

CHANCERY.

(Reported by ALEX. GRANT, Esq., Barrister-at-Law, Reporter to the Court.)

BANK OF UPPER CANADA V. BEATTY.

THE SAME V. THOMAS.

Judgment creditor—Fraudulent conveyances.

In order to retain the lien created by the registration of a judgment recovered at law, it is necessary that the bill to enforce such lien should have been filed on or before the 18th day of May, 1861.

When a judgment creditor files a bill to enforce his judgment against the lands of his debtor, it must be shown that the creditor has sued out execution on such judgment.

The agent of a bank having become indebted to his principals in a large sum of money, proceedings were taken to enforce payment thereof; and when execution therefor was on the eve of being sued out, the agent absconded from the country; and, with the avowed object of defeating the claim of the bank, but, as the agent alleged, for the purpose of paying his other creditors, conveyed away to a person to whom he was only then introduced, a large quantity of valuable lands to be paid for in goods at long dates, returning at night for the purpose of executing the conveyances, and which were executed without any investigation of the title to the property; and the agent subsequently signed the agreement for the delivery of the goods to his son, taking, in payment, his notes payable over a period of several years. The court, under the circumstances, set aside the sale as fraudulent against the bank.

The bill, in the first mentioned cause, was filed by the Bank of Upper Canada against James Beatty, George Thomas, and John Stephens, for the purpose of having enforced the payment of a judgment recovered by the bank against Thomas, under the circumstances set forth in the judgment. That cause, together with a suit instituted by Beatty against Stephens and the Bank of Upper Canada, came on to be heard at the same time.

Strong and Crickmore for the Bank.

Blake and Blain, for the defendants.

In the suit instituted by Beatty, the usual decree was pronounced. In the other, after taking time to look into the authorities cited, the following judgment was delivered by

VANKOUGHNET, C.—This is a bill to set aside a certain conveyance of lands by one of the defendants, Thomas, to one other of the defendants, Stephens, on the ground that it was made with the fraudulent intent of putting the property out of reach of the plaintiffs, and during the pendency of an action by them against the defendant Thomas, which resulted in a judgment at law for an amount of which the plaintiffs, by means of this bill, seek to obtain payment out of the property in question. The bill alleges that the conveyance to Stephens was voluntary and without consideration. This latter allegation is disproved. The bill prays in reference to the lands so conveyed, that the same, upon which the plaintiffs' judgment is a lien or incumbrance, or a competent part thereof, may be sold, and the proceeds applied to the payment of the judgment. The bill also impeaches a judgment recovered by the defendant Beatty against Thomas; but this portion of it is not material to the questions under consideration here, as Beatty, prior to the 18th of May, 1861, filed a bill on that judgment as a judgment creditor, making the plaintiffs parties defendants to it as judgment creditors of Thomas, and has obtained, since this cause was heard, the ordinary judgment creditor's decree. The plaintiffs, in their bill, which was filed in June, 1861, do not allege that upon their judgment they have issued any *fi. fa.* against lands, but they set up, as giving them a right to obtain the aid of this court to execution on and of their judgment, the bill filed by Beatty as a judgment creditor on the 14th of May, 1861, and to which, as stated, they were made parties defendants, and they set forth that they had put in their answer in which they claimed to be paid the judgment in question, as well as a prior judgment recovered by the Savings Bank, and assigned to them, but about which there is no dispute, as Beatty offers to redeem and pay it off. The plaintiffs rely upon this allegation, true in fact, as bringing them within the 11th sec. of the act 24 Vic., ch. 41, and therefore keeping alive their judgments as liens upon the lands of Thomas available for the payment of his debts, and they also contend that that act did not take effect till the 1st of September, 1861, whereas the bill in this case was filed in June previously, and that so their lien is preserved.

I think the plaintiffs fail to maintain either of these positions, and that they filed their bill too soon to give them the

benefit of any rights which they might have acquired as judgment creditors by virtue of Beatty's suit. The bill simply sets up the bill filed by Beatty, and the answer of the defendants filed long subsequently to the 18th of May, 1861. Beatty might, at any time, have dismissed that bill. The plaintiffs' right at the time this suit was commenced to preserve their lien as judgment creditors by means of Beatty's suit was inchoate, and until decree they could claim no benefit of the suit. This they anticipated, and, therefore, have in respect of it filed their bill too soon, just as when a judgment is no lien on any specific lands the plaintiff seeks equitable execution in this court without first having issued execution on his judgment at law. *Neate v. Marlborough*, (3 M. & Craig, 407.) *Angell v. Draper*, (1 Vernon, 399.) Had the plaintiffs' right to retain their lien matured before filing their bill by a decree at Beatty's suit I should, in accordance with the *Bank of Montreal v. Woodcock*, (9 Grant, 141.) have held that they had made out a title, so far, to ask the aid of this court. But, as I have already said, they have been premature, neither having a decree establishing their position in this court in Beatty's suit, nor execution at law when they filed their bill. As to the last clause of the 24 Vic., ch. 41, providing "This act shall take effect on the 1st day of September next," no doubt some uncertainty as to the time the act is to operate is created by it. It was probably hurriedly inserted in the bill after it had been introduced, but I think its effect must be limited to keeping registered judgments in their places or order of priority (but not as liens *per se*) until the 1st of September, in order that they may as to such priorities sustain writs of execution which shall have been issued on them in the meantime, and that in all other respects the act came into operation immediately on its passing. This view is confirmed by the act 25 Vic., ch. 21, passed to cure an omission in the other act relative to the registry of certificates of discharge of mortgage. It recites that it is expedient "to remove all doubts as to the sufficiency of such registration since the passing of the said act"—that is, the 24th Vic., ch. 41, and provides, in its 3rd section, that every certificate of mortgage registered since the 18th of May, 1861, which, before that date, would have been a sufficient discharge of a mortgage, "shall have the same effect and validity as if the second section of this act had passed and been the 8th sub-section of section number seven of the said act 24 Vic.," from which by an oversight in repealing the clause of the old act for the registration of such certificates provision therefor in the future had been omitted. The legislature here plainly shew that they treat the act of 24 Vic., as having come into force on the 18th of May, 1861, the date of its being passed.

The objection to the plaintiffs being in a position to ask the aid of this court having been taken by the answer, I must give the defendants their costs and dismiss the bill, but without prejudice; if that leave be necessary to the plaintiffs' filing another in respect of the same matters.

After this judgment had been delivered the Bank instituted proceedings in another suit against the same parties and one F. A. Thomas, a son of the defendant Thomas, to whom his father had transferred his claim upon Stephens.

Evidence was taken in the suit, and the case argued before his Lordship the Chancellor at the sittings of the court at London in March and April, 1863.

Becher, Q. C., and *Fitzgerald*, for the plaintiffs.

Blake and Blain, for defendants.

Cortlett v. Ratchiffe, (4 L. T. N. S. 1), *Skarf v. Souby*, (1 M. & Gor. 364), *Buckland v. Ross*, (7 Grant, 440), *Wood v. Dixie*, (7 Q. B. 892), *Thompson v. Webster*, (5 Jur. N. S. 668, S. C. on app. 7 Jur. N. S. 531), *French v. French*, (D. M. & G. 95), *Hale v. The Saloon Omnibus Company*, (4 Drew, 492), *Turnley v. Hooper*, (2 Jur. N. S. 1081), were, amongst other cases, referred to and commented on by counsel.

VANKOUGHNET, C.—The bill in this case is filed by the plaintiffs to have declared void as against them, and all other creditors of George Thomas, one of the defendants, certain conveyances of real estate executed by him to John Stephens, another of the defendants, under the following circumstances: Thomas having for some years been agent of the plaintiffs in Chatham, became