WILLIAM KINLOCH AND OTHERS, (DEFENDANTS) ..... } APPELLANTS.

AND

JOHN M SCRIBNER (PLAINTIFF).....RESPONDENT.

1886

*March 24.

*May 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and Purchaser—Open and notorious sale—Actual and continued change of possession—R. S. O. cap. 119 *sec.* 5*—Hiring of former owner as clerk.*

The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may still be "an actual and continued change of possession," as required by R. S. O. cap. 119 sec. 5. *Ontario Bank* v. *Wilcox* (1) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (2) affirming a judgment of the Divisional Court (3) in favor of the respondent.

The facts of the case are sufficiently set out in the judgments of the court.

McCarthy Q.C. and *Dougall* Q.C. for the appellants. The question of change of possession is one of fact which has been found in our favor on the trial, and this court should be governed by that finding. The act requires an actual and continued change of possession. Here the seller remains in possession and puts the buyer in possession also. There was no actual change of possession; if there was, there was no continued change of possession. The statute is not satisfied by the seller giving up possession for a short time and then resuming it again.

Lingard v. *Messiter* (4) shows what the law, as between creditors and purchasers, was prior to any statute defining it.

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* PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Gwynne JJ.

(1) 43 U. C. R. 460.
(2) 12 Ont. App. R. 367.
(3) 2 O. R. 265.
(4) 1 B & C. 308.

1886

KINLOCH v. SCRIBNER.

If a person sells goods and still remains in possession, the presumption in law is, that he is still the owner. *Doyle* v. *Lasher* (1).

The following authorities were relied on: *Carscallen* v. *Moodie* (2); *McLeod* v. *Hamilton* (3); *Ontario Bank* v. *Wilcox* (4); *Ex parte Hooman. In re Vining* (5); *Ancona* v. *Rogers* (6); *Whiting* v. *Hovey* (7); *Ex parte Lewis. In re Henderson* (8); *Ex parte Jay. In re Blenkhorn* (9); *Edwards* v. *Edwards* (10); *Carter* v. *Grasset* (11).

W. Cassels Q. C. and *Holman* for the respondent. All the judges in the court below have found that the sale was *bonâ fide* and valid, and this court is asked, after three courts have pronounced on the question of fact, to grope through the evidence to find a fraud on the part of Morton.

The argument for the appellants, and the judgment of Mr. Justice Patterson, virtually is that where a purchaser employs the seller as his clerk the sale may be set aside. But that is creating a statute.

The following cases were cited: *Vicarino* v. *Hollingsworth* (12); *Hale* v. *Kennedy* (13); *Smith* v. *Wall* (14); *Heward v. Mitchell* (15).

McCarthy Q. C., in reply, cited: *Snarr v. Smith* (16); *Burnham* v. *Waddell* (17).

Sir W. J. RITCHIE C.J.—This is an interpleader proceeding. The judgment creditor claims to have a right to the goods, because, though there was a transfer of the goods he alleges there was no continued change of possession and no registration. The learned judge who tried

(1) 16 U. C. C. P. 263.
(2) 15 U. C. Q. B. 92.
(3) 15 U. C. Q. B. 111.
(4) 43 U. C. Q. B. 460.
(5) L. R. 10 Eq. 63.
(6) 1 Ex. D. 285.
(7) 9 O. R. 314.
(8) 6 Ch. App. 626.
(9) 9 Ch. App. 697.
(10) 2 Ch. D. 291.
(11) 10 Can. S. C. R. 105.
(12) 20 L. T. N. S. 362.
(13) 8 Ont. App. R. 157.
(14) 18 L. T. N. S. 182.
(15) 10 U. C. R. 535.
(16) 45 U. C. Q. B. 156.
(17) 28 U. C. C. P. 263.

1886

KINLOCH v. SCRIBNER.

Ritchie C.J.

the case found, and the Court of Appeal entertained the same opinion, that this was a fair and *bonâ fide* transaction.

Then it is said that there was no change of possession after the transfer. The purchaser went into possession and employed the clerk of the seller who locked the store in the middle of the day for which the new owner dismissed him. He then, not having a person competent to take charge of the business, employed the seller to act as his clerk for a certain time, which he did. The respondent went on purchasing goods, added to his stock and the change of business was advertised in the local papers, and it was known to everybody in the neighborhood that the purchaser was in the store as proprietor and that the goods had been transferred by the seller who ceased to have any interest in them. "But" says the appellant, "that may be very true but you had no right to employ this man, even admitting the *bonâ fides* of the transaction." Why such an employment *per se* should be treated as fraud I cannot see; in connection with other circumstances it might be evidence of want of *bonâ fides* in the transaction but I think all the circumstances very clearly show that the transaction was a *bonâ fide* one and that there was a perfect and continuous change in the possession.

Gibbons v. *Hickson* (1), which I was not aware of at the time of the argument, appears to me to be this case exactly.

In that case Huddlestone B. says:

In this case the rule must be discharged.

It is clear that the goods in question were sold *bonâ fide* by Harrison to Gibbons, and the transaction was carried out by a deed of assignment, which provided that Harrison should remain as manager of the shop—that is, as a servant of the defendant. Now, this being a transfer of personal chattels comes within the definition of a "bill of sale" contained in the Bills of Sale Act, 1878, s. 4, and, therefore ought *primâ facie* to have been registered under section

(1) 34 W. R. 140.

1886

KINLOCH
v.
SCRIBNER.

Ritchie C.J.

8 of the same Act. But it is contended on behalf of the plaintiff that the goods in question were not in the "apparent possession" of Harrison at the time of the execution, and consequently, the deed of assignment is exempted from the operation of the statute. Let us examine the facts. The plaintiff took possession of everything in the shop, going round with an inventory to check the articles in stock; he took this deed of assignment from Harrison, whom he retained in the shop, but only as his paid servant. He changed the name over the shop from Harrison to Harrison & Co; he sent circulars to all Harrison's customers, and others besides, telling them that the business had changed hands. Not content with this, he advertised the fact three times in the newspapers, and finally wrote a letter to the defendants themselves on the subject, which they answered. I think that, with these facts before him, the county court judge was justified in directing the jury that there was evidence of a general knowledge of the change of ownership of the goods. As to the case of *Pickard* v. *Marriage*, there notice of the change of ownership was not given to the public as here. In *Gough* v. *Everard*, which was a case under the old Bills of Sale Act (the interpretation clause of which, 17 & 18 Vic, ch. 36, sec. 7, is in identical terms with that of the act now in force, as far as regards the meaning of the phrase "apparent possession," Bramwell B. says

> I construe this clause to mean that the goods shall be deemed to 'be in the "apparent possession" of the vendor as long as they are 'on premises occupied by him, if nothing more has been done than "the mere formal taking possession; but that where, as in the pre-"sent case, far more than mere formal possession has been taken, the "clause does not apply."

In this case, also, I am of opinion that "far more than mere formal possession has been taken," and that, therefore, the county court judge was right, and this appeal must be dismissed.

The present case seems to me a much stronger case of actual continuous and notorious change of possession than that of *Gibbons* v. *Hickson*. I think the appeal in this case should be dismissed.

STRONG J.—Possession is a question of fact, not of law. Certain legal results, such as acquisition of title under the statute of limitations, and the right to defend possession and re-acquire it after loss or forcible taking away, are legal consequences of possession; but, in itself, it is a pure question of fact, consisting as it does of the power of physical disposition of the thing which

1886

KINLOCH v. SCRIBNER.

Strong J.

is the subject of it coupled with the intention to possess as owner. These considerations are material here as showing that the question we have to determine in the present case is entirely one of evidence, and consequently that decided cases can have little or no bearing upon the decision of this appeal. Facts which, in other cases, have been held to warrant certain inferences, may, in the present case, lead to no such conclusion. The voluminous evidence before us, taken in conjunction with the finding of the learned judge who presided at the trial, and who saw and heard the witnesses give their testimony, that the sale was *bonâ fide*, can, in my opinion, only lead to the conclusion that the respondent was actually put in possession of these goods as the owner, and retained such possession continuously up to the date of the seizure. From the date of the sale the respondent, exclusive of all other persons, had full control and dominion over the goods, and they were subject to his disposition, and such as were sold were actually disposed of by him. There was, therefore, that actual and continued change from the prior possession of the assignor which the statute requires.

Again, the publicity and notoriety of this sale the *bonâ fides* of which, in view of the facts established and found by the learned judge at the trial, cannot be questioned, is almost conclusive to show that there was an actual change of possession, since, if the sale itself was bonâ fide and was really and honestly intended to effect a transfer of the property, there could be no object in making a merely fictitious or colorable change in the possession ; and I am of opinion that this is in no way contradicted by any presumption arising from the employment of the former owner as a clerk, under the circumstances detailed in the evidence. The goods were not in the possession of the clerk in this case, any

1886

KINLOCH v. SCRIBNER.

Strong J.

more than goods exposed for sale in a shop can, in any sense, be said to be in the possession of a clerk or servant of the proprietor employed to sell them, and it calls for no demonstration to show that in such a case the relation of the clerk or salesman to the goods which he is employed to sell is not that of possession.

If the words of the act had been stronger than they are, and had required, not merely an actual, but an open and notorious change of possession, the proof would have been quite sufficient to have established it.

Although decided cases are not controlling authorities on a mere question of fact like the present, yet it is satisfactory to find, that under circumstances precisely similar to those before us in this case it has been held in England that the apparent possession was not to be considered as remaining in the assignor, but as having passed to the assignee. This appears from the case of *Gibbons* v. *Hickson* (1) to which I have been referred by the Chief Justice who has cited it in his judgment.

The evil which the statute of Ontario was intended to remedy was that which arose in the case of a transfer of property of goods in which a mere formal possession was delivered but which were allowed to remain in the house or building, or upon the premises, in the occupation of the assignor, and so in his apparent possession, which is not the case here, inasmuch as the possession of the store in which the goods were was contemporaneous with the sale acquired by the respondent.

This appeal is, in my opinion, entirely without foundation, and should be dismissed with costs.

FOURNIER J. concurred.

HENRY J.—One William Morton, who had a general store of merchandise at Campbellford, Ontario, in 1881,

(1) 34 W. R. 140.

on the 25th of August in that year sold out his stock in trade for a valuable consideration to the respondent, delivered the goods to him and gave him two keys of the shop, one of which the respondent gave to Mr. Ray, a former clerk of Morton's, retaining the other himself. Mr. Ray opened the shop the next morning, but locked it up in the afternoon, whereupon a dispute arose, and the respondent discharged him, paying him $5.00 for his services. The respondent thereupon requested and obtained the services of Morton and agreed to pay him $1.50 a day as wages and a sum sufficient to pay his wife's board. The local paper of the village of the first of September, contained a notice of the change of the business and its transfer to the respondent, and it was generally known in the village on the 26th August. On the 15th September the respondent procured further aid in the shop, and Morton was frequently absent attending to business of his own. He, however, ceased to act for the respondent about the first week in October, when one Ingersoll was retained by the respondent in his place.

The learned judge of first instance found that the sale was *bonâ fide* and his finding on that point has been sustained by the courts before whom the case has been considered, and there is, in my opinion, no reason to doubt its correctness. The same learned judge, however, also found that there was no such actual and continued change of the possession of the goods as required by the statute, and gave judgment for the appellants. He seems to have arrived at that conclusion from decisions which he cited and remarked upon. I have carefully looked at those cases, and find they are not at all applicable to the facts of this case, and that, if the transaction, as we must hold it, was in good faith, the decision in the cases referred to does

1886

KINLOCH v. SCRIBNER.

Henry J.

not affect the question under consideration.

If the evidence given by the witnesses for the respondent is to be relied on, and it is not only uncontradicted but of such a character as to entitle it to credence, I am at a loss to find that the possession of the goods by the respondent was not actual and continued. He was given the actual possession and the keys of the store. He, and he alone, by himself and those in his service, had the continued control of the shop and the sales made in it after the delivery of the goods and the keys to him. How, then, can it be said that anyone else participated as owner or claiming any right to the goods in that possession? The evidence establishes the fact that Morton did not participate in that possession except as the paid employee of the respondent and only to the extent necessary to perform the services to the respondent that he was hired for. His acting in the shop as salesman where there is a question of *bonâ fides* as to the sale might be an element in the evidence to establish a fraudulent sale; but where the sale is admitted to have been *bonâ fide*, the mere fact of his acting as the clerk or assistant of the respondent cannot in the slightest degree affect the question of possession.

I do not consider it necessary to say more than that I fully concur in the views of the majority of the learned judges of the Divisional Court, of Chief Justice Cameron and the learned judges of the Appeal Court who concurred with him, and think the appeal herein should be dismissed with costs.

GWYNNE J.—These are interpleader issues in which the above respondent was plaintiff and the appellants were defendants. The learned judge before whom the issues were tried found as matters of fact that the goods which consisted of the

stock in trade in a general store in the village of Campbellford belonging to one William Morton were, on the 25th day of August, 1881, *bonâ fide* sold for valuable consideration paid therefor to the plaintiff into whose actual possession the goods were then delivered by Morton; that the plaintiff having received from Morton the keys of the store, on that 25th of August in the evening delivered one set of the keys to one Mckay who had been Morton's clerk and between whom and the plaintiff a partnership was contemplated directing him to open the store in the morning and took the other set away himself which he took home with him; no one slept in the building where the store was; that on the following day McKay opened the store in the morning but that in the afternoon a quarrel occurred between him and the plaintiff and the latter dismissed him paying him $5.00; that not being able at the moment to procure another clerk the plaintiff proposed to Morton to remain in the store and to take charge of it for the plaintiff in selling the goods, keeping the books, &c., until the plaintiff could get a clerk; that Morton being about to enter into some other employment at first expressed himself unwilling to do as the plaintiff requested but finally yielded to the plaintiff's solicitation and agreed to remain at $1.50 per day and a sum sufficient for his wife's board to be paid by the plaintiff; that the change was advertised in the papers on the 1st September and became generally known in the village after it occurred; that on the 15th of September the plaintiff hired a lad to assist him; that from the time that Morton was hired by the plaintiff he was occasionally absent on his own business but continued in the plaintiff's service until the 1st of October when the plaintiff hired one Ingersoll as a salesman and Morton oocasionally attended for a day or two afterwards explaining the

1886

KINLOCH v. SCRIBNER.

Gwynne J.

business to Ingersoll and assisting in sales; that the plaintiff himself was in the store a good part of the time, and to this it may be added that a large mass of evidence showed that he appeared to be the owner and was so understood to be by persons frequenting the store and the inhabitants of the village generally; that the sales were regularly entered in a new set of books which the plaintiff on purchasing the stock had opened. The goods were taken under executions on the 5th October.

Upon this state of facts the learned judge, while he found as matter of fact that the sale to the plaintiff was made in good faith on the part of both parties and for valuable consideration and that the plaintiff was not aware that any of the securities transferred in payment of the price was defective in character or deficient in value, and while he also held that upon the sale there had been an actual immediate transfer of the goods by the vendor into the possession of the plaintiff, he nevertheless held that he was *compelled to the conclusion* that upon the facts as found by him, and above stated, there was no such actual and continued change of possession as the statute requires and for this reason, and this reason only, he rendered his verdict for the defendants. What the learned judge plainly conveys by saying in his judgment: "I am compelled to the conclusion," &c., &c., &c., is that this conclusion, namely, that no such actual and continued change of possession had followed the actual delivery of the goods to the plaintiff, as the statute requires, was forced upon him by the judicial decisions in the cases which he had just enumerated and reviewed.

Now, when the motion to set aside this verdict and to enter judgment for the plaintiff upon the facts appearing in evidence and the finding of the learned judge as to the *bonâ fides* of the transaction and the

actual delivery of the goods to the plaintiff, was made in the court above what was, or were, the question or questions, raised before the Divisional Court in which the motion was made?

Plainly, as it appears to me, the following and only those:—

1st. Did the learned judge form a correct conception of the decided cases, when he held that they compelled him to arrive at the conclusion that, as matter of fact, the actual delivery of the goods which he found to have been made to the plaintiff upon a *bonâ fide* sale for valuable consideration was not followed by such an actual and continued change of possession as was contemplated by the statute?

And if the court should be of opinion that the decided cases did not necessitate such a conclusion then the duty was cast upon the court of determining as matter of fact

2nd. Whether, assuming the transaction to have been a *bonâ fide* sale and an immediate delivery made thereon, as found by the learned judge, the evidence did or not show that such delivery was followed by an actual and continued change of possession, as required by the statute? and

3rd. Was the finding of the learned judge as to the *bonâ fides* of the transaction so clearly erroneous as to require the Divisional Court to set aside the learned judge's finding upon that point and to render a verdict and judgment for the defendant upon that ground?

As to the first of the above questions I entirely concur with the judgment of the majority of the Divisional Court that the decided cases did not necessitate the conclusion the learned judge arrived at and upon this point I should not say anything in addition to the observations made by Chief Justice Cameron and the learned judges of the Court of Appeal for Ontario, who

1886

KINLOCH v. SCRIBNER.

Gwynne J.

have concurred with him, if language of my own in the case of the *Ontario Bank* v. *Wilcox* (1) was not given an interpretation very different from what I intended the language to bear and from what I think it does bear and which was relied upon in support of the contention in this case, namely, that a *bonâ fide* purchaser of goods for valuable consideration paid can in no case be protected in his purchase if he employs the vendor as his clerk after the sale and delivery of the goods. In that case the mortgagor of chattels which consisted of a quantity of lumber in his own yard, remained in actual possession, dealing with the lumber as owner just as he had been before the mortgage was executed. Upon an assignment of the mortgage having been made to the Ontario Bank it was agreed between the mortgagor and the bank that the former should continue in possession precisely as before and should continue selling the lumber, but that he should render weekly accounts to the bank of all sales. The bank, finding that the promised weekly returns of sales were not regularly made, put one Wharton into the lumber yard, in charge for the bank, under and subject to special instructions not to interfere with the mortgagor selling the lumber, nor to exercise control in any way further than to see that the mortgagor should make due returns to the bank of his sales; and to enable Wharton to conform to these instructions, the mortgagor pointed out to him what lumber in his yard was that which was covered by the chattel mortgage and over which his control was limited. The mortgagor had never been divested of his possession of the lumber, which remained always in his possession as it had originally been, unaffected in any way save as his sales were made subject to the control of Wharton, under the above special instructions given to him. It

(1) 43 U. C. R. 460.

1886

KINLOCH v. SCRIBNER.

Gwynne J.

is to this state of facts that the language which is relied upon relates, and by it I meant to convey, as I thought at the time and still think that the language simply does convey, that the possession or control, such as it was, that Wharton had, never having excluded the original possession of the mortgagor, the right of his creditors had not been excluded. This case I cannot think open to the construction put upon it by the learned counsel for the defendants.

Now, the decided cases not necessitating the conclusion which, upon their assumed authority, the learned judge arrived at, the question of fact as to the actual and continued change of possession remained undecided and open for the Divisional Court to decide; and they being of opinion that the finding of the learned judge who tried the issues as to the *bonâ fides* of the transaction could not successfully be questioned, came to the conclusion that the evidence did, to their satisfaction, establish that the delivery of the goods to the plaintiff upon the sale had been followed by such an actual and continued change of possession as excluded the claim of the creditors of the vendor; and they, therefore, rendered a verdict and judgment for the plaintiffs, which, in my opinion, should be sustained. Whatever force there is in the objection taken by the defendants, and so strongly urged on their behalf, namely, that the delivery of the goods had not been followed by an actual and continued change of possession, seems to me to point to and to affect rather the question of the *bonâ fides* of the transaction than the question of whose was the possession after the sale and after the delivery, continuously, until the seizure. The finding of a person who had been the open and notorious owner of chattels, still selling the goods, but calling himself the clerk of a person claiming to be the purchaser of the goods from him, may be a badge of fraud requiring explanation;

1886

KINLOCH v. SCRIBNER.

Gwynne J.

but if a satisfactory explanation be given and the sale is shown to have taken place in good faith and that the vendor was actually and in good faith hired and employed by the purchaser as his clerk or salesman, the possession which such a person in such case has is not the original possession which he had as owner, but is a wholly new possession which is that of his employer the purchaser; and when, as here, the change in the character in which the original owner is found dealing with the goods and the fact of the sale are found to have been notorious, to hold that the *bonâ fide* delivery of the goods had not been followed by such an actual and continued possession as the statute requires would be, as it seems to me, to make the statute operate to commit rather than to redress a fraud. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *A. P. Dougall.*

Solicitor for respondents: *Sidney Smith.*