# JOHNSON v. PECK.

Case No. 7,404.
{1 Woodb. & M. 334.}[1]

Circuit Court, D. Rhode Island. June Term, 1846.

SALE OF GOODS—MISREPRESENTATIONS BY PURCHASER—RIGHTS OF VENDOR—THIRD PARTY.

1. If a purchaser of goods make at the time material statements as to his debts and means, which are relied on and turn out to have been false, the sale is voidable.

{Cited in Work v. Jacobs. 35 Neb. 772, 53 N. W. 995.}

2. In such case, the articles may be recovered back by the vendor, though mortgaged to a third person to secure an existing debt, if the mortgage has not been foreclosed, or the third person has advanced no new consideration, and will not be placed in a worse position than he occupied before the mortgage, by his security, anticipated from it, failing. But if the title has absolutely passed to a third person without notice, and for a new consideration, the goods cannot be recovered back by the original vendor.

{Cited in People's Sav. Bank v. Bates, 7 Sup. Ct. 683, 120 U. S. 567: The Alfred J. Murray, 11 C. C. A. 177, 63 Fed. 272.}

{Cited in Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 903; Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892.}

This was an action of trover for a certain quantity of merchandise mostly English goods, valued at $722, and alleged to have been converted March 28th, 1846. The defendant pleaded not guilty. It appeared in evidence, that the plaintiffs were merchants in Boston, (Mass.) and early in March last, were applied to by one Wheelock, of Bristol, Rhode Island, to purchase of them a quantity of good's. Wheelock alleged that he was then worth $1,200 surplus after paying all debts, and owed nobody except one Briggs, for some goods he had lately purchased of him. The plaintiffs caused Wheelock to sign a written statement containing the above representations, and, relying on their truth, made sale to him of about $750 worth of merchandise, which Wheelock took and carried to Rhode Island. In a few days after, viz., April 17th, 1846, he gave a mortgage of them and his other goods to Briggs, to secure him for the purchase money of his stock, that had been sold to Wheelock in the January previous, and a mortgage of them then taken by Briggs from Wheelock, dated January 28th, 1846. On the 20th of

April, 1846, Wheelock executed another mortgage of them to Hutchins & Anthony, to secure a debt to them; and 22d April, 1846, assigned the whole to the defendant Peck, in trust, to be sold, and first pay Briggs, then Hutchins & Co., then other creditors, and the surplus to Wheelock. It further appeared in evidence, that $300 of the purchase money had been paid to Briggs in January, and some $200 or $300 since, by sales of the goods; and that in the assignment were contained sundry book accounts, to the amount of $700, a part of which had been collected by the defendant. It was now contended by the defendant, that all the property assigned would not more than pay the two original mortgages; and it was not shown that Wheelock in fact had any other estate, though his wife was reported to be worth some money. It was further shown, that when Wheelock bought of the plaintiffs, he owed other persons than Briggs, as follows, viz., Hutchins & Anthony, about $459; John A. Corey, $396; and Whitcomb, $185.

Waters & Carpenter, for plaintiff.

Mr. Bullock, for defendant.

WOODBURY, Circuit Justice, instructed the jury, that if the representations made by Wheelock to the plaintiff's, at the time of the purchase, were false and fraudulent, and were relied on by the plaintiffs, and were so material, that the sale would not probably have been made without them, the sale was voidable as between the parties to it. One party had obtained credit by means not justifiable, and the other had parted with his property under false pretences and averments, which were material and untrue. It was right, then, in law as well as equity, that such a purchaser should not profit by his own wrong, and that the seller and purchaser should in such case stand as if nothing had occurred between them. But when rights of third persons intervene in this class of cases, they are to be upheld, if those persons purchased the property absolutely, and parted with a new and valuable consideration for it, without notice of any fraud. Because, unlike the case of theft, the vendor here voluntarily parts with the possession of his property, and thus enables the purchaser to gain a credit, or to appear to be the owner, and thus be bought of honestly. And though in the case of theft, it is otherwise, and the owner may recover the property of third persons, yet he cannot in cases of fraudulent sales, else the community would be deceived and defrauded as much as the vendor. Parker v. Patrick, 5 Durn. & E. [5 Term R.] 175; Somes v. Brewer, 2 Pick. 184; Rowley v. Bigelow, 12 Pick. 307; Story, Bailm. §§ 124, 125; 8 Cow. 238; Lloyd v. Brewster, 4 Paige, 537.

The true tests, then, as to third persons, are these. If they buy absolutely, and for a new and full consideration, and without notice of the fraud in procuring the goods, they are to be protected in holding them. But if they have notice of the fraud, or give no new valuable consideration, or are mere mortgagees, pawnees, or assignees in trust for the debtor, or for him and others, such third persons are to be regarded as holding the goods open to the same equities and exceptions as to title, as they were open to in the hands of

the mortgager, pawner, or assigner. The latter is still interested in them; has a residuary title; has taken no new consideration for them; and his assignee or mortgagee has parted with nothing new for the goods; has not bought them; and, if he loses them, is in no worse condition than he stood before they were purchased and assigned or mortgaged him. If the defendant then stood in this attitude, or the mortgagees for whom he acted, the plaintiffs should recover against him. He would lose nothing by such a recovery, as he held other goods sufficient to defray his expenses, and had no debt against Wheelock to be secured or paid. Nor would the mortgagees lose any thing, looking to this transaction as a whole. They stood better than before it took place, as they had been partly paid by sales of some of these goods before a demand on the defendant, and these last sales are not to be computed in the damages recovered against him. They could stand no worse, as neither of them had given any new credit, or parted with any new consideration, on account of the mortgages or assignment of this property.

The court then called the attention of the jury to the evidence which bore upon the facts, that the representations made were not true, and were at the same time material in the trade.

The jury returned a verdict for the plaintiffs.

[1] {Reported, by Charles L. Woodbury, Esq., and George Minot, Esq.}