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MARCH 23. at its hands. Consequently I hold that the order of 9th February, 1893, was rightly made, and the summons of the 17th February, 1893, must be dismissed with costs. Counsel certified for.

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Summons dismissed.

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On the 23rd March, 1893, *Lang* (Acting Advocate General) on behalf of Premabai applied to the Court (consisting of Sargent, C.J., and Telang J.) in its extraordinary jurisdiction for revision of the order made by Starling, J., on the 9th February, 1893, under s. 622 of the Civil Procedure Code (XIV of 1882), and for a rule *nisi* calling on Messrs. Bhaishankar and Kanga to show cause why the said order should not be set aside, and also for an *interim* stay of the said order.

JUDGMENT.

SARGENT, C. J.—We do not think we have power to grant the application under s. 622. That section does not seem to apply to a case like this, where the order, of which a review is sought, was made by the High Court. We think the Court referred to in the section, whose records may be called for, is a Court other than the High Court, and we must, therefore, refuse this application.

Application refused.

Attorneys:—Messrs. *Bhaishankar and Kanga*, and Messrs. *Bicknell, Merwanji and Motilal*.

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Before Mr. Justice Farran, and on appeal before Sir. Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.

JAFFERBHOY LUDHABHOY CHATTOO (*Defendant*), *Appellant v.*
THOMAS D. CHARLESWORTH AND OTHERS (*Plaintiffs*),
*Respondents.** [17th and 18th March, 1893.]

Principal and agent—Principal and factor—Consignment for sale—Advances by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor.

In January 1889 an agreement was made between the plaintiffs and the defendant which provided that the defendant in Bombay was to act for the plaintiffs "in influencing consignments of produce" to the care of the plaintiffs in London. Such produce was to be sold by the plaintiffs in London for a certain commission and brokerage. One of the terms of the agreement was that the business in England was to be worked entirely in the defendant's name and the defendant was to "undertake to guarantee the plaintiffs free of all loss in connection with the said consignments and to guarantee the payment of redrafts, &c."

On the 25th January 1889 the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against the consignment a draft for £2,100 on the plaintiffs. In his consignment letter the defendant stated that the consignment was from his constituent Chatterbhuj Khimji, but that as Rs. 30,000 had been advanced to him, the consignment was shipped in the defendant's name. The letter continued: "The cost is 9½d. per pound, but he expects more, and not to be sold under the above rate."

The sum drawn against the cloves (£2,100) was £400 in excess of their value, and on receipt of the consignment letter on the 11th February 1889, the plaintiffs at once telegraphed to the defendant to remit by cable £400 against overdraft

* Suit No. 139 of 1890; Appeal No. 735.

against cloves. On the next day the defendant replied by telegraph: "I will remit you by outgoing mail." The plaintiffs accepted and paid the draft for £2,100 drawn against the cloves.

The price of cloves in the London market fell rapidly. The defendant from time to time lowered the limit of price, but not to such an extent as to allow of a sale being effected. The lowest limit named by him was 6*d.* per pound on the 31st October 1889. In December 1889 the market price was only 5*d.* per pound, and the deficit owing to the plaintiffs was £1,300. The plaintiffs presented bills to the defendant for this balance, but they were refused.

On the 5th February 1890, after due notice to the defendant, the 435 bales of cloves were sold—20 of them at 4½*d.* per pound and 415 at 4¾*d.* The balance due to the plaintiffs in respect of this consignment, after allowing for the proceeds of sale, was £1,432-15. This sum was part of the amount for which the present suit was brought. The defendant contended that the plaintiffs were not justified in selling the cloves below the price limited, viz., 6*d.* per pound, and claimed to be credited with [521] £329-1-8, which was the difference between the amount actually realized by the sale and the amount which would have been obtained if the cloves had been sold at the prescribed price.

Held by Farran, J., and by the Court of appeal, on the evidence,

(1) that the plaintiffs had accepted the consignment and had advanced money against it on condition of being kept in funds in case a deficit should arise, owing to a falling market, and that the defendant acquiesced in that condition;

(2) that the plaintiffs had throughout claimed the right to sell if the condition was not observed, and that the defendant had inferentially admitted the right claimed by the plaintiffs. The conclusion to be drawn was that the business was conducted on that basis, and that when the condition was broken the plaintiffs' right to sell arose according to the course of business, notwithstanding the limit of price imposed by the defendant.

Per SARGENT, C. J.—The result of the authorities is to show that where a factor for sale, who has made advances, claims the right to sell, *ex viro domino*, the question is whether there was an agreement between the parties, either express or to be inferred from the general course of business or from the circumstances attending the particular consignment, that the factor should under any and what circumstances have the power to sell against the wish of the owner of the goods. The *onus* of proving such agreement lies on the factor who has made the advances.

Per FARRAN, J.—On the whole the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on, if the principal do not put his factor in funds to make up the deficit so caused.

[R., 20 M. 97 (101).]

THE plaintiffs carried on business in London. The defendant was a merchant in Bombay. The suit was brought by the plaintiffs in March, 1890, to recover from the defendant a sum of £1,512-15-11 (then equivalent to Rs. 22,000-4-10) as the balance due to them on consignment transactions which had been carried on between them.

The defendant had made, or caused to be made, various consignments of goods to the plaintiffs for sale in England, against which (as the plaintiffs alleged) bills had been drawn upon them for amounts larger than the value of the consignments. The plaintiffs had paid these bills and had sold all the consignments, the result being that the above-mentioned sum claimed in the suit remained due to the plaintiffs in respect of these transactions.

[522] The defendant did not admit the correctness of the plaintiffs' account, and the suit was referred to the Commissioner for taking accounts. He reported that a sum £1,314-10 was due by the defendant to the

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plaintiffs on the 9th March 1890. The defendant filed exceptions to this report, the most important exception being with reference to a certain consignment of cloves, which had been sold by the plaintiffs below the limit of price prescribed by the defendant. The defendant contended that in the account they were entitled to charge the plaintiffs with the highest price obtained for cloves at any time subsequent to their sale, or at all events the difference between the price obtained by the plaintiffs and the price limited by the defendant.

From the evidence it appeared that prior to the year 1889 the plaintiffs and the defendant had done business with each other. In January, 1889, however, one of the partners in the plaintiffs' firm visited Bombay, and a new arrangement was come to between them with regard to the terms in which the business was subsequently to be carried on. This arrangement was a verbal one, but the following letters passed between them :—

7th January 1889.

" TO LUDHABHOY CHATTOO, ESQ.,

" Dear Sir,—I have now the pleasure to restate the arrangement verbally agreed upon between us in regard to the proposed increase in consignment business between our two houses. Briefly stated, the leading points are :—

" That you will act for us in influencing consignments of produce (cotton to be excepted) to our care.

" The business on this side to be worked entirely in your name, and you undertake to guarantee us free of all loss in connection with the said consignments, and you guarantee the payment of our redrafts, &c.

" It is distinctly understood that the entire business in Europe is to be confined to ourselves, the only exception being in such cases where dispute may arise between us and any of your consignors, in which event, should the latter so wish and with the object of retaining that particular connection, the consignment in question may be entrusted to some other London house until the dispute may be settled.

" We on our part agree to a net commission and brokerage of $1\frac{1}{2}$ per cent. The only exception to this will be in the case of hides and any other goods on which the customary London brokerage is 1 per cent., and in such instances our inclusive charge will be 2 per cent. for commission and brokerage.

[523] "Awaiting your confirmation and agreement to the foregoing terms, and trusting a large trade may arise between us to our mutual benefit,

"I am, &c.

"(Signed) W. B. CHARLESWORTH."

The defendant's reply was as follows :—

"Bombay, 11th January 1889.

"TO W. B. CHARLESWORTH, ESQ.,

"In reply to your letter of the 7th instant, we agree to the terms therein stated.

"Yours, &c.

"(Signed) LUDHABHOY CHATTOO."

The plaintiff was examined on commission in London, and he swore that, besides the points referred to in his above letter of 7th January, the verbal arrangement included two other terms, viz. :—

(1) That in all drafts drawn by the defendant on the plaintiffs against consignments, there should be a margin of 20 per cent. between the amount of the draft and the value of the goods exclusive of charges.

(2) That whenever that margin was not kept up owing to a fall in the market, the plaintiffs were to draw on the defendant.

No sworn evidence was given by the defendant as to whether or not these terms formed part of the agreement between him and the plaintiffs. From the cross-examination of the plaintiff, however, it appeared that the defendant did not admit them, and in a letter written by him to the plaintiffs, dated 15th February, 1889, which was put in evidence by the plaintiffs, it was alleged that the agreement was only that, when the deficit was found to amount to £1,000, the plaintiffs were to draw on the defendant for the amount. This version of the agreement was, however, at once repudiated by the plaintiffs in their letter of reply dated 8th March, 1889, in which it was said that to allow the deficiency to reach £1,000 "would, by obliging them to keep so large a sum locked up for months, cause the greater part of their commission to disappear." The plaintiff also swore in his evidence that no arrangement of that kind had been made.

The consignment in question, which consisted of 435 packages of cloves, was made by the defendant in January, 1889. The goods [524] were the property of Chatturbhuj Khimji, one of the defendant's constituents. Before shipping them to England the defendant advanced upon them to Chatturbhuj the sum of Rs. 30,000. He then consigned the goods in his own name to England and drew against them on the plaintiffs for £ 2,100. The following was the material part of the consignment letter :—

" 25th January 1889.

" MESSRS. THOMAS D. CHARLESWORTH & CO.,

" London.

" Dear Sirs,—We have to acknowledge the receipt of your favour of the 4th instant, and thank you for informing us fully with the tone of the different markets, which please continue by every one.

" We have by the present mail consigned to your good care 435 packages of cloves and 5 cases of fishmaws per S.S. 'Clan Sinclair,' and drawn against the same for £2,100 and £5 respectively. Please accept on presentation.

" The consignment of cloves is from our constituent Mr. Chatturbhuj Khimji; but as we had advanced Rs. 30,000 to him since a month, we have shipped the same in our own name. He is a very large shipper of cloves, and generally consigns them to Messrs. A. D. Sassoon and E. D. Sassoon & Co.; but a great deal of persuasion from us and promise to pay special attention and care on the sale and expenses, made here personally by your Mr. Williams, has given it to us. We need not, therefore, say any more about it, but we are sure that you will try your utmost to fetch the highest prices. The cost is 9½d. per pound, but he expects more and not to be sold under the above rate. He has also requested us to write to you that he has consigned to Messrs. David Sassoon & Co., 600 packages of cloves sold by them to arrive, but from their recent letter he finds that

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1893 dispute might arise; if so, he will telegraph to you through us to look to
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"We have, &c., &c.

"(Signed) LUDHABHOY CHATTOO."

In his evidence the plaintiff stated that the amount of £2,100 was not a fair sum to draw against the cloves. The sum should not have exceeded £1,625. The defendant in his invoice valued the cloves at 9 annas per pound. The price of "fair quality" cloves was only 9d. per pound, and the defendant's cloves were dark, inferior cloves below the standard of fair quality.

On receipt of the consignment letter the plaintiffs on the 11th February 1889 telegraphed to the defendant in Bombay as follows:—
 "Please remit £400 for your over draft on cloves per S.S. 'Clan Sinclair'; reply immediately." The defendant replied by telegram dated the next day: "I will remit you by outgoing [525] mail." On the same day the plaintiffs received another telegram from Bombay purporting to come from one Tharia Topan guaranteeing the bills drawn by the defendant. The telegram was as follows:—

"Accept Ludhabboy's bills. I guarantee.

"(Signed) THARIA TOPAN."

The plaintiffs accepted and paid the draft for £2,100 drawn against the cloves.

By the mail of the 15th February, 1889, the plaintiffs addressed the following letter to the defendant with reference to the consignment in question:—

"We have your esteemed favour of the 25th January for further consignments, for which we are much obliged.

"435 bales cloves per 'Clan Sinclair' against which you draw £2,100. In doing so you appear to have made a considerable error in your calculations. Taking the cabled value at the time of shipment at 9d., and each bale at 134 lbs., net (a very outside) will give a gross value of ... £2,150
 Less charges, freight, &c.... 325

£1,825

Margin as customary ... 200

£1,625

"We therefore cabled 11th instant: 'Empress cloves Sinclair Moroxite, or remit by cable £400 overdraft against cloves Clan Sinclair; reply immediately.' On following morning came your answer, that you would remit by mail; we also had telegram from Mr. Topan that he guaranteed you. Of course we know you cannot be responsible for fall in market, though our advices have been persistent in anticipating a fall; but you appear to have overlooked entirely the loss of weight on the voyage, and the freight and charges. As pointed out by Mr. W. B. Charlesworth, your business can only be done on the terms named, provided we are kept in funds. Now, looking at your other consignments at present market prices, we calculate that, in addition to overdraft on 435 bales cloves, there is a deficiency of between £500 and 600. Such style of

business will not remunerate any one and is quite opposed to the understanding. In any further business please adhere strictly to this understanding. We very much regret the position the account has assumed, but we are not the cause, and we did not wire for a cable transfer through any doubt, but as *a matter of business entirely*. We enclose a memo of our calculation, showing, irrespective of 435 bales cloves, a deficiency of £550. Against this we have to-day drawn upon you for Rs. 4,447-14-0, the equivalent of £300 at exchange $\frac{1}{2}$, $\frac{3}{4}$, at 15 d/s, in favour of the Chartered Bank of India, Australia and China, which please duly honour, leaving still a large balance against you.

[526] "Please note acceptance to your drafts as follows:—

£2,100 a/c. of 435 bales cloves 'Clan Sinclair' due 14th May.

£505 a/c. issue glass do: 14th May.

"We will do our best with both. We note remarks as to appointment of a surveyor for 600 bales cloves, but there would be no need for our interfering in any way with the firm mentioned. Unfortunately a large quantity of the cloves received here from Bombay have been of mixed or inferior quality, which in a falling market has naturally been availed of by rival buyers whose claims for allowances have been large. These have been assessed by arbitrators in a fair and honourable manner, ranging from $\frac{1}{8}$ to $\frac{1}{2}d$. per lb. and indeed some lots have been so bad that the buyers thought seriously of refusing the quality tendered and bringing an action against the seller for breach of contract. A few good fair sold at $8\frac{1}{2}$ being $\frac{1}{4}$ lower, and other weak holders may also have to sell. Landed stock 15,000 bales with heavy supplies close at hand. Only an accident can improve us."

There was also a mail from Bombay to London on the 15th February 1889, and by that mail the defendant wrote the following letter to the plaintiffs with reference to the consignment of cloves:—

"In acknowledging the receipt of your favour of the 25th ultimo, we have also to acknowledge the receipt of your telegram, dated 11th instant, stating 'remit by wire £400 on account of our draft overdrawn against cloves *ex S. S. 'Clan Sinclair,'* in reply to which we cabled you that 'we will remit by the outgoing mail,' and another telegram was also sent by our mutual friend, Mr. Thariabhoy Topan, saying 'I stand guarantee. Accept Ludhabhoy's bills.'

"We are very much surprised to receive such a telegram from you, especially when a clear understanding was made between us and your Mr. Williams, at the time of the arrangements, that whenever you find the deficit amounting to £1,000 you are to draw against us for the amount, while only a very short time has passed, and you have grown impatient as to keep our bill standing, and wiring us to remit, otherwise you will not accept the said bills is . . . astounding; but we thank you for giving us such a lesson. You will know (that is, your Mr. Williams must have fully informed you) that we have been doing business with other firms from a long time, but only through strong personal persuasions of Mr. Williams and Mr. Fazullbhoy (of Mr. Thariabhoy Topan) we consented to give the bulk of our business to you, and a very fair business was done in the last month, but are sorry to say that you have thought proper to terminate the arrangement so very soon. We cannot come to any conclusion what made you so very impatient and take alarm at such a paltry sum. However, to bring an end to this unpleasant matter, we have only to say that as there is no consignment by the present mail, we will remit by documentary bill by the next. We would not have waited till the next

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1893 mail, but now as you are safe enough for any deficit whatever, we have
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“ Hoping this will be sufficient.

“ We remain, &c.”

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[527] On the 21st February, 1889, the defendant wrote again, enclosing to the plaintiffs a sum of £ 250, directing him to “ credit the same to our general account, or to the deficit in cloves, just as you think proper.” The letter then continued :—

“ We consider the above amount to be sufficient to cover any deficiency in our overdrawn draft on the consignment of cloves per ‘ Clan Sinclair’ for which you took alarm and cabled us to remit even at the present low market, besides also you have our friend Mr. Thariabhoj Topan as guarantee. We have placed a limit of $9\frac{1}{2}d.$, on the said shipment, but on arrival, if you fail to obtain our limit, kindly wire the valuations, and consulting with our client Mr. Chatturbhuj Khimj we will send you a reply whether to hold or to sell the parcel. Please act accordingly, that is, if it is to be sold we will wire, but if it is otherwise we will not reply ; be pleased then to hold the same for some time. But according to the information received from Zanzibar, as well as the strong market here, we hope the market on your side will also increase in a short time, but we have induced the shipper to lower down the limit to $9\frac{1}{4}d.$ ”

In the London market the price of cloves fell rapidly. On the 8th March, 1889, the plaintiffs wrote to the defendant enclosing a report and valuation of the cloves made by a broker. It described them as “ dull and mixed,” and valued them at $7\frac{3}{4}d.$ per lb., which was nearly $2d.$, under the limit fixed. The plaintiffs also enclosed an account showing that the deficiency on the consignment then amounted to £516. On the 13th March the defendant telegraphed to the plaintiffs : “ Hold cloves ; have mailed a remittance of £400.” They followed this telegram by a letter dated the 15th March, 1889, in which they said :—

“ We have sent you a reply on the 13th that ‘ hold cloves ; have mailed a remittance of £400 ’ which we do by the present opportunity—that is, enclosed draft of £360 on Messrs. Heller and Weiss, of Mincing Lane, against documents of two different shipments of gum arabic per S.S. ‘ Huntingdon.’ Please present them the bills, and receiving the amount credit the same to our general account, but hold the parcels each and all, on which limits are placed, till further instructions. Let us also tell you that you received from us in all (with your draft of £300 drawn by you) £960, and we may still regularly go on remitting from time to time, as we think fit, but if even upon this you are afraid of still more deficiencies and are willing to discontinue business with us foregoing your commission on all our unsold shipments in your hands, we are ready to have them transferred to our friends Messrs. Heller and Weiss, of Mincing Lane. If you agree to this, please wire only one word ‘ Jafferbhoy,’ on the receipt whereof we will at once wire our above friends to take charge of all such shipments.”

On the 29th March, 1889, the plaintiffs wrote stating that the then price of cloves was $6\frac{5}{8}d.$ per lb. They enclosed *pro forma* [528] account sale, which showed the deficiency, had then reached the sum of £ 760.

On the 18th June 1889, the price of cloves having fallen still lower, the defendant wrote to the plaintiffs as follows :—

“ We have also at the last moment persuaded Mr. Chatturbhuj Khimji to withdraw his limit on cloves, which he hereby does, and leaves

the same in your hands to sell 200 packages out of 435 packages at the best market rate, either retail or wholesale, but not under $7\frac{1}{2}d$ per lb. and as soon as you have sold the 200, please cable us the price, and we will then try to leave the remaining to your good discretion. You know very well that he will be a great loser in this transaction, and the same were only not sold to arrive for a difference of $\frac{1}{8}$ per lb. and your Mr. Williams gave him solemn promise to obtain the contended price; but unfortunately as the market has gone so very low, please try to mitigate the loss by selling them retail at the above price. Kindly, therefore, try your utmost to obtain the above prices even $\frac{1}{4}d$. lower, but please don't sell the above 200 under $7\frac{1}{2}$ per lb., and we are fully convinced you will secure the above prices."

On the 25th June 1890 the defendant wrote again expressing regret to hear of further fall of cloves, and saying "after trying very much, and persuading Mr. Chatterbhuj to accept lower rate, we have no other resource left but to wait for some time more for a better opportunity. Save and except this parcel of cloves and gum arabic, we hereby withdraw all limits on our shipments now in your hands, and leave them entirely at your good discretion, and to dispose of them at the best market prices."

On the 23rd August, 1889, the plaintiffs addressed the following letter to the defendant threatening for the first time to sell the cloves:—

"We have no letter from you by mail 30th July, which greatly surprises us, as we fully expected, according to your promise, a considerable remittance to keep your account square. We therefore enclose *pro forma* account sales of all the produce unsold by reason of your over limits, calculated at the selling value of to-day, also a *pro forma* account current, which will give you a correct view of the state of affairs, *viz.*, a deficiency of £883-12-9. As we have all this sum lying idle, we have drawn the following drafts on you, say Rs. 5,976-10-6, exchange 1s. $4\frac{1}{16}d$., £400-0-3, in favour Chartered Bank; Rs. 5,976-1-6, exchange 1s. $4\frac{1}{16}d$., £400-0-3, in favour New Oriental Bank, which please do the needful with and pay at maturity. We have been very patient in allowing the above large balance to remain in your hands so long, as we could have turned it over many times to our great advantage, and we have only to add that if you refuse to pay we shall at once sell all the goods at best price obtainable.

"Yours, &c.

"(Signed) THOMAS D. CHARLESWORTH."

[529] P. S.—We have your favour of 6th instant without any remittance which we cannot understand, as you must know, as well as we do, the state of your account, which you promised to keep in order. We note you withdraw limits on all goods except cloves, and as the whole of the large deficiency is entirely caused by the shipment of 435 bales cloves *ex* 'Clan Sinclair' you will please take notice that, if you dishonour our drafts for £800, we shall proceed to sell the parcel forthwith."

To this letter the defendant sent the following reply refusing to accept the plaintiffs' bills, and warning them not to sell the cloves:—

"10th September, 1889.

"Dear Sirs,—Your esteemed favour of the 23rd ultimo is duly to hand, but we are very much astonished to find two drafts, of £400 each, written by your kind selves upon us, which, as a matter of course, and which you fully expected, being quite unreasonable are not accepted, but refused.

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"We had clearly written to you not to draw upon us, but whenever we will find any deficit in our consignments in your hands, we will at once remit, and we can assure you that calculating even the present declining prices the differences in the rates obtained by you much lower than the actual ruling rates in many instances, and the difference in charges (so very exorbitant), complaints for which have long been written to you, shortness in weights, as well as our return commission at 2 per cent., no material sum will be due by us; consequently it is out of common sense for us to accept the bills. We had so frequently requested you to forego your commission, and we will transfer all our goods to some other firm, but you would not accept our proposal, and have mercilessly sacrificed our constituents, who would all have left us had we not long ago discontinued business with you, and arranged with better people, with whom, we are happy to say, all our constituents are well pleased and satisfied, and there is no cause of any complaint. It is needless, therefore, to mention that through your own indifference and carelessness you have displeased, and through zeal and energy others have satisfied, all our constituents.

"Those that have totally (but fairly and justly) refused to pay your redrafts we have already mentioned to you, and you must rest assured that every penny we have to refund to them you shall have to pay. Whatever remonstrations and reproaches we have to hear we cannot describe, and that is all for your worthy selves.

"Let us also convince you that we are fully prepared with all the proofs required for our above statement as regards the loss in weights, differences in rates and extraordinary charges.

"Hoping you will still try to satisfy those who have removed their limits and, placing confidence, have entrusted their goods to your kind discretion. Regarding the cloves account Chaturbhuj Khimji, we have persuaded him to reduce the limits to 7*d.* per lb., which please note, and bear in mind that you shall be held responsible if you sell the same under the above limit.

"We remain, &c.,

"(Signed) LUDHABHOY."

[530] Further correspondence passed between the parties. On the 31st October the defendant by telegraph lowered the limit of price to 6*d.*, but the price had then fallen below that limit. On the 11th December 1889, the plaintiff, who had then come out to Bombay, wrote to the defendant as follows:—

"The only goods we now hold on your account are 435 bales cloves *ex* 'Clan Sinclair,' on which there is a deficiency at present market values of about £1,300. You have repeatedly promised Mr. W. B. Charlesworth that you would settle this matter, but you have not done so, and we now inform you for the last time that unless you answer to-morrow (12th instant) we must cable instructions to our London house to sell without reserve."

The 435 bales of cloves were sold by auction by the plaintiffs on 5th February 1890—20 of them at 4½*d.* per lb. and 415 at 4½*d.* Accounts were duly presented to the defendant, showing a balance due to the plaintiffs, in respect of the cloves, of £1,432-15. This sum was included in the amount (£1,512-15-11) above stated for which the suit was brought. In taking the accounts the Commissioner struck out certain items, and the

amount reported by him as due to the plaintiff in March 1890 was £1,314-10.

The exceptions to the report filed by the defendant, as above stated, were argued in December 1891 before Farran, J.

Kirkpatrick and *Fussel* appeared for the plaintiffs:—As to the question arising with reference to the sale of the cloves they contended that the plaintiffs had accepted the consignment and advanced £2,100 upon the condition that they were kept in funds, and that as the defendant had broken the condition, the plaintiffs were justified in selling the cloves to repay the amount of their advance. They referred to *Brown v. McGran* (1) and *Pothonier v. Dawson* (2).

Badrudin Tyabji and *Jardine* appeared for the defendant:—They contended that a factor had no power to sell against the orders of the principal, and they relied on *Smart v. Sandars* (3).

29th February, 1892. FARRAN, J. (after allowing the first and second exceptions to a certain extent) continued:—

[531] The third objection is one of great importance to the parties and also to merchants generally. I shall state with some particularity the facts which give rise to it.

The plaintiffs are a firm of merchants and commission agents carrying on business in London. They have no branch firm or place of business in Bombay, though one of the partners in the firm occasionally visits this city. The defendant is a merchant residing and carrying on business in Bombay. Previous to the 7th of January, 1889, the defendant had done consignment business with the plaintiffs. I cannot find evidence as to the exact terms upon which that business was carried on, or what was its exact nature, beyond this that it was of the same kind as that which was done subsequent to that date. In January, 1889, the plaintiffs and the defendant contemplated doing business together on a larger scale, and the plaintiff W. Charlesworth, who was then in Bombay, addressed a letter to the defendant, dated the 7th January, embodying the terms of an arrangement which they had come to. It was in the following words:—

“Dear Sir.—I have now the pleasure to re-state the arrangement verbally agreed upon between us in regard to the proposed increase in consignment business between our two houses. Briefly stated, the leading points are:—

“That you will act for us in influencing consignments of produce (cotton to be excepted) to our care.

“The business on this side to be worked entirely in your name, and you undertake to guarantee us free of all loss in connection with the said consignments, and you guarantee the payment of our redrafts, &c.

“It is distinctly understood that the entire business in Europe is to be confined to ourselves, the only exception being in such cases where a dispute may arise between us and any one of your consignors, in which event, should the latter so wish, and with the object of retaining that particular connection, the consignment in question may be entrusted to some other London house until the dispute may be settled.

“We on our part agree to a net commission and brokerage of 1½ per cent. The only exception to this will be in the case of hides or any other goods on which the customary London [532] brokerage is 1 per cent., and

(1) 14 Peters, 479 (American Rep.).

(2) Holt. (N. P.), 383.

(3) 3 C. B. 380=5 C. B. 895.

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in such instances our inclusive charge will be 2 per cent. for Commission and brokerage.

"Awaiting your confirmation and agreement to the foregoing terms, and trusting that a large trade may arise between us to our mutual benefit, I am, Dear sir, yours faithfully, W. B. Charlesworth."

From this letter it will be observed that it relates exclusively to the terms made by the defendant as an influencer of consignments and the plaintiffs as those in whose favour such consignments are to be influenced. There is no reference in it as to the nature and extent of the advances which the plaintiffs undertake to make upon goods consigned to them by consignors, or to the terms upon which they will make advances, or to the rights which such advances, if and when made, confer upon the plaintiffs over the goods consigned to them. All this is left to depend upon the previous course of dealing between the parties, the custom of the trade (if any), and the general law merchant applicable to the case. Charlesworth says that it was verbally arranged between him and the defendant that drafts would be drawn on the plaintiffs against consignments, and that such drafts should have a margin of 20 per cent. between the amount of the draft and the value of the goods exclusive of charges; and that whenever there was a deficit arising from a fall the plaintiffs were to draw on the defendant. It is, however, nowhere specifically alleged that it was agreed that in the event of there being such a deficit, the plaintiffs were to have a power of sale over the goods consigned to them irrespective of the wishes and directions of the consignors, except in so far as such agreement may be inferred from the correspondence. Upon that point also there is no evidence as to the custom of the trade between Bombay and London. The extent of the right is, so far as the evidence in this case is concerned, left to depend upon inference from the letters put in and the general law. The defendant admits the plaintiffs' right to draw upon him when a deficit arose, but says that such right did not accrue until the deficit amounted to £1,000. This limitation on the plaintiffs' right to draw for a deficit put forward in the correspondence is not proved; and I think it must, at all events, be taken that it was a term of the arrangement between the parties, whether [533] resting in the course of previous dealing or on direct contract, that the plaintiffs had the right to draw on the defendant when a deficit arose, and consequently that the defendant was under obligation to honour the plaintiffs' drafts when so drawn.

On the 25th January, 1889, the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against such consignment a draft for £2,100 on the plaintiffs. The following is an extract from the defendant's letter notifying the consignment: "We have by the present mail consigned to your good care 435 packages of cloves.....per S. S. 'Clan Sinclair' and drawn against the same for £2,100. Please accept on presentation. The consignment of cloves is from our constituent, Mr. Chaturbhuj Khimji, but as we had advanced Rs. 30,000 to him since a month, we have shipped the same in our own name..... We are sure that you will try your utmost to fetch the highest prices. The cost is 9½d. per pound, but he expects more, and not to be sold under the above rate." The invoice of the cloves is Ex. 89. The draft was apparently held by the Hongkong Bank.

On receipt of this letter and invoice the plaintiffs telegraphed to defendant; "Remit by cable £400 against overdraft against cloves per 'Clan Sinclair' 435 bales. Reply immediately." The defendant wired

a reply on the 12th February: "I will remit you by the outgoing mail." On the same day a telegram was received by the plaintiffs purporting to come from Tharia Topan as follows:—"Accept Ludhabhoy's bills. I guarantee." These telegrams are explained by the plaintiffs' letter of 15th February. The following are extracts from it:—"435 bales cloves per 'Clan Sinclair' against which you drew £2,100. In doing so you appear to have made a considerable error in your calculations. Taking the cabled value at the time of shipment at 9d. and each bale at 134 lbs., net (a very outside net weight) will give a gross value of ... £2,150
 Less charges, freights, &c, 325

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£1,825

Margin as customary... .. 200

£1,625"

[534] The letter then refers to the telegrams, and proceeds: "Of course we know that you cannot be responsible for fall in market..... but you appear to have overlooked entirely the loss of weight in the voyage, and the freight and charges. As pointed out by Mr. W. B. C., your business can only be done on terms named, provided we are kept in funds." It is then pointed out that on other consignments, independently of cloves, there was a deficit of £550, against which the plaintiffs had drawn on defendant for £300, and it is notified that the draft for £2,100 had been accepted. The defendant also wrote from Bombay on the 15th February referring to the telegrams, and adding: "We are very much surprised to receive such a telegram from you, especially when a clear understanding was made between us and your Mr. Williams at the time of the arrangement that whenever you find the deficit amounting to £1,000 you are to draw against us for the amount, while only a very short time has passed, and you have grown impatient as to keep our bill standing, and wiring us to 'remit, otherwise you will not accept the said bill' is.....astounding, but we thank you for giving us such a lesson. However, to bring an end to this unpleasant matter, we have only to say that as there is no consignment by the present mail, we will remit by documentary bill by the next, and we would not have waited till the next mail, but now as you are safe enough for any deficit whatever, we have taken time. Hoping this will be sufficient..."

The plaintiffs wrote to Tharia Topan also on the 15th February about his own business, and added to the letter this paragraph: "On the 10th instant we received your telegram 'Accept Ludhabhoy's bills. I guarantee.' Our telegram to that friend, of whom we have a high opinion, was the outcome of ordinary business principle. There is a question raised in the case whether Tharia Topan authorized the sending of the telegram sent in his name." I may say at once that it appears to me that the plaintiffs never accepted the unasked for guarantee of Tharia Topan in lieu of the rights (if any) which they had over the goods consigned to them, and that even if the guarantee was given, which seems very questionable, it cannot affect the legal rights of the parties. The telegram was sent to induce the plaintiffs to accept the bill [535] without a cabled remittance of £ 400; I shall make no further reference to this alleged guarantee. On the 21st February the defendant sent a bill for £250 to the plaintiffs, and authorized them to place it to his general account, or to the deficit in cloves, as they might think proper. The letter adds: "We consider the amount to be

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On the 8th March the 435 bales cloves having arrived were reported on as dullish and mixed, and valued at $7\frac{3}{8}d.$ This was telegraphed to the defendant, and on the same day the plaintiffs wrote to the defendant explaining the state of the accounts, which showed a large deficit. This letter also repudiated the idea that the plaintiffs were to wait until the deficit amounted to £1,000 before drawing. The defendant on the 13th March telegraphed to plaintiffs: "Hold cloves; have mailed a remittance of £400." The plaintiffs understood this as in addition to the £ 250 advised in defendant's letter of 21st February and received before 15th March, and on the 15th March wrote that in conformity with the defendant's instructions they would hold the cloves, but they point out that they feared a decline in price. The defendant followed up his telegram of 13th March by letter of 15th March: "We have sent you a reply on the 13th that hold cloves, and we have mailed remittance of £400, which we do by the present opportunity; that is, enclosed two drafts for £360, but hold the parcel each and all, on which limits are placed, till further instructions. Let us also tell you that you received from us in all £960, and we may still regularly go on remitting from time to time as we think fit. But if even upon [536] this you are afraid of still more deficiencies, and are willing to discontinue business with us, foregoing your commission on all your unsold shipments in our hands, we are ready to have them transferred to our friends, Messrs. Heller and Weiss, of Mincing Lane. If you agree to this, please wire only 'Jafferbhoy,' and we will at once wire our friends to take charge of all such shipments." On the 29th March the plaintiffs sent the defendant *pro forma* account sales to date, showing the probable deficiency in the cloves to be £760, against which the plaintiffs admit the receipt of £300 and purpose drawing in the residue according to the arrangement. The plaintiffs did not wire "Jafferbhoy" in reply to the defendant's letter of 15th March, and must therefore be taken to have refused the offer to hand over the unsold consignments to Heller and Weiss. The defendant on 5th April wrote as to that this: "We expected a reply by wire that you were willing to have all our consignments entrusted to some other firm, but, not having received it we think that you have thought proper to wait, which is the only remedy even left to us."

The above is the important part of the correspondence relating to the consignment of cloves, the terms upon which it was consigned, and the terms upon which the consignment is accepted. The proper inference to be drawn from it appears to me to be that the defendant consigned the cloves with a limit upon their sale of $9\frac{1}{2}d.$, subsequently reduced to $9\frac{1}{4}d.$, and that the plaintiffs accepted the consignment with such limit imposed, upon the condition that they were kept in funds, if a deficit should occur, owing to a fall in the market, or other cause, between the value of the goods and the amount advanced against them, and that the defendant acquiesced in the

plaintiffs' condition. What the plaintiffs' rights and remedies were to be if the condition were broken by the defendant, is not specifically set out.

In accordance with the views expressed by the plaintiffs the clove market fell with great rapidity. The defendant lowered the selling limit, but not to such an extent as to allow of a sale being effected. The defendant did not make up the deficit thus caused.

[537] On the 23rd August the plaintiffs wrote to defendant enclosing *pro forma* account sales of all the goods then in their hands, showing a deficiency of £883-12-9. For this they drew bills on the defendant for £800, and gave the defendant notice that, unless he accepted and paid them, they would proceed to sell the cloves at once. At this time the cloves were the only goods which the plaintiffs held subject to a limit. To this letter the defendant replied on the 10th September. He refused to pay the drafts on the ground that owing to the plaintiffs having sold goods below the ruling rates, their exorbitant rates on charges, the shortness of weight which they had allowed, and the return commission which they had to account for, no material sum would be found due from him to them. The letter closed with the following paragraph relating to the cloves:— Regarding the cloves account of Chatterbhuj Khimji, we have persuaded him to reduce the limit to 7*d.* per lb., which please note and bear in mind that you shall be held responsible if you sell the same under the above limit."

The correspondence about this time assumes a character of much bitterness. On the 28th October the plaintiffs wired to the defendant that they would sell the cloves at Wednesday market, unless he cabled them a margin of £ 800. In this telegram the market price is put at 5½*d.* This was followed by a telegram on the 30th, sent to the defendant: "Limit or we can sell at 5½*d.*: If you wish us to continue holding your goods, cable a margin of £800, otherwise selling." The reply on the 31st was: "Limit for cloves 6*d.*" That limit was never afterwards reduced. The plaintiffs did not sell then. On the 15th November cloves had fallen to 5*d.* The plaintiffs made out an account showing a deficit of £1,192-3-10 against the defendant. A telegram was sent the same day.

On receipt of the defendant's letter of 25th October, 1889, Charlesworth came out to Bombay bringing the account of 15th November with him and reached Bombay on the 1st December and presented bills for the balance £1,192-3-10 to the defendant, which the latter refused. On the 5th December cloves were 5*d.*, but this was a nominal price. There were several interviews between the plaintiff and the defendant, the result of [538] which was that the defendant refused to do anything about the deficit on the cloves unless the plaintiffs allowed him £600 for alleged overcharges, &c. Cloves were still going down. The plaintiff Charlesworth waited some time, hoping for a settlement.

On the 30th January 1890 Charlesworth wrote to the defendant informing him that he was in receipt of a telegram from London that his cloves were in course of being offered for sale by public auction, and that they would be sold on his account to the highest bidder. The cloves were accordingly sold, and realized 4¾*d.* to 4½*d.*

The defendant seeks to be credited with the price of the cloves at 6*d.* per lb., the lowest limit placed upon them. The difference amounts to £329-1-8. The question is, whether according to the terms upon which the plaintiff did consignment business for the defendant, or according to the general law, the plaintiffs not being kept in funds to meet

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the deficit arising from the fall in the market, were justified in selling when they did below the defendant's limit, or are liable to defendant for having done so. It is quite clear that when they sold there was a large deficit which the defendant was under obligation to make up. The conclusion I have arrived at is that the plaintiffs claimed that right throughout, though at first not specifically, and that the defendant inferentially admitted it. The defendant's letters of the 15th March and of the 10th September appear to be open to no other construction. His answer to the plaintiffs' demand for margin is in the one case to send it; on the other to contend that the plaintiffs were really fully covered. From this I think that the fair inference arises that the business was conducted on that basis. It is natural that it should be so. The plaintiffs in London have no practical remedy against the defendant in Bombay personally. They advance their moneys on the security of the goods, and it would seem a strange mode of doing business if in a falling market the defendant could prevent the plaintiffs from realizing their security without making up the deficit occasioned by such a fall. I have already pointed out that the plaintiffs did not advance their money on those particular goods, and accept the [539] defendant's limit, except conditionally. That condition being broken, the plaintiffs' right to sell arose, according to the course of business, notwithstanding the 6*d.* limit imposed by the defendant.

The point, whether a foreign consignment agent or factor, to whom goods are consigned for sale and who accepts and pays bills drawn against such goods, can sell them below the limit placed upon them by the consignee when he is not kept in funds to meet a deficit caused by falling markets, is a question of some difficulty in the authorities. Story lays down the law very broadly (1). He says: "As a lien is, ordinarily, nothing more than a right of retainer of the property, the party cannot sell or dispose of the property.....unless with the consent of the owner, either express or implied, from the nature and objects of the very transaction. Thus, for example, if goods are consigned to a factor for sale, and he makes advances upon them, he is, of course, invested with a right to sell them, and may out of the proceeds satisfy his lien, or use it by way of set off. Nay in certain cases where he has made advances as factor, it would seem to be clear that he may sell to repay those advances without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for the advances, does not repay the amount." The case of *Smart v. Sandars* (2) is not on all fours with the present. There the advances were made subsequent to the consignment, and it was admitted that such advances conferred a lien on the factor who made them. It was contended that they did more, (*viz.*) enlarged the factor's original power, and as a matter of law conferred upon him a right to sell *invito domino*. It was held that they did not. The distinction between that case and the case where consignment (*i.e.* the acceptance of the consignment) and the advance are concurrent, is pointed out by Channell Sergeant in his reply at p. 913 of the report in 5 C. B. Where such is the fact he admits, in effect, that he puts the case in the same position as that of pawnor and pawnee, and makes the principle laid down in *Pothonier v. Dawson* (3) applicable. The distinction [540] is also taken by Wilde, C. J., in delivering the judgment of the

(1) Story on Agency (9th Ed.), p. 443, para. 371.

(2) 3 C. B. 380=5 C. B. 895.

(3) Holt, (N. P.) 383.

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Court at p. 918 of the latter report (5 C.B.). On the other hand, *Brown v. McGran* (1), an American authority, in its facts very closely resembles the case before me, and is strong authority in favour of the right of the plaintiffs to sell under circumstances like the present. On the whole, I think that the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission, and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on, if the principal do not put his factor in funds to make up the deficit so caused. I must therefore disallow this exception.

The defendant appealed. The chief grounds of appeal were, first, that the defendant was not bound, and did not agree, to provide a margin to cover any deficit in respect of the consignment of cloves; second, that Farran, J., was wrong in holding that either by express or implied agreement or by law the plaintiffs had authority to sell the cloves without the authority or consent of the defendant.

Lang (Acting Advocate-General) and *Jardine*, for appellant (defendant).—The lower Court has by inference imported a term into the contract giving the plaintiffs a right to sell the goods consigned to them, unless they were kept in funds sufficient to cover any difference there might be between the amount drawn by the defendant against the goods and the value of the goods. There is no evidence of such an agreement. The general mercantile law does not permit a factor to sell against the wish of his principal—*Smith's Mercantile Law* (10th Ed.), p. 126; *Smart v. Sandars* (2). The law as laid down in *Story* is not English law: see *Story on Agency* (9th Ed.), para. 371 and note. If the law does not give the plaintiffs the right to sell, there is nothing in the [541] evidence from which we can gather any agreement that they should have such a right.

Macpherson and *Kirkpatrick*, for the respondents (the plaintiffs).—It is clear that the defendant agreed to keep the plaintiffs in funds. The plaintiffs only accepted the defendant's consignment on this condition. That condition was broken, and the defendant became largely indebted to the plaintiffs. The only remedy left to the plaintiffs living in England was to sell the goods in their hands. They claimed the right, and it was inferentially admitted by the defendant. The defendant in his letters does not deny the right to sell, but insists that there was no deficit to justify the sale. The goods were really a pledge in the plaintiffs' hands—*Murtunjoy v. Cockrane* (3).

The following authorities were cited and commented on:—*De Comas v. Prost* (4); *Brown v. McGran* (1); *Pothonier v. Dawson* (5); *Story on Agency* (9th Ed.), para. 371 and note; *Story on Bailments*, 308, 310; *Coote on Mortgage* (Ed. 1884), p. 615; *Indian Contract Act* (IX of 1872), ss. 202, 148, 172, 176.

JUDGMENT.

SARGENT, C. J.—The question in this appeal arises in taking the account between the parties to a consignment for sale of 435 packages of

(1) 14 Peters Rep. 479 (American Rep.).

(3) 10 M.I.A. 229 (247).

(5) Holt, (N. P.) 383.

(2) 3 C. B. 380=5 C. B. 895.

(4) 3 M.P.C. (N. S.) 159.

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cloves by the defendant, who is a merchant in Bombay, to the plaintiffs, who are a firm of merchants and commission agents in London.

The defendant had done consignment business with the plaintiffs previous to the 7th January, 1889, on which day the plaintiff Charlesworth, who was then in Bombay, wrote to the defendant a letter, the object of which was to state the result of a verbal arrangement come to between the parties with a view to the increase of the consignment business, and was in the following terms:—(His Lordship read the letter *supra*, pp. 522, 523.) This letter, it is to be observed, is silent on the subject of advances to be made by the plaintiffs on consignments, and it is therefore, to be inferred that in that respect the consignment business was to be carried on as it had been previously to the [542] new arrangement. There is no documentary evidence in the case as to what had been the course of business between the parties on this subject, and it has therefore to be gathered from the statements of the parties and the correspondence between them following upon the consignment in question. We may also add that there was no evidence as to any custom of the trade between Bombay and London; and the rights of the parties have therefore to be determined by the general principle of commercial law applicable to the case.

The general law applicable to commission agents as laid down in English authorities, on which the Courts of this country mainly rely in deciding commercial questions, was stated in *Smart v. Sandars* (1). In that case the advances were made subsequent to the consignment, and it was held that such advances conferred a lien on the factor for sale who made them, but that they did not confer upon him the right to sell, *invito domino*.

During the argument it was suggested that there might be a distinction between advances subsequent to and advances made contemporaneously with the acceptance of the consignment.

In *De Comas v. Prost* (2), the Privy Council say that the doctrine of *Smart v. Sandars* is that "mere" advances made by a factor whether at the time of his employment as such or subsequently cannot have the effect of altering the revocable nature of the authorities to sell, unless there was an agreement, and in that case they hold that the Court in Australia was right in granting a new trial moved for on behalf of the factor under the circumstances of the advances and the conversation and letters which preceded and followed them.

The result of these authorities is, I think, to show that where the factor for sale, who has made advances, claims the right to sell *invito domino*, the question is whether there was an agreement between the parties—either express or to be inferred from the general course of business or from the circumstances attending the particular consignment—that the factor should under any and what circumstances have the power to sell against the will of the owner of the goods, the *onus* of proving which lies [543] on the factor who has made the advances. Counsel for the respondent referred to s. 202 of the Contract Act and *illus. (b)* accompanying it. But these assume that the factor has an interest in the goods expressly given him by the consignor at the time of the consignment and have no bearing on the present question.

Passing to the evidence I entirely agree with Mr. Justice Farran that the correspondence can leave no doubt that the plaintiff accepted the

(1) 5 C. B. 895.

(2) 3 Moore P.C. (N.S.) 158 (179).

consignment in question with the restriction as to the minimum price at which the cloves were to be sold upon the understanding that they should be kept in funds by the defendant to meet any deficit arising from a falling market.

The market, it is not disputed, was a falling market from the date of the consignment, and the correspondence from first to last between the parties proceeds on the above assumption. The letters and telegrams are taken up with urgent demands by the plaintiffs for payments to cover the deficits, met by objections on the part of the defendant which are directed exclusively to the amount of such deficits and to the unreasonableness of the plaintiffs in asking for further cover than the defendant had already furnished. The correspondence continues to be exclusively of this character until 23rd August, when the plaintiffs, apparently despairing of inducing the defendant to comply with their demands that he should square the account, threaten to sell the cloves "at the best price obtainable" if the defendant refuses to pay them a deficiency of £883-2-9. The defendant's answer of the 10th September to this letter is an important one and is in the following terms. (His Lordship read the letter: see *supra* p. 529.)

It is to be remarked that throughout this letter the ground taken by the defendant is that the plaintiffs had not credited the defendant with the actual ruling rate, and that they had made exorbitant charges, and that, if the account were properly made out, "no material sum would be due from him," and it is on this ground alone that the defendant claims the right "to hold the plaintiffs responsible if they sell under 7d. per lb., the price to which he consents to reduce the limit. The plaintiffs [544] did not sell, nor did they forego their commission and transfer their business to another house as proposed by the defendant. An acrimonious correspondence then commenced and continued until the beginning of the following year whilst the price of cloves was dull and declining, having gone down to 5½d. on 1st November. At last, on 28th October, the plaintiffs telegraph to the defendant that they would sell unless they cabled a margin of £800, stating that the market price put at 5½, and again, on 30th October, they telegraphed: "Limit if we can sell at 5½. If you wish us to continue holding, cable a margin of 800, otherwise selling." On the 31st defendant replies: "Limit for cloves 6d." On 15th November the price had fallen to 5d., and the plaintiffs telegraphed an account showing a deficit of £1,192-3-10. On the 15th December Mr. Charlesworth having come out to Bombay informs the defendant he will telegraph to his firm to sell "at the best price obtainable" since he refuses to give them a margin to cover the heavy deficiency, and on 30th January 1890 informs the defendant that the goods were being sold on that day without reserve to the highest bidder.

Now, although no express admission by the defendant of the plaintiffs' right to sell in case of default of payment of deficiencies is to be found in the defendant's letters, they all tacitly proceed on the assumption that, according to the course of business between them, the plaintiffs would be justified in taking the course they threatened to take if the defendant committed default in remitting so as to cover any material amount of deficiency, and having regard to the nature of this business, which necessarily required that the factor for sale in England, who accepted the consignor's bills, should look mainly to the proceeds of the goods for payment of his advances, the inference from the above correspondence is, I think, that this consignment business was conducted between the parties

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1893 on the basis of the plaintiffs being entitled to sell in a falling market if the
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 — is strengthened by the conduct of the defendant, who never went into
 ORIGINAL the witness box to deny that such was the course of business.

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As no attempt has been made by the defendant, in taking the account, to show that there was not a material deficit at the [545] time the goods were sold, or that he was ready to meet it, I am of opinion that Mr. Justice Farran was right in holding that, under the circumstances disclosed by the evidence and according to the course of business, the plaintiffs' right to sell arose notwithstanding the 6*d.* limit imposed by the defendant, and that the exception to the Commissioner's report, which raises the question as to the defendant's claim to be credited with the price of the cloves at 6*d.* per lb., was properly disallowed, and that the appeal should be dismissed with costs.

STARLING, J.—In this case the question to be decided is whether the plaintiff as consignee of certain produce was entitled to sell the same against the orders of the defendant, the consignor, in order to recoup himself the advances he made when he accepted the consignments. The cases of *Smart v. Sandars* (1), taken together with *De Comas v. Prost* (2), decide that a factor, to whom goods have been delivered for sale, has no right to sell those goods against the orders of the owner in order to repay himself the amount he may have advanced upon them, whether the advance be made at the time the goods are handed to him or subsequently unless it be proved that an agreement to that effect was made at the time of the advance, or may be inferred from the course of business between the parties. The case of *Brown v. McGran* (3) and illustration (b) to s. 202 of the Contract Act do not afford any assistance, as in the American case a *general* authority was given at the time of the advance being made, and the illustration assumes that such authority has been given, and it will be seen that no such authority was given in this case.

From the evidence it appears that previous to January, 1889, the plaintiff and defendant had been doing business together, but the full details of the terms on which such business was carried on do not appear. At the beginning of that month some conversation took place between them as to an increase of business, &c. A letter was written by the plaintiff to the defendant referring to that conversation, but evidently containing only part of the terms on which such business was to be carried on. [546] On the 25th January, 1889, the defendant consigned 435 packages of cloves to the plaintiff, and drew against them £2,100 and fixed the limit of price at which they were to be sold at 9½*d.* (that limit was eventually reduced to 6*d.*). By the time the bill arrived in England cloves had fallen in price, and the plaintiff refused to accept the bill unless cover was provided for the deficiency. That cover was provided by the defendant with very little demur, and the plaintiff accepted the bill, but with the knowledge that his orders did not permit him to sell under a certain limit. On this occasion the defendant by his acts showed that he was bound to keep the plaintiff guaranteed against any deficiency, and his letters of 15th February 1889, 15th March 1889, and 10th September 1889 distinctly show that he never alleged that he was not bound to remit cover whenever it was needed by the fall in the market, but all he does allege is that no cover was necessary at the time the letters were written.

(1) 3 C. B. 380=5 C. B. 895.

(2) 3 Moore's P. C. (N. S.) 158.

(3) 14 Peters, 479 (American Rep.)

Clearly, then, the Court is justified in holding that this was part of the terms on which business was to be conducted between the defendant and the plaintiff. It is now admitted that the defendant did not remit sufficient cover in respect of this parcel of cloves. What, then, is the remedy which the plaintiff has in such a case? The plaintiff says that he was under the circumstances entitled to sell the cloves for the best price he could obtain, and in his letter of 23rd August 1889 he threatens to sell them unless margin is provided. The answer to that is contained in the defendant's letter of the 10th September, above referred to, in which no objection is taken to the power of the plaintiffs to sell under fitting circumstances, but it is alleged that those circumstances have no existence, as there would at that time be no deficiency.

On the 28th October sale was again threatened by telegram unless a remittance was sent, and the only reply the defendant made was to lower the limit to 6d. Sale was again threatened by the telegram of the 31st October and letter of 1st November, but these do not seem to have been replied to. Early in November the plaintiff started for Bombay, and after his arrival the letters of 11th and 13th December were written to the defendant again threatening sale, and from the evidence of the [547] plaintiff it appears that the defendant never set up the case that the plaintiff could not, in any event, sell below the limit fixed, but adopted a policy of procrastination, alleging at first that he had not time to examine the accounts, and subsequently refusing to discuss the matter until the plaintiff settled some counter claim he brought forward. If, according to the course of business, it was not open to the plaintiff under any circumstances to sell below the defendant's limit, that is the very first thing which would have been put forward by the defendant, but at no time does he allege that, and as he has refrained from tendering himself as a witness to prove such a condition, or to contradict the plaintiff when he says he had the right to sell if cover was not provided, the only inference that can be drawn is that, according to the established course of business between the plaintiff and the defendant, the plaintiff was entitled to sell the cloves at the best price he could obtain and against the wish of the defendant in the event of his not providing the plaintiff with sufficient cover as cloves fell in value. Consequently this appeal must fail.

Appeal dismissed.

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