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BANK OF BENGAL v. MENDES.

std up to the date of payment, upon the return by the Bank brit ne loan notes for Rs. 1,000 and Rs. 5,000 respectively.

GARTH, C. J.—With regard to what has just been said by my wa ied colleague, I quite agree that the defendant should be th Cberty to use the Bank's name, if he pleases, upon giving pre th an indemnity, and also that when he pays the sum due, the entitled to a return of the securities other than the so 0.000 note.

Appeal allowed.

Sh ttorneys for the appellants: Messrs. *Roberts, Morgan, & Co.*

ttorney for the respondent: Mr. *Hart.*

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at the *Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.*

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Jan. 12, 13, *& Feb.* 3.

PONTANGES MANUFACTURING CO. (DEFENDANTS) *v.* SOURUJ-MULL AND OTHERS (PLAINTIFFS).

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it, *dor and Vendee—Unpaid Vendor—Appropriation of particular goods* r *to Original Vendee—Estoppel by assent to delivery, order—Evidence Act (I of 1872), Chap. VIII.*

A contracted to buy from *B & Co.* 180,000 gunny bags for cash on delivery. Subsequently *C* agreed with *A* to advance Rs. 15,000 against 87,500 bags. *B & Co.* gave delivery orders to *A*, although the goods remained unpaid for. *A* then endorsed certain of the delivery orders over to *C*. On these orders the agents of *B & Co.*, at the request of *A*, wrote the following words,—"the bearer of this will personally take delivery of each lot as required."

C took delivery of 50,000 bags, but *B & Co.* refused to deliver to him the remainder, on the ground that *A* had not paid them according to the terms of his contract.

Held that, although there had been no actual appropriation of any goods to *A*, yet as *B & Co.*, by their agents, had consented to the transfer, and had thereby induced *C* to advance Rs. 15,000 on the delivery orders being endorsed and made over to him, it was not now open to them to repudiate the transfer, which they had, through their agent, been the means of confirming.

Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chap. VIII of the Evidence Act.

A man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention, which the rules of equity and good conscience prevent him from using as against his opponent.

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ON the 15th April, 7th May, and 22nd July 1878, Messrs. Ginly, & Co. entered into three contracts with the defendant Company, for the purchase of 180,000 gunny bags, cash on delivery. On the 23rd July 1878, Messrs. Cohen & Co. contracted with the plaintiffs' deliver 87,500 bags to the plaintiffs on the latter's advance by Cohen & Co. Rs. 15,000. On the same day a delivery order (1), made over to Messrs. Cohen & Co. by the defendant Company, although the bags remained unpaid for by Cohen & Co. The defendant Company, on presentation of the delivery order, which was duly endorsed by Cohen & Co. in favor of the plaintiffs, and countersigned by the agent of the defendant Company, handed over 50,000 bags to the plaintiffs, which bags were subsequently sold by them and realized Rs. 10,000. The defendant Company, however, refused to deliver the remaining 37,500 bags, claiming to hold them as against Cohen & Co., inasmuch as the latter had not paid the defendant Company according to the terms of their contracts of the 15th April and 7th May and 22nd July 1878. The plaintiffs, therefore, brought this suit to recover from the defendant Company the value of the bags of which they were refused delivery.

Mr. *Branson* and Mr. *Bonnerjee* for the plaintiffs.

Mr. *Woodroffe*, Mr. *Jackson*, Mr. *Phillips*, and Mr. *Stokoe* for the defendants.

WILSON, J.—In this case one Cohen bought of the defendants 87,000 bags. They were unpaid for, but Cohen obtained from the defendants a delivery order in respect of them,—that is to say, an order by the defendants upon those in charge of their own warehouses, authorizing delivery of the bags. Cohen proposed to the plaintiffs to advance money on the security of the goods represented by the delivery order. Thereupon Cohen wrote the letter of the 23rd July 1878.

From COHEN BROTHERS AND CO., 11, *Radha Bazar Lane, Calcutta, to* MESSRS. MACNEILL AND CO., *Agents, Ganges Jute Co., dated 23rd July* 1878.

DEAR SIRS,—With reference to your delivery order, Nos. 45 to 52, for 57,500 C bags, and Nos. 53 to 55, for 30,000 A twills, we have

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the ed the delivery order to Baboo Roop Chund Samareemull, to whom distrill please deliver the bags as may be required.

Yours faithfully,
COHEN BROTHERS & CO.

mind hen, and Ramrutton, the plaintiffs' manager, went together ening defendants' agents, and saw Mr. Lyall, the gentleman acted who had charge of the defendants' business. Ramrutton was poin ed out as the man to receive delivery, and the letter was give n to Mr. Lyall.

Mr. Lyall first initialled the letter, and subsequently wrote on it the words,—"The bearer of this will personally take delivery of each lot as required." The letter was given to Ramrutton, and on the faith of it, the plaintiffs advanced Rs. 15,000 to Cohen, receiving from him the letter and the delivery orders. The defendants delivered to the plaintiffs 50,000 bags, and these were sold by them and realized Rs. 10,000. They refused to deliver the remaining 37,000 bags, claiming to hold them for the unpaid price which Cohen had failed to pay, and the plaintiffs are thus out of pocket to the extent of Rs. 5,000. These seem to be the material facts of the case. The plaintiffs' witnesses, it is true, added other circumstances, which they say took place at the time when Mr. Lyall wrote on the letter. They say that Ramrutton expressly informed Mr. Lyall that he was about to advance money on the goods; that Mr. Lyall expressly promised, if he should so advance, the goods would be delivered to him. And they go so far as to say that Mr. Lyall was guilty of a purposeless fraud in misstating to Ramrutton what he had written on the letter. All this I entirely disbelieve. On the undisputed facts, however, I think the plaintiffs are entitled to succeed in the suit. Where the purchaser of goods transfers his interest to another, and gives that other a delivery order or other document purporting to entitle him to present possession, and where the original vendor assents to the transaction by acknowledging the title of the transferee, the original vendor cannot afterwards either deny the property of the transferee, or set up a lien for unpaid price against his right of possession, at any rate if the transferee has acted on the faith of such acknowledgment.

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Section 98 of the Contract Act states this doctrine plainly but it only mentions in express terms the case of a sub-purchaser and there may be some doubt whether it includes the case of a mortgagee; if it does, there is, I think, no doubt of the plaintiffs' right to recover. If it does not, then the case is governed by the previous law, and the cases of *Hawes* v. *Watson* (1), *Pearson* v. *Dawson* (2), *Woodley* v. *Coventry* (3), *Knights* v. *Wiffen* (4) are, I think, clear authorities for the law as I have stated it.

The plaintiffs' interest in the goods undelivered amounts to Rs. 5,000, and it has been shown that they are worth more than that sum. There will, therefore, be a decree for the plaintiffs for Rs. 5,000, with costs on scale 2.

The defendants appealed.

Mr. *Kennedy* (with him Mr. *Phillips*) for the appellants.—The plaintiffs claim as being the absolute proprietors of the bags; instead of claiming as mortgagees, they have set up a case of contract, but there is no written contract. Mr. Justice Wilson has found, that although there was no contract, the plaintiffs had an equitable claim. We did not claim a lien on any of the bags which were paid for on delivery, but only on those undelivered and unpaid for. [GARTH, C. J.—The question is, whether the defendants did or did not put it out of their power to claim a lien on the 37,500 bags undelivered.] In the case of *Knights* v. *Wiffen* (4), the goods had not passed, and it does not appear whether the sale was for cash or on credit. The vendor's lien does not arise until there has been a transfer of possession. Further, the case was decided on the point of estoppel. If the delivery order acted as an estoppel, we are placed in no worse position if we gave something else beyond the delivery order. *Farmeloe* v. *Bain* (5) lays down that a delivery order does not estop the defendants from setting up as against the vendees of the first purchasers their right as unpaid vendors to withhold delivery. [PONTIFEX, J.—That case only goes so far as this;

(1) 2 B. & C., 540.
(2) E. B. & E., 448; S. C., 27 L. J., Q. B., 248.
(3) 2 H. & C., 164.
(4) L. R., 5 Q. B., 660.
(5) 1 L. R., C. P. D., 445.

for; the plaintiffs must pay if they wish to sue. There is a question in that case between a delivery order given to the original vendee, and one given to some one else.] The meaning of the decision in *Woodley* v. *Coventry* (1) is, that where a man acknowledges that he holds goods on behalf of another, he cannot afterwards say he does not do so as against those who acted on the representation. *The Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (2) shows, that delivery orders may, in some cases, become securities, and pass from hand to hand, free from vendor's lien. [PONTIFEX, J.—That is not a case of estoppel. GARTH, C. J.—The question there was, whether a document drawn up in the form there used, avoided a right of lien.] Section 115 of the Evidence Act intends to include all the cases of estoppel applicable to India, and all other cases under any of the English cases used as estoppels are therefore excluded. [PONTIFEX, J.—In what part of the Act do you find that the estoppels mentioned, are the only cases of estoppels to be used out here. Supposing ss. 115, 116, and 117 had been omitted from the Act, could not the Courts have given effect to the doctrine of estoppel?]

Mr. *Phillips* on the same side.—I submit a plaintiff cannot, after making a case of express contract, throw over that, and rely on the doctrine of estoppel. If the defendant Company's agent had known he was giving up his right to cash payment, is it probable that he would have gone on with the contract. Can, therefore, a person, when acting in ignorance of such a fact, be said to be estopped from denying what he was ignorant of? Most of the cases cited in the judgment were not for cash on delivery. In *Knights* v. *Wiffen* (3) and *Woodley* v. *Coventry* (1) no question was raised as to cash payment, so it must have been unnecessary to decide that question. *Knights* v. *Wiffen* (3) decides that, if there were no sub-sale, a vendor might say, "I refuse to deliver because you are insolvent;" but if there had been no insolvency, he would have been bound to deliver. The goods in *Pearson* v. *Dawson* (4) were sold on a bill at three

(1) 2 H. and C., 164.
(2) L. R., 5 Ch. D., 205.
(3) L. R., 5 Q. B., 660.
(4) E. B. & E., 448; S. C., 27 L. J., Q. B., 244.

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months' sight, and therefore the vendee had a right to [illegible] delivery without payment. In *Dixon* v. *Yates* (1) the go[illegible] were sold on credit, or paid for by bill. In *Griffiths* v. *Perry* [illegible] no particular iron was ever set apart or appropriated to ans[illegible] the contract. It requires a stronger case than those mentioned [illegible] the judgment of the lower Court before our right of lien can [illegible] done away with; the plaintiffs in this case wish to substitute [illegible] the old contract, one fresh and larger,—*i.e.*, they endeavour to g[illegible] rid of an express term of the old contract, *viz.*, "cash [illegible] delivery." As to what is considered essential in question [illegible] estoppel, see *Freeman* v. *Cooke* (3).

Mr. *Branson*, Mr. *Bonnerjee*, and Mr. *Allen*, for the respondents, were not called upon.

The judgment of the Court was delivered by

GARTH, C. J.—We think that the lower Court has taken a correct view of this case. The plaint does not very correctly describe what the true cause of action is against the defendants; but the evidence is conflicting, and the circumstances peculiar; and we think that the learned Judge was fully justified in giving the plaintiffs a decree for what really appears to be their due.

The facts, as we consider them to be proved, are these:

Messrs. Cohen Brothers had contracted with the defendants to buy of them a large number of gunny bags in the months of April and May 1878. The time for taking delivery of these bags had been extended at the request of Messrs. Cohen; and on the 22nd July there remained 107,500 bags still undelivered.

The defendants had been pressing Messrs. Cohen to take delivery of these bags; and on the last-mentioned day Mr. Cohen, a member of the firm, called at the office of Messrs. Macneill and Co., the defendants' agents. He informed them that he had arranged to take delivery of 57,500 bags, and he then made a further contract for the purchase of 30,000 twilled bags. Accordingly, on the following morning, the 23rd July, the defendant Company sent to Messrs. Cohen delivery orders

(1) 5 B. and Ad., 313, 330. (2) 1 Ellis and Ellis, 680.

(3) 2 Exch. Rep., 654.

the 57,500 bags, and also for the 30,000 twilled bags sold the previous day. On the afternoon of that day Mr. Cohen in called at the office of Macneill and Co., and saw Mr. Lyall, o had the conduct of their business as the agents of the endants. According to Mr. Lyall's own evidence, Mr. Cohen, this occasion, handed him an open letter from Cohen Bro- ers to Macneill and Co., in the following terms:

MEMORANDUM.

rom COHEN BROTHERS AND CO., 11, *Radha Bazar Lane, Calcutta, to* MESSRS. MACNEILL AND CO., *Agents, Ganges Jute Co., dated 23rd July* 1878.

DEAR SIRS,

WITH reference to your delivery orders, Nos. 45 to 52, for 57,500 C bags, and Nos. 53 to 55, for 30,000 A twills, we have handed the delivery orders to Baboo Roop Chand Samareemull, to whom you will please deliver the bags as may be required.

Yours faithfully,
COHEN BROTHERS & CO.

Mr. Cohen said, that he had made arrangements to take the bags, for which they had received the delivery orders; but that he wished Macneill and Co. to deliver them to a person whom he had brought with him, the witness Ramrutton, who in fact represented the plaintiffs.

He then went and fetched Ramrutton into the room, and pointing to him said, that he was the man whom he wanted to have the bags, and begged Mr. Lyall to write to the manager to that effect. Mr. Lyall said, that there was no necessity for such a letter; but if he wished it, he would give one. He then proposed merely to initial the open letter; but Mr. Cohen said that that would not be enough, because he wished the bearer personally to get delivery; and therefore Mr. Lyall wrote these words upon the letter,—"the bearer of this will personally take delivery of each lot as required." Mr. Lyall states that he had no conversation with Ramrutton, and that this was substantially all that passed.

Ramrutton, on the other hand, says, that he told Mr. Lyall, that Roop Chund Samareemull, one of the plaintiffs, wanted the paper

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signed by Mr. Lyall as a guarantee for the 87,500 bags; that if he signed it, the plaintiffs would advance Rs. 15,000 Cohen; so that, according to his evidence, Mr. Lyall had not of the whole arrangement between the plaintiffs and Mess Cohen. This fact of Ramrutton's statement, however, the learn Judge in the Court below has disbelieved, and we are n disposed to question the correctness of his finding in th respect. Mr. Lyall, on the other hand, states, that he believ Ramrutton to be merely a servant of Messrs. Cohen, and tha the only reason why he was asked to sign the letter, was i order to secure the delivery of the bags to that particula man. But this statement of Mr. Lyall really amounts to nothing. What was said and done on this occasion is of course evidence; but what was passing in Mr. Lyall's mind is no evidence as against the plaintiffs. We are bound to put a reasonable construction on what occurred, and to view the transaction as Mr. Lyall himself, being a mercantile man and a man of business, ought to have regarded it: and dealing with it in that way, it seems to us quite impossible to accept the explanation which Mr. Lyall himself, and the appellants' counsel have endeavoured to impress upon us. It is obvious that Ramrutton was introduced to Mr. Lyall, not as a servant of Cohen and Co., but as a third person, to whom he desired Mr. Lyall to transfer the right of taking bags under the delivery orders. Messrs. Cohen had experienced great difficulty in taking delivery of these bags; it is pretty clear that this difficulty arose from their not being in a position to pay for them; and the fact of Ramrutton being introduced, and of Messrs. Macneill being asked as a favor to make a special order for the delivery of the bags to him, was quite sufficient, as it seems to us, coupled with the other circumstances of the case, to have fully apprized Mr. Lyall of what he was really asked to do.

The delivery orders which had been sent on the morning of the 23rd would have enabled any servant of Messrs. Cohen to obtain delivery of the goods upon paying for them. It would have been quite unnecessary to ask Mr. Lyall as a favor to deliver the goods to any of Messrs. Cohen's servants; and Mr. Lyall knew that perfectly well. The favor which Mr. Cohen

asked was to obtain an order for delivery to the plaintiffs, with whom he was making the arrangements; and we think that Mr. Lyall must, as he ought to, have known that this was Mr. Cohen's intention.

Certain it is, that, upon the faith of the order which Mr. Lyall signed for the delivery of the goods to Ramrutton, the plaintiffs were induced to, and did actually, advance Rs. 15,000 to Messrs. Cohen on that same day; and the larger portion of the goods was in fact afterwards delivered to the plaintiffs under that order, without their being required to pay for them.

The case, therefore, appears to us to come clearly within the principle of the authorities which were acted upon by the learned Judge, and especially the cases of *Knights* v. *Wiffen* (1) and *Woodley* v. *Coventry* (2). In the latter case, the defendants, who were warehousemen, had sold to a Mr. Clark a portion of a large quantity of flour, which was lying at their warehouse, without making any appropriation to him of any particular barrels. Mr. Clark then sold to Messrs. Woodley, the plaintiffs, a portion of that flour, and gave them a delivery order for it; which delivery order was taken to the defendants, who said that "it was in order," and subsequently delivered to the plaintiffs a portion of the flour. Clark then became insolvent, and the defendants refused to deliver to the plaintiffs the remainder of the flour. But it was held, that as the defendants had consented to the transfer, and had thereby induced the plaintiff to act upon it, it was not competent to them to recede from their word, or to repudiate the transfer which they had been the means of confirming.

In that case, as in this, no actual appropriation of the goods had been made to the original purchaser; and the point was taken, as it has been here, that as there had been no severance of the particular goods, no property in them had passed to the vendees; but the Court considered that as the delivery orders had been assented to by the defendants, the latter were estopped from denying that they held the goods, answering to the description in those orders, at the disposal of the person to whom the orders were given.

(1) L. R., 5 Q. B., 660. (2) 2 H. & C., 164.

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The case of *Knights* v. *Wiffen* (1) is to the same effect, there also no appropriation of the goods had been made to the original purchasers at the time of the transfer.

It has been further contended by the appellants, that ss. 115 to 117 contained in Chap. VIII of the Evidence Act lay down the only rules of estoppel which are now intended to be in force in British India; that those rules are treated by the Act as rules of evidence; and that, by s. 2 of the Act, all rules of evidence are repealed, except those which the Act contains.

But if this argument were well founded, the consequences would indeed be serious. The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of ss. 115 to 117, however important those questions might be to the due administration of the law.

The fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment in s. 115 is, no doubt, in one sense, a rule of evidence. It is founded upon the well-known doctrine laid down in *Pickard* v. *Sears* (2) and other cases, that where a man has made a representation to another of a particular fact or state of circumstances, and has thereby wilfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the fact or state of circumstances was not true. In such a case the rule of estoppel becomes so far a rule of evidence, that evidence is not admissible to disprove the fact or state of circumstances which was represented to exist. But "estoppels," in the sense in which the term is used in English legal phraseology, are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chap. VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent his using as against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe* v. *Oliver* (3);

(1) L. R., 5 Q. B., 660.
(2) 6 Ad. & E., 469.
(3) 2 Smith's L. C., 8th edn., pp. 775 *et seq.*

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and whatever the true meaning of s. 2 of the Evidence Act may be as regards estoppels which prevent persons from giving evidence, we are clearly of opinion that it does not debar the plaintiffs in this case from availing themselves of their present contention as against the defendants.

When once Mr. Lyall had consented to the transfer which had been made to the plaintiffs by his instrumentality, and had placed it in the power of Messrs. Cohen to obtain an advance from the plaintiffs on the strength of it, it would clearly be inequitable to allow the defendants to recede from the arrangements which had been made by their agent, Mr. Lyall.

Holding, therefore, as we do, that the judgment of the Court below was right on principle, and as there was no contention on the part of the appellants that the amount of the damages was erroneously estimated, the appeal will be dismissed with costs on scale 2.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Roberts, Morgan, & Co.*

Attorneys for the respondents: Messrs. *Orr* and *Harriss.*

Before Mr. Justice Wilson.

GOBIND LOLL SEAL AND OTHERS *v.* DEBENDRONATH MULLICK AND OTHERS.

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Limitation Act (XV of 1877), sched. ii, arts. 139, 142, 144.

In a suit to recover possession of a house, the plaintiffs alleged that their predecessor in title had permitted *A*, the father of the defendants, to occupy the house in question without paying any rent for it, and that since *A*'s death, which took place about twenty years before the institution of the suit, the defendants had been permitted to reside therein without paying rent. The defendants contended, that the plaintiffs' predecessor in title had made a gift of the house to *A*; that he had remained in possession of it until his death; and that since then they had been in possession of the house by virtue of the gift.

Held, that the suit was barred by limitation under Act XV of 1877, sched. ii, art. 142.

The meaning of art. 142 is, that where there has been possession followed by a discontinuance of possession, time runs from the moment of its discon-