CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

ELIZA McALLISTER, CHARLES GRANT BARNSTEAD AND WILLIAM ACKHURST (PLAINTIFFS) — APPELLANTS;

AND

GEORGE E. FORSYTH AND GEORGE DAVIDSON (DEFENDANTS.) — RESPONDENTS.

1884 *Nov. 11.

1885 *May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Chattel mortgage—Security for after acquired property—Agreement not to register—Assignment in trust by mortgagor—Legal title of trustee in goods mortgaged—Equitable title of mortgagee—Priority.

In May, 1880, the defendant D., being indebted to the plaintiffs in the sum of $8,000, gave them a chattel mortgage on all his stock in trade, chattels and effects then being in the store of the said defendant D. on Granville street, in the City of Halifax; and by the said mortgage the said defendant D. further agreed to convey to the plaintiffs all stock which, during the continuance of the said indebtedness, he might purchase for the purpose of sub-

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*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Taschereau JJ.

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stitution in place of stock then owned by him in connection with his said business, which goods were never so conveyed to the plaintiffs. By the terms of the mortgage, the debt due to the plaintiffs was to be paid in three years, in twelve equal instalments at specified times, and if any instalment should be unpaid for fifteen days after becoming due, the whole amount then due the plaintiffs would become immediately payable, and they could take possession of and sell the said mortgaged goods. It was further agreed between the defendant D. and the plaintiffs, that to save the business credit of D. the said mortgage was not to be filed and was to be kept secret, and it was not filed until the 12th December, 1881. On the 13th of December, 1881, D. made an assignment of all his property, real and personal, to the defendant F., in trust for the benefit of his (D.'s) creditors, and such trust deed was executed by D., F. and one creditor of D., and subsequently by a number of other creditors. F. had no notice of the mortgage to the plaintiffs. F. took possession of the goods in the store on Granville street, and refused to deliver them to the plaintiffs, who demanded them on 14th December, default having been made in the payments under the mortgage, and the plaintiffs brought this suit for the recovery of the goods and an account. Previous to the suit being commenced the defendant F. delivered to the plaintiffs a small portion of the goods in the store, which, as he alleged, were all that remained from the stock on the premises in May, 1880.

Held, affirming the judgment of the Court below, Strong J. dissenting, that the legal title to the property vested in the defendant F. must prevail, the plaintiffs' title being merely equitable, and the equities between the parties being equal.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment of the judge in equity dismissing the plaintiffs' bill. The facts of the case are fully set out in the judgment of the court and in the report of the case in the Court below.

Sedgwick Q.C. for appellants.

There was no evidence of fraud in the transaction between Davidson and plaintiffs. There was a good bill of sale registered in good time, and therefore it gives the appellants a good title to the property in question (2). *Ex parte Popplewell In re Storey.* (3).

(1) 5 Russ. & Geld. 151.

(2) Rev. Stats. N.S. 4th ser. ch. 84; 5th Ser. ch. 93.

(3) 21 Ch. D. 73.

As to subsequently acquired property the following cases were cited: *Holyrod* v. *Marshall* (1); *Brown* v. *Bateman* (2); *Clements* v. *Matthews* (3); *Lazarus* v. *Andrade* (4); *Flower* v. *Cornish* (5).

Graham Q.C. followed for the appellants.

The defendant Forsyth, being an assignee without value, cannot set up the fraud of Davidson.

Brownell v. *Curtis* (6); *Browning* v. *Hart* (7); *Leach* v. *Kelsey* (8).

There is no difference between this case and the case of a previous agreement to give a bill of sale which was afterwards carried out. This would be supported in England.

Henry Q.C. for respondents.

The agreement is not sufficiently definite to be susceptible of specific performance in equity.

Harris v. *Commercial Bank of Canada* (9); *Wilson* v. *Kerr* (10); Jones on Chattel Mortgages (11); *Reeve* v. *Whitmore* (12); *Tapfield* v. *Hillman* (13); *Belding* v. *Read* (14).

But my principal point is that this indenture of 8th May, 1880, was and is fraudulent and void against creditors, inasmuch as it was made secretly and was so held for nineteen months, or from 8th May, 1880, to 13th December, 1881, under a verbal agreement, made before or at the time of its execution by Davidson, with the appellants to that effect; which agreement was made for the express and admitted purpose of enabling Davidson

(1) 10 H. L. Cas. 191.
(2) L. R. 2 C. P. 272.
(3) 11 Q. B. D. 808.
(4) 5 C. P. D. 318.
(5) 25 Min. 473.
(6) 10 Paige 210.
(7) 6 Barb. 91.
(8) 7 Barb. 466.
(9) 16 U. C. Q. B., 437.
(10) 17 U. C. Q. B. 168.
(11) Sec. 103.
(12) 33 L. J. Ch. 63.
(13) 6 Scott N. R. 967; 6 M. & G. 245.
(14) 3 H. & C. 955.

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to carry on business—in other words, to obtain credit.

We have here established, by the evidence in the case, the following elements or badges of fraud:—

1. Possession after default, which was inconsistent with the terms of the mortgage.

2. Possession, under a verbal agreement inconsistent with the mortgage, in the nature of a secret trust.

3. Possession with the *jus disponendi*, exercised under the verbal agreement while the mortgage was held secretly; such possession being inconsistent with the mortgage.

The mortgage provided that Davidson "should, until default, have the right to retain possession of the goods and sell the same in the ordinary course of business." Davidson made default on 1st May, 1881, if not before.

The mortgage does not provide for any accounting for the proceeds of such sales; it in effect permitted Davidson to appropriate such proceeds as he pleased. The mortgagees did not exercise, nor had they the power to exercise, any control over Davidson in the disposal of the monies so derived.

It is contented that such a possession, coupled with the unrestrained *jus diponendi*, invalidates the mortgage as against creditors, or the representatives of creditors such as an assignee in trust for the benefit of creditors, in possession.

No case can be found in the English books where a bill of sale or mortgage, in which the power to dispose for the benefit of the grantor or mortgagor is conferred, has been upheld. *Bamford* v. *Baron* (1), is the only apparent exception, and the instrument in that case was an assignment for the benefit of creditors, by the terms of which the debtor was permitted to carry on the trade for a certain period, and account to the trustee for all the profits of the trade from the date of the assignment.

(1) 2 T. R. 594 (note).

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There the *jus disponendi* was for the benefit of creditors and not for the benefit of the assignee, while in *Paget* v. *Perchard* (1); *MacDona* v. *Swiney* (2); *Wordall* v. *Smith* (3); *Worseley* v. *DeMattos* (4), where possession and the right of disposal was retained and exercised by the vendor or mortgagor for their own benefit, the instruments were held void and the transactions fraudulent. See Bump on Fraudulent Conveyances (5), where the argument on this branch of the case is clearly put.

My learned friends urged "that Forsyth was a mere volunteer, and as Davidson could not set up fraud as a defence neither could he."

It will be remembered that this is not a suit in equity instituted by the trustee of creditors to set aside the deed; were it so there might be some foundation for the contention that only judgment creditors could avail themselves of the equities. Be that sound or no, it does not affect this suit. Here mortgagees bring suit in equity on an instrument tainted with fraud, and ask that it may be made effective to pass property to them. They invoke equitable principles to aid them in giving effect to the mortgage; and they are met in the inception by the principles: "He who seeks equity must do equity;" and again, "He who comes into a court of equity must come with clean hands." Equity will never permit eqnitable principles to be made instruments of fraud. But it is not so clear that a trustee of creditors may not avail himself of such fraud in an equity suit to set aside a deed fraudulent as against creditors. Under the Bankruptcy laws he clearly could; and, as respects an insolvent assigning for the benefit of creditors where no such laws exist, it is contended the same rule applies. He (the trustee)

(1) 1 Esp. 204.
(2) 8 Ir. L. R. (N.S.) 73.
(3) 1 Camp. 332.
(4) 1 Burr. 467.
(5) 3rd ed. p. 123.

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occupies a double character. 1st. As representing the insolvent party to the deed. 2nd. As standing in the place of, and entitled to exercise all the rights of, creditors. Quâ the representatives of the bankrupt the assignee has no power to set aside the deed; but, quâ the representatives of the creditors, he has that power. *Martin* v. *Pewtress* (1); *Anderson* v. *Maltby* (2); *Doe d. Grimsby* v. *Ball* (3).

Be this as it may, the trustee here is in possession under an assignment valid and effectual to pass the property but for the fraudulent deed; and in such a case, independently of 13 Eliz., he, representing *bona fide* creditors, can successfully resist the enforcement of the fraudulent transfer. *Ackraman* v. *Corbett* (4); *Tarleton* v. *Liddell* (5); *Goodricke* v. *Taylor* (6); *Cutten* v. *Sanger* (7).

Sedgwick Q.C. in reply.

Sir W. J. RITCHIE C.J.—By an indenture made the eighth day of May in the year of Our Lord one thousand eight hundred and eighty, between George Davidson, of Halifax, in the county of Halifax, merchant, of the first part; and Eliza McAllister of the same place, widow, Charles Grant Barnstead, of the same place, gentleman, and William Ackhurst, of the same place, merchant, of the second part, after reciting indebtedness of first party to the second party, the party of the first part agreed to convey and did thereby transfer and convey unto the said parties of the second part, all the stock in trade, chattels and effects then being in the store of the said party of the first part on Granville street, in the city of Halifax, to have and to hold the same to their own use and behoof; and he further agreed to convey

(1) 4 Burr. 2478.
(2) 2 Ves. jr. 244.
(3) 11 M. & W. 531.
(4) 1 J. & H. 410.
(5) 17 Q. B. 390.
(6) 2 DeG. J. & S. 135.
(7) 3 Y. & J. 374.

to the said parties of the second part, all stock which, during the continuance of the said indebtedness, he might purchase for the purpose of substituting in place of stock then owned by him in connection with his business.

Certain goods were subsequently purchased by Davidson and placed in the store on Granville street, but the same never were, in accordance with the terms of the mortgage, conveyed to the parties of the second part, nor was there any appropriation of the said goods ever made, or any possession thereof given to the said parties, but the same remained in the said store subject to the disposal of said Davidson.

On the 13th December, 1881, the said goods, then being in the possession and under the sole control of the said Davidson, he did by deed in trust for his creditors, dated 13th December, 1881, between George Davidson, of the first part, and George E. Forsyth, of second part, and the creditors of the said George Davidson, who should sign and seal the same within 60 days from the date thereof, of the third part; after reciting that he, the said George Davidson, was then unable to pay all his just debts, and had agreed to assign and convey all his estate, both real and personal, unto the said George E. Forsyth in trust for the benefit of all his creditors in manner thereafter provided, in consideration of the premises, and of one dollar paid him by the said George E. Forsyth, the receipt whereof was acknowledged:

Did grant, bargain, sell, assign, convey, transfer and set over unto the said George E. Forsyth, his heirs and assigns, all the said George Davidson's lands, tenements and hereditaments, goods, chattels, merchandise, stock in trade, debts and sum and sums of money, due, owing or belonging unto the said George Davidson, and all securities, had, taken or obtained for the same and all his right, title and interest, in and to the same, to have, and to hold the same unto the said George E. Forsyth, his heirs, executors, administrators and assigns, upon the special trusts nevertheless that said

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George E. Forsyth shall forthwith take possession and seisin of the premises hereby conveyed and within such convenient time as to him the said George E. Forsyth shall seem meet by public or private sale for the best price that can be procured, shall convert all and singular the premises into money and as soon as possible collect all and singular the debts and sum and sums of money aforesaid, and after deducting the cost and charges of the trusts before mentioned, including the costs of these presents and including a commission of five per cent. on the net proceeds of said estate for the remuneration of said Forsyth, shall pay and apply the money arising therefrom in manner following, that is to say; in the first place shall pay and discharge in equal portions the respective debts due from the said Geo. Davidson to Arthur Fordham, John McNab and Isaac H. Mathers, all of Halifax, aforesaid, and secondly, after the payment in full of the debts last above mentioned, shall out of the residue pay and discharge in equal portions the respective debts of all creditors aforesaid, who shall sign and seal these presents within the said period of sixty days, and in the third place, after the full satisfaction and discharge of the debts last above mentioned, shall pay over the surplus (if any) to the said George Davidson, his executors, administrators and assigns.

In witness whereof the parties to the said presents have hereunto their hands and seals set and affixed the day and year first before written.

GEORGE DAVIDSON. [L.S.]
GEORGE E. FORSYTH. [L.S.]
ARTHUR FORDHAM, [L.S.]
A creditor of said George Davidson.

And, subsequently, some twenty other creditors of said Davidson, who, it is admitted, have filed claims against the estate of the said Davidson. Under this deed possession of the goods in question was delivered to the defendant Forsyth who went into possession, not having had any notice of the deed of the 8th of May, 1880, no registration of the same having taken place, by arrangement between the parties thereto, till the 12th day of December, 1881, the said Davidson carrying on his business in the usual manner as if no mortgage existed, by selling and disposing of his goods and obtaining on credit other goods, including the goods in question. After the defendant had entered into pos-

session of these goods under the deed of the 13th of December, 1881, the plaintiffs claimed them as their property under the mortgage of the 8th of May, 1880, and commenced an action in the Supreme Court of Nova Scotia to replevy the same, in which suit, for some reason not stated, they failed, and they then, on the 2nd of February, 1882, commenced this action.

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While the arrangement not to register this deed, and keeping the same secret, thereby enabling the said Davidson to obtain credit as the ostensible owner of the stock he was dealing with in the ordinary course of business, and with the stipulation that he should convey all goods subsequently purchased on the strength of such credit to the plaintiffs, was a transaction, to say the least of it, of a most questionable character, it is not, and cannot be, I think, under the evidence, disputed, that the deed of the 13th of December was a *bonâ fide* transaction on the part of Forsyth, Fordham and the other creditors of Davidson, without notice of the existence of the mortgage or any notice whatever of any equitable claim on the part of the plaintiffs thereunder.

The question now raised is not between plaintiffs and Davidson, but between plaintiffs and Forsyth, as trustee, and Fordham and the other creditors of Davidson, and is in fact a simple question as to which shall have priority, the creditors under the mortgage or the creditors under the assignment to Forsyth. By the mere agreement of the deed of the 8th of May, 1880, to convey all stock Davidson might purchase, no property or title in any such goods passed to the plaintiffs. But by the deed of the 13th of December, 1881, the title and property in these goods, then in the possession of Davidson, vested absolutely in Forsyth, and Fordham, a creditor, being a party to the deed, the relation of trustee and *cestui que* trust was established between Forsyth

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and Fordham and the other creditors of Davidson whereby Fordham and the other creditors obtained a beneficial interest under it. The operation of the deed being to transfer the property, and to convey the legal title to Forsyth, and vest the beneficial interest in the creditors, for so soon as Fordham signed the deed, which he did at the same time as Davidson and Forsyth, there was a consideration, Forsyth ceased to be a mere mandatory of Davidson, but an onerous trust was imposed on him, creating a duty to the creditors which he could not cast off. This relation being established, it is, as Lord Campbell says in *Harland* v. *Binks* (1) "consideration for the deed, and it is no longer voluntary." Therefore, the plaintiff, having only an equitable title, and the defendant a legal title without notice, the legal title must prevail. I think this case is governed in principle by the cases of *Joseph* v. *Lyons* (2), where Brett, M.R. says:

> It was argued for the plaintiff that the bill of sale gave him the legal property in the after-acquired goods whenever they should come into the possession of Manning on the premises. For the defendant it was argued that the bill of sale only gave the plaintiff an equitable property in the goods. It was ingeniously argued for the plaintiff that the bill of sale was equivalent at law to a contract on the part of Manning that when any goods should come on to his premises for his business they should become the legal property of the plaintiff, and the case was likened to a contract of purchase and sale of unspecific goods, where the property does not pass at the moment of the contract, but when the goods are appropriated. Let us see what the law is. For a long series of years, where a bill of sale has assumed to assign future property to come upon the premises of the grantor, it has been held by the common law courts that that assignment does not pass the legal property in the goods, even when they have come on to the premises. The courts of equity have always held that, in those circumstances, when the goods have come upon the premises, the interest of the assignee under the bill of sale is not a legal, but only an equitable, interest. Therefore the case is decided by authority. The interpretation in equity was that the document

(1) 15 Q. B. 718.

(2) 33 W. Rep. p. 146.

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was considered as equivalent to a contract that, when the goods should be acquired, then there should be an equitable property in them. It was equivalent to a contract. They said that it was to be supposed that the parties intended that there should be some security, and that the court should say that it was an equitable contract that, when the goods should come into possession, there should be an equitable property in them. It seems to me that the language of Jessel M. R., in *Collyer* v. *Isaacs*, is exceedingly plain, and that, according to ordinary interpretation, it means what I have stated. He says, "The creditor had a mortgage security on existing chattels, and the benefit of what was, in form, an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law," he does not say "make a contract to," but, "assign what has no existence. Any man can contract to assign property which is to come into existence in the future, and, when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The contract is the governing thing there, and the clear meaning is that the contract becomes a complete assignment in equity and not in law.

It follows, therefore, that the interest of the plaintiff in these goods, even after they had come into the possession of Manning, was only an equitable interest. The legal interest, *i.e.*, the legal property, was in Manning. Therefore Manning, having the legal property, takes that property which at common law is his, and pledges it for an advance of money. The right of the pledgee in England as to goods which are the legal property of the pledger is not an equitable, but a legal right. It is a legal right, to be enforced by legal remedies. Therefore the title of the defendant is a legal right, that of the plaintiff is only an equitable interest. In those circumstances the plaintiff could not maintain against the defendant the legal remedy of trover and detinue.

Lindley L. J.—I am also of the same opinion. The plaintiff must establish either, first, that the legal title was in himself, or, secondly, that he had an equitable title in the goods, and that the defendant had notice of it when he acquired the goods. As to the first point, I confess that I cannot see how it has been made out consistently with the authorities. The clause at the end of the deed shows that the plaintiff knew that he had not got a legal title. The operation of the deed was to transfer the legal property in the existing stock-in-trade, but an equitable title in that to be acquired afterwards. The plain-

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tiff has an equitable title, and he can only deprive the defendant of his title by showing that the defendant had prior notice of the equitable title. The doctrine of constructive notice has not been carried so far as was suggested. It appears to me that our conclusion must be that the appeal must be allowed, and that judgment must be entered for the defendant with costs.

And in *Hallas* v. *Robinson* (1) Brett M. R. says:

In this case the defendant takes a bill of sale which, to my mind, is sufficiently specific, and gives him a right to take possession of after acquired property which should be brought upon the premises of the grantor. That, as has been decided, only gave the defendant an equitable title in the goods after they were brought on to the premises. It gave him a right to take possession on failure of the condition of the bill of sale, and if nothing else had happened, and he had taken possession rightly, he would have had a legal title in those goods. But something did happen, and in the meantime, whilst he had only that equitable title, and after property had been brought on to the premises, the same grantor gave a bill of sale to the plaintiff on property then upon the premises. I think the contention on that point was right, and that that bill of sale gave the plaintiff at that time a legal title in those goods subject to an equity. That legal title could not be ousted by reason of the defendant taking possession after it had vested in the plaintiff. Therefore, the defendant is in the same position as a person who has bought goods from a man who has already sold the goods to some one else, in which case the person on whom the fraud has been committed must suffer.

Baggally L J.:

I am of the same opinion. I think that the case is governed by *Joseph* v. *Lyons*, for though that is undoubtedly the converse of the case before us, still, for the purpose of decision as to the interests of the parties, the circumstances are the same. So far as by the bill of sale of 1875 the grantor purported to grant chattels which might be brought upon the premises, the bill of sale was null and void at law. But there was an equitable right that when the goods should be brought on to the premises the grantee should have an equitable interest in them, which, by taking possession of the goods, could be ripened into a legal interest if there was no intervention. But there was an intervention, because in 1882 property then in the actual possession of the grantor, and acquired between the dates of the first and of the second bill of sale, was granted to the plaintiff. Therefore that passed the legal title in the property to him. When

(1) 33 W. R. 426.

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that bill of sale was executed each party had an equitable interest in the goods, but the plaintiff had acquired a legal interest, and his title must prevail over that of the defendant. Thus far the case is entirely governed by *Joseph* v. *Lyons*. But there is the additional circumstance that when the plaintiff sought to take possession of the property he found that the defendant was in possession under an assignment which passed the equitable interest. By taking that possession, which would have been a perfectly good possession to give a legal interest, he could not deprive a person who had a legal interest of the benefit of that interest. It is not an answer to inquire whether the defendant had notice of the plaintiff's rights. The plaintiff and defendant may be regarded as two innocent persons, each of whom had advanced money, but one only of whom had a good title as against the other, and, therefore, the better title must prevail. The only distinction between this case and *Joseph* v. *Lyons* does not establish any real distinction in the way in which this case should be decided.

The plaintiffs had at most only an equitable interest, the legal title and property was in Davidson, which he transfers to Forsyth in trust, who had no notice of any such equitable interest, whereby the property became absolutely vested in Forsyth for the benefit of the creditors of Davidson. Forsyth enters into possession, and in pursuance of the trust, sells the goods on 30th December, 1881, receives the consideration money, hands the property over to the purchaser, and ceases to have any further control over, or any interest in the same.

I think the plaintiffs must fail, because Forsyth had a legal title to the property which gave him a superior right to any equitable interest the plaintiff may have had, and the equities being equal the legal title must prevail.

STRONG J.—I assume, for the purpose of the present decision, that a bill of sale, such as that which is in question here, is within chap. 84, 4th series of the revised statutes of Nova Scotia, and requires filing with the register of deeds according to the provisions

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of that statute in order that its priority may be conserved; it has been so considered by the court below, and in argument here counsel on both sides have assumed that upon the proper construction of the statute in question, a bill of sale by way of mortgage of after-acquired chattels is within the terms of the Act referred to. I will in the first place dispose very shortly of two points which were made in argument, neither of which seems to me to be entitled to any weight. The first is that by the agreement not to register the bill of sale, the appellants disentitled themselves to any relief in equity, and, therefore, when on the 12th December, 1881, they did register, they did not thereupon become entitled to such rights and priorities as the statute would, from that time, have conferred upon them in case they had never entered into an agreement not to file the mortgage. It is sufficient to say that this objection, which consists in imputing to the appellants what is called a fraud on the statute, is shown by two analogous cases in England to have no foundation. *Ramsden* v. *Lupton* (1); *Smale* v. *Burr* (2). These cases completely answer this argument against the validity of the bill of sale, for they show that an express agreement to evade the English Act by executing renewals of the bill of sale, at such short intervals as to substitute a new security for the preceding one before the statutory term for registration had expired, was no objection to the validity of the security, and that the mortgagee's rights were in no way effected by it. The mortgagees here in like manner are therefore entitled to claim the right secured to them by the statute, that their bill of sale shall take effect and have priority from the time of the filing thereof. (Chap. 84 Rev. Stat. 4th series section 1).

The other point was that the words of description

(1) L. R. 9 Q. B. 17. (2) L. R. 8 C. P. 64.

used in the deed were too vague and uncertain to entitle the mortgagees to an equitable lien upon the portion of the stock in trade which was acquired or purchased by the mortgagor subsequently to the execution of the instrument. The portions of the mortgage deed material to this question are as follows:

And for the purpose of securing the said indebtedness the said party of the first part agrees to convey and does hereby assign, transfer and convey unto the said parties of the second part, all the stock-in-trade, chattels and effects, now being in the store of the said party of the first part, on Granville street, in the city of Halifax, to have and to hold the same to their own use and behoof; and he further agrees to convey to the said parties of the second part, all stock which during the continuance of the said indebtedness he may purchase for the purpose of substituting in place of stock now owned by him in connection with his business.

The bill of sale also contained the following covenant by the mortgagor:

The said party of the first part further covenants that he will at all times hereafter, upon request, give to the said parties of the second part, all such transfers or conveyances as they may reasonably require for the purpose of conveying to them all such stock-in-trade as he at the time of such request may possess, be owner of or have any interest in, in order more effectually to secure the payment of any balance being part of said indebtedness which at any time hereafter may or shall be due as aforesaid.

That there is any uncertainty in this I am unable to see; surely it was a matter susceptible of being rendered certain by proof that stock acquired by Davidson subsequently to the execution of the bill of sale was purchased "for the purpose of being substituted for stock then owned by him in connection with his business," however difficult, in certain far-fetched hypothetical cases, when the stock had not actually been brought on the premises, used by him for his business and added to his other stock, such proof might be. That however, would be an objection, not to the deed itself as void for uncertainty, but to the proof by which it was sought to identify the goods. It would, I think, be unwarranted

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by either legal considerations or by common sense to say that this claim must therefore be held void for the reasons suggested. Then the very fact that the goods claimed here have been substituted for other stock by being added to and incorporated with the general stock-in-trade with which the grantor was carrying on his business brings them within the terms of the deed and constitutes sufficient proof that they were purchased for that purpose. *Res ipsa loquitur*. There might be some difficulty, as a matter of evidence, if the goods had never been added to the old stock or brought to the mortgagee's place of business, but that is a case which does not occur here, and one with which we have nothing to do. It appears to me, therefore, that in this respect the bill of sale was sufficiently certain and definite, and that the goods claimed are shown by the way in which they have been dealt with to come within the most strict and literal construction which can be placed on the language in which this claim is expressed. I entirely agree with what Mr. Justice Weatherbee has said on this head, and I refrain from dwelling longer on it, as I adopt his observations.

Then the deed being thus free from these two preliminary objections to it, that it was void on grounds of public policy, in consequence of the agreement not to register, and that the portion of it relating to after-acquired goods was void for uncertainty, we have next to enquire what effect was given to it by the registration which took place on the 12th December, 1881. The statute says (section 1) that upon registration the deed shall "take effect" against the several classes of persons mentioned in the same clause, amongst others, against "assignees for the general benefit of the "grantor's creditors." I do not understand these words "shall take effect" as conferring upon the deed by reason of its being registered or filed any greater or

more extended operation than it would at common law, and before the statute was passed, have had immediately upon its execution. Registration is only a process or solemnity in addition to the ordinary common law execution by sealing and delivering required to make the instrument effectual against the third persons named. But when the deed is once thus perfected its legal construction, and its operation both at law and in equity, must be exactly the same as they would have been irrespective of the statute.

This brings us to the consideration of the nature of the appellants' title to the goods now claimed being those acquired by the grantor subsequently to the execution of the bill of sale. The title asserted by the plaintiffs is, of course, a purely equitable one. If they had set up a legal title their bill would have been demurrable, as in such case their remedy would have been at law by an action of trover or detinue; and it is equally clear upon the evidence that in this they were perfectly right. In order to enforce a legal title some additional act on the part of the grantor, such as a further assignment, or at least a delivery of possession, of the after-acquired goods would have been requisite, and no such *novus actus* is proved. The law on this subject is so fully and thoroughly considered and explained in the well-known case of *Holroyd* v. *Marshall* (1), particularly in the opinion of Lord Westbury, delivered in that case, that no further reference to authorities on this point is called for. If, therefore, the suit had been instituted against the grantor before any assignment to the respondent was made, the relief prayed would have been granted as a matter of course. Then the appellants must be entitled to the same relief as against the respondent Forsyth, unless he can how that he is a purchaser for valuable consideration

(1) 10 H. L. Cas. 191.

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without notice, who having obtained a legal title, is entitled to priority over the appellants. This defence is so very imperfectly pleaded by the answer that it may well be doubted whether, according to the strict rules of equity pleading, respondent Forsyth is entitled to avail himself of it. But without dealing with the case on so narrow a ground as a point of pleading, and giving the respondent Forsyth the same benefit of this defence as if it had been pleaded in the most formal and technical manner, it seems very clear on the evidence that he does not bring himself within the conditions essential to constitute him a purchaser for value without notice, so as to entitle himself to protection against the plaintiff's demand. The onus of proving this defence is, of course, as in all cases when it is pleaded, in the first instance on the defendant. He must show that he was a purchaser for valuable consideration. It then lies on the plaintiff, if he can, to neutralize this defence by showing that at or before the time the defendant became such purchaser he had notice of the plaintiffs' equity. Now, what is the evidence to show that the defendant was a purchaser for valuable consideration? We have in the first place the deed of assignment, by which Davidson assigned to the respondent Forsyth, and which is dated and was executed on the evening of the 13th of December, 1881. What Mr. Forsyth says in his evidence as to the date of the execution of the deed, and the circumstances which led to it, is as follows:

> The transfer was made to me on the evening of the 13th December, 1881; at that time I had no knowledge of the existence of the bill of sale under which the plaintiffs claim; on the following Monday I took possession of everything in the store. I got possession from George Davidson.

And in his cross-examination he says:

> George Davidson met me on the street the evening of the 13th December, 1881; he asked me if I would act as his trustee; I did

not then know what he wanted; I do not remember his telling me anything about the bill of sale before the deed was signed; no creditor asked me to accept the trust; I did not employ Mr. Meagher in the matter; his own solicitor drew up the deed of trust; he asked me to go to Mr Meagher's office with him and sign the deed of trust; when he first spoke to me I supposed he wanted to transfer some property to his wife; the deed of trust was read over before we signed it.

Turning to the deed itself we find that it is a general assignment of all the assignor's (Davidson's) estate real and personal, lands, goods, chattels, merchandise, stock-in-trade and debts due to him, and the trust declared of the proceeds when sold are, first to pay the expenses of executing the trust, then to retain a commission of 5 per cent. on the net proceeds of the estate as the remuneration of the trustee, next to pay in full three preferred creditors named in the deed, and lastly to distribute the residue equally amongst such of the assignor's creditors as should sign and seal the deed within sixty days, with an ultimate trust as to any surplus in favor of the assignor himself. It is not alleged or pretended, nor is it recited in the deed, that Forsyth was himself a creditor. It is not shown when the creditors, or when any one of the creditors, had notice of the deed, nor when they assented to or became parties to it. All that appears in the evidence is an admission noted on the face of the depositions as follows:—"It is admitted that the following parties have filed claims against the estate of George Davidson & Co.," and then follows a list of names with the amount of the debt set opposite each; but there is nothing to show when the claims were filed.

What, then, was the effect of this deed before any creditor acceded to it?

Nothing can be better established by authority than the proposition that a trust deed of this kind, whereby a debtor conveys to a trustee for the benefit of creditors,

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does not constitute the trustee a purchaser until some creditor has had notice of the deed, and has either by some positive act or declaration, or by silent acquiescence, acceded to it. Until it is shown that a creditor has such notice the deed is considered by a Court of Equity a mere deed of management revocable by the debtor at will, and the assignee is held to be a trustee for the assignor only. There is scarcely any doctrine in the whole law of trusts in support of which such a long list of authorities can be cited as this. From the case of *Wallwyn* v. *Coutts* (1), *Garrard* v. *Lord Lauderdale* (2) down to *Smith* v. *Hunt* (3) and *Steel* v. *Murphy* (4); decisions are to be found affirming this principle. It makes no difference that the creditors are named in the deed or in a schedule to it; until they or some one of them has notice of the deed, it is revocable, and the assignee held to be a mere trustee for the assignor. So soon, however, as the fact of the execution of the deed has been communicated to a creditor who, though he may not execute it, does not repudiate it—a binding, irrevocable trust is created, which constitutes the trustee a purchaser for value. *Harland* v. *Burton* (5); *Acton* v. *Woodgate* (6). If the trustee is himself a creditor, the deed is binding and irrevocable, and the trustee a purchaser for value, from the time of its execution. *Siggers* v. *Evans* (7). All the cases are collected, and the conclusions to be drawn from them to the effect just laid down, in the notes to the case of *Ellison* v. *Ellison* in White and Tudor's leading cases (8).

Applying the law thus established to the facts in evidence already referred to, without more, it would follow that the respondent Forsyth fails to

(1) 3 Mer. 707.
(2) 3 Sim. 1.
(3) 10 Hare 30.
(4) 3 Moore P. C. 445.
(5) 15 Q. B. 713.
(6) 2 M. & R. 495.
(7) 5 E. & B. 367.
(8) Vol. 1 p. 288 (5th Ed).

establish his defence that he is entitled to priority in respect of his legal title over the equitable title to the appellants, for, as I have before said, there is nothing to show when creditors first had communication of the deed, and the claims filed, the reference to which is the only allusion to the assent of creditors to be found in the depositions may not have been presented until after the suit was instituted, and it was incumbent on the defendant to prove this defence strictly. But the evidence authorises us to put the case much more strongly than this against the respondent. In his cross-examination, part of which has already been extracted, Mr. Forsyth proceeds to say:

> The next morning (referring to the morning after the execution of the deed) Mr. Ackhurst and Mr. Barnstead (two of the appellants) came to the store and claimed title to the goods under the bill of sale. I took advice of counsel in the matter, and intimated to them afterwards that they had no right under their bill of sale to the goods acquired subsequent to its date.

It will be remembered that the deed was executed on the night of the 13th of December, 1881, and thus it appears that the next morning the respondent Forsyth, at a time when, so far as we have evidence, no creditor had become privy to the deed, and consequently whilst it was still revocable and the assignee a mere trustee for the debtor, had clear and distinct notice of the appellant's title, and proceeded to take legal advice upon it. The consequence must be that when creditors afterwards became parties to the deed and thus constituted Mr. Forsyth from that time a trustee for them, and a person who thus became entitled to the rights of a purchaser for value, that defence was rendered unavailing to him by the notice he had previously received, since, beyond all doubt or question, the notice so given to the trustee affected creditors subsequently coming in and taking the benefit of the assignment to as great an extent as it would have done if Forsyth had had notice

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when he first accepted the trust and executed the deed. It seems to me therefore an extremely clear case for giving the appellants the relief prayed, just as such relief was given in *Holroyd* v. *Marshall*, for the reason that in that case the defendant execution creditor was held to take subject to the equitable title of the assignee of after-acquired property, because he did not stand in the position of a purchaser for valuable consideration without notice.

It is out of the question to say that the statute before referred to (the Bill of Sale Act) has any bearing on the question of law just considered, or with its application here. All that the statute does is to require the filing of the bill of sale in order to make it a perfect instrument. When the deed is filed it is left to its ordinary legal and equitable operation, which is the same as it would have been before the statute was passed. The requirements of the statute which had been complied with are therefore wholly collateral to this question. It never could have been intended, by requiring registration, to make a deed irrevocable which, before the statute, was a mere revocable deed of management, thus affecting the rights of an assignee in a matter with which the Act was not intended to interfere. But there is even a more conclusive answer to any argument of this kind for, unless I have misstated the law, the effect of the decisions I have referred to is to show that the respondent Forsyth did not become an assignee for the benefit of creditors, but remained a mere assignee or trustee for the benefit of the settlor himself until the assignment was, by being actually communicated to a creditor, converted into a deed of trust for creditors, and therefore on the evidence he was not in a position to plead that defence until a time subsequently to that at which he had notice of the appellants' title.

There remains still another point which may be

noticed, though I do not think it would afford a ground for upholding the title of the appellants. The first section of the statute enacts that the bill of sale shall only "have priority" and, take effect, "from the time of the filing thereof."

There is nothing in the Act making registration notice, and I cannot read the words just quoted as intended to giving any preference or other priority to a registered bill of sale than before the statute it would have had without registration, and that it is plain, as I have already stated, would only have been an equitable priority so far as it created a charge on chattels to be subsequently ascertained. I am of opinion, therefore, that no argument from which the plaintiff can derive any benefit can be founded upon the use of these words.

It can be no objection to the relief prayed that it is in respect of chattels, contracts of sale relating to which are not ordinarily the subject of equitable jurisdiction by way of specific performance. This objection is fully answered by Lord Westbury in the case of *Holroyd* v. *Marshall*, a case like the present, being distinguishable on the ground of trust, for when a fiduciary relationship is once established a court of equity will interpose to enforce the trust whatever may be the nature of the property. In the notes to *Cuddee* v. *Rutter* in White and Tudor's Leading Cases (1), the law is thus stated:

> Although courts of equity, as we have seen, will not ordinarily decree specific performance of contracts to purchase chattels if damages at law will be an adequate compensation, nevertheless, if a trust is created, the circumstance that the subject matter to which the trust is attached is a formal chattel will not prevent the court from enforcing the due execution of that trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. See also *Pooley* v. *Budd* (2).

I am of opinion that the appeal should be allowed

(1) Vol. I. Ed. 5. p. 859. (2) 14 Beav. 34.

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with costs, and a decree for an account, as prayed, with costs be entered in the court below.

FOURNIER J.—I am in favor of dismissing the appeal for the reasons given by the learned judge in equity.

HENRY J.—I am strongly of the opinion that had there been but one point in the case I should have come to the conclusion that the arrangement between Davidson and McAllister, by which the creditors were not to be informed of the bill of sale which was executed, and when McAllister became a party to that, by which he was benefitted by the continuance to Davidson of supplies of goods by other parties, he apparently having a large stock and large business going on, and having taken this secret bill of sale which the statute of Nova Scotia was intended to prevent, rendered the agreement on the point of McAllister by which Davidson was to be enabled to impose upon the world outside and obtain credit for the benefit of McAlister, who, through Davidson obtaining stocks of goods from the parties, which were to inure to Davidson under this bill of sale, was, I consider, a fraud, and an attempt made by McAllister to obtain a benefit through Davidson obtaining further supplies of goods for his store for his benefit, and that he, being a party to that, cannot take advantage of that which was intended as a cover and a cloak to enable Davidson to obtain further credit. My judgment is not necessarily founded on that position, but if it were, I think I should have no difficulty in arriving at the conclusion that McAllister ought not to profit by the bill of sale made under the agreement in question, by which the other party, by false pretences, was enabled to obtain further credit from parties outside. I think the law in regard to it has been properly laid down by his Lordship the Chief Justice, supported and sustained by the case to which he has referred, viz: *Hallas* v. *Robert-*

son (1) which is exactly in point with this case. In that case Brett M.R., says (2): That confirms the judgment in *Joseph* v. *Lyons* (3), and enunciates a legal position applicable to this case. According to that doctrine McAllister had but an equitable title; not having obtained a legal title under that bill of sale the legal title was transferred legally by Davidson to Forsyth, and he is therefore entitled, I think, to the judgment of this court.

TASCHEREAU J.—For the same reasons I am in favor of dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Sedgwick, Stewart & O'Brien.*

Solicitors for respondents: *Weeks, Pearson & Forbes.*