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*May 20.

*June 6.

THOMAS H. PURDOM, EXECUTOR OF THE ESTATE OF ALEXANDER DAVIDSON, DECEASED, ALEXANDER PURDOM AND EBENEZER L. DAVIDSON (DEFENDANTS) ..... APPELLANTS;

AND

A. E. PAVEY & CO. (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action—Jurisdiction to entertain—Mortgage of foreign lands—Action to set aside—Secret trust—Lex rei sitæ.

A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought. *Burns* v. *Davidson* (21 O. R. 547) approved and followed.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Armour C.J. who allowed a demurrer to the statement of claim.

The facts of the case are stated by Chief Justice Armour as follows:

This action was brought by Pavey & Company on behalf of themselves and all other creditors of McKay & Davidson, and it was by their statement of claim alleged that the firm of McKay & Davidson was composed of William L. Mackay and Ebenezer Davidson; that they carried on business as merchants in Ontario, and on or about the 25th day of July, 1889, made a

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

(1) 23 Ont. App. R. 9 sub nom. *Pavey* v. *Davidson*.

general assignment for the benefit of their creditors; that the plaintiffs were of such creditors to the amount of $467, and that there were other such creditors to the amount of $13,000; that there was realized under such assignment only to the extent of forty cents on the dollar of the amounts due to the plaintiffs and such other creditors, and that the plaintiffs and such other creditors were still such creditors for the residue of the said amounts. That subsequent to the said assignment one John L. Davidson departed this life and by his last will devised to his father, Alexander Davidson, and his mother, Isabella Davidson, for their natural lives, certain lands in the city of Portland, in the State of Oregon, one of the United States of America, remainder to his brother, the said Ebenezer L. Davidson, in fee. That by indenture, dated the 19th day of December, 1889, the said Ebenezer L. Davidson conveyed the said lands to his father, the said Alexander Davidson, for the consideration of $6,500; that the same day the said Alexander Davidson conveyed the said lands to Alexander Purdom to secure payment of the sum of $6,500 which the said Alexander Davidson covenanted to pay to the said Alexander Purdom on or before five years after said date as set forth in said mortgage.

That the said Alexander Purdom took the said mortgage as a trustee only for the said Ebenezer L. Davidson, in pursuance of a fraudulent scheme entered into between the said Alexander Davidson, Alexander Purdom and Ebenezer L. Davidson, to the end, purpose and intent to delay, hinder and defraud the plaintiffs and the other creditors of the said Ebenezer L. Davidson, and that the said Alexander Purdom held the same as trustee aforesaid, or if he had realized upon the same; that he held the proceeds upon trust for the said Ebenezer L. Davidson; that the said Ebenezer L.

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Davidson had no assets out of which the plaintiffs and other creditors could obtain payment of their claims against him; that since the commencement of the action Alexander Davidson died, and that Thomas H. Purdom was his executor; and they claimed judgment against the said Ebenezer L. Davidson for the sum of $303.56, and interest and costs.

That the said Alexander Purdom might be declared to be a trustee for the said Ebenezer L. Davidson of the said mortgage and the moneys secured thereby; that the said Alexander Davidson might be restrained from paying the amount of said mortgage debt to the said Alexander Purdom, but might be ordered to pay the same into court to abide further order therein; or that a receiver might be appointed by this honourable court to collect in the moneys due under said mortgage, for payment into court of the moneys so collected, and distribution and payment thereof under the order and direction of the honourable court, and costs and further and other relief.

The defendants, Thomas H. Purdom, executor of the said Alexander Davidson and Alexander Purdom, demurred to the statement of claim on the ground, amongst others, that the conveyance and mortgage set forth in the statement of claim were made in Oregon respecting lands situated therein, and the transaction was not subject to the laws of Ontario, and the cause of action, if any, arose in the said state, and was beyond the jurisdiction of this honourable court.

And the defendant, Ebenezer L. Davidson, demurred to the said statement of claim upon the said ground.

Judgment was given allowing the demurrer, which judgment was reversed by the Court of Appeal, and the defendants appealed to this court from the latter decision.

An action had previously been brought by Pavey & Co. for the creditors of the insolvent firm to have the mortgage set aside as fraudulent and a demurrer in that action was allowed; *Burns* v. *Davidson* (1); the action was then abandoned and the present proceedings were taken.

Purdom for the appellants. The objection taken to the former action apply with equal force to this. The law as to how far our courts can deal with actions respecting foreign lands is clearly laid down in *Burns* v. *Davidson* (1); *Henderson* v. *The Bank of Hamilton* (2); *British South Africa Co.* v. *Companhia de Moçambique* (3).

Gibbons Q.C. for the respondents. The defendants by their demurrer admit that they are trustees only and the foreign courts could not grant the relief that is asked.

All the parties are within the jurisdiction and an order *in personam* only is asked for. We could garnishee the money in defendants' hands. *Vyse* v. *Brown* (4).

The courts will always grant relief against fraud though lands abroad may be affected. *Massie* v. *Watts* (5).

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Appeal reversing a judgment of the Chief Justice of the Queen's Bench Division upon a demurrer to the statement of claim. The pleadings and the nature of the question which has arisen upon the sufficiency of the statement of claim appear from

(1) 21 O. R. 547.
(2) 23 Can. S. C. R. 716.
(3) [1893] A. C. 602.
(4) 13 Q. B. D. 199.
(5) 6 Cranch 160.

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the judgments delivered in the Court of Appeal and by Chief Justice Armour and need not be repeated.

This case differs from the former case of *Burns* v. *Davidson* (1) in this respect; that was an action to have the conveyance of these same lands and the mortgage given for the purchase money declared fraudulent and void, whilst in the present case the respondents Pavey and Company (the plaintiffs below) do not attack the sale of the lands but in the 12th paragraph of the statement of claim allege:

> That the said Alexander Purdom took the said mortgage as a trustee only for the defendant E. L. Davidson in pursuance of a fraudulent scheme entered into between the defendants to the end, purpose and intent to delay, hinder and defraud the plaintiffs and the other creditors of the said defendant E. L. Davidson and that the said Alexander Purdom holds the same as trustee aforesaid, or if he has realized upon the same then that he holds the proceeds upon trust for the defendant E. L. Davidson.

This (giving the plaintiffs the benefit of the modern rule by which pleadings are now construed favourably to the pleader and not as formerly *contra proferentem*) I can only read as an allegation that the mortgage transaction, assuming the sale to be not impeached, was fraudulent as having been made upon a secret trust for the benefit of the debtor tending to hinder and defeat creditors.

So far as the lands are concerned, the validity or invalidity of this transaction must depend on the *lex rei sitae*—the law of the state of Oregon—and there is no allegation that according to that law a constructive trust by operation of law would arise by reason of the intent to hinder and delay creditors or that even an express trust must necessarily enure to the benefit of or be available for the satisfaction of creditors. It may be that a mortgagee's interest according to the law of Oregon is not exigible. Up to 1837, according to

(1) 21 O. R. 547.

English law such an interest was not at common law, nor until the passing of statutes of comparatively modern date, available to satisfy creditors by means of either legal or equitable execution. Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law.

It appears to me therefore that there is in principle the same objection to giving relief in a case of this kind as that which prevailed in the former action, although it may not be so strikingly apparent.

If it were possible to separate the debt from the security—the foreign lands—as the learned counsel for the respondent contended should be done, the case might admit of different considerations, but the second paragraph of the plaintiffs' claim for relief very clearly seeks a declaration of trust not of the debt alone but of the security, that is of the foreign lands so far as they are a security, as well as the debt. This claim for relief is in these words:

That the said defendant Alexander Purdom may be declared to be a trustee for the said Ebenezer L. Davidson of the said mortgage and the moneys secured thereby.

The word "mortgage" here signifies not merely the debt—indeed the plaintiffs themselves distinguish it from the debt—but the security for the debt—the lands.

Further, it is not at all clear that even if all that was asked had been a mere attachment of the debt such relief could be given, inasmuch as in that case the mortgagor could not be compelled to pay the debt without having the lands reconveyed to him and this would involve an administration of the law of Oregon by the courts here as the sufficiency of such a reconveyance would depend altogether on that law. See *Hope* v. *Carnegie* (1).

Whatever it may be in form this action is in substance an attempt to get satisfaction by way of equit-

(1) 1 Ch. App. 320, a converse case.

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able execution of a debt out of a mortgagee's interest in foreign lands. It therefore only differs from the cases of *Burns* v. *Davidson* (1), *Henderson* v. *Bank of Hamilton* (2) in this, that those were cases in which it was sought to make available for the satisfaction of creditors the interest of an absolute owner instead of as here the limited interest of a mortgagee in such lands.

I think therefore that the passage from Lord Selborne's judgment in *Harrison* v. *Harrison* (3), which is quoted by the Chancellor in *Burns* v. *Davidson* (1), is equally applicable to the present case.

Then whether the allegation of a "trust" of the purchase money secured by the mortgage which the plaintiffs allege is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitae*, and from this alone it follows that the forum of the *situs* is the proper forum.

In this last aspect of the case *Re Hawthorne. Graham* v. *Massey* (4) and *Norris* v. *Chambres* (5), appear to me to be authorities.

The appeal must be allowed, and the judgment of Chief Justice Armour allowing the demurrer must be restored with costs to the appellants in this court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Parke & Purdom.*

Solicitors for the respondents: *Gibbons, Mulkern & Harper.*

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(1) 21 O. R. 547.
(2) 23 Can. S. C. R. 716.
(3) 8 Ch. App. 346.
(4) 23 Ch. D. 743.
(5) 29 Beav. 246.