N. L. MARTIN .....APPELLANT;

AND

FREDERICK C. FOWLER AND OTHERS .....RESPONDENTS.

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*March 25, 26.

*May 7.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—"Creditors' Relief Act"—9 Edw. VII. c. 48, s. 6, ss. 4 (Ont.)—Contesting creditor's lien—"Assignments and Preferences Act"—10 Edw. VII. c. 64, s. 14 (Ont.).

Section 6, sub-sec. 4, of the "Creditors' Relief Act" of Ontario provides that "where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be deprived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates." Section 14 of the "Assignments and Preferences Act" is as follows:—

"14. An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands."

Held, affirming the judgment of the Court of Appeal (24 Ont. L.R. 356, *sub nom. Re Henderson Roller Bearings, Ltd.*), which affirmed that of the Divisional Court (22 Ont. L.R. 306), that the preferential lien given by the former Act to the contesting creditor is not taken away by said sec. 14 of the "Assignments and Preferences Act."

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from a decision of the Court of Appeal for Ontario(1), which maintained the judgment of a Divisional Court(2) in favour of the respondents.

The appellant was assignee for the general benefit of creditors under an assignment by the Henderson Roller Bearings, Ltd., and the respondents were execution creditors of the insolvent company. Under the executions issued by the respective respondents the goods of the company were seized by the sheriff, but before they were sold the company assigned. The respondents successfully contested an interpleader issue with a grantee of the goods which were then sold by order of court and the proceeds paid into court.

The only question for decision of the court on this appeal was whether or not the preferential lien given to an execution creditor by the "Creditors' Relief Act," sec. 6, sub-sec. 4, which is set out in the above head-note is taken away by section 14 of the "Assignments and Preferences Act." The courts below held that it was not.

Lefroy K.C. for the appellant. The intent of the legislature in enacting section 14 of the "Assignments and Preferences Act" was to make it impossible for a creditor to obtain more than a ratable share of an insolvent's assets unless his execution has been completely executed by payment and the interpleader proceedings cannot defeat that intent. *O'Brien* v. *Brodie*(3).

(1) 24 Ont. L.R. 356, *sub nom. Re Henderson Roller Bearings, Ltd.*

(2) 22 Ont. L.R. 306.

(3) L.R. 1 Ex. 302.

The cases of *Reid* v. *Murphy*(1), and *Reid* v. *Gowans*(2), relied on in the courts below are distinguishable and do not apply.

Watson K.C. and *J. Grayson Smith*, for the respondents. The goods were not sold under execution, but under a court order. See *Reid* v. *Murphy*(1); *Reid* v. *Gowans*(2); *Federal Life Ins. Co.* v. *Stinson* (3); the execution creditors had, therefore, acquired a new and independent status.

The execution creditors who have borne the brunt of the proceedings and recovered the assets in the interpleader issue should not be deprived of the benefit of their act in favour of other creditors who have held aloof. See *Wood* v. *Joselin*(4).

D. J. McDougall appeared for the respondent the sheriff of Toronto.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

DAVIES J.—The substantial question to be determined upon this appeal is whether the language of the 14th section of "Assignments and Preferences Act," 10 Edw. VII. ch. 64 (Ont.), is broad and comprehensive enough to embrace and cover creditors of the debtor who have previously to the assignment acquired a preferential claim or lien upon the proceeds of the sale of the debtor's property under an interpleader order under section 6, sub-sections 4 and

(1) 12 Ont. P.R. 338.
(2) 13 Ont. App. R. 501.
(3) 13 Ont. L.R. 127; 39 Can. S.C.R. 229.
(4) 18 Ont. App. R. 59.

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5 of the "Creditors' Relief Act," 9 Edw. VII. ch. 48 (Ont.).

I confess myself to have been greatly influenced by the able argument presented by Mr. Lefroy for the appellants, who contended that all and any preferences or liens which would ordinarily exist in favour of certain special creditors under the "Creditors' Relief Act" had been swept away by the 14th section of the "Assignments and Preferences Act."

A careful consideration of these two statutes, however, has convinced me that the impression made upon my mind at the argument was wrong and that so far as a preference lien, private claim or salvage claim, as my brother Duff prefers to call it, existed in favour of the respondents' claims under the "Creditors' Relief Act" it was not taken away by the 14th section of the "Assignments and Preferences Act."

That section reads as follows:—

> An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands.

The language of the section, it is true, is very broad and general, and the object and intention of the legislature plain, namely, to make an assignment for the general benefits of creditors "take precedence of attachments, garnishee orders, judgments, executions not completely executed by payments and orders appointing receivers by way of equitable execution."

The question is: Does this extend to the preference, priority, lien, salvage, or what you choose to call it,

specially created by sub-sections 3 and 4 of section 6 of the "Creditors' Relief Act" in favour of those creditors who accept and discharge the onus of defraying the expense of contesting any adverse claim made by a third party to the property or its proceeds seized under execution and as to which adverse claims have been set up, interpleader orders made, and contests entered upon, with the result of defeating such adverse claims ?

Does the 14th section of the "Assignments and Preferences Act" extend to such a case at all ?

To determine that requires, of course, a careful examination of the object and provisions of the "Creditors' Relief Act."

And, first, I would remark that the preference, lien, prior-charge or salvage, whatever it may be, given to the creditors who take upon themselves the risk and expense of contesting adverse claims to the property or moneys in dispute is not a preference or lien arising out of an unsatisfied execution in the sheriff's hands simply, but is a statutory right created as a reward or salvage to those creditors who undertake at their own expense to defeat an adverse claim and who are successful in doing so. Those creditors who refuse to accept the onus or burden the statute makes the price of the prize or salvage to be gained do not share in the latter's distribution. The creditors who are entitled to join in, or to accept, the statutory burden and to reap the statutory reward are not execution creditors only. "Certificated creditors" are equally entitled to become parties to the interpleader proceedings and to contribute towards the expense of contesting adverse claims *pro ratâ* and to share *pro ratâ* in the fruits of the contest.

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These certificated creditors are those who not having obtained judgment for the amount of their claims are creditors who have under the statute obtained from the County Court judge a certificate or allowance of their claim.

This "Creditors' Relief Act" not only abolishes priority amongst execution creditors, not only creates a lien or charge in favour of those creditors who agree to assume the expense of contesting adverse claims to the property or its fruits levied upon, but puts the certificated creditor on a par with the execution creditor and entitles him

> to share in any distribution as if he had delivered an execution to the sheriff.

The Act also declares, sub-section 3, section 10, that "*for the purposes of interpleader proceedings* the certificate should be deemed to be an execution."

Sub-section 4, of section 6, expressly limits the distribution in cases where proceedings are taken by the sheriff for relief under interpleader proceedings to such execution or certificated creditors who become parties to the interpleader proceedings, agree to contribute proportionately to the expense of the contest, and if successful become entitled to share in the fruits of success.

I do not think the general words of the 14th section of the "Assignments and Preferences Act" extend to such special statutory priorities, liens or privileges conceded as a reward for the burden assumed.

Take a case where the execution creditor on an adverse claim to the property seized being made refused to assume the burden of contesting, and a "certificated creditor" stepped into the breach, accepted the onus and successfully contested and defeated the

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adverse claim, the conduct of the proceedings being given to him by the judge would section 14 take away his right of preference or priority of payment which was purely a statutory creation ? I venture to think not and that this negative answer to the question answers the appellant's contention as to the scope of section 14.

No reference is made in that section to the certificated creditors' priority or lien. That did not flow from any execution because none such existed as regards the certificated creditors' debt. It was a pure creation of the statute, and I find no words in the 4th section broad enough to cover it or take it away. This argument I confess influences me very much in determining the proper construction of that section.

It was contended that the special lien created by the "Creditors' Relief Act" had been reduced by the 14th section of the "Assignments Act" above set out to the right to have the costs reimbursed to the creditors who had become liable for them.

But, as I said, that section does not extend to the special priority or lien given under the 6th section of the "Creditors' Relief Act."

At any rate I have not been able to satisfy myself that the judgments of the divisional and appeal courts are both clearly wrong in their construction of these statutes and, therefore, concur in dismissing the appeal.

I have not in view of my conclusion as above expressed deemed it necessary to refer to any of the other points argued.

IDINGTON J.—I agree in general with the reasoning of the several judgments of the learned judges in

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the courts below rejecting the claim of the appellant, and do not think it would serve any profitable purpose to repeat same here. Yet I may, in addition thereto, point out that the costs made by section 14 of the "Assignment Act" a preferential claim, are by no means the same costs which the amendment of the "Creditors' Relief Act" constitute, and always constituted, a lien in favour of execution creditors' taking upon them the burden of an interpleader issue and which are sometimes very great indeed.

To give effect to the contention of the appellant would deprive these execution creditors of all the costs incidental to the interpleader proceedings.

If the "Assignments Act" had been amended before or at the same time as the "Creditors' Relief Act" was amended in that regard to add such interpleader costs to what section 14 of the former preserves as a preferential lien, then the argument of the appellant might have had more force. The grievance of interpleading creditors had long been manifest and when the legislature undertook to remedy it, surely the only remedy manifest in the legislation ought to be applied.

It would be clearly inequitable to expose creditors, entering upon expensive litigation to defeat frauds upon creditors, to defeat and serious loss by such contrivances as manifestly were resorted to in this case.

In this regard the amendment to the law was certainly posterior to the original enactment.

I may also point out as supplementing the alleged technical application of legal principles involved in some of the reasonings I adopt and are relied upon below, that if the appellant or one in the like position was driven to make an independent attack upon any

fraudulent assignment, he would, as incidental to relief granted, if creditors such as the respondents were joined as defendants, as inevitably they must be, to give entire relief, have to pay these costs as a condition of relief.

I am not saying such a course was open to him, but if conceivable it would come with a better grace from an assignee in the appellant's position, to claim he was only seeking equity than seems open to appellant herein.

I think the appeal must be dismissed with costs.

DUFF J.—I think the appeal should be dismissed. Apart from statutory enactment an assignee for the benefit of creditors takes only that which his assignor can give him. A transfer of property impeachable under the Statute of Elizabeth as a fraud upon the creditors of the transferor may be perfectly inexpugnable so long as the creditors take no steps to have the property applied in satisfaction of their claims; as against the debtor it may give a perfectly good title to the property transferred. At common law, therefore, an assignee under an assignment for the benefit of creditors as such has no status to attack such a transfer as having been made in fraud of creditors. The "Assignments and Preferences Act" appears to treat these transfers in this way. The property affected is regarded as being in the hands of the transferee exigible in satisfaction of the just claims of the creditors generally to the same extent as it would have been so exigible in the hands of the debtor himself. For the purpose of satisfying such claims the transfer is treated as non-existent and an assignee under an assignment to which the Act applies is authorized as

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the representative of the creditors generally, to take such proceedings as may be necessary to have their rights declared. But in the event of the assignee failing to take steps to make the property affected by a fraudulent transfer available for the creditors generally, the Act authorizes any individual creditor to take such proceedings and confers upon such creditors the exclusive right to enjoy the benefits resulting therefrom if the proceedings should be successful. In this latter case the property affected by the transaction successfully impeached is not captured by the assignment at all.

Provisions similar in principle are found in the "Creditors' Relief Act." Under those provisions, speaking broadly, execution creditors who in interpleader proceedings assume the risk of contesting an adverse claim and are successful, become entitled to the benefits arising from their successful proceedings to the exclusion of creditors who have refused to partake in the responsibilities of the contest.

I think there is nothing in the "Assignments and Preferences Act" in virtue of which an assignment by the debtor can have the effect of divesting such creditors of this privilege once it has vested in them. It is not necessary to pass upon the question whether the surplus of property, the subject of such proceedings, could after payment of the privileged creditors be claimed by the assignee for the behoof of the creditors generally: it seems to be clear that there is nothing in the Act which can fairly be held to displace the privilege in favour of such creditors. Section 14, which is relied upon, gives the assignment precedence over "judgments and executions not completely executed by payment." But the privilege in question is

not an incident of the creditor's judgment or execution, it is a special privilege conferred upon him by the law as a reward for his activity in frustrating an attempt to commit a fraud; and I do not think the language of section 14 requires us to hold that it is within the purview of that section. On the whole, reading the relevant statutory provisions together, a reasonable view appears to be that the "Assignments and Preferences Act" recognizes the principle upon which the privilege created by the "Creditors' Relief Act" is based and there is nothing in the former Act which requires us to hold that the benefit of that privilege once acquired is by its provisions devested for the behoof of the creditors as a whole.

ANGLIN J.—In my opinion the assignment to Martin did not deprive the execution creditors who had successfully contested the interpleader issue against Atkinson of the special lien upon the goods under seizure which they thereby acquired in virtue of the provisions of the "Creditors' Relief Act," 9 Edw. VII. (O.) ch. 48. The effect of those provisions was not merely to establish the right of the contesting execution creditors to payment of their executions out of the proceeds of such goods, but also to bar *pro tanto* the right to share in them of all other creditors (sec. 6, sub-sec. 4), including the real claimant who is prosecuting the present proceedings in the name of the assignee, Martin. If any interest in those goods passed to Martin by the debtor's assignment, it was subject to the rights which had accrued from the anterior interpleader proceedings. I find nothing in the "Assignments and Prefer-

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ences Act" (10 Edw. VII. (O.) ch. 64, which deprives the contesting execution creditors of the statutory privilege which their activity had secured to them — nothing which restores to the other creditors rights of which the "Creditors' Relief Act" by reason of their inaction had deprived them.

Mr. Justice Meredith, I venture to think, misses the point when, he says of the statutory privilege acquired by the contesting execution creditors, that it was

> a lien which, of course, their executions alone gave them; there could be no other.

After the determination of the interpleader issue in their favour the successful execution creditors, in virtue of the statutory right conferred by the "Creditors' Relief Act," occupied a much stronger position than that of mere execution creditors. Elsewhere the same learned judge speaks of the creditor in whose behalf the present proceedings are taken as

> one who * * * never had the opportunity of joining in the contest.

It would almost seem that he had overlooked the provisions of sections 7 *et seq.* of the "Creditors' Relief Act," 9 Edw. VII. ch. 48 — particularly that of subsection 3 of section 10. Neither can I agree with him that

> it is quite clear that the goods in question have always been, as against creditors and the assignee, the property of the debtors.

The learned judge writes as if he were under the impression that a conveyance which is fraudulent as against creditors is absolutely void. As pointed out in numerous cases under the Statute of Elizabeth, notwithstanding that such a deed is there declared to be "clearly and utterly void, frustrate and of none

effect," it is good *inter partes* and not absolutely void, but only voidable at the instance of creditors.

Till made void by "creditors and others," it is a valid deed, and one by virtue of which the legal estate vests in the grantee, subject to its being divested. (See May on Fraudulent Conveyances, 2 ed., pp. 316-7, 325.)

It may be that these premises account in part for the conclusion of the learned appellate judge, who differed from his colleagues, that the 14th section of the "Assignments and Preferences Act" "very plainly covers this case."

Except as against the contesting execution creditors the conveyance to Atkinson had not been avoided when the assignment to Martin was made; nor has it since been avoided. On the contrary, as has been pointed out in the courts below, the re-conveyance from Atkinson, under which the assignee Martin now asserts title, proceeds on the assumption that the debtor's property had passed to and was vested in Atkinson.

I respectfully concur in the opinions expressed in the provincial courts by the learned judges who held that the Martin assignment cannot prevail against the rights of the respondents and would dismiss this appeal with costs.

BRODEUR J.—I concur in the opinion expressed by Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellant: *DuVernet, Raymond, Ross & Ardagh.*

Solicitors for the respondents: *Watson, Smoke, Chisholm & Smith.*