13763

No._____

Supreme Court of Illinois

Warner

vs.

Norton et al.

SUPREME COURT OF THE UNITED STATES.

No. 70.—December Term, 1857.

Francis Warner, Plaintiff in Error, vs. Cephas H. Norton et al. } In error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice McLEAN delivered the opinion of the Court.

This case is brought before us by a writ of error from the northern district of Illinois.

An action of trespass was commenced by Norton et al. against Warner, charging him with having seized and carried away personal property of the value of ten thousand dollars. The defendant pleaded not guilty, and by several special pleas set up that certain creditors of Augustus A. Haskins, who had left his residence at Lasalle, procured a writ of attachment, under the statutes of Illinois, which was directed to the defendant as sheriff, in virtue of which he attached the personal property of Haskins, which is the trespass charged, &c.

The bill of exceptions taken on the trial will show the points of law which were made on the facts. The proof of the plaintiffs tended to show that Beman, one of the plaintiffs, had a claim as creditor against Haskins for the sum of twelve hundred dollars, and that the firm of Norton, Jewett & Busby had also a claim of about three thousand dollars; that each of these claims had been put into the hands of one Anderson for collection, with authority to settle them; that on the 10th of January, 1855, the goods were chiefly in a hardware store-room and the tin shop attached thereto, in the village of Lasalle; that up to that time Haskins had been carrying on the business of a hardware retailer and manufacturer of tin ware; that while he was absent the business was conducted by one Atherton, his head clerk, who employed the operatives and superintended their work; that on the 10th of January, 1855, Haskins sold his stock to Beman, and the firm of Norton, Jewett & Busby, through Anderson as their agent, cancelling the aforesaid debts, and giving his notes on time to Haskins for the balance of the price agreed upon; and thereupon, by way of putting the purchaser into possession, Haskins, Anderson and Atherton being in the store-room, Haskins got the key of the outer door and gave it to Anderson, and Anderson gave the key and charge of the store

and tin shop to Atherton, who, up to that time, had been carrying on the business for Haskins, but then undertook to act for Anderson.

Anderson and Haskins left Lasalle, and did not return until after the attachment was laid on the goods. Haskins never returned to reside there, and exercised no ownership over the goods after the sale. Norton, Jewett & Busby were the ostensible partners of their firm, but they informed Anderson that John C. Phelps and his brother were special partners. There was no further evidence to show the interest of the Phelpses, except the belief of the witness that they were parties, though he could not so state from his own personal knowledge. An objection to this defect of proof was made, but not insisted on.

The plaintiffs' proof further tended to show that the sheriff, on the 9th of February, 1855, did take property attached, and removed it; and evidence was offered to show that, before and at the time of said sale, Haskins was in failing circumstances, and that certain creditors had sued out writs of attachment, as set forth in defendants' special pleas, against the goods of said Haskins, and that the taking of the property complained of was by legal process.

Defendant offered further evidence, tending to prove that said sale was made secretly; but several of the plaintiffs' witnesses stated the sale was not made secretly, and that, while the invoice was being made out, people were coming in and going out of the store as usual; that no steps were taken by any one to make the sale known until after the attachment was laid; that from the time of the sale, Atherton continued to control the goods and the business as before, and to all appearance was doing so for Haskins; that sales were made to customers as formerly, without notice to any one of the change of proprietors, and, in some instances, the bills and receipts of sales to customers were made out in the name of Haskins. No change was made in keeping the books; that the servants and operatives about the store and tin shop continued to work under the direction of Atherton, with no knowledge of any sale, and supposing the business was being carried on as formerly, and for the use of Haskins; but it did not appear that any of these things were authorized by the plaintiffs or known to them; and that this condition and course of things continued until the goods were seized by the sheriff.

After the testimony was closed the court charged the jury: First, they must be satisfied from the evidence that the plaintiffs named in the declaration had a joint interest in the property sued for, or they must find for the defendant.

The jury found for the plaintiffs; which shows they were satisfied with the evidence on the point made, or considered the objection abandoned. If it were not insisted on in the court below, it cannot be raised here. There is no error in this charge of the court.

The second, third, and fourth charges were, "that if the jury believe from the evidence the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as

against the defendant: and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case. That if the sale were secret, and no means taken to apprize the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant."

It is insisted that the sale was void as matter of law against creditors, and should have been so held by the court; and the case of Hamilton vs. Russel, 1 Cranch, 310, 1 Curtis, 415, is cited as sustaining this position. In that case Hamilton made an absolute bill of sale for a slave on the 4th of January, 1800, which was acknowledged and recorded on the 14th of April, 1801. The slave continued in the possession of the vendor until an execution was levied on him as the property of the vendor. Trespass was brought against the plaintiff in the execution, who directed the levy to be made. The court held, under the statute of Virginia against frauds, that an absolute bill of sale, unless possession "accompanies and follows" the deed, is fraudulent; and the case of Edwards vs. Harben, 2 Term Rep., 587, was cited. It is admitted that the statute is in affirmance of the common law.

In his 3d volume of Commentaries, Chancellor Kent has an interesting chapter on this subject, in which the case of Edwards vs. Harben, and many other authorities, are cited, and he favors the doctrine, that unless the possession of goods follows the deed, it is fraudulent per se. But he states many exceptions to this rule, as where the possession of the vendor is consistent with the deed or the circumstances of the case. And he says, in Steward vs. Lambe, 1 Brod. and Bing., 506, the court of C. B. questioned very strongly the general doctrine in Edwards vs. Harben, that actual possession was necessary to transfer the property in a chattel, and the authority itself was shaken. And he observes, the conclusion from the more recent English cases would seem to be, that though a continuance in possession by the vendor be prima facie a badge of fraud, yet the presumption of fraud may be rebutted by explanations.

In the case of Wood vs. Dexie, 7 Q. B., 894, the counsel, who was interested in maintaining the doctrine of Edwards vs. Harben, admitted that "some doubt exists whether upon certain facts, as, for instance, want of possession, fraud is a question of law to be decided by the court, or of fact for the jury; but it seems to be now established that the question is for the jury. In Martendale vs. Booth, 3 B. and Ad., 498, Parke, justice, says, the dictum of Buller, justice, in Edwards vs. Harben, has not been considered in subsequent cases to have that import; the want of delivery is only evidence that the transfer was colorable. In Benton vs. Thornbell, 2 Marsh., 427; Lattimer vs. Batson, 4 Barn. and Cres., 652; and in Wordall vs. Smith, 1 Campb., 332, the same doctrine is laid down. In the more modern English cases, the stringent doctrine of Edwards vs. Harben has been departed from; and the want of possession of chattels purchased is considered evidence of fraud before the jury. In Kidd vs. Rawlinson, 2 Bas. and Pull., 59, Lord El-

don admitted that a bill of sale of goods might be taken as a security on a loan of money, and the goods fairly and safely left with the debtor. And this decision conformed to Lord Holt's view, in Cole vs. Davis, 1 Lord Raymond, 724; and Lord Eldon, many years afterwards, declared in Lady Arundell vs. Phipps, 10 Ver., 145, that possession of goods by the vendor was only prima facie evidence of fraud. In Eastwood vs. Brown, 1 Ryan and Moody, Lord Tenterden held, want of possession was only prima facie evidence of fraud.

It would seem to be difficult, on principle, to maintain that the possession of goods sold is, per se, fraud, to be so pronounced by the court, as that cuts off all explanation of the transaction, which may have been entirely unexceptionable. If circumstances, at law, may be proved to rebut the presumption of fraud, the case must be submitted to the jury.

But the case before us is not similar to that of Hamilton vs. Russell. There was a change of possession in the goods purchased by Anderson, by the delivery to him of the key of the outer door of the store-house, which he delivered to Atherton, who had agreed to continue in the business as the agent of the purchasers. From the time of the purchase Haskins had no possession of the property, nor did he exercise any acts of ownership over it. He was absent from Lasalle from the time of the sale until after the attachment was laid.

Now whether this was a colorable delivery or not was a matter of fact for the jury, and not a matter of law for the court. It is clearly not within the case of Adams and Russell.

Few questions in the law have given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency has been, in England and in the United States, to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed it is prima facie fraudulent, but open to the circumstances of the transaction, which may prove an innocent purpose. But if such explanation may be given, it is a departure from the stringent rule in the case of Edwards vs. Harben.

It is urged that the fourth instruction is fraudulent per se, as the jury were told, though the sale was secret and no means taken to make it public, it was not fraudulent in law against the defendant. Whilst in the old cases it was held the possession of the vendor of goods sold was fraudulent against creditors, no case, it is believed, has been so held by the court on the alone ground of secrecy in making the contract. It is a circumstance connected with other facts from which fraud may be inferred. But if the secrecy supposed amounted to absolute fraud, yet the court could not have so pronounced in this case, as there was evidence controverting the supposition of secrecy, which the court could not properly take from the consideration of the jury.

The fifth and sixth charges that the jury were to determine the facts as to the possession after the sale; and if a sale is made by a party, and the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation; and under the sixth they left the case to the jury to determine whether the sale was in good faith and for an honest purpose; which instructions were, as we think, correct and in accordance with the general doctrine on the subject.

A decision on a motion for a new trial, being addressed to the discretion of the court, is no ground for a writ of error.

The judgment of the circuit court is affirmed.

60-129

Warner v. Norton

U. S. Sup. Ct

Opinion of Court

13763