1885 DANIEL McLEAN .....APPELLANT;

*Mar. 19, 20.

AND

*June 23. NICHOLAS GARLAND. .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment for benefit of creditors—Preference—R. S. O. Cap. 118 *sec.* 2—*Creditors named in schedule—Assignee not bound to confine distribution to.*

An insolvent made an assignment for the benefit of his creditors. The deed purported to be for the purpose of satisfying, without preference or priority, all the creditors of the insolvent, and the trust was declared to be: 1. To pay in full the debts of the several persons or firms named in a schedule to said deed, or, if not sufficient to pay the same in full, to divide the assets of the insolvent estate *pro ratâ* among such scheduled creditors, and: 2. To pay the surplus, if any, to the said insolvent. It appeared that there was a small creditor of the insolvent whose name was not on said schedule.

Held, per Ritchie C.J. and Fournier and Taschereau JJ., reversing the judgment of the court below, Henry J. dissenting, that the consideration for the deed, as expressed on its face, was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not bound to confine such distribution to the creditors named in the schedule.

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

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Per Strong J.—That the assignee was confined to the schedule, but effect must be given to the word "intent" in the statute and as the evidence showed that a *bonâ fide* effort was made to ascertain the names of all the creditors before the execution of the deed, it did not appear that the insolvent intended to prefer the scheduled creditors and the deed, therefore, was not void under R. S. O. cap. 118 sec. 2.

Semble, per Strong J.—That the word preference in R. S. O. cap. 118, sec. 2, imports a "voluntary preference" and is not applicable to the case of a deed obtained by a creditor or creditors who to obtain it have brought pressure to bear on the debtor.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Division (2) in favor of the respondent.

The material facts affecting this appeal are as follows:—

In 1882 one Thompson, a trader, being in difficulties and pressed by the respondent Garland who had issued a writ against him, went to Toronto and held a meeting of his creditors, at which meeting it was determined that Thompson should assign his estate to the Appellant McLean for the benefit of all his creditors. Before executing the deed of assignment a son of McLean went over all his books with the insolvent and made out what was supposed to be a complete list of the creditors. The deed was then prepared and executed by Thompson and by McLean. It provided for the payment of certain rents and taxes, and then for the payment in full, or *pro ratâ* as far as the assets would extend, of the debts of the creditors mentioned in a schedule annexed.

The respondent, Garland, having obtained judgment against Thompson, issued an execution, and the sheriff made a levy upon the goods assigned to McLean by the aforesaid deed. An interpleader issue was ordered to be tried to determine the title in said goods, and on the trial in the Common Pleas Division judgment was given for the Respondent and execution creditor Gar-

(1) 10 Ont. App. R. 405. (2) 32 U. C. C. P. 524.

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land, who had produced evidence to show that one Sinclair was a creditor of Thompson for a small amount and had not been included in the scheduled list of creditors, the court holding that this made the deed preferential of the creditors who were included and, consequently, void. On appeal to the Court of Appeal the judges of that court were equally divided in opinion and the appeal was dismissed. McLean then appealed to the Supreme Court of Canada.

W. *Cassels* Q. C. and *Galt* for the appellant.

The deed was made between Thompson, the debtor, and McLean, the appellant, and both are bound by the recital to treat this deed as one for the benefit of all Thompson's creditors. *Carpenter* v. *Buller* (1); Chitty on Contracts (2).

The appellant subimts: (1.) That the deed of assignment in question was made and executed for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of A. W. E. Thompson their just debts within the meaning of R. S. O. ch. 118 sec. 2.

(2). That this appears not only by the deed itself but by the strongest affirmative evidence.

(3). That if Sinclair were a creditor he could have proved his claim and ranked on the estate, and that if necessary the schedule can be amended by adding his name.

(4). That if Sinclair's trifling debt was excluded by accident, this cannot have the effect of avoiding the deed.

(5). That no debt from Thompson to Sinclair was proved by the respondent.

(6). That the Respondent's name being upon the schedule it is not competent for him to complain that the name of some other creditor is not there. Sinclair's claim was produced for the first time at the trial, and

(1) 8 M. & W. 209. (2) 11 Ed. pp. 85-90.

Thompson having by that time removed to the North-West, it was impossible to make any inquiries into it.

The following authorities were cited: *Kerr* v. *Canadian Bank of Commerce* (1); *Brayley* v. *Ellis* (2); *Alexander* v. *Wavell* (3).

Robinson Q.C. and *Walker* for the respondent.

The said deed of assignment was made for the payment of those creditors only who were mentioned in the schedule annexed to the deed, after the payment of rent, charges and assessments, &c., which were made a first charge on all the assets assigned. As a matter of fact certain creditors, namely, Alexander Sinclair and J. and J. Taylor, were excluded altogether from any benefit under the deed, and therefore the deed was and is invalid as against the respondent, an execution creditor of the assignor. Creditors could not be added to the schedule.

Drever v. *Mawdesley* (4); *Gault* v. *Baird* (5); *Buvelot* v. *Mills* (6); *Wood* v. *Rowcliffe* (7); *Kingston* v. *Chapman* (8); *Sellin* v. *Price* (9).

Even if the deed could be reformed as between the assignor and assignee, the immediate parties to it, it could not be reformed so as to affect the rights of creditors who were not parties to it. After the rights of an execution creditor had intervened, the deed could not be reformed so as to prejudice his rights and after any creditor became a party to it by filing his claim with the assignee, or in any other way intimating his willingness to accept the provisions of the deed, the deed could not be reformed, and he would have the right to insist upon having the assets distributed among those creditors only who are mentioned in the schedule.

(1) 4 O. R. 652.
(2) 9. Ont. App. R. 565.
(3) 10 Ont. App. R. 135.
(4) 16 Sim. 511.
(5) 4 Ont. App. R. 643.
(6) L. R. 1. Q. B. 104.
(7) 6 Ex. 407.
(8) 9 U. C. C. P. 130.
(9) L. R. 2 Ex. 189.

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The onus of proving that all creditors were included in the schedule was on the appellant, and without calling the assignor as a witness there could not be, and there was, no evidence of that fact. *Watts* v. *Howell* (1).

The recitals in the deed cannot control or enlarge the operative words in it unless the latter are ambiguous. *Ingleby* v. *Swift* (2); *N. W. R'y. Co.* v. *Whinray* (3). *Buvelot* v. *Mills* (4).

SIR W. J. RITCHIE C.J.—The consideration for making this deed, as expressed on its face, was that there should be a fair and equitable distribution of the debtor's property amongst his creditors, for the purpose of paying and satisfying, ratably and proportionately, and without preference or priority, all the creditors their just debts. This consideration is not limited to a distribution among the parties named in the schedule. The trustee having accepted the property in this case, is he not bound, notwithstanding a mistake in the schedule, to distribute the funds in accordance with the consideration on which he received them, that is, among the persons mentioned in the schedule, assuming them to be all the debtor's creditors? But if it should be that by accident or inadvertence a creditor is omitted, then, in accordance with the condition on which the deed was made, and the property received by the assignee, should not the distribution be among all the creditors?

I therefore think, that having received the property on the consideration of distributing it ratably among all the grantor's creditors, the trustee could not withhold a ratable proportion from any, and if he did so the creditor accidentally omitted would have a right to enforce payment of his ratable, proportional share with the creditors mentioned in the schedule.

(1) 21 U. C. Q. B. 255.
(2) 10 Bing. 84.
(3) 10 Ex. 77.
(4) L. R. 1 Q. B. 104.

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I am not satisfied that there was a debt proved to be due to Sinclair, but if there was I think the assignment was made *bonâ fide* and without any intent whatever to defeat or delay creditors or to give any creditor a preference over any other creditor or creditors.

STRONG J.—I am of opinion, with the majority of the Court of Appeal, that there was sufficient *primâ facie* evidence of the delivery of the goods sold by Alexander Sinclair to the assignor Thompson for the price of $26.86. The receipt given was, it is true, nominally by the warehousemen who were to keep the goods until they could be forwarded, but, as I understand, the same warehousemen were also the carriers or the agents for the carriers who were to take the goods to their destination, in which case the delivery was also a delivery to the carrier for the present purpose, though the liability of the carriers as such did not of course begin until they were actually shipped. Moreover, Sinclair says he wrote several letters to the debtor, but received no answer. It is to be presumed that these letters were received. And there is an inference in the case of letters of this kind that silence imports acquiesence. On the whole, I think the case could not well be decided on this ground against the respondent, more especially as much turns on the construction of Sinclair's evidence which presents some ambiguity, and the learned judge who presided at the trial has interpreted it in favor of the respondent.

I also entirely agree with the learned judges in the Court of Appeal who held that on the construction of the deed Sinclair was not entitled to the benefit of it. The operative parts of a deed always control the recitals, and the trusts here declared are expressly for the scheduled creditors and no one else. If authority is required for this proposition the case of *Buvelot* v. *Mills* (1), referred to by Mr. Justice Osler in

(1) L. R. 1 Q. B. 104.

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delivering the judgment of the Court of Common Pleas seems directly in point. Further I cannot agree with the dictum in *Thorne* v. *Torrance* (1) that the trustee has any right to add to the list of creditors, nor that on the strength of the mere recital in the deed that it was intended for the benefit of all creditors, taken by itself alone, and without more, a Court of Equity could interfere to rectify the omission in the schedule.

But I feel compelled to dissent from the court below and on the same grounds as those the learned Chief Justice of the Common Pleas has very forcibly put forward as the principal reasons for the judgment he has given. The statute R. S. O. c. 118, sec. 2, as it seems to me, is nothing more than a re-enactment of the statute 13 Eliz. with something added which the statute of Eliz. did not provide for, that addition being the avoidance of deeds made by an insolvent with intent to give one or more of his creditors a preference over the others or one other of such creditors. The exceptions are enacted for greater caution and have nothing to do with the present question. The real point for decision when it is sought to invalidate a deed under this sect. 2 must in every case be:—Is it sufficiently proved that the deed was made with intent to give a preference? And the answer to this must depend on all the evidence, extrinsic as well as that contained in the deed itself. If there is no extrinsic evidence shewing how the benefit of the trusts came to be witheld from certain creditors, or from one certain creditor, the conclusion must be inevitable. It must be presumed that the assignor intended the necessary consequence of his act, which would be to give creditors who, by the express words of the deed, were entitled to the benefit of the trusts declared by it, a preference over other creditors not included in its terms; the result being unavoidable that the deed is void under this section of the statute. This, however, does not

(1) 18 U. C. C. P. 35.

preclude the possibility of shewing by extrinsic evidence that the surrounding circumstances attending the execution of the deed were such as to rebut any presumption of an intent to prefer. If the mere effect of the deed itself was to be conclusive then the word "intent" might as well be stricken out of the statute altogether. It must also be remembered that as the statute originally stood on the statute book it contained certain penal clauses, by one of which the "intent," not to prefer, it is true, but to defraud, creditors, was made punishable as a misdemeanor. The intent so referred to in the penal clause, being the same intent as avoided the deed in one of the events provided for in the section now represented by this second clause, was of course to be arrived at by the same evidence, and no one can doubt that on such a prosecution all the surrounding circumstances would be admissible to shew the absence of fraudulent intent. And if so the intent would be ascertainable in the same way when the issue was on the validity or invalidity of a deed, and, to carry it still one step further, also when the enquiry was as to the intent to give a preference, for we cannot suppose, without putting an arbitrary construction on the act, that the deed in the latter case was to be held conclusive of the intent any more than in the former.

Again, as the learned Chief Justice of the Common Pleas has put it, the preference cannot be shewn without admitting evidence dehors the deed, and whenever extrinsic evidence is admitted to establish any proposition reason and authority both require that extrinsic evidence should likewise be admissible to counteract it.

Then the cases on the statute of Eliz. which have determined that in the case of a deed expressing to be made for a mere nominal consideration, and so on its face a mere voluntary conveyance and therefore void as against creditors, evidence is admissible to shew

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that in fact a valuable consideration was given, are also strong authorities in favor of the appellant in the present case.

On the whole, therefore, it seems to me very clear that evidence was admissible to rebut the presumption that a preference was intended, which certainly did arise as soon as it was shewn that there was a creditor from whom the benefit of this deed was withheld.

This reduces the question to one of the sufficiency of the evidence for the purpose referred to. Now it is shewn, that this assignment was not the mere voluntary act of the debtor himself, but was made at the instance of his creditors; that finding himself about to be pressed by the defendant's execution he went to Toronto and laid the state of his affairs before an informal meeting of a number of his creditors there; that this meeting resolved that an assignment for the benefit of creditors, that is, as Mr. McLean in his evidence states, for the benefit of all the creditors whose names could be ascertained, should be made; hat for the purpose of ascertaining exactly what Thompson's liabilities and assets were Mr Isaac McLean, the appellant's son, went to Thompson's place of residence and business at Gore Bay, on Manitoulin Island, and there, by examination of the books and inquiries of the insolvent himself, endeavoured by every means in his power to ascertain the names of all the creditors; and that from all the information he was able to acquire from Thompson, and to gather by searching and examining the books and papers, he "made out a full "and complete list of his creditors so far as he told me "and so far as the books shewed" There is nothing in the finding of the learned Judge who presided at the trial to shew that he did not give credit to the evidence of the appellant and to that of Isaac McLean, and I see therefore no reason why the evidence of both should not be considered as entitled to consideration;

more especially as it is uncontradicted and is in accordance with all the probabilities.

Then we have the fact that all parties to the deed and all parties interested under the deed who were privy to and cognizant of its execution, intended to include all creditors, but that one creditor whose debt only amounted to the small sum of $\$26\frac{86}{100}$ was by inadvertence and accident unintentionally omitted from the schedule and so not *primâ facie* entitled under the trusts declared. Further, we have this direct evidence confirmed by the inferences to be drawn from the circumstances of the case; for it surely cannot be presumed that the debtor, who had taken pains to communicate his insolvent condition to the general body of his creditors with a view to insuring a fair distribution of his estate, and who had submitted himself to their direction and was acting under those directions in making this assignment, designedly, and with intent to give a preference over this one creditor to whom he owed $\$26\frac{86}{100}$, suppressed his name in order that he should be excluded from the deed. Such a presumption would be against all the facts and all the probabilities, and I therefore conclude that upon the evidence of the circumstances preceding and attending the execution of the deed, and assuming that the validity of the assignment depended on the intention of the debtor alone, any presumption of an intent to prefer arising from the fact of Sinclair's debt having been omitted from the schedule is sufficiently rebutted.

But I do not wish to be understood as conceding that even if it had been distinctly proved that Thompson designedly concealed this debt it would make any difference, for I should be prepared to hold, if it were necessary to do so, that where a deed is made, as this deed was, at the instance and upon the request of creditors the section in question does not apply unless the creditors are themselves parties to the intent to

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give a preference or have notice of the debtor's design so to do and acquiesce in it.

Further, I desire to express no opinion whether a deed given as this manifestly was under pressure from creditors can in any case, even when the creditors obtaining it are preferred, be avoided as a preference under this second section, for as I have had occasion to say before, in cases arising under the late Insolvent Act, I consider the word *preference* as importing a *voluntary preference* and not applicable to the case of a deed obtained by a creditor or creditors who to obtain it have brought pressure to bear on the debtor. But whether this applies to the case of a general assignment of all the debtor's property is a point requiring further consideration, and which does not, in the view I take of the evidence, call for decision in the present case.

That the conclusion I arrive at imposes no hardship upon the omitted debtor is, I think, apparent from the consideration that upon the facts here proved relief on the head of accident and mistake would be granted as of course in a Court of Equity. We have the deed reciting an intention to assign the property comprised in it upon trust for all creditors; we further have the facts proved that the utmost diligence was exerted in order to get a complete list of the creditors, thus carrying out the intention of the meeting of the Toronto creditors as far as it was possible to do so, and that it was only owing to the loose state of the insolvent's books and to his forgetfulness, that Sinclair's name was omitted; at least such must be the irresistible inference from the evidence. A very different case for relief in Equity is thus made from that upon which it was suggested relief could be obtained in *Thorne* v. *Torrance*, and I do not hesitate to say that in a case like the present relief would be accorded as of course, and that any party to

the deed who, upon a proper application being made to him before suit, should refuse to consent to a rectification, and who by such refusal would render resort to the court necessary, would be made liable for costs.

As regards the provisions respecting rent and assessments I read the deed as referring to rents and assessments which would be charges upon the land at the time of sale and which would of course in any Court have priority, inasmuch as the purchaser would be entitled to deduct these amounts from his purchase money, or if the lands should be sold subject to the charges the price obtained would be so much the less.

I am of opinion that the appeal should be allowed with costs both here and in all the Courts below.

FOURNIER and TASCHEREAU JJ. concurred with His Lordship the Chief Justice.

HENRY J—I have the misfortune to differ from my learned brethren in this case. The deed of assignment under R. S. O. ch. 118, is void unless it is for the benefit of all creditors: now it is not a question of intention that we are called upon to decide but one of fact. Here the party makes out a deed and wants to pay all his creditors; in carrying out his intention he makes it for the benefit of those creditors only who are mentioned in the schedule and leaves out one of his creditors. Now if he can by mistake leave out one creditor, why not two or three. Is it sufficient for him to say he intended to include him? Reading the document we find he has left out Alexander Sinclair from the schedule, and the learned Judge so found at the trial of the case, and upon the true legal construction of this document it rested on the respondent to prove that all creditors were included, and this he has failed to do.

We are told equity can rectify any mistake. I do not see how that comes in at all. A party to a deed can

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rectify a mistake, provided the mistake is a mutual one, but how can you reform a document so as to affect the rights of a person who was not a party to the deed at all? I must confess I cannot see how the principles of equity are applicable to such a case as the present.

With regard to taxes, I think the party had a right to provide for the payment of them in full, of taxes on the land out of the proceeds of the land; but I do not think he could prefer the payment of such taxes out of personal assets. I think this is going beyond the law.

I am therefore of opinion that this document is not complete and it is not one which the law provides for. The appeal should, in my opinion, be dismissed.

Appeal allowed with costs.

Solicitors for Appellant: *Caston and Galt,*

Solicitors for Respondent: *Walker and Scott.*