

1892

# Stoppage in Transitu

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T H E S I S.

S T O P P A G E, I N   T R A N S I T U.

-By-

TRUMAN L. BENEDICT.  
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1892.

## C O N T E N T S.

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## STOPPAGE IN TRANSITU.

Stoppage in transitu is the name of that act of a vendor of goods, upon credit, who, on learning that the buyer is insolvent, resumes the possession of goods, while they are in the hands of a carrier or middle-man, in their transit to the buyer, and before they get in his actual possession. (Addison on Contracts, Vol. II, 187 ; Howhall v. Vargas, 13 Me. 93 ; Stevens v. Wheeler, 27 Barb. 658 ; Fraschieris v. Henriques, 6 Abb., N. S., 251.)

This is the last remedy which an unpaid vendor has against the goods which he has sold upon credit. This right, which arises solely upon the insolvency of the buyer, is based on the plain reason of justice and equity, that one man's goods should not be applied to the payment of another man's debts. (Per Lord Northington, C., in D'Aquila v. Lambert, 2 Eden Ch. 77.) If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods before

they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. (Parsons on Contracts, Vol. I. p. 476 ; Parsons on Mercantile Law, p. 60 ; Stevens v. Wheeler, 27 Barb. 658 ; Harris v. Pratt, 17 N. Y. 252.)

Therefore, we may say that the right of stoppage in transitu is nothing more than an extension of the vendor's common law lien upon goods for his price. (Rowley v. Bigelow, 12 Pick. 313 ; Atkins v. Colby, 20 N. H. 153.) Lord Abinger, C. B., in Gibson v. Carruthers, 8 H. & W. 337, said : "Although the question of stoppage in transitu has been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner." In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity which the common law has adopted. This was strongly insisted upon by Mr. Justice Butler in his celebrated judgment in the House of Lords in the case of Lickbarrow v. Mason, 1 Smith, L. C. 753 (Ed. 1873). It has also been said by Lord Kenyon that it was a principle

of equity adopted by the common law to answer the purposes of justice. "The most eminent equity lawyers that I have had opportunity of conversing with in times gone by", said Lord Abinger, "were unanimous in repudiating it as the offspring of a court of equity." The first case that occurred upon this subject affords some authority for the opinions of Mr. Justice Butler and Lord Kenyon. It is the case of Wiseman v. Vandeput (2 Verm. 202) in 1690. That was a bill filed by the assignees of the bankrupt against the vendor. The Lord Chancellor directed an action of trover to be brought by the plaintiffs, upon which they recovered a verdict. It is clear, therefore, that at that time the rule had not been adopted as law. The Lord Chancellor, however, adopted it in equity, and notwithstanding the verdict at law for the plaintiffs, made a decree against them. The case is that of Snee v. Prescott, 1 Atk. 245. Lord Hardwicke again applied the rule to a certain extent in equity. But it is remarkable that he received evidence of what was the custom of merchants on this point ; and he expressly founds his decree upon the evidence of the custom of merchants as well as upon the justice of the case. This decision occurred about the year 1742 or 1743. The next case is that of Wilkinson, Ex parte, in 1755, referred to in

D'Aquila v. Lambert (2 Eden Ch. 77) which took place in 1761. Thus, the Lord Chancellor again grounded his decree on the usage of merchants, and stated that the several previous decisions which had taken place to the same effect had given great satisfaction to the merchants. Numerous cases have followed at law, showing that the right of stoppage in transitu, under certain circumstances, is now part of the common law. Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contracts, as it prevails in this country, between vendor and vendee. It is to be observed, however, that the law of stoppage in transitu is not peculiar to the law of England in its early stage of development. It existed, I believe, in the commercial states of Europe. The cases I have already referred to show that it was practiced in the Italian States. That it existed in Holland, was proved in a case tried by Lord Ellenborough, and mentioned by him in his judgment in the case of Lickbarrow v. Mason, 1 Smith, L. S., 753 (Ed. 1873). That it is the law of Russia, was also proved in the case of Inglis v. Usherwood, 1 East, 515 ; and of Rothlingk v. English, 2 East, 397. It was also

recognized in Scotland in 1790. It appears also, on reference, that the law of France on this subject is in all points similar to the English law in its early stage of development. It may, therefore, be presumed to be a part of the law of merchants which prevailed generally in Europe in the seventeenth century, the proof of which from time to time, combined with its manifest justice and utility, was at length introduced into the common law of England, of which the law of merchants, properly understood, has always been reckoned to form a part. It now prevails almost universally among all commercial nations, and may best be considered by dividing the subject into the following sections :

1. Who may exercise the right.
2. Against whom may it be exercised.
3. When does the transit begin and end.
4. The manner of stopping.
5. The effect of stopping.

#### 1. Who may exercise the right.

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This right is strictly confined to an unpaid vendor of goods sold (Sweet v. Pym, 1 East, 4 ; Muller v. Pondir, 3



Ians. 472 ; 55 N. Y. 325 ; Benjamin on Sales, 689), or to persons who stand in the position of an unpaid vendor, as, a merchant who purchases goods on his own credit for another, and does not extend to persons who have forwarded goods to a creditor by way of payment, or in satisfaction or discharge of a debt due to the consignee. (Feise v. Wray, 3 East, 93 ; Vertue v. Jewell, 4 Campbell, 31.) The stoppage may be effected either by the vendor himself or his authorized agent, but not by a person who has no authority from the vendor to stop the goods ; and a subsequent ratification by the vendor of an unauthorized stoppage is not equivalent to a precedent authority, and will not cure the defect of want of authority, (Bird v. Brown, 4 Exch. 495), but the notice or demand for the goods may be made by the general agent of the consignor (Chandler v. Fulton, 10 Texas, 2), or even by a stranger, if the act be ratified by the vendor before the delivery to the vendee. (Bell v. Moss, 5 Whart., Penn., 189 ; Durgy Cement Co. v. O'Brien, 128 Mass. 12.) The transfer of a bill of lading by a vendor to his agent vests a sufficient special property in the latter to entitle him to stop in transitu in his own name (Seymour v. Newton, 105 Mass. 272 ; Newhall v. Vargas, 13 Me. 93 ; Bell v. Moss, 5 Whart., Penn., 189) ; and it was

held by Lord Ellenborough in Siffkin v. Wray (6 East, 371) that a mere surety for the buyer has no right to stop in transitu ; but it is held in this country that the right may be exercised by a person who pays the price of the goods for the vendee and takes from him an assignment of a bill of lading as security for his advances. (Gossler v. Schepeler, 5 Daly, 476.)

A principle consigning goods to a factor has the right of stoppage in transitu, on the latter becoming insolvent, even if the factor has made advances on the faith of the consignment, or has a joint interest with the consignor. (Newson v. Thornton, 6 East, 17.)

The delivery of goods sold on credit, to a carrier, for the mere purpose of conveyance to the vendee, does not divest the vendor of the right of stoppage ; he may, notwithstanding, exercise such right, provided he does so before the goods come to the actual possession of the purchaser or are placed under circumstances equivalent to actual possession. (Luckley v. Furness, 15 Wend. 137.)

Where there is an absolute sale of all the right and interest, the vendor loses the right of stoppage (2 Kent's Com. 541 ; Mactier v. Frith, 6 Wend. 103 ; Eaton v. Cook, 24

Vt. 58), but a partial payment of the price will not exclude the vendor's right of stoppage. (Van Casteel v. Booker, 2 Exch. 702.) Where a portion of the goods ordered has been received by a purchaser, at his residence or at his place of business, the right of stoppage as to the residue is not lost. (Hanson v. Myer, 6 East, 614 ; Valpy v. Oakeley, 15 Q. B. 941 ; Feise v. Wray, 3 East, 93 ; Newhall v. Vargas, 13 Me. 93.) The vendor is not entitled to exercise the right of stoppage, if at the time of the sale of the goods he knows the purchaser to be insolvent (Buckley v. Furness, 17 Wend. 504), or where the vendor unconditionally delivers goods to the vendee, without any fraud on the part of the latter, the principle of stoppage in transitu does not apply, and he can only look to the personal security of the vendee for the payment of the purchase price, and he has no equitable lien for the same on the goods. (Lupin v. Marie, 2 Paige Ch. 169.)

## 2. Against whom may it be exercised.

The vendor can only exercise this right against an insolvent or bankrupt buyer. (Benjamin on Sales, 696.) While

insolvency is necessary to create this right, it is not well settled what constitutes insolvency. It is a term which is used with various meanings. In a technical sense, it denotes the having taken the benefit of an insolvent law ; in a popular sense, a general inability to pay one's debts ; and in a mercantile sense, a stoppage of payment or failure in one's circumstances, as evinced by some overt act. That a technical insolvency is sufficient to authorize the exercise of the right of stoppage, has always been conceded, and in Hewson v. Thornton (6 East, 17) the right of the vendor to stop the property, on the insolvency of the consignee, was held good, where there had been only a stoppage of payment by the vendee. (Benedict v. Schaetle, 12 Ohio, 513.) Hence, it appears that the authorities and text writers furnish no support to the claim that a mere general inability to pay one's debts, unaccompanied by any visible change in the circumstances of the debtor, constitutes insolvency in such a sense as to confer the right of stoppage in transitu. (Hays v. Mouille, 14 Penn. 51 ; Chandler v. Fulton, 10 Texas, 2 ; Lee v. Kilburn, 3 Gray, 509.) It would seem, however, that we would be safe in saying that it would be sufficient to confer the right if there was merely a general inability to pay one's debts ; the

having taken the benefit of an insolvent law, or a stoppage of payment accompanied by some overt act, or "an inability to pay one's debts in the ordinary course as persons generally do." (Hickley v. Barnes, 15 Wend. 137 ; Lee v. Kallurn, 3 Gray, 594 ; Thompson v. Thompson, 4 Cush. 134 ; 2 Kent's Com. 543.)

Such privilege of stoppage, unless waived by the vendor, ought properly to extend to cases of insolvency whether existing at the time of the sale or occurring at any time before actual delivery of the goods (O'Brien v. Morris, 13 Md. 122 ; Reynolds v. Boston Ry. 43 N. H. 580), but it has been held in Connecticut that the buyer's failure must, in point of fact, have been later than the sale. (Rogers v. Thomas, 20 Conn. 54.) But the better rule is that insolvency means a general inability to pay one's debts, and if that fact exists, no matter how proved, the law requires no more. (Hays v. Mouille, 14 Penn. St. 48 ; Clark v. Lynch, 4 Daly, 83 ; Inslee v. Lane, 57 N. H. 454.) If the vendor knows, however, at the time of the sale, that the vendee is insolvent, he cannot exercise the right of stoppage, as, where a vendor trusts to the honor of his vendee for payment, knowing him to be insolvent. His knowledge of the insolvency must be obtained after the

goods are shipped. (Frankhauser v. Fellows, Nev., 21 Pacif. 886 ; Farrell v. Richmond Ry., N. C., 9 S. E. 302.)

The stoppage does not take place on the happening of the insolvency, but the right to stop is thereby acquired. The acquisition of the right works no beneficial result to the seller unless he intercepts the goods in their transit. (Mac-tier v. Brith, 6 Wend. 103.) If the vendor stops in transitu when the vendee has not yet become insolvent, he does so at his peril. If, on the arrival of the goods at destination the vendee is then insolvent, the premature stoppage will avail for the protection of the vendor ; but if the vendee remains solvent, the vendor would be bound to deliver the goods, with an indemnification for expenses incurred. (Benjamin on Sales, 696.)

An assignee in trust for creditors of an insolvent vendee is not a purchaser for value, and takes subject to the exercise of any right of stoppage in transitu which may exist against his assignor. (Harris v. Pratt, 17 N. Y. 249.) When goods are sold to one purchaser, who, before delivery to him, resells them to another, and this is known to the original vendor who consigns them to the second purchaser, the original vendor will have no right of stoppage. (Eaton v. Cook,

32 Vt. 58 ; Rosenthal v. Dessau, 11 Hun, 49 ; Pattison v. Cullen, 33 Ind. 240 ; S. C. & Am. Rep. 199.) The vendor cannot exercise the right of stoppage against a bona fide endorser for value of a bill of lading, because he stands in precisely the same light as any other bona fide purchaser of property from a fraudulent vendee. (Dows v. Green, 32 Barb. 490.)

### 3. When does the transit begin and end.

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The transit begins when the vendor or his agent delivers the goods to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account.

The law seems to be well settled that the right of stoppage in transitu exists as long as the goods remain in the hands of a middle-man on the way to their place of destination, and the right ceases whenever the goods are or have been either actually or constructively, delivered to the vendee. (Coyville v. Hitchcock, 23 Wend. 511 ; Mottram v. Heyer, 1 Denio, 487 ; 5 Denio, 629 ; Cabeen v. Campbell, 30 Penn. St.

264 ; Blackman v. Pierce, 23 Cal. 508 ; Aguirre v. Pammeloe, 22 Conn. 437.) If such is the case, then it becomes important to know when the transitus ends. The transitus continues so long as the goods remain in the hands of the middleman, whether he be a carrier either by land or water, or the keeper of a warehouse or a place of deposit connected with the transmission and delivery of the goods. (Calahan v. Mahoeck, 21 Ohio St. 281 ; 8 Am. Rep. 63 ; Harris v. Pratt, 17 N. Y. 249.) Formerly it was held that goods must have come to the corporal touch of the consignee, but now it is well settled that the transitus ceases when the goods have reached their place of destination, and have come to the actual or constructive possession of the consignee. (Motttram v. Heyer, 1 Denio, 483.) And so it was held in Mactier v. Brith (3 Wend. 103) that the transitus of the goods, and consequently the right of stoppage, is determined by the actual delivery to the vendee, or by circumstances which are equivalent to actual delivery. As has been said, the transitus<sup>will continue</sup> until the place of delivery be in fact the end of the journey of the goods, and they have arrived at the possession or under the control of the vendee himself. (2 Kent's Com. 543.)

A vendor of goods cannot exercise the right of stoppage



in transitu after the goods have been delivered by the carrier to a third person, on the order of the vendee, although they have never been delivered to the vendee at the place to which they were ordered by him to be sent. (Stevens v. Wheeler, 27 Barb. 658.) A delivery of goods or a part of them to the vendee or his agent, or a bona fide purchaser from him, terminates the transit, and consequently the right of the vendor to stop them. (Dows v. Green, 32 Barb. 490.)

The right of stoppage in transitu may be defeated by a sale to a third person and an endorsement of a bill of lading in good faith, for a valuable consideration (Rosenthal v. Dessau, 11 Hun, 49 ; Conard v. Atlantic Ins. Co., 1 Peters Rep. 386 ; Newson v. Thornton, 6 East, 17 ; Jordan v. James, 5 Ham., Ohio, 88 ; Lee v. Kimball, 45 Me. 172 ; Schumaker v. Fly, 24 Penn. St. 521 ; Holbrook v. Vose, 6 Bosworth, 76 -- 109 ; Dows v. Green, 24 N. Y. 638) ; but no other instrument except a bill of lading, which possesses something of the character of negotiable paper in the hands of a vendee without title, possesses the power of destroying the right of stoppage, until perfected by actual possession. (Ives & Osborn v. Polok & Bartling, 11 How. 411.) A bill of lading is not negotiable in the same sense as a bill of exchange, and

therefore the mere honest possession of a bill of lading endorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be, of the money promised to be paid by the acceptor. The endorsement of a bill of lading gives no better right to the goods than the endorser himself had, so that if the owner should lose or have stolen from him a bill of lading endorsed in blank, the finder or thief could confer no title upon an innocent third person. It is said that where the assignment of a bill of lading is merely collateral security for a pre-existing debt, and in which nothing is lost or surrendered by the assignee, the right of stoppage is not lost. (Leob v. Peters, 68 Ala. 243.)

The right may also be defeated where there has been a loan or advance on the faith of an endorsement of a bill of lading or from any other transaction which, though not a sale in the ordinary sense of the term, yet places the endorsee in the position and invests him with the rights of a purchaser for value. (Blossom v. Champlin, 28 Barb. 217.) The transfer of the bill of lading under such circumstances, gives rise to an equity which is superior to that of the vendor, and may not only preclude the latter from arresting the transit of the

goods which have been forwarded, but from making payment a condition precedent to the delivery of merchandise which is still in his own keeping. (Dows v. Rush, 28 Barb. 157 ; Winslow v. Norton, 29 Me. 419 ; Conard v. Atlantic Ins. Co., 1 Peters, 386.) The assignment of a bill of lading in a bona fide furtherance of a contract, conferring an interest in the goods for a valuable consideration, has, as regards the question of stoppage in transitu, the same effect at law that an actual delivery of the goods would have. (Gardner v. Howland, 2 Pick. 499 ; Indian Bank v. Colgate, 4 Daly, 41 ; The Thames, 4 Wall. 98, 106.) The mere receipt of a bill of lading by the original consignee and vendee, and remaining in his hands unendorsed, does not in any way interfere with or defeat the right of stoppage in transitu of the consignor and vendor (Stanton v. Eager, 18 Pick. 474 ; Schofield v. Bell, 14 Mass. 40) ; or the mere pleading of a bill of lading by the vendee, as a security for a debt, does not operate absolutely to defeat the vendor's right of stoppage. (Chandler v. Fulton, 10 Texas, 2.) In England the vendor's right of stoppage in transitu is not defeated by a transfer of a bill of lading where the consideration is a pre-existing debt (The Comptore Rogers v. Escompte de Paris, 8 Eng., Moak's Ed.,

209), but it has been held otherwise in this country. (Lee v. Kimball, 45 Me. 172.) Where the consideration for the endorsement of a bill of lading by the vendee was the advancement of money by the endorsee, it was held that the vendor still retained an equitable right of quasi stoppage in transitu, subject, however, to the right of the endorsee to be paid his advances ; but if the endorsee has other property of the vendee in his hands, he is bound to repay himself from that. (Chandler v. Fulton, 10 Texas, 2.) If the assignee of a bill of lading has notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of stoppage as against the assignee is not gone ; and any collusion or fraud between the consignee and his assignee will enable the consignor to assert his right. The mere fact that the assignee has notice that the consignor is not paid does not of itself render the assignment defeasible by the stopping of the goods, if the case is otherwise clear from fraud ; but if the assignee is aware that the consignee is unable to pay his debts, then the assignment will be deemed fraudulent as against the right of the consignor. (Cunning v. Brown, 9 East, 506 ; Stanton v. Eager, 16 Pick. 467, 476.) If the assignee of a bill of lading has given no value or consideration

for the endorsement of such bill of lading, or if he knew of the insolvency of his vendor at the time he took the bill, he will be in no better situation than the latter. (Cumming v. Brown, 9 East, 514.)

Perhaps, strictly and technically speaking, the right of stoppage in transitu in most cases apply to a case where the purchase may have been fair, but the purchaser is, or becomes, insolvent ; but it may be also, and more emphatically exercised, where the purchase was fraudulent, and the lawfulness of the exercise of this right in each case depends, when exerted against another party than the original purchaser, upon the question, "has such party obtained the transfer of title in good faith, for value, and upon the presumed ownership of the goods in his vendor ?" If so, the right of stoppage and the transit is ended. (Dows v. Green, 32 Barb. 490.)

Where goods are obtained by fraud from the consignor, he may stop such goods after they have been in transit by the person fraudulently obtaining such goods, as, where one agreed to sell goods on being informed by another that the money to pay for them had been deposited with a certain firm. The consignee fraudulently obtained from the consignor a statement that he (the consignee) had bought the goods, and on the

strength of such statement obtained possession of the goods from said firm and shipped them. In such a case the consignor has the right of stoppage in transitu. (Bergman v. Indianapolis & St. L. Ry. Co., 15 S. W. 992.)

If goods have arrived at an intermediate place, where they are placed under the orders of the vendee, and are to remain stationary until they receive his directions to put them again in motion for some new and ulterior destination, the transitus is ended. (Mactier v. Frith, 6 Wend. 135.) Where a party, residing at a distance from his correspondent, ordered a quantity of merchandise, directing it to be forwarded to an intermediate place, and the goods were accordingly forwarded, and after their arrival at the intermediate place and their delivery to a common carrier employed by the purchaser, and before the goods reached the residence of the purchaser, the vendor resumed the possession, on the ground of the insolvency of the purchaser, it was held that the goods not having arrived at the place of their final destination, the transitus was not ended, and the vendor had the right to stop and retain them until the price was paid. (Buckley v. Furness, 15 Wend. 137.)

A vendor's right of stoppage in transitu is not deter-

mined by the goods coming to the hands of a shipping agent appointed by the vendee, though they are delivered to him to await further directions in respect to the time and mode of shipment to the vendee at an ulterior destination previously fixed, and not to be affected by such subsequent directions. The transitus continues until the goods come to the possession of the vendee or some agent authorized to act in respect to the disposition of them otherwise than by forwarding them to the vendee. (Harris v. Pratt, 17 N. Y. 249.) When goods are placed in a public store, under the warehouse system, after a perfect entry for that purpose, at the place where he intends they shall remain, until he gives further orders for their disposal, the law recognizes his right to sell or dispose of them as he pleases, and in such a case the transit and right of stoppage is at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made. (Hoffman v. Meyer, 5 Denio, 632 ; Traschieris v. Henriques, 6 Abb., N. S., 251 ; Cartwright v. Wilmerding, 24 N. Y. 521 ; House v. Judson, 4 Dana, Ky., 11 ; O'Brien v. Morris, 16 Md. 122.) But the mere fact that goods imported from abroad, upon the order of a buyer, have come into the hands of the officers of the customs, and have by them been put

into a warehouse, the buyer exercising no right of ownership over them, has been held not to determine the transit. (Donath v. Broomhead, 7 Penn. St. 301.) Goods in public store, awaiting the completion of their entry at the custom house by the payment of the duties, are to be considered still in transitu; and it is well settled that as to goods thus deposited the right of a consignor to stop in transitu attaches. (Western Transp. Co. v. Hawley, 1 Daly, 327.) It seems that the right of stoppage in transitu or the transitus is not divested where goods are seized or levied upon by virtue of an attachment or execution at the suit of a creditor of the purchaser. (Buckley v. Furness, 15 Wend. 137.)

A complete delivery of part of an entire parcel or cargo, with the intention to take the whole, terminates the transitus and the vendor cannot stop the remainder. (Lord Ellenborough, 6 East, 627.) In other cases, where only a portion of the goods were delivered and the intention of the vendee was to only to take part of the goods, the right of stoppage as to the residue has been maintained. (Hanson v. Meyer, 6 East, 614; Buckley v. Furness, 17 Wend. 504.) A demand and marking of the goods by the agent of the vendee when they have arrived at the end of the journey (Ellis v. Hunt, 3 Term



Rep. 464), or suffering the goods to be marked and resold, and marked again by the under purchaser (Stowell v. Hughes, 14 East Rep. 308), all terminate the transitus. Goods are held not to be in transit when they are being carried in the purchaser's own cart or carriage, under the control of his own servant or agent. (Ogle v. Atkinson, 5 Taunt. 759 ; Thompson v. Stewart, 7 Phila., Penn., 187.) If the purchaser chartered and dispatches a vessel to a distant port to receive the goods, the fact of their being in transitu will depend upon the character in which the master or commander receives them. If the charter-party amounts merely to a contract for the carriage of merchandise, the captain having the general control and management of the vessel, and continuing the servant of the ship owner, the goods will be received by him in the character of a carrier and will be in transitu ; but if the charter-party amounts to a demise or bailment of the ship, the charterer becoming the temporary owner and the master or commander his servant or agent, the delivery of the goods on board will be a delivery to the purchaser, and the possession of the master his possession, and the vendor will have no right to retake them (Sandeman v. Scurr, 2 Q. B. 86 ; Rothlink v. Inglis, 3 East, 397 ; Newhall v. Vargas, 13 Me. 93 ;

Rowley v. Bigelow, 12 Pick. 307 ; Fowler v. McTaggard, 1 East, 522), unless the goods are shipped under a bill of lading reserving to the vendor the dominion and control over them ; that is, the vendor must take a bill of lading so expressed as to indicate that the delivery is to the master of the vessel as an agent for carriage, and not as agent to receive possession for the purchaser. (Turner v. Trustees, etc., 6 Exch. 543.) If the goods are not addressed directly to the assignee, but to the vendor's agent at the place of destination, accompanied by an order directing him to deliver them to the purchaser, the goods continue in the constructive possession of the vendor until they have been actually handed over to the purchaser or the agent has attorned to the the purchaser and agreed to hold the goods on his own account, and subject to his orders ; but goods in the hands of the purchaser's agent for custody are not in transit but are in the actual possession of the purchaser, and cannot be taken by an unpaid vendor, for the transit is ended. (Grout v. Hill, 4 Gray, 361 ; Stubbs v. Lund, 7 Mass. 453 ; Naylor v. Dennie, 8 Pick. 198 ; Calahan v. Babcock, 21 Ohio St. 281 ; Guilford v. Smith, 30 Vt. 49 ; Sawyer v. Joslin, 20 Vt. 192.) If the transit be once at an end it cannot commence de novo,

merely because the goods are again sent upon their travels towards a new and ulterior destination. (Dixon v. Baldwin, 5 East, 184.) If goods have been put on board a buyer's ship to be transported not by him but by his order to another place, they are so far in his possession, as soon as on board, that there can be no stoppage in transitu. (Stubbs v. Lund, 7 Mass. 453.) If it appears by a bill of lading that the goods were put on board a ship to be carried on account and at the risk of the consignee, this vests the property in him, and puts an end to the transit. (Ilisley v. Stubbs, 9 Mass. 65, 72.) As long as the carrier holds the goods as a mere instrument of conveyance, the goods are in transitu, but if the carrier enters expressly, or by implication, into a new agreement with the purchaser, distinct from the original contract for carriage, to hold the goods for the purchaser as his agent in a new character for the purpose of custody on his account, and subject to some new or further order to be given by him, the transitus is at an end. (Reynolds v. Boston & Lowell Ry., 42 N. H. 591 ; Atkins v. Colby, 20 N. H. 154.) Where goods have been landed and warehoused at a place commonly used by the purchaser as a place of deposit, and the purchaser, finding himself to be in failing circumstances, has

previously declared it to be his intention not to accept the goods and not to take possession of them as owner, there has been no actual delivery, and the unpaid vendor's right has not been destroyed. (Nicholson v. Bowen, 28 Q. B. 97.)

The vendor's right to stop in transitu can not be defeated by an claim of lien on the part of the carrier, wharfinger or any other middle-man. (Benjamin on Sales, 695.) Where goods are sold and sent by the seller to the buyer, it has been questioned whether a vendee can go forward and meet the goods and take possession of them before their regular delivery, and thus stop the transit. After many controversies, in many cases, it was finally decided that he may do this, and that the transit is terminated by the buyer thus taking possession of the goods. (Secomb v. Nutt, 14 B. Monr., Ky., 261 ; Jordan v. James, 5 Ohio, 88 ; Cabeen v. Campbell, 30 Penn. 254 ; Aguierre v. Parmelee, 22 Conn. 473 ; Parsons on Mercantile Law, 64.) But if the vendor attaches the goods as the property of the vendee while they are in the course of transportation, such attachment will destroy the right to stop them in transitu. (Woodruff v. Noyes, 15 Conn. 355.) It is held, however, that the commencement of an action against the buyer, by the attorney of the seller, for the price of

the goods sold on credit, without the knowledge of the seller, and before either was apprised that the transit was not terminated, is not a waiver of the right of stoppage, if it be asserted within a reasonable time and the improvident action be not prosecuted. (Calahan v. Babcock, 21 Ohio, 281 ; 8 Am. Rep. 63.)

#### 4. Manner of stopping.

The old rule of law, that a stoppage in transitu could be effected only by the corporeal touch of the goods, no longer prevails. (Litt v. Cowley, 7 Taunt. 168 ; Newhall v. Vargas, 13 Me. 93.) A notice to a carrier having charge of the goods is sufficient, but if given to an employer whose servant has the custody, it must be given at such time and under such circumstances that the employer may be able to communicate it to his servant in time to prevent a delivery to the consignee, and the notice must require the carrier to hold the goods subject to the vendor's orders. (Reynolds v. Boston & Maine Ry. 43 N. H. 591 ; Bell v. Moss, 5 Whart. 189.) Lord Hardwicke once said, that the vendor was so much favored in exer-

cising the right of stoppage, as to be justifiable in getting his goods back by any means not criminal, before they reached the possession of an insolvent vendee. (Benjamin on Sales, 717.) Upon demand by the vendor, while the right of stoppage in transitu continues, the carrier will become liable for a conversion of the goods, if he declines to re-deliver them to the vendor, or delivers them to the vendee. (O'Neil v. Garrett, 6 Iowa, 480 ; Blackman v. Pierce, 23 Cal. 508.) A notice from the consignor to a common carrier to stop and retain goods in transitu is sufficient, although it does not contain any statement of the reason thereof ; but the consignor must furnish such carrier with evidence of the validity of his claim if demanded, and if he unreasonably refuse, such refusal may be construed as a waiver of his right. In the absence of such reasonable refusal, the carrier is liable for the value of the goods, if after receiving such notice he delivers them to the consignee. (Allen v. Maine Cent. Ry., 9 At. 895 ; Hillard v. Webster, 8 At. 470.) Notice must be brought to the hands of the carrier before the goods are delivered. If goods are delivered and notice is received in the shortest time imaginable after the delivery, the right is lost ; as, where the freight has been paid by the consign-

ee and receipted for, and left in the depot to be called for, and the agent of the carrier discovered on opening his mail that he had instructions not to deliver them. (Longstaff v. Slix, Miss., 1 So. 97.)

The stoppage to be effective must be on behalf of the vendor, in the assertion of his rights as paramount to the rights of the buyer. (Siffkin v. Wray, 6 East, 371.)

#### 5. The effect of stopping.

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There can no longer be any reasonable doubt that the true nature and effect of this remedy of the vendor is simply to restore the goods to his possession, so as to enable him to exercise his right as an unpaid vendor, and not to rescind the sale. This question would be apt to be brought up, if after stoppage there should be a considerable advance in the price of the goods sold ; it is obvious that the subject then would be of practical importance. The question seems to be well settled now, both in England and in this country, that it is an extension of the common law lien. (Jordan v. James, 5 Ohio, 88 ; Rowley v. Bigelow, 12 Pick. 307 ; Newhall v. Var-

gas, 13 Me. 93 ; S. C. 15 Me. 315 ; Rogers v. Thomas, 20 Conn. 53 ; Martindale v. Smith, 12 Q. B. 389 ; Valpy v. Oakeley, 16 Q. B. 941 ; S. C. 20 Q. B. 380 ; Griffiths v. Perry, 28 Q. B. 204 ; Cross v. O'Donnell, 44 N. Y. 661 ; S. C. 4 Am. Rep. 721.) If the seller by stopping the goods in transitu rescinds the sale, he has no further claim for the price, nor any part of it, nor can the buyer, or any one representing him, pay the price and recover the goods against the will of the seller. If, however, he only exercises his right of lien, he holds the goods as the property of the buyer, and they may be redeemed by him or his representatives, by paying the price for which they are held as security, and if not redeemed they become the property of the vendor. Where one of two partners purchased goods without the privity of his copartner, and the latter, on learning of the fact, proposed by letter that the vendors have the goods again, which proposal was accepted and the goods stopped in transit, it was held that the sale was thereby rescinded. (Ash v. Putnam, 1 Hill, 302.) The sale may be rescinded by the consent of the vendor and the vendee, before the rights of others are concerned (Smith v. Field, 5 Taunt. 402.) The assignees of a bankrupt purchaser are entitled to call upon the vendor to



deliver the goods on being paid or tendered the price, but, if they refuse to take and pay for the goods, the vendor will be entitled to resell them in the same way that he is entitled to resell in ordinary cases after the refusal of a purchaser to take and pay for the things he has ordered and bought. If the vendee has paid part of the price, he can not recover it back, while the vendor, having regained the possession, is still willing to deliver the goods on payment of the balance. If the vendee refuses to pay the balance and take the goods, the vendor may, after notice and reasonable time, resell them and apply the proceeds to the payment of the price, and should a balance still remain unpaid, the vendor may recover it of the vendee. (Howhall v. Vargas, 18 Me. 93 ; 2 Kent's Com. 541.)

The retaking of goods by the seller in transitu, from the possession of the carrier in an action of replevin, of which the transferee of the bill of lading had no notice, and the recovery of judgment in favor of the seller, in such action do not bar the right of the transferee of the bill of lading to maintain an action against the seller for conversion.

(Rawls v. Deshler, 4 Abb. Ct. App. 12 ; S. C., Keyes, 572 ; S. C., 28 How. 66.)

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