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*Feb'y. 18.

*May 17.

RODERICK McDONALD (DEFENDANT)...APPELLANT;

AND

DAVID McPHERSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bill of lading – Assignment of – Property in goods under—Stoppage in transitu—Replevin.

H., of Souris, P.E.I, carried on the business of lobster packing, sending his goods to M., of Halifax, N.S., who supplied him with tin plates, &c. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef *viâ* Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent in Halifax to hold them. McM. applied to the agent at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent,—

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

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Held, affirming the judgment of the court below, Henry J. dissenting, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them.

Held also, that whether or not a legal title to the goods passed to McM. the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them.

APPEAL from a decision of the Supreme Court of Nova Scotia refusing to set aside a verdict for the plaintiff.

The facts of the case may be briefly stated as follows:

Early in 1877 one Haley, of Souris P. E. I., wishing to commence the business of packing lobsters, agreed with Mathers, of Halifax, that the latter should supply him with tin plates, money, &c., and that he should send to Mathers all the lobsters which he should pack in order that the supplies should be paid for out of the proceeds of the sales of the goods, Mathers being paid a commission for selling. That agreement was acted on for six years.

At the end of 1882 Haley was indebted to Mathers from $7,000 to $9,000. On 28th December, 1882, Haley sent from Souris to Halifax, per schr. "Josephine," *viâ* Pictou and Intercolonial Railway, the goods in question in this suit, 180 cases of canned beef, worth about $1,000, and forwarded to Mathers the bill of lading, which, however, made the goods deliverable to the freight agent of the Intercolonial Railway at Pictou Landing, or his assigns.

Mathers about this time getting into difficulties and wishing to secure the plaintiff, respondent, for accommodation endorsements which had previously been made, endorsed to him the bill of lading, which was never endorsed by the freight agent at Pictou Lading.

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After the transfer of the bill of lading the respondent called on the appellant and demanded possession of the goods, and tendered the appellant the amount of freight due upon these goods, and also a balance which the appellant claimed was due by Mathers to the railway in respect of certain goods carried and previously delivered to Mathers. The appellant declined to accept the money tendered, and refused to deliver the goods having been so instructed by Haley.

The assignee of the bill of lading replevied the goods and obtained a verdict which was sustained by the Supreme Court of Nova Scotia. The defendant appealed to the Supreme Court of Canada.

Henry Q.C., for appellants.

The agreement gives Mathers no right to the goods. He obtains an equitable right to have the goods left in his possession. At common law he would have a right to maintain an action for damages for the non-execution of the agreement. He was merely a bailee. Assuming that the bill of lading was effectually indorsed to McPherson, under these circumstances I question whether that would give him any additional rights to those which Mathers had. No new consideration was given.

The most that can be said as to Mather's position is, that he had a right to get the goods as Haley's agent. It will be conceded that in law and equity Haley is the real owner of the goods.

I take the point that this action, having been brought before the Judicature Act, must fail.

McPherson brought this action on the theory that these were his goods. Suppose this case were in equity, the judgment gives plaintiff the goods themselves, not the value of them.

Graham Q C., for the respondent.

The legal title in these goods passed to Mathers.

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The only thing urged against this is, that the bill of lading was unindorsed. This having been done in pursuance of the previous agreement, it vested the title to the goods in the plaintiff. See *Allen* v. *Williams* (1); Campbell on Commercial Sales, p. 240 citing the case of *Coxe* v. *Harden* (2); *Dick* v. *Lumsden* (3). The delivery of the bill of lading was the transfer of the goods. *Haile* v. *Smith* (4). It was an indication of the intention.

See Hutchinson on Carriers (5), and see Benjamin on Sales (6), which contains the rest of the cases relied on.

I think that under the Factor's Act McPherson had a right to the goods; at all events he had the bill of lading by which he had a right to receive the goods as a pledge. Story on Agency (7); *Donald* v. *Suckling* (8).

At common law you could not pass the property in the goods, though you could pass it as a pledge; but under an agreement such as this Mathers had a right to the possession of the goods. Jones on Pledges (9); Abbott on Shipping (10); *Halliday* v. *Holgate* (11).

Henry Q.C. in reply.

The relation of a factor, at common law, to his employer is that of a common agent, differing in no way from the position of any other agent. The Factor's Act does not apply to cases of past indebtedness. R. S. 4th ser., p. 63, sec. 3 A factor is but an agent to sell, and has no right to pledge. Further, even if he has a lien, he has no right to sell. The agreement excludes a right to do anything but sell. See Jones on Pledges, sec 338. The goods were not given to the plaintiff as security.

(1) 12 Pick. 302.
(2) 4 East 211.
(3) Peake's Cases p. 252.
(4) 1 B. & P. 563.
(5) Sec. 135.
(6) P. 307.
(7) Sec. 113.
(8) L. R. 1 Q. B. 585.
(9) Secs. 228 and 229.
(10) p. 271.
(11) L. R. 3 Ex. 299.

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Sir W. J. RITCHIE C. J.—The goods in question were originally the property of Haley, who shipped them from Prince Edward Island in a vessel called the "Josephine," the master of which signed the bill of lading to deliver the same at the port of Pictou "unto the freight agent, Intercolonial Railway, or to his assigns, freight payable in Halifax." In the margin "180 cases marked B;" freight "to I. H. Mathers, Esq., Halifax." These goods were unquestionably sent to the agent of the Intercolonial Railway at Pictou, to be forwarded by him, by the I. C. R., to the consignee, I. H. Mathers, at Halifax; and the agent at Pictou had no other interest in the goods, or right or duty connected with them, than to forward them to their destination.

On the arrival of the goods at Pictou, the agent gave to the captain of the "Josephine" the following receipt:—

B. A. W. 2.

INTERCOLONIAL RAILWAY,

PICTOU LANDING STATION,

2nd January, 1883.

Received from "Josephine," Haley, the following goods or merchandize, which are to be transported from this station to Halifax station, and delivered as addressed, agreeably to the "Conditions of Carriage," as set forth in the "General Freight Tariff" of this railway.

Mark—B; Car, 1817; Address in full—I. H. Mathers, Halifax: Quantities and description of goods—180 cases meats canned. Charges—$10.80.

D. BAIN.

And, in accordance with his duty, he forwarded the goods to Halifax with the following way-bill;—

B. A. W. No. 3.

No. 341.

INTERCOLONIAL RAILWAY.

Way Bill of Sundries sent from P. Landing to Halifax per o'clock train, the 3rd day of January, 1883.

No. of car—1817. Sender—"Josephine." Consignee—I. H. Mathers. Mark—B. Residence—Halifax. Description of Goods—

180 cases Canned Meats. Weight in lbs.—12,600. Rate per 100 lbs. —12. Charge for freight—$15.12. Charge for Expenses—$10.80. Total, to pay—$25.92.

Bain's, the Pictou agent's, testimony is short and very clear on this point. It is as follows :—

DANIEL BAIN.—Live at Pictou Landing; in the Intercolonial Railway employ for 16 years; was so in December, 1882, and January, 1883; was station agent at Pictou Landing; still hold that office, but have been temporarily removed to other side of Pictou harbor; remember consignment of goods came to the railway by schooner "Josephine" from Souris; I saw bill of lading that came with them; this is bill of lading signed by captain; I had no interest in goods. Bill marked B. A. W. No. 1. My duty in connection with these goods was to see that they were shipped and forwarded by rail to Halifax; goods were put into cars by captain of schooner; I signed shipping receipt for goods; I forwarded them to Halifax under way bill; gave two receipts to the captain and held one which I now produce—(B. A. W. 2); I did this on 2nd Jan., 1883; goods came into car that day and think they arrived in schooner same day; I have form of way bill in use and have press copy of way bill given with these goods; original way bill forwarded by me to R. McDonald, station agent of Intercolonial, at Halifax. Copy of way bill marked B. A. W. No. 3 produced. So far as respects these goods it is a correct copy of original way bill; I received goods from vessel and forwarded them to Halifax.

Bain says he received a telegram from Haley in reference to these goods. Haley's telegram was for him to hold 180 cases shipped by "Josephine." He says Haley's telegram was received on the 3rd of January, 1883. "The goods had been forwarded before I received the telegram; I mean forwarded from Pictou Landing," therefore at a time when Bain's duty in reference to, or control over, the goods had ceased

But he says on receipt of the telegram he telegraphed defendant as follows:—

B. A. W. No. 5.

PICTOU LANDING, 3rd January, 1883.

R. McDONALD, Halifax,—

Please hold 180 cases canned goods billed to I. H. Mathers per my bill 341 to-day for instructions; answer if all right.

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To this defendant telegraphed in reply:

B. A. W. No. 4.

HALIFAX, 3rd January, 1883.

D. BAIN, -

At whose instance are you holding the 180 cases canned goods, per your bill 341, for I. H. Mathers? There is a party here with endorsed bill of lading waiting to receive them. Have been sold him by Mathers; reply giving car number.

R. McDONALD.

And on the 4th, the day following, Bain replies by telegram:

B. A. W. No. 6.

PICTOU LANDING, 4th January, 1883.

R. McDONALD, Halifax,—

The 180 cases canned goods, per my bill 341, are held by order of shipper, C. J. Haley, Souris, P.E.I. Car No. 1817.

D. BAIN.

This is all the authority defendant appears to have for holding these goods, and Haley does not seem to have interfered in any other way, or to have intervened or taken part in this trial, or set up any right to the goods as against either Mathers or the plaintiff, or to controvert the statement of Mathers that at the time of the shipment of these goods he, Haley, was largely indebted to Mathers, or that Mathers was entitled, on the sale or other disposal of these goods, to apply the proceeds thereof in liquidation of such indebtedness.

Mathers, on the 1st of January, 1883, disposed of and transferred these goods to the plaintiff for a valuable consideration in excess of the value of the goods, and delivered to him the bill of lading transmitted by Haley to Mathers on 8th Dec., 1882, on which he endorsed the following: "deliver to David McPherson or order. Isaac H. Mathers." Under these circumstances I cannot understand upon what principle Bain interfered with these goods, or upon what principle defendant, when as he himself says there was a party here (at Halifax) with endorsed bill of lading waiting to receive them, they having been, as he says, sold to such party by

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Mathers, did not deliver them to such purchaser in obedience to the order endorsed on the bill of lading by Mathers, the consignee at Halifax, on being tendered the freight; and how, without showing any right whatever in Haley to stop the goods, he can keep possession of them against Mathers and his assignee. It is not, in my opinion, necessary to discuss the relations and rights of Haley and Mathers, as between themselves, as to the manner of the disposal of these goods by Mathers. With this, it appears to me, the defendant has nothing whatever to do. Mathers must account to Haley for their proper disposal or full value. Nor whether, as between Mathers and the plaintiff, an absolute legal title passed to the plaintiff. It is sufficient, I think, to say that as against the defendant, whose position, on the evidence, is simply that of a wrongdoer, the plaintiff, if he had not such a strict legal title, had such an equitable interest in the goods, and right to the possession thereof, as would prevent the present defendant from legally withholding them from him. The appeal, therefore, in my opinion, should be dismissed with costs.

STRONG J.—I am of opinion that the judgment of the Supreme Court of Nova Scotia, as delivered by Mr. Justice Thompson, was right, and should be affirmed.

FOURNIER J. concurred.

HENRY J.—This is an action of replevin brought by the respondent to obtain the possession of one hundred and eighty cases of canned beef alleged to be of the value of nine hundred dollars.

The defendant, when the action was brought, was station master of the Intercolonial Railway at Halifax, and as such had the goods in question in his keeping. While the goods were *en route* from Pictou the re-

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spondent obtained an order from Mathers to whom the shipper Haley had written apprising him of the shipment, for the delivery of them, and demanded them, but the appellant refused, at the instance of the shipper, to deliver them to him.

The defendant pleaded as follows to the action :—

1. The said defendant by J. Norman Ritchie, his attorney, for a first plea as to plaintiff's writ or declaration, says, that he did not unjustly detain said goods as alleged.

2. And for a second plea as to said writ or declaration defendant says, that the said goods were not, nor were any of them, the plaintiff's, as alleged.

3. And for a third plea as to said writ or declaration, defendant says, that the said goods were not, nor were any of them, the goods of the plaintiff, but were the goods of one Charles J. Haley, by whose authority he detained the same.

4. And for a fourth plea as to said writ or declaration, defendant says, that the said goods were the property of one Charles J. Haley, and were delivered by his authority to the station master or agent for the Intercolonial Railway at Pictou, to be carried by said railway to Halifax. That the said goods were so carried to Halifax and came into possession of the defendant, who was and is the agent or station master of said railway at Halifax, and were received by him in that capacity, and that while said goods were so in his custody as such station master as aforesaid the said Charles J. Haley, the owner thereof, claimed the same, and forbid the defendant from delivering them to any other person, and said goods were and are lawfully detained by the authority and directions of the said Charles J. Haley, the owner thereof.

5. And for a fifth plea as to said writ or declaration, defendant says that the said goods were the property of

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one Charles J. Haley, and were delivered by him to be carried to Halifax and delivered to one Isaac H. Mathers, who was the agent of the said Charles J. Haley for the sale thereof, and then representing himself to be a person of credit in trade and fit to be trusted with the said goods for sale, and who agreed to accept a bill of exchange or draft for one thousand dollars drawn on him by the said Charles J. Haley on account of the proceeds which might be realized by him from the sale of said goods. And the said Charles J. Haley, then believing the said Isaac H. Mathers to be solvent, and a person fit to be trusted with the said goods for sale on the terms above mentioned, delivered the said goods to be carried as hereinbefore mentioned; that after the delivery of the said goods, and before they arrived in Halifax or come into the custody of defendant, the said Isaac H. Mathers became insolvent and refused to accept said bill of exchange, and attempted to make an assignment of said goods to the plaintiff, who accepted the same in fraud of the said Charles J. Haley without giving any legal or valid consideration therefor; the said plaintiff then well knowing the premises, and that the said Isaac H. Mathers was insolvent and unable to meet his liabilities. That the said defendant is and was the station master and agent for the Intercolonial Railway at Halifax, and the said goods afterwards came into his custody as such, and after the said bill had been refused acceptance and protested, and after the said Isaac H. Mathers had become insolvent and unable to pay the same, and before the delivery of the said goods to the said Isaac H. Mathers or to the plaintiff, the said Charles J Haley gave notice to defendant not to deliver the said good to the said Isaac H. Mathers or his assigns, and then stopped the same *in transitu* and required them to be delivered to him, and defendant, at the request of the said Charles J. Haley

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stopped the same, and refused to deliver said goods to plaintiff, the same being then stopped *in transitu* by said Charles J. Haley, as he the said defendant lawfully might.

The respondent's ownership of the goods and his right to the possession of them being denied, strictly legal issues are raised and under them the action was tried. The defendant was lawfully in possession of the goods under Haley, the owner and shipper.

To recover, therefore, it was necessary to show that Haley was divested of his property in them and of the right to retain possession of them, and that such property and right of possession in them had been legally transferred to the respondent. That has been attempted to be shown by a document purporting to be a copy of a bill of lading sent by Haley to Mathers. The bill of lading executed by the master of a schooner who carried the goods from Souris, in Prince Edward Island, where they were put up by Haley, required the master to deliver them at Pictou to the freight agent of the Intercolonial Railway or to his assigns—the goods being stated as being marked and numbered as in the margin. The entries on the margin are: "180 cases marked (B) —freight—To I. H. Mathers, Halifax, N.S." On the copy of the bill of lading Mathers wrote and signed the endorsement: "Deliver to David McPherson" (the respondent) "or order. Isaac H. Mathers," and delivered the copy of the bill of lading so endorsed to the respondent. That was done, as appears by the evidence, before the goods arrived at Halifax, and it is relied on as evidence of a transfer of the property in the goods by Mathers to the respondent. I have no doubt when Haley shipped the goods he intended them to be delivered to Mathers as his agent to sell them on his account, but by doing so conveyed no property in them. Mathers was not intended to become the owner of the

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goods, but by the authority of Haley he could, by a sale in a legal way have, as authorized by the latter, transferred the property in the goods to a *bonâ fide* purchaser from him within his authority as agent of Haley, but in no other way could he transfer the property in them. If for the purpose of such sale Mathers had got the possession of the goods he would still be but a special bailee of Haley, but only for the sale of them. His possession would be good against all others but Haley would still be the owner, subject to any claim of Mathers' for storage, commission, &c. If then Mathers transferred the possession of the goods or parted with them on any terms outside of his authority both he and his transferree would be liable to Haley for a wrongful conversion. Mathers' authority then was to sell the goods to a real and *bonâ fide* purchaser and account to Haley for the proceeds. Mathers so states it. He however did not so sell, but by the evidence is shown to have given that order for the delivery before mentioned to the respondent to enable him to obtain the possession of the goods to be held by him as security to indemnify him against loss in case certain bills of exchange then current drawn by Mathers and endorsed and negotiated by the respondent should be unpaid and unproductive. Such a transfer, if what was done amounted to a transfer, conveyed the property in the goods to the respondent. They still were the goods of Haley, and the other parties, if the goods were delivered to the respondent, would in law have been wrongdoers. By the compact between Haley and Mathers the former gave the latter no authority to transfer his goods for the payment of, or security for, the debts or liabilities of the latter and without such authority Haley would not be bound. The goods were not and never had been in Mathers' possession and until they came to his possession by the acts and consent of Haley he could not in any way

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deal with them. If the goods had been destroyed or injured the loss would have been Haley's. A good deal was said on the argument, and in the judgment of the court below, that was applicable to cases of transfer and delivery to carriers, but the propositions were applicable only to cases between absolute vendors and purchasers, and wholly inapplicable to the position of parties here. If a man sells goods he intends to part with the property in them, and after delivery to a common carrier the property in them vests in the consignee as purchaser, but, if sold on credit, subject to the seller's right of stoppage *in transitu*. The law regulating such a stoppage is wholly inapplicable here, for as the obtaining of possession of goods sold would bar that right the purchaser's title to the goods would be complete. In a case like this such possession would not divest the shipper and owner, and he would remain owner until the goods were sold by his authority. As that was not done in this case Haley remained the legal owner and the respondent got no property in them, and the possession of the railway officials was that of Haley. If, however, Mathers became, as I have shown he did not, the transferee of the property in the goods, where is there evidence of a transfer by him to the respondent of the property in them? If the endorsement on the copy of the bill of lading had been an endorsement of a bill of lading to which Mathers was a party, as consignee, by which the title appeared to be in him, it would, in ordinary circumstances, operate as an assignment, but the endorsement of the request to deliver the goods to the respondent, written as it was, cannot operate as an assignment, and it amounts to nothing more than a request to deliver to the respondent, it might be as the agent or servant of Mathers. It is not at all events any transfer of the property. A regular

bill of lading is *primâ facie* evidence of property in the consignee, and its assignment is evidence also of property in his assignee, but the words in question endorsed on a bill of lading in favor of another party is of no more value than if written on a blank piece of paper, unless, indeed, to identify the goods to be delivered. It, however, appears that Mathers gave the order for the delivery of the goods to the respondent to receive and retain them as security as I before stated. No delivery of possession was or could be made because Mathers had no possession. No delivery, no present consideration given or received. No debt then due by Mathers to the respondent. No possession obtained by the latter. Was not the whole transaction void? It was only in words amounting to this, that, expecting that the respondent would get possession he, as far as Mathers was concerned, was to retain the goods, if he got them as security. Suppose after the respondent's failure to get delivery, Mathers, being more successful, had succeeded in getting them, what property had the respondent in them by what took place to recover them, or the value of them, by an action of replevin or otherwise, from Mathers. There was not, I maintain, any transfer of property legal or equitable. There was no delivery or consideration at the time nor was there any note or memorandum in writing except the request to deliver, and the whole transaction so far as concerns the assign ment of the goods was void by the statute of frauds and both parties as to it were afterwards as if such had never taken place.

The learned judge who tried the case reports:—

My judgment was for plaintiff; my view being that Mathers had the equitable right to the goods, that he had made, at least, an equitable transfer of that right to the plaintiff and that the equitable right of the plaintiff was sufficient to entitle him to recover since the Judicature Act. I cited 1 Q. B. D. 709 and L. R. 5 P. C. 253.

If the transaction as an assignment or sale of prop-

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erty was void I am at a loss to know how it could be enforced in equity or by law.

The case, of *Holroyd* v. *Marshall* (1); and the judgment of this court in *Clark* v. *Scottish Imperial Insurance Company* (2); have been referred to, but I fail to recognize anything in them applicable to this case. The question in the latter case was as to the insurable interest in a vessel in course of building. In that case the plaintiff had furnished supplies to the party who built the vessel under the express agreement that he should have a lien on her to the amount of his advances. He insured in an amount sufficient to cover his advances and she was burnt before being finished. On the ground that an equitable lien was sufficient to give an insurable interest this court decided in the plaintiff's favor. That, however, is a very different position from that of Mathers in respect of the preserved or canned beef in reference to which no bargain was made that Mathers was to have any lien or even any right to sell on account of Haley unless specially authorized. It appears from the evidence that about four or five years previous to the shipment of the goods in question, Mathers, who resided at Halifax, entered into an agreement with Haley to advance supplies and money to him to enable him to carry on, at Souris, the business of packing lobsters It was agreed, Mathers says in his evidence, that Haley was to give him all the goods (that is the lobsters) he packed to recoup him; he added: "such goods I was to sell on commission for him." "That was the agreement at the start and was acted on for six years."

At the end of 1882 Mathers says Haley owed him $9,000, but there is no evidence to show that any of it was advances made on account of the packing or preserving of beef, nor is it pretended on the part of

(1) 10 H. L. Cas. 191. (2) 4 Can. S. C. R. 192.

Mathers that as to canned beef there was any agreement that Mathers was to have the sale of it. Mathers made advances to Haley under the agreement as to the packing of lobsters but for nothing else. If then Haley undertook other business and in the course of such business put up pickled fish or purchased grain, hay, vegetables, or other articles, could it be contended that even if Mathers had a lien on canned lobsters the lien could be decreed either by law or equity to extend to those other articles?

Mathers was examined on the trial and did not pretend that he had any special agreement with Haley as to the canned beef. He, on the contrary, pretty clearly shows the contrary. He says:

I do not know when Haley's transactions in canned beef with me commenced, but I believe I sold canned beef for him before '82. The agreement between us related to lobsters, it was not then contemplated that he should can meats. I charged no commission in my books on beef.

From this evidence the conclusion is irresistible that Haley was under no agreement or promise of any kind to give Mathers the sale of canned beef. Mathers does not even say that he so understood. In fact he plainly and clearly discriminates as regards the canned lobsters and the canned beef. There does not appear to have been any previous transaction between them as to canned beef. Mathers says he thinks he sold some for Haley before '82 but on referring to his books he finds no commission charged for selling beef. If he had sold any his books would certainly show it. Where then arises the lien on or any obligation on the part of Haley to employ Mathers to sell the canned beef for him? Suppose in addition to the canned beef Haley had canned indian corn, tomatoes, berries and fruits of different kinds could, it be contended that Mathers' lien on lobsters, made four years before, extended to each and all of the others? If so there must be some-

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thing cabalistic in the term "canned" and if beef is included why not the others and if canned beef why not pickled beef put up in barrels or tierces We are considering alone the question of a lien by Mathers on the identical article of canned beef and to decide in favor of the respondent he must show that lien by evidence. I have fully considered the evidence on the trial and find it impossible to detect any. The issue was on the respondent and in my opinion he most signally failed to prove it.

It has been contended that, as Haley was indebted to Mathers for advances made under the original agreement as to the canned lobsters, he had an equitable claim to the possession of the canned beef. As I before stated no advance was made specially for the canned beef and what better does the fact of the indebtedness of Haley to Mathers make the plaintiff's claim. It was assumed by the learned judge that Mathers' rights as to the corned beef were the same as to the canned lobsters, but I cannot find any evidence to sustain it. If such assumptions are permitted to prevail then the old and recognized rule that parties rights must be adjudged according to their allegations and proofs would be improperly violated and the rights of parties decided upon and affected injuriously, The assumption however in this case, is, in my opinion, not only without any proof to sustain it, but actually in opposition to the evidence on the trial of the principal witness for the respondent.

It is not always that an equitable lien can be set up, and an equitable lien does not always give the party holding it the right of possession, and a legal binding conveyance and transfer of personal property may be made so as to oust the equitable lien. The decision lately of this court in *McAllister* v. *Forsyth* (1), supported

(1) 12 Can. S. C. R. 1.

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by and founded on English decisions, establishes that position. If Mathers had even an equitable lien on the goods in question, and Haley did not deliver them as agreed upon, what right would he have by means of an action of replevin to obtain the possession, and if Haley sold and delivered to another for a valuable consideration the property would pass by such sale, but if the property remained in the possession of Haley he might be required to deliver it under the terms of his agreement or Mathers might sustain an action for damages for the loss he sustained by not having the sale of the goods as agreed upon, but not including any amount due by Haley for money or supplies advanced to him. Such should be recovered under the common counts in assumpsit. The aid of equity is invoked to enforce specific performance of contracts but it is no part of its jurisdiction to make them for parties. As there was not shown to have been any equitable lien on the goods in question an equity court would, I think, go beyond its proper functions to assume one, and I am at a loss to conceive upon what principle an equitable lien could be decreed by a court of equity to be a legal title so as to enable the holder of it to recover the possession in replevin, and I am equally at a loss to know how the application of the Judicature Act to the case can affect the legal rights of the parties in this suit.

GWYNNE J.—I concur with the learned judge before whom this case was tried without a jury that the course of dealing between Haley and Mathers with respect to canned beef was conducted on the same understanding and agreement as had governed their dealings with respect to canned lobsters; and that the proper inference to be drawn from the manner in which the particular quantity of beef in question was forwarded by Haley to Mathers and from the circumstance of Haley having

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transmitted to Mathers by post a duplicate of the bill of lading is that Mathers had an interest in the beef and authority to dispose thereof to pay himself a portion of the debt of about $9,000 due to him by Haley. When the goods came into the possession of McDonald, as the servant of the Intercolonial Railway Company, at Halifax, he, as the servant of the company, held them for and on behalf of Mathers subject only to the payment of the freight charges, and when he refused to deliver up the goods to the plaintiff upon Mathers' order he committed a tort of which the plaintiff could sustain an action for the wrongful detention. The question that was raised and tried was as to Mathers having a right to have the goods delivered to him or to his order and not a question as to the sufficiency of the plaintiff's title to the property as between him and Mathers, Haley having already received full value for the goods and having sent forward the goods to Mathers upon a contract enabling him to pay himself out of the proceeds of the goods a portion of the debt due by Haley to him, and having forwarded to Mathers the bill of lading to enable him to receive the goods in fulfilment of such contract, could not, I think, stop the delivery of the goods after their arrival at the place of delivery to Mathers, or justify the carriers and their servant in detaining them.

The appeal therefore, in my opinion, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *J. N. & T. Ritchie.*

Solicitors for respondent: *Meagher, Chisholm & Drysdale.*