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*May 20.

*Dec. 9.

E. R. C. CLARKSON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

McMASTER & CO. (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—55 V. c. 26, ss. 2 and 4 (O.)—Chattel mortgage—Agreement not to register—Void mortgage—Possession by creditor.

By the act relating to chattel mortgages (R.S.O. [1887] c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 V. c. 26, s. 2 (O.) that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the act respecting assignments and preferences" (R.S.O. [1887] c. 124). By sec. 4 of 55 V. c. 26 a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors * * before such taking of possession."

Held, reversing the decision of the Court of Appeal, that under this legislation a mortgage so void is void as against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set it aside and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession.

Held, per Strong C.J., that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession such mortgage is, on grounds of public policy, void *ab initio*.

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*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment for plaintiffs at the trial.

On October 10th, 1893, one Davis executed a mortgage of all his stock in trade and other personal property to the defendants, McMaster & Co., one of the terms of which mortgage was that if Davis should pay fifty dollars per week to defendants on account of his indebtedness it would not be registered and upon failure of Davis to make such payment at any time defendants could take immediate possession. The mortgagor having made default defendants took possession, on Nov. 7th, 1893, of the property mortgaged and on Nov. 13th, Davis made an assignment under the Ontario Act to the plaintiff Clarkson for the benefit of all his creditors.

A writ was issued by the assignee and by a simple contract creditor of the insolvent on behalf of all the creditors against McMaster & Co. to have the mortgage set aside. On the trial before Mr. Justice MacMahon judgment was given for the plaintiffs, the trial judge holding that the mortgage was given in good faith, but that it was void for want of registration. The Court of Appeal reversed this judgment holding that under 55 Vic. ch. 26, which amended the Act relating to chattel mortgages, R. S. O. [1887] ch. 125, the mortgage could only be void as against execution creditors or simple contract creditors who had commenced proceedings to set it aside, or an assignee in the same position, and that the plaintiffs in this case did not come within the statute. The plaintiffs appealed from that decision.

S. H. Blake Q.C. for the appellants. Under 55 Vic. ch. 26 s. 4, if a mortgage is void for want of registra-

(1) 22 Ont. App. R. 138.

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tion the taking of possession by the mortgagee is of no avail.

The obvious intention of this amending Act was to make the mortgage void against all simple contract creditors as well as those having execution.

The agreement not to register the mortgage was a fraud on the creditors; *Jones* v. *Kinney* (1); *Ex parte Fisher* (2); *Clarkson* v. *Sterling* (3); and such agreement, in connection with the other facts of the case, shows that a fraudulent preference was intended.

Thompson Q.C. for the respondents. The finding of the trial judge that the mortgage was given in good faith should not be disturbed. *Grasett* v. *Carter* (4).

Prior to 55 Vic. ch. 26 a mortgage not registered was void as against execution creditors only. *Parkes* v. *St. George* (5).

The plaintiffs other than the assignee have no *locus standi* to impeach the transaction after the assignment; R. S. O. (1887) ch. 124, sec. 7, subsec. 1; nor after the mortgaged goods are sold; *Ross* v. *Dunn* (6); *Gillard* v. *Bollert* (7); *Meriden Britannia Co.* v. *Braden* (8).

The assignee, not having been appointed until after the mortgagee took possession, is not within the provisions of sec. 2 of 55 Vic. ch. 26.

THE CHIEF JUSTICE.—In the view which I take of this case it is not necessary that I should express any positive opinion as to the validity and *bona fides* of the mortgage so far as it is impeached upon the grounds of the mortgagor's insolvency and as a fraudulent preference, and therefore I refrain from doing so. I may say, however, that upon facts disclosed by the evidence,

(1) 11 Can. S. C. R. 708.
(2) 7 Ch. App. 636.
(3) 15 Ont. App. R. 234.
(4) 10 Can. S. C. R. 105.
(5) 10 Ont. App. R. 496.
(6) 16 Ont. App. R. 552.
(7) 24 O. R. 147.
(8) 21 Ont. App. R. 352.

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which are undisputed, and which are therefore open for consideration by an appellate court, I should entertain grave doubts as to the validity of the transaction as against the creditors of the mortgagor, apart altogether from the non-delivery of possession, the want of registration, and the express agreement not to register the mortgage, questions which I propose to consider.

Under the statute law regulating chattel mortgages in the province of Ontario, applicable to the mortgage now in question, I am of opinion that the appellants were entitled to attack the transaction, thus differing from the majority of the Court of Appeal, and agreeing in the conclusion of the learned Chief Justice of Ontario.

The general Act relating to mortgages of chattels (1) was amended and extended by Ontario statute 55 Vic. c. 26. By the second section of that act it was enacted as follows:

In the application of the said act, and of this act extending and amending the same, the words "void as against creditors" in said act shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting Assignments and Preferences by Insolvent Persons, and amendments thereto, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer.

And section 4 of the same act provides:

A mortgage or sale declared by said act to be void as against creditors and subsequent purchasers or mortgagees shall not, by the subsequent taking of possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee, be thereby made valid as against persons who became creditors, or purchasers, or mortgagees, before such taking of possession.

These enactments were undoubtedly intended by the legislature to obviate the construction which the courts had put upon the provisions embodied in the chapter

(1) R.S.O. c. 125.

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125 of the Revised Statutes of Ontario. Section 1 of that act provides that:

> Every mortgage of goods and chattels, not accompanied by immediate delivery, &c., shall within five days from the execution thereof be registered, &c.

And section 4 of the same act provides that:

> In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

The mortgage now in question was not registered within the prescribed time, nor was there any immediate delivery of the mortgaged goods. A line of decisions in the courts of the province had, previously to the passing of the Act of 1892, established that in the construction of the first section of the Chattel Mortgage Act just set forth, the word "creditors" was to be construed as meaning "judgment creditors," and the words "null and void" as meaning "voidable." It was also held that the mortgagee might at any time validate a mortgage invalid for want of possession or registration by taking possession of the mortgaged property. If it were necessary now to determine whether this construction was or was not correct I am compelled to say, with great respect for the opinions referred to, that I should find great difficulty in agreeing with these decisions. First, I see no reason why the word "creditors" should be restricted to a particular class of creditors, viz., judgment creditors. Why should the same word receive a different construction in this Act from that which it has received as used in the statute of the 13th Elizabeth? I see no reason for any such distinction. It is true that equitable execution as consequential on the avoidance of a transaction under the 13th Elizabeth could not, under the old system of separate jurisdictions for law and equity,

have been obtained by any but judgment creditors (1), but the deed was nevertheless held to be void as against simple contract creditors. In *Reese River Mining Co.* v. *Atwell* (2), it was held by Lord Romilly M.R. that simple contract creditors were entitled to a decree declaring a deed void under the Statute of Elizabeth, though not having obtained a judgment at law they could not have had equitable execution, and, as is pointed out in May on Fraudulent Conveyances (2 ed. p. 528), this was only carrying out what is said in the judgment of Lord Hardwicke in *Higgins* v. *York Buildings Co.* (3), where occurs the following passage:

> I do not know in the case of fraudulent conveyances that this court has ever done anything more than remove fraudulent conveyances out of the way * * * nor any instance of a decree for sale, but equity follows the law and leaves them to their remedy by elegit without interfering one way or the other.

And that an instrument fraudulent under the statute was void against all creditors, was also demonstrated by the well established practice of courts of equity in administering assets, which was not to require a judgment at law, but to treat deeds fraudulent under the statute as void against all creditors, and to deal with the property purported to be conveyed by such instruments as assets for the payment of simple contract as well as all other creditors. Then, there are reasons which, in my opinion, require a liberal construction of the word "creditors," derived from the manifest policy of the Chattel Mortgage Act. Registration or possession were required manifestly for the protection, not only of actual creditors, but of those who might become creditors, relying on the visible possession of property by their debtor, and the absence from the appropriate registry of any charge upon that property; and this for

(1) *Colman* v. *Croker* 1 Ves. 161; *Lister* v. *Turner* 5 Hare 281.

(2) L. R. 7 Eq. 347; see also cases collected in May on Fraudulent Conveyances 2 ed. p. 528.

(3) 2 Atk. 107.

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the protection of those who had not had the opportunity of recovering judgment, creditors payment of whose claims might be deferred, or who had not had time to get judgment.

Again, I am not impressed with the soundness of the construction which reads the terms "absolutely null and void" as "voidable." So to cut down the words of the Act is, I venture to say, in direct conflict with the manifest policy of the legislature, and is not justified by the consideration that creditors could not have the mortgaged chattels applied in payment of their debts until they had recovered judgment. The rule requiring a judgment at law to entitle a party to equitable execution is to be ascribed to the reluctance of the equity courts in former times to entertain legal questions; such questions were always sent to a court of law to be determined. The creditor's right to recover his debt was a purely legal question, and therefore he had to establish it by a judgment at law. This, however, by no means involved the necessity of saying that a deed was not void under the Statute of Elizabeth as against simple contract creditors. The authorities I have already referred to show that this proposition must be correct. Then, for these reasons, deduced from the Statute of Elizabeth and the decisions on that Act, and on the policy which led to the legislation embodied in the Chattel Mortgage Act, I should have thought the word "creditors" in the latter act ought to be construed as embracing all creditors. It follows from this that there was no sound reason for cutting down the expression "absolutely null and void" to "voidable."

Lastly, if a chattel mortgage not registered within the limited time, and where no possession had been taken, was absolutely null and void at the expiration of five days as against all creditors, I am unable to see

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how such a void security could be revived by the creditor simply taking possession of the goods. In the case of *Barker* v. *Leeson* (1), the learned Chancellor of Ontario delivered a judgment which, in my opinion, contains, not only a correct construction of the statute, but also a sound exposition of the policy of the law and the intent of the legislature in enacting it.

The Act of 1892 was, however, passed by way of altering and amending the law as established by the authorities referred to, and it impliedly recognizes the construction thus placed upon the first statute as being, at the time of the passing of the later act, the existing law. I do not, therefore, intend to decide this case upon my own view as to the proper interpretation of the original act, but assuming that the previous decisions are binding authorities, I propose to place the decision of this appeal entirely upon the amending Act 55 Vic. ch. 26, thus following the course of the learned Chief Justice of Ontario, who did not conceive himself in any way precluded by the state of the authorities from so doing. And doing this I come to the same conclusion as the learned Chief Justice.

The second section of the Act announces that it is the intention of the legislature thereby "to extend and amend" the existing law. How any extending or amending effect can be attributed to the act consistently with the judgment now under appeal I am unable to see. Nothing can be more explicit and distinct than the declaration of the legislature, that mortgages in relation to which the requirements of the original act have not been complied with shall be void as against simple contract creditors. I do not construe this declaration as in any way fettered with any condition as to the form of suit; all I understand to have been meant by the words "suing on behalf of them-

(1) 1 O. R. 114.

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selves and other creditors," was just this, that the mortgage, being void as to all, any action which might be brought to obtain the benefit of the nullity enacted by the statute should be on behalf of all creditors, so that all, and not merely those suing, might obtain the benefit of the Act. Then, applying this in the present case, this mortgage became absolutely null and void at the expiration of the five days allowed for registration. Then, the same second section provides that this avoidance shall enure to the benefit, not only of creditors who may sue on behalf of themselves and others, but also to the benefit of all creditors suing by their representative the statutory assignee for the benefit of creditors, who undoubtedly represents the creditors just as much as does in England an assignee in bankruptcy; and we constantly find cases reported in which such last mentioned assignees maintain actions to set aside deeds executed before their appointment. That being so, this mortgage being thus absolutely void under the Act of 1892, when the term for registration had elapsed, whatever the law may have been before, the assignee was entitled to maintain this action so soon as the assignment to him was completed, and I should be prepared so to hold even if there was not now a single creditor whose debt existed at the date of the mortgage, but only creditors whose debts had been contracted subsequently, for I think in construing these Acts (the Revised Statutes and the amending Act together) we ought not to restrict the avoidance of the mortgage to actual creditors at its date, but to extend its benefits to subsequent creditors, and that not only for the reasons stated in the judgment of the Chancellor before referred to, but on the very words of the fourth section of 55 Vic. ch. 26. This fourth section, in my opinion, very clearly indicates that creditors subsequent to the mortgage were intended to

be included, for it expressly provides that taking possession under a mortgage void as against creditors shall not validate it against creditors who became such before taking possession.

Then, did the subsequent taking possession validate this mortgage if it was, at the time possession was taken, absolutely "null and void"? If the foregoing reasons and conclusions are correct this may be answered in the very words of section four itself, which says in so many words that a mortgage declared to be void as against creditors and subsequent purchasers or mortgagees shall not, by the subsequent taking of possession of the things mortgaged, be thereby made valid as against persons who became creditors before such taking of possession. Creditors now represented by the assignee became creditors before the taking of possession, and, therefore, upon the express words of the Act which require no construing, since what is already plain and explicit does not bear interpretation, the possession did not set up this mortgage against the assignee nor against the creditors suing conjointly with him.

Lastly, I am of opinion that this mortgage ought to be avoided on a ground altogether distinct from that before considered. Not only was there a non-compliance with the conditions of the Act in respect of registration and taking possession, but there was a distinct agreement between the mortgagor and mortgagee that there should be neither registration nor immediate possession; in other words, that a transaction which the law required should be open and notorious, to be made so either by registering the mortgage or taking possession of the goods, should be concealed from subsequent creditors, purchasers and mortgagees. This mortgage was therefore given in pursuance of an agreement to contravene the statute and was, therefore, on

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grounds of public policy void *ab initio*. Whether the mortgagor was, or was not, insolvent at the date of the mortgage, this agreement, in my opinion, constituted what has been called a fraud upon the statute, and this upon the authority of the cases of *Jones* v. *Kinney* (1), *Ex parte Fisher* (2), and *Clarkson* v. *Sterling* (3), cited in the appellant's factum, in itself constitutes a distinct ground for holding the mortgage to have been a nullity as against creditors from the beginning and therefore void as against such persons even before the expiration of the term allowed for registration had expired.

I have seen the case of *Morris* v. *Morris* (4), but I find nothing in that authority to alter the opinion I had previously formed. The statute there under consideration differed in important respects from that which applies to the present case.

The appeal must be allowed with costs in this court and in the Court of Appeal, and the judgment of Mr. Justice MacMahon must be restored.

TASCHEREAU J.—I concur in the judgment of Mr. Justice Gwynne.

GWYNNE J.—Prior to the amendment of ch. 125 R.S.O. by sec. 2 of ch. 26 of 55 Vic., it had been held by the courts in Ontario that the words "creditors of the mortgagor" in sec. 1 of the said ch. 125, meant only "execution creditors," and that if a chattel mortgage not accompanied by immediate possession of the chattels mortgaged should not be registered as required by the statute, and the mortgagee should take possession of the chattels mentioned in the mortgage at any time before there should be a creditor of the mortgagor in

(1) 11 Can. S. C. R. 708.
(2) 7 Ch. App. 636.
(3) 15 Ont. App. R. 234.
(4) [1895] A. C. 625.

existence having an execution, he should hold the chattels under the mortgage, notwithstanding that it had not been registered as required by the statute, and I cannot entertain a doubt that the amendment made by 55 Vic. ch. 26, sec. 2, was for the express purpose of remedying the effect of this construction which had been put upon the statute by the courts, and that the effect of such amendment was to provide that the words "creditors of the mortgagor" in ch. 125, should no longer be construed as applying only to "execution creditors," but to all simple creditors as well, the words "suing upon behalf of themselves and other creditors" being inserted merely as indicating the proceeding in which the mortgage not registered as required by the statute should be adjudged to be fraudulent and void as against simple contract creditors. Then the 4th sec. of 55 Vic. ch. 26, enacts that a mortgage void by the act as against creditors, that is to say, against all creditors of the mortgagor, including simple contract creditors as well as execution creditors, shall not be made valid as against persons becoming creditors, whether by simple contract or execution, after the execution of the mortgage, but before the taking possession by the mortgagee of the chattels mortgaged; thus legislatively overruling wholly in the future the construction which the courts had put upon ch. 125. To confine sec. 4 to execution creditors only would be inconsistent both with the letter and with the spirit of the enactment, which was to place simple contract creditors upon the same footing as execution creditors.

In the present case, it appears to be clear that the intention of the parties to the mortgage was to endeavour to evade the provision of the Chattel Mortgage Act as to registration, for it was expressly agreed that the mortgage was not to be registered unless nor until default should be made by the mortgagor in payment

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of some one of the instalments mentioned in the mortgage. Such an agreement, whatever may have been the actual intent of the parties, was calculated, if it should be sustained, to defraud creditors who might sell to the mortgagor goods upon credit upon the faith that there was no mortgage in existence, none being registered, and thus would be effected the very thing which the statute was intended to prevent, namely, a transaction which should have the effect of defrauding other persons being or becoming creditors of the mortgagor upon the faith that his property was not mortgaged. Upon the 10th of October, 1893, the mortgage was executed subject to the above agreement as to non-registration. On the 7th November, 1893, the mortgagee took possession of the chattels mentioned in the mortgage, which by reason of its non-registration was, by the statute 55 Vic. ch. 26, declared to be void as against all persons who were then creditors of the mortgagor within the meaning of the statute, that is to say, whether by simple contract or by having execution. On the 10th November, 1893, the mortgagor made an assignment for the benefit of all his creditors to the appellant, who thereby represented all the creditors and who is entitled to all the relief which such creditors would, in the absence of such assignment, have been entitled to in a suit instituted by any one on behalf of himself and the other creditors. The act as amended by 55 Vic. ch. 26 in effect enacts that a mortgage of chattels not accompanied by immediate delivery shall, within five days from the execution thereof, be registered, &c., and that in case it be not so registered it shall be absolutely void as against all creditors of the mortgagor, including simple contract creditors, and against any assignee for the benefit of creditors within the meaning of the act respecting assignments and preferences by insolvent persons, and

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the amendments thereto. That the plaintiff is such an assignee cannot, I think, admit of a doubt. It is impossible, in my opinion, to construe the act as amended as applying only to an assignee in existence prior to the mortgagee taking possession, without defeating what appears to have been the plain intent of the statute 55 Vic. ch. 26, namely, to make an unregistered mortgage fraudulent and void as against all creditors of the mortgagor in existence at the time of the mortgagee taking possession of the chattels mortgaged, whether the remedy should be sought by an assignee for the benefit of all the creditors whenever made such assignee, or by any of the creditors suing on behalf of all. The appeal must, in my opinion, be allowed with costs, and judgment be ordered to be entered for the plaintiff in the court below with costs.

SEDGEWICK and KING JJ. were also of opinion that the appeal should be allowed and the judgment of MacMahon J. restored.

Appeal allowed with costs.

Solicitors for the appellants: *Teetzel, Harrison & McBrayne.*

Solicitors for the respondents: *Thompson, Henderson & Bell.*