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*Mar. 21.

*May 6.

JAMES P. LANGLEY AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

AND

E. VAN ALLEN AND COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Money paid—Voluntary payment—Insolvency of debtor—Action by assignee —Status.

S. a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim and took from S. notes aggregating in amount $708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for benefit of his creditors when the arrangement between him and V. first became known and the assignee and other creditors brought an action to recover the said sum of $708 from V. as part of the insolvent estate.

Held, affirming the judgment of the Court of Appeal (3 Ont. L. R. 5), and that at the trial (32 O. R. 216) that S. having paid the notes voluntarily without oppression or coercion could not himself have recovered back the amount and his assignee was in no better position.

Held, per Taschereau J.—As anything recovered by the assignee would be for the benefit of his co-plaintiffs only who would thus receive what would have been an unjust preference if stipulated for by the agreement for extension the plaintiffs had no *locus standi in curiâ*.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the defendants.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mil JJ.

(1) 3 Ont. L. R. 5. (2) 32 O. R. 216.

The facts about which they are practically no dispute, or conflict, are as follows:

Prior to 15th August, 1899, James A. Sword carried on a mercantile business in Toronto, and the appellants other than Langley, and the respondents, were in the habit of supplying him with goods on credit. Being unable to meet his liabilities as they matured he prepared a statement of his liabilities, and an approximate estimate of his financial position, based upon a previous stock-taking, for the purpose of interviewing his principal creditors, with a view of obtaining an extension of time for the payment of their claims.

The respondent, Eli Van Allen, was in Toronto on the date aforesaid, and saw Sword, who told him the position of his affairs, and stated that he was going to Montreal that evening for the purpose of seeing his principal creditors, who there resided, or carried on their business. Sword says that Van Allen approved of this course, and assured him that he would join the other creditors in granting him whatever time might be agreed upon.

On the following day, viz., 16th August, 1899, Sword arrived at Montreal and interviewed his principal creditors, showed them the statement of affairs prepared by him and asked an extension of time for payment of their claims against him.

He first saw Tooke Brothers, who were his largest creditors, and after talking over the position of matters with them, Mr. Tooke suggested that he should see Gault Brothers Company, who were also creditors for a large amount. Sword accordingly saw Mr. Rodger, the managing director of Gault Brothers Company, who, after examining into the statement of affairs prepared by Sword, and considering the matter, drew up an agreement whereby six of the largest

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cr ditors, whose aggregate claims represented about three-fourths of Sword's total liabilities, (the claims of the other creditors, with one exception, an English firm, being less than $200 respectively) agreed to extend the time for payment of their respective bills against him, maturing between 16th August and 8th December, and to accept payment therefor in six monthly instalments commencing the following October. Although not expressly mentioned in the document, it was understood that the first payment was to mature on 18th October, and so on for the succeeding months. Sword then circulated his statement of affairs and this agreement among his Montreal creditors, and on 16th August obtained the assent and signatures of all the appellants, other than Langley, thereto. He returned home the same evening, and on the following day forwarded the extension agreement to the respondents, in a letter to them dated 17th August, 1899, requesting their signature and explaining that the Montreal creditors had stipulated that he should send the agreement back to Montreal to show the creditors there that all who were intended to grant the extension had assented thereto and had signed the agreement. The letter is as follows:

"TORONTO, 17th August, 1899.

"DEAR VAN ALLEN,—I am sending you by to-night's mail agreement which I think will be very satisfactory to all. I had no trouble whatever, and like yourself they were all anxious to help me out. Kindly sign and return soon as possible, as I have to send it down to Montreal to show that all the names are on it. Thanking you in anticipation.

"I remain, yours respectfully,

"JAMES A. SWORD."

On the 18th August, 1899, Sword wrote the respondents again apologizing for his bookkeeper's neglect in

not having sent them the statement of affairs and stating "I am sending you by to-night's mail the exact copy I took to Montreal." On 22nd August Sword wrote again, and on that day the respondents replied acknowledging the receipt of Sword's statement of affairs and letter requesting them to sign and return agreement, and informed him, "before doing so we will have to have a little arrangement made as to those bills maturing in July and August previous to this agreement," and invited Sword to come to Hamilton to see them personally, saying, "we will try and have the matter arranged and signed, and you can take your paper home with you."

Sword complied with this request and went to Hamilton on 23rd August. He there saw the respondend, Mr. Eli Van Allen, who declined to sign the extension agreement except on certain conditions, and after a short interview in the respondent's office, Sword was taken over to the office of Messrs. Staunton & O'Heir, who, Van Allen gave him to understand, were acting as solicitors for the bank that was raising difficulty about the discounting of Sword's paper. These gentlemen were in reality the respondents' own solicicitors. The following agreement was then entered into:

"MEMORANDUM of agreement made this twenty-third day of August, one thousand eight hundred and ninety-nine."

"BETWEEN

JAMES A. SWORD, of Toronto, Merchant,
Of the first part,

AND

E. VAN ALLEN & COMPANY, of Hamilton,
Manufacturers,
Of the second part."

"Whereas the said Sword, being indebted to E. Van Allen & Company in a large amount has applied to

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said E. Van Allen & Company for an extension, and has requested the said E. Van Allen & Company to sign a certain agreement dated 16th August, 1899, and made between the said Sword, Tooke Bros., and others, for that purpose; and the said E. Van Allen & Company have consented to sign the said agreement in consideration of the said Sword entering into this agreement, and on the conditions hereinafter named."

"Now this agreement witnesseth, that in consideration of the said E. Van Allen & Company signing this agreement, as hereinbefore stated, the said Sword covenants and agrees, that he will, as they become due, pay to The Eagle Knitting Company (Limited) or order, the amount of six promisory notes made this day by him in favour of the said Eagle Knitting Company (Limited) for $118 each, payable on the 25th August, 1st September, 8th September, 15th September, 22nd September and 29th September, 1899, respectively."

"And it is further agreed, that if the said Sword shall make default in payment of any of the said notes, the whole amount of the indebtedness of the said Sword to the said E. Van Allen & Company, at the date of such default, shall become due and payable, notwithstanding the fact that notes or acceptances maturing at a later date may have been given by the said Sword to the said E. Van Allen & Company for the same, or any portion thereof."

"And it is further agreed that upon default being made by the said Sword in the payment of any one of the above mentioned notes the said E. Van Allen & Company shall thereupon be released and discharged from the said agreement, dated August 16th, 1899, and may forthwith after such default enforce payment of all indebtedness covered, or intended to be covered, by the said agreement."

"In witness whereof the parties hereto, have hereunto set their hands and seals, the day and year first above written."

"Signed, sealed and delivered in the presence of } "JAMES A. SWORD." [Seal.]

On the following day Van Allen & Co., sent Sword a copy of this agreement in the following letter:

"HAMILTON, Ontario, August 24th, 1899.

"MR. JAMES A. SWORD,

"55 King Street East, Toronto, Ont.

"DEAR SIRS,—Enclosed you will find a copy of the agreement which the solicitors prepared. I did not read this agreement until it was sent to the factory to-day. I presume it is in conformity with the wishes of the party who was so exacting about the notes. I trust you will try and meet them as they mature in conformity with the terms of the agreement and greatly oblige. If you will send your remittance up to the factory on Monday of each week, I will see that the paper is looked after."

"Yours truly,

"E. VAN ALLEN & CO."

Sword paid the notes mentioned in the said agreement and on October 16th assigned to the plaintiff Langley for benefit of his creditors. The latter and the other creditors eventually brought the action from which this appeal arose.

George Kerr for the appellant. If the arrangement between Sword and his creditors had been a composition instead of an extension of time the transaction with respondents would, clearly, have been a fraud on the other creditors. But there is no distinction in this respect between the two. *Leicester* v. *Rose* (1); *Atkinson* v. *Denby* (2).

(1) 4 East 372.

(2) 7 H. & N. 934.

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In all such arrangements the parties must contract on terms of equality. *Dauglish* v. *Tennent* (1).

The money can be recovered back. See *McKewan* v. *Sanderson* (2); *Clarkson* v. *McMaster* (3); *Wilson* v. *Ray* (4) has not been followed in later decisions.

Staunton K.C. for the respondent. In all the cases in which money has been ordered to be returned under circumstances such as we have here there has been coercion in obtaining the payment. See *Atkinson* v. *Denby* (5); *In re Lenzberg's Policy* (6).

Where the payment is voluntary the money cannot be recovered back even if paid under an illegal contract. *Kearley* v. *Thomson* (7); *Howden* v. *Haigh* (8); and see *Pickering* v. *Ilfracombe Railway Co.* (9).

TASCHEREAU J.—This is an appeal from the judgment of the Court of Appeal for Ontario affirming the judgment of His Lordship the Chancellor which had dismissed the appellants' action. I refer to the report of the Chancellor's judgment at page 216, vol. 32 of the Ontario reports for a full statement of the facts of the case.

The appeal is not pressed as to the $126 claimed for a quantity of shirting alleged to be illegally in the defendants' possession.

On the other part of the case, as I view it, I would dismiss the appeal upon the simple ground that the appellants have, upon their own allegations, no *locus standi* to maintain this action. As to the assignee, he is a trustee for the general body of creditors, but should he recover, his co-appellants only, not the other creditors, would get the benefit of the judgment. So that

(1) L. R. 2 Q. B. 49.
(2) L. R. 15 Eq. 229.
(3) 25 Can. S. C. R. 96.
(4) 10 A. & E. 82.
(5) 7 H. & N. 934.
(6) 7 Ch. D. 650.
(7) 24 Q. B. D. 742.
(8) 11 A. & E. 1033.
(9) L. R. 3 C. P. 235.

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he is asking the aid of the court to obtain after the debtor's assignment a preference for his co-appellants; and they join him in the action for the purpose of recovering for themselves exclusively an amount, the payment of which to them at this date Sword could not make without committing an act of fraudulent preference to the prejudice of his other creditors. That, it would seem to me, puts the appellants out of court.

It would not be necessary for me to go further. But in deference to the judges of the Court of Appeal, who granted special leave to appeal to this court (as the amount in litigation was below the statutory limitation) with the view of having, if possible, a mooted point of law settled in the public interest, I deem it right that we should not refrain from passing upon the main question raised and earnestly argued before us by Mr. Kerr for the appellants, as it had been before the Chancellor and in the Court of Appeal.

Mr. Kerr fairly admitted at the argument that he was asking us to overrule *Wilson* v. *Ray* (1). Now that case though questioned at bar in *Gibson* v. *Bruce* (2), has always, since 1839 that it dates from, been considered as law in England. In the last edition of Sir Frederick Pollock's book on Contracts and of Smith's Leading Cases, it is quoted as an authority, and it is to be found in the valuable collection of the revised reports edited by a number of the most eminent men in the profession (3). It is considered as law by the four judges of the Court of Appeal for Ontario, before whom this case was heard, including the Chief Justice, who, though dissenting, thought he could distinguish it, but did not question its law. It was under those circumstances an uphill undertaking for

(1) 10 A. & E. 82.

(2) 5 Man. & G. 399.

(3) 50 Rev. Rep., 341.

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Mr. Kerr to attempt to convince us that we should overrule it. I am sorry to say for his client that he has not succeeded. The action in that case was for money had and received. The plaintiff being about to compound with his creditors, the defendant, one of them, would not sign the deed unless he were paid in full. To obtain his signature the plaintiff gave him his note (not a payment in cash, and coerced to pay then and there as in *Atkinson* v. *Denby* (1)) for the amount required to pay him in full, upon which he signed the deed. Plaintiff, after dishonour of the note, paid it, and this action was to recover back from the defendant, Ray, the surplus that he had so received over his co-creditors.

His action was dismissed on the ground that he had paid the note voluntarily and with full knowledge of the facts. Of course, no action could have been maintained upon the note; it had been clearly extorted for an illegal consideration. But there was no extortion, no duress, nor any kind of compulsion practiced upon the plaintiff when he paid it. Ray could not have coerced the payment of that note. "He did not hold the rod" *Smith* v. *Cuff* (2), as quoted in *Atkinson* v. *Denby* (1). How then could Wilson say he was oppressed when he willingly assented to pay, though knowing all the facts that released him in law from the obligation to pay? His note had been given for an illegal consideration, no doubt, but it is the law that

> whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again.

Collins v. *Blantern* (3). Add to that dictum for the purposes of this case, after "thereof," the words "voluntarily," "without oppression," or "coercion" and

(1) 7 H. & N. 934. (2) 6 M. & S. 160.
(3) 1 Sm. L. C. (10th ed.) 355.

that is the law which rules this litigation. As Denman, L. C. J., said in that *Wilson Case* (1), one who pays under such circumstances waives the right he had not to pay. How can he be subsequently admitted to recover it back? As expressed in the Civil Law, "*Si sciens se non debere solvit, cessat repetitio.*" Poth. Pand. lib. 12, tit. 6, art. 3, par. 33.

The facts of the present case are not precisely similar to those upon which the decision in that *Wilson Case* (1) was given, but the appellants get no help from the difference between the two. Six of Sword's creditors, including the respondents, agreed with him to extend the time for payment of a specific part of their respective debts. It was however secretly agreed between him and the respondents that, notwithstanding the aforesaid agreement, he, Sword, would pay the respondents sooner than the other five creditors, and he gave them accordingly a note or notes payable before the time extended by them all, and when these notes became due he paid them. The appellants ask that the respondents be ordered to return the money so paid. Now Sword paid to the respondent nothing but what he owed them and as Maclennan J., remarked in the Court of Appeal:

> It is not a case of composition; there is no stipulation for ratable or proportionate payment, or for security by pledge of or charge upon the debtor's property; but he remains as before master of his estate.

Assuming that Sword would have had the right of refusing to pay these notes (though I fail to see upon what ground) the payment he made of them was a perfectly voluntary act on his part, and the law of *Wilson's Case* (1) clearly applies. He himself would have no right to recover and the plaintiffs have no more right than he would have.

Mention has been made of the "Act respecting

(1) 10 A. & E. 82.

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Assignments and Preferences," R.S.O. ch. 147. I do not see, however, that anything in that Act, did it apply, can affect this case. By section 3 thereof, money paid to a creditor although paid before the date at which his claim became exigible, even if a preferential payment, is exempted from the operation of section 2. *Campbell* v. *Patterson* (1). Then this is not an action for the benefit of Sword's estate.

The appellants further ask by their statement of claim that the respondents be restrained from proving upon the estate for the balance of their debt. This is a matter which cannot be adjudicated upon in this action. And whether an action would lie against the respondents by the co-contracting creditors upon the facts proved in this case is also a matter which is not before us.

I would dismiss the appeal with costs.

SEDGEWICK, GIROUARD and DAVIES JJ., concurred.

MILLS J.—In this case, one James A. Sword, of Toronto, was in debt to several mercantile firms in Montreal, and to Van Allen & Co., of Hamilton. On the 16th of August, 1898, the creditors of Sword agreed to grant him an extension of time for the payment of the notes which each of the parties held against him, which were maturing between that day and the 8th of December, and they agreed to accept notes from him payable in October, November, December, January, February and March, with interest at 7 per cent per annum. This agreement was to be valid only upon condition of its being signed by certain creditors within one week from its date. Van Allen had several notes which had fallen due before the 16th of August, some of which had been renewed and had been made pay-

(1) 21 Can. S.C.R. 645-651.

able after the date named in the agreement for the extension of time. These notes amounted to $708. It is said that the other parties to this agreement did not promise any extension of time on the notes which had fallen due prior to the 16th of August. And they complained that Van Allen should have demanded payment of those notes which had fallen due and had been renewed prior to that date, and which, by the renewal, were made payable after that date. Van Allen refused to sign the agreement for the extension unless those notes which had been renewed were arranged for and made payable independently of the terms of the proposed agreement. If Van Allen had not prior to entering into the agreement taken new notes, which fell due at a later period, his position with respect to these notes, or the indebtedness which they represented, would not have differed from that of the other creditors. When it became known that he had placed a certain part of his indebtedness upon the footing upon which it had before stood, Mr. Langley, the assignee of Sword's estate, sued Van Allen for payment into the common fund, of all the moneys which Sword had paid him after the date of the agreement. The trial judge was the Chancellor, Sir John Boyd. He pointed out that in any event $236.88 of the amount sued for must be retained by Van Allen as it had fallen due before the 16th of August, 1899, and no extension of time had been given to Sword in respect to these obligations, and so they were not included in the terms of the agreement, because Van Allen believed that by this arrangement he had simply placed himself upon a footing of equality with the other creditors of Sword who were parties to the agreement for the extension of time. There was no stipulation for secrecy; and it was not proved that the agreement was not mentioned to the plaintiff whereby the defend-

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ants were to be paid bills which had matured in July and August, amounting to $471.12, although the paper for this indebtedness had been renewed before the agreement was entered upon, nor does it appear for how much the defendants were to be given time, as understood by the plaintiffs. There was besides the parties to the agreement, a large number of outstanding creditors, whose claims amounted to over $2,000, who were not asked to come into the arrangement. The plaintiff who is one of the creditors of Sword, seeks to invalidate the transaction, fairly entered into. Sword cannot himself impeach the transaction. The assignee occupies no better position. The evidence discloses a business deal between Sword and the defendants. At the time the arrangement was made, Sword was solvent. He was simply arranging his affairs so as to be in a better position to pay his liabilities as they became due. He voluntarily entered into this agreement. He paid off the six notes to Van Allen & Co. for the sum of $708 before the end of September of that year. All of this had become due before the 16th of August, before the arrangement between Sword and the creditors who were parties to the agreement had arranged for delay. Defendants had given for some of the debts which had matured before the 16th of August, an extension of time, and when this new arrangement came to be made, they, apart from this transaction, would have been in a more advantageous position than the other creditors. They arranged with Sword for the earlier payment of these notes so that the agreement should not apply to them, and that the indebtedness for which an extension of time should be given and to which the agreement would apply, should be that indebtedness which matured after the 16th of August, and not to what had matured before, so that

they might stand upon a footing of exact equality with the other parties to the agreement.

Sword became insolvent between the 23rd of August and the 16th of October. The voluntary payment of these six notes before Sword's assignment gave Langley no right to sue Van Allen & Co. any more than if they had been paid before any arrangement was made.

The doctrine the plaintiff relies upon is that of extortion, and unjust oppression of the debtor when in straits, by a creditor. This doctrine which is discussed in *Smith* v. *Cuff* (1); *Alsager* v. *Spalding* (2); is not in my opinion involved in this case. The case of *Wilson* v. *Ray* (3) decides that where payment is voluntary made, as it is in this case, it is too late to re-agitate the matter thereafter. Here the sum was due. Van Allen & Co. were only getting their own. Sword was not insolvent, and he was at perfect liberty to have paid them all, had he been able to do so, before the extension of time expired. He was not paying into the hands of an assignee for the common benefit of all, but to each man, as he might deem proper.

The case of *Re Lenzberg's Policy* (4) decides that where a creditor, at the time of signing a composition deed under the Bankruptcy Act of 1861, sec. 192, took from the debtor a private agreement that the debtor should make future payments on his account the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder. Vice Chancellor Hall said:

> It is said that the memorandum which Lenzberg signed was a memorandum providing for future payments, which Kearns was not bound to make, and that from the character of the payments there was nothing wrong in the stipulation taken from the debtor. I cannot agree to that. It seems to me that the taking of any such engagement whether the debtor is bound to pay or not, is equally obnoxious

(1) 6 M. & S. 160.
(2) 4 Bing. N. C. 407.
(3) 10 A. & E. 82.
(4) 7 Ch. D. 650.

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to the rule which prohibits private or independent agreements with creditors at the time when a general arrangement is being made with them. Those agreements are called by law fraudulent, and are so far considered so that money paid thereunder has been recovered back. It is said that this was an independent transaction, distinct from the composition. But it is to be observed that it is part of the same case that this creditor signed the composition for a nominal amount. It is therefore not clear that the giving of the memorandum was a distinct transaction ; but it would seem as if the true explanation of what took place is that Kearns was not content with a verbal promise but got the stipulation put in writing. It, therefore, seems to me that the payment so made to the creditor's nominees are to be treated as having been made to himself, as they were on his own account and one within the rule. But independently of that rule, I think that the obtaining of this letter from the debtor by Kearns under the circumstances in this case, was a transaction which the court would not allow to stand ; and accordingly on equitable grounds alone, I cannot allow Kearns the benefit of any contract contained in the document. The conclusion is that the moneys in question were moneys paid by the debtor, for the use of the creditor and ought to be brought into account ; and Mr. Robinson's client must pay the cost of the summons.

Here Lenzberg was an insolvent. Sword was not, but was being dealt with as a solvent debtor.

In this case there was no difference between what was actually done by Van Allen & Co. and by the other creditors of Sword, who were parties to the agreement. They all exempted from its operation the debts that had become due before the date of the agreement. Van Allen & Co. were apparently an exception to the rule in this. They had given an extension of time upon debts due before the 16th of August before this extension of time to Sword was proposed, to the amount of $471 12, and this change in respect to prior debts, simply put that firm in a position of equality with the other creditors who were parties to the agreement.

An appeal was taken from the Chancellor's judgment and the case was heard in the Court of Appeal. The judgment of the Chancellor was appealed from on the ground that he erred as to the secrecy of Van

Allen's transaction with Sword; that he erred in holding that Van Allen had a right to stipulate for the payment of the notes included in this ageeement; and that he erred in eliminating the element of fraud in the consideration of the transaction. They submit also that the case of *Wilson* v. *Ray* (1) does not govern this case, and that it is not a satisfactory exposition of the law as applicable to secret agreements; that the case of *Cockshott* v. *Bennett* (2), which is quoted by the Master of the Rolls, in *Ex parte Milner* (3), is clearly in point, in support of the judgment rendered in the trial of *Wilson* v. *Ray* (1).

The case was heard in the Court of Appeal; the Chief Justice held that the transaction should be set aside and the money which had been paid to Van Allen handed over to the plaintiff, who is the assignee, for the benefit of the creditors, as Sword's assets had been diminished to the extent by which the defendant had profited by the perpetration of a fraud. He quoted Lord Chief Justice Cockburn in *Atkinson* v. *Denby* (4), who said:

> We are all of opinion that *Smith* v. *Bromley* (5), and *Smith* v. *Cuff* (6), govern the present case. When a debtor offers his creditors a composition whereby they all are to receive the proportionate amount in respect of their debts it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit. *Smith* v. *Bromley* (5); *Stock* v. *Mawson* (7).

But this is not a case to which the doctrine of these cases may be applied. Sword was not a bankrupt, but a debtor who claimed to have all means necessary to

(1) 10 A. & E. 82.
(2) 2 T. R. 763.
(3) 15 Q. B. D. 605.
(4) 7 H. & N. 934.
(5) Douglas 696*n*.
(6) 6 M. & S. 160.
(7) 1 B. & P. 286.

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pay his creditors, if sufficient time was given him. In *Kearley* v. *Thomson* (5), Fry L. J., after quoting from *Collins* v. *Blantern* (6), the general rule that whoever was a party to an unlawful contract if he had once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to get it back again; you shall not have the right of action when you come into a Court of Justice in this unclean manner, to recover back what has been paid; the Lord Justice said:

> To that general rule there are undoubtedly several exceptions, or apparent exceptions; one of these is the case of the oppressor and the oppressed, in which case usually the oppressed party may recover the money back from the oppressor.

Mr. Justice Osler held that the other plaintiffs here are creditors, who were parties to that agreement between Mr. Sword and his creditors. Langley represents the general creditors of Sword. The rights he had to enforce are those of the assignor. He stands in Mr. Sword's shoes and can maintain no action that Sword could not have maintained. The agreement was not a composition agreement, but one for the extension of time by a small body of Sword's creditors. The debtor had overdue obligations to Van Allen. The facts concerning these had not been brought to the notice of the other parties while their extended time was running, and the claims of Van Allen were being paid. It is not a case of a premium being paid to induce a creditor to sign the composition agreement, nor was it paying him a larger sum than the others, but it was putting him with respect to overdue obligations upon precisely the same footing as the others. It only differed from the others in this, that he had given already an extension of time in respect to some of these overdue obligations, which put him in respect to them

(5) 24 Q. B. D. 742.

(6) 1 Sm. L. C. (10 ed.) 360.

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upon a less advantageous footing than the other parties. The rule which applies in this case is, that payment of money voluntarily made cannot be recovered back. The facts are within the decision of *Wilson* v. *Ray* (1), and *Brigham* v. *Banque Jacques-Cartier* (2). In *Collins* v. *Blantern* (3) it was held that whoever is a party to an unlawful contract if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to recover it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back.' See *Weese* v. *Banfield* (4). A creditor who procures a fraudulent preference, cannot recover the amount of the composition, because the whole agreement with his debtor is vitiated by the fraud, and if he sues for his original debt, his debtor may plead a satisfaction for discharge under the composition, the validity of which the creditor is estopped from denying by reason of his partition in the fraud (5).

It is a universal rule that a fraudulent deed, though operative against a fraudulent party, is not operative for him, and therefore confers on him no right whatever. The deed is not void. The release remains absolute. But the condition being a fraudulent condition, made with the intention of deceiving all the other creditors, is void, and the fraudulent party has lost both the original debt and the composition. (6.) I agree with Maclennan J. A. where he said of this agreement between Sword and certain of his creditors for an extension of time for the payment of debts to become due, that it is not a case of composition; that there is no stipulation for proportionate payment, or for

(1) 10 A. & E. 82.
(2) 30 Can. S. C. R. 429.
(3) 1 Sm. L. C. (10 ed.) 360.
(4) 22 Ont. App. R. 489.
(5) Leake on Contracts (3 ed.) 669.
(6) *Ex parte Oliver*, 4 DeG. & S. 354.

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securities by a charge upon the debtor's property; he remains, as before, master of his estate. Soon after he pays one of the creditors part of the extended debt in advance, without availing himself of the extension of time. Subsequently he makes an assignment, and the other creditors and the assignee bring an action for the recovery of the money so paid in advance.

I know no law nor authority, says the learned judge, by which a debtor might not lawfully pay, and the creditor lawfully receive payment. It is no breach of any agreement. He embraced certain debts in respect to which an extension of time was given. If the two acts are inconsistent, the latter must prevail. He might have refused to pay four of the six notes. He didn't refuse, he paid them. He might have done so with any of the others without waiting for the intervening time to expire. There is no reason why he should not.

I think this is a proper exposition of the law applicable to this case. I also agree with Moss J. A. with regard to $236.88, part of the sum paid by Sword; it was overdue on the 16th August, and did not come within the terms of the agreement. The balance, $471.12 was covered by the extension. The remedy for its recovery was suspended, and technically fell within that part of his debt for which extension was promised. It was so far fraudulent and illegal that it vitiated the extension agreement, as against the other creditors. It was a payment which, if known to the other creditors, might have led them to repudiate the extension. Sword did not invoke the agreement or set up the illegality of this secret arrangement in answer to the demand for payment. The arrangement with the Eagle Knitting Co. was a matter of form, as Sword knew. The payments, under the circumstances were similar to those of *Smith* v. *Bromley* (1), *Smith* v. *Cuff* (2), and *Atkinson* v. *Denby* (3). There was no release of any part of Van Allen's claim against

(1) 2 Douglass, 696*n*. (2) 6 M. & S., 160.
(3) 7 H. & N., 934.

Sword. In *Smith* v. *Cuff* (1), the notes given by the plaintiff had been negotiated, and the plaintiffs had been compelled to make payment to the holder of one of them against whom he had no defence. *Wilson* v. *Ray* (2) is not distinguishable from this case. In *Lenzberg's Case* (3) the court proceeds upon the ground that in taking the account, Kearns could only displace that right by setting up an illegal agreement, which the court would not permit. As to $236.88 of the sum paid Van Allen, he stood upon the same footing as the other parties to the agreement; as to the remainder of the sum which he received, it was an overdue sum for which further time had been given to Sword, and Van Allen may have insisted upon its being restored to the position of an overdue debt, as a part of his claim for which no extension of time had been given, so that he might be upon a footing of equality with the other creditors; in thus exempting it from the terms of the agreement, which applied to the indebtedness of Sword falling due after the date of the agreement, Van Allen seemed to be simply aiming at equality. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Kerr, Bull & Rowell.*

Solicitors for the respondents: *Staunton & O'Heir.*

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(1) 6 M. & S., 160.
(2) 10 A. & E. 82.
(3) 7 Ch. D. 650.