

In the Supreme Court of the Hawaiian Islands. In Equity. In Chambers.

ALEXANDER J. CARTWRIGHT, TRUSTEE, VS. LYDIA M. PIKOI (OTHERWISE ENA) AND JOHN ENA.

The bill alleges that defendants, on June 26th, 1879, being then husband and wife, executed a certain deed of trust to the plaintiff of certain property therein mentioned. The deed recites that differences had arisen between the defendants and that they had agreed to live separate and that the defendant, Lydia, had so agreed to live separate at her own costs and expense without charging her husband with any debts whatsoever for her maintenance. And that said John Ena was desirous that all the said Lydia's property, both land and chattels should be held to the sole and separate use of said Lydia, her heirs and assigns forever. And witnessed that said J. and L. Ena granted and conveyed to the plaintiff the property mentioned. To hold upon said plaintiff his heirs and assigns forever, upon trust to apply the rents, issues and profits thereof to the said Lydia for her sole use and benefit and for her support and maintenance, and upon the death of the said John or in the event of the death of the said Lydia before the death of the said John, to convey the same free and clear of the trust to such person or persons as the said Lydia might direct, or by her last will and testament appoint.

The bill alleges that the said John and Lydia lived apart and that on the 7th April, 1883, said John obtained a decree of divorce absolute from said Lydia, and that John lawfully married another wife. That a parcel of land described in exhibit B in the bill, is included in said trust deed, and is unproductive and cannot be made productive without large expenditure of moneys, and is of great value, and that the present income of the trust property is insufficient to suitably support and maintain said defendant Lydia, and to make the repairs necessary to preserve the trust property. That the remaining estate is in need of repairs which will if made greatly improve the same and yield a large increased income for said defendant, Lydia, that it is necessary, advisable and greatly beneficial to the trust estate and also to the use and benefit of said defendant, Lydia, that said parcel of land described in exhibit B, be sold under the authority of the Court, and the proceeds be devoted to the remaining estate comprised in the trust and that there is danger of great waste.

The bill prays that said parcel of land be sold under the authority of the Court, discharged of all trusts and that the proceeds, after deducting expenses and costs, be appropriated by said plaintiff to the use and benefit of said defendant, Lydia, and the remaining trust estate. The defendant's answer admits the allegations in the bill and claims that the trust created under said deed of trust had terminated by the fact of the divorce between said defendants and the defendants submit that the Court has no authority under the bill to order a sale.

At the hearing the defendants urged that the divorce terminated the trust under the authority of *Swift vs. Neuman*, L. R., 10 Equity Cases 15 and *Russell vs. Dowling*, L. R., 14 Equity Cases 421. But these cases were overruled by *Fitzgerald vs. Chapman*, L. R., 1 Chan. Div. 563 and *Burton vs. Sturgeon*, L. R., 2 Chan. Div. 318.

These were all cases arising under marriage settlements, and as the trusts of the settlements were in some respects different from those in the deed before me, it may be that the Court would, on a proper showing, hold that the defendant, Lydia, would be entitled to have the trust property re-conveyed to her, but I cannot make such a decree in this suit.

The only person now interested in the trust property is the defendant, Lydia, she has under the deed a right to the whole income of the estate, there is no estate to protect for persons entitled in remainder, and the defendant, who is under no legal disability, objects to the sale of the portion of the estate for the purposes contemplated.

It is urged by the defendants that the Court has no jurisdiction in the matter, and by the plaintiff that the Court has jurisdiction of all trusts, and can rightfully make the order prayed for, to protect and preserve the remainder of the trust property.

I feel myself, very doubtful as to the authority of the Court to make the order under the circumstances, and am inclined to think it has no such authority, but the exercise of such authority, if it exists, is discretionary, and I exercise such discretion by declining to make the order.

The bill will therefore be dismissed. A decree will be signed on presentation. W. A. Whiting and Cecil Brown

for plaintiff; A. Rosa for defendants. Honolulu, Oct. 31, 1889.

In the Supreme Court of the Hawaiian Islands-In Banco. In Vacation, December 11, 1889.

COOK VS. DAYTON. Replevin. COOK VS. DAYTON. Assumpsit.

Appeal from Police Justice, Honolulu.

BEFORE JUDD C. J., M'CALLISTER, PRESTON, HICKERSON AND DOLE, JJ.

Opinion of the Court by Preston, J. This is an appeal from the decision of the Police Justice of Honolulu, whereby he gave judgment for the plaintiff in both the above cases.

On the 27th of March, 1888, Richard Cayford executed a voluntary deed, whereby he granted and transferred to John Cook, the furniture, implements, utensils and tools of whatever description and kind then owned by Cayford, and being in or upon or in any way connected with that certain dwelling-house and lot then occupied by him situate on Alakea street, and also, one brake and harness and one horse, said property being particularly specified in the schedule thereunder, upon certain trusts in favor of his (Cayford's) wife for her life. This deed was not recorded until the 10th of January, 1889. On the 17th of December, 1888, one Marcus K. Colburn commenced an action in the Supreme Court against the said Cayford for the recovery of damages through the loss of a horse alleged to have been occasioned by the malpractice of the said Cayford as a veterinary surgeon: a verdict was rendered in the said action on the 25th April, 1889, for the sum of three hundred (\$300) dollars, which judgment was duly entered up and the amount is still unpaid. Cayford was adjudged bankrupt on his own petition on the 20th of August, 1889, and the defendant was appointed assignee on the 30th of the same month. At the time of the adjudication, the aforesaid brake and harness was in the custody of the Marshal under an attachment, and was delivered to the defendant. On the 24th of June, and before the bankruptcy, certain of the furniture comprised in the aforesaid deed was sold at auction by James F. Morgan, and the proceeds, amounting to one hundred and nineteen and 30-100 (\$119.30) dollars were paid on the demand of the defendant to him by Morgan. It appears from the testimony in the lower Court that at the time of the execution of the deed, Cayford was solvent and was not indebted to any person whatever. Cook, the trustee, never took possession of the property.

The defendant appealed from the decision of the Police Court on the following points of law: First, "Was not said trust deed in fraud of creditors and therefore void?" Second, "Does not said deed come under the provisions of Section 1263 of the Compiled Laws, page 409?" BY THE COURT. It being admitted that Cayford, at the time of the execution of the deed was not indebted to anybody, and Colburn not becoming a creditor of the bankrupt until after the judgment was signed, this case falls within the principle of *Dowsett vs. Kapilau*, 3 Haw. 709, where it is stated that: "The law is likewise plainly settled that a voluntary conveyance not fraudulent in fact is good as to subsequent creditors, though void as to antecedent creditors;" we are therefore of the opinion that the deed is not a fraud as against the assignee in bankruptcy.

With regard to the second point, Section 1263 of the Compiled Laws has no application to this case; it merely requires mortgages of chattel property to be recorded; this deed is plainly not a mortgage. Had it been proved that the bankrupt was indebted at the time of the execution of the deed to any person, our decision might have been different. We think that it might fairly be contended that the deed was intended to defeat or delay creditors. We look upon the deed with great suspicion, and regret that under the circumstances of the case we are compelled to sustain the decision of the Court below.

The judgment of the Court below is affirmed. W. O. Smith for plaintiff; A. Rosa for defendant. Honolulu, Dec. 12, 1889.

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