THE DUEBER WATCH CASE MANUFACTURING COMPANY (PLAINTIFF) ..... APPELLANT;

AND

FRANK S. TAGGART & CO., FRANK S. TAGGART AND CHARLES CAMPBELL (DEFENDANTS) ..... RESPONDENTS.

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*April 24.

*June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Insolvent firm—Assignment for benefit of creditors—Composition—Discharge of debt—Release of debtor.

T. and C. doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the Dueber Company, a creditor, to pay off a chattel mortgage on the stock, and a composition of 25 cents on the dollar of unsecured claims, the company to receive its own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the Dueber Company, and the arrangement was carried out, the company eventually as provided in a contemporaneous deed executed by the parties interested reconveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action by the company against T. & Co. on the original debt.

Held, affirming the judgment of the Court of Appeal (26 Ont. App. R. 295) that the original debt was extinguished and C. was released from all liability thereunder.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment of MacMahon J. at the trial, who dismissed the action with costs.

The facts are sufficiently stated in the above headnote.

C. Millar for the appellant.

Nesbitt Q.C. for the respondents.

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

(1) 26 Ont. App. R. 295.

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The judgment of the court was delivered by :

GWYNNE J.—This appeal is from a judgment which relates only to the interests of defendant Campbell who formerly was a partner of the defendant Taggart, they having been in business together in partnership under the name of "Frank S. Taggart and Company." The appeal must be dismissed with costs, and upon the grounds upon which the courts of Ontario have proceeded. There cannot be entertained a doubt that the proper construction to be put upon the subject matter involved in this appeal is that all the acts and undertakings of Mr. Moore, who was secretary treasurer and had sole management of all the affairs of the company with the exception of the manufacturing business which is under the management of the president, were the acts and undertakings of the plaintiff company. Upon Taggart and Company executing the assignment for the benefit of their creditors, Taggart went to the State of Ohio to see the plaintiff company who next to a firm of Buntin, Reid and Company (who had security by chattel mortgage upon the stock in trade of the insolvent firm) were the principal creditors of the latter. The insolvent firm had also several other creditors whose united claims amounted to a little over $30,000. Taggart's object in seeing the plaintiffs was to endeavour to get them to come to his assistance in getting him out of his difficulties, and to set him up again in business on his own account altogether apart from the defendant Campbell. He had on that occasion an interview with the president of the company and the secretary treasurer, Mr. Moore, and gave them to uuderstand that if the plaintiff company would pay 25 cents on the dollar to the creditors, other than Buntin, Reid, and Company, and the plaintiffs themselves, he could get a discharge from all

the other creditors, and that then his estate which he represented to be worth more than $40,000 would be amply sufficient to pay Buntin, Reid & Co., and the plaintiffs. He so far prevailed with the plaintiffs that Mr. Moore was sent to Toronto to investigate the matter with full authority to make any arrangement he should think fit upon behalf of the plaintiffs. The president of the company says that it was left to Moore to carry out the transaction and to do what he liked in the matter. Whatever Moore did, he said, "was us, was for us."

Moore came to Toronto and saw the assignee in the insolvency, and adopted the valuation which the assignee had made of the insolvent estate and agreed to advance the sum of 25 cents on the dollar of the claims of the unsecured creditors, and did advance the sum necessary for that purpose, and thereupon the said creditors executed a deed of discharge of the said insolvent firm dated the 27th day of April, 1893.

The next step was the preparation of a deed in such form that it could be executed by Mr. Clarkson, the assignee of the insolvent firm, and for that purpose a deed was prepared and executed by the said assignee bearing date the 11th day of May, 1893, whereby in consideration of the sum of $8,637 therein alleged to be paid by Moore to the said assignee, the latter conveyed to Moore, his executors, administrators and assigns, all the estate and effects, real and personal, and all the right, title, interest, property, claim, demand, rights and credits of every nature whatsoever of the insolvent firm subject to the claims of the plaintiff company and of the Hampden Watch Company, and of Messrs. Buntin, Reid and Company.

The above sum of $8,637 was the 25 cents in the dollar advanced by the plaintiff company through Moore to pay the other creditors of the insolvent firm

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and a sum to cover costs of the proceedings taken on the consignment for the benefit of creditors, and the Hampden Watch Company was either a part of the plaintiff company or under its control

The deed contained a covenant executed by Moore, that he would duly settle with the said plaintiff company and with the Hampden Watch Company for their claims against the estate of the said firm of Taggart and Company, and would indemnify and save harmless the said assignee from all said claims.

Now this deed, in which Moore is named to be the grantee, was in substance a deed conveying the estate of the insolvent firm to the plaintiff company, and that this is so plainly appears by an instrument bearing date the same day and expressed to be made between the plaintiff company of the first part, Buntin, Reid and Company of the second part, Moore of the third part, and Taggart of the fourth part, whereby it was declared that Moore *should become* the purchaser of the said estate of the said insolvent firm, and should hold the same upon trust to sell and to apply the proceeds after deducting necessary expenses, as follows: 1st. To pay Buntin, Reid & Co. the amount secured by the chattel mortgage with interest and costs. 2nd. To pay the said sum of $8,637 and interest and costs 3rd. To pay the plaintiff company the amount of their debt with interest at the rate of 7 per cent; and 4th. Upon trust to assign and set over unto Frank Stark Taggart aforesaid, his executors, administrators or assigns, or to whom he or they should appoint, all the rest, residue and remainder of the said estate and effects together with the right of successorship in the said business, and all the assets of the said business then subsisting. The agreement then provided that Moore might at his discretion buy such other stock as he might think fit, and that the cost of the purchase

money of such goods, and the expenses attending the sale thereof should be added to the amount of $8,637 paid to Clarkson, and the proceeds arising from the sale thereof applied first in paying for the same and subject thereto in the same manner as the proceeds of the goods conveyed by Clarkson. Then the agreement contained a clause as follows:

> And the said Frank Stark Taggart having himself the sole and absolute right to the use of the firm name of "Frank S. Taggart & Co.," hereby consents and agrees that the said business shall be carried on as aforesaid by the said Moore in the name of "Frank S. Taggart & Co."

The business was then carried on by Moore on behalf of the plaintiffs, or I should rather say by the plaintiffs through the intervention of Moore, who placed Taggart and one Williams acting in the interest of Buntin, Reid & Co., in possession of the stock in trade conveyed by Clarkson, and of such other goods as the plaintiff through Moore supplied, and who sold them by retail under the name of "Frank S. Taggart & Co.," as provided in the above recited agreement. Moore from time to time received the accounts of and proceeds of sales until the month of October, 1893, when Buntin, Reid & Co. having been paid the amount of their claim upon the 7th day of October, executed a release of such their claim, and thereupon Moore on behalf of the plaintiff, or rather the plaintiff through the intervention of Moore, transferred what remained of the estate and effects which had been conveyed to Moore as aforesaid by Clarkson, the value of which was then estimated at $30,000, to Taggart for the sum of $25,000 secured by Taggart's promissory notes and a chattel mortgage executed by him on the stock in trade, and thus as it appears to me was affected the arrangement as prepared by Taggart in his own private interest, to the utter exclusion of the defendant Campbell, when Taggart in April sought

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the assistance of the plaintiffs. There cannot, I think, be entertained a doubt that all the subsequent proceedings as above related were entered into and carried out for the purpose of setting Taggart up in business again, and that the plaintiffs are the parties who entered into the arrangements with Taggart in the name of Moore, who acted simply as the representative of the plaintiffs; and that the transactions as above narrated had the effect of absolutely discharging the defendant Campbell from all liability to the plaintiffs in respect of the debt of the old firm of which he was a member, cannot I think admit of a doubt.

Appeal dismissed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hughes.*

Solicitors for the respondents: *Mills & Tennant*