ALBERT HENRY HOVEY AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

MATTHEW WHITING AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

1886
*Nov. 13.
1887
*March 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Powers of directors—Assignment for benefit of creditors—Description of property—Change of possession—R. S.O. c. 119 s. 5—Interpleader issue—Appeal from judgment on.

The decision of a judge of the High Court of Justice (which by sec. 28 of the Judicature Act is the decision of the court) on an interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued, is not an interlocutory order within the meaning of that expression in sec. 35 of the Judicature Act, or if it is it is such an order as was appealable before the passing of that act and in either case it is appealable now.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of creditors is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

Quære. Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R.S. O. c. 119?

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment:

Held, that if the assignment did come within the terms of the act its provisions were fully complied with, the deed being duly

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Gwynne JJ.

1886

HOVEY v. WHITING.

registered and there being an actual and continued change of possession as required by section 5.

In such deed of assignment the property was described as "all the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seized or entitled, or of or to which they may have any estate, right or interest of any kind or description, with the appurtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock in trade, goods, chattels, * * * and all other the personal estate, and effects whatsoever and wheresoever, whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever.

The schedule annexed specifically designated the real estate and included the foundry, erections and buildings thereon erected, and all articles such as engines, &c., in or upon said premises:

Held, that this was a sufficient description of the property intended to be conveyed to satisfy section 23 of R. S. O. ch. 119. *McCall* v. *Wolff* (1) approved and distinguished.

But see now 48 Vic. ch. 26 sec. 12 passed since this case was decided.

APPEAL from a decision of the Court of Appeal for Ontario (2) reversing the judgment of Ferguson J. in the Chancery Division (3) in favor of the appellants.

The facts of the case are as follows: The "Farm and Dairy Utensil Manufacturing Company" was incorporated by letters patent, dated the 27th July, 1881, under the Canada Joint Stock Companies' Act, 1877.

The company being unable to meet their liabilities a meeting of the board of directors was held on the 14th August, 1884. At this meeting a resolution was passed that the company should make an assignment of all their estate and effects, and that the president and secretary should execute such assignment to the respondents, which they did on the 15th August, 1884.

The assignment was executed by the president and

(1) 13 Can. S. C. R. 130. (2) 13 Ont. App. R. 7.
(3) 9 O. R. 314.

the secretary of the company, by the trustees, and by a creditor, and was registered in the registry office for the county of Brant and in the office of the clerk of the county court of the same county on the 16th August, 1884. It purports to convey all the real estate of the debtors as set forth in the schedule annexed thereto, and also their personal estate and effects, goods and chattels, which were described as follows: "The "personal estate and effects, stock in trade, goods, "chattels, rights and credits, fixtures, book debts' "notes, accounts, books of account, choses in action, "and all other personal estate and effects whatsoever "and wheresoever, whether upon the premises where "the debtors' business is carried on or elsewhere, and "which the said debtors are possessed of or entitled to "in any way whatever."

The trusts of the deed were for the conversion of the property into money if required, payment of debts, and payment over of any surplus to the company.

There was no by-law, or any assent of the shareholders, or any authority from the shareholders, at a meeting of the shareholders duly called or otherwise, to the said assignment.

The appellants, execution creditors of the company, caused the property comprised in said deed to be seized to satisfy their several executions, and an interpleader order was obtained to test the validity of the deed and ascertain the title to such property. The interpleader issue was tried before Mr. Justice Ferguson who gave judgment in favor of the execution creditors, holding that the description of the property in the deed was insufficient within the meaning of sec. 23 of R.S.O ch. 119, and inasmuch as there was no immediate delivery to the trustees, followed by an actual and continued change of possession, the assignment was invalid. The Court of Appeal reversed this decision, and held

1886

HOVEY v. WHITING.

that although the description of the property was not sufficient, there had been such an actual and continued change of possession as would vest the property in the trustees. The Court of Appeal also held that the directors had power to make the assignment. The execution creditors appealed from the last mentioned judgment to the Supreme Court of Canada.

The questions argued before the Court of Appeal, and submitted to the Supreme Court of Canada are :—

1. That the said judgment of Mr. Justice Ferguson, delivered on the 17th day of February, 1885, being an interlocutory judgment, no appeal lay therefrom to the Court of Appeal.

2. That the directors of a manufacturing and trading company, such as the "Farm and Dairy Utensil Manufacturing Company" was, had no power or capacity, without the assent and authority of the shareholders, duly evidenced by by-law at a meeting called for that purpose or otherwise, to authorise the execution of an assignment of the company's estate and effects for the benefit of creditors.

3. That the assignment for the benefit of creditors was within the act relating to chattel mortgages and bills of sale relating to personal property (R. S. O., ch. 119.)

4 That the description of the property assigned by the said deed of assignment, bearing date the 15th day of August, 1884, was insufficient to satisfy the requirements of sec. 23 of R.S.O., ch. 119.

5. That the sale of the goods and chattels purported to be conveyed by the said deed of assignment was not accompanied by an immediate delivery and followed by actual and continued change of possession as is required by sec. 5 R.S.O., ch. 119.

Robinson Q. C. and *Hall* for the appellants.

As to the right of the plaintiff to appeal from the

judgment of Ferguson J. see *McAndrew* v. *Barker*, (1); *King* v. *Simmonds*, (2).

The directors could not make this assignment without the consent of the shareholders, as each shareholder has a right to have a voice in the disposal of the property of the company. See *Donly* v *Holmwood*, (3); *Beaston* v. *Farmers' Bank of Delaware*, (4); *McNeil* v. *Reliance Ins. Co.* (5).

The description of the property was insufficient according to the decision of this court in *McCall* v. *Wolff* (6) and *Kinloch* v. *Scribner* (7).

The authorities cited on the hearing before Mr. Justice Ferguson (8) were also relied on.

Dr. *McMichael* Q.C. and *S. H. Blake* Q.C. (*Wilson* Q. C. with them) for the respondents.

The question raised as to the right of appeal is not open to the parties here, but if it is it is untenable. See *Dawson* v. *Fox* (9); *Robinson* v. *Tucker* (10).

That the assignment is not beyond the powers of the directors is clear from the authorities *Eppright* v. *Nickerson* (11); *White Water Canal Co.* v. *Vallette* (12). Brice on *Ultra Vires* (13).

On the other points raised for argument the learned counsel relied on the authorities cited in the report of the case in the Chancery Division (14).

Sir W. J. RITCHIE C. J.—In this case I think the appeal to the court below was rightly taken, and with reference to the first proposition, that the directors had no right to assign the property to trustees for the payment of their debts, I am clearly of opinion that they

(1) 7 Ch. D. 701.
(2) 7 Q. B. at p. 311.
(3) 4 Ont. App. R. 555.
(4) 12 Peters (U.S.) 102.
(5) 26 Gr. 567.
(6) 13 Can. S. C. R. 130.
(7) 14 Can. S. C. R. 77.
(8) 9 O. R 314.
(9) 14 Q. B. D. 377.
(10) 14 Q. B. D. 371.
(11) 18 Central L. J. 130.
(12) 21 How. (U. S.) 414.
(13) 2 Ed. p. 824.
(14) 9 O. R. 314.

1887

HOVEY v. WHITING.

Ritchie C.J.

not only had the right to do it, but that, whenever they found the company were unable to meet their engagements and were in an unquestionably insolvent condition, and that individual creditors were seeking to obtain judgments by which they might sweep away from the body of the creditors, for their individual benefit, the assets of the company, they not only had the right, but it was their bounden duty, in honesty and justice, to take such steps in their management of the affairs of the company entrusted to them by law as would preserve the property for the general benefit of all the creditors without priority or distinction, and this without any special statutory provision, upon general principles of justice and equity, and without the formal sanction of the whole body of shareholders. The board of directors, in my opinion, has unlimited powers over the property of the corporation so to deal with it as to pay the just debts of the corporation.

As to the question whether the statute applies to an assignment such as this for the general benefit, I do not think it necessary to enter upon a discussion of this question upon which there seems to be some diversity of opinion among the judiciary of the province of Ontario, because it is not necessary, in my opinion, for the determination of this case, for, assuming for the purposes of this case that such an instrument does come within the terms of the Ontario act, I am of opinion that there was a sufficient description of property. I have nothing to add to what I said in the case of *McCall* v. *Wolff* (1), and I said nothing in that case which interferes with the judgment of the court below in the present case, there having been, in this case, sufficient material on the face of the mortgage to indicate how the property might be identified after proper inquiries were instituted. I am also of opinion that

(1) 13 Can. S. C. R. 130.

1887

HOVEY v. WHITING.

Ritchie C.J.

the statute has been, in other respects, complied with. The instrument appears to have been duly registered, and there was evidence of an actual and continued change of possession before the issuing of the execution in this case. I therefore think this appeal should be dismissed.

STRONG J.—I entirely concur in the judgment delivered in the Court of Appeal by the learned Chief Justice of that court so far as the same relates to powers of the directors ; and I particularly agree in that passage of his judgment in support of which he cites the observations of Blackburn J. in the case of *Taylor* v. *Chichester Ry. Co.* (1) Further, I agree in the judgment of Patterson and Osler JJ. as to the evidence being ample to show that there was a taking of possession sufficient to meet the requirements of the statute.

For these reasons I am of opinion that the appeal should be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal in this case should be dismissed.

HENRY J.—I entirely agree with my brother Strong in the opinions which he has expressed on every point in this case, as to the possession, the actual and continued change of possession, and the sufficiency of the description of the property as required by the act, even if it was necessary to comply with its provisions; and I am of opinion that a sale or transfer by the directors of a company, as in this case giving everything up to secure to their creditors, share and share alike, all the property of the company, was an act which the directors had full authority to do, and that their affixing the seal of the corporation to the document, which I am of opinion they likewise had authority to

(1) L. R. 2 Ex. 356.

1887

HOVEY v. WHITING.

Henry J.

do, made it the act of the corporation.

I am also of opinion that such a document as that is not one which requires to be registered, nor do I find that in such a case in Ontario there has been any decision to the contrary. It has been held that where an assignment giving a preference has been made registration is necessary, but not for such a deed as the one in the case before us.

So that on all the points in the case I think the judgment of the court below was correct, and am in favor of affirming it and dismissing the appeal with costs.

GWYNNE J.—This is an appeal from the judgment of the Court of Appeal for Ontario reversing a judgment of the High Court of Justice of Ontario on an interpleader issue tried by Ferguson J. without a jury. The interpleader issue was between the above respondents as plaintiffs claiming, as assignees in trust for the benefit of all the creditors of a certain company called The Farm and Dairy Utensil Manufacturing Company, limited, certain goods and chattels seized and taken in execution, as the property of the said company, at the respective suits of the above named four appellants, who were made the defendants in the said interpleader issue. The learned judge before whom the issue was tried without a jury rendered judgment upon the issue in favor of the defendants, the execution creditors, finding the assignment to the plaintiffs in trust for creditors to be invalid as against the defendants under ch 119 of the Revised Statutes of Ontario The grounds of appeal stated are: (1).

As to the first of the above grounds, by the 28th section of the Judicature Act it is enacted that every action and proceeding in the High Court of

(1) See p. 518.

Justice and all business arising out of the same should, so far as practicable, be heard, determined and disposed of before a single judge, and that a judge sitting elsewhere than in a Divisional Court is to decide all questions coming properly before him, and is not to reserve any case or any point in any case for the consideration of a Divisional Court, and that in all such cases any judge sitting in court should be deemed to constitute a court.

The judgment therefore which is appealed from is a judgment pronounced by the High Court of Justice upon the matters in question in the interpleader issue, and in its terms it is a "judgment in favor of the de- "fendants in the issue, the execution creditors, with "costs."

Now by order 1 in the schedule to the Judicature Act, it is provided that with respect to interpleader the procedure and practice then used by the courts of common law under the Interpleader Act, ch. 54 of the revised statutes of Ontario, should apply to all actions and to all divisions of the High Court of Justice, and that the application by a defendant should be made at any time after being served with a writ or summons and before delivering a defence.

The application for an interpleader issue in the present case not being by a defendant, but by the sheriff on account of a claim made by the above respondents to goods and chattels seized by the sheriff as the property of the Farm and Dairy Utensil Manufacturing Company under executions issued upon judgments recovered against them at the suit of divers persons, proceedings were taken under the provisions of the 10th section of the Interpleader Act, for the relief of sheriffs, and a feigned issue was ordered at the suit of the claimants (the above respondents) as plaintiffs against the execution creditors (the above appellants)

1887

HOVEY v. WHITING.

Gwynne J.

as defendants to try whether the property seized by the sheriff under the executions was in fact the property of the claimants or not as against the rights acquired by the execution creditors in virtue of their judgments and executions Now the finding and judgment having been in favor of execution creditors that judgment was a judicial determination by the High Court of Justice upon the merits of the matter in contestation, as much as a like judgment upon matters in contestation between plaintiffs and defendants in an action originating in a writ of summons would be; and the judgment might have been entered of record under the provisions of the 19th section of the Interpleader Act, and execution might have been issued thereon for the costs adjudged to the defendants if not paid within the time prescribed in the 20th section. As to the actions at the suit of the defendants against the Farm and Dairy Utensil Manufacturing Company, in which actions the judgment on the interpleader issue is contended to be an interlocutory judgment. they had already been reduced to final judgment and nothing more remained to be done in them except to obtain the fruits of the judgments under the executions; an order it is true might be required to be made, consequential upon the adjudication on the merits of the matter in contestation in the interpleader issue being absolute, for the payment out of court of such monies as may have been, if any had been, realised by the sheriff by sale of the property seized and paid into court to await the determination of the interpleader issue; but such an order could have no effect whatever of the nature of making the adjudication upon the merits of the question tried on the interpleader issue a whit more final than it already was by the judgment of the court rendered in favor of the execution creditors, and if no such monies

1887

HOVEY v. WHITING.

Gwynne J.

had been realised and paid into court no such order would be required and nothing would remain to be done but to enter the judgment of record and for the sheriff to proceed to realise the amounts ordered to be levied by the executions in his hands. The judgment of the court upon an interpleader issue tried on the application of a sheriff for protection from claims made to property seized in execution, affirming the validity of the seizure in execution and determining conclusively, until reversed by some court of competent jurisdiction, the rights of the execution creditors to the fruits of the seizure as against the claimants, is, in my opinion, of a different character from a judgment on an interpleader issue ordered in the progress of a suit for the purpose of determining a point necessary, in the opinion of the court, to be determined before judgment should be pronounced on the matters in contestation in the suit, during the progress of which the interpleader had been ordered. Such was the case of *McAndrew* v. *Barker* (1); the order there was purely interlocutory and the subject of it was deemed necessary to be determined preliminary to rendering judgment on the merits in the two cases then pending in the court in the progress of which the interpleader issue had been ordered and tried; and there the question was not whether or not there was an appeal from an interlocutory order, but whether it had been brought in time. The case of *Cummins* v. *Herron* (2) was a similar case. Now, what the 35th section of the Judicature Act enacts is, that there shall be no appeal to the Court of Appeal from an interlocutory order in case before the passing of that act there would have been no relief from a like order by appeal to the Court of Appeal. The contention is that the judgment of the

(1) 7 Ch. D. 701. (2) 4 Ch. D. 787.

1887

HOVEY v. WHITING.

Gwynne J.

court presided over by Mr. Justice Ferguson on the trial of the above interpleader issue is an "interlocutory order" within the meaning of the above section, and it is said that before the passing of the Judicature Act there would have been no appeal from a like order to the Court of Appeal for Ontario. Now, as the judgment of Mr Justice Ferguson on this interpleader issue is, by the Ontario Judicature Act, a judgment of the High Court of Justice, and not merely in the nature of a finding of a jury or of a judge sitting alone without a jury under the provisions of the Administration of Justice Act of 1873, to find a like order, on an interpleader issue before the passing of the Judicature Act, to that contained in the judgment of Mr. Justice Ferguson in the present case we must look for a judgment of one of the Superior Courts as formerly constituted upon the matter in contestation on a like interpleader issue. Such a case was *Wilson* v. *Kerr* (1). There an interpleader issue ordered at the instance of a sheriff, as in the present case, came on to be tried before a jury, the only tribunal then recognised for trial of issues of fact in the courts of common law. At the trial before the late Sir John Robinson, then Chief Justice of the Court of Queen's Bench for Upper Canada, it was agreed, upon the evidence being taken, that the matter in issue should be left to the court to determine upon the evidence as taken, the court being at liberty to draw such inferences as they might think a jury should. The court rendered their judgment for the defendants the execution creditors just as Mr. Justice Ferguson has in the present case rendered the judgment of the High Court of Justice for Ontario. From that judgment an appeal was taken to the Court of Error and Appeal and the objection was taken that the judg-

(1) 17 U. C. R. 168 and in appeal 18 U. C. R. 470.

1887

HOVEY v. WHITING.

Gwynne J.

ment of the Court of Queen's Bench on the interpleader issue being only interlocutory there was no appeal from such judgment to the Court of Appeal but the court held that there was, and they heard the appeal, upon the authority of *Withers* vs. *Parker* (1). There the Court of Exchequer held that the English Common Law Procedure Act of 1854 gave an appeal to the Court of Appeal from the decisions of the courts of law upon interpleader issues equally as in all other cases, it being considered that the mischief to be remedied being as great in an interpleader issue as in any other the Legislature intended that there should be an appeal in the one case equally as in the other. This was a decision under the provisions of the Common Law Procedure Act of 1854 incorporated into the Upper Canada Common Law Procedure Act of 1856. We find then that under the Common Law Procedure Act of Upper Canada there was an appeal from the judgment of a court of common law upon the matters in contestation on the trial of an interpleader issue. Then in 1877 the Legislature of the Province of Ontario, by sec. 18 of ch. 38 of the Revised Statutes of Ontario, enacted that an appeal should lie to the Court of Appeal from every judgment of any of the Superior Courts, or of a judge sitting alone as and for any of such courts, in a cause or matter depending in any of the said courts or under any of the powers given by the Administration of Justice Act. Now the words in this section—"Judgment in a cause or matter depending, &c.,"—are abundantly sufficient to include and must be construed to include an interpleader issue and the matter in contestation therein.

It follows, therefore, that the judgment of the High Court of Justice of Ontario pronounced by Mr. Justice Ferguson on the interpleader issue under consideration here, which judgment conclusively determined the

(1) 4 H. & N. 810; 6 Jur. N.S. 22.

1887
HOVEY
v.
WHITING.
Gwynne J.

rights of the parties to the matter in contestation in such interpleader issue unless and until reversed by some court of competent, that is to say, appellate, jurisdiction, is either not an "interlocutory order" within the meaning of that expression in the 35th section of the Ontario Judicature Act, or if it be that it is such an order as was appealable to the Court of Appeal for Ontario prior to the passing of the Judicature Act, and in either of such cases it is appealable now. It would be singular if it should be otherwise, for the Ontario Interpleader Act gives an appeal expressly to the Court of Appeal from any decision of a county court or a county judge upon any question of law or fact arising on an interpleader issue.

The second of the above objections calls in question the validity of the assignment upon the contention that the directors of the company had no power or capacity to affix the corporate seal to the instrument without the assent and authority of the shareholders first obtained at a meeting of the shareholders duly convened for the purpose of authorising the execution of the assignment. If the execution of the assignment was absolutely illegal and void for want of such prior authority of the shareholders it is no doubt competent for the defendants in the interpleader issue to avail themselves of such invalidity, but if the assignment was voidable merely and not absolutely void for want of such prior authority it could only be avoided at the instance of some shareholder who should consider his interest prejudiced by such unauthorized, if it was an unauthorized, act of the directors, and until so avoided it would be valid and binding upon the company and could not be impeached by strangers, "for every shareholder may waive any right which is "given to him for his own protection only; and if he "has either expressly or tacitly done so, he can no longer "object; and neither a stranger nor the body corporate

1887

HOVEY v. WHITING.

Gwynne J.

" itself can raise such an objection to a contract made by " the corporation if no shareholder chooses to raise it for " himself." This is the language of Blackburne J. concurred in by Willes J. in *Taylor* v. *Chichester and Midhurst Railway Company* (1).

In connection with this point it has been urged that the assignment was not executed *bonâ fide* because, at the time of its having been executed, the directors contemplated endeavouring to procure all the creditors of the company to execute a deed of composition upon their being paid 50 cents in the dollar on their claims. I confess that I am unable to appreciate the force of the argument upon which this imputation of *mala fides* is rested; the deed was prepared for execution and was executed at the instance of, and in pursuance of a resolution of a majority of, the creditors of the company convened on the 14th of August, 1884, for the purpose of considering the condition of the affairs of the company; it is, in its terms, an absolute assignment of all the estate real and personal of the company to trustees upon trust to sell and to apply the proceeds in payment of all the creditors of the company without preference or priority, except such as had legal right to priority, ratably and in proportion to the amounts due to them respectively, and after payment in full of all the debts of the company and of the costs and charges attending the execution of the trusts of the deed upon trust to pay over any balance, if there should be any, to the company.

This deed executed under the corporate seal of the company was immediately after its execution registered in the registry office of the County of Brant, in which county the lands conveyed by the deed were situate, and in the office of the clerk of the county

(1) L. R. 2 Ex. 379.

1887

HOVEY v. WHITING.

Gwynne J.

court of the County of Brant, with the affidavits required by ch. 119 of the Revised Statutes of Ontario for the registration of bills of sale of chattels coming within the operation of that statute. The utmost publicity which registration could give was thus given. The instrument was executed not only with the knowledge of, but in pursuance of a resolution of a majority of, the creditors of the company and, as pointed out by the Chief Justice of the Court of Appeal for Ontario in his judgment, with the knowledge and consent also of the holders of shares in the company to the amount of $40,000 out of a total capital of $47,500. On the 18th of August a deed of composition was prepared for execution and was subsequently executed by a large majority of the creditors agreeing to accept in satisfaction 50 cents on the dollar on their claims conditional upon all the creditors accepting the like terms, which deed became inoperative by reason of a few of the creditors refusing to accept the composition. Now how can the fact that, at the time of the execution of the deed of assignment in trust for creditors, the directors may have entertained the hope that all the creditors would accept terms of composition which a majority of them were willing to accept affect with the taint of *mala fides* a deed of trust absolute in its terms providing for all creditors alike and prepared and executed at the instance of a majority of the creditors? The fair and reasonable construction of the whole matter, in my opinion, is that in the interest of the creditors of the company the deed of assignment was executed at the request of the majority of them as an absolute instrument and *bonâ fide* for the trust purposes declared therein, and that a number of the creditors having expressed their willingness to accept a composition of 50 cents on the dollar a deed of composition was prepared with intent of operating

only, as it only could operate, in the event of all the creditors giving their consent, which consent when given would operate in the interest of the stockholders. Now who are the persons who, under these circumstances, could with any propriety be heard to say that the trust deed of assignment was tainted with *mala fides* I fail to see; it surely cannot be in the power of a creditor who is provided for by the deed equally with all the other creditors to make such a charge in order that he may sweep away, it may be for his own benefit, all the property appropriated by the deed for the equal benefit of all.

Assuming then the trust assignment to be, as I think it is, free from any just imputation of want of *bona fides*, the case in so far as the point now under consideration is concerned is, since the judgment of the Exchequer Chamber in *Taylor* v. *The Chichester and Midhurst Railway Company* has been overruled by the House of Lords, governed by the dissentient judgment of Blackburn and Wells JJ., in that case in the Exchequer Chamber and the cases relied upon by Blackburn J.(1); and the rule to be collected from those cases which is applicable to the present may I think be thus stated—All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appear by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute, that the legislature meant that such deed should not be executed; and the directors of the

(1) *The South Western Ry. Co.* v. *Gt. N. Ry. Co.*, 9 Ex. 84; *Chambers* v. *M. & M. Ry. Co.*, 5 B. and S. 588; *Wilson* v. *Miers*, 10 C. B. N. S. 364; *S. W. Ry. Co.* v. *Redmond*, 10 C. B. N. S. 675; *Bateman* v. *Ashton-Under-Lyne*, 3 H. & N. 323; The judgment of Erle J. in *Mayor of Norwich* v. *Norfolk Ry.*, 4 E. & B. 412; and of Lord Chancellor Cranworth in the *Shrewsbury & Birmingham Ry. Co.* v. *N. W. R. Co.*, 6 H. L. Cas. at p. 136 and 3 Jur. N. S. at p. 781.

1887
HOVEY
v.
WHITING.
Gwynne J.

company have authority to affix the seal of the company to all such deeds not so, as above, forbidden by the legislature to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from, the enactments of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with.

It is not contended that the deed in question is illegal in the sense of the company being forbidden by any statute to execute such a deed, but it is contended that it is illegal and void by reason of the directors not having, as is contended, any power or capacity to affix the corporate seal to such a deed without a resolution of the company being first passed at a meeting of shareholders authorising the directors to execute the deed, or in other words, that the deed is illegal and void although the corporate seal has been affixed to it by resolution of the directors having charge of the seal and although the deed is signed by the proper persons to sign deeds which are binding on the company, because, as is contended, a statutory enactment either in express terms or by necessary implication forbids the directors to affix the corporate seal to a deed of the nature of that under consideration without the authority of such a resolution of the shareholders first passed as a condition precedent necessary to be complied with. The only statutory enactments in relation to the matter are contained in the 26th and 32nd sections of the Dominion statute, 40 Vic. ch. 43, respecting the incorporation of joint stock companies by letters patent, the former of which sections enacts that:

The affairs of the company shall be managed by a board of not less than three nor more than fifteen directors.

And the latter:—

That the directors of the company shall have full power in all things to administer the affairs of the company and to make or cause to be made for the company any description of contract which the company may by law enter into.

Now, it is contended that a deed purporting to transfer all the estate, real and personal, of an incorporated company for the benefit of the creditors of the company, it being in a state of insolvency, is, in effect, terminating the existence of and amounts to a winding up of the company instead of administering its affairs, which words, it is contended, necessarily imply that the power of the directors is confined to the management of the affairs of the company as a going concern and, consequently, to the period during which the company continues to be solvent.

Now, not to omit, although it is unnecessary to dwell upon, a plain answer to this contention, it by no means must necessarily follow that a deed conveying all the property of a company in trust for payment of its creditors amounts to a winding up of the affairs of the company and the termination of its existence; for although the creditors of the company have a just claim upon the company to have all the property of the company secured, so that it shall be appropriated in payment of the creditors equally, still it may be found that a sale of part only will prove sufficient and that a balance will remain which would enable the company to renew its operations. But assuming a company to be so insolvent that the whole assets of the company conveyed in trust for the payment of the debts of the company should be insufficient to pay those debts in full, and that nothing should remain to be paid over to the company, and so that the necessary result should be the winding up of the affairs of the

1887

HOVEY v. WHITING.

Gwynne J.

company, still the making provision for payment o the debts by the trust deed was no less part of the affairs of the company because of its insolvent condition. It cannot be said that the affairs of a company cease to require the management and administration of those to whom is specially intrusted the management of its affairs when it becomes unable to pay its debts in full. The insolvency, as it appears to me, makes it to be the first duty of those having intrusted to them the management and administration of the whole of the affairs of the company to take prompt measures to secure the assets of the company for distribution among all the creditors proportionably and equally without preference or priority, and the balance, if there be any, after payment of all the debts in full, for the shareholders. When the company is in insolvent circumstances the greatest care, as it appears to me, is necessary and the best management is required to prevent the assets of the company being wasted in litigation or lost by sacrifice at forced sales under execution, in order to preserve equal distribution among the creditors and if possible something out of the wreck for the shareholders of whose affairs the directors are given the management and administration. The statute, in my opinion, warrants no such limitation of the power of the directors, for it is the management of all the affairs of the company and power to make any description of contract which the company may legally make which is vested in the directors. If then the company could legally by a vote and resolution of its shareholders make a contract the effect of which would be to appropriate its assets in payment of its creditors equally and ratably without preference or priority, the statute in express terms declares that the directors may make for the company such a contract, and if such contract in order to be perfect requires the

seal of the company to be affixed to it, the directors must have authority to affix it. However, the language of Willes J. in *Wilson* v. *Miers* (1) is strangely misinterpreted and misapplied for the purpose of supporting the contention that directors have no power to affix the seal of the company to such a deed without special authority by vote of the shareholders first given to them; the language so relied upon, separating it from its context, is as follows (2):—

Then I apprehend there is another principle of law which applies and which makes the transaction valid, that the court is not to assume that parties propose to carry their intentions into effect by illegal means if their intention can be carried into effect by legal means. There is no presumption that the directors did in this case intend of their own heads and without consulting the company to effect a winding up. The court ought rather to presume that the directors would have been well advised and would have acted according to their duty; and on obtaining the £60,000 instead of proceeding forthwith to make a winding up of their own authority, they would have held a meeting and taken the opinion of the shareholders as they were bound to do on the subject.

This language has been referred to as if in using it the learned judge was laying down a general principle of law applicable to all cases making it illegal for directors in the management of the affairs of a company to take any steps, however insolvent the company might be, to have the assets of the company appropriated to distribution among the creditors of the company without first calling a meeting of the shareholders and obtaining from them special authority to make such appropriation of the company's assets, whereas the languages is applied to the circumstances of the particular case then in judgment and to the duty imposed upon the directors of the particular company in question there by the articles of association of the company, the 161st clause of which provides:—

That an absolute dissolution of the company shall be made under the following circumstances, that is to say, if a resolution for that

(1) 10 C B. N.S. 364. (2) At p. 366.

1887

HOVEY v. WHITING.

Gwynne J.

purpose shall be reduced into writing and shall be twice read and put to the vote, and shall be carried each time by a majority of at least two-thirds in number of the shareholders present personally or by proxy holding among them at least two-thirds of the shares of the company at an extraordinary general meeting, and if such resolution shall be confirmed by a like majority at a subsequent extraordinary general meeting to be held after the expiration of fourteen days but before the expiration of fourteen days next after the general meeting at which such first resolution shall have been passed, then the company shall be dissolved and it is hereby declared to be dissolved accordingly from the date of such second general meeting, except for the purposes mentioned in the next following article and without prejudice thereto.

This subsequent or 162nd article made provision for winding up the affairs of the company upon such dissolution being resolved upon. That it is to these clauses that the language of Willes J. applies is apparent on the face of the judgment itself, for in a previous part speaking of the directors and their powers he says:—

They have power in terms, by Art. 5, to sell the vessels belonging to the company. They then have in the same clause of the regulations, powers given not affecting that authority; and then they have powers conferred on them in the most sweeping terms to deal with all other matters in which the company are interested. Now there could be no doubt that the sale (which was in effect of all the assets of the company) was *primâ facie* within the authority of the directors; but it is said that that authority is taken away by the effect of the 161st and 162nd clauses of the regulations, which provide for the case of a dissolution of the company; and it is said that those provisions require, as they unquestionably do, the dissolution of the company to take place with the assent of a certain proportion in number and value of the shareholders, and that the assent of that proportion of the shareholders had not been obtained.

The whole judgment, in fact, is a strong argument in support of the validity of the deed in question here, in so far as the point now under consideration is concerned, for by statute the directors have been given in most sweeping terms power to manage and administer the affairs of the company in all things and make any description of contract which the company might legally make, and there is no clause in qualification of

1887

HOVEY v. WHITING.

Gwynne J.

this power, as there was in *Wilson* v. *Miers*, to which the language of Willes J. applies. A case of *Donly* v. *Holmwood* (1) was cited in which the Court of Appeal for Ontario held that a joint stock company incorporated under the joint stock companies letters patent act could not, without being specially authorized by the shareholders, make an assignment in insolvency under the 14th section of the Insolvent Act of 1875. In so far as this judgment is rested upon an implied prohibition to make such an assignment, if any there be, contained in the 15th sub-section of section 147 of the Insolvent Act, we are not called upon in the present case to express any opinion upon that judgment, but in so far as it is rested upon any supposed general principle of law applicable to all cases, or upon the language of Willes J. in *Wilson* v. *Miers*, in the absence of some statutory prohibition express or implied it cannot, in my opinion, be sustained.

Lastly, it was contended that as the Dominion statute 45 Vic. ch. 23 makes provision for the winding up of insolvent incorporated trading companies, such as the company in question here is, the proper procedure to have been taken was that authorized by this act. Well, that act enables a creditor for the sum of $200 to take proceedings under the act to bring a company become insolvent under its operation, and it is still quite competent for any such creditor, who thinks the dilatory and more expensive mode of procedure authorized by the act more beneficial to the creditors than carrying into effect the trust assignment which has been executed at their request, to petition the courts as they may be advised under the act. But the fact that it was competent for the creditors to have availed themselves of the provisions of that statute cannot make another proceeding, adopted in their interest and at

(1) 4 Ont. App. R. 555.

1887

HOVEY v. WHITING.

Gwynne J.

their request for the purpose of obtaining payment of their claims against the company in a less expensive manner, to be illegal. The deed therefore cannot, in my opinion, be assailed by the respondents upon the objection made as to the power of the directors to affix the seal of the company to it.

The 3rd and 4th grounds of appeal are that the trust deed of assignment in question is a deed of sale of goods and chattels within ch. 119 of the revised statutes of Ontario and that it is void under that statute as against the defendants in the interpleader issue, the above named execution creditors of the company executing the assignment, by reason of insufficiency in the description of the chattel property thereby assigned.

With respect to this ground of appeal, which brings in review for the first time before a Court of Appeal certain decisions of the Superior courts of common law before the passing of the Judicature Act of Ontario with which the unanimous judgment of the Divisional Court of Queen's Bench of the High Court of Justice in a recent case of *Robertson* v. *Thomas* (1) is said to be in conflict, before entering upon a consideration of the points involved in those several cases it may be premised that the case before us appears to be defective in this, that there is nothing to show what were the goods and chattels seized by the sheriff under the executions in his hands, the title to which alone was what was in question in the interpleader issue and which is now in question before us, and this is not an immaterial defect for from the language of the deed o assignment it may be that the assignees in trust for creditors have by the terms and operation of the deed, assuming it to be within the provisions of the above statute, perfect title to some of the goods and chattels assigned although not to others, that is to say, that some

(1) 8 O. R. 20.

1887

HOVEY v. WHITING.

Gwynne J.

of the goods and chattels assigned by the deed may be sufficiently described within the provisions of the statute although others may not be, and upon the question to which class, namely, to the sufficiently or to the insufficiently described goods the things seized under the executions belong may depend the question whether our judgment should be for the plaintiffs or the defendants in the interpleader issue. The consideration of this point which comes within the 4th ground of appeal I shall for the present defer until I shall have dealt with the point involved in the third ground of appeal which raises the question—Whether a deed executed *bonâ fide*, assigning all the estate real and personal of a debtor to trustees in trust for sale and an equal distribution of the proceeds amongst the creditors ratably and proportionably to the amounts due to them respectively without any preference or priority save such as the law may have established and given, and without any qualification, condition or provision for the release of the debtor, or for any benefit to him whatever until all his creditors should be paid in full, is a deed of sale within ch. 119 of the revised statutes of Ontario.

By a statute of the legislature of Canada, passed in the year 1849, 12 Vic. ch. 74, in its first section it was enacted that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, made in Upper Canada after the passing of the act which should not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged should be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith unless the mortgage or conveyance, or a true copy thereof, together with an affidavit of a

1887

HOVEY v. WHITING.

Gwynne J.

witness thereto sworn before a commissioner of the Queen's Bench of the due execution of the mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy to be filed purports to be a copy, shall be filed as directed in the 2nd clause of the act. It is to be observed that this act only related to mortgages, or "conveyances "intended to operate as mortgages of goods and chat-"tels." Now an instrument absolute on its face as a sale and conveyance of chattels might be intended to operate as a mortgage, the agreement for defeasance being contained in another instrument or being verbal, and by reason of the difficulty of proving, in the event of a claim being made by the bargainee in the bill of sale to the goods when seized in execution against the bargainor that the conveyance absolute on its face was intended to operate as a mortgage, the beneficial object of the act might be defeated. Whether this was or not the reason for passing the act 13-14 Vic. ch. 62 we cannot tell, but in 1850 that act was passed under the title of

An act to alter and amend the act requiring mortgages of personal property in Upper Canada to be filed.

And after reciting that the law in force in Upper Canada requiring mortgages of personal property to be filed requires amendment, so as to require that every sale of goods and chattels which should not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, shall be in writing, it was enacted that the first section of

An act requiring mortgages of personal property in Upper Canada to be filed,

Should be amended by adding at the end thereof as follows:—

And that every sale of goods and chattels which shall not be accompanied by an immediate delivery and followed by an actual and

1887

HOVEY v. WHITING.

Gwynne J.

continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of the said act.

In 1857 these acts were amended by 20 Vic. ch. 3, by which forms of affidavit were prescribed applicable to the cases of a mortgage and of a sale respectively, and providing that mortgages might be executed to secure future advances in certain cases, and enacting that all instruments mentioned in the act, whether for the sale or mortgage of goods and chattels, should contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished. The clause as to the sale of chattels was as follows:—

Every sale of goods and chattels which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of this act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and the affidavit of the bargainee or his agent duly authorized in writing to take such conveyance, a copy of which authority shall be attached to such conveyance that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and shall be registered as hereinafter provided within five days from the execution thereof, otherwise such sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

The act contained other clauses not material to the point under consideration.

In 1858 it was enacted by 19th sec. of 22 Vic. ch. 96 that:—

If any person being at the time in insolvent circumstances or unable to pay his debts in full or knowing himself to be on the eve of insolvency shall make or cause to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects or deliver or make over or cause to be delivered or made over any bills, bonds, notes or other securities or property with intent to defeat or delay the creditors of such person or with intent of giving one or more of the creditors of such person a preference over his other creditors or

1887

HOVEY v. WHITING.

Gwynne J.

over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery shall be deemed and taken to be absolutely null and void as against the creditors of such person. Provided always that nothing herein contained shall be held or construed to invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably and without preference or priority all the creditors of such debtor their just debts.

The deeds of assignment made void by this clause are only made so as against the creditors of the debtor. That is to say, they are the only persons who could impeach and invalidate the deeds, and they only because of the deeds having been made either with intent to defeat or delay the creditors of the person executing the deed as a class or with intent of giving one or more of the creditors of such person a preference over his other creditors. Now a deed of assignment of all the property of an insolvent made in good faith and effectually executed so as to be irrevocable in trust for the purpose of paying and satisfying ratably and proportionably all the creditors of such persons their just debts without preference or priority never could, although the proviso never had been inserted in this clause, have been construed to be a deed impeachable by the creditors of the insolvent as a deed made either with intent to defeat or delay the creditors of the insolvent or with intent of giving one or more of his creditors a preference over others. The proviso therefore was not necessary for the purpose of protecting and maintaining the validity of a deed which but for the proviso would, by the previous terms of the clause, have been made void as against creditors. It is however a legislative declaration that such a deed made for the benefit of all creditors without preference or priority could not be invalidated by the creditors of the person executing it.

The act 20 Vic. ch. 3 was incorporated in the consolidated statutes of Upper Canada, ch. 45, and is now

incorporated in the revised statutes of Ontario, ch. 119, and the above 19th sec. of 22 Vic. ch. 96 was incorporated in the 26th chapter of the consolidated statutes of Upper Canada, and is now the 2nd section of ch. 118 of the revised statutes of Ontario.

In *Taylor* v. *Whittemore* (1) which came before the Court of Queen's Bench for Upper Canada in 1853, the case was that one Mountjoy being largely indebted to divers persons in the sum of £5,864 made an assignment of his estate and effects upon trust to pay several preferred creditors several specified sums amounting in the whole to £1,750, and after payment of those preferred debts then on trust for the payment ratably and proportionably of the several debts mentioned in a schedule annexed to the deed provided the creditor should execute the deed within two months and thereby release Mountjoy. The deed provided that if the trustees should think it advisable, and the creditors who might sign the deed or a majority of them in value should assent thereto, they might carry on the business for the benefit of the creditors who should come into the assignment, and they might employ Mountjoy in carrying on the business for the trustees and the benefit of the creditors and, from time to time, out of the proceeds realised from the sale of the stock and merchandise assigned, might add to the said stock as the trustees might think it advisable until the same should be exhausted and disposed of, and then to wind up the said business and to collect and get in all the debts due and payable to Mountjoy, so assigned, and all debts which might grow due in the carrying on of the said business as soon as the trustees conveniently could, and at all events within two years from the date of the deed, unless the debts mentioned in the schedule

(1) 10 U. C. R. 440.

1887

HOVEY v. WHITING.

Gwynne J.

should be sooner paid, satisfied and discharged. The deed contained a release from the creditors of Mountjoy to him in full of their respective demands, also a provision that the trustees might permit Mountjoy to have use and occupy so much and such portions of his then household furniture and for such time and upon such terms as the trustees might think proper. This provision, however, did not in any way vest the property or title in such property or any portion of it in said Mountjoy. This transaction was assailed by creditors who refused to come into the assignment upon the contention that the assignment was fraudulent and void within the statute of 13 Elizabeth ch. 5, on the grounds following: "1st. For providing for the "employment of Mountjoy in carrying on the busi- "ness; 2nd. For providing that he might be allowed "to retain possession of the furniture; 3rd. Because it "contained provisions for carrying on the business; "and 4th. As providing for the payment of certain "debts in full instead of putting all on an equal foot- "ing." It was held that the deed was not impeachable within the statute of Elizabeth. The only point which was raised under 12 Vic. ch. 74, as amended by 13–14 Vic. ch. 62, was that inasmuch as it appeared that Mountjoy's household furniture was never delivered to the trustees it was contended that the deed was void as to those things which had been delivered, the deed not having been filed as required by those statutes; but it was held that the non-delivery could only affect the goods not delivered, leaving the deed good as to those which had been received into the actual possession of the trustees, and as the goods taken in execution were some of those which had been taken into their actual possession the trustees were held entitled to recover on the interpleader issue, it being held that the effect of the acts was to avoid

1887

HOVEY v. WHITING.

Gwynne J.

the deed *quoad* the subject matter of the suit, and as the household furniture had not been taken in execution the title as to it was not before the court, so that the objection as to the non-delivery of the household furniture into the actual possession of the trustees had no effect upon the matter in issue in the interpleader; it was assumed and not disputed that the deed in question there came within the operation of the act, 12 Vic. ch. 74, as amended by 13–14 Vic. ch. 62, but it must be observed that the deed before the court there was not a deed in trust for the payment of all the creditors of the debtor equally without preference or priority; on the contrary it was only for the benefit of such as should be content to take what should remain after payment of the preferred creditors the amounts to be first paid to them in full satisfaction of their debts, and this should release the debtor from all further claim.

In *Heward* v. *Mitchell et al.* (1) decided in the same term as was *Taylor* v. *Whittemore*, the point appears to have been taken that the trust deed there did not come within the statute, 12 Vic. ch. 74, as amended by 13–14 Vic. ch. 62, and the court held that it did. The deed of assignment there provided for the payment, in the first place, of certain notes which the trustees had endorsed for the benefit of the debtors who made the assignment, and then for the payment in full of the debts owing by the debtors to such creditors as should sign the deed; and although the deed contained no clause of release of the debtors by the creditors signing the deed it did contain a covenant by the signing creditors not to sue the debtors during a period of three years during which the trustees were to be at liberty in their discretion to add to the stock and carry on

(1) 10 U. C. R. 535.

1887

HOVEY v. WHITING.

Gwynne J.

the business. The assignment, therefore, was for the benefit only of the preferred creditors and such others as should be willing to take the benefit of the assignment subject to the condition of executing such a covenant. That was not an assignment for the benefit of all creditors alike without preference or priority, and subject to no conditions imposed in the interest of the debtor.

In *Olmstead* v. *Smith* (1) which was before the same court in 1857 the terms of the trust assignment are not set out and it does not appear whether or not it made provision for payment first of preferred creditors, or whether its benefits were or not limited to such creditors only as should signify their assent to the terms of the deed by signing it within any prescribed time, nor whether it was clogged with a condition releasing the debtor from all further claim whether the property assigned should or not pay all debts in full. It was assumed there, no doubt upon the authority of *Taylor* v. *Whittemore* and *Heward* v. *Mitchell*, that the deed came within the provisions of the statute 13-14 Vic. ch. 62, and the affidavit was held to be defective within the provisions of that statute; however, McLean J. though feeling bound by the prior decisions makes use of the following language showing grave doubt to exist in his mind as to the application of the statute to trust deeds executed for the benefit of creditors.

I do not see (he says) how the affidavit required by the statute can be taken by assignees in the position of the plaintiffs who take a conveyance of goods in trust for the benefit of creditors, the very object of the conveyance being to hold them against all creditors though with a view of distributing the proceeds ultimately among them or such as may choose to become parties to an assignment. It can scarcely be said that the plaintiffs are not to hold the goods of Trevor against his creditors because they were authorised to sell them and make specific payments. The creditors could not touch

(1) 15 U. C. R. 421.

1887

HOVEY v. WHITING.

Gwynne J.

the goods if the assignment is legal. The plaintiffs now are holding Trevor's goods against the defendants, his creditors, and how could they swear that they did not receive them for that express purpose.

The defect in the affidavit was that instead of saying in the words of the statute that the assignment was not made for the purpose of holding or enabling the assignees to hold the goods therein mentioned against the creditors of Trevor, the assignor, it said that the assignment was not made for the purpose of holding or of enabling Trevor to hold the goods therein mentioned against his creditors. The language of McLean J., (although susceptible of an answer when applied to cases of trust assignments such as were those in *Taylor* v. *Whittemore* and *Heward* v. *Mitchell* upon the assumed application of the authority of which cases, by which the learned judge and the court of which he was a member were bound, to *Olmstead* v. *Smith*, the latter case proceeded,) seems to me to be unanswerable when applied to the case of a trust assignment for the equal benefit of all creditors alike without preference or priority save such as the law has given ; for if the affidavit which is required by the statute in the case of every deed to which the statute applies cannot with truth be made in the case of such a deed, it must of necessity follow that such a deed cannot be within the intent and operation of the statute, a point which was decided by the same court in *Baldwin* v. *Benjamin* (1) in which it was held, however, that the affidavit could be made in the particular circumstances of that case which have no application to the point now under consideration.

Harris v. *the Commercial Bank* (2) was a case no doubt of the same description as *Taylor* v. *Whittemore* and *Heward* v. *Mitchell*, that is to say, that the trust deed made provision for the payment first of certain

(1) 16 U.C.R. 52.

(2) 16 U. C. R. 437.

1887

HOVEY v. WHITING.

Gwynne J.

preferred creditors and that only such as should become parties to the deed should participate in its benefits, and that it contained a clause providing for the carrying on of the business by the trustees in their discretion and for release of the debtor from all further claims, for while the report does set forth a clause providing that such creditors only as should become parties to the deed within 90 days from notice of its execution, given to them or sent to them by mail, should participate in the benefits of the deed to the conclusion of all others, the non-insertion of the terms and conditions of the deed in the report is thus excused:

As the objections to its provisions independently of the statute were not pressed on the argument, only the description of the goods assigned is material to be given here.

And moreover Robinson C.J. in giving judgment says:—

I see nothing in the arrangements made by the deed which would warrant us in holding it void. They are such I think as MacDonell (the debtor) was then at liberty to make.

indicating by this language that the trust provisions were not simply for the benefit of all creditors alike without preference or priority, but that the assignment contained provisions which were objected to but not pressed as making the deed void under the statute of Elizabeth, as had been contended in *Taylor* v. *Whittemore*. He also says:—

I have doubts, which I believe, however, are not entertained by my brother judges generally, whether assignments of this description, namely, to trustees for the benefit of creditors, come within the provisions of our statute, 20 Vic. ch. 3.

Then referring to the language of the statute which speaks of "the sale of goods," as distinguished from mortgages, and speaks also of the "bargainor and bargainee," and of the sale being made *bonâ fide* and for "good consideration as set forth in the conveyance," he says:—

1887

HOVEY v. WHITING.

Gwynne J.

It is true that in respect to real property trusts are created by deeds of bargain and sale—I mean by a description of conveyance technically so called—although the grantor is not selling the estate nor the trustee buying it, and though no bargain in the common sense of the term is made between the parties; and it is true also that in the language of the courts all persons acquiring lands by deed or will or otherwise than by inheritance are said to hold as purchasers; but we have to deal here with goods and chattels, and it has not seemed to me that the Legislature has used the words "every sale of goods and chattels" in these statutes in any other sense than their common acceptation as applied to goods, that is, when the absolute beneficial interest passes from a seller to a buyer.

A more comprehensive construction, however, has been given to them by our courts, and they are held to comprehend assignments to trustees for the benefit of creditors like that before us.

It is clear, to my mind, that the case in which this language is used was one similar to that in *Taylor* v. *Whittemore* and in *Heward* v. *Mitchell*, where the application of the statute to deeds like that before the court in *Harris* v. *Commercial Bank* was decided by the court, and by which judgments the Chief Justice, although differing from them, deemed himself to be bound. Assuming then the deed in question there to be within the statute 20 Vic. ch. 3, the point decided by the judgment was that a description of the goods assigned as "all the goods, &c.," of the assignor being in and about his warehouse on T. street and all his furniture in and about his dwelling house on W. street, and all bonds bills and securities for money loans, stock, notes, &c., &c.. whatsoever and wheresoever belonging, due or owing to him was sufficient to satisfy the statute.

In *Wilson* v. *Kerr* (1) the assignment was of

All and singular the stock in trade of the assignor situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years leases and securities for money,

in trust for such creditors as should execute the deed within forty days. The deed contained a clause of

(1) 17 U. C. R. 168 and 18 U. C. R. 470.

1887

HOVEY v. WHITING.

Gwynne J.

release, by creditors executing, of all claim beyond what the dividends might produce, and the surplus, after paying out the proceeds ratably to the creditors who should execute, was by the terms of the trust to be paid over to the assignor. The deed also contained a clause empowering the assignee to return to the assignor the household furniture not exceeding £100 in value if he should see fit, which was done.

Robinson C.J. held the deed to be fraudulent and void against creditors, upon the ground:—

1st. That it was fraudulent for the assignor to assign only on the understanding that he should be allowed to keep possession of his household furniture which he did keep and enjoy as before.

2nd. That it was fraudulent by reason of the stipulation contained in the assignment that no creditor should share in the proceeds except such as should execute the assignment within forty days which assignment contained a release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the executing creditors should be paid their dividend any surplus that there might be should go to the assignor; "it is" he said "an attempt to coerce the creditors to "come under a disadvantageous condition on the peril "of getting nothing," and he held

3rd. Assuming the deed to be within the intent of 20 Vic. ch. 3, the description of the goods intended to be assigned was insufficient.

Burns J. saying that the only point he had considered was this last, also held the description to be insufficient; the report says that McLean J. concurred, but whether or not with the whole of the judgment of the Chief Justice or only with that part which Burns J. had considered and in which he concurred is not stated.

1887

HOVEY v. WHITING.

Gwynne J.

The report of what took place in appeal in this case (1) is still more unsatisfactory for, notwithstanding the doubts which had been expressed by the Chief Justice and by McLean J. as to trust deeds for the benefit of creditors being within the statute, and as to the deed in *Wilson* v. *Kerr* being fraudulent and void for the reasons given by the Chief Justice, neither of these points appears to have been mooted or referred to in the case in appeal, the Court of Appeal resting their judgment affirming the judgment of the Court of Queen's Bench upon the point merely of the insufficiency of the description of the goods, assuming the deed to be within the operation of the statute, and this is the more remarkable because the Court of Queen's Bench, in the same term in which it had given judgment in *Wilson* v. *Kerr*, gave judgment in *Maulson* v. *Topping* (2) wherein it was held by the unanimous judgment of the court that a deed in trust for the benefit of such creditors as should execute the deed within a stated time, and which enacted a release in full from those who should execute it, was fraudulent and void against non-executing creditors, notwithstanding that the requirements of 20 Vic. ch 3 should be complied with.

In *Maulson et al* v. *Peck et al* (3) the deed in trust for creditors contained a provision :—

For payment in full of certain preferred creditors, and to pay, distribute and divide all the balance of monies arising from the property assigned ratably among the other creditors, according to the several amounts of their respective debts, in full satisfaction and discharge thereof, subject, however, to this proviso: that if any of the creditors of the assignors should refuse to come in and become parties to the deed of assignment or to accede thereto within two months after the date thereof, or such further time not exceeding four months as the trustees might extend to them, then that the dividends on such debts respectively should be paid to the assignors

(1) 18 U. C. R. 470. (2) 17 U. C. R. 183.
(3) 18 U. C. R. 113.

1887

HOVEY v. WHITING.

Gwynne J.

as part of their personal estate, and in order that the goods might be disposed of to the best advantage power is given to the assignees to purchase from time to time other stock to assort and sell with the assigned goods for the benefit of the estate.

It seems to raise a nice question to determine wherein a deed like this, which contained a clause that only the parties executing it, other than the preferred creditors, should participate in the balance remaining after payment of the preferred creditors, and which contained also a clause that those executing should accept whatever dividends the assigned property would give to each ratably to the respective amounts due to every creditor of the debtors after such payment in full satisfaction and discharge of their debts, and that the dividends attributable to the debts due to those who should not execute the deed should be paid over to the debtors, differs from the deed in *Maulson* v. *Topping*, which was declared to be fraudulent and void for exacting a release of the debtors by those who should execute the deed; however, no such point was taken in the case, and the only point which was taken and decided was upon a question whether or not, as was contended, the power given to the assignees to purchase additional stock from time to time made the executing creditors partners in the business, and whether the insertion of that clause did or not make the deed void, which questions were decided in the negative.

In *Hutchinson* v. *Roberts* (1), the only point decided was that the statute 20 Vic. ch. 3 did not apply to that case, because the trust deed for creditors was accompanied by an immediate and actual and continued change of possession.

In *Maulson et al.* v. *Joseph* (2) the terms of the deed which was an assignment for the benefit of creditors

(1) 7 U. C. C. P. 471. (2) 8 U. C. C. P. 15.

do not appear in the report. They probably were the same as those contained in the deed in *Maulson* v. *Peck* which was before the Court of Queen's Bench at the same time. The report does say that after the deed was executed the assignees carried on the business which was continued for some months. The case cannot, I think, be regarded in any stronger light than a confirmation of the judgment of the Queen's Bench in *Taylor* v. *Whittemore* and *Heward* v. *Mitchell* notwithstanding the doubts of Sir John Robinson as to the statute 20 Vic. ch. 3 having any application to trust deeds in favor of creditors.

In *Arnold* v. *Robertson* (1) the trusts of the deed were declared in an instrument referred to in the deed of assignment, and they were, to sell the goods, chattels and effects specified in the bill of sale and to apply the proceeds in payment of all necessary and incidental expenses and then in payment of certain preferred claims in full, and to apply the residue towards the payment of the debts in schedule A. due to such of the creditors as should execute the assignment ratably, and to pay the surplus to the debtor, who was to be discharged from all further liability to the creditors who should execute the assignment. This case was expressly rested upon the authority of *Heward* v. *Mitchell*. Draper C. J. in giving the judgment of the Court of Common Pleas then says—

> Since the case of *Heward* v. *Mitchell* which has been followed in this court it is not a question open to argument that sales or assignments of goods for the benefit of creditors in trust to dispose of the proceeds thereof in payment of the creditors of the assignor are not within the statute.

This judgment simply affirms the anthority of *Heward* v. *Mitchell*, saying that it has been followed, so that this case does not nor, indeed, do any of the reported cases go further than to recognise the judg-

(1) 8 U. C. C. P. 147.

1887

HOVEY v. WHITING.

Gwynne J.

ments in the early cases of *Taylor* v. *Whittemore*, *Heward* v. *Mitchell* and *Harris* v. *The Commercial Bank* as binding authorities unless and until reversed in a court of appeal.

It was contended that as the decisions in *Taylor* v. *Whittemore* and *Heward* v. *Mitchell* have been followed for a period of thirty years, a court of appeal even should not now reverse those judgments. That would be, I confess, in my opinion, a very strong argument if the decisions so followed for such a length of time had involved the construction of a statute in relation to real estate so as to maintain in their integrity the rights belonging to a fee simple estate, or if upon the faith of the decisions so followed large sums of money had been expended by the owners of land in fee in the improvement of their property, and if the reversal of the decisions would deprive such owners in fee, without giving them any compensation whatever, of the full enjoyment of their property, and of all benefit from the large sums of money so expended by them on its improvements; but even in such a case as I have described the judicial committee of Her Majesty's Privy Council of England, in the recent case of *Maclaren* v. *Caldwell* (1), seems to have felt no difficulty in reversing the unanimous judgment of this court which upheld the judgment of the Court of Common Pleas for Upper Canada, pronounced about twenty years previously and upon different occasions followed, putting a construction upon an act of the Provincial Legislature in a matter having relation to the condition of the province, with which the judges of the courts of the province at the time of the passing of the act, having had intimate knowledge, may be said to have had peculiar qualifications eminently fitting them to put a sound construction upon the act, and the effect of whose construction was to maintain

(1) 9 App. Cas. 392.

1887

HOVEY v. WHITING.

Gwynne J.

the fee simple proprietors of land in the full enjoyment of their property and of the benefit of all such sums as should be expended by them on its improvement, and the effect of the reversal of such their construction being to deprive such owners without any compensation whatever of the benefit of the outlay of immense sums of money expended by them upon the faith of the judgment pronounced shortly after the passing of the act, and followed without any doubt having been expressed as to its soundness during a period of about twenty years. But a judgment now putting upon the statute under consideration a different construction from that which was put upon it by the judgments in *Taylor* v. *Whittemore*, *Heward* v. *Mitchell*, and the other cases decided upon their authority would have no such effect; in fact no rights or interests whatever, whether acquired upon the strength of the former decisions or otherwise, would be effected injuriously or at all by their reversal. However, in none of the cases to which we have been referred, and in none of the reported cases that I have seen prior to *Robertson* v. *Thomas* (1), does any question appear to have arisen as to the application of the statutes under consideration to the case of a trust deed for the payment of all the creditors of the assignor ratably and proportionably to the amounts due to them respectively without any preference or priority and without any release of the debtor or any other benefit whatever reserved in the interest of the assignor. The deed in *Dolan* v. *Donelly* (2) may possibly have been such a deed, but if it was it is not made to appear so in the report; the only question there was as the sufficiency of the description of the goods, upon the assumption that upon the authority of *Taylor* v. *Whittemore* and *Heward* v. *Mitchell*, and the other cases follow-

(1) 8 O. R. 20. (2) 4 O. R. 440.

1887

HOVEY v. WHITING.

Gwynne J.

ing them the deed was one to which the statute applied. In *Robertson* v. *Thomas* the question does appear to have arisen and for the first time, so far as I have been able to find. There the divisional Court of Queen's Bench unanimously decided that an assignment in trust made for the *bonâ fide* purpose of paying and satisfying ratably and proportionably without preference or priority all the creditors of a debtor their just debts was not within the statute ch. 119 R. S. O.

This decision can, in my judgment, well stand without its being necessary to question the application of the statute to trust assignments drawn in such terms as were those in *Taylor* v. *Whittemore*, *Heward* v. *Mitchell* and *Harris* v. *The Commercial Bank*, and such like cases, for there is a vast distinction between a trust assignment made for the benefit of all creditors alike without preference or priority, not requiring the creditors to execute any release of the debtor, and an assignment in trust first for the payment in full of certain preferred creditors, and then for such only as should within a limited time prescribed by the debtor signify their acceptance of the terms of the trust assignment by signing it containing a release of the debtor, whether the property assigned should or not realize sufficient for payment of such creditors in full.

Although preference of one creditor over another be not in itself unlawful, unless the debtor making such preference be in insolvent circumstances and unable to pay all his debts in full, still the preferring one to another is an act injurious to all other creditors; and as the object of the statute under consideration was, in my opinion, to prevent the committal of fraud upon creditors by a debtor and to guard against pretended sales or secret incumbrances made and executed to the prejudice of the creditors of the assignor as a class, every creditor has an interest in knowing and a right

1887

HOVEY v. WHITING.

Gwynne J.

to know what disposition, if any, a debtor has made of property originally his own and still remaining in his actual possession and to all appearance his own, whether such disposition be made to a stranger or to, or in trust for, a preferred creditor. In such deeds of assignment therefore the statute may well be held to apply for the benefit of all non-preferred creditors who, as persons prejudiced by the trust assignment, refuse to accept the terms inserted in it in relation to their claims. But where a debtor makes an irrevocable assignment of property in trust for the benefit of all his creditors alike, without preference or priority, no creditor has any just right to complain of his being prejudiced by the terms of such a trust assignment. The statute does not avoid all conveyances by way of mortgage or sale of chattels as to which the terms of the statute are not complied with, but only avoids them in the interest of and at the suit of the creditors of the debtor making the assignment. But an individual creditor who, repudiating a trust assignment made in his favor equally with all the other creditors of the debtor, proceeds to judgment and execution, as he can not be said to have been prejudiced by the terms of the trust assignment he cannot in justice invoke the terms of the statute to aid him in obtaining a preference over all the other creditors who by the trust assignment were placed on precisely the same footing with himself. If the statute should be construed so as to aid an individual creditor in such an attempt it would be made to operate to the prejudice of the creditors whom, as a class, the statute was passed to protect. To hold that a trust assignment, such as that before us, made by an insolvent debtor at the request of the body of the creditors of the insolvent, for the benefit of all such creditors alike without preference or priority,

1887

HOVEY v. WHITING.

Gwynne J.

and which therefore makes the precise disposition, not only which the body of creditors desired but which in the case of insolvency was the disposition made by the Insolvent Act when in force, could be defeated by an individual creditor hurrying to judgment and execution upon the suggestion that in some particular the terms of chapter 119 of the R. S. O. had not been fully complied with in relation to the deed in question, and so upon such suggestion to aid an individual creditor to obtain a preference over all the other creditors whom, as a class, the statute was passed to protect, would be, in my opinion, at variance with the intent and object of the statute, as converting an act intended to protect creditors from acts of their debtor into an instrument by which one creditor placed honestly by his debtor upon an equal footing with all his other creditors, might perpetrate a fraud upon all such others; and by which one of several *cestuis que trustent* under the same deed might defraud the others. In my opinion the statute does not apply to such a trust assignment.

There is in the fourth of the above grounds of appeal a question involved upon which, as there seems to be some variety of opinion on a point of importance and as the question has been raised in a court of appeal, it should, I think, be disposed of. The question is as to the sufficiency of the description in the trust assignment before us, assuming it to be an instrument within the operation of the statute, of the goods seized. The question turns upon the construction of the 23 sec. of ch. 119 R. S. O. That section enacts that "all instru-" ments mentioned in the act, whether for the sale or " mortgage of goods and chattels, shall contain such " sufficient and full description thereof that the same " may be thereby readily known and distinguished."

By the deed of assignment, read in connection with

the schedule annexed thereto and made part thereof, the debtors, describing themselves as "The Farm and "Dairy Utensil Manufacturing Company," carrying on their business as manufacturers at the city of Brantford and declaring themselves to be in insolvent circumstances, granted, bargained, sold, assigned, &c., to trustees named :—

All and singular these certain parcels or tracts of land and premises situate lying and being in the city of Brantford in the county of Brant, being composed of town lots numbers 14, 15 and 16 on the east side of Waterloo street, and lots numbers two and three on the west side of Duke street running half-way through to Wadsworth street, in the said city of Brantford, with the appurtenances to the said lands belonging or in any wise appertaining and used or enjoyed therewith, and the foundry erections and buildings thereon erected and being, including all articles such as engine, boiler, cupola, machinery, and shaftings in and upon said premises. And all and singular the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever and whether upon the premises where said debtors business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever, on trust for sale and distribution of the proceeds among all the creditors of the debtors without preference or priority.

Now, from this deed it is, I think, abundantly apparent that the place where the debtors carried on their business as farm and dairy utensil manufacturers was on the lands described in the deed, which with the erections and buildings thereon and all articles such as engine, boiler, cupola, machinery and shafting in and upon the premises were conveyed by the deed. These latter articles, although conveyed with the land and buildings thereon, either passed to the trustees as part of the realty upon the authority of *Holland* v. *Hodgson* (1), or if they be regarded as pure chattels it cannot be doubted that they are sufficiently described so as to be readily and easily known and distinguished. In so far then as these articles are concerned, if they

(1) L. R. 7 C. P. 328.

1887

HOVEY v. WHITING.

Gwynne J.

were seized by the sheriff under the executions in his hands, the execution creditors could have no claim to them founded upon any insufficiency in their description. Then again as to all and singular the stock in trade, goods, chattels, &c, upon the premises where the said debtors' business is carried on, or which the said debtors are possessed of or entitled to in any way whatever, there can, I think, be no doubt that the locality of that place of business is sufficiently designated, assuming a statement of locality to be in such case necessary, whatever uncertainty of insufficiency the introduction of the words "wheresoever" or "elsewhere," in the connection in which they are used in the clause enumerating the several particulars of the personal estate and effects intended to be conveyed, may create in distinguishing what goods and chattels, personal estate and effects, are intended under the description of being situated elsewhere than on the premises where the debtors' business is carried on. There is no uncertainty as to the locality of those described as being on the premises where that business is carried on, these premises being plainly enough designated in the deed.

The question, therefore, as to the goods, &c., is, as it appears to me—Whether or not a conveyance by a debtor in the terms following, namely, all and singular the stock in trade, goods, chattels, fixtures, &c., upon the premises where the debtors' business is carried on, and which the debtors are possessed of or entitled to (such premises being plainly enough designated in the deed so as to remove all doubt as to their locality) is an insufficient description within the 23rd section of the statute to cover all or any "stock in trade," goods, chattels, fixtures, &c., situate on their premises and belonging to the debtors at the time of execution of the conveyance.

In *Ross* v. *Conger* (1), A.D. 1857, it was held that:—

(1) 14 U. C. R. 525.

1887

HOVEY
v.
WHITING.

Gwynne J.

All the stock of dry goods, hardware, crockery, groceries, and other goods, wares and merchandise in the store and premises occupied by the mortgagor, etc.

was a sufficient description within the statute to cover all such articles as were in the store at the time of the execution of the mortgage.

In *Harris* v. *The Commercial Bank* (1) it was held that a description of the goods assigned as :—

All the goods, &c., of the assignor being in and about his warehouse on T. Street, and all his furniture in and about his dwelling house on W. Street, and all bonds, bills and securities for money loans, stocks, notes, &c., whatsoever and wheresoever belonging, due or owing to him.

was sufficient within 20 Vic. ch. 3 s. 4.

In *Rose* v. *Scott* (2) the goods in a chattel mortgage were described as :—

Seven horses, three lumber wagons, one carriage, one pleasure sleigh, all the household furniture in possession of the assignor and being in his dwelling house, all the lumber and logs in and about the sawmill and premises of said assignor, and all the blacksmith's tools of said party of the first part, six cows and four stoves.

And it was held that the description was sufficient to cover the household furniture, lumber and logs, but that it was insufficient as to the other goods.

In *Fraser* v. *Bank of Toronto* (3) the goods were referred to in a chattel mortgage as set forth in schedules annexed ; two schedules were annexed, designated C. and D. The former was headed "Household furniture in J. E. W's. residence" and then followed an enumeration of articles, but no locality was stated for the residence of J. E. W. Schedule D was headed : "House-"hold furniture and property of J. R. McD," one of the assignors, and then followed an enumeration of articles ; it was held that the headings on both schedules sufficiently described the locality of the goods, for as to schedule C., J. E. W's. residence was readily ascertainable, and as to schedule D that the terms "House-"hold furniture and property of J. R. McD," sufficient-

(1) 16 U. C. R. 437.
(2) 17 U. C. R. 385.
(3) 19 U. C. R. 381.

1887

HOVEY v. WHITING.

Gwynne J.

ly showed that J. R. McD's. dwelling house was their locality, which was readily ascertainable.

In *Powell* v. *the Bank of Upper Canada* (1), the property covered by a chattel mortgage was described as :—

The goods, chattels, furniture and household stuff expressed in the schedule hereunto annexed.

Which schedule was headed :—

An inventory of goods and chattels in the possession of J. R.

on a certain day, the locality of the house in which the goods were not being mentioned, and it was held a sufficient description of the goods intended to be covered by the mortgage in compliance with the statute.

In *Mills* v. *King* (2) the description of goods mortgaged was given in the mortgage as follows :—

All and singular the goods and chattels, furniture and household stuff, and articles particularly mentioned and expressed in the schedule hereunto annexed, and which are now in the warehouse of James Reid, in the City of Hamilton, and are about to be placed in the building known as the Burlington Hotel.

The schedule mentioned then a long list of articles as situate in several rooms of the hotel, designating the rooms as parlor "C," parlor "H," &c. In some of the rooms there were goods as described in the schedule, in others there were no goods, and some of the goods described in the schedule were still in possession of Reid, who was the manufacturer of them ; and it was held that all the goods in the schedule which were said to be in certain rooms in the hotel in which rooms there were such goods were sufficiently described, but that goods described in the schedule as being in certain rooms which were not in these rooms did not pass ; and that all goods of the mortgagor that were in Reid's warehouse did pass as sufficiently described.

In *Sutherland* v. *Nixon* (3) the goods mortgaged were specified as—

The goods, chattels, furniture and household stuffs particularly

(1) 11 U. C. C. P. 303. (2) 14 U. C. C. P. 228.
(3) 21 U. C. R. 629.

mentioned and described in the schedule thereunto annexed marked A.

In this schedule the chattels were put down without any other description than

One buggy, one cutter, one cart, one bread sleigh, two sets of harness, one horse, one chaff cutter, and the following household furniture, namely, in the small parlor, one stove, &c.,

and then the various articles of furniture were enumerated in the several rooms in the mortgagor's dwelling house, but where the dwelling house was situate did not appear. This description was held sufficient as to the furniture, but insufficient as to the other articles.

In *Mathers* v. *Lynch* (1) goods in a chattel mortgage were described as—

The following goods and articles being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, 85 gallons of vinegar, &c., giving a long list, and also the following goods, being of the stock in trade of the party of the first part, taken in the month of April last, that is to say, 16 pieces of tweed, &c.

In this case the court had no difficulty in holding that the goods described as "being of the stock in trade, &c,," of the mortgagor were situate in the store previously mentioned, and that the goods enumerated as "the stock in trade" of the mortgagor were therefore sufficiently described.

Now as to the correctness of all those judgments, as to the sufficiency of the several descriptions which were held to be sufficient, there can not in my opinion be entertained a doubt; but the reasoning upon which the description in *Wilson* v. *Kerr* (2), was held to be insufficient appears to me to be hypercritical and to proceed upon what I think was a misconception of the object and intent of the statute.

The trust assignment in question there was executed by a trader who had become insolvent, and the person assailing it was an execution creditor of such trader.

(1) 28 U. C. R. 354. (2) 17 U. C. R. 168; 18 U. C. R. 470.

1887

HOVEY v. WHITING.

Gwynne J.

Now a creditor of the assignor was the only person who could assail the mortgage and there can be little doubt that he well knew in what building on Ontario Street, in Stratford, the person who had become his debtor carried on his business, and if he knew the place where his debtor carried on his business and where his stock in trade was he could not have been prejudiced by reason of the mortgage not having more precisely stated a fact which may have been well known to him and all the creditors of the assignor and they were the persons, and not the court, for whose information the statute required the description of the goods assigned to be inserted in the assignment. In that case the goods were described as—

> All and singular the stock in trade of the said R. D. W. (the assignor) situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses, cattle and also all bonds, bills, notes, debts, choses in action, &c., &c.

Now the enactment in question was not based upon the assumption that persons dealing with a trader and becoming his creditors might be ignorant of the nature of the trade in which he was engaged, or the place where such trade was carried on, and that to protect them from any prejudice arising from such ignorance it was necessary that any mortgage made by a debtor of goods and chattels under the designation of "all the "stock in trade" of the mortgagor should be void as against creditors unless the nature of the debtor's trade should be stated in the mortgage and the place where such stock in trade was situate should be stated with greater preciseness than naming the street and town where it was.

It is, in my opinion, quite a mistake to hold that the statute is to be construed as meaning that by reading the instrument itself or a schedule annexed thereto such a description should be obtained as would convey to every reader and to the court, whenever a question

1887

HOVEY v. WHITING.

Gwynne J.

should arise, without the aid of any oral evidence of surrounding circumstances or otherwise, what were the particular articles which constituted "all the stock in "trade" of the mortgagor, or that in a mortgage of goods and chattels under such designation it is indispensable that an inventory should be made or stock taken and that the nature, quantity, quality and value of the several items constituting the stock in trade should be set out in the mortgage or in a schedule annexed thereto.

Such an inventory, perfect though it should be, would be of no use whatever in many cases; if, for example, the debtor, after executing a mortgage of all his stock in trade in his shop at a named place designating every item of such stock in an inventory annexed by its quantity, quality and value, and after selling one-third of such stock in the course of his trade should replenish his shop with other goods of the like description, quality and value but in much greater quantities so that the goods remaining of the stock in trade mortgaged should, when a question should arise, constitute but a part of the mortgagor's stock in trade in his shop of the like articles as those mortaged consisted of, in such a case it would be impossible by reading the mortgage alone without any oral evidence to distinguish the mortgaged goods from those of the like description which had been subsequently purchased, but with oral evidence the goods mortaged could be readily and easily known and distinguished from the others.

So again, if the mortgage should be of a part only of the mortgagor's stock in trade in his shop and there should be an inventory annexed specifying the goods intended to be conveyed by their quantity, quality and value as for example :—

5 pieces of black silk for ladies dresses of the value of $2 per yard, ten pieces of black satin for ladies dresses at $2.25 per yard, twenty pieces of grey cotton goods at twenty cents per yard, ten bales of

1887

HOVEY v. WHITIN G.

Gwynne J.

Brussels carpet, containing each 100 yards, of the value of $2 per yard, twenty bales of tapestry carpet, containing each 100 yards, of the value of $1 per yard, and five bales of Kidderminster carpet of 100 yards, each of the value of $1.25 per yard, all of which goods were described as being in the mortgagor's shop, the precise site of which is stated — such a description would be utterly insufficient to enable a person who knew no more than the inventory annexed to the mortgage stated to distinguish the goods intended to be mortgaged from others of the like description, quantities, quality and value in the mortgagor's shop at the time of the execution of the mortgage. This is what I understand the judgment of this court in *McCall* v. *Wolff* (1), in substance to decide. I was not a party to that judgment, but the majority of the court appear to have been of opinion that the goods as described in the mortgage constituted part only of the goods in the mortgagor's shop at the time of the execution of the mortgage, and it is plain I think, from the language of His Lordship the Chief Justice who delivered the judgment of the majority, that if the goods had been stated in the mortgage to have been all the goods in the mortgagor's shop, or even if oral evidence had established that the goods were, in point of fact, all the goods that were in the mortgagor's shop when the mortgage was executed, it would have been sufficient.

The naming a locality where the goods intended to be covered by the mortgage or bill of sale are at the time of its execution seems to me to be the least efficient mode possible of describing the goods intended to be assigned and in many cases utterly useless, for when the question arises whether the goods intended to be covered by the assignment can be readily and easily known so as to be distinguished from other goods of the assignor the locality in which the goods were at the time of the mortgage may be

(1) 13 Can. S. C. R. 130.

1887

HOVEY v. WHITING.

Gwynne J.

wholly changed. Thus if the mortgagor described the property intended to be mortgaged as

> One black gelding. one bay mare, one Alderney cow, one Jersey heifer, one Durham bull, and five South Down ewes, the property of the mortgagor, all of which cattle are now in the care of A. B. and grazing upon his farm, situate upon lot No. 1, in the 2nd Concession of the Township of Nepean,

of what use would the statement of locality be if A. B. should himself have property of his own or of some other person of like description on the farm named when the question as to the sufficiency of the description should arise? And yet, independently of the locality stated, the interested parties, namely, the mortgagor's creditors, might have no difficulty whatever in distinguishing which were the property of the mortgagor, and so which were covered by the mortgage. When the execution creditors who assailed the mortgage in *Wilson* v. *Kerr*, in order to obtain satisfaction of their execution seized a portion of the stock in trade of the mortgagor they had no difficulty in finding the goods seized where they were on Ontario Street, in the town of Stratford, so that they could not have been prejudiced by any supposed insufficiency of the statement in the mortgage of a building on Ontario Street in which the mortgagor's stock in trade was. Whether or not a description is sufficient to enable the goods mortgaged to be distinguished within the meaning of the statute, is always a question of fact and not of law. In the above case the question was limited to the sufficiency of the statement of the locality where the mortgaged stock in trade was and was whether the description given conveyed such information to the parties interested, namely, the creditors of the mortgagor, as to have enabled them to find the goods; and the tribunal to determine such fact could not reasonably exclude from consideration any evidence of knowledge bearing upon such fact which the creditors possessed through their dealings with their debtors.

1887

HOVEY v. WHITING.

Gwynne J.

Again, if a mortgage should describe the property mortgaged as

> One Alderney cow, one Jersey cow, one bay mare, one Durham bull, one plough, one threshing machine, two harrows, all of which cattle, goods and chattels are now upon the farm of the mortgagor, being the S. ½ of lot No. 2, in the 2nd Concession of the Township of Gloucester,

of what use would this statement of locality of the cattle, goods and chattels mortgaged be if, when the question should arise, the mortgagor had already removed to another farm in another township to which the cattle and chattels mortgaged had been removed? And yet oral testimony of the most undoubted veracity might without difficulty shew—and perhaps out of the lips of the creditors assailing the mortgage—that at the time of the execution of the mortgage the mortgagor owned and had in his possession no cattle, goods or chattels of the description stated in the mortgage other than the precise number there stated, and that they were, at the time of the question arising, on the farm to which he had removed. Innumerable instances might be given of the insufficiency of a statement of the locality of the goods intended to be covered by a mortgage as a mode of distinguishing the goods intended to be covered by the mortgage from other goods of the mortgagor. But when all a man's stock in trade is assigned no occasion for distinguishing assigned from non-assigned goods can arise unless it be to distinguish what a man had at the time of the execution of the mortgage from articles of a like description, if any there be, in his possession which he had subsequently acquired, and that is a thing which no description in the mortgage might be able to effect but which could readily and easily be done by parol evidence.

So where a man assigns all his bonds, bills, notes and securities for money, there can be no doubt that such a description was intended to cover every bond,

bill, note and security for money of which the mortgagor was, at the time of the execution of the mortgage, the owner and entitled to receive the proceeds, whatever might be the names of the obligors of the bonds or of the makers of the notes or of the acceptors of the bills, and whether the mortgagee was obligee or assignee of the bonds or payee or endorser of the notes, and whatever might be the amount secured by each respectively, and whether they were in the possession of the mortgagor's bankers for safe keeping, or in a strong box or safe in his own custody, which places of safe keeping might, if stated in the mortgage, be changed after its execution and before the occasion for distinguishing what was intended to pass should arise; and as that occasion never could arise except at the suit of some creditor assailing the mortgage, and in respect of some particular bond, bill, note, or security for money claimed to be the property of the mortgagor, and as such applicable to payment of the debt due to the creditor or creditors assailing the mortgage, and as the mortgage plainly shows that all the bonds, bills, notes and securities for money which the mortgagor possessed at the time of the execution of the mortgage were covered by it, the only question would be, whether the particular security or securities which the assailing creditor or creditors claimed to be applicable to satisfaction of their debts was or were the property of the mortgagor at the time of the execution of the mortgage or had been acquired by him since; and for this purpose I cannot see upon what principle oral evidence should be excluded. The statute never intended, in my opinion, to exclude oral evidence of circumstances surrounding the execution of the mortgage and throwing light upon the question of fact to be determined or to cancel the maxim *certum est quod certum reddi potest.*

The object and intent of the statute, in my opinion,

1887

HOVEY v. WHITING.

Gwynne J.

was to prevent creditors being defrauded by means of secret mortgages or bills of sale being executed by the debtor of property still remaining in his possession and to all appearance his own property, and to afford facilities for unsecured creditors to distinguish betweeen the goods of their debtor which are encumbered from those which are as yet unencumbered, and to protect persons dealing with him and giving him credit upon the faith of the property of which he was in open possession being, as it appeared to be, his own property. The clause in the statute which requires such a description of the goods intended to be covered by the instrument that the same may be thereby readily and easily known and distinguished was not, in my opinion, enacted either for the purpose of enabling the mortgagee or assignee to know and distinguish the goods upon which he had agreed to accept the security taken, nor to enable a stranger to the transaction or the court upon a question arising by merely looking at the description in the mortgage to distinguish what goods were covered by the mortgage from other goods of the mortgagors, but to enable unsecured creditors of a debtor and persons having dealings with him or contemplating becoming his creditors to ascertain what part if any of the goods and chattels being in his possession and apparently his own is to any, and if to any to what, extent encumbered by assignment to a stranger or to a preferred creditor so as to be removed wholly or in part from liability to unsecured creditors; in short, to distinguish the encumbered from the unencumbered goods so as to enable them to determine how they shall govern themselves in their dealings with him, namely, whether to continue dealing with him, and trusting him, and giving him credit, or to call in question the assignment, if any, as not being executed in good faith. When all the goods and chattels of a debtor are

assigned the occasion for distinguishing that which is assigned from that which is not assigned does not arise, and when such assignment is put on registry in the manner and with the affidavits required by the statute the object and intent of the statute is attained, and the only question open to the unsecured creditors, as it appears to me, is as to the *bona fides* of the instrument.

In the case before us, assuming the deed to be within the operation of the statute and to be open to attack at the suit of the particular creditors assailing it to the prejudice of all other creditors, who equally with the assailing creditors are all alike *cestui que trustent* of the trust assignment, and as the only objection taken to the sufficiency of the description is as to its sufficiency to protect from seizure the goods taken in execution, none of which are suggested not to have been on the premises where the debtors' business was carried on at the time of the execution of the trust assignment, all that is necessary to determine is that as to all such goods the description given in the trust assignment is abundantly sufficient upon a true construction of the statute, and I am of opinion that it is. And assuming locality of the assigned goods to be necessary to have been stated in the trust assignment, that locality does sufficiently appear by the deed to have been in the particular lots of land conveyed by the deed, where the debtor's business was carried on and where the goods were when seized and taken out of the possession of the trustees of the deed, and, therefore, upon the authority of the great weight of the decisions in the Ontario courts, and of what was said in this court when holding the description in *McCall* v *Wolff* (1) to have been insufficient, the statute has been sufficiently complied with in the present case, and the plaintiffs in the interpleader issue were upon this point also entitled to judgment, as well as upon the

(1) 13 Can. S. C. R. 130.

1887

HOVEY v. WHITING.

Gwynne J.

ground that the statute does not apply to such a trust deed for the benefit of all creditors of the as signor alike ratably to the amount due to each without preference or priority.

The appeal must for the above reasons, in my judgment, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *William M. Hall.*

Solicitor for respondents: *Hugh McKenzie Wilson.*