D. McCALL & Co., JOHN FERGUSON AND J R. COX (the said D. McCALL & Co.) (DEFENDANTS)..... } APPELLANTS;

AND

JOHN McDONALD, SAMSON, KENNEDY & GEMMELL, TAIT, BURCH & COMPANY, JENNINGS & HAMILTON, SIMPSON ROBERTSON & SIMPSON, AND McKINNON, PROCTOR & COMPANY (PLAINTIFFS)..... } RESPONDENTS.

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*May 28 & 29.

*Nov. 8

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Chattel morgage—Fraudulent as against creditors—Assignment in trust by mortgagor—Trust in after suit by creditors to set aside mortgage—Mortgagees not included as plaintiffs—Trust deed not attacked.

Where a trader who was in insolvent circumstances had given a chattel mortgage on his stock in trade to secure a debt, and shortly after executed an assignment in trust for the benefit of his creditors—

Held, affirming the judgment of the courts below, that the mortgage was void under the statute, and that certain simple contract creditors of such trader could maintain a suit, on behalf of themselves and all other creditors except the mortgagees, to set aside the mortgage without including the mortgagees as plaintiffs, and without attacking the assignment in trust.

APPEAL from the Court of Appeal for Ontario (1), affirming the judgment of the Chancery Division (2) in favor of the plaintiffs.

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Gwynne JJ.

(1) 12 Ont. App. R. 593. (2) 9 O. R. 185.

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One Cox, a trader, gave a mortgage on his stock to the firm of McCall & Co., and a short time afterwards he assigned all his estate to one Ferguson in trust for the benefit of his creditors. The firm of McDonald & Co., who were simple contract creditors of Cox, brought suit, after the assignment in trust, against the mortgagees and Ferguson to set aside the mortgage, alleging that it was given when Cox knew himself to be insolvent, and with intent to defeat and delay his creditors and give McCall & Co. a fraudulent preference. It was also alleged that the assignment in trust was made at the instance of McCall & Co with intent to prevent any impeachment of the mortgage. McCall & Co. were not made plaintiffs in the suit.

The goods covered by the mortgage were the only assets of Cox, and the mortgagees had taken possession of and were selling them. It was agreed that they should all be sold and the proceeds paid into court to abide the results of the suit.

At the hearing before Ferguson J. a decree was made in favor of the plaintiffs, the material portion of which was as follows :

2. This court doth declare that the chattel mortgage made by the defendant Cox in favor of the defendants D. McCall & Co., and bearing date the 22nd day of March, A.D. 1884, was and is fraudulent and void as against the plaintiffs and such other of the creditors of the defendant Cox as may contribute to the expenses of this suit, and doth order and adjudge the same accordingly.

3. And it appearing that the defendants D. McCall & Co. have, under the chattel mortgage aforesaid, sold the goods and chattels covered thereby, and that, under the terms of an order made in this action and dated the sixteenth day of May, 1884, they have paid into court to the credit of this cause the amount realized under the said sale, to wit, the sum of $5,000 ; this court doth

order and adjudge that the said sum of $5,000, together with interest accrued thereon, be forthwith paid out of court to the defendant Ferguson, to be by him forthwith distributed among the creditors of the defendant Cox, under the terms of the deed of assignment from the defendant Cox to the said defendant Ferguson, having regard to the provision hereinafter contained as to the costs of these proceedings.

The Court of Appeal affirmed the decree except as to the disposition of the money in court, which they ordered to be retained in court and paid to the creditors filing claims. The defendants then appealed to the Supreme Court of Canada.

In addition to the authorities cited in the report of the case 9 O.R. 185 and in the present judgments, the learned counsel for the appellant *Robinson* Q.C. and *Geo. Kerr* referred to the following cases :—*Wood* v. *Dixie* (1) ; *Bills* v. *Smith* (2) ; *Royal Canadian Bank* v. *Kerr* (3) ; *Johnson* v. *Fesemeyer* (4) ; *Nunes* v. *Carter* (5) ; *Ex parte Topham* (6) ; *Newton* v. *Ontario Bank* (7) ; *Allan* v. *Clarkson* (8) ; *Totten* v. *Douglas* (9) ; *McWhirter* v. *Thorne* (10) ; *McCrae* v. *White* (11) ; *Long* v. *Hancock* (12) ; *Ex parte Chesney, Re Dungate* (13) ; *Ex parte Winder, Re Winstanley* (14) ; *Ex parte King. In re King* (15).

S. H. Blake Q.C. and *Macdonald* for respondent referred to *Ex parte Wheatly* (16); *Ex parte Hall* (17); *Ex parte Hill* (18); *Ex parte Griffith* (19); *Ex parte Chaplin* (20); *Ex parte Johnson* (21) ; *Re Maddever* (22) ; *Cookson* v. *Swire* (23) ;

(1) 7 Q. B. 892.
(2) 11 Jur. N. S. 157.
(3) 17 Gr. 47.
(4) 3 DeG. & J. 73.
(5) L. R. 1 P. C. 342.
(6) 8 Ch. App. 619.
(7) 15 Gr. 283.
(8) 17 Gr. 570.
(9) 18 Gr. 341.
(10) 19 U. C. C. P. 302.
(11) 9 Can. S. C. R. 22.
(12) 12 Can. S. C. R. 532.
(13) 9 Ch. D. 701.
(14) 1 Ch. D. 290.
(15) 2 Ch. D. 256.
(16) 45 L. T. N. S. 80.
(17) 19 Ch. D. 580.
(18) 23 Ch. D. 695.
(19) 23 Ch. D. 60.
(20) 26 Ch. D. 319.
(21) 26 Ch. D. 338.
(22) 27 Ch. D. 523.
(23) 9 App. Cas. 653.

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Tomkins v. *Saffery* (1); *Jones* v. *Kinney* (2).

Sir W. J. RITCHIE C.J.—No sufficient grounds have, in my opinion, been shown for disturbing the finding, on the question of fact, of the court of first instance confirmed, as it has been, by the Court of Appeal; so that the only questions we have to consider are questions of law.

Two preliminary objections were urged before Mr. Justice Ferguson. He says:—

A preliminary objection was taken and urged as to the frame of the suit. It was said that when the simple contract creditor brings a suit to set aside a conveyance, he must sue on behalf of himself and all other creditors, and the exclusion by the plaintiff of McCall & Co., who were creditors, was fatal.

There was also another preliminary objection which was renewed at the final argument, namely, that a simple contract creditor could not sustain a suit to set aside a chattel mortgage for fraud in a case where the mortgagor had made an assignment for the benefit of creditors generally; that the simple contract creditors, the plaintiffs in this case, could not sustain the suit as they did not attack the assignment as well as the mortgage.

The learned Chief Justice of the Court of Appeal says:—

"Several legal questions have been raised. First, the right of these plaintiffs to ask this relief; they are simple contract creditors, suing on behalf of themselves and all other creditors other than the defendants; this has been objected to but I think it fully warranted by the practice in such cases

"It has been objected that the plaintiffs cannot sue before judgment. This, he thinks, can be done, and I agree with him that simple contract creditors, suing on behalf of themselves and all other creditors other

(1) 3 App. Cas. 213. (2) 11 Can. S. C. R. 708.

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than the defendants, can maintain a suit to avoid a deed fradulent and void as against creditors.

Then he says:—

"The strongest objection urged was, that as the debtor had made a general assignment of his estate to a trustee for the general benefit a few weeks after he had made the impeached chattel mortgage this, it is contended, puts the plaintiffs out of court in this suit.

"It is urged that the mortgage is only void against creditors; that it is good against the mortgagor, and that his assignee has no higher right and now represents him, and that so long as the latter assignment is unimpeached no creditor can be heard to impeach the mortgage."

I confess myself wholly unable to understand how the making of this assignment by the mortgagor for the general benefit of his creditors can practically confirm and make good a mortgage which is now admitted to have been fradulent and void as against creditors, and thus, as it is claimed, put the plaintiffs out of court. It is said that the mortgage is good as against the assignee and that he could not contest its validity. Assuming this to be so, so far from its militating against the creditors' right to intervene and have the mortgage declared, as it has been proved to be, fradulent and void, it seems to me rather to strengthen their position. All they want is, that all the debtor's property should be fairly distributed among them, and they are therefore willing that the assignment, which they have executed and which provides for such a distribution, should stand. But is that any reason why a mortgage, fradulent and void as against them, should also stand? And because they are willing that there should be a fair and equal distribution of the debtor's property among all his creditors are they to be shut out from claiming that the property so fradulently conveyed should be included in such distribution as not having

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been, as against them, legally mortgaged, but on the other hand that by the act of their debtor assigning all his estate for their benefit the fradulent and void mortgage is made good and valid? Instead of such a monstrous result it does seem to me that if the assignee for the creditors could not set aside the fraudulent instrument, every principle of reason and common sense points out that the creditors should be able to have it declared void and of none effect, and so remove it from out of his and their way. It seems to me no better than mockery to say to the creditors, "true it is your debtor has made a mortgage fraudulent and void as against you, but as he has conveyed for your benefit all his estate and property, including the very property covered by the mortgage, and without any reference to the mortgage, and to which instrument you are assenting parties, that this makes good the mortgage and renders it valid and binding, unless, indeed, you set aside the assignment which nobody impugns, and still less, you who are parties to it, and which, in fact, you think fair and just, as also fraudulent and void.

As the assignment to Ferguson is not attacked, does it not follow, as a matter of course, that the proceeds of the sale would necessarily go to Ferguson for distribution among the creditors of Cox? The mortgage being removed, the property or the proceeds of the property, come to him unincumbered, and why should it not be held by him and be distributed in accordance with the terms of the assignment to him? Putting it in the most favorable way, namely, that the assignment only amounted to a conveyance of the equity of redemption in the mortgaged goods, if Ferguson, on behalf of the creditors, sought to redeem the property, could the mortgagor and the mortgagee, or either of them, set up the claim as against the creditors that the mortgage debt was due and payable, and without payment of which the property could not be redeemed

when the mortgage itselt, as against those very creditors on whose behalf Ferguson was seeking to redeem the property, had been declared fraudulent and void, and to the proceeds of which they, the creditors, had therefore become entitled? The moment this mortgage was displaced, and to be treated, as against creditors, as non-existing, the property, in my opinion, necessarily falls into the assignment for their benefit, and thus becomes in a position to be immediately administered for their benefit, thus affording them an effectual and substantial relief against the property. Therefore, the setting aside of this mortgage is no mere barren declaration; on the contrary, the moment the deed is set aside the creditors and others for whom they sue are in a position to obtain, under the assignment, the fruits of the decree, the court having set aside the deed, and the defendant Ferguson, representing the creditors, holding the property for their benefit under an instrument the validity of which neither the mortgagor nor mortgagee can, or do, question. Therefore, no necessity exists, in my opinion, for independent proceedings to obtain execution against the property in the deed, supposing such would have been necessary if no assignment had been made, for the simple reason that if the assignment is good no execution could issue against the goods at the instance of an individual creditor inasmuch as, I take it, it would be competent for Ferguson, under the assignment, on behalf of the general body of creditors to resist any such execution.

I agree with the learned Chief Justice that there is no difficulty in disposing of all the matters in controversy between the parties before the court; in fact I find but one matter really in controversy, namely, was or was not this mortgage fraudulent and void? If so, then there does not appear to be any further controversy that I can discover. Nobody alleges that if this mortgage is fraudulent and void the assignment is not

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reasonable and fair and that the proceeds of the mortgaged goods should not be distributed in accordance with its terms. Then, what possible objection can there be to the court ordering the money to be paid out to the creditors through the instrumentality of the deed of assignment? If Ferguson J. had not adjudged the amount to be paid out to the assignee, he being a party before the court and the assignment to him not being disputed or questioned, if he applied for an order to have the money paid over to him as the party legally entitled to it on the face of the proceedings, who could successfully resist his claim? Certainly not Cox nor his mortgagees, still less the creditors who claim to have the mortgage set aside for the very purpose of having the proceeds distributed equally among them. The solution of the whole matter, to my mind, is that so soon as the mortgage is declared fraudulent and void, it is to be treated and dealt with as if it had never existed, as against the creditors as if the mortgage had never been executed.

There does not appear to have been any question raised, or objection made, to the money being paid to Ferguson; on the contrary, it appears that all parties are willing that that course should be adopted, and therefore I can see no reason for varying the judgment of Ferguson J. in this particular. If any reason was shown why he should not receive it, then I agree with Chief Justice Haggarty, that the court can deal with the matter and allow each creditor to prove his claim in the master's office, and therefore, in my opinion, the decree in this case is neither futile nor fruitless.

I may say generally, that the judgment of Chief Justice Haggarty, and the reasons on which it is founded, commend themselves strongly to my mind.

STRONG J.—The plaintiffs' right to maintain this suit without having recovered judgment for their debt is, I

think, clear upon the authority of *Reese River Mining Co.* v. *Attwell* (1). The Master of the Rolls there points out the distinction between a suit to set aside a deed as a fraud on creditors under the statute of Elizabeth where the relief sought is confined to the mere avoidance of the deed, and such a suit where there is superadded the additional relief of equitable execution. In the latter class of cases for the reasons given by Lord Cottenham in his judgment in *Neate* v. *Duke of Marlborough* (2); and for those assigned for the judgment in *Smith* v. *Hurst* (3); not only was the recovery of a judgment an essential preliminary to the filing of the bill but legal execution must also have been issued and lodged in the sheriff's hands.

There are two cases in which it is laid down generally that a creditor cannot maintain a bill to set aside a deed as being void against creditors without having first recovered a judgment at law, *Colman* v. *Croker* (4); and *Lister* v. *Turner* (5); but those cases may, I think, fairly be attributed to principles governing the exercise of equity jurisdiction which prevailed at the time they were decided, but which have long since become obsolete, both in Ontario and in England. At the date of these decisions the Court of Chancery scrupulously avoided deciding any questions of law; if a legal question arose it was sent to a court of law for decision, if in other respects the suit was maintainable. As the foundation of the creditors' right to sue was a legal question, namely, the existence of the legal debt which constituted him a creditor, this was treated as a matter for adjudication in a court of law and until it had been there disposed of it was considered that the creditor had no *locus standi* in equity. Since 1853. at all events, when this practice was abolished by general orders, afterwards confirmed by statute, this rule has not

(1) L. R. 7 Eq. 347.
(2) 3 Mylne & C. 407.
(3) 10 Hare 30.
(4) 1 Ves. jr. 160.
(5) 5 Hare 281.

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applied (if indeed it ever did apply) to the Ontario Court of Chancery and since the passage of the statute, commonly called from its author "Rolt's Act," and which was enacted long before the Judicature Act, it has ceased to have force in England. I, therefore, adhere in all respects to the judgment delivered in the case of *Longeway* v. *Mitchell* (1)

As regards the right of assignees for the benefit of creditors to maintain a suit to set aside a deed made by the assignor (the debtor) in fraud of creditors generally, I am of opinion (following what was decided in *McMaster* v. *Clare* (2), and in this court in *Burland* v. *Moffatt* (3); and what has frequently been laid down as law in the United States(4); that the assignee or trustee in such cases must be deemed to claim under the debtor his assignor,and consequently that he cannot,like an assignee in bankruptcy, or one who has a statutory title under an Insolvent Act, be admitted to assert a title paramount to that derived by him from his author, the debtor, who manifestly could not sue for such a purpose. There is, however, no reason so far as I can see for disentitling a creditor who is entitled to the benefit of such a trust deed from suing so long as he has not released his debt or accepted the benefit of the trust as a satisfaction of the debtors liability to him.

As regards the merits of this case upon the evidence I have had great doubt whether it establishes the plaintiff's case. So far as it depends on conflicting testimony in the oral evidence of witnesses who were examined at the trial, I consider myself bound to accept the finding of the learned judge so far as he adopted the facts deposed to by the plaintiff's witnesses in preference to those stated on behalf of the defendants. But the case depends to some extent on other considerations—on inferences to be drawn from undis-

(1) 17 Gr. 190.
(2) 7 Gr. 550.
(3) 11 Can. S. C. R. 76.
(4) See Waite on Fraudulent Conveyances (2nd ed.) p. 179.

puted or established facts, and from written evidence contained in documents and correspondence, to which class of proofs the rule laid down in *Gray* v. *Turnbull* (1) and many other cases has no application. I think, however, when a case has been heard in an intermediate Court of Appeal, and the decision of the judge of first instance has there been confirmed without dissent upon questions purely of fact, though of facts not depending on conflicting testimony, no useful purpose is served by a single judge dissenting in a second Court of Appeal; and, I must add, I doubt if a second Court of Appeal ought, ever, except in a case of the most manifest error, to disturb a concurrent judgment arrived at by a first judge, and a unanimous Court of Appeal, upon any question of fact, even upon one not depending on the credit to be attributed to witnesses, but dependent altogether on inferences to be drawn from documentary evidence or undisputed facts. In making these observations I do so upon the under- standing that Mr. Justice Burton, who differed in the Court of Appeal, did not express any positive opinion upon the evidence, but based his dissent altogether on legal points irrespective of the merits.

I am of opinion that the appeal should be dismissed with costs.

FOURNIER, TASCHEREAU and GWYNNE JJ. concurred in dismissing the appeal for the reasons given by His Lordship the Chief Justice.

Appeal dismissed with costs, the judgment of the Court of Appeal being varied as to the disposition of the money in court, and the original judgment of Ferguson J. restored.

Solicitors for appellants McCall & Co.: *Kerr & Bull.*

Solicitors for appellant Ferguson: *Foster, Clarke & Bowes.*

Solicitors for respondents: *MacLaren, MacDonald, Merritt & Shepley.*

(1) L. R. 2 Sc. App. 53.