*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rodger* v. *the Comptoir d'Escompte de Paris and others, from Hong Kong; delivered 19th February,* 1869.

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Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

THIS was an action of trover brought by the Respondents against the Appellants in the Supreme Court of Hong Kong for 355 bales of merchandize which were shipped at London for Hong Kong on board a vessel called the "Min," by the direction of George Lyall and Charles Frederick Still, of London, deliverable to Lyall, Still, and Co., or their assigns, according to the bills of lading, of which the Respondents became the transferees. The Appellants were the owners of the "Min."

They pleaded a denial of the conversion, and also a denial that the goods were the goods of the Plaintiffs (the Respondents) as alleged.

The case was tried at Hong Kong before the Chief Justice, and a special jury and a verdict was found for the Plaintiffs, for the amount of the value of the goods.

A motion was afterwards made to have this verdict set aside and a nonsuit entered, pursuant to leave reserved at the trial on the ground that the Plaintiffs had not proved that they were indorsees of the bills of lading for valuable consideration without notice so as to pass property, or that a new trial should be directed on this and other grounds of objection. An order was made that the motion be refused with costs.

This Appeal has been brought for the purpose of

having this order and the verdict found for the Plaintiffs set aside, and judgment of nonsuit entered or a new trial directed.

It appears on the Chief Justice's notes of the evidence of the Plaintiffs, that the goods in question were purchased from merchants at Manchester in the autumn of 1866 by George Lyall and Charles Frederick Still, of London, for their firm at Hong Kong, which traded there under the style of Lyall, Still, and Co. Mr. George Frederick Maclean was the resident partner and manager at Hong Kong.

One parcel of these goods was purchased from B. Liebert and Co., on a ten months' credit, which was the usual course in such transactions as between Manchester and Hong Kong merchants.

It was part of the contract that remittances of proceeds of sales should be made from Hong Kong to meet the acceptances of George Lyall and Charles Frederick Still, given for the price of the goods, on receipt of the bills of lading.

The second parcel was purchased from Samuel Mendel on a nine months' credit, with a stipulation of a similar character as to remittances.

The third parcel was purchased from Calvert and Co. on a six months' credit, without any special stipulation.

The object of the long credit was to give ample time for realizing proceeds, so as to make remittances according to agreement.

When the time arrived for forwarding the goods from Manchester, Lyall and Still, of London, employed Killick, Martin, and Co., as shipping agents there, to secure tonnage in the "Min," which was then in the berth for Hong Kong. When this was secured, Lyall and Still directed the vendors at Manchester to forward the goods to Kelleck, Martin, and Co., for shipment in the "Min;" and they also directed Killick, Martin, and Co. to receive the goods so to be forwarded to them simply for the purpose of the shipment. In accordance with these instructions the goods were packed and marked at Manchester ready for shipment and were sent up to Killick, Martin, and Co., with whom Lyall and Still had contracted for the carriage from Manchester to Hong Kong. All the charges were included in one through freight.

The goods were shipped on board the "Min;"

bills of lading for them, deliverable to Lyall, Still, and Co., or their assigns, were signed by the master, and were handed over to Lyall and Still, who accepted the draft of the vendors for the price in each case.

Before this period the firm at Hong Kong was in a failing condition; their deficit was about 4 lacs of dollars, and, in November, their condition had not improved. At the end of November and beginning of December, Maclean had bill transactions with the Respondents (two banking firms at Hong Kong), by which he got large advances on the undertaking to furnish shipping documents for silk cargoes, to be ready for the mail of 15th of December from Hong Kong.

On the 13th December the transactions of the firm were at a stand; they had ceased to make purchases or shipments of tea or silk as theretofore; they were under the necessity of returning bills of their correspondents, and had refused payment of their acceptances to the amount of 150,000 dollars. This was well known at the time in Hong Kong.

On the 14th December, Mr. Kaiser, the manager of one of the two banks, addressed a letter to Lyall, Still, and Co., requiring them to furnish, in the course of the day, the shipping documents according to their undertaking; to which Mr. Maclean replied, that they were unfortunately unable to comply with this request.

On the 17th, Mr. Kaiser wrote another letter, insisting on getting the documents or a return of the advance made on the faith of the undertaking to furnish them, and he concludes his letter in these words:—

"I must ask your immediate attention to this matter, and beg to warn you that my now offering to receive back the money obtained by you must not be looked upon as in any way binding me to treat the matter as one of debt, as I shall hold myself perfectly at liberty to deal with the matter as one of a much more serious character than a mere debt, if it be not at once satisfactorily arranged."

Mr. Kaye, the resident manager of the other bank, had had a conversation with Mr. Maclean in reference to the refusal of Lyall, Still, and Co. to pay their acceptances. He also became impatient

and urgent for an arrangement, on account of the advance made by his bank. The two banks then combined, and Maclean was pressed, as he could not give them the documents he promised, *to give them all he had.*

He was asked, what can you give us? He made out a Memorandum which he handed to Mr. Pollard, the counsel for the banks, in order that he might prepare a formal assignment. This was prepared, and was executed, on the 22nd of December, by Mr. Maclean in the name of the firm, which was at this time insolvent, with liabilities uncovered to the amount of 8 lacs of dollars.

The assignment states the consideration of it to be, first, a debt of 85,714 dollars 28 cents owing by Lyall, Still, and Co. to one of the banks, and of 50,000 dollars to the other; next, the agreement to furnish bills and shipping documents, upon the faith of which the advances were made, which constituted the debts to the banks and the release of all claim upon the part of the banks in respect of this agreement. It then proceeds to make over to the banks, "the whole of the property, premises, and chattels specified in the Schedule at the foot, with all the estate, right, title, interest, claim or demand of Lyall, Still, and Co. therein or thereto, or arising thereout or therefrom. It further provides for doing all acts that might be required to give full and formal effect for securing and perfecting the assignment.

In the schedule, the first item is a share in the Hong Kong Club. There are other items of shares in various Insurance Companies; an equity of redemption, and two items in these words:—

"All goods and bills of lading or other documents for all goods now on the way hither to arrive in December 1866, or January 1867.

"All goods or documents for goods alluded to in a telegram dated 9th November, 1866, from London partners to Hong Kong firm, received by steamer "Clan Alpine," viâ Calcutta, in the words, 'are shipping more goods; shirtings thirteen six, shipment remitted;' and all goods or documents for goods purchased and shipped and now on the way hither."

The documents arrived on the 27th December 1866, and 1st January, 1867, including the bills of

lading for the goods shipped in the "Min." These were indorsed, and handed over by Mr. Maclean (together with the policies on the goods) to Mr. Kaiser, *in performance of the agreement in the assignment.*

After the arrival of the "Min" at Hong Kong, a demand was made on the part of the unpaid vendors, by persons authorized on their behalf, to claim possession of the goods, and this demand was acceded to on behalf of the owners of the "Min." Subsequently the Respondents, as transferees and holders of the bills of lading, made a like demand which was refused.

In order to decide between the rival claimants, two questions have to be answered—

First. Did the *transitus* terminate before the demand was made on behalf of the Appellants?

Secondly. Was the transfer of the bills of lading made to the Respondents for valuable consideration, and without notice of such circumstances as rendered them not fairly and honestly assignable, and so as to transfer to the Respondents a property in the goods freed and discharged from the proprietary lien of the unpaid vendors?

The general rule is, that where goods are sold to be sent to a particular destination named by the vendee, the right of the unpaid vendor to stop them continues until they arrive and are delivered there according to the bills of lading. The *transitus* continues whilst they are in the charge of some third party contracted with as carrier for the purpose of forwarding them, and who has them in charge simply for this purpose. It may suffice to refer to the recent case of Berndston *v.* Strong 4 L. R. Eq. 481. The documents in evidence as well as the oral testimony in the present case, establish beyond doubt that Hong Kong was the destination agreed upon between vendors and vendee; and the other parties who intervened, for the purpose of having the goods forwarded to their destination, had them in charge for this purpose only. Their Lordships, therefore, entertain no doubt that the *transitus* had not ended before the arrival at Hong Kong.

The second is the real question in the case. The Respondents contend that they gave value for the bills of lading; that they had no notice of any

special terms of agreement between the vendors and vendees of which they say that they were not informed, and as to which they also say that they were not bound to make inquiry.

The managers of the banks (Messrs. Kaiser and Kaye), were not examined as witnesses at the trial; but it plainly appears on the evidence adduced by the Plaintiffs (the Respondents) that the insolvency of Lyall, Still, and Co. was known to the banks at the time of the assignment, and it is but reasonable to suppose that they were quite familiar with what also, on the same evidence, appears to be the usage of trade as between Manchester and Hong Kong (see Newsome *v.* Thornton, 6 East, 19).

At the time the bills of lading were handed over to them, no money was advanced, no benefit was conferred or promised on the faith of these securities. They were transferred simply (as stated in the evidence of the Plaintiffs) *in performance of the agreement in the assignment.* We have, therefore, to refer to the assignment itself to see what was the interest in these bills of lading that was agreed to be transferred, as part of what was assigned for the consideration expressed.

The general rule so clearly stated and explained by Lord St. Leonards in the case of Mangles *v.* Dixon (3 H. of L. C. 702), is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule was not disputed, but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds.

Doubtless, the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third: and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sustain it. (Lickbarrow *v.* Mason,

2. T. R., 70.) But in this case, at the time of the assignment, Maclean had not possession of the documents; nothing was advanced on the faith of them. There is merely a general description of documents expected to arrive, without knowing their contents or how far they might be limited or qualified. The property of the firm in the goods expected, was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors. And can it be contended that before Maclean got possession of the documents when his firm was in a condition of undoubted insolvency, and the terms of the documents were not disclosed, there was conveyed to the Respondents by this assignment the benefit of a prospective breach of trust and violation of contract? There is not a word in the instrument that could be held to convey a greater interest than the assignors had. The power they might afterwards acquire of committing a fraud upon the vendors is not "property, estate, interest, claim, or demand, legal or equitable." "It is," says Sir Edward Coke, "a general rule that whensoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." (Co. Litt., 42 a.) *Constructio legis non facit injuriam;* as it is pithily said in the passage from the Touchstone referred to by Sir Roundell Palmer in his able argument: "The law in its genuine construction prefers a less estate by right to a larger estate by wrong."

The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong. The lien of the unpaid vendor is allowed by law for the very purpose of protecting him against the insolvency of the vendee; and the assignment in this case, which left the assignors in insolvency, even if it could be said that it did not find them so, would be sufficient to originate the very right, which according to the argument for the Respondents, it is also sufficient to extinguish.

In the case of Spalding *v.* Ruding (6th Beav., 376), the vendor's right was asserted as against property which had so far passed into the hands of the consignee that he was enabled by mortgage of the bills of lading to pass the interest in the goods to the extent of that mortgage; the right of stoppage *in transitu* was upheld as against the surplus, in preference to a claim of the mortgagee to apply it to liquidate the balance of a general account. This (as Vice-Chancellor Wood observes in the case already referred to on the question of *transitus*) was in some degree an extension of what was supposed to be the right of the consignor, and it shows the desire to give this right a full and equitable protection.

Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken: to the extent to which he has so given value, he has a prior claim. But the rule is founded on the reason of it, as already explained; *cessante ratione, cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents; where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent, for an improvident advance made upon the faith of a totally different security; where, upon the true construction of the assignment, no interest passed that would place the assignee in a better position than the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment and without other consideration whatsoever, it appears to their Lordships that such a transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim.

Their Lordships therefore are of opinion that the Chief Justice ought to have nonsuited the Plaintiffs, inasmuch as, upon their evidence, it did not appear that they had acquired a property in the goods sufficient to sustain the action of trover for the conversion alleged, which took place after the assertion of the right of stoppage.

They will therefore recommend Her Majesty that

the Order appealed against should be set aside, together with the verdict found for the Respondents, and that a Judgment of Nonsuit should be entered.

The Appellants to have their costs of this Appeal.

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