

[HIGH COURT OF AUSTRALIA.]

COLLEY . . . . . APPELLANT ;  
DEFENDANT,

AND

CLEMENTS . . . . . RESPONDENT.  
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

*Bill of Sale—Validity—Situation of property comprised in bill of sale—Property described as situated on specified premises or used “in or about or in connection with” business carried on at premises—Insufficient description—Instruments Act 1928 (Vict.) (No. 3706), sec. 30 (2) (a) (iii.).*

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MELBOURNE,  
Oct. 20, 21.  
SYDNEY,  
Dec. 4.  
Latham C.J.,  
Starke, Dixon  
and McTiernan  
JJ.

A bill of sale, after referring to a specified messuage and to the business carried on there, described the property comprised in the bill of sale as “now standing in or upon the said messuage . . . or otherwise used or employed by the . . . mortgagor in or about or in connection with the said business.”

Held that, by reason of the alternative description of the property as “otherwise used or employed by the . . . mortgagor in or about or in connection with the said business,” the bill of sale did not set forth the situation of the property comprised in it and was therefore invalidated by sec. 30 (2) (a) (iii.) of the *Instruments Act* 1928 (Vict.).

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

William Ernest Clements brought an action in the County Court at Melbourne against Joseph Henry Pomeroy Colley, claiming damages for trespass in that in September 1935 the defendant, his servants or agents (a) unlawfully broke and entered the dwelling house



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of the plaintiff and carried away therefrom certain household furniture and effects of the plaintiff, and (b) unlawfully broke and entered the factory of the plaintiff and seized certain plant and stock of the plaintiffs and excluded the plaintiff from the factory.

The defendant justified the entry under a conditional bill of sale given to him by the plaintiff over certain chattels comprised in the schedule thereto. The bill of sale provided that "in consideration of one hundred and fifty pounds this day lent and advanced by the . . . mortgagee to the . . . mortgagor (the receipt whereof the mortgagor doth hereby acknowledge) the said mortgagor doth by these presents bargain sell assign and transfer unto the said mortgagee his executors administrators and assigns all and singular the chattels effects and property matters and things whatsoever described or comprised or mentioned or referred to in or by the schedule hereunder written or hereunto annexed and now standing in or upon the said messuage or tenement or otherwise used or employed by the said mortgagor in or about or in connection with the said business." The words "the said messuage or tenement" referred to premises occupied by the plaintiff which were specified in the bill of sale, and "the said business" referred to a business carried on by the plaintiff on portion of the premises.

The validity of the bill of sale was attacked on the ground that it did not set forth the situation of the property comprised therein as required by sec. 30 (2) (a) (iii.) of the *Instruments Act* 1928 (Vict.). The County Court judge overruled this objection and held that the bill of sale was valid. The plaintiff appealed to the Full Court of the Supreme Court of Victoria, which held that the bill of sale was invalid.

From this decision the defendant, by special leave, appealed to the High Court.

*Walker*, for the appellant. The bill of sale is valid. The description of the property comprised therein is the usual description found in bills of sale in Victoria, and it sufficiently identifies the goods. Bills of sale in Victoria have always been in this form and this objection has never been taken before. This document relates to a business transaction and should be given a wide interpretation



(*Ex parte Johnson* ; *In re Chapman* (1) ). If some of the goods are insufficiently described, they are severable from the rest (*In re Isaacson* ; *Ex parte Mason* (2) ; *Malick v. Lloyd* (3) ; *In re North Wales Produce and Supply Society* (4) ; *Gibbes v. Rolls* (5) ).

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*Gowans*, for the respondent. On its face the bill of sale is invalid for not setting forth the situation of the property comprised in it, and for not setting forth a sufficient description of such property. The first legislation on the subject in Victoria was the *Instruments and Securities Statute* 1864 (27 Vict. No. 204), which was amended by 40 Vict. No. 557 (Service's Act) (1876). Then followed the *Instruments Acts* of 1896, 1915, 1916, 1927 and 1928. It is only since 1927 that the description and situation require to be set out. It is necessary for the bill of sale to state where the creditor may go to find the chattels, and that is not stated in this bill. The description goods used "in connection with the said business" do not sufficiently describe the goods themselves or the place where they are situated. The goods must be described by some quality in themselves and not by user. More particularity is required in the description of goods in a bill of sale than is necessary to avoid uncertainty in a conveyance (*Carpenter v. Deen* (6) ; *In re Christie* (7) ; *Eyre v. McCullough* (8) ; *Lyons v. Graham* (9) ; *In re Rohrlach* ; *Riedel v. Official Receiver* (10) ; *Wurm v. Richardson* (11) ). If future-acquired chattels are included they must be precisely described (*Boucher v. Shire of Avon* (12) ; *King v. Greig* ; *Rechner, claimant* (13) ; *Yarnton v. Taylor* (14) ; *Perl v. Richardson* ; *Richardson (claimant)* (15) ; *Bank of Victoria Ltd. v. Langlands Foundry Co. Ltd.* (16) ). This bill of sale is invalid on its face and there can be no severability. In England the position is different (*Bills of Sale Act* (1878) *Amendment Act* 1882 (45 & 46 Vict. c. 43), sec. 4.)

[McTIERNAN J. referred to *Davies v. Rees* (17) and *In re Burdett* ; *Ex parte Byrne* (18).]

(1) (1884) 26 Ch. D. 338, at p. 348.

(2) (1895) 1 Q.B. 333.

(3) (1913) 16 C.L.R. 483.

(4) (1922) 2 Ch. 340, at p. 345.

(5) (1871) 2 A.J.R. 113.

(6) (1889) 23 Q.B.D. 566, at p. 574.

(7) (1901) 19 N.Z.L.R. 615.

(8) (1925) N.Z.L.R. 395.

(9) (1892) 18 V.L.R. 491 ; 14 A.L.T. 75.

(10) (1928) S.A.S.R. 113.

(11) (1932) 46 C.L.R. 301.

(12) (1922) V.L.R. 767 ; 44 A.L.T. 66.

(13) (1931) V.L.R. 413, at p. 429.

(14) (1887) 13 V.L.R. 903.

(15) (1886) 8 A.L.T. 63.

(16) (1898) 24 V.L.R. 230 ; 20 A.L.T. 71.

(17) (1886) 17 Q.B.D. 408.

(18) (1888) 20 Q.B.D. 310.



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*Walker*, in reply. The situation of the goods is sufficiently described and the after-acquired property cannot be described with greater detail (*Andrew & Son v. Barker* (1); *Anderson v. Carter* (2)). The bill is good as to the chattels whose situation is properly described.

[McTIERNAN J. referred to *Stackpool v. Russ* (3).]

*Cur. adv. vult.*

Dec. 4.

The following written judgments were delivered :—

LATHAM C.J. Special leave to appeal was granted in this case because the Full Court of the Supreme Court of Victoria had held to be invalid a bill of sale which was in a form which had been widely used for many years.

The bill of sale, after referring to certain messuages or tenements in the occupation of the grantee, assigns by way of mortgage “all and singular the chattels effects and property matters and things whatsoever described or comprised or mentioned or referred to in or by the schedule hereunder written or hereunto annexed and now standing in or upon the said messuage or tenement or otherwise used or employed by the said mortgagor in or about or in connection with the said business and also all other the chattels and effects matters and things which at any time during the continuance of this security may be brought by the said mortgagor into or upon the said messuages or tenements or either of them or used in or about or in connection with such business as aforesaid (either in addition to or in substitution for all or any of the chattels and premises described or mentioned in the said schedule).”

The schedule contained lists of tools, machinery, &c., and certain household furniture. The bill of sale is a bill of sale within the meaning of the *Instruments Act* 1928. That Act in sec. 30 provides that no bill of sale shall be filed (as required by preceding provisions) or be operative or have any validity at law or in equity unless it sets forth (*inter alia*) : (iii.) the situation of the property comprised in the bill of sale. The question is whether the bill of sale in this case complies with this provision of the statute.

(1) (1891) 17 V.L.R. 514.

(2) (1894) 20 V.L.R. 246 ; 16 A.L.T. 49.

(3) (1928) 45 W.N. (N.S.W.) 181.



The information which the bill of sale sets forth about the situation of the goods is that they are either on specified premises or are "otherwise used or employed by the said mortgagor in or about or in connection with the said business." The business is identified in the bill of sale as a business carried on at the specified premises. The position, therefore, is that the goods are said to be goods which are either at a certain place, or, if not there, are used in or about or in connection with a business carried on at that place. The goods are either at a certain place or they are somewhere else. It is, in my opinion, impossible to hold that the bill of sale sets forth the situation of the property. It does not state where the property was at the time when the bill of sale was given. It is therefore invalid by reason of sec. 30 of the *Instruments Act*.

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It has been suggested that the bill of sale might nevertheless be valid as to any goods which were in fact on the premises mentioned at the time when the bill was given. The statute does not permit any such possibility. If sec. 30 operates at all it operates to invalidate the whole bill of sale as a bill of sale to which the statute applies.

It has been urged that the bill of sale applies to certain "future property" and that, even if it does not comply with the statute, it may be valid as to such property for the reason that the Act does not apply to bills of sale so far as they deal with future property. The matter was discussed in *King v. Greig*; *Rechner, claimant* (1); and see *Wurm v. Richardson* (2); but it is not necessary to consider it, as no question arises in this case with respect to chattels brought on to the premises after the bill of sale was given.

As I am of opinion that the bill of sale is invalid because it does not set forth the situation of the property comprised in it, it is not necessary to deal with the question whether it sets forth the consideration for the bill of sale.

In my opinion the judgment of the Full Court was right and should be affirmed.

STARKE J. This appeal, I agree, should be dismissed.

The *Instruments Act* 1928 of Victoria, sec. 30 (2), explicitly provides that no bill of sale shall be filed or be operative or have any

(1) (1931) V.L.R. 413.

(2) (1932) 46 C.L.R. 301.



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validity at law or in equity unless it sets forth the situation of the property comprised therein. The nature of the description will depend upon the circumstances and the character of the property ; but its location must, in every case, be so stated that it is identifiable with reasonable certainty. It will not do to say that the situation of the property is either A, or B, or C. The bill of sale in the present case describes the situation of certain property referred to in a schedule as “ now standing in or upon the messuage or tenement ” —that is a messuage or tenement belonging to or in the occupation of the grantor situate at and known as No. 36 Toorak Road, South Yarra—“ or otherwise used or employed ” by the grantor “ in or about or in connection with the said business ”—that is, a business carried on by him in or upon such messuage or tenement. But it is impossible from this description to determine the location or situation of this property with any certainty ; it may be upon the premises, or it may be elsewhere though used or employed in or about or in connection with the business.

It was suggested that the Act only avoids the bill of sale as to the property comprised therein the situation whereof is not set forth. But the Act is explicit : the bill of sale is avoided unless the situation of the property comprised therein is set forth : the situation of all the property comprised therein must therefore be set forth. The Act does not confine the invalidity of the document to the property whereof the situation is not set forth, but on the contrary it enacts that the bill of sale shall have no validity at law or in equity unless it sets forth the situation of the property comprised therein.

Other matters were discussed during the argument, but in the view I take they do not call for decision.

DIXON J. This appeal arises out of an action for damages for trespass *quare clausum* and for trespass *de bonis*. It was brought in the County Court at Melbourne. The plaintiff was a manufacturer of nursery furniture. His factory, of which he seems to have been a weekly tenant, contained some plant, mostly fixtures, and some partly manufactured goods. He occupied a dwelling containing household furniture. In July 1935 he borrowed £150 from the



defendant upon the security of a bill of sale. The bill of sale included in one schedule enumerated articles of household furniture and in another of plant, and referred also to partly manufactured goods. On 6th September the defendant made a seizure under the bill of sale. In the dwelling, he seems to have seized some goods that were not comprised in his security. In the factory, he is said to have gone further than seizing chattels. He occupied the factory and carried on business there, executing some orders which had been received by the plaintiff.

The trespass to land complained of consisted in the entry upon both sets of premises and the continued occupation of the factory to the exclusion of the plaintiff. The defendant justified the entry under the bill of sale, and, as to his occupation of the factory, he alleged that he had obtained a lease or tenancy from the plaintiff's landlord, who had just terminated the plaintiff's tenancy. The seizure of the goods the defendant justified under the bill of sale. The plaintiff, however, contended that the bill of sale was void and, in any case, did not authorize all that the defendant had done. It appeared that the plaintiff had failed to observe some of the provisions of the bill of sale and that £147 10s. remained owing under it.

The jury found that the plaintiff's tenancy had not been terminated, and assessed damages at £285 on the assumption that the bill of sale was invalid, and at £135 on the footing that it was valid. The learned judge of the County Court decided that the bill of sale was valid. He did not give judgment for the plaintiff for the damages, £135, found for him on that assumption, and, on a counterclaim which the defendant had filed, he gave judgment against the plaintiff for the amount owing on account of the money borrowed. But he took from the defendant an undertaking that the judgment on the counterclaim would not be executed until the goods seized were sold and then that execution would be issued for no more than the deficiency. The judgment dealt also with some small additional mutual claims which need not now be considered.

The plaintiff appealed to the Supreme Court, which reversed the judgment on the claim and entered judgment for the plaintiff for £285 damages, setting off against it an unconditional judgment for

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£147 10s. for the defendant on his counterclaim. Their Honours decided that the bill of sale was void, on the ground that it failed to set forth the situation of some of the property it comprised. On representations by the defendant that the decision would affect a large number of bills of sale in Victoria, this court gave him special leave to appeal. But, having regard to the jury's findings, it is doubtful whether the validity of the bill of sale is of any further importance to the parties themselves, except as to the form of judgment and the consequential scale of costs. For the Supreme Court has upheld the jury's finding of £285 damages on the footing that the bill of sale was invalid, and this necessarily implies that on the contrary assumption the verdict of £135 would stand. The difference of £150 in the two amounts of damages found by the jury is, of course, attributable to the seizure of the chattels. If that was justifiable under the bill of sale, the almost equivalent sum of £147 10s. could not be recovered by the defendant, except subject to accounting for the chattels. Judgment for this sum has been entered in his favour by the Supreme Court because the jury's verdict of £285 has been treated as covering the amount of the chattels seized by the defendant, which, on payment of this sum, would become his property, the damages having, it seems, been assessed as for detinue or trover and not trespass *de bonis* simply.

The defendant did not move for a new trial in the County Court or take any substantive proceeding to have the jury's findings set aside, and his notice of appeal does not attack them. The consequence of holding the bill of sale valid and then entering judgment in accordance with the jury's findings would be to do no more than reduce the judgment for the plaintiff to £135, and then to stay execution on the counterclaim in accordance with the defendant's undertaking until the chattels seized were sold and the proceeds applied in satisfaction of the debt secured by the bill of sale. This would produce the same practical result as the judgment under appeal, unless the value placed upon the chattels proved to be a considerable over-estimate. But, in any case, I think the decision of the Supreme Court upon the validity of the bill of sale is right.

Sec. 30 (2) of the *Instruments Act* 1928 expressly says that no bill of sale of a kind to which the present instrument belongs shall be



filed or be operative or have any validity at law or in equity, unless the same sets forth the situation of the property comprised in the bill of sale. The bill of sale under consideration describes the chattels enumerated in the schedule relating to the factory as "now standing in or upon the said messuage or tenement or otherwise used or employed by the said mortgagor in or about or in connection with the said business," that is, the business of manufacturer of nursery furniture carried on at the plaintiff's factory, the address of which is given. No better statement of the situation of the chattels is contained in the bill of sale. It does not definitely say where the chattels are. It gives only an alternative, namely, that either they are situated at the factory, or, if not, they are in some other manner used or employed in connection with the business. The section is clear and insists on a statement of the place where the chattels are when the bill of sale is given. No doubt if they are chattels, such as vehicles, the ordinary use of which involves them in movement, the place where they are usually kept when not in active use would be their situation. But some situation must be given for whatever the bill of sale comprises.

It is said that the same or a similar form of words has been long in use and has always been allowed to pass as a sufficient compliance with the requirement under former legislation that a notice of intention to file a bill of sale should state where the property was situate (See Fifth Schedule of the *Instruments Act* 1890, which goes back to the Act of 1876, known as Service's Act). Perhaps since 1896 this may be accounted for by sec. 14 of the Act of that year, Act No. 1423, which relieved in the case of an honest error. But, in any case, such a practice cannot absolve the court from the necessity of giving effect to the very definite language of the provisions which express the present law. That language has the further consequence of making it impossible to treat the bill of sale as ineffectual in relation to those chattels only the situation of which is not set forth. No doubt a bill of sale by way of security operates to charge the whole debt distributively on every chattel it covers. But the section forbids the filing of every such bill unless it sets forth the situation of the property comprised in it, which means all the property comprised in it. If it is filed, then the bill of sale is to be void. There is no room for partial invalidation.

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The decision of the Supreme Court was put upon the ground with which I have dealt. Other and more difficult grounds in addition were relied upon by the respondent in support of the conclusion that the bill of sale was void, but it is unnecessary to discuss them.

In my opinion the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed. The bill of sale says the mortgaged property is that mentioned in the schedule "and now standing in or upon the said messuage or tenement or otherwise used or employed by the said mortgagor in or about or in connection with the said business." By these words the chattels mentioned are described as physically connected with the premises or as having the relationship, which they indicate, to the business. It is not possible to limit that relationship to one importing an ascertainable physical situation. The bill of sale, therefore, mortgages property which is situated on the premises or which has an unascertainable situation. In this respect the bill of sale contravenes sec. 30 (2) of the *Instruments Act* 1928. The consequence which the section says is to follow from this contravention is that the bill of sale is not to be operative or have any validity at law or in equity. In this case there is no ground for avoiding this consequence.

*Appeal dismissed.*

Solicitor for the appellant, *M. C. Larkin.*

Solicitor for the respondent, *A. W. H. Akehurst.*

H. D. W.