

The payment of \$1,000 in cash to the defendant could not be attacked, and that sum should be treated as having formed part of the sum of \$5,200 paid to retire two of the notes.

The \$5,000 cheque transferred to the defendant was not a payment in cash but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm; *Davidson v. Fraser*, 23 A.R. 439.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself: *Botham v. Armstrong*, 24 Gr. 216; *Churche v. Cousins*, 28 U.C.R. 540.

Gibbons, Q.C., for plaintiff. *Magee*, Q.C., for defendant.

Rose, J.]

KIRBY v. RATHBURN CO.

[July 4.

Company—Winding-up—Mortgage to creditor—Setting aside—Insolvency—Knowledge—"May be set aside"—Presumption—Rebuttal—R.S.C. c. 129, ss. 68-71.

A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R.S.C. c. 129.

Held, 1. Notwithstanding the fact that the mortgage was given upon demand of the mortgagee, the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should therefore be set aside, that being the effect of the words "may be set aside."

2. The words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," are not applicable to the giving of a mortgage as security for a past debt.

3. None of the other sections relied on apply so as to avoid the mortgage; and, following *Lawson v. McGeoch*, 22 O.R. 474; 20 A.R. 464, and distinguishing *Webster v. Crickmore*, 25 A.R. 97, the presumption referred to in s. 71 is rebuttable.

Order, for plaintiffs. *Hogg*, Q.C., for defendants