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*Dec. 5.
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*May 5.

JOHN FORRISTAL, *et al.*, (DEFENDANTS). APPELLANTS;

AND

JOHN McDONALD, (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Consignment of goods subject to payment—Agreement that purchaser shall not sell—Passing property.

The plaintiff consigned crude oil to *A*, who was a refiner, on the express agreement that no property in the oil should pass until he made up certain payments. Without making such payments, however, *A* sold the oil to the defendants without the knowledge of the plaintiff.

Held,—(Affirming the judgment of the Court of Appeal for *Ontario*,) that although the defendants were purchasers for value from *A*, in the belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with *A*, having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil.

APPEAL by the defendants, *Forristal* and *McIntosh*, from the judgment of the Court of Appeal for *Ontario*

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

(1), dismissing an appeal of the said defendants from a judgment of the Court of Chancery.

The action was instituted by *Jhon McDonald* to recover the value of five car loads of oil said to have been converted to their own use by *Forristal & McIntosh*, who were carrying on business at the city of *London* as refiners of and dealers in oil.

McDonald claimed the oil under an agreement between him and another defendant *Adams*, and the defendants *Forristal & McIntosh* claimed by purchase and delivery from the defendant *Adams*. The agreement under which the plaintiff claimed is referred to at length in the judgment of *Ritchie*, C.J.

Mr. *Gibbons* for appellant.

Mr. *Street*, Q.C., for respondent.

The arguments are fully noticed in the judgments.

The following authorities were referred to:

Walker v. *Hyman* (2); *Pickering* v. *Busk* (3); *Crossman* v. *Shears* (4); *Chitty* on Contracts (5); *Higgins* v. *Burton* (6); *Campbell* on Sales (7); *Johnson* v. *Credit Lyonnais Co.* (8); *Rumball* v. *Metropolitan Bank* (9).

RITCHIE, C.J.:

This case certainly does not come within the Act respecting contracts in relation to goods entrusted to agents. *Adams* was in no sense the agent of *McDonald*, nor was he in any way entrusted with these goods, shipped to him by *McDonald*, to sell, consign, or part or deal with them. His position with reference to these goods was simply for the purpose of safe custody and refining the crude oil under an agreement, dated

(1) 29 Grant 300.
(2) 1 Ont. App. R. 345.
(3) 15 East 37.
(4) 3 Ont. App. R. 583.
(5) 10 Ed. 355.
(6) 26 L. Jour. Ex. 342.
(7) P. 32.
(8) 3 C. P. Div. 32.
(9) 2 Q. B. Div. 194.

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Ritchie, C.J.

20th December, 1880, between *Adams* and *McDonald*, within two weeks after each delivery or shipment by *McDonald* to *Adams*. The said agreement stipulating that: "The crude oil so shipped is to remain the sole "property of the said *McDonald*, and to be held in his "name until the sum of one dollar and sixty cents per "barrel has been paid for it, and the shipment of it to "the said *Adams* is not, nor is the refining of it by him, "to be taken to change the property in the said oil from "the said *McDonald* to the said *Adams*, but upon pay- "ment for each lot the same is to be transferred from the "said *McDonald* to said *Adams*. In case default shall "be made in payment of any of the moneys hereby "secured, the said *McDonald* is entitled to possession of "the said refinery, and of the crude or refined oil then "being therein, and he may, after due notice to said "*Adams*, sell and dispose of the same, but the said "refinery shall not, nor shall any of the fixtures or "machinery be sold until after the expiration of one "month from the time of default, and the said *Adams* "shall again be entitled to resume possession of the said "refinery at any time before sale has been made, upon "payment of all arrears and costs and charges. And for "the purpose of better enabling the said *McDonald* to "take possession in case of default, the said *Adams* is to "be, and hereby becomes, tenant to the said *McDonald* "of the said refinery, the said such tenancy to continue "until the objects intended by this assignment have been "realized. In case the said *McDonald* acquires a new "lease of the premises during the continuance of these "presents, he shall transfer the same to the said *Adams* "upon payment of all the monies hereby intended to be "secured, and of all expenses connected therewith. In "case *Adams* shall make default in paying the said sum "of one dollar and sixty cents per barrel within the "period of two weeks after shipment to him, according

"to the terms being, he shall not be entitled to call for "any more oil from the said *McDonald* until he shall "have paid all arrears in full."

Adams, having no authority to sell, could not, by making a sale, transfer the property of *McDonald* to *Forristal*. I can discover nothing in the conduct of *McDonald*, nor the neglect of any duty by him, by which he enabled *Adams* to hold himself forth to the world as having, not the possession only, but the property in this crude oil, so as to estop him, *McDonald*, from asserting his right to it. *Adams'* general and principal business was that of a refiner of crude oil and though he may have made occasionally sales of crude oil, it is quite clear such sales were exceptional, and not in the general and ordinary course of his business, and I think the learned Judge *Proudfoot* was quite justified in coming to the conclusion that *McDonald* did not deal with *Adams* as a seller to others of crude oil but as a refiner. This, in my opinion, he had a perfect right to do, and I am of opinion the alleged sale or transfer by *Adams* to *Forristal*, of which *McDonald* had no notice, in payment of a prior indebtedness, of this crude oil, the property in which had never passed from *McDonald*, and the possession which *Adams* had was for the purpose of refining only, on the conditions contained in the agreement, was a fraud on him. Arriving therefore, at the conclusion that *Adams* was not entrusted with these goods as an agent at all; that they were placed in his hands as a refiner to refine them; that *McDonald* was guilty of no negligence, and did not give either authority, or ostensible authority, to *Adams* to sell these goods, nor did he do anything to estop him from maintaining against the defendant his right of ownership, I think the judgments of the court of first instance and of the Court of Appeal quite right, and therefore this appeal should be dismissed with costs.

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STRONG, J.:—

In my opinion the decree of the Court of Chancery in this case was perfectly correct and must be maintained.

There can be no question that the property in the oil never passed to *Adams*. This is expressly stipulated in the agreement of the 20th December, 1880, by the provision of that instrument which is in the following words:

> The crude oil so shipped is to remain the sole property of the said *McDonald* and to be held in his name until the sum of $1.60 per barrel has been paid him for it, and the shipment of it to the said *Adams* is not, nor is the refining of it by him, to be taken to change the property in the said oil from the said *McDonald* to the said *Adams*, but upon payment for each lot the same is to be transferred from the said *McDonald* to the said *Adams*.

It was quite competent to the parties to make this agreement, as an unpaid vendor may always reserve the property in goods sold,—the passing of the property being in every case a matter of intention which can be controlled by the contract of the parties.

Consequently *Adams* could transfer no property unless the case can either be brought within the Factors Act, or there was such conduct on the part of the respondent as estops him from denying that the property was vested in the appellants by the sale which *Adams* assumed to make to them, for sale in market overt, is, of course, out of the question. If any authority is wanted for this position, nothing can be clearer than the following statement of the law by Mr. Justice *Blackburn* in *Cole* v. *N. Western Bank* (1); that learned judge there says:

> At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But

(1) L. R. 10 C. P. 354.

the general rule was that, to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced *bonâ fide* to act on the faith of that apparent authority, and the result as to them was the same as if he had really given it.

That the Factors Acts do not apply, is a proposition concluded by authority, since the goods were not entrusted to *Adams* as the factor or agent for sale of the respondent (1), and for the reason that *Adams* did not in fact carry on the business or calling of a factor. That there was no estoppel is equally apparent from the same authorities, and especially from the case of *Cole* v. *N. W. Bank*. *Adams* had, it is true, the possession, but no case has ever decided that the owner of goods is estopped merely because he has entrusted with the possession of his property a person who, being engaged in a business in the course of which he sells goods of the same kind as those which have been delivered to him as a bailee, in breach of his duty, has wrongfully sold the goods of his bailor as his own. If this were so, no man could safely leave his watch with a watchmaker who sells watches, or his carriage with a carriage maker who sells carriages, to be repaired.

In the judgment of Mr. Justice *Blackburn* already quoted from occurs this passage:

For example, if a furnished house be let to one who carries on the business of an auctioneer, he is entrusted as tenant with the furniture, being in fact an auctioneer, but it never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction room and then sold it, he could confer any better title on the purchaser than if he had as an auctioneer acted for some

(1) *Fuentes* v. *Montis*, L. R. 4 C. P. 93; *Cole* v. *N. W. Bank* 3 C. P. Div. 32. *Johnson* v. *Credit Lyonnais Co'y*, *ubi supra* per Baron *Bramwell*;

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other tenant who committed a similar larceny as a fraudulent bailee; or, to come nearer to the present case, that a warehouseman or wharfinger, who, as such, is entrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been entrusted to some other warehouseman who employed him to sell.

It is true that, if, in addition to the possession, the *indicia* of the property (not merely documents authorizing the holder to acquire the possession, for such latter documents can be of no greater effect than the actual possession itself) are handed over, then a sale by the party so entrusted, though in breach of faith, will operate as an estoppel in favor of a purchaser in good faith, who has relied on the *primâ facie* title with which the true owner has invested his bailee. This was the true *ratio decidendi* of Lord *Ellenborough's* judgment in *Pickering* v. *Busk* (1); and is also, though with some hesitation, stated as law by Lord *Tenterden* in *Dyer* v. *Pearson* (2), both of which cases were decisions at common law; that of *Pickering* v. *Busk* having been decided in 1812, before any of the Factors Acts had been enacted.

The case which is most like the present, and which seems decisive of it is that of *The City Bank* v. *Barrow* (3). In that case hides had been sent to a tanner near *Montreal* to be tanned and re-shipped to the owner in *England*. The consignee, who, in the course of his business, purchased hides and from them manufactured leather, pledged the hides which had been consigned to him to be tanned, together with others of his own, to a bank, which acted in perfect good faith, as security for advances. It was held by the House of Lords that the bank had no title against the true owner, and was liable for the value of the hides which had been sold. There can be no doubt but that this case correctly states and

(1) 15 East 58.

(2) 3 B. & C. 38.

(3) 5 App. Cases 664.

applies the law of *England*, though it may be doubtful whether it as accurately states the law of *Quebec*, which was assumed to be in this respect identical with the English law.

Were we to hold in this case that *Adams* was able to transfer a good title to the oil in question, we should be establishing the principle that in all cases possession is evidence of title, and this rule that possession is equivalent to title, although it is undoubtedly the law of *France*, and of many other countries whose legal system is founded on that of the French code, and amongst others, and in a restricted sense and as applicable only to commercial transactions, that of the Province of *Quebec*, has never been recognized as a rule of the law of *England;* if it had been, there never would have been any necessity for the enactment of the statutes known as the Factors Acts, and the numerous cases which have arisen on those Acts, and have led to so many refined distinctions, might all have been solved without difficulty, for, in that case, all inquiry would have been limited to two questions of fact—the actual possession of the person assuming to sell or pledge and the *bonâ fides* of the vendee or pledgee.

Therefore, notwithstanding the very able and ingenious argument of the learned counsel for the appellants, I am constrained to say that I heard nothing from the bar, and on subsequent consideration I have found nothing in the authorities, to throw a shadow of doubt on the decision of the court below.

My judgment is that the appeal must be dismissed with costs.

FOURNIER and TASCHEREAU, J J., concurred.

HENRY, J.:

I concur with the other members of the court who

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have expressed their views, that the appeal in this case should be dismissed. *McDonald* was the owner of the property in question, and never conveyed his title to *Adams*. He placed it with him as bailee for a special purpose, which did not include the power to sell. In fact, it was specially agreed that he should not sell or dispose of it in any way himself. There is nothing to show that he was in any way the agent of *McDonald*. Evidence was given on the trial that *Adams* was in the habit of selling refined oil, and, on one or two occasions, had sold crude oil,—but it was only when he was overstocked and had not the means to convert it; but his business was that of a refiner,—of converting oil from the crude to the refined state. I have no doubt the law applicable to this case is as stated by the learned Chief Justice, and my brother *Strong*. A man cannot give a title to property to which he has no title himself. A bailee cannot, because he has merely possession of property, give a title which he has not himself. If a livery stable keeper hires a horse and carriage to a party to drive out, and gives him possession of it for the time being, no one would pretend for a moment, that if he sold the horse and carriage he had hired, the owner could not look to the purchaser for them. The same principle applies to this case. The bailee undertook to sell the property in his possession, and applied the funds to pay an old debt to *Forristal*. The transaction under the circumstances was a fraud upon *McDonald* *Forristal* knew the terms by which *Adams* came in possession of the property.

I have no doubt that under the law applicable to the case and the evidence that the judgment of the Vice-Chancellor was the correct one, and ought to be sustained, and therefore the appeal should be dismissed with costs

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GWYNNE, J.:—

Although the defendants are, in my opinion, purchasers for value from *Adams* in the belief that he was the owner of and entitled to sell the oil in question, still I am of opinion that the plaintiff is entitled to retain the judgment rendered in his favor in the courts below. That *Adams* was not an agent entrusted with the possession of the oil within the meaning of ch. 121 of the Revised Statutes of *Ontario* is clear from the judgment of the Exchequer Chamber in *Cole* v. *The North Western Bank* (1). No question arises here which might arise in a case of conflicting evidence of the terms of an oral contract and of the intention of the parties thereto, namely, whether the provision as to the property not passing until payment was not inserted as an attempt to restrict the rights already acquired by the vendee, to whom, by force of other terms of the contract, it was apparent that the intention of the parties was that the property should pass upon delivery. Here the question arises upon a sealed instrument carefully prepared, the true construction of which I think is that the crude oil was delivered to *Adams* for the purpose of being refined at his refinery, the keeping open of which in operation was the main object in view, and the intention of the parties is clearly and, I think, reasonably, expressed to be that the property in the oil, notwithstanding its change from the crude state to refined, should not pass from the plaintiff to *Adams* until payments should be made in the manner stated in the instrument. I am of opinion also that the case does not come within the doctrine of *Pickard* v. *Sears* (2), or *Freeman* v. *Cooke* (3), as explained in *Swan* v. *N. B. Australasian Co.* (4), approved of in *Johnson* v.

(1) L. R. 10 C. P. 354.
(2) 6 A. & E. 469.
(3) 2 Ex. 654.
(4) 2 H. & C. 175.

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Credit Lionais Co. in the Court of Appeal (1); so as to deprive the plaintiff of his common law right of re-claiming his property from the defendants, although purhasers for value, and without notice, from *Adams*, who, in violation of the terms upon which he had acquired possession of the plaintiff's property, assumed to deal with it as his own.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Gibbons, McNab & Mulkern.*

Solicitors for respondents: *Street & Beecher.*