H. EDWIN MOORE AND OTHERS, (PLAINTIFFS)..... } APPELLANTS;

AND

GEORGE F. ROPER (DEFENDANT).....RESPONDENT.

1904
*Dec. 3.
1905
*Jan. 31.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Debtor and creditor—Assignment of debt—Sheriff's sale—Equitable assignment—Statute of Limitations—Payment—Ratification—Principal and agent.

In Nova Scotia book debts cannot be sold under execution and the act of the judgment debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser.

The purchaser received payment on account of a debt so sold which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations.

Held, that though the creditor might be unable to deny the validity of the payment he could not adopt it so as to obtain a right of action thereon and the payment having been made to a third party who was not his agent did not interrupt the prescription. *Keighley, Maxtead & Co.* v. *Durant* ([1901] A. C. 240) followed.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs.

The facts of the case are stated by the trial judge in his judgment as follows:

"The plaintiff, H. E. Moore, was in partnership with one Robertson, and the firm sold part of the goods for which the action is brought and the other part Moore sold to the defendant after the dissolution when Moore took an assignment of Robertson's interest in the assets. On the 19th of January, 1897, H. E. Moore assigned for the benefit of creditors of W. A. Moore and one Moffat. On the same date W. H. Moore

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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recovered judgment against H. E. Moore for upward of $15,000 and an execution was forthwith issued and placed in the sheriff's hands. Apparently the assignment was afterwards treated as void for under the execution a levy upon and sale were made of the goods of H. E. Moore. The books of account and book debts due to H. E. Moore were levied upon under the execution and a sale of the same took place on the 22nd April, 1897. The execution was returned satisfied for the amount realized from the goods, book debts, etc. Before this sale, namely, on the 22nd February, 1897, W. H. Moore himself had assigned for the benefit of creditors to one Treen and Treen, at the sheriff's sale, as such trustee bid in these books and book debts, which included the claim against the defendant. He took possession of the books, notified debtors, and for several months, indeed until the 22nd June, 1898, he was collecting under the supervision of H. E. Moore these debts. On that date Treen re-conveyed back to W. H. Moore, who had compounded with his creditors. On the 24th October, 1898, a decree was made at the suit of a creditor of H. E. Moore setting aside as contrary to the Statute of Elizabeth, the assignment made by H. E. Moore. Apparently it contained some of the clauses condemned by the Supreme Court of Canada.

"Recently an action has been brought to recover the claim against the defendant and every person who has any possible interest has been joined as plaintiff. The Statute of Limitations is pleaded and the plaintiffs are obliged to rely upon an acknowledgment in writing and a payment made during the period when Treen, trustee of W. H. Moore, was believed to be the owner of the chose in action. The payment was made by a shipment of fish to be sold and the proceeds credited on account of the debt. H. E. Moore was concerned in conducting the business and he was cognizant of the

collection and its payment. The amount was credited in the original account in the book of H. E. Moore. The defendant in evidence says: 'After that I shipped the fish to Mr. William Ross for Mr. H. E. Moore in payment of the claim he had against me.' He had already received from Treen, as trustee, a statement of the account and a notification and his letter advising of the shipment of the fish was addressed to Treen."

The learned judge held that this transaction was capable of being, and was ratified by H. E. Moore and took the case out of the statute. He gave judgment for the plaintiffs for the sum claimed which judgment was reversed by the full court.

Newcombe K.C. for the appellants. The decision of the learned trial judge was right. The assignment having been for the benefit of creditors solely, and having been set aside as void as against creditors, is completely out of the way. Such assignments stand on a different footing from others which stand good *inter* parties. If the assignment be regarded as out of the way and the payment be regarded as having been made to Treen or to H. E. Moore, it was properly made; Treen and H. E. Moore were, it is submitted, in privity. Again, there has been ratification. The payment made has been adopted and is credited in the statement of claim herein. See Warren on Choses in Action, pp. 64, 78, 79 and 82.

If the assignment is out of the way and book debts cannot be seized and sold by the sheriff and if seized and sold such action cannot be ratified, then appellant H. E. Moore would be the creditor to whom the respondent in his evidence testified he made the payment through Ross, and the debt could be garnished by creditors. If the assignment be good and the book debts not leviable by the sheriff, even in this case H. E. Moore would be *cestui que trust*, and a payment

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made to him can be taken advantage of by the assignees to bar the Statute of Limitations. *Megginson* v. *Harper* (1). Darby & Bosanquet on Limitations of Actions (2 ed.) 114, 115, 116.

Both of the exceptions referred to in the case of *Stamford Spalding and Boston Banking Co.* v. *Smith* (2), occur here:—1. A payment to a person erroneously believed to fill a representative capacity which payment will enure to the benefit of the person entitled to receive payment. 2. A mistake made by both parties, which mistake will not prevent the payment having the effect it was intended to have.

In support of the exceptions referred to in *Stamford Spaulding and Boston Banking Co.* v. *Smith* (2) we refer to Wood on Limitations of Actions, p. 231; *Hart* v. *Stephens* (3); *Trulock* v. *Robey* (4); *McAuliffe* v. *Fitzsimons* (5); *Clark* v. *Hooper* (6); *Lyell* v. *Kennedy* (7); *Worthington* v. *Grimsditch* (8); Hewett on Statutes of Limitations, p. 32, s. 8.

Treen was, by implication of law, agent for the assignee of H. E. Moore, and a payment made to him either in error as to his capacity or otherwise enured to the assignee's benefit. Freeman on Executions, p. 262. A *fortiori* the debtor or his assignee could recover the amounts by suit unless ratification of payment was permissible and exercised.

W. B. A. Ritchie K.C. for the respondent. In order to take the case out of the Statute of Limitations, the payment must be made to the creditor or his agent. The respondent never understood that Treen was in any sense the agent of H. E. Moore; *Stamford Spalding and Boston Banking Co.* v. *Smith* (2). See also *Keighly, Maxted & Co.* v. *Durant* (9); *Fraser* v. *Sweet* (10).

(1) 2 C. & M. 322.
(2) [1892] 1 Q. B. 765.
(3) 6 Q. B. 937.
(4) 12 Sim. 402.
(5) 26 L. R. Ir. 29.
(6) 10 Bing. 480.
(7) 14 App. Cas. 437.
(8) 7 Q. B. 479.
(9) [1901] A. C. 240.
(10) 13 Man. Rep. 147.

The sheriff in selling under an execution does not act as agent of the judgment creditor, much less of the judgment debtor; he acts for himself, executing the law. *Wilson* v. *Tumman* (1). H. E. Moore could not ratify the sale, having assigned all his book debts for the benefit of his creditors before the sale took place. There can be no ratification without full knowledge. It does not appear that H. E. Moore had notice or knowledge of the invalidity of the sheriff's sale and he no doubt supposed it valid. He cannot be said to have acquiesced in the sale, because, not knowing it was invalid, he took no steps to question it. Leake on Contracts, (4 ed.) page 311; *Lewis* v. *Read* (2); *La Banque Jacques Cartier* v. *La Banque D'Epargne, &c. de Montréal* (3); *Marsh* v. *Joseph* (4) at page 246. Mere failure to give notice of invalidity is not acquiescence or ratification. We also refer to *Boultbee* v. *Burke* (5); *Tanner* v. *Smart* (6); *Grenfell* v. *Girdlestone* (7) at p. 676; *Howcutt* v. *Bonser* (8).

The judgment of the court was delivered by:

KILLAM J.—We are all of opinion that the judgment in this case should be affirmed on the ground stated by Townshend J., to which I will add but a few words upon one or two points raised before us.

It has been suggested that there was an equitable assignment by H. E. Moore to Treen. It does not appear to me that there were either words or acts amounting to such an assignment. Moore did nothing more than stand by and allow the sheriff's vendee to collect the debts, probably supposing that the sheriff's sale was good. While he might possibly have been

(1) 6 M. & G. 236.
(2) 13 M. & W. 834.
(3) 13 App. Cas. 111.
(4) [1897] 1 Ch. 213.
(5) 9 O. R. 80.
(6) 6 B. & C. 603.
(7) 2 Y. & C. (Ex.) 662.
(8) 3 Ex. 491.

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estopped from denying the validity of a payment to Treen, he cannot adopt it so as to give himself a right of action under it.

Treen did not assume to act as the agent of Moore, and therefore, upon the principle laid down in *Keighley, Maxsted & Co.* v. *Durant* (1), Moore could not make the transaction his own by ratification.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *R. F. Phalen.*

Solicitor for the respondent: *Hugh Ross.*

(1) [1901] A. C. 240.