1884
*Nov. 25.
1885
*Feb'y. 6.

GEORGE B. BURLAND (PLAINTIFF).....APPELLANT;

AND

ALEXANDER MOFFATT, *ès-qualité*, (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Right of Assignee to sue under voluntary assignment—Arts. 13 *and* 19, *C. C. P.* (*L. C.*)—*Assignee represents only Assignor.*

In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not, by a plea in his own name, ask to have a conveyance, made by the debtor to the plaintiff prior to the assignment under which defendant claimed, rescinded or set a side as fraudulent against creditors.

The nullity of a deed should not be pronounced without putting all the parties to it *en cause en déclaration de jugement commun.*

Semble—The plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property in question which he could set up even against an action brought directly by the creditors.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1).

The action in this case was commenced by the appellant (plaintiff), by a writ of seizure in revendication of certain machinery. The appellant claimed to be the proprietor of the machinery in question, in virtue of a deed of sale thereof executed by a certain firm of J. G. Gebhardt & Co. to the Canada Paper Co. before Beaufield, notary public, on the 27th day of April,

*PRESENT—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, JJ.

(1) 4 Dorion's Rep. 590.

1880, and of another deed executed by the Canada Paper Co. to appellant on the 12th day of May, 1881, before Marler, notary. Concurrently with the sale from Gebhardt & Co. to the Canada Paper Co. the latter executed a lease of the object of sale to the former, and Gebhardt & Co. remained in possession of the goods. After the date of this sale Gebhardt & Co. continued their business, and used the machinery in question for about a year, when they became financially embarrassed, and made a voluntary assignment of all their estate and effects to respondent, Alexander Moffatt, before a notary; and in virtue of that deed Moffatt took possession of Gebhardt & Co.'s place of business and its contents—and among other property, the machinery now in question. Moffatt had advertised the estate, including this machinery, for sale, when he was stopped by the present action. The action was directed against the firm of Gebhardt & Co., as being legal possessors of the effects claimed, and also against respondent, as being in physical possession thereof, and detaining them against appellant's will. Gebhardt & Co. did not plead, but Moffatt appeared and pleaded the assignment of the said effects to him, as above set forth: that the deed from Gebhardt & Co. to the Canada Paper Co. was fraudulent and simulated; that Gebhardt & Co. were at the time insolvent; and concluded that said deed should be declared null, and that he (Moffatt) be maintained in his possession.

The appellant, by his answer to the plea of Moffatt alleged that Moffatt had no right to defend his possession of the goods seized in this cause, by setting up pretended matters personal to the creditors of G. J. Gebhardt & Co.

That Moffatt was not, and did not allege himself to be, a creditor of said firm, or to have suffered damage by reason of the pretended fraud, which he alleged.

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That if the deed or transfer in trust, alleged by Moffatt, conveyed to him any rights whatever, which was denied, the same did not convey to him the right to take possession of property not belonging to the defendant, nor to represent the rights of the creditors generally, nor to defend any action such as the present.

That if Moffatt held any legal position under the said deed, such position was that of defendants George J. Gebhardt & Co., and not that of the creditors of the firm.

That all of the creditors of the said firm of G. J. Gebhardt & Co. did not consent to the said deed of assignment, nor did even a majority of them, nor did any of said creditors authorize Moffatt to plead as he had done.

That Moffatt was pleading *droits d'autrui*, and his plea was void.

That said Moffatt alleged nothing personal to himself, nor to G. J. Gebhardt & Co., to justify his retention of the goods seized.

The plaintiff in addition fyled a general answer.

The Superior Court dismissed Moffatt's plea and maintained Burland's action. On appeal to the Court of Queen's Bench for Lower Canada (appeal side), that court reversed the judgment of the Superior Court, on the ground that the assignee under a voluntary deed of assignment by a debtor for the benefit of his creditors can, as such assignee, sue and be sued in reference to the estate and property assigned to him.

Archibald for appellant, and *Strachan Bethune*, Q. C. and *J. Doutre*, Q. C., for respondent.

The points relied on by counsel and authorities cited are fully noticed in the judgment of Taschereau, J., hereinafter given, and in the judgments of the court below (1).

(1) 4 Dorion's Rep 590 *et seq.*

RITCHIE, C. J., concurred with Taschereau, J.

STRONG, J.:

This is an action of revendication to recover certain plant and machinery, brought against the assignee for the benefit of the creditors of the original vendors, under whom the plaintiff claims. The defendant impeaches the original contract of sale entered into between the insolvents, the assignors of the defendants, and the persons from whom the appellant purchased, as being fraudulent against creditors.

The objections to the judgment, very ably urged in argument by Mr. Archibald, which seem to me to be conclusive in favor of the appeal are: first, that the assignee, the present respondent, has no *locus standi* for the purpose of maintaining such a defence, as it could not have been successfully pleaded by the assignors themselves. The debtor who makes a deed which is fraudulent against creditors cannot institute an action to set it aside, and his assignee can stand in no better position than his author. This is the view taken by Mr. Justice Monk, and I think he is entirely right. In English law, as administered in England and the Province of Ontario, the law to this effect is well understood and settled, as is apparent from the cases of *Robinson* v. *McDonell* (1), in England, and that of *McMaster* v. *Clare* (2), in Ontario. And in the United States, though the decisions are not uniform, the law is generally settled the same way—at least, I find it so stated in a recent and American treatise on the law relating to conveyances in fraud of creditors (3), where the authorities will be found collected. In the Province of Quebec the reasoning upon which these decisions proceed is *a fortiori* applicable—since

(1) 2 B. & Ald. 136.
(2) 7 Gr. 550.
(3) Wait on Fraudulent Conveyances, at p. 179.

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the maxim "*nemo potest plus transferre quam ipse habet*," is of course also the rule of that law, and the principle upon which the exceptional American cases profess to be founded, namely, that the assignee is the representative of the creditors, is, in Quebec, excluded by the well known rule of the ancient French law, that no one can sue by "*procureur*" except the King. Therefore, in the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights of action as the parties making the assigment to him could have enforced.

A second ground for allowing this appeal is that the appellant was a purchaser in good faith and for value. There is no evidence to show that he had any intimation of fraud in the first sale by Gebhart & Co. to the Canada Paper Company, so that he stands in a different and more advantageous position than the original purchasers (1). Therefore, if this action had been instituted by the creditors directly, instead of by the assignee, it must have failed.

On these grounds, which I only state shortly and in outline, I am of opinion that the judgment of the court below should be reversed. The reasons I assign for my judgment will be fully treated in the judgment which has been prepared by my brother Taschereau, and I refer to that for a more amplified statement of the arguments and reasons upon which, I think, the appeal should be decided.

FOURNIER, J., concurred with Taschereau, J.

(1) See Demolombe, Contrats et obligations, t. 2 p. 196 No. 200, *et seq.*; Capmas, Revocation des Actes, No.74 to 76; Aubry et Rau. 4 ed., Vol. 4, p. 157; Larombière, Vol. 1, p. 252, *et seq.*; Bedarride, Vol. 4, Art. 1670, *et seq.*

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HENRY, J.:—

The defendant in this action claims under a conveyance from Gebhart & Co. they having made to him an assignment of their property in general terms for the benefit of their creditors. The plaintiff claims under a conveyance from another party about a year previous, who purchased the property in question from Gebhart & Co. for a valuable consideration. He had a prior title from Gebhart & Co. to that of the assignee. He says: I have the title, I have paid a valuable considreation for the property and I am entitled to hold it. It remained in the possession of Gebhart & Co. under the lease by which they were to pay rent to the original purchasers, and they were at the time in the position of tenants of the property purchased from Gebhart & Co He was therefore in possession of the property by his tenants from whom he had a right to receive rent, and, that being so, and the defendant being in possession the action is brought to recover possession of it. The assignee claims under an assignment from Gebhart & Co. of all their property. The question then arises: What did he take under that? He took only such property as Gebhart & Co. had the right to sell. Gebhart & Co., having the year previously sold this property, had no right or title to it. But he says: You made that assignment to the other company fraudulently, in fraud of your creditors. But the question is: What right had he to say so? He did not take possession under the Insolvent Act, which enables the assignee to go back and enquire into the transactions of the insolvent for some time previous to his becoming insolvent; and which, if he finds creditors have been improperly preferred, or that assignments made previously have been in contemplation of bankruptcy, provides that he shall have the right of enquiry into the circumstances; and no such power is given to an assignee apart from

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the Act. The assignee merely took the title that Gebhart & Co. had, and, having taken that, he has no right to enquire into the dealings of Gebhart & Co. by which they transferred the property previously. The property was theirs at the time, and they cannot say: We assigned it fraudulently, and he as their assignee is not permitted to say so. Under these circumstances, I think the case, independently of any questions which might otherwise arise, is clearly in favor of the plaintiff in the action. I, think, therefore that the judgment of the court below is erroneous. There was a good deal of law cited by the learned Chief Justice of the Court of Appeal in the Province of Quebec, but it does not touch the point. The assignee had conveyed to him the property that Gebhart & Co. had, but that is not the question here. The position here is that he did not receive any itle to this property in question, because Gebhart & Co., at the time they made the assignment, had no title to give him. Therefore the law cited, that an assignee of property may bring an action to recover it, is not applicable. I, think, therefore, the appeal should be allowed and that the judgment should be to affirm the judgment of the Superior Court in favor of the appellant.

TASCHEREAU, J.:—

This is an appeal from a judgment dismissing an action in revendication by which Burland, the appellant, claims certain machinery, which he contends the respondent Moffatt, detains illegally. Burland, in his declaration, alleges that he bought this machinery by deed of the 12th of May, 1881, from the Canada Paper Co., who had themselves bought it from Gebhart & Co. by deed of the 27th of April, 1880.

Moffatt answered this action by a plea alleging that he detains the said machinery under a voluntary assignment, of the 18th June, 1881, by the said Gebhart & Co.,

of the whole of their estate, to him, Moffatt, for the benefit of their creditors; and that when Gebhart & Co. sold it to the Canada Paper Co., they were insolvent or embarrassed, the said sale having been collusively concerted in order to give to the said company a fraudulent and illegal preference in fraud of the other creditors of the said Gebhart & Co. The conclusions of this plea are that the said sale of Gebhart & Co. to the Canada Paper Co., and the sale by the Canada Paper Co. to the plaintiff, be declared to have been, and to be simulated, fraudulent, inoperative, null and void; that the said deeds be rescinded and set aside, and the action in revendication of the said plaintiff dismissed. To this plea Burland replied that Moffatt had no legal status to oppose such objections to this action; that Moffatt was not a creditor, and had no interest; that he could not plead defences that belonged only to the creditors; and that he had no authority to represent the creditors by pleading in his own name.

The Superior Court in Montreal (Rainville, J.,) dismissed Moffatt's plea, and maintained Burland's action on these grounds, as follows:—

Considérant que le défendeur n'a pas droit de plaider à cette cause en la qualité par lui invoquée parce que personne d'après l'article 19 du Code de Procédure Civile ne peut plaider au nom d'autrui.

Considérant en outre qu'en supposant que la vente faite par les dits George J. Gebhart et Cie. serait simulée et frauduleuse, cette simulation ou cette fraude ne pouvait réflechir contre le démandeur qui a acquis les dits meubles de bonne foi, pour valable consideration.

Considérant que d'après les articles 1025 et 1027 du Code Civil du Bas Canada, l'aliénation d'une chose certaine et determinée rend l'acquéreur propriétaire par le seul consentement des parties sans tradition, et ce aussi bien a l'égard des tiers qu'a l'égard des parties contractantes, et qu'en conséquence le démandeur est propriétaire des effets saisis revendiqués.

I am of opinion that this judgment was right, and should not have been reversed by the Court of Appeal

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as it has been. Clearly, Moffatt, by his plea, professes to represent and act in lieu of the creditors of Gebhart & Co., and of them only. It is not for Gebhart & Co. and as their representative that he asks the resiliation of these deeds. In that quality he could not have done so, for the simple reason that Gebhart & Co. could not themselves have done it. And as to himself, he is not a creditor, does not claim to be one, and has personally no interest whatever in the case. He is certainly not *procurator in rem suam.* By the said plea he became virtually a plaintiff, in his own name, in an action *Pauliana,* or *en déclaration de similation.* Now, if he had instituted a direct action, of the same nature, would he have done so in his own individual name, or in his quality of assignee. I can answer without hesitation, that he never would have thought of sueing otherwise than in his quality of assignee. Then, on what ground can he contend that here he, in his own individual name, has the right to demand for Gebhart's creditors the resiliation of the said deeds? The only answer he has given to this, is that he had to do it because he is sued in his own individual name. But surely that could not hinder him from filing an intervention in his quality of assignee, or from bringing a direct action in this quality. That *nul ne peut plaider par procureur* is, and has always been, the law. In *Nesbitt* v. *Turgeon* (1), the Court of Queen's Bench (as far back as 1845, Sir James Stuart, C.J., Bowen, Panet and Bedard, JJ.), held that, even in the case where the debtor had expressly agreed that the action against him should be brought in the name of the attorney or agent, it could not be done. There are apparent though no real exceptions to this rule, but none applicable here, and the respondent has failed to produce a single authority to establish that with us, the assignee, or trustee, for the benefit of credi-

tors has, in his own and individual name, the actions of the creditors. And this alone would dispose of his demand *en résiliation*. Could he, however, be considered an assignee or trustee, he would not have has more success. In the absence of a bankrupt law, the assignee represents the assignor, but not the creditors. Mr. Justice Monk has clearly demonstrated this proposition in his dissenting opinion in the present cause, and the respondent has cited no authority to the contrary, outside of the writers, under the Ordinance of Commerce of 1673, or the French Code of Procedure, or the Code of Commerce, all of which are not law here.

In our own courts I cannot find a single case in which, the point being taken, it has been held, that an assignee under such circumstances can act for and in the name of the creditors. In all the cases cited by the respondent and which I have been able to refer to, the assignee was suing for the assignor, as his *locum tenens* and claiming the assignor's right. In not one of them, can I see that the assignee was exercising the personal actions of the creditors, that is the actions given to them alone, and denied to the assignor. *Withall* v. *Young* (1), and *Bruce* v. *Anderson* (2), would seem to be exceptions to this, but a reference to these cases shows that the point there was not at all raised by the parties, or decided by the court. In *Starkie* v. *Henderson* (3), it was the assignor's action that the plaintiff had taken, and on the peculiar state of facts, the court held that there was a privity of contract between himself and the defendant, and that so he had rightly brought the action in his name. Of course in exercising the assignor's action, and claiming the assignor's rights and debts, the assignee does it in the interest of the creditors, as well as of his assignor, but that is

(1) 10 L. C. R. 122. (2) Stuarts' Rep. 137.
(3) 9 L. C. Jur. 238.

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quite different. It is then as any *concessionaire* may do, the actions pertaining to the assignor, the actions that before the assignment, or without it, the assignor would himself have had which he then brings, whilst here the assignee claims rights pertaining to the creditors alone, and to which his assignor could never have had any claim.

In *Prevost* v. *Drolet* (1), in the Court of Appeal, Mr. Justice Loranger, delivering the judgment of the court, held that an assignee, under the assignmet to him by an insolvent for the general benefit of his creditors, not made under the Insolvent Act, has no quality to sue in his own name for anything connected with such assignment. That was going further than was necessary to do here. By the report of the case one would certainly think that the court there were unanimous in that holding. It may be, however, as has been said at the bar, that the three other judges composing the court simply concurred in the result of the judgment on the plea to the merits without entering into the question discussed by Judge Loranger. But to make them hold quite the reverse as contended here by the respondent, simply because the demurrer attacking the plaintiff's rights of action had been dismissed by the judgment of the first court, and because the said judge in appeal did not reverse that judgment seems to me going far, as the appeal was by the plaintiff, who had obtained *gain de cause* on the demurrer, and who consequently did not complain of the judgment which had dismissed it. However, this is immaterial, the case having no application here, as the plaintiff there also claimed, purely and solely as *locum tenens* of the assignor a debt due to the assignor. The cases of *Ferries* v. *Thomson* and *Amour & Main* (2), and *Mills* v. *Philbin* (3), cited

(1) 18 L. C. Jur. 300. (2) 2 Rev. de Legis. 303.
(3) 3 Rev. de Legis. 255.

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by the respondent, do not seem to me to have any bearing the present case, whilst two reported cases are decidedly adverse to him. In *Chevalt* v. *de Chantal* (1), it was distinctly held that the assignee cannot judicially represent the creditors of the assignor. And in *Whitney* v. *Bideaux* (2), Mr. Justice Badgley also held that the assignees of an insolvent cannot *ester en justice* for the creditors.

The respondent has cited some unreported cases from Montreal, of 1845 or 1846. I have not been able to refer to them, but they were probably under the then existing bankruptcy law, 7 Vic, ch. 10 (1843), and from what has been said of them, they were, I believe, all actions belonging to the assignor that had been so brought by the assignee.

I may here remark, this assignment was not made for the benefit of Gebhart & Co's. creditors generally, but only for the benefit of nine specified creditors, parties to the said deed, the said nine creditors to be paid their claims on the proceeds of the sale of Gebhart & Co's. estate, goods and chattels, the surplus, if any, to be paid over to the said Gebhart & Co. Burland, the appellant, was himself one of these nine creditors, and it has been urged upon us that this was fatal to his present action, But I really cannot see how this alone could confer upon the respondent the right to *ester en justice* as *locum tenens* of the creditors. *Burland*, moreover, signed the deed without prejudice to any privilege or security he had; and when Gebhart & Co. assigned their goods and chattels, without any description or enumeration whatsoever, and without any schedule annexed to the deed or any mention whatsoever, of the machinery in question here, *Burland* was, it seems to me, perfectly justified in not seeing in the deed an assignment of what were then

(1) 8 L. C. Jur. 85. (2) 12 Rev. Leg. 518.

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his goods and effects. They ceded their goods, not Burland's.

Another serious objection taken against the respondent is, that none of the parties to the sale by Gebhart & Co. to the Canada Paper Co., of which the revocation is asked are *en cause*. See *Lacroix v Moreau* (1). Neither the paper company nor Gebhart are parties to this issue, and neither of them have had an opportunity to contest this demand in revocation. Moffatt here, as I have already remarked, does not represent Gebhart & Co., and does not pretend to do so.

L'action en rescision, (says Bédarride), (2), doit être poursuivie directement contre les auteurs du dol., alors même que la chose qui en est l'objet serait passée en d'autres mains.

The reasons this author there gives for this opinion apply to all revocatory actions, and to the actions instituted by the creditors not parties to the deed (3).

And it is on the party who demands the revocation of any deed under such circumstances that lies the duty to see the entire fulfilment of all the conditions necessary for the success of his demand. If Moffatt had formed his demand in resiliation by an action, he would have had to direct it against Gebhart & Co., as well as against the Canada Paper Co. and against Burland Now, when he demanded this resiliation, as here, by an incidental procedure, why did he not bring *en cause* Gebhart & Co. and the Canada Paper Co. *en déclaration de jugement commun*. By holding fast to the old and well established rule that, in any proceeding and demand, all the parties interested in its results should be called in, courts of justice will prevent a multiplicity of contestions and contradictory judgments. For it is evident that, here, for instance, a judgment between the appellant

(1) 15 L. C. R. 485.
(2) Dol et fraude, No. 299.
(3) Ibid No. 273. See also 4 Bédarride, No. 1436.

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and the respondent could not be opposed to the Canada Paper Co., and would not be *res judicata* as to them. And this would be so, perhaps, even as regards Gebhart & Co. Though some cases have gone so far as to say that it is not always necessary that all the parties should be called in (on what authority does not appear). I am not aware of any case in which a deed has been annulled in the absence of all and every one of the parties thereto. The court may, perhaps, sometimes, if in the course of the proceedings it is of opinion that certain other parties have an interest in the case, upon proper application, order them to be summoned (1). But it would not do so after a final hearing on the merits. If it then appears that though the objection has been taken, *ab initio*, the party demanding the resiliation has claimed the right and persisted in going on with the case on the issue joined with the adversary he has chosen, his demand must be dismissed; he has failed voluntarily to put the court in a position to grant it, and his adversary has then an acquired right to its dismissal. Were the court to order, then, the *mise en cause* of any other party, it would necessarily follow that the pleadings, *enquête*, and all the proceedings, would have to be begun over again, a result which, it is obvious, would be an injustice to the party entitled to a judgment.

Moffatt's contention, that in an action in revendication—"*Si la chose n'appartient pas au possesseur, vous devez faire assigner son bailleur*"—is irrefutably answered on the part of the appellant, by the fact that he has done so, and that Gebhart & Co., Moffatt's *bailleurs*, are co-defendants in this suit. That the appellant should have summoned the creditors, I cannot see. Is the plaintiff, in a petitory action, obliged to put *en cause* the mortgagees? Then, if Moffatt had no

(1) Bioche dict. de procéd. vo. mise en cause No. 4.

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right to question the titles upon which the action is based, his doing so cannot have put the appellant under the obligation to call in any other party who might have had that right. Burland's action is to revendicate the possession and ownership of this machinery, and is surely well brought against both the actual detainer and the pretended owners of it (for the assignment would not deprive Gebhart & Co. of the ownership of it.) Then, how can Moffatt be admitted to contend that the appellant should have called in the creditors, when he rests and leaves his whole case on the ground that he himself here is acting for them, and represents them, and that it is entirely and solely for and in their name that he asks the resiliation of the plaintiff's title. If he represents the creditors, they have not to be called on. If he does not represent them, he is out of court.

The rule that the defendant, in an action in revendication, upon his declaring that he does not hold for himself, has a right, upon saying for whom he holds, to be put *hors de cause*, does not apply, I believe, where the said defendant joins issue and engages in a contestation with the plaintiff. This contestation, it is evident, has to be brought to judgment between the parties to it and them alone, and the defendant then, who has taken upon himself to resist the plaintiff's demand, cannot be admitted to complain that the real owner is not *en cause*.

Another important question raised by the appellant, and also decided in his favor by the Superior Court, is that he was a second purchaser in good faith of the machinery in question, and that whatever fraud may have been committed between Gebhart and The Canada Paper Co. cannot affect his rights to the said machinery, and his purchase of it from the Paper Co. The

great majority of writers on this point (1) are of opinion that the action *Pauliana* does not lie against a subsequent purchaser in good faith, though Laurent (2), it would seem, is of a contrary opinion. However, it is unnecessary for us to consider and determine that question here as on the first ground alone the appellant is entitled to succeed.

Appeal allowed with costs.

Solicitors for appellant: *Archibald & McCormick.*

Solicitors for respondent: *Dunlop & Lyman.*