

[HIGH COURT OF AUSTRALIA.]

ADDISON AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

THE CITY MUTUAL LIFE ASSURANCE }
SOCIETY LIMITED AND ANOTHER } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
QUEENSLAND.

H. C. OF A. *Mortgage—Priority of encumbrances—Lien and mortgages—Declaration by High Court that mortgages invalid as securities—Cause remitted to Supreme Court—Supreme Court's order thereunder not perfected—Validity of mortgages established by subsequent amending statute—Rights acquired under judgments preserved—Vacation of unperfected order—Consequential relief—Form of relief—Amending statute—Effect—Liquor Act 1912-1926 (Q.) (3 Geo. V. No. 29—17 Geo. V. No. 3), sec. 69—Liquor Acts Amendment Act 1932 (Q.) (23 Geo. V. No. 2), secs. 2, 3.*
1933.
SYDNEY,
April 20;
May 4.

Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

On 30th May 1932 the High Court declared in *Addison v. Cain*, (1932) 47 C.L.R. 208, that certain mortgages, which, otherwise, would have taken priority over a lien claimed by the appellants, were contrary to the provisions of sec. 69 of the *Liquor Act 1912-1926 (Q.)*, and, therefore, were invalid as securities over certain lands constituting licensed premises, and remitted the cause to the Supreme Court. On 4th July a Judge of the Supreme Court pronounced a judgment in the cause. He ordered the mortgagee and the mortgagor to execute forthwith all documents necessary to free the lands from the mortgages. Before this judgment was perfected, amending legislation, on 2nd September 1932, retrospectively repealed sec. 69 and established the validity of all securities given contrary to its provisions, but by a proviso the rights of any parties to judgments given prior to 1st August

1932, and the rights of parties on appeal from such judgments, were preserved. As compliance with the order of 4th July would result in the mortgages being discharged for all purposes, for the benefit of strangers as well as parties to the suit, the mortgagee applied to the Judge to reconsider his judgment, which had not been passed and entered. On 15th November 1932 the Judge vacated his order of 4th July and ordered that the mortgagee and the mortgagor should do, at their own expense, all things necessary to procure priority in registration of the appellants' lien over the mortgages.

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Held that the vacation of the unperfected order of 4th July 1932 was a matter within the discretion of the Judge; but that, in administering consequential relief after the amending legislation, only such remedies should be granted as might appear necessary for the protection of the lien from impairment by anything done under the mortgages, but so that any rights as against others which the mortgagee might have under the amending legislation would not be destroyed or adversely affected. The order requiring a reversal of the priority in registration of the lien and the mortgages should be discharged, and there should be substituted therefor a declaration that the mortgagee was bound as against the appellants to treat their lien as paramount to the security given over the land the subject of the lien by the mortgages.

Order of the Supreme Court of Queensland (*Webb J.*) discharged and a new order made in lieu thereof.

APPEAL from the Supreme Court of Queensland.

The appellants, George Frederick Addison and Herbert Stanley MacDonald, brought an action against Annie Teresa Cain, licensee of Lennon's Hotel, George Street, Brisbane, and the City Mutual Life Assurance Society Ltd., for a declaration that two mortgages given by Mrs. Cain and taken by the Society, in respect of the land on which the hotel was erected and also other land, were given and taken contrary to the provisions of sec. 69 of the *Liquor Act* 1912-1926 (Q.) and were void and of no effect. The appellants claimed to be entitled to a lien under the *Contractors' and Workmen's Lien Acts* 1906-1921 (Q.) over the lands above mentioned. The mortgages were registered under the *Real Property Acts* (Q.) and the lien was registered subsequently. Accordingly, the mortgages, if valid, would have taken priority over the lien. On appeal to the High Court, the appellants obtained, on 30th May 1932, a declaration that the mortgages were, in so far as they gave or purported to give security over the freehold in or in connection with the licensed premises, contrary to the provisions of the *Liquor Act* 1912-1926

H. C. OF A. and unlawful and invalid, and an order was made remitting the
 1933. cause to the Supreme Court of Queensland (*Addison v. Cain* (1)).
 {
 ADDISON On 4th July 1932, *Webb J.* pronounced a judgment ordering the
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 CITY MUTUAL mortgagee and the mortgagor to execute forthwith all documents
 LIFE necessary to free the lands constituting the licensed premises from
 ASSURANCE the bills of mortgage. But this judgment had not been perfected
 SOCIETY LTD. when the *Liquor Acts Amendment Act* 1932 (Q.) came into force on
 2nd September 1932. This Act retrospectively repealed sec. 69 of
 the *Liquor Act* 1912-1926 and established the validity of all securities
 which had been given contrary to its provisions, but by a proviso
 the rights of parties to judgments given prior to 1st August 1932,
 and the rights of parties on appeal from such judgments, were
 preserved. On 15th November 1932, on the application of the
 mortgagee, *Webb J.* vacated the judgment pronounced on 4th July
 and ordered that the mortgagee and the mortgagor should do, at
 their own expense, all things necessary to procure priority in
 registration in the office of the Registrar of Titles of the appellants'
 lien over the mortgages.

From this order the appellants now appealed to the High Court.

Maughan K.C. and *Graham*, for the appellants. In the circumstances *Webb J.* should not have paid any regard to the amending legislation. The rights of the parties had then been settled by a decree of this Court which established the invalidity of the mortgages, but did not establish the lien. All consequential orders that may be necessary should be made as if the *Liquor Acts Amendment Act* of 1932 had not been enacted. The order of *Webb J.* is incapable of being given effect to and also is inconsistent with the order of this Court. As to the practice followed in Queensland in regard to the setting aside of documents, see *Wilson v. Brown* (2); see also *Hogg's Australian Torrens System* (1905), pp. 842-847. In view of the practice prevailing in Queensland this Court's order of 30th May 1932 should be supplemented in such a way as to secure finality (see *Beckenham and Harris' Real Property Act* (N.S.W.) (1929), p. 285). The mortgagee should be directed to execute a

(1) (1932) 47 C.L.R. 208.

(2) (1896) 7 Q.L.J. 16.

release of the mortgage and the mortgagor or her trustee in bankruptcy should be directed to sign a registration copy of such release as correct for registration. The appellants are also unsecured creditors of the mortgagor. This Court is entitled to make the order it should and would have made when the matter was previously before the Court.

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Macrossan, for the respondent, The City Mutual Life Assurance Society Ltd. The order made by *Webb J.* on 15th November 1932 is substantially correct and should be upheld. The mortgages in question were completely re-established as against all persons by secs. 2 and 3 of the *Liquor Acts Amendment Act* of 1932, which was assented to on 2nd September 1932. The proviso to sec. 3 was intended only to protect rights acquired by persons as parties to a judgment. As a defendant in the action, the mortgagor, and through her her trustee in bankruptcy, acquired no rights from a judgment which was given against her. Upon the passing of the amending legislation the position between the parties was altered immediately, and, as the order made by *Webb J.* on 4th July 1932 had never been signed and otherwise perfected, the mortgagee was entitled to ask his Honor to substitute for the order he was proposing to make an order which would meet the position created by the amending Act. His Honor had jurisdiction to deal with such request, and to make the order of 15th November 1932.

W. Linton, for the trustee in bankruptcy of the mortgagor, submitted to any order the Court might make.

Maughan K.C., in reply. *Webb J.* should not have allowed himself to be influenced by the amending Act. His Honor should have confined himself to giving effect to the decree of this Court by such orders consequential upon the decree as might be necessary. The rights of the appellants as established by that decree cannot be affected by the subsequent amending legislation.

Cur. adv. vult.

H. C. OF A. THE COURT delivered the following written judgment :—

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The appellants, who claim to be entitled to a contractor's lien under the *Contractors' and Workmen's Lien Act* 1906-1921 (Q.), obtained in a previous appeal to this Court a declaration that two bills of mortgage, which, otherwise, would take priority of the lien, were, in so far as they gave or purported to give security over the freehold in or in connection with certain licensed premises, contrary to the provisions of the *Liquor Act* 1912-1926 (Q.), and unlawful and invalid (see *Addison v. Cain* (1)). This declaration was made on 30th May 1932, and the order, which contained it, remitted the cause to the Supreme Court of Queensland. The bills of mortgage were registered under the Real Property Acts and included other lands besides the licensed premises. On 4th July 1932, the action was brought on by motion for further hearing before *Webb J.*, who, in the first instance, pronounced a judgment ordering the respondents to execute forthwith all documents necessary to free the lands constituting the licensed premises from the bills of mortgage. But before the judgment was perfected the *Liquor Acts Amendment Act* of 1932 (Q.) came into force. This statute, which was assented to on 2nd September 1932, repealed retrospectively sec. 69 of the *Liquor Act* 1912-1926, the provision which, in the opinion of this Court, had operated to invalidate the bills of mortgage. The enactment established the validity of all securities which had been given contrary to that provision. But the effect of the validating provision was qualified by the following proviso: "Provided that nothing in this Act shall prejudice or affect the rights of any party to any judgment of any Court of competent jurisdiction in any case where such judgment was given prior to the first day of August, one thousand nine hundred and thirty-two, nor prejudice or affect the rights of any party upon appeal from such judgment."

It was evident that, if the judgment pronounced by *Webb J.* on 4th July 1932 was carried into effect, the land constituting the licensed premises would be discharged from the security for all purposes, for the benefit of strangers to the suit as well as of the parties. A respondent, the mortgagee, therefore applied to *Webb J.* to reconsider his judgment. As the judgment had not been

passed and entered, he had jurisdiction to recall it, and this jurisdiction he exercised. He then made an order which he considered would operate as between the parties to carry into effect the declaration of invalidity made by this Court and at the same time, as against others, would preserve the respondents' security and so give effect to the validating statute. He ordered that the respondents should do at their own expense all things necessary to procure priority in registration in the office of the Registrar of Titles of the appellants' lien over the bills of mortgage. From this order the appellants now appeal. While the appeal was pending the mortgagor, who was joined as a defendant in the suit and as a respondent upon the appeal, became a bankrupt. Her trustee in bankruptcy has since been made a party to the proceedings.

It is not easy to see what the order appealed from requires the mortgagee to do in order to reverse the priorities of the existing instruments. But, if the order were carried out, it would completely postpone the mortgagee to the lien of the appellants which would, therefore, be as effectually protected as if the mortgages did not stand behind it. As the appellants' title to impeach the mortgages consisted in their interest in the land as lienees, it does not appear that they would be aggrieved by the order, if it could be carried out. But the appellants say that they are also creditors of the mortgagor in respect of unsecured debts and that, if the land were discharged of the encumbrances, or if otherwise full effect were given to this Court's declaration of the invalidity of these instruments, they would benefit in their capacity of unsecured creditors. They further say that the rights preserved to them by the proviso include all such consequential rights as may arise from the invalidity of the mortgages as declared by the order of 30th May 1932. However this may be, it is clear that the appellants never were entitled to any substantive relief except for the purpose of protecting the lien which they claim. As lienees, but not as unsecured creditors, they were entitled to complain that an unlawful and void encumbrance was set up and relied upon as having priority to the security given by their lien. No doubt, when the encumbrance was either void or valid as against all alike, an appropriate form of relief was a declaration of invalidity and a consequential

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order for the execution of a discharge of the land from the bills of mortgage, which would prevent the lien being over-reached by a transfer of the void security to a third person taking it bona fide for value on the faith of the register. But no "right" to this particular form of consequential relief arose from the declaration contained in the order of 30th May 1932. The rights of the parties to that order are protected by the proviso to the validating enactment, but the order appealed from was made after the statute, and upon this appeal we must take account of its provisions unless we are prepared to say that *Webb J.* ought not to have vacated his unperfected order of 4th July 1932, a course which, in our opinion, it was within his discretion to adopt. In administering consequential relief after that statute, we ought, we think, to go no further than to grant such remedies as may appear necessary for the protection of the appellants' lien from impairment by anything done under the bills of mortgage, but so that any rights as against others which the respondent, the mortgagee, may have in virtue of the validating statute will not be destroyed or adversely affected. Whatever rights the appellants have in virtue of this Court's former declaration stand unaffected. But nothing should be done to prejudice the possible operation of the subsequent statute. It was suggested that, as the mortgagor was a party to the order declaring the bills of mortgage to be invalid, she had a right to have them treated as void, which is preserved and which has passed to her trustee. But she sought no relief in the action and her trustee has asked for none upon this appeal. The question whether she acquired any such right must be litigated elsewhere if it arise as a practical matter, and we should make no order which would prejudice that question. The appellants, therefore, fail in the real object of their appeal. But the order appealed from requires a reversal of the order of priority upon the Register of Titles which, so far as we can see, could not be accomplished unless the existing encumbrances are destroyed. So far from contemplating their destruction, it supposes that they will be preserved, as indeed they must be in order that the rights of the parties should be retained. This order should be discharged. In lieu thereof, it should be ordered as follows :—Declare that in the exercise of any right or power

arising under the lien referred to in the pleadings and in the prosecution of any remedy for its enforcement, the plaintiffs are entitled as against the defendants to proceed upon the footing that the bills of mortgage registered numbers A86,804 and A131,905 in so far as they give or purport to give a security over the lands described in certificate of title number 314,521 vol. 1702 fol. 11 are void and that the defendant Society is bound as against the plaintiffs to treat such lien as paramount in all respects over any security given over the said lands by such bills of mortgage or either of them. Reserve liberty to apply. Let the defendant Society pay the plaintiffs' costs of and incidental to the proceedings in the Supreme Court of Queensland after the order of this Court of 30th May 1932 up to and including 4th July 1932. Let all parties abide their own respective costs of all proceedings in the Supreme Court of Queensland after 4th July 1932 up to the date of this order. Let the appellants pay the costs of this appeal.

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Order accordingly.

Solicitors for the appellants, *O'Shea, O'Shea, Corser & Wadley*, Brisbane, by *Pigott, Stinson, Macgregor & Palmer*.

Solicitors for the respondent The City Mutual Life Assurance Society Ltd., *Tully & Wilson*, Brisbane, by *Barry, Norris & Wildes*.

Solicitors for the respondent trustee in bankruptcy, *Hobbs, Caine & McDonald*, Brisbane, by *Ernest Cohen & Linton*.

J. B.