

cation. It would be a strange thing if, when they could only stop the cheque by running the risk or incurring the obligation of having to pay the money to the holders, they should be bound to pay the money to the trustee because they did not run that risk.

Solicitors for Appellants: *E. Doyle & Sons*, agents for *Binney, Sons, & Wilson, Sheffield*.

Solicitors for Trustee: *Munton & Morris*, agents for *Parker & Brailsford, Sheffield*.

W. L. C.

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*Ex parte*  
RICHDALE.  
*In re*  
PALMER.

*Ex parte* FIRTH. *In re* COWBURN.

*Bill of Sale—Statement of Consideration—Deduction of Expenses—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8—Appeal—Evidence—Duty of Appellant—Right to raise new Point in Court of Appeal.*

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1881  
C. J. B.  
Dec. 5.

If the amount of the expenses incident to the preparation of a bill of sale, given by way of mortgage, is deducted from the sum stated in it as the consideration, and the balance only is actually paid by the lender to the borrower, the consideration is not truly stated so as to satisfy sect. 8 of the *Bills of Sale Act, 1878*.

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*Ex parte National Mercantile Bank* (1) and *Ex parte Challinor* (2) must be treated as binding authorities only in so far as they decide that, if part of the sum stated in a bill of sale as the consideration is, by the grantor's direction, given at the time of the execution of the deed, applied in satisfying a then existing debt due by him, the money so applied may be properly stated in the deed to be money then paid to him.

It is the duty of an appellant to bring before the Court of Appeal the whole of the evidence, oral as well as written, on which the order appealed from was founded, and if he does not do this, his appeal ought to be dismissed.

The Court of Appeal, however, has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again.

An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut it if the point had been raised originally.

ON the 10th of June, 1880, *Sidney Cowburn* and *Samuel Cowburn*, who were manufacturing chemists at *Gomersal*, in *York-*

(1) 15 Ch. D. 42.

(2) 16 Ch. D. 260.

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shire, executed a bill of sale of household furniture and other chattels to *Joseph Freedman*, a money-lender at *Leeds* and other places. The deed contained a recital that *Freedman* (described as the mortgagee) had agreed to lend to the grantors (described as the mortgagor) "the sum of £40, upon having the repayment thereof, together with the further sum of £20, being the amount of interest and expenses attending the said advance, making altogether the sum of £60, secured in manner hereinafter appearing." And the deed was expressed to be made "in consideration of the sum of £40 now lent and paid by the mortgagee to the mortgagor." The deed provided for the reassignment of the property by the mortgagee to the mortgagor on payment by the mortgagor to the mortgagee of the sum of £60, by consecutive monthly instalments of £5 each, the first of which was to be paid on the 10th of July, 1881. A receipt for £40 was signed by the grantors at the foot of the deed, acknowledging that they had received the £40 on the day of the date of the deed. In the latter part of July, 1881, an execution for a sum under £50 was levied on the goods of the grantors, and in consequence of this an auctioneer named *Richardson* was instructed by *Freedman* to take possession of the goods comprised in the bill of sale in accordance with the provisions contained therein. The debtors deposed that *Richardson* seized all their property on the 27th of July. *Richardson* made an affidavit in which he said that, in consequence of the execution, "on the 27th of July I levied the bill of sale, and I advertised the sale of the effects, and I should have sold them had I not been restrained by the order of the Court." He added—that "after I had seized the effects *Sidney Cowburn* informed me that the amount they owed Mr. *Freedman* was £55." The first instalment had been paid on the 10th of July. The sale was advertised to take place on the 30th of July. On the 30th of July the grantees filed a liquidation petition in the *Dewsbury* County Court (under which a trustee was afterwards appointed), and on the same day, on the application of the debtors and of the receiver who had been appointed, an order was made by the County Court restraining *Richardson* and *Freedman*, until the 19th of August, from selling under the bill of sale or otherwise dealing with the property. This order was afterwards

continued to the 29th of September. On the 22nd of September the trustee gave notice to *Freedman* of a motion in the County Court for an order declaring the bill of sale void as against the trustee, on the ground (*inter alia*) that the consideration for which it was given was not truly stated in the deed, and that, instead of £40 being paid to the debtors on the execution of the deed, only £38 10s. was in fact paid to them.

In support of this application affidavits were made by the debtors in which they swore positively that only £38 10s. was paid to them on the execution of the deed, and they said that this sum was handed to them by one *David Marks*, a clerk of *Freedman*, who managed his business at *Leeds*, in seven £5 notes, three sovereigns, and 10s. in silver. They said that they asked *Marks* for £1 10s. more, but he told them that 10s. was deducted for his attendance at their place of business to look at the property, and £1 for the fee of the solicitor who attested the execution of the deed. In answer to this, affidavits were made by *Marks*, by the solicitor, and another agent of *Freedman*, who said that he was present when the deed was executed, and they all positively swore that £40 in cash was paid to the debtors on the execution of the deed. On the hearing of the motion by the County Court Judge, *Freedman's* witnesses were cross-examined, and in the result the Judge disbelieved them, and gave credit to the story of the debtors that the £1 10s. was deducted. And he held, on the authority of *Hamilton v. Chainé* (1), that the consideration was not truly stated in the deed, and declared the deed void as against the trustee.

The Judge was not asked to take a note of the *vivâ voce* evidence, and did not take any, and no shorthand writer was employed by the parties to take a note, nor was any note taken by counsel. *Freedman* appealed to the Chief Judge. The appeal was heard on the 5th of December, 1881. The *vivâ voce* evidence was not in any way brought before the Chief Judge, but he was informed by counsel that the Appellant's witnesses had been cross-examined before the County Court Judge, but that no notes of the cross-examination could be obtained. On behalf of *Freedman* it was contended that the *Bills of Sale Act* did not apply at

(1) 7 Q. B. D. 1, 319.

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all, because the evidence shewed that, when the petition was filed, the goods comprised in the bill of sale were not in the apparent possession of the debtors. This point had not been taken in the County Court.

*Finlay Knight*, for the Appellant :—

First, upon the evidence, the debtors were paid the full amount of £40 ; secondly, if not, the deduction of the £1 10s. was immaterial ; thirdly, the evidence shews that, at the time of the filing of the liquidation petition, the goods were in the possession of the sheriff under an execution, and thus, according to the doctrine of *Ex parte Saffery* (1), all question as to the validity of the bill of sale as against the trustee is at an end.

As to the second point ; a deduction of £3 10s. for expenses from a sum of £50 paid by the lender has been held not inconsistent with the statement that the consideration was £50 : *Ex parte Nicholson* (2) ; *Ex parte Rolph* (3).

Upon the third point ; the seizure by the Appellant was on the 27th of July ; a sale was advertised for the 30th, and not until the 30th was the act of bankruptcy committed. The possession was not merely formal, as in *Ex parte Lewis* (4), but was an apparent and actual possession, so as to avoid the operation of the 8th section of the *Bills of Sale Act*, 1878.

*J. G. Wood*, for the trustee :—

We deny that £40 was paid, and we say that if the cross-examination could be brought before the Court, the testimony of the Appellant's witnesses would be disproved. The burden is on the Appellant to supply the Court with all the evidence on the point on which he relies. If he fails in this duty, his case on that point must fail.

Assuming, then, that the 30s. was deducted, the bill of sale, not having stated this fact, is void : *Hamilton v. Chaine* (5). Indeed, the recital in this case is rather farther from the truth than the recital was in *Hamilton v. Chaine*.

(1) 16 Ch. D. 668.

(2) 44 L. T. (N.S.) 828.

(3) 19 Ch. D. 98.

(4) Law Rep. 6 Ch. 626.

(5) 7 Q. B. D. 319.

In *Ex parte Charing Cross Advance and Deposit Bank* (1), Lord Justice *James* expressly says: "The very object of the Act was to prevent the setting forth as part of the consideration that which was retained by the grantor in the shape of interest and expenses," and he proceeds to point out the difference between that case and *Ex parte National Mercantile Bank* (2), where part of the arrangement was that part of the consideration should be applied in payment of a *bonâ fide* antecedent debt, and it was decided that this part of the arrangement need not be stated. This is the ground of the decision in *Ex parte Nicholson* (3).

[BACON, C.J.:—In *Ex parte National Mercantile Bank* I considered the whole transaction to have been a mere sham and a fraud, but the Court of Appeal did not agree with that view.]

The result of the cases is, that a deduction for expenses must be stated.

On the third point, the County Court Judge thought the evidence conclusive.

BACON, C.J.:—

It is not in evidence that there was any testimony given in the Court below which is not now before me; and I cannot allow the question to be argued of whether there was or was not. I say this without prejudice to the Respondent's right to bring evidence to shew that there was, if he thinks fit.

At present the case seems to me to be quite clear. The intention of the provision in the statute was to prevent frauds. With that object it provides that the attestation of the execution shall state that the effect of the instrument has been explained to the maker. It also provides that the consideration shall be truly stated. Whether in this instance the consideration was truly stated or not, I have to decide only upon the evidence that has been adduced before me on this point. If the consideration was not truly stated there remains no other question in the case.

Upon turning to the evidence, I find that the two borrowers say that a sum of £38 10s. only was paid to them. On the other

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(1) 16 Ch. D. 35, 38.

(2) 15 Ch. D. 42.

(3) 44 L. T. (N.S.) 828.

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*Ex parte*  
BIRTH.  
*In re*  
COWBURN.  
—

hand, on the part of the Appellant it has been proved by *Marks* and another man that £40 was paid. It cannot be denied that the instrument speaks of £40 as having been paid to the borrowers. The execution appears to have been regularly attested by a solicitor, it was duly registered, and a certificate of registration has been produced. Upon the evidence, the facts appear to me to be, that £40 was actually paid to the borrowers, and that they afterwards paid back again £1 10s. for expenses. The Act of Parliament seems to have been fully complied with, and unless I am to disbelieve the evidence on the part of the Appellant, I must take that evidence, corroborated as it is by the testimony of the instrument, as conclusive against the debtors' statement.

I think the order of the Court below was wrong, and it must be discharged with costs.

J. B. D.

C. A.      From this decision the trustee appealed. The appeal was heard on the 19th of January, 1882.

*Millar*, Q.C., and *J. G. Wood*, for the Appellant:—

The County Court Judge disbelieved the Respondent's witnesses after hearing their cross-examination, and the Chief Judge has reversed the decision without having before him the whole of the evidence on which it was founded.

[JESSEL, M.R.:—There has been a complete miscarriage. It is the duty of an appellant to produce to the Court to which he appeals a sufficient note of all the evidence upon which the order appealed from was founded.

BRETT, L.J.:—And if he does not, it is the duty of the Court to dismiss the appeal.

*Winslow*, Q.C., for the Respondent, then agreed to admit a report which appeared in a *Dewsbury* newspaper of the cross-examination of the witnesses in the County Court.]

[This report was accordingly read.]

This evidence proves that the £1 10s. was retained by the grantee, and that only £38 10s. was paid to the grantors. The consideration for the bill of sale was therefore not duly set forth

in compliance with sect. 8 of the *Bills of Sale Act*, 1878: *Ex parte Charing Cross Advance and Deposit Bank* (1); *Hamilton, v. Chaine* (2).

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*Winslow*, Q.C., and *Finlay Knight*, for the bill of sale holder:—

The *Bills of Sale Act* does not apply at all, for the goods were not at the time of the filing of the petition (the 30th of July) in the apparent possession of the grantors, the sheriff being in possession under an execution: *Ex parte Saffery* (3). And *Richardson* on the 27th of July advertised the goods for sale on the 30th of July.

[JESSEL, M.R.:—It appears that this point was not raised in the County Court. If it had been, the trustee might have been able to answer your evidence.]

The debtors' own evidence is that *Richardson* seized all their property on the 27th of July.

As to the deduction of £1 10s., *Ex parte National Mercantile Bank* (4) and *Ex parte Challinor* (5) exactly apply, and shew that the expenses incident to the preparation of the deed may be properly deducted from the sum which is stated in it as the consideration, because the borrower is liable to pay those expenses.

[JESSEL, M.R., referred to *Ex parte Rolph* (6).]

The borrower is bound to pay the fee of the solicitor for attesting the execution of the deed.

JESSEL, M.R.:—

This is an appeal from a decision of the Chief Judge overruling a decision of the County Court Judge, and I must say that, in my opinion, there was a miscarriage on the hearing before the Chief Judge. The County Court Judge decided the case upon evidence of this character, half a dozen affidavits and the cross-examination of five witnesses who had made the affidavits. The cross-examination was oral, and it appears that no request was made to the

(1) 16 Ch. D. 35.

(4) 15 Ch. D. 42.

(2) 7 Q. B. D. 1, 319.

(5) 16 Ch. D. 260.

(3) 16 Ch. D. 668.

(6) 19 Ch. D. 98.

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County Court Judge to take a note of the evidence, and he did not take a note. When the case came on before the Chief Judge, there being no note of the oral evidence taken by the County Court Judge, and no sufficient note of it taken by anybody else, there was no proof before the Chief Judge of what the effect of the cross-examination was, and thereupon he decided the case without knowing what it was, and upon the affidavits only. With great respect to the Chief Judge, it appears to me, as I have already said, that that was a miscarriage. The Appellant was bound, if he appealed, to present to the Chief Judge a sufficient note of the cross-examination. If he intended to appeal he might have got a shorthand note taken of the cross-examination, or he might have had his counsel's note, or his solicitor's note properly verified by affidavit. If he had not intended to appeal, or if by some accident (for accidents will occur) the notes were lost, if the Judge's notes and the counsel's notes were lost, then, of course, he might apply by way of indulgence to the Court of Appeal to have the evidence taken over again, and the Court might or might not accede to that application. But, in my opinion, the Court cannot decide an appeal in the absence of the evidence on which the order appealed from was founded. Before us that defect has been cured by the admission of a newspaper report, which appears to be very full. Therefore we know the evidence which was before the County Court Judge, and we find that the evidence of one of the witnesses for the present Respondent, the solicitor who attested the bill of sale, was entirely disbelieved by him. On cross-examination he said that he did not know whether the £40 was paid. Then we have two witnesses against two witnesses who are swearing exactly contrary to each other, and the County Court Judge, who saw the witnesses, says that he believes the two who made the statement on which the present Appellant relies, and that he does not believe the two on which the Respondent relies. In that state of circumstances it is not the practice of the Appeal Court to overrule the decision of the Judge of the Court below. It has been over and over again stated in many reported cases that it requires a very strong case indeed to induce the Court of Appeal to interfere on a question of fact, when there has been conflicting evidence before the tribunal,



whether composed of a Judge alone or of a Judge and a jury, which has seen the witnesses. Therefore, on the present materials, the Court must come to the conclusion that £38 10s. only was paid to the grantors of the bill of sale, and not £40 as is stated in the body of the bill. If that is so, how can it be said that the true consideration was stated in the deed? It is stated that £20 was kept for interest and expenses, so that we have £20 plus £40, and the bill of sale is given to secure £60. Then it is suggested that the 30s. which was not paid to the grantors was retained by the grantee for expenses incident to the transaction itself. If it was so, in my opinion the consideration is not truly stated. There is a great distinction between a sum of money being advanced on the terms of the lender paying out of it a debt due by the borrower to a third person, a portion of that sum being handed back again to the lender or handed over by him to another person who is a creditor of the borrower, and a sum of money being retained for that which is not truly a debt until after the transaction itself is completed, that is, a sum of money which consists of the expenses of the transaction itself. When a mortgage is completed the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitor for those expenses. The mortgagor is liable to pay over to the mortgagee what he pays to his own solicitor, but there is no debt until the transaction is completed. Indeed, it has been decided that, if the transaction falls through, the intending mortgagee cannot recover his expenses from the intending mortgagor, and to avoid that difficulty it has for many years become the practice of solicitors before engaging in a mortgage transaction to obtain an undertaking by the intending borrower's solicitor to pay the expenses. And I have known cases where in very large transactions the solicitor of an intending mortgagee has taken a written contract from the intending borrower to pay the expenses, if the title to the property proposed to be mortgaged should prove not to be a good one. That being so, though it may be true that the borrower would be liable to pay these expenses, yet, in the absence of special contract, he could not be liable until after the deed was executed. Therefore, this sum could not have been properly

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treated in the deed as a part of the costs which the borrower was liable to pay. Moreover, in this particular instance, there was in my opinion no liability on his part to pay those costs. £20 was expressly charged for interest and expenses generally, that is, for the expenses attending the loan. Therefore, there was no additional liability whatever, and consequently there was not in this case even (if I may so call it) an inchoate debt for any other expenses of the transaction.

That would finish what I have to say on this part of the case were it not that our attention has been called, or rather recalled, to the two decisions of *Ex parte National Mercantile Bank* (1) and *Ex parte Challinor* (2). Now I am quite satisfied to take those decisions as they are explained in *Ex parte Challinor* by Lord Justice *James*, who was then presiding in this Court. After stating what he thought the Act meant, he said (3), "But when a man borrows money he generally does so for the purpose of paying his debts, at any rate he ought to employ it in paying them, and if by his direction the money stated as the consideration is applied by the lender in the honest discharge of the borrower's debts, there is no reason for saying that that is not a payment of the money to him. That was the principle of our decision in *Ex parte National Mercantile Bank*, and in that case, besides the promissory notes of the borrower which were taken up, there were deducted some charges for the preparation of the security. It appears to me quite right to deduct the costs of preparing the bill of sale, and the auctioneer's charges for valuing the property, for that is what happens upon every mortgage transaction." Then he goes on: "And it does not seem to me that the money was the less paid to the borrower because part of it was with his consent applied in payment of a debt for costs to his solicitor, which was not indeed strictly payable, because a bill of costs had not been delivered, but which was really owing to the solicitor." It is plain, therefore, that Lord Justice *James*, in dealing with this small sum for costs, thought it was a debt. He treats it on the principle that you can only apply the consideration in the payment of a debt. The fact that the costs of the preparation of

(1) 15 Ch. D. 42.

(2) 16 Ch. D. 260.

(3) 16 Ch. D. 266.

the deed did not become a debt due from the grantee until after the transaction was completed was not present to his mind, and all he intended to decide was that a debt strictly so called, a debt existing at the time, might be deducted. I think that this reconciles the case with the subsequent decisions. But, if it cannot be reconciled, all I can say is, that, though I am bound by the decision in a precisely similar case, I do not feel inclined to extend it any further.

The other point taken was this: The Respondent alleges that the order can be supported on the ground that the possession of the goods had changed before the filing of the liquidation petition. It is quite true that there is some evidence about that, but the point was not taken in the County Court, and the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence. Now the *Bills of Sale Act* does not allow mere possession to prevail against the trustee, because it may be a merely formal, not a real possession. It may be taken for the sake of form only; it may not be a *bonâ fide* possession, or it may not be a continuing possession. We must, therefore, consider what is the evidence of possession on which reliance is placed, and whether it does shew conclusively that such a state of things existed that no answer can be given on behalf of the trustee. It appears to me that the evidence falls far short of that, and therefore that the point cannot now be taken with success. The evidence is that an auctioneer, in consequence of an execution being issued, "levied the bill of sale." What that means I do not know. It was suggested by Mr. *Winslow* that it meant that he took possession. Perhaps it does; but he could not do that, because, according to the statement in his affidavit, the sheriff was in possession under an execution. Therefore it was impossible that he could have taken possession, unless he paid out the sheriff. I am told that he did, but I cannot listen to that statement, as it is not supported by any evidence. Then the auctioneer does not go on to say that he retained possession until after the 30th, nor that he did any ostensible act. All that he proves is that the property was advertised

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for sale. That does not prove possession. A bill of sale holder may advertise the goods comprised in his security for sale without taking possession. Then it is said that an injunction was applied for. But that was an injunction to restrain the auctioneer and the bill of sale holder from taking possession; and it does not shew that they were then in possession. An injunction can be granted against a man who has not taken possession, but who only threatens to take possession when he has no right to threaten. Therefore there is not sufficient evidence to shew that the auctioneer had continued possession up to the time of the filing of the liquidation petition, or that it was an actual *bonâ fide* possession sufficient within the meaning of the Act. Therefore, it appears to me that the appeal must be allowed with costs.

BRETT, L.J.:—

I am of the same opinion on all the points. I will only add that I think that *Ex parte Challinor* (1) and *Ex parte National Mercantile Bank* (2) can only be treated in future as binding authorities in cases which come within the principle enunciated by Lord Justice *James* (3) as the ground of those decisions; that is to say, they are only authorities for saying that, if a part of the money stated in a bill of sale as the consideration paid at the time of its execution is, by the direction of the borrower, given at the time, paid in order to satisfy debts of his then existing, the money so paid may be properly stated in the deed as money then paid to him. Beyond that it seems to me that those cases have no binding authority.

HOLKER, L.J.:—

I am of the same opinion. The only question before the County Court Judge seems to have been whether £40 or £38 10s. was in fact paid to the borrowers. The Judge had the opportunity of seeing the witnesses and noticing their demeanour, and he came to the conclusion that only £38 10s. was paid. I do not think Mr. *Winslow* would argue that, if £40 is stated in the bill of sale as the consideration and only £38 10s. was paid, and there is no explanation, the consideration would be truly stated

(1) 16 Ch. D. 260.

(2) 15 Ch. D. 42.

(3) 16 Ch. D. 266.

within the meaning of the *Bills of Sale Act*. Unfortunately, it appears that the Chief Judge has reversed the decision of the County Court Judge without being made acquainted with the *vivâ voce* evidence upon which that decision was come to. That evidence does not appear to have been in any way before him, and he seems, so far as I understand his judgment, to have come to the conclusion that the £40 was actually paid, mainly because the borrowers had signed a receipt at the foot of the bill of sale for that sum. No doubt it is a very important fact against the borrowers that they signed a receipt for £40, but that is easily explained if you take their account of the transaction. They say they were told that they were paid only £38 10s., because £1 was deducted in order to pay the fee of the solicitor who attested the execution of the bill of sale, and 10s. to somebody else. Now, if they were under a liability to pay £1 to the solicitor and 10s. to somebody else, they would in effect have been paid £40, and that explains why they signed the receipt for it. However, I must say that, if the evidence which has been read from the newspaper report had been before me originally, I should have come to the same conclusion as the learned County Court Judge. Mr. *Winslow* argues in this way: Take the account of the debtors themselves. They say that £1 was deducted in order to pay the solicitor, and 10s. to pay somebody else, and that was a perfectly fair and proper deduction. Therefore the true consideration was stated in the bill of sale. But, unfortunately, there is no evidence that either the £1 or the 10s. was deducted for or applied to the purposes mentioned. Therefore, on the whole, I come to the conclusion that the appeal must be allowed.

Order of the County Court Judge to be restored, and Appellant to pay the costs of the appeal and of the hearing before the Chief Judge.

Solicitors for Appellant: *W. & J. Flower & Nussey*, agents for *Carr & Cadman, Gomersal*.

Solicitors for Respondent: *Hamlin & Grammer*, agents for *B. C. Pullan, Leeds*.

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