1892 APRIL 8. CRIMINAL REVISION. 17 B. 127.

evidence given by them upon oath in a judicial proceeding. The judgment in that case contains the following observations :—

"Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public, and the administration of justice, that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by [128] suits for damages; but that the only penalty they should incur, if they give evidence falsely, should be an indictment for perjury."

With reference to this judgment, Mr. Justice Shepherd observed in *Manjaya* v. *Shesha Shetti* (1) that public policy must no less require that witnesses should not be exposed to the fear of prosecution, except the prosecution for perjury. And the learned Chief Justice of the Madras High Court applied in that case (which, like the present, was one where a witness was prosecuted for defamation in respect of a statement made by him when giving evidence in a judicial proceeding), the observations of Cockburn, C.J., in *Seaman* v. *Netherclift* (2) and of Field, J., in *Goffin* v. *Donnelly* (3) as to the rules of public policy which subordinated the interest of the individual to that of a higher interest, *viz.*, public justice. With reference to the case of *Hinde* v. *Baudry* (4) Sir Arthur Collins remarked :—

"The Judges there said that the principle of public policy guards the statements of a witness against an action, whether the statements are malicious or not. I think the same observation will apply if the criminal law is set in motion and proceedings are taken under s. 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence. I therefore hold that the petitioner was wrongfully convicted of defamation."

Following this ruling, and having regard also to *Dawan Singh* v. *Mahip Singh* (5) and *Bhikumber Singh* v. *Becharam Sirkar* (6), we reverse the conviction and sentence, and acquit the accused of the offence of defamation of which he has been convicted, and we direct that the fine, if paid, be refunded to him.

---

17 B.129=Chitty's S.C.C.R. 320.

[129] ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice), and Mr. Justice Farran.

J. G. SMITH AND OTHERS (*Plaintiffs*) *v.* LUDHA GHELLA DAMODAR (*Defendant*).* [15th July, 1892.]

Contract—Construction—Custom or usage qualifying contract—Evidence—Evidence Act I of 1872, *s.* 92, *proviso* 5—*Shipment, meaning of—Arbtiration—Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire.*

On 18th April, 1890, the defendant signed a contract (No. 3053) to buy from the plaintiffs 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." These goods were not supplied, as they could not be

* Small Cause Court Suit No. 25439 of 1891.

(1) 11 M. 477. (2) 2 C.P.D. 53. (3) 6 Q.B.D. 307.
(4) 2 M. 13. (5) 10 A. 425. (6) 15 C. 264.

1892
JULY 15.

ORIGINAL CIVIL.

17 B. 129 = Chitty's S.C.C.R. 320.

obtained at the price limited. On 24th September, 1890, the defendant gave the plaintiffs an order at an increased limit of price in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1*d.* per pair on original limits for November, December, January shipments, in three monthly lots, about 8 bales to be shipped in each month." This order was accepted and the goods were shipped as follows :—6 bales were handed to the carriers (the S & N. W. Railway Co.) in Manchester on the 28th November, 1890, and were shipped at Birkenhead on the 9th December, 1890; 6 bales were handed to the same carriers on the 4th December, 1890, and were shipped on the 13th December, 1890 ; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped on the 6th January, 1891. The defendant refused to accept the goods. He contended that the documents of 18th April and 24th September should be read together, and that the final contract was for November, December, January shipments, in three monthly lots, at intervals of four weeks. He also contended that the shipment on the 9th December, 1890, was a late shipment, and that he was not, therefore, bound to accept the goods under the contract. As to this last contention the plaintiffs alleged that by the custom of Bombay in the case of contracts made with members of the Native Piece-goods Association the date of the carrier's weight note was to be regarded as the date of shipment, and that, under such a contract as the one in question, delivery to the Railway Company or other inland carrier was equivalent to shipment. This custom, it was alleged, originated in consequence of the above Association having agreed that all piece goods ordered out by its members should be conveyed to Bombay by certain lines of steamers, only and by no others. It was stated that, unlesssome such custom existed, it would in many instances be impossible for Bombay merchants to carry out their contracts, as no steamers of the selected lines might be available. The Judge of the Court of Small Causes at the hearing found that the alleged custom existed, and was generally accepted and understood by merchants and dealers in Bombay. On reference to the High Court,

[130] *Held*—

(1) that the contract finally agreed on was that 25 bales relating to No. 3053 (*i.e.* the document of the 18th April) should be purchased on defendant's account at an all round advance of 1*d.* per pair on the original limits. Such bales to be shipped in the manner and at the times mentioned in the document of the 24th September 1890;

(2) that evidence of the alleged custom or usage of trade was not admissible under s. 92, proviso (5), of the Evidence Act (I of 1872) to explain or vary the natural and ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer, and to allow evidence of a usage that delivery to a Railway Company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town would be to allow evidence of a usage repugnant to, or inconsistent with, the express terms of the contract.

The contract in question provided that disputes between the parties were to be referred to the arbitration of two merchants, and that should the arbitrators be unable to agree, they should appoint an umpire. The plaintiffs and defendant referred their dispute to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire, who made his award.

Held, that the appointment of the umpire was invalid. The arbitrators could not delegate the power of appointment conferred on them by the contract.

[R., 30 B. 1 (15) = 6 Bom. L.R. 948.]

CASE stated for the opinion of the High Court by C.W. Chitty, Chief Judge of the Small Cause Court, Bombay, under s. 69 of the Presidency Small Cause Court Act, XV of 1882.

The case was stated as follows :—

1. In this case the plaintiffs sue to recover Rs. 2,000, part of a sum of Rs. 2,112-1-3, as damages sustained by them in consequence of the defendant's failure to take delivery of, and pay for, 25 bales grey dhoties, which he had agreed to purchase from the plaintiffs.

1892
JULY 15.
—
ORIGINAL CIVIL.
—
17 B. 129 = Chitty's S. C. C. R. 320.

2. The contract with the plaintiffs was admitted by the defendant, though question was raised as to the proper construction to be put upon it. On the 18th April 1890, the defendant signed a contract (No. 3053) on the printed form of the plaintiffs' office for the purchase of 25 bales grey dhoties, "June shipment, in four lots, with an interval of four weeks." The goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September, 1890, the defendant gave to the [131] plaintiffs an order, at an increased limit, in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1*d.* per pair on original limits for November, December, January shipment, in three monthly lots, about 8 bales to be shipped in each month. Reply in 10 days."

3. The last mentioned order was accepted, and the goods supplied and shipped as follows:—6 bales were handed to the carriers (the S. & N. W. R. Company) in Manchester on the 28th November, 1890, and shipped at Birkenhead on the 9th December, 1890, per S.S. "Clan Graham;" 6 bales were handed to the same carriers on the 4th December, 1890, and shipped per S. S. "Branksome Hall," on the 13th December, 1890; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped per S. S. "Werneth Hall" on the 6th January, 1891.

4. The defendant contended that the documents of the 18th April and 24th September must be read together, and that the final contract was for November, December and January shipments, in three monthly lots, at interval of four weeks. This can hardly have been intended, the two arrangements being inconsistent and incapable of being taken as one; *e.g.* if goods were shipped on 1st November, (which would satisfy the term "November shipment"), the next shipment would have to be made on the 29th November, and not in December at all, and the third in December and not in January. It was further contended on behalf of the defendant that the shipment per S.S. "Clan Graham" was a late shipment, and that, consequently, the defendant was not bound to accept the goods under the contract.

The question whether the said shipment was late or not depends on the further question, whether or not by the custom of Bombay, in the case of piece-goods ordered out by members of the Native Piece-goods Association and shipped by one of the Conference steamers, the date of the carrier's weight note must be regarded as the date of the shipment. This was the main point in issue in the case, and my finding on it is given in the following paragraphs.

[132] 5. It was proved before me that, some six years ago, the Native Piece-goods Association took for the first time to arranging their own freight contracts, and by an agreement with four lines of steamers, (which has since been renewed from time to time as required), they agreed that all piece-goods ordered out by members of the Association should be conveyed to Bombay by steamers of those four lines only and no others. It was after, and in consequence of, this action on the part of the piece-goods dealers that the alleged custom arose. The reason for it is obvious, as, unless some such custom existed, or express provision were made to meet the case, it would in many instances be impossible for merchants in Bombay to carry out their contracts. Goods, for instance, ordered for a January shipment might be sent to Birkenhead early in the month, and, because no Conference steamer was ready before the 31st,

1892 JULY 15. ORIGINAL CIVIL. 17 B. 129 = Chitty's S. C. C. R. 320.

might be detained in Birkenhead until February, and so the contract would not be complied with. To meet this difficulty it is alleged that it has, for the last six years or thereabouts, been the custom to treat the *date of the carrier's weight notes in* Manchester as the date of shipment for the purposes of carrying out such contracts. As to the existence of such a custom, a large body of evidence was given before me by gentlemen, *partners or assistants of trading* firms in Bombay. Their testimony was unanimous as to such custom obtaining in Bombay; while, on the other hand, not a single witness was called on the part of the defendants to *disprove it*. Of course, the onus lies on the plaintiffs to prove a custom on which they rely; but it seems curious that, if no such custom existed, ample testimony should not be found to meet that given on the plaintiffs' behalf.

6. It was contended for the defendant that no specific instances could be shown where such custom had been objected to and had been forced on an unwilling party. Though, no doubt, such evidence would be valuable, I did not consider it absolutely essential. If it were a custom which in itself was so reasonable and universally accepted that no one had ever disputed, it could never be proved in a Court of law. At the same time almost all the witnesses stated that complaints had been made in their office by dealers on account of late shipments, but that the dates of the carrier's weight notes were always accepted by such [133] dealers as equivalent to the date of shipment. Then, again, it was contended that the fact that some firms insert a clause in their contracts expressly stipulating that the date of the carrier's weight notes should count as the date of shipment showed that no such general custom existed. The evidence before me, however, went to show that such a practice was by no means universal, and that when inserted, it was so inserted *ex majore cautela*, and not in any way from ignorance of, or disregard for, the general custom. On the evidence, therefore, before me I am clearly of opinion that the custom, as alleged, does exist and has existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

7. It was contended on behalf of the defendant by his counsel, (but not till he commenced to open his case), that evidence of such a custom was inadmissible under s. 92 of the Evidence Act. The objection was taken, it is true, by the pleader for the defendant during the examination *de bene esse* of one of the plaintiffs' witnesses on the 14th January, 1892, but was not then pressed, and was never taken during the hearing of the plaintiffs' case. It cannot, I think, be successfully maintained, and if not, it follows that the first shipment by S S. "Clan Graham" was in time, and that the defendant was not justified in refusing the goods.

8. The goods on arrival in Bombay were tendered *to the defendant* in the usual course, and he refused to accept them on the ground of late shipment. Much correspondence ensued, the plaintiffs insisting on an arbitration in terms of their contract. *The goods were, in fact, surveyed ex parte* by Mr. Black on behalf of the plaintiffs, but the plaintiffs afterwards consented to cancel that report, and the matters in dispute—*i.e.*, defective quality and late shipment—*were referred to two arbitrators*, Mr. O. Schilizze for the plaintiffs and Mr. Purshotam Kuverji for the defendant. On the 4th of August, 1891, after these gentlemen had held their survey, *but before they made their report, the defendant* wrote, saying the notice for arbitration was too short; that contrary to

1892
JULY 15.

ORIGINAL CIVIL.

17 B. 129 = Chitty's S. C. C. R. 320.

arrangement Mr. Black's report had been shown to the arbitrators, and that he repudiated the arbitration proceedings. [134] There is, I may mention, no evidence of any such arrangement as alleged. On the 5th August 1891, the arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce, in the usual way, to appoint an umpire. Mr. J. S. Symons, of Finlay, Muir & Co., was accordingly appointed, and, after survey, reported that the goods were a fair tender against the contract; that the dates of the carrier's notes must be taken as the dates of shipment, and that the slight irregularity must be met by the adjustment proposed in plaintiffs' letter of the 27th April 1891, *i.e.*, to allow interest and exchange on the shipment as of intervals of 30 days. It was proved before me that the defendant would not be in any way prejudiced by the third shipment being made too early; especially if, as suggested by Mr. Symons, an allowance was made to him in terms of the plaintiffs' letter of 27th April 1891, in respect of interest and exchange.

9. The defendant declined to be bound by the said award, and the plaintiffs accordingly filed this suit.

10. As to the amount of damages, there was practically no dispute raised before me. It also appeared that, if the calculation were made on the basis suggested by the said letter of 27th April 1891, and Mr. Symon's award owing to the difference of exchange, the result would be to slightly increase the sum due to the plaintiffs, and it would not, therefore, affect the amount of their claim in this suit, which cannot exceed Rs. 2,000.

11. The defendant's Counsel requested me to state a case for the opinion of their Lordships on the questions of law arising in the case. In accordance with the practice, of late adopted by Mr. Hart, I set out the questions submitted on behalf of the defendant, which are as follows:—

(1) What is the proper construction of the two documents of the 18th April and the 24th September 1890?

(2) Did the plaintiffs carry out the contract by shipping goods on the 9th and 13th December and 6th January 1891?

(3) Is evidence admissible to prove that the words 'shipment' and 'to be shipped' have any other meaning than their plain, ordinary and accepted meaning?

[135] (4) If so, has the mercantile usage in Bombay—under which plaintiffs contend that, in contracts for Manchester goods, shipment means and includes delivery to carrier at Manchester—been proved in absence of proof of specific instances?

(5) If the first shipment was not in time under the contract, was defendant bound to take delivery of the two later shipments?

(6) If evidence of the custom was admissible, and the date of the carrier's weight note is to be taken as the date of shipment, was defendant bound to take delivery of the third shipment, those goods being admittedly delivered to the carrier on 23rd and 24th December, 1890?

(7) Does the arbitration clause in the contract preclude defendant from setting up any legal defences he may have to the action?

(8) Was the reference made by the arbitrators of the matters in dispute to the Chamber of Commerce within the terms of the arbitration clause?

(9) Is the defendant bound by the award made by Mr. Symons?

(10) Had not the defendant the right to withdraw from arbitration any time before award, and if so, did not his attorney's letter of 4th August, 1891, operate as a withdrawal?

1892
JULY 15.

ORIGINAL CIVIL.

17 B. 129 = Chitty's S. C. C. R. 320.

(11) Whether, the plaintiffs not having filed this suit on the award, the parties are not relegated to their legal rights under the contract?

12. Some of these questions appear to me to be open to objection, and they do not state exactly the points requiring decision. The first must be regarded only so far as it deals with the dates and mode of shipment. The second deals with a question of fact depending on my finding on the above-mentioned custom. The third was taken late, but is open to no objection. The fourth is a question of fact. The answer to the fifth is too obvious to require remark. The last five deal with the question of arbitration. With regard to that it may be mentioned that the defendant by his letter of the 4th August, 1891, declined to be bound by the award, and also that, though the contract provided [136] for the umpire to be chosen by the arbitrators, he was, in fact, chosen by the Chamber of Commerce, to whom the arbitrators referred the matter in the usual course for that purpose.

13. The questions of law arising on the above facts, and requiring decision, seem to me to be as follows:—

(1) What is the proper construction of the two documents of the 18th April 1890 and 24th September 1890, especially with regard to the time and mode of shipment?

(2) Is evidence admissible to prove that the words "shipment" and "to be shipped" have any other meaning than their plain, ordinary and accepted meaning?

(3) If such evidence is admissible, and the date of the carrier's weight note is to count as the date of shipment, was defendant bound to take delivery of the third shipment, the goods being admittedly delivered to the carriers on the 23rd and 24th December 1890?

(4) Is the defendant bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire, or having regard to defendant's contention in his letter of the 4th August 1891?

(5) Are the plaintiffs precluded from relying on such award, because their particulars of claim were not calculated on the basis so awarded?

14. I have reserved judgment in this case, until the decision of their Lordships on the above questions has been received.

Rivett-Carnac, for defendant:—Shipment means placing on board ship, not delivering to the carrier. He cited *Bowes* v. *Shand* (1); Contract Act (IX of 1872), s. 28, exception 1.

Scott, for plaintiffs, *contra*;—He cited Specific Relief Act (I of 1877), s. 21; Contract Act (IX of 1872), *Re Rouse and Meier* (2); *Koegler* v. *The Coringa Oil Co.* (3); *Re Hopper* (4); *Ireland* v. *Livingston*(5); Benjamin on Sales, (4th Ed.), p. 578; [137] *Spicer* v. *Cooper*(6); Smith's Leading Cases (9th Ed.), Vol. 1, p. 589; *Simpson* v. *Crippin*(7); *Brandt* v. *Lawrence* (8).

JUDGMENT.

BAYLEY, C. J.—Upon this reference under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) the first question to be considered is what is the proper construction of two documents, dated the 18th April, 1890, and 24th September, 1890, by which the defendant agreed to purchase 25 bales of grey dhoties, and which on their arrival in Bombay the defendant refused to take delivery of, and pay for.

(1) 2 Ap. Ca. 455. (2) L.R. 6 C. P. 212. (3) 1 C. 42.
(4) L. R. 2 Q.B. 367. (5) 5 Eng. & Ir. App. 395. (6) 1 Q. B. 424.
(7) L.R. 8 Q. B. 14. (8) 1 Q.B.D. 344.

1892
JULY 15.
ORIGINAL CIVIL.
17 B. 129 = Chitty's S. C. C. R. 320.

On the 18th April, 1890, the defendant signed a contract, No. 3053, on the printed form of the plaintiffs' office for the purchase of 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." It is stated in the case that the goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September, 1890, the defendant gave to the plaintiffs an order, at an increased limit, in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1*d.* per pair on original limits for November, December, January shipment, in three monthly lots, about 8 bales to be shipped in each month." In the original document of the 24th September, 1890, which was handed to us during the argument, the word "each" in that sentence is underlined.

The last mentioned order was accepted, and the goods were supplied and shipped as follows:—6 bales were handed to the carriers (the S. & N. W. Railway Company) in Manchester on the 28th November, 1890, and shipped at Birkenhead, on the 9th December following, per S. S. "Clan Graham;" 8 bales were handed to the said carriers on the 4th December, 1890, and shipped per S. S. "Branksome Hall" on the 13th of that month; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped per S. S. "Werneth Hall" on the 6th January, 1891.

The case stated that the defendant contended that the documents of the 18th April and 24th September must be read **[138]** together, and that the final contract was for November, December and January shipments, in three monthly lots, at intervals of four weeks.

I think that such contention is quite untenable. The provision as to the interval of four weeks referred solely to the contemplated June shipment, mentioned in the first document, the goods for which could not be obtained at the defendant's limits, and so were not supplied. The times and mode of shipment of the 25 bales were those specified in the document of the 24th September, *viz.*, for November, December, and January shipment, in three monthly lots, about 8 bales to be supplied in each month. The second document refers to the previous one, and the contract finally agreed on was to purchase, on defendant's account, 25 bales relating to No. 3053 (*i.e.*, the document of the 18th April) at an all round advance of 1*d.* per pair on the original limits, such bales to be shipped in the manner and at the times mentioned in the document of the 24th September.

It was stated in the House of Lords, in *Bowes* v. *Shand* (1), to be perfectly well settled that the construction of a contract, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, is for the Court, *i.e.*, as distinct from the jury.

Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract, and it has been held by the highest authority that it is a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods. Some difficulty has been found in the interpretation of the expression "to be shipped," or "shipment," within a certain time. But it was finally settled, in the case just cited, that such expressions mean that the goods shall be placed on board ship during the

(1) 2 Ap. Ca. 455 (462).

1892
JULY 15.
ORIGINAL CIVIL.
17 B. 129 = Chitty's S. C. C. R. 320.

time specified, according to the natural meaning of the words, in the absence of any trade usage to alter that meaning.

This view was arrived in *Bowes* v. *Shand* (1) in 1877, but not till after very eminent Judges had previously come to a [139] different conclusion as to the correct construction of the contract in dispute in that case. The two contracts there were made in London for the sale of 600 tons of rice (each for the sale of 300 tons of rice) to be supplied at Madras or Coast during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per "Rajah of Cochin." All the rice had been put on board, and bills of lading given for it in February, except as to 4 tons of rice, which were put on board in March. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March $\frac{\text{and}}{\text{or}}$ April. The House of Lords reversing the judgment of the Court of appeal (reported at 2 Q. B. D., 112) held that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given the plaintiffs could not recover on the contract.

In the present case it was contended by the defendant that the shipment of the first of the three monthly lots per S. S "Clan Graham" at Birkenhead on the 9th December, 1890, was a late shipment, not having been shipped in November, and that, consequently, he was not bound to accept the goods under the contract.

The plaintiffs met, or endeavoured to meet, that objection by alleging and calling evidence to prove that for the last six years, or thereabout, it had been the custom in Bombay, in the case of piece-goods ordered out by members of the Native Piece-goods Association (to which, as admitted during the argument before us, the defendant belonged) and shipped by one of the Conference steamers, to treat the date of the carrier's weight notes in Manchester as the date of shipment for purposes of carrying out such contracts. The Chief Judge states that a large body of evidence was given before him by gentlemen, partners or assistants of trading firms in Bombay, and that their testimony was unanimous as to such custom obtaining in Bombay; while, on the other hand, not a single witness had been called on the part of the defendant to disprove it. The Chief Judge, on the evidence before [140] him, was clearly of opinion that the custom as alleged did exist, and had existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

I am clearly of opinion that evidence of such a custom or usage of trade is not admissible to explain or vary the natural and ordinary meaning of the words in the contract in the present case.

By s. 92, proviso (5), of the Indian Evidence Act (I of 1872), 'any usage or custom, by which incidents not necessarily mentioned in any contract are usually annexed to contracts of that description, may be proved, provided that the annexing of such incidents would not be repugnant to, or inconsistent with, the express terms of the contract.'

As already noticed, the document of the 24th September refers to the one of the 18th April, and by one of the clauses of the printed portion of the document of the 18th April "all goods, except metals, are to be shipped per steamers in accordance with indenter's freight contracts." I think that by 'shipment' in the document of the 24th September is meant

(1) 2 Ap. Ca. 455 (462).

1892
JULY 15.
ORIGINAL CIVIL.
17 B 129 = Chitty's S. C. C. R. 320.

the same as "to be shipped per steamers" in the earlier document. The parties had, in my opinion, contracted for a shipment on board of a ship or steamer, and to ask that delivery to the Railway Company at an inland town may be treated as equivalent to shipment on board a vessel at a sea-port town is, in my opinion, 'repugnant to, or inconsistent with, the express terms of the contract,' and that evidence of any such custom or usage of trade is, in a contract like the present, clearly inadmissible.

Reference was made during the argument in this Court to s. 98 of the Evidence Act, which states that, 'evidence may be given to show the meaning of * * * local and provincial expressions * * * and of words used in a peculiar sense.'

The evidence in the present case does not, from the statement of it by the Chief Judge, appear to have been given for the purpose of showing that the word 'shipment' was 'used in a peculiar sense,' but to prove a custom to treat the date of the carrier's weight notes in Manchester as the date of shipment at Birkenhead [141] or Liverpool for purposes of carrying out such contracts as the present one.

The defendant here, a Hindu, had stipulated, by a document written in the English language, for shipment in three monthly lots in three specified months, and such he was entitled. As stated by the Lord Chancellor (Lord Cairns) in *Bowes* v. *Shand*(1), 'it is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.* * *?

The portions of the Indian Evidence Act which I have quoted merely reproduce the English law on the subject; the Act itself, to use the language of Sir James F. Stephen, who framed it, being 'little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.' (Introduction to the Indian Evidence Act, p. 2.)

The next point for consideration is that raised in the fourth question put by the Chief Judge, *viz.*, is the defendant bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire, or having regard to defendant's contention in his letter of the 4th August, 1891?

In the document of the 18th April it is provided that disputes of whatever nature are to be referred to the arbitration of two merchants, and that, should the arbitrators be unable to agree, they shall appoint an umpire.

The arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce (the Chief Judge states 'in the usual way') to appoint an umpire. Mr. Symons was accordingly appointed and made his award.

I think that such appointment was clearly bad. By the document of the 18th April one of each of the two merchants who were to act as arbitrators was to be appointed by each party, and such arbitrators, if unable to agree, were to appoint an umpire. The arbitrators were themselves to exercise the authority thus [142] conferred upon them, and could not delegate such power to any one else. Consequently, the appointment of an umpir e in a manner totally different from that which the parties had agreed for, was, in my opinion, an invalid appointment. The case of *Re Hopper* (2) relied upon by Mr. Scott for the plaintiffs in the argument before us, is no authority in support of the validity of the appointment of

(1) 2 Ap. Ca. 463. (2) L.R. 2 Q.B. 367.

1892
JULY 15.
ORIGINAL CIVIL.
17 B. 129 = Chitty's S. C. C. R. 320.

Mr. Symons by the Chamber of Commerce. In that case two arbitrators, not being able to agree in the appointment of an umpire, cast lots as to which of two persons, nominated by them, should be appointed umpire. There was, therefore, as Cockburn, C.J., said in his judgment (page 375), a concurrent judgment as to the fitness of the person who was finally appointed, and when the arbitrators have come to such a concurrence, and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lots, such a case falls directly within the decision of *Neal* v. *Ledger* (1), a case upheld by the Court of Common Pleas in *European and American Steam Navigation Company* v. *Croskey* (2).

In the present case the arbitrators nominated no one as umpire, but left that duty to be performed by third parties, *viz.*, the Chamber of Commerce.

Such being my view, the fifth question raised by the Chief Judge requires no answer.

The questions of law referred by the Chief Judge for our decision, I would, therefore, answer thus:—

To question

1. That the proper construction of the two documents of the 18th April and 24th September 1890, is that 25 bales grey dhoties relating to the O/3053 (*i.e.*, the document dated 18th April), at an all-round advance of 1*d.* per pair on the original limits, were to be shipped in the steamers in November, December, January, in three monthly lots, about 8 bales to be shipped in each of those months.
2. That, with regard to this particular contract, evidence was not admissible to prove that the words "shipment" and "to [143] be shipped" have any other meaning than their plain and ordinary meaning.
3. This question does not require to be answered.
4. That the defendant is not bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire.
5. This question does not arise.

FARRAN, J.—I agree in the answers which the Chief Justice proposes to give to the questions in this case, and do not, as to the first question, wish to add anything to what he has said.

The second question is a very important one, and I desire to add a few words, expressing my reasons for the opinion I have arrived at regarding it. That question as propounded is, I think, too wide to justify us in answering it in its actual words. It must be read in connection with the facts stated in the case, which narrow it to this:—Whether evidence of a usage in the Bombay piece-goods trade is admissible to explain the phrase "November, December, January" shipment and "bales to be shipped in each month" so as to alter its meaning into "November, December and January delivery to railway carriers at Manchester" and "bales to be so delivered in each month." Such evidence can only be tendered under s. 92, proviso (5), or under s. 98 of the Evidence Act. Under the earlier section and provision the instrument is read in its ordinary sense, but the custom or usages of a particular trade may add an incident to the contract. This is in accordance with English

(1) 16 East. 51. (2) 8 C.B. (N.S.) 397.

1892
JULY 15.
ORIGINAL CIVIL.
17 B. 129 = Chitty's S. C. C. R. 320.

law. The rule and the reason for it are laid down and explained with great lucidity by Parker, B., in delivering the judgment of the Exchequer Chamber in *Hutton* v. *Warren* (1). "It has been long settled," (said His Lordship), "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed: and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in [144] writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." This evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and the inconsistency may be evinced (*a*) by the express terms of the written instrument, or (*b*) by implication therefrom (see per Blackburn, J., in *Myers* v. *Sarl* (2)). These latter rules the Evidence Act adopts in enacting in proviso (5) that the annexing of such incident shall not be repugnant to, or inconsistent with, the express terms of the contract. In the case before us, to prove a usage that under a contract, which expressly provides that there shall be a shipment in a particular month, delivery to an inland carrier will satisfy the contract, is to prove a usage which does not add an incident to the contract in respect of which the contract is silent, but one which goes to establish that the performance in a different manner from that stipulated for is a performance of it. This is in contradiction to the express terms of the written instrument. The evidence of such a usage is, therefore, not admissible under proviso (5) of s. 92.

Is the evidence, then, admissible under s. 98, which enact that evidence may be given to show the meaning of * * * words used in a peculiar sense? Mercantile usage is in such a case "the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." Per Lord Cairns, L. C., in *Bowes* v. *Shand* (3). In such a case the evidence cannot properly be said to vary the contract; it only explains the meaning in which the mercantile terms in it are used. The difficulty here is that this is not what the case states as the result of the evidence. The custom set up is that the date of the carrier's weight note must be regarded as the date of shipment. It is not alleged that the word "shipment," which is the quivalent of "putting on board a ship" (see *Bowes* v. *Shand*, *supra*), has acquired in the Bombay piece-goods trade a technical meaning, or that it is used in a peculiar sense. What is alleged is that a delivery to [145] an inland carrier is treated, in the case of contracts made with members of the "Native Piece-goods Association" (of which the defendant is one), as equivalent to a performance of a contract 'to ship.' It is not alleged that the words "to ship" have acquired the technical or peculiar meaning of putting in a railway truck. I am not prepared to say that the expressions "to ship" and "shipment" may not acquire a meaning in a particular trade different from their plain ordinary and accepted meaning, and that evidence of such meaning may not be given under s. 98 of the Evidence Act, but I think that the evidence given in this case (being of the nature that it is) is not admissible for that purpose.

The third question does not arise.

(1) 1 M. & W. 474. (2) 3 E. & E. 306 (320). (3) 2 App. Ca. 468.

1892
JULY 15.

ORIGINAL CIVIL.

17 B. 129 = Chitty's S. C. C. R. 320.

I agree as to the fourth question; the answer must be in the negative. The contract provides for the arbitrators, in case of difference, appointing an umpire. It is not a compliance with such a provision for the arbitrators to refer the matter to the Chamber of Commerce, and for the latter body to select a gentleman to deal with the dispute. The case of *Re Hopper* (1) has no application to the facts before us. There the arbitrators appointed an umpire. It was sought to treat that appointment as bad, on the ground that the arbitrators had decided by lot which of the two persons selected for appointment by the arbitrators respectively should be appointed. The Court ruled that, under the circumstances the appointment of the umpire was unimpeachable. Here the arbitrators made no appointment at all. They referred the whole matter to the Chamber of Commerce. That body are said to have dealt with it in the usual way. That is not the contract. What the parties contracted for, was that the arbitrators should appoint an umpire. It is unnecessary, in this view, for me to express an opinion as to the right of the defendant to withdraw from the arbitration, or whether in fact he did so. I wish for myself to say that I do not agree that it is law in India that one of the parties to a written reference can recede from it without cause before award made. The case of *Pestonjee* v. *Manokjee* (2) is an authority to the **[146]** contrary. *Koegler* v. *The Coringa Oil Co.* (3) has no bearing upon the question. There one of the parties did not, in fact, appoint an arbitrator at all.

Attorneys for the plaintiffs:—Messrs. *R. S. Brown & Co.*

Attorneys for the defendant:—Messrs. *Balkrishna and Perozeshaw.*

---

17 B. 146.

PARSI MATRIMONIAL COURT.

Before Mr. Justice Jardine.

HIRABAI (*Plaintiff*) *v.* DHUNJIBHOY BOMANJI (*Defendant*).*

[29th July, 1892.]

Husband and wife—Parsi Matrimonial Court—Act XV of 1865*—Suit by wife for judicial separation--Alimony--Alimony after decree dismissing wife's suit and pending appeal —Alimony pending petition for review of judgment—Practice in allotment of alimony.*

A wife sued her husband for judicial separation in the Parsi Matrimonial Court. Alimony was granted to be by an order dated 11th July 1891, which directed the defendant to pay alimony to her from the 15th April 1891, "until the final decree herein be passed." On the 18th July 1891 the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was discharged on the 27th January 1892, and on the 18th March 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal.

Held—

(1) Dismissing the application, that the words "final decree herein" contained in the order of the 11th July 1891, by which alimony was granted, meant the decree in the suit and not in the appeal.

(2) That the Parsi Matrimonial Court constituted under Act XV of 1865 had no power to award alimony "*pendente lite*" after decree and pending appeal.

---

* Suit No. 4 of 1891.

(1) L.R. 2 Q. B. 367. (2) 12 M. I. A. 112. (3) 1 C. 42.