AUBREY KIRK (PLAINTIFF).....APPELLANT; 1896

AND *Feb. 20, 21.
*Mar. 24.

DUNCAN C. CHISHOLM (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment for benefit of creditors—Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel mortgage—Statute of Eliz.

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under section 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92), and does not require an affidavit of *bona fides*. *Durkee* v. *Flint* (19 N. S. Rep. 487) approved and followed; *Archibald* v. *Hubley* (18 Can. S. C. R. 116) distinguished.

A provision in an assignment for the security and indemnity of makers and endorsers of paper not due, for accommodation of the debtor, does not make it a chattel mortgage under sec. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it.

An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.

A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee unless there be gross negligence or fraud on his part" will also avoid the assignment under the statute of Elizabeth.

Authority to the assignee not only to prefer parties to accommodation paper but also to pay all "costs, charges and expenses to arise in consequence" of such paper is a badge of fraud.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment of the trial judge in favour of the plaintiff.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

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The question for decision on this appeal was whether or not an assignment to the plaintiff for benefit of creditors was valid under the Bills of Sale Act of Nova Scotia (1), and the statute of Elizabeth relating to voluntary conveyances. The deed was attacked under the Nova Scotia Act on the ground that the affidavit of *bona fides* was defective. As against that ground of attack it was contended that under section 10 of the Act no affidavit was required.

The material portions of the assignment after the provision for payment by the assignee of the expenses attendant upon its execution and carrying into effect its trusts and powers were as follows:—

"In the next place, shall pay all debts due and owing by the said assignor to A. Kirk & Co., of Antigonish aforesaid, merchant, for and on account of any judgments, mortgages, promissory notes and bills of exchange made or drawn, accepted or endorsed by the said A. Kirk & Co., now due or growing due, book debts and all other debts or claims of the said A. Kirk & Co. against the said assignor, and also all interest upon or to accrue upon said debts, and all of them, for, during and until the same are realized, paid and fully satisfied at the rate of seven per centum per annum.

"In the third place, shall pay the indebtedness of the said assignor to Charles Matheson, of Antigonish aforesaid, tailor, which debt is one hundred and four dollars, in full.

"In the fourth place, shall pay share and share alike, ratably and proportionately and without preference or priority as between them all, and every claim upon which the following persons, to wit:—T. Downie Kirk, of Antigonish aforesaid, merchant; Allan Gillis, of Antigonish aforesaid, carpenter; Hugh McAdam, of Antigonish aforesaid, tailor; John J. Cameron, of

(1) R.S.N.S. 5 ser. ch. 92.

Antigonish aforesaid, doctor of medicine; John J. McPherson, of Antigonish aforesaid, baggage master, may respectively become liable as makers or endorsers of any bill or bills of exchange, or promissory notes heretofore made or endorsed by the said parties for the accommodation of the said assignor and any costs, charges or expenses to arise in consequence thereof.

"In the fifth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall execute these presents within sixty days from the date hereof respectively and ratably and proportionately and without preference or priority as between them.

"In the sixth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall not execute these presents *pro rata* in equal proportions and without priority as between this class of creditors. And lastly, shall pay the surplus, if any, after payment of all the debts, claims, costs and charges aforesaid unto the said assignor.

"And it is further agreed that the said assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part."

This action was brought by the assignee against the sheriff of the county of Antigonish, who had seized under execution against the assignor some of the goods so assigned. On the trial the assignee had a verdict which was set aside by the full court.

Mellish for the appellant. An affidavit is not required for an assignment for the general benefit of creditors (1); and this is such an assignment. *Durkee* v. *Flint* (2); *McMullin* v. *Buchanan* (3).

(1) R.S.N.S. 5 ser. ch. 92 s. 10. (2) 19 N.S. Rep. 487.
(3) 26 N.S. Rep. 146.

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Archibald v. *Hubley* (1), is distinguishable. The assignment in that case did not, so far as appeared, provide for payment of all the creditors and so it was not for general benefit.

The assignment cannot be attacked under the statute of Elizabeth which has not been pleaded. Rules of Supreme Court of Nova Scotia, 1884, order xix, rule 15; *Tuck* v. *The Southern Counties Bank* (2).

The trial judge found against fraud, and the full court did not disturb his judgment on that ground. This court, therefore, will accept such finding as conclusive.

The provision that the assignee should only be liable for "gross negligence or fraud" does not alter his position, as that is all he would be liable for without it. *Whitman* v. *The Union Bank* (3).

Ernest Gregory for the respondent. An assignment containing preferences is not an "assignment for the general benefit of creditors" under sec. 10 of the Act. *Black* v. *Sawyer* (4).

If the deed will hinder or delay creditors it is void, even if actual fraud is not proved. *Hassells* v. *Simpson* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The assignment made by the execution debtor to the appellant contained declarations of trusts in the following words:

In the fifth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall execute these presents within sixty days from the date hereof respectively and ratably and proportionately and without preference or priority as between them. In the sixth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall not execute these presents

(1) 18 Can. S.C.R. 116.
(2) 42 Ch. D. 471.
(3) 16 Can. S.C.R. 410.
(4) 2 Old. (N.S.) 1.
(5) Doug. 89n.

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pro rata in equal proportions and without priority as between this class of creditors.

In the court below Mr. Justice Weatherbe and Mr. Justice Ritchie held that the affidavit prescribed by the Revised Statutes of Nova Scotia ch. 92, s. 4, was not requisite to the validity of this trust deed inasmuch as it was not a bill of sale or chattel mortgage within that section. I am also of this opinion for the same reason, viz., that it was an "assignment for the general benefit of the creditors" of the assignor within the exception contained in the 10th section. That it was not such a chattel mortgage as is referred to in section 4 is apparent on its face, since it is not a chattel mortgage at all unless it is so in consequence of the fourth trust in the deed by which provision is made for indemnifying certain named accommodation endorsers and makers of promissory notes in respect of paper which might not then have reached maturity. If in this last respect the deed is to be considered a chattel mortgage it is so under section 5 of the Act, not under section 4. In the case of *Durkee* v. *Flint* (1), it was held first by Mr. Justice Thompson, the trial judge, and then by the full court on appeal, that an assignment for the benefit of creditors, although it contained preferences in favour of particular named creditors, was, if it included, subject to such preferences, a trust in favour of all the assigning debtor's creditors, "an assignment for the general benefit of creditors" coming within the exception contained in the 10th section of the Act. This case decided in 1886 directly overrules *Black* v. *Sawyer* (2), decided in 1865. In *Archibald* v. *Hubley* (3), it was held that an assignment not for the benefit of creditors generally, but upon a trust to realize the property assigned and apply the proceeds in payment of certain

(1) 19 N.S. Rep. 487. (2) 2 Old. (N.S.) 1.
(3) 18 Can. S.C.R. 116.

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named creditors, nine in number, it not appearing that these were all the creditors of the assignor, and then to pay any surplus to the assignor, was not such an assignment for the benefit of creditors generally as the 10th section exempts from the obligation imposed upon the grantees in bills of sale generally by the 4th section. *Archibald* v. *Hubley* (1) does not, as it appears to me, overrule *Durkee* v. *Flint* (2), or in any way interfere with it. It is desirable to uphold the last mentioned case inasmuch as during the nine years which intervened between its decision and the present time, many assignments must have been made in reliance on it. Moreover, I should have reached the same conclusion without authority. The words of the exception "the general benefit of creditors" are sufficient to include any instrument made with such an object whatever its other provisions may be. These words indicate not merely that the affidavit shall not be requisite as regards so much of the deed as provides for the general benefit of creditors, but that the whole of the assignment containing such a trust is to be excepted from the operation of section 4. To restrict the exception to such deeds as should not contain any preferences would be to read the Act as though the words had been assignments for the general and equal benefit of creditors, which would of course be wholly unjustifiable.

Mr. Justice Meagher considers the fourth clause of the assignment providing for the indemnity and security of the persons named therein who had undertaken liabilities for the assignor upon accommodation paper as a mortgage coming within section 5 of the Act. I cannot assent to this. The deed is in no sense "a chattel mortgage," the only form of security to which the fifth section applies. In the case of a mort-

(1) 18 Can. S.C.R. 116. (2) 19 N.S. Rep. 487.

gage the property is redeemable, and the mortgagor retains an interest in it. Here there is nothing of this kind; there is an absolute trust for sale of all the property, and the security is to arise from an application of the produce of the sale. This construction may, it is true, lead to inconveniences and may go far to interfere with the usefulness of the statute, but if so it is for the legislature to apply the remedy if it is desired to include other securities than "mortgages" which alone are the subject of the enactment in section 5.

Mr. Justice Ritchie and Mr. Justice Meagher have held the assignment void under the statute 13th Elizabeth, chapter 5, as tending to hinder, delay and defeat creditors, and I agree with their conclusions in this respect. The preferences alone do not of course render the assignment a fraud on creditors declining to execute it (1). An assignment for the benefit of creditors generally is, as has long been settled, free from impeachment under the statute of Elizabeth (2). If, however, such instruments contain provisions for the benefit of the assignor or for the personal benefit of the trustee, putting it in his power and making it his interest to hinder creditors, and evidently having a tendency to delay the prompt realization of the assets and their application to the satisfaction of creditors, the deed may be one which it would be unreasonable to require creditors to accept, and in that case they are manifestly entitled to insist on its avoidance under the statute.

I find several objectionable provisions in the deed before us, which, taken in connection with the way in which the assignee proceeded during the interval, nearly four months, between the execution of the trust deed and the lodging of the execution under which the

(1) *Holbird* v. *Anderson*, 5 T.R. 235. (2) *Pickstock* v. *Lyster*, 3 M. & S. 371.

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sheriff seized, indicate, in my judgment, an intent to delay and hinder creditors. In the first place the assignee is a member of a firm which are the largest creditors of the assignor. This firm is not only preferred before all other creditors as regards their debt due at the date of the deed (which by itself is, I concede, no objection to the assignment), but it is provided that upon the debts so due to the trustee's firm "for during and until the same are realized, paid and fully satisfied" interest is to run at the rate of seven per cent per annum. Then, the assignee never took more than formal possession of the stock in trade but permitted the assignor to carry on business with it just as he had done before the assignment, and, indeed, the assignee furnished new stock to enable the debtor to carry on the business. It is true that the deed permits the assignee to employ the assignor in winding up the business, but he has done more than this, he has assumed to carry it on without any apparent change in its management. Again, this by itself might not be fatal, but the continuance of the assignor in the same possession and control which he had before the assignment, though not conclusive in law to show the deed fraudulent, is always a circumstance to be considered by the tribunal having to decide on the fact of *bonâ fides*, but when accompanied, as it is here, with a first preference in favour of the assignee, which entirely secures and protects him, and a provision which makes it his interest, as does the allowance of interest at seven per cent, to prolong the winding up, thus directly conflicting with his duty to the general creditors to execute the trusts as speedily as possible, I am compelled to hold that this makes the deed void as against execution creditors.

But this is not all. The fourth trust declared authorizes the assignee not only to pay preferentially

parties to promissory notes negotiated for the accommodation of the assignor, but also all "costs, charges and expenses to arise in consequence" of the promissory notes which they have made or endorsed. This is to authorize payment to such persons of moneys which they could not have recovered from the debtor himself, and therefore is in effect to authorize the giving away to the prejudice of non-assenting creditors of a portion of the assets which may equal or exceed the amount of their debt. This I consider a badge of fraud. Then, the deed contains this clause:

And it is further agreed that the said assignee shall only be liable for such moneys as shall come into his hands as such assignee unless there be gross negligence or fraud on his part.

By this provision the trustee is exonerated from obligations which the general law imposes upon persons standing in his position. I find no English authorities on this head, probably for the reason that in England such care is taken in the preparation of deeds and in conveyancing generally that no one would think of exposing the validity of a deed of assignment to the risk of such a clause being held to vitiate it against non-assenting creditors. There are, however, numerous American authorities showing that such a clause avoids the deed. A text writer (1) deduces from the decided cases the rule to be:

That a reservation or restriction of the liability of the assignee to a degree less than that which the law imposes upon trustees renders the assignment void.

And in another passage the same writer (2) says:

A stipulation limiting the liability of an assignee or trustee to his own gross negligence or wilful misconduct, exonerates him from a great portion of the responsibility which the law attaches to his office, considered evidence of an intent to hinder, delay and defraud creditors, and has therefore been held to render the assignment void against them.

(1) Burrill on assignments, p. 340, 4 ed.

(2) Burrill, p. 339.

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In *McIntire* v. *Benson* (1), the Supreme Court of Illinois in a judgment delivered by the late Chief Justice Breese, had before it for adjudication the validity of a deed of assignment for the benefit of creditors, which contained a clause providing that the trustee should be responsible only for his actual receipts and wilful defaults. The whole of this judgment is instructive but I must content myself with making two short extracts from it. The court says:

> We think this clause makes the deed fraudulent and void for these reasons: that as trustee the assignee is bound to manage the trust property for the benefit of the creditors with all the care and caution and diligence of a prudent owner, and so far is this rule extended that however fully a discretionary power of management may have been given, yet if the trustee omits doing what would be plainly beneficial he will be answerable. * * The principle is a sound and safe one that every provision in a deed of assignment exempting the assignee from any liability he is by law subject to as assignee is, of itself, a badge of fraud.

The cases of *Finlay* v. *Dickerson* (2) and *True* v. *Congdon* (3), are to the same effect. These cases are cited in the respondent's factum. I may add a reference to the case of *Litchfield* v. *White* (4), where the provision was in the identical words of that in the present deed. The reasoning employed by the courts in these cases, independently of their weight as authorities, commends itself to our consideration and compels us to hold the present deed also void for this reason as unduly interfering with the rights of creditors by hindering and delaying them.

The Nova Scotia Statute ch. 18, sec. 9, of the Acts of 1889, re-enacting a clause of the English statute known as Lord St. Leonard's Act, has no bearing upon this

(1) 20 Ill. 500.
(2) 29 Ill. 9.
(3) 44 N.H. 48.
(4) 3 Sand. (N. Y. S. C.) 545; Affd. in Appeal 7 N.Y. 438.

question; the object of that section was merely to exonerate one of several trustees from liability for the wilful default of his co-trustees.

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The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. F. McIsaac.*

Solicitor for the respondent: *Ernest Gregory.*