

tiff knew about its condition a printed notice was not required; that the accident was a mere misadventure and the plaintiff could not recover.

*Maxwell*, for plaintiff. *MacLennan*, K.C., and *Lawlor*, for defendants.

Boyd, C., Meredith, J., Idington, J.]

[Oct. 27, 1904.

CRAIG v. MCKAY.

*Insolvency—Assignment for creditors—Mortgage by insolvent—Preference—Purchase by assignee—Action to set aside mortgage—Status of assignee—Statutory presumption—Rebuttal—Nonsuit—New trial.*

On Oct. 15, 1896, an insolvent made a second mortgage of his farm to the defendants, solicitors, as security for a bill of costs, and six days later made a statutory assignment to the plaintiff for the benefit of creditors. The assets were realized and a dividend paid to the creditors in June, 1897. The farm was sold, subject to the first mortgage, on March 13, 1897, to a nominal purchaser, who conveyed it to the plaintiff himself in August, 1897. After providing for the first mortgage out of the purchase money, there was a balance of \$600, which the plaintiff distributed among the creditors. The defendants filed their claim as creditors (but without disclosing their mortgage) in December, 1896, and received their share of the dividend in June, 1897. The defendants' mortgage was not registered until the 10th February, 1897, and the plaintiff had no notice or knowledge of it until October, 1897. The plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until he received notice of the exercise of the power of sale contained in the defendants' mortgage, on May 10, 1903, when this action was begun by the plaintiff as assignee to invalidate the instrument or to stay proceedings thereon. The action was tried without a jury, and the trial Judge dismissed it without hearing the defendants' evidence.

*Held*, 1. The plaintiff was still assignee and had a status to maintain the action; his purchase of the farm could not stand for his own benefit, and he was to be regarded as in possession as trustee for the creditors and liable to account, which he submitted to do.

2. In view of the conflicting authorities, that the defendants should be allowed upon a new trial to give evidence to shew the validity of their mortgage, notwithstanding the presumption that it was an unjust preference within the meaning of 54 Vict. c. 20,