[HIGH COURT OF AUSTRALIA.]

MALICK AND ANOTHER . . . . APPELLANTS;

AND

LLOYD (OFFICIAL ASSIGNEE) . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 28, 29, 30; *August* 13.

Barton A.C.J., Gavan Duffy and Rich JJ.

Bill of sale—Registration—Assignment of after-acquired property—Validity as against assignee in bankruptcy of grantor—Bills of Sale Act 1898 (*N.S.W.*) (*No.* 10 *of* 1898), *secs.* 3, 5—*Bankruptcy Acts Amendment Act* 1896 (*N.S.W.*) (60 *Vict. No.* 29), *sec* 31.

Sec. 3 of the *Bills of Sale Act* 1898 (N.S.W.) provides that "'Bill of sale' shall include bills of sale, assignments, transfers, declarations of trusts without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt . . ."

Sec. 5 of the same Act contains a provision that "No bill of sale shall have any validity as against the official assignee or trustee of a bankrupt estate, unless it is duly registered in accordance with, and within the time prescribed by this Act or any Act amending the same."

Held, that an instrument which purports to assign goods acquired after the execution thereof does not require registration in order to give it validity as against the official assignee in bankruptcy of the grantor.

Decision of *Street* J.: *In re Catip*, 12 S.R. (N.S.W.), 552, reversed on a ground not argued below.

APPEAL from the Supreme Court of New South Wales.

A motion was made to the Supreme Court in Bankruptcy by Charles Fairfax Waterloo Lloyd, the official assignee of the estate of Hilda Catip, a bankrupt, for an order declaring void as against the official assignee a certain alleged indenture or bill of

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sale made on 28th October 1910 between the bankrupt of the one part and Nicholas Malick and Aziz Malick, the respondents to the motion, of the other part, and registered under the *Bills of Sale Act* 1898; and for an order declaring that the official assignee was entitled as against the respondents to the stock-in-trade, furniture, plant, fixtures, fittings, book debts, books of account, live stock, vehicles, harness, goods, chattels and effects seized or taken possession of by the respondents purporting to act under and by virtue of the said alleged indenture or bill of sale, or to be paid the value thereof; and for an order directing the respondents to pay to the official assignee the value of the stock-in-trade, &c.; and for an order referring it to the Registrar to inquire and ascertain the nature and value of the property so seized and taken possession of. The grounds of the motion were: (1) that the indenture or bill of sale was void within the meaning of the *Bills of Sale Act* 1898; (2) that in any event the stock-in-trade, &c., were property of the bankrupt at the commencement of the bankruptcy and as such passed to and became vested in the official assignee; and (3) that the book debts were at the commencement of the bankruptcy or at some time between that date and the date of the order of sequestration in the possession, order, or disposition of the bankrupt by consent and permission of the respondents under such circumstances that the bankrupt was the reputed owner thereof.

The motion was heard by *Street* J., who held that the registration of the bill of sale in question was defective on the ground that the bankrupt's occupation was not properly stated in the affidavit filed on registration, and that the bill of sale was consequently void as against the official assignee. He therefore made an order declaring that the bill of sale was void as against the official assignee, and that the official assignee was entitled as against the respondents to the property taken possession of by them under it; ordering a reference to the Registrar in Bankruptcy to inquire and ascertain the nature and value of the property so taken possession of; and further ordering that the respondents should pay to the assignee the amount of the value so ascertained: *In re Catip* (1).

(1) 12 S.R. (N.S.W.), 552.

From this decision the respondents now appealed to the High Court.

The material facts are set out in the judgment hereunder.

Campbell K.C. (with him *Maughan*), for the appellants. The description of the grantor as "wife of Moses Catip" was a sufficient description: *Luckin* v. *Hamlyn* (1); *Neverson* v. *Seymour* (2); *Feast* v. *Robinson* (3); *Blount* v. *Harris* (4); *O'Connor* v. *Quinn* (5); *Throssell* v. *Marsh* (6); *Usher & Co.* v. *Martin* (7); *Ex parte Chapman*; *Re Davey* (8); *Downs* v. *Salmon* (9); *Re Davies*; *Ex parte Equitable Investment Co. Ltd.* (10); *Ex parte M'Hattie*; *In re Wood* (11); *Kemble* v. *Addison* (12). Future acquired goods are covered by the bill of sale, and, having come into the possession of the grantee, the assignment is effective: *Morris* v. *Taylor* (13); *Richards* v. *Cohen* (14).

Loxton K.C. and *R. K. Manning*, for the respondent. The bill of sale only covered goods brought on to the premises at Narrabri or other places where at the time the bill of sale was given business was being carried on or which might then be in course of transmission to those places. Sec. 31 (I.) of the *Bankruptcy Acts Amendment Act* 1896, which is practically in the same words as sec. 5 of the *Bills of Sale Act* 1898, required registration of all bills of sale, including bills of sale of after-acquired goods. The definition of "bill of sale" in sec. 3 of the *Bills of Sale Act* 1898 is not exclusive, and in sec. 5 it should be read as referring to those bills of sale which were covered by sec. 31. [They referred to *Thomas* v. *Kelly* (15); *R.* v. *Kershaw* (16); *R.* v. *Hermann* (17).]

[RICH J. referred to *In re Isaacson*; *Ex parte Mason* (18).

GAVAN DUFFY J. referred to *Bruce & Sons* v. *McCluskey* (19).]

The description of the grantor is insufficient.

Maughan, in reply.

Cur. adv. vult.

(1) 21 L.T., 366.
(2) 97 L.T., 788.
(3) 70 L.T., 168.
(4) 4 Q.B.D., 603, at p. 605.
(5) 12 C.L.R., 239.
(6) 53 L.T., 321.
(7) 61 L.T., 778.
(8) 45 L.T., 268.
(9) 20 Q.B.D., 775, at p. 778.
(10) 77 L.T., 567.
(11) 10 Ch. D., 398, at p. 401.
(12) (1900) 1 Q.B., 430.
(13) Legge, 978, at p. 984.
(14) 7 W.N. (N.S.W.), 51.
(15) 13 App. Cas., 506, at p. 508.
(16) 6 El. & Bl., 999.
(17) 4 Q.B.D., 284.
(18) (1895) 1 Q.B., 333, at p. 337.
(19) 21 V.L.R., 262, at p. 266.

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The judgment of the Court was read by

BARTON A.C.J. Hilda Catip is the wife of Moses Catip, and in October 1910 was living with him at 13 Adelaide Street, Woollahra. The appellants are a firm trading in Sydney as merchants, supplying country storekeepers. On 28th October 1910 Mrs. Catip gave the appellants a bill of sale over her furniture at her place of residence, and "all and singular the stock-in-trade and plant of the said mortgagor as a storekeeper at Narrabri or elsewhere in the said State now being in upon or about the premises now occupied by the mortgagor at Narrabri aforesaid or elsewhere, . . . and also the goodwill of the business of the mortgagor as a storekeeper, and the book and business debts now due or hereafter to accrue due to the said mortgagor in the said business, and the live stock fittings fixtures plant harness household and office-furniture, books of account goods chattels and effects now being in upon or about the said premises or used in connection with the said business, and also the stock-in-trade furniture goods plant chattels and effects that shall at any time or times hereafter during the continuance of this security be in upon or about the said premises and either in lieu of or in substitution or in addition to the said stock-in-trade furniture goods chattels and effects now therein or otherwise or which shall be purchased for or supplied or advanced to or be in course of transmission to the said mortgagor at either of the said premises or elsewhere in the said State." The bill of sale was to secure the price of goods to be supplied by the grantees to the grantor to a value not exceeding £500, and there was a proviso for redemption on payment, on demand, of that sum or such other sum as might become due "for such goods so to be supplied and all further sums that the said mortgagor may become indebted to the said mortgagees for further advances goods supplied or otherwise," with interest in the meantime at 8 per cent. The power to enter and to take possession on default extended to "the said premises at Woollahra and Narrabri aforesaid and any other premises where the said furniture goods and plant chattels and effects may be or may be supposed to be."

The goods, the stock-in-trade first supplied on the footing of this security, were purchased on 25th, 26th, 27th and 28th October 1910. On the last-named day Moses Catip went to Narrabri

holding a full general power of attorney for his wife. On the 31st he procured possession of a shed or shop, obtained delivery of the goods, which had been forwarded by rail, and began a storekeeping business for his wife. This enterprise apparently did not succeed. It came to an end in four or five weeks. Then Catip, who acted for his wife in business throughout, removed the stock from Narrabri to Moree, and attempted to establish a business there. This venture was abortive, as also was an attempt made in the meantime to set up a business at Boggabri. Then Catip established a business at Gunnedah, where he opened a store five or six weeks after the Narrabri business had been abandoned. About December 1911 he also began business at Gloucester. The stores at these two places remained open until 4th April 1912, when the appellants as mortgagees took possession.

Catip says that when he opened the store at Gunnedah the goods in stock had been bought from several firms, including the appellants, but he does not, nor does any other witness, affirm that any part of them was included in the original stock-in-trade at Narrabri, purchased eighteen months before the seizure. Catip says that he bought "everywhere" for the Gunnedah and Gloucester stores, making most of his purchases from the appellants. No evidence came before us of the amount of the debt at the time of seizure, though an affidavit made on the renewal of registration stated it at £1,900 8s. 2d. on 19th October 1911. At that time the Gunnedah store was Mrs. Catip's only place of business, and the amount stated goes to show that there was a considerable turnover of goods. Taking all the evidence together, and bearing in mind the fact that so long a period elapsed between the purchase of the goods sent to Narrabri in October 1910 and the seizure in April 1912, it cannot be said to have been established that any of the goods originally purchased were part of the stock-in-trade at the latter date. In other words, all that was seized by the appellants came under the designation of "after-acquired property"—that is, acquired after the giving of the security.

On 30th April 1912 a sequestration order was made against Hilda Catip on her own petition, and the respondent was constituted the official assignee of the bankrupt estate.

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The respondent moved the Supreme Court in Bankruptcy under sec. 134 of the Act of 1898 for an order declaring the bill of sale void as against him, for a declaration that he was entitled as against the appellants to the stock-in-trade, book debts, &c., seized by them under the bill of sale, and for an order to the appellants to pay to him their value. This motion having been allowed by *Street* J., we are now to say whether his order ought to stand.

There were many objections taken to the bill of sale before his Honor. The judgment, however, was based on his opinion that the affidavit of the attesting witness on the registration of the bill of sale ought to have stated, but did not state, the occupation of the grantor, Mrs. Catip, at the date of the affidavit and of registration, 31st October 1910. This, it will be remembered, was also the date on which Moses Catip began business for the grantor, now the bankrupt, at Narrabri, and his Honor was of opinion that she should have been described as a storekeeper, and not merely as the wife of Moses Catip.

We do not think it necessary to express any opinion as to the correctness of his Honor's conclusion on that part of the case, because the decision, as it seems to us, ought to depend on considerations which were not definitely, if at all, brought before him.

The property seized not having been shown to have been *in esse* at the time of the giving of the bill of sale, and the respondent's attack upon that instrument being based on the alleged invalidity of its registration, it seems to us that the real question is whether the instrument, so far as it operates as an assignment of future property, requires registration at all. If it does not, there is no ground for the respondent's motion. An instrument "may be void as to part of it while it remains good as to the rest of it, provided that the subject matter is so described as to be severable": *In re Isaacson*; *Ex parte Mason* (1).

Sec. 5 of the *Bills of Sale Act* 1898, which is a consolidating Statute, is in these terms:—"No bill of sale shall have any validity as against the official assignee or trustee of a bankrupt estate, unless it is duly registered in accordance with, and within

(1) (1895) 1 Q.B., 333, at p. 338.

the time prescribed by this Act or any Act amending the same, and unless such registration is renewed by the grantee, or his assignee, once at least in every twelve months."

It is under this provision that, as the respondent contends, the bill of sale given by the bankrupt requires due registration as to after-acquired as well as then existing property; without which process he says it is void as against him. He contends that the term "bill of sale," as there used, includes assignments of after-acquired property; that the definition in sec. 3 does not apply to it because that section does not purport to enumerate all the instruments that may be regarded as bills of sale. Secs. 5, 6, 7, 8 and 10 (4) of the *Bills of Sale Act* 1898 are re-enactments upon repeal of secs. 31, 32, 33 and 34 of the *Bankruptcy Acts Amendment Act* 1896. The respondent's contention that the definition does not apply is, so far as we understand it, based on the fact that in the last-mentioned Act sec. 1 provided that it should with the Bankruptcy Acts of 1887 and 1888 be cited together and construed as one Act; which shows, he says, that the above-named sections of the Bankruptcy Act of 1896 are not to be read with the Bills of Sale Acts. These sections stood by themselves in the Act of 1896, and there is nothing in the Bankruptcy Acts which affects the ordinary meaning of their terms. We see no reason why the term "bill of sale" in sec. 31 of the Bankruptcy Act of 1896 should not always have been read in that section as an expression which had already acquired a meaning similar to that given to it by the original *Bills of Sale Act*, and which is exactly the meaning given to it by the consolidating Act of which it is now a part. Ever since 1856 there was only one sense in which lawyers and the public here had understood the expression "bill of sale," and that is the sense in which the English Act of 1854 and 19 Vict. No. 2 had alike used it. But if this were not so, we are thrown back upon the meaning of the term as used before this Statute of 1854—that is, the common law meaning. Then, what was the meaning of a bill of sale at common law? It seems to us that it meant nothing more than an assignment of personal chattels in existence, and therefore assignable at common law. It might be secret or open; it might be accompanied or followed by a change of possession. These were

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incidents which might affect the nature or the validity of the transaction, but the document itself was still a bill of sale. It was because, by secret documents of this character, without change of *possession*, the grantors were enabled "to keep up the appearance of being in good circumstances and *possessed* of property," while the grantees had "the power of taking *possession* of the property of such persons to the exclusion of the rest of their creditors" (see the preamble to the original Act, 19 Vict. No. 2), that legislation became necessary.

We are free from doubt that the definition in sec. 3 of the Act of 1898 applies, and that its effect in connection with sec. 5 is to require due registration for the protection of the grantee against the official assignee where and so far as the security includes chattels capable of complete transfer by delivery, but not to require any registration where no such chattels at all are included: See *Bruce & Sons* v. *McCluskey* (1).

The term "bill of sale" is, by sec. 3, made inclusive of a considerable variety of personal chattels—meaning goods, furniture, fixtures, and other articles capable of complete transfer by delivery. Whether the document be in form a bill of sale, an assignment, a transfer, a declaration of trust without transfer, or other kind of assurance, or a power of attorney, authority, or licence to take possession as security for any debt, it is still only a bill of sale (requiring registration) to the extent that it deals with "articles capable of complete transfer by delivery." And to make that limitation to articles *in esse* in possession more distinctly the note of "personal chattels," the definition goes on to exclude various interests, &c., and among them choses in action,

But, it is said, the definition of "bill of sale" is not exclusive, and therefore it includes everything that was previously known as a bill of sale. That may be conceded, but we have already pointed out that before the passage of the Acts requiring registration, the term meant nothing more than an assignment of personal chattels in existence. The term with that meaning is fatal to the respondent's contention that, where future property is included, registration is necessary.

In the case of *Thomas* v. *Kelly* (2), two at least of the learned

(1) 21 V.L.R., 262, at p. 266. (2) 13 App. Cas., 506.

Lords expressed opinions as to the English Act of 1854 which are of value in the present case, because they are, of course, applicable to the consolidating legislation now in question. Lord *FitzGerald* said (1):—"The Act of 1854 seems to have dealt only with bills of sale of existing goods capable of being seized and taken possession of, and which might be the subjects of 'ostensible ownership.' It does not seem to have contemplated that a bill of sale as such could apply to goods not in existence, and which might never exist. The definitions in that Act of 'bills of sale' and 'personal chattels,' and the exclusions from these definitions lead to that conclusion." Lord *Macnaghten* said (2):—". . . I am disposed to think that the expression 'capable of complete transfer by delivery' means capable of such transfer at the time when the bill of sale is executed. That was the view of the Divisional Court, consisting of the present Master of the Rolls and *Archibald* J., in *Brantom* v. *Griffits* (3). The Master of the Rolls there adopted the argument that 'the Act' (it was the Act of 1854) 'only applies to things which at the moment when the bill is given, and the provisions of the Act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor.' *Archibald* J. concurred. 'The application of the Statute,' he said, 'must be limited to articles of which possession could have been given to the vendee, and which are capable of removal.' I am the more inclined to adopt this view of the meaning of the expression 'capable of complete transfer by delivery' because the decision in *Brantom* v. *Griffits* (3), which was given in 1876, was standing unchallenged when the Act of 1878 was passed, and obviously engaged the attention of the framers of that Act."

It is well, therefore, to refer to the definition section of the Act—41 & 42 Vict. c. 31, sec. 4. There is in that section, as pointed out to us by Mr. *Maughan*, an amendment of the Act of 1854 intended to include after-acquired property. It is the insertion, among the documents to be considered as bills of sale, after the words "security for any debt," of these words: "and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to

(1) 13 App. Cas., 506, at p. 514. (2) 13 App. Cas., 506, at p. 518.
(3) 1 C.P.D., 349.

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any personal chattels, or to any charge or security thereon, shall be conferred." This may well be read with the statement by Lord *FitzGerald*, in the case just cited (1), that "an assignment of non-existent property, that is, of property which might or might not be acquired in the future, was at common law inoperative; but if for value, it was in equity regarded as a contract of which specific performance might be enforced when (if ever) the thing came into actual existence."

The insertion of this amendment in the definition section is strong to show that the framers of the English Act of 1878 thought that the section, as it had stood since 1854, did not include a document purporting to assign after-acquired property. If the legislature of this State had desired to include assignments of after-acquired property as proper subjects for the requirement of registration, it would have been easy to make an amendment in the law similar to that which the Parliament of the United Kingdom thought necessary to effect that purpose in 1878.

We are of opinion, then, that there is not sufficient evidence (if any) that any property existing at the time of the bill of sale was in possession of the bankrupt at the time of seizure; that the property then in her possession must therefore be considered to have been acquired after the execution of the security; and that, on this state of facts, the due registration of the document was not necessary in law to give it validity as against the official assignee, so far as the *Bills of Sale Act* is concerned. We do not say anything further as to the rights of the parties.

It follows that the appeal must be allowed, the order appealed from discharged, and the respondent's motion dismissed with costs. As the point on which the case is found to turn was not argued below, we do not think we should allow the appellants their costs of the appeal.

Appeal allowed. Order appealed from discharged. Respondent's motion dismissed with costs.

Solicitors, for the appellants, *Sly & Russell.*

Solicitors, for the respondent, *McCoy & McCoy.*

B. L.

(1) 13 App. Cas., 506, at p. 515.