CATHERINE DONOHOE (DEFENDANT)..APPELLANT; 1895

AND

*April 2.
*June 26.

HULL BROS. & CO. AND OTHERS (PLAINTIFFS) .. .. RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Husband and wife—Purchase of land by wife—Re-sale—Garnishee of purchase money on—Debt of husband—Practice—Statute of Elizabeth—Hindering or delaying creditors.

D. having entered into an agreement to purchase land had the conveyance made to his wife who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was garnisheed in the hands of M. and an issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth and that she therefore held the land and was entitled to the purchase money on the re-sale as trustee for D.

Held, reversing the decision of the Supreme Court of the North-west Territories, that under the evidence given in the case the original transfer to the wife of D. was *bonâ fide*; that she paid for the land with her own money and bought it for her own use; and that if it was not *bonâ fide* the Supreme Court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity, could not, in these

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

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statutory proceedings, grant the relief that could have been obtained in a suit in equity.

Held further, also reversing the judgment appealed from, that even if the proceedings were not *bonâ fide* the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer and the vendor never undertook to treat him as a debtor; that if there was a debt it was not one which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action on in his own right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit.

APPEAL from a decision of the Supreme Court of the North-west Territories reversing the judgment for defendant at the trial.

The facts of the case are thus stated in the judgment of the court:

On March 23rd, 1887, Edward Donohoe, the husband of the appellant, agreed to purchase from one George K. Leeson certain lands in the town of Calgary, North-west Territories, for the sum of $1,100 payable in one year. Before the expiration of the year an arrangement was entered into by which Leeson made the transfer of the land, not to Edward Donohoe but to his wife the present appellant, she paying him, from her own moneys, as she contends, but from her husband's as the respondents contend, the $1,100 purchase money. The husband subsequently transferred to her, for the nominal consideration of one dollar, all his interest and such proceedings were thereafter taken that on the 16th of March, 1889, a certificate of ownership was issued in her favour under the Territories Real Property Act by which it was certified that she was then the owner in fee simple of the property in question, subject to certain encumbrances.

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She so continued the registered owner until the 1st of September, 1892, a period of more than three years. On or about that date she, with the concurrence of her husband, entered into an agreement with one Joseph H. Millward by which she agreed to sell to him the property for $1,800 cash, the purchaser to assume a mortgage of $3,000 that had in the meantime been placed upon it.

A transfer dated 1st September, 1892, was executed (in which the payment of the $1,800 was acknowledged) and placed in the hands of the solicitor of the Donohoes. In some unexplained manner this document found its way into the possession of the purchaser Millward's solicitors and it was thereupon registered and a new certificate of title issued in his (Millward's) favour, the certificate in favour of Mrs. Donohoe being cancelled. This registration took place before and without payment of the $1,800 purchase money, and so far as appears in the absence of any agreement on the part of the vendors that credit was to be given for the purchase money, and notwithstanding the fact that the evidence showed that the payment of that money and the delivery of the title deeds were to be contemporaneous acts. But it so happened that the solicitors of Millward were likewise the solicitors of five firms or individuals who had claims against Mrs. Donohoe's husband amounting in the aggregate to about $1,168, and the idea was conceived that the $1,800 purchase money might be resorted to to pay off the claims of these five creditors. Consequently the purchase money was not handed over to Mrs. Donohoe. Five actions at law were instituted against the husband for the recovery of the debts mentioned, and before judgment (which was subsequently obtained) garnishee summonses were issued (as might be done under the special provisions of the Judicature ordinance) on the five

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actions against Millward. Upon the return of these summonses (it appearing that Mrs. Donohoe claimed the $1,800 in Millward's hands and that judgments by *nil dicit* had in the meantime been entered up) an order was made consolidating the five actions and directing an issue as between the five judgment creditors as plaintiffs and Mrs. Donohoe as sole defendant, as to whether these moneys in the hands of the garnishee were at the time of the service of the garnishee summonses the moneys of the plaintiffs (the judgment creditors) or any of them as creditors of Edward Donohoe as against the defendant. A consent order was subsequently made under which the purchase money in Millward's hands was paid into court where it still is. Upon the trial of the issues before Mr. Justice Rouleau it appeared that the only ground upon which the plaintiffs in the first instance based their right to the purchase money was that the transfer from Leeson and Edward Donohoe to the defendant, Mrs. Donohoe, in 1889 was void as against creditors under the statute 13 Elizabeth, ch. 5, having been as was alleged a voluntary transfer and having been made for the purpose of defrauding creditors; that she therefore held the land and the purchase money arising from its sale as a trustee for him; that these moneys were consequently his moneys and that they were due and owing not to his wife but to himself, and were therefore attachable by garnishee process at the instance of his (judgment) creditors.

Mr. Justice Rouleau, without then determining whether the transfer in question was voluntary or whether it was executed for the fraudulent purpose alleged, held that it could not be attached by garnishee proceedings but only by a direct suit in court, and he therefore dismissed the proceedings with costs. Upon appeal to the Supreme Court in banc, McGuire J. in a

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most elaborate judgment held that the transfer was voluntary and, being fraudulent, was void as against not only existing but subsequent creditors, and he further held that the purchase money was attachable in Millward's hands by the plaintiffs. In this, Richardson J. concurred. Wetmore J. came to the conclusion that the moneys were not attachable, but inasmuch as in his view the transaction impeached was a fraudulent one, and as the purchase money had at the instance of Mrs. Donohoe been paid into court as if proper proceedings had been taken in the first instance, and as these moneys in a proper suit brought for the purpose would have been declared to be the moneys of her husband for distribution amongst his creditors, the court was seized of jurisdiction to rightly distribute them to the proper parties: and he consequently concurred in the opinion of McGuire and Richardson JJ. that the appeal should be allowed.

Rouleau J. on the other hand adhered to the opinion expressed at the trial and further held that upon a review of the evidence the original transfer to Mrs. Donohoe was neither voluntary nor entered into with a fraudulent purpose.

The appeal was therefore allowed, and it is from that judgment that an appeal is asserted to this court.

Armour Q.C. for the appellant. The *bonâ fides* of the transfer to Mrs. Donohoe cannot be inquired into in garnishee proceedings. *Vyse* v. *Brown* (1).

There was no debt for which Donohoe could have sued alone, and if there was one due to him and his wife jointly it could not be attached on a judgment against him alone. *Macdonald* v. *Tacquah Gold Mines Co.* (2).

Gibbons Q.C. for the respondent referred to *Masuret* v. *Stewart* (3); May on Fraudulent Conveyances (4).

(1) 13 Q. B. D. 199.
(2) 13 Q. B. D. 535.
(3) 22 O. R. 290.
(4) 2 ed. pp. 61 to 69.

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The judgment of the court was delivered by:

SEDGEWICK J.—In my view the first, the fundamental, question to be considered upon the present appeal is as to whether the garnishee proceedings in question were properly taken, assuming for the purpose of this inquiry that the transfer impeached was, and might have been, declared to be void as against creditors in a suit properly instituted for that purpose.

The provisions of the Judicature Ordinance sections 305–312 are, so far as any questions involved in this case are concerned, identical with the corresponding sections of the English Common Law Procedure Act, 1854, secs. 60–67 now incorporated in the rules of the Supreme Court 1883, Order XLII., Rules 32 and 34 and Order XLV. as well as with corresponding enactments in Ontario and Nova Scotia where the provisions of the English Judicature Act have been substantially enacted, and the cases decided in England, and in Canada as well, as to the meaning of these provisions, may usefully be examined in determining the questions in controversy here.

Now one elementary principle runs through all these cases, viz., to enable a judgment creditor to obtain an order compelling a third person (the garnishee) to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and the debt must be of such a character that it would vest in the debtor's assignee or trustee in bankruptcy if he became insolvent. There are cases where, even with both of these conditions present, garnishee process will not lie, but these cases do not concern us now. There must in all cases be the beneficial interest, as well as the right of action against the garnishee, in the judgment debtor. Further, the claim of the debtor

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must be a debt: it must arise *ex contractu* not *ex delicto*. Now apply these principles to the present case. Was there here a contractual obligation between Millward on the one hand and Edward Donohoe on the other, which the latter in his own right and for the exclusive benefit of himself or his estate could enforce in an action at law or a suit in equity? In my opinion there was not, and that for two reasons. First: There was no agreement or understanding between the parties that Millward should have any time—a period of credit—to pay the $1,800. The agreement was that that money was to be paid upon delivery of the transfer. In the absence of any explanation on the subject I must assume that the transfer was without authority treated as delivered and so registered. Under such circumstances the Donohoes might have brought one of several forms of action in order to obtain redress; they might have brought a common law action to recover damages by reason of the conversion of the instrument of transfer. If as a matter of fact there had been a delivery of the deed and it contained an acknowledgment of the payment of the purchase money, they could not at law, in the absence of fraud, maintain an action for it. They would be estopped by their deed. They might, however, have elected to accept the delivery and then sue in equity, not upon their contractual rights but to assert a lien on the land sold by reason of the purchase money not having been paid and obtain a decree giving effect to that lien. Still, all the while they might have stood upon their rights and demanded back their deed. They never undertook with Millward that he was to become their debtor for a single moment, and until they elected so to treat him he was only a wrong doer in his relations with them and liable to be treated accordingly. But secondly, assuming that there was a debt of some

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kind, to whom was that debt due so far as Millward was concerned? Could Edward Donohoe in his own name and for his own benefit have recovered it? As between the husband and the wife the conveyance to her even if voluntary was a perfectly valid one. So, too, as between him and her assigns. If he could not claim against her he could not against them. The deed is void as against creditors only (1), and the land as between her and him being hers, she had a right to sell to Millward without intervention or interference on her husband's part. The land therefore being hers, the contract being made with her, Millward was bound to pay her, her husband having no possible right to the price or any part of it. It is clear then that he could not, without at least joining his wife as plaintiff, sue Millward in his own name, and if not the debt was not, under the authorities attachable in his hands at the instance of Donohoe's creditors. The case of *Vyse* v. *Brown* (2) is on this point exactly analogous to this (assuming here that, as in that case, the instrument was voluntary):

> Even supposing, said Vaughan Williams J., that the plaintiff had taken the proper steps to set aside the settlement as void, and had succeeded in doing so, even then Brown could never have been placed in the position of being obliged to pay over the money to Vyse; the settlement would still be valid and subsisting between the parties; and, although in such a suit Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor that could never be by reason of his becoming indebted to the judgment debtor.

And see *Webb* v. *Stenton* (3) and *Boyd* v. *Haynes* (4). I am unable to find any English or Canadian case at variance with the case from which this extract is taken, and I think it is directly in point in favour of this appeal. If then there is nothing more than this in

(1) See May on Fraudulent Conveyances, 2 ed. pp. 316, 317, 325 and cases cited.

(2) 13 Q. B. D. 199.

(3) 11 Q. B. D. 518.

(4) 5 Ont. P. R. 15.

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the case, if the alleged debt is not attachable, then the proceedings, being taken without authority, must fail.

But the argument is that Mrs. Donohoe has precluded herself from claiming the advantage of this lack of jurisdiction by reason of the non-attachability of the debt, because in the first place she assented to the issue in its present form, and because in the second place she did not move to set aside the proceedings, but asked that the money in Millward's hands should be paid into court, thereby, it is said, consenting that that court should have absolute power to deal with it as might be thought right. I must confess I cannot appreciate the force of either of these contentions.

The issue settled upon by both parties was in effect this: "Was the purchase money in Millward's hands the money of Donohoe's judgment creditors as against Mrs. Donohoe?" Perhaps the issue should have taken the form of an inquiry as to whether the money in question was a debt due from Millward to the husband or a debt due to the wife, but what substantial difference is there between the two statements? The real question to be determined was as to the attachability of the money. Determine that fact in the negative and the plaintiffs' case must fail. Besides if Mrs. Donohoe is to be estopped from asserting her rights because of words that counsel have used in the pleadings, she can surely be allowed to insist upon a strict interpretation of the language creating that estoppel. If so, the answer to the question as framed in the issue must be in the negative. The moneys garnisheed were never at any time the moneys of the judgment creditors. They might become so but they certainly were not at the time of the service of the garnishee summonses. Nor could they though "bound" by the attaching process ever become their moneys until, after due course of law, payment over had been made to

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them. But, waiving this point, the issue was substantially a proper one. Bear in mind that the deed of transfer to Millward was executed by both husband and wife and it might well be that there was a contractual obligation between all parties that as between the husband and wife the money was to be paid to the husband, and if so then the moneys in that event would be attachable. But all that was a matter to be determined on the trial of the issue, a thing of the future, and in my view some such question as that is just as likely to have been within the contemplation of the parties when the issue was settled as an issue to determine whether certain dealings between Donohoe and his wife four or five years previously were fraudulent and void under the statute of Elizabeth.

As I view the case it was the plaintiffs, not the defendant, who sought to give evidence upon an issue not raised. The issue raised was property or no property; the issue upon which the case was decided upon appeal was fraud or no fraud; and that too, notwithstanding the universal rule that where an action is brought with the express purpose of setting aside a settlement, there must be an allegation in the statement of claim that the settlement is fraudulent. *Richardson* v. *Horton* (1); *Holderness* v. *Rankin* (2); *Davy* v. *Garrett* (3); *Wallingford* v. *Mutual Society* (4); Kerr on Fraud and Mistake (5). I entirely agree with the trial judge in the view that the whole inquiry as to the circumstances under which Mrs. Donohoe became possessed of the property in question was irrelevant,—foreign to the issue agreed upon by the parties.

Then as to the question whether Mrs. Donohoe is to be estopped from claiming that these moneys are non-

(1) 7 Beav. 112.
(2) 6 Jur. N. S. 903, 928.
(3) 7 Ch. D. 473.
(4) 5 App. Cas. 685.
(5) 2 ed. pp. 425 and 509.

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attachable because she with Millward's consent obtained an order directing the moneys attached to be paid into court. The statute authorizes payment into court by the garnishee. The order directing payment expressly renders the money subject to the issue. If the issue is decided in favour of the defendant, the money according to the terms of the order is to go to her. By what process of reasoning can it be made to appear that, because the person claiming the money asked that for her own protection the person holding the money in the exercise of his statutory privilege should pay it into court, the issue of property or no property in the money, which without such request must be decided one way, must because of such request be decided the other way? A person's rights are ordinarily determined as they stand at the time of the institution of proceedings against him. If these rights are to be minimized or absolutely taken from him by subsequent acts or omissions of his own, there surely should be conclusive evidence of them. How can the payment of this money into court at her request make that money which otherwise would be hers, the money of strangers?

The questions still remain: Were the instruments under which the defendant acquired the property in Calgary, voluntary within the meaning of the statute of Elizabeth, (although the expression "voluntary" is not there used) and if so, were they executed for the purpose of hindering, defeating, delaying or defrauding her husband's creditors? In considering these questions all the circumstances at the time the instruments were made must be looked at and not subsequent events, except such as must be taken to have been in the contemplation of the husband at the time of transferring the property and from which a fraudulent

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intention at that time may be gathered. *Mackay* v. *Douglas* (1); *Ex parte Russell* (2); *In re Maddever* (3). After a repeated perusal of all the evidence I have come to the conclusion that the transaction was a *bonâ fide* one, the property having been purchased by the wife and paid for with her own money. The husband never owned the land. His only interest was an agreement for purchase from one Leeson for $1,100. According to the evidence of himself and his wife he never paid one dollar of this money, but the whole of it was paid by the wife, he transferring for a nominal consideration his interest, and Leeson transferring the fee simple for the expressed consideration of $1,100. This was in March, 1889. Now what was the condition of affairs at this time? The husband was a blacksmith and had been working at his trade at Anthracite from 1887, but had never otherwise carried on or contemplated carrying on business there. He appears to have been a thriftless person, while his wife appears to have been a good business woman—everything that her husband was not. Anthracite coal had been discovered there and was being largely worked, bringing a considerable population to the place. It has been conclusively proved that she in her own name, for her own benefit, entered into a partnership with one Gorman, for the purpose of carrying on at Anthracite an hotel business (articles of partnership being duly executed); that they together purchased an hotel, the instruments of purchase being produced in evidence; that they together conducted an hotel business on a pretty large scale on the premises so purchased; that all this time the husband was working at his trade, taking no part in the management of the hotel except as the occasional messenger of his wife, and not pretending to have any

(1) L. R. 14 Eq. 120. (2) 19 Ch. D. 588.
(3) 27 Ch. D. 523.

interest in it; that after a time she and Gorman dissolved partnership (the written articles of dissolution being produced) and that she went on with the business on her own account and for her own benefit until long afterwards, when the coal mines were shut down; that while engaged in the business she had 45 or 50 permanent boarders; that she sold liquors (although a prohibitory liquor law was then in force) and that her net profits averaged five or six hundred dollars a month. All this is undisputed. And it was with the money so earned that as she says she paid to Leeson the $1,100 for the Calgary property and with her husband's assent took from him a deed in her own name. Now both husband and wife were examined by the plaintiffs; they were both made their witnesses and such is the evidence they gave. I have searched most diligently to see if there is any evidence which casts suspicion upon it but in vain, and I agree with the opinion of the trial judge as expressed in his final judgment that the transaction was one entered into in the most perfect good faith and without reference to the husband's creditors whether present or future, and when it appeared that all his debts (they were few and of small amount) had been paid off by her long before the institution of the present proceedings additional weight is added to the oral and documentary testimony in support of the contention that the original transaction was in all respects a *bonâ fide* one.

In coming to these conclusions I have not been uninfluenced by the consideration that the onus of proving *mala fides* was strongly on the plaintiffs in the present case. They have in my view signally failed in showing that the transaction was a voluntary one, while the evidence both documentary and oral points almost conclusively the other way.

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It does not, it seems to me, in the view of the case that I have taken so far, appear necessary to discuss at length the question as to whether the present plaintiffs, all being subsequent creditors, have a *locus standi* to attach Leeson's transfer to Mrs. Donohoe of the 24th of March, 1888, or her husband's transfer of 2nd March, 1889. It has been proved as already stated that all Donohoe's debts existing at these dates were wholly paid off long before the institution of the present proceedings, and it has not been shown that there was any connection between the debts now in existence and the old debts. Had such connection been shown, that is, had it been proved that these debts were contracted for the purpose of obtaining funds to pay off the old ones, or had it been shown that the transfers were made with express intent to "delay, hinder or defraud" future creditors, or that at that time Donohoe was about to engage in trade and the transaction was entered into in contemplation of possible future indebtedness, had facts such as these been proved, then I would suppose that the plaintiffs had such a *locus standi*. But in my view on all these points they have signally failed to adduce evidence.

There remains to be considered one other point upon which the respondents rely in support of the judgment below. Section 8, subsections 1, 4 and 5 of the North-West Territories Judicature Ordinance enact in effect that in the administration of justice in the Territories effect shall be given to equitable principles, that equitable estates rights, titles, duties, liabilities, &c., shall be recognized and enforced, and that too, whether these rights, &c., appear incidentally or are set up as the substantial ground of action or relief.

Mostyn v. *West Mostyn Coal & Iron Co.* (1); *Salt* v.

(1) 1 C. P. D. 145.

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Cooper (1); *Re Tharp* (2); *McDougall* v. *Hall* (3); *Hedley* v. *Bates* (4); *Searle* v. *Choat* (5); *Howe* v. *Smith* (6); *London, Chatham & Dover Railway Co.* v. *South-Eastern Railway Co.* (7); *Western Waggon & Property Co.* v. *West* (8); are all cited in support of the contention that in the present proceedings, inasmuch as the evidence shows that the transfers now impeached are void under the statute of Elizabeth and would so be declared by an English court exercising chancery jurisdiction, the Supreme Court of the Territories was bound in these proceedings to make a like declaration and as a consequence order payment to the judgment creditors. I have no fault to find with the principles laid down in all of these cases, but none of them support the position contended for. It may be admitted that the Supreme Court of the Territories has all the jurisdiction formerly exercised by the common law and chancery courts in England—that it is a court of equity as well as a court of law, and that it is bound in cases where common law and equity principles come in conflict to give effect to the latter. But the question remains: Would a court of equity in England before the Judicature Act or since, in a case such as the present where the proceedings are purely statutory —fixed and defined by express enactment and interlocutory as well—give the relief claimed? There is no precedent or authority for such a proposition. Here the plaintiffs relied upon the garnishee provisions of he Ordinance for relief. Had they succeeded in bringing themselves under those provisions the money in dispute would have been theirs. But so far as this position is concerned they admit they are outside, but they say "on general equity principles the money is

(1) 16 Ch. D. 544.
(2) 3 P. D. 81.
(3) 13 O. R. 166.
(4) 13 Ch. D. 501.
(5) 25 Ch. D. 727.
(6) 27 Ch. D. 96.
(7) [1892] 1 Ch. 152.
(8) [1892] 1 Ch. 277.

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ours, therefore give it to us." The patent answer surely is: "The money may be yours, but equity has devised a machinery to determine that. Bring your suit in the ordinary way. File your bill. Join all necessary parties. Bring in the husband. He has a right to show that his wife's property shall not be appropriated to pay his debts. Bring in the custodian of the fund. He has a right to insist that the money in his hands is paid to the proper party. Bring in all persons claiming under the wife and other parties in interest. Let the issues be defined and a trial on those issues be had and so let equity prevail." That, as I understand it, is equity. It is upon principles such as these that courts of equity act. Thus is the Supreme Court of the Territories, bound as it is to administer equity, to act. To dismiss this appeal would be to give to the court a jurisdiction and authority hitherto unasserted by any court of equity whether in England or here.

I am of opinion that the appeal should be allowed and the judgment of Mr. Justice Rouleau restored, the whole with costs, both in this court and the court below.

Appeal allowed with costs.

Solicitors for appellant: *Costigan, McCaul & Bangs.*

Solicitors for respondents: *McCarthy & Harvey.*