

[IN THE COURT OF APPEAL.]

C. A.

1899

March 3, 8.CAHN AND MAYER v. POCKETT'S BRISTOL CHANNEL
STEAM PACKET COMPANY, LIMITED.

Sale of Goods—Document of Title, Possession of—Consent of Seller—Draft, Failure to Accept—Transfer of Bill of Lading to Sub-vendee—Stoppage in Transitu—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25, sub-s. 2; s. 47—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 1; ss. 9, 10.

In fulfilment of a contract for the sale of a certain quantity of copper the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on the defendants' ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, and delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, and they thereupon paid him the price of the copper. The plaintiffs took the bill of lading in good faith, and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper in transitu. In an action by the plaintiffs against the defendants for non-delivery of the copper:—

Held, reversing the judgment of Mathew J., that, the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and that the sellers had no right to stop it in transitu.

APPEAL from the judgment of Mathew J. (1)

The plaintiffs, as indorsees of a bill of lading for certain copper, sued the defendants, who were shipowners, for damages for non-delivery of the copper, or in the alternative for a conversion thereof.

On July 12, 1897, the firm of Steinmann & Co., of Liverpool, contracted to sell to one Pintscher, a merchant of Altona, ten tons of copper, to be delivered, c.i.f., at Rotterdam, payment to be made by his acceptance at thirty days from the date of the bill of lading.

The copper in question was shipped from Swansea in the defendants' steamship *Collier* under a bill of lading which

(1) [1898] 2 Q. B. 61.

C. A. provided that it was to be conveyed to Bristol and thence
 1899 forwarded to Rotterdam by a steamer of the Bristol Steam
 Navigation Company, Limited. On August 27, 1897, the
 CAHN plaintiffs Cahn and Mayer purchased of Pintscher ten tons of
 v. POCKETT'S copper. Upon August 30, 1897, Steinmann & Co., in fulfil-
 BRISTOL ment of their contract with Pintscher, forwarded by letter to
 CHANNEL Pintscher the bill of lading for the copper indorsed in blank
 STEAM with a draft for the price of the copper for his acceptance.
 PACKET This letter reached Pintscher, who was then insolvent, on Sep-
 COMPANY. tember 1, and he thereupon handed the bill of lading to his
 banker in order that the banker might deliver it to the
 plaintiffs in fulfilment of Pintscher's contract with them upon
 payment by them of the price of the copper, which was to be
 placed to the credit of Pintscher's account with the banker,
 which was then overdrawn. Pintscher never accepted the
 draft. On September 2 the banker handed the bill of lading
 to the plaintiffs, and they paid the price of the copper in cash
 to the banker, who credited Pintscher with it in account.
 The plaintiffs took the bill of lading in good faith and without
 notice of the rights of Steinmann & Co. in respect of the
 copper. Before the copper arrived at Rotterdam, Steinmann
 & Co., becoming aware that Pintscher was insolvent, gave
 notice to stop it in transitu, which they succeeded in doing
 upon giving an indemnity to the defendants.

Mathew J. gave judgment for the defendants.

Joseph Walton, Q.C. (J. A. Hamilton with him), for the
 plaintiffs. Pintscher, as buyer of the goods, having obtained
 possession of the bill of lading with the consent of Steinmann
 & Co., the sellers, the transfer of it by him to the plaintiffs,
 who received it in good faith, and without notice of Steinmann
 & Co.'s rights in respect of the goods, had, by virtue of s. 25,
 sub-s. 2, of the Sale of Goods Act, 1893, the same effect as if
 Pintscher had been a mercantile agent within the meaning
 of the Factors Acts in possession of the bill of lading with the
 consent of the owner. By s. 2, sub-s. 1, of the Factors Act,
 1889, a sale, pledge, or other disposition of the goods repre-
 sented by the bill of lading made by such an agent is as valid

as if he were expressly authorized by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. By s. 1, sub-s. 1, of the Factors Act, 1889, "mercantile agent" means for the purposes of that Act a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. By sub-s. 2 of the same section "possession" means actual custody. The case of *Shepherd v. Harrison* (1), which was relied on in the Court below for the defendants, has no application to this case. No question as to the Factors Acts arose there. All that was held was that, the bill of exchange not having been accepted, the property in the goods did not pass to the buyer. The effect of Pintscher's not accepting the bill of exchange no doubt was that the property in the goods did not pass to him; but the provisions of the Factors Acts can only have application to cases where the property in the goods is not in the person making the disposition. The fact that possession of the bill of lading was given to Pintscher upon a condition is immaterial, for he none the less obtained possession of it with the consent of the sellers. If he had obtained possession of it by a trick, so as to be guilty of larceny of it, that might not be obtaining possession with the consent of the seller, but that is not the present case. It is immaterial that the contract for the sale of the goods to the plaintiffs was before Pintscher obtained possession of the bill of lading. The plaintiffs did not pay for the goods until the bill of lading was transferred to them. It is the delivery or transfer of the goods or documents of title to them under a sale, not the sale itself, which is validated by s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and there can be no doubt that such a delivery or transfer is a disposition of the goods within the Factors Act, 1889, s. 2, sub-s. 1. The bill of lading represents, and is the symbol of, the goods themselves, and the transfer of it as such is a disposition of the goods. All

(1) (1871) L. R. 5 H. L. 116.

C. A.
1899
CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

C. A. 1899 <hr/> CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.	that is necessary to bring the case within s. 25, sub-s. 2, of the Sale of Goods Act, 1893, is that Pintscher should have "obtained" possession of the bill of lading with the consent of the sellers. It is not necessary that the possession should continue to be with their consent at the time of the transfer of the bill of lading by him. In the case of factors the determination of the consent is immaterial unless the person taking the disposition has notice of it. See Factors Act, 1889, s. 2, sub-s. 2.
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In a case which comes within s. 25, sub-s. 2, of the Sale of Goods Act, 1893, there can be no right on the part of the unpaid vendor to stop the goods in transitu as against the bonâ fide transferee of the bill of lading for value. The intention of that sub-section is to give a good title to such a transferee, though his transferor had none; and it would to a great extent defeat that intention if in such a case the right of the vendor to stop in transitu should continue to exist. By s. 47 of the Sale of Goods Act, 1893, "subject to the provisions of this Act, the unpaid seller's right of lien, or retention, or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto; provided that, where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention, or stoppage in transitu is defeated." The provisions of the operative part of this section are expressly made subject to the provisions of the Act; and by s. 25, sub-s. 2, this case is brought within the proviso. Sects. 10 and 11 of the Factors Act, 1889, shew what is meant by "lawfully transferred" in the proviso. Sect. 11 provides that for the purposes of the Act the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery or makes the goods deliverable to the bearer, then by delivery. "Lawfully transferred" only means transferred in the legal manner appropriate to the particular instrument. By s. 25,

sub-s. 2, of the Sale of Goods Act, 1893, the plaintiffs are placed in the position of a bonâ fide indorsee for value of a bill of lading to whom the property in the goods has passed. The unpaid vendor has no right as against such an indorsee to stop in transitu: *Lickbarrow v. Mason*. (1) There can be no right of stoppage in transitu in a case where the Factors Act applies. By s. 2, sub-s. 1, of the Factors Act, 1889, a disposition of the goods by a mercantile agent coming within that section is to be as valid as if expressly authorized by the owner of the goods. If Steinmann & Co. had expressly authorized Pintscher to transfer the bill of lading to the plaintiffs as sub-vendees of the goods upon payment of the price of the goods to him, they could not afterwards have stopped the goods in transitu. [He also cited *Jenkyns v. Usborne*. (2)]

Cohen, Q.C. (*H. Parker Lowe* with him), for the defendants. Pintscher did not obtain possession of the bill of lading with the consent of Steinmann & Co. within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893. The language of that sub-section differs from that of sub-s. 1, which relates to a seller remaining in possession of goods or the documents of title to them. Sub-s. 1 of s. 25 gives a delivery or transfer of the goods or documents by such a seller the same effect as if authorized by the owner of the goods. Sub-s. 2 gives a delivery or transfer of the goods or documents of title under it the same effect as if the person making it were a mercantile agent in possession of the goods or documents with the consent of the owner. By s. 2, sub-s. 1, of the Factors Act, 1889, a sale or other disposition by a mercantile agent who is with the consent of the owner of goods in possession of the goods or documents of title to them is to be as valid as if expressly authorized by the owner of the goods; and by sub-s. 2, where the agent has, with the consent of the owner, been in possession of the goods or documents, the sale or other disposition is to be valid notwithstanding the determination of the consent, provided the person taking under the disposition has no notice of it. Here Pintscher never was in possession of the bill of lading with the consent of the

C. A.

1899

 CAHN
 v.
 POCKETT'S
 BRISTOL
 CHANNEL
 STEAM
 PACKET
 COMPANY.

(1) (1787) 2 T. R. 63; (1790) 1 H. Bl. 357; 6 East, 20.

(2) (1844) 7 M. & G. 678.

C. A.
1899
CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

sellers within the meaning of those provisions. Steinmann & Co. never consented to its being in his custody, unless he accepted the bill of exchange which accompanied it. If he did not accept the bill of exchange, it was his duty immediately to return the bill of lading to Steinmann & Co. If a bill of lading and draft were sent by a messenger to a vendee of goods, and just handed by the former to the latter in order that he might accept the draft, there would be no change of the possession of the bill of lading with the consent of the vendors till he did so. It makes no difference that the documents are sent by post. The observations of Lord Westbury and Lord Cairns in *Shepherd v. Harrison* (1) are authorities to shew that in such a case as this the bill of lading cannot be considered as in the possession of the buyer of the goods with the consent of the seller until the bill of exchange is accepted.

Sect. 2, sub-s. 1, of the Factors Act, 1889, only applies to sales or other dispositions of goods made by a mercantile agent in possession of goods or the documents of title to them to a person who buys or takes on the faith of that possession: *Bonzi v. Stewart*. (2) Here the sale of the goods to the plaintiffs by Pintscher preceded the sending of the bill of lading to him by Steinmann & Co.

Assuming that s. 25, sub-s. 2, of the Sale of Goods Act, 1893, applies, it does not affect the right of the unpaid vendors to stop the goods in transitu. Apart from statute, the right of an unpaid vendor of goods to stop them in transitu was only defeated where the bill of lading had been indorsed to a bonâ fide indorsee for value by a purchaser to whom the property in the goods had passed. In the present case it is clear from the judgment of the House of Lords in *Shepherd v. Harrison* (1), and sub-ss. 2, 3 of s. 19 of the Sale of Goods Act, 1893, which merely embody the law as laid down in that case, that no property in the goods mentioned in the bill of lading passed to Pintscher, so that there could be no question, apart from statutory enactments, of defeating the right to stop in transitu. If s. 25, sub-s. 2, of the Sale of Goods Act, 1893, applies, the effect is that there is a valid disposition of the goods by Pintscher

(1) L. R. 5 H. L. 116.

(2) (1842) 4 M. & G. 295.

to the plaintiffs, but it does not follow that that defeats the unpaid vendor's right of stoppage in transitu. The question still remains whether the provisions of the Sale of Goods Act, 1893, or of the Factors Acts have that effect. It is submitted that they have not. By s. 61, sub-s. 2, of the Sale of Goods Act, 1893, the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, are to continue to apply to contracts for the sale of goods. Therefore, so far as the common law with regard to stoppage in transitu is not excluded by the express terms of the Act, it continues in force. The provisions of s. 25, sub-s. 2, cannot be considered as expressly excluding the right of stoppage in transitu in cases that come within it. If the sub-section had that effect, the proviso to s. 47 would be unnecessary. There is no reference to the right of stoppage in transitu in terms in the sub-section, which there would have been, if it had been intended to affect it. There is nothing inconsistent with the right of an unpaid vendor to stop in transitu in s. 25, sub-s. 2, of the Sale of Goods Act, or in s. 2, sub-s. 1, of the Factors Act, 1889. *Primâ facie* the general scope of the Factors Act has nothing to do with stoppage in transitu. Sect. 2, sub-s. 1, of the Factors Act, 1889, has to do, not with the effect upon the right to stop in transitu of an indorsement or transfer of a bill of lading or other document of title to goods by a mercantile agent, but only with the validity of a sale or other disposition of the goods themselves made by a mercantile agent in possession of the goods or the documents of title to them. Sect. 9 of the Factors Act, 1889, is substantially to the same effect as s. 25, sub-s. 2, of the Sale of Goods Act, 1893. Their provisions merely put a buyer who obtains possession of the goods or documents of title to them with the seller's consent in the same position as a mercantile agent in possession of goods or the documents of title to them with the consent of the owner. The effect is that a sale or other disposition of the goods by such a buyer is valid; but it is not the sale or other disposition of the goods *per se* which at law defeats the right to stop in transitu, but the transfer of the bill of lading or other similar document. It is submitted that neither

C. A.

1899

 CAHN
 v.
 POCKETT'S
 BRISTOL
 CHANNEL
 STEAM
 PACKET
 COMPANY.

C. A.
1899
CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

the Sale of Goods Act, 1893, nor the Factors Act, 1889, says that in such a case the transfer or delivery of the document shall defeat the right to stop in transitu which according to the rules of the common law would otherwise exist. Sect. 47 of the Sale of Goods Act, 1893, and s. 10 of the Factors Act, 1889, which corresponds to the proviso to that section, do expressly refer to stoppage in transitu. It is submitted that, unless the unpaid vendor's right to stop in transitu is defeated by the provisions of s. 47 of the Sale of Goods Act, 1893, or those of s. 10 of the Factors Act, 1889, it is not affected by any provision of either of the Acts. This case does not come within the proviso to s. 47 of the Sale of Goods Act, 1893, or s. 10 of the Factors Act, 1889, for the bill of lading in this case cannot be said to have been "lawfully transferred" to Pintscher, as the property in the goods was not intended to pass to him till he accepted the draft, and moreover the transfer by him to the plaintiffs was not by way of sale, the sale having previously taken place. [He cited *Gurney v. Behrend* (1) ; *Burdick v. Sewell*. (2)]

Joseph Walton, Q.C., in reply. At common law of course, where the property in the goods had not passed from the vendor, no question of stoppage in transitu properly so called could arise, and, if the vendor stopped the goods, it was by virtue, not of the right to stop in transitu, but of ownership of the goods. No property in the goods really passed in this case to Pintscher, but in cases coming within s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and s. 9 of the Factors Act, 1889, the real facts are not to be looked at, but the case is to be dealt with on the statutory assumption, which is that the buyer under those provisions is a mercantile agent authorized by the seller to dispose of the goods by transfer or delivery of the goods or documents of title to them under a sale or other disposition thereof. Upon this statutory assumption no right of stoppage in transitu can remain in the seller. A delivery of the bill of lading does not necessarily pass the property in the goods, but it passes the constructive possession of them, and, if made under such circumstances that it would pass the property, if the person delivering it had the property, it amounts to a dis-

(1) (1854) 3 E. & B. 622.

(2) (1884) 13 Q. B. D. 159.

position of the goods within the meaning of the Factors Act, 1889.

C. A.

1899

Cur. adv. vult.

CAHN

v.

POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

March 8. A. L. SMITH L.J. read the following judgment—
The question raised in this case is whether, when a seller of goods sends to his buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, the buyer can keep the bill of lading and refuse to accept the draft and yet give a good title to the goods covered by the bill of lading to a sub-purchaser from him who takes in good faith and without notice of the want of authority of the buyer to deal with the bill of lading and the goods represented thereby. If the question be answered in the affirmative, a further question as to stoppage in transitu will arise, which I will deal with hereafter.

Upon July 12, 1897, Steinmann & Co., of Liverpool, contracted to sell to Pintscher, of Altona, ten tons of copper to be delivered, c.i.f., at Rotterdam, payment to be made by Pintscher's acceptance at thirty days from date of bill of lading. On August 27, 1897, the plaintiffs, Cahn and Mayer, purchased of Pintscher ten tons of copper. Upon August 30, 1897, Steinmann & Co., in fulfilment of their contract with Pintscher, forwarded to him a bill of lading indorsed in blank for ten tons of copper, accompanied by a draft for his acceptance in the following letter: "Liverpool, August 30, 1897. Mr. M. D. Pintscher, Altona. Dear Sir,—We beg to confirm our respects of the 26th inst., and have the pleasure of handing you herewith bill of lading for ten tons R.T.C. ingots, shipped per ss. *Collier* to Rotterdam. We further hand you our invoice for these goods amounting to M.10,624 30, and our draft for the same amount, which be good enough to provide with your acceptance and return to us as soon as possible. Yours truly, R. Steinmann & Co." The draft contained in this letter was by mistake drawn for 10*l.* in excess of the contract price of the copper, but no point is made as to this. This letter, with its inclosures, reached Pintscher upon September 1, 1897, and he thereupon retained the bill of lading and handed it to his

C. A. 1899
 CAHN
 v.
 POCKETT'S
 BRISTOL
 CHANNEL
 STEAM
 PACKET
 COMPANY.
 A. L. Smith L.J.

banker to hand to the plaintiffs, and when they paid against the bill of lading, the banker was to credit the proceeds to Pintscher's account which was then in debit. Pintscher never accepted the draft. The banker on September 2, 1897, accordingly handed the bill of lading indorsed by Pintscher to the plaintiffs in fulfilment of their contract with Pintscher, and against this bill of lading the plaintiffs paid cash to the banker, taking it in good faith and without notice that Pintscher had no authority from Steinmann & Co. to deal with the bill of lading as he was doing. The banker credited the amount received from the plaintiffs to Pintscher's overdrawn account. Before the goods arrived at Rotterdam, Steinmann & Co. being unpaid for their copper and Pintscher having become insolvent, Steinmann & Co. stopped the copper in transitu. In these circumstances, are the plaintiffs entitled to the copper as against Steinmann & Co., the unpaid vendors? This depends upon the Sale of Goods Act, 1893, coupled with the Factors Act, 1889, which clearly must be read together, for without these Acts there can be no doubt that the plaintiffs took no title to the goods, and the learned judge has held that they did not, and the plaintiffs appeal.

That the Factors Acts, commencing as they do in the year 1823 (4 Geo. 4, c. 83), and finishing up with the Sale of Goods Act, 1893, were passed to afford protection to persons dealing in good faith and without notice with factors cannot be disputed, and that additional protection to persons so dealing, not only with factors, but also with buyers of goods, has by these Acts from time to time been afforded is equally clear; and the first question is whether the plaintiffs are within the protection of the last of these Acts—namely, the Sale of Goods Act, 1893—coupled with the Factors Act, 1889. I would point out that it is only in cases where an owner has in some way been deprived of his goods without his authority that the Factors Acts are required; for, if he is not so deprived, the Acts are not needed to protect *bonâ fide* transactions with agents and buyers.

By s. 25, sub-s. 2, of the Sale of Goods Act, 1893, it is enacted, "Where a person having bought or agreed to buy goods"—this embraces Pintscher—"obtains with the consent

of the seller"—this embraces Steinmann & Co.—"possession of the goods or the documents of title to the goods"—which undoubtedly comprises a bill of lading—"the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." By sub-s. 3 of this section the term "mercantile agent" has the same meaning as in the Factors Acts. It will be noticed that the important words of this section are, "obtains with the consent of the seller possession of the goods or the documents of title to the goods." I now turn to s. 2, sub-s. 1, of the Factors Act, 1889, to see what are the powers of a "mercantile agent." It is thereby enacted: "Where a mercantile agent is with the consent of the owner"—in this case, where Pintscher is with the consent of Steinmann & Co.—"in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." By s. 2, sub-s. 2, of this Act of 1889 it is enacted that "where a mercantile agent"—which includes a buyer—"has, with the consent of the owner, been in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition which would have been valid, if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined." By s. 1, sub-s. 2, of this Act of 1889 it is enacted that "a person shall be deemed to be in

C. A.

1899

CAHN

v.

POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

A. L. Smith L.J.

C. A. possession of goods, or of the documents of title to goods,
 1899 where the goods or documents are in his actual custody or are
 held by any other person subject to his control or for him or
 on his behalf."

CAHN
 v.
 POCKETT'S
 BRISTOL
 CHANNEL
 STEAM
 PACKET
 COMPANY.

A. L. Smith L.J.

So it will be seen that in this case the first question comes to this—Did Pintscher obtain the actual custody of the bill of lading with the consent of Steinmann & Co.? For, if so, the plaintiffs can make title to the bill of lading and the goods under the above-mentioned Acts. No point is made as to whether Pintscher acted in the ordinary course of business of a mercantile agent when he parted with the bill of lading as he did to his banker. A point was made that, when the plaintiffs contracted with Pintscher to buy ten tons of copper, they did so before Pintscher had the custody of the bill of lading, and that the plaintiffs were not therefore protected by the Acts; for it was said that the sale was made by Pintscher to the plaintiffs before he was in possession of the document of title. But I think the answer to this argument is that s. 25, sub-s. 2, of the Sale of Goods Act, 1893, validates the delivery or transfer of a document of title, which took place in this case when Pintscher transferred the indorsed bill of lading through his banker to the plaintiffs, against which they paid their money. This point fails Steinmann & Co. That the bill of lading was in the actual custody of Pintscher is clear, though I agree that this does not suffice, for the statute enacts that the actual custody of the document of title must be obtained by the mercantile agent or buyer with the consent of the seller. Now the bill of lading was not obtained by Pintscher from Steinmann & Co. by any trick or device, in which case it could not, I think, be said that Pintscher had obtained the actual custody of it with Steinmann & Co.'s consent; but, on the contrary, the bill of lading, accompanied by the draft, was voluntarily sent by Steinmann & Co. to Pintscher, and it was by this voluntary act of Steinmann & Co. and by this alone that the bill of lading was obtained by Pintscher from them, and thus got into his "actual custody," which are the words of the Act. Why, then, was not the bill of lading obtained by Pintscher and in his actual custody with Steinmann & Co.'s consent?

The limitation of Pintscher's authority to deal with the bill of lading after he got it into his custody, before he accepted the draft, is not to the point, which as before stated is—Did Pintscher obtain the actual custody of it with the consent of Steinmann & Co.? In my judgment the words of the Act mean actual physical custody. After consideration, the only answer I can give to this question is that the bill of lading was obtained by Pintscher from Steinmann & Co. and was in his actual custody with Steinmann & Co.'s consent.

C. A.

1899

CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

A. L. Smith L.J.

It is, however, argued that what Lords Westbury and Cairns said in *Shepherd v. Harrison* (1) shews that I am wrong, but I do not think so. What those noble and learned Lords were dealing with was the passing of property in goods contained in a bill of lading to a purchaser, he not accepting the draft accompanying the bill of lading. We have nothing to do in this case with the passing of property to Pintscher. That no property passed to Pintscher in the copper cannot be doubted, but this is not the question. Lord Westbury (2) said that, though it was not in writing, the meaning of the transaction was "Remember you are not to possess yourselves of the bill of lading until you have accepted the bill of exchange"; and Lord Cairns (3) said: "I do not believe there is a merchant in England that would have had any doubt that the meaning" (of sending the bill of lading and draft together) "was: You shall have the bill of lading when you accept the bill of exchange. . . . I hold it to be perfectly clear that, when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and the bill of exchange are transmitted in a letter, either 'to approbate or to reprobate' entirely and completely, then and there. . . . I therefore think that, when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in inclosing these bills of lading and bills of exchange is, that, before you use the bills of lading, you shall accept the

(1) L. R. 5 H. L. 116.

(2) L. R. 5 H. L. at p. 130.

(3) L. R. 5 H. L. at p. 132.

C. A.
1899
CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.
A. L. Smith L.J.

bills of exchange." It seems to me that the noble and learned Lords clearly state that, before the draft is accepted, the buyer is not to use the bill of lading, and, if he does so, it is a clear breach of his duty to his seller, and in such circumstances no property passes to the buyer. But this does not cover the present question, which is, Did Pintscher obtain the actual custody of the bill of lading, that is of the thing itself, with Steinmann & Co.'s consent? The noble and learned Lords were not dealing with the effect of the Factors Acts, which was not before them, and with which they had nothing to do. I agree that it was Steinmann & Co.'s intention that Pintscher was not to use the bill of lading, unless and until he accepted the draft; but the bill of lading was none the less in Pintscher's actual custody with their consent before he had accepted the draft. The Legislature, when it passed the Sale of Goods Act, 1893, by s. 19, sub-s. 3, enacted what had been held by the House of Lords in *Shepherd v. Harrison* (1) and nothing more, the Act being an Act to codify the law.

I now come to the second question, raised in this Court for the first time, for it was not made in the Court below—that, supposing the plaintiffs had a good title to the bill of lading by virtue of the protection afforded to them by the conjoint operation of the Sale of Goods Act, 1893, and the Factors Act, 1889, Steinmann & Co. could, nevertheless, stop, as they did, the goods in transitu and thus defeat the plaintiffs' statutory title to the goods comprised in the bill of lading. I agree that this is an important point, for, if it be sound, the title to a bill of lading and the goods represented thereby, which a sub-purchaser in good faith takes from a buyer of the goods and obtains by reason of the provisions of the Act, will in many cases be invalidated. Now, what does s. 2, sub-s. 1, of the Act of 1889 enact? It enacts that, where a mercantile agent (which includes a buyer) is, with the consent of the owner, in the actual custody of goods or the documents of title to goods (which for this point must be taken to be the case), any disposition of the goods made by him shall, subject to the provisions of this Act, be as valid as if he were expressly authorized

(1) L. R. 5 H. L. 116.

by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same: in other words, as if the disposition had been made by the owner of the goods himself or by his lawfully authorized agent. By s. 10 of this Act it is enacted that, where a document of title to goods has been lawfully transferred to a person as a buyer (which was done in this case by Steinmann & Co. passing the indorsed bill of lading to Pintscher), and that person transfers the document to a person (the plaintiffs) who takes the document in good faith and for valuable consideration (as the plaintiffs did), the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu. What avail, then, is it to call attention to s. 61, sub-s. 2, of the Sale of Goods Act, 1893, which enacts that the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods? For, in my judgment, the provisions of s. 2, sub-s. 1, and s. 10 of the Factors Act, 1889, which it is conceded must be read as part of the Act of 1893, expressly provide that, in circumstances such as exist in the present case, the right to stoppage in transitu is defeated. See also, as to this, the proviso to s. 47 of the Act of 1893, of which section the first part leaves the right of stoppage in transitu precisely where it was before upon the mere sale of goods, when no transfer of the bill of lading by indorsement takes place, and the proviso re-enacts s. 10 of the Factors Act, 1889. This second point, therefore, as to stoppage in transitu, also fails Steinmann & Co. For the reasons above I think that the appeal must be allowed.

COLLINS L.J. read the following judgment:—The crucial question in this case is whether Pintscher, the buyer, obtained possession of the bill of lading with the consent of Steinmann & Co., the sellers. If he did, his transfer of it for cash to

C. A.

1899

CAHN

v.

POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

A. L. Smith L.J.

C. A.

1899

CAHN

v.

POCKETT'S

BRISTOL

CHANNEL

STEAM

PACKET
COMPANY.

Collins L.J.

Cahn and Mayer, the sub-purchasers, who received the same in good faith, and without notice of any lien or other right of Steinmann & Co., was by s. 25, sub-s. 2, of the Sale of Goods Act, 1893, as effectual as if Pintscher had been a mercantile agent in possession of the bill of lading with the consent of the owner. Such a sale by a mercantile agent is, by s. 2, sub-s. 1, of the Factors Act, 1889, as valid as if he were expressly authorized by the owner to make it. It is to be noted that the words of s. 25, sub-s. 2, are "obtains possession" with the consent of the seller. It is therefore immaterial whether the consent was afterwards withdrawn. When he has once got possession by consent, his subsequent disposition of the bill of lading, whether such consent still subsists or not, is made as effectual as if he were in making the transfer a mercantile agent in possession with the consent of the owner. A mercantile agent is himself placed in a similar position by sub-s. 2 of s. 2 of the Factors Act, 1889. Where he has been in possession with consent, the determination of the consent does not, while he retains possession, defeat his disposition. "Possession" by the Factors Act, 1889, s. 1, sub-s. 2, means actual custody. The Factors Act, 1889, which is thus referred to, and as to part of it in terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to bonâ fide purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the bonâ fide purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner. But, if a mercantile agent, or one of the persons whose disposition is made as effectual as that of

a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines v. Swainson* (1) ; *Sheppard v. Union Bank of London* (2)), he is able to pass a good title to a bonâ fide purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Blackburn J. in *Cole v. North Western Bank*. (3) These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann & Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment. If he became criminally responsible for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking. He might conceivably have fully intended to accept the draft and forward it by the first post. If he had disposed of the bill of lading, while he remained in this attitude of mind, and subsequently accepted the draft, and forwarded it, and become insolvent before the transitus of the goods was over, could Steinmann & Co. have stopped them effectually on the ground that Pintscher had not obtained possession of the bill of lading with their consent? If not, it could only be because the original taking was with their consent. The possession, i.e., the actual custody, was obtained once for all when the bill of lading was placed in Pintscher's hand, and no subsequent changes in his intention with regard to the draft could change the character

C. A.

1899

 CAHN
 v.
 POCKETT'S
 BRISTOL
 CHANNEL
 STEAM
 PACKET
 COMPANY.

 Collins L.J.

(1) (1863) 4 B. & S. 270.

(2) (1862) 7 H. & N. 661.

(3) (1875) L. R. 10 C. P. 354, at p. 373.

C. A.
1899
CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.
Collins L.J.

of this completed act. It would in my opinion defeat the purpose of the Act, and work a public mischief, if a vendor who had himself placed the bill of lading in the hands of his purchaser were entitled as against a bonâ fide sub-purchaser from the latter to enter into nice questions as to the intention with which the original purchaser took the document of title into his possession. The Legislature has deliberately chosen to alter the common law which made a transfer of a bill of lading ineffectual, if the person transferring was not himself the owner of the goods. It has step by step enlarged the class of persons who, having possession, may give a better title than they have themselves got, and has relaxed the conditions under which they may do so; and I think it would be a backward step to subject the title of the purchaser from such persons to speculations such as the argument for the defendants suggests. It is to be noted that s. 25, on which the question turns, and which makes possession obtained by consent the only condition of the buyer's power to sell again, follows immediately upon a series of sections dealing with transfers by persons without title, in the last of which the distinction of possession obtained under circumstances amounting to larceny from that obtained by fraud or other wrongful means not amounting to larceny is made the basis of an enactment. Read in this context, the section itself at once suggests the test of larceny, where the obtaining possession has been, as in this case, by direct delivery by the owner to the buyer. In *Phillips v. Huth* (1), decided upon the law as it stood before 5 & 6 Vict. c. 39, Parke B. in delivering the judgment of the Court says: "If the Legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided: if they had, the innocent party dealing with him would have been protected, but the innocent owner would in that case have suffered, if the document had been taken from him by felony or fraud: but by providing that a person should be intrusted, as well as in possession, the inconvenience is obviated." Though, as we have seen, the word "intrust"

(1) (1840) 6 M. & W. 573, at p. 597.

was afterwards held to be satisfied, although the intrusting was induced by fraud, I think the omission of this word in the present statute, and the substitution of "obtain with consent," must have been still further to improve the position of the purchaser from one of the class of persons dealt with in the Act, and at least to exclude all consideration of the conditions upon, or purposes for which actual possession was in fact voluntarily given to his vendor. In *Cole v. North Western Bank* (1) Blackburn J., in delivering the judgment of the Exchequer Chamber, says: "The Legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who bonâ fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell, or to procure the advance." In *Sanders v. Maclean* (2) Bowen L.J., in dealing with an objection that the usage there contended for would facilitate fraud, says: "The object of mercantile usages is to prevent the risk of insolvency not of fraud. . . . Credit, not distrust, is the basis of commercial dealings." The later legislation is clearly an attempt to bring the law more nearly into line with mercantile opinion, and to extend the statutory implication of misleading to the case where persons not agents at all have been permitted by the owner to obtain possession of goods or documents of title. In short the vendor who puts his purchaser in possession of the documents may be deemed to have misled the sub-purchaser who buys on the faith of that possession. The vendor from whom they have been stolen, or taken against his will, cannot. The common precaution of sending the bill of lading to his own agent instead of to the buyer direct would have avoided all difficulty, and I think the Legislature must have been well aware of the common practice in these cases, and left the seller to protect himself.

It is, however, contended by the respondents that s. 19, sub-s. 3, of the Sale of Goods Act, which enacts the law as laid (1) L. R. 10 C. P. 354, at p. 372. (2) (1883) 11 Q. B. D. 327, at p. 343.

C. A.

1899

 CAHN
 v.
 POCKETT'S
 BRISTOL
 CHANNEL
 STEAM
 PACKET
 COMPANY.
 ———
 Collins L.J.

C. A.
1899

CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.
—
Collins L.J.

down in *Shepherd v. Harrison* (1), concludes the case in their favour, and the learned judge below seems to have adopted this view. With the greatest respect for his opinion, I cannot think that section has any bearing on the point now under discussion. It is not addressed to the original obtaining possession of the bill of lading at all. It is addressed to the duty of the recipient after he has got it, and declares that, if he wrongfully retains it, the property in the goods does not pass. All this is wholly consistent with, and indeed assumes custody with consent. His possession becomes wrongful only if he does not honour the bill of exchange; then and only then he is bound to return the bill of lading. Even when by electing not to accept the bill of exchange he has come under a duty to return the bill of lading, he is bailee of the bill of lading for that purpose with the consent of the owner. But at what moment does his retention become wrongful? Suppose he *bonâ fide* intends to honour the bill of exchange, and lays both bill of lading and bill of exchange aside for an interval, while he is attending to other matters, is his possession during this interval without consent? At what point of time does he obtain possession with consent in case he makes up his mind to accept the bill? Surely the "obtaining" possession with consent cannot depend on the fluctuations which his mind goes through during the period that the bill is in his custody. But when *Shepherd v. Harrison* (1) itself is looked at, it is clear that the point there decided was quite outside the question of the possession as distinguished from the *jus disponendi*. The whole point was whether the true owner had shewn that he intended to reserve to himself the *jus disponendi* in the goods so as to negative the inference that the property in them had passed to the person to whom a bill of lading indorsed in blank had been handed by the owner's agent together with a bill of exchange for the price for acceptance. The handing over the bill of lading under such conditions clearly did not rebut the conclusive evidence from the transaction itself that the seller intended to preserve his *jus disponendi* until the acceptance of the bill of exchange, and that therefore no property in the goods passed to the plaintiff

(1) L. R. 5 H. L. 116.

by the delivery of the bill of lading. It was not a question what title the buyer, having no title himself, could pass to a bonâ fide purchaser, but whether he could make title against the seller himself, a point wholly outside the special legislation of these Acts which are based, as I have shewn, on a constructive misleading of third persons. The decision and the dicta are addressed to this point only. "I therefore think," says Lord Cairns (1), "that, when one merchant in this country sends to another under circumstances like the present a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in inclosing these bills of lading and bills of exchange is that, before you use the bills of lading, you shall accept the bills of exchange." This is what he means when he says earlier in his speech: "The meaning of that was: You shall have the bill of lading when you accept the bill of exchange." The same meaning must be attributed to Lord Westbury's paraphrase: "Remember you are not to possess yourselves of the bill of lading until you have accepted the bill of exchange." Property, control, not mere actual custody, is what their Lordships are referring to. The statutory declaration of the buyer's duty, when he has got the bill of lading, could not, any more than a mandate actually given or implied by law out of the circumstances, undo, or defeat the effect of, possession given concurrently with the mandate. It is expressly provided by s. 21, sub-s. 2, that nothing in the Sale of Goods Act shall affect the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. If therefore there was possession with consent here under the Factors Act, this provision would not suffice to defeat it. But for the reasons I have given I think it leaves the law precisely as it was, and has no bearing on the discussion. On the principal point in the case therefore I think the appellants are right.

It remains only to deal with Mr. Cohen's argument that, even on the assumption that Pintscher obtained possession of the bill of lading with the consent of Steinmann & Co., his

C. A.
1899

CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.
Collins L.J.

(1) L. R. 5 H. L. at p. 133.

C. A.
1899

CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.
Collins L.J.

transfer of it to Cahn and Mayer did not suffice to defeat the right of Steinmann & Co. to stop in transitu. He relied on s. 61 of the Sale of Goods Act, which preserves the rules of the law merchant save in so far as they are inconsistent with the Act, and pointed out that, apart from the Factors Acts, a transfer such as that made by Pintscher, having himself no property in the bill of lading, would not have defeated the unpaid vendor's right to stop. But that Mr. Cohen pressed this point upon us I should have thought it unarguable. The law merchant has unquestionably been altered by this Act, which partly re-enacts and partly applies the existing Factors Act. Sect. 21, sub-s. 2 (a), expressly enacts that "nothing in this Act shall affect the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof." The effect of this legislation therefore has been to enable a buyer who has obtained possession of the bill of lading with the consent of the owner to deal with it as effectually as he might have done before if he had had property as well as possession. By s. 25, sub-s. 2, his transfer is made as effectual as if he were a mercantile agent in possession of the goods or documents with the consent of the owner; and by s. 2, sub-s. 1, of the Factors Act, 1889, a disposition of the goods by a mercantile agent under such circumstances is "as valid as if he were expressly authorized by the owner of the goods to make the same." I have no hesitation in holding that a transfer of the bill of lading is a disposition of the goods within the meaning of those words in this section. But Mr. Cohen then fell back on s. 47 of the Sale of Goods Act, and said that that section now defines the only terms under which a buyer may defeat the right to stop in transitu by a sub-sale, and that this case does not fall within them. But the opening words of this section would be sufficient to introduce the Factors Act legislation into this enactment even if it had not been otherwise expressly preserved. They are: "'subject to the provisions of this Act' the unpaid seller's right of . . . stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto."

It then provides that, "where a document of title to goods has been lawfully transferred to any person as buyer or owner" he may defeat the right to stop by a transfer of the document to a person who takes it in good faith and for valuable consideration. Mr. Cohen contended that in this case the bill of lading had not been "lawfully transferred" to Pintscher as buyer, inasmuch as it was not intended that the property should pass. But by s. 11 of the Factors Act, 1889, "The transfer of a document may be by indorsement, or where the document is by custom, or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery." "Delivery" by the Sale of Goods Act, s. 62, means "voluntary transfer of possession from one person to another." I think there can be no doubt whatever that the bill of lading, which was indorsed in blank, was in this case lawfully transferred to Pintscher as buyer. It would indeed be a strange result of this legislation if the transfer of a bill of lading by a buyer to a sub-purchaser under the statutory conditions were ineffectual to defeat the vendor's rights in the case where such transfers are most likely to take place, namely, while the goods are still in transit.

The result is that all Mr. Cohen's points fail. I have dealt with the case throughout upon the same footing as that upon which it was dealt with in the Court below, namely, as though the transfer of the bill of lading was from Pintscher to Cahn and Mayer direct. No point was made before us upon any other hypothesis. As to the point that there had been a bargain made by Pintscher with Cahn and Mayer before the former got possession of the bill of lading, the answer is that Cahn and Mayer's title rests on the transfer of the bill of lading for cash, and not on the prior bargain.

I think that the appellants are entitled to judgment.

ROMER L.J. read the following judgment:—Sect. 25, sub-s. 2, of the Sale of Goods Act, 1893, applies if Pintscher obtained possession of the bill of lading with the consent of Steinmann & Co. Now "possession" in that context means, I think, "actual custody." See the definition of "possession" in the

C. A.

1899

CAHN

v.

POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

Collins L.J.

C. A.

1899

CAHN
v.
POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.
—
Romer L. J.

Factors Act, 1889, s. 1. The question therefore becomes narrowed to one of consent. On that question I have come to the conclusion that Steinmann & Co. did consent to Pintscher obtaining the custody of the bill of lading. No doubt Steinmann & Co. contemplated that Pintscher would, on receipt of the bill of lading, accept the bill of exchange drawn for the price of the goods; and, when Pintscher declined to accept the bill of exchange, he ought not to have dealt with the bill of lading. But I do not think that this is a case where the owners of the bill of lading made it a condition precedent to its custody being obtained by Pintscher that the bill of exchange should be accepted, so that, if the bill of exchange was not accepted, it was not the intention of Steinmann & Co. that Pintscher should obtain the custody of the bill of lading. I think the circumstances negative that view. It appears to me that Steinmann & Co. did intend and consent that the bill of lading and the bill of exchange should both come into the actual custody of Pintscher, though, after Pintscher obtained that custody, he had certain duties to discharge as between him and Steinmann & Co. with regard to both documents. Steinmann & Co., in short, consented that Pintscher should obtain the custody of the bill of lading, though they did not consent that Pintscher should use the bill of lading after it came into his custody before accepting the bill of exchange. See the observations of Lord Cairns in *Shepherd v. Harrison*. (1) It follows that Pintscher was for the purposes of this case in the position of a mercantile agent having possession of the bill of lading with the consent of the owner, and accordingly s. 2 of the Factors Act, 1889, applies, and the plaintiffs Cahn and Mayer obtained a good title to the goods; for under the circumstances of this case it cannot in my opinion be successfully contended by Steinmann & Co. that the transaction between Pintscher and Cahn and Mayer was not a disposition of the goods within the meaning of that phrase as used in s. 2, sub-s. 1, of the last-named Act.

With regard to the second point argued before us, which relates to the right of stoppage in transitu, I do not desire to

(1) L. R. 5 H. L. 116, at p. 133.

add anything to what the other members of the Court have already said

C. A.

1899

Appeal allowed.

CAHN

v.

POCKETT'S
BRISTOL
CHANNEL
STEAM
PACKET
COMPANY.

Solicitors for plaintiffs: *Richard White, for E. M. Clason Dähne, Swansea.*

Solicitors for defendants: *Woodcock, Ryland & Parker, for Forshaw & Hawkins, Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.

1899

Feb. 16.

CARTWRIGHT, APPELLANT; THE GUARDIANS OF
THE POOR OF THE SCULCOATES UNION, RES-
PONDENTS.

Poor-rate—Rateable Value—Public-house—Evidence of advantageous Situation and Business done—6 & 7 Will. 4, c. 96, s. 1.

On an appeal by the occupier against an assessment of a public-house to a poor-rate, an arbitrator, to whom the case was referred, and whose award was to be published in the form of a special case, found that the rents actually paid for other public-houses in the district furnished no criterion of the rent which would be paid for the appellant's house. He rejected evidence, which the respondents desired to give, by cross-examination of the appellant, of the amount of the weekly takings, but he admitted evidence as to the largeness of the business actually done, and as to the advantageous situation of the house for carrying on business:—

Held, affirming the judgment of the Divisional Court, that, the ordinary method of arriving at a valuation by comparison with the market value of other public-houses not being available, the method of arriving at the valuation of this house adopted by the arbitrator was correct.

Dodds v. South Shields Union, [1895] 2 Q. B. 133, distinguished.

APPEAL from a judgment of a Divisional Court on the special case set out below, stated by an arbitrator, by agreement and pursuant to a judge's order, upon an appeal to quarter sessions against an assessment to a poor-rate for the parish of Newington in the respondent union.

1. The appellant was rated as the occupier of the Star and Garter public-house, at 850*l.* gross estimated rental and 680*l.*