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*May. 7.

*Nov. 14.

JAMES CORBY *et al*.....APPELLANTS;

AND

GEORGE E. WILLIAMS.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Vendor and purchaser—Jus disponendi—Delivery.

W., a commission merchant residing at *Toledo*, *Ohio*, purchased and shipped a cargo of corn on the order of *C. et al.*, distillers at *Belleville*, and drew on them at ten days from date for the price, freight and insurance. This draft was transferred to a bank in *Toledo* and the amount of it received by *W.* from the bank, and the corn, having been insured by *W.* for his own benefit, was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy, and bill of lading

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

(1) See 2nd Stephen's Commentaries, 85, and Kent's Commentaries, 9th Ed. 454.

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to their agents at *Belleville*, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by *C. et al.*, but the cargo arriving at *Belleville* in a damaged and heated condition, between the dates of the acceptance and the maturity of the said draft, *C. et al.* refused to receive it and afterwards to pay draft at maturity. Thereupon the bank and *W.* sold the cargo for behalf of whom it might concern, credited *C. et al.* with the proceeds on account of draft, and *W.* filed a bill to recover balance and interest.

Held, Reversing the judgment of the Court of Appeal of *Ontario*, (*Strong*, J., dissenting), That the contract was not one of agency and that the property in the corn remained by the act of *W.* in himself and his assignees, until after the arrival of the corn at *Belleville* and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in *W.* and his assignees, *C. et al.* should not bear the loss.

APPEAL from the judgment of the Court of Appeal of *Ontario*, whereby the decree pronounced in favor of the appellants by the Court of Chancery for *Ontario*, was reversed with costs, and a decree made in favor of the respondent (1).

This was a bill filed in the Court of Chancery for *Ontario* to recover portion of the amount of a bill of exchange drawn by the respondent on the appellants by their request and accepted by them in payment of a cargo of corn purchased and shipped by the respondent, a commission merchant, residing at *Toledo, Ohio*, on the order and for account of the appellants, distillers, at *Belleville, Ontario*. Upon the arrival at *Belleville* of the cargo, between the dates of the acceptance and the maturity of the said draft, the appellants refused to receive it and afterwards to pay the said draft at maturity, alleging the corn to be heated and useless, and the respondent thereupon sold the cargo for behalf of whom it might concern and for the best price he could obtain, giving the appellants credit for the proceeds on account of their said acceptance, and sued appellants for the balance and interest.

(1) 5 Ont. App. R. 626.

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The appellants, by their answer, set up that they had contracted with the respondent for the delivery of the corn in good order, at *Belleville*, and that they had refused to honor their acceptance, as the corn was discovered to be musty and in bad condition on its arrival.

The pleadings and facts are fully set out in the judgments hereinafter given.

Mr. *Walter Cassels* for appellants:

The appellants do not admit that there is any evidence showing that they were contracting with the plaintiff as an agent in the matter, and on the contrary, as will be shown hereafter, the conduct of the plaintiff shows conclusively that he was not contracting as a commission agent, but that he was contracting as a principal.

The Court of Appeal assume that under the true construction of the contract the defendants were entering into a contract whereby they only agreed to pay for the corn when delivered in *Belleville*. It is clear from the correspondence and telegrams which passed between the parties that such was the intention on the part of the defendant, and the appellants submit that unless it is determined that a commission agent cannot enter into a contract whereby he binds himself to deliver at *Belleville*, then the contract must be construed according to its legal effect, and it is of no consequence whether the plaintiff was a commission agent or not.

This was the first contract entered into between the plaintiff and the defendants. It appears from the evidence of the plaintiff himself that the ordinary rate of commission which should be charged was one-half cent a bushel. It appears that in this case however, the plaintiff purchased the corn in question from different people. It appears that he purchased from *Howe, Son & Co*, about 6,600 bushels at forty-one cents. In order to fulfil his contract the plaintiff borrowed the remainder

of the corn to make up the cargo from *King & Co.*, and on the following Monday purchased corn at 40½ cents and replaced with the corn so purchased that borrowed from *King & Co.*, therefore in regard to the portion of the corn so purchased the plaintiff so purchased it at a half a cent a bushel less than charged to the defendants these appellants. This difference would, had the plaintiff been acting as agent in the matter, have accrued to the benefit of the defendants, but the plaintiff appropriated this difference for his own use.

We submit that it is of no consequence what the amount of the commission retained by the plaintiff was, whether a large or a small sum. It is a cogent and convincing piece of evidence that the plaintiff was not acting as agent in the matter, because if he was, the benefit of the reduction should have gone to the purchaser. The position assumed by the Court of Appeal, viz., that if he had had to pay more to *King & Co.*, than forty-one cents, the plaintiff would have been the loser, demonstrates the force of this contention.

In due course, as appears by the evidence, the corn would have reached *Belleville* within five days after leaving *Toledo*. If the judgment of the Court of Appeal is correct, so soon as the corn reached *Belleville* it would be the property of the defendants, the present appellants. The plaintiff chose to give ten days time within which the defendants were to pay for the corn, but the plaintiff assigned to the Merchants' Bank, in *Toledo*, the bill of lading and the policy of insurance, and this bill of lading and policy of insurance were transmitted to *Belleville* with instructions that the corn was not to be delivered over until payment of the draft. Therefore, had the vessel not been detained on the voyage the corn would have been at the wharf in *Belleville* for five or six days before the defendants could have obtained the same, pending the maturity of the draft.

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Again, when the corn was damaged the plaintiff without reference to the defendants, the present appellants, applies to the insurance company for the insurance due by reason of the damage to the corn. The insurance company and the plaintiff, each appointing an arbitrator, an award is made assessing the amount due. All this is done in the absence of the present appellants and without reference to them. Whereas if the contention of the plaintiff and the judgment of the Court of Appeal is correct, the plaintiff had no right to the insurance money, and any loss due by the insurance company was payable to the present appellants. The plaintiff also, without reference to the present appellants, sold the corn in question.

We contend, also, that the plaintiff was a vendor. If this be so, the question is one entirely of the construction of the contract under telegrams A & B especially the words "will you deliver here at 47." Under this contract the property would have remained vested in the plaintiff.

In addition to the authorities referred to in the judgment of the Court of Appeal we would refer to *Ireland* v. *Livingstone* (1); *Jenkins* v. *Brown* (2); *Addison* on Contracts (3); *Kirchner* v. *Venus* (4); *Lewis* v. *Marshall* (5); *Leake* on Contracts (6); and *Bartlett* v. *Pentland* (7); *Parsons* on Contracts (8); *Robinson* v. *Mollet* (9); *Sotilichos* v. *Kemp* (10); *Hodgson* v. *Davies* (11); *Rogers* v. *Woodruff* (12); *Inglebright* v. *Hammond* (13); *Hayes* v. *Nesbitt* (14).

As to the construction of the contract, the learned judges of the Court of Appeal have held that the con-

(1) L. R. 5 H. L. 408.
(2) 14 Q. B. 496.
(3) 7th ed. p. 185.
(4) 12 Moo. P. C. 361.
(5) 7 M. & G. 745.
(6) P. 197.
(7) 10 B. & C. 760.
(8) Vol. 2, 561.
(9) L. R. 7 H. L. 815.
(10) 3 Ex. 105.
(11) 2 Camp. 532.
(12) 23 Ohio 632.
(13) 19 Ohio 337.
(14) 25 U. C. C. P. 101.

tract contended for by these appellants is the correct one. We would refer to *Dunlop* v. *Lambert* (1); *Gilmour* v. *Supple* (2); *Leake* on Contracts (3); *Story* on Contracts (4); *Bundy* v. *Johnson* (5); *M'Giverin* v. *James* (6).

Mr. *Bethune*, Q.C, and Mr. *Machar*, for respondent:

The evidence establishes that the plaintiff acted in the transaction of the purchase of the cargo of corn in question herein as the agent of the defendants, as was held by the Court of Appeal, and therefore the cargo was at the risk of the defendants from the time it was shipped on board the schooner "*Annandale*."

The defendants, having, after receipt of advice from the plaintiff of the purchase by him for their account and risk (in terms of the invoice enclosed in plaintiff's letter of advice) without objection or dissent, accepted the bill of exchange drawn by plaintiff at their request, accompanied by the bill of laiding and other shipping documents, must be held to have thereby adopted the construction of their order in the sense understood and now contended by the plaintiff, and could not afterwards repudiate their engagement under pretence of a different construction, and cannot now be heard to advance a different contention.

The defendants at all events by their silence and subsequent acceptance recognized and ratified the plaintiff's action as in compliance with their instructions.

The evidence establishes (and it was conceded by the defendants upon the argument at the trial) that the said cargo when shipped was in good order and condition, and was of the quality or description known as old high mixed corn, and therefore the responsibility for any deterioration or alteration in its condition

(1) 6 Cl. & Fin. 622.
(2) 11 Moo. P. C. 560.
(3) P. 826.
(4) P. 803.
(5) 6 U. C. C. P. 221.
(6) 33 U. C. Q. B. 212.

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observable upon its arrival at *Belleville* was not in anywise due to or chargeable against the plaintiff.

The evidence further establishes that the said cargo was really paid for by the defendants, the plaintiff not having advanced any money of his own in order to pay for the same, but the whole price, including commission, insurance, &c., was derived through the draft upon the defendants, which was discounted at the Merchants' National Bank of *Toledo*, and was accepted by the defendants upon presentation to them.

The learned counsel then referred:

A.—As to the relation of agency between plaintiff and defendants *inter se* and construction of orders and ratification of acts: *Benjamin* on Sales (2nd Am. ed.), p. 476; *Story* on Agency (8th ed.), ss. 33 (note 3), 34, 74-77, 82, 111, 112, 199 (note 6), 400-401 a.; *Paley* on Agency, by *Boyd*, 248, 373, 382; 2 *Bell's* Commentaries, § 799-802.

English cases—*Ireland* v. *Livingston* (1); *Baring* v. *Corrie* (2); *Grissell* v. *Bristowe* (3).

American cases—On construction and ratification: *Abbott's* N. Y. Digest (4).

B.—As to cargo being at defendants' risk, even as between vendor and vendee: *Chitty* on Contracts (10 ed.), vol. 1 pp. 519 (note), 520; *Benjamin* on Sales, pp. 542, 546, 551.

English cases—*Bull* v. *Robinson* (5); *Dickson* v. *Zizinia* (6); *Tarling* v. *Baxter* (7); *Martineau* v. *Kitching* (8).

American cases—*Crawford* v. *Smith* (9); *Willis* v. *Willis* (10); *Hooben* v. *Bidwell* (11); *Merrill* v. *Parker* (12).

(1) L. R. 5 Q. B. 515.
(2) 2 B. & Ald. 143.
(3) L. R. 4 C. P. 36.
(4) Sec. 3 p. 392.
(5) 10 Ex. 342.
(6) 10 C. B. 602.
(7) 6 B. & C. 362.
(8) L. R. 7 Q. B. 436.
(9) 7 Dana 59-61.
(10) 6 Dana 48.
(11) 16 Ohio 509.
(12) 24 Maine 89.

Mr. *Walter Cassels* in reply.

RITCHIE, C. J. :—

The plaintiff is doing business as a commission merchant at *Toledo*, in the *U. S. A.* The defendants are grain dealers, residing and doing business at *Belleville*, in the dominion of *Canada*. This was the first business transaction between the parties; defendants had had dealings with plaintiff's brother, in whose employ plaintiff was, and to whose business he succeeded. The communications between the parties in reference to the matters in controversy were by means of telegrams, and from these telegrams must be gathered the contract in this case. The first, of which we have any evidence, was from the plaintiff to one of the defendants, and is as follows :

1 Telegram.—(A.)—*Toledo*, Sept. 13th, 1878. To *H. Corby*, jun., *Belleville, Ont.*: Schooner *Annandale* obtainable 5c., vessel paying unloading. High mixed costing 47.

Geo. E. Williams.

It is very obvious that this must have been preceded by some inquiry as to the transportation and cost of corn in the *Toledo* market; if so, it must have been by letter or telegram, the contents of which either party might have shown; as neither did do so, it may be inferred that any communication which did take place would throw no additional light in support of the contention on either side.

To this telegram of the 13th, defendants on the same day reply,

(B.) *Belleville, Ont.*, Sept. 13th, 1878, 6.45 p.m. To *Geo. E. Williams*: Do you not think corn will be lower next month? Will you deliver here at 47.

H. Corby & Sons.

To which plaintiff immediately answers :

(C.) *Toledo*, Sept. 13th, 1878. To *H. Corby & Sons, Belleville, Ont.*: Higher corn predicted by exporting customers. *England* advancing. October selling here half above cash. We don't antici-

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pate lower prices. Receipts light. Roads bad. Good shipping demand, offer cargo 47, cost freight, commissions, insurance. Prompt acceptance.

Geo. E. Williams.

Plaintiff not receiving a prompt acceptance of this offer from the defendants, the next day telegraphs as follows:

(D.) *Toledo*, Sept. 14th, 1878.—To *H. Corby & Sons, Belleville, Ont.:* 13,000 or 16,000 spot, vessel obtainable, vessel paying unloading expenses. Hurry answer. *Geo. E. Williams.* (Pencilled by *Clark.*) The captain is waiting answer. He wants to give *Randell* by two o'clock, but will wait for your answer.

Clark.

On the same day defendants answer as follows:—

(E.) *Belleville, Ont.*, Sept. 14th, 1878.—To *G. E. Williams:* Will take 13,000 old high mixed 47 delivered here, vessel paying loading. Draw ten days through Merchants' Bank here. Send prime corn.

H. Corby & Sons.

And on the same day plaintiff telegraphs his acquiescence and execution of the order in these terms:—

(F.) *Toledo, Ohio*, Sept. 14th, 1878.—To *H. Corby & Sons, Belleville, Ont.:* Telegram received. Executed order—limit. Loading schooner *Annandale.* About 13,000.

Geo. E. Williams.

These are all the communications that passed with reference to the purchase of this corn.

On the 16th of Sept. plaintiff thus enclosed the invoice and advised the drawing of the draft and sailing of the vessel:

(K.) *Toledo, Ohio*, Sept. 16th, 1878.—To Messrs. *H. Corby & Sons, Belleville, Ont.:* Gentlemen, we enclose invoice of 12,965 $\frac{30}{100}$ bushels H. Mix. corn per schooner *Annandale*, draft as stated made to-day. This cargo of corn we know will please you. It is as nice a one as has left here this season. The schooner sailed this p.m. with a fair wind. Corn ruled dull to-day, and prices are a shade lower. Any demand, however, would set prices up again rapidly, as the stocks are not heavy and our receipts only moderate. See P. C. enclosed.

Yours truly,

Geo. E. Williams.

EXHIBIT (L.) Account purchase by *George E. Williams* of 12,595·30

bushels high mixed corn, for account and risk of Messrs. *H. Corby & Sons.* Shipped schr. *Annandale:*

1878—Sept. 14, purchased 12,965·30 bush., at 42c	$5,445 51	
Freight, 5c. Cost afloat, *Belleville*, 47c. Advanced Captain	20 00	$5,465 51
CREDIT.		
Sept. 16, by draft 10 days	$5,492 16	
Less interest 10 days at 10 p. c. and exchange ⅛	26 65	$5,465 51

E. & O. E.

Toledo, Ohio, Sept. 16, 1878. *George E. Williams.*

Part of the corn thus shipped was purchased at different prices by plaintiff and part borrowed by him from another party, and subsequently returned. As to this purchase by defendants, plaintiff's brother in his employ, a witness on his behalf, says:

In this case, on the purchase of this specific cargo, it was out of the usual course, in that time was asked for in payment. The defendants asked a ten days draft, equivalent to 13 days time.

The corn was shipped under the following bill of lading:

EXHIBIT X.—(*Annandale's* BILL OF LADING).

Toledo, O., Sept. 16th, 1878.

Shipped, in good order and condition, by *George E. Williams*, successor to *E. R. Williams & Co.*, as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner *Annandale*, whereof————is Master, bound from this port for *Belleville*, the following articles as here marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below (dangers of navigation, fire, and collision excepted).

And it is agreed between the carriers, and shippers and assigns, that in consideration especially of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns, and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination (except when grain is heated or heats in transit), and that they will deliver the full quantity hereon named, or pay for any part of cargo not

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delivered, at the current market price; the value thereof to be deducted from the freight money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers and owners rights of property and action therefor.

And said shippers or owners hereby assign their claim and right of action for such deficiency or deficiencies to the carrier.

In witness whereof, the said master of said vessel hath affirmed to ——— bills of lading of this tenor and date, one of which being accomplished the other to stand void.

The Merchants' Nat. Bank,
Toledo, O. C. C. Doolittle, Cr.

Order of — 12,965 30 Bus. H: M. Corn.
Merchants' National Bank, — Freight 5c. per Bu.
Toledo, O., — Vessel to unload.
To the Merchants' Bank of *Canada*, — Advanced $20 on acct. freight.
Belleville, Ont., — *Peter Mowat.*

Care *H. Corby & Son*,
Belleville, Ont.

The draft is as follows :—

EXHIBIT (Z.) ACCEPTANCE IN SUIT.

Protested by me for non-payment this 30th day of Sept., 1878. Charges $1.32. *R. J. Bell*, N.P.

Accepted payable Bank, Merchants' *Belleville*. *H. Corby & Son.* Sept. 19, 1878.

Geo. E. Williams, successor to *E. R. Williams & Co.*
Grain Commission Buyers,
$5492.16. *Toledo, Ohio*, Sept. 16th, 1878.

Ten days after date, with exchange on *New York* and *Belleville* Bank charges, pay to the order of ourselves, fifty-four hundred and ninety-two $\frac{16}{100}$ dollars, at

Value received, and charge the same to account of *Geo. E. Williams.*

To Messrs. *H. Corby & Sons, Belleville, Ont.*

This draft was transferred by the plaintiff to the Merchants' National Bank, *Toledo*, and the amount of it realized from them by plaintiff; and with it the bill of lading and policy of insurance were handed to the bank as security for the payment of the draft, the amount of which they had so advanced to plaintiff. The plaintiff thus describes his mode of dealing with the bank :—

Q.—Whose name was used in the purchase of that corn? A.—The general custom is for us to notify our banks what orders we have, and they supply us with the currency, and we agree to give them a bill of lading. The bank furnishes the money on my promise to give them the bill of lading and draft on our customer when the corn is loaded, and in this case it was on *Corby & Son.*

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With this arrangement, it must be borne in mind, the defendants had no connection. Under ordinary circumstances in the usual course of dealing, when payment was made by draft at sight it would no doubt work satisfactorily to all parties, but was in my opinion quite inapplicable to such a case as this, which, as the witness says, "was out of the usual course, in that time was asked in payment." The bill of lading was by the Merchants' National Bank of *Toledo* indorsed over with the draft and policy of insurance and transmitted to the Merchants' Bank of *Canada*, *Belleville*, for collection and remittance, with instructions to that bank not to hand over the bill of lading or allow the cargo to be delivered till the draft was paid.

The draft was accepted by defendants on the 19th September, 1878.

The evidence shows that under ordinary circumstances the voyage between *Toledo* and *Belleville* is under five days, so that, as the vessel sailed on the same day the draft was drawn and dated, the cargo ought in due course, without accident, to have reached *Belleville* eight days before the draft became due; in fact the grain arrived at *Belleville* several days before the draft fell due, in a damaged condition, having been injured in course of transportation, and defendants refused to have anything to do with it. The plaintiff and the bank took possession of the cargo, disposed of the same and settled with the underwriters and discharged them. On the draft maturing, the defendants allowed it to go to protest, denying any liability to pay for the corn, hence the present action to recover the difference between what the bank and plaintiff received on account of insurance and the amount of the draft.

The defendants resist this claim on two grounds. First, that under the contract, as it is to be collected from those telegrams, the plaintiff agreed to deliver the

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corn in good condition at *Belleville* for 47 cents, and, not having done so, cannot recover the price; and secondly, that plaintiff, having assigned the bill of lading and policy of insurance to the Merchants' Bank of *Toledo*, and the same having been transmitted by them to *Belleville* with instructions that the corn was not to be delivered to defendants until payment of the draft, no property passed to defendants and the corn continued and was at the time of its injury the property and at the risk of plaintiff or the bank and not of the defendants.

As to the first point, had plaintiff in reply to the question in defendants' telegram of the 13th Sept., '78, "will you deliver here at 47c.," simply assented thereto, I should have found it extremely difficult, if not impossible, to put any other construction on the language used than that plaintiff was to deliver the corn at *Belleville;* but plaintiff does not so answer, his reply is "offer cargo 47 cost, freight, commission, insurance." I think we have here a clear interpretation of the language of defendants' telegrams, as understood by plaintiff, viz., that the corn was only to cost the defendants 47 cents at *Belleville*, including cost, freight, commission and insurance, and the subsequent telegram of the 14th I think supports this view, for there he adds this additional item, "vessel paying unloading expenses." If plaintiff was to deliver at *Belleville* at 47 cents, what possible interest had defendants in any of these items, cost, freight, commission, insurance, or unloading expenses? But defendants' next telegram still more strongly confirms this, and shows it was defendants' view also, for plaintiff, having, as we have seen, mentioned "unloading expenses," defendants, in their telegram in reply accepting plaintiff's offer, seem to have thought that if there might have been a question as to the unloading expenses, there might also be as to the

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loading expenses. To set that at rest, as plaintiff had already done as to the unloading, defendants still further expressed, or rather make more manifest the meaning of the first telegram ("delivered here,") or at any rate of their understanding of plaintiff's offer, by saying "will take 13,000 old high mixed 47 delivered "here, vessel paying loading."

If by 47 delivered here, it was intended that the corn was to be delivered by plaintiff at *Belleville*, and defendants were to have nothing to do with it till it was so delivered, what concern was it of defendants what the commissions cost, or what commissions and freight were paid, or whether the corn was insured or not; or what matter was it to defendants whether the plaintiff or the vessel paid the expense of loading or unloading? Clearly the stipulations that defendants were to receive the corn free of all these charges must have been based on the idea that the corn was shipped at their risk, and were inserted for the protection of the defendants; and to show that, though the corn was, on shipment and delivery of shipping papers to defendants, and the accepting the draft, to be defendants, it was only to cost them 47 cents at *Belleville*; if otherwise, and if plaintiff was bound to deliver at *Belleville*, and until so delivered the corn was to be the property and at the risk of plaintiff, all this as to these expenses would be meaningless. I therefore think the true construction of the agreement between these parties is not, as defendants contend, that plaintiff bound himself to deliver at *Belleville* this corn to defendants in good condition, and that until so delivered it was to be at plaintiff's risk.

I am unable to distinguish this case from that of *Tregelles* v. *Sewell* (1). The principles and reasons that induced the Court of Exchequer and the Exchequer

(1) 7 H. & N. 574.

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Chamber, (on a contract whereby plaintiffs bought of defendants 300 tons of old bridge rails at £5 14s. 6d. per ton, delivered at *Harburgh*, cost, freight and insurance; payment by net cash in *London*, less freight, upon handing bill of lading and policy of insurance; a dock company's weight note or captain's signature for weight "to be taken by buyers, as a voucher for the quantity shipped,") to hold that the true construction of the contract was that the defendant did not undertake to deliver the iron at *Harburgh*, but that when he put it on board a ship bound for that place and handed to the plaintiffs the policy of insurance and other documents, his liability ceased and the goods were at the risk of the purchaser, are applicable, in my opinion, to the facts of this case. When the case of *Tregelles* v. *Sewell* was in the Common Pleas, *Martin*, B., who had tried the cause and who on trial entertained a strong impression that under the contract defendant was bound to deliver the iron at *Harburgh*, says on the argument that his view was altered by considering that a document of this kind ought to be construed according to the known practice of merchants in respect of such transactions, and adds:

> The goods were to be put on board by the vendor, and he was to receive a dock company's receipt for the weight or the signature of the captain, and he was to take that to the vendors, who were then to pay him at the rate of £5 14s. 6d. a ton, deducting the amount of the freight. That would be a common and ordinary transaction. Then the question is whether the insertion of the words, delivered at *Harburgh*, costs, freight and insurance, leads to a different conclusion. It seems to me that their more natural meaning is the true meaning, and that when £5 14s. 6d. was mentioned the parties were desirous of ascertaining beyond all doubt what was included in that amount. It is as if they had said: "Take notice the £5 14s. 6d. is to cover the cost of the iron, the freight from *London* to *Harburgh*, and the premium on the policy of insurance."

Therefore he says:

On consideration I think the true meaning of the ntract is this:

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When you, the defendant, have performed what you were bound to do, and put the goods on board a ship destined for *Harburgh*, and handed me the bill of lading and a policy of insurance, I will pay you £5 14*s.* 6*d.* per ton, less the freight.

It is true in that case that payment was to be by net cash in *London*, less freight upon handing bill of lading and policy of insurance, but in what respect in principle does that differ from this case? Here the payment was to be by draft at ten days, and plaintiff was to ship to defendants and clearly was to insure the corn, and when he was in a position to hand over the bill of lading and policy of insurance he was entitled to require acceptance of the draft, but unquestionably not before. Had he done so the property would, in my opinion, have passed to defendants and have been at their risk. These telegrams are equivalent to the construction as suggested by *Pollock*, B. (1):

I buy of you; you are to ship and insure the goods, which are to go to *Harburgh*, (*Belleville*), and if you do all that, I will pay you for them, (not in *London*), but by accepting a draft for ten days.

If, then, it is not the true construction of these telegrams that plaintiff agreed to deliver the corn at *Belleville*, then, as to the second point, the only other construction must necessarily be, that in consideration of the acceptance of a draft at ten days, plaintiff bound himself to ship to defendants the corn on board a certain vessel at *Toledo*, deliverable to defendants by the vessel on its arrival at *Belleville*, and to insure it for defendants' benefit, and on defendants' acceptance of the draft at ten days, to hand the necessary shipping papers over to defendants to vest the property in them and enable them to deal with and obtain possession of it on the arrival of the vessel at *Belleville*. The defendants, by accepting the draft, clearly fulfilled their part of the contract. Did plaintiff then so fulfil his as to entitle him to recover from

(1) P. 589.

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defendants the amount of the draft, or rather the price of the corn? or was there a failure of consideration relieving defendants from the obligation of paying the draft to plaintiff, or rather of paying plaintiff for the balance claimed to be due, after crediting the amount received from the insurance company for the price of the corn? It appears to me the plaintiff entirely failed in the fulfilment of his contract. It cannot be gainsaid that the defendants never received the corn and never were placed in a position to receive it, or entitled in any way to deal or interfere with it. When it was agreed that the corn should be paid for by draft at 10 days, it was no part of the contract that defendants should not be entitled to the corn until payment of the draft; the contract clearly was that the corn should be shipped to defendants, and on acceptance of draft be deliverable to them by the carrier on arrival at *Belleville*. After shipment and obtaining acceptance of the draft, plaintiff was to retain no property in or right to the corn, except possibly his right of stoppage *in transitu*. But plaintiff never so shipped the corn, to defendants, never parted with the property or control of the corn and never placed defendants, though they accepted the draft, in a position to demand or be entitled to receive delivery of the corn on its arrival at *Belleville*; on the contrary, the plaintiff shipped the corn deliverable to the Merchants Bank of *Toledo*, and most clearly never could have intended that the property should pass, or the bill of lading be handed to defendants, until they paid the draft. The plaintiff without doubt made, outside of his contract, a conditional appropriation of these goods on payment of the draft, instead of an absolute appropriation on acceptance of the draft. He clearly, to use the words of *Cotton*, L. J., in *Mirabita* v. *Imperial Ottoman Bank* (1):

(1) 3 Ex. Div. 173.

Made use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract.

By shipping the corn to the order of the bank and transferring to them the bill of lading and policy of insurance, he disabled himself from fulfilling his contract with defendants. For if the bill of lading was to be held by the bank as security till the draft was paid, as we shall see was done in this case, then the result necessarily was that the defendants could not be entitled to receive the goods on the arrival at *Belleville*, which it was the clear intention, as gathered from the telegrams, he should do, unless indeed he should pay the draft on the arrival of the goods, in which case he would be deprived of the credit of ten days, on which terms he agreed to buy the corn. To say under such circumstances that the property in this corn had passed to defendants and was at their risk, seems to me preposterous. Suppose the corn had arrived at *Belleville* in due course, eight days before the maturity of the bill, what was to become of the corn? who was to take charge of it? at whose risk was it to be during those days? where is there anything in the telegrams justifying or authorizing plaintiff to transfer this corn to the bank, or authorizing the plaintiff or the bank to hold it after acceptance till the falling due of the draft? The vessel under the bill of lading would be entitled to unload on arrival; to whom was the cargo to be delivered? not certainly to the defendants. The bank held the bill of lading, to them only could the master deliver the cargo, and yet what is there in these telegrams to justify the detention from defendants of the corn for those days, or so detaining the corn, to impose any duty or risk in respect thereof on defendants. It is to my mind abundantly clear that all plaintiff's dealings with the cargo, in transferring it to the bank

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and subsequently in disposing of the corn after being damaged, and settling with the underwriters in reference to the damage it sustained, are entirely inconsistent with any idea of the property vesting in defendants or being at their risk, and equally so with the contract, as indicated by these telegrams. Plaintiff, instead of shipping the corn to and insuring it for the defendants, reserved to himself a *jus disponendi*, by virtue of which he, for his own purpose, dealt with the corn in a manner wholly inconsistent with the property vesting in the defendants, and wholly inconsistent with his contract, whereby the property in the corn continued in the plaintiff or his assignee the bank, and so, never having vested in, was never at the risk of, defendants, and therefore the consideration for which the draft was accepted wholly failed. If the plaintiff's contention could be sustained, it would amount to this, that he was not only not bound to deliver the goods at *Belleville*, but that he was not bound to ship the goods to the defendants; that he was not only entitled to the acceptance given in payment of the goods and to use it for his own purposes, but he was also entitled to retain the control over his goods and use them for his own benefit, as in this case, for the purposes of realizing on the acceptance, and in so using them so to deal with them as to put it out of the power of the defendants, though they had fulfilled their contract by accepting the draft, to claim or receive delivery of the goods on their arrival at *Belleville*, and also so to insure the goods for his own benefit and deal with the insurance company in relation thereto, without reference to the defendants, and still at the same time, while so retaining the property in and the control and disposition of the goods and the insurance thereof, they were to be at the defendants' risk. Had plaintiff shipped the corn and effected the insurance for defendants' benefit, as the contract con-

templates he should do, and on acceptance of the draft, had handed the necessary papers, that is, the invoice, the bill of lading and policy of insurance, to the defendants, I think there can be no doubt the property in the corn would have passed to the defendants, and it would have been at their risk; the amount of the insurance money would then be received by them, and the plaintiff would be entitled in this case to recover the amount of the draft, the price of the corn. But plaintiff's conduct having been the exact opposite of this, whereby he changed the whole character of the operation, I think he has no right to claim from defendants the price of the corn, inasmuch as he never had parted with the possession or property except to the bank.

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But that we are reversing the unanimous judgment of the Court of Appeal for *Ontario*, I should not have deemed it necessary to refer to any authorities to establish that in this case the property never passed to the defendants, and therefore was never at defendants' risk. I think the following cases, and those therein referred to, will place this beyond all doubt. *Benjamin* on Sales (1):

However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If *A.*, in *New York*, orders goods from *B.*, in *Liverpool*, without sending the money for them, there are two modes usually resorted to, among merchants, by which *B.* may execute the order without assuming the risk of *A's* inability or refusal to pay for the goods on arrival. *B.* may take the bill of lading, making the goods deliverable to his own order or that

(1) 2 Ed. p. 288.

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of his agent in *New York*, and send it to his agent, with instructions not to transfer it to *A.*, except on payment of the goods. Or *B.* may not choose to advance the money in *Liverpool*, and may draw a bill of exchange for the price of the goods on *A.*, and sell the bill to a *Liverpool* banker, transferring to the banker the bill of lading for the goods to be delivered to *A.*, on payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that *B.* had the least idea of passing the property to *A.*, at the time of appropriating the goods to the contract. So that although he may write to *A.* and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice stating plainly that these specific goods are shipped for *A's* account, and in accordance with *A's* order, making his election final and determinate, the property in the goods will nevertheless remain in *B.*, or in the banker, as the case may be, till the bill of lading has been indorsed and delivered up to *A.*

Mr. *Benjamin* says this principle, *inter alia*, is established by the authorities (1):

Secondly.—Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried. This principle runs through all the cases, and is clearly enunciated by *Parke*, B., in *Wait* v. *Baker* (2) and by *Byles*, J., in *Moakes* v. *Nicholson* (3), and the above two points are approved as an accurate statement of the law by Lord *Chelmsford* in *Shepherd* v. *Harrison* (4).

Thirdly.—The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee (5).

In *Shepherd* v. *Harrison* (6) Lord *Chelmsford* says:

My Lords, in a book to which my learned friend near me (Lord *Cairns*) has referred me, and which appears to be very ably written, on the sale of personal property, the authorities on the subject of

(1) P.306
(2) L. R. 2 Ex. 1.
(3) 19 C. B. N. S. 290.
(4) L. R. 4 Q. B. 196-493.
(5) *Wilmshurst* v. *Bowker*, 7 M. & G. 882; *Ellershaw* v. *Magniac*, 6 Ex. 570; *Waite* v. *Baker*, 2 Ex. 1; *Van Casteel* v. *Booker*, 2 Ex. 691; *Jenkyns* v. *Brown*, 14 Q. B. 496; *Shepherd* v. *Harrison*, L. R. 4 Q. B. 196, 493.
(6) L. R. 5 H. L. 127.

reservation of the *jus disponendi* are all collected, and the whole matter is summed up clearly and distinctly in the following passage. (quoting the 1st and 2nd.)

Lord *Westbury* (1):

The house at *Pernambuco* accepted a commission and agency to buy cotton on behalf of *Shepherd & Co.*, the present appellants. They did so, and they paid for that cotton out of their own money. It was expressly agreed that funds which they happened to be in possession of, belonging to *Shepherd & Co.*, should be altogether separated from the transaction, and should not be resorted to for the purposes of the cotton purchase. They shipped the cotton on board the *Olinda*—I am speaking of the 200 bales—and when they delivered the cotton to the captain of the *Olinda*, they took from him the ordinary bill of lading to their own order.

Now, what was the effect of that transaction in law and according to mercantile usage? The effect was this—that they controlled the possession of the captain, and made the captain accountable to deliver the cotton to the holder of the bill of lading. The bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the right of demanding possession from the captain. They had, therefore, all the incidents of property vested in themselves. Now that was by no means inconsistent with the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers. That is perfectly consistent with the property, as evidenced by the bill of lading remaining in the possession of the vendors of the cotton in question.

Lord *Cairns* (2):

There was an order given to the house at *Pernambuco* to buy and ship cotton. Two portions of the cotton were shipped in the *Capella* and the *La Plata*, and a third portion in the *Olinda*. In the invoice the goods are described as being shipped on account and at the risk of the plaintiff. But along with the invoice a bill of lading was taken from the captain making the cotton deliverable, not to the plaintiff, but to the shipper on board. It is perfectly well settled that, in that state of things, the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi*

(1) P. 128. (2) P. 131.

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being reserved by the shipper through the medium of the bill of lading.

In *Gabarron* v. *Kreeft* (1) *Bramwell*, B., thus expresses himself:

Then there is the case of *Falke* v. *Fletcher* (2) in which *Willes*, J., uses expressions which go to shew that a shipper may ship saying nothing, and then demand a bill of lading in exchange for the mate's receipt on such form as he pleases. *Wait* v. *Baker* (3) is not in point, because there the vendor had a right of lien. But *Parke*, B., said: "The delivery of the goods on board the ship was not a deliv-"ery of them to the defendant, but a delivery to the captain to be "carried under a bill of lading, and that bill of lading indicated the "person for whom they were to be carried."

He said the same thing in *Van Casteel* v. *Booker* (4). In *Moakes* v. *Nicholson* (5) it was held that retaining the bill of lading, though made out in the buyer's name, prevented the passing of the property. There, however, the vendor had a lien. * * * *

The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shippers property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him.

* * * * * * * *

I feel bound by the authorities, which perhaps establish a more convenient state of law than would exist if bills of lading might be got deliverable to one person while the property was in another.

And *Cleasby*, B., (6) says:

But upon the effect of delivering a cargo contracted for on board the vessel of the vendee, the authorities are too numerous to refer to. I may mention *Turner* v. *Trustees of the Liverpool Docks* (7) as an early one (with *Ellershaw* v. *Magniac* (8) in the note in that case) and *Shepherd* v. *Harrison* (9) as the last. The effect of these is that the delivering of goods contracted for on board a ship when a bill of lading is taken is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply where the ship is the ship of the vendee.

(1) L. R. 10 Exch. p. 280.
(2) 18 C. B. N.S. 400.
(3) 2 Ex. 1.
(4) 2 Ex. 691.
(5) 19 C. B. N. S. 290.
(6) P. 285.
(7) 6 Exch. 543.
(8) 6 Exch. 570.
(9) L. R. 5 H. L. 116.

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In *Browne* v. *Hare* (1), in the course of the argument *Waite* v. *Baker* being mentioned, *Crompton*, J., says:

In that case the vendor kept his hand upon the goods by not indorsing the bill of lading to the vendee.

And again he says:

In *Turner* v. *The Trustees of the Liverpool Docks* (2) the Court seem to affirm the proposition, that if a vendor says: "I will send goods so as to be delivered if the vendee pays for them," it shows that he is shipping to himself.

Erle, J., delivering the judgment of the Court, says:

The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to; and under that we think the property passed when the goods were placed "free on board," in performance of the contract.

In this class of cases the passing of the property may depend according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. Here it is passed by the act of the vendor alone. If the bill of lading had made the goods "to be de-"livered to the order of the consignee," the passing of the property would be clear. The bill of lading made them "to be delivered to the order of the consignor," and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus the real question has been on the intention with which the bill of of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them "free on board;" or for the purpose of retaining a control over them and continuing to be owner, contrary to the contract, as in the case of *Waite* v. *Baker* (3), and as is explained in *Turner* v. *The Trustees of the Liverpool Docks* (4), and *Van Casteel* v. *Booker* (5).

In a note to this case (6), citing *Couturie* v. *Hastie* (7), it was said:

The goods are either shipped free on board, when they are thenceforward at the risk of the vendee, or they are shipped "to arrive", which saves the vendee from all risk till they are safely brought to port.

(1) 4 H. & N. 822.
(2) 6 Exch. 543.
(3) 2 Exch. 1.
(4) 6 Exch. 503.
(5) 2 Exch. 691.
(6) P. 286.
(7) 5 H. L. 673.

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In *Mirabita* v. *Imperial Ottoman Bank* (1), *Bramwell*, L.J., says :

A long series of authorities beginning with *Waite* v. *Baker* (2), and ending with *Ogg* v. *Shuter* (3) is cited.

It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add that I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a *jus disponendi*. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor.

This appears from *Waite* v. *Baker* (4); *Gabarron* v. *Kreeft* (5); and to some extent from *Ellershaw* v. *Magniac* (6).

And *Cotton*, L.J., in whose judgment *Bramwell*, L.J., said he entirely agreed, thus states the law (7) :

Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by a vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as an agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and consequently that there is no final appropriation, and the property on shipment does not pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Waite* v. *Baker* (8), *Ellershaw* v. *Magniac* (9), and *Gabarron* v. *Kreeft* (10), in each of which cases the vendors had dealt with the bills of lading for

(1) 3 Exch. Div. 169.
(2) 2 Exch. 1.
(3) 1 C. P. D. 47.
(4) 2 Ex. 1.
(5) L. R. 10 Ex. 274.
(6) 6 Exch. 570.
(7) Page 172.
(8) 2 Ex. 1.
(9) L. R. 10 Ex. 274.
(10) 6 Ex. 570.

their own benefit, the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for, or had paid the price So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft or payment or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (1); *Shepherd* v. *Harrison* (2); *Ogg* v. *Shuter* (3).

STRONG, J.:

This is a bill in equity filed under a practice established by a statute, until lately in force in the Province of *Ontario*, whereby parties were at liberty to sue in the Court of Chancery in respect of legal rights.

The defence is failure of consideration under the following circumstances:—The appellants are distillers at *Belleville* in *Ontario*, and the respondent is a commission merchant carrying on business at *Toledo* in *Ohio*. On the 13th and 14th Sept., 1878, certain telegrams passed between the parties, which resulted in one sent on the latter day by the appellants to the respondent in the words following:

Will take 13,000 old high mixed 47 delivered here, vessel paying loading. Draw ten days through Merchants' Bank here. Send prime corn.

In pursuance of this order, which the respondent considered and acted upon as an order by principals to their agent, the respondent purchased a cargo of corn amounting to 12,965 bushels, which he shipped on board the schooner "*Annandale*," the price at *Toledo* being 42 cents per bushel, and the freight, including charge for unloading, making the gross price 47 cents, the limit

(1) 6 Ex. 543. (2) L. R. 4 Q. B. 196.
(3) 1 C. P. D. 47.

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mentioned in the appellants' telegram. The vessel sailed on the 16th Sept. The respondent took from the captain a bill of lading, dated the same day, for the cargo to be delivered as "addressed per margin," the margin being left blank. On the same day he drew on the appellants the bill of exchange, for the recovery of the amount of which the suit is brought—a bill at 10 days after date for $5,492.16. This amount was made up of a charge of 42 cents per bushel to cover price paid for corn and respondent's commission, and five cents per bushel for freight, with $20 advanced to the captain, and $26.65 interest for 10 days added. This draft the respondent procured to be discounted by the Merchants' National Bank of *Toledo*, to whom he at the same time and by way of collateral security for the draft, transferred the bill of lading. The Merchants' Bank of *Toledo* immediately endorsed both the draft and the bill of lading to the Merchants' Bank of *Canada* at *Belleville* for collection, and sent them forward in order that the appellants' acceptance of the draft might be procured On the 19th Sept. the appellants accepted the draft. The vessel did not reach *Belleville* until the 28th Sept., some days later than the usual time of a voyage between the ports of *Toledo* and *Belleville*; the cause of the delay being unavoidable detention in the *Welland* canal. Upon the arrival of the vessel it was found that the corn, which the evidence shews to have been shipped in good order, had become heated in the voyage and was much damaged. Under these circumstances the appellants refused to accept delivery, and it was subsequently sold for the benefit of whom it might concern. The appellants refused to pay the draft which the respondent subsequently retired and then brought this suit for the recovery of the amount for which it was drawn.

On the day on which the vessel sailed, the 16th

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Sept., the respondent also sent to the appellants an invoice of the corn, (exhibit L.) headed as follows:

Account purchase by *George E. Williams* of 12,965 bushels high mixed corn, for account and risk of Messrs. *H. Corby & Sons.* Shipped schr. *Annandale.*

This invoice was enclosed in a letter of the same date from respondent to appellants, in which he says:

We enclose invoice of 12,965 bushels high mixed corn per schr. *Annandale,* draft as stated made to-day.

The Court of Appeal, upon this state of facts and upon a consideration of the evidence of usage prevailing among commission merchants in the grain trade at *Toledo*, reversed the decree of the Court of Chancery by which the bill had been dismissed, and determined that the respondent was entitled to recover.

It was decided by the Court of Appeal that the relation between the parties was that of principal and agent, and that the telegram of the 14th Sept., already stated, was to be regarded as an order by the appellants to the respondent, to purchase for them a cargo of corn within the limit of 47 cents a bushel for cost and freight. I entirely concur and adopt the judgment of the court in this respect as well as in their conclusion that the charges made by the respondent were fair and legitimate, and such as he was entitled to make in his character of an agent or commission merchant. It appears to me, however, that the contract of agency was not the only one between the parties, but that there also existed the relation of vendor and purchaser in respect of this corn. A passage in the opinion of Mr. Justice *Blackburn* in the case of *Ireland* v. *Livingston*, in the House of Lords (1), seems to me to afford a very precise definition of the legal effect of the contract between the parties to the present appeal. He says:

It is quite true that the agent who in thus executing an order, ships

(1) L. R. 5 H. L. 395.

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goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. * * * * The property in the goods passes from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*.

The decision of the present case, which depends, in my opinion, altogether on the questions whether the property in this corn had vested in the appellants before it became damaged, or whether, if the property in the corn had not passed to the appellants, it was by the stipulations of the parties at the risk of the purchasers, is to be governed by the ordinary principles of the contract of sale. The passing of the property under a contract for the sale of goods is said to be altogether a question of intention—the rules laid down being merely intended as guides for discovering or presuming the intention when the parties have not clearly expressed it. There can be generally no stronger evidence of a vendor's intention not to pass the property to the vendee than the fact that he takes the bill of lading in his own name. In the present case, by the terms of the bill of lading, the goods were deliverable to the person whose name should be inserted in the margin, and the name inserted was that of the bank which discounted the draft for the price, and to whom the bill of lading was delivered as collateral security. The effect of this was clearly to vest a special property in the corn in the bank, and this special property was in the nature of a hypothecation of the goods, designed to secure the payment of the draft, and subject to which the absolute

legal property either remained in the respondent or became vested in the appellants (1).

Had the bill of lading been taken originally in the respondent's own name and then endorsed by him to the bank, it would be strong evidence, even between parties whose relations were such as those before us, to shew that the vendor intended to reserve the property, subject to the rights of the bank, to himself, at least until by some further act he indicated an intention to pass it to the purchasers. Here, however, the vendor seems to have parted with all power over the disposition of the property, when he handed over the bill of lading to the bank.

However this may be, it seems to me clear, both upon authority and principle, that when, on the same day as that on which the vessel sailed and the bill of lading was handed over to the bank, the respondent sent the letter of advice enclosing the invoice, stating that the goods were for account "*and risk*" of the appellants, he did an act which divested him of any property in the goods and vested it in the appellants. In other words, when he said the goods were to be at the risk of the appellants he meant what he said. Had the invoice merely stated the goods to have been purchased on account of the appellants, it might not have been so conclusive, but even in that case, I should have thought every presumption ought to be made against any intention on the part of the respondent, a mere factor,

(1) Note: the effect of a transfer of the bill of lading by way of security is only to vest a special legal property in the goods in the secured creditor, and to leave the general legal property in the owner subject to the charge, and not to vest the whole legal property in the secured creditor, leaving only an equitable right of redemption in the transferor. See the case of *Glyn, Mills, Currie & Co.* v. *The East and West India Dock Company*, 6 Q. B. D. 475—per *Bagga/lay* and *Bramwell*, L.JJ., against the opinion of *Brett*, L.J., p. 449—and *Burdick* v. *Sewell*, 10 Q. B. D. 363; both decided since the present case. Also *Campbell* on sales, p. 338.

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whose commission had been included in the bill drawn for the price, to retain the property, and so subject himself to the risk of any loss which the insurance might be insufficient to cover, more especially as he had so dealt with the bill of lading as to authorise its delivery to the vendees upon payment of the draft drawn for the price; but the insertion of the word "risk" in the invoice seems to me to make it unnecessary to resort to any such presumption, and to be amply sufficient to vest the property in the appellants from the date at which the invoice and letter of advice were transmitted—the 16th September,—the day on which the vessel sailed. In the case of *Jenkyns* v. *Brown* (1), which I mentioned during the argument of this appeal, the facts were almost identical with those in the present case, and the decision itself entirely warrants the opinion already expressed as to the legal result from those facts.

In Mr. *Benjamin's* work on Sales (2), he thus summarises the facts of that case:

Klingender, a merchant in *New Orleans*, had bought a cargo of corn on the order of plaintiffs and taken a bill of lading for it deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a *New Orleans* banker, to whom he also endorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs showing that the cargo was bought and shipped on their account and at their risk. Held, that the property did not pass to the plaintiffs, as the taking of a bill of lading by *Klingender* in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the endorsed bill of lading to the buyer of the bills of exchange he had conveyed to them "a special property" in the cargo, and by the invoice and letter of advice to the plaintiffs he had passed to them the general property in the cargo subject to this special property, so that the plaintiffs right of possession would not arise until the bills of exchange were paid by them.

I am unable to distinguish this case of *Jenkyns* v.

(1) 14 Q. B. 496. (2) 2 Am. Ed. p. 347.

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Brown from the present, and I am therefore of opinion that in the present case the property, subject to the rights of the bank, was vested in and at the risk of the appellants from the 16th of September, the day on which the schooner sailed from *Toledo*, and as the damage to the corn occurred after that date there was no failure of consideration, and the respondent was entitled to recover. Further, as showing that the terms of the invoice, making the goods as shipped at the buyer's risk, was a sufficient indication of intention to pass the property, I refer to the cases of *Castle* v. *Playford* (1) and *Martineau* v. *Kitching* (2), which are also authorities for the respondent in another view of the case, which I shall hereafter state.

I see nothing in the fact that the bill was drawn at ten days, whilst the usual length of voyage from *Toledo* to *Belleville* was only five or six days, to raise any presumption against an intention to vest. The only difference this would make would be that in case the corn arrived and the vessel unloaded before the maturity of the bill, it would have to be left in store for some two or three days before the appellants, by paying their acceptance and obtaining the bill of lading, would get possession.

But even if the property in the corn did not pass to the appellants, I should still have been of opinion that there was no failure of consideration. The effect of the contract of sale depends entirely on the intention of the parties, and they may always provide that, though the property is not to pass to the buyer, it shall be at his risk, so that, if it perishes by fortuitous circumstances before delivery, the vendor shall still have the right to be paid the price. That this is the law is well established by the case of *Castle* v. *Playford* (3), and also by

(1) L. R. 5 Exch. 165, S. C. L. R. 7 Exch. 98.

(2) L. R. 7 Q. B. 436.

(3) L. R. 5 Exch. 165; S. C. L. R. 7 Exch. 98.

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the case of *Martineau* v. *Kitching* (2), per *Blackburn* and *Lush*, L.JJ, already referred to. Then, in the present case, by the express terms of the invoice,—which was retained without objection by the appellants,—it was a term of the contract that the property from the time of shipment was to be at the risk of the purchasers, and this was such a reasonable and natural provision, having regard to the relationship existing between the parties, that it could not have been expected that it would have given rise to any objection, at all events none was ever made, and we have therefore a right to presume it was part of the contract of sale, and if so it constitutes a complete answer to this attempt to throw the loss on the respondent. This conclusion is in accordance with the well understood usage of the grain trade, found by the witnesses called by the respondent at the trial.

I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J., concurred with the Chief Justice

HENRY, J.:—

This is an action brought in the Court of Chancery for *Ontario* by the respondent against the appellants, and in which a decree was pronounced in favor of the latter. On appeal to the Appeal Court of *Ontario*, it was reversed and a decree made in favor of the respondent. From the latter it came by appeal to this court. The decision of the matter in controversy depends mainly on the construction to be put on the contract entered into by means of telegraphic communications between the parties.

The respondent was a commission agent at *Toledo*, *Ohio*, *U.S*, and commenced the correspondence by a telegram which finally ended in an agreement that he

(2) L. R. 7 Q. B. 436.

should ship 13,000 bushels of "high mixed corn" to the appellants at *Belleville*. The telegram is dated the 15th September, 1878, as follows:

Schooner "Annandale" obtainable, 5c., vessel paying unloading. High mixed corn 47c.

On the same day the appellants answered by telegram:

Do you not think corn will be lower next month? Will you deliver here at 47c.?

The respondent on the same day replied:

Higher corn predicted by exporting customers. England advancing. October selling here half above cash. We don't anticipate lower prices. Receipts light. Roads bad. Good shipping demand. Offer cargo 47 cost, freight, commissions, insurance—prompt acceptance.

The latter is a reply to the question—"Will you deliver here at 47c?"

The appellants on the 14th telegraphed as follows:

Will take 13,000 old high mixed (47c.), delivered here · vessel paying unloading. Draw, ten days, through Merchants' Bank here. Send prime corn.

Upon receipt of the latter telegram, the respondent decided to ship the corn, and shortly afterwards did so, and drew on the appellants at the rate of 42c. per bushel, and by letter requested the latter to pay the freight at the rate of 5c. per bushel. The draft spoken of was drawn by the respondent as directed, and was made payable to the order of the National Bank at *Toledo*. He insured the cargo in his own name, and took a bill of lading for it to be delivered to his own order or assigns. He assigned the policy of insurance and the bill of lading to the same bank. The latter forwarded the whole of the documents mentioned to *Belleville*, and the draft was accepted. The respondent had obtained advances from the bank, and the latter was authorized by him to hold the corn as security until the draft should be paid, and in default of payment to sell the

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same to reimburse themselves to the amount of the draft. The corn arrived at *Belleville* between the time of the acceptance and maturing of the draft, but in such a damaged condition that the appellants refused to receive it, and so notified the respondent. It was subsequently sold by him, and he now seeks to recover the difference between the amount it realized and the cost. The respondent contends in the first place that he purchased and shipped the corn as the agent of the appellants; and, secondly, that if that contention be not sustained, that there was such a delivery when it was put on board the vessel as to make it the property of the appellants, and therefore at their risk.

The appellants deny both propositions. There is no evidence whatever that the respondent acted as agent of the appellants, but, on the contrary, the telegrams are evidence of a sale by him as principal. The mere fact that he was a commission merchant or broker can have no weight against the clear language of the telegrams. They show also very clearly that the delivery was to be at *Belleville* at the price named, and the respondent requested the appellants to pay the freight out of the principal sum. The respondent himself took the most effectual means of preventing the appellants from having any property in the corn until delivered. He assigned it to the bank with the policy of insurance, and in case of loss by the perils of navigation, the bank could alone recover for it. The latter were the legal owners, and the appellants had no title whatever to the corn, when it got injured on the voyage. The bank might have sold it to any one they pleased, and the appellants could not have gainsaid their right to do so, and the only redress open to them (if any) would be in the shape of damages from the respondent for not delivering the corn according to the agreement.

The respondent seeks to recover from the appellants

the balance of the price of the corn which was never delivered to them or at their risk, and which in its damaged state they were not bound to receive. By his own act he prevented too the appellants from having any title to the corn until the draft should be paid. He did not ship it in pursuance of the agreement, and by adding the condition of prepayment, he relieved the appellants from the obligation to take it under any circumstances. I am of opinion, for these reasons, that the appeal should be allowed, the judgment of the court below reversed, and the decree of the Vice-Chancellor sustained, with costs.

GWYNNE, J :—

This is an action instituted in the Court of Chancery in the province of *Ontario*, a proceeding authorized by the Administration of Justice Act of that province, for the recovery of a purely legal demand, arising out of a contract between the plaintiff and the defendants; but instead of stating the case, as it would have been in an action at law in the like circumstances—namely, as upon an acceptance by the defendants of a bill of exchange drawn upon them by the plaintiff, the latter, in his bill of complaint, sets out at large what, according to his interpretation and contention, was the contract between him and the defendants out of which the acceptance arose, and he alleges the fulfilment of such contract upon his part and the breach of it by the defendants.

Upon the evidence, as indeed was admitted in the argument, we must take the fact to be that, although the corn was in good condition and of the quality required by the defendants when it was shipped on board the vessel at *Toledo*, it did not arrive at *Belleville* in good condition, and by reason thereof, it was useless for defendants' purposes; and the questions we have to

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decide are, what was the true nature and effect of the contract made between the plaintiff and the defendants; and which of them, under the circumstances appearing in the case, should bear the loss arising out of the transaction?

The plaintiff, on the one side, contends that even if the contract should be held to be one of sale and purchase, still the property passed to defendants on shipment, and that thereafter all risk was theirs; the defendants, on the contrary, contend that regarding them as purchasers they acquired no property and incurred no liability until delivery at *Belleville* in pursuance of the contract, and that even if the contract should be held to be one between principal and agent originally, still the plaintiff so dealt with the corn as to retain in himself the property therein in disregard of what would be defendants' rights as principals, and attached to their getting possession of the corn a condition inconsistent with the plaintiff being merely defendants' agent, and consistent only with his retaining the ownership of the corn until delivery to the defendants at *Belleville*, and so, that the plaintiff retained in himself all responsibility and risk, as well as the property in the corn, until the loss and damage had occurred, and thereafter continued to deal with it as his own.

This appears to have been the first transaction which the defendants had with the plaintiff. They had had dealings for several years with plaintiff's brother, to whose business the plaintiff succeeded in April, 1878. The defendants say that they dealt with the plaintiff's brother, sometimes upon the basis of a contract for the purchase from him of corn delivered at *Kingston*, and sometimes on the basis of a contract of purchase by him as defendants' agent of corn at *Toledo*, deliverable to the defendants f. o. b. there, but that they preferred

the former method. The manner in which the defendants may have been in the habit of dealing with the plaintiff's brother has no bearing upon this case, except as explanatory of the defendants' intention in entering into this contract, and of his *bona fides* in contending that such intention was to enter into a contract of purchase of corn on delivery at *Belleville*.

As to the manner in which the present contract came about, the plaintiff says—and he does not appear to be contradicted in this—that after commencing business for himself, he no doubt wrote to defendants soliciting their orders; that he received some communications from them in September, 1878, prior to the 13th, but whether it was he or the defendants who started such communications, he cannot say—no such communication is produced. With this information that there had been some prior communications, the correspondence out of which this contract arose, so far as is laid before us, commenced with a telegram from the plaintiff at *Toledo* dated 15th September, 1878, to the defendant, *H. Corby* jun., at *Belleville*, as follows :—

Schooner "Annandale" obtainable, 5c., vessel paying unloading. High mixed corn, 47c.

In reply to this upon the same day the defendants telegraph to the plaintiff:

Do you not think corn will be lower next month; will you deliver here at 47c?

To which on the same day the plaintiff replies by telegram :

Higher corn predicted by exporting customers. *England* advancing. October selling here half above cash. We don't anticipate lower prices. Receipts light. Roads bad. Good shipping demand. Offer cargo 47 cost, freight, commissions, insurance—prompt acceptance.

This latter appears to be in answer to defendants enquiry, "Will you deliver here at 47 cents ?"

On the 14th the defendants reply :

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Will take 13,000 old high mixed, 47 delivered here, vessel paying unloading; draw ten days through Merchants Bank here; send prime corn.

Now, if it were not for the fact that the plaintiff carried on the business of a commission agent, I should think the natural construction to put upon the correspondence involved in the above telegrams would be—that the defendants only contracted to take, that is to receive on delivery at *Belleville*, corn of the description specified, namely, prime old high mixed corn, and to pay for it by an acceptance of a draft on ten days credit, but the plaintiff contends that the fact of his being a commission agent makes all the difference, and that he understood the defendants to be authorizing him as their agent to purchase corn for them at such price as should not cost them more, but might cost them less than 47c. at *Belleville*, to be paid for by an acceptance of plaintiffs' draft at ten days, and he contends, upon the authority of *Ireland* v. *Livingston* (1), that although the defendants' telegrams may be susceptible of the construction put upon them by defendants, still that they are susceptible also of the construction put upon them by the plaintiff, and that after having, as he contends he has, *bonâ fide* acted upon them in that sense, it is not now competent for the defendants to repudiate their order, upon the ground that the plaintiff did not act upon it in the sense intended by defendants.

That case decides, that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense, of which it was equally capable.

Whether that principle is applicable to a case in which the question is as to the character in which two

(1) L. R. 5 H. L. 395.

parties, who might each have acted in one or other of two characters, did in fact contract, it is not necessary, in the view which I take, now to decide. In such a case, when it may have to be decided, it will have to be considered whether it is not equally incumbent upon both parties to make it clear in what character they are respectively dealing; namely, whether as vendor and vendee, or as principal and agent; or to apply the question to the case here, whether it was not equally incumbent upon the plaintiff, who offered the cargo, to make it clear in what character he offered it, as it was for the defendants to make it clear in what character they accepted the offer. It is not, however, necessary, in the view which I take, to decide that point in this case, for the defendants contend, as I think not without reason, that the acts of the plaintiff have been inconsistent with his having understood the contract assumed by him to be one of agency only, or that the defendants entered into it in the character of principal, employing an agent to purchase for them, and, that he retained the property in himself and transferred it to the bank of *Toledo* and not to the defendants. The plaintiff says that he procured the money with which he carried on business, and did procure the money with which he purchased the corn, which is the subject of this litigation, under an arrangement made by him with the banks at *Toledo*, that he would draw upon his consignees through the bank furnishing the funds, endorsing the draft to the bank, and assigning to them also the bill of lading and a policy of insurance upon the cargo. The question, therefore is, after the plaintiff purchased the corn, which is the subject of this litigation, when and to whom did he part with the property therein? and when, if ever, did that property pass from the plaintiff to the defendants? Upon shipping the corn on board the "Annadale" upon

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the 16th Sept., he received a bill of lading from the master. He effected, at the same time, a policy of insurance on the cargo in his own name. That bill of lading, the symbol of property in the corn, together with the policy of insurance he assigned to the National Bank, *Toledo*, and drew through them at ten days upon the defendants, endorsing at the same time the bill of exchange to the bank, all in pursuance of an agreement to that effect, upon which he had procured the money to carry on his business, and for the purpose of vesting the property in the corn in the bank to hold to their use until the bill of exchange should be paid, and in default of payment to sell to reimburse themselves to the amount of the bill of exchange.

The corn in due course would ordinarily reach *Belleville* in four or five days from *Toledo*, that is upon the 21st or 22nd September. The defendants had contracted for the credit upon a draft at ten days to ensure the arrival of the corn before the draft should become payable. Upon presentation, of the bill of exchange, they accepted, relying as their security upon the arrival of the corn before the bill should be payable on the 1st of October. The corn arrived at *Belleville* on the 27th or 28th September, and was at once refused by the defendants as being so damaged as to be for their purposes useless. Now, when the plaintiff, as above stated, transferred the property in the corn to the bank, he had nothing that he could transfer to the defendants otherwise than subject to the condition of their first paying the draft, that is to say, looking at the ordinary time for a vessel to go from *Toledo* to *Belleville* of seven or eight days in advance of the time which the defendants (according to the plaintiff's own view of the contract) had contracted for. The plaintiff thus imposed upon the defendants a condition precedent to their acquiring possession of the corn

not warranted by their contract, according to the plaintiff's own view of it. Property consigned to the defendants, subject to such condition, could not be property forwarded in pursuance of their contract in any view of it, or which they could be obliged to take.

After having transferred the property to the bank, the plaintiff forwarded to the defendants an invoice, wherein the corn is spoken of as purchased by the plaintiff as an agent upon commission, and which speaks of the cost afloat at *Belleville*, 47c.; whereas, the defendants had contracted for delivery on shore out of the vessel at that price. With the invoice, the plaintiff did not inform defendants of his having transferred to the bank the property in the corn, and that they could only get it upon condition of first paying the draft forwarded for their acceptance. The sending of this invoice to the defendants gave to them—unless and until the latter should pay the draft—no property in the corn, which, and not merely a lien upon it, was what was vested in the bank upon the authority of *Jenkyns* v. *Brown* (1). All that the plaintiff ever gave to the defendants was a right to receive the corn, conditional upon their first paying their draft, which, as appears, wanted three days of maturity when the corn arrived in damaged condition at *Belleville*. This condition, as I have shewn, was not warranted by the contract, according to the plaintiff's own construction of it. He had no right to superadd such a condition to the defendant's contract. The result then is, that the property in this corn remained by the act of the plaintiff, contrary to the terms of the contract, as he alleges he understood it, in the plaintiff and his assignees, the bank, the plaintiff's creditors, until and after the arrival of the corn at *Belleville*. The damage to the corn occurred, then, while the property continued to be in the plaintiff and his

(1) 16 Q. B. 502,

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assignees—the bank. As then the plaintiff, contrary to his own understanding of the contract, as now contended for by him, retained in himself and his creditors, the bank, for their own benefit, the property in the corn until it became damaged, it is but reasonable that they, and not the defendants, should bear the loss. For the above reasons, I am of opinion that the defendants' contention is well founded; that the appeal should be allowed with costs, and that the decree of the Vice-Chancellor should be restored.

Appeal allowed with costs.

Solicitors for appellants: *Blake, Kerr, Boyd & Cassels.*

Solicitors for respondent: *Bawden & Machar.*