31, 1934

In the Privy Council.

No. 84 of 1933.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN

JEAN MACKENZIE (Plaintiff) - - - - *Appellant*

AND

THE ROYAL BANK OF CANADA (Defendant) - *Respondent.*

CASE OF THE RESPONDENT.

RESPONDENT'S CASE

1. This is an appeal in forma pauperis, by special leave, from a judgment of the Appellate Division of the Supreme Court of Ontario, delivered on the 23rd day of June, 1932, upon an appeal from a judgment of the Honourable Mr. Justice McEvoy, dated the 21st day of September, 1931. The judgment of the Appellate Division reversed the judgment of the learned Trial Judge, which had been in favour of the (Plaintiff) Appellant and dismissed the action. Record. p. 166. p. 152.

2. The Appellant is the wife of one John Angus Mackenzie who was the active Manager of a business carried on by a firm of Mackenzie & Company, which was incorporated under the name of " Mackenzie Limited " in 1913, and the assets of which later in 1921, became the property of a Company then formed with the name of " Mackenzie Manufacturing Company, Limited." p. 122, l. 20. p. 25, l. 40. pp. 183, 184.

3. The Appellant had been left by her father, who died in 1907, a number of shares of stock in a Company known as The Ottawa Dairy Company, and at the time her husband was carrying on business as Mackenzie & Company she hypothecated this stock to the Bank of Ottawa to enable him to obtain credit. From that time on the stock was continuously hypothecated, at first to the Bank of Ottawa and later on several occasions to the present Respondent Bank, to secure advances made from p. 25, l. 24. p. 122, l. 23.

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Record. pp. 182, 194, 200, 203. time to time to the Company carried on by her husband. Upon the occasion of each hypothecation the Respondent was given by the Appellant a certificate of independent advice from a lawyer selected by the Appellant wholly apart from the Respondent, to the effect that he had fully advised her as to the effect of the transaction, and that she understood the nature p. 182. of it, and to each certificate was appended a declaration signed by the Appellant to the same effect.

p. 120, l. 35. **4.** The business of Mackenzie Limited was very prosperous during the period of the Great War and for two years thereafter, but in the latter part p. 121, l. 37. of the year 1920 and throughout the year 1921 there was a great shrinkage in stock values, and Mackenzie Limited was forced to make an assignment in bankruptcy during the Summer of 1921. Long negotiations followed between the Respondent, the Appellant's husband and the trustee in bankruptcy of Mackenzie Limited and an arrangement was eventually entered into, the story of which is perhaps most conveniently told in pp. 184-9. Exhibit number 10. Under this arrangement, the assets of the Company, practically all of which were then under hypothecation to the Respondent, were released to the Respondent by the Trustee in Bankruptcy, and then transferred by the Respondent to the Appellant's husband who in his turn transferred them to a newly incorporated Company, Mackenzie Manufacturing Company, Limited.

5. The Ottawa Dairy stock of the Appellant was then under hypothecation to the Respondent, and to enable the transaction to be carried out in such a way that the Respondent would not have to relinquish any of its securities, the Appellant and her husband first signed a letter addressed to the Respondent under date of 13th September, 1921, running as follows :—

p. 173, ll. 13-27.

> " We understand that you are filing with the Authorised Assignee of Mackenzie Limited an affidavit valuing certain securities held by you at the sum of $125,000.00 and that the Authorised Assignee will be at liberty to accept your valuation in which case as between the Authorised Assignee and the Bank the Bank's claim would be considered paid in all.
>
> " It is our desire that you should file the affidavit in question and we hereby agree that your so doing shall not in any way release us from our obligation under guarantees to the Bank nor shall our personal securities be in any way affected until the amount due to the Bank by Mackenzie Limited has been actually paid.
>
> " Yours truly,
>
> " (Sgd) JOHN A. MACKENZIE.
>
> " (Sgd) JEAN MACKENZIE."

When the necessary Order in bankruptcy had been obtained, the Appellant and her husband signed a further letter dated the 25th November, 1921, re-affirming the right of the Respondent to hold all the securities. Record. p. 174. p. 183.

6. When this transaction was finally completed, and the title transferred to the newly formed Company, subject to the rights of the Respondent, the Appellant gave to the Respondent a new hypothecation, dated 21st November, 1921, and at the same time gave to it the certificate of independent advice filed as Exhibit number 8. pp. 204, 205. p. 182.

7. The new Company carried on business for some time but went into liquidation on 20th October, 1926, and the Respondent was from that time down to the date of trial gradually liquidating the various securities which it then held. p. 103, l. 12. p. 103, l. 39.

8. The present action was brought by the Appellant on the 9th February, 1928, to have it declared (1) that on the 14th November, 1921, the date of the Order in bankruptcy ratifying the releases to the Respondent of the securities it then held, she was entitled to have her securities returned to her; (2) that the letter of hypothecation, dated 25th November, 1921 (probably an error for 21st November, 1921), was executed by her under a misapprehension induced by representations made to her by her husband, and by the form of the letter of 13th September, 1921; (3) a similar claim as to a letter of guarantee dated the 21st November, 1921, given by the Appellant to the Respondent; and (4) an Order requiring the Respondent to re-convey her securities to her. The statement of claim contained no allegation that the Appellant had been subjected to any duress, coercion, or undue influence by her husband, still less by the Respondent. pp. 4 and 5. p. 174. p. 204. p. 173. p. 180.

9. The action was tried by the Honourable Mr. Justice McEvoy on the 19th and 20th May, 1931, and on the 21st September, 1931, he gave judgment in favour of the Appellant, ordering the Respondent to re-convey the securities in question. His reasons for judgment, which are quite lengthy, are based almost entirely upon his opinion that as the Appellant was pledging her own securities for the debts of the company carried on by her husband she was one of what he called " the protected class " under the authorities. He referred to a number of authorities bearing upon this situation, and in particular to the decision of the Privy Council in *Inche Noriah* v. *Shaik Allie Bin Omar* [1929] A.C. 127, followed by the Supreme Court of Canada in *Krys* v. *Krys* case [1929] S.C.R. 153. He found that the Appellant was a woman of above average intelligence but that on account of her position as one entitled to " the protection " she was entitled to the kind of independent advice discussed in the *Inche Noriah* case. He accepted the Appellant's statement that the p. 152. pp. 134–151. p. 147, l. 21. p. 149, l. 44. p. 150, l. 8. p. 150, l. 10.

Record.

p. 150, l. 37. advice which she had received on each of the several occasions was given in a more or less formal way, and stated that the Respondent should have called as witnesses the several lawyers who had advised the Appellant from time to time and had given certificates of independent advice, in order to satisfy the Court that their advice " was given with a knowledge of all the relevant circumstances," and that it was " such as a competent and honest adviser would give if acting solely in the interests of the

p. 150, l. 23. Plaintiff and having in mind all the relevant circumstances." Thus placing the onus on the Respondent, he concluded that, since the several legal advisers had not been called the Respondent was not entitled to rely either on the said certificates or on the Appellant's own statements appended thereto, and had failed to discharge the onus of proof; and that the Respondent accordingly had no claim or lien upon the shares in question. The learned judge does not appear to have regarded as relevant the fact that the Respondent was quite unaware that the Appellant (as she alleged) was not fully advised by the various independent lawyers to whom she resorted from time to time.

10. On appeal to the Appellate Division of the Supreme Court of

pp. 166-7. Ontario, that Court by unanimous judgment of a full Court of five judges, allowed the appeal of the present Respondent, and directed a dismissal

pp. 156-165. of the action. The reasons were written by Mr. Justice Fisher.

11. The learned Appellate Judge discussed the Appellant's evidence at some length. He pointed out that she had had considerable experience in the hypothecation of her securities to the Bank, both on her husband's

p. 58, l. 19. behalf and on her own personal account, the first occasion being when the husband first went into business in 1913. She was at that time independently advised by Mr. H. P. Hill, K.C. As to this and all similar occasions when

p. 60, l. 29. she received independent legal advice and gave certificates to the Respondent, her explanation in evidence was that it was always a formal matter which had to be signed by a lawyer in order to make the transaction legal

p. 61, l. 40. with the Bank, and that she treated the certificate which she herself signed

p. 182. on each occasion as a similar matter of form. She knew quite clearly,

p. 69, l. 14. however, that she was making her securities responsible for the liabilities of the business, and at the most important stage of the business she said that

p. 73, l. 26. she was anxious that it should carry on because it was practically her bread and butter.

p. 157, l. 46. **12.** Dealing with the several certificates of independent advice the learned Appellate Judge pointed out that the Appellant had agreed that the

p. 64, l. 36. several lawyers who had advised her were men of high standing in their profession, but that she seemed to have had the idea that they should have gone into the transaction in a manner which would satisfy them that she

p. 133, l. 5. was not taking any risk of loss in hypothecating her securities. Pointing

out the obvious absurdity of this idea, the learned Judge reached the conclusion, on the evidence of the Appellant herself, that she had been independently advised by competent legal advisers. Record. p. 163, l. 28. p. 165, l. 5.

13. The conclusions of the Appellate Division as expressed by Mr. Justice Fisher were (A) that the Appellant understood the transaction; (B) that the onus lay on the Appellant to prove knowledge on the part of the Respondent of any duress, which onus had not been satisfied, but that in any event there was no duress; (C) that the Appellant was independently advised, and that even if the advice was not sufficient in character, she was estopped by reason of her own actions from setting up lack of independent advice; (D) that the Appellant had an extensive knowledge of previous like transactions in hypothecations and of receiving independent advice thereon, and particularly of the transactions attacked, that she understood the nature and effect of hypothecation, and that she was accordingly not in the protected class. p. 164, l. 40, to p. 165, l. 19.

14. The Respondent submits that the decision of the Appellate Division of the Supreme Court of Ontario is right, and that the appeal should be dismissed for the following, among other

REASONS.

(1) BECAUSE the Appellant fully understood the transaction in question.

(2) BECAUSE there was no evidence upon which it could properly have been found that the Appellant signed the hypothecation in question by reason of any duress or undue influence on the part of her husband.

(3) BECAUSE undue influence on the part of the Respondent is neither alleged nor proved.

(4) BECAUSE in any event the Appellant's husband was not the agent of the Respondent Bank.

(5) BECAUSE the Respondent had no knowledge of any influence exercised by the husband over the Appellant.

(6) BECAUSE the onus of proof lay on the Appellant and was not discharged.

(7) BECAUSE in any event the Appellant was fully advised and had a complete knowledge of the effect of the transaction in question.

(8) BECAUSE the Appellant was not in all the circumstances one of the " protected class."

(9) BECAUSE the Appellant knew that the Respondent Bank made additional advances to the business managed by her husband upon the faith of her hypothecation of the securities in question, and is, therefore, estopped from setting up the contention that the certificates furnished by her to the Respondent Bank were not in substance true statements of fact as alleged by them.

(10) BECAUSE the Respondent made its advances in good faith on the strength of securities voluntarily deposited with it by the Appellant; because on each occasion the Appellant consulted an independent lawyer of good standing, unconnected with the Respondent and selected by the Appellant wholly independently of the Respondent, and the Respondent held no communication with such lawyer; and because on each such occasion the lawyer so selected and consulted by the Appellant gave a certificate to the effect that he had advised the Appellant fully and separately and that she understood the transaction, and the Appellant herself signed a statement to the like effect.

(11) BECAUSE the judgment appealed from is right and ought to be affirmed.

D. N. PRITT.

J. DOUGLAS WATT.

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BETWEEN

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(Plaintiff) - - - *Appellant*

AND

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CASE OF THE RESPONDENT.

BLAKE & REDDEN,
17 Victoria Street, S.W.1.