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GORDON MACKAY & COMPANY, LIMITED, SUING ON BEHALF OF ITSELF AND ALL OTHER CREDITORS OF J. A. LAROCQUE, LIMITED, AND CANADIAN CREDIT MEN'S ASSOCIATION LTD., TRUSTEE OF THE PROPERTY OF J. A. LAROCQUE, LIMITED, A BANKRUPT (PLAINTIFFS) ..... } APPELLANTS;

AND

CAPITAL TRUST CORPORATION LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

J. A. LAROCQUE LIMITED ..... (DEFENDANT).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Chattel mortgage—"Floating charge" created by company to secure payment of its bonds—Requirement of registration under Bills of Sale and Chattel Mortgage Act, Ont. (R.S.O., 1914, c. 135).

A trading company (formed under the Dominion *Companies Act*), to secure payment of its bonds, by a "trust deed" purported to "sell,

assign, transfer, hypothecate, mortgage, pledge and set over and charge" unto a trustee, certain land, and all its movable assets for the time being, both present and future, in the province of Ontario, subject to the proviso that the "floating charge" created should not prevent the company, until the security should become enforceable and the trustee should have demanded or become bound to enforce it, dealing with the subject matter of the "floating charge" in the ordinary course of its business and for the purpose of carrying on the same. The instrument was registered in the land registry office, and was filed with the Secretary of State as required by the Dominion *Companies Act,* but was not registered under the Ontario *Bills of Sale and Chattel Mortgage Act* (R.S.O., 1914, c. 135), and, for want of such registration, was attacked on behalf of the company's creditors.

Held (Anglin C.J.C. and Rinfret J. dissenting) that the instrument was a "mortgage" within the meaning of the said *Bills of Sale and Chattel Mortgage Act,* and required registration under it.

Judgment of the Appellate Division, Ont. (59 Ont. L.R. 293) reversed on this point.

The nature and effect of a "floating charge" discussed, with references to authorities.

Per Anglin C.J.C. and Rinfret J. (dissenting): If the Act had been originally enacted in its present form and terms, a floating charge might be deemed to fall within its operation, as being within the mischief it was designed to meet; but, according the proper consideration to the history and development of the statute, a floating charge (within which term the instrument came) cannot be said to be a "mortgage" or a "conveyance intended to operate as a mortgage" within the meaning of the Act. History of the legislation reviewed, with references to cases; *Johnston* v. *Wade* (17 Ont. L.R. 372) explained and discussed.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) in so far as it varied the judgment of Fisher J. (2) by holding that the instrument in question did not require registration under the Ontario *Bills of Sale and Chattel Mortgage Act.*

The defendant J. A. Larocque Limited was incorporated under the Dominion *Companies Act* (R.S.C., 1906, c. 79), and carried on the business of retail merchants at the city of Ottawa, Ontario. The company decided to borrow money for its corporate purposes by the issue of bonds, and to secure payment thereof it gave a "trust deed" to the defendant the Capital Trust Corporation Limited (therein

(1) (1926) 59 Ont. L.R. 293. (2) (1926) 58 Ont. L.R. 305.

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called "The Trustee"), dated 17th September, 1923. The instrument read in part as follows:

Now therefore this indenture witnesseth that in order to secure the payment of the principal and interest of all the said bonds at any time issued and outstanding hereunder, according to their tenor, the company, in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and in consideration of the sum of $1 to it paid by the Trustee, receipt whereof is hereby acknowledged, has sold, assigned, transferred, hypothecated, mortgaged, pledged and set over, and by these presents doth sell, assign, transfer, hypothecate, mortgage, pledge and set over and charge unto the Trustee, its successors and assigns, forever:

1. All that certain parcel or tract of land and premises [particularly described].

2. All its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the province of Ontario, hereinafter referred to as the "floating charged property" and including its undertaking and its other property and assets, real, personal or mixed, present and future, not hereinbefore assured, together with all its present and future tolls, rents, revenues, incomes and sources of income, goodwill, chattels, stock-in-trade, plant, furniture, books of account, moneys, credits, things in action, contracts, agreements, bills, notes, negotiable and non-negotiable instruments, judgments, securities, rights, powers, patents, trade-marks, copyrights, privileges and franchises, and all of the property and things of value of every kind and nature which the company may be or hereafter shall become possessed of or entitled to, providing that the "floating charge," created by this paragraph shall in no way hinder or prevent the company until the security hereby constituted shall become enforceable and the Trustee shall have demanded or become bound to enforce the same, either by dividends out of profits, leasing, mortgaging, pledging, selling, alienating or otherwise disposing of or dealing with the subject matters of such "floating charge" in the ordinary course of its business and for the purpose of carrying on the same.

The instrument was registered in the land registry office, and was filed with the Secretary of State as required by the Dominion *Companies Act* (R.S.C., 1906, c. 79, as amended by 4 & 5 Geo. V, c. 23, s. 3, and 7 & 8 Geo. V, c. 25, s. 9), but was not registered pursuant to the Ontario *Bills of Sale and Chattel Mortgage Act* (R.S.O., 1914, c. 135), nor pursuant to the Ontario *Assignment of Book Debts Act, 1923,* (c. 29).

Default was made by the debtor company, and on 9th June, 1925, under the provisions of the said instrument, the defendant the Capital Trust Corporation Limited, the trustee, appointed a receiver who took possession of the debtor company's property and carried on its business.

On 6th August, 1925, the plaintiff Gordon Mackay & Company Limited, commenced this action on behalf of

itself and all other creditors of the debtor company, to set aside the trust deed for want of registration, both as a chattel mortgage and as an assignment of the book debts.

On 21st August, 1925, the debtor company was, by order of the court, adjudged bankrupt, and the plaintiff Canadian Credit Men's Association Limited became trustee in bankruptcy, and, by order of 17th November, 1925, was added as a plaintiff in the action, and by the same order leave was granted to the plaintiffs to proceed with the action.

The trial judge, Fisher J., gave judgment in favour of the plaintiffs (1), declaring that, so far as the instrument purported to cover the goods and chattels and book debts, it was null and void as against the plaintiffs for want of registration.

The Appellate Division (2) varied the judgment of Fisher J. by declaring (Magee and Ferguson, JJ.A., dissenting) that the security created, in so far as it purported to cover the goods and chattels, was a valid floating charge or security, and was not required to be registered as a mortgage under the provisions of the *Bills of Sale and Chattel Mortgage Act*. It declared (unanimously upholding the judgment of Fisher J. in this respect) that, in so far as it purported to cover the book debts, it was, as against the plaintiffs, null and void for want of registration under the *Assignment of Book Debts Act, 1923*.

In so far as the judgment of the Appellate Division varied the judgment of Fisher J., as above stated, the plaintiffs appealed to this Court.

The question for decision by this Court was whether the instrument in question was a mortgage within the meaning of the *Bills of Sale and Chattel Mortgage Act*, R.S.O., 1914, c. 135, and, for want of registration, was void as regards the chattel property. The defendant the Capital Trust Corporation Limited contended that, the effect of the instrument, as to the chattel property, being merely to create a "floating charge", it was not a mortgage within the meaning of that Act and did not require registration under it.

(1) (1926) 58 Ont. L.R. 305. (2) (1926) 59 Ont. L.R. 293.

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G. H. Kilmer K.C., T. A. Beament K.C., and *H. H. Davis* for the appellant.

F. H. Chrysler K.C. and *P. H. Chrysler* for the respondent.

ANGLIN C.J.C. (dissenting).—If the *Bills of Sale and Chattel Mortgage Act* (R.S.O., 1914, c. 135) had been originally enacted in the form and terms in which we now find it, and if the question on this appeal were *res integra,* it may be that, giving due effect to the rule of construction embodied in s. 10 of the *Interpretation Act,* (R.S.O., c. 1), a floating charge such as that now before us might be held to come within its purview. The unknown and unregistered floating charge is as formidable a menace to the confiding and unsuspecting creditor, purchaser or mortgagee as is the unregistered bill of sale or chattel mortgage not accompanied by delivery and actual and continued change of possession. Within the mischief which the statute was designed to meet, the floating charge might be deemed to fall within its operation as now framed, if it were a new Act.

But, in construing a statute of gradual growth, such as the *Bills of Sale and Chattel Mortgage Act* in its present form, we cannot ignore its history and development without incurring grave risk of giving to it an effect which the legislature has not intended. *MacMillan* v. *Dent* (1); *Eastman Photographic Materials Co., Ltd.* v. *Comptroller-General of Patents* (2); *Shaw* v. *Great Western Railway Company* (3). According the consideration to which they are entitled to the history and development of this statute, the majority of the Appellate Divisional Court (Mulock C.J.O., Hodgins and Smith JJ.A.), were, in my opinion, right in holding (4) that a floating charge is not a mortgage, or a conveyance intended to operate as a mortgage (s. 2 (*c*)), within the meaning of that Act.

The floating charge, its character and incidents, and the distinction between it and a chattel mortgage with licence to sell and substitute in the ordinary course of business, although that distinction is fine and sometimes elusive, are well-known to English law. Of this the cases cited in the

(1) [1907] 1 Ch. 107, at p. 120.
(2) [1898] A.C. 571, at p. 575.
(3) [1894] 1 Q.B. 373, at p. 380.
(4) (1926) 59 Ont. L.R. 293.

judgments of Hodgins and Smith JJ.A., afford abundant illustration. With those learned judges, I am convinced that the instrument now under consideration was intended to be, and must be regarded as, a floating charge in the sense defined by the English authorities. It did not operate, when given, as a specific charge on any property of J. A. Larocque, Ltd.; it covered that company's entire undertaking as a floating charge in suspense until the situation arose and the acts were done upon which it was to become a specific mortgage, and thereupon it attached to and bound every portion of the personal property of the company comprised in its undertaking as it then subsisted. I do not dwell further upon this aspect of the case, because neither in this Court nor in the Appellate Divisional Court does there seem to be any serious difficulty in regard to it.

There can be no doubt that the *Bills of Sale and Chattel Mortgage Act*, as originally enacted in 1849 (12 Vic., c. 74), as re-enacted in 1857 (20 Vic., c. 3), and as consolidated in 1859 (C.S., U.C., c. 45), in 1877, (R.S.O., c. 119), and in 1887, (R.S.O., c. 125), applied only to mortgages and sales of goods *in esse* and susceptible of immediate delivery by the mortgagor, and had no application to such securities as floating charges. The provisions of the first section of each of these statutes, requiring registration of mortgages of goods and chattels not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, puts this beyond controversy. That the application and scope of this legislation was thus restricted was the effect of many early Upper Canada and Ontario decisions. For instance, reference may be had to *Harris* v. *Commercial Bank of Canada* (1), where a conveyance, and to *May* v. *Security Loan and Savings Co.* (2), where a mortgage, in each case of goods in bond, were held not within the Act because the goods were not in the present possession and disposition of the mortgagor; to *Burton* v. *Bellhouse* (3), where a transfer of goods in course of manufacture was excluded from the operation of the Act; to *Hamilton* v. *Harrison* (4), where a mortgage upon growing crops was held not covered by the statute; and

(1) (1858) 16 U.C.Q.B. 437.
(2) (1880) 45 U.C.Q.B. 106.
(3) (1860) 20 U.C.Q.B. 60.
(4) (1881) 46 U.C.Q.B. 127.

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to *Banks* v. *Robinson* (1), where an agreement charging an interest in "future-acquired property" was likewise held not to require registration. All these decisions were based on the view that the statute applied only to conveyances or mortgages of goods and chattels in the actual possession of, and susceptible of present delivery by, the mortgagor or vendor. As put by Hagarty C.J., in *May* v. *Security Loan and Savings' Co.* (2):

> In the case of goods in a bonded warehouse we do not see how a registered bill of sale is necessary. They are not in the actual possession of the vendor.

Therefore, until after 1887, it would seem clear that a floating charge intended to attach to all the personal property comprised in a company's undertaking, as it should then be, only upon the mortgagee's claim becoming exigible, was not within the purview of the *Bills of Sale and Chattel Mortgage Act.*

The later amendments relied upon by the appellants to bring such a charge within the statute are now embodied in chapter 135 of the R.S.O., 1914, as sections 11, 16 and 24.

It was not until 1892 that the present s. 11, extending the application of the statute to mortgages and sales of "future-acquired property," was enacted (55 Vic., c. 26, s. 1); (R.S.O., 1897, c. 148, s. 37). It deals with mortgages and sales of goods not the property of or in the possession of the mortgagor or bargainor; but its application is confined to "mortgages and sales." There is nothing in it indicative of a legislative intent to embrace instruments intended not to operate as mortgages of specific existing or future-acquired property, but merely to have effect as floating charges. As an amendment intended to enlarge the scope of a statute operating in derogation of the common law, this provision may not be given a wider construction than its language imports merely because, in the opinion of the court, it would be in the public interest that its application should be so extended. *Judicis est jus dicere, non dare.* The terms of the amendment clearly indicate the intention that the requirement of registration shall apply to "after-acquired property," but only where

(1) (1888) 15 O.R. 618.

(2) (1880) 45 U.C.Q.B. 106, at p. 110.

the instrument affecting such property is a "mortgage" or a "sale." This section merely does away with the former restriction, of which it affords some legislative recognition, viz: that the operation of the statute had been theretofore confined to goods owned by or in the possession of the mortgagor at the time the mortgage was made.

The present section 16 was enacted in 1896 (59 Vic., c. 4, s. 1) (R.S.O., 1897, c. 148, s. 11). It has to do with contracts to give mortgages. It clearly contemplates agreements intended to be followed by instruments which should be mortgages within the purview of the statute. It is difficult indeed to conceive that in enacting this provision the legislature had in view floating charges. To include them, terms entirely different would have been required.

The obvious purpose of s. 24 of the R.S.O., 1914, first introduced in 1890 (53 Vic., c. 35, s. 1) and amended in 1897 (60 Vic., c. 14, s. 86), was to provide, in the case of company mortgages to secure debentures, a substitute for the affidavit of *bona fides* usually required from chattel mortgagees (s. 5 (*b*)), and for the renewal of such mortgages, the existing statutory provisions having been, in these respects, inapplicable to them. Again there is nothing whatever in the terms employed by the legislature indicative of an intent to extend the application of the statute to instruments intended to operate as floating charges as distinguished from mortgages, or to give to the word "mortgage" in the statute a new and extended meaning, such as that for which the appellant contends.

We are invited by the appellants to overrule the decision of the Ontario Court of Appeal in *Johnston* v. *Wade* (1). Mr. Justice Smith would seem (2) to have been of the opinion that a judgment in their favour would involve a reversal of that case.

But, as pointed out by Moss C.J.O. (3), the Court was dealing in *Johnston* v. *Wade* (1) not with a covering instrument, such as that now before us, designed to secure debentures by a charge upon the issuing company's undertaking, but with a charge created by the debentures themselves which, says the learned Chief Justice,

(1) (1908) 17 Ont. L.R. 372. (2) 59 Ont. L.R., at p. 302.
(3) 17 Ont. L.R., at p. 386.

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pass no property in the goods and chattels to the holder and confer upon him no right to take possession of them or to interfere with them in any way, except through the interposition of the Court.

The actual decision in *Johnston* v. *Wade* (1) does not, therefore, conclude a case where the debentures are secured by a covering instrument such as a floating charge, which, upon the prescribed circumstances coming into existence, attaches as a specific mortgage to all the property then comprised in the mortgagor's undertaking, and may be enforced without curial intervention if it contain provisions apt to sanction that being done. Towards the close of his judgment in *Johnston* v. *Wade* (1), however, Moss C.J.O. said (p. 386):

> The words of s. 1 of the Act 12 Vict., c. 74, are "every mortgage or conveyance intended to operate as a mortgage of goods and chattels." And the words of the Act 13 & 14 Vict., c. 62, are, "every sale of goods and chattels." These words have been carried without alteration through the 20 Vict., c. 3, the C.S.U.C., and various revisions, to the present R.S.O., 1897, c. 148, secs. 2 and 6. There is no other definition of chattel mortgages or bills of sale. The words "mortgage or conveyance intended to operate as a mortgage of goods and chattels" describe instruments of a well-known character.

Osler J.A., added, at pp. 387-8:

> The instruments to which the Act applies are such as directly affect the title to goods and chattels, either by immediate assignment or conveyance intended to operate as an assignment by way of mortgage to a mortgagee, and covenants, promises, and agreements to make, execute, or give such instruments. Section 23 of the Act shews how far the legislature intended to go in dealing with instruments for securing the bonds or debentures of a company. The only instruments of that class which are required to be registered are mortgages or conveyances of goods and chattels made to a bondholder or trustee for the purpose of securing the bonds or debentures of the company—instruments, as I understand the section, of the same character as those mentioned in other sections of the Act, something quite different from the security by way of floating charge which the Companies Act enables the company to create by the bonds themselves.

Meredith J.A. pointed out (p. 389) that the goods comprised in the company's undertaking, upon which its debentures may be secured (p. 391),

> may be in different countries and removable from one county to another for the purposes of the company's business. The provisions of the Act and its requirements are so inapplicable as to render compliance with it impossible if these bonds were such mortgages. * * * The same legislative power which imposed the provisions of the Chattel Mortgage Act also conferred power to pledge the whole of the assets of the company to secure payment of the bonds in a manner quite inconsistent with an intention to require compliance with the provisions of that Act.

(1) (1908) 17 Ont. L.R. 372.

* * * The Chattel Mortgage Act has, I think, always been held—generally speaking—to be inapplicable to cases in which it is impossible to comply with its requirements.

This judgment of the highest court of final resort in Ontario has been generally regarded as implying that a "floating charge" given to secure debentures issued by a company is not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the purview of the *Bills of Sale and Chattel Mortgage Act,* which, from its first enactment in 1849 (12 Vic., c. 74) has described in these words the instruments to which it was meant to apply. Since *Johnston* v. *Wade* (1) was decided in 1908, many instruments similar in character to that now before us have been executed, and debentures running into many millions of dollars are probably secured to-day throughout Ontario by covering conveyances in the nature of floating charges which are invalid for want of registration if subject to the requirements of the *Bills of Sale and Chattel Mortgage Act.*

Moreover, the *Ontario Companies Act* (R.S.O., 1914, c. 178) (like that of the Dominion, [secs. 69 and 69A of the *Companies Act,* R.S.C., c. 79; 4 & 5 Geo. V, c. 23, s. 3; 7 & 8 Geo. V, c. 25, s. 9] which applies to the defendant company) contains the following provisions:

82. (1) The directors may charge, hypothecate, mortgage, or pledge any or all of the real or personal property, including book debts and unpaid calls, rights, powers, undertaking and franchises of the corporation to secure any bonds, debentures, debenture stock, or other securities, or any liability of the corporation.

(2) A duplicate original of such charge, mortgage, or other instrument of hypothecation or pledge made to secure such bonds, debentures, or debenture stock, or other securities, shall be forthwith filed in the office of the Provincial Secretary as well as registered under the provisions of any other Act in that behalf.

This section apparently contemplates that there may be charges which do not require registration under any other statute and makes provision for their publicity by enacting that duplicates thereof be filed *forthwith* in a government office.

With Meredith J.A. (*Johnston* v. *Wade* (1), at p. 391), if it is desirable that such a charge as that claimed in this case should be registered under the provisions of the Chattel Mortgage Act * * * it is, I think, the duty of the Court to wait until the legislature so enacts,

(1) (1908) 17 Ont. L.R. 372.

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not to anticipate such an enactment upon the more than doubtful language of the present enactments upon the subject.

For these reasons, as well as for those stated by Hodgins and Smith JJ.A., in the Appellate Divisional Court, the floating charge executed by the defendant company in favour of the respondent does not, in my opinion, fall within the purview of the *Bills of Sale and Chattel Mortgage Act.*

The present appeal, therefore, fails and should be dismissed with costs.

DUFF J.—This appeal raises the question whether or not a certain instrument falls within the category of instruments dealt with by Chapter 135 of the Revised Statutes of Ontario for 1914, known as the *Bills of Sale and Chattel Mortgage Act.* The immediate practical point is whether or not the requirements of the statute apply in such a way as to make registration of the instrument obligatory.

The instrument was executed on the 17th of September, 1923, by J. A. Larocque, Ltd., in favour of The Capital Trust Corporation, Ltd., described as the Trustee; and by it the company sold, assigned, transferred, hypothecated, mortgaged, pledged and set over as security for certain bonds of the company a certain parcel of real estate in the city of Ottawa and all its movable assets for the time being, both present and future, in the province of Ontario, subject to provisoes of redemption, and also subject to the condition that until the security should become enforceable, the company should not, by reason of the floating charge created by the instrument, be hindered or prevented dealing with any of its property in the ordinary course of its business and for the purpose of carrying on the same.

The question to be decided is whether an instrument of this character—that is, an instrument intended to operate as a floating charge—falls within the category of mortgages dealt with by the statute mentioned.

I have not been able to satisfy myself that you cannot have a floating security by way of mortgage. Nobody doubts that you can have a mortgage of after acquired property: the statute, indeed, recognizes that itself. You can have, for example, a valid mortgage of chattels to be afterwards brought upon certain premises. As soon as the

property is brought there and identified, the equitable right of the mortgagee attaches. That being so, I do not understand why you cannot have a mortgage of present and after acquired property to which the equitable rights of the mortgagee only attach specifically on the intervention of the mortgagee in the events upon which his right to intervene arises. In *Tailby* v. *Official Receiver* (1), Lord Macnaghten describes the nature of this class of security in these words:

> I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which, perhaps, the most familiar example is to be found in the debentures of trading companies. It is a floating security, reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation.

The instrument in question in that case seems to have been almost identical in terms with the instrument now before us; and throughout the judgment of Lord Macnaghten it is everywhere spoken of as a mortgage. And in truth the language of that judgment makes it quite clear that in the opinion of that great judge and master of equity, such a document as that before us might properly be described as an equitable mortgage.

It may, moreover, be observed that one of the recognized modes of creating an equitable mortgage is to create an equitable charge. That an instrument creating a floating security creates a present charge upon the property for the time being, falling within the description of property affected by it, is shewn by the fact that, notwithstanding the right of the mortgagor to deal with the property in the ordinary way of business, the charge takes priority over executions and judgments and over the rights of general creditors. There seems to be no reason to doubt the soundness of the statement in Palmer's Company Law, 11th Ed., p. 319:

> A floating charge operates as an immediate and continuing charge on the property charged, subject only to the company's powers to deal with the property in the ordinary course of its business.

Then arises the question whether a security of this character, although properly described as a mortgage, does or

(1) (1888) 13 App. Cas. 523, at p. 541.

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does not fall within the operation of s. 11 of the statute. That section is very comprehensive in its terms; it extends to all mortgages, including equitable mortgages, of present and future goods, and there appears to be no good reason for affirming that it does not extend to a mortgage by an individual trader of all his present and future property, held in connection, for example, with a given business, or, indeed, without such restriction, in so far as that property may consist of goods and chattels. It seems impossible to restrict the section in such a way as to exclude an instrument which pledges other property as well as goods and chattels: one cannot suppose that either s. 5 or s. 11 could be evaded by the device of adding, for example, a charge upon book debts. Such an instrument would, on the principle of the judgment of Giffard L.J., in *In Re Panama, New Zealand, and Australian Royal Mail Co.* (1), be a floating security, because it would naturally imply that the trader was entitled to carry on his business; nor does there seem to be any sound reason for excluding from the operation of s. 11 a mortgage of such a character containing an express provision that, subject to the mortgagee's right to intervene in named conditions, the mortgagor should be entitled to deal with the mortgaged property in the ordinary way of his business and for the purposes of that business.

And if that section has its full operation as respects such instruments when executed by individual traders, it is not easy to assign a reason for holding that it should not apply equally in the case of such instruments when executed by trading companies. The Act is general in its operation, and I can think of no reason, based on constitutional grounds, for holding that it is not applicable to instruments executed by Dominion companies.

The appeal should be allowed with costs, and the judgment of Fisher J. restored.

MIGNAULT J. concurs with Duff J.

NEWCOMBE J.—The question is whether the trust deed of 17th September, 1923, is a mortgage or a conveyance in-

(1) (1870) L.R. 5 Ch. App. 318.

tended to operate as a mortgage within the meaning of the *Bills of Sale and Chattel Mortgage Act*, of Ontario, R.S.O., 1914, c. 135, and it depends upon the intent of the instrument, by which, in order to secure the payment of the principal and interest of the bonds, the respondent, Larocque Co., sells, assigns, transfers, hypothecates, mortgages, pledges, sets over and charges, first, the real estate described, and secondly:

all its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the province of Ontario, hereinafter referred to as the "floating charged property" and including its undertaking and its other property and assets, real, personal or mixed, present and future, not hereinbefore assured, together with all its present and future tolls, rents, revenues, incomes and sources of income, goodwill, chattels, stock-in-trade, plant, furniture, books of account, moneys, credits, things in action, contracts, agreements, bills, notes, negotiable and non-negotiable instruments, judgments, securities, rights, powers, patents, trade-marks, copyrights, privileges and franchises, and all of the property and things of value of every kind and nature which the company may be or hereafter shall become possessed of or entitled to, providing that "the floating charge," created by this paragraph shall in no way hinder or prevent the company until the security hereby constituted shall become enforceable and the Trustee shall have demanded or become bound to enforce the same, either by dividends out of profits, leasing, mortgaging, pledging, selling, alienating or otherwise, disposing of or dealing with the subject matters of such "floating charge" in the ordinary course of its business and for the purpose of carrying on the same.

Some light may be afforded by considering the instrument in its application to a subsequent disposition by the company of existing assets made otherwise than "in the ordinary course of business and for the purpose of carrying on the same." I apprehend that this would constitute default "in the observance or performance of something hereby (by the trust deed) required to be observed and performed by the company." This default, if not made good, would terminate the company's right to possession, and the security would thereby become enforcible. The express permission which the company has to dispose of the assets described is limited to dispositions in the ordinary course of its business and for the purpose of carrying on the same, and it follows from the principle of interpretation expressed in the maxim *expressio unius est exclusio alterius* that it is not intended to reserve any other power of disposition. It is, I think, clear that the charge created is to have precedence of transfers made by the company

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otherwise than in the ordinary course of business, and it is from the time of its creation always effective for that purpose as against any assets, identified as within the description, which are thus disposed of. The provisions of the trust deed which it is said distinguish the sort of charge which it was intended to create from a mortgage, or a conveyance intended to operate as a mortgage, have no application to subsequent transfers not made in pursuance of the conceded power to deal with the subject-matter in ordinary course, and therefore an interest acquired by means of a disposition not permitted by the trust deed cannot prevail as against that of the trustee claiming by force of his original title. The instrument is in form and expression, to all intents and purposes, a mortgage, except that until the mortgagee take possession upon default the mortgagor retains a limited power of disposition.

I know that it has been said by high authority that "a floating security is not a specific mortgage of the assets plus a license to the mortgagor to dispose of them in the course of his business," per Buckley L.J. in *Evans* v. *Rival Granite Quarries Ltd.* (1). This observation is, I think, to be understood by applying the emphasis to the word "specific," because the learned Lord Justice, in the very same passage, speaks of a floating charge as a mortgage subject to a license to carry on business. Lord MacNaghten said, in *Governments Stock and Other Securities Investment Co., Ltd.*, v. *Manila Ry. Co., Ltd.* (2),

> It is of the essence of such a charge (a floating security) that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.

Therefore, if there be no period of dormancy, there is no floating charge. In the present case a charge is declared and established by the conveyance, and is, except by the exercise of a special power thereby stipulated, so to remain until satisfied, and if that be therefore not a floating charge, then it was a misnomer to describe the security as a floating charge; but, however that may be, the instrument is, I think, not inaptly described as a mortgage. See *In Re*

(1) [1910] 2 K.B. 979, at p. 999. (2) [1897] A.C. 81, at p. 86.

Florence Land and Public Works Co. (1); *Hubbuck* v. *Helms* (2); *In Re Standard Manufacturing Co.* (3); *Driver* v. *Broad* (4); *Wallace* v. *Evershed* (5).

RINFRET J. (dissenting) concurs with Anglin C.J.C.

Appeal allowed with costs.

Solicitors for the appellants: *Kilmer, Irving & Davis.*

Solicitors for the respondent: *Chrysler & Chrysler.*