Supreme Court of Canada

Taylor *v.* Cummings (1897) 27 SCR 589

Date: 1897-06-07

Robert Taylor and others (Plaintiffs)

Appellants

And

Selden W. Cummings and People's Bank of Halifax (Defendants)

Respondents

1897: May 4; 1897: June 7.

Present:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment for the benefit of creditors—Preferred creditors—Moneys paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.

In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the statute of Elizabeth neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox* v. *Worrall* (26 N.S. Rep. 366) questioned.

Appeal from the judgment of the Supreme Court of Nova Scotia, *in banc,* affirming the judgments in the Supreme Court of Nova Scotia (Townshend J.) in favour of the defendants, the People's Bank of Halifax

[Page 590]

and Selden W. Cummings, respectively, and dismissing plaintiffs' appeals therefrom with costs.

The suit is in connection with an assignment for the benefit of his creditors by one Neil McKinnon to the respondent Selden W. Cummings wherein the other respondent, the People's Bank of Halifax, was preferred for $200, which amount was subsequently paid in full to the bank, as a preferred creditor, by the assignee. The firm of "Wm. Cummings & Sons," another creditor, was likewise preferred therein to the amount of $1,201.

The clauses of the assignment in reference to these preferred claims are as follows:—"In the second place, to pay the People's Bank of Halifax the sum of two hundred dollars due the said the Peoples' Bank of Halifax by the said assignor. And, in the third place, after payment in full of the said claim of the People's Bank of Halifax, to pay to the firm of Wm. Cummings & Sons, of Truro, merchants, the sum of twelve hundred and one dollars, due by the said assignor to the said firm of Wm. Cummings & Sons. And in the fourth place, after payment in full of the said claims of the People's Bank of Halifax and Wm. Cummings & Sons, to pay and discharge out of the residue then remaining, if any, all debts due by the said assignor to the following persons *pro rata* according to the amount of their several claims against the assignor and in satisfaction so far as such money will extend of the debts, viz.: (*here follows a list of creditors.*)*"*

The plaintiffs sued on behalf of themselves and all other creditors and claimed; a declaration that the assignment was fraudulent and void as against the plaintiffs and other creditors; an account from the defendants Selden W. Cummings, Wm. Cummings & Sons and the People's Bank of Halifax, of all property, moneys and assets received or paid by them or any or

[Page 591]

either of them under the provisions of the assignment; payment of the plaintiffs' claims, respectively, by the said Selden W. Cummings, Wm. Cummings & Sons and the People's Bank of Halifax out of any property and moneys received by them or any of them under said deed; the appointment of a receiver; an injunction, and other relief.

The statement of plaintiffs' claims alleged, as reasons against the assignment, that the Peoples' Bank of Halifax was preferred for $200, which was paid to them by Selden W. Cummings, as assignee and trustee, and accepted and received by them pursuant to the terms of said assignment; that there was a secret agreement between McKinnon, Selden W. Cummings and Wm. Cummings & Sons, whereby the said Wm. Cummings & Sons were preferred therein for a large sum in excess of their claim, which agreement was not set forth in the deed nor communicated to the other creditors and therefore hindered, delayed and defeated such creditors, retained a benefit for McKinnon by enabling him to retain a portion of such preference for himself, and was part of a fraudulent scheme by which he attempted to retain a portion of his estate.

Other facts affecting the issues in this case are stated in the report of *McDonald* v. *Cummings[[1]](#footnote-2)*, in which the deed in question was set aside. Before the present action was taken, however, the assignee had disposed of the assets and, acting in good faith, had made the payments to the preferred creditors as provided in the deed of assignment, without notice of its fraudulent character,

*McNeil* for the appellants. We rely on *Cox* v. *Worrall[[2]](#footnote-3)* as establishing the right of creditors to take such proceedings as these.

[Page 592]

*Borden* Q.C. and *Lovett* for the respondents, cited *Collumb* v. *Read[[3]](#footnote-4)*, *Davis* v. *Wickson[[4]](#footnote-5)*.

The judgment of the court was delivered by:

SEDGEWICK J.—We are of opinion that this appeal should be dismissed, not only for the reasons stated by the learned judges below, but because in our view the action itself was baseless except in so far as it sought to set aside the deed in question and thereby render the property covered by it available for execution or garnishment at the instance of judgment creditors.

The claim of the plaintiff for an account against William Cummings & Son and the People's Bank, with a view of making them pay over to the creditors the moneys received by them under the deed on account of the assignor's indebtedness to them, is absolutely untenable under English law, in an action to declare a deed void under the statute of Elizabeth. No decree has ever yet been made ordering restitution of property parted with by the assignor of the deed or persons claiming under him. That statute avoids the deed, nothing more—it leaves the creditor defeated or delayed to his ordinary remedies, execution, garnishment. No English case has been shown where, in a suit of this kind, a personal liability for property disposed of has been cast upon persons taking under the deed, and the reason is obvious. A creditor, as such, has no claim either at law or in equity to his debtor's property. He must first obtain his judgment and charge it by way of execution.

In this view we must express our dissent from the decision of the Supreme Court of Nova Scotia in *Cox* v. *Worrall[[5]](#footnote-6)*, it being understood, however, that we are not dealing with a case where persons deliberately

[Page 593]

combine and conspire to dispose of property in fraud of creditors, but only with a case where a deed is sought to be set aside and the assignee and creditors have, in the meantime, in good faith, acted under it. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: Alexander McNeil

Solicitor for the respondent Cummings: H. A Lovett.

Solicitor for the respondent, People's Bank of Halifax: Jas. A. McDonald.

1. 24 Can. S. C. R. 321. [↑](#footnote-ref-2)
2. 26 N. S. Rep. 366. [↑](#footnote-ref-3)
3. 24 N. Y. 505. [↑](#footnote-ref-4)
4. 1 O. R. 369. [↑](#footnote-ref-5)
5. 26 N. S. Rep. 366. [↑](#footnote-ref-6)