GAULT BROTHERS, LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE EDWARD WINTER, ASSIGNEE OF FRANKLIN & NIXON (PLAINTIFF) ..... } RESPONDENT.

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*Feb. 6, 9.
*March 23.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Bill of sale—Mortgage—Registration—Affidavit—Verification—B.C. "Bills of Sale Act," 5 Edw. VII., c. 8, s. 7.

The defendants rendered financial aid to F. & N. enabling them to purchase the stock-in-trade in the possession of a dealer in Vancouver, including also a quantity of goods ordered by him, but not then delivered, a payment on account being made in cash advanced by the defendants and the balance by four promissory notes, in deferred payments, which the defendants indorsed. At the same time new stock to the amount of $2,700 was purchased by F. & N. from the defendants which was afterwards delivered to them. A bill of sale by way of chattel mortgage was then given by F. & N. to the defendants for the advances so made and to secure them against liability on the indorsements, the proviso for redemption being on payment of the amounts mentioned and also for all goods thereafter supplied by the defendants to F. & N. during the continuance of the security. The bill of sale was registered with an affidavit by the acting-manager of the defendants, at Vancouver, who therein described himself as "secretary" of the company, which office was also held by him. The affidavit stated that the bill of sale was made *bonâ fide* for valuable consideration, namely, the amounts therein mentioned, and other considerations therein set forth, but it did not state that the grantors were justly and truly indebted to the grantees in such sums. About two years later, F. & N. made an assignment for the benefit of creditors to the plaintiff and, on the same day, after the execution of the assignment, but before the assignee had taken possession, the appellants entered into posses-

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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sion of F. & N.'s stock-in-trade by virtue of the bill of sale and refused delivery to the assignee. In an action by the assignee for a declaration that the bill of sale was void as against him and the creditors and to recover possession of the stock-in-trade,

Held, that the registration of the bill of sale was not effective against the assignee or the creditors as it had not been verified in conformity with the provisions of the British Columbia "Bills of Sale Act," 5 Edw. VII., ch. 8, sec. 7. In regard to the goods supplied after the execution of the bill of sale, the onus was upon the defendants to shew that there were such goods in the possession of the mortgagors at the time of the assignment for the benefit of creditors.

Judgment appealed from (18 B.C. Rep. 487) affirmed.

Per Duff J. (Idington, J. *dubitante*).—The affidavit of *bona fides* required by section 7 of the British Columbia "Bills of Sale Act," 5 Edw. VII., ch. 8, may be made by the secretary of a company who, at the time he makes such affidavit, is also *de facto* manager of the company's business.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Clement J., at the trial, maintaining the plaintiff's action with costs.

The questions in issue on this appeal are set out in the judgments now reported.

Sir Charles Hibbert Tupper K.C. for the appellants.

M. A. MacDonald K.C. for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

IDINGTON J.—Franklin & Nixon without any substantial means of any sort arranged with appellant, a wholesale merchant company, and one Horner, carrying on business in Vancouver, to buy that business and stock in trade therein, to be paid as to half by cash advanced by appellant and as to other half by their promissory notes indorsed by appellant.

(1) 18 B.C. Rep. 487.

It was the opportunity of selling goods that moved the appellant to entertain the proposal, and concurrent with its assenting thereto and carrying out the main purchase, a stock of new goods to the amount of $2,700 was selected and set aside in its warehouse ready to be shipped upon completion of the bill of sale now in question which was to be the security for the re-payment of said sum of $2,700 as well as for the re-payment of the money advanced and for indemnity against the indorsement for the balance of purchase of Horner's stock in trade.

Besides this new goods purchase of $2,700 there was at the same time a pretty substantial item of goods ordered by Horner elsewhere and taken over by the new firm for which appellant indorsed and looked to the bill of sale to indemnify it. Then there were goods to be supplied from time to time by the appellant to be secured by the same bill of sale.

Franklin & Nixon became insolvent, and on the 27th October, 1909, made an assignment to respondent under the provisions of the "Creditors' Trust Deed Act," 1901, and, when he went to take possession, he was met by some one who refused to give possession, claiming to represent appellant and hold the goods by virtue of said bill of sale.

It is stated in evidence and not denied that the taking possession by the appellant was after the execution of the assignment. The respondent then instituted this suit to have said bill of sale set aside and declared null and void (as against respondent as assignee representing the creditors) by reason of its infringing the provisions of the "Bills of Sales Act" of 1905, and being so declared in such cases as therein provided.

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The respondent, amongst other grounds taken, set up the following provision of section 7, sub-section 1, requiring that a bill of sale set forth the true consideration

> for which the bill of sale was given otherwise such bill of sale as against all assignees, receivers or trustees of the estate and effects of the person whose chattels, or any of them, are comprised in such bill of sale, or under any assignment for the benefit of the creditors of such person, etc., * * * shall be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of such purchase or mortgage as the case may be, and after the expiration of the time hereinafter prescribed shall be in the possession, or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be. * * *

I agree with the learned trial judge that on the facts above outlined "the true consideration" has not been set forth as required by this bill of sale. Indeed, I find it difficult to see how it can be said otherwise.

I cannot agree with the view which the learned trial judge has taken of the case of *Ex parte Popplewell; In re Storey*(1), as bearing upon the omission of the $2,700 purchase and sale of new goods or the Horner guarantee.

These transactions do not seem to me in any sense such collateral transactions as was the premium given in the *Storey Case*(1) to induce the mortgagee to refrain from registering the instrument.

In this case the transactions in question were clearly part of what the bill of sale was made to secure and by the terms thereof would be swept in under the general provisions for redemption.

(1) 21 Ch. D. 73.

The object of the legislation now in question was to enable creditors and others concerned to ascertain with reasonable accuracy, from a reading of the instrument, the extent and nature of the encumbrance.

This document failed sadly in executing such purpose of the legislature. Those goods covered by these transactions were, on the facts shewn, comprised within the very terms of the description used in the document, but the facts were so hidden away from the observation of any one interested searching this instrument, that he could never suspect such to be the case.

Indeed, the recitals in the document and statements therein, were calculated to mislead the closest observer.

It seems to me that these omissions were serious offences against the clear policy and plain meaning of the statute and render this bill of sale null and void as against the respondent,

so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of such purchase or mortgage as the case may be, and after the expiration of the time hereinafter prescribed shall be in the possession or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given.

When we read this nullifying part of the clause attentively, it clearly destroys all pretension not only to those goods which formed part of the stock in trade bought from Horner and the omitted transactions, but also any

property in or right *to the possession of any chattels comprised in the bill of sale.*

I think, therefore, the elaborate argument to bring the other goods resulting from later sales and deliver-

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ies to the mortgagors within the class of cases where a bill of sale or chattel mortgage is of such a nature as to render it impossible to conform with the statute and, therefore, outside the statute falls to the ground.

I cannot say that, under the very comprehensive nature of the language used, these later deliveries are not comprised in the bill of sale and in the nullification of the statute.

Indeed, it is of the essence of the claim made to the possession of these goods that they are "comprised in the bill of sale" and assuredly they were sold to the mortgagors and were found to be in their "possession, or apparent possession," at or after the execution of the assignment.

In short, under this statute, however much it may be possible to find cases of transactions which as a whole may be outside the statute and, therefore, not nullified by it, the doctrine thus involved will not help where there is a bill of sale which in its substantial parts is within the statute and a claim is made to a right of property or possession which by the express language of the nullifying part of the section we have to deal with is made null and void.

If the term "personal chattels" given by the Act a specific statutory interpretation, had been repeated in this nullifying part of the section or the general scope of the statute rendered it imperative to read the word "chattels" as if "personal chattels," then the argument put forward might have had some force. Note also the provision covers possession "at or after the" execution of the assignments.

Moreover, the facts in this case and the frame of the instrument in question shew just that kind of

abuse which a careful draftsman seeking to promote the remedy adopted for the evil aimed at in the legislation in question should be expected to strike at in or by the comprehensive language I have quoted.

The appellant's factum quotes a number of cases decided on the English Acts relative to bills of sale. None of them meet or even touch upon the interpretation of section 8 of the English "Bills of Sale Act" of 1878, corresponding to section 7, sub-section 8.

They are in fact chiefly upon the English Act, as amended by the Act of 1882, which repeals sections 8 and 20 and possibly, by implication, some other sections of the Act of 1878.

The amendments made in 1882 are in the direction of making the very abuse before us impossible by making the clauses substituted more direct and clearly operative.

If, however, the interpretation and construction I adopt is to be adhered to it would be pretty effective. It might be so severe as to be undesirable.

As the Act is amended this becomes, except in a few cases, purely academic. But even if my interpretation be not well founded I agree in the view taken by Mr. Justice Clement as to the onus of proof resting upon the appellant in presenting any claim to enforce the possible equitable right the appellant might have on another view of its rights.

The possession which the insolvents had passed by operation of law to the respondent as assignee and the duty of appellant was to have prosecuted its claim accordingly and that would in due order have involved the appellant proving its right to recover the goods.

Of course, if appellant had got possession before the assignment an entirely different state of things

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might have arisen to which different principles would have been so applicable.

Moreover, counsel who appeared for appellant before Mr. Justice Clement seemed to be quite willing at one stage to abide by his ruling whatever it might be in this regard of onus of proof if only granted a special reference enabling appellant to make good its claim as it had not.

The referee was bound by the direction of the learned judge and appellant cannot complain of his reporting the fact that there was no evidence to support its claim. And as it seems to be, under all the circumstances, nothing but a mere matter of procedure that is involved where no violence had been done to natural justice, I doubt if we are not bound by the jurisprudence of this court to refrain from interfering even if so disposed as to this point.

See the collection of authorities in note to the Revised Statutes of Canada, 1906, ch. 139, page 2328 (annotated edition).

I agree with the conclusion reached by the Court of Appeal relative to the affidavit. It may have been necessary to make affidavits to meet both branches of the section, but evidently it was necessary to have verified the indebtedness.

I need not, however, pursue this inquiry further for that which was most obviously needed was discarded.

And as to the capacity of the appellant's officer to make the affidavit I much doubt his right to make it.

The appeal should be dismissed with costs.

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DUFF J.—The controversy on this appeal is between the appellants, Gault Bros., as mortgagees under a bill of sale by way of chattel mortgage, dated the 20th day of September, 1907, executed by Arthur Albert Franklin and Thos. W. H. Nixon, carrying on business in the firm name of Franklin & Nixon and George Ed. Winter, assignee for the benefit of creditors of Franklin & Nixon under a general assignment executed on the 27th of October, 1909. Gault Bros. are wholesale merchants in Montreal. Before the bill of sale just referred to was given Franklin & Nixon conceived the idea of purchasing the business of one Horner, including his stock of goods, who had been for some years carrying on business in Vancouver. It was arranged between Gault Bros. and Franklin & Nixon that Gault Bros. should supply the necessary cash and financial support to enable Franklin & Nixon to carry out this purchase. Accordingly, Franklin & Nixon became the purchasers for a certain price, of which about $9,000 was to be paid in cash advanced by Gault Bros., and an equal sum was to be paid in deferred payments of four equal instalments for which promissory notes were to be given indorsed by Gault Bros. This transaction was carried out and, as security for Gault Bros., the bill of sale above referred to was executed.

The dispute between the parties is whether certain goods which were in the possession of Franklin & Nixon at the time of the execution of the general assignment are validly charged by the instrumentality of the bill of sale with the mortgagors' obligation to Gault Bros., or whether on the contrary, they belong to the unencumbered assets of the grantors and are at the disposition of the assignee

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for the discharge of the liabilities generally. There is no dispute that the property in controversy falls within the description of the mortgaged property in the bill of sale; or that as between the parties to the instrument prior to the execution of the assignment for the general benefit of the creditors the provisions of the bill of sale applied to this property or that all the powers of the bill of sale were exercisable in respect of it by the mortgagee. The assignee contends, and effect has been given to this contention in the court below, that certain provisions of the "Bills of Sale Act," 1905, essential to the valid registration of an instrument such as this were not complied with by the mortgagees and that the result of this want of legally effective registration is to invalidate the mortgage as against the assignee with respect, at all events, to all goods which were the property of the mortgagors at the time of the execution of the mortgage; and as regards after-acquired property if the mortgage be legally effective in respect of such property, the mortgagees must fail even as to that, because there is no evidence by which the court can identify the after-acquired property and segregate it from the general mass.

There are three statutory requirements the absence of which it is contended vitiates the registration of this mortgage; the first of the requirements being that bills of sale shall set forth the "true consideration" for which they are given as provided by section 7(1), and the second and third of which are two of the requirements said to be exacted by sub-section 8 of section 7 of the Act referred to. As to two of these three requirements, I entertain no doubt that the provisions of the Act have been sufficiently observed. I

postpone the discussion of them until I have dealt with another of the objections which appears to me to have been made good and to which I feel it my duty to give effect. That objection is founded on sub-section 8 of section 7 and, before stating it, it will be convenient to quote that sub-section in full and also two of the provisions of the bill of sale to which it will be necessary to give attention in order to make the point of the objection perfectly clear. Sub-section 8 of section 7 is as follows:—

(8) Every bill of sale shall further be accompanied by an affidavit by the grantee, or one of several grantees, his or their agent, that the assignment is *bonâ fide* for valuable consideration and that the consideration is duly set forth in the bill of sale, and that it is not for the purpose of enabling the grantor to hold the goods mentioned therein as against the creditors of the grantor; or in the case of security for a debt, that the grantor is justly and truly indebted to the grantee in the sum therein mentioned, and for the express purpose of securing the payment of money justly due or accruing due; and in all cases that the bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of the grantor, or of preventing the creditors of said grantor from obtaining payment of any claim against him; and said affidavit shall be filed along with said bill of sale, otherwise the registration of the bill of sale shall be void. This sub-section shall not apply to the bills of sale mentioned in section 5.

The stipulations of the bill of sale which it is necessary to consider are as follows; the first being contained in the proviso for redemption following the habendum:—

PROVIDED always and these presents are upon this express condition that if the said parties of the first part, their executors and administrators, do and shall well and truly pay or cause to be paid unto the parties of the second part or their assigns, the full sum of $9,483.86 with interest for the same at the rate of 7% per annum from the date hereof by periodical payments to the entire and uncontrolled satisfaction of the parties of the second part or in one sum at any time on demand of the parties of the second part, and do and shall pay or cause to be paid the aforesaid promissory notes at maturity or any and all renewal and renewals thereof and all interest in respect thereof and pay, indemnify and save harmless the

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said parties of the second part from all loss, costs, charges, damages, or expenses in respect of the said notes or any renewal thereof and do and shall pay all sums of money which shall become payable by the parties of the first part to the parties of the second part for or in respect of all goods which shall be supplied by the parties of the second part to the parties of the first part during the continuance of this security punctually when the same shall become payable according to the terms of credit given by the parties of the second part to the parties of the first part, and do and shall repay on demand all advances of money made by the parties of the second part to the parties of the first part during the continuance of these presents.

* * * * *

AND THE SAID PARTIES of the first part do hereby jointly and severally, for themselves, their executors and administrators, covenant, promise and agree to and with the said parties of the second part and their assigns that they the said parties of the first part, their executors or administrators or some one of them, shall and will well and truly pay or cause to be paid to their assigns the said several sums of money in the above proviso mentioned with interest for the same as aforesaid on the days and times and in the manner above limited for the payment thereof; and will pay or cause to be paid the said promissory notes or renewal or renewals thereof as aforesaid and all interest and incidental expenses to accrue thereon and indemnify the said parties of the second part from all costs, charges, damages and expenses in respect thereof and all other sums of money which may or shall be secured hereby at any time and from time to time.

In order to make the point quite clear, it is necessary also to quote the affidavit filed with the bill of sale which is as follows:—

I, Charles T. McHattie, of Vancouver, British Columbia, Secretary-Treasurer of the grantee in the annexed bill of sale marked A named make oath and say:—

That I am the Secretary-Treasurer of the grantee company and am authorized to make this affidavit on their behalf.

That the assignment contained in the said bill of sale is *bonâ fide* for valuable consideration, namely, $9,483.86 and the other considerations set forth in the said bill of sale and that the consideration is duly set forth in the said bill of sale and that it is not for the purpose of enabling the grantors to hold the goods mentioned therein as against creditors of the said grantors.

That the said bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of

the grantors or of preventing the creditors of the said grantors from obtaining payment of any claim against them.

SWORN before me at Vancouver, British Columbia, this 21st day of September, A.D. 1907.
H. W. C. BOAK.

C. T. McHATTIE.

The objection I am now considering is this: It is said that the bill of sale in question constitutes a "security for a debt" within the meaning of sub-section 8 and that the affidavit accompanying the bill of sale in intended or professed compliance with that sub-section does not contain the statement that the grantor is justly and truly indebted to the grantee in the sum therein mentioned; and it is contended that in the case of such a security the affidavit in order to comply with the sub-section must contain such a statement or the equivalent of it.

The points to be considered are first whether this bill of sale is a security for a debt within the meaning of this provision, and secondly, assuming that to be so, whether on the true construction of this enactment it is essential that the affidavit of *bona fides* should contain the statement that the grantor is "justly and truly indebted to the grantee" in the sum mentioned as the debt to be secured.

I confess that on the first point I do not entertain any doubt. I think that where a bill of sale is given as security for money which is owing, but payable at a future date (*debitum in præsenti, solvendum in futuro*), then it is to that extent a "security for a debt" within the meaning of this provision and I think that is shewn by the words "securing payment of moneys justly due or accruing due," which follow. I think, moreover, where by a bill of sale property

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is assigned as security for a debt, in the sense just indicated, that it is none the less a security for a debt within this enactment because it contains additional provisions which in themselves would constitute a bill of sale, but would not constitute such a security.

The next point is a point with which I have had a great deal of difficulty, and the conclusion I have reached, in a sense adverse to the contention of the appellants, is one that I have come to with hesitation and, I must say, with much regret in view of the fact that the result is to defeat a perfectly honest and legitimate business transaction.

The question is, as I have already said, whether in the case of a bill of sale given as a security for a debt this sub-section requires that the statement above quoted or its equivalent shall appear in the affidavit of *bona fides*. Now, the difficulties of construing this sub-section are not inconsiderable. But it seems clear enough that one admissible construction, if you regard only the verbal structure of it, is to treat the second branch as providing in one particular an alternative form of affidavit which, in the case of securities for debt, the mortgagee may at his election adopt in preference to the general form which is provided for in the earlier part of the sub-section; and I am inclined to think that is the more natural way of reading the clause as it stands. On the other hand the sub-section is capable of being read as requiring in the second branch a particular averment which is imperative in the case mentioned. After much reflection, I am convinced, however, that in construing this provision one must have regard to the legislation as it stood at the time of the passing of this Act, which is mainly a consolidating statute, and I find that under

the law as it then stood in case of mortgages of this description an affidavit in the form indicated in the branch of the sub-section we are considering was essential and imperative. The rule requiring a specific averment under oath by the mortgagee of the indebtedness of the mortgagor in these cases was a rule adopted for the protection of the public; and if, in consequence of a change of policy, mortgagees in such cases were to be given the right to adopt the more general form of averment that the consideration had been truly stated (as sufficient for the protection of the public) one does not see why the more specific form should not have been altogether done away with. Reading the sub-section in light of the legislation then existing and the manifest object of it, I am forced to the conclusion that the appellants' construction must be rejected.

On this ground, with very great regret as I have said, I conclude that the appellant must fail in respect of all property which as being the personal chattels of the grantors at the time the mortgage was executed within the definition of the "Bills of Sale Act" would be affected by the provisions of that Act. We may perhaps venture to hope, however, that the case may be the subject of consideration elsewhere; and I think I ought to express my opinion upon the other points involved.

The two remaining objections directly based upon the "Bills of Sale Act" are first, that the bill of sale does not, as required by section 7, sub-section 1, set forth the "true consideration" for which it was given, and secondly, that the affidavit accompanying the bill of sale, was not made by the appellants or their agents as provided by sub-section 8 of section 7.

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The second objection may be disposed of very shortly. Mr. McHattie, who made the affidavit, described himself as the "secretary" of the company. At the time the affidavit was made, and at the time the bill of sale was taken, he was in point of fact exercising the powers of manager of the company. He was, indeed, *de facto* manager of the company. There can be no doubt that the taking of the security was within the scope of his duty as acting manager. It follows that he was within the meaning of section 7 of the Act "manager" * * * or other officers of the company authorized for" the purpose of making the affidavit.

As to the objection that the consideration for which the bill of sale was given is not truly set forth, this objection is grounded upon the contention that, in order to comply with the statutory direction, two transactions ought to have been recited which are omitted. The two transactions are these: 1. In the month of September, 1907, Mr. Campbell, a buyer for Franklin & Nixon, purchased $2,700 worth of goods from Gault Bros. on behalf of Franklin & Nixon. These goods were purchased in anticipation of the arrangement between Gault Bros. and Franklin & Nixon, which afterwards was carried to completion, including, of course, the bill of sale. In the ordinary course, the goods would not be delivered until after the time when it was anticipated that these arrangements would be completed and the evidence is quite clear that if anything had happened to prevent these being carried out the goods would not have been sent forward and this would have been quite in accordance with the intention of the parties. The purchase was unquestionably a conditional purchase which was not to become legally effective until after the contem-

plated arrangements were consummated. The other transaction was this:—Horner, whose business Franklin & Nixon were purchasing, had ordered goods which had not come into stock (with the exception of some that arrived on the very date, the 20th of September) when the bill of sale was executed. Horner was, of course, under an obligation to take these goods and pay for them. These goods would, of course, according to the general intention of the parties, which was, that Horner's business was to be transferred to Franklin & Nixon, be received by the latter and paid for by them, but Horner evidently required some more satisfactory assurance, that his obligations to the sellers would be met; and the matter was arranged by Gault Bros. guaranteeing payment of the goods.

Neither of these transactions is specifically referred to in the bill of sale, and it is said that the failure to recite them makes the description of the consideration so imperfect as to constitute a violation of the provision of section 7(1). The trial judge rejected this contention which seems, however, to have been accepted and acted upon by Mr. Justice Irving in the Court of Appeal.

I think the contention involves a misapprehension of the effect of the word "consideration" in sub-section 1. That word might, according to context and subject-matter, be, of course, read in a very large sense embracing acts and motives leading up to and influencing more or less directly the transaction in relation to which it is employed. That, I think, is not the sense in which the term ought to be interpreted here. It is used, I think, in the strict legal sense; and construing it in the strict legal sense, the "true con-

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sideration" for which the bill of sale was given must, I think, be taken to mean that which passed to the grantor or that which was suffered by the grantee as the consideration in point of law for the assuring to the grantee of an interest, *in præsenti* or *in futuro*, in the property to which the bill of sale applies where that is the nature of the instrument or for the vesting in the grantee of some power or authority in respect of the property affected where the instrument is in the nature of a licence or power of attorney. Construing the word "consideration" in this way it seems to me that this bill of sale presents no difficulty. The proviso for redemption above quoted shews that the property to which the document relates is charged with the payment of

> all sums of money which shall become payable by the parties of the first part to the parties of the second part for or in respect of all goods which shall be supplied by the parties of the second part to the parties of the first part during the continuation of this security.

If the goods purchased in September are to be regarded as "goods supplied during the continuance of this security," and I can see no reason why they should not be so regarded, I am unable to follow the argument that the consideration for the charge thereby created is not truly stated, the consideration being measured by the value as determined by the price of the goods supplied.

In view of some observations that have been made I think I ought to add this:—Nobody reading the recitals of this bill of sale could fail to observe that the general intention was to provide security, first for the repayment of the cash advanced by the mortgagees, next, in respect of the mortgagees' guarantees in connection with the purchase, and thirdly, for pay-

ment of the price of goods supplied by the mortgagees. I think that any business man being made acquainted with the fact that such was the general intention of the parties to the instrument would not be surprised to find that the instrument was to stand as security for the price of the goods included in what has been referred to as the September sale. On the contrary, he would be very much surprised indeed to find that it was not so. Whether you look at this instrument from the point of view of the practical man, not a lawyer, or from the point of view of the lawyer there appears to be nothing in it, which as regards this transaction can fairly be described as misleading.

As to the other transaction. If the words quoted from the proviso for redemption

> goods supplied by the parties of the second part to the parties of the first part during the continuance of the security

do not embrace the goods which were the subject of this transaction and I agree with the contention of the respondent that they do not, then the property affected by the bill of sale is not charged with the repayment of any moneys paid by Gault Bros. under their guarantee in respect of them and the obligation arising under the guaranty is not part of the consideration for the bill of sale within the meaning of section 7. The transaction is a collateral one which the parties were entitled to bring within the bill of sale or leave out of the bill of sale as they should choose. This objection for these reasons in my opinion fails. I do not discuss the decisions, none of which is inconsistent with, and one of which, at all events, *Ex parte Popplewell* (1), strongly supports the view I have expressed.

(1) 21 Ch. D. 73.

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There is still another point upon which the appellants rely. It is argued that the provisions of the "Bills of Sale Act," 1905, have no application to goods which were not property of Franklin & Nixon at the time the bill of sale was executed. I have no doubt that prior to the amendment of 1912, 2 Geo. V. ch. 2, sec. 5, the "Bills of Sale Act" of British Columbia did not apply to assurances of after-acquired goods. My reasons for that were given in *Traves* v. *Forrest*(1). I there gave my reasons for thinking that the history of the British Columbia "Bills of Sale Act," taken together with the course of judicial decision in England in relation to the definitions of "personal chattels" in the English Acts of 1854 and 1878, which have been closely followed in the British Columbia legislation, led to the conclusion that the British Columbia legislature had adopted the decision in *Brantom* v. *Griffits*(2), and that in construing the Act of 1905 one must be governed by that decision. In this view a majority of the court concurred and it may be noted that the parts of the Act then construed were re-enacted without relevant alteration in the consolidation which took place two years later. The law was changed by the amendment of 1912 above referred to. If that enactment is retroactive in its operation then the contention of the appellant on this point must fail; but that question need not, in the view I take of the point raised as to the onus of proof, be considered on this appeal.

I have come to the conclusion after carefully weighing the argument advanced by the appellants that the onus was on the appellants to identify the goods in respect of which they alleged the bill of sale

(1) 42 Can. S.C.R. 514. (2) 1 C.P.D. 349.

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was effective, and I have come to that conclusion for this reason:—The interest in after-acquired goods under a mortgage of them when they come under the operation of the mortgage is, as Lord Macnaghten pointed out, in *Tailby* v. *Official Receiver*(1), at page 546, an equitable interest. The appellants' interest, if any, therefore, under this mortgage in the property in question was an equitable interest only. Now the effect of the assignment was to vest in the assignee the general property in the goods affected by the mortgage subject to this equitable interest of the mortgagee, if any; and such being the case it appears to me that, on general principles, the onus is upon the mortgagee who alleges this equitable interest to establish his title to it.

Since writing the above my attention has been called to the fact that a point raised by the counsel for the appellant has not been noticed in any of the judgments and in view of the possibility of further proceedings and in order to avoid any dispute on the subject I think it is right to mention it. The point was, briefly, that on the construction of sub-section 8 of section 7 of the "Bills of Sale Act," which I have adopted, it would be impossible to frame an affidavit of *bona fides* for the bill of sale in question which should at once be truthful and in conformity with the requirements of that enactment. I merely add, in a word, that having carefully considered the argument I have been unable to satisfy myself that there would be any real difficulty in framing such an affidavit.

ANGLIN J.—With some regret, because the transaction appears to be free from the slightest taint of

(1) 13 App. Cas. 523.

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fraud or suspicion of fraudulent preference, I find myself obliged to concur in the dismissal of this appeal.

As to the goods which were in the possession of the mortgagors when the impeached instrument was executed, I agree that it was void as against the plaintiff because the affidavit of *bona fides* did not comply with the statutory requirements. It is also possible that the consideration for which the mortgage was given was not accurately or sufficiently stated.

As to the after-acquired goods, assuming that, notwithstanding the sweeping terms of section 7 of the British Columbia "Bills of Sale Act" of 1905, the mortgage was enforceable, I agree with Mr. Justice Clement and the Court of Appeal that the burden was on the mortgagees to have shewn that there were in fact such goods in the insolvents' stock, and to have segregated and identified them. That they have failed to do.

BRODEUR J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Tupper, Kitto & Wightman.*

Solicitors for the respondent: *Russell, Mowat, Hancox & Farris.*