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New Jersey Court of Errors and Appeals

No. 38, November Term, 1915.

WILKINSON, GADDIS & COMPANY, a corporation, *Plaintiff-Appellant,* *vs.* HENNING BOHLEN, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

Brief for Plaintiff-Appellant.

Facts.

Wilkinson, Gaddis & Company, plaintiff-appellant, was the creditor of one George Bohlen on and before November 11, 1913, to the amount of $392.70 and still remains a creditor.

On November 25, 1913, Wilkinson, Gaddis & Company recovered a judgment against George Bohlen in the First District Court of the City of Newark for $416.86 damages and costs. Execution was issued on said judgment on November 26, 1913, to Edgar A. Hartdorn, a constable, who made a levy under said execution on November 26, 1913, on the groceries and fixtures which were replevined in this action. The groceries and fixtures were duly advertised and sold under said judgment, execution and levy at public sale on December 1, 1913, to appellant for $125, who received a bill of sale therefor from the constable (Case, p. 18).

On November 13, 1913, George Bohlen executed an instrument purporting to be a chattel mortgage to Henning Bohlen, the defendant-respondent, the

schedule of which included the chattels in question. The chattels were the property of and were in the possession of George Bohlen and the execution of the chattel mortgage was not accompanied by an immediate delivery nor was it followed by an actual and continued change of possession (Agreed State of Facts, Case, p. 13) on the execution and delivery of the chattel mortgage. The chattels were the stock in trade of George Bohlen, a grocer doing business at 217 Mulberry Street, Newark, N. J., and were in his store in their usual place at the time of the sale by the constable to Wilkinson, Gaddis & Company, the sale actually taking place at the store.

On November 18, 1913, defendant delivered the chattel mortgage to John McNellen, another constable, for the purpose of foreclosure. McNellen advertised the property for sale as a step in the foreclosure proceeding, naming November 24, 1913, as the date for the sale. On that day McNellen sold the goods in question to defendant Henning Bohlen and gave him a bill of sale therefor.

After the sale to the plaintiff on December 1, 1913, plaintiff demanded possession of the goods and chattels, which was refused. On December 3, 1913, a writ of replevin was issued and delivered to the Sheriff of Essex County. By virtue of this, plaintiff obtained possession of the goods and this action was brought to try the title thereto. The action was tried before the Honorable Nelson Y. Dungan at the Essex Circuit, sitting without a jury, on a stipulation and agreed state of fact (Case, p. 12).

At the trial plaintiff moved for judgment on the following grounds:

1. That the paper dated November 13, 1913, purporting to be a chattel mortgage, was void as against plaintiff, a creditor of defendant at the

time said mortgage was given, because it did not have annexed to it an affidavit or affirmation stating the true consideration of said alleged mortgage.

2. That defendant by foreclosing the alleged mortgage and purchasing property at the foreclosure sale prior to the levy under plaintiff's judgment obtained no title to the property as against the plaintiff.

3. That defendant by taking possession of the property before plaintiff's judgment was recovered did not give validity to defendant's mortgage as against the plaintiff.

4. That whatever title defendant had grew out of the mortgage and gave possession no greater efficiency as against the plaintiff than the mortgage itself.

On the last three grounds the Court ruled against plaintiff and gave judgment for defendant for $125. This appeal was taken from that judgment and is based upon the objection to the Court's ruling on the last three grounds above stated, upon which plaintiff moved for judgment (Case, p. 21, lines 3 and 4).

The paper dated November 13, 1913, purporting to be a Chattel Mortgage was void as against plaintiff, a creditor of defendant at the time said mortgage was given, because it did not have annexed to it an affidavit or affirmation stating the *true consideration* for which it was given.

The affidavit annexed to the chattel mortgage recites the consideration of the same to be "A note of the sum of $1,000 of even date herewith with interest at 5% payable on demand."

The mortgage not being accompanied by an immediate delivery and followed by a continued change of possession of the chattels is void as to

Wilkinson, Gaddis & Company, a creditor at the time of the execution of said mortgage and ever since, by virtue of Section 4 of the act entitled "An Act concerning mortgages on chattels" (P. L. 1902, p. 487), which reads as follows:

> Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, *shall be absolutely void* as against the *creditors* of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act; *provided,* * * *.

The chattel mortgage in this case did not have annexed to it an affidavit stating the true consideration within the meaning of the statute and was therefore void as against creditors of the mortgagor.

Ehler v. *Turner,* 35 N. J. E., 68, 70.

Graham Button Co. v. *Spielman,* 50 N. J. E., 120.

Thropp v. *Knight,* 28 Atl., 1037.

Dunham v. *Cramer,* 63 N. J. E., 151.

Collerd v. *Tully,* 77 N. J. E., 439.

In this case the Trial Judge ruled in appellant's favor on this point (Case, p. 21).

The sharp question presented on this appeal is, can a mortgagee by foreclosing a chattel mortgage void under the statute as to an existing creditor obtain good title by virtue of a bill of sale from the constable who acted for him in the foreclosure, as against such creditor where such creditor obtains a judgment one day after the foreclosure sale and a lien by execution the following day and perfects his lien by sale, the question being presented in an action of replevin on the part of the judgment creditor?

The Trial Judge held that the mortgage being good as between the mortgagor and mortgagee, a sale thereunder previous to the creditor's obtaining a lien passed a good title against the creditor. He states the ground of his decision as follows:

> "I think there can be no question but that the mortgagor on the 24th day of November, 1913, might have sold the property in question to the chattel mortgagee or to any other person, and the purchaser would have acquired good title, free from any right of the plaintiff to have his execution attach to it, because on that date the plaintiff's debt was not fastened in any way upon the property. The mere fact that the mortgaged chattels were purchased by the chattel mortgagee instead of by a third party, cannot, of course, affect his rights acquired under the sale."

The Trial Judge we submit erred by holding that the creditor must obtain a lien before the sale (Case, pages 25-26) under the chattel mortgage, misapplying the rule that a creditor must have a lien of title before the commencement of legal proceedings.

The answer to the argument of the Trial Judge that the debtor might have given a bill of sale to the mortgagee or other person, passing a good

title, is that while it is true that he had that right nevertheless he would have had to comply with theh Bulk Sales Law which would have given the creditor time to obtain a lien by judgment and execution.

While the amount involved on this appeal is small, it is a test case to determine whether or not a debtor can circumvent the Bulk Sales Law through the instrumentality of a chattel mortgage and foreclosure of the same. This latter method of transfer has become very prevalent in the last few years since the Bulk Sales Law has been enforced and the credit men generally desire the principle raised in this case, to be clearly established by the courts of this State. We have, therefore, brought this case to this court by stipulation of facts in an endeavor to have this court hold that the proceedings we took were proper and to establish that it is unnecessary to file a bill in equity to set aside the chattel mortgage and foreclosure thereunder, and ask this court to sanction the creditor's pursuing his remedy at law where the conveyance is void as to him, in the same manner as has been held under the Bulk Sales Law in the case of *Dickinson* v. *Harbison,* 78 N. J. L., 97. The equitable remedy in most cases is impracticable because the amount involved does not warrant the resorting to a court of equity.

The trial court erred in holding that the appellant's debt must be fastened upon the property replevined previous to the foreclosure sale under the chattel mortgage.

The Trial Judge in his decision refers to the case of *Currie* v. *Knight,* 34 N. J. E., 485 (Case, page 24), and quotes the opinion of the Court in that case wherein the Court says that the creditors meant by an act similar to the one in question are

"those having a lien on the things mortgaged," and further, "creditors without a lien have no right to or interest in the thing mortgaged and for that reason cannot be heard to question a mortgage which is valid against the person who made it." The Trial Judge fails to state the balance of the paragraph which is as follows: "The fact that the mortgagee takes possession of the thing mortgaged subsequent to the execution of the mortgage and before a creditor at large has perfected his lien by payment (evidently a misprint for judgment) or otherwise will not give validity to the mortgage "as against such creditor, if the mortgage was not filed according to the statute."

The case of *Currie* v. *Knight* was one which held that it was necessary for a creditor to obtain a lien in order to set aside an invalid chattel mortgage and where the statute directed that lands of a decedent should be liable for the payment of his debts the creditor could base his relief upon the lien given by the statute.

The meaning of the words "the creditors here meant are those having a lien on the thing mortgaged" is explained by the decision of Vice Chancellor Leaming in *Smith* v. *Hotel Ritz Co.*, 74 N. J. E., 296, wherein he holds that *the infirmity of the mortgage would be ascertained by reference to conditions obtaining at the time the creditor became a creditor and not at the time the lien of the creditor was procured.*

In the latter case the Court, in commenting upon the case of *Currie* v. *Knight,* says:

> "While in Currie *v.* Knight (*supra*) *it was* held that creditors could not, without a judgment or other lien on the chattels, assert their claims against the validity of such a mortgage, it was also held that when a lien should have been procured by a creditor and

the invalidity of the mortgage asserted by virtue of the lien, the infirmity of the mortgage would be ascertained by reference to conditions obtaining at the time the creditor became a creditor and not at the time the lien of the creditor was procured."

The Trial Judge makes the following reference to *Graham Button Co.* v. *Spielman,* 50 N. J. E., 120:

> "In a later opinion by the same Vice Chancellor (Van Fleet), in Graham Button Company *v.* Spielman, 50 Eq., p. 120, at p. 123, he says, that the right to have a chattel mortgage with defective affidavit adjudged to be a nullity 'does not inhere in all the creditors of the mortgagor. A creditor without judgment or other legal process and without a right by law, to have his debtor's property seized and sold for his benefit has no such right. To be in a position to assert this right he must have a debt fastened on his debtor's property by law, judicial process or in some other way, for, until his debt is so fastened he has no right to or interest in his debtor's property, and cannot ask the court to control its disposition nor can he prevent his debtor from exercising full and complete dominion over it.'"

In the case of *Graham Button Company* v. *Spielman* the Court was dealing merely with the question of the right of the creditor to enforce his remedy. It is not claimed that a creditor can enforce his remedy until he has fixed his claim upon the property by judgment, execution and levy or some other process.

Where a conveyance is void as to existing creditors, a creditor, if his claim has been reduced to judgment, may levy his execution upon the property and subject it to sale for the satisfaction of his debt.

Mulford v. *Tunis,* 35 N. J. L. 256.

Brockhurst v. *Cox,* 71 N. J. E. 703, at page 708.

Haston v. *Castner,* 31 N. J. E. 697, at p. 698.

Dickinson v. *Harbison,* 78 N. J. L. 97, at p. 100.

A judgment creditor desiring to attack a conveyance which is declared void by the statute as to him, has his election either to proceed *in rem* against the property, treating the conveyance as a nullity, or to bring an equitable action to have the conveyance declared void. In most of the cases in this state that are reported the creditor has chosen to go into a court of equity to set aside the conveyance. This was not the case, however, in *Mulford* v. *Tunis* (*supra*) which was an ejectment suit, where the fraudulent conveyance and the sale under a common law execution clashed.

A sale in a proceeding at law under a levy by an execution creditor, where a conveyance of personal property had been made in violation of the Bulk Sales Law (P. L. 1907, p. 570), has been held to pass title to the property notwithstanding the previous sale by the debtor. *Dickinson* v. *Harbison,* 78 N. J. L. 97, see page 100, the Court there holding that where a legal title to property is once vested in the debtor the law does not consider him, as far as his creditors are concerned, to have been divested of it by a conveyance which is fraudulent as against them. If any creditor's claim has been reduced to judgment, he may levy his execution upon the property and subject it to sale for the satisfaction of his debt, citing *Mulford* v. *Tunis* and *Brockhurst* v. *Cox* (*supra*).

The Court also refers to *14 Am. and Eng. Enc. of Law, 311,* and in that volume, at page 314, the principle is stated, "A judgment creditor has his election either to proceed *in rem* against the property fraudulently conveyed, treating the conveyance as a nullity, or to bring an equitable action to have the conveyance declared void." The proposition is also stated in the last paragraph on said page and at the beginning of page 315, that the creditor's demand must be reduced to judgment.

The plaintiff-appellant's remedy where it has perfected its title by bill of sale under the execution is in a court of law by replevin and not by bill in equity.

Jersey City Milling Co. v. *Blackwell,* 58 N. J. E., 123.

In the foregoing cited case Vice Chancellor Emery in a case where an attaching creditor, after sale to him by the auditor, asked for an injunction to restrain the sale under an invalid chattel mortgage previously given, denied the injunction on the ground that the complainant had an adequate remedy at law by replevin, stating, at page 123:

> "The complainant by the sale and deed, has now the legal title to the property and no longer stands merely upon its rights as a creditor to the assistance of a court of equity to enforce its lien. The preliminary question is whether as such purchaser and holder of the legal title he is entitled to an injunction in order to settle in this court the invalidity of the chattel mortgage under the statute. This invalidity by reason of this defective affidavit is one which avoids the mortgage in courts of law as well as of equity and complainant's right to bring the decision of the question into

this court rather than in a court of law and trial by jury must be based on the insfficiency of the remedy at law."

The courts of New York, under a similar statute, and under decisions approved in this state, have held that a foreclosure sale and delivery of possession under an invalid Chattel Mortgage does not pass title as against a creditor who subsequently obtains a lien.

Mandeville v. *Avery,* 124 N. Y. 376; 26 N. E. 951.

Stephens v. *Perrine,* 143 N. Y. 476; 39 N. E. 11.

The New York Statute on chattel mortgages provides as follows (Chapter 279, Laws of 1833):

> Sec. 1. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the thing mortgaged, shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith unless the mortgage or a true copy thereof shall be filed as directed in the succeeding section of this act.

In the case of *Mandeville* v. *Avery* (*supra*) the defendant was the holder of two chattel mortgages executed by one Beck—one to Avery directly and the other to a bank of which he was president and by the bank assigned to him. The mortgage to the bank was the older of the two and was not recorded and no possession was taken under it until the later mortgage was executed, when immediate possession was taken under both by Avery, who sold the goods. It was held, reversing the Supreme

Court, that the receiver appointed under the judgment recovered by one Ross, a creditor of Beck, could recover against Avery so much of the proceeds of the sale of the goods as was appropriated by him to the payment of the bank mortgage. In discussing the situation, the Court said, at page 953:

> "The General Term, however, based its decision (in favor of the bank) upon the ground that the debt to the bank having been a valid one, and having been paid out of the mortgaged property before any lien was obtained thereon, another creditor could not compel the mortgagee to refund the money on the ground that, as against creditors generally, the mortgage given to secure the paid debt would have been adjudged void.
>
> "Two classes of cases are cited by that learned court to sustain this conclusion, first, those holding that an assignee, acting under a void assignment, will not be held accountable for such of the proceeds of the assigned property paid out by him to creditors in pursuance of the assignment before any other creditor has obtained a lien upon the assigned property; second, that the objection that a chattel mortgage is void is not available when, before any creditor has questioned its validity, the mortgagor delivered the chattels to the mortgagee and authorized an immediate sale thereof by him. I am unable to see that the first class of cases has any application to the facts before us. As to the second, there is no doubt as to the right of the debtor to prefer any creditor and to pay his debt in full, either in money or property, to the exclusion of all others. But to apply that principle to this case is to ignore completely the facts pleaded and

found by the court. There was no claim that the property sold was turned over by Beck (the debtor), to Avery in payment of the debt. The complaint alleged that the property was sold by Avery under the mortgage and this fact was not denied by the answer. The court also found that Avery, by virtue of both mortgages, took possession of the mortgaged property and as such mortgagee caused the same to be advertised at public sale and sold under said mortgages. There is nowhere any suggestion in the evidence or findings that the mortgage was waived or abandoned or that the debtor had voluntarily delivered the property to Avery with authority to sell it. Everything that was done was pursuant to and under the mortgages. Avery could not and did not claim to have received the property or the proceeds of the sale in payment of his debt as the voluntary act of the debtor but as mortgagee. He cannot, therefore, assert against the claim of other creditors the honesty of his own debt. The mortgage being void all proceedings under it were void. And although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor."

In *Stephens* v. *Perrine* (*supra*) the mortgage was made on February 25, 1892, and was not filed until March 30, 1892, on which day the mortgagee took actual possession. It was for a bona fide present consideration of $2,000 and was void under the above act because it was not filed immediately after February 25th. Plaintiff, who was a creditor of defendant, on February 25, 1892, obtained his judgment and the question was whether plaintiff could recover the property in the hands of the mortgagee. The Court, on appeal, affirmed the

judgment in favor of plaintiff. On page 12, 39 N. E., the Court said:

> "The mortgage, as to the creditors of the mortgagor, was always void. It continued to be void notwithstanding the fact that the mortgagee assumed to take possession under, and to sell the property by virtue of, such void instrument. As between these mortgagors and creditors it was the same as if the mortgage did not exist, and the mortgagee could not, as against these creditors, obtain any rights under it. * * * * *
>
> "If before any lien had been acquired by the creditors the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been, in such a case, a transfer of property by them in payment of their debt and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make. But in this case there was nothing of the kind done. The mortgagee acted under and by virtue of her mortgage all the time. The mortgagors did not deliver the property to her in payment of her debt. She took it under the assumed right given by the mortgage."

In *Skilton* v. *Coddington,* 185 N. Y. 801; 77 N. E. 790 (following Stephens *v.* Perrine, *supra*) Cullen, *C. J.* said, at page 791:

> "In Stephens *v.* Perrine the mortgagee had obtained possession of the mortgaged property and sold the same prior to the recovery of the judgment by the creditor, nevertheless the mortgagee was held liable to account to the creditor for the amount realized from the sale of the property. * * * * This decision

seems to me controlling on the point we are now considering."

Mandeville v. *Avery* and *Stephens* v. *Perrine* (both *supra*), were approved in this state by Vice Chancellor Pitney in *National Shoe and Leather Bank of the City of New York* v. *August*, 54 N. J. E. 182, where the similarity of the statutes of New York and New Jersey was noted.

The transaction between the defendant here and his mortgagor was not an attempt by the latter by a bill of sale in satisfaction of the mortgage debt to prefer the former.

Should the view of the case be taken that the sale on November 24, 1913, was a sale by George Bohlen to Henning Bohlen irrespective of the existence of the chattel mortgage, then it was a sale of the whole or a large part of the seller's stock in trade and fixtures not in the ordinary course of business and was void under the Bulk Sales Law, as the defendant did not comply with the act by giving the statutory notice of sale to the creditors. *Dickinson* v. *Harbison* (*supra*).

Conclusion.

A decision of this court sustaining the appellant's contention will, as to void Chattel Mortgages, parallel the recent decision of Dickinson *v.* Harrison as to bulk sales. Thus a principle uniform to both classes of cases will be established.

Transfers declared void as to sales and chattel mortgages will be uniformly treated, the result being that the Bulk Sales Law cannot be evaded by using the means of a chattel mortgage to accomplish that which was accomplished by bill of sale before the passage of that law. The scheme of

the Legislature will, therefore, be harmonious and complete.

We respectfully submit that the judgment of the Supreme Court be reversed and the record remitted with directions to enter judgment for the plaintiff-appellant, with costs.

COULT & SMITH,
Attorneys for Plaintiff-Appellant.

WM. A. SMITH,
Of Counsel.

New Jersey
Court of Errors and Appeals

NOVEMBER TERM—1915

WILKINSON, GADDIS & Co., a corporation, Plaintiff-Appellant, vs. HENNING BOHLEN, Defendant-Respondent.	Number 38. On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT

It is contended on behalf of the plaintiff-appellant that the mortgage dated November 13, 1913, purporting to be a chattel mortgage, was void as against the plaintiff-appellant, a creditor of the mortgagor therein at the time the said mortgage was given because it did not have annexed to it an affidavit or affirmation stating the true consideration for which it was given.

This leads us to a consideration of the meaning of the word "void" as used in Section 4 of an Act respecting Mortgages on Chattels, Revision of 1902. In considering the meaning of that word, reference might be had to the use of that word in a similar manner in Section 19 of an Act entitled,

"An Act for the prevention of frauds and perjuries. C. S. page 2622,"

and the decisions construing the meaning of the word as used in that section.

In *Dickinson vs. Harbison,* 78 New Jersey Law, 97, it was held that such a sale (of goods in bulk or a whole or large part of merchandise, etc.), is not void *ipso facto,* but only at the instance of persons who may be injured or aggrieved thereby.

A fair construction of Section 4 of the Chattel Mortgage Act requires that the same meaning be attributed to the word "void." The chattel mortgage in question in this case being merely voidable and not void by reason of the fact that there were creditors at the time the same was given and that the said mortgage was not accompanied by an affidavit as required by Section 4, it follows that until some proceedings were taken to set aside or defeat the lien of the said mortgage, the mortgage was good and valid in law to all intents and purposes. The act contemplates some action by the creditors of the mortgagor or purchasers, or mortgagees in good faith, to overthrow the chattel mortgage in question before the same shall become void. There can be no question that as between the immediate parties to the chattel mortgage, the mortgage is good notwithstanding the absence of the affidavit required by Section 4 of the Chattel Mortgage Act, as that section makes it void only as against creditors and subsequent purchasers and mortgagees in good faith.

There can be no doubt that the defendant-respondent acquired a valid lien upon the goods and chattels mentioned in his said chattel mortgage at the time the chattel mortgage was executed and delivered and that the sale under the foreclosure of the said chattel mortgage vested

in the defendant-respondent, Henning Bohlen, a good title to the property included in the said mortgage.

TO ENABLE A CREDITOR TO IMPEACH A CHATTEL MORTGAGE THE CREDITOR MUST SHOW THAT HIS DEBT HAS BEEN FASTENED UPON HIS DEBTOR'S PROPERTY. AS HAS BEEN STATED BEFORE NO FORMALITIES ARE REQUIRED FOR A VALID EXECUTION OF A CHATTEL MORTGAGE AS BETWEEN MORTGAGOR AHD MORTGAGEE.

Kane vs. Loder, 56 N. J. Equity, 268.

In *Currie vs. Knight,* 34 N. J. Equity, 485, Vice-Chancellor Van Fleet, in construing Section 4, states what the creditors meant by the use of that term were

> "those having a lien on the things mortgaged."

Creditors without a lien have no right to or interest in the things mortgaged and for that reason cannot be heard to question a mortgage which is valid against the person who made it.

In *Graham Button Company v. Spielman,* 50 Equity, 120, the same Vice-Chancellor held that the right to have a chattel mortgage with defective affidavit adjudged to be a nullity,

> "does not inhere in all the creditors of the mortgagor. A creditor without judgment or other legal process, and without a right by law to have his debtor's property seized and sold for his benefit, has no such right. To be in a position to assert this right, he must have a debt fastened on his debtor's property by law, judicial process or some other way, for until his debt is so fastened, he has no right to or interest in his debtor's property, and cannot ask

the Court to control its disposition, nor can he prevent his debtor from exercising full and complete dominion over it."

As above stated, as against the chattel mortgagor named in the mortgage in question, the defendant-respondent acquired a good title by virtue of the foreclosure sale held on the 24th day of November, 1913, so that at the time that the levy was made on the plaintiff-appellant's judgment, to wit: on the 26th day of November, 1913, by virtue of the execution issued under the judgment recovered by the plaintiff on November 25th, 1913, the goods and chattels which had been embraced in the defendant's mortgage were no longer the property of the debtor, George J. H. Bohen, and were at that time the property and possession of the defendant, Henning Bohlen.

This Court must clearly keep in mind the fact that at the time the levy under the appellant's judgment was made, there was not a vestige of legal title in the debtor, George J. H. Bohlen. The majority of cases in which the question herein involved has been raised are cases in which the mortgage was still alive as a mortgage, and that the mortgagee had not as yet perfected his title by foreclosure and sale, and this is true of the case of *Currie vs. Knight,* 34 Equity, 485, cited by plaintiff-appellant on pages 6 and 7 of its brief, as supporting the contention that the appellant need not have fastened his debt upon his property previous to the foreclosure sale under the chattel mortgage. A perusal of that case would show that the mortgage had not at the time of the levy been foreclosed, but that the mortgagee attempted to justify the imperfections in the chattel mortgage in question by attempting to prove that

there was a delivery of possession by the mortgagor to the mortgagee. Possession of the goods and chattels in question in the *Knight* case, undertaken by the mortgagee in that case was not had by the mortgagee until some period subsequent to the execution and delivery of the chattel mortgage in question in that case. That was the question at issue in that case and is not analogous to or controlling upon the issue involved in this case.

It appearing that the defendant-respondent had perfected his title under the chattel mortgage prior to the time that the plaintiff-appellant had recovered its judgment; and the legal title to the goods and chattels in question having become vested in the defendant-respondent prior to the issuing of the execution and the levy made under the judgment recovered by the plaintiff-appellant against the defendant-respondent's mortgagor, it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

FRED'K JAY,
Attorney for Defendant-Respondent.

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Notice of Appeal.

(Filed June 23, 1915.)

New Jersey Supreme Court.

WILKINSON, GADDIS & COMPANY, *Plaintiff.* *vs.* HENNING BOHLEN, *Defendant.*	*Notice of Appeal.*

To FREDERICK JAY, ESQUIRE,
Attorney of Defendant.

Take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this action.

Respectfully,

COULT & SMITH,
Attorneys of Appellant.

Dated, June 22, 1915.

Complaint.

(Filed December 1913)

SUPREME COURT OF NEW JERSEY,
ESSEX COUNTY.

WILKINSON, GADDIS & COMPANY, A CORPORATION, *Plaintiff,* *vs.* GEORGE BOHLEN, HENNING BOHLEN, HENRY L. C. KIRCHNER AND FREDERICK JAY, *Defendants.*	*Action at Law.* *Complaint.*

Plaintiff, Wilkinson, Gaddis & Company, a corporation, having its principal office at No. 866 Broad street, in the City of Newark, New Jersey, says that:

First—On November 25, 1913, the plaintiff, Wilkinson, Gaddis & Company, recovered a judgment in the First District Court in the City of Newark, against George Bohlen for $393.61 damages, and $23.25 costs of suit.

Second—That on November 26, 1913, the above named George Bohlen was the owner of the following list of goods, wares and merchandise, to wit:

2 show cases, 3 scales, 1 coffee mill, 1 register.

500 cans peas, 100 boxes sardines, assorted; 50 cans lobster, assorted.

25 cans salmon, assorted; 12 cans shaker salt, 21 cans Campbell's soup, assorted; 10 cans Heinz baked beans, 26 boxes jello, 10 cans Van Camp's

spaghetti, all bottled catsup, vinegar, bluing, sweet oil, jellies, all polish, blacking, and all other goods and chattels in said store, No. 217 Mulberry street, Newark, N. J.

Third—That on November 25, 1913, execution was issued on said judgment at the said Court to Edgar A. Hartdorn, sergeant-at-arms of said Court. That levy was made under said execution by said sergeant-at-arms on the said goods, wares and merchandise on November 26, 1913.

Fourth—That on December 1, 1913, sale was made under said execution and levy of said goods, wares and merchandise to the plaintiff for $125.00.

Fifth—That said defendants now have possession of said goods, wares and merchandise.

Sixth—That on the day of plaintiff made written demand of defendants for the return of said goods, wares and merchandise.

Seventh—Defendants then and there wrongfully refused to deliver the said goods, wares and merchandise to the plaintiff then in said store at No. 217 Mulberry Street, Newark, and then and now wrongfully detain the same.

Plaintiff demands possession of said goods, wares and merchandise or in case they cannot be returned to plaintiff then $1,000 damages for said goods and $300 damages for their detention.

COULT & SMITH,
Attys. of Plaintiff.

Answer.

Filed December 29, 1913.

SUPREME COURT OF NEW JERSEY.
ESSEX COUNTY.

WILKINSON, GADDIS & COMPANY, a corporation,
Plaintiff,

vs.

GEORGE BOHLEN, HENRY BOHLEN, HENNING BOHLEN and HENRY L. C. KIRCHNER,
Defendants.

Action at Law.
Answer.

Defendants, George Bohlen, Henry Bohlen, Henning Bohlen and Henry L. C. Kirchner, residing in the City of Newark, Essex County, New Jersey, say that:

1. They admit the truth of the matter contained in paragraph one of the complaint.

2. The defendants, George Bohlen, Henry Bohlen, Henry L. C. Kirchner, answering separately, say they disclaim all right to the property described in the complaint.

3. The defendant, Henning Bohlen, denies the truth of the second paragraph.

4. The defendant, Henning Bohlen, further says that on November 24th, 1913, he caused a certain chattel mortgage encumbering the goods and chattels mentioned in the complaint—which mortgage was open of record in the Register's Office in the County of Essex, aforesaid—to be foreclosed by John McNellen, Sergeant-at-Arms of

the First District Court of the City of Newark, and a sale of the said goods was conducted in legal manner by the said John McNellen; that upon such sale on the said twenty-fourth day of November, this defendant, Henning Bohlen, purchased the said goods and chattels, he being the highest bidder therefor.

5. The defendants, George Bohlen and Henning Bohlen, say further that when the levy and sale on the judgment mentioned in the complaint by said plaintiff was had on the first day of December, nineteen hundred and thirteen, the said George Bohlen was no longer the owner of said goods, and that the said Henning was then the legal owner thereof.

6. Defendant Henning Bohlen says further that he was served with a demand as stated in paragraph six of the complaint, but that he was not compelled to comply under the circumstances.

7. Defendant Henning Bohlen says further that he became, on the twenty-fourth day of November, and still is, the rightful owner of the said goods and entitled to the immediate possession thereof.

8. Defendant Henning Bohlen denies further that he has wrongfully retained said goods as alleged in paragraph seven of the complaint.

9. Paragraphs three and four of the complaint are admitted.

10. Defendant Henning Bohlen demands possession of the said goods and chattels and two hundred dollars ($200.00) damages.

Attorneys of Defendants.

Rule for Discontinuance.

Filed December 29, 1913.

SUPREME COURT OF NEW JERSEY.

WILKINSON, GADDIS & COMPANY, a corporation, *Plaintiff,* *vs.* GEORGE BOHLEN and HENNING BOHLEN, *et al.,* *Defendants.*	*Action at Law. Rule for Discontinuance as to George Bohlen, Henry Bohlen and Henry L. C. Kirchner.*

The defendants, George Bohlen, Henry Bohlen and Henry L. C. Kirchner, having by their answer herein disclaimed any right to the property described in the complaint:

IT IS ORDERED, that this action on the part of the plaintiff against George Bohlen, Henry Bohlen and Henry L. C. Kirchner be discontinued without costs as to either of said parties against the other, and that said defendants George Bohlen, Henry Bohlen and Henry L. C. Kirchner be dropped as defendants to this action.

Entered December 29th, nineteen hundred and thirteen.

On motion of

COULT & SMITH,
Attorneys for Plaintiff.

I hereby consent to the entry of the foregoing rule.

FREDERICK JAY,
Attorney for Defendants.

Plaintiff's Reply.

Filed January 6, 1914.

SUPREME COURT OF NEW JERSEY.

WILKINSON, GADDIS & COMPANY, a corporation, *Plaintiff,* *vs.* HENNING BOHLEN, *Defendants.*	*Action at Law.* *Plaintiff's Reply to Defendants' Answer.*

Plaintiff, replying to defendants' answer, says that

1. On and from the 11th day of November, 1913, plaintiff was a creditor of George Bohlen in the amount of $392.70, and being such creditor plaintiff obtained a judgment on said indebtedness, which judgment is the judgment referred to in Paragraph 1 of the complaint.

2. On November 26, 1913, levy under said judgment was made upon the goods, wares and merchandise described in Paragraph 2 of the complaint, as stated in Paragraph 2 of the complaint, and that by virtue of said levy plaintiff acquired a lien on and an interest in said property.

3. Paragraph 4 of the complaint is made Paragraph 3 of this reply.

4. The said defendant George Bohlen from the date of said sale remained indebted to the plaintiff in the sum of $291.86, being the balance remaining due on said judgment, and still remains so indebted.

Plaintiff's Reply.

5. The goods, wares and merchandise described in Paragraph 2 of said complaint and levied upon under said execution, as aforesaid, at and before the 11th day of November, 1913, and from thence until said levy under said execution was made, were in the possession of George Bohlen.

6. The said defendant Henning Bohlen did not by the said paper purporting to be a chattel mortgage, set up in Paragraph 4 of defendants' answer, or by any foreclosure or sale thereunder or by virtue thereof, acquire any property, title, claim, demand, encumbrance, right or possession in or to any of the goods, wares and merchandise referred to in Paragraph 2 of the complaint in the above action.

7. Plaintiff was from the 11th day of November, 1913, a creditor of the said George Bohlen and has remained such from thence to the present time.

8. Plaintiff says that said paper purporting to be a chattel mortgage was void as against the plaintiff in that the execution and delivery of said paper purporting to be a chattel mortgage, referred to in Paragraph 4 of the defendants' answer, was not accompanied by an immediate delivery and followed by an actual and continued change of possession of said goods, wares and merchandise described therein and alleged to be conveyed thereby, for the reasons:

(1) Said paper purporting to be a chattel mortgage did not have annexed to it an affidavit or affirmation made and subscribed by Henning Bohlen, the holder thereof, or by his agent or attorney, stating the consideration of said alleged mortgage.

(2) Said paper purporting to be a chattel mortgage did not have annexed to it an affidavit

or affirmation made and subscribed by the said Henning Bohlen, the holder thereof, his agent or attorney, stating as nearly as possible the amount due and to grow due thereon.

(3) Said alleged chattel mortgage was not immediately after its execution recorded.

(4) There was no consideration for said alleged chattel mortgage.

9. Plaintiff denies that there was any foreclosure or sale under or by virtue of said alleged chattel mortgage.

10. Plaintiff admits, as stated in Paragraph 5 of defendants' answer, that said sale under said judgment, execution and levy by the plaintiff in the action against George Bohlen, wherein this plaintiff recovered judgment against said George Bohlen in the First District Court of the City of Newark, was had on December 1, 1913, but plaintiff denies that said levy was made on said date and says that said levy was made on the 26th day of November, 1913, and this plaintiff denies the balance of Paragraph 5.

11. Plaintiff admits, as stated in Paragraph 6 of defendants' answer, that defendant Henning Bohlen was served with said notice, but plaintiff denies the balance of said paragraph.

12. Plaintiff denies Paragraph 7 of defendants' answer.

13. Plaintiff denies Paragraph 8 of defendants' answer.

14. Plaintiff denies Paragraph 10 of defendants' answer.

COULT & SMITH,
Attorneys of Plaintiff.

Defendant's Rejoinder.

Filed April 7, 1914.

SUPREME COURT OF NEW JERSEY.

WILKINSON, GADDIS & COMPANY, a corporation, *Plaintiff,* *vs.* GEORGE BOHLEN and HENNING BOHLEN, *et al.,* *Defendants.*	*Action at Law.* *Defendants' Rejoinder to Plaintiff's Reply.*

The defendants, George Bohlen and Henning Bohlen, answering separately, say by way of rejoinder to plaintiff's reply, that:

1. They admit the truth of the matter contained in Paragraph (1) of plaintiff's reply.

2. The defendants say further that they admit the truth of the matter contained in Paragraph (2) of the plaintiff's reply, except that plaintiff acquired any lien or interest in the said goods, wares and merchandise referred to in Paragraph (2) of plaintiff's complaint. This the defendants deny.

3. As to the matter alleged in Paragraph (3) of plaintiff's reply, the defendants lack sufficient knowledge and information to form a belief.

4. The defendant, George Bohlen, admits the truth of the allegations contained in Paragraph (4) of plaintiff's reply.

5. Defendant Henning Bohlen lacks sufficient knowledge and information to form a belief as to the matter contained in Paragraph (4) of plaintiff's reply.

Defendant's Rejoinder.

6. The defendants, George Bohlen and Henning Bohlen, admit the truth of the matter alleged in Paragraph (5) of plaintiff's reply, except the allegation that the said goods, wares and merchandise described in Paragraph (2) of plaintiff's complaint, were in the possession of George Bohlen at the time levy and execution pursuant to plaintiff's judgment were made. This the defendants deny.

7. The defendants, George Bohlen and Henning Bohlen, deny the truth of the matter set forth in Paragraph (6) of plaintiff's reply.

8. The defendant, George Bohlen, admits the truth of the matter contained in Paragraph (7) of the plaintiff's reply.

9. The defendant, Henning Bohlen, says that as to the matter contained in Paragraph (7) of plaintiff's reply, he lacks sufficient knowledge and information to form a belief.

10. The defendants, George Bohlen and Henning Bohlen, further admit that the execution of the chattel mortgage referred to in Paragraph (4) of the defendants' answer and in Paragraph (8) of the plaintiff's reply, was not accompanied by the immediate delivery and by the actual change of possession of the said goods, wares and merchandise described therein and conveyed thereby, but the said defendants deny the truth of the allegations set forth in sub-divisions 1, 2, 3 and 4 of Paragraph (8) of plaintiff's reply.

11. The defendants, George Bohlen and Henning Bohlen, deny the truth of the matter contained in Paragraph (9) of plaintiff's reply.

12. The defendants admit the allegation set forth in Paragraph (10) of the plaintiff's reply.

JAY & GLUECKFIELD,
Attorneys of Defendants.

Stipulation and Agreed State of Facts.

(Filed January, 1915).

NEW JERSEY SUPREME COURT.

WILKINSON, GADDIS & COMPANY, a corporation, *Plaintiff,* *vs.* HENNING BOHLEN, *Defendant.*	*Action at Law.* *Stipulation and Agreed State of Facts.*

It is hereby stipulated between the plaintiff and the defendant, through their respective attorneys, that this action be tried before the Honorable Nelson Y. Dungan, the Circuit Court Judge to whom the above entitled action has been referred for trial, and that it be tried before said Judge without a jury, upon the following agreed state of facts:

Wilkinson, Gaddis & Company, the plaintiff, was a creditor of George Bohlen on and before November 11, 1913, to the amount of $392.70, and still remains a creditor of the said George Bohlen, during the latter part of the time for a smaller amount. On November 25, 1913, Wilkinson, Gaddis & Company recovered a judgment against George Bohlen in the First District Court of the City of Newark for $416.86, damages and costs. Execution was issued on said judgment on November 26, 1913, to Edgar A. Hartdorn, one of the constables of the First District Court of the City of Newark, and a levy was made by him under said execution on November 26, 1913, on

the groceries and fixtures which were replevined in this action, which property was theretofore the property of George Bohlen and had been in his possession up to November 18, 1813. The title to said property subsequent to that date is governed and to be determined by the state of facts herein set forth. Said chattels were and had been the stock in trade of George Bohlen at his place of business, No. 217 Mulberry Street, Newark, New Jersey, and were also the same chattels described in the paper purporting to be a chattel mortgage, hereinafter referred to. Said chattels were duly advertised for sale under said judgment, execution and levy obtained by Wilkinson, Gaddis & Company, and were sold thereunder by said constable to the plaintiff on December 1, 1913, at public sale for $125. The plaintiff received a bill of sale for said goods, made and delivered to it by Edgar A. Hartdorn, the aforesaid constable. On November 13, 1913, George Bohlen executed a paper purporting to be a chattel mortgage to Henning Bohlen, the defendant, describing the chattels hereinbefore referred to. A true copy of said paper purporting to be a chattel mortgage is annexed hereto and made part hereof. On the execution and delivery of said paper purporting to be a chattel mortgage, said George Bohlen continued in possession of the chattels therein described. Said paper purporting to be a chattel mortgage was not accompanied by an immediate delivery, nor was it followed by an actual and continued change of possession of the chattles described therein, the chattels described therein being the stock in trade of George Bohlen, at No. 217 Mulberry Street, Newark, N. J., and so remaining until the delivery of the chattel mortgage above mentioned to John

McNellen, Sergeant-at-Arms of the First District Court of the City of Newark, on November 18, 1913.

On November 24, 1913, a sale was made of the property described in said paper purporting to be a chattel mortgage to Henning Bohlen, the defendant, by John McNellen, Sergeant-at-Arms as aforesaid, acting as attorney for said Henning Bohlen, on a foreclosure of said chattel mortgage. A true copy of the bill of sale made and delivered by the said John McNellen is attached hereto.

On December 3, 1913, the plaintiff in this action caused the issuance of a writ of replevin in this action and the Sheriff took possession of the chattels hereinbefore mentioned, and, after holding them for the statutory period, delivered said chattels to the plaintiff. A written demand was made upon the defendant, Henning Bohlen, by the plaintiff for the possession of the goods replevied, previous to the issuance of the writ of replevin, which demand was not complied with.

COULT & SMITH,
Attorneys for Plaintiff.

FREDERICK JAY,
Attorney for Defendant.

KNOW ALL MEN BY THESE PRESENTS, THAT,

I, GEORGE J. H. BOHLEN, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, for securing the payment of the money herein mentioned, and in consideration of the sum of One Dollar to me duly paid by Henning Bohlen of the Borough of Tenafly, County of Bergen and State of New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is here-

by acknowledged, have bargained and sold, and by these presents do bargain and sell unto the said party of the second part, his executors, administrators and assigns all the goods and chattels mentioned in the schedule hereunto annexed, and now in premises No. 217 Mulberry Street, Newark, N. J., and goods and chattels hereafter to be placed in said store premises, to replace goods sold or disposed of in the usual and ordinary course of business.

To Have and to Hold, all and singular, the said goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators and assigns forever, And I, the said party of the first part, for myself, my heirs, executors, administrators, all and singular the said goods and chattels above bargained and sold unto the said party of the second part, executors, administrators and assigns, against me, the said party of the first part, and against all and every person and persons whomsoever, shall and will warrant and forever defend.

Upon Condition that if I, the said party of the first part, shall and do well and truly pay unto the said party of the second part, his executors, administrators and assigns, a note in the sum of $1,000 of even date herewith, interest at 5%, payable on demand, then these presents shall be void, And I, the said party of the first part, for myself, my heirs, executors, administrators and assigns, do covenant and agree to and with the said party of the second part, his executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, or in case the said party of the first part shall, at any time before the day of payment herein provided for, remove the said goods and chattels, or any

of them, or permit or suffer any attachment or other process against property to be issued against me, or permit or suffer any judgment to be entered up against me, then the said sum of money herein mentioned shall become instantly due and payable, and then it shall and may be lawful for, and I, the said party of the first part do hereby authorize and empower the said party of the second part, his executors, administrators and assigns, with the aid and assistance of any person or persons, to enter dwelling-house, store and other premises, and such other places whatsoever, in which the said goods and chattels, or any of them, are or may be placed, and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto me, the said party of the first part, my heirs, executors, administrators or assigns.

In Witness Whereof, I, the said party of the first part have hereunto set my hand and seal the 13th day of November in the year of our Lord One Thousand Nine Hundred and Thirteen.

GEORGE J. H. BOHLEN, (signed).

Sealed and Delivered
in the presence of
Fred'k Jay, (*signed*).

State of New Jersey, }
County of Essex. } *ss.*

Henning Bohlen, the mortgagee in the foregoing mortgage named, being duly sworn on his oath

says that the true consideration of the said mortgage is as follows, viz.:

A note in the sum of $1,000, of even date herewith, with interest at 5%, payable on demand. The deponent further says that there is due on said mortgage the sum of One Thousand Dollars, by note of even date besides lawful interest thereon from the 13th day of November, 1913.

HENNING BOHLEN.

Sworn and subscribed this 13th day of November, A. D., 1913, before me, at Tenafly, N. J.,

(*Signed*) ROBERT C. VAIL,
[L. S.] *Notary public.*

SCHEDULE.

The following is the Schedule referred to in the foregoing mortgage:

27 cans potted beef, 23 cans cod fish, 5 pds. lemon peel, 10 bottles vinegar, 7 doz. baked beans, 6 bottles capers, 300 cans sardines, 2 boxes of candles, 66 cans potash, ½ box tooth picks, 1,500 bags, 50 lbs. paper, 25 pds. spices, 30 cans string beans, 4 cases milk, 20 cases asparagus, 50 jars jellies and jams, 20 cans mushrooms, 175 bags salt, 75 cans cocoa, 25 lbs. shred cocoanut, 20 bottles of salad dressing, 28 bot. Wor. sauce, 114 bot. olives, ½ bbl. mackerel, ½ bbl. vinegar, 2 cans oil, 4 bags potatoes, 84 bot. oils, 23 bags coal, 24 pineapples, 2 doz. cod-fish, 2 doz. boxes celery salt, 72 bottles grape juice, 25 bot. pickles, 40 cans corn, 45 pkgs. spaghetti, 3 cases soap and scg. powders, 100 lbs. coffee, 200 lbs. tea, 1½ cases salmon, 4 cases lobsters, 30 pkgs. macaroni, 310 p. cereals, 70 bags flour, 30 p. noodles, 50 lbs. crackers, 5½ case soap, 50 pkgs. cornstarch, 39 boxes starch, 28 cases peas,

5 cases succotash, 50 cans b. powder, 24 bot. oyster cocktail sauce, 69 tomatoes, 25 bot. catsup, 40 bot. ammonia, 40 brooms, 1 case toilet paper, 25 obs. peas, ½ box fly paper, 1 doz. cans b. chicken, 1 horse and wagon, 1 buggy with appurtenances, 1 safe, 20 p. bath brick, 14 doz. c. coups, 50 p. bird gravel, 50 p. bird seed, 1 bu. beans.

(*Signed*) GEORGE J. H. BOHLEN.

Witness,
(*Signed*) FRED'K JAY.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

BE IT REMEMBERED, that on this 13th day of November, in the year of our Lord, One Thousand Nine Hundred and Thirteen, before me the subscriber, a Master in Chancery of New Jersey, personally appeared GEORGE J. H. BOHLEN, who, I am satisfied, is the grantor in the within chattel mortgage named; and I, having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed:

(*Signed*) FRED'K JAY,
Master in Chancery of N. J.

KNOW ALL MEN BY THESE PRESENTS, THAT,

WHEREAS, Wilkinson, Gaddis & Company, a corporation, recovered judgment against George Bohlen in the First District Court of the City of Newark, on the twenty-fifth day of November, one thousand nine hundred and thirteen, for three hundred and ninety-three dollars and sixty-one cents

($393.61) damages and twenty-three dollars and twenty-five cents ($23.25) costs of suit: And,

Whereas, execution was issued on said judgment out of said court to Edgar A. Hartdorn, Sergeant-at-Arms of said court on November 25, 1913: And

Whereas, levy was made in due form of law under said execution by said sergeant-at-arms on the twenty-sixth day of November, one thousand nine hundred and thirteen, on the goods, wares and merchandise hereinafter enumerated: And

Whereas, On December 1, 1913, the time appointed for said sale, the said Wilkinson, Gaddis & Company did make the highest bid for said goods in the amount of one hundred and twenty-five dollars ($125):

Now This Indenture Witnesseth, that Edgar A. Hartdorn, sergeant-at-arms of the First District Court of the City of Newark, party of the first part, for and in consideration of the sum of one hundred and twenty-five dollars ($125), lawful money of the United States, to him in hand paid at or before the ensealing or delivery of these presents by Wilkinson, Gaddis & Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, has bargained and sold and by these presents does grant and convey unto said party of the second part, its successors and assigns, the goods and chattels particularly described as follows:

2 show cases, 3 scales, 1 coffee mill, 1 register, 500 cans peas, 100 boxes sardines (assorted), 50 cans lobster (assorted), 25 cans salmon (assorted), 12 cans shaker salt, 21 cans Campbell's soup (assorted), 10 cans Heinz baked beans, 26 boxes jello, 10 cans Van Camp's spaghetti, all bottled catsup, vinegar, bluing, sweet oil, jellies, all polish, blacking, and all other goods and chattels in the store

at No. 217 Mulberry Street, Newark, New Jersey.

To Have and to Hold the same unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, I have hereunto set my hand and seal the First day of December, in the year of our Lord, one thousand nine hundred and thirteen.

EDGAR A. HARTDORN, [L. S.]

Signed, sealed and delivered
in the presence of
Thos. S. Woodruff.

NEW JERSEY SUPREME COURT.

Wilkinson, Gaddis & Company, a corporation,

vs.

Henning Bohlen,

Record.

Newark, N. J., January 22, 1915.

Before Hon. Nelson Y. Dungan, Judge, without a jury, by consent.

Coult & Smith, for plaintiff.

Frederick Jay, for defendant.

By consent the case is submitted on the pleadings, and stipulation as to facts.

(Argued.)

The Court. I have no doubt that this is an improper affidavit, and if I am obliged to decide on that alone, I will be obliged to decide in favor of the plaintiff. However, I think there may be a question as to whether or not it is a proper case,

in view of the fact that the sale by the constable had really taken place, and the goods delivered by the constable to Mr. Bohlen, before the judgment, and execution and levy of Wilkinson & Gaddis. I am not deciding whether that is so, and I will give you an opportunity, if you desire, to submit a brief upon that point. Briefs may be sent to me at Somerville, N. J., by Friday of next week.

Plaintiff moved for judgment on the following grounds:

1. That the paper dated November 13, 1913, purporting to be a chattel mortgage, was void as against plaintiff, a creditor of defendant at the time said mortgage was given, because it did not have annexed to it an affidavit or affirmation stating the true consideration of said alleged mortgage.

2. That defendant by foreclosing the alleged mortgage and purchasing property at the foreclosure sale prior to the levy under plaintiff's judgment, obtained no title to the property as against the plaintiff.

3. That defendant, by taking possession of the property before plaintiff's judgment was recovered, did not give validity to defendant's mortgage as against the plaintiff.

4. That whatever title defendant had grew out of the mortgage and could possess no greater efficacy as against the plaintiff than the mortgage itself.

On the first ground I have ruled in favor of the plaintiff. Grounds 2, 3 and 4 I deem unsound as hereinabove stated, and on these will rule adversely to plaintiff and allow it an exception to such ruling.

NELSON Y. DUNGAN,
Circuit Court Judge.

Decision of Judge Dungan.

April 16, 1915.

NEW JERSEY SUPREME COURT.

WILKINSON, GADDIS & COMPANY, a corporation,
Plaintiff,

vs.

HENNING BOHLEN,
Defendant.

Decision.

Dungan, *J.*

A jury in this case was waived and the case submitted to the Court upon an agreed statement of the facts and briefs submitted by counsel for plaintiff and defendant.

The facts in detail appear from this agreed statement of facts. It is sufficient to state here that this is an action of replevin brought by the plaintiff which claims title under an execution sale on December 1st, 1913, by virtue of a levy upon the goods and chattels claimed, made on November 25, 1913, against the defendant, who claims the same goods by virtue of a chattel mortgage dated November 13, 1913, which was foreclosed and the property sold November 24, 1913, one day before the levy under execution under which the plaintiff claims title.

After the sale under the execution, defendant retained possession of the goods and chattels, and on December 3rd, 1913, the plaintiffs caused the issuance of a writ of replevin in this action and the Sheriff took possession of the goods and chat-

tels; and, after holding them for the statutory period, delivered them to the plaintiff.

The affidavit attached to the chattel mortgage is as follows:

"Henning Bohlen, the mortgagee in the foregoing mortgage named, being duly sworn on his oath says that the true consideration of the said mortgage is as follows, viz.: a note in the sum of one thousand dollars of even date herewith with interest at five per cent. payable on demand. The deponent further says that there is due on said mortgage the sum of one thousand dollars by note of even date besides lawful interest thereon from the 13th day of November 13."

This affidavit is certainly not a compliance with the statute which requires that "Every mortgage of goods and chattels hereafter made which shall not be accompanied by immediate delivery and followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of the mortgage, his agent or attorney, stating the consideration of his mortgage, * * * be recorded as directed by the succeeding section of this act," etc.

This mortgage was recorded on the 14th day of November, 1913, but it surely cannot be contended that the statement that the consideration is a "A Note in the sum of One thousand dollars of even date herewith", expresses the true consideration of the mortgage.

Ehler *vs.* Turner, 35 N. J., E. 68.

Graham Button Co. *vs.* Spielman, 50 Eq. 120.

Indeed it seems to be conceded by the defendant's brief, that as to creditors with substantial rights having attached to the property in question the chattel mortgage cannot be upheld.

But it is insisted on the part of the defendant that as between the chattel mortgagor and chattel mortgagee, the chattel mortgage was valid and the sale under such chattel mortgage having taken place before the lien of the execution had attached to the goods and chattels, that the plaintiffs cannot now complain of the irregularity in the affidavit attached to the chattel mortgage, and I am inclined to agree with this view.

There is no question of the bona fides of this mortgage. It must therefore be assumed that it is free from any taint of fraud as between the parties to it.

Under the chattel mortgage act a defective affidavit would make it void only as to the creditors of the mortgagor and subsequent purchasers and mortgagee in good faith.

It would not affect the chattel mortgage as between the mortgagor and mortgagee. As a matter of fact it would be valid and enforcable without any affidavit, and in the case of Currie *vs.* Knight, 34 Eq., page 485, Vice Chancellor Van Fleet states that the creditors meant by an act similar to the one in question are "those having a lien on the things mortgaged". He says, "Creditors without a lien have no right to, or interest in the thing mortgaged, and for that reason cannot be heard to question a mortgage which is valid against the person who made it."

In a later opinion by the same Vice Chancellor, in Graham Button Company *vs.* Spielman, 50 Eq., p. 120, at p. 123 he says, that the right to have a chattel mortgage with defective affidavit adjudged

to be a nullity "Does not inhere in all the creditors of the mortgagor. A creditor without judgment or other legal process and without a right by law, to have his debtor's property seized and sold for his benefit has no such right. To be in a position to assert this right he must have a debt fastened on his debtor's property by law, judicial process or in some other way, for, until his debt is so fastened he has no right to or interest in his debtor's property, and cannot ask the Court to control its disposition nor can he prevent his debtor from exercising full and complete dominion over it."

All the cases to which reference is made by the plaintiff in support of its contention that the chattel mortgage is void as to creditors, are cases in which the lien of the creditor has attached to the goods either by judgment, execution and levy, or by other proceedings such as insolvency proceedings or where the debtor was deceased and his property was liable for all his debts, and the chattel mortgagee was still the holder of his mortgage.

I think there can be no question but that the mortgagor on the 24th day of November, 1913, might have sold the property in question to the chattel mortgagee or to any other person, and the purchaser would have acquired good title, free from any right of the plaintiff to have his execution attach to it, because on that date the plaintiff's debt was not fastened in any way upon the property. The mere fact that the mortgaged chattels were purchased by the chattel mortgagee instead of by a third party, cannot, of course, affect his rights acquired under the sale.

It is undoubtedly true that, if the defendant's title to the property in question had not been perfected by a foreclosure and sale under the chattel

mortgage, but that his only right to the possession of the goods was by virtue of the lien of the chattel mortgage of which he was still the holder, the right of the creditor under its levy would have been paramount to such lien; but since that is not the case, and since the lien under the chattel mortgage was perfected by foreclosure and sale, I am unable to find that the rights of the defendant were any different from those of a bona fide purchaser from the mortgagor, and that therefore the plaintiff had no right or title to the goods replevined by virtue of the sale under their execution issued on the 25th day of November, 1913.

This results in a finding that the goods and chattels were not the property of the plaintiff, Wilkinson, Gaddis & Company, but were the goods and chattels of the defendant, Henning Bohlen, and judgment is therefore given in favor of the defendant and against the plaintiff.

It is insisted by the brief of the attorney of the plaintiff that "If the judgment of the Court be for the defendant in damages then the only evidence before the Court of the value of the goods fix their value at $125."

The situation seems to be controlled by Section 27 of the Replevin Act, Compiled Statutes, page 4375, which provides "That in all actions for replevin if a verdict be found in favor of the defendant, the defendant shall recover his damages and costs against the plaintiff, if the plaintiff would have recovered damages and costs if he had succeeded in the action."

The statement of facts is silent on the question of damages, except the statement that under the execution sale to the plaintiff on December 1st, 1913, this property was sold for $125.00; but, the price obtained at such a sale is not a proper meas-

ure of value except where there is no other proof of value. That being the only proof on the subject of damages the Court is limited in awarding damages to the defendant for that amount, which amount is hereby awarded with costs of suit.

Postea.

Filed June 2, 1915.

NEW JERSEY SUPREME COURT.
Essex County.

WILKINSON, GADDIS & COMPANY, a corporation, *Plaintiff,* *vs.* HENNING BOHLEN, *Defendant.*	*In Replevin.* *Postea.*

This case was tried before Judge Nelson Y. Dungan at the Essex Circuit, on the 14th day of April, nineteen hundred and fifteen, without a jury.

The Court rendered a general verdict against the plaintiff and in favor of the defendant for one hundred and twenty-five dollars ($125.00), and costs.

NELSON Y. DUNGAN,
Circuit Court Judge.

A true copy,

WM. C. GEBHARDT,
Clerk.

Grounds of Appeal.

Filed June 23, 1915.

New Jersey Court of Errors and Appeals

WILKINSON, GADDIS & COMPANY, a corporation,
Plaintiff-Appellant,
vs.
HENNING BOHLEN,
Defendant-Respondent.

Grounds of Appeal.

The appellant states the following grounds of appeal:

Because the plaintiff moved for judgment on the grounds that,

1. The defendant, by foreclosing the alleged mortgage and purchasing property at the foreclosure sale prior to the levy under plaintiff's judgment, obtained no title to the property as against the plaintiff.

This motion was denied and exception taken.

2. The defendant, by taking possession of the property before plaintiff's judgment was recovered, did not give validity to defendant's mortgage as against the plaintiff.

This motion was denied and exception taken.

3. Whatever title defendant had grew out of the mortgage and could possess no greater efficacy as against the plaintiff than the mortgage itself.

This motion was denied and exception taken.

COULT & SMITH,
Attys. of Appellant.