1919
*Feb. 6.
*Mar. 17.

THE BANK OF HAMILTON (PLAINTIFF) ..... APPELLANT;

AND

MARY ANN HARTERY AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Debtor and creditor—Judgment—Mortgage—Registration—Priority—"Land Registry Act," R.S.B.C. (1911), c. 127, ss. 73, 104, 137—"Execution Act," R.S.B.C. (1911), c. 79, s. 27.

A judgment, registered in the Land Registry Office on an application made after the date of the execution of a mortgage by the judgment debtor but before the application for the registration of the mortgage, takes priority over the mortgage by virtue of section 73 of the "Land Registry Act." *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, and *Entwistle* v. *Lenz*, 14 B.C. Rep. 51; 9 W.L.R. 17, distinguished. Idington J. dissenting.

Per Idington J. dissenting.—The only charge a judgment creditor gets by virtue of his judgment is upon such interest as the debtor may have at the time of registration or issue of execution; and, in this case, that is subject to whatever rights the mortgagee may have acquired by virtue of its mortgage.

Judgment of the Court of Appeal (43 D.L.R. 14; [1918] 3 W.W.R. 551), affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Clement J. (2), and dismissing the plaintiff's action.

The appellant held a mortgage, upon certain lands, executed by Harper between the 10th and the 16th of March, 1916, and registered in the Land Registry Office on an application dated the 12th of July, 1916.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 43 D.L.R. 14; [1918] 3 W.W.R. 551.
(2) 25 B.C. Rep. 150; [1917] 3 W.W.R. 964.

The respondents were the holders of a judgment against Harper, which was duly registered on an application made on some date between the 16th of March and the 12th of July, 1916. The question in issue is which of these charges is entitled to priority.

W. C. Brown for the appellant.
G. E. Housser for the respondent.

THE CHIEF JUSTICE.—I think the judgment appealed from correctly interprets the meaning of section 73 of the "Land Registry Act" of British Columbia on which this appeal depends. That section gives priority to charges according to date of their registration, not of their execution. As put by Mr. Justice Martin, could there possibly be any doubt as to the meaning and effect of that section in a dispute between two charges of the same kind, *e.g.*, mortgages, or as to the priority that ought to be declared between them? I think not, and am unable to see how a contrary conclusion could be reached as to charges of a different kind.

I agree with the Chief Justice that the cases relied upon by Mr. Justice McPhillips, *Entwisle* v. *Lenz* (1), and *Jellett* v. *Wilkie* (2), do not govern or apply to the case before us, which is simply one as to the priority of charges under section 73 of the "Land Registry Act" and the rule which should govern in a contest on that point and is not one as between an equitable right to the fee as against a charge.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The decision of the courts below, that by prior registration a judgment

(1). 14 B.C. Rep. 51. (2) 26 Can. S.C.R. 282.

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creditor destroys, as against him an existent though unregistered mortgage, is supported by a rather plausible way of putting forward the alleged premises and drawing the conclusion reached.

Nevertheless, I think the premises are not well founded. The only charge a judgment creditor gets by virtue of his judgment is upon such interest as the debtor may have at the time of registration or issue of execution.

In this case that is subject to whatever rights the mortgagee may have acquired by virtue of its mortgage.

Suppose I see fit to charge one-half of my interest in any land with a burden of some sort, and then give another charge expressly subject thereto, could priority in registration of the latter give its holder any advantage over the former? No one, I venture to think, would say it could. Yet when we have regard to the language of the last part of section 27 of the "Execution Act," par. 1, defining what is acquired by registration of a judgment, the lien or charge created thereby on the lands of the judgment debtor is expressly declared to operate

> in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of such judgment the judgment creditor may, if he wish to do so, forthwith proceed upon the lien and charge thereby created.

Surely that means only such interest in any lands as the judgment debtor has and no more.

Because the words "lands of a judgment debtor" are used they cannot be held to mean the entire fee in same, but only the interest he may happen to have therein.

This is not only in accord with common sense, and the law as it stood before the enactment of these registration provisions, but is in accord also with the

provisions in sub-sec. (*b*) of sec. 137 of the "Land Registry Act," which reads as follows:—

No judgment shall form a lien upon any lands as against a registered owner thereof, or the holder of a registered charge thereon, where the registration of such person as owner or as holder of a charge has been effected after a notice, of not less than fourteen days, has been given by the registrar to the judgment creditor, either personally or at his registered address, of the registrar's intention to effect registration of the aforesaid fee or charge free of such judgment. If the judgment creditor claims a lien upon the said lands by virtue of his judgment he shall within the time fixed by the registrar's notice, register a certificate of *lis pendens* in accordance with section 34 of the "Execution Act," otherwise the registrar may register such fee or charge free from such judgment.

As I read this, it makes a clear provision for the adjustment of the priority of the respective rights of the judgment creditor and the holder of another charge.

If the judgments below are to be taken literally surely there never was any need for the adjustment thus provided for.

Again, section 104 of the "Land Registry Act" reads as follows:—

No instrument executed and taking effect after the 30th day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the 13th day of June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefitted thereby, and on those claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments.

What does this section mean? Respondents urge that it means a good deal more than it says. For we must read the whole and not drop the last few lines as giving nothing. Whilst by the drastic language of the first part of the section every right of a vendor or chargee seems swept away, clearly the last few lines give a right to have something registered.

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The right thus given clearly cuts down or renders liable to be so, the judgment creditor's right by rendering it subject to the possibility of the registration by vendee or chargee or those claiming under him of any instrument which is designed to convey or charge the land.

That is the right of the appellant and the mode of enforcing it was supplied by section 137 of the "Land Registry Act," as well as what is indicated herein.

My only difficulty in this case is whether or not the appellant lost its opportunity by the registration it made of its mortgage in July, 1916, six months before bringing this action for prosecuting the specific remedy given by these sections. And my difficulty has not been helped much by what I respectfully submit are the extreme views taken by the court below depending entirely upon a construction of section 73 of the "Land Registry Act" with which I cannot agree.

The dissenting judgment of Mr. Justice McPhillips failing to observe the effect I find in said sections, or indeed to notice them at all, further increases my difficulties. Such omission suggests there may be something else in the Acts in question which counteracts said effect or prevents reliance upon said sections at all under the peculiar circumstances of the appellant's registration of its mortgage.

However, I have been unable to discover anything else than such registration by appellant.

It seems to me that act was done in error by the appellant; that it has not misled any one; that nothing has been done by anyone concerned in reliance thereon, and that under the authority of *Howard* v. *Miller* (1), the mistake may be rectified, and that being possible the rights of the parties hereto may be declared

(1) [1915] A.C. 318; 22 D.L.R. 75.

as if nothing had happened. We were told in that case when before us that there could be no rectification unless for fraud. I was not then of those who accepted that doctrine and, seeing the court above has discarded it, am less inclined to act upon it.

The principles therein involved and applicable to the peculiar circumstances there in question are somewhat analogous, but the actual decision helps herein no further than holding it possible to rectify an error when no countervailing equity intervenes.

The findings of fact, so far as they go, do not suggest any other difficulty. In the *Howard Case* (1) there was an error not only on the part of the party applying for registration but also the registrar or someone in his office. Here the mistake seems wholly the appellant's own. Though otherwise alleged in the declaration I can find no proof bearing out the allegations in that regard.

I am of opinion the appeal should be allowed and the appellant held entitled to a declaration as prayed.

It is not a case for costs, and the error of appellant being the primary cause of the litigation the fee of five dollars fixed by the statute would have been payable to respondent if the right proceeding had been taken.

ANGLIN J.—Section 27 of the "Execution Act" provides that upon registration a judgment shall form a lien or charge on land of the debtor

in the same manner as if charged in writing by the judgment debtor under his hand and seal.

Under section 2 of the "Land Registry Act" a "charge" includes a judgment. Amendments to the "Land Registry Act" made by ch. 43, sec. 3, of the statutes of 1914, read as follows:—

(1) [1915] A.C. 318; 22 D.L.R. 75.

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"Mortgage" means and includes any charge on land created for securing a debt or lien, or any hypothecation of such charge;

"Mortgagee" means the owner of a mortgage registered under this Act;

"Mortgagor" means and includes the owner of land or of an estate or interest in land pledged as security for a debt.

Section 73 of the same Act provides that:—

When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the date at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

The respondent's judgment was registered before the appellant's mortgage. Indeed, although the appellant's mortgage was executed before the registration of the respondent's judgment, the certificate of acknowledgement or proof required by section 77 of the "Land Registry Act" to obtain registration was procured only some three months after the registration of the judgment. The appellant, therefore, became entitled to apply for registration of its mortgage only after the respondent's judgment had become a charge on the land by registration.

Section 104 of the "Land Registry Act" reads as follows:—

No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefitted thereby, and on those claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments. 1905, ch. 23, sec. 74; 1908, ch. 29, sec. 6.

By section 2, "instrument" includes any document dealing with or affecting land.

Notwithstanding the very plain and explicit language of section 104 (formerly section 74 of the

Act of 1906), the Supreme Court of British Columbia *en banc*, reversing Martin J., held in *Entwisle* v. *Lenz* (1), that a prior unregistered deed has priority over a registered judgment, I agree with Martin J. that this decision is logically irreconcilable with the judgment now under review. Only because the legislature has re-enacted section 74 *in ipsissimis verbis* in the revision of 1911 as section 104, and because we are here dealing not with a deed or transfer but with a mortgage or charge, do I hesitate to hold that *Entwistle* v. *Lenz* (1), should be overruled, unless, indeed, it can be distinguished on the ground that the transfer in that case was actually deposited for registration but owing to a mistake in the description was not recorded against the debtor's land. When a statute declares that an instrument

shall (not) pass any estate or interest either at law or in equity

until registered, the reasoning by which the conclusion is reached that the transferor in an unregistered deed to which that statute applies is nevertheless merely a dry legal trustee and that he retains no estate or interest, but that the entire beneficial interest is vested in the transferee, is, I confess, quite too subtle for me to follow.

But the case now before us may, I think, be disposed of under section 27 of the "Execution Act" and section 73 of the "Land Registry Act" without actually overruling *Entwistle* v. *Lenz* (1), by merely declining to apply it to facts not absolutely identical with those there dealt with. Even if some estate or interest was created in the debtor's land by the appellant's unregistered mortgage upon its execution, as against another chargee who had registered his charge before that mortgage was registered, the interest or

(1) 14 B.C. Rep. 51.

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estate so created could not avail. Section 73 in terms so provides, unless it be entirely meaningless. As Mr. Justice Martin says:—

> If this were a case between two "charges" of the same kind, *e.g.* mortgages, would there be any doubt as to the "priority" that ought to be declared?

But by section 27 of the "Execution Act" the lien created by a judgment when registered is the same as if such judgment had been

> charged in writing by the judgment debtor under his hand and seal,

i.e., is the same as the lien created by a registered mortgage. Reading these two statutory provisions together, as they must be read, I entertain no doubt that the judgment appealed from is correct and should be upheld.

Yorkshire v. *Edmonds* (1), is necessarily overruled by this judgment. *Chapman* v. *Edwards et al.* (2), on the other hand, may be supported as depending on the consequences of fraud. Neither fraud nor actual notice is present in the case now before us. As to the latter, however, sub-sec. 2 of sec. 104, as enacted in 1912 (ch. 15, sec. 28), must be taken into account. It indicates how far the legislature is prepared to go in support of the rights created by prior registration.

BRODEUR J.—In March, 1916, the appellant had a mortgage executed in its favour by McArthur and Harper on lands which they possessed. That mortgage was registered only on the 12th July, 1916. In the meantime, *i.e.*, between March and July, 1916, the respondents, who are the holders of a judgment against McArthur and Harper, had that judgment duly registered.

The question is: Is the mortgage held by the

(1) 7 B.C. Rep. 348. (2) 16 B.C. Rep. 334.

bank, or the charge arising out of the judgment, entitled to priority?

By section 73 of the "Land Registry Act" (R.S. B.C., ch. 127) it is enacted that:—

> When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

There is no doubt that the mortgage constituted a charge upon the property, and there is no dispute as to that.

As to the judgment, section 2 of the same "Land Registry Act" declares that the word "charge" includes a judgment.

But it is contended by the appellant that a judgment can affect only the interest which the judgment debtor actually had in the lands, relying, in that respect, on a judgment rendered in this court in the case of *Jellett* v. *Wilkie* (1).

In that case of *Jellett* (1), Sir Henry Strong C.J. stated that the common law rule is that

> an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor;

and he adds that this law has become the law in the North West Territories

> unless it has been displaced by some statutory provision to the contrary.

The provisions of the "Land Registry Act" which I have quoted above shew conclusively that the registration of the mortgage and of the judgment creates two charges upon the land; that those charges are to be treated alike; and there is no distinction made in that statute with regard to the beneficial interest of the judgment debtor or not as it was under the common

(1) 26 Can. S.C.R. 282.

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law. The statute has superseded the old rule and the priority of the charge is to be determined by the dates at which they are registered.

Besides, by section 104 of the same "Land Registry Act," it is provided that no instrument purporting to affect land shall pass any estate in such land until it shall be registered. The effect of that provision is that the appellant's mortgage should be considered as being an instrument dated the 12th of July, 1916, and until then the estate which the mortgage would have passed has remained in the mortgagor and the judgment duly affected all the estate he had at that time in the land.

I am of opinion that the appeal should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Ellis & Brown.*

Solicitors for the respondents: *Williams, Walsh, McKim & Housser.*