

If, then, cl. 4, sub-cl. (c) and (d), apply to the case, the question arises whether the words "the amount at which the relief sought is valued in the plaint" allow the plaintiff to put forward an arbitrary valuation. *Prima facie*, they certainly do seem to leave such a liberty to a plaintiff, and some reasonable grounds for such liberty being allowed are suggested by Westropp, C. J., in *Manohar Ganesh v. Bawa Ramcharandas*(1). But, without going into the general question on the present occasion, I think the case before us is one in which the valuation did not form part of the functions of the Court, but could be made by the plaintiff as he pleased. And the Judge's order, therefore, to amend the valuation, and his subsequent dismissal of the suit for refusal to amend, were both erroneous. The decree of the Court below must, therefore, be reversed and the suit remanded for trial on the merits. The defendant ought, I think, to pay the appellant his costs of his appeal. All other costs to be dealt with by the Court below in making its decree on the new trial.

Order reversed.

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Before Mr. Justice Farran.

LILLADHAR JAIRAM NARRANJI AND OTHERS (Plaintiffs) v.

GEORGE WREFORD AND OTHERS (Defendants).*

[15th September and 3rd October, 1892.]

Sale of goods—Appropriation to vendee—Passing of property to vendee—Bankruptcy of agents for purchase—Unpaid vendor—Stoppage in transit—Termination of transit—Goods landed in Dock and held by Dock authorities—Bombay Act, VI of 1879, ss. 43 and 62—Port Trustees of Bombay—Bye-laws of Port Trust, Rule 59.

In August 1890, the plaintiffs, through Benn, Ashley and Co., of Bombay, ordered from Bevis, Russell and Co., in London, 100 bales of grey shirtings at 7s. 10d. per piece f. o. b., November-December shipment. In order to carry out this order, Bevis, Russell and Co. purchased goods of the required description from Messrs. Dewhurst and Co. of Manchester. The heading of the invoice of the goods supplied by Dewhurst and Co. contained these words: "Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptances of Geo. and R. Dewhurst's draft against this or any of these shipments," and the letter addressed by Dewhurst and Co., to Bevis, Russell and Co., forwarding draft, contained the following clause:—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm." To this letter Bevis, Russell and Co. replied: "We confirm the arrangements between us as to the disposal of remittances and against the shipments." The bales were duly marked with the plaintiffs' mark by direction of Bevis, Russell and Co. and were to be delivered f. o. b. at Liverpool. Dewhurst and Co. accordingly despatched the 100 bales to Liverpool, and there Bevis, Russell and Co. had them shipped in eight different vessels, *viz.*, 13 bales in each of the four steamers "Nubia," "Clan Drummond," "Inchulva" and "Roumania," and 12 bales in each of the ships "Hispania," "Eden Hall," "City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay, by Bevis, Russell and Co., in their own name, the bills of lading being made out to their order or to his or their assigns." Bevis, Russell and Co. paid the freight at Liverpool and effected insurance on the plaintiffs' behalf. All the shipments were made before the 1st December,

* Suit No., 679 of 1890.

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1890, except the 12 bales by the "Wistow Hall," which were shipped on that day. On the several shipments being effected, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months after date. The bills of lading of the bales shipped in the "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co., and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived at Bombay in November, and the plaintiffs received the 13 bales shipped by her, Benn, Ashley and Co. having endorsed the bill of lading to the plaintiffs. No specific payment was made by the plaintiffs in respect of these bales, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The invoices of 25 more bales, viz., 13 bales *ex* "Clan Drummond" and 12 bales *ex* "Hispania," arrived in Bombay later in November, and were handed to the plaintiffs. On [63] the 1st December, 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December, 1890, Bevis, Russell and Co. suspended payment, and on that day a receiving order was made vesting their assets in the first defendant, Wreford; and on the next day Pixley was appointed special manager of the estate under s. 12 of the English Bankruptcy Act (Stat. 46 and 47 Vic., c. 52). At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co., who then handed them over to Pixley. On the same 5th December, 1890, Benn, Ashley and Co. suspended payment in Bombay. On the 13th December, 1890, Dewhurst and Co. telegraphed to their agents in Bombay, Messrs. Ritchie, Steuart and Co., directing them to stop the goods in transit, including the 25 bales *ex* "Clan Drummond" and "Hispania." On the 15th December, Ritchie, Steuart and Co. on behalf of Dewhurst and Co., gave notice to the agents of the "Hispania" to stop the 12 bales on board that vessel. Previously to that notice, however, the bales had been landed in the Dock at Bombay. They then gave the Dock authorities notices, but at that time the ships' agents had already given the plaintiffs a delivery order for the goods. On the same day, viz., the 15th December, Ritchie, Steuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board. These bales had not then been landed, and were then still on board.

The other five steamers with the remaining 62 bales duly arrived in Bombay and went into Dock. On the 2nd January, 1891, the "Roumania," the "City of Edinburgh" and the "Wistow Hall" had landed all the bales which they had on board. The "Eden Hall" had landed 9 out of the 12 which she had brought, leaving 3 still to be discharged, and the "Inchulva" had not landed any of her bales, the whole 13 being still on board. On that day (2nd January, 1891) Ritchie, Steuart and Co., on behalf of Dewhurst and Co., wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of "Wistow Hall," in respect of which no notice was sent. These notices were all delivered on the 3rd January, 1891.

Held—

(1) On the evidence, that the payment of the Rs. 25,000, by the plaintiffs, to Benn, Ashley and Co., in Bombay was a payment for and on account of the 100 bales. In respect of transactions before bankruptcy, a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were agents to receive payment.

(2) That on the goods being shipped at Liverpool, if not at an earlier date, the property in them passed from Dewhurst and Co., to Bevis, Russell and Co., and from the latter, by reason of the plaintiffs' contract with Bevis, Russell and Co., to the plaintiffs,—Bevis, Russell and Co. having, by holding the bills of lading, the constructive possession of the goods, and the legal right to their actual possession, and to retain the same until their price was paid by the plaintiffs with the charges.

(3) That the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co., and Benn, Ashley and Co., in bankruptcy, to the bills of lading and the goods represented by them without further payment, Ritchie, Steuart and Co., as agents of the Official Receiver had not, therefore, the right to withhold the bills of lading of any of these bales from the plaintiffs.

[64] (4) On the evidence, that when Dewhurst and Co. forwarded the goods to Bevis, Russell and Co. at Liverpool they really started the goods on their voyage to Bombay, and that the transit lasted until the bales were "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

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(5) That effectual notice on behalf of Dewhurst and Co., to stop in transit was given in respect of the 13 bales *ex* "Roumania" by the notice sent by Ritchie, Stuart and Co., on the 15th December 1890. The general notice given on that day to the agents of the "Roumania" not only as to specific bales, but as to any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co., although indefinite, covered the shipment by the "Roumania," and was given in time to prevent the bales on board that ship from reaching "home."

(6) That effectual notice by Ritchie, Stuart and Co., on behalf of Dewhurst and Co., to stop in transit was given in respect of the 13 bales *ex* "Inchulva" and 3 bales (out of the 12) *ex* "Eden Hall" which were still on board and undischarged at the date of the notice of the 2nd January 1891.

(7) As to the 12 bales *ex* "Hispania" landed prior to the notice of the 15th December, and as to the 12 bales *ex* "City of Edinburgh" and the 9 (out of the 12) *ex* "Eden Hall," landed before the notice of the 2nd January 1891, and as to the 12 *ex* "Wistow Hall" in respect of which no notice at all was given, that the plaintiffs were entitled to them.

(8) That the goods ceased to be in transit when landed in Dock in Bombay.

BENN, Ashley and Russell carried on business in Bombay as merchants under the style of Benn, Ashley and Co., and in London and Manchester under the style of Bevis, Russell and Co. W. Macdonald was the manager of Benn, Ashley and Co., in Bombay, but was not a partner.

The plaintiffs were merchants carrying on business in Bombay under the name of Jairam Narranji and Sons. They dealt in piece-goods, which they used to order out from England from Bevis, Russell and Co., through the Bombay firm of Benn, Ashley and Co.

In August 1890, the plaintiffs ordered from Bevis, Russell and Co. in London, through Benn, Ashley and Co., of Bombay, 100 bales of grey shirtings at 7s. 10d per piece f. o. b., November-December shipment. In order to be in a position to execute this order, Bevis, Russell and Co. purchased goods of the required description from Dewhurst and Co., of Manchester.

The heading of the invoice of the goods supplied by Dewhurst and Co. contained these words: "Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the [65] protection of their acceptances of Geo. and R. Dewhurst's drafts against this or any of these shipments," and the letter addressed by Dewhurst and Co. to Bevis, Russell and Co., forwarding draft contained the following clause:—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill or any other of your acceptances of our drafts against such shipments, which please confirm," and to this letter Bevis, Russell and Co. replied as follows:—"We confirm the arrangements between us as to the disposal of remittances and against the shipments."

On the 1st September, 1890, Bevis, Russell and Co. directed the 100 bales to be marked with the plaintiffs' mark. The goods were to be delivered f. o. b. at Liverpool. Dewhurst and Co. accordingly despatched the 100 bales bearing the plaintiffs' mark to Liverpool in different lots. At Liverpool, Bevis, Russell and Co. had them shipped in eight different vessels, *viz.*, 13 bales in each of the four ships "Nubia," "Clan Drummond," "Inchulva," and "Roumania" and 12 bales in each of the ships "Hispania," "Eden Hall," "City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay by Bevis, Russell and Co., in their own names, the bills of lading being made out to their own "order or to his or their assigns." The freight was paid by Bevis, Russell and Co., in Liverpool on the plaintiffs' behalf, and they also effected insurance for the plaintiffs. All

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the shipments were made before the 1st of December, 1890, except the 12 bales by the "Wistow Hall," which were shipped on that day. On the several lots being shipped, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months after date.

The bills of lading for the bales *ex* "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co., and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived in Bombay in November, and the plaintiffs received the 13 bales shipped by her,—Messrs. Benn, Ashley and Co., having endorsed the bill of lading to the plaintiffs. The plaintiffs received these bales without making any specific payment in respect of them, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The [66] invoices of 25 more bales, *viz.*, 13 *ex* "Clan Drummond" and 12 *ex* "Hispania" arrived in Bombay later in November, and were handed to the plaintiffs. On the 1st December 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December 1890, Bevis, Russell and Co. suspended payment, and on the same day a receiving order was made vesting their assets in the first defendant, Wreford. On the next day F. W. Pixley was appointed special manager of the estate under s. 12 of the English Bankruptcy Act, 1883. At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co., in England, who then handed them over to Pixley. On the same day (5th December 1890) Benn, Ashley and Co. suspended payment in Bombay.

On the 6th December 1890, the vendors, Dewhurst and Co., gave notice to the receiver, Wreford, that they claimed all shipping documents, goods and proceeds of goods and remittances to Benn, Ashley and Co., Bombay, for which Dewhurst and Co. had drawn bills, and requiring him to apply the same proceeds and remittances towards payments of such bills in accordance with the invoice headings. On the 10th December 1890, Dewhurst and Co., sent a telegram to their agents in Bombay, Messrs. Ritchie, Steuart and Co., stating that they claimed "to have the goods sold by them and proceeds specifically applied to pay bills against goods." This was notified to Benn, Ashley and Co.

On the 11th December it was arranged between the Official Receiver and Dewhurst and Co., that the goods of the latter which had been sent out to native constituents in India should be sold by Messrs. Ritchie, Steuart and Co., of Bombay, who should hold the proceeds of such goods to the joint account of the receiver and Dewhurst and Co. On this arrangement being made, a joint telegram was sent to Ritchie, Steuart and Co., on the 12th December 1890 in the following terms:—"Please carry out sales to natives delivering goods against cash only and remit proceeds to England in joint names of Pixley and Dewhurst." In pursuance of this arrangement, Pixley sent the bills of lading for the 62 bales to Ritchie, Steuart and Co., in Bombay.

[67] On the 13th December, 1890, Dewhurst and Co., having heard that the Official Assignee in Bombay claimed all goods consigned to Benn, Ashley and Co., sent a telegram to Ritchie, Steuart and Co., directing them to stop the goods in transit, including the 25 bales *ex* "Clan Drummond" and "Hispania." On the morning of the 15th December, Ritchie, Steuart and Co., on behalf of Dewhurst and Co., gave notice to Graham and Co., the agents for the "Hispania," to stop the 12 bales on board that vessel. Previously to that notice, however, the goods had been landed in the

Dock at Bombay. They then gave the Dock authorities notice to stop them, but at that time Graham and Co. had already given the plaintiffs a delivery order for the goods. On the same morning, *viz.*, the 15th December, Ritchie, Steuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board that vessel. These bales had not then been landed, and were then still on board.

The remaining 62 bales duly arrived in Bombay. As already mentioned, Pixley had sent the bills of lading to Ritchie, Steuart and Co. By the arrangement of the 11th December between Dewhurst and Co. and the receiver it had been arranged that Ritchie, Steuart and Co. should sell these (with others) goods and hold the proceeds. On the 31st December, Ritchie, Steuart and Co., on behalf of the Official Receiver and of Pixley sent notices to the agents of the five different vessels in which the 62 bales were shipped, to hold the goods for them, stating that they held the bills of lading. At that time four of the vessels were in the Dock. On the 2nd January, 1891, out of the 62 bales which had arrived, 46 had been discharged and were in the hands of the Dock authorities, and 16 were still on board. On that day the 62 bales were found to be as shown in the following table:—

Vessel.	Number of bales discharged.	Number of bales undischarged.
"Eden Hall"	9	3
"Inchulva"	0	13
"Roumania"	13	0
"City of Edinburgh"	12	0
"Wistow Hall"	12	0
Total discharged	46	Undischarged ... 16

[68] On the said 2nd January 1891, Ritchie, Steuart and Co., on behalf of Dewhurst and Co., wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was given. These notices were all delivered on the 3rd January, 1891.

The suit was filed on the 8th December, 1890. The plaint set forth (*inter alia*) that, prior to the failure of Bevis, Russell and Co., and Benn, Ashley and Co., the 100 bales had been shipped to Bombay on account and at the risk of the plaintiffs by Bevis, Russell and Co.; that 13 bales *ex* "Nubia" had been duly received by the plaintiffs; that a further lot of 25 bales (*viz.*, 13 bales *ex* "Clan Drummond" and 12 bales *ex* "Hispania,") had arrived, and of these the plaintiffs, as receivers, had got possession of 13, but that the agents of the S.S. "Hispania," in which the 12 bales had arrived, refused to deliver these latter to the plaintiffs; that subsequently 62 bales, the remainder of the 100 bales, arrived in Bombay, and were taken possession of by the defendants, Messrs. Ritchie, Steuart and Co. acting, as they alleged, under the instructions of the first defendant, Wreford, the Official Receiver in England of the estate of Bevis, Russell and Co., and also on behalf of Messrs. Dewhurst and Co., of Manchester, the alleged vendors of the said 100 bales. Messrs. Ritchie, Steuart and Co. refused to deliver up the said bales to the plaintiffs except upon the terms of the plaintiffs paying the full invoice price thereof and the charges thereon.

The plaint prayed (*inter alia*) that the plaintiffs might be declared entitled to the two lots of 25 bales and 62 bales, and that the defendants.

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Messrs. Ritchie, Steuart and Co., might be ordered to deliver up the said 62 bales, and to pay Rs. 1,000 as damages for the illegal detention thereof. The defendants, Messrs. Ritchie, Steuart and Co., filed a written statement. They set forth that, in respect of the matters complained of, they had acted as the agents for the defendant Wreford, the Official Receiver in England of Bevis, Russell and Co., and also as the agents of one F. W. Pixley of London who had been, on the application of the creditors, appointed by the said Official Receiver to the special manager of the estate [69] of the said insolvent firm under s. 12 of the English Bankruptcy Act (Stat. 46 and 47 Vic., c. 52) and also as the agents of Messrs. Geo. and R. Dewhurst, the vendors of the said goods. They submitted that the right of Wreford, of Pixley, and of Messrs. Geo. and R. Dewhurst, or of some of them; to the said 87 bales was superior to the right (if any) of the plaintiffs.

They further stated that for many years Messrs. Geo. and R. Dewhurst had dealt with Messrs. Bevis, Russell and Co. as follows. The latter firm on obtaining indents from natives in Bombay used to contract to purchase goods from Geo. and R. Dewhurst, who sold the same on the express condition that they should be consigned to Benn, Ashley and Co., of Bombay, and that the proceeds of such goods should be specifically held for the protection of all the acceptances by Bevis, Russell and Co. of the drafts of Geo. and R. Dewhurst drawn against every shipment of goods sold by Geo. and R. Dewhurst to Bevis, Russell and Co.

The bills drawn by the said Geo. and R. Dewhurst against the said 87 bales, and accepted by Bevis, Russell and Co., had been dishonoured, and there were outstanding dishonoured acceptances of Bevis, Russell and Co. on the drafts of Geo. and R. Dewhurst drawn in the course of business aforesaid to the amount of about £ 22,676-14-6.

The defendants submitted that, (having regard to the course of dealing between Geo. and R. Dewhurst and Bevis, Russell and Co.) all goods sold by them as aforesaid were held by Bevis, Russell and Co., or by Benn, Ashley and Co., as trustees for the said Geo. and R. Dewhurst, and that the said goods, and the proceeds of such goods, formed no part of the estate of Bevis, Russell and Co., or Benn, Ashley and Co., but were specifically set apart and ear-marked as appropriated for the protection, not only of the drafts drawn on any particular shipment, but of all outstanding acceptances of Bevis, Russell and Co. on the drafts of Geo. and R. Dewhurst. They contended that, in the events that had happened, the said Geo. and R. Dewhurst were entitled to a lien and charge on the said 87 bales of goods, or that the said 87 bales were impressed with a trust in favour of Geo. and R. Dewhurst for the amount of all outstanding [70] acceptances, or, at any rate, for the amount of the drafts drawn against the said 87 bales and dishonoured by Bevis, Russell and Co., or that otherwise Geo. and R. Dewhurst had a claim to the 87 bales paramount to the plaintiffs.

The written statement further alleged that Geo. and R. Dewhurst, as unpaid vendors, had stopped the said goods in transit, and were entitled to do so.

The defendants annexed to this written statement, copies of the form of invoice and of the letter forwarding draft drawn against shipments for acceptance used by Geo. and R. Dewhurst in their dealings with Bevis, Russell and Co., and of the letter in reply from Bevis, Russell and Co. The written statement alleged that "the said forms were always

used, and the drafts, with reference to the goods in the plaint mentioned, are in the same form." The following was the heading of the invoice:—

"Invoice of 5 bales goods marked, &c., shipped per S. S. _____ to Bombay consigned to Messrs. Benn, Ashley and Co. there on account of the concerned. Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptance of Geo. and R. Dewhurst's drafts against this or any of these shipments."

The following was the form of the letter addressed to Messrs. Bevis, Russell and Co. forwarding draft:—

"MESSRS. BEVIS, RUSSELL AND CO.,

"London.

"DEAR SIRs,—We beg to hand, for favour of your acceptance and return to our London office, our draft @ 3 m/d. for £ _____ against shipment as per above statement.

"It is understood that the proceeds of the goods are to be remitted to and held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm.

"Yours faithfully,

"(Signed) G. AND R. DEWHURST."

The following was the form of Bevis, Russell and Co's letter of reply:—

"MESSRS. GEO. AND R. DEWHURST,

"Manchester.

"DEAR SIRs,—We are in receipt of your favours of yesterday enclosing your draft upon us for £ _____ due 13th October, which we have handed to your firm here [71] duly accepted, and we confirm the arrangements between us as to the amount of remittances and against the shipments.

"Yours faithfully,

"(Signed) BEVIS, RUSSELL AND Co."

On the 24th February 1891, by consent of the parties an order was made that the plaintiffs should obtain possession of all the bales not already received by them upon their undertaking, (in the event of the defendants, or any of them, being held entitled to the bales, or any of them, or to a lien, charge or trust on them, or any of them, as against the plaintiffs), to pay to the defendants so held entitled the invoice value of the bales or the amount of such lien, charge, &c., &c.

Lang (Acting Advocate-General) and *Anderson*, for the plaintiffs.

Inverarity and *Jardine*, for the defendants, Messrs. Ritchie, Stuart and Co.

Scott, for the Official Receiver, Wreford, (defendant No. 1).

Lang (Acting Advocate-General) and *Anderson*, for plaintiffs. —The plaintiffs are entitled to the goods. Dewhurst and Co. have no title. Apart from the question of stoppage in transit, the goods had become the property of the plaintiffs. The plaintiffs had paid Rs. 25,000 as the price of these, and the bales had been duly appropriated to them. The freight and insurance had also been paid on their behalf. It cannot be said that on the bankruptcy of Bevis, Russell and Co. the bales were in their reputed ownership under s. 44 of the English Bankruptcy Act, 1883, Stat. 46 and 47 Vic., c. 52. That doctrine does not apply in a case like

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this. See Lindley on Partnership (5th Ed.), p. 682. Here, however, the goods were not in possession of the bankrupt. They only had the bills of lading, and they held these in trust for the owners of the goods, who became entitled to them on payment of the prices—Lindley on Partnership (5th Ed.), p. 683. As to stoppage in transit, we contend that the transit, during which Dewhurst and Co. could exercise the right to stop, was only to Liverpool, not to Bombay—Indian Contract Act (IX of 1872), s. 99; *Ex parte Miles* (1); *Ex parte Watson* (2); [72] *Bethell v. Clark* (3); *Lyon v. Hoffnung* (4); *Berndtson v. Strang* (5). If so, there was clearly no stoppage. Nor was there a good stoppage, even assuming that the transit lasted to Bombay—Benjamin on Sales (4th Ed.), pp. 871—884; *Ex parte Falk* (6).

Inverarity and Jardine, for the defendants, Messrs. Ritchie, Stuart and Co.:—It is admitted that Dewhurst and Co. are unpaid vendors. They, therefore, had a right to stop the 87 bales in transit. The transit lasted until the goods reached Bombay. Bevis, Russell and Co. were bound to ship to Bombay, and to Bombay only—Smith's Mercantile Law (10th Ed.), p. 690; *Lyon v. Hoffnung* (4); *Bethell v. Clark* (3); *Ex parte Watson* (2). We further contend that we did effectually stop the bales in transit. Even those which were landed in Dock at the time notice was given were then still in transit—Benjamin on Sales (4th Ed.), p. 871. The 59th Bye-law of the Port Trust provides that goods which have been landed shall only be delivered on production of the bill of lading and a delivery order from the master or agent of the vessel. The bales *ex* "Clan Drummond" and *ex* "Hispania" were wrongfully delivered, and by such delivery our right could not be affected. As to the 62 bales, we got the bills of lading, and that was enough—*Ex parte Watson* (2), but besides that, we gave notice to the ship-owners—Benjamin on Sales (4th Ed.), p. 882; *Phelps, Stokes and Co. v. Comber* (7). We also contend that the plaintiffs did not pay for the goods. The Rs. 25,000 paid in by them on the 1st December was a deposit—*Berndtson v. Strang* (5); *Ex parte Hayman* (8); *In re Rowland* (9).

JUDGMENT.

FARRAN, J.—This suit has arisen out of the failure of the firms of Bevis, Russell and Co. of London and other places, and of Benn, Ashley and Co. of Bombay. As is not unusual in such cases, the questions which have to be decided in it are of some nicety. At the close of the case I thought that I had satisfactorily solved them all, and so expressed myself. Further consideration has caused me to modify my [73] views in some particulars, and to feel that the difficulties are somewhat greater than I then supposed.

The facts, though somewhat involved, are not much in dispute. The plaintiffs, a firm of piece-goods merchants in Bombay, seek to establish their right to 87 bales of grey shirtings which they purchased from Bevis, Russell and Co., and which they allege that they paid for before the failure of that firm. By their plaint, however, they offer to pay anything which may still be due in respect of the bales. The bales have been sold since suit by arrangement between the parties embodied in an order of

(1) 15 Q. B. D. 39.

(4) 15 Ap. Ca. 391.

(7) 29 Ch. D. 813.

(2) 5 Ch. D. 35.

(5) 27 L. J. (Ch.) 665.

(8) Ch. D. 11.

(3) 20 Q. B. D. 615. (616).

(6) 14 Ch. D. 446.

(9) L.R. 1 Ch. Ap. 421.

Court dated the 24th February, 1891. The decree will determine what is to be done under that arrangement and order.

The defendants at present on the record are the members of the firm of Ritchie, Steuart and Co., George Wreford, the chief Official Receiver of the London Bankruptcy Court, and J. Whinney, trustee of the estate of Bevis, Russell and Co. The Official Assignee, C. A. Turner, is also a defendant, but nothing is now claimed by or against him, and his presence on the record has long since become unnecessary. The firm of Ritchie, Steuart and Co. are attorneys for the firm of Geo. and R. Dewhurst, of Manchester, who claim the bales as unpaid vendors, and have stopped them in transit and also under arrangement which they allege that they have made with Wreford, Pixley and Whinney as representing Bevis, Russell and Co., Ritchie, Steuart and Co. are also the attorneys of the defendant Wreford. They are not personally interested in the matter. Wreford and Ritchie, Steuart and Co. were made parties to the suit on the 19th January, 1891. As against them the suit began on that day.

It will be convenient to consider, first, the rights of the plaintiffs in respect of the 87 bales as against the firm of Bevis, Russell and Co., and their representatives in bankruptcy; secondly, what rights Dewhurst and Co. have derived from these representatives, and what rights they were entitled to put in force as unpaid vendors of the bales, and how far they effectually exercised these latter rights.

[74] On the 12th and 14th of August, 1890, the plaintiffs by telegram ordered from Bevis, Russell and Co. 100 bales grey shirtings. The exact terms of the order are contained in the plaintiffs' letter to Bevis, Russell and Co. of the 15th August. It is only necessary to note here that the price was 7s. 10d. per piece f. o. b. November-December shipment, and that such price bore interest, from shipment at all events, at five per cent. This order was accepted by Bevis, Russell and Co. In order to be in a position to execute the plaintiffs' order, Bevis, Russell and Co. ordered goods of the required description from Dewhurst and Co. The memorandum of sale by Dewhursts to Bevis, Russell and Co. is dated 15th August, 1890. Bevis, Russell and Co. on the 18th August confirmed the purchase, and on the 1st September directed, in correction of a previous direction, the 100 bales to be marked (^{J. N. S.}_{Bombay}). These are the initials of the plaintiffs' firm Jairam Narranji and Sons. In connection with Dewhursts' claim to stop the goods in transit, it will be necessary to examine with accuracy the terms upon which this sale was made. For the present purpose it need only be stated that the goods were to be delivered f. o. b. at Liverpool.

Dewhurst and Co. accordingly despatched the 100 bales, bearing the plaintiffs' mark, to Liverpool in different lots. There Bevis, Russell and Co. had them shipped in eight different vessels, as follows:—

- 13 bales by the "Nubia."
- 13 bales by the "Clan Drummond."
- 12 bales by the "Hispania."
- 12 bales by the "Eden Hall."
- 13 bales by the "Inchulva."
- 13 bales by the "Roumania."
- 12 bales by the "City of Edinburgh."
- 12 bales by the "Wistow Hall."

These steamers were what were called "Conference" steamers. By agreement between their owners and the Bombay Piece-goods Association, the former carry the goods of members of the Association at a fixed rate of

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1892 freight. The plaintiffs were members [75] of the Association; and Bevis, Oct. 3. Russell and Co. had standing orders to ship plaintiffs' goods by "Conference" vessels.

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Bevis, Russell and Co. consigned the 100 bales to Bombay in their own names, having the bills of lading made out to their own "order or to his or their assigns." The freight was paid by Bevis, Russell and Co. in Liverpool on plaintiffs' behalf, and insurance was effected by Bevis, Russell and Co. for the plaintiffs. It is unnecessary to state the date of the several shipments. They were all made before the 1st December, 1890, save the 12 bales by "Wistow Hall" which were shipped on that day. On the several lots being shipped, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months, I think, after date of their invoiced price, f. o. b.

There can, I think, be no doubt but that on the goods being so shipped, if not at an earlier date, the property in them passed from Dewhurst and Co. to Bevis, Russell and Co. (see Benjamin on Sales (4th Ed.), p. 322); and from the latter, by reason of the plaintiffs' contract with Bevis, Russell and Co. to the plaintiffs. The terms of the plaintiffs' contract show that this was the intention of the parties. If it can be said that, by reason of the bill of lading being taken by Bevis, Russell and Co. in their own name payable to their order, the legal property in the goods was, after their shipment, in Bevis, Russell and Co., these latter were then trustees of that legal property for the plaintiffs, having a lien on the bills of lading, the symbols of the goods, and upon the goods themselves for their price and charges incurred in respect of them. I think, however, the correct view is that the property in the goods was in the plaintiffs.—Bevis, Russell and Co. having, by holding the bills of lading, the constructive possession of the goods and the legal right to their actual possession and to retain the same until their price was paid by the plaintiffs with the charges.

The bills of lading of the bales by "Nubia," "Clan Drummond" and "Hispania" Bevis, Russell and Co. endorsed in blank and sent by post to the firm of Benn, Ashley and Co. in Bombay. The "Nubia" arrived in Bombay in November. Benn, Ashley and Co. endorsed the bill of lading of the goods by her to the plaintiffs. The plaintiffs under it received the 13 bales [76] *ex* "Nubia." The plaintiffs did not then make any specific payment in cash for the goods, but they had a sum standing to their credit in a book kept by Benn, Ashley and Co. called the "Goods Indenters' Hundi Account." I shall more particularly refer to it hereafter. On this account no doubt they were given delivery of the 13 bales without making any specific payment. The invoices of the 25 bales per "Clan Drummond" and "Hispania" arrived in Bombay previously to the 1st December (probably on 14th November), showing the amount due by the plaintiffs for the 13 bales per "Clan Drummond" and the 12 per "Hispania" (on the 31st October and 3rd November respectively). They were handed to the plaintiffs. On the 1st December the plaintiffs paid Rs. 25,000 to the firm of Benn, Ashley and Co.

It is an important question in the case whether this payment is to be considered as a payment for or on account of the 100 bales or not. The defendants contend that it was not a payment for the bales, but was, in fact and in law, a deposit by the plaintiffs with the firm of Benn, Ashley and Co., out of which the plaintiffs intended probably to pay for the goods, but that, as the plaintiffs did not fix the rate of exchange so as to convert it into sterling, it never became a payment for the goods to

Bevis, Russell and Co. Before mentioning the oral evidence upon the subject, I will notice the manner in which this payment is treated in the books of Benn, Ashley and Co. The first to refer to is the "Goods Indenters' Ledger." In this the invoices, on their arrival, are entered to the debit of the dealers. The invoices per "Nubia," "Clan Drummond" and "Hispania" are accordingly entered to the plaintiffs' debit on the 31st October and 14th November respectively; the invoices of goods per "Clan Drummond" and "Hispania" on the latter date. The sterling price shown in the invoices is the amount so entered. This was the only debit to the plaintiff in the books of Benn, Ashley and Co. on the 1st December. The plaintiffs had no account with that firm, but their goods purchase account. The Rs. 25,000 paid in by the plaintiffs on the 1st December are entered in the cash book thus:—"Jairam Narranji and Sons—Received from them Rs. 25,000 on account." On what account? The natural conclusion to draw is that they were received on [77] account of the only debit in the books against the plaintiffs; but as the sums paid in exceeded that debit, the further inference arises that they were paid on account of the transaction of which that debit forms a part. The cash book entry is posted in the ledger to the plaintiffs' account and credit. That entry is colourless, and throws no light on the object of the payment. It is, however, also carried to the plaintiffs' credit in the "Goods Indenters' Hundi Account." This shows, I think, clearly on what account the parties intended the payment should be treated as made. It could not be carried directly to the plaintiffs' credit in the "Goods Indenters' Ledger," as that account was kept in sterling. Before that could be done, rupees had to be artificially valued into sterling and in that condition transferred from the "Goods Indenters' Hundi Account" into the "Goods Indenters' Ledger." As far as the books show that conversion might have been an arithmetical calculation carried out by any calculator in the office. Looking at the books alone, the plaintiffs would appear to have paid for the 100 bales when they paid the Rs. 25,000 into the firm of Benn, Ashley and Co.

The plaintiff Khimji Jairam swears that he paid in the Rs. 25,000 to pay for the 100 bales, and that he did so thus early to save interest, which was running against the plaintiff. (He made the same statement on 6th December, 1890, and again on 7th January in reply to Ex. O). He calculated, he says, from the invoices already received the probable price of the whole (the invoices of the bales per "Clan Drummond" and "Hispania" were exactly a quarter of the whole), and paid in Rs. 25,000 to cover the total costs. Mr. Macdonald, the manager of the firm in Bombay and an ostensible, though not an actual, partner in it, confirms the plaintiffs' evidence on this point. The after-conduct of the partners points in the same direction. Mr. Macdonald and the Official Assignee, after the insolvency of Macdonald, calculated the sterling value of the money paid by the plaintiffs on account of goods purchased, and placed the sum to the plaintiffs' debit in the "Goods Indenters' Hundi Account," carrying it to their credit in the "Goods Indenters' Ledger." This may have been unauthorized after Macdonald had received notice of the bankruptcy of the English firm, but when it was notified to the representatives in bankruptcy of the English, [78] firm, they entered the sum to the credit of the plaintiffs in the books of the English firm. The plaintiffs now stand credited in the books of Bevis, Russell and Co. with the price of 100 bales in sterling. The plaintiffs have not repudiated this action of Macdonald.

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Against this strong body of evidence we have the remark of Macdonald in his letter of the 10th January, 1891 :—"Owing to the low rate of exchange the dealers would not remit, but left the money with us in deposit." This is not evidence against the plaintiffs; but I have to consider it, inasmuch as a book-keeper of the firm said, in answer to a leading question, that the contents of the letter were correct. Macdonald's attention was not drawn to it when he was cross-examined. It is really of no value, as the remark applies to about fifty dealers. It may have been correct as to forty-nine of them, yet not correct as to the plaintiffs. On looking through the cash book of Benn, Ashley and Co., I find that, when moneys were deposited with Benn, Ashley and Co., the fact is so stated in the cash entry with the rate of interest. The evidence of the plaintiff Khimji is sought to be impeached by a reference to the former course of dealing between the plaintiffs and the firm of Benn, Ashley and Co., and by a consideration of the improbability of the plaintiffs making a payment for goods, as to some of which they did not know whether they had been shipped or not. It would be improper, I think, to disbelieve positive evidence as to the payment for the goods in question, if and because it can be shown that in previous instances the plaintiffs had made a deposit with Benn, Ashley and Co., and not a payment for goods, the deposit being subsequently applied in payment for the goods. But nothing of the kind has been shown. To render the argument of any value, we should have to consider each particular case in connection with all the circumstances connected with it, and if, after such consideration, we found that in most cases the plaintiffs made a deposit, and not a payment in the first instance, some inference might be drawn from that fact unfavourable to the plaintiffs' contention. So far, however, as I can judge, it was the plaintiffs' practice to make a large payment in rupees, when the early invoices of any of their indents arrived, and to settle the exchange; or, in other words, to adjust the account [79] when the indent was completed, or nearly so. Khimji is not strictly accurate. On the whole, I think him an honest and careful witness when he says that the exchange was always fixed within a week or fortnight after the payment of a sum by him to pay for goods. Longer intervals occurred. The strongest instance relied upon by the defendants is in the case of the transaction immediately preceding the present. On the 19th July and 4th August, Khimji paid in Rs. 8,000 and Rs. 2,000 respectively. The sterling was not fixed till September 12th. Just, however, when their payment was made, it will be seen from Ex. H, that invoices of the plaintiffs' goods were arriving in considerable quantities and the plaintiffs were being debited with their amount. From the books alone I should draw the inference (as in this case) that the payment of Rs. 8,000 and Rs. 2,000 were payment on account of goods, though the account was not adjusted for a considerable time after the payment was made. On the other hand, I myself see nothing improbable in the plaintiffs making the payment in question, even though they were not certain that the goods had been shipped. Khimji, however, tells us that Macdonald told him that the goods would come (*i.e.*, were coming), and so he made the payment. I have arrived at a very positive conclusion that the plaintiffs intended to pay the Rs. 25,000 on account of the goods, and that Macdonald received the money on that account.

I also am of opinion that it was, in law, a payment for the goods. It was argued that the money paid in rupees was not and could not be payment for goods priced in sterling. That is not so. Payment may be

made in any medium which the parties mutually agree to give and accept. In India a guest may pay his hotel bill with English sovereigns if the host will accept them. The present case is much stronger; for the plaintiffs never, on any occasion, paid for their goods except in rupees. Having regard to the course of business, the contract was really to pay Benn, Ashley and Co., on behalf of Bevis, Russell and Co., as many rupees as would make up the price of 100 bales expressed in sterling.

[80] Then it is said that there was no payment till the exchange was fixed. That, again, I think, was not so. The payment was made, but until the exchange was fixed it could not be known how much change the plaintiffs were entitled to get back. Till that was done, the proper entries could not be made to close the transaction, just as in the case of the English sovereigns given to the hotel clerk in payment of the hotel bill. Lastly, it is said that payment was in rupees to Benn, Ashley and Co., while the payment had to be made in sterling to Bevis, Russell and Co., and it is argued that the two firms were distinct, as Macdonald was an ostensible, though not a real, partner in Benn, Ashley and Co. That may be so in the case of bankruptcy for the purpose of regulating the distribution of the assets; but in respect of transactions before bankruptcy, it certainly seems to me that a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were certainly agents to receive payment in the manner in which the plaintiffs paid. The cash book entries were sent home each week to Bevis, Russell and Co., to let them know how the dealers' accounts stood. It was open to Bevis, Russell and Co., not to receive payments for indent goods in rupees unless the exchange in respect of the rupees paid was at once fixed, but for mutual convenience the other course was adopted with the assent of Bevis, Russell and Co. The plaintiffs' payment was, in my judgment, good in law. At the time of the payment, Macdonald had the bills of lading in his hands of the goods shipped per "Clan Drummond," and "Hispania." He was quite ready to hand them, endorsed to the plaintiffs, but the plaintiffs did not ask for them, as the vessels had not arrived. On the payment being made, Benn, Ashley and Co. in Bombay held these bills of lading in trust for the plaintiffs freed from any lien or claim on their part. Similarly, in London, Bevis, Russell and Co. held the bills of lading, in respect of the 62 bales shipped in the steamers "Eden Hall," "Inchulva," "Roumania," "City of Edinburgh" and "Wistow Hall," in trust for the plaintiffs.

On the 4th of December, 1890, Bevis, Russell and Co. suspended payment, and on the same day a receiving order was made vesting their assets in the defendant Wreford. On the next [81] day, F. W. Pixley was appointed special manager of the estate. The bills of lading for the 62 bales were then handed by Bevis, Russell and Co. to Pixley. It was not argued before me, and I do not think that it could have been successfully contended, that under the order and disposition clause of the English Bankruptcy Act, 1883, (Stat. 46 and 47 Vic., c. 52) or otherwise, Wreford or Pixley acquired by the vesting order any other or different right to the bills of lading of the 62 bales which they held in London, or to the bills of lading of the 25 bales held by Benn, Ashley and Co., or to the goods of which these bills of lading were the symbols, than that in which Bevis, Russell and Co. and Benn, Ashley and Co. held them immediately before their suspension. The point was not expressly conceded or admitted, but it was not, on the other hand, expressly contended for. I, therefore, do not enter upon it more fully. If that be so,

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Wreford or Pixley became trustee of these bills of lading and of the bales represented by them for the plaintiffs. The bills of lading for the 62 bales at that time bore the endorsement, in blank, of Bevis, Russell and Co.

Macdonald filed his petition in insolvency in Bombay on the 10th day of December, 1890. Under the vesting order made upon that petition the defendant C. A. Turner claimed to be entitled to hold the assets of Benn, Ashley and Co. in Bombay. Macdonald handed the bills of lading per "Clan Drummond" and "Hispania" to C. A. Turner endorsed in blank apparently.

On the 8th December, 1890, the plaintiffs filed this suit against Bevis, Russell and Co. and Benn, Ashley and Co., and Macdonald for a declaration of their right to the 25 and 62 bales, and consequential relief. On giving security the plaintiff Khimji Jairam was appointed *interim* receiver of the bales. On the 16th December Mr. Turner endorsed the bills of lading per "Clan Drummond" and "Hispania" to the plaintiff Khimji Jairam. These vessels had before then arrived in Bombay. The plaintiff Khimji Jairam under that endorsement received the 13 bales *ex* "Clan Drummond" on the 23rd December, 1890, but not those *ex* "Hispania" till much later. On the 9th December, 1890, the Official Receiver, Wreford, had caused a telegram to be sent to Ritchie, Steuart and Co., to protect the [82] goods of Bevis, Russell and Co. and Benn, Ashley and Co. on his behalf in Bombay. Ritchie, Steuart and Co. accordingly claimed the assets from C. A. Turner on the 10th December. Since then Ritchie, Steuart and Co., have represented the Official Receiver of the bankrupt firms in Bombay. Prior to the 21st of December, 1890, they received the bills of lading for the 62 bales from Pixley. On the 30th of December, 1890, the plaintiffs by their solicitors' letter (Ex. J.) demanded these bills of lading from Ritchie, Steuart and Co. To this letter Ritchie, Steuart and Co. replied by their solicitors' letter of the 31st December, that they had received the bills of lading from Pixley with his orders not to deliver until completion of the payments. They accordingly refused to deliver the bills of lading to the plaintiffs. On the same day Ritchie, Steuart and Co. wrote to the plaintiffs offering to deliver the 62 bales to the plaintiffs, as they arrived in Bombay, on payment of their invoiced price. On 21st January they demanded payment from the plaintiffs of £2,008.

In the view I have taken of the case, the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co. and Benn, Ashley and Co. in bankruptcy, to the bills of lading and the goods represented by them without further payment. Ritchie, Steuart and Co., as attorneys for the Official Receiver, had not, therefore, the right to withhold the bills of lading of any of them, or the bales, from the plaintiffs.

The firms of Bevis, Russell and Co. and Benn, Ashley and Co. were adjudged bankrupt on the 14th of February 1891, and the defendant J. Whinney was appointed their trustee on the 16th February, 1891. He was subsequently added as a defendant to this suit. The bankrupts made an arrangement with their creditors, under which they have paid, or secured their creditors, a composition of 6s. in the pound. Their bankruptcy was, therefore, annulled on the 5th August, 1891. The defendant J. Whinney makes no claim to any of the 87 bales, or their proceeds. All assets which C. A. Turner collected belonging to the estate of Benn, Ashley and Co. in Bombay he has made over to the defendant J. Whinney.

[83] It follows, from what I have said, that the representatives in bankruptcy of Bevis, Russell and Co. and Benn, Ashley and Co. had no

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rights to the 87 bales in dispute to confer on Geo. and R. Dewhurst, and that firm can claim no rights in the bales conferred by these representatives. They have not, however, purported to confer any rights on Dewhurst and Co. or assigned any rights to that firm. The claim of Dewhurst and Co. to the 87 bales depends, therefore, in my judgment, altogether on their right, as unpaid vendors, to stop the goods in transit.

Before I enter upon a consideration of their rights in that respect I shall clear the ground by stating that, in my judgment, they have not lost, since suit, the rights (if any) which they possessed when it was filed against them, I mean by reason of the agreement which they have entered into with the defendant Whinney on 31st July, 1891. So far as the plaintiffs and the 87 bales are concerned, the agreement amounts to this:—Dewhurst and Co. are to recover the 87 bales, or their proceeds, from the plaintiffs, if they can, and are to give up their claim to the Rs. 25,000, and, giving credit for what they may receive in respect of the 87 bales, are to provide for the difference in bankruptcy, or under the deed. This is not so stated in so many words, as the 87 bales in question are only one of many consignments to a very much larger extent made by Dewhurst and Co. under similar circumstances, and the agreement relates to all the goods sold by Dewhurst and Co. to Bevis, Russell and Co., for which they have not been paid, but in effect that is the arrangement as to the 87 bales. I, at one time, thought that, if Whinney held the Rs. 25,000 in trust for Dewhurst and Co. under the terms of the invoices under which Dewhurst and Co. had sold them, the arrangement was a fraud on the plaintiffs, as Dewhurst and Co. gave up a fund out of which they were entitled to pay themselves for the 87 bales; but I am now satisfied that the Rs. 25,000 had been before bankruptcy mixed up with the other moneys of the bankrupt firm, and could not be followed or ear-marked, and that, therefore, Wreford first and Whinney after him did not hold any fund in trust to pay Dewhurst and Co. for the 87 bales. It is not necessary to consider what would have been the result if they had done so. Possibly it would have been a case of subrogation. [84] I give no opinion upon it. I also think that Dewhurst and Co. have not been paid 4s. or 6s. in the pound on the price of the 87 bales. Notwithstanding the endorsements of that 4s. payment on the bills, the truth is that it was paid in the balance estimated to remain due to Dewhurst and Co. after their securities, including the 87 bales in question, had been realized—a balance which is still open to final adjustment.

In this view it is unimportant to consider why Dewhurst and Co. were not made parties to this suit.

It is admitted that Dewhurst and Co. were, upon the suspension of Bevis, Russell and Co., unpaid vendors of the 87 bales and entitled to the exercise of all rights which unpaid vendors possess, including the right to stop the bales in transit. The first question which arises is whether that right did not cease when Bevis, Russell and Co. received (if they received) and shipped the bales at Liverpool. That depends upon the terms upon which Dewhurst and Co. sold the goods to Bevis, Russell and Co., and started them upon their journey. The memoranda of sale and purchase of the goods in question already referred to do not profess to be more than mere memoranda. The terms upon which the sale took place must be taken to be the usual terms upon which Bevis, Russell and Co. were in the habit of purchasing goods from Dewhurst and Co. These

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are set out in the invoices. They are similar in the case of all the shipments. The following is the wording of one of them :—
" Invoice of 12 bales goods marked J. N. & S. 159/175 shipped per "Eden Hall," Bombay, consigned to Messrs. Benn, Ashley and Co. there on account of the concerned. Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptances of Geo. and R. Dewhurst's drafts against this or any of these shipments."

The letter of Dewhurst and Co. enclosing their draft for acceptance for the price of the goods repeats the terms as to the specific appropriation of the proceeds. The letter of Bevis, Russell and Co. notifying acceptance of the draft confirms the arrangement. From these documents and the oral evidence given in commission, it appears to me that when Dewhurst and Co. forwarded the goods to Bevis, Russell and Co. at Liverpool, and sent the carrier's receipts with the name of the steamer by which they [85] were to be forwarded, they really started the goods on their voyage to Bombay, consigned to Benn, Ashley and Co. there, and that though Bevis, Russell and Co. at Liverpool had the power, by reason of their possession of the indicia of title to the goods, to alter their destination there and to start them on a different voyage, yet to have done so would have been a breach of faith on their part towards Dewhurst and Co., if not a violation of the express terms of their contract. At Liverpool, Bevis, Russell and Co. never had actual physical possession of the goods. That was always in the hands of intermediaries for the purposes of the voyage; and though Bevis, Russell and Co. shipped the goods in their own name, they did so in pursuance of the contract between them and Dewhurst and Co. They did not impart to the goods a new destination. This circumstance differentiates the present case from *Ex parte Miles* (1), and brings it within the authority of *Ex parte Watson* (2). The fact that it was the firm of Bevis, Russell and Co. who attended to the shipping arrangements in Liverpool, does not render the voyage, which, in its inception, was intended to be a voyage to Bombay, a voyage first to Liverpool and then from Liverpool to Bombay. It is not sufficient, so to say, to break the continuity of the voyage—*Lyon v. Hoffnung* (3) approving *Bethell v. Clark* (4). The transit lasted, in my opinion until the bales were, as it is called in some cases, "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

I have next to consider whether Dewhurst and Co. did effectually stop the goods, or any of them, in transit so as to defeat plaintiffs' title to them.

On the 6th December Dewhurst and Co. wrote to the receiver giving him notice that they claimed all shipping documents, goods, and proceeds of goods and remittances in respect of shipments to Benn, Ashley & Co., Bombay, for which Geo. and R. Dewhurst drew bills, and requiring him to apply the same proceeds and remittances towards payments of such bills in accordance with the terms of the invoice headings. On the 9th December [86] Dewhurst and Co. caused a telegram to be sent to Ritchie, Stuart and Co.: "Dewhursts request give every assistance Macdonald, Benn, Ashley and Co., protecting their interest," and on the 10th December another telegram: "Dewhursts claim (to have) goods

(1) 15 Q.B.D. 39. (2) 5 Ch.D. 35. (3) 15 Ap.Ca. 391. (4) 20 Q.B.D. 615.

sold by them and proceeds specifically applied to pay bills against goods. Sending p/a." This was notified to Benn, Ashley and Co. Since then Ritchie, Steuart and Co. have acted for Dewhurst and Co. in Bombay as well as representing the Official Receiver in the bankruptcy proceedings. After the sending of these telegrams, negotiations took place between Dewhursts and the Official Receiver. There is in my judgment no foundation, either in fact or in law, for the argument that they amounted to a stoppage of the goods in transit on the part of Dewhursts.

The letters which passed between the parties and the oral evidence alike show that on the 11th December it was arranged that the Official Receiver and Pixley should carry out the sale of Dewhursts' goods which had been made to native constituents for cash, through Ritchie, Steuart and Co., and that Ritchie, Steuart and Co. should hold the proceeds of such goods to the joint account of the Official Receiver and Dewhursts. When this arrangement was made, it was not known that the plaintiffs claimed the 87 bales, nor was it known that the Official Assignee asserted an adverse interest to that of the Official Receiver. At that time Dewhursts relied on their remedy under the specific appropriation clause in their invoices. This claim was not then actually admitted by the Official Receiver, but it does not seem to have been seriously disputed. Its validity was left to be determined thereafter.

On this arrangement being come to, the joint telegram of the 12th December was sent to Ritchie, Steuart and Co., in order that they might carry it out. This telegram was not in the exact form the parties had agreed on. That will be found at the back of Ex. 68 and in Ex. 72 to the commission: "Please carry out sales to natives delivering goods against cash only and remit proceeds to England in joint names of Pixley and Dewhursts." This arrangement was not communicated to the ship-owners, and it did not, of course, contemplate a stoppage of the goods in transit [87] by Dewhursts. It is in these respects altogether different from the arrangement in *Ex parte Watson* (1). In pursuance of it, Pixley sent forward the bill of lading of the 62 bales to Ritchie, Steuart and Co. He did not part with, and did not intend to part with the bill of lading of the 62 bales, except to his agents, nor to deprive himself of such advantages as the possession of the bill of lading conferred upon him, though the proceeds of the goods were to be remitted to the joint account of himself and Dewhursts. Mr. Wade's letter, which was probably written after Pixley's, expresses the arrangement more accurately than Pixley's, and must be considered the guiding one. Dewhursts' solicitors' letter by the same mail shows the view which they took of the position. Before it was written, Dewhursts had received the telegram of 11th December, notifying the Official Assignee's adverse claim to all goods consigned to Benn, Ashley and Co. In consequence of this claim, on December 13th Dewhurst and Co., had a telegram sent to Ritchie, Steuart and Co., directing them to stop, in transit, a large number of bales including the 25 bales *ex* "Clan Drummond" and "Hispania." They also sent instructions to the agents of the "Clan Drummond" and "Hispania" in England to stop these bales, but as these were later in date to the steps actually taken in Bombay I need not further refer to them.

I now come to the steps taken on behalf of Dewhurst and Co., in Bombay. On the 15th December the solicitors of Ritchie, Steuart and

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Co., wrote to Benn, Ashley and Co., that they had instructions to stop in transit, amongst the bales, the 25 bales *ex* "Clan Drummond" and "Hispania;" but as Macdonald was then insolvent, and had long before parted with all documents to the Official Assignee, this notice cannot be treated as of any value as a stoppage in transit of these bales, even if under any circumstances a notice to the consignees can be treated as effectual as a stoppage. I think that it cannot: see on this point *Phelps Stokes and Co. v. Comber* (1). The solicitors of Ritchie, Steuart and Co., on the same day wrote to the Official Assignee, informing him that they had stopped the 12 bales *ex* "Hispania" in the hands of [88] the Port Trust, and also of steps which they had taken as to the 13 bales *ex* "Clan Drummond" then expected. It appears from this letter that previous to its date Graham and Co. had given a delivery order for the 13 bales *ex* "Hispania." The notice of stoppage to the Official Assignee was valueless as in itself a stoppage in transit. It was apparently written after the notice presently to be referred to.

On the morning of the 15th December, Ritchie, Steuart and Co., gave notice to Graham and Co., agents for the "Hispania," to stop the 12 bales which had been brought by that vessel. It would, however, appear that, previous to that notice, the goods had been landed in the Dock. Mr. Ker, on behalf of Ritchie, Steuart and Co. acting for Dewhurst and Co., went to the Prince's Dock and found the bales landed there. He thereupon gave the Dock authorities notice to stop them. At this time a delivery order for the goods had been granted by Graham and Co. For reasons which I shall presently assign, I have come to the conclusion that this was an ineffectual attempt to stop these particular bales, and that the plaintiffs' title as to them must prevail over that of Agents of Dewhurst and Co. The goods were "at home" before the notice to stop was given. It is unnecessary to refer to other letters put in on this part of the case. The tortious act of the carrier, after the goods are "at home," cannot defeat the purchaser's right—*Bird v. Brown* (2).

On the same morning of the 15th December, Ritchie, Steuart and Co., gave notice to Finlay, Muir and Co., agents for the "Clan Drummond," to stop the 13 bales by that vessel in transit. At the time this notice was given, it appears, from the evidence of Mr. Ker, that these bales were still on board the "Clan Drummond." He went to the Prince's Dock and ascertained that fact. He also gave notice to the Dock authorities to stop the goods. At this time the goods were, without doubt, in the possession of the master of the "Clan Drummond," and, therefore, were still in the carrier's hands and liable to be stopped. It was, it appears to me, the duty of the agents at once to have communicated that notice to the master of the "Clan [89] Drummond," and the notice to the agents is, therefore, equivalent to a notice to him—*Kemp v. Falk* (3). The bill of lading had not, at this time, been endorsed or handed to the plaintiff Khimji, but was in the hands of the Official Assignee of Macdonald, who did not hold it in any better right than that of Benn, Ashley and Co., a right which the unpaid vendors were entitled to defeat. I think, therefore, that this notice to stop was in time to defeat the plaintiffs' title to the 13 bales. It is unnecessary to refer to the further correspondence on this point. On the 23rd December the 13 bales were delivered to the plaintiff Khimji, as receiver and under the endorsement of the bill of lading, by the Official Assignee. It is, I think,

(1) 29 Ch. D. 813.

(2) 4 Ex. 786.

(3) 7 Ap. Ca. 585.

clear law that a wrongful delivery of goods by the carrier after notice to stop in transit does not defeat the right of the unpaid vendor—*Sett v. Cowley* (1).

I now come to the 62 bales of which Pixley offered delivery to the plaintiffs on the 31st December, if they would pay for them. Under the agreement of the 11th December between Dewhurst and Co., and the Official Receiver, to which I have already referred, Ritchie, Steuart and Co., in my judgment, held them as agents for the Official Receiver and Pixley, and not for Dewhursts. The letter of Messrs. Conroy and Brown of the 8th January, 1891, is erroneous in stating that they were held for Dewhurst as well. It was the proceeds of the goods which were to be held on joint account and not the bill of lading. This possession of the Official Receiver and Pixley, who were trustees of the bill of lading for the plaintiffs, enured for the benefit of the plaintiffs against Dewhurst and Co. On the 31st of December, Ritchie, Steuart and Co., on behalf of the Official Receiver and Pixley sent round notices to the agents of the five different vessels, in which the 62 bales had been shipped, to hold the goods for them, stating that they held the bills of lading. These notices were all received before the series of notices next to be referred to, on behalf of Dewhursts were sent out. At that time four of the vessels, at least, were in the Dock. The dates of discharge of the bales in question were as follows:—

[90] "Eden Hall" had on the							
	2nd January	1891,	discharged	9 bales,	leaving	undischarged	3
"Inchulva"	do.	do.	do.	0	do.	do.	13
"Roumania"	do.	do.	do.	13	do.	do.	0
"City of Edinburgh"	do.	do.	do.	12	do.	do.	0
"Wistow Hall"	do.	do.	do.	12	do.	do.	0
				Total discharged	46	Undischarged	16

On the evening of the 2nd January 1891, therefore, 46 bales were in the hands of the Dock authorities, and 16 bales were still on board the "Inchulva" and "Eden Hall."

On the 2nd January, Ritchie, Steuart and Co., wrote notices to the several agents of the above steamers, on behalf of Dewhurst and Co., of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was given. At the end of the letter there was also a notice to stop in transit on behalf of the Official Receiver, but as in respect of these particular bales he was not an unpaid vendor, the notice on his behalf may be disregarded.

These notices were all delivered on the 3rd January. As to the 16 bales then on board the steamers, I must hold, for the same reasons I gave in the case of the "Clan Drummond," that notices to stop in transit on behalf of Dewhursts were in time. The title of Dewhurst and Co., to these must prevail. It must also prevail, I think, as to the 13 bales *ex* "Roumania." The notice given to Graham and Co., the agents of the "Roumania," on the 15th December 1890, related not only to the bales per "Hispania," but also to "any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co." This notice was no doubt indefinite, but still it covers the shipment by the "Roumania," and was given in time to prevent the bales per "Roumania" reaching "home." As to the 12 bales per "Wistow Hall" out of the remaining 33 bales which were in

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the Prince's Dock on the 2nd January, no notice of any kind on behalf of Dewhurst and Co., has been proved, and to these the plaintiffs are entitled.

The position of the remaining 21 bales raises questions of great doubt and difficulty. I regret that as to them the case was not more fully argued. In what capacity did the "Trustees of the [91] Port" hold such goods? Bombay Act VI of 1879 constitutes them a public body, and imposes certain duties upon them. Amongst other things it constitutes them wharfingers, and for their duties as such they are to levy tolls and charges under s. 43. Being a public body they are bound to receive on their wharves and in their sheds all goods properly tendered to them. Section 62 provides that, if the master or owner of any vessel before landing goods at any wharf of the Board shall give the Board notice in writing that such goods are to remain subject to a lien for freight or other charges payable to the shipowner, such goods shall continue liable to the same lien (if any) for such charges as they were subject to before the landing thereof. The goods, however, are to lie in the warehouse and sheds of the Board at the risk and expense of the owners liable to be sold to pay the above lien and the Board's charges. The sections in the Bombay Act relating to this subject are similar to those under which goods are landed at "Sufferance" wharves in London and elsewhere. The effect of landing goods at such wharves was much considered in *Barber v. Meyerstein* (1) and in *Glyn Mills Co. v. East and West India Dock Co.* (2). In the latter case there was much difference of opinion amongst the several Judges, before whom the case came, as to whether the goods after being landed were held under a contract or not, and, if yea, with whom. The view on this point held by Brett, L. J., in the Court of appeal was, I think, that adopted in the House of Lords, *viz.*, that the goods are landed under the provisions of the statute, and held under the same provisions, and that there is no contract with any one. In the statute there considered as here also, there was no provision as to how and to whom delivery was to be made, and it was held that the landing of the goods made no difference in that respect, and that the wharfingers were for this purpose placed in the same position as the master, and had to make delivery according to the exigencies of the bill of lading handed to them duly endorsed. A further proposition is also, I think, to be gathered from the judgments delivered in the House of Lords, namely, that as long as the goods are subject to a stop order for freight, the bill of lading has not discharged its office, and that the [92] goods are subject to incidents arising out of the original contract contained in the bill of lading.

From this it would seem to follow that so long as they are subject to a lien for freight the transit has not ended. The goods are not at home. The converse proposition would, however, seem also to be true, that when the shipowner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the statutable wharfingers for the consignee alone. In the present case, as the freight was in every instance prepaid, the masters of the several vessels, when they landed the plaintiffs' goods at the Prince's Dock, had no longer any control or lien over them. The Dock authorities held them under the provisions of the statute for the holders of the bills of lading, *i.e.*, the Official Receiver and Pixley, represented by their agents, Ritchie Stuart and Co., who in turn held

(1) 4 Eng. and Ir. App. 317.

(2) 7 Ap. Ca. 591.

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these bills of lading as trustees for the plaintiffs. If that is the correct view, the goods ceased to be in transit when landed.

Great difficulty is, however, introduced by the 59th rule of the Byelaws of the Port Trust, which is this:—"Goods landed at the Dock shall only be delivered on production of bills of lading accompanied by a delivery order from the master or agent of the vessel." This delivery order is, no doubt, intended as a voucher that the freight has been paid, and that there is no lien under s. 62 of the Act. Does the non-obtaining of it by the holder of the bill of lading keep up the transit until it has been obtained, when there is no freight due, and no lien on the part of the master? On the whole, I have come to the conclusion that it does not. The rule, I think, was not intended to have, and has not, any effect on the rights of consignees, but is merely a departmental rule to prevent servants of the Board from delivering goods subject to the master's lien. I do not see how the agent of a steamer could be compelled to give such a delivery order. The goods, as I have shown, are not under his control after being landed free of freight. This seems to be the view of the Dock authorities. The shed master under pressure of the cross-examination seems to me to have put the delivery order on too [93] high a footing. In the case of the "Hispania," however, it must be remembered that the bill of lading was endorsed with the delivery order of the agents before Dewhurst and Co. gave notice of the stoppage on the 13th of December. As to the 21 bales also, I think that, when the Official Receiver gave his notices of the 31st December, the case must be treated as if he had obtained delivery orders at that time.

Whether that be so or not, I am of opinion that, in respect of the goods which were landed before Dewhurst and Co. gave their notice of stoppage on the 3rd of January, no notice of stoppage in transit has been proved to have been given to proper persons. The Dock authorities were not the servants of the several agents to whom notices were given, and no duty was cast on the several agents to give information of them to the Dock authorities. The agents' duties as to the goods were over when they had been landed under the provisions of the statute. Accordingly, when the latter gave up the goods in March under the endorsement upon the bills of landing of Ritchie, Steuart and Co. which must be taken to have been made by them as agents of the Official Receiver and Pixley, they are not shown to have received any notice of stoppage in transit, and, therefore, the title of the plaintiffs to the 21 bales, which I am now considering, is superior to that of Dewhurst and Co.

The result is that under terms of the consent order of the 24th February, 1891, the plaintiffs must pay Dewhurst and Co. through Ritchie, Steuart and Co. the invoice cost of 42 bales (see note), with interest at 5 per cent. per annum from their due dates to payment.

All parties to bear their own costs respectively.

Attorneys for the plaintiffs:—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the defendants:—Messrs. *Conroy and Brown.*

NOTE.—The 42 bales in respect of which it was held that goods notice to stop in transit had been given, and for which, therefore, the plaintiffs had to pay (see order of 24th February *supra*, p. 71), were made up as follows:—13 bales *ex* "Clan Drummond" and 13 bales *ex* "Roumania" stopped by the notice dated the 15th December, 1890, and 13 bales *ex* "Inchulva" and 3 (out of 12) *ex* "Eden Hall" which were still on board and undischarged on the 3rd January, 1891.