Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of W. Morris v. *A. Morris, the Official Assignee of the Estate of E. W. Cook, from the Supreme Court of New South Wales; delivered 3rd July* 1895.

Present:

The Lord Chancellor.
Lord Hobhouse.
Lord Morris.
Lord Davey.
Sir Richard Couch.

[*Delivered by The Lord Chancellor.*]

This is an Appeal from an Order of the Supreme Court of New South Wales reversing an Order of Mr. Justice Owen, sitting as Judge in Bankruptcy, who refused to declare a Bill of Sale given by the bankrupt to the Appellant on the 11th July 1892 void as against the Official Assignee of the bankrupt.

The assignment included all the stock in trade, book debts, and other property of the bankrupt. It appears that he was indebted in a sum of 500*l.* to a Mr. Warner who required payment. The bankrupt accordingly sought, through the agency of a Mr. Tomkins, to obtain a loan for the purpose of enabling him to discharge this debt, and of providing him with further funds. Tomkins applied to the Appellant to make the advance. He promised to lend 600*l.*, upon obtaining as security a Bill of Sale. While the negotiations were proceeding, the Appellant was under the impression that the proposed borrower

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was a brother of the bankrupt. Upon his discovering that this was not the case, he at first refused to make the loan, but ultimately agreed to do so, and a Bill of Sale was executed and the money advanced on the 11th July 1892.

Mr. Justice Owen, who heard the case, states in his Judgment (as their Lordships think with perfect correctness) that there was no evidence that the bankrupt was at that time in any financial difficulties. The case then stands thus:—The Appellant made the advance of 600*l.* in good faith, as the Judge found, to a man who, as far as appears, was solvent, taking as security the assignment in question of which he is *primâ facie* entitled to the benefit. It is asserted, however, that the assignment was made with intent to defeat or delay creditors within the meaning either of the Act 13 Eliz. c. 5, or of the Bankruptcy Act then in force, and is therefore void as against the Respondent. The Bill of Sale was not registered, and possession was not taken by the Appellant until immediately before the bankruptcy, but it was taken in time to prevent the instrument being avoided under the provisions of the Bills of Sale Act.

It was incumbent therefore on the Respondent to prove the intent, which he alleges, to defeat or delay the creditors of the bankrupt. For this purpose he relies on what passed with reference to the registration of the Bill of Sale at the time the transaction was entered into. There is some conflict of evidence as to this. The Appellant asserts that it was he who insisted that the Bill of Sale should not be registered, on the ground that as he was a medical man and not a money-lender he did not wish his name to appear, in connection with a loan, upon the Trade Register. His evidence is confirmed in this respect by Tomkins.

In a prior deposition in bankruptcy the Appellant said:—"It was arranged that the "Bill of Sale was not to be registered. I agreed "to this." There appears to be no inconsistency between this statement and his evidence at the hearing.

The bankrupt in his evidence did not contradict the Appellant's statement that the idea of non-registration emanated from him, though on his examination in bankruptcy he had said that he thought he asked the Appellant not to register the Bill of Sale as it would injure his credit. The Appellant denied this, and the learned Judge in whose presence the witnesses were examined believed this denial, and said that no one who heard the bankrupt give his evidence could doubt that he was an unreliable witness.

Their Lordships, therefore, can have no hesitation in accepting the Appellant's account of what had happened. They entertain no doubt that the sole reason why the Appellant did not register the Bill of Sale was that which he gave, and that there was no agreement that he should refrain from registering it at the instance, and for the benefit, of the bankrupt.

The Respondent, however, further relies upon an alleged agreement by the bankrupt to inform the Appellant if "things were not looking so "bright," so that he could either register the Bill of Sale or take possession under it. The learned Judge says:—"The Respondent" (the present Appellant) "at first denied this, then "he said he did not remember, and finally he "volunteered the statement that he would not "undertake to say that the words were not used. "I must therefore take it that those words may "have been used, but even so it does not show "an intent on the Respondent's part to defeat "or delay his creditors."

In view of the fact that the learned Judge

treated the Appellant as a witness of truth, and characterized the bankrupt as an unreliable witness, it may well be doubted whether, if it were material, any finding adverse to the Appellant could properly be based upon this evidence of the bankrupt, even though the Appellant would not undertake absolutely to contradict it. But their Lordships entirely agree with the learned Judge of First Instance that even if the bankrupt volunteered, as he alleges he did, to give the Appellant information if his circumstances should become precarious, it does not assist the Respondent's case.

The question is, with what intent the assignment was made, and not why the Appellant refrained from registering or postponed taking possession. Their Lordships see no evidence that the assignment was made with intent to defeat or delay creditors. They think the transaction was a perfectly honest and straightforward one. The intent of the bankrupt who made the Bill of Sale was to obtain an advance of 600*l.*, which he could not get except upon the terms of his giving that security. The intent of the Appellant who made the advance was to obtain security for his loan. Their Lordships do not believe that there was on the part of either of them any other intent.

It was suggested for the Respondent that as the Appellant knew that Warner, who was unsecured, was to be repaid out of the advance of 600*l.*, it was really a device for transferring Warner's debt to the Appellant, and so giving a security for it which could not safely have been given to Warner in respect of an antecedent debt due to him. There appears to their Lordships to be no pretence for this suggestion. If the assignment was not vitiated by any such intent as is alleged it is immaterial to inquire why the Appellant refrained from

registering or postponed taking possession. He was under no legal obligation to do either. No doubt unless he registered or took possession he incurred the risk of losing his security. So long as he did neither, his security would have been avoided by an execution or a bankruptcy. But he was entitled to run this risk if he pleased. Subject to this risk the law in England as well as in New South Wales allows a title to be acquired by an assignment without delivery of possession.

This is, in their Lordships' opinion, the answer to the reasons which appear to have mainly influenced the Supreme Court. It is quite true that credit may probably have been given to the bankrupt after the date of the Bill of Sale which he would not have obtained if that transaction had been made public either by registration or a change of possession. But when the Legislature determined to interfere with secret Bills of Sale they did not render all assignments void unless accompanied by delivery or followed by registration. The operation of the Bills of Sale Act was much more limited.

The learned Chief Justice in the Supreme Court relied much on the case of *In re Ash* (7 L. R. Ch. Ap. 636). In that case a Bill of Sale was given in respect of an antecedent debt, and at a time when the grantor was in a condition of insolvency. It was therefore *primâ facie* bad. It was sought to validate it upon the ground that the advance had been made on a promise that a Bill of Sale should be given, and that the sum advanced was therefore to be treated as a present advance on the security of that instrument. The Court whilst admitting that as a general rule this would be so, thought that the rule did not protect transactions where the giving of a Bill of Sale was purposely postponed until the trader was in a state of insolvency in order to

prevent the destruction of his credit, which would result from registering a Bill of Sale.

The Chief Justice said in his judgment in the present case that "there was a close analogy " between the case of postponing the giving of a " Bill of Sale and postponement in entering into " possession." Their Lordships cannot agree with this view. In the case relied on the Bill of Sale was given by an insolvent person without any present advance, and of itself could not avail the grantee. He invoked the aid of a prior promise made at the time of the advance but, for the reasons given, the Court held that he could not derive any benefit from this promise.

In the case under appeal the Bill of Sale was granted in respect of a present advance by a person not shown to be insolvent. The title of the grantee was then complete, and did not depend upon his taking possession, though, owing to his not doing so, the provisions of the Bills of Sale Act might in certain events have deprived him of his security. Beyond this his title was unaffected by it.

Their Lordships will humbly advise Her Majesty that the judgment appealed from should be reversed and the Order of the Judge in Bankruptcy restored, and that the Respondent should pay the costs in the Supreme Court and the costs of this Appeal.