356

BRIEF FOR DEFENDANTS IN ERROR.

IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE.

JUNE TERM, 1926.

F. E. NEWCOMB, PLAINTIFF,

versus

C. W. GUTHRIE, ET ALS., DEFENDANTS.

ERROR TO THE LAW AND CHANCERY COURT FOR THE CITY OF ROANOKE, VIRGINIA.

JAMES P. HART,
POINDEXTER & POINDEXTER,
Attorneys for Defendants in Error.

Roanoke, Virginia,

RICHMOND PRESS, I NC., PRINTERS

IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE.

F. E. NEWCOMB, PLAINTIFF,

versus

C. W. GUTHRIE, ET ALS., DEFENDANTS.

BRIEF OF APPELLEES.

FACTS.

The facts in this case in their chronological order are as follows:

On August 1, 1923, F. E. Newcomb, then actively conducting a grocery store at 1613 Third Avenue, Roanoke, Virginia, sold his *shifting* stock of goods, together with certain fixtures, to C. W. Guthrie and L. E. Spangler, partners as Guthrie and Spangler, for the purchase price of $2,463.58, the purchaser executing three interest-bearing notes payable in thirty (30), sixty (60) and ninety (90) days (Record, page 10). A contract of conditional sale—the subject matter of this litigation—was executed, in which legal title was attempted to be reserved by the vendor. The vital and controverted feature of this contract is in the following language:

> "But the title thereto is hereby expressly reserved by and remains vested in the said party of the first part, and shall so remain until the payment in full of the sum of $2,463.58, which amount is unpaid on the purchase price of the said *merchandise* (italics ours) and fixtures, and evidenced by (3) interest-bearing, negotiable notes for the sum of $821.16 each, signed by C. W. Guthrie and L. E. Spangler, and payable to F. E. Newcomb *30, 60 and 90 days from date* (italics ours), said amounts being the balance of purchase price of said *goods and merchandise* (italics ours) and fixtures." (Record, page 10.)

Of the purchase price there was paid $673.62, leaving a balance due of $1,789.96 (Record, page 12).

On August 17, 1923, sixteen days after the contract was entered into, this *alleged* contract of conditional sale was attempted to be docketed in the Clerk's Office of Roanoke City, Virginia (Record, page 11).

From August 6th to October 1st, 1923, debts in the conduct of this business were contracted by Guthrie and Spangler with Wilson and Company and other creditors in at least the sum of $695.10 yet due and owing (Record, pages 18 and 19), which debts were reduced to judgments, on which executions issued on June 10, 1925 (Record, pages 29, 32), for the recovery of which a petition and supplemental petition were filed by these creditors in this suit (Record, pages 17 and 28). A *lien* debt with S. L. Newcomb, duly secured by a Deed of Trust on these fixtures, was likewise contracted, which Deed of Trust was duly recorded in the Clerk's Office of Roanoke City, Virginia (Record, page 41).

On October 25, 1923, Guthrie and Spangler, through C. W. Guthrie (L. E. Spangler having disappeared), executed and delivered to James P. Hart, Trustee for their creditors, a *general* deed of assignment conveying this *shifting* stock of goods, fixtures, etc. James P. Hart, Trustee, immediately took possession of the same (Re-

cord, page 12) who, under decree entered in this cause, duly converted the same into cash (Record, page 45), the funds to await the result of this litigation.

On November 10, 1923, appellant instituted this suit to enforce his alleged bill of sale on

(a) the shifting stock of goods, and

(b) the fixtures, (Record, page 9).

to the sufficiency of which bill a demurrer was filed by C. W. Guthrie, the assignor, S. L. Newcomb, the landlord, and a lien creditor under his Deed of Trust (Record, page 41), and James P. Hart, Trustee, a purchaser for value and without notice (Record, page 13).

On May 17, 1924, the Court sustained the demurrer and dismissed the bill (Record, pages 44-45).

On May 24, 1924, on motion of plaintiff (appellant) the decree sustaining the demurrer was set aside and leave granted to file an amended petition (Record, page 45), the purpose of which was to allege that James P. Hart, Trustee, had prior and personal knowledge of the contract of conditional sale.

On October 10, 1925, the day fixed by the Court for hearing the cause, further time was extended the plaintiff (appellant)

> "to allow him to take depositions showing that James P. Hart, Trustee, had actual notice of the sale by F. E. Newcomb to Guthrie and Spangler." (Record, page 47.)

On October 16, 1925, deposition of appellant was taken which utterly failed to show that James P. Hart, Trustee, had actual notice of said purported contract of conditional sale (Record, page 41). On the contrary, however, this deposition does show that Guthrie and Spangler had encumbered the fixtures in question with

a Deed of Trust for $500.00 in favor of S. L. Newcomb, an uncle of appellant, which had been duly recorded, thereby constituting notice to the world, and especially to appellant, who had personally gone to the Court House and seen the Deed of Trust (Record, page 41).

Disregarding the special terms of the decree that further time was given

> "to allow him to take depositions showing that James P. Hart, Trustee, had actual notice of the sale by F. E. Newcomb to Guthrie and Spangler,"

the witness (appellant) attempted to show that a few days prior to the execution of the general deed of assignment to James P. Hart, Trustee, C. W. Guthrie told him, appellant, to take back the stock of goods and fixtures and deliver to him the keys to the store (Record, page 34, *et seq.*)

On December 4, 1925, the Court entered its decree appealed from in this case, that the plaintiff (appellant) was not entitled to the relief prayed for, since

(a) the contract of conditional sale was *inherently incapable* of being docketed and constituted no notice to creditors or purchasers for value; and

(b) that James P. Hart, Trustee, had no actual notice of the contract of conditional sale between F. E. Newcomb and Guthrie and Spangler. (Record, p. 48.)

ARGUMENT AND LAW OF THE CASE.

I. THE CONTRACT OF CONDITIONAL SALE WAS *INHERENTLY* INCAPABLE OF BEING DOCKETED, BY REASON OF WHICH IT WAS NEVER DOCKETED, THEREBY AFFORDING NO NOTICE, CONSTRUCTIVE OR OTHERWISE, TO JAMES P. HART, TRUSTEE, A PURCHASER FOR

VALUE, OR ANY OTHER PERSON, EVEN THOUGH A MEMORANDUM OF SAID CONTRACT WAS COPIED ON THE DOCKET BOOK IN THE CLERK'S OFFICE OF ROANOKE CITY, VIRGINIA.

This contract recites that the deferred purchase money is

> "evidenced by (3) interest-bearing, negotiable notes for the sum of $821.16 each, signed by C. W. Guthrie and L. E. Spangler, and payable to F. E. Newcomb 30, 60 and 90 days from date."

It will be observed that this contract nowhere recites *any* date from which the 30, 60 and 90 days can be computed in order to determine the date on which the notes become due and payable.

Section 5189 Code of Virginia (1919) and Acts amendatory thereto is as follows:

> "Every sale or contract for the sale of goods and chattels wherein the title thereto or lien thereon is reserved until the same be paid for, in whole or in part, or the transfer of title is made to depend on any condition where possession is delivered to the vendee, shall, in respect to such reservation and condition, be *void* as to creditors of and *purchasers for value without notice* from such vendee, until such sale or contract be evidenced by writing signed by the vendor and the vendee, setting forth the date thereof, the amount due, *when and how payable,* a brief description of the goods and chattels, and the terms of the reservation or condition, and until and except from the time the writing evidencing such sale or contract is duly admitted to record in the county or corporation in which said goods or chattels may be," * * * (Italics ours).

In the case of *National Cash Register* vs. *Burrow,*

110 Va., page 787, *et seq.*, and in so far as the maturity of the deferred payments was concerned, involving facts similar to those in the instant case, Judge Cardwell, in rendering the opinion of the Court, says:

> "We do not deem it necessary to set out the statute at length. Suffice it to say, *it requires that the registry or docketing of the contract must be done by the Clerk 'from the original contract,'* and for the contract to be *inherently capable of being docketed* under the statute *it must contain everything which the clerk must have before him to be put on the docket, to-wit*: (1) date of contract; (2) amount due thereon; (3) *when payable;* (4) how payable; (5) a brief description of the goods or chattels; and (6) name of vendor and vendee. * * * *The statute requires the six requisites named above to appear in the contract.* * * * It will be observed that the vendee was authorized to date the above mentioned note (i. e., the note for first deferred payment) at such time as he might elect, and to insert such date either prior to or after the execution of such note; so that the time of payment of the other installments of the purchase money was made entirely dependent upon the date of the first note, these installments being payable monthly after its date, thus setting out an agreement between the parties that they may have fully understood, but *failing entirely to provide any sort of notice to third parties as to when* and how *the deferred payments for the chattels in question were to be paid.* * * * Furthermore, it appears that the note of which we have been speaking was not dated until nearly a month after the supposed docketing of the contract; so that the contract, as presented to the clerk, which *should have been capable of giving the required information as to when the balance of the purchase money for the cash registers in question was payable, could not have given such information until after the date of the note was inserted therein, and we concur in the view of counsel for defendants in error that without the complete note set out in the contract or attached thereto as a part thereof the con-*

tract was inherently incapable of being docketed under the statute. * * *'' (Italics ours.)

To the same effect see:

National Cash Register vs. *Norfolk City,* 110 Va. 791.

II. JAMES P. HART, TRUSTEE, WAS A PURCHASER FOR VALUE.

See:

Arbuckle vs. *Gates,* 95 Va. 802;
Corbett vs. *Riddle,* 209 Fed. 84.

III. THE CONDITIONAL SALES CONTRACT INVOLVED HEREIN IS NOT *VOIDABLE MERELY,* BUT IS *ABSOLUTELY VOID IN TOTO,* AND CAN HAVE NO BINDING FORCE AND EFFECT, AND FROM WHICH NO RIGHTS CAN FLOW TO PLAINTIFF IN ERROR, OR ANY OTHER PERSON, PLAINTIFF IN ERROR THEREBY BECOMING ONE OF THE GENERAL CREDITORS OF GUTHRIE AND SPANGLER.

(a) The conditional sales contract having failed to designate any definite date when the notes in 30, 60 and 90 days would become due, renders the contract *void* as an entirety.

Section 5189 Code of Virginia, *supra,* expressly provides.

''shall, in respect to such reservation and condition, be *void* as to creditors of and *purchasers for value without notice from such vendee,* until such sale or contract be evidenced by writing signed by the ven-

dor and the vendee, setting forth the date thereof, the amount due, *when and how payable,* a brief description of the goods and chattels and the terms of the reservation or condition, and until and except from the time the writing evidencing such sale or contract is duly admitted to record in the county or corporation in which said goods or chattels may be." (Italics ours.)

(b) The conditional sales contract attempted to reserve a lien or mortgage on a shifting stock of goods.

In *Boice* vs. *Finance and Guaranty Corporation,* 127 Va., at page 568, it is said:

"The substantial question for our consideration is: Can a chattel mortgage be given on goods and chattels actively used in trade by one who continues to exercise the dominion of owner over the same? * * * From *Lang* vs. *Lee,* 3 Rand. (24 Va.) 410, decided in 1825, until the present time, it has been uniformly held by this court that such a mortgage as is first mentioned on a stock of goods, wares and merchandise, or in fact any mortgage on that class of goods which contains provisions adequate to defeat its purposes, is 'null and void as against creditors and purchasers' of the grantor. The cases are too numerous to cite."

Citing various cases.

In Wait on Fraudulent Conveyances, Section 434, it is said:

"A deed *void in part is void in toto.* And in New York a mortgage which is fraudulent by reason of provisions contained in it allowing the mortgagor to sell merchandise covered by it, in the usual course of trade *is ineffectual as to any other kind of property embraced in it. The fraudulent portion vitiates the whole instrument."* (Italics ours.)

Citing:

Russell vs. *Stone,* 37 N. Y. 591, and a number of other authorities.

IV. APPELLANT INSISTS THAT THE MERCHANDISE AND FIXTURES WERE RETURNED TO APPELLANT IN SATISFACTION OF HIS DEBT, AND ONLY LIEN CREDITORS CAN COMPLAIN. (Record, page 6.)

This Honorable Court will not here for the *first* time adjudicate the question as to whether or not the stock of merchandise and fixtures were returned to appellant, since this question was not even argued, submitted or adjudicated in the trial court.

The Court, in its final decree entered in this cause, assigns only the following reasons for dismissing the bill:

> (a) "That the alleged contract of conditional sale between the said F. E. Newcomb and C. W. Guthrie and L. E. Spangler was inherently incapable of being docketed, by reason of which it constituted no notice to creditors or purchasers for value;" and
>
> (b) "That the plaintiff, F. E. Newcomb, has not shown that the said James P. Hart, Trustee, had actual notice of the attempted reservation of title on the part of the said F. E. Newcomb in the sale made by him to the said C. W. Guthrie and L. E. Spangler, and doth so adjudge, order and decree." (Record, page 48.)

In *Union Bank* vs. *Richmond,* 94 Va., at page 320, the Court says:

> "We can only consider such alleged errors as are involved in the record and *have been considered*

and passed upon by the court below.''' (Italics ours.)

Citing:

National Bank vs. *Commonwealth,* 9 Wallace 353.

In *Stephenson* vs. *Henkle,* 100 Va., page 597, the same language is used.

In *National Bank* vs. *Commonwealth,* 9 Wallace 353 (19 L. Ed., U. S. Supreme Court Reports, page 704), the Court says:

> "We have so often of late decided that when a case is brought before us by a writ of error to a state court we can only consider such alleged errors as are involved in the record and actually received the considerations of the state court, that it is only necessary to state the proposition now."

In *West Virginia* vs. *Stewart* (W. Va.), 70 S. E. at page 118, the Court says:

> "Only the rulings of the trial court may be received here. Upon the demurrer we can only say whether the evidence sustains plaintiff's right to the judgments, *for that is all the lower court considered.* It was not requested to rule upon the correctness of the findings of the Jury as to the question of damages. *Its action is a prerequisite to the exercise of any jurisdiction by this court.''* (Italics ours.)

In *Woods* vs. *Campbell* (W. Va.), 32 S. E., at page 209, the Court says:

> "Answers were filed to this bill setting up matters in bar thereof and demurrer thereto, *but such matters remained wholly undetermined, as the final decree does not notice them* (italics ours) other than

to refuse a demand for security for costs and to require other parties," etc.

In the case of *Clintwood Coal Corporation* vs. *Turner,* 133 Va., at page 470, the Court says:

> "It is perfectly clear that *the court and the parties understood* that the case was submitted for a decree upon the merits. *No further proof was desired or contemplated on either side and the court took the case 'for final determination'* pursuant to the agreed decree formerly entered in the cause. *If the court had been of the opinion to award the injunction, it would then have been necessary to refer the cause to a commissioner to take an account, but having decided that the complainant was not entitled to the relief prayed for, nothing remained to be done except to dismiss the bill at the complainant's costs."* (Italics ours.)

It is perfectly evident that the converse of this proposition is equally true, viz: that if the Court and the parties *did not understand* that the case was submitted for a final decree upon the question as to whether or not the stock of goods and fixtures had been returned to plaintiff in error, then the decree entered in this cause (Record, page 48) *is not a final determination of the case quoad that feature of the same,* and should be referred back to the trial Court for further evidence and proceedings if this inquiry becomes pertinent to the issue.

A demurrer had previously been filed in this cause, sustained and then set aside for the only and sole purpose to allow plaintiff in error to file an amended petition alleging that J. P. Hart, Trustee, had personal knowledge of the conditional sales contract. This amended petition was filed; whereupon the Court, by its decree of October 10, 1925, gave special permission to plaintiff in error to take his deposition by a certain date to show *only one thing,* viz: *that J. P. Hart, Trustee,*

did have personal knowledge of the conditional sales contract prior to becoming Trustee under the deed of assignment. The deposition taken by plaintiff in error *under the limited terms* of this decree utterly failed to show any such fact; whereupon, the case was submitted to the trial court and decided by it *only and solely* upon the two grounds therein assigned, viz:

(a) Whether or not the contract was *inherently incapable* of being docketed and afforded no notice to any one.

(b) Whether or not James P. Hart, Trustee, had personal knowledge of said contract prior to becoming assignee under the Deed of Trust. (Record, page 48.)

Wilson and Company and the other petitioning creditors, under the limited terms of the decree of October 10, 1925 (Record, page 47), were not afforded an opportunity to disprove plaintiff in error's testimony that the goods and fixtures had been returned by C. W. Guthrie to plaintiff in error, a return of which would have been a fraud upon their rights, a violation of the Bulk Sales Statute, in that there is no evidence that Section 5187 Code of Virginia (1919) and Acts amendatory thereto was complied with. Information was given for the first time in this deposition of plaintiff in error that said goods and fixtures had been returned to plaintiff in error long after the expiration of the six months, the statutory period prescribed by Section 5187 Code of Virginia, in which they or their creditors or James P. Hart, Trustee, could bring suit to set aside such alleged "transfer or assignment in bulk" of said stock of goods and merchandise, which "transfer" they are prepared to show was never made.

S. L. Newcomb, a lien creditor in the sum of $500.00, was not given an opportunity under the *limited* terms of said decree to show from what date his indebtedness of

$500.00 is to bear interest, nor was he given an opportunity to show, in addition thereto, that he is likewise a *lien creditor* by reason of the fact that he was the landlord, from whom the premises were rented, a large portion of which rent yet remains due and unpaid.

C. W. Guthrie, under the *limited* terms of said decree, has likewise not only been afforded no opportunity to controvert the testimony of plaintiff in error that such transfer was never made, but, on the contrary, is prepared to show that the keys to the store, instead of being *voluntarily delivered* to plaintiff in error, were, in fact, physically taken from him over his protest, and, in addition thereto, he was virtually ejected from the store, for the showing of all of which said parties would have sought the permission of the Court if such issue had been before the Court for determination.

We submit, theerfore, that since the trial court has not attempted to pass upon the question as to whether or not C. W. Guthrie symbolically delivered back to appellant the stock of goods and fixtures in settlement of his original indebtedness, that this Court has not that question before it to adjudicate and will not attempt so to In justice to Honorable W. W. Moffett, the trial Judge, if we may be excused for so saying, we believe counsel for appellant will bear us out in the statement that this question was never argued before him, no request was made of him to introduce such testimony or to pass upon the same, and the question for the first time is brought to this Honorable Court. It is eminently unfair to the trial Judge to ask this Court to reverse this case on a question which he has not even been requested to pass upon.

We confidently submit that the decree of the lower Court should be affirmed.

JAMES P. HART,
POINDEXTER & POINDEXTER,
Counsel for Appellees.