

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

G. E. Newman, for the appellant.

A. C. Heighington, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who, after stating the facts, among which it appeared that a chattel mortgage was made to the appellant by one Margaret Nethery on the stock in trade and fixtures of a business carried on by the defendant Wilford, and that the appellant sold them, said that the defendant Wilford was insolvent, to the knowledge of the appellant, when the chattel mortgage was given; and that the proper conclusion upon the evidence was that, if the chattel mortgage was not made for the purpose of defeating, delaying, and hindering the creditors of Wilford, it was at all events a fraudulent preference and void as against them. Even if the promise to give a chattel mortgage was proved, it would not avail to support the chattel mortgage in question: sec. 16 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135.

The stock in trade and fixtures having been disposed of by the appellant, the creditors of Wilford were entitled to recover from him the proceeds of the sale: Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 13; and that was the remedy which the respondent sought.

The respondent, however, was not, in the opinion of the Chief Justice, entitled to recover more than \$165, which was the sum received by the appellant from one Denne, to whom he sold. But the respondent should have an opportunity of proving that the appellant was answerable for more than the money which he received from Denne. If the respondent so elects, he may have a reference for that purpose; and in that case there should be substituted for the judgment in the Court below a judgment declaring the appellant's chattel mortgage to be void as against the respondent and the other creditors of Wilford; requiring the appellant to pay to the Sheriff of York \$165 and such other sum (if any) as the appellant may on the reference be found liable for; reserving further directions and subsequent costs until after report; requiring the appellant to pay the costs of the action up to judgment; and directing that there be no costs of the appeal to either party. If the respondent does not, within ten days, elect to take the reference, the judgment below should be varied by reducing the amount to \$165, and, with that variation, the judgment should be affirmed, and each party should bear his own costs of the appeal.