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*Nov. 12.

*Dec. 7.

JAMES P. KENT (PLAINTIFF)..... APPELLANT;

AND

LORENZO ELLIS (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Pleading—Conversion—Defect in plaintiff's title—Statute of frauds.

In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.

It is only where the action is between the parties to the contract which one of them seeks to enforce against the other that the defendant must plead the Statute of Frauds if he wishes to avail himself of it.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 549) affirmed.

*Present :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the defendant.

The material facts are stated in the judgments published herewith. The main question raised on the appeal was whether or not the defendant could without having pleaded it claim the benefit of the Statute of Frauds as avoiding the contract under which plaintiff claimed title to the goods for conversion of which the action was brought to which contract the defendant was not a party.

The trial judge gave judgment for defendant which was affirmed by the court *en banc*. The plaintiff appealed to this court.

Newcombe Q.C. and *Sedgewick* for the appellant. The statute must be pleaded. *Clarke* v. *Callow* (2); *Olley* v. *Fisher* (3); *Morgan* v. *Worthington* (4); *James* v. *Smith* (5). Nor will the defence of the statute be allowed at the trial unless the plaintiff to a material extent changes front. *Brunning* v. *Odhams Brothers* (6). Even if pleaded, the respondent being a stranger could not avail himself of the statute. *Waters* v. *Towers* (7); *Maddison* v. *Alderson* (8), at p. 488, per Blackburn L.J.

In reference to the sufficiency of the contract at common law, delivery is not necessary to pass the title. As soon as a bargain and sale of specific personal property are concluded the contract becomes absolute without actual payment or delivery. *Tarling* v. *Baxter* (9); *Hinde* v *Whitehouse* (10); *Clarke* v. *Spence* (11); *Bentall* v. *Burn* (12).

(1) 32 N. S. Rep. 549.
(2) 46 L. J. Q. B. 53.
(3) 34 Ch. D. 367.
(4) 38 L. T. 443.
(5) [1891] 1 Ch. 384.
(6) 75 L. T. 602.
(7) 8 Ex. 401.
(8) 8 App. Cas. 467.
(9) 6 B. & C. 360.
(10) 7 East 558.
(11) 4 Ad. & E. 448.
(12) 3 B. & C. 423.

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R. G. Code for the respondent. This court will not interfere with a decision such as is now appealed from as it is upon a mere question of procedure; *Dawson* v. *Union Bank* (1); *Gladwin* v. *Cummings* (2); *Ferrier* v. *Trépannier* (3); *Scammell* v. *James* (4); *Williams* v. *Leonard & Sons* (5).

The failure to plead the Statute of Frauds was not invoked at the trial and it is too late now to claim any benefit from it. *Hart* v. *McDougall* (6); *Horlor* v. *Carpenter* (7); *Bauld* v. *Challoner* (8). The trial judge had power to amend for the purpose of determining the real question or issue raised by or depending on the proceedings; Order XXVIII, rule 12; and he would undoubtedly have ordered such amendment if objection had been raised at the trial to the pleadings. *Dempster* v. *Fairbanks* (9); *Power* v. *Pringle* (10); *James* v. *Smith* (11). The plaintiff has no title to the goods, which were above the value of $40.00 and were not delivered to him, nor did he make payment, nor was there any memorandum in writing as required by the Statute of Frauds. *Waters* v. *Towers* (12); is distinguishable, and in *Smeed* v. *Ford* (13) Crompton J. said: "*Waters* v. *Towers* (12) seems to be treated as overruled in *Hadley* v. *Baxendale*" (14).

This is not an action on contract and we are not properly speaking setting up the Statute of Frauds. Our contention is that every link in the plaintiff's title should be a good valid link, and that if the link in question is dependent on a contract which cannot be

(1) Cass. Dig. (2 ed.) 429.
(2) Cass. Dig. (2 ed.) 427.
(3) 24 S. C. R. 86.
(4) 16 S. C. R. 593.
(5) 26 S. C. R. 406.
(6) 25 N. S. Rep. 38.
(7) 3 C. B. N. S. 172.
(8) 28 N. S. Rep. 205.
(9) 29 N. S. Rep. 456.
(10) 31 N. S. Rep. 78.
(11) [1891] 1 Ch. 384.
(12) 8 Ex. 401.
(13) 5 Jur. N. S. 291.
(14) 9 Ex. 341.

enforced, it is not a valid link. *Britain* v. *Rossitter* (1); *Sykes* v. *Dixon* (2); *Benbow* v. *Low* (3).

TASCHEREAU J.—Who owns the old sleigh and carriage in question, worth, at most, eighty dollars, which the appellant, who claims them, bought for fifty dollars, is the important question to be determined by the Supreme Court of Canada upon this appeal.

We hold with the two courts below that the appellant purchased the articles from one who had no right to sell them and the appeal is dismissed with costs.

The Maritime Provinces enjoy the costly privilege of bringing appeals to this court upon such paltry amounts. In a case from Prince Edward Island of *Gorman v. Dixon* (4), where one hundred and sixty dollars was the amount in controversy, the Chief Justice, speaking for the court, said:—

> It is to be hoped that some statutory amendment of the law may in the future prevent appeals to this court in cases of such very minor importance as the present in which the amount in controversy is so greatly disproportioned to the expense of the appeal.

These remarks have their full application in this case.

That such appeals should be possible is a blot upon the administration of justice. I hope the bar from the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things.

GWYNNE J.—The plaintiff in his statement of claim alleges that he has suffered damage by the defendant wrongfully depriving the plaintiff of his goods and chattels, to wit: one double-seated sleigh and one light riding carriage, which the defendant wrongfully took and carried away and converted to his own use. The

(1) 11 Q. B. D. 123.
(2) 9 Ad. & El. 693.
(3) 16 Ch. D. 93.
(4) 26 Can. S. C. R. 87.

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defendant in his statement of defence, pleads; first, that the said goods were not, nor was any of them, the plaintiff's; secondly, that the defendant did not at any time deprive the plaintiff of the said goods; and, thirdly, that at the time the defendant took the said goods, they were the property of one Arthur A. Archibald and not of the plaintiff and that in taking the goods the defendant acted by the authority and as the servant or agent of the said Archibald.

The plaintiff replied by joining issue to this defence and he also pleaded a special replication to the defendant's third plea.

This replication, Mr. Justice Ritchie was of opinion, was wholly unnecessary and irregular. It may not have been necessary for there is little or no difference between the modern and the former mode of pleading in actions for the conversion of goods. The first two paragraphs or pleas in the defendant's statement of defence are precisely similar in substance to the old pleas of "not guilty" and that the property was not the property of the plaintiff; and, under those pleas, all matters in difference of title could be given in evidence. It may, therefore, be that the special replication in the present case was unnecessary, but inasmuch as the plaintiff's title, if any he had, was acquired from a person, not the absolute owner of the goods but having only a qualified title to them under the true owner, and so that his title, if any, was derived under and in virtue of ch. 92, R. S. N. S. (5 ser.), I cannot say that it was improper for the plaintiff to plead a title under that statute as a purchaser for valuable consideration without notice.

The special replication is pleaded to the defendant's third plea and, in short substance, is that Arthur A. Archibald's sole title to the goods in question was by virtue of an unfiled and secret bill of sale thereof and

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that the same was and is under chapter 92, R. S. N. S., void against the plaintiff for that Lindsay as administrator of Nelson, without any notice or knowledge of the claim or title of Archibald, sold the goods for good and valuable consideration to the plaintiff, who likewise had no notice or knowledge of such claim.

I concur, however, with the learned judge that the rejoinder filed by the defendant to this replication served no useful purpose, for all the matters therein alleged otherwise than by way of repetition of his denial of the plaintiff's title to the goods, were matters of evidence in support of the defendant's plea of title in Archibald.

Now, at the trial, it appeared that within four days after Nelson's decease, one Lindsay and the plaintiff, who lived about sixteen miles from where Nelson had lived and died, came out together to the deceased's place claiming to be creditors of the deceased and wanting to see about his property, and they found one Chisholm Nelson, a cousin and brother-in-law of the deceased, in possession of his effects.

The plaintiff on that occasion went into the barns where the carriage and sleigh in question were and saw them there. Lindsay entered into conversation with Chisholm and asked him if he would administer to the deceased's estate, saying that if he, Chisholm, would not, he would. Chisholm replied that he would let him know in a few days, which he did, and within two or three days executed some papers renouncing administration.

Chisholm said that he told Lindsay that he thought the defendant had a claim against the carriage and sleigh. Lindsay replied that it was hard to tell whether he had or not; that he, Chisholm, told him that he thought there was an agreement; that Lindsay said, "some people would do most anything."

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Chisholm also said that as soon as deceased was buried he had locked up the deceased's goods in the barn and kept it locked until the defendant got possession of the carriage and sleigh, which he did, as also appears in the evidence, from Chisholm himself, on production of the paper showing Archibald's title to the goods. And he said further that Lindsay had told him not to let the defendant have the property unless he had a written agreement.

Lindsay, who besides the plaintiff himself was the plaintiff's sole witness, said that he had made no inventory of the deceased's effects before receiving the letters of administration and that the carriage and sleigh in question were not included in an inventory made after receiving the letters of administration, which he received by mail on the 17th of March, 1899.

He admitted also that he had heard that the deceased had got the carriage and sleigh from the defendant whom he knew to be a person employed in selling carriages and sleighs; that he did not know how the deceased had bought these; he said further that he himself had never seen the carriage before he sold it and the sleigh as he said he did to the plaintiff on the 17th of March. He had seen the sleigh on the day when he went out with the plaintiff before receiving the letters of administration.

Now the facts of what he calls a sale to the plaintiff are these. He says that the plaintiff never got possession of the goods; that the defendant had taken them away *before he could do so;* that plaintiff did not pay anything for them nor did he give any note for the price; that he took the plaintiff's word that he would pay fifty dollars at the expiration of nine months: that he sold on the seventeenth of March, *because he thought that he had got a good chance to do so;* that he had not seen the goods after receiving the

letters of administration before this sale to the plaintiff; that he told the plaintiff that the goods were locked up in a building owned by the deceased; the key, he said, was at the house of the deceased's brother-in-law, (Chisholm Nelson); that a few days after this sale he and the plaintiff went out together to this brother-in-law's house, which was seven miles from where the goods were, for the purpose of getting the key, but did not get it, and that, in consequence thereof the plaintiff did not get the goods.

But at this time the goods were restored by Chisholm Nelson to the defendant's possession, for Lindsay said that not having got the key they did go on to where the goods were but that he and the plaintiff returning home met the defendant on the road driving the carriage; that neither he nor the plaintiff then made any claim to the carriage; that although he, Lindsay, had some conversation with the defendant who told them that he had received the sleigh also and was about to sell it, yet that he cannot say that the plaintiff said anything at all.

The plaintiff having been called in his own behalf, said, that Lindsay, after he was appointed administrator, sold him the carriage and sleigh in his, Lindsay's, own store at Middle Musquodoboit on the seventeenth of March, 1899, for fifty dollars, payable in nine months; that the carriage and sleigh were then at Moore River; that Lindsay asked him if he would go out to Moore River and get them; that he, plaintiff, asked if they were all right there, to which Lindsay replied that the barn was locked and that nobody could get them; that plaintiff said he would go out and get them the first of the week. Then he added. "*I heard that the defendant was going to take the carriage and sleigh and I started out with Lindsay to get*

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ahead of him but we were too late; on the road we met the defendant."

Then, as to what took place on that occasion, he said:

> Lindsay and the defendant were talking about the property. The defendant said that he had taken them away, I understood, before that. I said nothing to the defendant about the property; he, Lindsay, did not speak to the defendant of the carriage being his or mine.

The plaintiff denied that he had any notice of Archibald or any one having a claim on the carriage or sleigh.

The defendant shewed Archibald's title to the goods and produced the leases or bills of sale in virtue of which Nelson had held them in his lifetime, which reserved the property in Archibald until payment in full, and he proved that upon the sleigh no payments had been made and that nearly half of the rental of the carriage remained unpaid. He also proved the authority of Archibald for him to do all that he had done in the premises, and he testified that he, as agent for Archibald, took from Nelson his signature to the papers, and that he re-took possession. He found them, he said, in deceased's barn when he went for them; that he found Chisholm Nelson in charge of the building; that he had the key and that he showed the papers, (of title), to Chisholm Nelson, who at defendant's request came and opened the door and allowed the defendant to take the carriage and sleigh away.

He said that the second day after he had taken them away he met the plaintiff and Lindsay on the road; that Lindsay asked him by what authority he had taken the goods, to which the defendant replied, that if he, Lindsay, would come to town, Mr. Archibald would shew his authority; that Lindsay said: "I will find out what authority he had for taking them,

if you are without it;" that plaintiff was sitting in the same waggon with Lindsay during this conversation but said nothing at all, and the witness finally told them that, if they would pay what was against the goods, they could have them.

At the close of the plaintiff's case, before the defendant entered upon his defence, defendant's counsel moved for judgment for the following reasons:

1. That the sale was void under the statute of frauds;
2. No delivery;
3. No payment; no writing;
4. No delivery before or after Lindsay appointed administrator.

The contention of the plaintiff's counsel as to the objection of the statute of frauds, was that no person but a party to the contract could raise that objection.

The learned trial judge after the close of the defendant's evidence and arguments of counsel rendered judgment for the defendant, holding that it was competent in the present action for the objection to be taken by the defendant, and he held that the plaintiff never having had any possession, and not having title in writing, under the statute of frauds, could not recover in this action.

From this judgment the plaintiff appealed to the Supreme Court of Nova Scotia and there changed the frame of his contentions, which then, was not that a stranger to a contract could not raise any objection to the plaintiff's title as being defective for non-compliance with the statute of frauds, but that he was bound to plead the statute, and that the defendant, not having done so, could not object to any defect appearing in the plaintiff's title by reason of non-compliance with the statute.

This alteration in the plaintiff's contention never should have been entertained, for, if the plaintiff's objection had assumed that shape at the trial, the

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learned judge should have, and undoubtedly would have, under the circumstances appearing at the trial, intervened by allowing the plea to have been then pleaded, whether necessary or not, and so have avoided the scandal of an appeal in a case like the present, involving a claim by the plaintiff to the amount of fifty dollars, in a case where he had not paid a cent nor bound himself by any note or other instrument to pay a cent for the property in question in the event which has happened of his never having had the property delivered to him.

The ends of justice will, I think, be attained, if we dismiss the present appeal upon this ground alone, although, as the case has been argued both in the Supreme Court of Nova Scotia and before us, I must say, that in my opinion, there is really no material difference between the present and the former mode of pleading, or in the evidence necessary to support such pleading, or in the practice on the trial of a case of conversion.

When defendant denies the actual taking of the goods from the plaintiff, and also the plaintiff's property in the goods, the case is wholly at issue, and nothing remains but evidence of title which the plaintiff in order to recover must prove to be in himself by an unquestionable title, and if an instrument in writing is necessary, under the circumstances appearing in evidence to make his title perfect as against the defendant, he must prove such instrument or fail, and, if he should make default in showing a perfect title, it is quite competent for the defendant still, as it always was, to point to such defect in the plaintiff's title, and to insist upon it.

Until the defect became apparent, he could not have been required by a plea to point out a defect of which he cannot be assumed to have been aware. The defend-

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ant had only to support his own title, and anticipation of defects in the plaintiff's evidence produced by him of his title, constituted no part of the defendant's case or of the duty cast upon him.

All the cases which have been cited before us show that where the defendant was bound to plead the statute of frauds was in cases between the parties to the contract, where one of the parties was seeking *to enforce the contract against the other*, and the language of Lord Blackburn in *Maddison* v. *Alderson* (1), shows that it is in relation to a case instituted by one of the parties to a contract against the other to enforce the contract, he is speaking, when he says that a defendant must plead the statute. And Chief Baron Kelly, in *Clarke* v. *Callow* (2), and Lord Cairns in *Hawkins* v. *Lord Penrhyn* (3), explain why a party to a contract who is sued by the other party to enforce it must plead the statute of frauds, if he intends to rely upon it, because otherwise it could not be known whether or not he *intended to shelter himself* under the statute, or to *waive his right* to shelter himself under it.

This cannot apply to the case of a defendant in an action for the conversion of goods where title to the goods is the point in issue, in which action the defendant has nothing to do but to insist upon the plaintiff showing a title good *in omnibus* as against the defendant.

In a case like the present where the plaintiff had no title whatever to the goods in question unless he should prove, as he had undertaken to do upon the record, a good title under the provision of chapter 92 R. S. N. S. (5 ser.) he could not defeat Archibald's title unless he should establish beyond all reasonable doubt, a *bonâ fide* purchase for valuable consideration

(1) 8 App. Cas. 488.
(2) 46 L. J. Q. B. 53.
(3) 4 App. Cas. 58.

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without notice, and I must say, that the evidence in the present case is in my opinion pregnant with doubts as to the *bona fides* of the transaction and as to what was the real bargain between the parties.

The non-insertion by Lindsay in any inventory of the deceased's effects; the time selected for the alleged sale to the plaintiff, immediately after the receipt by Lindsay of the letters of administration; the price fixed which was just about two-thirds of the amount due to Archibald and less than half the value set by the plaintiff upon the goods in this action; the deferring of the payment of that small sum for nine months, without even the security of a promissory note; the non-explanation of any reason for the hasty sale; the knowledge that Lindsay had not possession of the goods, not even possession of the key of the building in which Chisholm Nelson had them locked up ever since Nelson's death; the admission by the plaintiff that it was because he had heard of the defendant's intention to take possession of the goods that he and Lindsay hurried away to get the key with the intention of endeavouring to get ahead of the defendant; and the non-assertion by the plaintiff of any claim whatever to the goods when he and Lindsay met the defendant driving the carriage and when he said he had got the sleigh also and was about to sell it; all these things appear to me to point to the conclusion that the bargain between the plaintiff and Lindsay was an imperfect one and was not intended to be complete unless they should succeed in getting possession of the goods so as to enable delivery to be made of them to the plaintiff.

This question of getting possession and of delivery to the plaintiff had surely something to say to the postponement for nine months; that sum surely never could become payable in the event

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which has happened of the plaintiff never getting possession of the goods.

Of the *mala fides* of Lindsay there can be no doubt. And I must say that the evidence affects my mind with the very gravest suspicions that the plaintiff was combining with Lindsay in an attempt to defeat the claim of Archibald or of some person known or believed to be the owner of the goods. Upon the plaintiff was cast the burthen of clearing up these doubts and suspicions and in my opinion he has failed to do so.

Then there is another point. When Chisholm Nelson restored the goods to the defendant upon production of the papers under which alone the deceased had held them he acted either in the character of an executor de son tort or as agent of Lindsay, the administrator and by his authority, for Chisholm said that Lindsay told him not to give up the goods to the defendant unless he should produce a written agreement. That direction implied authority for Chisholm to give them up upon production of the written agreement. This Chisholm did, and thereby the uninterrupted possession of the goods got back to the owner in the terms of the agreement under which the deceased had held them. This restoration of the actual possession of the goods to the person having the property in them must supersede the agreement between Lindsay and the plaintiff as it appears in the evidence.

For the above reasons I am of opinion that the appeal should be dismissed with costs. I will however add a few words in relation to actions of this description. When a plaintiff can only claim a title to goods under the provisions of chapter 92, R. S. N. S., or such like statute, by showing a *bonâ fide* purchase for valuable consideration without notice, I think that as equitable principles are now to govern in all actions

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of whatever form and as the plea of purchase for valuable consideration without notice owes its origin to courts of equity the least that should be required of a plaintiff should be conformity with the principles prevailing in equity, by his shewing that before he had notice of any adverse claim he had actually paid his purchase or such portion of it as would afford some guarantee of the *bona fides* of the transaction and that as in courts of equity upon such a plea he should have protection only as to the extent of the amount of his purchase money actually paid. See Story's Pleading in Equity, secs. 604-805, and Metford on Equity by Jeremy.

SEDGEWICK, KING and GIROUARD JJ. concurred.

Appeal dismissed with costs.

Solicitor for the appellant: *James A. Sedgewick.*

Solicitor for the respondent: *Hugh Mackenzie.*