

Full Court.]

NEWTON v. LILLY.

[May 7.

Fraudulent preference—Sale of stock to person who assumes liability of insolvent to creditor.

The insolvents sold their stock in trade to the defendant Lilly at 87½ cents on the dollar. Being indebted to the defendants, Gault Bros. & Co., in \$4,374.27, they accepted Lilly's undertaking to pay that indebtedness, and received cash for the balance. Gault Bros. then discharged the insolvents and accepted Lilly as their debtor. The insolvents within sixty days made an assignment to the plaintiff under R.S.M. 1902, c. 8, for the benefit of creditors generally. The Court agreed with the finding of the trial judge that Gault Bros. did not know and had not sufficient reason to believe that the assignors were unable to meet their liabilities at the time the transaction attacked was entered into. This action was brought to have that part of the agreement providing for the payment by Lilly to Gault Bros. declared fraudulent and void as against the other creditors of the insolvents.

Held, 1. The effect of the arrangement that was actually made and carried out between the insolvents, Lilly and Gault Bros. was the same as if Lilly had paid the cash in full to the insolvents and they had paid it over immediately to Gault Bros., and therefore although Gault Bros. agreed to give time to Lilly, the payment by Lilly to Gault Bros. came within the saving clause of the Act, s. 44, and was to be treated as a payment of money made by the insolvents and so taken out of the operation of s. 41 of the Act. *Gibbons v. Wilson*, 17 A.R. 1, and *Johnson v. Hope*, 17 A.R. 10, followed. *Burns v. Wilson*, 28 S.C.R. 207, explained.

The plaintiff's contention that the transaction attacked was in effect an assignment by the insolvents to Gault Bros. of a chose in action, that is to say, of a part of the purchase money due from Lilly, and so came directly within the meaning of s. 41 of the Act, should not prevail, for the assumption by Lilly of the Gault Bros.' claim and the obtaining of a release from them to the insolvents formed part of the actual consideration for the sale, and it was not the same as if the insolvents had first sold to Lilly and afterwards assigned to Gault Bros. so much of their claim against Lilly for the purchase money.

2. The transaction attacked could not be held void under s. 45 of the Act which, as s. 44 makes good a payment of money by