

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Archibald v. Taylor and others, from the Supreme Court at Halifax in the Province of Nova Scotia, Canada; delivered Friday, 1st March 1878.

Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THEIR Lordships are of opinion that this case ought to be submitted to another jury.

The declaration charges that "the Defendants broke and entered certain land of the Plaintiff, situate at L'Ardoise, in the county of Richmond, known as the 'Donald Matheson property,' and also certain shops, stores, and other buildings being thereon, and seized, took, and carried away a large quantity of goods, wares, and chattels from the said stores, shops, and buildings, and destroyed the same."

There was a count in trover specifying the goods which the Defendants were charged with having converted to their own use, and there was also an allegation of special damage.

The Defendants denied that they committed the trespasses complained of and also denied the Plaintiff's possession or right to the possession of the land or goods; and thereby raised the question whether the transfer from Matheson to his daughter Martha, who afterwards married Bradford W. Brown, or the transfer from the daughter and her husband to the Plaintiff her brother-in-law, were *bonâ fide* or merely colourable transactions.

The auctioneer in his evidence said the property was a very fine property. "There is a fine large dwelling-house, I think two barns or outhouses, a dry goods store, a large fish store, and a small wharf; another large building, which I think was used as a dry fish store; another building, in which lobsters were put up; a building for a cook-house, or for men to lodge in on the property. The dwelling-house was at the time occupied by Matheson." Matheson did not state in his evidence that he assigned these premises to his daughter. He stated that an inventory was made of the goods which were on the premises, and that he transferred the goods to his daughter; that she gave a note for a thousand dollars in payment of the goods; and that she took a delivery of the goods at the time the note was given; that she had possession of his stores after she took possession of the goods, and up to the time when she made a transfer to the Plaintiff.

There was no ostensible change of possession; the business went on as before; all the family were provided for out of the proceeds of it, and it was contended that there was nothing to show that there was any transfer of the business or of the stock from the father to the daughter which was intended to take effect as a *bonâ fide* transaction. The daughter subsequently married, and then she and her husband made an assignment to her brother-in-law. They did not profess to assign the premises or the goodwill. By the bill of sale, after reciting that "before her marriage with her said husband, the said Martha Brown, formerly Martha Matheson, carried on and transacted business as a general retail trader and dealer in merchandise at L'Ardoise, in the said county of Richmond; and as such trader and dealer had and was possessed of certain

goods, chattels, debts, effects, and stock in trade, and was largely indebted to several parties, her creditors, for the same; that by the advice and consent of her husband she was desirous, and that her husband was also desirous, to assign all the said goods, chattels, debts, effects, and stock in trade belonging to the said Martha J. Brown at the date of her marriage to the Plaintiff on condition that he should assume, discharge, and pay all the liabilities of her the said Martha J. Brown at the date of her said marriage in and in connection with the said trade and business, it was witnessed that in consideration of the sum of one thousand dollars to them, the said Bradford W. Brown and Martha J. Brown in hand paid by the said Plaintiff, and also in consideration of the said Plaintiff's assuming, discharging, and paying all the debts and liabilities in connection with the trade and business aforesaid at the date of the marriage aforesaid, the said Martha Brown and her husband assigned, transferred, sold, conveyed, and made over unto the said Plaintiff all the said goods, chattels, debts, effects, and stock in trade aforesaid of her the said Martha J. Brown. It is admitted that notwithstanding the recital no money was ever paid by the Plaintiff as a consideration for the assignment. There was no assignment to the Plaintiff of the premises upon which the business was carried on; and yet the Plaintiff is said to have carried on the business there for about one month after the bill of sale and up to the time of the seizure by the Defendants. It did not appear that any rent was ever paid, or that there was any agreement for paying rent, to Matheson, the father, for the use of the premises.

With regard to the damages, they were assessed at \$7,500. The learned Judge who tried the

case says that \$6,500 of that amount was treated as the value of the goods which were seized. The note for \$1,000 which the daughter gave to her father was never paid; but the Plaintiff gave his own note for a similar amount in substitution for it. Chipman stated that he had gone on supplying goods to the daughter, and that there was a debt of \$1,600 due to him. No evidence was given to show that the daughter owed any other debts, nor was there any evidence to show that the Plaintiff, beyond giving his note in substitution for that of the daughter, ever paid anything for the goods which were assigned to him, or ever entered into any engagement with Chipman or any one else to pay any portion of the debts which were due from the daughter. The total amount therefore of the consideration which the Plaintiff appears to have given for goods treated as of the value of \$6,500 was his liability to Matheson upon the note for \$1,000, and his liability as between himself and the daughter and her husband for Chipman's demand of \$1,600. The Plaintiff himself was not called; and a strong presumption against the truth of his case arises from the fact that the Plaintiff did not come forward to give evidence in the case, and to declare upon his oath that the transaction between him and his sister-in-law was really intended to operate as a transfer to him of the property, and was not a mere colourable transaction for the benefit of Matheson, his father-in-law.

The learned Judge who tried the case reported to the Court his general direction to the jury. After dealing with the case, he says, "I told the jury, in conclusion, that if they thought there was no collusion between Donald Matheson and his daughter in relation to the goods, and the business she carried on, and believed that the credit upon the goods was *bond fide*

“ given by Chipman to Martha Matheson to
“ carry on business for herself, and for herself
“ alone, and that she and her husband had
“ made a *bonâ fide* sale and transfer of her
“ stock of goods and business to the Plaintiff,
“ and that he consequently was the owner of
“ them, and also came to the conclusion that
“ the bond given by the Defendants, Duffus,
“ Taylor, and Troop, was an indemnity to
“ Adler,” that then they should find a verdict
in favour of the Plaintiff against all the Defen-
dants “for such reasonable damages as they
considered him entitled to.” Their Lordships
cannot say that this was a misdirection in point
of law. But the attention of the jury ought to
have been pointedly called to the circumstance
that the business continued to be carried on
from first to last on the premises which had
never been assigned, and in the same way as it
had been carried on before the father made
any transfer of the goods to the daughter; also
to the value of the goods and of the consideration
which appeared to have been given by the
Plaintiff to the daughter and her husband; to
the relationship of the different parties; and also
to the fact that the Plaintiff had not come
forward as a witness to explain the transaction
between him and his sister-in-law, and to prove
that it was really intended to vest the property
in him for his own use.

Their Lordships think that, under the circum-
stances, the Court were right in coming to the
conclusion that the case ought to be submitted
to another jury, and that they were therefore
right in making the rule absolute for a new trial.

Under these circumstances their Lordships
will humbly recommend Her Majesty to dismiss
this Appeal.

