

their three principal creditors on the 21st July, 1914, resulted in an arrangement by which the three creditors formed themselves into a committee to look after the affairs of the debtors upon the basis that all the creditors were to be paid pro rata. That finding rested upon contradictory evidence. In the mortgage itself there was a statement that it was made subject to the provisions of an agreement bearing even date herewith made between the mortgagee and the mortgagor. It was impossible, upon the whole evidence, to disturb the finding of the Chancellor.

Upon the argument it was pointed out that the plaintiff, as assignee, was empowered by the Assignments and Preferences Act, R.S.O. 1914 ch. 134, to take action only to set aside transactions made or entered into in fraud of creditors or in violation of the Act. It was said that the transaction was not covered by the provisions of the Act. It might be that the preference given by the mortgagee, while unjust if regarded in the light of the arrangement of the 21st July, 1914, was not strictly within the provisions of the Act. It was not necessary to determine that now, because the plaintiff as assignee would, at all events, succeed to the right of the debtors to be relieved from the mortgage upon payment of whatever was the stipulated amount referred to in the evidence of Smith.

Application was made to add as a plaintiff a creditor of the Smith firm and to amend by making the action one brought on behalf of all creditors. There was no reason why this should not be granted if provision was made for carrying out the arrangement originally made, as found by the Chancellor, i.e., payment pro rata to all the creditors, except the small ones who might be paid in full. This was not a case of the plaintiff having no claim at all and another being substituted. The appellant company (one of the three creditors), in face of its agreement, had obtained an advantage inconsistent with the position it had been found to occupy. The arrangement between the debtors and these creditors was intended for the benefit of the body of creditors; but it included, so far as the three were concerned, a restriction to pro rata payments, in consideration that the others refrained from pressure or suit against the debtors. This consideration was sufficient to uphold the bargain.

There was no difficulty in determining that, so far as it could be done, the security should form part of the assets which it was the duty of the plaintiff to distribute pro rata. An account might be taken of the creditors' claims on the 21st July, 1914, and those who elected to take advantage of the scheme then settled upon could prove their claims with the plaintiff.