

WILLIAM CUMMINGS & SONS } APPELLANTS;
 (DEFENDANTS)..... }

AND

ROBERT TAYLOR AND BAULD } RESPONDENTS.
 GIBSON & CO. (PLAINTIFFS)..... }

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*Feb. 15.

*May 6.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth.

Where an assignment has been held void as against the statute, 13 Eliz. c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right and no equity to an account or to follow moneys received by the assignee or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), dismissing an appeal by the present appellants and affirming the judgment of the trial judge which declared that a certain deed of assignment was fraudulent and void as against the creditors of the assignor, appointed a receiver to his estate and directed accounts to be taken of such portion thereof as may have come into the hands of the present appellants either under the said deed of assignment or otherwise.

One Neil McKinnon made an assignment for the benefit of his creditors, to Selden W. Cummings, a solicitor, who acted under a power of attorney from

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the appellants. Shortly after the making of the assignment, Robert Taylor, one of the appellants, recovered judgment, which he recorded against the lands so assigned and issued an execution thereon against McKinnon, under which the sheriff levied upon and sold the assignor's personal property remaining at the time of levy. The assignee thereupon took action against the sheriff for the conversion of the said personal property, and the sheriff justified under the execution, and attacked the assignment under the statute, 13 Eliz. ch. 5. The trial judge in that action decided in favour of the plaintiff, and upheld the assignment, and his judgment was sustained on appeal to the Supreme Court of Nova Scotia *in banc*, but on further appeal, was reversed by the Supreme Court of Canada (1).

In January, 1895, between the date of the argument of the last appeal and the delivery of judgment by the Supreme Court of Canada, the assignor brought his books to the appellants' office and assigned the book debts to them.

The present action was commenced in June, 1895, by the respondents, judgment creditors of McKinnon, against him, his assignee and two preferred creditors, the appellants and The Peoples' Bank of Halifax, claiming:—(a) A declaration that the said deed of assignment was fraudulent and void as against the plaintiffs and other creditors of the said assignor; (b) An account from the appellants of all property, money and assets received or paid by them under the provisions of said deed of assignment; (c) Payment of the respondent's claim out of any property, moneys, and assets received by the appellants under said assignment; (d) The appointment of a receiver for all the

(1) *Sub nomine, McDonald v. Cummings*, 24 Can. S. C. R. 321.

property, moneys, and assets hereinbefore mentioned ;
and the usual injunction, orders, directions, and so forth.

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The appellants admitted the deed to be void for the reasons expressed in *McDonald v. Cummings* (1), but denied any liability to account for the moneys received by them or for the book debts assigned to them. They set up (a) the sale of the personal property of the insolvent under the execution of the plaintiff, Robert Taylor; (b) that all the moneys received for goods or debts, with the exception of \$169, had been paid over by the debtor to creditors; (c) that these payments amounted to \$839.88 and were made before the judgment of the Supreme Court of Canada above referred to, and to the creditors intended to be preferred by the said deed of assignment, including the Peoples' Bank of Halifax, and (d) that the balance of the moneys, said \$169, came into the hands of the defendant, Selden W. Cummings, and was by him paid over to the appellants shortly after the said judgment in pursuance of an order made shortly before the said judgment by the debtor McKinnon on the said Selden W. Cummings, in favour of the appellants, creditors of the said Neil McKinnon. They alleged also that McKinnon at the same time assigned the balance of his book debts, the only other asset outside the land, to the appellants, and after the said judgment and before this action was commenced that the respondents delivered the books of account to the appellants and assented to the transfer.

The action was tried before Townshend J. without a jury and the learned judge, so far as the respondents on this appeal are affected, decided that, at the time the moneys were received by them, and the debts were assigned to them, they were aware that the deed had been attacked as fraudulent and void and under the decision of the court in *Cox v. Worrall* (2) they could

(1) 24 Can. S. C. R. 321.
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(2) 26 N. S. Rep. 366.

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The result was that the deed of assignment made by McKinnon to Selden W. Cummings, was declared fraudulent and void as against the creditors of the assignor; that a receiver was appointed for all the moneys, assets and property of the assignor, and that an account was ordered to be taken of the same which have come into the hands of defendants, William Cummings & Son, either under the deed of assignment or otherwise, and also from the defendant, McKinnon.

A decree was taken on that judgment, and the present appellants appealed therefrom and from the decree thereon to the Supreme Court of Nova Scotia *en banc*. The appeal was heard before Weatherbe, Graham and Henry JJ. who were unanimous in dismissing the appeal, and the formal judgment dismissing the appeal of William Cummings & Son, also dismissed an appeal of the defendant, McKinnon, and made each of the said appellants liable for all the costs of the appeal. From that judgment the present appeal is taken.

Lovett for the appellants. In this action the plaintiffs, the present respondents, sought to follow the sum of \$200 paid by the assignor, McKinnon, to the Peoples' Bank under the deed of assignment, into the hands of that corporation. Their action was dismissed by the trial judge and the Supreme Court of Nova Scotia on the ground that the Peoples' Bank was a *bonâ fide* payee for value without notice, and on appeal to this court the judgments below were affirmed (1). We refer to the opinion delivered by Mr. Justice Sedgewick at pages 592 and 593. The trial judge decided against the present appellants in deference to the opinion of the majority of the Supreme Court of Nova Scotia in

(1) 27 Can. S. C. R. 589.

Cox v. Worrall (1), now overruled and expressly stated that but for that case he would have dismissed the action as against them, and the Supreme Court of Nova Scotia also followed *Cox v. Worrall*.

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There are only two views to be taken of the facts. 1st. William Cummings & Son being creditors of Neil McKinnon received the assets under the deed on account of the claim due to them by McKinnon and for which they were preferred. 2ndly. They received these assets from the debtor independent of the deed and in payment of a *bonâ fide* claim against him. In the first view of the facts the appellants are clearly within the decision quoted above. In the second view their position is still stronger because they are in the position of creditors obtaining payment from their debtor, and if other creditors have no equity to follow money paid by the assignee under the deed, they certainly have no equity to follow payments made by the debtor to other creditors independent of the deed.

The appellants refer to the following authorities:—*Higgins v. York Buildings Co.* (2); *Reese River Silver Mining Co. v. Atwell* (3); *Cornish v. Clark* (4); *Bott v. Smith* (5); *Blenkinsopp v. Blenkinsopp* (6); *In re Maddever* (7); *Longeway v. Mitchell* (8); *Wills v. Luff* (9); and *Salt v. Cooper* there cited (10); *Davis v. Wickson* (11); *Masuret v. Stewart* (12); *Holmes v. Millage* (13); *Tennant v. Gallow* (14); *Harris v. Beauchamp* (15); *Crowninshield v. Kittridge* (16); *In re Shephard* (17);

(1) 26 N. S. Rep. 366.

(2) 2 Atkyns 107.

(3) L. R. 7 Eq. 347.

(4) L. R. 14 Eq. 184.

(5) 21 Beav. 511.

(6) 1 DeG., M & G. 495.

(7) 27 Ch. D. 523.

(8) 17 Gr. 190.

(9) 38 Ch. D. 197.

(10) 16 Ch. D. 544.

(11) 1 O. R. 369.

(12) 22 O. R. 290.

(13) [1893] 1 Q. B. 551.

(14) 25 O. R. 56.

(15) [1894] 1 Q. B. 801.

(16) 7 Mete. (Mass.) 520.

(17) 43 Ch. D. 131.

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Burrell on Assignments, (4th ed.) sec. 461; May on Fraudulent Conveyances, p. 528; 2 Bigelow on Fraud, p. 419, 462, 490, 493; Bump on Fraudulent Conveyances, p. 566; *Cox v. Worrall* (1), per Townshend J.

So far as the assignment of the book debts is concerned that instrument is not impeached in this action and there was no evidence on which it could be impeached.

The receiver is not entitled to recover from these appellants the money and property received by them in right of the debtor, since the transaction remains good as between the debtor and the appellants and in any event the appellants could set off their debt in an action by the receiver and he can not recover in right of the assignee, he is not put in the assignees shoes, and, in any event, the assignee could not recover the property. It is not established that the creditors attacking the deed have any equity to recover back property received from the debtor by other creditors. The statute of Elizabeth confers no such rights and outside of the statutes the equities are equal and the appellants are in possession.

McNeil for the respondents. The appellants were parties to the assignment and to the fraud which rendered it void, *Cummings v. McDonald* (2). See also decision by Graham J. in the court below (3) at pages 168 *et seq.* Being parties to the fraud, although creditors of the assignor, they cannot retain what they obtained by virtue thereof. No person can take advantage of his own wrong. *Cox v. Worrall* (1); *Bury v. Murray* (4); Winslow's Private Arrangements between Debtors and Creditors, pp. 156-7; *Knight v. Hunt* (5); *Howden v. Haigh* (6); *Higgins v. Pitt* (7).

(1) 26 N. S. R. 366.

(2) 24 Can. S. C. R. 321.

(3) 29 N. S. R. 162.

(4) 24 Can. S. C. R. 77.

(5) 5 Bing., 432.

(6) 11 A. & E. 1033.

(7) 4 Ex. 312.

A person cannot avail himself of the fraud of another, unless he is innocent and has given some valuable consideration. A *fortiori*, a person who is cognizant of the fraud and a party to it cannot avail himself of the benefit gained thereby. *Bury v. Murray* (1) at page 84; *Scholefield v. Templer* (2); *Huguenin v. Baseley* (3) at page 289; *Daubeney v. Cockburn* (4) at page 643; *Topham v. Duke of Portland* (5) at page 569.

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The respondents, before this action, recovered judgment for their debts against the assignor, and issued thereon legal executions, and realized all they could by virtue thereof. The assignment was in this action declared fraudulent and void, under the statute 13 Elizabeth, ch. 5, the appellants being not only cognizant of, but parties to the fraud which vitiated the deed. In an action to avoid the deed under such circumstances the respondents are entitled to an accounting from the appellants for all they received under the void deed, and all consequential relief by way of equitable execution. N. S. Judicature Act, 1884, sec. 13, sub-sec. 7, R. S., 5th series, p. 806. Also s. 12, ss. 7, p. 804; Daniels, Ch. Pr. Vol. I., pp. 931-2. *Ex parte Evans*; *in re Watkins* (6); *Anglo-Italian Bank v. Davies* (7); *Smith v. Cowell* (8); *In re Pope* (9); *Reese River Silver Mining Co. v. Atwell* (10) at page 352; *Longeway v. Mitchell* at page 193 (11); *McCall v. McDonald* (12); *The Queen v. Judge of the County Court of Lincolnshire* (13); per Hawkins J., at p. 171; *Westhead v. Riley* (14).

So long as the property of the executive debtor remains distinguishable, and so long as no purchaser for

(1) 24 Can. S. C. R. 77.

(2) 4 DeG. & J. 429.

(3) 14 Ves. 273.

(4) 1 Mer. 626.

(5) 1 DeG. J. & S. 517.

(6) 11 Ch. D. 691; 13 Ch. D. 252.

(7) 9 Ch. D. 275.

(8) 6 Q. B. D. 75.

(9) 17 Q. B. D. 743.

(10) L. R. 7 Eq. 347.

(11) 17 Gr. 190.

(12) 13 Can. S. C. R. 247.

(13) 20 Q. B. D. 167.

(14) 25 Ch. D. 413.

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value without notice intervenes, so long may the court award relief against that property in the hands of fraudulent or voluntary holders. *Tennant v. Gallow* (1). at p. 61; *Masuret v. Stewart et al.* (2); *Cornish v. Clark* (3).

Book debts are in the broad sense of the word exigible, and being in the hands of the appellants, fraudulent holders, they will be compelled to account for them to the creditors. *Labatt v. Bixel* (4); *Meharg v. Lumbers* (5).

The assignment made in January, 1895, from McKinnon to the appellant, William Cummings was of no avail:—Because the choses in action intended thereby to be assigned had previously been vested in Selden W. Cummings by the assignment for the benefit of creditors, dated November 11th, 1892, and this was known to William Cummings;—Because, the assignment for the benefit of the creditors was binding between the parties, and he was a party to the assignment, his firm, as creditors of the assignor, having executed the same, and,—Because after this assignment had been executed by the assignor, assignee, and any of the creditors, it was irrevocable. May on Fraudulent Conveyances (Blackstone Series) pp. 69, 70, 331, 471; *Curtis v. Price* (6) at page 103; *Smith v. Cherrill* (7); *Tanqueray v. Bowles* (8), at page 157; *French v. French* (9), at page 103; 2 Bigelow on Frauds, p. 408. See also cases cited in 9 Can. L. T. 125 & 145, and *Kincaid v. Kincaid* (10); and *Salt v. Cooper* (11) at page 552.

TASCHEREAU J.—I would be of opinion to adopt Mr. Justice Graham's reasoning in the court below, and dis-

(1) 25 O. R. 56.

(2) 22 O. R. 290.

(3) L. R. 14 Eq. 184.

(4) 28 Gr. 593.

(5) 23 Ont. App. R. 51.

(6) 12 Ves. 89.

(7) L. R. 4 Eq. 390.

(8) L. R. 14, Eq. 151.

(9) 6 DeG. M. & G. 95.

(10) 12 Ont. P. R. 462.

(11) 16 Ch. D. 544.

miss this appeal. The majority of the court, however, have come to the conclusion that the appeal should be allowed.

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GWYNNE J.—Was of opinion that the appeal should be allowed for reasons given by Mr. Justice Sedgewick.

SEDGEWICK J.—On the 11th November, 1892, one Neil McKinnon made a general assignment to the defendant Selden W. Cummings, he then being in insolvent circumstances. Robert Taylor, one of the present plaintiffs, who subsequently obtained judgment against McKinnon notwithstanding this assignment, issued execution, recorded it in the county where McKinnon's lands were situated, and under it sold through the sheriff all the personal property transferred by the assignment. The assignee, Selden W. Cummings, then brought his action against the sheriff claiming under the assignment. That action was decided in favour of Cummings by the courts in Nova Scotia, but upon appeal to this court we held that the assignment was void as against the statute, 13 Eliz., chap. 5 (1), the result being that Taylor, the present plaintiff was held entitled to the proceeds of all of the personal property of McKinnon, levied upon by him under his execution. After that determination the plaintiff Taylor instituted these proceedings, making the insolvent trustee under the assignment, and William Cummings & Sons and the Peoples' Bank of Halifax, the latter having received benefits under it, defendants, by which they sought :—

(a.) A declaration that the assignment in question was fraudulent as against the plaintiff and the other creditors.

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(b.) An account from the defendants, other than the insolvent, of all moneys received under the assignment.

(c.) Payment of the plaintiff's claim out of such moneys.

(d.) The appointment of a receiver ; and

(e.) An injunction.

In that action a judgment was entered for the plaintiffs giving them the declaration and account asked for, and appointing a receiver. That judgment was sustained upon appeal to the Supreme Court of Nova Scotia, except in regard to the Peoples' Bank, against which the action was dismissed. This is the second appeal before us from the judgment in question.

In the first appeal we decided that the claim of the plaintiff for an account against Wm. Cummings & Sons and the Peoples' Bank, with a view of making them pay over to the creditors the moneys received by them under the assignment on account of the assignor entitled to them was untenable ; that under English law, in the absence of any right of, or interest in, property transferred no decree could be made dealing with it, except a decree setting aside the assignment attacked. It follows, we think, as a necessary consequence, that this appeal must be allowed. The plaintiffs are entitled to whatever benefits they can get from the fact that the assignment in question has been declared void and may adopt such remedies as they see fit in order to obtain recovery of the balance of their debt from any debts, personal property, or real estate upon which they have or had any lien or charge or other right under their judgments or under any execution issued upon them. But so far as the evidence shows they have never taken any steps by garnishee process to obtain a charge upon the debts of the insolvent, and as to the personal property they have already

obtained the proceeds of it under their execution. As they have no interest, either legal or equitable, in the debts of the insolvent, they have no legal right except by taking the necessary statutory proceedings to make them exigible, nor have they any equity to follow the moneys received by the assignee under his deed or paid by him under it. If the decree in this case can be supported there would appear to be but little necessity for a bankruptcy law, as, if it can be supported, the Supreme Court of Nova Scotia is itself a bankruptcy court empowered by its judgment, without any statutory or other authority that I am aware of, to take possession of an insolvent's estate and distribute it as it may think fit, whether ratably or otherwise, amongst creditors. The decree appealed from may be sustained so far as it contains a declaration that the assignment in question is void, but inasmuch as no case has been made out for the taking of an account or for the appointment of a receiver, the decree must be amended in that regard, the appellants being allowed all costs both here and in the court below.

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KING and GIROUARD JJ. concurred in the dismissal of the appeal for the reasons given by Mr. Justice Sedgewick.

Appeal allowed with costs.

Solicitor for the appellants: *H. A. Lovett.*

Solicitor for the respondents: *Alexander McNeil.*
