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ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1904.
September 16.

PAUL BEIER AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* CHOTALAL JAVERDAS (ORIGINAL DEFENDANT), RESPONDENT.*

Contract—Construction—Custom of trade in Bombay—Vendor and Purchaser—Principal and Agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms—Liability to account.

The plaintiffs sued to recover the balance due to them for goods delivered by them to the defendant under certain indents, the first clause of the printed portion of which ran as follows:—"$\frac{\text{We}}{\text{I}}$ hereby request and authorise you to order, and, if possible, buy and send $\frac{\text{us}}{\text{me}}$ the undermentioned goods on $\frac{\text{our}}{\text{my}}$ account and risk and $\frac{\text{we}}{\text{I}}$ bind $\frac{\text{ourselves}}{\text{myself}}$ to pay for the same at the prices and conditions specified below." Other printed clauses provided that goods were to be landed by the defendant, who was to pay the import duty; the plaintiffs were not to be liable for damages though they might have advised the defendant of having placed the order, or any portion of it; the liability of the sellers and buyers respectively, was to be the same as though a separate contract had been made out and signed in respect of each instalment; insurance was to be effected in Europe and the plaintiffs were to be free of all responsibility regarding it; the plaintiffs were not to be bound by any clauses or customs not specifically mentioned in the indent; and anything written on the indent form by the buyers in any language, other than English, except their signature, was to be null and void.

To this indent form the following matter, *inter alia*, was added in writing:—"12 Cases E./contg. 18 Pcs. of 25/30 yds. Plain Velvet 1421/18 at 1*s.* 9*d.* per yard. Nett free godown including duty. 60 days. 6 per cent. Int. after due date."

The plaintiffs brought out the goods referred to in the indents and the defendant took delivery of a portion of the same, but refused to take delivery of

* Suit No. 614 of 1904, Appeal No. 1317.

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the remainder. The defendant contended, by way of defence and counter-claim, that the plaintiffs were his commission agents for the purpose of purchasing goods in the European markets, and that they were bound to furnish an account of the difference, if any, between the cost price of the goods and the price mentioned in the indents.

The lower Court, by an interlocutory judgment, held that the relation between the parties was that of principal and agent, and ordered the plaintiffs to furnish an account. The plaintiffs appealed. On appeal the preliminary objection was taken that the lower Court had erred in excluding evidence as to the custom of trade in Bombay.

By an order dated the 7th March 1904 the suit was referred back to the lower Court in order that such evidence might be taken.

On further hearing, after such evidence was taken —

Held, that there was an inconsistency between the printed and the written provisions of the indent. The print, however, could not be discarded, but it was necessary to discover the real contract of the parties from the printed as well as from the written words.

Gumm v. *Tyrie*(1) followed.

Held, also, that according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe, at a fixed price, nett free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.

APPEAL from Russell, J.

In the years 1900 and 1901, Chotalal Javerdas, the defendant, by various indents numbered respectively 109, 134, 218, 318, ordered out goods from Europe through the plaintiffs, Messrs. Beier and Co.

The indents were composed partly of a printed form and partly of written matter added thereto.

The printed form ran as follows :—

A. A. 190

Indent No. .....

Messrs. Beier and Co., Lyons.

Dear Sirs,

$\frac{we}{I}$ hereby request and authorise you to order, and, if possible, buy and send $\frac{us}{me}$ the undermentioned goods on $\frac{our}{my}$ account and risk and $\frac{we}{I}$ bind $\frac{ourselves}{myself}$ to

(1) (1864) 33 L. J. (Q. B.) 97 at p. 111.

pay for the same at the prices and conditions specified below. The goods to be shipped by steamer to Bombay and the invoice amount or amounts, including European charges, to be drawn for upon $\frac{us}{me}$, payable at Bombay at 60 days' sight, with documents attached for payment, which draft or drafts $\frac{we}{I}$ hereby pledge $\frac{ourselves}{myself}$ to duly accept on presentation and pay at maturity, or as soon as the goods have arrived at abovesaid port of destination, whichever may first happen. Should $\frac{we}{I}$ fail so to accept or pay the draft or drafts, $\frac{we}{I}$ hereby authorize you or your nominated Agents to dispose of the documents or goods for $\frac{our}{my}$ account and risk, either by private sale or public auction, when, where, and how you consider advisable, and without any reference to $\frac{us}{me}$, and $\frac{we}{I}$ hereby engage to make good to you any loss or deficiency which may arise from such sale or sales and all expenses, together with 5 per cent. commission and interest at 9 per cent. per annum, $\frac{we}{I}$ waiving $\frac{our}{my}$ claim to profit on the goods, should there be any.

The goods to be taken charge of, landed and passed through the Custom House by $\frac{us}{me}$ or by $\frac{our}{my}$ nominated Agent, and Import duty will be paid by $\frac{us}{me}$ on arrival of the vessel.

It shall be optional for you to execute the whole or any part of this order: and if through the failure of the manufacturers or strikes or accidents of whatever nature, the goods or any portion thereof are not shipped or delivered at the stipulated time; or if you should have to reject the goods, or any portion thereof, on account of late or bad delivery, this indent, or such portion thereof remaining unexecuted or unshipped, may be considered cancelled, and $\frac{we}{I}$ shall not be entitled to claim any damages for such total or partial non-delivery, notwithstanding your having previously advised $\frac{us}{me}$ of having placed the order or any portion thereof.

Date of delivery to carrier in ..... or other manufacturing place in Europe shall count as date of shipment; and a delay not exceeding 15 days beyond the time stipulated for shipment shall be no ground for cancelling this Indent, or any portion thereof, or afford reason for refusing acceptance of the goods or payment of the drafts on their due date. You shall, moreover, not be responsible if the goods ordered herein or any portion thereof be shut out by the steamer; not for any delays arising from alterations in the sailing dates, or the suppression of the departures of the steamers for which the goods were destined to be shipped, and $\frac{we}{I}$ hereby agree to personally bear the risks and consequences of such occurrences $\frac{and}{or}$ delays.

$\frac{We}{I}$ agree to accept your invoices as conclusive proof of the number $\frac{and}{or}$ contents of the packages therein stated.

If the goods or any portion thereof are shipped or have arrived prior to the time stipulated, $\frac{we}{I}$ shall have no right to reject the same, but shall accept

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them with an extension of the due date of payment corresponding to the period that the goods are shipped prior to the time contracted for.

We/I shall not be entitled to refuse to accept any drafts in respect of goods of which the representing samples have not been submitted to us/me. Partial damage or short quantity or measure or inferiority or difference in quality or designs or colours shall not be a ground of objection to accept the drafts and/or take delivery of the goods; and if any dispute should arise respecting the goods, you are always to have the option of cancelling them, or should you not elect to do so, two European merchants, resident in Bombay, shall, after we/I have paid for the goods, be nominated arbitrators, one by each party, to survey the goods and determine the points in dispute, and decide upon them as they may consider just and equitable to both parties; and in the event of their disagreeing, they shall appoint an umpire and their, or in the latter case, his decision shall be final and binding upon both parties, and the provisions of the Code of Civil Procedure relating to arbitration shall be applicable to such arbitrations. This provision for arbitration shall be an absolute bar to any suit or legal proceedings, otherwise than for the enforcement of the award, in respect of all matters so agreed to be the subject of reference, and all costs and expenses attending such arbitration shall be in the discretion of the arbitrators or arbitrator or umpire, and shall be paid by the party against whom the award is made.

All claims in respect of goods covered by this Indent must be submitted in writing *within 14 days after their* arrival at sea-port of destination, after which time we/I shall be precluded from raising any claim or objection even though there should exist grounds for such claim or objection.

Loss of the vessel shall cancel the portion of this contract shipped in the vessel lost.

Goods ordered in sterling currency are to be drawn for with interest added at the rate of 6 per cent. per annum from date of invoice till approximate due date of remittance reaching home payable at the current demand rate of exchange in London, and in accordance with rules from time to time established on this behalf by the Exchange Banks in Bombay.

This agreement is to be deemed and construed as a separate contract in respect of each instalment of goods, *and the rights and liabilities of the sellers and buyers respectively* shall be the same as though a separate contract had been made out and signed in respect of each instalment.

Insurance to be effected in Europe and you to be free of all responsibilities regarding it.

In case of war, whatever may be the terms of our/my indent, we/I give you liberty to insure against war risk on our/my account.

You are not bound by any arrangement, clauses, or customs which are not specially mentioned in this indent.

We/I hereby expressly agree that any actions which may arise in respect of this contract shall be brought before the competent Courts in Bombay, who shall

have full and complete jurisdiction with regard to such actions, no matter where the cause of action may have arisen.

Anything written on this Indent form by the buyers in any language other than English, except their plain signature, shall be null and void.

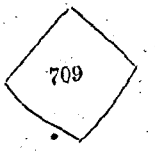
To Indent No. 109 the following was added in writing:—

10 cases each contg. 10 Pieces of 25/30 yds. Plain Velvet 38087/18 inches at 2/4 per yd. Nett free godown including duty. 60 days. 6 per cent. int. after due date.

Assortment.

Colours—Scarlet.	Chocolate.	Blue.	Purple.	Green.	Black.
2	2	2	2	1	1

Quality, Border, Shades and (No. 1221) as supplied against case 10082.



Shipment in 5 lots:—Two cases January, and out of remaining 2 cases to follow at an interval of 2/3 weeks.

CHOTALAL JAVERDAS.

To Indent No. 134 was added:—

15 cases Ea. contg. 20 Pcs. of 25/30 yds. German Flowered Velvet 1205/18 at 1s./11d. per yd. nett free godown including duty. Sixty days. 6 % Int. after due date.

Assortment.

1 Pec. of Patt. 1 but green ground and scarlet flowers

Etc. Etc. Etc.

Each case to contain 20 pieces in the above 20 designs and colors.

Shipment:—4 cases January, 4 cases February, 4 cases March and 3 cases April.

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Indents Nos. 218 and 318 were of a similar nature.

On the 24th of January 1901 Messrs. Beier and Company wrote as follows:—

Lyons, 24th January 1901.

Mr. CHOTALAL JAVERDAS,

Bombay.

Dear Sir,

We have the honour to report on the following indent kindly entrusted to us for execution.

Indent No. 109 Date confirmation.

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10 cases each containing 10 pieces 25/30 yards 18".

Plain Velvet Quality, price, shipment, and terms as per indent. Assortment and border changed as per note have been placed.

Yours faithfully,
P. P. on Beier & Co.,
ARTHUR BEIER.

On the 26th July 1901, the following letter was written by the plaintiffs:—

Lyons, 26th July 1901.

Mr. CHOTALAL JAVERDAS,
Bombay.

Dear Sir,

We have the honour to report on the following indent kindly entrusted to us for execution.

Indent No. 318 Date 15th June confirmation 5th July.

12 cases each containing 16 pieces 18" 25/30 yards.

Plain Velvets 1421

have been placed.

Yours faithfully,
BEIER & Co.

The plaintiffs brought out the goods referred to in the indents and the defendant took delivery of a portion of the same, but refused to take delivery of the remainder.

The plaintiffs thereupon filed a suit to recover the sum of Rs. 4,724-5-0, being the balance, which, they alleged, was due to them from the defendant.

The written statement of Chotalal Javerdas contained, *inter alia*, the following passage:—

11. The defendant says that the plaintiffs were his Commission Agents for the purpose of purchasing goods in the European markets. The indents given to them are merely orders to purchase such goods as are mentioned therein on defendant's account. The defendant says that the prices mentioned in the said indents are limits which the plaintiffs were not to exceed while executing the defendant's orders. The defendant has grave reasons to believe that the plaintiffs have purchased goods on defendant's account at prices lower than those mentioned in the different indents given by the defendant. The defendant submits that the plaintiffs are not entitled to charge him any prices higher than those actually paid by them for the said goods, and that on the taking of accounts the defendant ought only to be debited with the prices actually paid by the plaintiffs and not the prices mentioned in the indents.

The defendant accordingly prayed, by way of counter claim.

That an account may be taken by and under the directions of this Court of all the dealings and transactions had between the plaintiffs and the defendant on the basis contended for in paragraph 11 hereof, and that on taking such accounts whatever may be found due by the one party to the other may be ordered to be paid by such party as may be found indebted.

Raikes with *Scott* (Advocate General) and *Davar* for the defendant:—The relation between the parties was clearly that of principal and agent. It was never suggested before the hearing that the plaintiffs were vendors of the goods. The terms of the indent are inconsistent with such a relation. In the first paragraph it is expressly stated that the goods were to be bought and sent out on the defendant's account and risk. In the third paragraph of the indent and also in the correspondence the expression "placing the order" is used. This shows that the plaintiffs were acting as agents and not as vendors. The figures added in writing to the printed form were limits, which the plaintiffs were not to exceed, in purchasing the goods. The defendant therefore is entitled to be paid the difference if any between the cost price and the price mentioned in the indents, see *Mahomedally Ebrahim Pirkhan* v. *Schiller Dosogne & Co.*[1]

Jardine and *Robertson* for the plaintiffs in reply:—The relation between the parties was that of vendors and purchasers. The expression "on our account and risk" in the first clause of the indent was redundant, having regard to the express terms in writing. The second paragraph was also over-ridden by the written terms. With reference to the 3rd clause, the plaintiffs were not manufacturers and had not ready stocks, therefore, the clause was not inconsistent with a relation of vendor and purchaser. It provided for the failure of the vendor under certain circumstances. Clauses 7, 8 and 9 are not inconsistent with the relation of vendor and purchaser and in clause 5 the expression "your invoices," *i. e.*, not the manufacturer's invoices, is used. The expression "nett free godown including duty" in the written terms meant that the plaintiffs had to pay the cost of the goods, the shipping charges, the carriage to port of shipment, freight, insurance, landing charges, clearing charges, custom's duty, Port Trust dues and godown rent in Bombay;

(1) (1889) 13 Bom. 476.

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but no rate of remuneration was mentioned. It follows, that, Messrs. Beier & Co. could make no profit and get no remuneration, except out of the price, at which they purchased from their vendors.

On the 19th June 1903, the following interlocutory judgment was delivered by

RUSSELL, J.:—This case has been going on before me for the last 3 days. It is an extremely interesting case and I have considered it from all its bearings during that time, and, it being a commercial case, I think it desirable to express my conclusions without delay. Now, the first question to consider is what are the pleadings in this case. The plaint has been as observed by Mr. Raikes drawn in a most careful manner and we do not find in it any suggestion whatever of the plaintiffs being the vendors of the goods. This appears from the first paragraph of the plaint and it will be seen from the first paragraph of the written portion of the indent No. 109 that the defendant ordered 10 Plain Velvets, 38087—18 inches at 2/4. In November 1900, Beier writes that the order referred to "has been placed and we are pleased to inform you that the maker agrees to reserve this quality exclusively to our new firm." In the written statement, in paragraph 11, the defendant says that the plaintiffs were his Commission Agents for the purpose of purchasing goods in the European markets, and further in paragraph 12 he prays, that an account may be taken by and under the directions of this Court of all the dealings and transactions had between the plaintiffs and defendant on the basis contended for. I do not know whether I have formed a wrong opinion with regard to this, but from the way Mr. Jackli gave his evidence it seems to me that the above quoted paragraph was very probably unpleasant to the plaintiffs. They did not quite like it and consequently they raised the question "whether the relations of the plaintiffs and defendant were that of vendors and purchasers or principal and agents." At all events in their affidavit of the 16th February 1903 we have the first mention of this question. Because we find, the plaintiffs in paragraph 3 of the affidavit dated 16th February 1903 have made the following statement: "That the

plaintiffs have in their possession in Lyons in France documents which are relevant to the suit only in the event of the issue as to whether the plaintiffs were the agents of the defendant to purchase the goods in question in the suit for him at the best price not exceeding a limit or whether the plaintiffs were not vendors at a particular price being determined in favour of the defendant." This is the first intimation we have of this question being raised. Accordingly on the 2nd April the Judge's order was made setting down the issue "whether the relation of the plaintiffs and defendant were vendors and purchasers or principal and agents for trial. It is highly desirable that the parties as far as the Court goes be prevented from going into unnecessary expense, which they would undoubtedly have had to incur if the inspection of the plaintiffs' documents had been allowed to the defendant as asked for by him. To come to a satisfactory conclusion on this point, we have to decide the construction of the contract supplemented by the evidence that the parties have offered. If the plaintiffs were simply vendors of these goods to the defendant then no question could arise whether or not there was any foundation for the statements contained in paragraph 11 of the defendant's written statement. If they were vendors they were entitled to buy at any price and sell to the defendant at any price they chose to fix. So much for the case as presented to my mind from the pleadings.

Now looking at the indent itself I find that it is addressed to Messrs. Beier & Co., Lyons, and runs as follows:—"We (I) hereby request and authorise you to order, and, if possible, buy and send us (me) the undermentioned goods on our (my) account and risk, etc." This seems to me to be an order for goods on behalf of the defendant. There are certain other clauses and sentences which are immaterial to this issue. Then again I notice that below the printed form of the indent, the defendant has given his order, which is as follows:—"10 cases each containing 10 pieces of 25/30 yards plain velvet 38087—18 inches at 2/4 per yard, nett free godown including duty. 60 days. 6 per cent. interest after due date." The rate quoted here is now relied on as the price fixed between the vendor and purchaser. After this we have a very curious provision under which the defendant in

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case of failure authorises plaintiffs "to dispose of the goods on his account and risk either by private sale or public auction, when and where and how you consider advisable and without any reference to me and I hereby engage to make good to you any loss or deficiency which may arise from such a sale or sales and all expenses together with 5 per cent. commission and interest at 9 per cent. per annum. I waiving my claim to profit on the goods should there be any." A provision of this kind is not what we expect on behalf of the vendor. Between vendor and vendee the former would recover the difference between the market rate and the contract rate. It is further provided "if through failure of manufactures, of strikes or accidents of whatever nature, the goods or any portion thereof are not shipped or delivered at the stipulated time, . . . I shall not be entitled to claim any damages." Then again there is a stipulation, that "This agreement is to be deemed and construed as a separate contract in respect of each instalment of goods and the rights and liabilities of the *sellers* and *buyers* respectively shall be the same as though a separate contract had been made out and signed in respect of each instalment."

The expression "sellers and buyers" used in this clause would at first sight appear to refer to plaintiffs and defendant but when you read the indent carefully, I think there can be no doubt that it does not relate to plaintiffs and defendant, because in that case we would expect that the words "you and us" or "you and we" would have been used but not the words "sellers and buyers." Mr. Jardine has, however, not relied on this clause, it is a very obscure one, it is not therefore necessary for me to discuss it any further.

In coming to a conclusion in this case, I rely on the case of *Mahomedally Ebrahim Pirkhan* v. *Schiller Dosogne and Co.*[1]. This case is for all practical purposes the same as the present case. The more you read the indent in *Schiller's case*, the more striking is the resemblance. It is obviously binding on me. I must hold therefore that the indent in this case has not created a relationship between the parties of vendor and purchaser but of "principal and agents." It is clear from the cases of *Armstrong*

(1) (1889) 13 Bom. 470.

v. *Stokes*[1] and *Robinson* v. *Mollett*[2] that the law which is embodied in the sections of the Indian Contract Act originated from mercantile practice for it was found impossible to create a privity of contract between the foreign indentor and the manufacturer of each firm of silk or velvet as the case might be. The manufacturer at Birmingham who sends his goods to a London firm who have contracted with a person in the United Kingdom or out in India cannot be considered as contracting with the indentor. Lord Blackburn in *Robinson* v. *Mollett*[2] has held, that although there may be no privity of contract between the manufacturer and the person abroad to whom the manufacturer has sent goods through an agent still it is perfectly consistent to hold that the relationship between the agent and indentor is that of a principal and agent. Therefore it seems to me to follow from *Ireland* v. *Livingston*[3] and *Cassaboglou* v. *Gibb*[4] that if once you establish the relationship of principal and agent, the ordinary incident of that relationship must follow of which one is that the agent must account for any profits he makes out of his agency unknown to the principal. It may be that the plaintiffs have made no profits whatever, but if the relationship of principal and agent exists, then the defendant is entitled to inspection of the documents in support of his allegation in paragraph 11 of his written statement. He is entitled to see all the documents.

I find on the issue, that the relationship between the plaintiffs and the defendant was that of principal and agent respectively.

The plaintiffs appealed and the defendant filed cross-objections.

On appeal, the preliminary objection was taken, that the lower Court had erred in excluding evidence, as to the usage of trade in Bombay, with reference to the liability to account of a merchant, through whom goods are ordered at a fixed price nett free godown, and no remuneration is mentioned.

By an order, dated the 7th March 1904, the suit was referred back to the lower Court in order that evidence might be taken on the following issues :—

1. Whether according to the custom of trade in Bombay when a merchant in Bombay requests or authorizes a firm to order and to buy and send goods to

(1) (1872) L. R. 7 Q. B. 598.
(2) (1874) L. R. 7 H. L. 802, at p. 810.
(3) (1871) L. R. 5 H. L. 395.
(4) (1883) 11 Q. B. D. 797.

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him from Europe at a fixed price nett free godown including duty or free Bombay harbour and no rate of remuneration is specifically mentioned, the firm is or is not bound to account for the price at which the goods were sold to the firm by the manufacturer?

2. If this be answered in the negative does it make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant?

3. If the first issue be answered in the negative then at the dates of the *several indents* in this suit was the defendant aware of such custom?

4. Apart from any general custom of trade what in relation to transactions of the character indicated in the first issue has been the usage (*a*) between the plaintiffs and the defendant and (*b*) between Messrs. *Beier* and *Katz* and the defendant?

On the 8th of July 1904, the following judgment was delivered by

RUSSELL, J.:—This matter has been referred to me by the Appeal Courts' Order under section 566 of the Code and, having heard the evidence on both sides at great length, I propose to record my findings on the issues.

On the one hand, namely on behalf of the plaintiffs, we have had representations of all the most influential firms in Bombay together with two large dealers and Mr. Robertson was anxious to call about 30 more witnesses but I stopped him.

On the other hand, the defendant called no representatives of *firms but dealers only* who of course would be very glad to have this alleged custom broken down.

Now the plaintiffs' evidence I find is all one way and I confess that after many years' experience in Bombay it was difficult for me to imagine that any evidence would be brought to contradict this alleged custom.

One has only to regard the course of business to shew that it is impossible to conceive that the dealers should have the right to call upon the home firms or their Bombay representatives to render an account of any profits made on purchases of goods.

The indent is an offer by the dealer in Bombay at a fixed price. His offer is wired home. The home firm after communication with the makers or in any other way they can put their hand upon the goods. The price is to include costs, freight and insurance and everything down to the time that the goods arrive

in Bombay harbour. Then if the home people accept the offer made, they wire the acceptance to their representatives here and from that moment a price is fixed as between the parties and therefore it seems to me that it is incredible that when two persons have fixed the price in this way, the dealer should be entitled to any rebate if the home people can get the goods at a less price from the manufacturer and when you come to think of it, it stands to reason. A private person in Bombay orders out from a shop certain articles and is willing to pay a certain fixed price for those articles. It is impossible to believe that he could call upon the shop to account for any profit made as between the purchasing and selling price. No instance has been given of any dealer calling upon a firm in Bombay for an account and all the witnesses are unanimous in saying that if such an account were called for, they should refuse to give it. Of course it must be borne in mind that indents are drawn up in different forms and during the examination of Sorabji M. Shah, it was stated that his firm acting on the advice of their attorneys Messrs. Craigie, Lynch and Owen altered the form of their former indents so as to meet this very point. It may, therefore, be desirable for the mercantile community of Bombay to consider whether it would not be for their advantage to put a point such as has been raised in the present case beyond all dispute by altering their indents in the way Sorabji M. Shah's firm altered theirs under legal advice.

This custom is in accordance with part of the opinion expressed by Blackburn, J., in *Ireland* v. *Livingston* [1] and I do not find anything in *Robinson* v. *Mollett* [2] to militate against it.

I find on Issue No. 1 that under the circumstances mentioned therein the firm is not bound to account for the profits as therein mentioned.

On Issue No. 2 I find it makes no difference if the firm receives commission or trade discount as suggested.

On Issue No. 3 I find the defendant was perfectly aware of the custom.

On Issue No. 4 you have only to look at the indent itself to see that the relation as between Beier and Katz, and the defend-

(1) (1871) L. R. 5 H. L. 395. (2) (1874) L. R. 7 H. L. 802.

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ant was buyer and seller and not principal and agent. There are other clauses in the indent which bear out the same terms, but it is not necessary for me to refer to the indent at length.

This was the opinion I had at first formed in this case but I conceived that the case of *Mahomedally Ebrahim Pirkhan* v. *Schiller Dosogne & Co.*[1] compelled me to hold the contrary. I understand from counsel, that the case was differentiated from the present one in the court of appeal in a way in which it was not differentiated before me.

Inverarity with *Robertson* and *Jardine* for the appellants (plaintiffs) :—The written part of the indent is in variance with the printed parts. Therefore the printed clauses which are in direct variance go out, see *Dudgeon* v. *Pembroke*[2] *Ex parte Miles. In re Isaacs*[3]. The court will look at the transaction, and not regard what the parties call themselves, *Ex parte White. In re Nevill*[4]. We say the plaintiffs received an offer from the dealers for delivery free ex godown. Therefore the relation between the parties was that of vendor and purchaser, not principal and agent. No commission was given by the dealer in Bombay, nor did the plaintiff receive commission from the makers at home, except in certain rare cases. It is well known, that the persons who take these offers, take the indent price and make what profit they can. There is nothing secret about such profits. It follows, that even if the relation between the parties was that of principal and agent, the agent was entitled to the difference between the indent price and the cost price. We rely on the custom in Bombay, that the indent price is a fixed price and that persons who take such orders are not bound to render an account.

The case of *Mahomedally Ebrahim Pirkhan* v. *Schiller Dosogne & Co.*[1] does not apply; on the other hand, see *Great Western Insurance Co.* v. *Cunliffe*[5] and *Baring* v. *Stanton*[6].

Strangman and *Setalvad* for the respondent (defendant) :—Custom is expressly excluded by the indent, therefore it cannot be relied on in the present case.

(1) (1889) 13 Bom. 470.
(2) (1877) 2 App. Cas. 284.
(3) (1885) 15 Q. B. D. 39 at p. 42.
(4) (1870) L. R. 6 Ch. 397 at p. 399.
(5) (1874) L. R. 9 Ch. 525 at p. 536.
(6) (1876) 3 Ch. D. 502.

[JENKINS, C. J.—What, having regard to contracts of this kind, which are ambiguous, are the obligations of the parties ?]

The contract in question is more consistent with agency than with sale; therefore the onus is on the plaintiffs to prove terms inconsistent with agency. The relationship between the defendant and Messrs. Beier & Co. was the same as that which formerly existed between the defendant and Messrs. Beier and Katz. In 1895 Messrs. Beier and Katz wrote "the maker refuses to listen to your offer" and "the maker refuses selling at your limit". Similarly in January 1901 the plaintiffs wrote "assortment and border charged as per note have been placed" and in July 1901 "12 cases plain velvet have been placed." These expressions are only consistent with a relation of principal and agent.

The plaintiffs now allege a custom, that they are entitled, not only to the commission or discount allowed by the manufacturer, but also to the difference in price. No such custom is in fact proved. The merchants who gave evidence used vague expressions. Not one of them spoke of instances, where both the difference in price, and also commission were taken. But a usage of trade must be proved by instances and not by mere expressions of opinion, see *Cunningham* v. *Fonblanque*[1], *Mackenzie* v. *Dunlop*[2], *Rahimatbai* v. *Hirbai*[3], *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*[4]. The custom set up by the plaintiff is not of a universal nature, therefore, to bind the defendant, it was necessary to prove that he was aware of it, see *Robinson* v. *Mollett*[5]. We contend further, that even if the custom exists, it is bad, because it is not consistent with law, see *Meyer* v. *Dresser*[6], *Turnbull* v. *Garden*[7], *Kimber* v. *Barber*[8], *Thompson* v. *Meade*[9], and lastly we say, that it is not admissible in any event, because it is repugnant to and inconsistent with the express terms of the contract, see the Indian Evidence Act [10] and the judgment of Farran, J., in *J. G. Smith* v. *Ludha Ghella Damodar*[11].

(1) (1833) 6 C. & P. 44 at p. 47.
(2) (1856) 3 Macq. H. L. Cas. 22 at pp. 26, 27, 40.
(3) (1877) 3 Bom. 34.
(4) (1879) 3 Bom. 273 at p. 297.
(5) (1874) L. R. 7 H. L. 802.
(6) (1864) 16 C. B. N. S. 646.
(7) (1868) 38 L. J. (Ch.) 331 at p. 334.
(8) (1872) L. R. 8 Ch. 56.
(9) (1891) 7 T. L. R. 698.
(10) Section 92, proviso 5.
(11) (1892) 17 Bom. 129 at p. 143.

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[JENKINS, C. J.—We expressed a strong view before, that "buyers and sellers," in clause 11, referred to the indent.]

That would be an end of the case. We contend that the difference between the opening words of the indent, and those of a ready goods contract, clearly shows, that the relation between the parties was that of principal and agent.

JENKINS, C. J.—The plaintiffs, who carry on business in partnership in Bombay and at Lyons, sue to recover Rs. 4,724 as the balance due to them in respect of goods alleged to have been delivered by them to the defendant under four indents numbered 109, 134, 218, 318.

These goods were procured by the plaintiffs from Europe at the defendant's instance. The plaintiffs contend that they are entitled to charge the defendant for the goods the rates mentioned in the indents, irrespective of the price paid to the manufacturers: the defendant, on the other hand, maintains that those rates are merely limits, and the plaintiffs cannot charge as the purchase price of the goods more than the manufacturers were paid.

These indents, though four in number, are substantially in identical terms; each is on a printed document, to which written matter has been added to meet the exigencies of the particular case.

To the claim in respect of two of these indents an objection is made on the score of the time, at which they were sent; but it will be more convenient first to consider the general question apart from this particular objection, and so I will select for discussion an indent No. 318, not obnoxious to it. It is dated the 15th June 1901; it is headed with the name of Messrs. Beier and Co., that being the name or style, under which the plaintiffs then carried on business in Lyons and Bombay; it is addressed to that firm at Lyons; and it is signed by the defendant.

It will be noticed that, apart from a few lines at the end, the whole of the document is on a printed form, and it is common ground that the form was supplied by the plaintiffs, and is one commonly used by them in business of this class.

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By it the defendant purports to request and authorise the plaintiffs to order, and, if possible, buy and send the defendant the undermentioned goods on the account and risk of the defendant, who binds himself to pay for the same at the prices and conditions specified below: the invoice amount, including European charges are to be drawn on the defendant: the goods are to be landed by the defendant, who will pay import duty: it is to be optional for the plaintiffs to execute the whole or any part of the order: in the events therein specified the plaintiffs are not to be liable for damages though they may have advised the defendant of *having placed the order or any portion thereof*: the "agreement is to be deemed and construed as a separate contract in respect of each instalment of goods and the rights and liabilities of the *sellers and buyers* respectively shall be the same as though a separate contract had been made out and signed in respect of each instalment: insurance is to be effected in Europe and the plaintiffs are to be free of all responsibilities regarding it: and anything written on the Indent Form by the *buyers* in any language other than English except their signature shall be null and void.

Then there are added in writing the following words:—

"12 cases ea/. contg. 18 Pcs. of 25/30 yds. Plain Velvet 1421-18 at 1s. 9d. *per yd.* nett free godown including duty. 60 days 6 per cent. Int. after due date.

Assortment by next mail.

Shipment in 4 lots:—1st 10/12 weeks from acceptance or earlier if possible and out of remaining each to follow every month.

Quality and silk *border to be exact as supplied in c/s.* 2218 1090 Ind. 218."

There is, it will be seen, an inconsistency between the printed and the written provisions; but this is no uncommon occurrence in the documents of business men, and we have in the decided cases guidance as to how it should be handled.

In *Gumm* v. *Tyrie*(1) Blackburn, J., said: "I do not agree with the proposition that Mr. Lush puts his case upon, that the words so printed are to be treated less as part of the contract than the other words, because they are printed. I think where

(1) (1864) 33 L. J. (Q. B.) 97 at p. 111.

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there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think when one is to overpower the other and to have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract, have been more considered and more thought of than those merely ordinary words, and no doubt these printed forms are customary, and, consequently the written terms would be more considered by him; and if they conflict and cannot be reconciled, then the written terms, those more special terms thought of by himself, may be considered to be more thought of, and, consequently, to have more weight by him."

We cannot therefore discard the print, but must as far as possible discover the real contract of the parties from the printed as well as from the written words.

For the defendant it is argued that the legal relation constituted by this document is that of principal and agent, with the incidents (including the agent's liability to account) which that relation ordinarily involves.

The plaintiffs, on the other hand, maintain that the contract is one of purchase and sale, so that no liability to account can arise: and alternatively they contend that, if the contract is one of agency, they are by the custom of trade under no obligation to account.

It appears to me that the method of approaching the case, which these rival contentions invite, is unsatisfactory: each is based on too superficial a view of the position; the case is (in my opinion) not one to be decided by an attempt to bring the contract within the one or the other of the two categories of sale or agency; the provisions of the document are equivocal, some lean towards the one relation, some towards the other.

Therefore we must examine the document as a whole and in its several parts, and also the surrounding circumstances, for thus only (as it appears to me) can it be determined whether or not an obligation to account exists.

To place the Court in full possession of these surrounding circumstances the plaintiffs proposed to lead evidence in order to show that according to commercial usage in Bombay, when

business was done on indents like the present, accounts were never given, as the profits were the importer's remuneration, and that this has been repeatedly recognized even by the defendant.

Mr. Justice Russell however declined to allow this evidence. Objection was taken to this ruling when this appeal first came before us and we held this decision was wrong.

The indent admittedly made no provision in express terms for the remuneration of the plaintiffs: it could not be supposed that they were to engage in trade without any profit to themselves: and (even in the learned Judge's view of the relations between the parties) in the absence of a special contract the allowance and custom of trade is the only medium to ascertain what is due: *Roberts* v. *Jackson*[1].

Moreover it appeared to us that a matter of general and far-reaching importance to the commercial community was involved, and as an appeal was made to the usage of trade, we thought it desirable that the Court should be placed in a position to determine whether the alleged custom existed, and, if so, what was its bearing on the present litigation.

Accordingly in the light of what had been decided in *Robinson* v. *Mollett*[2], *Bourne* v. *Gatliff*[3], *Cumming* v. *Shrand*[4] and *Rowcliffe* v. *Leigh*[5] we framed issues which we sent back to the first Court that evidence might be recorded thereon. The issues were in these terms:

"1. Whether according to the custom of trade in Bombay when a merchant in Bombay requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price nett free godown including duty or free Bombay Harbour and no rate of remuneration is specifically mentioned the firm is or is not bound to account for the price at which the goods were sold to the firm by the manufacturer?

2. If the first issue is answered in the negative does it make any difference that the firm receives commission or trade-discount from the manufacturer either with or without the knowledge of the merchant?

3. If the first issue be answered in the negative then at the dates of the several indents in suit was the defendant aware of such custom?

(1) (1817) 2 Stark 225.
(2) (1875) L. R. 7 H. L. 802.
(3) (1844) 11 Cl. & F. 45.
(4) (1860) 29 L. J. (Ex.) 129.
(5) (1877) 6 Ch. D. 256.

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4. Apart from any general custom of trade what in relation to transactions of the character indicated in the 1st issue has been the usage (*a*) between the plaintiffs and the defendant (*b*) between Messrs. Beier & Katz and the defendant?"

Evidence has now been recorded, and returned to us by Mr. Justice Russell, who has given us the benefit of his opinion as to its value and effect.

When eighteen witnesses had been examined by the plaintiffs, the learned Judge intervened and expressed the opinion that it was not necessary for the plaintiffs to call any further evidence, though Mr. Robertson, who appeared for the plaintiffs, intimated that he had 30 more witnesses to call in support of the custom.

The defendant too on his side called many witnesses.

The majority of the witnesses called by the plaintiffs are the representatives of large importing firms in Bombay, and most of them actually do business on indents practically undistinguishable from that with which I am now dealing.

All these witnesses are agreed that in the circumstances indicated in the 1st issue the firm is not bound to account for the price at which the goods are sold to the firm by the manufacturer.

It is unnecessary to discuss the evidence of each one in detail: it will suffice to examine the evidence of the first of these witnesses, Mr. Abercrombie, who is fairly typical of the majority that follow.

He represents Messrs. Latham Abercrombie and Co., and has been Chairman of the Chamber of Commerce. He has had 30 years experience in Bombay: his firm has been taking indents in Bombay, the terms being free Bombay Harbour, free ex godown, and c. f. i. c. i., for the last 10 or 15 years. When the price is fixed in the indent the firm, he says, is not liable to account for the price paid to the maker: they have never accounted to the indentor, and he has never demanded it: if he did they would not give it: when the price is fixed they get nothing from the indentor except the fixed price: it makes no difference whether the firm receives commission or trade discount from the maker either with or without the knowledge of the indentor: he believes it to be the custom in Bombay: his firm gets their profit in the

price: the price to the indentor covers every single thing till the goods arrive in Bombay: the dealers knew they got their profits in this way: the home firm can decline the indent or not: the home firm accepts the indents: if they miscalculate they are still bound by the indent if they have accepted it.

Mr. Abercrombie was cross-examined; but his evidence was in no way shaken, and what he has said is borne out by the plaintiffs' other witnesses.

Of these other witnesses 3 or 4 are no doubt the representatives of firms, who import on documents distinguishable from those in suit.

From among these I will take Mr. Armstrong, the present Chairman of the Chamber of Commerce, whose evidence affords a sample of what the other witnesses of this class say. He is a partner in Lyon and Co. and has been 20 years in Bombay: his firm brings out goods free Bombay Harbour, and c. f. i. c. i. and sometimes free ex godown.

In reference to the 1st issue he says he would not account for the price, and that it makes no difference whether the firm receives commission from the maker with or without the indentor's knowledge. He deposes that they have never accounted for the price, and an account has never been demanded; that after they have accepted the indent they were principals and of course should carry out their contract; and that after acceptance it becomes a sale.

Mr. Armstrong was subsequently called by the defendant as a witness, and it then appeared that the indent was not the only document employed by his firm, but on acceptance a sub-contract form is employed and the transaction becomes an absolute sale from Lyon and Co., Bombay, to the indentor.

It thus appears that Mr. Armstrong's firm, with more regard for actual facts than is according to the evidence generally observed, uses documents, which give accurate expression to the transaction in its several stages. To this extent this evidence is not of the same value to the plaintiffs, and this remark applies also to the evidence of Mr. Barraclough and Mr. Gillum, though each of them, as gentlemen engaged in business in Bombay, would answer the first two issues in the plaintiffs' favour.

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In addition to the evidence given by the representatives of firms, there is that of Mr. Wadia, a salesman of 42 years experience, Yamin Turki, a dealer, Mr. Gordhandas Khimji, a piece-goods merchant in a large way, Mr. M. N. Gazdar, who is in the plaintiffs' employ, and Mr. Jackli, one of the plaintiffs, all of whom support the plaintiffs' view.

While Mr. Sorabji M. Shah, who was called by the defendant, says, "the indents give the prices. The goods are to be ordered out (*sic*) a certain price. I think it may not be fair but the firm must take the profit in answer to issue I."

Other witnesses called by the defendant would answer the 1st issue in the negative, though it obviously detracts from the value of their evidence that in no single instance has it been shown or even suggested that an account has been rendered.

It is true that by some it was stated that an account has been demanded, and that the demand has been met by demonstration that there had been no profits; but these statements have been supported in no instance by documentary evidence or by the testimony of any one from whom a demand is alleged to have been made. This (in my opinion) largely discounts the worth of this evidence.

But the defendant does not rest his opposition to the plaintiffs' claim on this alone; he relies on other circumstances, which he urges are in his favour. Thus he points to Exhibits Reference 8 and 9 as implying that when he dealt through Beier and Katz—and I may here remark parenthetically it is common ground that business with that firm was conducted on precisely the same lines as with their successors, the plaintiffs—he was brought into direct relation with the maker, and in support of this he points to the statement "the maker refuses to listen to your offer" in the first of these letters; and "the maker refuses selling at your limit which is too much below costs" in the second.

Neither of these statements was put to Mr. Jackli in cross-examination either at the first or the subsequent hearing.

It has been suggested before us that these letters must have been a very recent discovery. But taking them for what they

are worth, it is to be noticed that they were written as far back as 1895, and stand alone.

But apart from that, do they really support the suggestion in aid of which they are read?

It cannot be pretended that either statement is literally correct: the defendant's offer, it may be assumed, was free Bombay Harbour, or on equivalent terms; but manifestly and admittedly no offer on that basis would be made to the maker. I think these statements mean no more than that the terms on which the maker is willing to sell would not allow of the firm's accepting the indent, and this is all that was intended to be communicated.

I cannot regard either statement as showing that direct relations were established between the indentor and the maker; each is just one of those elliptical phrases, which, read literally, is based on a fiction that deceives no one.

Then stress has been laid on the advice notes (Exhibits Reference 2 and 3) in which a reduction in price was made.

But the reduction was not made after acceptance; it merely was that the firm said it could do the particular business on more favourable terms than the indentor had proposed.

It has been urged this could not be so, because, it is said, "you do not find generosity in business"; but the fact remains despite this notional maxim of commercial life.

The truth is, as Mr. Armstrong pithily remarks, "sometimes accepting at a less price doubles the order. It is a matter of policy."

Then much is made of the fact that in some cases invoices have been sent direct to the indentor, but in none of the instances specified has the fact been of value, because in them the indent has been addressed direct to the home firm.

Taking the whole of the evidence into consideration the conclusion to which I come is that, according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe at a fixed price nett, free godown including duty, or free Bombay,

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Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer.

I further hold that it does not make any difference that the firm receives commission or trade discount from the manufacturer either with or without the knowledge of the merchant.

That the defendant knew of this custom there is in my opinion no doubt.

Though he has had dealings for a considerable period with the plaintiffs and their predecessors, he never has asked for an account, and he is not able to point to or even suggest, any instance when an account has been furnished either to himself or any other dealer.

And yet he must have known that profits were made: he cannot have supposed that firms worked for no profit: and it obviously is no answer to say that it never came to his knowledge in any particular transaction that a profit was made by the difference of prices. He never chose to find out, because his rights were satisfied when he got the goods at the indent price.

The defendant's version that he was told the plaintiffs' only profits were a five per cent. commission from the manufacturers is one I do not credit: it is emphatically denied by the plaintiffs, and is in my opinion highly improbable.

But then it has been ingeniously argued by Mr. Strangman that we cannot have regard to the custom proved, because thereby an incident would be annexed "repugnant to, or inconsistent with, the express terms of the contract" (section 92, provisio 5 of the Evidence Act).

But there is a fallacy underlying this: the incident is clearly not repugnant to or inconsistent with any *express* term of the contract. There is no *express* term that accounts shall be rendered: it can only be claimed that the obligation exists by implying, or importing into the contract an incident of the relations between a principal and his agent.

Moreover the argument assumes that the contract between the parties was that of agency.

I have already said that on this point the express terms of the Indent are equivocal, and it is interesting to trace how in practice these transactions are carried to completion.

In the case of Messrs. Lyon and Co.'s dealings there are two distinct phases of the transaction, each marked by a separate document.

First, there is the indent pure and simple, and then the contract of sale between the firm and the dealer; so that the transaction begins with a request or authority, on the basis of which the firm enters on negotiation with the European house with a view to learning whether the dealer's proposals are feasible, and when this is ascertained in the affirmative the contract for sale is made. No doubt the course of dealing in their case is in accord with the documents passed, but I gather that this is so because this particular firm is careful to see that their documents are in agreement with the course of trade.

So again Mr. Abercrombie states, that the firm is bound to deliver if they accept the indent, and this view is to be found running through the evidence of the other witnesses called by the plaintiffs.

Even as between the parties to this suit we find goods supplied under the indents described as *bought* of Beier and Co. (see Ex. A, Al).

In the view however that I take of the case it is not necessary, nor is it desirable that we should decide whether on the acceptance of the indent the relations of the parties became crystallized into those of vendors and purchasers pure and simple, for apart from that, I hold that on the terms of the indent viewed in the light of the custom of trade in Bombay the plaintiffs are under no obligation to account.

So far I have dealt only with indent No. 318: it has not been suggested that the others can be differentiated from it except that some of them were earlier in date than the 1st of January 1901.

The firm of Beier and Co. dates from the 1st of January 1901. Prior to that the plaintiff Paul Beier had traded in partnership with a Mr. Katz under the name style and firm of Beier and Katz. The defendant contends that the indents prior to the 1st of

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January 1901 were with Messrs. Beier and Katz, and that this suit cannot be maintained by the present plaintiffs. This objection has no substance in it. Not only was it arranged between Beier and Katz prior to the date of these indents that no obligations should be taken to be performed after the 1st of January 1901, the defendant with full knowledge of the dissolution accepted delivery of goods under the indents from the plaintiffs in whom the property in the goods was vested.

Under the circumstances, I am of opinion that the defendant cannot successfully contend that the present plaintiffs cannot sue.

Mr. Justice Russell has directed by his decree that the Prothonotary should forward the plaint and other document to Mr. Katz at Lyons at the plaintiffs' expense and has given Mr. Katz liberty to intervene in the suit.

The direction was given against the will of the plaintiffs and the defendant has not attempted to support it.

When the case was before us prior to remand, we determined that this order must be set aside.

The result is that there will be a decree for Rs. 4,724 (the sum agreed by the parties) with interest at 6 per cent. to the date of the decree.

The plaintiffs must get all their costs of the suit including reserved costs, but in respect of the costs of the summons of the 17th day of March 1903 we cannot direct them to be taxed on the footing of the summons being certified as fit for the employment of counsel. The decretal amount will bear interest at 6 per cent.

Appeal allowed.

Attorneys for appellants:—*Messrs. Bicknell, Merwanji and Motilal.*

Attorney for respondent:—*Mr. K. D. Shroff.*

A. H. S. A.