1881
*Nov. 5.
1882
*March 28.

GEORGE F. TROOP, *et al* .... APPELLANTS;

AND

LEVI HART, (*Assignee, &c.*) .... RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of fish in storage—Right to hold goods by bailee for unpaid purchase money—Delivery of part.

Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of *W. M. R.* the respondent's assignor. One of the branches of appellants' business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One *S.*, who so dealt with appellants, in October, 1877, sent them 77 barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, *S.* sold all the

*PRESENT—Sir W. J. Ritchie, C.J.; and Strong, Fournier, Henry and Gwynne, JJ.

fish he had, including those mackerel, to one *R.* at $8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received $4,000 and a promissory note for $4,000 at four months. This note was given to appellants by *S.* on account of his general indebtedness. On the 4th March, 1878, *R.* became insolvent and the respondent who was subsequently appointed assignee, demanded the 236 barrels of mackerel and brought an action to recover the same. After issue was joined, the appellants proved against the estate of *R.* on the note and received a dividend on it.

The Chief Justice at the trial gave judgment for $1,888, less $46.10 for one month's insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting.

Held,—(*Strong*, J., dissenting,) that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had as against the appellants' a right to the immediate possession of the fish.

2. That *S.* had not stored the fish with appellants by way of security for a debt due by him, and as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvents' note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* in favor of the respondent. The action was one of trover charging the appellants (who do business under the name of *Black Bros. & Co.*,) with converting 250 barrels of mackerel, which were the property of *William M. Richardson*, the respondent's assignor. One of the branches of the appellants' business was the supplying of merchants who were connected with fishing business in the country, and they were accustomed, as others in the same line, to receive in return the fish which their customers obtained, and to sell such fish, placing the proceeds to the account of their customers. One *D. N. Shaw*, living in *Cape Breton*, so dealt with the

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appellants, obtaining all his supplies from them and sending them all his fish. In October, 1877, he sent to appellants 77 barrels of herring and 236 barrels of mackerel, which they placed in their store. While these fish were in their store *Shaw* came to *Halifax*, and sold the 236 barrels of mackerel along with a quantity of other fish (with which the appellants had no concern), to *W. M. Richardson*, who soon after became insolvent; respondent as his assignee demanded the 236 barrels of mackerel and appellants refused to deliver. On 16th March, 1878, verbal demand was made on appellants for the fish. On the 22nd March appellant sold 200 barrels of the fish to *West*. On the 4th April a written demand was made on the appellants for the fish. The whole amount of the sale by *Shaw* to *Richardson* was $8,101.11, of which half was paid in cash and a note was given for the other half ($4,050.56), and this note was endorsed over by *Shaw* to the appellants, who held it, unpaid and overdue, when the demand was made and action brought. The appellants pleaded not guilty and that the goods were not, nor was any of them, the respondent's as such assignee as alleged. The action was brought 6th April, 1878, and, long after issue joined, viz.: in January, 1880, appellants proved against the estate of *Richardson* on the note, and in February, 1880, received a dividend thereon of $577.20. The late Chief Justice tried the cause without a jury and gave judgment against the appellants for $1,841 90, on the ground that they knew *Richardson* had included the mackerel in his statement of assets and had not objected at the meeting of the creditors. Only one of the appellants was present at this meeting.

Mr. *Thompson*, Q.C., for appellants:

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The action in this case charging the defendants with converting 250 barrels of fish, which were the property of the plaintiff's assignor, was brought on the 6th April, 1878, and it was long after issue joined, viz.: in January, 1880, that the defendants proved against the estate of *Richardson* on the note and received a dividend thereon of $577.20. Now, the learned judge who tried the case gave judgment against the defendants, on the ground that they knew *Richardson* had included this particular fish in his statement of assets, and that they had not objected at the meeting of the creditors, but accepted a dividend on the note and declared they held no security. Only one of the defendants was present at this meeting, and having great quantities of fish in store from time to time for different persons, he could not be certain that *Richardson* had not any fish there until he should make enquiry. But even if the defendants had knowledge that the fish sued for were included by the insolvent in the statement of assets and made no objection thereto known to the assignee or creditors at the meeting, these facts did not entitle the plaintiff to judgment. Defendants were not bound to make any such objection. The plaintiff cannot claim by estoppel, and these facts did not amount to an estoppel. The assignee can only avail himself of such title as *Richardson* had. *Freeman* v. *Cook* (1); *Clarke* v. *Hart* (2). It was a fact immaterial to the issue—it was not made matter of replication, and any replication of that fact would have been demurrable, and therefore such a ground is not now available to plaintiff.

The case of *ex parte English* v. *American Bank* (3) is an authority that the defendants did not lose their title to the fish by alleging in the proof of claim that they held no security for the claim. A creditor can properly

(1) 2 Ex. 654. (2) 6 H. L. Cas. 633, 656.
(3) L. R. 4 Ch. App. 56.

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so attest if he holds no security from the insolvent. Insolvent Act of 1875 (1); *McMahon's* Insolvent Act (2).

My second point is that the fish were the property of defendants, either absolutely or as pledged to them by *Shaw*. *Langton* v. *Higgins* (3).

If the fish are the property of *Shaw*, as assumed in and stated by the judgment, and the defendants were merely the custodians of them, they had at least the right on *Shaw's* behalf to hold the fish for the unpaid purchase money. *Benjamin* on Sales (4); *Bullen* and *Leake* (5).

There was a lien on the fish for unpaid purchase money, and whether this lien was in *Shaw* or the defendants, it was an answer to the action. *Butler* v. *Hobson* (6); *Gadsden* v. *Barron* (7); *Leake* v. *Loveday* (8).

There was a lien, according to the Chief Justice's finding, for insurance and storage, which he deducted from plaintiff's damages. The validity of any such charges (which the learned judge expressly affirmed) did not constitute them a set-off against the plaintiff's damages, but constituted a defence to the action, and one that did not require to be pleaded. *Bullen & Leake* (9).

Finally, I submit even if the fish were only left with defendants to sell for *Shaw*, they had such an interest that *Shaw* could not revoke their authority and sell without their consent. *Jones* v. *Hodgskins* (10); *Benjamin* on Sales (11); *Gaussen* v. *Morton* (12); *Walsh* v. *Whitcomb* (13).

(1) Section 84.
(2) P. 146.
(3) 4 H. & N. 402.
(4) Pp. 626, 640.
(5) P. 717.
(6) 4 Bing. N. C. 290.
(7) 9 Ex. 574.
(8) 4 M. & G. 972.
(9) P. 717.
(10) 61 Maine 480.
(11) P. 74.
(12) 10 B. & C. 731.
(13) 2 Esp. 565.

Mr. *Rigby*, Q.C., for respondent:

A good deal of my learned friend's argument is based upon the assumption that the learned judge only found upon one of the facts in issue. Now, in order to arrive at the conclusion he did, he must have found that the fish was *Richardson's* and had been originally *Shaw's*. This special finding is an addition to the general verdict in our favor. There were only two issues raised by the pleadings: the first issue denies the commission of trover, and second, goods not plaintiff's and he had no right to possession. Now my learned friend rests his contention entirely upon the lien of an unpaid vendor. I contend he cannot raise the question of lien at all under our practice act. Then, we come to the question of fact. Whose property was it? It is not denied that it was *Richardson's*, but they say there was an equitable assignment of it. Surely that must be pleaded.

There is no proof that the appellants are defending this suit for or on behalf of *Shaw*, and if not, they cannot, under any circumstances, set up the non-payment of the note or *Richardson's* insolvency as a defence to this action, and they cannot, under the state of the pleadings herein, in view of the provisions of c. 94 of the Revised Statutes, fourth series, and especially of s. 152 thereof, set up any such defence.

If the appellants' claim to hold the fish be founded on stoppage *in transitu*, there is no proof that *Shaw* ever exercised such right, nor that he authorized the appellants to do so, nor that they did so. In order to constitute stoppage *in transitu*, there must be some act or declaration on the part of the vendor countermanding delivery. *Benjamin* on Sales (1).

If any such right existed, and could under the circumstances in proof herein be properly exercised, it gave at most only the right to detain, and not to sell,

(1) 1st ed. p. 652.

the goods, and by selling them the appellants were guilty of a conversion, and respondent is therefore entitled to recover. *Roscoe's Nisi Prius* (1).

The *transitus* was at an end when the goods were sold by *Shaw* to *Richardson*.

Part of the fish, viz., 36 barrels, having been delivered, it must, in the absence of proof to the contrary, be deemed equivalent to delivery of the whole, and the right of stoppage *in transitu* was at an end.

The respondent in any point of view—the contract made with *Shaw* never having been rescinded—had the right to tender the portion of the purchase-money remaining unpaid, and thus entitle himself to the goods, and any profit or advantage to accrue from their possession; and the appellants, by not setting up when the several demands were made their alleged right to detain, have misled the respondent, and have also waived and lost all right, if any such ever existed, to insist upon a lien or right to detain.

The only other point I intend to urge is, that the defendants cannot set up either a lien for charges or unpaid balance account, because they filed a claim for their note with a sworn statement that they had no security and received a dividend.

The defendants knew that *Richardson*, at his first meeting, claimed the fish as his, and although *Lewis*, one of the appellants, informed himself, as he says, between the first and second meeting, as to the accuracy of this claim, yet he made no objections to such claim at the second meeting, although the claim on the part of *Richardson* to the fish was repeated at the second meeting.

Mr. *Thompson*, Q.C., in reply.

(1) 13th ed. p. 955.

RITCHIE, C.J. :—

Defendants were commission merchants and warehousemen. One *Shaw*, living at *L'Ardoise*, in the island of *Cape Breton*, a distance from *Halifax*, was in habit of dealing with them, they supplying him with goods, he sending them his fish, which they stored and sold, and credited him with the proceeds. In the summer of 1877 *Shaw* had in the store of defendants 236 barrels of mackerel. *Richardson*, the insolvent, says, and I think all the surrounding circumstances corroborate his testimony, that

> Mr. *Troop* told him they had 236 No. 3 mackerel (large), belonging to *Shaw*. I was asked by *Troop* what they were worth, and I said $8, *Troop* said he did not want to sell these, as *Shaw* was on his way from *Cape Breton* and would dispose of them himself. He said, "I might probably buy them from him," and I said, "probably" and did so.

On the 3rd November, 1877, *Shaw*, being in *Halifax*, sold all the fish he had, including those mackerel, to *Richardson*, the mackerel at $8 a barrel=$1,828 for the 236 barrels. The whole sale amounting to $8,101.11 for which *Richardson* paid, half cash, or - - - $4,050 56
And half by a note at 4 months for - - - 4,050 56

$8,101 12

Shortly after the sale and date of the note at 3 months, *Shaw* endorsed the note to defendants on account of his indebtedness to them. The note would fall due on 6th March, 1878. All the fish sold, except the 236 barrels, were at time of sale in two vessels, and of all these fish *Richardson* got the actual delivery. The 236 barrels remained in defendants' store. On the 4th March, 1878, before the note fell due, *Richardson* assigned under the Insolvent Act of 1869.

Plaintiff became assignee of the insolvent, 15th March, 1878. On the 16th March verbal demand was made on defendants for the fish.

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On 22nd March, 1878, defendants sold 200 barrels of the fish to *West*.

On 4th April a written demand was made on defendants for the fish; and

On 6th April, 1878, the writ was issued in the case; and

On 7th May, 1878, defendants sold the remaining 36 barrels to *Cochran*.

There were three meetings of *Richardson's* creditors after the assignment, and no meeting after the 18th March. At these meetings one of the defendants, *Lewis*, attended, and at these meetings a statement was produced of the insolvent's assets, in which among the items of assets the fish now in dispute was put down as "236 bbls. mackerel, stored at *Black Bros*." At the first meeting the defendants took a copy of this statement. The witness, *W. H. Hart*, inspector, and a creditor, who was present at the three meetings says:

Statements of the assets and liabilities were read at them all. "A" was one of them. I heard no objection raised by *Lewis* at any of the meetings, nor by any one else.

And on cross-examination, he says:

Each of the items in "A" were read over and discussed; and at all these meetings, the statement of the personal property in "A" was generally thought correct. *Lewis* spoke several times. "A" was passed round and read. I heard no objection to the personal items.

This was fully confirmed by other witnesses present. Though taking apparently a very active part, and fully informed as to these fish being claimed as the property of the insolvent, and as an item of his estate available for his creditors, neither this defendant nor his firm ever set up any claim thereto or lien thereon on behalf of themselves, *Shaw*, or any one else, but, on the contrary, filed with the assignee a claim against *Richardson's* estate as follows:—

HALIFAX, N. S., December, 1879.

Mr. *W. M. Richardson* to *Black Bros. & Co*, Dr.

March 6, 1878. To cash retired his note favor *D. N. Shaw*..$4050 56

And supported the claim by an affidavit sworn to, 8th January, 1880, by *Lewis*, in which he says:

1. I am a member of the firm of *Black Bros & Co.*, claimants, and the said firm is composed of myself and of *George J. Troop*, also of *Halifax*. 2. The insolvent is indebted to the claimants in the sum of four thousand and fifty dollars and fifty six cents. 3. The claimants hold no security for the claim, and I have signed.

And the plaintiff, the assignee, says:

I paid defendants $577.20, 10th February, 1880, a dividend on the note in claim 14½ cents on the dollar.

I think there is satisfactory evidence in this case to show that whatever may have been the general dealings or relations between *Shaw* and defendants with respect to these fish, they clearly refused to sell them on account of *Shaw*, and left *Shaw* to deal with and sell them entirely independent of them, and referred *Richardson* to him to buy them direct from him without their intervention, and necessarily free from any claim that might have existed, growing out of the general dealings of defendants with *Shaw*; and there can be no doubt that under such sale by *Shaw* to *Richardson*, the latter would, up to the time of his insolvency, have been entitled to demand and receive from defendants the said goods, wholly free from any lien or claim arising from such general dealings between *Shaw* and defendants, and also in like manner as against *Shaw*, would have been entitled to have delivery and possession of the goods. Such being the case, and defendants in their own rights having no lien, had *Shaw* a lien? and, if so, did defendants deal with those goods by virtue of such claim, or have they set up *Shaw's* lien as a defence to this action? There can be no doubt that if a vendor sells on time and takes a bill of exchange or promissory note for the price, he loses his lien on the

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goods sold, though in like manner there can be no doubt that it revives on the dishonor of the instrument in the hands of the vendor; that is to say, if a purchaser becomes insolvent before the goods are actually delivered, the vendor's right to refuse delivery revives, the law does not compel the vendor to deliver to an insolvent purchaser, but if the buyer does not become insolvent during the time that the bill is current, there is no vendor's lien, and the vendor is bound to deliver. It is stated in some of the text books that such lien does not revive on the dishonor of the instrument, if it be then outstanding in the hands of a third person, and in support of this proposition the case of *Bunny* v. *Poynts* (1) is generally to be found cited, but that was a case where the agent of the vendor took the notes of the vendee and another for the price and discounted them with his banker and endorsed them, but the vendor, his employer, did not endorse them. The court held the vendor must be considered as having received payment for his goods and could not retain them, though his agent afterwards became bankrupt and the notes were dishonored. It is somewhat difficult to understand why the fact of the notes being endorsed by the agent or the principal should make any difference in the right of the principal to retain the goods on dishonor of the note. If the creditor negotiates the bill or note for value and without rendering himself liable, it will operate as payment though dishonored, for in such a case he has obtained value which he cannot be compelled to refund, and therefore, if by a lien on the goods he could recover the price he would be paid twice. But if the creditor negotiates the bill or note, so as render himself personally liable upon it, in that case it will not operate as a payment, if dishonored.

It is said the bill is still outstanding; that is true, and

(1) 4 B. & Ad. 568.

it may, perhaps, operate to prevent the seller from having a complete right to the goods so as to be able to give a valid title by re-selling them to a third party, but the only question in the present case is whether he has not a right to hold them till the price is paid.

But if the goods sold are in the warehouse of a third person, and he assented to hold them as agent for the vendee, then there would have been a delivery of the goods, and the possession of the warehouseman would be the possession of the vendee, and all right of lien on the part of the vendor would be gone. In other words, the right of property and possession would both have passed from *Shaw* to the insolvent, and the right of lien would be destroyed, or rather would not exist.

In this case, did not defendants, by their conduct, recognize *Richardson* and his assignee, as having the absolute right in the property and the possession of the goods?

It is in vain to say that defendants did not know of the sale to *Richardson.* It was at their instance that *Richardson* negotiated with and bought from *Shaw.* They received the cash and note given by *Richardson* in payment for these and the other fish, and it is asking too much to expect us to believe that they did not know for what the notes and cash were given ; the non-production of the warehouse books and of their warehousman, the sending to *Richardson* the notice of the running out of the insurance (for it is clear it could only have come from their establishment), their non-insuring the goods for the benefit of themselves or *Shaw* after the sale, then allowing the insurance to run out, the statement of *Troop* that the storage was at a fixed rate, and his saying: "I charged *Richardson* the usual rate," taken in connection with the non-repudiation of *Richardson's* property in the goods and the right to them of the plaintiff, as his assignee, at the several meetings of the creditors, the

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not setting up any claim of lien of any sort, or in any person when the property was demanded, or of *Shaw* on the trial, the non-assertion of any lien being on the goods, the entire absence of *Shaw* from any participation in the doings of the plaintiff in reference to securing these goods, the entire absence of the assertion of any claim of lien or otherwise by *Shaw* or by defendants in his behalf, the putting in of their claim to the full amount of the note, their swearing, long after this action was brought, that *Richardson's* estate owed thereon the full amount, and that they held no other security, would, in my opinion, fully justify a jury in coming to the conclusion that defendants acknowledged *Richardson* as owner, and that they actually held the goods for him; if so, then *Shaw* would have no lien, for Lord *Campbell* in *Pearson* v. *Dawson* says (1):

> The title of the purchaser being once acknowledged by the warehouseman, the purchaser has a right to treat the warehouseman as his agent, and the latter cannot afterwards set up a right in respect of a third party.

It is true Mr. *Troop* says in cross-examination:

> The first notice we had of *Richardson's* claim on the fish was after the insolvency.

This may be so, but it is quite consistent therewith that his partner and his warehouseman or managing man may have had full knowledge of the whole transaction, and it is to be remarked that his partner is on this point suggestively silent. He does say:

> I had no knowledge till yesterday (27th April, 1880,) of what fish was sold to *Richardson* or that it extended beyond the two cargoes.

This is entirely irreconcilable with all the evidence in the case, and it is the more strange that with the two cargoes they had nothing to do, these having been sold by *Shaw* himself from the vessels, and it is still more

(1) E. B. & E. 457.

strange, when it is recollected what took place at the meetings in March, 1878; and the finding of the Chief Justice was, "that defendants had knowledge that the "fish sued for were included by the insolvent in the "statement of his assets, and made no objection thereto "known to the assignee or creditors at the meeting;" and which finding is supported by overwhelming evidence. There is no evidence whatever that notice of dishonor of this note was ever given to *Shaw*, or that the defendants hold him in any way liable thereon as indorser, or that *Shaw* in *Cape Breton* had any notice or knowledge of *Richardson's* insolvency at *Halifax*, or that he had any notice or knowledge of the note having been dishonored. Nor is there any evidence whatever that *Shaw* in any way directly or indirectly authorized defendants to set up any lien on his behalf on the said goods, or that he ever knew that any such claim ever was so set up nor in fact is there a tittle of evidence to show that defendants, with or without the consent or knowledge or authority of *Shaw*, ever did set up such claim on his behalf, or that they ever did deal with or claim to deal with the fish as the agents of or as authorized in any way by *Shaw* so to do; on the contrary, the fair inference from the evidence is that, on the ground that they had a claim on them in their own right, they dealt with the fish of their own mere motion without reference to *Shaw* or anybody else, and that they received the proceeds of the sales to *West* and *Cochran*, without accounting to the plaintiff as assignee of the estate of *Richardson*, or without crediting the proceeds on the note, though they say the amounts of the sales were credited to *Shaw*. If they sold them on *Shaw's* lien they should have credited the insolvent or his assignee on the note, and not *Shaw*, but it does not appear that that fact was ever communicated to *Shaw* by them, or that he ever had any knowledge of it. On the

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contrary, without any apparent communication with *Shaw* on the subject, and, so far as the evidence shows, without any reference to him or to the said sale, some two years after, the defendants prove the whole amount of the note was due by the insolvent estate to them, and claimed and received a dividend on such full amount, a proceeding wholly inconsistent with a sale of the fish under a lien (supposing, if a lien, a sale would be justifiable,) for the fish appear to have been sold;

200 barrels for $7.50 and 36 at $6.30 would amount to	$1,734 00
and deducting charges, &c., in which there are items which could not be charged against the insolvent, supposing there was	67 15
there would be a balance of	$1,666 85

which, if the property had been sold under *Shaw's* or any other lien, would have to be credited on account of the note, for the security of which the lien, if any, must have existed. And would leave only $2,383.71 instead of $4,050.56, due on the note, for which any claim could possibly be made on the insolvent estate. The sworn claim, therefore, that the defendants put in for the full amount of the note, and for which they swore they had no security, is conclusive, to my mind, that they did not dispose of the said fish by virtue of any right of lien or under any authority from *Shaw*, or by or with his consent or approval, and in this connection it may not be amiss to notice that a vendor will lose his right of lien if he prove for the price of the goods under an adjudication in bankruptcy against the vendee. *Exp. Hornby* (1).

Again, if *Shaw* had a lien, neither *Shaw* nor defendants, supposing they were acting for them, had any

(1) Buck's Bank. Cases, 7 Glyn & J. 25.

right to sell or dispose of the goods, and such sale was a conversion as against the assignee, in whom the property was, subject to the lien. Assuming that under a plea of not possessed a lien may be given in evidence, still, if you admit evidence of a lien you cannot exclude evidence to show that it had ceased to exist at the time of the conversion, so that supposing the defendants had a lien on these goods, and he should prove it under the plea of not possessed, the plaintiff would be entitled to show that the lien had ceased at the time he converted them.

The defendants clearly had no right to sell the goods, as they had no property in them; they do sell the goods and thereby necessarily put an end to the lien, if any existed. Continuance of possession being indispensable to the existence of liens at law, an abandonment of the property over which the right extends divests the lien.

But assuming again that *Shaw* had a lien, the defendants cannot, under the pleadings in this case, set up such a defence to this action, and if they could, under the pleas in this case, set up a lien in *Shaw*, they could not justify, as against the assignee of *Richardson*, in whom the general property in these fish was, a sale and conversion unauthorized by *Shaw*, and unwarranted if authorized.

STRONG, J.:—

This is an appeal from the judgment of the Supreme Court of *Nova Scotia* discharging a *rule nisi* for a new trial. The facts on which the questions presented for the decision of the court arise, are as follows: In October, 1877, one *D. N. Shaw*, a merchant at *L'Ardoise*, in *Cape Breton*, consigned to the appellants, merchants at *Halifax*, trading under the name of *Black Bros.*, a quantity of fish consisting of 236 barrels of mackerel and 77 barrels

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of herring. These fish were stored by the defendants. *Shaw* had for some time previous to this consignment been in the habit of dealing with the defendants, who supplied him with goods, and *Shaw* consigned fish to the defendants, who sold them and credited him with the proceeds. That this was the regular course of dealing between *Shaw* and the defendants is proved by both the latter and not contradicted. The defendant *Troop* in his evidence says:

Shaw lives at *L'Ardoise*. We are still dealing with him. We supply him with goods and he sends us his fish. We store the pickled fish, and when we sell it credit him with the proceeds.

The defendant *Lewis* says:

Shaw dealt with us largely; made all his purchases through us; sent us all his fish to be sold and the proceeds put to his credit. That was the course of dealing. In 1877 we supplied him throughout the year. In the fall of 1877 he sent us fish. * * * During the winter we sold the herring to *Twining*, and the 236 barrels of mackerel to *West*. * * *

Some time in November he (*Shaw*) endorsed the note to us on account of his debt to us. He paid us several sums of money in November. * * * After the note and payment made by *Shaw*, he was still in our debt. He is still in our debt.

He also says:

We had no special agreement with *Shaw* as to those fish.

In November, 1877, *Shaw* came to *Halifax* and *W. M. Richardson*, of whom the respondent is the assignee in insolvency, purchased from him a large quantity of fish comprising, amongst other lots, 292 barrels of mackerel at $8 per barrel. This lot of 292 barrels included the 236 barrels, which had previously been consigned to the appellants, and were at the time of sale held in store by them. The difference, 56 barrels of mackerel and the rest of the fish purchased by *Richardson*, were delivered to him by *Shaw* at the wharf, never having been in the possession of the appellants.

Richardson says in his evidence that before he made

his purchase one of the appellants (*Troop*) told him they did not want to sell the fish in their hands as *Shaw* was on his way from *Cape Breton*, and would probably dispose of them himself, and that *Richardson* might probably buy them from *Shaw*. This conversation is denied by *Troop*. He says :

He (*Richardson*) asked me if we expected *Shaw*, and when he came, to give him a chance or opportunity to purchase fish. *Richardson* in former years had bought *Shaw's* fish, and when he bought from *Shaw* he usually came to us and made an arrangement for the warehouse rent for the fish, the day after the purchase.

The price of all the fish purchased by *Richardson* from *Shaw* was $8,101.11—of this amount, one-half was paid by *Richardson* to *Shaw* in cash, and for the other half, $4,050.56, *Richardson* gave *Shaw* his promissory note, dated 3rd November, 1877, payable four months after date. Dr. *Lewis*, one of the appellants, swears that his firm had given *Shaw* no authority to sell the fish in their warehouse, but some time in November *Shaw* endorsed *Richardson's* note to the appellants on account of his debt to them. *Lewis*, however, says :

I had no knowledge until yesterday of what fish was sold to *Richardson* or that it extended beyond the two cargoes.

Troop swears:

The first notice we had of *Richardson's* claim on the fish was after the insolvency.

Further, *Richardson* states :

I did not go to *Black Bros*., I got delivery of all the fish in the two vessels. I never went there to look after the fish or make arrangements for storage. I paid them storage in previous years.

There is a seeming inconsistency between these several statements of the appellants and *Richardson* and that of *Troop* on cross-examination, when the latter says :

The storage is at a fixed rate. I charged *Richardson* the usual rate ;

if, by this, it is meant that the appellants charged

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Richardson storage on the 236 barrels of mackerel in dispute.

On the 4th of March, 1878, and before the promissory note, which did not mature until the 7th of March, fell due, *Richardson* became insolvent and executed an assignment under the Insolvency Act of 1869. At this time the appellants still had the 236 barrels of fish in their possession. The respondent was appointed the creditors' assignee of *Richardson's* estate on the 15th March, 1878, and on the next day made a verbal demand on the appellants for the fish; the terms of the appellants' answer to this demand are not stated in the evidence; the respondent merely says, he did not get the fish. On the 4th April following a written demand was made, to which the appellants replied by a letter, referring the respondent to their solicitor.

The appellants, on the 22nd March, 1878, sold 200 barrels of the fish to *West*, and on the 17th May, 1878, they sold the remaining 36 barrels to *Cochrane*. This action was commenced on the 6th April, 1878. In the statement of assets belonging to the insolvent *Richardson*, received by the respondent from the official assignee, the fish now in dispute, described as "236 barrels of mackerel stored at *Black Bros.*," was included. This statement was produced and handed round at two, if not at three, meetings of *Richardson's* creditors, held prior to the 18th March, 1878, at both of which the appellant *Lewis* was present. Dr *Lewis* admits having seen the statement at the first meeting held before the assignment, though there is some contradiction between him and the other witnesses as to whether the statement was read or produced at the subsequent meeting. No objection was made by Dr. *Lewis* to the statement in respect of the fish in question in *Black Bros.* warehouse being the property of the insolvent. Dr. *Lewis's* evidence on this point is as follows:

I saw the statement "A" at the first meeting; it was handed round; not read aloud; I said to those around me, that I knew of no fish of *Richardson's* stored in our store; I did not see "A" at the second meeting, nor hear it read. Between the first and second meetings I had ascertained that my impression at the first was correct: At the second there was no discussion as to the assets.

In January, 1880, long after this action had been commenced and after appellants must have ascertained the facts of *Shaw* having sold or assumed to sell this identical lot of fish to *Richardson*, and that the price was included in the note, which had been indorsed by them to *Shaw*; the appellants proved their debt on the note in the insolvency matter, the proof of the claim being made by Dr. *Lewis*, who, in his affidavit, swore that the appellants held no security for the claim; and on this proof, a dividend amounting to $577.20 being at the rate declared of 14½ cents on the dollar, was afterwards paid by the assignee to the appellants.

The declaration was in trover for the conversion of the fish, and the pleas were, not guilty, not possessed, and a traverse of the respondents' property in the goods. The action was tried on the 28th of April, 1880, before the late Chief Justice of *Nova Scotia* (Sir *William Young*) without a jury, when a verdict was found for the plaintiff for $1,841.90, being the value of the 236 barrels of mackerel at $8 per barrel, less the sum of $46.10 allowed for insurance and storage.

Shaw was not called as a witness at the trial. It appears from the judge's notes of the trial that the Attorney General, for the defendants, then raised the same point of lien which he insisted on in the argument here. The note being as follows:

Attorney General closes for defendant (*Benjamin* on Sales, 626; 7 B. & P. 567.) Stoppage in transitu and the right of detention for payment on the same principle, 4 B. & Cr. 941, 951; 1 El. & El. 680.

The reference to 4 B. & Cr. 941 is to the cases of

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Bloxam v. *Sanders* and *Bloxam* v. *Morley*, the leading cases on the law of vendor's lien in cases of insolvency. The Chief Justice found for the plaintiff upon the ground, as expressed in his note, that the "defendants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting." The Chief Justice adds to his finding this further note:

If a rule *nisi* for a new trial is moved for, I shall readily acquiesce in it, that the case may be argued and thoroughly examined.

from which it appears that it was intended that all questions of law arising on the evidence should be open at the argument on the application for a new trial, and, at all events, that the defendants were not to be precluded from raising then the same points which they had insisted on at the trial. The court in banc afterwards granted a *rule nisi* to set aside this verdict, which was upon argument discharged with costs.

It was contended on the argument of the appeal before this court, by the Attorney General, on behalf of the appellants—1st. That *Shaw* had a lien upon the 236 barrels of fish for the unpaid residue of the price of all the fish sold by him to *Richardson*, *i.e.*, for the amount of the promissory note, which lien, the appellants were entitled to set up and enforce. 2nd. That if *Shaw* had not such a lien, the appellants themselves, under the arrangement with *Shaw* upon which the fish had been consigned to them, were entitled to one in their own right for the price of the 236 barrels in question.

There is, I think, nothing in the objection that the defence of a lien either in *Shaw* or in the defendants themselves was not admissible under the pleadings. The evidence of conversion was, as regards all the goods claimed, the demand and refusal to deliver, and also as regards 200 barrels, the sale to *West* before the action;

the remaining 36 barrels not having been sold to *Cochrane* until after action brought, the demand and refusal constitute the only evidence of the conversion of that quantity. The effect of not guilty, in an action for conversion under the English rule of Trinity Term, 1853, with which section 146 of the Revised Statutes of *Nova Scotia* (4 Series) cap. 94 is identical, is stated in *William's* notes to *Saunders* (1), as follows:

> After some contrariety of decision, it is now settled that under the rule the plea of not guilty puts in issue not only the fact of the conversion, but also its righteousness (2).

And this is not affected by sec. 144 of Revised Statutes of *Nova Scotia* (4 series) cap. 94. Then as the right to the possession, as well to the property in the goods, at the time of conversion is requisite to enable a party to maintain an action of this kind, a right of lien, either in the defendants in their own right or in *Shaw*, whose agents the defendants were, as I shall hereafter establish, is a sufficient defence to the action as disentitling the plaintiff to the possession; and it is clear upon authority that such a lien may be set up under pleas traversing the plaintiff's property and possession (3), for even assuming that the appellant had no right to re-sell, yet, as the buyer had no title to the immediate possession of the goods at the time of conversion, the defence must be admissible under the plea of not possessed. In *William's* notes to *Saunders*, (4) it is said:

> Again, on the principle that there must exist a right of possession as well as property to support trover, it is held, that although a vendee of goods acquires a right of property by the contract of sale, he cannot maintain trover for them, until he pays or tenders the

(1) Vol. 2 p. 114.

(2) *Young* v. *Cooper*, 6 Exch. 259; *Higgins* v. *Thomas*, 8 Q. B. 908; *Bingham* v. *Clements*, 12 Q. B. 260; *Wentmore* v. *Green*, 13 M. & W. 104.

(3) *Owen* v. *Knight*, 4 Bing. N. C. 54; *Brandoo* v. *Barnett*, 1 M. & G. 908; *Richards* v. *Symons*, 8 Q. B. 90; *Bullen* and *Leake's* Precedents p. 741, 3rd Ed.

(4) Vol. 2, p. 93.

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price, for until this is done he does not (unless the goods were sold on credit) acquire a right of possession to them (1).

This principle is also very clearly stated by Mr. *Benjamin* in his Treatise on Sales (2). He says:

> In the case of re-sale, a buyer in default cannot maintain trover against the vendor, being deprived by his default of that right of possession without which trover will not lie.

I have noticed this question of pleading, not because it gives rise to any difficulty, but for the reason that it was strenously contended by the learned counsel for the respondent that the defence was not open to the appellants on this record.

Then proceeding to consider the substantial question raised by this appeal, I am inclined to the opinion, that although as between themselves and *Shaw*, the appellants originally had, under the arrangement upon which consignments were made to them by *Shaw*, a lien or rather a special property in these goods with a power of sale, and authority to apply the proceeds in payment of *Shaw's* debt to them, their conduct has been such as to have debarred them from insisting upon it as against *Richardson*,or the respondent as his assignee, as a paramount title invalidating the sale by *Shaw* to *Richardson*.

Richardson says:

> Shortly before the purchase, Mr. *Troop* told me they had 236 barrels No. 3 mackerel belonging to *Shaw*; I was asked by *Troop* what they were worth, and I said $8. *Troop* said he did not want to sell them as *Shaw* was on his way from *Cape Breton*, and would dispose of them himself. He said, I might probably buy them from him, and I said "probably," and did so.

I think we must assume *Richardson's* account of this conversation to be correct, for by purchasing the fish from *Shaw*, he acted upon what he states *Troop* to have said to him, in a way he would hardly have done, had

(1) *Bloxam* v. *Saunders*, 4 B. & Cr. 941; *Milgate* v. *Kebble*, 3 M. & G. 100.

(2) 2 Am. Ed., p. 654.

he not considered *Shaw* had the right to sell free from all lien or other superior title on the part of the appellants. This view of the evidence is also consistent with the conduct of the appellants in not setting up their claim when they found *Richardson* had included the fish in his list of assets. I assume, therefore, that the appellants are precluded from setting up in their own right any title paramount under the terms of *Richardson's* consignment to them. The property must, therefore be deemed to have been in their hands in the character of bailees, *i.e.* as warehousemen for *Shaw* at the time of the sale by the latter to *Richardson.* Then, assuming for the present that the appellants continued to hold the goods in the character of warehousemen for *Shaw* down to the date of *Richardson's* insolvency, two questions arise—1st. Was it competent to the defendants to set up *Shaw's* rights as an unpaid vendor? 2nd. What was the nature and extent of those rights?

It is clear upon the most elementary principles of the law of agency that an agent, such as a warehouseman, in possession of goods deposited with him by a principal, who has afterwards sold them under a contract of sale which has operated to pass the property to the vendee, is in such privity with his vendor, that he not only may, but must, in order to perform his duty to his principal and protect himself from liability to him, set up any lien or right of retention until payment, which the vendor to the knowledge of his agent may have, in answer to the vendee's demand of possession without payment. If, under such conditions, a warehouseman were to deliver the goods to the purchaser without payment, thus waiving the lien he would be personally liable to indemnify his principal against the loss so caused. It is out of the question, therefore, to say in the present case that the appellants holding these goods as

warehousemen for *Shaw* were setting up a *jus tertii* in insisting upon *Shaw's* lien (1).

Next we are to consider what were *Shaw's* rights in these fish, still assuming that at the time of the sale to *Richardson* they were held by the appellants as warehousemen for *Shaw*, and that there was never any change in the character of their possession as such.

The promissory note for $4,050.56, which had been given by *Richardson* on account of one-half the price of the whole lot of fish purchased by him from *Shaw*, including the two cargoes delivered at the wharf and those now in question, was, at the time of the insolvency and also at the date of the commencement of this action, in the hands of the appellants as holders for value, having been endorsed to them by *Shaw* on account of his debt to the appellants; and at the date of the insolvency which occurred on the 4th March this note was still current, not maturing until the 7th of March, 1878. The case is therefore to be considered precisely as if this note had been outstanding in the hands of some third person other than the appellants, holding it as *a bonâ fide* indorsee for value. Would it then have been competent for *Shaw*, having taken a negotiable security for the unpaid portion of the price, which he had transferred to a holder for valuable consideration, to have asserted a lien on the goods on the occurrence of *Richardson's* insolvency?

There can be no doubt that the property had passed to *Richardson* by the operation of the sale, the goods having been ascertained and the requirements of the Statute of Frauds having been satisfied by the receipt and acceptance by *Richardson* of the two cargoes delivered at the wharf. The only question is as to the lien or right of retention for the price, arising upon the

(1) Story on agency 9 edit. sec. 217 and notes and cases there cited.

insolvency of the vendee. It is a well established rule that upon the sale of ascertained chattels upon credit the vendee not only acquires the property in the goods sold, but has also a right to the immediate possession. If, however, the price is not paid at the expiration of the term of credit, or if before that period, and during the currency of the credit, the vendee becomes insolvent a lien at once arises entitling the vendor to retain the goods still remaining in his actual possession or in that of his bailee until payment. Further, the vendor is entitled to insist on this lien as well in the case where a bill or note has been taken for the purchase money as in that where the price is unsecured; and the circumstance that a bill so taken is outstanding in the hands of a *bonâ fide* holder for value makes no difference in the vendor's rights if he is himself liable as an indorser on the bill. It is also settled by authority that the vendor by consenting to hold the goods as a warehouseman for the purchaser, does not disentitle himself to insist on the lien. If, however, the goods are in the custody of a warehouseman who, upon the sale, has attorned to the purchaser, as the goods can then in no sense be said to be in the possession of the vendor, the right of lien is gone.

These principles are so well established that a reference to authorities in support of them is scarcely required. It may be useful, however, to point out a few amongst the numerous decided cases which show that the law is thus settled beyond controversey. Most of these are referred to by Mr. *Benjamin* in his Treatise on Sales (1), in which is to be found a very full discussion of the vendor's right in this respect. The leading case is *Bloxam* v. *Sanders* (2). In the course of his judgment in that case *Bayley*, J., states the law very fully and clearly.

(1) Edition 2, Book 5, Chapter 2, beginning at Sec. 766.

(2) 4 B. & C. 941.

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In this case of *Bloxam* v. *Sanders* the term of credit, upon which the goods had been sold, had expired at the date of the resale. The general doctrine here referred to was also clearly expounded and acted upon in the recent case of *Grice* v. *Henderson* (1). But the proposition that goods which have been sold on a credit which has not expired, so that the vendee, being solvent, would be entitled to immediate possession, may, upon the vendee's insolvency occurring be retained by the vendor until payment, and that although bills have been given for the price which have been negotiated and are still current and outstanding in the hands of third parties, holders for value, does not depend merely upon the *dictum* of Mr. Justice *Bayley* in *Bloxam* v. *Sanders*, in which these circumstances did not occur, but is warranted by adjudicated cases in which these facts were actually presented. In the case of *McEwan* v. *Smith* (2), a quantity of sugar had been sold at a credit of four months, and a bill taken for the price, but upon the insolvency of the vendees taking place during the currency of the bill, the vendors were held entitled to refuse delivery until payment of the price. It does not appear in this case that the bill had been negotiated. *Gunn* v. *Bolckow, Vaughan & Co.* (3), was a case decided in the Court of Appeal in Chancery by Lords Justices *James* and *Mellish*. The defendants had contracted to sell to the *Aberdare Iron Company* a lot of railway iron which they manufactured, and which was approved and accepted by the vendees and stacked at the defendants' works. Wharfingers' certificates that the iron was lying at the vendors works ready for shipment were given to the *Aberdare Company*, who, upon receipt of these certificates, accepted bills for the price at six months date, which *Bolckow, Vaughan & Co.* negotiated. The *Aber-*

(1) 3 App. Cases 314. (2) 2 H. L. C. 309.
(3) L. R. 10 Ch. 491.

dare Company handed the certificates to one *Jones*, whose administrator the plaintiff was, as security for a loan The plaintiff had given notice to the defendants that he claimed a lien on the rails for the amount of the loan. Subsequently the *Aberdare Company* became insolvent and filed a liquidation petition. At this time, two of the bills accepted by them had become due and had been dishonored. The other bills had not matured and were outstanding in the hands of holders for value. Upon this state of facts the Lords Justices held that the defendants were entitled to retain the iron for the whole price, as well for that portion which was represented by the bills not yet matured, and which were outstanding in the hands of *bonâ fide* holders, as for that covered by the bills which had been dishonored. Lord Justice *Mellish* says:

Now, it is said that it is a question of fact to be tried, whether that acceptance was taken in satisfaction. * * * * * * * * * * * Whoever heard of such a thing in a mercantile contract, where it is said that payment is to be made by buyers acceptance of sellers' drafts, that if the acceptance was dishonored, the right to sue under the original contract did not revive? No one ever heard that if the purchaser became insolvent before the goods were actually delivered, the vendors' right to refuse delivery to an insolvent purchaser did not revive. Or even if he had actually started the goods, and delivered them to a carrier to be carried to the purchaser, it is perfectly well known that at law upon the buyers' insolvency there would be a right of stoppage *in transitu* which would revest the vendors lien. It would make no difference that a bill had been given which had not yet become due, or that credit had been given. No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien and the vendor is bound to deliver. But if the bill has been dishonored before the delivery has been made, there the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser.

Then, in a subsequent part of the judgment, the Lord Justice determines that the vendor's right to the lien

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for the whole price was not affected by the fact that some of the bills were outstanding in the hands of *bonâ fide* holders for value and that two of them had been dishonoured.

A very late writer on the law of sales, (1) thus sums up the result of the authorities:

If the buyer, being still indebted to the vendor in respect of the price, becomes insolvent before the vendor has parted with the possession, the rights of the latter revive. When I say indebted, I include the case where payment has been made by a bill of exchange, on which the vendor, as well as the buyer is liable, or of which the vendor is himself the holder.

As I have already stated, the fact that the goods have been left in the custody of the vendor, even though he has assented to hold them as a warehouseman for the buyer and has been paid warehouse rent in respect of them makes no difference in the vendor's right to the lien, arising on the insolvency; if they are in the actual possession of the vendor, even although he has agreed to hold as a warehouseman, and has been paid as such for his care, he is entitled to retain until the price is paid. For this proposition *Grice* v. *Richardson* (2), *Miles* v. *Gorton* (3), and *Townley* v. *Crump* (4), are direct authorities, and are recognized as such by Mr. *Benjamin* (5). If, however, the goods are not in the actual possession of the vendor himself, but were, at the time of sale, in the custody of a third party as a warehouseman or bailee, and have, after the sale and up to the date of the vendee's insolvency, remained in the possession of such third party, then the right of lien depends on the question whether the warehouseman has assented to hold the property as bailee for the purchaser or, as it is commonly expressed, has attorned

(1) *Campbell* on the sale of goods and Commercial Agency, 331.
(2) 3 App. Cas. 319.
(3) 2 Cr. & M. 504.
(4) 4 Ad. & E. 58.
(5) *Benjamin* on Sales (Ed. 2) s. 769.

to him. If the bailee has so attorned to the purchaser, it is clear that the goods can no longer be said to be in the possession of the vendor, and all right of lien is gone. If, however, the warehouseman has not, by his consent to hold for the buyer, established the relationship of bailor and bailee between them, he will not, although he has had notice of the sale and has even had presented to him the vendor's order for delivery to the vendee or to a sub-purchaser from him, be considered as holding for the vendee or sub-purchaser, but the goods will be considered as still remaining in the constructive possession of the seller, whose right of retention will revive on the insolvency of the purchaser. For this proposition I need only cite from amongst numerous authorities the single case of *McEwan* v. *Smith* (1) in the House of Lords, already referred to on another point. In that case the goods were sold on a credit of four months, an acceptance at that date being taken for the price and a delivery order given to the buyers by the vendors directing their agent, in whose name the property was stored in a bonded warehouse, to deliver it to the purchasers. The purchasers having become insolvent before the expiration of the credit, it was held that although the goods had been re-sold by the original purchasers and the delivery order duly transferred to their sub-vendee's, nothing had occurred to interfere with the vendor's right to a lien arising on the insolvency. *Griffiths* v. *Perry* (2) is also a case, in which it was expressly held, that the right of the vendor to retain the goods is not affected by the giving of a delivery order and its transfer to a subsequent purchaser. In short, as is observed by a late treatise writer already referred to (3):—

The criteria for transfer of possession so as to divest the vendor's

(1) 2 H. L. C. 309. (2) 1 E. & E. 680.
(3) Campbell on Sales, p. 341.

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rights are exactly the same as those for *actual receipt*, in regard to the Statute of Frauds.

The same author in the following extract also clearly states what is requisite to constitute the warehouseman the bailee of the purchaser (1):—

Where the goods, notwithstanding the engagement to sell, remain in the custody of a middleman, who at the time of sale held them as warehouseman for the vendor, the question of actual receipt within the statute depends upon the consent of the three parties to the effect that the middleman shall thenceforth hold them as warehouseman for the buyer. Such joint consent constitutes an equivalent to delivery for, I think, every legal purpose. The most satisfac tory evidence of it is an order by the vendor, and a note by the middleman acknowledging the order, and stating that the goods have been transferred in his books to the vendee.

Again Mr. *Benjamin* in his work on sales states the law thus (3):

When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they become in the possession of an agent for the purchaser, and therefore in that of the purchaser himself. But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in the possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not affect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed he remains agent and bailee of the vendor.

I have made these quotations for the reason that in the view which I take of the law applicable to this case I find myself dissenting from the other members of the court, and in deference to them I considered it incum-

(1) Campbell on Sales, p. 186. (2) 2nd Edition, Sec. 174.

bent on me to set forth, with the utmost fulness and clearness, the principles of law which I rely on as warranting the opinion I have formed. The obvious deductions from the foregoing authorities is, that mere notice of the sale to the warehouseman is not sufficient to create a privity between him and the purchaser; there must be beyond that an assent by the agent not merely to the sale, which must be a matter of indifference to him, but such an assent as will be sufficient to create a new contract for holding the goods between himself and the buyer, such as, if the bailment is not gratuitous, will entitle him to sue the latter for warehouse rent.

Then to apply these principles, which I have thus extracted from the authorities, to the facts of the present case, it appears to me that, subject to what I shall hereafter have to say as to a statement contained in the evidence of Mr. *Troop*, one of the defendants, the result must be to sustain the present appeal. The goods at the time of the sale to *Richardson* were in the hands of the defendants as warehousemen for *Shaw*. There is not, subject to the ambiguous passage in Mr. *Troop's* cross-examination to be referred to hereafter, a particle of evidence to show that the character of this possession was ever changed by the attornment of the defendants to *Richardson*, so as to create between them the relationship of bailee and bailor. On the contrary, *Richardson* himself swears positively that nothing was done to change the possession. The property in the fish, no doubt, passed to *Richardson* on the sale, and of this the defendants had notice, but it has been shewn that even an order directing the warehouseman to deliver the goods, much less notice of the sale, is insufficient to work a change of possession, unless the warehouseman in addition, expressly, or impliedly by words, or by conduct with the consent of the vendor, assents to hold for the

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vendee. That the defendants never made any new arrangement to hold for *Richardson* appears very distinctly from *Richardson's* own testimony; he says:

I did not go to *Black Bros.* I got delivery of all fish in the two vessels. I never went there to look after fish or make arrangements for storage. *I paid them storage in previous years.*

It was contended on behalf of the respondent that the notice from the insurance agent of the expiration of the policy which had been effected by the defendants upon the fish must have been sent by them to *Richardson*, and that this implied a recognition of *Richardson's* constructive possession through the defendants as his bailees I am of opinion, however, that the Attorney General's answers to this argument are conclusive. First it nowhere appears in the evidence that this notice was transmitted by or through the defendants. All that is said about this notice is what is stated by *Richardson* and the defendants. The former says:

About three weeks after the purchase, a young man brought me a notice of the insurance on that fish, the day before it was to expire, the 24th Nov. I made enquiry but did not insure.

Dr. *Lewis*, one of the defendants, says:

I never sent any notice to *Richardson* or authorized any. We insured the fish ourselves.

Mr. *Troop* also denies all connection with this notice. He says:

I never sent any notice as to the insurance of this fish to *Richardson.*

The fact of the defendants having forwarded the notice is therefore not established either directly or inferentially. But even if it had been distinctly proved, that the insurance agent having sent to *Black Bros.* the usual notice that their insurance was about to expire, they had transmitted it to *Richardson*, I should not have considered that the right of lien would have been in any way prejudiced by that circumstance. The property

was undoubtedly in *Richardson*, and the fish were consequently at his risk; an insurance by him, with the assent of, and at the instance of, the defendants, would therefore have been in no way inconsistent with the fact of the goods being still in the constructive possession of *Shaw*, held by the defendants, as they had always held them, in the character of warehousemen for him.

For the like reason, I see nothing in the conduct of the defendant *Lewis*, with regard to the list of assets produced at the insolvency meeting, which can in any way affect the defendants' rights in the present case. The tacit acquiescence of Dr. *Lewis*, if, indeed, it amounted to that, in the statement that these fish belonged to *Richardson*, and were stored in the defendants' warehouse, involved no admission that the fish were held by the defendants as warehousemen for *Richardson*, or that he was entitled to a delivery of them without payment of the price. Further, the defendants' possession of the fish, originally held for *Shaw*, could not have been changed into one for *Richardson*, without the assent and privity of *Shaw*, and there is not the least proof of anything having been said or done by *Shaw* which could have that effect. It does not appear that any order or direction for delivery, either verbal or written, was ever given by *Shaw*, and *Richardson* does not pretend that he ever received such an order. If, therefore, the defendants are to be held in this action to have converted themselves into warehousemen for *Richardson* or his assignee, by force of any admission made at the creditors meeting, it would not relieve them from a like responsibility to *Shaw*; for their liability to the present plaintiff could only proceed on the principle of estoppel, and to warrant the conclusion that there was such an estoppel, involving as it would a double liability, the clearest and most unequivocal proof of representation or conduct, inconsistent with the defence

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put forward in this action, must have been established (1), and no such evidence has been given.

That no estoppel could have arisen from any assent given by the defendants to the list of assets will be apparent from a slight consideration of the facts taken in connection with the first principles of the doctrine of estoppels. It is not shown that any of the creditors were in any way induced to alter their positions, or to do any act of any kind, on the strength of Dr. *Lewis*' silence, and, under the circumstances, it is not easy to see how they could have been led so to act. It was not the case of a compromise with creditors, or a deed of arrangement being entered into with their assent, but *Richardson* executed an assignment to an official assignee under the Dominion Insolvency Act of 1869, to which, of course, the creditors were not parties, and which required no consent of creditors and no previous statement to them of the amount of his assets. It is not even shown for what purpose the meetings preliminary to the assignment were held, and we can only conjecture that it was with a view of obtaining the advice of his creditors as to whether he should continue to carry on his business, compromise, or assign, that *Richardson* called them together. We are in like manner left entirely to conjecture whether the assignment was the result of the advice of the creditors or was made, as *Richardson* had a right to make it, without their consent. But even if we should assume that the assignment was the result of the advice or pressure, there is nothing to warrant the inference that this action of the creditors was in any way induced by the fact of these barrels of fish appearing in the list of assets, and the consequent assumption, that they were the property of the insolvent clear of any lien; and every presumption must be against such a conclusion

(1) Bigelow on Estoppel, 2nd ed., 441.

from the facts. Therefore, in this respect one of the essential requisites of an estoppel *in pais* is wanting; for no proposition in law can be more plain in reason or better supported by authority than that which affirms it to be essential to the creation of this kind of estoppel, that the representation or concealment relied upon must not only have been made with the intention that the other party should act upon it, but also that the latter should have acted upon it in such a way as to change his position. Mr. *Bigelow* (1) in the treatise on Estoppel states this to be the law in so many words; he says:

> The rule is well settled that if the representation, containing all the foregoing elements, has also been acted upon, the estoppel arises * * * But unless the representation is acted upon the estoppel cannot arise.

And numerous authorities are cited which place this plain and well known principle beyond all controversy. The conclusion must be, that the failure of Dr. *Lewis* to object to the list of assets, or to explain the nature of *Shaw's* lien on this fish, can in no way prejudice the defendants in this action.

It appears, from the Chief Justice's notes of the trial, that a statement of the charges on the fish up to the time of sale delivered to *Shaw* by the defendants was put in and read. This document has not been printed amongst the exhibits, nor was it produced before this court, and I have not had an opportunity of seeing it. From the description given of it, however, it cannot possibly affect the defendants' liability. The mere circumstance that the defendants had rendered *Shaw* an account charging him with the storage up to the date of sale, when the property vested in *Richardson*, does not imply that from that date they held for *Richardson*, or charged warehouse rent to him by his authority, more especially is it not sufficient to prove any such fact when

(1) Ed. 2, p. 492.

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we find *Richardson* himself swearing as he does that he did not authorize such a change. There is, however, in the evidence of *Troop*, in his cross-examination, a statement which certainly requires explanation. He says:

The storage is at the fixed rate. I charged *Richardson* the usual rate.

Taken by itself, isolated from the rest of *Troop's* testimony and the evidence of *Richardson* and *Lewis*, this might be taken to refer to the lot of fish now in question, but when read in connection with the context of *Troop's* evidence and the statements of the other witnesses, I consider it as referring to fish on former occasions *Richardson* had bought from *Shaw*, and had, under an express agreement with the defendants, warehoused with them. Taken in this sense, the passage I have quoted from *Troop's* evidence is not only consistent with what he had himself just before stated, but also with the statements of *Richardson* and *Lewis*. *Troop* in his examination in chief says:

Richardson in former years had bought *Shaw's* fish, and when he bought from *Shaw*, he invariably came to us and made an arrangement for the fish, so bought, after the day of purchase. * * * I gave *Shaw* no authority to sell the fish. I did not know he had sold them until after the assignment. * * * I did not know that the sale to *Richardson* included the fish.

Dr. *Lewis* says:

I had no knowledge till yesterday of what fish were sold to *Richardson* or that it extended beyond the two cargoes.

And in his cross-examination, he produced the warehouse book of his firm, from which it may be presumed it would have appeared that the fish had been transferred into *Richardson's* name, if any such transfer had in fact taken place, but no entry of the kind is extracted from the book or in any way referred to, from which I infer it contained none. Then *Richardson* himself entirely supports the view I take, for he swears:

I did not go to *Black Bros.* I got delivery of all the fish in the two vessels. I never went to look after fish or make arrangements for storage. I paid them storage in previous years.

I come to the conclusion, therefore, that it is impossible on this evidence to hold that the defendants ever attorned to *Richardson*, for there is not a scintilla of proof to warrant such a finding, except the passage in *Troop's* cross-examination, which I have already quoted, and which, read with the context and compared with the unequivocal statement of *Richardson*, can only have the meaning I attribute to it. Moreover, the Chief Justice does not appear to have found that there had been any change of the possession, and, even if there had been such a finding, supported, as it would have been, by no other proof than the vague and ambiguous statement appearing in the note of *Troop's* cross-examination, a statement entirely inconsistent with the testimony of the plaintiff's own witness, and not, so far as it appears, supported by any entry in the defendants' warehouse books, I should have thought a new trial proper in order to ascertain with accuracy what the facts in this respect really were. But, after all, I have, perhaps, attached too much importance to this question of evidence, which, however, was much relied on by the learned counsel for the respondent, for if the law as to the requisites to a transfer of possession by the attornment of a warehouseman is correctly stated, as undoubtedly it is, by Mr. *Benjamin* in the extract I have before made from his book, it could have made little difference even if it had appeared that the defendants had actually charged *Richardson* with the warehouse rent, and had entered the fish in their warehouse book as being held by him, in the face of *Richardson's* positive assertion that he never went to the defendants to look after the fish, or to make any arrangement about storage, for it must be remembered that no change of possession could

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have been worked by the act of the defendants alone, however clear and unequivocal, without the consent of *Richardson*, which, as just shown, he swears he never gave. *Shaw's* consent to the change of possession would also have been indisputable, and of that also there is no proof.

The promissory note for $4,050.56, which had been given by *Richardson* to *Shaw* on account of part of the price of all the fish sold, comprising as well the two cargoes delivered at the wharf as those stored in the defendants' warehouse, was endorsed by *Shaw* to the defendants, and he was liable upon it by reason of that endorsement. At the date of *Richardson's* assignment on the 4th March, 1878, this note had not matured, but it became due on the 7th March, and was overdue and unpaid when the demand of possession was made by the plaintiff, and when the defendants subsequently resold the fish. Therefore, although the authorities before adduced, particularly the cases of *Gunn* v. *Bolckow*, and *McEwan* v. *Smith*, and the quotations from the opinions of text writers, show conclusively that, if the vendee has become insolvent, the vendor is not bound to deliver without payment, upon the demand of the vendee or his assignees during the currency of bills given for the price, yet in the present case, the defendants, being in the position of holders for an unpaid vendor, who has sold on a credit which has expired, do not require the support of those authorities. The defendants were no doubt *bonâ fide* holders for value of the promissory note, and the plaintiff is entitled to put the case against them, when they assert *Shaw's* lien, just as if the note had been outstanding in the hands of third parties, entire strangers to the transaction of the sale and holders for value. But the extract I have before given from the judgment of Lord Justice *Mellish* in

Gunn v. *Bolckow*, the cases of *Valpy* v. *Oakley* (1), and *Feize* v. *Wray* (2), and the passage extracted from Mr. *Campbell's* work on sales all show that this makes no difference, as in reason it should not, in the right of a vendor to insist upon payment, either to himself or to the holder of the bill or note given for the price, before parting with the possession of goods sold to an insolvent vendee.

The note is put in evidence, and *Shaw* appears upon it as an indorser with the usual liability as such, the indorsement not being without recourse or in any way restrictive. The lien attached on the occurrence of the insolvency on the 4th March, 1878, during the currency of the note, which did not become due until the 7th of March. If it is objected, that it does not appear from the evidence that notice of dishonour was given to *Shaw*, so as to hold him liable upon the note, and that for all that appears he was discharged from liability, and his debt thus in effect satisfied, the answers to that argument are: 1st. That the lien having once attached, it was for the plaintiff, as representing the purchaser, to show that it was afterwards discharged, just as if he had relied on a discharge by actual payment. Secondly, that this same circumstance occurred in the case already cited of *Gunn* v. *Bolckow, Vaughan & Co.*, where Lord Justice *Mellish* expressly states of the two overdue bills, that although there was "no evidence one way or the other as to their being indorsed or what has happened," the vendors had a lien in respect of them; in other words, he presumed that the vendors were still liable to take up the bills, a presumption which we must make here as to *Shaw's* continued liability in the absence of all contrary proof. Thirdly, that this point was not made at the trial, when, if it had been raised, the

(1) 16 Q. B. 941. (2) 3 East 96.

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appellants might possibly have shewn that due notice of dishonour was given.

This is an action for the conversion of the goods in question, and the facts relied on as evidence of a conversion are, first, the refusal of the defendants to deliver on the demand of the assignee, implied in the reference by the letter of the plaintiff to their solicitor; and, secondly, the resale of the goods, or at least of part them; for a portion was not sold until after action brought. Had the defendants coupled their refusal to deliver with a claim in any way inconsistent with the vendor's lien which they set up, they might have precluded themselves from now asserting it, but nothing of this kind was done; in answer to the demand of the plaintiff as assignee they wrote the letter of the 8th of April, 1878, which amounts to a refusal to deliver, based on no specific ground.

It was a sufficient defence for the defendants to show that, neither at the time of the refusal to deliver possession to the plaintiff, nor at the date of the subsequent re-sale, had the plaintiff any right to possession, and I cannot discover that the defendants had done anything to disentitle themselves to use any of the facts disclosed in the evidence for the purpose of establishing this defence.

My conclusion upon the whole case, therefore, is that the defendants, at the time of the refusal to deliver, and also at the date of the re-sale of the fish, held it as warehousemen for *Shaw*, an unpaid vendor who had originally sold on credit, and who therefore had a right, on the purchasers insolvency happening, to retain possession of the goods until actual payment either to himself or to the holders of the note given for the price. That this lien or right of retention was not confined to a proportionate part of the price equal to the price of the fish in the hands of the defendants, but extended

to the whole amount of the unpaid purchase money of the whole lot of goods sold, secured by the promissory note, for the sale having been an entire one of the two cargoes, as well as of the fish in the warehouse of the defendants, the price was also an entire one (1). The principle therefore applies that when there has been a sale of goods for an entire price, part of which have been delivered, the whole unpaid purchase money becomes a lien upon the undelivered residue of the goods (2). The defendants therefore, both as warehousemen holding the property for *Shaw*, and as consignees, under the agreement upon which the fish was originally consigned to them, were entitled and bound to assert *Shaw's* rights and would have made themselves liable to him had they failed to do so. Further, that *Shaw* being liable upon the note as endorser, the fact that it was not held by him, but by the defendants to whom it had been transferred for value, did not disentitle him, and consequently does not disentitle the defendants as his agents, to insist on the lien.

It being clear that the plaintiff is not entitled to maintain an action for conversion, unless he was entitled to the possession as well as to the property at the time of the refusal to deliver and of the sales, it is immaterial to enquire, for the purpose of deciding the present appeal, whether a vendor, having the right of lien or retention arising upon the insolvency of the purchaser, has or has not a legal power of re-sale.

In *Bloxam* v. *Sanders* (3), and *Bloxam* v. *Morley* (4) already referred to, Mr. Justice *Bayley* states the law thus:

> If, for instance, the original vendor sell when he ought not, they (the assignees of the buyer) may bring a special action against him

(1) *Baldeg* v. *Parker*, 2 B. & C. 37.

(2) Benjamin on Sales (Ed. 2, Sec. 805); *Miles* v. *Gorton*, 2 C. & M. 504.

(3) 4 B. & C. 941.

(4) 4 B. & C. 951.

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for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights.

Mr. *Benjamin* points out that this judgment of *Bayley*, J., is said by Mr. Justice *Blackburn* (1), as recently as 1866 to be still a correct exposition of the "peculiar law" as to unpaid vendors, and the last mentioned writer, after having discussed at length (2) the whole question of the rights of unpaid vendors in respect of goods retained for the price in section 794 of his book, gives a summary of the rules which he deduces from the cases, one of which is as follows:

> Fourthly. In the case of a re-sale, a buyer in default cannot maintain trover against the vendor, being deprived by his default of that right of possession without which trover will not lie.

Campbell on sales (3) is to the same effect. He says:

> These rights, commonly known as "vendor's rights," include the right to retain the goods until payment of the whole price; but they are larger than a mere right of retention or lien, and extend in many cases to a right to re-sell the goods. In the case where the buyer has become insolvent, the vendor's rights extends to a right to sell the goods in order to realise his debt. Where the buyer is not insolvent but is in default: If before the attempted re-sale, he makes tender of the price, the vendor's right is at an end, and the re-sale is void; but if no tender is made, the vendor may re-sell—the buyer having no immediate right of possession and therefore being unable to complain of the act as a wrongful conversion of the goods.

And the author cites the case of *Milgate* v. *Kebble* (4) and *Lord* v. *Price* (5) as authorities for his text. Lord *Blackburn* (6) thus gives his conclusion from the cases which had been decided at the time he wrote; he says:

> Assuming, therefore, what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed

(1) *McDonald* v. *Suckling*, 35 L. J. Q. B. 237.

(2) Benjamin on Sales; book 5, edition 2, part I, cap. 3.

(3) P. 329.

(4) 3 M. & G. 1000.

(5) L. R. 9 Ex. 54.

(6) Blackburn on Sales p. 329.

to the assent of the purchaser, under the contract of sale, the question arises, how much greater than a lien are they? And this is a question which, in the present state of the law, no one will venture to answer positively, but as has been already said the better opinion seems to be, that in no case do they amount to a complete resumption of the right of property, or in other words to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale than to any other common law rights. At all events it seems, that a re-sale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to receive back any deposit of the price, or to resist payment of any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and to entitle the purchaser to sue in trover.

Then it was urged that the proof of the defendants, founded upon the note which had been endorsed to them by *Shaw*, against the insolvent estate of *Richardson*, and the receipt of a dividend upon that proof, was a waiver of the right of the defendants to set up any lien either in themselves or *Shaw*. In considering this objection, it is important to bear in mind the material dates. The refusal to deliver on the demand of the plaintiff was on the 4th April, 1878; part of the fish (200 barrels) was sold to *West* on 22nd March, 1878; the residue was sold to *Cochrane* on 17th May, 1878; the action was commenced on 6th April, 1878; the proof in insolvency was made on 8th January, 1880, and the dividend was received by the defendants on the 10th February, 1880.

It will be remembered that both counts of the declaration were for a conversion or in trover, and that the pleas were not guilty and a traverse of the plaintiff's property and right of possession. It is manifest that the defendants were entitled to succeed on the issue on the plea of not guilty, as well as on that on not possessed, if, at the time of the sale of the fish and the refusal to deliver on the plaintiff's demand, which refusal was merely evidence of a conversion, the de-

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fendants were entitled to set up *Shaw's* rights as an unpaid vendor, and to retain the fish in his right. That they were entitled so to do, I have already endeavored to establish. Then, how could this subsequent proof, *pendente lite*, operate retroactively so as to alter the rights of the parties as they stood at the time the action was brought? A little consideration will, I think, show that for several reasons it could not possibly prejudice the defendants in their defence to this action. *Troop* says in his evidence that the net proceeds of both sales were credited to *Shaw* by the defendants. By this I understand that the money so credited was appropriated by the defendants, not as a payment on account of the note which they held, but to the unsecured balance of account on which *Shaw* was indebted to them. This, I think, was not a proper application of the payment, for the defendants were bound to have given credit for this money as a part payment of the note which had been endorsed to them by *Shaw*, and for the payment of which the fish, held by them as *Shaw's* agents, was in the nature of a collateral security in *Shaw's* hands. That they did not do so, however, but claimed, and were permitted by the assignee to prove for, the whole amount, does not establish that they were guilty of illegal acts in witholding possession of the goods and afterwards selling them, but merely that they have obtained from the insolvent's estate more than they were entitled to claim. But this cannot have the retroactive effect of rendering illegal the acts referred to, which at the time of their commission, if I am right in my view of the law, were unobjectionable as regards the plaintiff, as assignee, if not perfectly legal. The remedy of the assignee in insolvency is plainly one which he must seek in the insolvency matter, viz., an application to reduce the proof and compel the defendants to repay so much of the dividend

as they have improperly received. That the proof was excessive, I think is apparent. The defendants were entitled to prove only for the amount due for principal and interest upon the note after deducting the net proceeds of the sales. The defendants, it is true, were creditors in their own right, as *bonâ fide* endorsers for value, but the note being overdue, *Shaw* was in the position of a surety to them for the debt which it represented, and the goods remaining constructively in his possession are to be considered as held by him by way of counter security against his liability. Then, upon realising this security by the sale of the fish, *Shaw* through his agents, the defendants, became a trustee of the proceeds for the holders of the note, and was bound to apply the money so received to the payment *pro tanto* of the note. This he did in effect by allowing the defendants to receive and deal with the money as their own. But the defendants, so receiving this money with the knowledge of all the facts, were bound to impute it as a payment on account of the price of the fish —that is, as part payment of the note—in the same way that *Shaw* himself was bound to deal with it, and were not at liberty to apply it as a general and unappropriated payment by *Shaw*, by giving him credit for it on account of the general balance due to them by him, apart from the note. The result of all this, however, is only to show that, in a legal proceeding adopted by the defendants to obtain payment from *Richardson's* estate, they have received, without opposition, as far as it appears, from the assignee or other creditors, more than they were legally or equitably entitled to be paid, and this, not in a conclusive proceeding, but under a proof which it is competent for the court in insolvency at any time to reduce, and in this way to afford the plaintiff as assignee a complete remedy. I cannot think that this has any bearing on the rights of the parties in this

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action; that it either shows the defendants to have been guilty of unlawful conversion, or that the plaintiff had a right to the possession of the fish at the time of the commencement of the action, which are the only questions to be here decided. Had the proof and receipt of dividend been before the action was brought, and prior in date to the sale of the fish and the refusal to deliver, the case might have admitted of different considerations.

I have taken the least favorable view to the defendants in treating them as warehousemen for *Shaw*. It was, as I understood the Attorney-General, contended that, as under the terms of the original consignment the defendants had a right to sell the fish and apply the proceeds in reduction of *Shaw's* debt to them, they were entitled to adopt the sale which *Shaw* made, as though it had been made by him as their agent, in which case they would not only have all the rights which, in my judgment, *Shaw*, if himself the vendor, had, but they would be relieved from any difficulty, even if it should be considered that they had attorned to *Richardson*; since it is clear that if goods remain in the actual possession of the vendor himself, and not in that of a middleman, the lien for the price revives on non-payment or insolvency, notwithstanding the fact that the vendor has expressly constituted himself a warehouseman for the purchaser and has even received warehouse rent from him (1). I have already said I incline to think the defendants are estopped from setting up this title by *Troop's* statement to *Richardson*, but I express no decided opinion upon the point.

I think there should be a new trial on which it will be competent for the plaintiff to establish, if he can, that the defendants had adopted the character of bailees for *Richardson*, and held the fish for him, which would be

(1) *Grice* v. *Richardson*, 3 App. Cases, 319.

conclusive against the defendants, unless they can make good the position, which I have last alluded to, of having been in legal construction the vendors of the fish through the agency of *Shaw*.

My judgment, therefore, is that this appeal should be allowed with costs, and that the rule *nisi* for a new trial should be made absolute and, in accordance with the *Nova Scotia* practice, with costs.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J.:—

I do not for a moment contradict the law as laid down by my brother *Strong*; the difficulty I have is, that the law, so correctly stated, does not apply to this case. Now, what do the defendants answer to the plaintiff's action: 1st. That they did not convert the property; 2nd. Deny that plaintiff, as assignee of *Richardson*, had any right to the property in question. The question then arises, what was the title of *Richardson* to the fish in question after the purchase by him from *Shaw*? The facts are these: *Richardson* purchased a quantity of fish from *Shaw* for which he paid one half in cash and balance by note at four months. He got delivery of part of the fish which was in vessels, but did not get the balance, viz., 236 barrels, which happened to be at the time of the sale in a store belonging to appellants. What was then the position of *Richardson* with regard to this fish? It cannot matter where the fish was, if it could be identified; the fish became by operation of law the property of *Richardson*. The plea put in is, that the fish does not belong to *Richardson*. If not his, whose property was it? Certainly not appellants, they never had a lien on the property, and did not plead one in themselves or in *Shaw*. If they had put in such a plea there might

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have been a question as to lien as between *Richardson* and *Shaw*, but in that plea they should have alleged the title of *Shaw* to the fish, and that they were holding it by his directions. Now there is no evidence that they held for *Shaw*, or that *Shaw* ever asserted any lien on the fish. If a lien had been pleaded in *Shaw*, it would have been necessary for them to show that *Shaw* was liable on the note which he endorsed over to the appellants; and on this point also there is no such evidence. The property in this case, in my opinion, passed to *Richardson* by a bill of parcels given by *Shaw*, and adopted by appellants, they agreeing from that date to hold the property for *Richardson*. *Richardson's* title depended upon his purchase and payment in virtue of which the property immediately vested in him. For these reasons, I am of opinion, the appeal should be dismissed.

GWYNNE, J.:—

As to the soundness of the principle of the cases upon which the learned counsel for the appellants so much relied there can be no doubt, but their applicability to the case before us is, in my judgment, open to great doubt. The learned judge who pronounced the judgment of the Supreme Court of *Nova Scotia*, sustaining the verdict rendered in favour of the plaintiff by the learned Chief Justice of that court, before whom the case was tried without a jury, referred, among other things, to a fact which appeared in evidence at the trial, namely: that the defendants claimed against the estate of *Richardson* in insolvency, as holders of the note which *Richardson* had made to *Shaw* for the balance of purchase money of the fish purchased by *Richardson* from *Shaw*, and received a dividend out of *Richardson's* estate in respect of that claim, and that in an affidavit made by *Lewis*, one of the defendants, in support of that

claim, he swore that the insolvent was indebted to himself and the other defendant in the sum of $4,050.56 (the amount of that note) for which they held no security.

At the time of the making of this affidavit the defendants, it is true, did not hold the fish, the conversion of which is the subject of this suit. They had already sold them; a part, in the month of March, and the remainder in the month of May, 1878; but they had received, and, according to their own shewing, had appropriated, the proceeds arising from the sale thereof, amounting to $1,734, to their own use, and gave no credit therefor to *Richardson* upon the note, but took their dividend out of his estate in insolvency upon the full amount of the note. Now, the contention of the learned counsel for the defendants before us was, that the defendants had a perfect right, in law, thus to retain the proceeds of the sale of the fish and to prove on *Richardson's* insolvency for the full amount of the note, upon the authority of *ex parte English* and *American Bank* (1), which the learned counsel contended was conclusively in his favor upon this point.

That case affirmed a rule well established in bankruptcy, that a creditor who has a security from a third person, or a security which belongs jointly to the bankrupt and a third person, can prove in the bankruptcy for the whole debt without giving up the security. Upon the authority of this rule the learned counsel relied in justification of the defendants having (notwithstanding the sale of the fish in 1878) proved for the whole amount of the note. But neither the case, nor the rule affirmed thereby, asserts a right in a creditor, after realizing upon the security, and so reducing the debt by the amount realized, to prove for the whole debt. Moreover, it is obvious that the rule relied upon applies to a security placed in the hands of the bank-

(1) L. R. 4 Ch. App. 56.

rupt's creditor by way of security for the debt of the bankrupt, and it is equally obvious that such was not the state of the facts in the present case. The fish are clearly shewn to have become the property of *Richardson* in November, 1877, while they were in the possession of the defendants in the only right, whatever it was, by which they ever had possession of them; they continued to be the property of *Richardson* in virtue of his purchase from *Shaw*, the owner of them, until *Richardson's* insolvency on the 4th March, 1878, when they became the property of his assignee, subject, it may be, after the 6th March, when the note became due, assuming the fish not to have previously been reduced into the actual possession of *Richardson* or his assignee, to a right in the nature of the right of stoppage *in transitu* in *Shaw*, who might, in such case, if he had pleased, have given, but he did not, notice to the defendants not to permit *Richardson* or his assignee to have possession of the fish without payment to *Shaw* of the balance of the purchase money. As matter of fact *Shaw* has never interfered in any manner in the matter. He has never claimed or asserted any right of detention of the fish, nor has he offered any impediment to his vendee receiving them, but they were never placed in the defendants' hands by way of security for any debt due by *Richardson* to the defendants, so that the rule referred to has no application to the case. Moreover, this claim, now apparently for the first time asserted, upon the authority of the above rule, is quite inconsistent with the allegation in *Lewis's* affidavit to the effect that he and his partner had no security whatever for *Richardson's* liability to them upon the note, and also quite inconsistent with the position taken by the defendants at the trial, and upon which they wholly rested their defence to the action.

To the plaintiff's declaration, which is for the wrong-

ful conversion by the defendants of the property of the plaintiff, as assignee of *Richardson*, they pleaded not guilty, and that the goods were not, nor was any of them, the plaintiff's as such assignee as alleged. This latter plea enabled them to dispute the title of the assignee, and also of *Richardson*, by setting up the title in themselves or in a third person, and the whole contention of the defendants at the trial, and which is repeated in the third paragraph of the appellant's factum, was, that *Richardson* had never any property in the fish, for that they were consigned by *Shaw* to the defendants as his factors, with authority to them to sell to cover certain advances made by them to *Shaw*, and to apply the proceeds to *Shaw's* credit, and that in virtue of this title and authority they sold the fish, and that in fact they had no knowledge that *Richardson* claimed any interest in the fish until after his insolvency; and that they, the defendants, as stated by *Lewis* in his evidence, gave no authority to *Shaw* to sell them. Upon this title, asserted to be in the defendants themselves, the defendants wholly rested their defence to the plaintiff's action at the trial, and at the close of the plaintiff's case a nonsuit was moved upon the ground of the alleged insufficiency of the evidence to shew *Shaw's* ownership of the fish, so as to entitle him to sell them to *Richardson*; this objection being overruled, the defendant *Lewis* was called as a witness for the defence, when he asserted title as above stated. He said among other things that the defendants received a bill of lading with the fish; but no such document was produced. To that, if, as seems to have been implied, its contents would have supported the defendants claim, its non production constituted a material flaw in defendants' evidence. Upon cross-examination moreover *Lewis* stated that until the day before, "he had no knowledge of what fish was sold to *Richardson*, or that it extended beyond two cargoes," (not

comprising the fish in question); and the defendant *Troop* admitted that the defendants had no special agreement with *Shaw* as to the fish in question. In view of this evidence and of the evidence given on the part of the plaintiff, which, if believed, was abundantly sufficient to shew that the fish were in truth *Shaw's*, stored only by him with the defendants, and that *Shaw* sold them to *Richardson* in Nov. 1877, whose property they then became and thenceforth remained, it is not at all surprising, as it appears to me, that the learned Chief Justice, before whom the case was tried, came to the conclusion that the defendants wholly failed to prove the title to the fish and their proceeds which they had set up, and rendered a verdict for the plaintiff.

The defendants now raise a point, that inasmuch as the learned Chief Justice has allowed them a sum for storage and insurance, which does not constitute matter of set-off, the effect of his so allowing this sum is to recognize a right of lien in the defendants, which existing is a defence to the action; but the defendants, not only never before the commencement of the action nor at the trial set up any claim of lien, but such a claim, if set up, would have been inconsistent with the position upon which they rested their defence at the trial; and the learned Chief Justice, having allowed them for storage and insurance as against *Richardson* from the time of his purchasing, cannot give to the defendants a right to appeal against a verdict which gives them a benefit to which, in strict law, they were not entitled.

The defendants now also attempt to set up, as another ground of appeal, a point which was not made a ground of objection at the trial and which is also inconsistent with the defence then relied upon, and which, not having been taken at the trial, could not now be entertained, if there were anything in it, viz.: that admitting

the fish to have been the property of *Shaw* in November, 1877, and to have been then sold by him to *Richardson*, whose property they then became and thenceforth continued to be, still that, upon non-payment of his note by *Richardson* when it became due on the 6th of March, 1878, inasmuch as *Richardson* had not then obtained actual possession of the fish, the defendants can resist this action by setting up, under the doctrine of the *jus tertii*, the right of *Shaw* to have prevented *Richardson's* assignee obtaining actual possession of the fish without payment of the balance of the purchase money. It is certainly true that the defendants, although acknowledged wrongdoers, might, to an action for conversion, under the plea that "the goods were not the plaintiff's as alleged," prove the property in the goods to be in *Shaw* or in any other person, and not in the plaintiff; but no case has been cited to us to show that, to an action like the present, brought by the person in whom the title and property in the goods are, a wrongdoer can resist the right of such owner of the goods converted, to recover, by setting up a right in the nature of a right of stoppage *in transitu*, which a third person might have had it in his power to exercise, but did not exercise, of interfering to prevent the vendee of the goods (who although by the terms of sale entitled to have had, had not yet obtained actual possession of the goods) from receiving such actual possession until he should pay a balance of purchase money; nor has any case been cited to shew that a person who had received possession of the goods only as storekeeper for the vendor could, without any authority from the vendor, sell the goods and apply the proceeds to his own benefit, although in satisfaction of a debt claimed to be due by the vendor, without subjecting himself to an action at the suit of the vendee

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owner, for wrongfully depriving such owner of his property. For our present purpose it is sufficient to say that no such point having been made at the trial it cannot now be entertained.

In fine, the sale of the fish by the defendants was made by them, and, so far as appears in evidence, without any right whatever, when the fish were the property of the plaintiff as assignee of *Richardson;* and the defendants having failed to establish the only title asserted by them in justification of that sale, such sale was wrongful to the plaintiff, as such assignee, who, for anything established in evidence, had as against the defendants a right to the immediate possession of the fish which, together with the right of property, is sufficient to maintain this action. There is no evidence whatever that *Shaw* ever claimed to have had any right to dispute the right of *Richardson* and his assignee to the possession of the fish; that he had such a right is an assumption merely of the defendants, and I do not think that the defendants, who sold *Richardson's* property without any right so to do, and without any direction or authority from *Shaw* so to do, can shelter themselves under an assumed right of detention of the fish in *Shaw*, which right *Shaw* has never claimed or asserted, and so relieve themselves, as a defence to this action, from the consequences of having without any legal right sold *Richardson's* property and applied the proceeds to their own use The point that 36 barrels of the fish were sold after the action brought was never made, and the court is not called upon to suggest it; but the rest of the fish was sold before action and a demand and refusal of the whole before action was also proved, and no claim of lien on them then or at the trial made. In my opinion, therefore, the appeal should be dismissed with costs,

and judgment entered for the plaintiff on the verdict rendered in his favor.

Appeal dismissed with costs.

Solicitors for appellant: *Thompson & Graham.*

Solicitor for respondent: *John M. Chisholm.*