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therefore, properly rejected by the Subordinate Judge. The contrary decree of the District Court must be reversed, and that of the Subordinate Judge restored, with costs throughout on the plaintiff Vishvasráv.

Decree reversed with costs.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.

LEGEYT, PLAINTIFF, *v.* HARVEY AND ANOTHER, DEFENDANTS.* *July 2.*

Delivery order—Effect of endorsement of—Vendor's lien—Indian Contract Act (IX of 1872), Sec. 108,

The plaintiff was a broker in cotton and also traded in cotton on his own account. On the 27th January, 1883, he contracted with the defendants to sell to them 100 candies of cotton, at Rs. 200 per candy, *deliverable from the 15th to the 25th April following.* On the 30th January, 1883, in his capacity as broker, he effected a contract for the sale of the same 100 candies of cotton by the defendants to L. & Co. at Rs. 202 per candy.

L. & Co. sold the cotton to D., and D. again sold it back to the defendants at Rs. 191 per candy. The defendants then sold it to H., by whom it was sold to K., and K. finally sold it to B. & Co. at Rs. 191 per candy. B. & Co. obtained possession of the cotton from the plaintiff on or about the 24th April on payment of Rs. 191 per candy, for which they had contracted to buy it from K.

The delivery order for the cotton had been sent on the 20th April by the plaintiff to the defendants, who immediately, on receiving it, wrote to the plaintiff as follows:—"We beg to ask *pro forma* for survey on 100 bales M.-G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party please secure payment for the cotton direct, and before parting with the cotton, if necessary." The delivery order was then endorsed by the defendants to their vendees (L & Co.), who in turn endorsed it to D., by whom it was endorsed to the defendants. By subsequent endorsements it came ultimately to B. & Co., who, as above mentioned, got delivery of the cotton from the plaintiff on payment of Rs. 191 per candy.

The plaintiff, who had sold to the defendants at Rs. 200 per candy and who received from B. & Co. only Rs. 191 per candy, sued the defendants in the Small Cause Court for the difference.

The defendants contended that after the receipt of the letter written by them to the plaintiff he was bound not to deliver the cotton to L & Co., or to any subsequent endorsee of the delivery order, until he had obtained pay-

*Small Cause Court Suit, No. 15,786 of 1883.

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ment of the full price (Rs. 200 per candy) which the defendants had agreed to pay him for it; that the delivery to B. & Co. was not a delivery authorized by the defendants; that the payment made by B. & Co. to the plaintiff was not a payment made by or on behalf of the defendants; that the plaintiff's cause of action, if any, against the defendants was for the full price of the cotton; and that as that exceeded Rs. 2,000. the Small Cause Court had no jurisdiction.

Held that the defendants' letter to the plaintiff was ineffectual to control or alter the course of the delivery order, and that the plaintiff was bound to deliver the cotton to B. & Co. on payment, by them, of the price of Rs. 191 per candy. The defendants, having re-purchased the cotton after it had passed through several hands, sold it for Rs. 191 per candy to H., from whom it ultimately passed to B. & Co. The plaintiff's lien, therefore, as regarded H. and his sub-vendees, was confined to the price at the above rate, and B. & Co. were entitled to the goods as against the defendants on payment of that price. The defendants' letter, therefore, of the 20th April, 1883—however the plaintiff might have been bound to act on it as regarded L. & Co., to whom the cotton was sold at Rs. 202 per candy, and the other sub-vendees *prior* to the re-purchase by the defendants—could only, as regards *subsequent* purchasers, prevent delivery to them before payment of the price at which the defendants had resold the goods, *viz.*, Rs. 191 per candy. That price was actually paid to the plaintiff before he did deliver the goods, and credit was given to the defendants in the account.

By the English common law a delivery order is regarded as a mere token of authority to deliver; and before the wharfinger has attorned, it does not, independently of statute or custom, enable the purchaser to confer a title upon a vendee or a sub-vendee free from the vendor's lien for the price.

The Indian Contract Act (IX of 1872) gives no larger effect, *except by section 108*, to a delivery order than it had by English common law, and under that Act (sec. 90, ill (c), and secs. 95 and 98) the giving of a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien. The exception to this rule contained in exception (1) to section 108, which provides that a seller may give to a buyer a better title than he had himself where he is, by consent of the owner, in possession of the goods or documents relating thereto, cannot be held to apply to cases where the possession is entirely beyond the control of the owner.

THE following case was stated for the opinion of the High Court, under section 69 of Act XV of 1882, by A. Spencer, acting First Judge of the Court of Small Causes at Bombay:—

"The plaintiff in this case seeks to recover from the defendants the sum of Rs. 658-1-6 as the balance of the price of one hundred candies of cotton sold by plaintiff to the defendants.

"The facts of the case are as follows:—

"The plaintiff is a broker in cotton, and also trades in cotton on his own account. On the 27th of January last he entered into

a contract with the defendants to sell to them one hundred candies of good machine-ginned Broach cotton at Rs. 200 per candy deliverable 'from 15th to 25th April' following. On the 30th of January the plaintiff, in his capacity of broker, effected a contract for the sale of the same parcel of one hundred candies of cotton by the defendants to Messrs. Lupi & Co., at the price of Rs. 202 per candy,—that is, at a profit of Rs. 2 per candy.

"On the 20th of April the plaintiff sent the defendants two orders for the delivery of the cotton, each order being for one hundred bales or fifty candies.

"These orders were put in at the hearing, and marked A and B.

"I held that the plaintiff was entitled to the sum of Rs. 236-4-0 claimed as due under order B, and gave judgment for the plaintiff for that amount. The defendants are not dissatisfied with my finding on this point, but the plaintiff has asked me to submit, for the opinion of the High Court, the question whether he is not entitled to the further sum of Rs. 421-13-6 claimed by him in respect of delivery order A.

"It will be observed that the defendants endorsed the order, and made the cotton deliverable to Messrs. Lupi & Co. or order. By Messrs. Lupi & Co. it was endorsed to Dewjee Dossa & Co. to whom they had sold the cotton for less than Rs. 200 per candy. By Dewjee Dossa & Co. it was endorsed to Messrs. Harvey & Sabapathy, the defendants, who, according to the evidence, had contracted with Dewjee Dossa to buy cotton at Rs. 191 per candy. By Messrs. Harvey & Sabapathy it was again endorsed to Hurry Bhánji or order. By Hurry Bhánji it was endorsed to Khimji Ruttonsey, and by Khimji Ruttonsey it was endorsed to Messrs. Breul & Co., who took delivery of the one hundred bales of cotton from the plaintiff on or about the 24th April, and paid for it at Rs. 191 per candy, the price at which they had bought from their immediate endorser, Khimji Ruttonsey.

"The delivery order, it will be seen from the series of endorsements, after having been made over to Lupi & Co. by the defendants, came back to them in fulfilment of a separate contract to purchase, which they had entered into with Dewjee Dossa & Co., and was re-issued by them. But the plaintiff was

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not aware that the order had been so returned to, and re-issued by, the defendants until the order was delivered to him, and delivery of the cotton taken by the last endorsee, Breul & Co., nor did he know at what price the defendants had contracted to buy from Dewjee Dossa.

"Immediately on receiving the delivery order A the defendants wrote a letter to the plaintiff, of which the following is a copy:—'We beg to ask *pro forma* for survey on 100 bales good M.-G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party, please secure payment for the cotton direct and before parting with the cotton, if necessary.—Yours, &c., &c. *P. pro.* Harvey & Sabapathy, Náráyan Dhondiba.'

"Mr. Náráyan Dhondiba, who represents the defendants, stated that his reason for writing this letter was that he was not satisfied as to the pecuniary position of Lupi & Co. to whom he was about to transfer the order. This circumstance, however, was not communicated to the plaintiff, and the plaintiff in his evidence stated that he was not aware that the defendants had any doubts as to the position of Lupi & Co.

"The sum of Rs. 421-13-6 claimed by plaintiff is the difference between the rate of Rs. 200 per candy at which the defendants had contracted to buy these fifty candies of cotton, and Rs. 191 per candy, the rate at which the plaintiff has received payment from Breul & Co.

"On behalf of the plaintiff it was contended by Mr. Macfarlane that it was the custom in Bombay to make deliveries of cotton under orders endorsed, as is the order in the present case, to the last endorsee, if he were a respectable merchant, and to receive payment from him at the rate at which he stated he had purchased, as a payment on account of the first purchaser, without referring to, or communicating with, the first-purchaser, and to prefer a bill against the latter for the difference. For the defendants it was contended by Mr. Owen that when the person taking delivery tendered payment at a lower rate than that at which the order was issued, it was the practice for the vendor who issued the order, before giving delivery, to ascertain from

the first purchaser whether he would undertake to pay the difference, and to refuse to deliver if such an undertaking was not given. Mr. Owen further contended that after the receipt of the letter written by the defendants to the plaintiff, set out above, the plaintiff was bound not to deliver the cotton to Lupi & Co., or to any subsequent endorsee of the delivery order, until he had obtained payment for the cotton at the full price which the defendants had agreed to pay for it, and that, if the plaintiff was not bound to do so, the delivery to Breul & Co. was not a delivery authorized by the defendants; that the plaintiff could not set off against the price of one hundred bales of cotton, which exceeded Rs. 9,000, the money he had received from Breul & Co., which was not a payment made by, or on behalf of, the defendants; that the plaintiff's cause of action, if any, against them was for the full price of the cotton, and as that exceeded the pecuniary jurisdiction of this Court, the Court had no jurisdiction to entertain the suit.

"There was only one witness examined on each side, and I did not consider that either custom alleged was established. The question, therefore, which I had to decide was, what is the effect of transferring a delivery order by endorsement, and what is the liability of a person who puts such an order in circulation.

"I held that the defendants having put the delivery order in circulation by making the cotton deliverable to Messrs. Lupi & Co., or their order, the plaintiff would have been justified, in the absence of any directions as to the terms under which delivery was to be made, in delivering the cotton to Breul & Co., and treating any payment he received from them as a payment on account of the defendants, and holding the defendants liable for the difference. But that after the receipt of the letter of the 20th April the plaintiff (not being aware that the letter had reference to Lupi & Co.) ought not to have delivered the cotton to Lupi & Co., or to any subsequent endorsee, without receiving from such endorsee the full price which the defendants had agreed to pay for the cotton, or ascertaining from the defendants to whom he should look for the difference, and that this Court had jurisdiction to entertain the suit, as the payment made by Breul & Co. must be regarded as a payment made by, or on

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behalf of, the defendants, and that the plaintiff was entitled to set off such payment against the entire price of the cotton.

"For the reasons given above I was of opinion that the plaintiff was not entitled to recover the difference of Rs. 421-13-6 claimed by him in respect of delivery order A.

"At the request of the plaintiff's attorney I submit the following questions for the opinion of the High Court:—

"1. Whether, under the circumstances of the case, the defendants having parted with, and put into circulation the delivery order by his endorsement to Lupi & Co., or order, could by their letter to the plaintiff interfere with the negotiability of that order, or attach a condition to it which did not appear on the face of the delivery order, and whether the plaintiff was not justified in treating the letter as ineffectual to control or alter the ordinary course of the delivery order.

"2. If it is held that the letter of the defendants to the plaintiff at all affected the delivery order, must it not be held that it was to have effect only in the event of Lupi & Co. taking delivery of the cotton, and that it ceased to have any effect after Lupi & Co. had parted with the order to another purchaser.

"3. Whether in the face of the fact that the defendants were, the second time the delivery order came into their possession, the holders of the order at Rs. 191 per candy, the same price at which Breul & Co. took delivery and paid for the cotton, the plaintiffs should have refused to deliver to Breul & Co., unless they paid at the original contract-price, *i.e.*, Rs. 200."

Inverarity for the plaintiff.—The plaintiff gave the delivery order to the defendants. He then had a lien for the purchase-money, but he lost it as soon as the defendants had endorsed it over, and the defendants, when they had endorsed it, had a lien as against their vendee for the purchase-money due to them, and LeGeyt, the plaintiff, was the defendants' agent holding the goods for them; but when the defendants endorsed it over, their lien was gone, and their direction to LeGeyt to preserve it by not parting with the goods was of no effect. They could not direct him to hold the goods against the sub-vendee, when the sub-vendee had endorsed. A

delivery order is a document of title. A person in possession of it gives a good title to goods—Indian Contract Act (IX of 1872), sec. 108. English law is now the same—Stat. 40 and 41 Vic., c. 39. The English authorities show what a vendor's rights are, and what is his remedy when he is given a delivery order. His remedy is not impaired by giving a delivery order if he countermands before his bailee has attorned to the buyer, but if the buyer transfers the document of title to a sub-vendee for value and in good faith, his lien is gone—see cases; Benjamin on Sales (3rd ed.), pp. 763, 764. This is enough to decide this case.

But a further point arises. The defendants became again the purchasers of the goods and the holders of the delivery order. That in itself would destroy any lien they had against their vendee (Lupi & Co.), because they bought from Lupi & Co.'s vendee, and they thus recognized Lupi & Co.'s sale, and the defendants became by such purchase owners of the goods. How can they be owners as having purchased under these circumstances and at the same time have a lien in respect of the previous sale? Being thus owners for the second time they again sell, and sell for Rs. 191 per candy. They would have a lien against the buyer for Rs. 191 per candy, and would be bound to deliver to him on payment of that Rs. 191. That purchaser to whom they are so bound to deliver, has sold the goods in his turn, and transferred the delivery order. If my argument on the first point is good, this would destroy defendants' lien even for the Rs. 191. But suppose it did not; they would only have a lien for the Rs. 191, and LeGeyt, on delivering to the ultimate purchaser, received the Rs. 191 before he delivered. What pretence is there, then, for the defendants not paying us the contract price agreed on? The question of vendor's right in cases of this kind is not a question of stoppage in transitu—see *per* Lord Campbell cited in Benjamin on Sales (3rd ed., p. 758); *McEwan* v. *Smith*[1].

As to the point of jurisdiction raised by the defendants, that the Small Cause Court had no jurisdiction. The first vendor here has got payment from the ultimate purchaser, instead of several payments between each purchaser and each vendor

(1) 2 H. L. Ca., 309.

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being made. This must be taken to have been with the consent of all the intermediate vendors and purchasers, as none of them have ever taken any objection. They consented to closing all the transactions by treating this as a payment on account, receiving and paying the difference. It has been found by the Small Cause Court Judge to have been a payment on account; consequently the plaintiff can only sue the defendants for the balance and that balance is within the jurisdiction.

There was no appearance for the defendants.

SARGENT, C. J.—In order to determine the first question referred for our decision, it will be well to consider how the law stood before the Indian Contract Act IX of 1872, upon the proper construction of which its solution turns. It is clear upon the English authorities that a delivery order is regarded as a mere token of authority to deliver; and that, before the wharfinger has attorned, it does not, independently of statute or custom, enable the purchaser to confer a title upon a vendee or sub-vendee free from the vendor's lien for the price—*Farina* v. *Home*(1); *McEwan* v. *Smith*(2).

The English Factors' Acts (Geo. IV, c. 83; 6 Geo. IV, c 94; and 5 and 6 Vic., c. 39), which were extended to this country by Acts of the Indian Legislature (Act XIII of 1840 and Act XX of 1844), created statutory exceptions to that rule in the case of "agents entrusted with" certain mercantile documents, *including a delivery order.* Again, the case of *The Merchant Banking Company* v. *Phœnix Bessemer Steel Company*(3) affords an illustration of the effect of a well-established mercantile custom qualifying the rule; the custom being held by Sir G. Jessel to be proved, that the warrant in that case passed from hand to hand in the iron trade and gave a title to the goods *free from any vendor's lien.* The Indian Acts XIII of 1840 and XX of 1844 were repealed by the Indian Contract Act, and no custom has been proved in this case, such as obtained in the case of *The Merchant Banking Company* v. *Phœnix Bessemer Steel Company*(3).

Passing to the Indian Contract Act it is plain that that Act gives no larger effect, *except by section 108,* to a delivery order

(1) 16 M. & W., 119. (2) 2 H. L. Ca., 309. (3) L. R., 5 Ch. Div., 205.

than it had by English common law. Section 90, illustration (c), read with sections 95 and 98, shows that the giving a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien.

By section 108, however, it is provided that "no seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases, of which the first is as follows :—"When any person is, *by the consent of the owner*, in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary : provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods."

The language of this proviso is, doubtless, very general, and the omission of the expressions "agent" and "entrusted with" used in the repealed Factors' Acts doubtless gives the section a larger scope than those Acts possessed as construed by the Courts in England. We think, however, that it would be straining the expression "by consent of the owner" beyond its plain meaning if it were held applicable to cases where the possession is entirely beyond the control of the owner of the goods. Such would appear to have been the view taken of the section by the Calcutta High Court in *Greenwood* v. *Holgarth* [1], where Couch, C. J., says : "It is the kind of possession which a factor or agent has where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession."

Since the Indian Contract Act became law in 1872, the English Factors' Act of 1877 (40 and 41 Vic., c. 39) has been passed, which

(1) 12 Beng. L. R., 42.

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extends the operation of the earlier Factors' Acts to the case of a purchaser in possession of documents of title of goods, and would, doubtless, have deprived the defendants of their lien after parting with the delivery order.

If the above construction of section 108 of the Contract Act be thought inconvenient to the interests of commerce the remedy is to be found in the extension, by the Legislature, of the English Act of 1877 to this country as was done in the case of the earlier English Factors' Acts.

In the present case the defendants repurchased the goods after they had passed through several hands, and sold them for 191 rupees per candy to Hurry Bhánji, from whom they ultimately passed to Messrs. Breul & Co. Their lien, therefore, as regarded Hurry Bhánji and his sub-vendees was confined to the price at the above rate, and Messrs. Breul & Co. were entitled to the goods as against defendants on payment of that price. The defendants' letter, therefore, of the 20th April 1883—however the plaintiff might have been bound to act on it as regards Lupi & Co., to whom the cotton was sold at Rs. 202 per candy, and the other sub-vendees prior to the repurchase by the defendants—could only, as regards purchasers subsequent to such repurchase, prevent delivery to them before payment of the price at which the defendants had resold the goods, *viz.*, Rs. 191 per candy. That price was actually paid to the plaintiff before he did deliver the goods, and credit was given to the defendants in the account upon which the plaintiffs are now suing.

Our answer to the first question must, therefore, be that the defendants, notwithstanding the endorsement of the delivery order, could by letter to the plaintiff control the delivery of the goods in virtue of their lien, but that, under the circumstances of this case, the plaintiff was justified in treating the defendants' letter as ineffectual to stay the delivery after payment to him of Rs. 191 per candy by Breul & Co. The third question is answered in the negative. It is, consequently, not necessary to answer the second.

Attorneys for the plaintiffs.—Messrs. *Macfarlane and Edgelow.*