

I think the action should be dismissed with costs.

I do not base the judgment at all upon any finding that the debtor in giving the chattel mortgage was actuated by any desire to get rid of the danger of a criminal prosecution in respect of the two notes; I do not find that that was a moving cause, but I find that the moving cause was an honest desire to secure the defendant here for the debt, and I am not able to find that the debtor himself appreciated that he was insolvent and unable, eventually, to pay all his charges.

MACMAHON, J.

JUNE 12TH, 1907.

TRIAL.

DAVIES CO. v. WELDON.

*Money Paid—Failure of Consideration—Action to Recover—
Defence of Repayment—Conflicting Evidence—Credibility
—Surrounding Circumstances.*

Action to recover \$800 alleged to have been overpaid to defendant upon a running account between plaintiffs and defendant, and to recover interest thereon.

W. E. Middleton, for plaintiffs.

A. J. Russell Snow, for defendant.

MACMAHON, J.:—Plaintiffs, through their agent T. E. Colwell, commenced purchasing hogs from defendant in July, 1905, and deposited money from time to time to Colwell's credit in the Dominion Bank at Whitby, and Colwell made advances to defendant, as required, sometimes by sending cheques direct to the Dominion Bank at Lindsay, where defendant kept his account, to be credited to him therein, sometimes by cheques payable to defendant's order. The amounts remitted by Colwell were usually considerable, ranging from \$800 to \$2,100, the whole amount totalling \$13,903, the receipt of which defendant did not dispute.

Of the above amount, \$800 was a cheque sent by Colwell on 5th July, 1905, payable to the credit of defendant at the Lindsay bank.

Defendant said this \$800 cheque was sent in consequence of a representation made by him to Colwell that he was shipping some hogs belonging to one Graham, as well as others he had purchased, and required the additional sum to pay Graham; but that Graham being then unable to ship, the matter was overlooked until the first part of August, when Colwell spoke to him over the telephone about the \$800, and