shewn, take the bulk of his property out of the reach of his creditors. I think it is a case forming an exception to the principle laid down in *Mackay v. Douglas*¹², an exception explicitly stated by the same learned Justice Malins, V.C., in *Crossley v. Elworthy*[13], at page 167. In the case of *Re Butterworth*, ex parte Russell in 1882[14], Jessel M.R. says at page 598:—

The principle of *Mackay v. Douglas*¹², and that line of cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: “If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.”

I think if that expresses the true principle it would be impossible to bring this case within it. The business he was entering into in Ottawa was the one he had been engaged in all his life. It was not a new business nor was it a hazardous one in the sense in which that word is used by Malins, V.C., in *Mackay v. Douglas*[15], and by Jessel M.R., in *Re Butterworth*[16].

The settlement impeached did not embrace “all of his property” or indeed the larger part of it. It embraced practically that part of the property which the wife had herself in great part built up. It was made by a man who was not insolvent at the time he made it, but became so afterwards from accidents and causes which he neither did nor could have anticipated. It does seem to me to be rather the refinement of irony when the two chief creditors, the Wine Vault Company and the Capital Brewing Company, in order to defeat the claim of the wife and children to a portion of the property which the life’s labours of the former largely created, unite to proclaim a business a “hazardous” one which they themselves exist upon and supply with the “sinews of war” to keep alive and on a commercial basis.

I am of opinion that the appeal should be allowed and the judgment of the Divisional Court restored.

IDINGTON J.—I think this appeal should be dismissed with costs for the reasons assigned by the judgment of the learned trial judge, the dissenting judgment in the Divisional Court and the judgments in the Court of Appeal.

Counsel for appellant quite properly points out that there is an oversight in the first of these in one set of figures necessarily taking into account the Madoc mortgage, and in the next set of calculations not making allowance therefor, but I apprehend the result of these figures did not affect the learned judge’s conclusions at all. The broad features of the case he presents are a voluntary conveyance by a man three months after he had made a fatal mistake in a business venture and had some reason to see it was such as evidenced by his increasing liabilities, and his inability to explain better than he did how he became fifteen months later hopelessly insolvent.

Making every allowance for his misfortunes hardly accounts for what happened, save that he had made such a mistake in so venturing.

Licenses, good will and other such non-exigible assets must be put aside by any man hoping to shew solvency in cases of this kind.

DUFF J.—I think there is not sufficient ground for impeaching the finding of the learned trial judge that the conveyance was voluntary; but I do not agree that the circumstances justify the conclusion that the necessary effect of the conveyance was to defeat or delay existing creditors. The burden was consequently upon the plaintiffs at the outset to shew that the conveyance was made by the debtor with a view to protecting himself or his family against the consequences of failure in the business into which he had a short time before entered. I think the fact that a collapse did come within a few months after the execution of the conveyance was sufficient to shift the burden to the appellants of shewing that such was not the intent of the transaction. I do not think that burden has been discharged.

ANGLIN J.—It is clearly established, as has been found in the courts below, that the conveyance by the male defendant to his wife was voluntary. The considerations now suggested to support it are afterthoughts and purely illusory.

I am not satisfied that it is an unfair inference from the judgment of the learned trial judge that he reached the conclusion ascribed to him by the dissenting Chief Justice in the Divisional Court and by the unanimous Court of Appeal—in which they expressly concur—that this conveyance was made with the intent of protecting the property transferred from the claims of possible, if not probable, future creditors of the hazardous business in which the defendant John L. McGuire had shortly before embarked. Neither am I convinced that this conclusion is not warranted by the evidence. The appellants have, in my opinion, failed to make a case for disturbing it. Other reasons for the transfer put forward by them do not account for its having been made when and as it was. I agree with the Court of Appeal that this case is governed by the principles on which *Mackay v. Douglas*[17], approved by the Court of Appeal in *Ex parte Russell*[18], was decided.

The defendants are, however, entitled to a formal rectification of the judgment pronounced by the trial court. The defendant Hattie McGuire had an inchoate dower right in the Madoc property. A conveyance of that property by her to the assignee, as directed in the second paragraph of the judgment, might deprive her of that right. Of course this was not intended and, had attention been drawn on the settlement of the minutes to this possible effect of the conveyance directed by the judgment, provision excepting from its operation Mrs. McGuire's dower right would certainly have been made. In actions such as this, the relief granted is properly confined to setting aside the impeached conveyance, thus removing it as an obstacle to the creditor's recovery under executions against their debtor. The first paragraph of the judgment accomplishes this. Moreover, it is inconsistent to declare a conveyance void and to set it aside and then to direct that the grantee under that conveyance shall convey to the assignee for the benefit of the creditors the property of which she has thus been already deprived. The judgment of the trial court should be amended by striking out the second paragraph.

With this variation this appeal should be dismissed with costs.

BRODEUR J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellants: Frank B. Proctor.

Solicitors for the respondents: Hogg & Hogg.

[1] 27 Ont. L.R. 319.

[2] 24 Ont. L.R. 591.

[3] L.R. 12 Eq. 158.

[4] L.R. 14 Eq. 106.

[5] 6 DeG. M. & G. 95.

[6] 7 Gr. 440.

[7] [1900] 2 Q.B. 508.

[8] 28 Gr. 556.

[9] 14 Gr. 156.

[10] 26 Gr. 240.

[11] 3 Drew. 419, at p. 426.

[12] (1872) L.R. 14 Eq. 106.

[13] L.R. 12 Eq. 158.

[14] 19 Ch. D. 588.

[15] L.R. 14 Eq. 106.

[16] 19 Ch. D. 588.

[17] L.R. 14 Eq. 106.

[18] 19 Ch. D. 588.

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