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*Feb. 10, 11.
*May 4.

INTERNATIONAL TYPESETTING MACHINE CO. (DEFENDANT)..... APPELLANT;

AND

J. C. FOSTER AND E. H. McARTHUR (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Company—Debenture—Lien—Registration—Priority—"Bills of Sale Ordinance," N.W.T. Ord. Cons. (1915) *c.* 43—*"Ordinance respecting Hire Receipts and Conditional Sales of Goods," N.W.T. Ord. Cons. c.* 44—*Alta. S.* (1916) *c.* 3, *s.* 8.

A manufacturing company, under a conditional sale agreement, sold in 1913 certain machinery, and in 1915 the purchaser gave to F. as security for an advance of money a "first mortgage debenture" thereon which was declared to be "a specific charge" as regards the "fixed assets" of the purchaser but was never registered. In 1916, the legislature amended the law respecting conditional sales and it was then provided that, unless a renewal statement of the amount due was registered every two years, the condition of the agreement "should cease to have effect." The vendor did not comply with the provision.

Per Davies CJ., Idington and Brodeur JJ.—By the failure of the vendor to renew the registration of its lien agreement, the priority of the lien over F.'s debenture was lost.

Per Duff and Mignault JJ. (dissenting)—F.'s debenture is a mortgage within the meaning of "The Bills of Sale Ordinance" and, not having been registered, is void against the vendor who is a creditor of the purchaser. *Grand Trunk Pacific Railway Co.* v. *Dearborn* (58 Can. S.C.R. 315), followed.

Judgment of the Appellate Division (1919) 2 W.W.R. 652) affirmed, Duff and Mignault JJ. dissenting.

* PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Brodeur and Mignault JJ.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Ives J. at the trial (1) and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

R. B. Bennett K.C. for the appellant.

H. P. O. Savary K.C., for the respondent.

THE CHIEF JUSTICE.—The issue in this appeal was an interpleader one to determine the priority of the parties' rights to certain property of the Press Publishing Company, Limited, under the respective securities of the litigants.

I am of the opinion that the decision of the trial judge, Mr. Justice Ives, was correct, namely, that the failure of the defendant appellant to renew the registration of its lien agreement on the 3rd day of October, 1917, when the previous registration expired, had the effect of losing the priority of the defendant's lien agreement over the plaintiff's debenture.

This judgment was unanimously concurred in by the Appellate Division.

The appeal, therefore, should be dismissed with costs.

IDINGTON J.—If, as I submit we must, we strictly observe the terms of the interpleader issue herein and read it in light of the facts leading up to its framing and apply the relevant law, the question raised by this appeal is in a very narrow compass.

(1) [1919] 2 W. W. R. 652.

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The appellant, under a conditional sale agreement, agreed to sell for $2,150 in 1913 to the Press Publishing Company, Limited, some printing machines and delivered same to the latter.

The said Press Publishing Company in 1915, gave to the respondents as security for an advance of $6,763.47, a first mortgage debenture, the validity of which as such is not impeached.

The Press Publishing Company, Limited, became insolvent and its property was seized by the sheriff under executions of other creditors than parties hereto and the landlord had later placed in his hands a warrant to distrain for rent. Thereupon an order was made for its winding up.

In the course of proceedings thereunder it was decided by the creditors and others concerned, and affirmed by an order of the Master at Calgary, to transfer to the respondents as holders of said debentures, all the assets, undertaking and business of said company, free from all liabilities of the company subject only to such liens or charges as might exist therein for taxes

or under chattel mortgages or lien notes or agreements or claims for rent entitled to priority over the said debenture but reserving to the said Edward H. McArthur and the said James C. Foster, Jr., all rights which they might have, notwithstanding this order, to resist or contest any claim of mortgage or lien upon the said assets, be and the same is hereby approved.

The Order of the Master proceeded further thus:—

And it is further ordered that the Liquidator be and it is hereby authorized and empowered to carry out and complete such settlement and to sell and transfer unto the said Edward H. McArthur and James C. Foster, Jr. all of the assets, undertaking and business of the said Company, subject to such mortgages and liens as may appear to be a charge thereon in priority to the charge created by the Debenture held by them, and that the acceptance of such transfer shall not prejudice or affect any rights which the said Edward H. McArthur and the

said James C. Foster, Jr. have, or, but for the making of this Order and the transfer hereunder, might have had to resist or contest any such mortgage, lien, charge or encumbrance, and they shall take and hold said assets, undertaking and business subject only to such mortgages, liens, charges and encumbrances as are or were prior to the making of this order, entitled to priority over the charge created by their said debenture, but reserving unto the Intertype Corporation only the right to contest the validity of the debenture held by the said Edward H. McArthur and James C. Foster, Jr., and to take such action or proceedings at its own expense and for its own benefit only as it may see fit, to set aside the same for the purpose only of recovering the amount owing by the Company to the said Intertype Corporation.

F. Clarry,
M.C.

The issue arising out of the foregoing is as follows:—

Whereas the above named James C. Foster, Junior, and Edward H. McArthur affirm, and the above named International Typesetting Machine Company and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of The Press Publishing Company, Limited, seized by the Sheriff of the Judicial District of Calgary under Warrant of Distress from W. R. Hull, are the property of the plaintiffs, or that the plaintiffs have the right to possession thereof, as against the defendants, or either of them; and it has been ordered by order of the Master dated the 14th day of January, A.D. 1919, that the said question shall be tried by a Judge without a Jury at Calgary at a date to be fixed by the Clerk of the Court.

The appellant by its solicitors then gave a written admission of facts for the purposes of this "action," admitting respondents' advance; that it was made on the express condition that a debenture would be issued to respondents to secure its repayment; and further in detail admitted all the legal requirements to constitute, in my opinion, the validity of the debenture, and admit non-payment of the money; and that respondents are the holders of the debenture and had made demand for payment, and that yet it remains unpaid.

There was no reservation of any kind in the appellant's favour in the admission.

The appellant was not at the time of its making the agreement of sale with the Press Publishing Company in law bound to renew its registration of such lien

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agreement as it had, but long before the seizure by the sheriff the law was changed by an amendment of the statute of Alberta, 1916, chapter 3, section 8, which provided that unless registration is renewed

> any such agreement, proviso or condition as is mentioned in Section 1 of this Act, shall cease to have effect and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser.

The appellant made default in complying with the law by failing to renew on 3rd Oct. 1918.

As a result thereof I am of the opinion that its title and right of possession passed to and became vested in The Press Publishing Company, Limited, which was the purchaser.

The moment that occurred, the respondent's claim as against the Press Company became *ipso facto* operative upon that which had so passed and remained so throughout.

Whether other creditors might, in turn, have sought successfully to have impeached that result, by reason of any failure on the part of the respondents to register, in any of the ways which the "Companies Act" or "The Bills of Sale Ordinance" require, is not open on this issue. It might conceivably be open to argument on behalf of such creditors in a proper case. That does not concern us, for all such matters are precluded by the proceedings I have so fully recited leading up to the order transferring the property then in liquidation to the respondents.

And the form of the issue founded thereon, together with the all comprehensive admission of appellant, leaves no room for other creditors or even the appellant itself to start a new issue.

As this way of looking at the case seems to me quite impregnable, I need not pursue the matter further.

I may, however, say that if I could find any flaw in the process of reasoning I adopt, and had to consider the matter from the point of view taken by the court below, I could not see my way to reverse, though I do see in that way of looking at the case a rather wider field for argument not touched upon before us, which rests upon the peculiar provision in "The Bills of Sale Ordinance" contemplating evidently a renewal of debenture mortgages, and again the registration of them being provided in another place.

I confess I have not followed up these respective provisions to see whether in force or not and concurrently so.

But if they are, I may be permitted to say, the sooner the confusion they may create is removed by legislation the better.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—The debenture of the 5th April, 1915, charges the "fixed assets" of the company and the charge upon these assets is declared to be a "specific charge." As regards the "fixed assets," therefore, I have no hesitation in holding that the debenture is a mortgage within "The Bills of Sale Ordinance," and, not having been registered, it is, under the authority of the *Dearborn Case* (1), void as against creditors.

By the order of the 27th of December, 1918, the right was reserved to the appellant company alone to contest the validity of the debenture as against the appellant company and the issue directed to be tried is in the following terms:

(1) 58 Can. S.C.R. 315.

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Whereas the above named James C. Foster, Junior, and Edward H. McArthur affirm, and the above named International Typesetting Machine Company and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of the Press Publishing Company, Limited, seized by the sheriff of the Judicial District of Calgary under Warrant of Distress from W. R. Hull, are the property of the plaintiffs, or that the plaintiffs have the right to possession thereof, as against the defendants, or either of them.

The right of the appellant company to contest the validity of the debenture as against the respondents is not open to dispute and the claim of the respondents as affirmants in the issue must, therefore, fail.

BRODEUR J.—I am of opinion that this appeal should be dismissed. I concur with my borther Idington.

MIGNAULT J. (dissenting).—The appellant, in October, 1913, had sold to The Press Publishing Co., Limited, a machine described as "one model A Intertype," for $2,150, the price being payable by instalments, and the title to the property remaining in the appellant until full payment of the purchase price, which however was never fully paid. The agreement was registered as required by the "Ordinance respecting Hire Receipts and Conditional Sales of Goods" (ch. 44 of the Ordinances of the Northwest Territories). In 1916 an amendment was adopted requiring the filing of an annual renewal statement, and the appellant failed to file this renewal statement as it should have done on the 3rd October, 1918, the effect of this failure being, in the words of the statute, that the agreement

shall cease to have effect, and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee.

On that date however, 3rd October, 1918, the appellant's solicitors sent a distress warrant to the sheriff with instructions to seize the machine, and on

the following day the sheriff answered that the goods were under seizure under a landlord's warrant, so that it would not be necessary to seize under the appellant's warrant, but that he (the sheriff) had placed the warrant on file and would protect the legal amount of the appellant's claim in the event of sale.

While the appellant's title to the machine in question was fully protected by registration, the respondents obtained from the Press Publishing Company, Limited, a first mortgage debenture for an advance of $6,763.47, carrying interest at seven per cent and dated the 5th April, 1915. This debenture contained the following clauses:—

3. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future and such charge under this debenture as regards the company's fixed assets and good-will is to be a specific charge, and as regards the company's other assets is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on its property ranking in priority to or *pari passu* with this debenture.

4. The company may at any time, without notice, pay off this debenture.

5. The principal moneys hereby secured shall immediately become payable if an order is made or an effective resolution is passed for the winding up of the company.

The respondent's debenture was never registered in the Registration Office under "The Bills of Sales Ordinance," nor was it registered with the registrar of joint stock companies.

By "The Bills of Sales Ordinance" chapter 43 of the Ordinances of the Northwest Territories, section 6):

Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and actual and continued possession of the things mortgaged, shall within thirty days from the execution thereof be registered * * *

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and section 11 provides that a mortgage not registered shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration.

In *Grand Trunk Pacific Railway Company* v. *Dearborn* (1) this court held that the word "creditors" as used in section 17 of this ordinance—and the opinions of the judges shew that the meaning of this word in sections 11 and 17 was considered for purposes of construction—means all creditors of the mortgagor, and not merely execution creditors. It would therefore appear that even if the appellant is not an execution creditor, its status as a contract creditor of the Press Publishing Co., Limited, would entitle it to treat the mortgage debenture of the respondents, if subject to registration, as being absolutely null and void.

The respondents, however, contend that their debenture was not subject to registration. The learned trial judge, whose judgment was affirmed by the Appellate Division of Alberta, accepted this contention. He said:—

> Clearly the security is not a mortgage but a charge and does not come within the provisions of "The Bills of Sales Ordinance" according to the cases, *Johnston* v. *Wade* (2), and the cases there cited.

I cannot, with respect, agree with this construction of the debenture or of the ordinance. The debenture expressly states that it is to be a specific charge as regards the company's fixed assets and good-will. If such a charge is not of the nature of a mortgage I cannot see how it could affect the company's fixed assets, and if it is a mortgage, it is null and void for want of registration as regards the company's creditors, and the appellant is undoubtedly a creditor of the company.

(1) 58 Can. S.C.R. 315. (2) 17 Ont. L.R. 372.

In *Johnston* v. *Wade* (1), the bond contained the following conditions:—

> The company hereby charges with such payments its undertaking and all its property real and personal, rights, powers and assets of every kind and description, present and future, including its uncalled capital.

In the present case, as I have said, the bond expressly provides that the charge under the debenture

> as regards the company's fixed assets and good-will is to be a specific charge, and as regards the company's other assets it is to be a floating security.

This sufficiently distinguishes this case from *Johnston* v. *Wade* (1), and also from several English decisions relied on by the respondents, where the effect of a floating charge was considered, for here, as to the fixed assets of the company, the debenture was made a specific and not a floating charge.

On this view of the case it does not appear necessary to consider whether the appellant has or has not a lien on the machine it sold to the Press Publishing Company, Limited. It is, however, contended that by the amendment of 1916 it is provided that if the required renewal statement is not filed the conditional sale agreement

> shall cease to have effect, and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee.

I would think that this enactment would not render the agreement void *inter partes* (see also *Stuart Manufacturing Co.* v. *Whitaker* (2)), but it appears sufficient, as regards any mortgage created by the respondent's debenture, to say that the appellant was and is a creditor of the Press Publishing Company, Limited.

(1) 17 Ont. L.R. 372. (2) 11 Alta. L.R. 495.

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I have hitherto discussed the questions submitted as they were presented by the learned counsel of both parties, each of whom denied the validity of the lien or charge claimed by the other. I may also add that both courts below dealt with the matter as involving a question of priority between two rival claimants.

The question arose under an order of the Master in Chambers, of the 14th January, 1919, subsequent to the liquidation proceedings taken against the Press Publishing Company, Limited. This order authorized a settlement of the claim of the respondents by transferring to them all the assets of the company free and clear of all debts and liabilities of the company, but subject to such mortgages, liens, charges and encumbrances as are or were, prior to the making of the order, entitled to priority over the charge created by the respondent's debenture, reserving unto the appellant only the right to contest the validity of the debenture, and to take proceedings to set aside the same for the purpose only of recovering the amount owing by the company to the appellant.

Then an interpleader order was made on the 22nd February, 1919, stating as follows the question to be decided:

> Whereas the above named James C. Foster, Junior, and Edward H. McArthur affirm, and the above named International Typesetting Machine Company and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of the Press Publishing Company, Limited, seized by the sheriff of the Judicial District of Calgary, under warrant of distress from W. R. Hull, are the property of the plaintiffs (Foster and McArthur), or that the plaintiffs have the right to possession thereof, as against the defendants (International Typesetting Company and Drumheller) or either of them; and it has been ordered by order of the Master dated the 14th day of January, A.D. 1919, that the said question be judged by a judge without a jury at Calgary, at a date to be fixed by the Clerk of the Court:

Therefore let the same be tried accordingly.

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On the question thus submitted, I am of opinion, for the reasons above stated, that this question should be answered in the negative. I do not however wish to be understood as passing in any way on the rights of any creditor who had seized the machine in question, if any such rights can now be asserted.

The appeal should, therefore, be allowed with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Lougheed, Bennett & Company.*

Solicitors for the respondents: *Savary, Fenerty & Chadwick.*