ORIGINAL CIVIL.

(76)

Before Mr. Justice Green.

1878 *August 30 and September 2 and 5.*

C. H. B. FORBES AND OTHERS (PLAINTIFF) *v.* TULLOKCHAND MANOCKCHAND AND SHAPURJI, BURJORJI, TRADING UNDER THE FIRM OF TULLOCKCHAND AND SHAPURJI (DEFENDANT)*

Contract of sale—Transfer of contract—Construction—Cargo.

On the 16th April 1878 the plaintiffs contracted to purchase from F. M. & Co., of Bombay, at Rs. 18 per ton "*the entire cargo of coal per 'Culzean' amounting to tons, or thereabouts.*" On 18th April the plaintiffs transferred the contract to the defendants and one Nanabhai Bomansha, and the following endorsement was made:—"*The contract to be transferred to Messrs. Tullockchand and Shapurji and Nanabhai Bomansha at Rs. 20½. For C. H. B. Forbes and Selves, W. Tennent & Co.*" Underneath this endorsement the transferres wrote as follows:—"*Accepted 450 tons at Rs. 20½ per ton. Nanabhai Bomansha. Accepted 450 tons at Rs. 20½ per ton. Tullockchand and Shapurji.*" The "Culzean" arrived at Bombay with a cargo of 2,197 tons of coal, on board of which appeared that 1,300 tons had been shipped to the B. B. & C. I. Railway Company and 867 ton to the order of the shippers. F. M. & Co. were agents at Bombay for the shippers. The defendants refused to take delivery of the coal, on the ground that the contract transferred to the and Nanabhai Bomansha was a contract for an "entire cargo." The plaintiffs sued the defendants for non-acceptance, contending that there had been no transfer to defendants and Nanabhai Bomansha of the original contract, but a new several contract for separate portions of the cargo.

Held that the joint effect of the endorsement and the original contract was that the defendants agreed to purchase 450 tons, part of an entire cargo of 900 tons, or thereabouts; that, inasmuch as the cargo of the "Culzean" consisted of 2,167 tons, the defendants were not bound to accept any part of such cargo, and that the suit was not maintainable.

Borrowman v. *Drayton* (1) followed.

In this suit the plaintiffs sought to recover from the defendants the sum of Rs. 1,125 as damages sustained by the plaintiffs by reason of the defendants' alleged breach of contract in refusing to take delivery of 450 tons of coal.

On the 16th April 1878 the plaintiffs contracted to purchase from Messrs. Finlay, Muir & Co., of Bombay, an entire cargo of coal then expected to arrive in Bombay, per the ship "Culzean," at the rate of Rs. 18 per ton. The contract was in the following terms:—

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"*Bombay April* 16, 1878.

"The undersigned have this day sold to C. H. B. Forbes, Esquire, the entire cargo of coal per 'Culzean' amounting to 900 tons or thereabouts.

"The coal to be of the description known as West Longrigg coal, and to be delivered into purchaser's boats alongside at Rs. 18 (rupees eighteen) per ton.

"Delivered to be taken at chartered rate, but not more than 500 tons per diem.

"All conditions in the charter party, as to demurrage, &c., to be binding on the purchaser.

"*Terms.*—If required, the coals are to be landed (by the purchase's muccadum) and kept on the bandar for two months at purchaser's risk and expense, purchaser paying ground-rent, watching, &c., and interest 9 per cent. per annum from date of discharge.

"Should the purchaser fail to take delivery within one day of receipt of notice that the ship is ready to discharge, it shall be optional with the vendors to land, the coal at the purchaser's risk and expense, and thereafter to re-sell the said coal after giving two clear days' notice of their intention to do so; and the purchaser here holds himself, his heirs, representatives, or executors responsible and obliges himself or them to forfeit any advantage, or to make good any loss or difference that may arise through such re-sale.

"Should the vessel put back or put into any port through stress of weather or any other cause, the terms of this contract shall not be prejudiced thereby.

"In the event of the ship being lost, this contract to be null and void.

FINLAY, MUIR & Co.

On the 18th April the plaintiffs transferred the above contract to the defendants and one Nanabhai Bomansha.

The following endorsement was made upon the contract:—

"The contract to be transferred to Messrs. Tullockchand and Shapurji and Nanabhai Bomansha at Rs. 20½.

For C. H. B. FORBES & SELVES,

W. TENNENT & Co."

Underneath this endorsement the transferees wrote the following words:—

"Accepted 450 tons at Rs. 20½ per ton.

NANABHAI BOMANSHA.

"Accepted 450 tons at Rs. 20½ per ton.

TULLOCKCHAND AND SHAPURJI.

Bombay, 18*th April* 1878.

The "Culzean" arrived at Bombay on the 19th June with a cargo of 2,167 tons of coal. Of this cargo it appeared that 1,300

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tons had been shipped to the Bombay and Baroda Railway Company and 867 to the order of the shippers, Messrs. Mason & Co. of Leith. Messrs. Finlay, Muir & Co. were agents in Bombay for the owners of the "Culzean" and also for the shippers of the coal, Messrs. Mason & Co.

On the 21st June the "Culzean" began to discharge coal for the Bombay and Baroda Railway Company, and on the 27th June about 338 tons had been discharged.

On that day the plaintiff wrote to the defendant as follows :—

"We beg to inform you that the "Culzean" has arrived with your coals. We have not yet received notice from the agents, but when we receive their notice to commence discharging we will let you know."

To this letter the defendants replied through their solicitors, refusing to take deliver of the coal, on the ground that the contract transferred to them was a contract for an "entire cargo". The plaintiffs thereupon filed this suit. They also in Suit 352 of 1878 sued Nanabhai Bomansha, the other transferee of the contract. It was, however, agreed that this second case should not be brought to a hearing, but that the parties should be bound by the decision given in this suit.

Macpherson and *Inverarity* for plaintiffs.—Section 7 of the Indian Contract Act requires acceptance of an offer to be absolute. Here the endorsements do not accept the proposed transfer of the contract. They really amount to a new offer by the defendants to the plaintiffs, which offer was accepted by the plaintiffs. We law our damage at Rs. 2½ per ton : Contract Act (IX of 1872), sec. 73, illustration (*h*). The defendant' contention is that they are only jointly liable, that the contract was for 900 tons or thereabouts transferred to them jointly, and that the statement in the endorsement, that each accepted 450 tons, had reference merely to a private arrangement between themselves. But a mere private arrangement would not have been endorsed on the contract paper, and the first part of the endorsement cannot be separated from the signatures. The whole endorsement must be taken together. The defendants' contract with the plaintiffs was not simply a transfer of the plaintiffs' original contract with Finlay, Muir & Co.

The endorsements show that the two transferred did not assent to the transfer of the original contract. The ultimate contract to which they assented was differed from the original contract. Their contract was not a joint contract for an entire cargo of 900 tons. It was a several contract for separate portions of the cargo; otherwise, why did they add the words "for 450 tons"? The omission from the endorsement of the words "thereabouts" shows that the cargo was not transferred. They would not be bound to take more or less than a specific quantity of 440 tons each. As to the meaning of the words "thereabouts" in a contract, *Oxendale* v. *Wetherell.*(1) The reasons why it may be important to a purchaser to have an entire cargo, are stated in *Borrowman* v. *Drayton,*(2) but these reasons do not apply to a case where each of a number of purchasers buys a specific quantity, the aggregate of which makes up the entire cargo. The only purpose for which we may refer to the original contract, is to ascertain the quality of the coal. That is necessary, because there is noting in the endorsement on the subject; but it is otherwise as to quantity. The question as to our readiness and willingness to deliver, only arises if it should be held that the plaintiffs only contracted to give the plaintiffs 450 tons. It is plaint we could not have delivered an entire cargo. The cargo consisted of 2,167 tons, and on the 27th June only 338 tons had been delivered to other purchaser: so that 1,829 tons were still on board when we wrote out letter of 27th June to the defendants. The defendants and Nanabhai Bomansha might have gone along side, and taken delivery *pari passu* with the B. B. & C. I. Railway Company,—at all events, we could have delivered 450 tons to the defendants, event if we had not an equal quantity to deliver to Nanabhai Bomansha.

Latham and *Jardine* for defendants.—The plaintiffs made a contract with Finlay, Muir & Co., and transferred that contract to the defendants and Nanabhai Bomansha, with an order added dividing the cargo as between the purchasers. We are not bound to accept anything but an entire cargo: *Borrowman* v. *Drayton.*(3) It is clear that the two quantities of 450 tons, specified in the endorsement, refer to the 900 tons mentioned in the original

(1) 9 B. & C. 386. (2) L. R. 2 Ex. D. 15. (3) L. R. 2 Ex. D. 15.

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contract. To understand the endorsement we must refer to the contract. Even if the plaintiffs' construction be correct, we contend that they were not ready to deliver the 900 tons : Benjamin on Sales, p. 567; Leake on Contracts, p. 437 ; *Tamvaco* v. *Lucas* ;(1) Indian Contract Act (IX of 1872), sec. 38 ; *Hochster* v. *De Latour* ; *Frost* v. *Knight*.(3)

GREEN, J.—In this suit and also in suit 352 of 1878 the plaintiffs are four persons, viz., Charles H. B. Forbes, William Middleton Tennent, William Pirrie and Ronchordas Ghella, the three last named of whom carry on business together under the firm of W. Tennent & Co. In this suit the defendants are Tullokchand Manockchand and Shapurji Burjorji who carry on business together under the firm of Tullockchand and Shapurji. In suit 352 of 1878 the defendant is Nanabhai Bomansha. The two suits were not heard together, but it was stated by counsel that the parties in suit 352 of 1878 had agreed that the decision in this suit should govern suit 352 of 1878, there being, it was considered, precisely the same questions of fact and law to be determined in each, though the defendants in the two suits were different. This arrangement had been made shortly after the suits were instituted, and before they came on for hearing, and is embodied in the letters of the attorneys of the parties which have been put in evidence.

The plaintiffs in this suit sue the defendants therein to recover Rs. 1,825 as amount of damages sustained by reason of the alleged breach, by the defendants, of the contract alleged in this behalf in the plaint. The contract, as alleged, is one of the 18th April 1878 for the purchase and acceptance of delivery, by the defendants from the plaintiff, of 450 tons of coal (then expected to arrive in Bombay by the ship "Gulzean", and being part of the cargo thereof) at the rate of Rs. 20-8 per ton. The breach alleged is that the defendants on the 27th June 1878 and after they had notice of the arrival of the ship, declined to take delivery of the coal so purchased by them. The amount of damages claimed is the difference, on 450 tons, of the price

(1) E. & E. 581. *Ibid*, 592. (2) 2 E. & B. 678.
(3) L. R, 5 Ex, 322 : L. R. 7 Ex. 111.

at the said rate of Rs. 20-8 per ton and the rate of Rs. 18 per ton at which it is alleged the plaintiffs had agreed to purchase th said coal on the 16th April 1878, viz., two days before they agree to sell the defendants.

The issues raised and settled were as follows:—

(1.) Whether there was any contract between the plaintiffs and defendants in respect of the matters in the plaint mentioned other than an agreement by the plaintiffs on the one side and the defendants, to gether with one Nanabhai Bomansha Marshall (*i. e.* the defendants in suit 352 of 1878) on the other, for the transfer to the defendants and the said Nanabhai Bomansha Marshall of the contract in para. 3 of the plaint mentioned. (This last-mentioned contract is the one of the 16th April 1878, in which the plaintiffs were purchasers.

(2.) Whether the said Nanabhai Bomansha Marshall is not a necessary party to this suit.

(3.) Whether the plaintiffs were ever ready and willing to fulfil the contract which they had entered into with the defendants.

(4.) Whether 1,300 tons of coal out of the cargo of the said ship "Culzean" were not delivered to the B. B. & C. I. Railway Company in priority to any offer of delivery to the defendants.

(5.) Whether after the delivery of the 1,300 tons of coal to the said railway company there were as much as 900 tons of coal remaining out of the said cargo.

(6) Whether the portion of coal left after delivery of the said 1,300 tons were not of inferior character, and such as the defendants were not bound accept; and

(7.) Whether the plaintiffs are entitled to recover the amount claimed, or any part thereof.

In order to ascertain what was the contract between the parties to these suits we have to considered, first, the contract between Messrs. Finlay, Muir & Co. (the original vendors of the coal) and the present plaintiffs, and then that between the present plaintiff and the defendants. These two contracts are contained on one piece of paper. On the face of the paper it is as follows. (His

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Lordship read the contract.) The name of the ship "Culzean" was not, however, inserted till long after the date the contract bears, viz., the 16th April 1878, and was not, in fact, known to the plaintiffs, nor it would seem even to the original vendors, Messrs. Finlay, Muir & Co. It will be noticed that the name of the purchaser mentioned is that of C. H. B. Forbes alone. But the evidence shows that the contract of purchase, though in his name alone, was, in truth, on the joint account of him and the firm of W. Tennent & Co., and that Messrs. Finlay, Muir & Co. were aware at the time that W. Tennent & Co. had an interest in the contract. [His Lordship then discussed the evidence with reference to the circumstances under which the original contract was made between the plaintiffs and Messrs. Finlay, Muir & Co. and stated as his conclusion "that as between Messrs. Finlay, Muir & Co. and the plaintiffs the contract was for 900 tons, or thereabouts, being the entire cargo of some ship not then named." He then proceeded to examine the evidence with regard to the transfer of the contract of the plaintiffs to the defendants and Nanabhai Bomanshá, and continued.] So that the matter stands thus. The relations of vendor and puchaser, as expressed in the contract between Finlay, Muir & Co. and the plaintiffs (in the same of the plaintiff Forbes) were trnsferred so as to become the relations of vendor and purchaser as between the plaintiffs and the defendants and Nanabhai Bomanshá, but with this modification that the defendants become purchaser of other 450 tons only, and Nanabhai Bomansha became purchaser of other 450 tons, the quantity expressed in the original contract between Finlay, Muir & Co. and plaintiffs being for 900 tons.

It was argued, however, on behalf of the plaintiffs that the words of the endorsements by the defendants operated to vary the terms of the original contract to a greater extent than that above mentioned; that as the words "450 tons" got rid of and displaced the words "or thereabouts" in the original contract, so the several endorsements for 450 tons each, got rid of and displaced the words "entire cargo". That one who has contracted to buy a cargo or an 'entire corgo' is not bound to accept goods which, though answering in quantity and quality to the quan tit

and quality mentioned as that of the cargo purchased, are not, in fact, *the cargo*, by reason that the ship has other cargo, and particularly of the same description, on board, and this though the name of the ship by which the cargo is to be brought is not mentioned, is clearly laid down in the case of *Borrowman* v. *Drayton*.(1) In that case, as in the present, the name of the particular ship, the cargo of which was sold, was not mentioned in the contract. The contract was for a cargo of from 2,500 to 3,000 barrels of petroleum, and though the plaintiffs were ready to deliver to the defendants 3,000 barrels, and otherwise to comply with the terms of contract as to odering the ship to call and unload at any port of delivery within the contract, and deliver to the defendant, at any such port, 2,750 barrels as the mean between 2,500 and 3,000, and although the defendant had refused accept either the 3,000 barrels, or any other quantity, a judgment by non-suit was upheld on the ground that beyond 3,000 barrels the ship had on board 300 other barrels though marked with a different marked and shipped under a separate bill of lading. By the bills of lading in the present suit (exhibits F and G), dated 22nd March 1878, it appears that "Culzean" had shipped on board, by Messrs. Mason & Co. of Leith, in all some 2,167 tons of West Longrigg coal, of which tons 1,300 were shipped under the bill of lading (exhibit F) to the B. B. & C. I. Railway Company or assigns, and 867 tons to order of the shippers, besides 20 tons of coal for ship's use. The firm of Finlay, Muir & Co. were agents in Bombay for the owners of the "Culzean" as well as for the shippers of the coal, Messrs. Mason & Co. The ship arrived in Bombay on or about the 19th June 1878. By this time the price of coal had gone down Rs. 2 or Rs. 3 a ton; otherwise, no doubt, we should not have heard anything of the present suits. Shortly after her arrival, and on the 21st June, she began discharging coal for the railway company without any notice of her readiness to discharge having been given to the plaintiffs. Mr. Wilson, of the firm of Finlay, Muir & Co., states that, though his firm did not consider themselves bound, in right, to deliver 1,300 tons to the railway company in priority to others, he believed they had a letter from the shippers in which the latter said this was to be done. No, having regard to the fact that the bill of lading for the 867 tons was

(1) L. R. 2 Ex. D. 15.

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to order of the shippers, the shippers may have been quite in their right to give such instruction. I cannot, however, understand how Messrs. Finlay, Muir and Co. should be entitled to act on such instruction when they had themselves sold, to other parties than the railway company, 900 tons, or thereabouts, described as an *entire cargo*. The quantity, however, delivered to the railway company down to the 27th June was not more than 338 tons : so, at the time of the defendants' refusal to take delivery, there was, in fact, on board an ample quantity to satisfy their contract, though not, as will be seen, to satisfy the entire bill of lading of the railway company as well as the contracts for 450 tons to the defendants and 450 tons so Nanabhai Bomansha. On that day the present plaintiffs caused to be written to the defendants and to Nanabhai Bomansha separate notices in the same terms. That addressed to the defendants was as follows :—

"*27th June* 1878.

"Messrs. TULLOCKCHAND and SHAPURJI.

"Dear Sirs,

"We beg to inform you that the 'Culzean' has arrived with your coals. We have not yet received notice from the agents ; but when we receive their notice to commence discharging, we will let you know.

Yours faithfully,

W. TENNENT & Co."

On the same day a reply was sent by the defendants' attorneys on behalf of defendants and Nanabhai Bomansha jointly :—

"*Bombay 27th June* 1878.

Messrs. TENNENT & Co.

Dear Sirs,

"We are instructed by Messrs. Tullockchand and Shapurji and Nanabhai Bomansha to acknowledge receipt of your letters of this date with reference to ship 'Culzean', and to inform you that the contract transferred to our clients was for an 'entire cargo of coal' and not for part only of cargo. Our clients, therefore,

decline to take delivery of the coals referred to in your letters under reply.

We are,

Dear Sirs,

Yours faithfully,

RIMINGTON, HORE & CONROY."

The plaintiffs had no notice from Messrs. Finlay, Muir & Co. that the "Culzean" was ready to discharge till the 1st July 1878, when they received the following letter :—

"Messrs. W. TENNENT & Co.

"Dear Sirs.

"As we learn from Captain Pirrie, of the 'Culzean', that he is ready to discharge the West Longrigg coal sold by us to you under contract dated 16th April last, we have now to give you information thereof, and to request you to take delivery in terms of the contract.

Yours faithfully,

FINLAY, MUIR & Co."

During this period, and down to the 10th July, discharge and delivery was going on to the railway company, and by the last-mentioned date 1,338 tons 15 cwts. 2 quarters, as weighed on the Bunder, had been delivered to them. After the letter of the 1st July, correspondence ensued between the plaintiffs (in the name of W. Tennent & Co.) and Messrs. Finlay, Muir & Co.

(His Lordship read the correspondence, which is not material to this report.)

The defendants and Nanabhai Bomansha, it will have been seen by their attorneys' letter of the 27th June, repudiated their contract, which in the said letter is treated as a joint contract, on the ground that the contract transferred to them was for an "entire cargo of coal" and not for part only of a cargo.

Now, Joshua Brooks and Phirozsha, the brokers through whom the transfer of the contract to the defendants had been negotiated, had become aware, about a fortnight before the "Culzean"

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arrived, that the 900 tons transferred by the plaintiffs to the defendants and Nanabhai Bomansha was not the entire cargo of coal, and yet Mr. Brooks says he never communicated this information either to the plaintiff Tennent or to the defendant Shapurji. Shapurji states he did not even hear the name of the ship till the day before the 27th June. He must be mistaken as to this, if the evidence of Nanabhai Bomansha be true, that about the time of the ship's arrival, viz., the 19th June, he had heard he was not to get 450 tons out of an *entire cargo* of 900 tons. However, there can be no doubt that the defendants and Nanabhai Bomansha had become aware that the "Culzean" had other cargo of coal on board, at least by the time of their letter of the 27th June. Considering the very small opportunities (if any) that, according to the evidence either the defendants Shapurji or Nanabhai Bomansha had, from their own experience, of judging of the respective merits of entire or apart cargoes, and that at the time of the contract of the 18th April, owing to the despatch of the Indian troops to Malta, there was considerable business in the Bombay coal market, and prices were rising rapidly, I am of opinion that the defendants Shapurji and Nanabhai Bomansha have, to say the least, greatly coloured their evidence as to their anxiety in April to get nothing but an entire cargo. I cannot held forming the opinion that it was Mr. Joshua Brooks, or his partner Phirozsha, who, directly indirectly, suggested to the defendants and Nanabhai Bomansha that they might avoid taking delivery on the ground that the 900 tons was not an entire cargo. The question, however, still remains—whatever may have been the advice and whatever the real motives of the defendants and Nanabhai Bomansha in refusing to take delivery of the coals—were they entitled or not, in law, to do so?

The opinion I have come to on this part of the case is, that, save as modified by the words of the endorsements by the defendant and Nánábhai Bomanshá respectively, all the terms of the contract as between Finlay, Muir & Co. and the plaintiffs were binding as between the plaintiffs and the defendants and Nanabhai Bomansha respectively. I cannot see any inconsistency between the endorsement and the original contracts, in the fact that endorsements mention 450 tons, whereas the original contract is for 900 tons or *thereabouts*

I consider the joint effect of the endoresments signed by the Shapurji on behalf of those defendants and the original contract was that the defendants agreed to purchase 450 tons, part of an entire cargo of 900 tons, or thereabouts. As the two lots of 450 tons were to come out of cargo described as 'of 600 tons, or thereabouts,' it seems to me that the "thereabouts" of the original contract of necessity applies to each of the 450 tons, that the contracts of the defendants and Nanabhai Bomansha respectively were in each case for 450 tons or thereabouts, out of an entire cargo of 900 tons or thereabouts. The circumstance that the defendants and Nanabhai Bomansha were in some way connected, and operating, as it were, together, though not as joint contractors, with the plaintiffs does not, in my opinion, affect the question. Had the contract been with the present defendants alone for 450 tons, the rest of the 900 tons being sold to a purchaser quite unconnected with them, or had plaintiffs themselves retained the rest, I am of opinion that the defendants would still have been entitled to decline to accept 450 tons, unless the 900 tons, or thereabouts, was the entire cargo. The defendants and Nanabhai and Bomansha are, therefore, warranted, in my opinion, in contending that what they respectively contracted to purchase was 450 tons, or thereabouts, out of 900, or thereabouts, such 900 tons, however, being an entire cargo. I cannot distinguish on any solid ground the case of *Borrowman* v. *Drayton* (1) from the present one. The case of *Krueger* v. *Blanck* (2) is to the same effect. Certain reasons are stated on which is ground the rule that a purchaser of an 'entire cargo' or 'cargo' simply (the quantity purchased being mentioned exactly or approximately) is not bound to take goods he has purchased, if, in fact, the ship has other cargo on the board, and particularly cargo of the same class as that sold to such purchaser. One of these reasons more particularly applicable in the present case is that a contract for an entire cargo practically gives the purchaser complete control over the vessel and that thereby he is free from the inconvenience of other person's goods being unloaded at the same time with his own. Another of the reasons is to some extent, though not so directly, applicable here, namely, that the purchaser of an entire cargo

(1) L. R. 2 Ex. D. 15. (2) L. R. Ex. 179.

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avoids the competition arising from other people's goods being ready for sale at the same place and at the same time. No doubt the coals for the B. B. & C. I. Railway were delivered to consumers directly, not to a merchant. Still however, the very fact of a large consumer like a railway company, and that in a comparatively small market as Bombay, being supplied direct and not through a local merchant, would to a certain extent diminish the chance of such consumer having to resort to a local merchant. But as Kelly, C. B., in his judgment in *Krueger* v. *Blanck* (1) lays it down, we are not to inquire whether the considerations which constitute the reason of the rule in question are, in fact, applicable in each particular case. We have, however, in the present case an actul exemplification of one of the possible disadvantages to which a purchaser of part of a cargo of coal may be subject as compared with the purchaser of an entire cargo. Within two days after the arrival of this ship, her agents began to give delivery to the railway company, the purchasers of 1,300 tons out of her cargo (though Mr. Wilson states that he does not consider Finlay, Muir & Co. were, in law, bound to give them priority), and did not send to the plaintiffs, who were purchasers from themselves of 900 tons, notice of the ship being ready to discharge till the 1st July, *i. e.* thirteen days after her arrival. That there was favour, in fact, shown to the railway company, cannot be doubted, and this would not probably have been the case had the 900 tons sold to the plaintiffs been the entire cargo.

Having arrived at the conclusion that the defedants and Nanabhai Bomansha were entitled (and I may mention that I consider the plaintiffs also as against Nessrs. Finlay, Muir & Co. were likewise entitled) to refuse to take delivery of any coals *ex* the "Culzean", unless the 900 tons, or thereabouts, mentioned in the contract between Finlay, Muir & Co. and the plaintiffs was the entire cargo, it is not necessary to discuss at any length the other issues in the case. As to the actual quantity of the entire cargo on the board, it seems to have been about 2,119 tons. On this amount the railway company obtained 1,338 tons 15 cwts. *i.e.* 38 tons and 15 cwts. more than were entitled to), and 780 tons

(1) L. R. 5 Ex 179.

10 cwts. were sold by public auction by Finlay, Muir & Co., at Rs. 17-8 a ton, since those suits were instituted. It appears, therefore, that there were about 81 tons less than what was required to satisfy the bill of lading for 1,300 tons and the contract for 900 tons. But, though there was this deficiency, as matters turned out I cannot have the least doubt that had the defendants and Nanabhai Bomansha not repudiated the contract on another ground than insufficiency of quantity, and had they been willing, respectively, to receive and take delivery of 450 tons, and pay Rs. 20-8 per ton for it, the plaintiffs would have been able and certainly willing to deliver the full quantity of 450 tons to each within a reasonable time, and I do not find that the plaintiffs were bound to deliver to them at any specified time after the arrival of the ship. One cannot suppose the Bombay and Baroda Railway Company put such a special value or had such a special affection for coal *ex* the ship "Culzeon" that they would not have been perfectly willing to let the plaintiffs have, out of their consignment the comparatively small quantity necessary to make up the 900 tons, thereby making a profit of some Rs. 200 or more, even taking the then market price as about Rs. 18. It would, indeed, have been the interest of the plaintiffs to give even more than Rs. 20-8 a ton for the quantity to make up the 900 tons.

Apart, however, from any question of getting additional coals from the railway company, I should have thought that the plaintiffs were, in fact, able to deliver coals to the defendants and Nanabhai Bomansha, respectively, in sufficient quantity to comply with the contracts. Supposing the railway company to have taken only what they were entitled to, viz. 1,300 tons, there would have been 409½ ton for the defendants and Nanabhai Bomansha respectively, and having regard to Mr. Wilson's evidence and the cases cited at page 569 and the following pages of Banjamin on sales (2n ed.), I am by no means prepared to say that this deffect, as compared with 450 tons, would not be covered by the "thereabouts" of the original contract,—a term which I consider, as I have stated, to form part of the contract with the defendants and Nanabhai Bomansha.

As to the question of quality, I am opinion that the evidence that the 783 tons sold by auction by order of Finlay, Muir & Co.

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fetched a very good price considering the market rate at the time, far outweights the survey by Captain Clarke. I do not for a moment doubt Captain Clarke's capacity as a coal surveyor, or that the description he gives, in his survey, of the coal he saw on the 29th July is a correct one. But there is wholly wanting any evidence that the coal he saw was the coal of which the defendants were required to take delivery of. Then there is something curious in this, that no notice of this survey being about to be held was given to the plaintiffs, though it was held seventeen days after the plaint was filed, and only five days before the defendants filed their written statement. Having regard to these circumstances, the evidence of Captain Clarke, trustworthy as it may be in itself, cannot outweigh the fact that for 780 tons of coal *ex* the "Culzean", remaining after the railway company had taken their 1,338 tons 15 cwts., purchasers were willing to give what was a fair or rather a good price, according to the market rates of the day, for coal of the description of West Longrigg.

The findings on the issues are as follows :—

On the first in the affirmative, and for the plaintiffs, and that there was a contract between the plaintiffs on the one side and the defendants on the other, and another contract between the plaintiffs on the one side and Nanabhai Bomansha, in the said first issue mentioned, on the other, for the acceptance by the defendants and the said Nanabhai Bomansha, respectively, of 450 tons, respectively, of coal at Rs. 20-8 per ton, but otherwise on the terms and conditions of the contract in the 3rd para. of the plaint referred to.

On the second issue in the negative, and for the plaintiffs.

On the third issue the finding is that the plaintiffs were not ready and willing to deliver to the defendants 450 tons of a cargo, per "Culzean", of 900 tons, or thereabouts, being an entire cargo, but were otherwise ready and willing to fulfil their contract with the defendants.

On the fourth the finding is that before any offer of delivery by the plaintiffs was made, but at a time when 338 tons only or thereabouts, out of the cargo in the issue mentioned had been delivered

to the railway company, the defendants had repudiated any liability to take delivery of coal *ex* the "Culzean".

On the fifth in the negative, and for the defendants.

On the sixth in the negative, and for the plaintiffs.

On the seventh in the negative and for the defendants, and the suit must be dismissed with costs, but I will give no costs of the hearing beyond those of the first two days and of hearing judgment. I make this order as to costs from a consideration that the hearing has been considerably lengthened by the number of points of defence raised by the defendants in their written statement, or in the issues, on some of which they have failed. But, though this be so, and that in respect in certain branches of the evidence I cannot regard the defendants' case with entire satisfaction, there is no reason, inasmuch as they have succeeded in the defence and on a ground set up from the first, for not allowing them costs of the suit and of the hearing to the extent aforesaid.

As to the suit 352 of 1878 between the same plaintiffs and Nanabhai Bomansha, defendant, the same is dismissed with costs, having regard to the agreement contained in the letters in evidence.

Attorneys for the plaintiffs.—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the defendants.—Messr. *Rimington, Hore and Conroy.*