REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

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1806. *April.*

M'KIM *and others, representatives of* DAVIES
v.
ALEXANDER *and* JAMES FULTON.

The endorsement, by the clerk of the court of chancery, that the suit is brought to *attach* the effects of the absent defendant, is sufficient to restrain the application of them to any other use, until the plaintiffs' demand is satisfied.

This case is an appeal from the court of chancery. In the bill filed by the appellants, it is stated that a partnership in trade formerly subsisted between *John Davies* and *Alexander Fulton*, which lasted about three years. That in 1798 a dissolution of the partnership was agreed on; that *Alexander Fulton* in consideration that *John Davies* would relinquish to him all his interest in the concern, agreed to pay said *Davies* $ 36,150, and also to pay all the debts of what kind soever due from the firm, and to indemnify and keep harmless the said *John Davies* from said debts. That *John Davies* died on the 4th of November, 1798, and bequeathed his property to his widow and two infant children, who are plaintiffs in the suit. That at the time of the dissolution of the said company of *Davies & Fulton*, they were possessed of a capital stock, and had debts owing to them of very great value. That the said *Alexander Fulton* entered into partnership with his brother *James*, who brought no capital into the firm; and that the said *Alexander*, instead of applying the debts and effects of *Davies & Fulton* to discharge the debts due from that concern, applied them to support the trade and credit of *Alexander* and *James Fulton*. That there are debts due and unpaid from *Davies & Fulton* amounting to £ 3,000 sterling. That the object of *Alexander Fulton* is to subject the estate of *Davies* to the payment of said debts in case he should prove insolvent. The bill then prays that sundry debts due from persons in Virginia, named in the said bill, may be attached so as to be applied to exonerate the plaintiffs from the debts due from

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Davies & Fulton and for general relief. There was an endorsement on the subpœna that the object of it was to attach the effects of the defendants.

The answer of *Alexander* and *James Fulton*, admits the existence and dissolution of the firm of *Davies & Fulton:* and *Alexander Fulton* answering for himself, says, that the business of the concern in Baltimore was chiefly conducted by *Davies*, as the said *Alexander* was generally in Europe, attending to the business of the company, purchasing goods, forming connections, &c. That he was applied to and strongly urged by *Davies* to purchase his interest in the concern, and that *Davies* exhibited to him a balance sheet of the affairs of the concern, the correctness of which from the defendant's want of acquaintance with the affairs of the concern, their unsettled state, and the urgency of the occasion, he had no opportunity to ascertain. That the said *Davies* represented most of the debts due to the concern to be good; and this defendant having confidence in him, agreed to the terms of the dissolution stated in the bill. That the defendant has since discovered that the representations and statement of the said *Davies* were fraudulently made, to deceive this defendant and to exact from him more than in justice he ought to have paid. That *Davies* represented the firm to be worth upwards of $ 56,000, after paying all its debts, and deducting bad debts. That the defendant has discovered that *Davies* omitted in his statement upwards of $17,000, due from *Davies & Fulton*, which he knew they would have to pay, and the greater part of which have since been paid by *A.* and *J. Fulton.* That the business of *Alexander* and *James Fulton* was chiefly supported by credit they obtained with merchants in England; and, that so far from the said firm being supported with the effects of *Davies & Fulton*, all the stock, effects and debts of said firm, as far as the defendants have been able to collect the said debts, together with a large proportion of the profits of *Alexander* and *James Fulton*, have been applied to discharge the debts due from *Davies & Fulton.* That

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Alexander and *James Fulton* have actually advanced and paid for *Davies & Fulton* upwards of $ 50,000. That the whole amount of debts due from *Davies & Fulton* does not exceed $14,000; and there is still due, to the said concern of *Davies & Fulton*, upwards of $ 60,000; which *Alexander Fulton* has in vain endeavoured to collect. That owing to the large advances made for *Davies & Fulton*, and losses in trade, the defendants, in order to make a just distribution of their property, have conveyed, by deed on the 8th November, 1804, all their property to *Luke Tiernan* and *Alexander M'Donald*, for the benefit of their creditors: and that the defendants were proceeding to collect those debts under a power of attorney from the trustees of their creditors, when they were stopped by the attachments.

The supplemental answer of *A.* and *J. Fulton* states, that part of the debts attached as the property of *Alexander* and *James Fulton* really belonged to *William M'Creery* of Baltimore; particularly part of the debt attached as due from *William King*, and the debt due from *John* and *William Allen;* the same being debts assigned as an indemnity by *James Neilson* to *William M'Creery*, who was his endorser at the bank of Baltimore: and that the plaintiffs in addition to the debts attached in this state, which amount to at least $ 45,000, have levied attachments in Tennessee to the amount of at least $ 11,000.

There are several depositions as to the manner in which the affairs of *Davies & Fulton* were conducted, and the circumstances attending the dissolution of that firm. Sundry evidence and documents to prove part of the debts attached to be the property of *William M'Creery*. A receipt from the representatives of *Davies* for the $ 36,150; which, according to the terms of dissolution, *Alexander Fulton* was to advance to *Davies*. The indenture of dissolution between *Fulton & Davies*. Several accounts, and a deposition to support them.

An abstract of those accounts making it appear that, after crediting *Davies & Fulton* with all their cash on hand, at

the dissolution, merchandize and debts, deducting from the debts such as appear to be insolvent, and sundry losses on bills of exchange; and debiting them with the payments made by *Alexander* and *James Fulton* of the debts due from *Davies & Fulton*; *Alexander* and *James Fulton* are actually in advance for *Davies & Fulton* $ 58,329 12 cts.

On the 4th of October, 1805, on motion of the defendants, the court of chancery, without deciding the question, whether the endorsements on the subpœnas in this cause amount to attachments, is of opinion that, if there be any attachments in the cause, they ought to be discharged, and discharged them accordingly. The plaintiffs appealed to the court of appeals.

Wickham, for the appellants. The plaintiffs had a right to attach; for when *Davies* transferred his interest to *Fulton*, the latter became the real debtor; and as the creditors might have attached, the security has a right to stand in their place, *Eppes* v. *Randolph*, 2 Call, 188. *Tinsley* v. *Anderson*, 3 Call, 329. It is not material, whether the endorsement on the writ be conformable to the strict letter of the act of assembly: It is sufficient that it has been sanctified by long practice; especially as it is a means of preventing mischief; for otherwise the debtor will remove the effects. If it be said, that the court should make the order, the answer is, that it is but form, and never has been attended to in practice. There is a receiver appointed by consent; and that impounds the effects; for it was a substitution for the order of attachment. The effects are liable to the plaintiffs' demand; for they came from *Davies & Fulton*, and may be pursued in equity. It is not true, that they have all been exhausted in paying the debts of *Davies & Fulton*. There is no evidence of it; for if the books themselves were here, they would not be evidence; and the statement, said to be taken from them, is weaker still. The *Fultons* have merely transferred the debts of *Davies & Fulton* to their own books; and we have a right to enquire into the fact. 2 *Ch. Rep.* 595.

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Young is interested as endorser for the *Fultons* at bank; and although he says he is indemnified, that does not remove the objection; for the question is, whether the deed of indemnity be not void. It is void. That it would be so under the bankrupt laws of England, is very clear; and it ought to be so here upon common law principles; for every trader ought to observe equality among his creditors; but these gentlemen have given an absolute preference. Besides, none are to have any benefit, but those who sign within eight months; which is monstrous injustice, as those in Europe, or other distant regions could know nothing of it. The deed does not, at law, assign more than the specialty debts; and a court of equity will not, in such a case, carry it further than the law does. The deed has not been recorded in Virginia; and, therefore, it is void against creditors. But it is void as to the plaintiffs for another reason, namely, that it was executed after the date of the attachment; and therefore the donees in it are *lite pendente* purchasers. That it was so executed is clear; for, although the *Fultons* might have acknowledged it on the day it bears date, yet it does not appear to have been delivered until some time afterwards; or that the creditors had even then assented to it. Consequently, it was the mere private act of the *Fultons*, who always considered themselves as having full power over it. The proof of assent must come from the appellees; for we are not bound to prove the negative. At all events, the attachment ought not to have been discharged until a reasonable time for obtaining testimony had been allowed to the plaintiffs.

Nicholas, attorney general, *Hay* and *Randolph*, *contra*. It is absolutely necessary, according to the act of assembly, that the court itself should make the order for attachment; and the endorsement by the clerk, at the instance of the plaintiff, is not sufficient; for the court has not power to dispense with the requisition of the law. The plaintiff, in all such cases, must be a creditor at the time, or he cannot at-

tach; for the legislature did not intend that it should be used as a preventive remedy against contingent cases. The plaintiff ought to be an inhabitant of Virginia; and it is questionable whether if the creditor and debtor be both non-residents, one of them can come here and attach the effects of the other. The partnership debts ought to be first paid, before the partnership effects can be applied to the discharge of demands against the individual members of the firm. *Coop. Bank. Law*, 395, 398. But, in the face of this equitable rule, the plaintiffs contend that the debts due to the *Fultons* should be applied to the payment of those due from *Davies & Fulton*. If the *Fultons* were liable, it would only be to the extent of the effects received from *Davies & Fulton;* and therefore when they shew them to have been all applied, they are discharged. The deed of trust is valid; for it was given for a valuable consideration, and was, in fact, executed at the time it bears date. It is not true that a deed preferring particular creditors is void; for such deeds are made every day, and never have been questioned before. 8 *T. Rep.* 520. It will appear upon a fair settlement, that *Davies* was indebted to the *Fultons;* and that the dissolution of the partnership between *Davies* and *Fulton*, was effected by fraud, to the great injury of the *Fultons*. There was no necessity that the deed should be recorded in Virginia; for deeds of personal property may be recorded in the place where the grantor resides. 2 *H. Black.* 404. 4 *T. Rep.* 407. The *Fultons* had no control over the deed after it was acknowledged; and the creditors having accepted it, the right was complete, and the title fixed *ab initio*, by relation. But, as no proof with respect to the execution of the deed was called for in the court of chancery, none can be required here.

Wickham, in reply. The benefit of this kind of process is not confined to actual creditors at the time it emanates; for the fifth section of the act of assembly extends it to all who have equitable claims. Foreigners as well as inhabi-

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tants have a right to attach; and the law has always been so understood, and practised on. There is no imputation upon the conduct of *Davies;* for so far from making out the balance sheet himself, he was unable to do it: And the *Fultons* had long been in possession of the books.

Cur. adv. vult.

LYONS, President. The court is of opinion, that the decree is to be reversed; and the following is to be the entry:

"This day came the parties by their counsel, and the court having maturely considered the transcript of the record of the order aforesaid, and the arguments of counsel, (without deciding what ought to be the final decree in this cause), is of opinion, that the said order is erroneous in this, that the bill should have been dismissed as to all the debtors of *James C. Neilson* and *William M'Creery*, in the second answer of the defendants, *Alexander* and *James Fulton*, mentioned, the said debts having been assigned to the said *Alexander* and *James Fulton*, for collection only, and not liable to be attached for their debts: And, in not directing bond and security for fourteen thousand dollars, with condition to account faithfully for the money which they may receive from their debtors, so that fourteen thousand dollars, if so much be collected by them, shall be forthcoming to satisfy such decree as may be pronounced in this cause, before the other attachments were discharged. Therefore it is decreed and ordered, that the said order be reversed and annulled, and that the appellees pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is ordered, that the said cause be remanded to the said superior court of chancery, to be proceeded in according to the opinion herein before mentioned, and for other proceedings to be had therein."