FRANK RYAN (DEFENDANT).....APPELLANT;

AND

KATHERINE CHARLESWORTH, ADMINISTRATRIX OF THE ESTATE OF PETER RYAN, DECEASED, AND THE SAID KATHERINE CHARLESWORTH (PLAINTIFF) ..... } RESPONDENT.

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*Mar. 10, 11.
*April 10.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Executors and Administrators—Fraudulent conveyances—Attack by plaintiff, claiming as judgment creditor of deceased and as administratrix

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of his estate, on alleged transfers by deceased in fraud of creditors—Status of plaintiff in said capacities—Doctrine as to extinguishment of debt due to an executor by his testator.

Plaintiff, a daughter of R., deceased, purchased judgments which had been obtained against R. in his lifetime. She later became administratrix of his estate. She then, as administratrix and in her personal capacity, sued her brother, the defendant, attacking transfers made by R. to defendant as having been made to defraud creditors. The Appellate Division, Ont. (36 Ont. W.N. 265), held that the transfers were fraudulent and void as against creditors; and that defendant must account and pay over, out of what had been transferred to him, sufficient to meet creditors' claims; but rejected plaintiff's claim as administratrix to the further moneys in defendant's hands. On appeal and cross-appeal:

Held (1) The findings below that the transfers were made in fraud of creditors should be sustained.

(2) As to defendant's contention that plaintiff's claims against R.'s estate were extinguished by operation of law upon the grant of letters of administration followed by the acquisition of assets by her as administratrix—putting the doctrine, as to extinguishment of a debt due to an executor from his testator, in the form most favourable to defendant, it had no application in this case, as there was nothing to show the existence of assets in plaintiff's hands "sufficient and properly applicable to pay" the judgments acquired by her (*In re Rhoades,* [1899] 2 Q.B. 347, at pp. 352-353).

(3) Plaintiff's position as administratrix did not entitle her to attack the fraudulent transfers. A debtor who fraudulently transfers his property cannot himself attack his fraudulent transaction, and his administrator has no greater right (*Shaw* v. *Jeffery,* 13 Moo. P.C., 432; *Hawes* v. *Leader,* 1 Brownl. & G. 111; *Orlabar* v. *Harwar,* Comb. 348; *Ayerst* v. *Jenkins,* L.R. 16 Eq., 275; *Colman* v. *Croker,* 1 Ves. 160).

Judgment of the Appellate Division, Ont. (*supra*) affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) varying, but as varied affirming, the judgment of Raney J. (2).

The plaintiff and defendant are children of Peter Ryan, late of the city of Toronto, deceased, who died on October 26, 1925, intestate. Letters of administration of his property were granted to the plaintiff on October 31, 1927.

The plaintiff alleged that judgments had been obtained against the said deceased in his life time; that she in her personal capacity had purchased all such judgments as were in force at the date of his death of which she had been able to obtain any knowledge, and was the assignee thereof.

(1) (1929) 36 Ont. W.N. 265. (2) (1928) 34 Ont. W.N. 284.

The dates of the plaintiff's acquisition of the judgments were prior to the date of her taking out letters of administration.

The plaintiff, as administratrix of the deceased's estate, and in her personal capacity, brought action in the Supreme Court of Ontario, alleging that said deceased had from time to time transferred to the defendant various sums of money, stocks, bonds and other assets of said deceased, with intent to defeat, delay and hinder his creditors from obtaining payment of their judgments; that such transfers were fraudulent and void as against the judgment creditors and as against her as their assignee; and that defendant had full knowledge of the circumstances and of said intent and was a party to the fraudulent scheme to defeat the creditors; further that all assets transferred to defendant as aforesaid were to be held by him in trust for the said deceased and form part of his estate. She claimed an account, an order requiring defendant to assign and transfer all of said assets to her as administratrix of the estate of said deceased, and incidental relief.

The defendant denied the plaintiff's allegations; and alleged that, while it was true that from time to time the deceased had given to him sums of money and securities, these were given to him as absolute gifts and advancements for the purpose of assisting him in his business; that many transfers of property had been made by deceased to plaintiff and other members of the family in addition to those made to defendant, and that the transfers made to defendant represented that share or portion which the deceased desired that defendant should have in his estate; and that all transfers made by the deceased to the defendant or other members of the family were matters of common knowledge to plaintiff and other members of the family.

Raney J. (1) gave judgment against the defendant. The formal judgment at trial was as follows:

> 2. * * * that the moneys, stocks, bonds and other assets of the said Peter Ryan transferred or caused to be transferred to the defendant were not gifts to the defendant or advances to him, but were so transferred for the sole purpose of defeating, delaying and hindering the creditors of the said Peter Ryan from obtaining payment of their claims and that all such transfers were and are fraudulent and void and doth order and adjudge the same accordingly;

(1) (1928) 34 Ont. W.N. 284.

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3. * * * that it be referred to the Master of this Court to inquire and state what moneys, stocks, bonds and other assets were transferred by the said Peter Ryan to the said defendant and what of such assets remained in the hands of the said defendant at the date of the issue of the writ in this action and when and for what consideration the defendant disposed of the remainder of said assets and the market value thereof on this date, and the said Master is hereby directed to advertise for creditors of the said Peter Ryan and to pass on the claims of said creditors and to report;

4. * * * that the moneys and securities received by the plaintiff from the said Peter Ryan and the securities still in the hands of the defendant that were received by him her sister, Margaret Monteith, and her brother, Bernard Ryan, belong to the Estate of the said Peter Ryan, and doth order and adjudge the same accordingly. [*Reporter's Note:* Apparently there is some omission or error in this paragraph. As to what was directed by the trial judge, see 34 Ont. W.N., at p. 286.]

5. * * * appoints the Sheriff of the City of Toronto Receiver of the assets of the Estate of the said Peter Ryan and directs the plaintiff and the defendant to turn over to the said receiver all moneys and securities in their hands belonging to the said estate and that the solicitor for the said sheriff shall act as solicitor for all creditors of the said Peter Ryan other than those whose claims have been assigned to the plaintiff until such creditors are ascertained and are otherwise adequately represented on the said reference;

6. * * * that further directions and the question of costs and of the Sheriff's compensation be reserved until the said Master shall have made his report.

On appeal by the defendant, the Appellate Division (1) varied the judgment below, but, subject to the variation, dismissed the appeal with costs. The formal judgment in the Appellate Division was as follows:

Upon motion * * * by way of appeal * * * and the plaintiff by her counsel agreeing not to assert any individual claim to the moneys recovered from the defendant save for her out of pocket expenses in obtaining the assignments of the judgments on which this action is brought and to hold the moneys recovered from the defendant for the benefit of the next of kin of the said Peter Ryan, deceased, other than the defendant, * * *

1. This Court doth order that the said Judgment be varied and as varied be as follows:

(1) "* * * that the moneys, stock, bonds and other assets of the said Peter Ryan transferred or caused to be transferred to the defendant were so transferred for the sole purpose of defeating, delaying and hindering the creditors of the said Peter Ryan from obtaining payment of their claims and that all such transfers were and are fraudulent and void as against the plaintiff Katharine Charlesworth and other creditors of the said Peter Ryan, deceased, and doth order and adjudge the same accordingly.

(1) (1929) 36 Ont. W.N. 265.

(2) "* * * that it be referred to the Master of this Court at Toronto to ascertain and state whether the judgments of the plaintiff are the only liabilities of the estate of the said Peter Ryan, deceased, and the said Master is directed to advertise for creditors of the estate of the said Peter Ryan, deceased, and that the said Master do ascertain the amount of the plaintiff's claim and that he do ascertain and pass upon the claims of the other creditors, if any, of the said estate.

(3) "* * * that the defendant do pay to the plaintiff the amount found due to her by the said Master forthwith after the confirmation of the said Master's report and that the said money when recovered by the plaintiff be disbursed in accordance with her undertaking.

(4) "* * * that after payment of the plaintiff's costs the defendant do pay to the other creditors of the said Peter Ryan, deceased (if any), the amounts found due to them by the said Master's report forthwith after the confirmation thereof.

(5) "* * * that Margaret Ryan and Bernard Ryan be added as party defendants in the Master's Office.

(6) "* * * that the plaintiff do recover from the defendant her costs of this action and of the reference before the said Master forthwith after taxation thereof.

7. "* * * that the said Master do also take an account of the costs of the plaintiff as between solicitor and client and the costs, charges and expenses and disbursements of the plaintiff of and incidental to this action over and above the plaintiff's costs as between party and party and apportion the difference among the creditors who have proved their claims before him, including the plaintiff, in proportion to the amounts of their respective claims, and that the said creditors other than the plaintiff do pay to the plaintiff their respective proportions of such difference."

2. And this Court doth further order that in all other respects this appeal be and the same is dismissed.

3. [Costs of the appeal.]

The defendant appealed from the judgment of the Appellate Division to the Supreme Court of Canada. The plaintiff, while submitting that the judgment appealed from was correct in so far as it gave effect to her claim as a judgment creditor, submitted, by way of cross-appeal, that the judgment should be amplified to give effect to her claim as administratrix to recover from the defendant all the property of the deceased that came into his hands in order that she might administer the estate according to law.

The appeal and cross-appeal were dismissed with costs.

D. L. McCarthy K.C. and *S. Haydon* for the appellant.

I. F. Hellmuth K.C. and *M. Des Brisay* for the respondent.

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Duff J.

The judgment of the court was delivered by

DUFF J.—This appeal should, in my opinion, be dismissed. Three substantial points were raised on the argument and these I shall discuss *seriatim*.

First, Mr. McCarthy's principal contention was that the respondent's claims against the estate of Peter Ryan were extinguished by operation of law upon the grant of letters of administration followed by the acquisition of assets by her as administratrix. This, I think, is completely answered by the judgment of Lindley M.R., in *In re Rhoades* (1):

> The older common law authorities go far to shew that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt (and all others of a higher degree, if any) such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly. His words are (Bl. Com. by Kerr, 4th ed., vol. iii, p. 18): "So much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose." Plowden goes further, and says that the property in the assets is changed: See *Woodward* v. *Darcy* (2). But this can only be true if the assets spoken of can be identified and appropriated to the debt which they have satisfied, and this presupposes the exercise of the right in fact; and in the case in Plowden it had been so exercised: See *ibid.*, p. 184. [The learned judge then referred to the facts stated in the report of *Woodward* v. *Darcy* (3), and proceeded:—]
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> Until the executor does some act to shew which assets he retains, it is obvious that the property in them cannot be changed. This has been noticed before: See [1898] 1 Q.B. 286, and Wentworth's Office of Executor, cited in the margin of 1 Plowden, p. 185a. But it was settled that an executor sued by a creditor could give a retainer by himself in satisfaction of his own debt in evidence under a general plea of plene administravit, and that he need not plead a retainer specially: 1 Wm. Saunders, 333, n.6. The extent to which the doctrine that his debt was extinguished was carried is further illustrated by the cases collected in Williams on Executors, vol. ii, p. 1180, which shew that an executor, having assets sufficient and properly applicable to pay a debt due to him from his testator, could not sue the testator's heir nor any third person who might be liable with the testator for the debt in question.

There is nothing in this case to shew the existence of assets in the respondent's hands "sufficient and properly applicable to pay" the judgments acquired by her, and, therefore, it is quite clear that, putting the doctrine in the form most favourable to Mr. McCarthy, it has no application here.

(1) [1899] 2 Q.B., 347, at pp. 352, 353.
(2) 1 Plowd. 184, at p. 186. (3) 1 Plowd. 184.

Second, Mr. McCarthy contends that the respondent was a party to the scheme under which the property in question was acquired by the appellant. It is sufficient to say that while more than one member of the family seems to have been aware of the transactions by which the intestate intended to put his property beyond the reach of his creditors, there is no evidence implicating the respondent.

Third, the concurrent findings of the courts below that the property in question was in fact transferred in fraud of creditors were attacked, but quite unsuccessfully.

The form of the order is perhaps a little exceptional, but in view of the special circumstances there appears to be no good ground for interfering with the disposition of the case by the Appellate Division.

It is necessary to notice a point, urged by Mr. Hellmuth by way of cross-appeal, which, we think, also fails. The argument advanced is very clearly and concisely stated in the respondent's factum in these words:

> The respondent submits that the defendant is retaining property to which he has no right and which was never intended to be his and the equitable rule that a settlor cannot recover from his transferee property fraudulently transferred does not estop an administrator of the settlor seeking to recover assets forming part of the deceased's estate for the benefit of persons not parties to the fraud and that to refuse relief would be to make an equitable rule an instrument of iniquity.
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> The respondent will submit that the point as to whether or not an administrator in the circumstances present here could recover has not been settled by any decision binding on this Court.

We agree with the Appellate Division (1) that this contention is not sustainable, and that as to the property transferred into the name of Frank Ryan by his father, for the purpose of defeating his father's creditors; the respondent, as administratrix, stands in no better position than that which her father would have occupied. "Transfers made by him which were fraudulent and void as being for the purpose of defeating his creditors could not be attacked by him and can not be attacked by his administratrix. A debtor who fraudulently transfers his property cannot himself attack his own fraudulent transaction, and his administrator has no greater right." This passage in the judgment of the learned judge states a settled proposition of

(1) (1929) 36 Ont. W.N. 265.

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law. *Shaw* v. *Jeffery* (1); *Hawes* v. *Leader* (2); *Orlabar* v. *Harwar* (3); *Ayerst* v. *Jenkins* (4); *Colman* v. *Croker* (5).

The appeal and cross-appeal are dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *Guy R. Roach.*

Solicitors for the respondent: *Cassels, Defries & Des Brisay.*

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*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.