F. J. BATEMAN (PLAINTIFF).....APPELLANT;

AND

CORNELIUS SCOTT AND MARGARET SCOTT (DEFENDANTS)..RESPONDENTS.

1916

*Feb. 1.
*March 3.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Appeal—Title to land—Fraudulent Conveyance—Statute of Elizabeth.

In an action to set aside a conveyance of land by the defendant to his wife as intended to defeat, hinder or delay creditors, no title to real estate is in question to give the Supreme Court of Canada jurisdiction to entertain an appeal under sec. 48 (*a*) of the Supreme Court Act. Duff and Brodeur JJ. contra.

MOTION to quash for want of jurisdiction an appeal from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the plaintiff's action was dismissed.

The motion to quash an appeal from the judgment of the Appellate Division raised the single question whether or not a creditor's action to set aside a conveyance as fraudulent under the statute of Elizabeth brought in question the title to real estate and so gave the Supreme Court Jurisdiction to entertain the appeal, which in all other respects was admittedly incompetent, under section 48 subsection (*a*) of the Supreme Court Act.

G. F. Henderson K.C. for the motion referred to *Lamothe* v. *Daveluy*(1).

Chrysler K.C. contra.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 41 Can. S.C.R. 80.

1916

BATEMAN v. SCOTT.

Davies J.

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

DAVIES J.—The claim of the plaintiff in this case was that a conveyance made to the defendant Margaret Scott, wife of the defendant Cornelius Scott by a third party for an alleged valuable consideration should be declared void as against the plaintiff because made for the purpose of defeating and delaying the plaintiff in the recovery of his claim against the defendant Cornelius and as being in contravention of the Statute of Elizabeth.

The trial judge found

> there was no fraud in the transaction and no intent on the part of either defendant to defeat, delay or hinder any creditor of Cornelius Scott in the recovery of any debt.

That was the real substantial question in controversy between the parties and on this finding of the trial judge he dismissed the action.

On appeal to the Appellate Division of Ontario the judgment of the trial judge was confirmed and the appeal dismissed.

The defendant now moves to quash an appeal to this court from the judgment of the Appellate Division on the ground of want of jurisdiction. The motion is made on the grounds that the claim of the plaintiff is in amount too small in itself to give jurisdiction and that the title to lands is really not directly in question though collaterally and indirectly it may be said to be so.

But the collateral effect or consequences of our judgment are not the test of our jurisdiction and the real substantial question upon which both courts passed and which was the question in controversy between the parties and on which an appeal, if allowed,

to this court must alone turn would be the existence of a fraudulent intent to defeat creditors of Cornelius Scott by taking a conveyance of certain lands in the name of his wife. *Canadian Mutual Loan and Investment Co.* v. *Lee*(1). See also *Lamothe* v. *Daveluy*(2).

The decisions of the court below on that question of fraudulent intent in the negative settled and determined the action which was thereon properly dismissed.

Under these circumstances I do not think we should affirm our jurisdiction to hear an appeal on the ground that title to land is in question, because it is clearly only so indirectly and collaterally and the real question upon which the result of an appeal must depend is one of fraudulent intent to defeat creditors.

If the conveyance should be set aside, it would only be as against the plaintiff and other creditors of Cornelius Scott; and so far as appears, the claims of Scott's creditors are very much less than $1,000.

IDINGTON J.—I think the motion to quash ought to prevail. It has been decided more than once that these cases merely seeking execution out of lands alleged to have been conveyed to defeat creditors, involve no question of title to land or any interest therein within the meaning of sec. 48 of the "Supreme Court Act," and must exhibit a creditor's interest exceeding one thousand dollars to give this court jurisdiction in such an appeal.

I can conceive of a case founded on a creditor's right to relief, developing in its progress or defence something that in fact raised an issue where title to

(1) 34 Can. S.C.R. 224. (2) 41 Can. S.C.R. 80.

1916

BATEMAN
v.
SCOTT.

Duff J.

land might be involved, but that does not appear in this case.

The motion should be allowed with costs.

DUFF J. (dissenting)—On principle it appears to me to be very clear that a question of title to lands arises. The question arises in this way. The action is an action brought for a declaration that the husband, the judgment debtor, had a beneficial interest in the lands, the legal title to which stands in the name of the wife, which interest is available for the satisfaction of the judgment creditor's debt. I am unable to understand on what principle it can be said that such an action does not involve a question of title to land. The analogy is only superficial between such an action and some others; an action by a creditor, for example, to set aside a conveyance of property which was intended by the debtor to pass his beneficial as well as his legal interest on the ground that the conveyance is impeachable under the statutes prohibiting preferences or an action to set aside a voluntary conveyance on the ground that the intention was to benefit the grantee at the expense of the grantor's creditors or an action to set aside a conveyance for consideration on the ground that the real object and intent was to defeat creditors although in point of fact the conveyance was intended between the parties to pass not only the legal but the beneficial title to the grantee. Such actions are not based upon an allegation that the judgment debtor has a title but that the title though vested in the grantee has been acquired by fraud and is held primarily subject to a charge in favour of creditors. A claim that land standing in the name of another is really the property of the judgment debtor stands in my opinion on a different footing.

ANGLIN J.—I concur in the opinion of Mr. Justice Davies.

BRODEUR J. (dissenting)—This is a motion to quash for want of jurisdiction.

The plaintiff asked by his declaration that the property held by the defendant's wife, Mrs. Margaret Scott, had always been the property of the husband, Cornelius Scott.

The question now is whether under section 48 of the "Supreme Court Act" we have jurisdiction to entertain the appeal.

The respondent relies on the case of *Lamothe* v. *Daveluy*(1). That case was an "*actio Pauliana*" brought to set aside the contract for sale of an immovable in Quebec and it was decided that such an action is a personal one and does not relate to a title to land so as to give a right of appeal to this court.

The *actio Pauliana* is peculiar to the Province of Quebec and though there is a great deal of divergence of opinion, it seems to be settled law that this is a personal action and not a real action. That was the basis of the decision in *Lamothe* v. *Daveluy*(1).

In the present case, the matter in controversy is whether the transfer made by the husband to his wife is valid and whether the husband should not be declared to be the absolute owner of the property. It is asked that it be declared that the deed passed between husband and wife was simulated and that virtually she is holding the property as a trustee for her husband.

It is then no more a personal action resulting from a personal right as in the *actio Pauliana;* but it is an

(1) 41 Can. S.C.R. 80.

1916

BATEMAN
v.
SCOTT.

Brodeur J.

action concerning title to real estate and should be considered as falling under the provisions of 48(*a*).

The motion to quash should be dismissed.

Appeal quashed with costs.

Solicitor for the appellant: *E. Traver.*
Solicitors for the respondents: *Meredith & Fisher.*