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*May 6, 9.
*Oct. 10.

BANQUE CANADIENNE NATIONALE (PLAINTIFF) ..... APPELLANT;

AND

JOHN TENCHA, JOSEPH TENCHA AND IGNACE TENCHA ..... (DEFENDANTS);

AND

IRENE TENCHA (CLAIMANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Fraudulent conveyance—Husband and wife—Farm transferred by husband to wife, both continuing to occupy and work it—Grain grown thereon subsequent to transfer seized under execution against husband—Grain claimed by wife—Interpleader—Relevancy of evidence of circumstances of transfer—Transfer alleged to have been in fraud of creditors—Effect as to right to the grain—Exemption—Married Women's Property Act, R.S.M. 1913, c. 123, ss. 5, 2 (b), 14—Real Property Act, R.S.M. 1913, c. 171, s. 79—Executions Act, R.S.M. 1913, c. 66, ss. 29, 34 —Apportionment of costs.

T., who had bought a farm under agreement of sale, transferred his interest therein (and also his stock and farming implements) to his wife, who subsequently obtained title from the vendor and became the registered owner. The consideration of the transfer was expressed to be natural love and affection and $1. T. and his wife continued to occupy and work the farm as formerly. Plaintiff recovered a judgment

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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against T., and under execution issued thereon the sheriff seized certain grain which had been grown on the farm since T.'s wife became the registered owner and which grain had been shipped in her name. T.'s wife claimed the grain.

Held (reversing in part judgment of the Court of Appeal for Manitoba, 36 Man. R. 135, and restoring in part judgment of Macdonald J., *ibid;* Anglin C.J.C. and Mignault J. dissenting): The trial judge's finding that the transfer was made to defraud T.'s creditors should be affirmed; (*held,* that the evidence presented as to this was open to consideration, having regard to the form of the issue and the course of the trial); therefore (subject to the effect of the *Executions Act,* Man.) the transfer was void as against them, and as against the sheriff representing them, even though as between T. and his wife, it may have been intended to operate irrevocably as an absolute gift, and, the conveyance being voluntary, it made no difference whether it was a sham or not; hence the creditors could look to T. as having the equitable and beneficial title to the farm, to which the possession and right to the crops were incident (applying the rule derived from the Roman Law, by which, at least as against a purchaser other than a *bona fide* possessor, the owner of the principal thing becomes the owner also of the fruits; and not adopting the law as stated in certain cases resting upon *Kilbride* v. *Cameron,* 17 U.C.C.P., 373, which case is discussed). T.'s wife could not justify her claim upon the evidence that she directed the farming operations and contributed to the necessary labour in which T. was also engaged. The grain was, therefore, liable to seizure under plaintiff's execution, but subject to the *Executions Act,* R.S.M. 1913, c. 66. The effect of that Act was to exempt from such seizure the grain grown on 160 acres of the farm. The grain seized was the product of 150 acres of wheat and 100 acres of rye, and, having regard to the choice allowed the judgment debtor under the Act (which choice the claimant might justly exercise) the exempted grain should be fixed as comprising all the wheat (the more valuable grain) and 1/10 part of the rye. Costs of the interpleader order to go to plaintiff; all other costs in all courts to be apportioned *pro rata* according to the value of the grain as to which the parties respectively succeed (*Dixon* v. *Yates,* 5 B. & Ad. 347, and other cases, referred to).

Per Anglin C.J.C. and Mignault J. (dissenting): The wife, after the transfer to her, actually carried on the farming operations on her own account and without her husband having any "proprietary interest" therein or control thereof. The grain was "property acquired" by her in an "occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest" within s. 2 (*b*) of the *Married Women's Property Act,* R.S.M. 1913, c. 123. As to the *bona fides* of her claim in that respect, evidence of the circumstances under which she acquired the farm was admissible. But, once it is found that she so carried on the farming operations, the facts that the transfer of the farm to her was fraudulent and void as against her husband's creditors (if a finding to that effect was justified) and that the husband resided on the farm and aided in the farming, did not prevent her from claiming the crops grown as her own to the exclusion of his creditors (*Kilbride* v. *Cameron,* 17

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U.C.C.P. 373, and *Standard Trusts Co.* v. *Briggs*, [1926] 1 W.W.R. 832, approved on this point). S. 14 of the *Married Women's Property Act* had no bearing on the question in issue.

APPEAL by the plaintiff (by leave of the Court of Appeal for Manitoba) from the judgment of the Court of Appeal for Manitoba (1) which, by a majority, reversing the judgment of Macdonald J. (2), held that the grain referred to in the interpleader order herein, was, at the time of the seizure thereof by the sheriff, the property of the claimant as against the plaintiff, and was not liable to seizure under the writ of execution issued on behalf of the plaintiff against the defendant Ignace Tencha, husband of the claimant. The material facts of the case are sufficiently stated in the judgment now reported.

N. A. Belcourt K.C. for the appellant.

H. A. Bergman K.C. for the respondent.

The judgment of the majority of the court (Duff, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The appellant, formerly known as the Banque d'Hochelaga, obtained judgment in the Court of King's Bench of Manitoba against the defendant, Ignace Tencha, on 25th July, 1924, for $1,643.34 debt, and $51.80 costs, upon a promissory note which had been given to the bank by the defendant, John Tencha, and guaranteed by the defendants, Joseph Tencha and Ignace Tencha. The liability was originally contracted by these parties by a promissory note of 7th August, 1922, which in the interval had been renewed from time to time. Execution was issued upon this judgment on 22nd August, 1924, and was subsequently renewed for two years from 19th August, 1926. The writ was delivered to the sheriff of the Eastern Judicial District of Manitoba, who was directed to levy the amount. The bank, at the same time, held other judgments amounting to a considerable sum against Ignace Tencha. He was a farmer residing, with his wife, Irene Tencha, the claimant, and adopted children, on a farm in Manitoba known in the case as the Johnston farm, consisting of the west half of section 19, township 8, range

(1) 36 Man. R. 135; [1926] 3 W.W.R. 532, 702.

(2) 36 Man. R. 135; [1926] 1 W.W.R. 867.

3, East, which they had occupied and worked since January, 1918, when it was bought by the husband from Hugh Johnston, who appears to have been the registered owner of the farm, subject to a mortgage to the Great West Life Assurance Company for the principal sum of $6,500. Johnston says he sold the farm to Ignace Tencha for $15,000 and received a cash payment on account of $1,600. It is said also that the sale included some stock and farming machinery or implements; the agreement was in writing but the writing is not produced. It appears, however, as will be shown, that Johnston, while he retained the legal title, received the crops of grain which were grown upon the land, and that the proceeds, in considerable part at least, went in reduction of the purchase price, of which the amount due upon the mortgage formed part.

On 15th November, 1922, Ignace Tencha, the judgment debtor, gave a deed to his wife whereby he granted, released and quitted claim to her all his "estate, right, title, interest, claim and demand whatsoever both in law and in equity" in the Johnston farm for the expressed consideration of natural love and affection and the sum of $1. At the same time, and for the like consideration he gave her a bill of sale of all his stock and farming implements. The learned trial judge found that "at this time the husband was heavily involved financially to the knowledge of his wife, and, by the giving away of his lands and chattels, he was stripped of every possible available means or power of satisfying his creditors"; and that the transfers were executed "for the purpose of defrauding creditors of the husband by preventing the recovery of their claims against him."

Mrs. Tencha, having thus acquired her husband's interest in the farm, concluded an arrangement with Johnston, who had the legal title, whereby he transferred his title to her in consideration of the assignment of a mortgage of $900, which she had upon the property of one Sawchuk, and it is said that she agreed to assume the Great West Mortgage, upon which the principal still remained unpaid. The registered title to the Johnston farm is proved by the deputy district registrar, and it appears by his evidence that Johnston transferred to Mrs. Tencha on 22nd April,

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1924, subject to the mortgage, and that there is a certificate of title outstanding in her name.

After the transfer by the husband to his wife, they continued to reside on the farm and to work it as formerly, she doing a man's work on the place, as she had been accustomed to do. There is evidence that she was the better manager, and that she planned the farming operations. The husband was not called.

On 18th November, 1925, grain grown during that season upon the Johnston farm was shipped in three cars in the name of Mrs. Tencha from Cartier Siding in Manitoba, consigned to the Manitoba Wheat Pool, an institution of which Mrs. Tencha seems to have been a member. In one of these cars, no. 321371, there were 1,052.30 bushels of damp rejected 2 C.W. Amber Durum Wheat; in another, no. 310797, 1,145.50 bushels tough rejected 3 C.W. Amber Durum Wheat, while the third car, no. 406159, contained 632.52 bushels net brake and damp rejected Rye. It was upon this grain that the Sheriff proposed to levy the amount of the plaintiff's execution against the judgment debtor, Ignace Tencha, the plaintiff claiming that the grain was liable to answer the judgment debt notwithstanding the transfers to Mrs. Tencha and her certificate of title; Mrs. Tencha, however, claimed the property as her own, and the sheriff, on 5th December, 1925, obtained an interpleader order directing that the plaintiff and the claimant should proceed to trial of an issue in the Court of King's Bench at Winnipeg wherein the bank should be plaintiff, and that the question to be tried should be whether the grain shipped

from Cartier Siding in Manitoba on or about the 18th day of November, 1925, in railway cars Nos. C.N 321371 and C.N. 310797, consigned to The Manitoba Wheat Pool, and that part of the grain in car No. 406159, claimed by the above named Irene Tencha, is liable to seizure under the writ of *Fieri Facias* herein as against the claim of the said Irene Tencha.

This issue was accordingly tried, and the trial judge found for the plaintiff, but his judgment was reversed by the Court of Appeal, two of the learned justices dissenting.

There was considerable discussion in both courts about the *Married Women's Property Act,* and there is in the respondent's factum an elaborate review of the provincial decisions interpreting the various acts, although it is not denied on either side that the legislation confers upon the

wife adequate capacity to acquire and hold the property; *Married Women's Property Act*, R.S.M., 1913, ch. 123, ss. 3 et seq. It is however expressly declared by s. 14 that:

> nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife, of any property, in fraud of his creditors,

and, that being so, I apprehend that while Mrs. Tencha acquired title to the land conveyed by her husband and by Johnston, as to which she subsequently obtained a certificate of title, that title, notwithstanding anything in the *Married Women's Property Act*, remained subject to the infirmity by which it was affected by reason of the statute, 13 Elizabeth, c. 5. Section 79 of the *Real Property Act*, R.S.M. 1913, c. 171, which provides that a certificate of title, while in force, shall be conclusive evidence in law and in equity that the person named is entitled to the land described therein for the estate or interest therein mentioned, is also expressed to be subject to the right of any person

> to show fraud wherein the registered owner, mortgagee or encumberancer (*sic*) has participated or colluded and as against such registered owner, mortgagee or encumbrancee; but the onus of proving * * * such fraud shall be upon the person alleging the same.

It follows from these enactments and from their interpretation as affirmed in the judgment of this court in *Fraser* v. *Douglas* (1), that, in the absence of fraud, the conveyance by Ignace Tencha to his wife would have been effective as against his creditors. I shall assume, then, that if the conveyance had not been fraudulent, the wife would have had a vindicable right to the crops; and therefore, if this action is to succeed, it must be because it is established that, as against the husband's creditors, the conveyance of the farm by the husband to the wife was fraudulent, and that the husband, as the owner of the land, was also the owner of the grain as to which the right of seizure is now in question.

I have read the evidence and judgments very attentively, and I entertain no doubt in the result that the findings of the learned trial judge upon the facts should be allowed to stand, except in so far as they are affected by the *Executions Act*, to which I shall presently refer. It would, of course, have been more satisfactory if the written agree-

(1) (1908) 40 Can. S.C.R. 384.

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ment between Johnston and Ignace Tencha had been produced, or if there had been acceptable proof of its contents, particularly with relation to the crops, because it seems that, although after the agreement the crops were raised by the Tenchas, they were shipped by Johnston, who received them and their proceeds, and made the payments which were made thereout. Johnston, who was called for the claimant, in direct examination says:

Mr. BOWLES: Q. How were their payments made during the first four years. Did they make them promptly?

A. Yes. We just shipped the grain, and I looked after the grain for them. Mrs. Tencha doesn't know very much English, and she shipped the grain, and it went to the Station.

Q. There was a mortgage to the Great West Life?

A. Yes. They assumed it, and I paid it.

His LORDSHIP: Who did you sell to?

A. To the Tenchas, Irene and Ignace.

Q. Was your agreement with both of them?

A. No. It was drawn in Ignace Tencha's name—I am not sure.

Mr. BOWLES: Q. You made the payments to the Great West Life on that mortgage?

A. Yes.

Q. And you handled the grain yourself, you say?

A. Yes.

Q. Was there any dissatisfaction on the part of the Great West Life Assurance Company, about the money that they were getting?

A. No, except they complained one year because they didn't get the money, because we were holding the grain to try and get the higher price in the spring, which Mrs. Tencha thought we should do.

* * * * * *

Mr. BOWLES: It is an agreement in writing between yourself and Ignace Tencha?

A. Yes.

Q. It provided for the payment—the instalments?

A. Yes, it does.

Q. Have you a copy of that agreement?

A. No. I didn't bring it here, no.

Q. You haven't got it with you now?

A. No, I didn't bring it here, of course.

And further in cross-examination:

His LORDSHIP: You sold the property for $15,000?

A. Yes.

Q. And you got $1,500 in cash?

A. Yes.

Q. And you got this $850 mortgage?

A. Yes.

Q. And they assumed the mortgage for about $7,000?

A. $6,500 I think it was.

Q. You had about $6,000 coming to you?

A. I had. I was getting a share of the grain during this time, and I applied that on my agreement, of course.

Mr. BERGMAN: Did you get any payments from Ignace Tencha direct, on your agreement, apart from the cash payment?

A. No.

Q. All the rest of the payments that you got on the agreement until Mrs. Tencha took it over, were, what you realized by taking possession of the crop each year?

A. Yes.

Ignace Tencha, as I have said, gave no evidence. He was not called by either side. Mrs. Tencha, in her examination for discovery, speaking of the Johnston farm and the period before she received the conveyance from her husband, had said:

Q. And he was putting in the seed?
A. Yes.
Q. That time he was looking after it himself?
A. Yes, he was boss.
Q. He was boss at that time?
A. Yes.
Q. He got the money from the crop?
A. When?
Q. He got the money from the crop that time?
A. Yes.
Q. He sold the wheat?
A. Yes.
Q. And got the money?
A. Yes.

And, when called at the trial on her own behalf, she said:

Q. Did you have any conversations with him about the buying of the land, that is, with Mr. Johnston, I mean?

A. Yes, I had.

Q. What conversations did you have? What was said?

A. After my husband bought the land I told Mr. Johnston to sell the crop and take the money.

This evidence suggests that the annual crops may have been the subject of some stipulation in the agreement of sale, and that Johnston evidently had an interest in them. It is, of course, a necessary part of the plaintiff's case to show that they belonged to Ignace Tencha under a title which could be upheld in competition with that of Mrs. Tencha, who succeeded to Johnston's rights under his agreement of sale when he conveyed the property to her in 1924; but that burden was *prima facie* satisfied by the proof of Tencha's title and possession upon which the plaintiff relied, and when the transfer from Tencha to his wife, under which she claimed the crops, was shown to be void against

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the plaintiff, and when she introduced the evidence which I have quoted, if the purpose were to show that she had derived title to the crops as the assignee of Johnston, I think it was incumbent upon the claimant to prove the Johnston agreement; it was in her possession, or in that of Johnston under whom she claimed, and she was therefore in a position to produce it, and no doubt would have done so if its provisions had been favourable to her claim. Therefore I think it must be taken that, as between Johnston or his assignee and Ignace Tencha, the crops belonged to the latter.

Then, if the transfer by Ignace Tencha to his wife were, as is found, fraudulent and void against his creditors, has Mrs. Tencha nevertheless a right to the grain subsequently grown upon the land? The Court of Appeal answers this question in the affirmative, relying upon the cases of *Kilbride* v. *Cameron* (1), and others to which I shall refer. *Kilbride* v. *Cameron* (1) was heard before two judges of the Court of Common Pleas of Ontario, Adam Wilson J. and John Wilson J., on appeal from Richards C.J., the Chief Justice of that court. It was an interpleader issue to try whether the crops mentioned below were the property of the claimant as against the defendant, who was an execution creditor of John Kilbride, the claimant's father. There were twenty-four acres of hay in stack, also sixteen acres of wheat and four acres of peas growing upon a lot which John Kilbride, the former owner, had conveyed to one of his sons, either Thomas or another who conveyed it to Thomas, who devised it to his brother Patrick, who conveyed it to the claimant. Patrick had got the land subject to a mortgage; the maintenance of his father and mother; a small annuity to them during their lives, and other charges, and he had conveyed to the claimant subject to these. The consideration of the deed from John Kilbride was that his son should pay him $500, and also pay his debts. It was contended at the trial that all these conveyances and transactions were fraudulent and voluntary and not intended to pass the land in fact, but the Chief Justice was of opinion upon the evidence that there was an intention to pass the property in the land, and that there

(1) (1867) 17 U.C.C.P. 373.

was no evidence upon which the jury could be satisfied that the intention was otherwise. He was also of the opinion that even if the conveyances were fraudulent, still the grain and crops raised upon the land by the plaintiff or his brothers by their labour and at their expense could not be taken in execution to satisfy the father's debts and he directed a verdict for the plaintiff. Upon motion for a new trial, A. Wilson, J., considered that, even if the transactions relating to the land were not valid as to the creditors of the father, that would not determine the right of property to the crops in question, because it was shown that the father did not raise the crops nor furnish the means for doing so, and that the labour and means were contributed by the sons alone. He thought that, assuming the deed to be fraudulent, the sheriff's right to seize the crops depended upon whether John Kilbride, the judgment debtor, had contributed to the expense of raising them. He proceeded to say, moreover, that the burdens imposed by the devisor upon the devisee, and which the devisee assumed to discharge, constituted an actual and valuable consideration which would support the prior fraudulent deed, unless both devisor and devisee could be charged with notice of the fraudulent object, and he concluded upon the evidence that the crops were the sole property of the plaintiff as against the execution creditor. J. Wilson J., on the other hand, considered that the evidence rather pointed to the fact that the conveyances were colourable, and that the crops therefore belonged to the father, and he thought there should be a new trial. The report adds that Richards, C.J., expressed an opinion in favour of the view of A. Wilson J., but took no part in the judgment, as he had not been present at the argument, and that, the court therefore being equally divided, the rule could not be discharged, and the verdict consequently stood. There is thus nothing conclusive about this case, even for the court by which it was decided. In *Johnston Lumber Co.* v. *Hager* (1), Clarke J.A., delivering his judgment of the Appellate Division of the Supreme Court of Alberta, quotes with approval the judgment of J. Wilson J., in *Kilbride* v. *Cameron* (2); and, in *Standard Trust Co.*

(1) (1924) 20 Alta. L.R. 286.
(2) (1867) 17 U.C.C.P. 373.

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v. *Briggs* (1), Harvey C.J., of the same court, refers to these cases as showing that, if the conveyance of the land were fraudulent, the crops raised for the transferee do not belong to the transferor. Newlands, J., expressed the same view, citing *Kilbride* v. *Cameron* (2), in *Massey-Harris* v. *Moore* (3), and in *Cotton* v. *Boyd* (4). Thus all these cases, for which no other authority is cited, rest upon *Kilbride* v. *Cameron* (2), a very indecisive case, the reasoning of which, moreover, depends upon facts the opposite of those now in proof. I prefer to apply the rule derived from the Roman Law, by which, at least as against a purchaser other than a *bona fide* possessor, the owner of the principal thing becomes the owner also of the fruits. Here there was no case of *bona fide* possession, because it was at the instance and by the contrivance of Mrs. Tencha that she received the voluntary conveyance, and, as to the possession in fact, husband and wife continued thereafter to occupy and work the premises as they had done before. It is laid down in Blackstone's Commentaries, Vol. II, p. 404, that

> The doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman Law, it any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, in the reign of King Henry III; and have since been confirmed by many resolutions of the courts.

This passage is reproduced with some enlargement in Stephen's Commentaries, 17th ed., Vol. II, p. 525, including the statement that even when the offspring or produce is separated from the principal corporeal object it still belongs to the owner of the latter. It must therefore follow, since the judgment debtor's conveyance of the land was void when brought into competition with the claims of his creditors, that it should, for the purpose of adjudi-

(1) [1926] 1 W.W.R. 832.
(2) (1867) 17 U.C.C.P. 373.
(3) (1905) 6 Terr. L.R. 75.
(4) (1915) 8 Sask. L.R. 229.

cating their rights, be treated as frustrate and not existing, and then it comes to this—that Tencha had the equitable or beneficial title, to which the possession and right to the crops was incident, while his wife, after she had obtained the legal title from Johnston, had the rights that the latter would have had if he had not conveyed to her. She cannot, I think, justify her claim upon the evidence that she directed the farming operations and contributed with her own hands to the necessary labour in which her husband was also engaged.

It is argued, and I think held by some of the judges of the Court of Appeal, that evidence should not have been admitted to prove that the transfer from Ignace Tencha to his wife was fraudulent, and the case of *Donohoe* v. *Hull et al* in this Court (1), is cited; but, looking to the form of the issue, which was settled by agreement between counsel, and having regard to the course of the trial, I think the case as presented must be considered, seeing that the character of the conveyance was regarded by the parties throughout as a question of fact upon which the right of seizure depended. Fullerton J.A., who delivered the dissenting judgment in the Court of Appeal, states that:

> On the trial, counsel for defendant objected to all evidence tendered with a view to showing that the transfer of the land from the husband to the wife was fraudulent against creditors.

He considers, however, for the reasons which he gives, that the evidence was relevant to the issue and therefore admissible. But I think that the learned judge was mistaken in supposing that such an objection was taken. I do not find it noted in the record; on the contrary, when the bank manager was being examined for the plaintiff at the very outset, and was asked to prove some promissory notes which had been given by Ignace Tencha, claimant's counsel said:

> I object to this on the grounds that it is in reference to some dealings between the bank and Ignace Tencha.

Then, upon the discussion which followed, plaintiff's counsel having stated that he was attacking the transfer as fraudulent as against the creditors, there was no answer on the part of the claimant's counsel to that contention, and the judge intimated that he would allow the evidence. The trial proceeded without further reference to the point,

(1) (1895) 24 Can. S.C.R. 683, at p. 692.

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and a great part of the testimony, and of the subsequent discussion in the case, is taken up with the question as to whether or not the transfer was fraudulent. It was held by Ritchie C.J. in *Royal Insurance Company* v. *Duffus* (1), following a similar ruling of Lord Denman in *Rex* v. *Grant* (2), that.

When evidence is tendered the judge and opposing counsel are entitled to know the ground on which it is offered, and none can be urged on appeal that has not been put forward at the trial.

This ruling expresses a sound principle, well recognized in practice. If the conveyance be fraudulent the sheriff has the right and is compellable to seize, and the question of fraud is therefore one which enters into the very heart of the issue. It is no more immune from trial in interpleader proceedings than any other material fact.

It has always been common practice to determine, in an action against the sheriff for conversion or for a false return, the character and effect of a conveyance alleged to be fraudulent against creditors. It is not necessary to invoke the jurisdiction of the court to declare the conveyance void or to set it aside. In Baron Parke's well known judgment in *Imray* v. *Magnay* (3), he says:

The conclusion to which we have arrived is, that where there are goods seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is compellable to seize and sell such goods under that subsequent execution; and this by virtue of the statute 13 Eliz. c. 5. (His Lordship read the second section of that statute). The judgment is by the statute made void against creditors, but by implication it is void against a sheriff, who acts in right of a creditor; as a deed is, which is fraudulent against creditors; *Turvil* v. *Tipper* (4). And it is now of frequent occurrence that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor; and the statute seems to us to put both on the same footing. The creditor has no other way of avoiding the judgment, than by enforcing his execution for his debt, notwithstanding an execution upon it; or by application to the equitable jurisdiction of the court to set it aside, which we apprehend has arisen in comparatively modern times; and whatever right the creditor had at the time of the statute he has now.

The issue under the Interpleader Rules is devised as a convenient means to enable the sheriff and the parties to have the question determined as to whether the sheriff is

(1) (1890) 18 Can. S.C.R. 711.
(2) (1834) 5 B. & Ad. 1081, at p. 1085.
(3) (1843) 11 M. & W. 267, at p. 275.
(4) Latch, 222.

compellable to seize and sell the goods, and for the information of the court the issue is framed to include all questions which arise as to the title. There are no pleadings, and when the parties and the court understand, as they did in this case, that the object is to ascertain whether or not the conveyance upon which the claimant relies was fraudulent as against the creditors of the judgment debtor, the trial ought, I should think, to proceed upon that footing. In any event, it is, I think, too late to object upon appeal that there was a mistrial because the fraud was not pleaded.

It is suggested, if not held by the Court of Appeal, that the transfer cannot be attacked by the sheriff if it be intended to operate between the parties—that it must be shown to be a mere sham or device for keeping off the sheriff. But it is, I think, certain, and it is unnecessary to quote cases for the proposition, that a deed, like that of Ignace Tencha to the claimant, made without valuable consideration and with the intention of defeating the grantor's creditors, is void as against them, and as against the sheriff representing them, although, as between grantor and grantee, it be intended to operate irrevocably as an absolute gift. Transfers of that nature are not to be confounded with those which were intended to prefer one or more of the grantor's creditors, or to avoid an execution by granting such a preference. Although the debtor's right of preference has been abrogated or modified by the Bankruptcy Acts or other statutes, it was admissible by Common Law, and was not affected by the Statute of Elizabeth, and a conveyance creating preferences was therefore formerly good, subject however to be avoided if it were shown to be a mere sham or pretext to keep off an execution and to enable the debtor to have the property back again; that, in a proper case, was a question for the jury, but it does not arise in a case like the present, which involves no question of preference, and where the purpose is to put the property out of reach of the creditors. Such a conveyance does not operate against them, sham or not. *Twyne's case* (1); *Riches* v. *Evans* (2).

(1) (1601) 3 Co. Rep. 80b. (2) (1840) 9 C. & P., 640.

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There is, however, difficulty in the plaintiff's way arising out of a point which does not appear to have been raised in the courts below nor by the respondent's factum, and which nevertheless has been pressed in this Court without any objection on the ground of prejudice. In any case, it invokes a statutory rule and the Court is bound to consider it. It is declared by s. 29 of the *Executions Act*, R.S.M., 1913, ch. 66, that:

> The following personal and real estate are hereby declared free from seizure by virtue of all writs of execution issued by any court in this province, namely, * * * *
>
> (*h*) the land upon which the judgment debtor or his family actually resides or which he cultivates either wholly or in part, or which he actually uses for grazing or other purposes;
>
> Provided the same be not more than one hundred and sixty acres; in case it be more, the surplus may be sold, subject to any lien or encumbrance thereon.

And by s. 34, it is provided that:

> The judgment debtor shall be entitled to a choice from the greater quantity of the same kind of property or articles which are hereby exempted from seizure.

It is said in the appellant's factum that the Johnston farm was a 240 acre farm, but I see no evidence in support of that statement. The farm appears to have consisted of 320 acres, that is the statutory complement of a half section, and Mrs. Tencha says that in 1925 they sowed on the Johnston farm 150 acres of wheat, 20 acres of oats, and 100 acres of rye. She says, moreover, that there were 30 acres not worked or ploughed, and that the farm comprised in all 320 acres. This leaves 20 acres, the use of which is unaccounted for. The issue to be determined is whether the wheat and rye are liable to seizure under the execution: but transfers of property which is not available to creditors are not, I take it, avoided by the Statute of Elizabeth. Therefore I think the Statute may be taken as declaring, in its application to the case, that the 150 acres of wheat and 10 acres of rye are exempt, because the judgment debtor having a choice, which it would seem to be just that the claimant should exercise, would naturally elect for the exemption of the more valuable part of the crop. The plaintiff can therefore in these circumstances succeed upon the issue only as to nine-tenths of 632.52 bushels net brake and damp rejected rye. As to so much the plaintiff appears to be entitled to the proceeds.

The plaintiff should have the costs of the interpleader order; and, as the costs with relation to the wheat and the rye are not separable upon any other basis, all other costs in all Courts should be apportioned *pro rata* according to the value of the grain as to which the respective parties succeed. *Dixon* v. *Yates* (1); *Lewis* v. *Holding* (2); *Clifton* v. *Davis* (3); Annual Practice 1927, p. 1336.

The judgment of Anglin C.J.C. and Mignault J., dissenting, was delivered by

ANGLIN C.J.C.—In this interpleader issue the question for determination is whether the grain seized by the sheriff under a writ of *fieri facias* issued by the plaintiff (appellant) against the lands of Ignace Tencha was liable to such seizure against his wife, Irene Tencha, the defendant.

The grain when seized was upon cars of the Canadian National Railway consigned to the Manitoba Wheat Pool by Irene Tencha, who was a member of that organization. It had been grown in the year 1925 on land known as the Johnston Farm, which had stood in her name in the land titles register since 1922, and for which she held a certificate of title.

By the *Married Women's Property Act* (R.S.M. 1913, c. 123, s. 5) it was enacted that

all property which * * * * shall be, standing in, or allotted to, or placed, registered or transferred in or into, or made to stand in, the sole name of a married woman, shall be deemed, unless and until the contrary be shown, to be her property * * * ; and she alone shall be entitled to deal therewith, and to receive the rents, issues, dividends, interests and profits thereof;

and by s. 2 (*b*) "property" is defined as meaning

any real or personal property, of every kind and description, of a married woman

and as including

all wages, earnings, money and property, gained or acquired by a married woman in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest * * *.

Apart, therefore, from any question of onus arising from the facts that the execution creditor is the plaintiff and the

(1) (1833) 5 B. & Ad. 313, at p. 347.
(2) (1841) 2 Man. & G. 875.
(3) (1856) 6 E. & B. 392.

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claimant is the defendant, the property in question must be regarded as that of Irene Tencha "unless and until the contrary be shown" by the execution creditor. Accordingly, the question for determination is: Did the evidence establish such an ownership of, or interest in, the consigned grain on the part of the judgment debtor, Ignace Tencha, as was exigible under the execution against him? The learned trial judge held that it did, explicitly resting that conclusion on the two distinct grounds:

1. That the transfer to the wife was a fraudulent transaction, executed for the purpose of defrauding creditors of the husband by preventing the recovery of their claims against him, and that, although the land is registered in the name of the wife, it is not hers, and the crops grown thereon are his.

2. That even if the farm were the property of the wife she was not carrying on the farming business separate and apart from her husband within the meaning of the statute, and, adopting the language of Mr. Justice Killam in the *Slingerland* v. *Massey* case (1), "I cannot think that the legislature intended to protect from the husband's creditors the produce of his labour in an occupation which the wife allows him to carry on upon her lands—or to permit him thus to bestow the fruits of his labour on his wife against his creditors.

By a majority the Court of Appeal reversed this decision, questioning the soundness of the finding that the transfer of the Johnston Farm to Mrs. Tencha was fraudulent and void as against her husband's creditors, but holding that, although it were, inasmuch as the transfer was *inter partes* intended to be effective and was not a mere sham and the farming operations had been carried on by Mrs. Tencha as proprietor and without her husband having any interest in or control over them, the grain seized was her exclusive property and was not exigible under the plaintiff's execution against the husband. The dissenting judges also expressed the views that

there is no issue on the record * * * that the transfer of land * * * was fraudulent against creditors

and that a finding that it was

is by no means conclusive of the question as to the ownership of the grain;

and they agreed with the trial judge that

the question of how she (the wife) became the owner cannot be enquired into * * * in any way to affect her registered title, but it seems to me that it can be gone into for the purpose of ascertaining the *bona fides* of her (the wife's) claim to be engaged in the business of farming these lands separate and apart from her husband.

(1) (1894) 10 Man. R. 21.

In holding that the farming operations on the Johnston Farm were not carried on in 1925 by Mrs. Tencha separately from her husband, the learned trial judge rested his conclusion on some early decisions of the Manitoba courts, of which *Striemer* v. *Merchants' Bank* (1), is, perhaps, the strongest. These cases discussed the words "which she carries on separately from her husband" before the amendment had been made which attached to them the words: "and in which her husband has no proprietary interest." They, in effect, held that if the husband resides with his wife on the farm and assists her in the raising of the crops, although the farm belonged to the wife and she conducted it on her own account, employing her husband to aid in the work, the crop is liable to seizure under an execution against the husband.

The learned judge did not find that the carrying on of the farming operations by Mrs. Tencha was merely colourable or a sham; and the evidence, as we read it, would not warrant such a finding. On the contrary, there is abundant evidence to support the view expressed by the learned judges who constituted a majority in the Court of Appeal that, after 1922, the farming operations on the Johnston Farm were actually and *bona fide* carried on by Mrs. Tencha on her own account and without her husband having any "proprietary interest" therein or any control thereof.

If the question whether Mrs. Tencha is the owner of the Johnston Farm as against the creditors of her husband were to be determined in this proceeding, we should have to consider the evidence very carefully indeed before holding that she is not. It seems to us extremely doubtful whether Ignace Tencha had any real or substantial equity in that farm—whether the whole beneficial interest did not belong to Johnston and did not vest in Mrs. Tencha by virtue of his conveyance to her. But that issue is not before us and in our view its determination is of very little importance in deciding the ownership of the grain in question.

We shall, therefore, assume, but without so deciding, that the evidence of the circumstances under which Mrs. Tencha acquired the Johnston Farm justified the finding

(1) (1894) 9 Man. R. 546.

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that the transfer of it to her was void as against the creditors of Ignace Tencha. We accept the view that such evidence was admissible as relevant to the question of the *bona fides* of Mrs. Tencha's claim that she had actually carried on the farming operations since 1922 separately and on her own account and that her husband had no proprietary interest therein. We are, however, satisfied that the conclusion of the majority of the learned judges of the Court of Appeal, that the operations were in fact so carried on by Mrs. Tencha, as she asserts, must also be accepted.

We are further of the opinion that the construction placed by the learned trial judge on the words of s. 2 (*b*) of the *Married Women's Property Act* was erroneous, and that the contrary view held by the majority of the learned judges of the Court of Appeal as to its meaning and effect was correct; and we agree in the unanimous view of that court, to quote from the dissenting judgment of Fullerton J.A., that

> a finding that a transfer is fraudulent as against creditors is by no means conclusive of the question as to the ownership of the grain.

On the point last mentioned the various provincial Courts of Appeal appear to have uniformly held that the invalidity of the title of the transferee of land as against an execution creditor of the transferor by no means determines the right of such creditor to have crops grown on the land taken under his execution. It was so decided in Ontario, in 1867, in the case of *Kilbride* v. *Cameron* (1), by the Court of Common Pleas (Adam Wilson and John Wilson JJ.) affirming Richards C.J. So far as we can ascertain, that decision has never since been questioned and has been followed and approved in recent years by the Supreme Courts of the Western Provinces in cases cited in the judgments of Dennistoun and Trueman, JJ.A., in the Court of Appeal.

It was pointed out in the *Kilbride Case* (1) by Adam Wilson J., that

> the parties intended to pass the estate in the land by the different conveyances

and that

> there was no proceeding whatever which directly impeached the land transfer, for the execution was against goods, not against lands

(1) (1867) 17 U.C.C.P., 373.

The admission, he said, that the

transactions as to the land were not valid as against the creditors of the father * * * would by no means determine the right of property to the crops in question.

John Wilson J., said

If * * * as against creditors (the conveyances) were fraudulent and void, the crops would not belong to the (transferor); but if * * * the whole was colourable only * * * then the crops were the property of John Kilbride (the grantor).

The last of the decisions cited, *Standard Trusts Co.* v. *Briggs* (1), was rendered by the Court of Appeal for Alberta. The circumstances very closely resemble those now before us. Indeed they were stronger in favour of the execution creditor, inasmuch as the land had there been transferred to the wife after the execution against her husband had issued and the wife admitted that the farming operations were carried on by her and as her separate business, although with her husband's assistance, because of the existence of the execution against him. The judgment of the Court was delivered by Harvey C.J.A., who said, at p. 833:

Even if the conveyance of the land were fraudulent—*Kilbride* v. *Cameron* (2), and *Johnstone Lbr. Co.* v. *Hager* (3), show that crops raised by the transferee do not belong to the transferor. The crops in question were, of course, not transferred by the husband to the wife. If they ever were his, his creditor has a right to seize them. If they were not, equally, the creditor has no such right. The question is really whose business the farming operations which produced the crops, was * * *

and, at p. 835,

In the present case the only oral testimony is that of the wife. She is quite evidently a very clear minded, intelligent woman and one may judge quite capable of managing any ordinary business enterprise. The learned trial judge made no finding of fact whatever helpful as to the decision whether she is the real manager of the farming operations * * *

and, at p. 836,

There is no law of which I am aware that gives an execution creditor the right to compel the debtor to work for him though we have laws which impose obligations upon a man to provide for his wife and children. The plan adopted here was for the purpose of enabling the husband to work efficiently, to perform his legal obligations to his family without furnishing his creditor with the opportunity to deprive them of the fruits of his labour. When the wife was asked if she paid her husband anything for his labour she said she did not but that he was receiving the same reward for his labour that she had received for hers during the preceding 12 years of their married life. She said, however, that she employed and paid all the hired labour that was required and paid all other

(1) [1926] 1 W.W.R. 832. (2) (1867) 17 U.C.C.P., 373.
(3) 20 Alta. L.R., 286; [1924] 1 W.W.R. 389.

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expenses and, while her husband apparently worked much as he had done before, she and her children also themselves worked to some extent in the fields and that her husband in respect to any acts of management acted as her foreman.

The resemblance between these facts and those of the case now before us is very striking. The Court (Harvey C.J.A., Beck and Clarke JJ.A.) set aside the judgment of the trial judge in favour of the execution creditor.

In our opinion the statement of the law, bearing on the question now being considered, in *Kilbride* v. *Cameron* (1) and the decisions following it is correct. But, if we thought its soundness dubious, we should hesitate to reject a view so distinctly enunciated and which has prevailed so long and has been so uniformly acted upon. We, accordingly, agree with what appears to have been the unanimous opinion of the Manitoba Court of Appeal in the present case that, although the transfer of the land to the wife should be deemed a fraudulent transaction as against the creditors of the husband, it does not follow that he had an interest in the crops which would make them seizable under an execution against him.

On the second ground taken by the learned trial judge we are of the opinion with the majority of the learned judges of the Court of Appeal that the grain in question was " property acquired " by the respondent in an

occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest

within the meaning of clause (*b*) of s. 2 of the *Married Women's Property Act,* R.S.M., 1913, s. 123.

Once the conclusion is reached that the carrying on of the farming operations by Mrs. Tencha was not a mere sham but was *bona fide* intended to be for her exclusive benefit and that her husband had no proprietary interest therein or control thereof, we are satisfied that the facts that he resided on the farm and aided in the farming do not prevent the wife from claiming the crops grown as her own to the exclusion of his creditors. We should have viewed the farming operations as having been carried on by Mrs. Tencha " separately from her husband " had the case arisen under the Manitoba *Married Women's Property Act* of 1892, i.e., before the addition of the words:

(1) (1867) 17 U.C.C.P. 373.

"and in which her husband has no proprietary interest." We agree with the construction placed on the words "carried on separately from her husband," as they stood in the early Ontario statute, by Spragge C.J.O., and Cameron J., in *Murray* v. *McCallum* (1), rather than with the narrower construction given them by Burton and Patterson JJ.A. That the Ontario Legislature intended that the view taken by the two former judges of the effect of the legislation should prevail was made clear by its action in substituting in 1887 the words: "and in which her husband has no proprietary interest" for the words: "separately from her husband." (50 V., c. 7, s. 22).

In Manitoba, instead of making such a substitution, the Legislature in 1900 merely added the words: "and in which her husband has no proprietary interest," leaving the words "separately from her husband" still in the Act. (63-64 V., c. 27, s. 2 (2)). Unless the words so added be regarded as designed to indicate the view of the legislature that the phrase: "Separately from her husband" shall be taken to mean what Cameron J. (at p. 306) held it did in *Murray* v. *McCallum* (1), it is difficult to understand why these words were inserted. If that be not their effect they are mere surplusage. It should, perhaps, be noted that the Manitoba statute speaks of an "occupation" carried on by the wife "separately from her husband," and not "separately and apart from her husband" as the learned trial judge expressed it.

Where the occupation is *bona fide* carried on as the business of the wife and without her husband having any proprietary interest in it or any right of interference in or control over it—when he takes no part in it other than as his wife's employee—the facts, that he resides with and aids her in carrying it on, do not prevent its being, for the purposes of the *Married Women's Property Act,* her business and an occupation carried on separately from her husband. As Osler J.A., in delivering the judgment of the Court in *Baby* v. *Ross* (2), said, at p. 446:

> There is no law which compels (the husband) to work for his creditors if he chooses to live in idleness, or which prevents him from giving away his time and services, or devoting them towards satisfying one creditor's demand. The arrangement (that he should work for his wife

(1) (1883) 8 Ont. A.R., 277. (2) (1892) 14 Ont. P.R. 440.

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alone, she receiving the whole of the proceeds and he getting nothing but his board) which the plaintiff complains of was neither unreasonable nor illegal; and I am unable to comprehend on what principle it can be said to be a making away of property in order to defeat or defraud creditors.

We have not overlooked the provision of s. 14 of the *Married Women's Property Act* of Manitoba that

> nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife, of any property, in fraud of his creditors.

The only gift suggested to have been made by Tencha to his wife is of the land comprised in the Johnston Farm. The title to that farm is not in issue; we determine nothing as to it; and the plaintiff is entirely at liberty to impeach it in any way in any other proceeding it may be advised to take. There was no gift of the crops by Tencha to his wife. He never had any interest in, or claim upon, them which could be the subject of such a gift. Section 14 has no bearing on the matter of which we dispose.

We are, for these reasons, of the opinion that the judgment *a quo* is right and should be affirmed.

Appeal allowed in part.

Solicitor for the appellant: *J. T. Beaubien.*

Solicitor for the respondent: *A. E. Bowles.*