FIELD *vs.* SIMCO.

The non-delivery of personal property, on sale, is not *per se* fraud but is only a circumstance in proof of fraud, which may be explained.

Upon a sale of sixty-four barrels of whiskey, in the possession of a third person, as bailee, the parties went to the house of the bailee, where the whiskey was deposited, and there in his presence completed the contract, without any formal delivery—Held, that the circumstances as effectually changed the possession of the vendor to the purchaser, as an actual delivery would have done, and that, from thenceforth, the purchaser became the owner and bailor of the property.

Where a party fails to object to the competency of testimony at the trial, he cannot question its legality on error.

In a trial of the right of property, on interpleader, between an attaching creditor, and the vendee of the defendant in attachment, such defendant being a competent witness, his declaration cannot be given in evidence.

Appeal from the Circuit Court of Crawford County.

INTERPLEADER, determined in the Crawford circuit court, at the October term 1844, before BROWN, judge.

Richard Field brought assumpsit, by attachment, against Richard Ratcliff, and the sheriff levied the attachment on sixty-four barrels

of *whiskey* as the property of Ratcliff. Afterwards the death of Ratcliff was suggested, his administrator, Alexander, made a party to the suit, and judgment rendered against him.

William R. Simco filed an interplea, under the statute, alleging that the whiskey attached belonged to him, and not to Ratcliff, to which issue was taken by Field, the cause submitted to a jury, and verdict for Simco. Field moved for a new trial, which the court refused, he excepted and took a bill of exceptions, setting out the evidence, &c, from which it appears:

Stoneroad, a witness for Simco, testified that sometime in the winter previous to the trial, Ratcliff stored in his house eighty barrels of whiskey, which had previously been stored at one Lowry's. Afterwards, Simco and Ratcliff came to the house where the whiskey was stored, and inquired of witness if he could ascertain the number of gallons said barrels contained? He replied that it would be attended with great trouble and inconvenience. They asked if witness thought the barrels would average forty gallons? To which he responded in the affirmative. They asked him to make an estimate of the number of gallons the eighty barrels contained, and to calculate its value at thirty-seven and a half cents per gallon; which he did, and informed them it amounted to $1200. Witness inquired if they were about to make a trade? They replied they were about to close a trade. Simco then paid Ratcliff five dollars, and remarked he would pay him the other five dollars, which would be the difference between the sum agreed to be given by Ratcliff for a certain reservation claim which Simco had against the Government and the estimated value of the said whiskey. Ratcliff stated to witness that he knew the claim he had bought of Simco, that it was a good one; that he owned part of it himself and wanted to own the entire claim. Witness further stated that he afterwards made application to Simco to purchase said whiskey; and thought that the sale from Ratcliff to Simco was made in good faith. Sometime after the sale, Ratcliff sent his wagon to the house of witness, and hauled away six barrels of the whiskey, and after that sent again for six more, but before witness delivered the last six barrels he called on Simco, and informed him

that Ratcliff had sent and hauled away six barrels of his whiskey, and had again sent for six, to which Simco replied that it was *all right*. That Simco never removed the whiskey from the house of witness—was at the time of the purchase from Ratcliff, and for a long time previous, a very poor man. Ratcliff was a Cherokee Indian, resided in the Nation, and he and Simco were brothers-in-law.

Delano, a witness for Simco, testified that some time in the month of November, 1843, he went to Ratcliff to purchase a lot of whiskey, and he said he had disposed of it to Simco, and "told witness it was in payment for a reservation claim belonging to the Government in the Cherokee Nation." Witness had heard Ratcliff say there was such a claim.

W. Walker, a witness for Field, testified that some time in the fall or winter of 1843, Ratcliff called upon him, and informed him that he had been gambling the "over night," and lost a large sum of money, which he promised to pay that day, but failing to do so, one of the gamblers had attached his horse—he employed witness to dissolve the attachment, which he did, and Ratcliff then told him he had no money to pay his fee, but had a large lot of whisky at Lowry's, and would pay witness his fee when he returned for his whisky—that Ratcliff expressed some apprehensions about the whisky, saying he was fearful the gambler who attached his horse would attach the whisky in his absence—asked witness to defend it if he should, and at the same time remarked that he would arrange it so his whisky could not be attached.

Jenkins, a witness for Field, testified "that he heard Ratcliff state that he had fraudulently sold the whisky in question to Simco to prevent it from being attached, and that it was the understanding of Simco and himself at the time of the sale that the object was only to prevent the whisky from being attached."

This was all the evidence adduced on the trial, as the bill of exceptions states, whereupon, on motion of Simco, the court instructed the jury to exclude the whole of that part of the testimony of Walker and Jenkins which relates to the declarations and admissions of Ratcliff. The jury having found for Simco, Field

moved for a new trial upon the grounds that the verdict was contrary to evidence: 2d, the court erred in excluding from the jury the testimony of Walker and Jenkins as to Ratcliff's declarations: 3d, in permitting the evidence of Delano to go to the jury. The court overruled the motion, he excepted and appealed.

CUMMINS, for appellant. We urge, 1st. That the pretended sale of the whiskey to Simco was fraudulent as to purchasers: 2d. That the statements of Ratcliff were improperly excluded from going to the jury as evidence: 3. That Simco's statements were improperly admitted on his own behalf.

See *Rev. Code ch.* 65, *sec.* 1 2-4. These sections are substantially a re-enactment of the English statutes of fraud, and similar enactments are contained in the code of each state of the Union. The decisions upon these acts in England and the different states will therefore be applicable here.

All statutes in suppression of fraud are to be literally construed, so as to carry out the objects of the legislature. *Roberts on Fraud, Con.* 542 &c.

The most enlightened courts in our country have held the remaining in possession by the vendor after a pretended sale, or even a valid sale of chattels, is *per se* a fraud and renders the transfer void as to creditors. *Gallis C. C. Rep.* 414. *Hamilton vs. Russell,* 1 *Cranch.* 309. *Baylor vs. Smithers,* 1 *Litt. Rep.* 112. *Babb vs. Clennon,* 10 *Serg. & Rawle,* 419. *Martin vs. Mathiot,* 14 *Serg. & Rawle,* 214. *Thomas vs. Soper,* 5 *Murnf.* 28. *Fitzhugh vs. Anderson et al.* 2 *Hen. & Murnf.* 289. 9 *J. R.* 337. *Shumway vs. Butler,* 7 *Pick.* 56.

But all the courts hold the remaining in possession of chattels after sale by vendor, to be a badge, or rather *prima facie* evidence of fraud, susceptible however of explanation by showing that the transaction was *bona fide.* The courts have never relaxed the rule further than this, and the weight of authority is against the relaxation. 1 *Pick.* 390. 16 *Mass. Rep.* 279. 2 *Stark. Ev.* 618 &c.

For the purposes of the present argument the latter rule is suffi-

ciently strict. The evidence shows that the vendor remained in possession of the chattels, and there is no attempt to show that his possession was consistent with good faith. *See* 2 *Stark.* 615 *Twine's case,* 3 *Co. Rep.* 80, as to the possession and other badges of fraud shown by the evidence.

Where a vendor remains in possession of chattels, after a pretended or real sale, the fact of possession is, as we have seen, *prima facie* proof of fraud, and that fact, of itself, is also *prima facie* evidence of a fraudulent conspiracy between vendor and vendee to defraud creditors. Upon the establishment of such conspiracy by such evidence, the universal rule is, that the declarations of the vendor, in respect to the fraud, are good evidence against the vendee in a controversy between him and the attaching creditor. This is clearly established by all the authorities. *Clayton vs. Anthony,* 6 *Rand.* 285. *Reitenback vs. Reitenback,* 1 *Rawle* 458. *Willies vs. Farley,* 3 *Cur. & Payne* 395. *Babb. vs. Clennon,* 10 *Serg. & Rawle* 419, 426, 427. *S. C.,* 12 *id.* 328, 330. *Overseers of Germantown vs. Overseers of Livingston,* 2 *Caines R.* 1067. 9 *Cond. R.* 140. *Gridley vs. Grivot,* 2 *Martin's R. U. S.* 13, 15. *Martin vs. Reeves,* 3 *id.* 22. *Highlander vs. Fluke.* 5 *Martin's Rep.* 1*st series,* 442, 449.

These declarations are admissible although the vendor is a competent witness, and might be examined on oath in court. *Cowen & Hill's notes to Phillips Ev. Vol.* 2 *n.* 481, *p.* 662, 663; where the authorities are collated.

Such declarations are never admissible for vendee. *Id. p.* 669. It is clear from these authorities that Ratcliff's declarations were improperly excluded from the jury.

If competent evidence be excluded by the judge, the party is always entitled to a new trial; for the court cannot undertake to say what weight such evidence might have had upon the jury. *Hunt vs. Adams,* 7 *Mass. Rep.* 518. *Wilkinson vs. Scott,* 17 *Mass. Rep.* 249. *Middlesex Canal vs. McGregor,* 3 *Mass. Rep.* 124.

E. H. ENGLISH, contra. The old English rule is that where the vendor retains possession, it is fraud *per se.* A majority of the

courts in this country have held, that it is merely evidence of fraud, and may be explained. And so this court say in *Cocke vs. Chapman, ante* 179. Neither rule, however, strictly applies to this case, for the whisky was in possession of Stoneroad, as bailee of Ratcliff, when he sold to Simco. On the sale, he became the bailee of Simco, and the possession, in law, passed to him. The law did not require Simco to remove it from Stoneroad's. Whether the sale from Ratcliff to Simco was fraudulent, was a question for the jury—they determined it upon the weight of evidence, and this court will not disturb the verdict. *Howell vs. Webb,* 2 *Ark. R.* 360. *Wilson vs. Smith,* 5 *Yerger* 380. *Grubbs' lessee vs. McClatchy,* 3 *Yerger,* 442.

The court below properly excluded the declarations of Ratcliff. This was a contest between his creditor and vendee. His interest was balanced, and he was a competent witness. 1 *Greenleaf on Evidence* 445, 464. 1 *Starkie's Ev.* 118. Being a competent witness, his declarations could not be given in evidence. He should have been examined in court, or his deposition taken. His being dead does not change the rule. The declarations of a competent witness can be introduced in no case, except where he has once testified under oath in the same cause, and died before a second trial, then what he swore on the first trial may be introduced *aliunde.* He had never testified in this case.

True Simco's witness, Delano, testified as to the declarations of Ratcliff, but Field did not object to the competency of the evidence, or move to exclude it. He cannot raise the objection in this court. Besides there is evidence enough without Delano's to sustain the verdict: this being the case a new trial will not be granted. *Wilson vs. Smith, Supra.*

OLDHAM, J., did not sit.

JOHNSON, C. J. The first question taken by the appellant is that the possession of the property attached continued with the vendor after the sale, and therefore the whole transaction was fraudulent and void as to creditors. We will concede for the sake of the

argument that his statement as to the facts of possession is strictly true, and then see whether the law will sustain him in his conclusion. There is no such thing as a fraud in law as distinguished from fraud in fact. What was formerly considered conclusive evidence of fraud is now held to be but *prima facie* evidence to be submitted to the jury. *Jackson vs. Simmerman,* 7 *Wend.* 436. *Seward vs. Jackson* 8 *Cow.* 405. *Jackson vs. Peck,* 4 *Wend.* 303. The non-delivery of property on sale is only one circumstance in proof of fraud and may be explained. *Butts vs. Swartwood* 2 *Cow.* 431. *Beals vs. Guirnsey,* 8 *J. R.* 446. *Wickham vs. Miller,* 12 *J. R.* 320. It will be perceived from these authorities, that the rule as laid down anciently, has been greatly relaxed by the courts in modern times. According to the weight of authority at the present day, the mere fact of possession by the vendor subsequent to the sale does not amount to fraud *per se,* but is merely *prima facie* evidence of fraud.

We will now advert to the testimony and endeavor to ascertain whether the statement of the appellant as to the possession is supported by the facts of the case. It does not appear from the evidence that the whisky was ever in the actual possession of Ratcliff, the defendant in the attachment. It was first stored in the house of Lowry, and was afterwards removed to that of Stoneroad, the witness, and there it remained until the sale. The proof is that Ratcliff and Simco went together to the house of Stoneroad, where the whisky was stored, and that they there in his presence closed the trade; that Simco paid Ratcliff five dollars, and said at the same time that he would pay him five more, which would be the difference between the sum agreed to be given by Ratcliff for a certain reservation claim which he, Simco, had against the Government and the estimated value of the lot of whisky; that Ratcliff stated that he knew the claim he had bought and that it was a good one, that he owned a part of it himself and wanted to own the entire claim. The defendant then introduced another witness who testified that some time in the month of November, 1843, he went to the defendant Ratcliff to purchase a lot of whisky and that he said he had disposed of it to W. R. Simco, and that he told

him it was in payment of a reservation claim belonging to the Government in the Cherokee Nation, and also that Ratcliff stated that there was such a claim. This is the substance of the testimony offered by the defendant in error.

The point now presented is whether the continued possession of Stoneroad is consistent with the right of property as claimed by Simco. The reason why the law formerly held the continued possession of the vendor to be fraud *per se,* was that it was considered inconsistent with the right of the vendee. Let it be supposed that Ratcliff had gone to the place where the whisky was deposited and there in the presence of witnesses had given formal possession to Simco. Would that ceremony have transferred the possession more effectually than the acts which had already been done by the parties? We think not. The property was of such a character as not to be capable of actual delivery from hand to hand, and a mere symbolical delivery would have been merely a work of supererogation, and wholly nugatory in point of law. We think that, from the time of the sale to Simco, the property in the whisky passed from Ratcliff, and that the possession went with it. The law, from the moment of the sale, transferred the possession to Simco, and Stoneroad became his bailee. Under this view of the law arising upon the facts of this case, it is clear that the jury were at liberty to find for or against the defendant according to the weight of the testimony adduced before them.

But it is contended that the declarations of the defendant in the attachment, introduced by the party interpleading were inadmissible in evidence to establish the claim of the latter. Whether this position be correct or not, we do not conceive it to be necessary to decide as the point was not raised at the trial, and therefore is not properly before the court. The next objection is, that the court erred in excluding the evidence offered by the plaintiff below in relation to the declarations of the defendant in the attachment. It is insisted that he stood indifferent in the contest between the plaintiff and the party interpleading, and that therefore his declarations ought to have been received. The question of the admissibility of his declarations is not before us, as the plaintiff did not

lay the foundation for its introduction. It does not appear from the bill of exceptions that he had ever been examined upon oath before any court or tribunal having jurisdiction of the subject matter, and that he had afterwards died: nor is there any showing whatever to authorize the admission of his declarations. If he was a competent witness between the parties litigant, he should have been produced in person, or in case his personal attendance could not have been secured, his depositions should have been taken and read upon the trial. His loose declarations, without the force and solemnity of an oath, would have been but mere hearsay, and consequently nothing more than secondary evidence. Upon this principle the court decided correctly in excluding it from the jury. We have looked carefully through the record and have not been able to discover any error. Judgment affirmed.