COCKE *vs.* CHAPMAN.

A sale of personal property for a valuable consideration, will pass the legal title without delivery of possession if the property be not in the actual possession of the seller, and the transaction be not tainted with fraud or collusion.

The want of delivery and possession under the transfer may be evidence of fraud, but are not *per se* conclusive.

Where possession of the thing sold cannot be actually given, a symbolical delivery such as the delivery of a bill of sale—is equivalent to the delivery of the thing itself.

Writ of Error to the Circuit Court of Hempstead County.

INTERPLEADER, determined in the Hempstead circuit court, at the November term 1845, before CONWAY, judge. The facts appear in the opinion of this court.

PIKE & BALDWIN, for the plaintiff. The only ground upon which the sale from Johnston to Cocke can be avoided is upon that of fraud, either in fact or in law. Fraud in fact was not so much as even pretended in the court below. The interpleader denied property in Johnston and set up property in Cocke; issue was joined generally, in short by consent; thus presenting rather a double question of no property in Johnston and a good title in the party claiming.

Ships, slaves, and other chattels may be sold and the title passed without actual delivery, and that too so as to defeat the claims of attaching creditors,—as where it is inconvenient or impossible at the time to make actual delivery, and the price paid being the earnest that the parties are acting in good faith. *Joy* v. *Sears,* 9 *Pick.*

Turner v. *Coolidge,* 2 *Metcalf* 350, was for the sale of a ship where the claimant did not take possession for more than a year after his purchase; yet the sale was held good against attaching creditors of his vendor.

A sale of goods without an actual delivery to or possession by the vendee of the goods sold, will vest the property in the vendee, if

the property be of such a nature and in such a situation that a personal possession is either impracticable or inconvenient. *Jernett* v. *Warren,* 12 *Mass.* 300. *Rice* v. *Austin,* 17 *Mass.* 197. *Badlam* v. *Tucker,* 1 *Pick.* 839.

If the sale be by deed the property in the goods will in general pass irrevocably to the vendee by the delivery of the deed. *Long on Sales, (Rand's edition)* 43. A sale is defined to be a transfer of property from one to another in consideration of a sum of money to be paid by the vendee to the vendor. *Long on Sales,* 1. To be paid: in the case at bar the consideration was in fact paid long before the attachment levied or sued. The agreement of the parties and payment of the purchase money consummates the sale and gives to the buyer the complete and absolute right of property against the whole world. *Long on Sales,* 260 *et seq.*

Fraud can never be presumed. It is an intendment of law, that a person is innocent of fraud, and the party insisting upon the contrary must state it in his pleading. *Co. Lit.,* 78, *b. Heath's Mag.,* 207, 212. *Chit. Pl.* 253. Illegality in a transaction will never be presumed: on the contrary, every thing will be presumed to be legally done till the contrary is proved. 1 *B. & Ald.* 463. 1 *Chit. Pl.* 253. The slave was in custody of the law as a runaway, and he was held by the lien upon him for jail-fees, and therefore not subject to attachment. *De Wolf* v. *Dearborn et al.,* 4 *Pick.* 466. *Denine* v. *Harris,* 9 *Pick.* 364. *Tureworth* v. *Moore,* 9 *Pick.* 347, is more strongly in point and meets precisely the case at bar.

Sale of a chattel without delivery gives the vendee a constructive possession sufficient to maintain trespass against one taking the same without right, even against an attaching creditor where seizure is subsequent to the sale. *Parson* 1. *Dickinson,* 11 *Pick.* 351. Our statute gives the claimant the right to interplead in the same manner as in an ordinary action at law. *Rev. Stat. p.* 121, *sec.* 38.

ROYSTON & COCKE, contra. The first question which arises upon the state of facts is, will an attaching creditor have priority over a purchaser of personal property who never had possession? We

admit that as between vendor and vendee the sale would be good, but we deny that the sale would be valid as against creditors, without actual delivery. In the case of *Lanfear* v. *Sumner,* 17 *Mass. Rep.* 113, a case very analogous to the present, the court say the attaching creditors are to be considered as purchasers for a valuable consideration; and that the general rule is perfectly well established that the delivery of possession is necessary in a conveyance of personal chattels as against every one but the vendor." Again, in the case of *Shumway* v. *Rutter* 7 *Pick.* 58, Chief Justice PARKER affirms the principle of the case of *Lanfear* v. *Sumner,* and says, "by the bill of sale the property was transferred between the vendor and the vendee but not against creditors who should attach before possession was taken." Again, in 11 *Pick., Parsons* v. *Dickinson,* 352, the court say in reference to that case: "If this should be considered a question between a bona fide vendor and an attaching creditor, it would be clear for the latter, for the creditor attached the goods before the vendee had perfected his title by having an actual delivery of them to him." These authorities are direct in point and decisive of the question.

CROSS, J. From the evidence, as set forth in the record, it appears that James H. Johnston, a citizen of Texas, was the owner of a negro man that had run away, and before his apprehension, or having ascertained where he was, sold him for a valuable consideration to Cocke, the plaintiff in error, he, Cocke, "agreeing to take the responsibility of getting said negro upon himself." Johnston executed a bill of sale to Cocke, acknowledging the receipt of six hundred dollars as the consideration, and warranting as to title, &c., on the 8th day of October, 1845. On the 20th of that month the negro was apprehended and committed to the jail of Hempstead county as a runaway slave. Chapman, the defendant in error, having a debt against Johnston, brought suit against him by attachment on the 27th of the month, and on the 30th, and before Cocke had obtained possession, caused the negro to be seized by the sheriff under his writ. At the return term of the writ, Cocke appeared, and by interplea set up his title. The pleadings were

made up in short upon the record, and neither party requiring a jury, the cause was by agreement submitted for trial upon the facts substantially as above stated. The court rendered judgment that "the said Benjamin F. Cocke take nothing by his said interplea, and that the said plaintiff, Robert D. Chapman, have and recover from the said Cocke all his costs," &c. No fraud or collusion between Johnston and Cocke was proved or attempted to be proved on the trial in reference to the sale, and the only question material to be considered relates to the ownership of the property at the time the writ of attachment was served.

However true as a general rule, that the delivery of possession is necessary in a conveyance of personal chattels as against every one but the vendor, such delivery may be symbolical or by implication. When the actual delivery is impracticable, as where goods are on board a ship at sea, the indorsement and delivery of the bill of lading has been held sufficient, that being considered equivalent to an actual delivery. *Lamb & others* v. *Durant,* 12 *Mass. Rep.* 54. *Caldwell & others* v. *Ball,* 1 *D. & E.* 205. There is a clear and well recognized difference between the rules of the civil and common law in this respect. By the former, "delivery preceded by a contract of sale, is essential to transfer the right in the thing and perfect the title," but by the latter, "the title is perfected by the contract of sale and payment of the price without any delivery." *Comyn on Contracts,* 2 *ed.* 208. *Parsons* v. *Dickinson,* 11 *Pick.* 354. *Brown on Sales,* 9, 10, 11, 393, referred to in note 6 to case of *Lanfear* v. *Sumner,* 17 *Mass. Rep.* 113. The want of delivery, or possession in conformity to the terms of the deed or instrument of transfer may be evidence of fraud, but they are not *per se* conclusive. *Ib. note* 9. If fraud enter into the transaction, the sale is void as to subsequent purchasers or attaching creditors, the latter being regarded as purchasers, *bona fide,* for a valuable consideration.

In the case before us, the consideration was paid; its legality not contested; fraud neither alleged or fairly deducible from the evidence; and the only delivery of the property practicable at the time, that is symbolical, or by delivery of the bill of sale or instrument of transfer, made. If the negro had not been found, or had

died at any moment after the execution of the bill of sale by Johnston the loss would unquestionably have rested upon Cocke. Chapman as a creditor was not injured. A fair consideration having been paid, Johnston's means were as ample after as before the sale to meet his liabilities.

It is not deemed necessary to allude to the lien of the jailor for his fees further than to remark that such lien is in no wise affected by the proceedings in this cause.

We are clear in the opinion that from the evidence as presented by the record, the title to the negro in controversy was vested in Cocke under his purchase and transfer on the 8th of October, 1845, and that at the time of the service of the writ of attachment the ownership of the property was with him, and ought to have been so found and adjudged on the trial in the circuit court. The judgment therefore rendered in the court below must be reversed with costs.