

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Henderson and another v. The Comptoir
d'Escompte de Paris, from the Supreme
Court of Hong Kong; delivered 16th July
1873.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE facts of this case, about which there is no dispute, may be very shortly stated. A firm in Manchester, Messrs. Henderson and Co., purchased a quantity of goods, pledging their own credit, on behalf of Messrs. Lyall, Still, and Co., who were a firm in London, having a branch at Hong Kong. An arrangement was entered into by the parties, which is embodied in an invoice of these goods, which is as follows :—“ Invoice of
“ 50 bales, T. cloths, shipped by C. P. Henderson
“ & Co., per ‘ Ariel,’ from London to Hong Kong,
“ and consigned to Messrs. Lyall, Still, & Co.
“ there for realization, the proceeds to be
“ remitted to Messrs. George Lyall and C. F.
“ Still, London, in first class bank bills, specially
“ to meet their acceptance of C. P. Henderson &
“ Co.’s draft (or any renewal thereof) against
“ the shipment, and bought for account and
“ risk of Messrs. George Lyall & C. F. Still,
“ London.”

Now, that was the arrangement entered into between the parties, and, as between the parties, their Lordships are of opinion that Messrs. Lyall, Still, and Co., of Hong Kong, were under the

obligation so to deal with the goods as to realize proceeds from their sale, and to transmit those proceeds to Lyall, Still, and Co., in London, for the purpose indicated in this invoice, namely, of meeting their acceptances to Messrs. Henderson. It appears, that a bill of lading was made out, which is in the usual form, with this difference, that the words "or order or assigns" are omitted. It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at *nisi prius* for that proposition; but, undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as "or order or assigns" ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument.

The bill of lading and the invoice were received by Messrs. Lyall, Still, and Co. at Hong Kong on the 13th November 1866, and soon after, it does not precisely appear when, this bill of lading was endorsed to the Defendants, who are bankers at Hong Kong. It was endorsed for this purpose: it was in order to enable Messrs. Lyall, Still, and Co. of Hong Kong to obtain back from the Defendants certain silk documents, as they are described, which were deposited with them to meet two acceptances, one for \$22,000 and the other for \$22,500. It appears that Lyall, Still, and Co. met the first bill; but when the second bill became due they borrowed a sum of money sufficient to pay it of the bankers, the Defendants, on giving their promissory note dated 31st December 1866, and from that time this bill of lading remained with the bankers as a security for their repayment of that loan upon their promissory note. What next occurred, which is

material, is stated very fairly in the case of the Appellants. They state that the ship "Ariel," that is the ship carrying these goods, "arrived at Hong Kong early in January 1867, and the said fifty bales were delivered to the Respondents on the 7th January 1867; the Respondents handed to the said firm of Lyall, Still, & Co. the said bill of lading endorsed to the Respondents as aforesaid, receiving from them a receipt as follows:—'Hong Kong, 7th January 1867. Received of the Comptoir d'Escompte de Paris (Hong Kong agency) bill of lading for E. S. C. P. H. \$51,100, 50 bales merchandise per 'Ariel,' valued at \$7,625, proceeds of which we hereby engage to pay to the said bank as soon as collected on account of our promissory note for \$22,500, dated 21st December, (it should be 31st December,) 1866, and interest \$209/59. It is at the same time understood that the goods in question are stored for account and belong to the said bank until such proceeds have been paid Lyall, Still, & Co.' The case further states that in accordance with the terms of the said receipt, the said firm of Lyall, Still, & Co. sold the said fifty bales for \$6,837-50, and remitted the proceeds of the sales of the said bales, amounting to 6,837-50, to the Respondents, who applied the same in part satisfaction of the said promissory note for \$22,500."

The view of their Lordships is this, that assuming as they do, that the bill of lading was not a negotiable instrument, its endorsement and delivery to the bank gave them only an equitable right to the goods. But in their Lordships view the transaction, which took place subsequently, amounted to a delivery of these goods to the bank after the goods had been landed and delivered in pursuance of the bill of lading, and when the bill of lading was *functus officio*. It ap-

pears to their Lordships that Lyall, Still, & Co. having received these goods at Hong Kong did deliver the possession of them to the bank. It is true that the bank did not take them to their own warehouses, probably because they had not warehouses convenient to hold them; and the bank did not sell them themselves, probably because it would not be in the way of their business to sell them. They employed Lyall, Still, & Co. to sell them for the bank; but, in their Lordships opinion, in so selling them Lyall, Still, & Co. acted but as brokers to the bank; and possession was in fact delivered to the bank of the goods by Lyall, Still, & Co., after Lyall, Still, & Co. at Hong Kong had the goods in their possession, and were able so to do deliver them.

That being so, in their Lordships opinion, the bank after that delivery united in themselves a legal and equitable title to the goods. If that be so, the only question which remains is, whether they had actual or constructive notice of the trust which, as between the original parties, Henderson and Co., and Lyall, Still, and Co., in their Lordships opinion existed?

It is conceded that there was no actual notice. The question remains whether there was constructive notice, and it should be—in order to make out the case of the Plaintiff—constructive notice at the time of the endorsement of the bill of lading. That constructive notice is attempted to be inferred in this way, and in this way only: It is said that the bill of lading was in an unusual form, omitting the words “or order or assigns,” that the bank ought to have taken notice of the bill of lading being in that unusual form, that they ought hence to have inferred that it was probable that some such equitable arrangement existed as that which is now proved, and that they ought to have made enquiries on the subject. It does not appear why the words “or order or assigns”

were omitted. There is no evidence whatever that they were omitted intentionally with a view in any way to carry into effect the arrangement between the parties. It is admitted as a fact that Lyall, Still, and Co. at Hong Kong, when they endorsed the bill of lading to the bank, were not aware of this omission. And their Lordships think that it may be assumed, from the conduct of the bank and from other circumstances, that they did not notice it.

Their Lordships are further of opinion that the omission of these words, if noticed, was not a circumstance from which the peculiar arrangements subsisting between the Appellants and Lyall, Still, and Co. were necessarily to be inferred; nor even one which would necessarily excite the suspicions of a man of business of ordinary prudence, and put him on inquiry into the nature of those arrangements. They cannot therefore impute to the Respondents, either from their failure, if they did fail, to observe the omission, or from their failure, if they did observe it, to make further inquiry into the title of Lyall, Still, and Co., what in the decided cases is sometimes called "wilful blindness," and sometimes "gross negligence." And they are of opinion that to hold that the mere absence of these words from the bill of lading, without more, was constructive notice to the bank would be carrying the doctrine of constructive notice further than it has ever been carried, certainly much further than it has been the tendency of the courts in recent cases to carry it.

Their Lordships are, therefore, of opinion that the decision of the Court below was right, and they will humbly advise Her Majesty that that decision be affirmed, and that this Appeal be dismissed, with costs.

