

1880.  
June 11.  
" 14.  
" 15.  
July 12.  
—  
Trustees in  
Insolvent  
Estate of Smith  
vs. Smith.

want of just and valuable consideration. Then comes the question whether a *bonâ fide* price was paid by the brother of the insolvent. It seems to me that the defendant has proved that he actually paid the price, which was a fair one, and has thus established his *bona fides* and valuable consideration. Judgment must therefore be given in favour of the defendant, with costs.

DWYER, J.:—This is a case as to which I have had very great difficulty. I do not think it has been shown that there has been an undue preference, and judgment ought to be for the defendant, the plaintiff not having succeeded in making out his case.

SMITH, J.:—It appears to me that there has been a good deal of shuffling of the cards in this case. I think, however, it is one of those cases in which I ought to defer to the opinion of my brother Judges.

[Attorneys for Plaintiffs, FAIRBRIDGE, ARDERNE & SCANLEN.  
Attorneys for Defendant, J. & H. REID & NEPHEW.]

# TRUSTEES IN INSOLVENT ESTATE OF SMITH vs. JOHNSTONE McCAIG.

*Insolvent Ordinance, §§ 83, 84, 88.—Undue Preference.*

*H. S. knowing his affairs to be in an unsound condition, sold to one J. M., who was his creditor in respect of two promissory notes, seven ostriches, J. M. engaging to meet the notes in consideration of this sale. H. S. shortly after became insolvent. Held, on action for the rescission of the sale being brought by his trustees against J. M., that the sale was not void under § 83 of the Insolvent Ordinance, but was an undue preference under § 84. J. M. was however declared entitled to prove his claim in respect of the promissory notes, on the insolvent estate.*

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This was an action brought by the trustees in the insolvent estate of Henry J. Smith against one Johnstone McCaig, who had bought certain seven ostriches of the insolvent, to procure the setting aside of the sale on the

ground that it was void under the provisions of the Insolvent Ordinance.

On the 24th of April, 1878, defendant gave insolvent two promissory notes, one for £200, and one for £100. They were both accommodation notes. Insolvent pledged his interest in seven ostriches to the defendant as security for these notes. Subsequently the notes were exchanged for others of the same date, for the amounts of £179 16s. 6d. and £120 3s. 6d., respectively. When the notes were exchanged nothing was said about the security. One of these notes came due on the 24th of July, and the other on the 24th of August. Towards the end of July insolvent, finding that he would not be able to provide for the notes, sold the seven ostriches to defendant for £40 each, £20 each to be also paid to one George Mansfield for his interest in them. In consideration of this sale defendant was to meet the notes in question. In April, 1878, insolvent had been pressed by A. C. Stewart and Co., and had offered them the ostriches in reduction of their claim, at the valuation at which defendant bought them. From the beginning of July insolvent considered his affairs unsound. On the 15th of August, 1878, insolvent's estate was sequestrated. It was proved that insolvent's affairs were insolvent in July, and that the ostriches were worth about £60 each, but there was no proof that defendant had not acted *bonâ fide* in respect of the sale.

The declaration claimed that the sale was void under the 83rd section of the Insolvent Ordinance, inasmuch as it was made at a time when the liabilities of the insolvent fairly calculated exceeded his assets fairly valued, without *bona fides* and not upon just and valuable consideration,

Or otherwise that it was void under the 84th section, since it was made by insolvent to a creditor at a time when insolvent was contemplating insolvency, with intent thereby to prefer directly or indirectly such creditor to his other creditors.

It was further claimed that the sale was made through a collusive arrangement between defendant and insolvent, the one to give and the other to get an undue preference, and that therefore it should be declared in terms of the 88th section of the Insolvent Ordinance that the defendant was debarred from claiming or proving in the insolvent estate the amount of such undue preference.

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*Upington, A.G.* (with him *Gregorowski*), for plaintiffs.  
*Leonard* (with him *Giddy*), for defendant.

*Cur. adv. vult.*

*Postea* (July 12th),—

DE VILLIERS, C.J.:—In this case, the trustees of the insolvent's estate sue McCaig, under the 83rd section of the Insolvent Ordinance, and also under the 84th section. The charge under the 83rd section has fallen to the ground altogether, because it is perfectly clear that the sale was made *bonâ fide* and that valuable consideration was given for the seven pairs of ostriches which were delivered by the insolvent to the defendant, and this section therefore does not apply. Under the 84th section, the plaintiff claims to have the property restored, on the ground that it was transferred to a creditor at a time when the insolvent contemplated sequestration, and intended by such alienation to prefer the defendant either directly or indirectly. As to the contemplation of sequestration, the Court must be guided by the various circumstances surrounding the case. It appears to me to be perfectly clear that the insolvent did contemplate insolvency, and from his own showing he was hopelessly insolvent at the end of 1878. Only a few days after the transaction now in question, the insolvent endeavoured to compromise with his creditors. I think it is evident that there was an intention to prefer McCaig to the other creditors, and judgment must be given accordingly. The next question is, what is the amount which must be restored by McCaig. The value of the ostriches which were delivered must be taken to be £40 a pair. The total amount of their value will, therefore, be £280, and for this amount judgment must be given for the plaintiffs with costs. The defendant will have a right to prove his claim upon the insolvent estate, but he must restore the sum of £280 to the insolvent estate.

DWYER and SMITH, JJ., concurred.

[Plaintiffs' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]  
[Defendant's Attorneys, J. & H. REID & NEPHEW.]