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*Nov. 24.
1888
*June 14.

JAMES GARDNER (DEFENDANT).....APPELLANT ;

AND

CHRISTIAN KLŒPFER & CHARLES WALKER (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment—In trust for creditors—Creditor attacking—Effect of—Right to participate in after.

A creditor is not debarred from participating in the benefits of an assignment in trust for the general benefit of creditors by an unsuccessful attempt to have such deed set aside as defective.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) and ordering the verdict for the defendant to be set aside and judgment entered for the plaintiffs.

The plaintiffs and defendant were, respectively, creditors of a firm trading as McKenzie & McKinnon, which firm had executed an assignment of all their real and personal property to the defendant in trust for the general benefit of their creditors. Prior to the assignment a meeting of the creditors of the firm was held at which the plaintiff Klœpfer was present, and he assented to the assignment and was appointed an inspector of the estate.

The plaintiffs subsequently obtained a judgment against the said firm of McKenzie & McKinnon and issued an execution under which a portion of the good assigned to the defendant was seized. The defendant having claimed the goods under the assignment, an interpleader order was issued on the trial of which the plaintiffs endeavored to impeach the vali-

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* PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

(Henry J. was present at the argument but died before judgment was delivered.)

(1) 14 Ont. App. R. 60. (2) 10 O. R. 415.

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dity of the defendant's deed. It was held, however, that the plaintiffs having assented to the deed were estopped from disputing its validity, and judgment was given for the defendant.

After this decision the plaintiffs filed a claim against the insolvent estate, and on declaring a dividend their claim was included; another creditor of the estate then formally notified the defendant not to pay a dividend to the plaintiffs who, the notice alleged, had forfeited their right to participate in the benefit of the assignment by attacking the deed. The plaintiffs brought an action for their dividend.

On the trial judgment was given in favor of the defendant, which was affirmed by the Divisional Court. The decision of the latter court was afterwards reversed by the Court of Appeal. The defendant then appealed to the Supreme Court of Canada.

McLennan Q. C. for the appellant.

The Court of Appeal has decided that a creditor may attempt to destroy an assignment by the debtor and failing to do so may still claim the benefit of the deed which was the subject of such attempt. It is submitted that the authorities are against such a right. *Field* v. *Lord Donoughmore* (1), *Watson* v. *Knight* (2), *Re Meredith* (3).

McCarthy Q.C. for the respondent referred to the following authorities: *Ellison* v. *Ellison*, (4); *Harley* v. *Greenwood* (5); *Thorne* v. *Torrance* (6); *Spencer* v. *Demett* (7); *Clough* v. *London and North Western Ry. Co.* (8); *Jewett* v. *Woodward* (9).

(1) 1 Dr. & War. 227.
(2) 19 Beav. 369.
(3) 29 Ch. D. 745.
(4) 1 White & Tudor L. C. 5 ed. 289.
(5) 5 B. & Al. 95.
(6) 16 U. C. C. P. 445; 18 U. C. C. P. 29.
(7) 13 L. T. N. S. 677.
(8) L. R. 7 Ex. 26.
(9) 1 Ed. Ch. (N.Y.) 195.

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Ritchie C.J.

Sir W. J. RITCHIE C.J.—I think the respondent had a perfect right to test the validity of the assignment, and on its being established to come in and claim their share of the estate under it.

STRONG, J.—The facts of this case which are few and simple are contained in documentary evidence and the admissions of the parties, no oral evidence of witnesses having been adduced at the trial. They may be shortly stated as follows:—

On the 4th of May, 1883, the firm of McKenzie & McKinnon, carrying on business at the town of Meaford, executed a deed of assignment for the benefit of creditors whereby they assigned to the appellant all their stock in trade, goods, chattels, debts, lands and other property upon trust, to sell and convert the estate and get in the debts and, after paying the costs and expenses attending the execution of the trust, to apply the residue of the fund "in or towards the payment of the debts of the said debtors in proportion to their respective amounts without preference or priority." The respondents Gardner & Walker, a partnership firm carrying on business at Guelph, were creditors of the assignors for a considerable amount over $3000.00, their debt being the largest in amount of the assignor's liabilities.

This deed appears to have been communicated to the respondents and they acquiesced in it. Mr. Justice Osler before whom the interpleader issue, to be hereafter mentioned more particularly, was tried, has found that Kloepfer, acting for his firm, attended a meeting of creditors called by the appellant as assignee under the deed, on the 14th of May 1883, and assented to a resolution appointing him one of the trustees to act on behalf of the creditors in assisting the assignee to wind up the estate, and further that he acted as such trustee in inspecting and reporting on the stock, and that he was also present and did not

dissent when a resolution was passed to pay certain arrears of wages to the men employed in the manufactory which had been carried on by the assignors. A few days afterwards, however, the respondents brought an action against the assignors, recovered judgment by default, issued execution thereon, and caused the property assigned to be seized thereunder, contending that the assignment was invalid because it contained unreasonable conditions to which creditors were not bound to assent. Thereupon, the appellant having claimed the property seized, the sheriff applied for an interpleader order which was made by the master in chambers. By this order an issue, in which the appellant was the plaintiff and the respondents defendants, was ordered to be tried in order to ascertain whether the property in the goods seized was in the appellant at the time of the seizure by the sheriff. It was further ordered that in default of security being given by the claimant (the appellant) the goods should be sold and the price paid into court and this was accordingly done. The interpleader issue came on to be tried before Mr. Justice Osler without a jury at the autumn assizes in 1883, when the learned judge found the facts before mentioned as to the respondents' conduct in acting under the deed of assignment, and upon that held the respondents estopped from impeaching the deed as execution creditors, and determined the issue in favor of the appellant. Thereupon, the appellant having prepared a "first dividend sheet" and having by it collocated the respondents as creditors entitled to a dividend on their debt to the amount of $962.64, James Cleland, one of the largest creditors of the insolvents, served the appellant with a written notice not to pay the dividend upon the ground that the respondents "had forfeited their right to share in the estate through their having endeavored to destroy the trust." The ap-

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pellant then having refused to pay over the dividend, the respondents brought this action to compel payment, to which the appellant set up as a defence the proceedings already mentioned under the respondents' execution. The action was tried before the late Chief Justice of the Queen's Bench Division without a jury, when no evidence having been taken, but the before mentioned facts being admitted, that learned judge found for the defendant in the action, the present appellant. An order *nisi* subsequently obtained to enter the verdict for the plaintiff was after argument before the Queen's Bench Division discharged, Mr. Justice O'Connor dissenting. The respondents then appealed to the Court of Appeal, by which court the judgment of the Queen's Bench Division was reversed, and judgment was ordered to be entered for the plaintiffs in the action (the present respondents) for the full amount of their claim. From this last judgment the present appeal has been taken.

The judgment of the Queen's Bench Division, which is reported in the 10th volume of the Ontario Reports, appears to have proceeded upon the grounds that the respondents had by their conduct forfeited their *primâ facie* rights under the deed; and the cases of *Field* v. *Lord Donoughmore*, (1); *Watson* v. *Knight*, (2); *Meredith* v. *Facey*, (3), were relied on as authorities for this position. The dissenting judgment of Mr. Justice O'Connor puts in forcible language what he considered to be an unanswerable objection to the reasoning upon which the opinion of the majority of the court was founded, namely, that the respondent having in the interpleader issue been met by the deed, and held to be bound by it, could not afterwards be deprived of the benefit of the trusts contained in it. The judgment of the Court of Appeal which was delivered by Mr. Justice Osler, rests the case on two distinct

(1) 1 Dr. & War. 227.
(2) 19 Beav. 369.
(3) 29 Ch. D. 745.

grounds, the first ground being that the respondents having been originally entitled as *cestuis que trusts* under the deed irrespectively of any acts of acquiescence on their part, could not by reason of any subsequent conduct involving a repudiation of the trusts be considered to have forfeited their rights to the benefits secured to them in common with the general body of creditors. The other ground taken by the Court of Appeal was that put forward by Mr. Justice O'Connor in the Queen's Bench Division, that the appellant having in the interpleader issue set up the deed and the respondents' acquiescence in it to defeat the execution, could not afterwards be permitted to withdraw from the respondents the benefits which it assured them.

It appears to me that on both these grounds the judgment of the Court of Appeal is correct and ought to be sustained. The deed appears on its face to be a perfectly good and valid deed of assignment for the benefit of creditors, such as is expressly excepted from the avoidance of preferential assignments and other deeds intended to defeat and delay creditors contained in the Revised Statutes of Ontario chapter 118 sec. 2. The respondents were therefore bound by it and had no alternative but to accept the benefit of the trusts created in favor of the general body of creditors or to forego their rights altogether. In this state of things it is out of the question to say that by taking proceedings in repudiation of the deed, or by any course of conduct adverse to it, they can be deemed to have worked a forfeiture of their rights under it. A court of equity never proceeds *in pœnam*, and to enforce such a forfeiture would be nothing less than to inflict a penalty upon the respondents as a punishment for their conduct.

If instead of the respondents having been originally bound by the deed, and therefore entitled to the bene-

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fits conferred by it, their right to claim under it had been dependent on their election to take under or against it, and then having first rejected it they had sought to be let in to participate in the trusts, the case would have been different, and as in the cases cited they could justly have been met by the objection that having chosen to act adversely to the trust they were not entitled to claim benefits which they had thus distinctly repudiated.

In all the cases referred to in the judgment of the Queen's Bench Division the parties seeking to come in under the assignment had not been originally parties to the deed, and having had the option of either accepting or rejecting the terms, and having in the first instance chosen the latter alternative, were asking the court to give them the benefit of that which they had formerly disclaimed; in other words they were asking relief inconsistent with the position which they had deliberately chosen to assume, seeking to "approbate" that which before they had "reprobated," a course which the law will not permit. The difference between such cases and the present is obvious and consists in this, that in the case now before us the creditors had no liberty of choice, but were bound by the deed *ab initio.*

But aside altogether from this, the principal ground upon which the Court of Appeal have rested their judgment, I am of opinion that the reasoning upon which Mr. Justice O'Connor's judgment proceeded and which is also adopted by the Court of Appeal affords a conclusive answer to the appellant's contention. The objection now made to the respondents' claim to be paid in common with the other creditors their proportionate share with the insolvents' estate is that they attempted to enforce their execution, but in this attempt they were defeated by the deed and their previous acceptance of the trusts contained in it. Who ever heard

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of a party being held bound by a deed so far as to be barred from setting up claims adverse to it, and yet being at the same time deprived of advantages secured to him by the same instrument? It is a universal principle of law, common to all systems, and founded on the most obvious principles of justice and reason, that a party who is compelled to accept a disadvantageous position shall nevertheless be entitled to any incidental advantages which he can claim consistently with that position. The maxim of law is: *Qui sentit commodum sentire debet et onus*, but the converse maxim, *Qui sentit onus sentire debet et commodum*, (1), is also true, and the principle which the respondents invoke in this case, is summed up and comprehensively included in this general rule of law. To say that the respondents, in the circumstances in which they have been placed, are not to be permitted to participate in the division of the trust estate would be indeed to compel them to bear the *onus*, but to withhold from them the advantages of the situation which the appellant has placed them in.

It therefore follows that even if the respondents were not originally bound by the deed, as I think they were, they are now, by reason of their adoption of it before bringing their action, and by reason of the effect which has been given to it at the instance of the appellant in the interpleader proceeding, concluded by it, and being thus concluded they are entitled to share its advantages like any other creditor.

The appeal must be dismissed with costs.

FOURNIER J.—I am in favor of dismissing this appeal for the reasons given by Mr. Justice Osler in the Court of Appeal.

TASCHEREAU and GWYNNE JJ. concurred in the

(1) Brooms maxims (Ed. 5th) 712.

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reasons given by Strong J. in favor of sustaining the judgment of the Court of Appeal.

Appeal dismissed with costs

Solicitors for appellant: *Wilson & Evans.*

Solicitors for respondents: *Coffee, Field & Wissler.*