RECENT ENGLISH DECISIONS.

In the Exchequer Chamber, November 29, 1856.

KINGSFORD AND ANOTHER *vs.* MERRY.[1]

1. The plaintiffs, the owners of a large quantity of acid in barrels, employed certain brokers to sell it. The brokers contracted with B for the purchase of part, and gave him an order on the plaintiffs that they should deliver to him or his order a certain number of tons of acid. B sold his interest in this contract to E, who sold it to L. A bought the same of L, falsely representing himself as agent for V, and thereby, on pretence of inspecting the acid, obtained from L, the brokers' orders on the plaintiffs for the quantity. These orders had been endorsed over and passed from one purchaser to another, and when delivered by L to A were endorsed by L specially deliverable to himself. A presented the brokers' orders to the plaintiffs, and stating that he had purchased the acid of L on his own account, though nominally for V, induced the plaintiffs to give him a transfer or delivery order on the wharfinger in whose warehouse the acid was lying, authorizing the transfer into A's name of certain specific casks of acid, amounting to the quantity in the brokers' orders mentioned. The wharfinger thereupon transferred the specified casks of acid into A's name. A immediately borrowed money of the defendant, and pledged the casks of acid with him as a security for the repayment, handing over to the defendant the warrants which he had had made out, by the means of which the defendant obtained possession of the acid:—Held, that, as A obtained the delivery order from the plaintiffs by the false and fraudulent representation that he had purchased acid by a sub-sale from a purchaser from the plaintiffs, there was no privity of contract between the plaintiffs and A, consequently that the latter could not convey a good title in the casks of acid to the defendant, though a bona fide pawnee for value, but that the plaintiffs might recover the acid back from him in trover.

2. When the court below has refused a rule, the proper time for taking a preliminary objection to the right of the appellant to appeal is on showing cause after the rule nisi has been granted in this court on the case stated. It is most convenient that cause be shown in the first instance. Only one counsel will be heard on each side.

This was an appeal by the plaintiffs against the decision of the Court of Exchequer[2] refusing to grant a rule to enter a verdict for them, pursuant to the leave reserved at the trial.

[1] 26 Law J. Exch. 89. Coram Coleridge, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., Crompton, J., Crowder, J. and Willes, J.

[2] 25 Law J. Rep. (N. S.) Exch. 166.

The action was trover for three tons of tartaric acid.

Pleas—not guilty; and plaintiffs not possessed. Issue thereon.

The cause was tried, before Pollock, C. B., at the London Sittings after Michaelmas term, 1855, when the following facts were proved by the witnesses for the plaintiffs:—The plaintiffs were manufacturing chemists at Bow Common, in the county of Middlesex, and the defendant was a drug-broker, carrying on business at Fenchurch street, in the city of London. In April, 1853, Messrs. Jones, Thompson & Co., of Liverpool, sold for the plaintiffs six tons of tartaric acid, of which two tons were to be delivered in the next November, and they sent to the plaintiffs the following sold note:—

"*Bank Exchange Buildings,*
Liverpool, April 25th, 1853.

"Messrs. Kingsford & Swinford.—We have this day sold for you the following goods, six tons tartaric acid at 1*s.* 4*d.* per lb., as under,

Viz., to selves,

One ton to be delivered in London in all September, 1853.

To Mr. James Roe,

One ton	do.	October,	do.
Two tons	do.	November,	do.
Two tons	do.	December,	do.

Customary allowances—Payment, cash, in 14 days from date of each invoice, less 5 per cent. discount.

Respectfully yours,

"JONES, THOMPSON & Co., *Brokers.*"

On the 14th of October, 1853, Messrs. Gray & Co., of Mincing Lane, brokers, sold for the plaintiffs two tons of tartaric acid, to be delivered also in the month of November, and the following was the sold note sent by them to the plaintiffs:—

"*London, 14th October,* 1853.

"Messrs. Kingsford & Swinford.—We have this day sold for your account two tons tartaric acid crystals, of good merchantable quality, at 1*s.* 9*d.* per lb., to be delivered in November next. Cus-

tomary conditions—Prompt fourteen days after delivery; discount 5 per cent. Brokerage 1 per cent.

Your obedient servants,

"GRAY & Co."

In pursuance of these contracts, invoices were, on the 1st of November, 1853, sent in the usual course by the plaintiffs to, and received by, Messrs. Jones, Thompson & Co., and Gray & Co., about the middle of the same month. After the sending of the invoices, two delivery orders were left at the counting-house of the plaintiffs by a clerk of Anderson, which were the only documents the plaintiffs received to vouch for the representations of Anderson as to his being the owner of the acid before they transferred it to his name, as hereinafter mentioned. One of the delivery orders was in the following form:—

"*Liverpool, 4th November*, 1853.

"Messrs. Kingsford & Swinford.—Please to deliver to Mr. Thos. Broomhall, or order, one ton tartaric acid, part of two tons invoiced 1st inst., on payment of 149*l.* 2*s.* 11*d.*, and oblige yours,

Respectfully,

"JONES, THOMPSON & Co."

"Bow Common, London."

This order was, at the time it was so left at the counting-house of the plaintiffs, endorsed as follows:—

"Please deliver to my orders given out and furnish me with separate weights of casks.

THOMAS BROOMHALL."

"155 Fenchurch Street, 10th Nov. 1853."

At the foot of this last mentioned endorsement are the words "delivered to Anderson," which the plaintiff C. Kingsford stated was a private memorandum of his own. The other delivery order was in the following form:—

"*London, Nov.* 12, 1853, *Mincing Lane.*

"To Messrs. Kingsford & Swinford.—Please deliver to Mr. T. Broomhall or order the undermentioned goods: charges from

———, to be paid by bearer. Two tons tartaric acid crystals. Mark (Lot or No.) Two tons tartaric acid crystals. Invoiced as 4,480 lb. net.

"GRAY & Co."

This order was, at the time it was so left at the counting-house of the plaintiffs, endorsed as follows:—

"Thomas Broomhall, deliver to Mr. W. Leask.—John Ellis.

"Please deliver at Custom-house Quay, to my sub-order.

"WILLIAM LEASK."

The said William Leask was a broker in the city of London. These two delivery orders, with the endorsements thereon as above, except the memorandum "delivered to Anderson," were about the middle of November, 1853, left at the counting-house of the plaintiffs by a clerk of Anderson, who then was carrying on business as a merchant in the city. After the delivery orders had been so left at the plaintiffs' counting-house, and before the 21st of November, Anderson called upon the plaintiffs, and saw the plaintiff C. Kingsford, and told him that he had purchased the "three tons tartaric acid" mentioned in the delivery orders from Leask, and requested him to deliver them to his order at Custom-house Quay. On the faith of Anderson's statement that he had purchased the three tons from Leask, the plaintiff C. Kingsford directed one of their clerks to deliver them according to Anderson's request, and the "three tons tartaric acid" were delivered on the 21st of November, 1853, at Custom-house Quay; but, by a mistake of the clerk, they were made deliverable to the order of the plaintiffs themselves, instead of to Anderson's order. On the 29th of November, Anderson again called on the plaintiff, C. Kingsford, and on his second representation that the acid was his, the said plaintiff gave to him an order, of which the following is a copy:—

"*Chemical Works, Bow Common,*

"*London, 29th Nov.*, 1853.

"Mr. Blake, East Warehouse, Supt., Custom-house Quay.

"Please transfer to the order of Mr. Anderson, 180-2—186-191, nine casks of tartaric acid—charges to him.

"KINGSFORD & SWINFORD."

Anderson, on the said 29th of November, took the last mentioned order to Messrs. Hall at the Custom-house Quay; and the said acid was thereupon and then transferred by them into his name, and thenceforth held by them to his order and on his account. Leask, (who had, previously to the year 1853, had many transactions in business with Anderson, both on his own account and for other people, and, amongst others, for Van Notten & Co.,) on the 27th of October, 1853, was directed by Anderson (who at that time, and until after his arrest, was believed by Leask to be the agent of and acting for Van Notten & Co.) to purchase, and Leask did accordingly purchase, eight tons of tartaric acid for Van Notten & Co., four tons to be delivered in November, and four in December. These eight tons were purchased by Leask of the John Ellis, whose name is endorsed on one of the delivery orders set forth above. The sold note and counterpart of the bought note of Leask, the broker, are as follows:—

"*October 27th*, 1853.

"Sold on account of John Ellis,

"8 tons best tartaric acid crystals, at 2*s*. 6*d*. per lb., to be delivered 4 tons November, and 4 tons December.

"14 days after delivery, 5 per cent.

"P. & C. VAN NOTTEN & Co."

"Bought for P. & C. V. N. 8 tons at 2*s*. 6*d*. Customary allowances; prompt 14; discount 5; deliverable November and December, 1853.

"W. LEASK."

In part performance of the last-mentioned contract, the said John Ellis, in November aforesaid, delivered to W. Leask orders for the delivery of three tons of tartaric acid, that is to say, one for the delivery of two tons, and one for the delivery of one ton. The one for two tons is the delivery order set forth above. After the receipt of the delivery orders by Leask, Anderson, whom Leask then thought was acting as agent for Van Notten & Co., asked Leask to let him inspect the acid, and Leask having first endorsed both the orders specially deliverable to himself gave them so endorsed to Anderson

for the purpose of enabling him to inspect the acid mentioned therein, and for that purpose only. Leask never authorized Anderson to take possession of the acid, or to have it delivered at Custom-house Quay for himself, or to say that he had bought it. Anderson was not authorized by Van Notten & Co. to purchase the acid for them, and they repudiated it. On the 20th of December, 1853, Anderson was apprehended on a charge of forgery. On the 21st of the same month he was duly adjudicated a bankrupt. On the 26th of November, 1853, Leask sent to the plaintiffs the following notice:—

"14 *Eastcheap, Nov. 26th*, 1853.

"Messrs. Kingsford & Co.

"Gentlemen,—I find you have not sent the 'tartaric' to Custom-house Quay, deliverable to my order; please to do so at your earliest convenience.

"Yours respectfully,

"WILLIAM LEASK."

On the 6th of December, Leask again sent to the plaintiffs, requiring the three tons of tartaric acid to be sent to Custom-house Quay to his order. After several subsequent applications the plaintiffs sent the acid. On the 7th of December the plaintiffs served Messrs. Hall, the proprietors of the wharf at Custom-house Quay, with a notice not to transfer from Anderson's name, or deliver without their instructions, the nine casks of tartaric acid there lying to to his order. In reply, Messrs. Hall informed the plaintiffs that warrants for the acid had been made out and delivered to the defendant. On the 28th of November, 1853, the defendant was, for the first time, introduced to Anderson, who, on the following day, applied to him to advance money on some tartaric acid, which the defendant consented to do upon the usual terms of advances made by brokers to merchants, and an authority to sell, in default of repayment on the 1st of February, 1854, which authority to sell was subsequently altered by giving the defendant free liberty to act as regarded sales. Anderson then stated to the defendant that he had forty-four casks of tartaric acid, and asked the defendant whether he would have the warrants for the said acid made out in his own name,

or in Anderson's; whereupon the defendant required them to be made out in his own name. And Anderson, on the same day, accordingly procured warrants for the said forty-four casks of acid from the said Messrs. Hall, in the name of the defendant, and delivered the said warrants (including the nine casks sent by the plaintiffs) to the defendant in pledge, and as a security for the sum of 2,000*l.* then advanced to him. In making the said advance the defendant acted *bona fide*, and in the ordinary and usual course of business, and he had not, either at the time he received the warrants and made the advance, or at the time he received and sold the acid, any notice or knowledge that the acid, or any part thereof, or the warrants, or any of them, were or had been claimed by the plaintiffs, or belonged to them, or that Anderson had not authority or power to deal with or pledge the acid or warrants. By means of the warrants the defendant obtained possession of the forty-four casks of tartaric acid, including the nine casks sent to the Custom-house Quay by the plaintiffs. The defendant sold thirty-four casks of the acid, including the nine casks, by public auction, on the 24th of January, 1854, and endorsed warrants for the same to the purchasers thereof, to whom the acid was accordingly delivered.

At the close of the plaintiffs' case, the Lord Chief Baron directed the jury that, upon the facts, they must find a verdict for the defendant, but reserved leave for the plaintiffs to move to enter a verdict for them for 680*l.*, if the court, being at liberty to draw any inferences that, and to deal with the facts as, a jury would be authorized to do, should be of opinion that the plaintiffs were entitled to the verdict.

Sir F. Thesiger, for the defendant, the respondent, (Nov. 26.) There is a preliminary objection that no appeal will lie in this case.

Hugh Hill, for the plaintiffs, the appellants. The defendant has agreed to the special case. By settling that with the plaintiffs, he has waived any preliminary objection. He should have refused to settle the case.

[COLERIDGE, J.—Settling the case does not preclude the defendant from afterwards relying on a preliminary objection.]

Sir F. Thesiger.—It is important to know whether a preliminary

objection ought to be taken before the party who failed to get the rule below applies to the court here or after the court here has granted a rule *nisi*.

[COLERIDGE, J.—We think a preliminary objection may be taken in showing cause to the rule *nisi*.]

Sir F. Thesiger.—Will more than one counsel be heard for each party?

[COLERIDGE, J.—Only one counsel can be heard on each side.]

Sir F. Thesiger.—May cause be shown in the first instance?

[CRESSWELL, J.—It is the most convenient course that cause should be shown in the first instance.]

Hugh Hill.—The appellants, the plaintiffs below, apply for a rule to enter a verdict for the plaintiffs pursuant to the leave reserved. The preliminary objection intended to be urged on the part of the defendant is that the leave reserved depends upon a conclusion of fact to be drawn by the court below upon the evidence, and that no appeal lies on a question of fact. By way of anticipation, it may be answered, that there is an express direction in law by the Chief Baron that the defendant is entitled to the verdict. The Common Law Procedure Act, 1854, s. 34, says: "In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted, and then discharged or made absolute, the party decided against may appeal." This is the case of a rule refused where a point has been reserved at the trial. The circumstance that the court is to be at liberty to draw any inference of fact that a jury might draw does not neutralize the effect of the leave reserved upon the point of law. A bill of exceptions might have been tendered to this ruling.

Sir F. Thesiger was then called upon to support his preliminary objection.—This case is not one within section 34 of the above act. That section applies only to a case where a simple point of law is reserved, not where a point of law is mixed up with facts. The Chief Baron reserved the point, if the court on the facts should be of opinion that the plaintiff was entitled to a verdict. The plaintiff, therefore, was only entitled to a verdict if, upon the facts, the court thought him entitled. No appeal will lie against the decision of the court below on the facts.

[CRESSWELL, J.—The point was, whether the law upon the existing state of facts gave the plaintiff the right to the verdict. Then, in order to prevent any difficulty as to any fact not being sufficiently found, it was agreed that the court should be at liberty to draw any inferences which a jury might draw.]

[COLERIDGE, J.—We are all of opinion that we may hear the appeal.[1]]

Hugh Hill.—The learned Chief Baron was wrong in directing a verdict for the defendant. It is not intended to impugn the law laid down in *White* v. *Garden*,[2] which shows that where one is induced to sell an article by the fraudulent representation of the purchaser, and that purchaser parts with the property to a *bona fide* holder for a valuable consideration, without notice of the fraud, the seller cannot recover the property back. But that rule proceeds upon the principle that a contract so obtained by fraud is not absolutely void, but only voidable, and that if the seller does not elect to avoid it before third parties are interested, he cannot do so afterwards. But the great distinction to this case is, that here the relation of vendor and vendee did not subsist between the plaintiffs and Anderson, though the case is so treated in the court below. There was no contract at all between them. There was no privity. No case goes so far as to show that a person obtaining property from another by a fraudulent representation without a contract, can convey a good title to a *bona fide* purchaser from him. The plaintiffs, on Anderson's naked lie that he was the buyer, give him the delivery order on the wharfinger. In *Boyson* v. *Coles*,[3] it was held that possession of the transfer orders by the consent of the owners of the goods did not enable the broker to deal with the property as the owner of it. The allowing the acids to be transferred into Anderson's name, in the wharfinger's books, does not in any way change the property in the goods: *Jenkyns* v. *Usborne*,[4] *M'Ewen* v. *Smith*,[5] *Dyer* v.

[1] The court expressed an opinion that it would be convenient in future that the case stated for the appeal should mention where the case was reported in the court below.

[2] 10 Com. B. Rep. 919; s. c. 20 Law J. Rep. (N. S.) C. P. 166.

[3] 6 M. & S. 14.

[4] 7 Man. & G. 678; s. c. 13 Law J. Rep. (N. S.) C. P. 196. [5] 2 H. L. Cas. 309.

Pearson,[1] *Williams* v. *Barton*.[2] The defendant acted incautiously in advancing money to Anderson without ascertaining the title to the property.

COLERIDGE, J.—We grant a rule *nisi*.

Sir F. Thesiger showed cause.—The contracts for the sale of the acid, entered into by the plaintiffs' brokers on their behalf, were floating contracts. The brokers' delivery orders on the plaintiffs passed from hand to hand until the time for payment came, and the party who, when the time of payment arrived, presented himself with the brokers' orders and tendered payment, was entitled to receive the acids.

[CROMPTON, J.—You treat these contracts as assignable at law. They are contracts to supply, not to sell, any particular goods. No specific property is assigned until you come to the dealing with Anderson.]

It is not necessary to contend that there was an actual sale to Anderson by the plaintiffs. If there was a transfer by them to him, it is sufficient to enable him to confer a good title.

[ERLE, J.—It was a transfer by the plaintiffs to Anderson under a mistaken notion that he had the property in the goods.]

In Story on Sales of Personal Property, it is said, sec. 200: "There is, however, a distinction which obtains in cases where sales are made of property to which the vendor has obtained a title by fraudulent means, and cases where the vendor has no title, and has obtained possession of the goods by felony or chance, or who holds them as a mere bailee. In the former class of cases, when the vendor has obtained his title by fraudulent representations or artifices, he can make a valid sale of the goods to a bona fide purchaser for a valuable consideration, so as to deprive the original purchaser of his power to reclaim them."

[CRESSWELL, J.—All that passage assumes the existence of a contract.]

Stevenson v. *Newnham*[3] affirms the same law. Where a party has put another in possession of the *indicia* of property, so as to

[1] 3 B. & C. 38. [2] 3 Bing. 139.

[3] 13 Com. B. Rep. 285; s. c. 22 Law J. Rep, (N. S.) C. P. 110.

enable him to represent himself as owner, and that other sells the goods, the original possessor cannot recover the goods back. *Boyson* v. *Coles* does not govern this case. In *Lucas* v. *Dorrien*,[1] where the owners of the goods gave a written order on the wharfinger for delivery, and this was communicated to the wharfinger, who assented to it, the property in the goods was held to pass.

[CRESSWELL, J.—In that case there was a bona fide vendee. You must contend that every one into whose name property is transferred at a wharf, has power to dispose of it.]

[CROMPTON, J.—Would not the case be the same if Anderson, by some misstatement, had got the actual goods from the plaintiffs?]

It may be further urged, that as between the plaintiffs and Anderson there was an actual sale. They accept his statement that he was the purchaser. He would have been estopped from saying he was not. They might have sued him for the price: *Hill* v. *Perrott*,[2] *Biddell* v. *Levy*.[3]

[WIGHTMAN, J.—Suppose it had all been genuine, and there had been a sub-sale from Van Notten to Anderson, there would have been no privity between him and the plaintiffs.]

It will be a great evil to the mercantile world if parties who buy of persons in Anderson's situation are bound to investigate the title to the goods. When one of two innocent parties must suffer by a fraud, it is a principle of law that he whose negligence or credulity has given opportunity for it must be the party to bear the loss. *Root* v. *French*.[4] Here the plaintiffs are the parties guilty of carelessness and credulity, and therefore they ought to suffer, not the defendant.

Hugh Hill replied. *Cur adv. vult.*

Judgment was now delivered by

WIGHTMAN, J.—The judgment of the Court of Exchequer appears to have been founded upon the assumption that the plaintiffs would have been warranted, by the circumstances stated in the case, in

[1] 7 Taunt. 278. [2] 3 Taunt. 274. [3] 1 Stark. 20.
[4] 13 Wendel's (American) Rep. 570.

treating the transaction between them and Anderson as a contract which, by reason of the fraud of Anderson, they might disaffirm if they pleased, or affirm, and proceed as for goods sold and delivered; but that their right to disaffirm was subject to any intermediate right which the *bona fide* vendee or pawnee from Anderson might acquire. We are, however, of opinion that on the facts stated in the case, the plaintiffs and Anderson never did stand in the relation of vendors and vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm. It is stated in the evidence set out in the case, that the plaintiffs gave a delivery order to Anderson, and dealt with him as they did, not as purchasing the goods from them, but as having purchased them from Leask, as falsely represented by him, giving him credit as a sub-contracter by purchase from a contractor with them. There was no privity of contract between them and Anderson, and it was only as representing himself as claiming under Leask that they gave him by the delivery order the means of possessing the goods. Such a delivery, under the circumstances of this case, would no more pass the property in the goods than a delivery to an agent or servant of Leask would pass the property to such agent or servant. But upon the facts it appears that Anderson had no authority from Leask to receive, but only to inspect the goods, and that Anderson obtained the transfer to himself without authority, and by false pretences. The mere possession, with no further *indicia* of title than a delivery order, is not sufficient to entitle a *bona fide* pawnee of a person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action of trover. Our judgment, therefore, reversing the judgment of the Court of Exchequer, is, that the verdict be entered for the plaintiffs upon the leave reserved.

Judgment accordingly.