

As to the 2nd point, the auctioneer, although for many purposes an agent, is for this purpose a stakeholder: *Burrough v. Skinner (k)*. And the money having been deposited with him as a stakeholder, and being in his hands, the plaintiff could not recover against the defendant, but should have sued the auctioneer.

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A'DAMJI.  
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BHIMJI  
PURSHOIAM.

I am, therefore, of opinion that judgment should be entered for the plaintiff in the Court of Small Causes; but that as the decision is not on the merits, each party should bear his own costs.

WESTROPP, J., concurred.



*Referred Case.*

LAKHMIDA'S HIRA'CHAND v. THE GREAT INDIAN  
PENINSULA RAILWAY COMPANY.

Aug. 17.

*Silk—Dhotra—Value of Silk—Evidence, question of—Act XVIII. of 1854, Sec. 10—Act IX. of 1850, Sec. 55—Act XXVI. of 1864, Sec. 7.*

Whether or not cotton fabrics bordered with silk, or having a portion of silk otherwise used in their manufacture, are "silks in a manufactured or unmanufactured state, wrought up or not wrought up with other materials," within the meaning of Act XVIII. of 1854, Sec. 10, is a question of fact, to be decided on the evidence, not a question of law, to be reserved for the opinion of the High Court, under Act IX. of 1850, Sec. 55, and Act XXVI. of 1864, Sec. 7.

*Brunt v. The Midland Railway Company* (33 L. J., Ex. 137) followed.

*Semle*: The proper test for a Judge to apply in such cases, is to determine whether or not the value of the silk wrought up with other materials is more than half the value of the fabric. If it be not, the fabric cannot be considered to be silk, within the meaning of the Act.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

"This suit was instituted to recover from the defendants the sum of Rs. 794-14-3; being damages for non-delivery of a bale of piece goods, intrusted to the defendants, to be carried on the defendants' railway for hire.

"At the trial, Mr. Hurrell, for the defendants, admitted that the Company had received the bale; that they had

(k) 5 Burr. 2639.

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not delivered it; and that the value of it, at the place where it should have been delivered, was Rs. 775, which was the value of the goods according to the evidence for the plaintiffs. The defence was that the goods were silk, or at least were goods which came within the operation of Sec. 10 of Act XVIII. of 1854.

“On the evidence for the plaintiffs, it appeared that the bale in question consisted entirely of *dhotré*, that is, cotton cloths about six yards long by three-quarters of a yard wide, with a border of silk at the ends, varying from one in some *dhotré* to three inches in others. The plaintiff did not produce the invoice, but stated that the *dhotré* varied in value from Rs. 10 to Rs. 4; that they were all silk-bordered; and that the value of these *dhotré* without the silk border would vary from Rs. 7 to Rs. 2 or Rs. 2½. Plaintiff himself stated that the silk border of a *dhotra* made a difference of about Rs. 2 in the value of the article.

“Under these circumstances, I was of opinion that the Company were, by Sec. 10 of Act XVIII. of 1854, exempted from liability for the loss.

“The plaintiff thereupon required me to give judgment, contingent upon the opinion of the High Court, upon the following question:—Did the fact that the *dhotré* were, to the extent set forth in the evidence for the plaintiff, composed of silk, exempt the Company from liability for their loss. Subject to the opinion of the High Court on the above question, I give a verdict for the defendants.”

9 Aug. The case came on for hearing this day, before COUCH, C.J., and WESTROPP, J.

*Dunbar* (White with him), for the plaintiffs, cited *Brunt v. The Midland Railway Company* (a), *Bernstein v. Baxendale*. (b)

*Green* (Howard with him), for the defendants, commented on the cases cited (*supra*).

*Dunbar* in reply.

*Cur. adv. vult.*

(a) 33 Law J., Ex. 187; S. C. 10 Jur., N. S. 181.

(b) 28 Law J., C. P. 265; S. C. 5 Jur., N. S. 1056

COUCH, C.J. :—The articles in question are stated by the First Judge of the Small Cause Court to have been sent by the plaintiff to be carried on the defendants' railway. No other evidence except that of the plaintiff, was given as to the value and composition of the goods. The border made a difference, taking an average, of about Rs. 2 in the value of each article. In some of them the value of the silk amounted to 2 in 7 or  $2\frac{1}{2}$  in 7. In no case was the value of the silk more than one-half of the entire value. There is no evidence before us as to what quantity were of so small a value as Rs. 4 or  $4\frac{1}{2}$ .

The Judge has referred to us the question, whether these articles are, or are not, silks wrought up with other materials. This is not a question of law, which, by Act XXVI. of 1864, the Judge had power to reserve for the opinion of this court. In *Brunt v. The Midland Railway Company* three of the Judges treated it as a question of fact, to be dealt with by the Court sitting as a jury. So that the Judge is not proceeding under the Act in submitting this question for our opinion; but as it has come before us, I think it right to express our opinion upon it as a question of fact: and as a question of fact I consider that these articles are not silks wrought up with other materials within the meaning of the Act.

I should take as a general test in these cases, whether the value of the silk is more than half of that of the whole article. This consideration would appear to have influenced the judgment of the Court in *Brunt v. The Midland Railway Company*. The evidence in this case, as stated by the Judge, fails to show that the silk here bore so large a proportion to the other materials as to bring the goods within the denomination of silks wrought up with other materials within the meaning of the Act.

WESTROFF, J. :—I concur in holding that the articles in this case do not fall within the meaning of the 10th section of the Act, as silks wrought up with other materials.

Not long ago an appeal was brought by Mr. Hayes, Traffic Manager on the Bombay, Baroda, and Central India Rail-

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way, against Vasantram Bhikaridas, who had sued the company in the court below for goods which had been lost by the Railway Company. The value of the goods as a whole had been ascertained by the Judge of the court below, but the value of the proportion of silk and the other materials had not been ascertained; and the Appellate Court, consisting of myself and Mr. Justice Tucker, reversed the proceedings of the court below, and directed a new trial, upon issues framed for the purpose of ascertaining the value of the silk in the goods, and also the value of the gold in the goods (c). Some of the goods in that case were similar to those in this case—*dhotre*, with silk borders, and some of them with gold in the borders, and the total value of each material was the chief point remaining to be ascertained.

In the Court of Exchequer, in the case of *Brunt v. The Midland Railway Company*, the question was treated as a question of fact, and in deciding it the Court appeared to be guided by a principle, which principle was to ascertain whether the silk was the major part of the value; and they came to the conclusion that it was, inasmuch as it stood in the ratio of 9 to 7 to the other material; and, accordingly, the Court found that the goods came within the section. Here the value of the silk was far below the value of the other material in many of the articles, and in no instance did it exceed one-half. I, therefore, think that the case does not come within the terms of the section.

(c) See order of 10th January 1866 made in that case.