HARRY ROSEN AND HYMAN ROSEN (*Plaintiffs*) ..... APPELLANTS;

1957

*June 13, 14
**Oct. 1

AND

CHARLES S. ANGLIN (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Chattel mortgages—Priorities—Failure to file renewal statement—Whether subsequent mortgagee is "in good faith"—Notice—Insolvency of mortgagor—Sufficiency of affidavit of bona fides—The Bills of Sale and Chattel Mortgages Act, R.S.O. 1950, c. 36, s. 24(1), (11).

The defendant took a chattel mortgage on June 22, 1951, covering goods in Kingston. This mortgage was for about $5,700, but only $3,800 of this was advanced by the defendant in cash, the balance of the consideration being an existing indebtedness of the mortgagors to the defendant and a company controlled by him. The same goods had already been mortgaged to the plaintiffs under two mortgages dated and registered in 1949 but no renewal statements covering the 1949 mortgages were filed until July 30, 1951. The goods were seized by both the plaintiffs and the defendant in June 1953, and the bailiff interpleaded. The trial judge found as a fact that the defendant, at the time he advanced the $3,800 and registered his mortgage, was honestly ignorant of the existence of the plaintiffs' mortgages, and had no constructive notice of them, and this finding was affirmed on appeal. It was argued, however, that the defendant, when he took the mortgage, was aware of the fact that the mortgagors were insolvent, and that his object in taking the mortgage was to obtain security for a past-due and unsecured indebtedness, which constituted an unjust preference over the other creditors.

Held (Locke J. dissenting): The defendant was entitled to priority but only to the extent of the $3,800 actually advanced by him.

The concurrent findings as to the defendant's ignorance of the existence of the other chattel mortgages should not be disturbed but proof of lack of knowledge was not necessarily equivalent to proof of "good faith". It should be found on the evidence that the defendant knew when he took his mortgage that the mortgagors were insolvent, that the mortgage covered practically all of the mortgagors' assets, and that the purpose was to obtain an unjust preference. In these circumstances, the defendant could not be said to be "a subsequent mortgagee in good faith", within the meaning of s. 24(1) and (11) of *The Bills of Sale and Chattel Mortgages Act,* in respect of the past-due indebtedness. *In re Jukes; Ex parte Official Receiver,* [1902] 2 K.B. 58 at 60, agreed with. As to the moneys actually advanced by the defendant, however, the transaction was severable and the defendant was entitled to priority. *Campbell v. Patterson* (1893), 21 S.C.R. 645 at 653; *Hunt v. Long* (1916), 35 O.L.R. 502, applied.

While it was true that the defendant's affidavit of *bona fides* stated that the mortgagors were indebted to him in the sum mentioned in the mortgage, although in fact part of that sum was owed to a company

*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Nolan JJ.
**Nolan J. died before the delivery of judgment.

1957

ROSEN *et al.* v. ANGLIN

of which the defendant was an officer, the proper inference to be drawn from the evidence was that the defendant in taking the mortgage was acting as trustee for the company as well as for himself personally, and the mortgage was consequently not vitiated by this statement in the affidavit. *Light v. Hawley* (1897), 29 O.R. 25, approved.

Per Locke J., *dissenting*: On the pleadings, the plaintiffs were not entitled to contend that the mortgage had been taken in order to obtain a fraudulent preference, the defendant being then aware of the mortgagors' insolvency. The only issue open on the pleadings was whether the defendant had notice of the plaintiffs' mortgages when he took his own mortgage, and the finding of the Courts below was conclusive on this issue.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Wells J. (1), affirming an appeal from a report of Reynolds Co. Ct. J. Appeal allowed in part.

W. B. Williston, Q.C., for the plaintiffs, appellants.

A. S. Pattillo, Q.C., for the defendant, respondent.

The judgment of Kerwin C. J. and Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Wells J. (1), whereby an appeal from the report of His Honour Judge Reynolds, finding that a chattel mortgage held by the respondent had priority over two chattel mortgages held by the appellants, was dismissed.

By a chattel mortgage dated January 3, 1949, and registered on January 4, 1949, Solly Sam Cohen, hereinafter referred to as Cohen, mortgaged the goods and chattels used by him in the dry-cleaning business known as Safeway Cleaners to the appellants for $10,000. During the year 1949 Cohen sold this business and the goods and chattels to Safeway Cleaners Limited, a company of which he was at all relevant times the chief shareholder and manager. By a chattel mortgage dated June 7, 1949, Safeway Cleaners Limited mortgaged the same goods and chattels to the appellant Hyman Rosen for $10,000. The renewal statement required by s. 24(1) of *The Bills of Sale and Chattel Mortgages Act*, R.S.O. 1950, c. 36, hereinafter referred to as the Act, was not filed in the case of either of these

(1) [1956] O.W.N. 248.

mortgages until July 30, 1951. On that date, pursuant to a judge's order duly made under s. 24(11) of the Act, renewal statements were registered showing the amount owing on the mortgage of January 3, 1949, to be $10,000 with interest from January 3, 1949, and the amount owing on the mortgage of June 7, 1949, to be $8,000.

In the meantime, by a chattel mortgage dated June 22, 1951, and registered on June 25, 1951, Safeway Cleaners Limited and Cohen mortgaged the same goods to the respondent for $5,711.31.

On June 23, 1953, payments were in default under the three chattel mortgages and on that date the respondent seized the goods now in dispute. Subsequently the appellants issued distress warrants to Tice, a bailiff, who seized the same goods on their behalf. Tice interpleaded. An issue was directed in which the appellants were plaintiffs and the respondent defendant, and pleadings were ordered to be delivered.

In their statement of claim the appellants alleged that they were the holders of the two chattel mortgages first above referred to, that on September 10, 1953, the amount owing on the mortgage of January 3, 1949, was $10,300 and that owing on the mortgage of June 7, 1949, was $5,984.46, that they had seized the goods in question, that their mortgages were good, valid and subsisting mortgages, that the respondent had no interest in the goods covered by the mortgages, which were listed in detail in the statement of claim, or alternatively had no interest therein in priority to that of the appellants, and claimed a declaration of priority accordingly.

In his statement of defence the respondent denied that the mortgages held by the appellants were given in good faith, pleaded that he held a mortgage dated June 20 (*sic*), 1951, which mortgage had priority over those of the appellants by reason of prior registration, that he had seized the goods in question on June 23, 1953, and that the mortgages referred to in the statement of claim became invalid as against him when the appellants failed to file renewal statements as required by s. 24(1) of the Act.

1957

ROSEN *et al.* v. ANGLIN

Cartwright J.

The appellants delivered a reply the first paragraph of which reads as follows:

> If the Defendant holds a Chattel Mortgage dated June 20th [*sic*], 1951 in which Safeway Cleaners Limited and S. Cohen were Mortgagors and the Defendant was Mortgagee, the Defendant was not a subsequent purchaser or Mortgagee in good faith for valuable consideration.

No particulars of this allegation were demanded by the respondent.

In my opinion the pleadings sufficiently raised the questions of fact and law which Mr. Williston argued before us, and I did not understand counsel to contend otherwise. Mr. Williston's main submission was that the mortgage held by the respondent was obtained by him when he knew that the mortgagors were insolvent and for the purpose of obtaining an unjust preference over the other creditors and that therefore he was not "a subsequent mortgagee in good faith" within the meaning of those words in s. 24(1) and s. 24(11) of the Act.

The evidence tendered as to the financial condition of Safeway Cleaners Limited and as to the respondent's knowledge of it was obviously directed to this issue, and that the position taken before us by Mr. Williston was taken before His Honour Judge Reynolds is clear from the following discussion which occurred in the course of the cross-examination of the respondent. It should be mentioned that, at the hearing before His Honour, Mr. Nickle was counsel for the respondent and Mr. Robb for the appellants.

Mr. NICKLE: My position is based on the definition of good faith, which is exactly what it says.

HIS HONOUR: Your position, Mr. Robb, is that the Anglin mortgage gave him an undue preference over other creditors?

Mr. ROBB: My position is that the chattel mortgage was taken for the express purpose of giving him a preference over other creditors.

HIS HONOUR: And not in good faith.

Mr. ROBB: And secondly, he had notice.

HIS HONOUR: I am going to need considerable assistance from counsel in regard to what is meant by good faith.

His Honour does not mention the matter in his report or reasons. We were informed that the point was argued before Wells J. but no mention is made of it in his reasons and no reasons were delivered by the Court of Appeal.

On conflicting evidence His Honour found that the respondent registered his mortgage and advanced the sum of $3,800, to be mentioned hereafter, in honest ignorance of the existence of the chattel mortgages held by the appellants, and Wells J. has concurred in this finding. There is no doubt that the respondent gave valuable consideration and in my opinion we ought not to interfere with the concurrent findings that at the time of taking his mortgage, he was honestly ignorant of the existence of the appellants' mortgages. The decision of this Court in *The Canadian Bank of Commerce v. Munro* (1), particularly the passage at p. 311, quoted in the reasons of Wells J., makes it clear that if the respondent had had knowledge of the existence of the appellants' mortgages he could not be held to be acting in good faith; but it does not follow that proof of lack of knowledge is equivalent to proof of "good faith".

As none of the learned judges in the Courts below discuss the questions of fact and law involved in Mr. Williston's main submission, we must endeavour to find the relevant facts from the written record. After a perusal of all the evidence and the exhibits, I see no escape from the conclusion that, at the time of registering his mortgage, the respondent knew that Safeway Cleaners Limited, the owner of the goods in question, was insolvent and that the purpose of taking the mortgage was to give him security for a past-due and unsecured indebtedness, which constituted an unjust preference over the other creditors of that company.

I refer particularly to the following matters:

The principal of the mortgage, $5,711.31, was made up of $3,800 advanced by the respondent to pay off a mortgage on the goods in question held by Trenton Finance Company dated February 5, 1951, $500 rent owed to the respondent, a further amount for rent, some interest, $632.15 paid by the respondent on a note he had endorsed for Cohen, and $636.86 owed to S. Anglin Co. Limited, a company of which the respondent was an officer. The last two items were overdue and unsecured. The respondent had pressed for payment repeatedly and unsuccessfully.

(1) [1925] S.C.R. 302, [1925] 2 D.L.R. 928.

1957

ROSEN *et al.* v. ANGLIN

Cartwright J.

On June 10, 1950, the solicitors then acting for Safeway Cleaners Limited wrote to S. Anglin Co. Limited, a letter reading as follows:

Dear Sirs:

Re: *Safeway Cleaners Limited, Kingston*

The above named client would appear to owe you the sum of $1,040.48. First, would you verify to us the amount owing to you.

Secondly, we would like to point out that the financial position of the above named is such that were it called to pay all its obligations now it could not do so and insolvency would result. The only assets of this Limited Company are its cleaning equipment, fixtures, etc., which are all covered by liens to creditors on a preferred basis. These preferred creditors as at present indicate that they will not seize or attempt to put this Company out of business. We have also reason to believe that the large creditors of this client will not put it out of business because they have some confidence that their debts will be reduced eventually, and are presently getting the benefit of selling to this Company on cash basis, and therefore making some profit.

However, there are about 25 or 30 small creditors of claims from $25 to $150 roughly, and these quite properly have been pressing. If all these persons pressed together or if the Company attempted to pay them all, insolvency would result, and none of these creditors would get anything, being unsecured and secondary in preference to preferred creditors—Workmen's Compensation Board, Income Tax Authorities, landlord, etc.

We wish to make it clear that this Company does not wish to default and feels that under present operations all creditors can be paid over a period of time. The credit position of this Company has improved in the last year by several thousands of dollars and based on present business should improve during the coming year.

Under these circumstances may we have an indication from you as to whether or not you would be content "not to rock the boat" because the only certain result of rocking the boat is that you will get nothing whereas if the boat is not rocked, you stand a very admirable chance of getting paid off, although it may take two years to do it.

The acknowledgment of this letter, dated June 13, 1950, was signed by the respondent for S. Anglin Co. Limited.

On August 30, 1950, the respondent signed a letter on behalf of S. Anglin Co. Limited to the solicitors for Safeway Cleaners Limited reading as follows:

Gentlemen:—

Re: Safeway Cleaners Limited,
Kingston, Ontario.

In answer to your letter of almost three months ago, we wrote you on June 13th re the above, who now owe us a much overdue account of One Thousand Three Hundred and Thirty-four Dollars and Eighty-six cents ($1,334.86). They also owe Charles S. Anglin several months rent.

In our letter we suggested that a meeting of Mr. Cohen's creditors should be called. We feel that at such a meeting a plan could be mapped out to put the business on a paying basis. If this is not done very soon, we are afraid that the business will have to go into liquidation, and in that case there will be nothing left for the ordinary creditors, nor for Mr. Cohen.

Mr. Cohen has promised the writer to come to our office next week to discuss his affairs. In the meantime, we would like to have a letter from you giving us your suggestions.

On November 4, 1950, a copy of the financial statement of Safeway Cleaners Limited as of September 30, 1950, was sent to S. Anglin Co. Limited. The respondent had this in his possession when he obtained his mortgage. It showed total assets, excluding goodwill, of $32,317.95 and total liabilities, excluding issued capital stock, of $50,333.30. Of the assets $24,147.34 was made up of "machinery and equipment". All, or substantially all, of this was covered by the respondent's mortgage. As to its real value the respondent gave the following evidence:

Q. What is your value of the machinery and equipment? You have got it now. A. At the present time?

Q. Yes. A. It is not worth too much. It's old machinery.

Q. How much do you say it was worth? A. You mean how much when I took the mortgage?

Q. How much would it be worth if sold? What amount would it have raised for the benefit of creditors? A. I think $5,000 would be the limit.

The financial statement amply supports the opinion expressed by the respondent in his letter of August 30, 1950, that in the event of liquidation there would be nothing left for ordinary creditors.

In cross-examination of the respondent there are the following questions and answers:

Q. Any further explanation you want to give with respect to that, because I suggest that you took this mortgage for the express purpose of protecting the goods mentioned in the mortgage with respect to the claims of S. Anglin Ltd. and Charles Anglin personally, which were unsecured. A. Charles Anglin personally was mortgagee.

Q. Have you got any other explanation you want to make? A. Perhaps Mr. Nickle has.

I have been unable to find any other explanation in the record.

Having reached the conclusion that at the time of taking his mortgage the respondent knew that Safeway Cleaners Limited was insolvent, that the mortgage covered

1957

ROSEN *et al.* v. ANGLIN

Cartwright J.

practically all of its tangible assets, and that the purpose was to obtain an unjust preference over other creditors of Safeway Cleaners Limited, it is necessary to consider the question of law whether, in these circumstances, the respondent can be said to be "a subsequent mortgagee in good faith" within the meaning of subss. (1) and (11) of s. 24 of the Act.

These subsections read as follows:

> 24.(1) Except as provided in subsection 2 and subject to section 28 every mortgage registered in pursuance of this Act shall cease to be valid, as against the creditors of the person making the same and as against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the day of the registration thereof unless, within 30 days next preceding the expiration of the said term of one year, a statement (Form 1), exhibiting the interest of the mortgagee, his executors, administrators or assigns in the mortgaged property, and showing the amount still due for principal and interest thereon, and all payments made on account thereof, is registered in the proper office, as mentioned in section 21, of the county, provisional county or district in which the mortgage was registered, with an affidavit of the mortgagee that the statement is true and that the mortgage has not been kept on foot for any fraudulent purpose.
>
> (11) Where a statement of renewal is not duly registered within the time prescribed by this section, the judge of the county or district court may permit the same to be registered at a later date upon being satisfied by affidavit, or affidavits, that the failure to register arose from misadventure, ignorance or some other cause which constitutes a reasonable excuse, and that the parties have acted and are acting in good faith, but in such case the renewal statement shall as against creditors of the mortgagor, or as against subsequent purchasers or mortgagees in good faith for valuable consideration who have purchased or have given credit after the expiry of the mortgage but before registration be deemed to have been executed and to be effective only from the date of registration, and, for the purposes of registration of any further statement of renewal, such statement of renewal shall be deemed to have been registered upon the actual date of registration.

In *In re Jukes; Exparte Official Receiver* (1), Wright J., dealing with a case under the English *Bankruptcy Act*, 1883, said at p. 60:

> But I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith.

I agree with the reasoning of this passage and think it applicable to the case at bar where the respondent took substantially the whole of the property of his debtor as security for payment, *inter alia,* of his past-due debts knowing of his debtor's insolvency.

(1) [1902] 2 K.B. 58.

I conclude therefore that in so far as the mortgage was taken as security for past-due debts the respondent was not a subsequent mortgagee in good faith within the meaning of that expression as used in the subsections quoted.

The question remains whether the respondent should be held to have priority to the extent of $3,800 which he paid to discharge the mortgage held by Trenton Finance Company. No question as to the validity of this mortgage was raised in the pleadings or at the trial and I understood counsel to argue the appeal on the assumption that at the time it was paid off it was a valid and subsisting charge on the goods in question. Not without hesitation, I have reached the conclusion that this part of the transaction falls within the principle stated by Gwynne J. in *Campbell v. Paterson; Mader v. S. McKinnon & Co. et al.* (1), and by the Appellate Division of the Supreme Court of Ontario in *Hunt v. Long* (2), and so may be treated as severable, and that the respondent's mortgage is entitled to priority over those of the appellants to the extent only of the actual cash advanced, $3,800, and interest thereon.

I have not overlooked Mr. Williston's argument that the respondent's mortgage is bad *in toto* on the ground that his affidavit of *bona fides* stated that the mortgagor was indebted to him in the sum mentioned in the mortgage when in fact part of that sum was owed not to the respondent personally but to S. Anglin Co. Limited. In my opinion the proper inference to be drawn from the evidence is that the respondent in taking the mortgage was acting as trustee for S. Anglin Co. Limited, as well as for himself personally. In *Light v. Hawley* (3), the facts were similar. A chattel mortgage to secure a debt was made to a nominee of the creditor. There was nothing on the face of the mortgage or in the affidavit of *bona fides* to show the fiduciary position of the mortgagee but the mortgage was held to be valid. I agree with the statement of Meredith C. J. at p. 26, that the applicable principle is "that a mortgage may be given to one who has no beneficial interest in the debt secured by it, when the mortgagee is in fact a trustee for the person to whom the debt is due".

(1) (1893), 21 S.C.R. 645 at 653.
(2) (1916), 35 O.L.R. 502, 27 D.L.R. 337.
(3) (1897), 29 O.R. 25.

1957

ROSEN *et al.* v. ANGLIN

Cartwright J.

For the above reasons I would allow the appeal to the extent of declaring that the mortgage of the respondent has priority over those of the appellants to the extent of only $3,800 and interest. Success has been divided and I would direct that there be no order as to costs in this Court or in any of the Courts below.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario which dismissed the appeal of the present appellants from an order of Wells J. (1), by which their appeal from the report of His Honour Judge Reynolds, Judge of the County Court of the County of Frontenac, was dismissed.

On September 10, 1953, the appellants caused a seizure to be made of certain chattels in the city of Kingston under a chattel mortgage granted to them on January 3, 1949, by one Cohen. On the same date, the appellant Hyman Rosen caused a seizure to be made of the same chattels under a chattel mortgage dated June 7, 1949, granted to him by Safeway Cleaners Limited.

The respondent Anglin claimed possession of the said goods under a chattel mortgage dated June 20, 1951, granted to him by Safeway Cleaners Limited and the said Cohen, claiming priority over the chattel mortgages of the appellants.

The bailiff by whom the seizure had been made applied for an interpleader order and on this application His Honour Judge Reynolds, in his capacity as local judge of the Supreme Court, directed that the claimants proceed to the trial of an issue in which the present appellants should be plaintiffs and the respondent defendant, and directing:

> that the question to be tried shall be whether at the time of the seizure by the said bailiff William Tice the plaintiffs were entitled to seize the goods and chattels seized in priority to the defendant, and whether the said mortgages to the plaintiffs were in priority to the mortgage of the defendant on the goods and chattels seized.

The order further directed that pleadings be delivered and the appellants delivered a statement of claim in the Supreme Court of Ontario asserting their claim to the chattels under the chattel mortgages mentioned and asking

(1) [1956] O.W.N. 248.

for a declaration that they were entitled to seize the goods in priority to the defendant and that their chattel mortgages were entitled to priority.

By the statement of defence, the respondent claimed priority under his chattel mortgage and asserted that the chattel mortgages of the plaintiffs were invalid as against him by reason of their failure to file renewal statements as required by s. 24(1) of *The Bills of Sale and Chattel Mortgages Act,* R.S.O. 1950, c. 36. By way of counterclaim the respondent asked for a declaration that his mortgage be declared to have priority and alleged that the distress by the appellants was illegal and claimed damages.

To the defence the appellants replied that the respondent was not a mortgagee in good faith for valuable consideration and pleaded ss. 7 and 24(1) of the said Act. The defence to the counterclaim denied that the respondent had suffered any damages. On this defence the respondent joined issue.

By an order of Judson J. the trial of the action was referred to His Honour Judge Reynolds. By his report he found that the respondent was a mortgagee in good faith and for valuable consideration within the meaning of s. 24(1) and, accordingly, that his mortgage was entitled to priority over that of the appellants.

The present appellants appealed and written reasons were given by Wells J. (1) for his order dismissing the appeal and confirming the report. The appeal taken to the Court of Appeal was dismissed without written reasons.

The learned County Court Judge, after referring to the facts, found in terms that the present respondent had no notice, actual or constructive, of the appellants' mortgages at the time he took his chattel mortgage and, in reaching that conclusion, accepted the respondent's evidence in preference to that given by Cohen. Mr. Justice Wells, quoting the language of the report upon this aspect of the matter, said that having himself considered the evidence he would come to the same conclusion as had Judge Reynolds. As the learned judges of the Court of Appeal dismissed the appeal, it is apparent that they came to the same conclusion.

(1) [1956] O.W.N. 248.

1957

ROSEN *et al.* v. ANGLIN

Locke J.

Section 24(1), in so far as it affects the matter, reads:

> . . . every mortgage registered in pursuance of this Act shall cease to be valid, as against the creditors of the person making the same and as against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the day of the registration thereof unless, within 30 days next preceding the expiration of the said term of one year, a statement (Form 1), exhibiting the interest of the mortgagee, his executors, administrators or assigns in the mortgaged property, and showing the amount still due for principal and interest thereon, and all payments made on account thereof, is registered in the proper office.

In considering the question as to whether the respondent was a subsequent mortgagee in good faith, the learned County Court Judge, as shown by his report, considered the mater only from the standpoint as to whether the respondent had notice at the time he took his chattel mortgage that the mortgages to the appellants were in existence and unsatisfied.

On the argument before us, however, while the accuracy of the finding that the respondent did not in fact know of the existence of those mortgages was not conceded, the main attack upon the judgment was put upon a different ground, namely that, at the time the respondent's mortgage was taken, Safeway Cleaners Limited was, to the knowledge of the respondent, in insolvent circumstances, that the mortgage was taken to enable him and S. Anglin Co. Limited, a company managed by him, to obtain a preference over other creditors of that company and that, in these circumstances, he could not be said to be a mortgagee in good faith.

We were informed upon the argument that this question was argued before Mr. Justice Wells but no mention is made of it in the reasons for his judgment dismissing the appeal.

In my opinion, this issue was not properly raised in the appellants' pleadings. In reply to the statement of defence which claimed priority for the respondent's mortgage, the appellants merely asserted that the defendant was not a mortgagee in good faith for valuable consideration. Whether upon the issue to be tried, as defined in the interpleader order, the question as to whether the respondent's chattel mortgage had been taken in order to obtain a fraudulent preference over the other creditors could have

been raised is, in my opinion, very debatable. The pleadings, however, did not expressly raise the point and while some evidence was admitted that, in the year preceding the taking of the respondent's mortgage, he was aware that Safeway Cleaners Limited was in financial difficulties, and counsel for the appellants said at the hearing that it had been taken for the purpose of giving him a preference over the other creditors, the matter of the financial position of the company at the time the respondent's chattel mortgage was given was not gone into in any detail as, undoubtedly, would have been done had that issue been raised.

It was shown that the chattel mortgage taken by the respondent was drawn by his solicitors and that, before any money was advanced, they made a search of the records in the office of the County Court and found that no chattel mortgage or renewal of a chattel mortgage had been registered within a period of 12 months prior to that time. The amount for which the respondent's chattel mortgage was taken was $5,711.31. Of this amount, however, only $3,800 represented a present advance, that amount being loaned to enable the company to pay off a prior chattel mortgage held by Trenton Finance Company. The remainder consisted of $500 rent owing by the company to Anglin and an amount owing to S. Anglin Co. Limited. Had proceedings been taken to set aside the respondent's chattel mortgage on the ground that it amounted to a fraudulent preference over the other creditors, and had it been shown that the mortgagors were insolvent at the time the mortgage was given, to Anglin's knowledge, I would expect that upon the evidence it would have been held to be a good security only for the amount of the actual cash advanced: *Campbell v. Patterson; Mader v. S. McKinnon & Co. et al.* (1).

The argument addressed to us on this aspect of the matter does not, of course, ask for a declaration that the respondent's mortgage should be held invalid as a preference, its alleged invalidity on this ground being used only as a ground for urging that the respondent was not acting in good faith in taking the mortgage. In my opinion, that question is not in issue. I may say that if it had been open, my examination of the evidence would lead me to

(1) (1893), 21 S.C.R. 645.

1957

ROSEN *et al.* v. ANGLIN

Locke J.

the conclusion that it was not shown that, at the time the respondent's mortgage was taken, the mortgagors, or either of them, were in insolvent circumstances.

I would dismiss this appeal with costs.

Appeal allowed in part without costs, LOCKE J. *dissenting.*

Solicitor for the plaintiffs, appellants: Malcolm Robb, Toronto.

Solicitors for the defendant, respondent: Webster & Webster, Kingston.

---

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.