Thomas Hamilton *v.* James Russell.

Fraud in law.—Retention of possession by vendor of goods.—Charge of the court.

An absolute bill of sale of goods, is fraudulent as to creditors, unless possession accompanies and follows the deed.

The want of possession is not merely evidence of fraud, but is a circumstance *per se*, which makes the transaction fraudulent in point of law.[1]

The court are not bound to give an opinion on an abstract point of law, unless it be so stated as to show its connection with the cause.

Hamilton *v.* Russell, 1 Cr. C. C. 97, affirmed.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria.

*310] *James Russell the defendant, having obtained a judgment against Robert Hamilton, brother of the plaintiff in error, ordered the marshal to levy the *fieri facias* upon sundry goods and chattels in the possession of Robert, the debtor; which was done accordingly; whereupon, the present plaintiff, Thomas Hamilton, brought an action of trespass against Russell, claiming the goods by virtue of an absolute bill of sale from his brother Robert, dated the 4th of January 1800, and acknowledged and recorded in the circuit court of the district of Columbia, for the county of Alexandria, on the 14th of April 1801. Notwithstanding which bill of sale, Robert, the vendor, continued in possession, and exercised acts of ownership over the property. There was a general verdict in the court below, and judgment for the defendant, upon the general issue. The transcript of the record contained two bills of exception.

The first stated that the defendant "prayed the court to instruct the jury, that if they should be of opinion, from the evidence, that the plaintiff, who claims the slave George, in the declaration mentioned, under an absolute bill of sale, for a valuable consideration" (which bill of sale, recorded before the issuing of the *fieri facias* upon which the property was seized, is set forth in the bill of exceptions), "permitted the vendor, Robert Hamilton, to continue in possession of the slave, and to exercise acts of ownership over the same, he, the said plaintiff, has not a good title to the said slave, against the execution of the defendant, who was a *bonâ fide* creditor of Robert Hamilton;" which execution the defendant directed to be served "on the said slave. And the court so instructed the jury;" to which the plaintiff excepted.

The second bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, "that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession, at the time it is seized by a sheriff, in virtue of an execution against the person so in possession, can

[1] But see Davis *v.* Turner, 4 Gratt. 422, where it is said, that in Virginia, the retention of possession of personal property by the vendor, after an absolute sale, is *primâ facie* fraudulent, but the presumption may be rebutted by proof. This is a leading case upon the subject, and has been followed by the courts of Virginia, and of other states. Howard *v.* Prince, 1 Hughes 243. See Born *v.* Shaw, 29 Penn. St. 288; Baltimore and Ohio Railroad Co. *v.* Hoge, 34 Id. 214; Callen *v.* Thompson, 3 Yerg. 475. And this is the doctrine of the modern English cases, where Edwards *v.* Harben, 2 T. R. 587, is not now recognised in all its strictness. Warner *v.* Norton, 20 How. 459, and cases there cited.

sustain an action of trespass for a seizure upon such possession." But the court, being divided in opinion, did not give the instruction as prayed.

*Swann, for the plaintiff in error, contended that, 1st. The bill of sale being acknowledged and recorded according to the act of assembly of Virginia, respecting frauds and perjuries (Rev. Code, p. 18), is valid and not fraudulent as to creditors. That act of assembly contains provisions similar to those in the English statutes of 29 Car. II., c. 3, § 4; 13 Eliz., c. 5, § 2; and 27 Eliz., c. 4, § 2; and has, moreover, a clause in the following words, viz.: [*311

"If a conveyance be of goods and chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged and proved (if the same deed include lands also), in such manner as conveyances of land are by law directed to be acknowledged or proved; or if it be of goods and chattels only, then acknowledged, or proved by two witnesses in the general court, or court of the county wherein one of the parties lives, within eight months after the execution thereof, or unless possession shall really and *bonâ fide* remain with the donee."

"This act shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common or profit, out of the same, which shall be, upon good consideration, and *bonâ fide*, lawfully conveyed or assured to any person or persons, bodies politic or corporate."

Under this act, he contended, the deed would be good against creditors, notwithstanding that the possession did not accompany the deed. And although the deed was not acknowledged within eight months after its execution, yet being acknowledged and recorded before the *fieri facias* issued, upon which the goods were seized, it was good against that execution; and for this he cited the case of *Eppes* v. *Randolph*, 2 Call 125.

2d. The court ought to have instructed the jury, as prayed in the second bill of exceptions. The law is well established, that he who has the general property of goods may maintain trespass against him who *tortiously takes them out of the possession of the owner's bailee. 5 Bac. Abr. (Gwillim's edit.) 164. [*312

Simms, for the defendant in error.—As to the first bill of exceptions. This deed is clearly fraudulent as to creditors. In the case of *Lavender* v. *Blackstone*, 2 Lev. 147, Lord HALE said, that "every conveyance shall be esteemed *primâ facie* fraudulent against a purchaser." And in *Edwards* v. *Harben*, 2 T. R. 594; it is said by BULLER, Justice, to have been the unanimous opinion of all the judges in England, "that unless possession accompanies and follows the deed, it is fraudulent and void." If the possession be inconsistent with the deed, it is clear and conclusive evidence of fraud. *Haselinton* v. *Gill*, cited in *Jarman* v. *Woolloton*, 3 T. R. 620; *Cadogan* v. *Kennet*, Cowp. 434.

The act of assembly of Virginia has similar provisions with the statutes of 13th and 27th Eliz., and nearly in the same words. Those provisions, however, were nothing more than a declaration of the principles of the common law. But this act of assembly, by making deeds absolutely void, which are not for a valuable consideration, unless acknowledged, cannot be construed to make good, as against creditors, a deed purporting to be for a

valuable consideration. The act makes the deeds therein mentioned, which are not for valuable consideration, absolutely void, even between the parties themselves; and it cannot be pretended, that the acknowledgment according to that act, would set up such a deed against *bonâ fide* creditors. The act was intended to suppress, and not promote or conceal fraud. If such a construction could be put upon the act, as is contended for, it would make valid, deeds which would before have been void, as being fraudulent against creditors. But the act takes no notice at all of such a deed as this, except in the second section of the law, where deeds made with the intent to defraud creditors are expressly declared to be void. So anxious is the act to suppress fraud, that in the case of a loan, if the lender does not demand the property lent in five years, and follow up that demand with a prosecu-
*313] tion at law to recover possession *of his goods, the possession becomes conclusive evidence of property.

2d. As to the second bill of exceptions, the court did right in not giving the instruction as prayed. Possession is necessary to support an action of trespass. Bull. N. P. 79. This ought to have been an action on the case, and not trespass. *Reynolds* v. *Clarke*, 1 Str. 635; *Ward* v. *Macauley*, 4 T. R. 489.

C. Lee, on the same side.—The case of *Ward* v. *Macauley* has overruled all the cases cited from Bacon's Abridgment, and has been recognized in the case of *Gordon* v. *Harper*, 7 T. R. 9, where the doctrine has been carried even farther, and held, that neither trespass nor trover would lie, unless the possession, or right of possession, was in the plaintiff. In that case, the goods of the landlord had been leased to the tenant, and during the lease, were taken in execution for the debt of a third person. The court held, that during the lease, the landlord had neither the possession, nor the right of possession, and therefore, he could maintain neither trespass nor trover. Now, in the case made by the second bill of exceptions, it is not stated, whether the loan was for a time certain, or at the will of the lender. If the loan was for a time certain, there is no difference between that case and a lease for a time certain. In neither case, is the possession, or the right of possession, in the plaintiff. The bailee by loan, for a time certain, has an equal right to the possession, during that time, with a bailee for hire: and either may maintain trespass against him who violates that possession, whether it be a stranger or the owner.

Chase, Justice.—There is here no exception applicable to this case. The bill of exceptions states only an abstract question. It is not, whether the plaintiff in this case can maintain an action of trespass, but whether any plaintiff can maintain trespass for property loaned to a friend.

*314] *Swann*, in reply, relied on the act of assembly of Virginia. The English cases do not apply; for in England they have no such statute authorizing the recording of deeds of personal property; nor any substitute for the actual delivery of possession of goods in any case whatever. Even a mortgage of personal property is there deemed fraudulent as to creditors, unless possession accompanies the deed; and the reason given in all the books is, that it gives a false credit to the mortgagor, enables him to impose

upon the world, and gives him a power to deceive and defraud those who deal with him. *Ryall* v. *Rolle*, 1 Wils. 260. But when such a deed is publicly made and exposed to view upon the public records, as this was, such reason must fail; and with the reason, the law must fail also.

As to the second bill of exceptions. There is certainly a difference between a loan and a lease. In a loan, the lender does not part with the right of possession, nor, in law, does he part with the actual possession; for the bailee's possession is the possession of the lender, who has a right to resume the thing into his own hands, at any moment. There is no adverse possession, nor adverse claim, as there is in the case of a lease.

Fraud or no fraud, is a point to be decided by the jury, and not by the court. It is a question of fact; and the court have instructed the jury as if it were a matter of law. The possession of the vendor is not, in itself, a fraud, but only a circumstance from which, connected with others, the jury may presume the fact of a fraudulent intent.

February 28th, 1803. The CHIEF JUSTICE delivered the opinion of the court.—On the 4th January 1800, Robert Hamilton made to Thomas Hamilton an absolute bill of sale, for a slave in the bill mentioned, which, on the 14th of April 1801, was acknowledged and recorded in the court of the county in which he resided. The slave continued in possession *of the vendor; and some short time after the bill of sale was recorded, [*315 an execution, on a judgment obtained against the vendor, was levied on the slave, and on some other personal property, also in possession of the vendor. In July 1801, Thomas Hamilton, the vendee, brought trespass against the defendant Russell, by whose execution, and by whose direction, the property had been seized; and at the trial, the counsel for the defendant moved the court to instruct the jury, that if the slave George, remained in the possession of the vendor by the consent and permission of the vendee; and if, by such consent and permission, the vendor continued to exercise acts of ownership over him, the vendee, under such circumstances, could not protect such slave from the execution of the defendant. The court gave the instruction required, to which a bill of exceptions was taken.

The counsel for the plaintiff then moved the court to instruct the jury, that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession, at the time it is seized by a sheriff, in virtue of an execution against the person so in possession, can sustain an action of trespass for a seizure, upon such possesssion. The court, being divided, refused to give the instruction required, and the jury found a verdict for the defendant. Judgment was accordingly rendered for the defendant, to which a writ of error has been sued out, and the question is, whether the court below has erred in the instructions given or refused.

In the opinion to which the first bill of exceptions was taken, it is contended, on two grounds, that the circuit court has erred. 1st. Because this sale is, under the act of the Virginia assembly against fraudulent sales, protected by being recorded. 2d. That if it be not protected by that act, still, it is only evidence of fraud, and not, in itself, a fraud.

*On examining the act of assembly alluded to, the court is of [*316 opinion, that it does not comprehend absolute bills of sale, among those where the title may be separated from the possession, and yet the conveyance

be a valid one, if recorded within eight months. On this point, one judge doubted, but he is of opinion, that this bill of sale was not recorded within the time required by the act, and that the decision in the case of *Eppes* v. *Randolph*, which was made by the court of appeals of Virginia, on a different act of assembly, would not apply to this act.

On the second point, there was more difficulty. The act of assembly which governs the case, appears, so far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of the 13th and 27th of Eliz., and those acts are considered as declaratory only of the principles of the common law. The decisions of the English judges, therefore, apply to this case. In some cases, a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence or a badge of fraud, to be submitted to the jury, under the direction of the court, and not as constituting, in itself, in point of law, an actual fraud, which rendered the transaction as to creditors entirely void. Modern decisions have taken this question up upon principle, and have determined, that an unconditional sale, where the possession does not "accompany and follow the deed," is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. The distinction they have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition, which does not entitle the vendor to the immediate possession.

The case of *Edwards* v. *Harben, Ex'r of Tempest Mercer*, 2 T. R. 587, turns on this distinction, and is a very strong case. William Tempest Mercer, on the 27th of March 1786, offered to the defendant Harben, a bill of sale of sundry chattels, as a security for a debt due by Mercer to Harben. This Harben refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should *remain unpaid, to take possession *317] of the goods and sell them, in satisfaction of the debt; the surplus money to be returned to Mercer. To this Mercer agreed, and a bill of sale, purporting, on the face of it, to be absolute, was executed, and a corkscrew delivered in the name of the whole. Mercer died within the fourteen days, and immediately after their expiration, Harben took possession of the goods specified in the bill of sale, and sold them. A suit was then brought against him by Edwards, who was also a creditor of Mercer, charging Harben as executor in his own wrong, and the question was, whether this bill of sale was fraudulent and void, as being on its face absolute, and being unaccompanied by the delivery of possession. It was determined to be fraudulent; and in that case, it is said, that all the judges of England had been consulted on a motion for a new trial in the case of *Bamford* v. *Baron*, 2 T. R. 594, and were unanimously of opinion that "unless possession accompanies and follows the deed, it is fraudulent and void;" that is, that unless the possession remain with the person shown by the deed to be entitled to it, such deed is void as to creditors, within the statutes. This principle is said, by Judge Buller, to have been long settled, and never to have been seriously questioned. He states it to have been established by Lord Coke, in 2 Bulst., so far as to declare, that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent. "But if the deed or conveyance be conditional, there the vendor's continuing in possession, does not

avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition." "And that case," continues Judge BULLER, "makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For, in the latter case, the possession continuing with the vendor till such future time, or till that condition be performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed by all the cases since." "This," continues the judge, "has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in point of *law; that is the point which we have considered, and we are all of opinion, that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent."[1] [*318

This court is of the same opinion. We think, that the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring that an absolute bill of sale is itself a fraud, unless possession "accompanies, and follows the deed." This construction, too, comports with the words of the act. Such a deed must be considered as made with an intent "to delay, hinder, or defraud creditors."

On the second bill of exceptions the court did right in refusing to give the instruction required. The question propounded seems to have been an abstract question, not belonging to the cause.

Judgment affirmed, with costs.

UNITED STATES *v.* R. T. HOOE and others.

Practice on appeal.—Statement of facts.

Under the judiciary act of 1789, in chancery cases, a statement of facts must accompany the transcript.

This provision was revived by the repeal of the act of February 1801.

THIS was a writ of error to a decree of the Circuit Court of the district of Columbia, sitting as a court of chancery.

The case was, that Colonel Fitzgerald, in the year 1794, was appointed collector of the customs for the port of Alexandria, and gave bond to the United States in the penalty of $10,000, with R. T. Hooe, as his surety, for the faithful performance of the duties of the office. In consequence of misapplication of large sums of money by the chief clerk, who was intrusted with almost the whole *management of the business, Col. Fitzgerald became deficient in his accounts with the United States to the amount of $57,000. After this fact was discovered, he executed a deed of trust, of part of his real estate, to trustees, to be sold to indemnify [*319

[1] But see Wood *v.* Dixie, 7 Q. B. 894; Martindale *v.* Booth, 3 B. & Ad. 498; Benton *v.* Thornbel, 2 Marsh. 427; Lattimer *v.* Batson, 4 B. & C. 652; Arundell *v.* Phipps, 10 Ves. 145; Eastwood *v.* Browne, 1 Ry. & Moo. 312.