CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

GEORGE EMERSON AND J. H. ASHDOWN (DEFENDANTS)..... } APPELLANTS;

AND

JAMES BANNERMAN (PLAINTIFF).....RESPONDENT.

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*Jan. 21.

*June 22.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Bill of sale—Affidavit of bona fides—Adherence to statutory form—Proof of execution—Attesting witness.

Where an affidavit of *bona fides* to a bill of sale stated that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against *the* creditors of the bargainor, while the form given in the statute uses the words "against *any* creditors of the bargainor," such variation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. Gwynne J. dissenting.

The statute requires the affidavit to be made by a witness to the execution of the bill of sale but as attestation is not essential to the validity of the instrument its execution can be proved by any competent witness.

APPEAL from a decision of the Supreme Court of

PRESENT: Sir W. J. Ritchie C. J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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the North-West Territories (1) affirming the judgment at the trial of an interpleader issue in favor of the defendants.

The issue was ordered to ascertain the title to a stack of oats. The plaintiffs claimed as execution creditors and the defendants as mortgagees under a bill of sale.

The bill of sale was attacked on two grounds. First, that the affidavit of *bona fides* was defective in not following the strict wording of the ordinance, the affidavit stating that the mortgage was not made to defeat or delay the creditors of the mortgagor the ordinance using the words any creditors.

Secondly, that the bill of sale was not properly proved at the trial, it being made, as the ordinance requires, in the presence of an attesting witness who, under the rules of evidence in the territories, was the only person who could prove its execution and who was not called.

The court below held the bill of sale good as against both objections.

Davis for the appellant. The Ontario courts have held, in these cases, that very slight deviations from the statute will invalidate a bill of sale. *Harding* v. *Knowlson* (2); *Boynton* v. *Boyd* (3); *Boulton* v. *Smith* (4). These cases have never been overruled, and are recognized as good law in *Boldrick* v. *Ryan* (5).

The words of the ordinance must be construed in their ordinary grammatical sense, and if there is a deviation which makes it doubtful if the meaning is the same as the statute so construed it is fatal.

In an affimative sentence the expression "the creditors" would include "any creditors," but it is otherwise in a negative sentence.

(1) 1 N.W. T. Rep. No. 2 p. 36.
(2) 17 U.C. Q.B. 564.
(3) 12 U.C.C.P. 334.
(4) 17 U.C. Q.B. 406.
(5) 17 Ont. App. R. 260.

That the bill of sale could not be proved except by the attesting witness, see *Bryan* v. *White* (1); *Roberts* v. *Phillips* (2).

Moss Q.C. for the respondent cited as to the objection to the affidavit, *Mathers* v. *Lynch* (3); *Farlinger* v. *McDonald* (4); *Gemmill* v. *Garland* (5); and that the execution of the mortgage was properly proved, *Armstrong* v. *Ausman* (6).)

The judgment of the majority of the court was delivered by

PATTERSON J.—Mr Davis in his learned and exhaustive argument presented very fully all the grounds that could be urged against the judgment appealed from, but without creating in my mind any doubt of its correctness.

The objection that the affidavit of *bona fides* fails to satisfy the statute because, while it denies any intention to hold the goods against *the creditors* of the bargainor the term used in the revised ordinance ch. 47 section 5 is "against *any* creditors," seems to me to require a construction of the statute which would be unreasonable and unnecessary. I think the evidence furnished by the statute itself by means of the retention of the expression "the creditors," in the two cognate sections (3 and 4) proves that the legislature regarded the two forms of expression as practically synonomous, and I do not think the criticism bestowed upon them, ingenious and thorough as it was, led at all directly to a different interpretation. The bargainee deposes that the instrument is not made for the purpose of holding or enabling him to hold the goods against the bargainor's creditors, or "the creditors of the bargainor,"

(1) 2 Rob. Eccl. 137.
(2) 24 L. J. Q.B. 171.
(3) 28 U.C. Q.B. 354.
(4) 45 U.C. Q.B. 233.
(5) 12 O. R. 142; 14 Can. S. C. R. 321.
(6) 11 U.C. Q.B. 498.

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which is precisely the same thing. It is urged that an assignment of perjury upon this affidavit would not be sustained by proof of intent to hold the goods against any number of creditors short of the whole body of them; in other words, that in case a debtor assigned to one creditor with intent to defraud all the others, or to a stranger with intent to defraud all his creditors but one with whom he had an understanding, he could, without fear of an indictment for perjury, make that affidavit. The proposition is, to my mind, too obviously untenable to require serious argument. If the intent was to defraud any creditors of the bargainor it cannot be truly said that there was no intent to defraud the bargainor's creditors. Thus whether the words are "any creditors" or "the creditors," the meaning is the same.

It was argued that an intent to defraud one single creditor would be covered by the term "any creditors" and not by the other form of expression; but both expressions being in the plural the distinction is too subtle for my perception. It is not made clearer by a reference to the case cited of *The Queen* v. *Rowlands* (1), in which it was decided that an indictment charging a man with having removed his goods with intent to defraud his creditors, contrary to a statute which made it a misdemeanor to do so, was not sustained by proof of removing the goods for the purpose of defrauding one particular creditor, it not being shown that there were other creditors. It is not our duty at present to consider that decision more closely. The importance of clearly apprehending what is really decided by it before applying the decision as an authority in other cases is very obvious, but our present purpose is satisfied by noting that if the decision be taken to establish as a general proposition that a charge

(1) 8 Q. B. D. 530.

based on a plural form of words, *e. g.* "his creditors" will not be sustained by proof of an act touching one creditor alone, which is what must not be hastily assumed, it applies equally to both the plural expressions before us, "the creditors" and "any creditors," and so fails to affect the discussion.

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I am not prepared to say that the inquiry whether a charge of perjury assigned upon the affidavit before us could be sustained by proof of intent to defraud any number of creditors, whether one or several, less than the whole body, is a final test of the sufficiency of the affidavit to satisfy the clause of the statute which, in the formula given, uses the words "any creditors." I do not feel driven to pronounce on that point because, in my opinion, the test supports the sufficiency of the affidavit. We have to read the formula in the light of the Interpretation Ordinance, which enacts that slight deviations from forms prescribed by the ordinances, not affecting the substance or calculated to mislead, shall not vitiate them; and we have here an affidavit which deviates slightly from the formula given, the deviation not affecting the substance or calculated to mislead. We have in this particular a different rule of construction to follow from that on which we had lately to act in *Archibald* v. *Hubley* (1), in applying a statute which required a rigid adherence to the forms it prescribed.

The other point made on the appeal related to the proof at the trial of the bill of sale in question.

It was proved by a credible witness who was not an attesting or subscribing witness to the execution of the instrument but who had been present at its execution.

There is no ground whatever for valid objection to the sufficiency of that proof. The objection taken con-

(1) 18 Can. S.C.R. 116.

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founded two things which are quite distinct, the execution of the deed between the parties, which the statute does not interfere with, and the proof by affidavit for the purpose of notice to creditors and subsequent purchasers. That affidavit must be made by a witness to the instrument, and it was made by a subscribing witness. It is not the subject of objection.

Attestation is not essential to the valid execution of the deed between the parties, and that being so the deed may be proved at a trial by one who is not attesting witness to it, whether there happens or does not happen to be an attesting or subscribing witness.

In my opinion the appeal should be dismissed.

GWYNNE J.—The question raised on this interpleader issue is as to the validity of the bill of sale of a stack of oats by one Sparrow to the plaintiff Bannerman.

By an ordinance of the North-West Territories in force at the time of the execution of the bill of sale in question it was enacted that every sale, assignment and transfer of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and that such sale shall be absolutely null and void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith, unless the bill of sale should be accompanied by an affidavit of the bargainee, or one of several bargainees, or of the agent of the bargainee or bargainees duly authorized to take the conveyance, that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against any creditors of the bargainor, which conveyance and affidavit were re-

quired to be registered as in the ordinance directed within fifteen days from the execution thereof. By a bill of sale bearing date and made upon the 24th day of September, 1889, Sparrow, in consideration of the sum of $400.00 therein acknowledged to be paid to him by Bannerman, bargained, sold, assigned, transferred and set over to Bannerman the stack of oats in question, to have and to hold the same unto and to the use of Bannerman, his executors, administrators and assigns, to and for his sole and only use forever, and by the said conveyance Sparrow undertook and agreed to thresh the oats and to deliver the same in Calgary to Bannerman as soon as possible. While the stack of oats still remained unthreshed in Sparrow's possession it was seized by the sheriff upon executions in his hands at the suit of the above defendants as judgment creditors of Sparrow. The affidavit accompanying the bill of sale was made by Bannerman the bargainee, and is in the words following:

I, James Bannerman, of &c., &c., in the foregoing bill of sale named, make oath and say, that the sale therein is *bonâ fide*, and for good consideration, namely, four hundred dollars, and not for the purpose of holding or enabling me this deponent to hold the goods mentioned therein against the creditors of the said bargainor.

It is objected that this affidavit is defective as not being in conformity with the affidavit prescribed in the ordinance, which required the affidavit of the bargainee to contain his declaration upon oath that the sale was not made for the purpose of enabling him to hold the goods "against any creditors of the bargainor." I regret very much feeling constrained to yield to this objection, for I entertain no doubt, as has been found by the learned judge who tried the interpleader issue, that the transaction was an absolute and perfectly honest sale of the oats in question, and that it is not open to any of the other objections taken

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to it. I cannot, however, bring my mind to the conclusion that there is not a marked difference between an affidavit that a sale was not made for the purpose of enabling the bargainee to hold goods "against any creditors of the bargainor;" and that it was not made for the purpose of enabling him to hold them "against the creditors of the bargainor," the former expression is identical with, "any or any one of the bargainor's creditors"—while the latter refers to the general body of his creditors—and although there might be no intention in a given case to hold goods purported to be sold to a bargainee against the general body of the bargainor's creditors there might be an intention to hold them against one particular creditor. Assuming, then, the latter to have been the intention in the present case, and that the deponent should be indicted for perjury, then, if the indictment should be framed assigning the perjury to have been committed in an affidavit stated in the words of the ordinance, the affidavit actually made upon its production would disprove the allegation in the indictment; and assuming the indictment to be framed stating the affidavit in the words in which it was actually made then the prosecution must fail upon its appearing that the intention, in point of fact, was to hold only against one particular creditor, although that is the very case which the ordinance declares shall make the bill of sale absolutely void against the bargainor's creditors. In the present case the bill was perfectly honest and absolute and for good consideration as found by the learned judge and not voidable within the meaning of the ordinance upon any ground except for defect in the affidavit of the bargainee of the *bonâ fides* of the sale; still I can see no way of avoiding the peremptory provision of the ordinance. I cannot concur in holding that an affidavit, the terms of which vary

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materially from the terms required by an ordinance, is a sufficient compliance with the ordinance, nor can I concur in the idea that we can for any reason assume that the alteration of the former ordinance upon the same subject by the substitution of the word "any" for the word "the" in the affidavit required to be made was occasioned by error, or carelessness or any inadvertence of the legislative body making the alteration, or that it was occasioned by the mistake of a clerk copying the ordinance as originally framed. The mistake in the frame of the affidavit most probably has been occasioned by the use of a printed form of bill of sale and affidavit endorsed thereon, as the same were in use before the former ordinance was repealed and the altered one substituted therefor, and although in the present case strict adherence to the terms of the amended ordinance will have the effect of defeating a perfectly honest, *bonâ fide*, absolute sale made for good consideration I can see no way, as I have already said, of getting over the peremptory provision of the ordinance. The appeal must, therefore, in my opinion, be allowed.

Appeal dismissed with costs.

Solicitor for appellants : *E. P. Davis.*

Solicitors for respondent : *Smith & West.*