ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *July 17.*

N. JOACHINSON AND OTHERS, APPELLANTS AND PLAINTIFFS, *v.* MEGHJEE VALLABHDAS, RESPONDENT AND DEFENDANT.*

Principal and Agent—Construction of Contract—Indian Contract Act (IX of 1872), sections 215-216—Agent appointed to sell goods buying them on his own account.

Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not.

The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

Salomons v. *Pender*(1) and *Andrews* v. *Ramsay & Co.*(2), referred to.

THE plaintiffs, namely, N. Joachinson, J. Joachinson and S. Joachinson, all resided in Hamburg and did business as merchants in Bombay in the name, style and firm of Messrs. Worman and Co. by their constituted attorney Emil Schumacher. The defendant was a seed merchant carrying on business in Bombay.

On the 3rd of April 1907 the defendant signed two documents (exhibits B. and D.) purporting to be contracts of sale addressed to the plaintiffs in respect of 200 and 100 tons respectively of

* Appeal No. 55 of 1908. Suit No. 590 of 1907.

(1) (1865) 3 H. & C. 639.

(2) [1903] 2 K. B. 635.

Bombay cotton seed at the price of 103*s.* 9*d.* per ton C. I. F. (costs, insurance and freight payable by the defendant) less 2 per cent. at fixed exchange of 1*s.* $4\frac{7}{32}$*d.* The two contracts were in the following forms :—

"*Bombay, April 3rd,* 1907.

Contract of Sale No. 99.

To

Messrs. Worman and Co.,

Bombay.

Dear Sir,

I (we) herewith confirm the following sale through you on the terms and conditions mentioned herein (100) one hundred tons Bombay cotton seed f.a. g.

Prices 103*s.* 9*d.* per ton C.I.F. less 2 per cent.
Shipment to Hull
" in May 1907
} Exchange 1*s.* $4\frac{7}{32}$*d.*

Insurance as usual.

Payment against Mate's receipt.

Remarks :—As per London Incorporated Oil Seed Association."

"I (we) herewith confirm the following sale through you, on the terms and conditions mentioned herein.........

"I (we) guarantee to the buyers the weights, quality and sound condition at the port of delivery and I (we) bind myself (ourselves) to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever, which the agents or buyers in Europe may bring against or on account of the goods or shipment immediately on demand, and I (we) agree to accept your or your agent's reports, decisions, accounts, final invoices and (or) other vouchers as correct and conclusive and binding upon me (us).

"With reference to this contract it is mutually arranged that no weighing or superintending charges should be charged but only arbitration charges and allowances (if any) and short weight (if any)."

In pursuancee of these contracts the defendant handed over to the plaintiffs mate's receipts duly endorsed for 300 tons cotton seed shipped by him to Hull and the plaintiffs paid Rs. 17,000 against the receipts. On the 1st June 1907 bills were made out under the terms of the contract and the balance due to the defendant of Rs. 1,102-5-0 was paid to him on the 3rd June for which he gave a receipt in full payment.

The goods arrived at Hull on the 5th July and on the 10th August the plaintiffs informed the defendant that they had received a telegram from home that an allowance of 8*s.* 9*d.* a ton

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had been awarded by arbitration in respect of the 200 tons and 6*s.* 9*d.* in respect of the 100 tons. To this the defendant replied on the same day as follows:—

"It is very astonishing to note that both the said shipments are of one and the same quality and same marks and yet the allowances vary; in the first it is 6*s.* 9*d.* and in the other it is 8*s.* 9*d.* We think either you have misunderstood the telegram or there is something extraordinary in sampling the shipments for arbitration, because nearly 8,000 tons of the same mark and to the same port were shipped and almost all with the exception of very few passed without any allowance, and in the said few a trifling allowance, ranging from 6*d.* to 1*s.* 9*d.* per ton was awarded.

"We cannot agree to the awards stated by you and therefore request you to wire your home firm to attend on the spot and re-sample the whole of both the lots and have a survey held over same or to appeal against the said awards after re-sampling the same.

"We would like to nominate our surveyors and you will please let us know at once if you have any objection thereto."

The plaintiffs replied to this on the 12th August as follows:—

"In accordance with your letter of August 10th, which we have just received, we have sent a cable to our agent instructing him to re-sample and to appeal against the awards on your two shipments of cotton-seed."

The plaintiffs' agent at Hamburg cabled on the 14th August saying:—

"Shall we appeal against decision, fee £21 each case, re-sampling impossible, telegraph at once, am waiting in telegraph office."

This was communicated to the defendant on the 15th August: and not having received a reply the plaintiffs sent their representative Mr. Unvalla to the defendant; and after the interview they wrote saying: "We take note of your instructions to cable home for appeal, which has been done." To this the defendant returned the following reply:

"In the interval between...... (your) two letters your representative had seen us, to whom we gave instructions that under any circumstances resampling must be done, even of the remainder, if part is consumed, and it appears that your second letter is incomplete or you do not agree with the clear instructions. . . . We therefore again say that whatever shall be done without re-sampling shall not be binding upon us."

Further correspondence took place between the parties, which terminated with the plaintiffs' letter of the 25th August, wherein they stated "appeal has terminated unfavourably, awards confirmed". And the defendant replied to it next day saying "If the appeal is carried out without observance of the instruction . . . its decision is not at all binding upon us."

On the 19th September the plaintiffs sent to the defendant final accounts for shortage allowances, fee, &c., in respect of the two consignments. The defendant declined to pay and asked for inspection of document.

On the 17th November the plaintiffs filed this suit to recover the shortage allowance, &c., from the defendant. The defendant contended in his written statement that the plaintiffs as agents of the defendant had not carried out his instructions as regards the re-sampling and therefore he was not liable. Without prejudice to this defence Rs. 800 were paid into Court at the rate of *2s. 6d.* per ton.

As Mr. Schumacher, the plaintiffs' constituted attorney in Bombay, who had transacted this business with the defendant, was about to leave India, he was examined *de bene esse* on the 22nd February 1908. In cross examination he said :—

"I was the principal in the contract. It was an out and out sale to me. This is the first time I have stated to the defendant that it was an out and out sale to me."

The defendant then alleged that the plaintiffs, according to this evidence, were making out a different case to that set out in their plaint, namely, that they were suing as principals and not as agents, and obtained leave to file a supplemental written statement, wherein he contended that the plaintiffs were his agents for sale being remunerated by a commission of 2 per cent., and were therefore bound to account to him for all their dealings with the said goods. He denied the goods were sold to the plaintiffs, as contended by Mr. Schumacher, as such contention was entirely contrary to the terms of the contract and inconsistent with the whole course of business between himself and plaintiffs and with the usual course of business between merchants and commission agents in Bombay. He counter-claimed for an account and asked for the suit to be dismissed.

The cause was tried by Macleod, J.

The learned Judge held that the contract goods were short in weight and of inferior quality when they arrived at Hull; that the

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plaintiffs did carry out the defendant's instructions in obtaining a fresh survey of the goods; and that the plaintiffs were acting under the said contracts as agents for sale of the defendant and were bound to account to the defendant for all their dealings in the said goods. The suit was, therefore, dismissed.

The learned Judge, in the course of his judgment, remarked as follows :—

"The evidence shows that it is the practice for export houses in Bombay to receive offers from their correspondents in Europe, without mentioning the name of the offerers, and the defendant certainly understood that he was accepting certain specific offers received from Europe by the plaintiffs. Although the plaintiffs knew they were as a matter of fact buying on their own account, they held themselves out as agents in the contracts they signed with the defendant, and they cannot now be allowed to say that they were acting as principals in the transactions. As agents they were not entitled to make any profit beyond what was contained in the contracts and as they sold at higher rate they are bound to account to the defendant for the excess. To hold otherwise would be to give an interpretation to the contracts which the words of the contracts cannot possibly bear. There is no ambiguity about the wording of the contracts and the ordinary rule of construction applies that the grammatical and ordinary sense of the words must be adhered to unless that would lead to some absurdity or some inconsistency with the rest of the instrument: *Gray* v. *Pearson,* (1857) 6. H. L. C. 106; *Caledonian Railway Company* v. *North British Railway Co.,* (1881) 6 App. Cas. 131.

"If I give the words 'confirm the sale through you' their ordinary and popular meaning, I cannot possibly hold that plaintiffs were purchasers. But it may be said that this is a mercantile contract and that these words have a special mercantile meaning. To support this contention there must be evidence . . . . In my opinion, defendant contracted to ship through the plaintiffs certain goods at a fixed price less 2 per cent. C. I. F. for a certain shipment to a fixed port for delivery to an unknown buyer. Plaintiffs contracted to pay the price fixed against mate's receipts in Bombay. As the plaintiffs did not take over the goods in Bombay or inspect them, defendant guaranteed to the buyers weight, quality and sound condition at the port of delivery and bound himself to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever which the agents' buyers in Europe might bring against or on account of the goods immediately on demand and agreed to accept plaintiffs' and plaintiffs' agents reports, decisions, accounts, final invoices, and other invoices as correct and conclusive and binding upon him. The plaintiffs took the risk of the buyers not taking delivery but as the sale was through them they could not derive any profit by delivering at a higher price. The defendant trusted to the plaintiffs selling his goods at the rate he was paid in Bombay and no doubt if an allowance of 2*s*. or 2*s*. 6*d*. had been awarded on these 300 tons, he would have paid that without making any inquiries. If a misunderstanding about re-sampling and appealing had not occurred, he might still have paid the allowances. The fact that plaintiffs had realised higher prices would in the ordinary course of events never be revealed except by means of legal proceedings, but if plaintiffs contracted as agents, they cannot get rid of their liability to account arising from the contract.

"If the plaintiffs claim to be the purchasers in Bombay contrary to the express wording of the contract, their claim on the defendant's guarantee must fail, as that guarantee was given on the understanding that plaintiffs were acting as agents."

The plaintiffs appealed.

Strangman, Advocate General, and *Lang*, for the appellants.

It is quite unnecessary for the Court to find what was the relationship between the parties, the only question is whether or not the plaintiff is entitled to an account. The lower Court gave the relationship a name and said that certain incidents flowed from it. See Jenkins, C. J.'s judgment in *Paul Beier* v. *Chotalal*[1]. It is impossible in Bombay to say what the relationship is. There have been three previous dealings between the parties two of which were put through and one settled. In neither cases were accounts demanded. Our first submission is that we must get a decree for what we have claimed.

There is no doubt that we have acted *bonâ fide*. They admit "to" and "through" in the contract are the same. The plaintiff is entitled to say "I am ready to account for what I have done."

As to the contract itself the heading is 'Contract of Sale.' We say the 2 per cent. is discount, they say it is commission. When the goods get to European ports they are surveyed, if the survey is disputed there is arbitration and an appeal: see rules. The defendant has according to the rules to accept all reports, etc. We undertook to pay all weighing and superintending charges, these amounted to 9*d*. in the ton, *i.e.*, $\frac{3}{4}$ per cent. Therefore if the 2 per cent. is commission it is at once reduced to $1\frac{1}{4}$ per cent.

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We also pay in England 2½ per cent. discount and something must also be allowed for brokerage, therefore we would have been working at a loss. The whole difficulty in the case arises through the word "through" to the contracts. The word does not necessarily imply an agency.

The finding of the lower Court only comes to this that the defendant thought that the plaintiff was an agent. Their own broker's evidence does not bear out their contention.

The conclusions to be drawn from the evidence are :—

(1) The plaintiffs treated themselves as principals.

(2) The plaintiffs never held themselves out as agents.

(3) It is admitted that the defendant never asked for accounts.

(4) The question of agency is an afterthought as witnessed by the original written statement and the fact that the moonim is not called.

(5) It is immaterial which word is used "through" or "to."

(6) Accounts under such contracts are never asked for.

If the Court comes to the conclusion that we are agents we must account. If they waive their right to accounts we must have our decree. The defendant's election does not prejudice our right on the other issues.

Jardine (with him *Robertson*), for the respondent.

There is a question of the *bonâ fides* of the plaintiff: we were induced to enter into this contract because we thought he was our agent who had no adverse interest. The facts show that he had adverse interests. They cannot say we have tried to evade payment. They say there is no need to define the relationship of the parties; the Court will look at the contract itself. Can the Court treat the word "through" as of no account. If you want an agent you say you do a thing "through" him.

[CHANDAVARKAR, J.:—You don't deny that evidence to the contrary may be given?]

No evidence was adduced beyond the statement made in cross-examination by the plaintiffs' constituted attorney; what was the object in putting in the word "through". We say you cannot say "through" is same as "to": see the heading "contract of sale" and the counterpart which says "sale through us."

The defendant pays freight insurance and costs. Why should we pay the costs if they are out and out purchasers. The 2 per cent., we say, is commission. The plaintiffs never wanted to give evidence as to the meaning of the 2 per cent. Schumacher says it is a custom to deduct 2 per cent. discount but no custom is proved.

They now say the relationship is a complex one but we were not asked to meet that case in the lower Court. They held themselves out as agents both by the conversation we have alleged and by placing the contract before us.

Strangman in reply.

Our points are:—

(1) Is it necessary to define the relationship?

(2) If so, has agency been made out?

(3) If agency is made out to what relief are the plaintiffs entitled?

As to (1) the relationship was not defined in *Paul Beier* v. *Chotalal*[1]; there as here the plaintiff said that on the form of the contract there was a contract of vendor and purchaser and the defendant contended that it was an agency contract. The whole point is whether there is a liability on behalf of the plaintiffs to account. The evidence shows there is not. The defendant says he never asked for accounts. It is the wrong way to approach the case to try and bring this complex relationship under the head of agency.

On the question as to whether or not agency is made out. They say they were induced to enter into the contracts because they thought the plaintiffs would get the best price for them from England. But see the broker's evidence. The defendant never suggested that he did not get a fair rate. He could not do so because he knew well what the rates were as he was dealing in the same goods with Sassoon and others. That is all the evidence There can be no question of prejudice here. It is quite im-

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material whether the plaintiffs were acting as principals or agents. Therefore on the question of agency we say (i) the Court cannot be asked by the defendant to hold agency in view of his first written statement and of his letter of 1st January 1908 where his attornies write "you contracted to purchase from our client", (ii) no stress should be laid upon the word "through" in view of the defendant's own admission that "through" is the same as "to", (iii) no accounts were asked for in the previous dealings and it is not the custom to demand accounts, (iv) if this is agency our benefits would be nil. As to (i) they say it is hard to hold the defendant to a slip, but why is the Moonim not called to explain the slip?

(3) But if agency is made out to what relief are the plaintiffs entitled? The lower Court says none under section 236 of the Contract Act. They rely on *Robinson* v. *Mollett*[1]. Section 236 applies only to executory contracts. Section 215 does not apply to this case as there is no dishonest concealment established or that the dealings of the agents have been disadvantageous to the principal. The defendant can only say that he is entitled to an account of our profits.

CHANDAVARKAR, J.:—The first question argued on this appeal is, whether the relationship constituted between the appellants (plaintiffs) and the respondent (defendant) by the two contracts, on which the suit was brought, was one of agent and principal, or of purchaser and vendor. Both the contracts are in writing, and, judging from their terms alone, the conclusion is, I think, inevitable that the appellants accepted under them the business of agency to sell the goods for and on behalf of the respondent.

Each contract begins with these words:—"We", (*i. e.*, respondents), "herewith confirm the sale through you" (*i.e.*, appellants), words which are apt to convey the meaning that the latter were appointed to sell for the former. There is an admission, however, by the respondent in his deposition that "sale through you" and "sale to you" mean the same thing; and in his solicitors' letter to the appellants, exhibit A 14, the goods forming the subject-matter

(1) (1875) L. R. 7 H. L. 802.

of another contract are referred to as having been sold to the appellants. We must, therefore, look at the other terms and language of the contract to find the clear intention of the parties. Each of the contracts was on c. i. f. terms, that is, the respondent as vendor agreed to be liable for costs, insurance, and freight. The rate of exchange was fixed in each by the agreement of the parties. Each of these conditions may be as consistent with the relation of principal and agent as with that of vendor and purchaser. There is, however, extraneous evidence in the case, adduced for the respondent to show that these two terms are incompatible, according to the usage of trade, with the latter relation and mark an agency business. That evidence has carried weight with the learned Judge in the Court below. Each of the two contracts in dispute shows that there was a deduction of 2 per cent. in favour of the appellants from the purchase money advanced by them to the respondent and the latter has led evidence to prove that this 2 per cent., according to commercial usage, is treated as commission, though it is sometimes spoken of and described in a written contract as discount. This evidence also has been believed by the learned Judge. To all this evidence of usage the objection urged before us on appeal is that no questions as to usage of trade were put to Mr. Schumacher, the appellants' constituted attorney in Bombay, during his cross-examination. But the circumstances under which that cross-examination had to be made are sufficient justification for the omission complained of. Mr. Schumacher had to be examined *de bene esse* before the trial commenced and issues were raised, because he was leaving for Europe. At that time the respondent had no distinct intimation that the appellants were going to set up a case of purchase under the contracts on their own account. In the course of his cross-examination Mr. Schumacher set up that case for the first time; and the respondent has sworn that at that time he was at Calcutta and could not, therefore, give instructions to his counsel as to the new case unexpectedly set up. Under these circumstances we cannot eliminate from the case the evidence as to usage. It was open to the appellants to ask the learned Judge to postpone the hearing for the purpose of examining Mr. Schumacher by commission on the points as to trade usage.

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But even if we exclude all this evidence from our consideration and confine ourselves to the language of the written contracts, what is the result? The facts that the contracts were on c. i. f. terms, that a rate of exchange was fixed by the agreement of the parties, and that two per cent. was deducted from the price paid for the goods may be, as I have already observed, as consistent with the case of the appellants as with that of the respondent. And if that had been all the language of the contracts, we might have construed them in favour of the appellants. But it is, in my opinion, difficult to do that in face of the language of the paragraph in each of the contracts, which begins with the respondents granting "*to the buyers* the weights &c." and ends with the respondent agreeing to accept the appellants' or their agents' reports, decisions &c., as "correct and conclusive and binding upon" him. There is (in my opinion) here a studious distinction made between the appellants as parties to the contract and "the buyers." Had both the parties intended "the buyers" to be the same as the appellants, there was no need of distinguishing between the two. And this distinction becomes still more marked when we have the fact that one term of the contract imported into it by the incorporation of the contract form of the Oil Seeds Association (Ex. C) was that it should be deemed to have been made in England or to be performed there, implying that the buyers were not here but were foreigners living abroad. It could not be said that the appellants were not here. They formed a trading firm carrying on business in Bombay by their constituted attorney, Mr. Schumacher. This conclusion is further strengthened by another fact. After the goods shipped by the respondent had arrived at their destination, the appellants wrote to the respondent that "buyers" complained bitterly of the quality of the shipments, (Ex. T), implying that the buyers were people distinct from them (appellants). I agree, therefore, with Macleod J. in the conclusion of fact at which he arrived in the case, holding that under the contracts in dispute the appellants had become agents of the respondent to sell his goods.

It is, however, urged before us that, assuming that an agency is established, the evidence on record proves beyond doubt that it was not, according to usage, an agency to sell and to account.

No doubt there is evidence to show that in the case of such contracts no accounts have been called for. The respondent had three previous dealings with the appellants in each of which the contract was of the same nature as the present. The first was settled by payment of differences; in the other two there was no accounting by the appellants and no inquiry by the respondent whether the goods had been sold by the former at the contract rate or for a lower or higher price than that. Similar dealings of the respondent with E. D. Sassoon & Co. and David Sassoon & Co. have hitherto ended without any account having been demanded or rendered.

But the respondent and his witnesses have given an explanation which to my mind is satisfactory, besides that it is not met by any evidence to contradict it. The explanation is that the contract in such cases is invariably made "against price offers"; the sale being in all cases at the rate fixed, there is no necessity for an account; but that there may be a case for accounts is contemplated by the terms of the contract itself. In each of the contracts in dispute the respondent agrees to accept as conclusive and binding upon him the appellants' or their agents' accounts.

The agency set up by the respondent being established, the next question is one of law. It is admitted that the goods shipped from here under the contracts were bought by the appellants themselves, and not sold to others for and on behalf of the respondent. Upon these facts Macleod J. held that the appellants, having acted in breach of their agency, were not entitled to the charges to recover which the appellants had brought the suit. It is argued that, upon the facts found, the respondent can claim, according to section 216 of the Indian Contract Act, no more than that the appellants should, as agents, account for the profits they may have made from the transactions, but that the respondent cannot deprive them of the right to the charges incurred by them under the written contracts. Section 216 is merely enabling and confers upon a principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account

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of the latter. The principal is free to exercise that right or not. Mr. Jardine for the respondent relied, in support of Macleod J.'s decree dismissing the appellants' suit, on section 236 of the Indian Contract Act; but the learned Advocate-General urged that that section applied only to executory, not to executed, contracts. Section 236 can have no relevancy here on either construction of it. We have in the present case a dispute between a principal and *his* agent; section 236 contemplates a dispute between two persons, one of whom falsely professed as agent of a third party to deal with the other. It is section 215 of the Act which has a bearing on the case. It provides that—

"If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."

The learned Advocate-General argues that where there has been no repudiation, that is, where the principal has, as in the present case, elected to affirm the purchase by the agent to himself, it is not open to the principal to retain the benefit of the purchase by pocketing the price he has already received and declining at the same time to bear the burden of the transaction, that is, to pay to the agent the sums which he has expended for the transaction and which the principal has under the contract rendered himself liable to pay.

Now, the law, no doubt, is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

In the present case what is affirmed is the transaction of purchase by the agent on his own account. Whether the arbitration charges and allowances, which the appellants seek to recover from the respondent under the two contracts in suit, are incidents of and ancillary to that transaction or to the contract of agency is a question which must depend upon the construction of those contracts. To my mind it is clear that those charges and allowances are annexed by the special agreement of the parties to the contract of agency as distinguished, in the written contracts, from the transaction of purchase. One part of the written contract is that the respondent as vendor accepts through the appellants (as his agents) the purchasers' offer to buy for the price specified in the contract. The other part is the term by which the respondent binds himself to his agents (the appellants) to pay to them the arbitration charges and allowances including short weight. The two parts are severable and contemplate two distinct liabilities. The fair inference, derivable from the words of the condition as to the charges and allowances in dispute and from the context in which it is introduced into each of the two written contracts in suit, is that it attaches to the agency, not to the purchase. The words are "with reference to this contract it is mutually arranged that no weighing or superintending charges should be charged but only arbitration charges and allowances (if any) and short weight (if any)." This mutual arrangement is between the respondent as principal and the appellants as his agents. This term has nothing to do with, but is independent of, the purchaser contemplated by the contract. If the agents substituted the character of purchaser for that of agent with reference to the goods, the condition disappeared with the latter, and no burden was left for the respondent to bear.

It cannot be fairly contended with reference to the two contracts in suit that the arbitration charges and allowances are not in the nature of remuneration for the agents' services but that they are expenses properly incurred for completing the sale and form part of the transaction of purchase affirmed by the principal. They might have been so if the written contracts had been silent; but here the parties have provided for the matter in express terms and imposed the burden as a condition of the principal's liability to his agents.

The reasons for that express agreement are not pure speculation. The arbitration had to be in a foreign country where the respondent could not personally be present to look after his own interests in the matter. Had he dealt with the buyers direct he

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would have said: "You are at the place of arbitration and can look after your own interests. I cannot. You must, therefore, agree to bear the burden of the charges and allowances." And probably the purchaser would have agreed. But rather than bargain in that way with the purchaser, the respondent let him off and bargained with the appellants as his agents and chose to bear the burden, because they were appointed and trusted to protect his interests at the place of arbitration. If the agents, notwithstanding that condition, of their own wrong converted themselves into principals and bought the goods on their own account, the transaction when affirmed must be construed as one in which, as between the vendors and the buyers, the latter had agreed to bear the burden of the charges and allowances. That is the legal aspect of the case presented by the proved facts and surrounding circumstances of the transaction.

This view of the law is supported by the authority of two decided cases, which I was able to find after we had heard arguments on appeal. In *Salomons* v. *Pender*(1), followed in *Andrews* v. *Ramsay & Co.*(2), the question for decision was the right to commission of an agent, who, without his principal's consent and knowledge, had dealt with the business of the agency on his own account. But the principle, on which the decision in either case turned and the right in question was negatived, is broad enough to cover the present case. In *Salomons* v. *Pender*(1) Pollock C. B. said:—

"No authority has been adduced for a departure from the general principles governing such a case, and the argument has failed to convince me that a person can in the same transaction buy in the character of principal, and at the same time charge the seller as his agent. I cannot agree that, because the seller has chosen to abide by the sale, he is therefore to be held to have acknowledged the claims of the plaintiff both as agent and purchaser."

Bramwell B. said:—

"It is true that the plaintiff may have derived no material advantage from the interest which he has acquired in the premises; and that the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say 'what you have done has been done as a volunteer and does not come within the line of your duties as agent'."

(1) (1865) 3 H. & C. 639. (2) [1903] 2 K. B. 635 at p. 637.

So also, Martin B.—

"Mr. Bovill has contended, that as the sale was not rescinded there is a subsisting contract to pay the commission. But that seems to me to be a fallacy. The engagement to pay a commission to the plaintiff is quite distinct from the acceptance of an offer to buy the land."

And then he cited Story on Agency: "In matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves"—a principle which is fully recognized in the Indian Contract Act.

The rule of law, then, is this. Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them. That is the principle, as I understand it, of the decisions in *Salomons* v. *Pender*[1] and *Andrews* v. *Ramsay & Co.*[2]. As that principle, in my opinion, governs the present case, the decree appealed from must be affirmed with costs.

HEATON, J.—The defendant in this suit sold 300 tons of cotton seed which were shipped by him on the S. S. Knight of the Thistle and sent to Hull.

The intermediary in the sale was Mr. Schumacher of the plaintiffs' firm Worman and Co. He settled the price with the defendant, obtained the bills of lading, paid the agreed price to the defendant, and caused the cotton seed to be delivered in Hull to buyers known to him but not to the defendant. The shipment of the three hundred tons though by one steamer, was in two

(1) (1865) 3 H. & C. 639.

(2) [1903] 2 K. B. 635 at p. 637.

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lots, of two hundred tons (3,200 bags) and hundred tons (1,600 bags) and the two lots were delivered to two different buyers. The arrangement between defendant and plaintiffs was embodied in two written agreements, signed by defendant which are set out at pp. 40 and 48 of the paper book, with counterparts signed by Worman and Co., which appear at pp. 128-129. One of the terms of the agreements was this:

"I/we guarantee to the buyers the weights, quality and sound condition at the port of delivery and I/we bind myself/ourselves to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever, which the agents or buyers in Europe may bring against or on account of the goods or shipment immediately on demand, and I/we agree to accept your or your agents' reports, decisions, accounts, final invoices and/or other vouchers as correct and conclusive and binding upon me/us.

It happened that by the same steamer the defendant shipped about 6,000 more bags of cotton-seed (he says of the same quality as the 300 tons) to other unknown buyers in England through other firms in Bombay under agreements on the same general lines as those with Worman and Co.

The utmost deduction he was called on to pay for short weight and inferior quality in respect of these other bags of cotton seed was *2s. 6d.* a ton. But Worman and Co. informed him that in respect of the two shipments of 200 and 100 tons he had to pay at the rate *8s. 9d.* and *6s. 9d.* a ton respectively. These deductions were made under the rules of the London Incorporated Oil Seeds Association after weighment and sampling at Hull, the port of discharge, as provided in the contract. The extraordinary difference in the amount of the deductions payable, excited the attention of the defendant. He desired re-sampling in the case of the shipment of 300 tons. This was impossible. He appealed through Worman and Co. against the deductions: the appeal was fruitless. Then he declined to pay the charges claimed and in November 1907 Worman and Co. brought this suit to recover those charges from the defendant.

He resisted the claim at first on the ground that Worman and Co. as his agents had failed to carry out his instructions as to re-sampling and appealing. That ground, it should be mentioned, failed in the suit and was not sought to be made good in appeal, In February 1908, Mr. Schumacher found that he had to go to Europe shortly and desired to expedite the suit. This the defendant was not prepared for but agreed that Mr. Schumacher should be examined *de bene esse*. This was done in February.

The suit was heard in September. Mr. Schumacher had stated in his examination that the sale to him by defendant was an out and out sale and that he was not defendant's agent through whom the cotton seed was sold to unknown buyers. After this the defendant put in a supplemental written statement alleging in brief that Worman and Co. were his agents to sell; that the sampling at Hull was made not under his contract with Worman and Co. but under other contracts between Worman and Co. and buyers in England, with which contracts defendant had no concern and under which he incurred no liability; and that Worman and Co. were bound to account for all their dealings with the goods.

In the suit the controversy turned on two main points which, briefly put, amount to this—

(1) Were the sampling and the appeal binding on the defendant?

(2) Were Worman and Co. agents to sell or buyers out and out?

The first controversial point was decided against defendant; the second in his favour.

Thereupon, this was the position. Under the contract between the plaintiffs and defendant the latter was bound to pay the deductions claimed. But the plaintiff had not acted under the contract, he had set it aside for he had bought for himself, not acted as a commission agent, and consequently could not claim under it. In the result, Macleod J. allowed the defendant to elect whether he would take a decree on the footing that defendant and plaintiffs were principal and agents or on the footing that plaintiffs were buyers out and out, had set aside the contract and could not claim under it. Defendant elected to take the latter course and the suit was dismissed.

The plaintiffs have appealed and the Hon. the Advocate-General who represented them stated fully, clearly and forcibly the argument for his clients and maintained that all the merits were on their side. He put it this way; these deductions for short

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weight and inferior quality have to be paid by some one. All Worman and Co. can get is the price payable by the English buyers less the deductions. All defendant is entitled to, is the price agreed on less the deductions. But Worman and Co. have actually paid to the defendant the full price agreed on. How then in justice can defendant avoid paying the deductions? How can he justly retain the full price when the allowances which he agreed to pay have actually been paid by the plaintiff? So stated the case does appear to be very strong for the plaintiff. But as usual there is another side to it. Defendant (it is said on his behalf) dealt with Worman and Co. as commission agents. He trusted them as the business compelled him to do, to safeguard his interest. He was unaware of the identity of the buyers in England and could not reach them or protect himself in dealing with them except by the agency of Worman and Co.

When the weighing and sampling came to be made at Hull, it was all-important that they should be done in the presence of some one who would have a motive for safe-guarding defendant's interests. So long as Worman and Co. were agents acting in the interests of defendant they would employ agents at home who would make it their business to see that the weighing and sampling were fair to the defendant. But if Worman and Co. were buying on their own account they might ship to themselves (or their own agents) in Hull and then it would be to their interest to have the weighing and sampling done so as to bring about a large instead of a small deduction. For they themselves would pocket the whole of the deduction. This view of the case is of importance, not as suggesting dishonesty on the part of Worman and Co. but as showing that if defendant dealt with them as buyers he was running far greater commercial risks than if he dealt with them as commission agents.

Now Macleod J. has found that although the plaintiffs knew they were as a matter of fact buying on their own account, they held themselves out agents in the contracts they signed with the defendant.

If that be so, they induced defendant to believe he was running no more than ordinary commercial risks, whereas in reality he was running risks of a much more serious nature and was placing them in a position in which they could benefit by his loss.

If it be so, justice does not require that they should be protected against loss due to their own action in order that defendant may not take an unforeseen profit. They could apparently have obtained from defendant deductions at 2 *s.* 6 *d.* a ton; defendant was apparently ready to pay that for he deposited it in Court but they preferred to take the chance of getting more. It is not for them to complain because in taking that chance they incurred the risk of getting nothing.

In this case the merits are not unquestionably all on one side but depend on the facts found.

The real crucial question is that on which Macleod J. has recorded an unambiguous finding. Did the plaintiffs induce the defendant to enter into contracts in the belief that they were to be commission agents?

The actual form of the contract has been keenly and exhaustively discussed. The result of the discussion is to demonstrate that it is in a form which suggests that Worman and Co. were commission agents and not buyers. It is unnecessary to embark on a detailed examination of the arguments one way or the other; it is enough to say that the relations between the parties were complex; one party took some risks, the other party took other risks; but nevertheless according to the form of the contract, the plaintiffs were to sell the cotton seed on behalf of defendant and not to buy it themselves. There are however two arguments which need comment. The Hon. the Advocate-General urged that defendant himself had admitted that plaintiffs were buyers and that the terms of the contract were such that plaintiffs stood to lose if they got nothing but the 2 p. c. commission or discount provided for in the contract.

It is quite true that defendant has spoken and written of plaintiffs as buyers from him. But this does not of itself indicate that defendant ever believed they were buyers only; and not his agents selling on commission. They were buyers in the sense that they represented purchasers in England and were the only persons with whom defendant would deal in arranging his

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relations with the real buyers. Therefore, once the agreements were signed and the goods shipped, Worman and Co. would be of more immediate and practical importance to him as agents of the buyers in England than as his agents to sell. It was after this stage had been reached that defendant termed them buyers. It is not surprising then, that he did speak of them as buyers; unless we assume that he would carefully discriminate between the two capacities in which they stood to him, namely, as agents to sell on his behalf and as buyers on behalf of clients in England. Such nice discrimination is not to be expected and its absence does not and need not excite the belief that defendant knew the plaintiffs were out and out buyers.

The second argument is made out in this way, plaintiffs were to get 2 p. c. on the price defendant paid, but they had to pay about $\frac{3}{4}$ p. c. as weighing and superintending charges in Hull and $2\frac{1}{2}$ p. c. discount to the buyers there. So unless they could make a profit by getting a better price in England they must inevitably lose; therefore, it must have been intended that they were to get a better price if they could: and it follows that they bought to make a profit for themselves and were buyers out and out and not agents to sell. The argument is neat but unconvincing. The price entered in the agreement between plaintiff and defendant would not be identical with the price arranged with the buyers in England. The latter price would naturally allow for the discount of $2\frac{1}{2}$ p. c. if not for the charge of about $\frac{3}{4}$ p. c. We have the evidence of Mr. Powell of Messrs. David Sassoon and Co. to show that it is so and it naturally would be. In the nature of things, commission agreements need not state both the price at which the principal sells and that at which his agent sells. It may be implied that the price at which the agent sells is to cover discount and other charges and still leave him his clear commission. It is not necessary to express this, and what evidence there is on the point indicates that it is usually implied and not expressed. It does not, therefore, appear that the contracts were in a form so different from ordinary contracts made with commission agents as to suggest a sale out and out. The Hon. the Advocate-General also urged, it seems to me quite correctly, that the right way to deal with this case, is to ascertain from the contract and the evidence what really were the relations between the parties; not to give the contract a name and from that name infer the relations. He urges that the crucial test is whether the plaintiffs were bound to account to the defendant and argues that they were not because the defendant did not call for an account either in this matter or in the previous dealings between the parties; and because the evidence shows that in apparently similar dealings between defendant and other parties accounts were not called for. All this is true; but the fact that in practice accounts are not called for, does not prove that there is not a liability to account. It is an indication which properly may be used as an argument in plaintiffs' favour. But is it a cogent argument or one of only slight value? I think, in this case it is the latter. In these, as in other mercantile dealings, there is necessarily a good deal of give and take and much mutual confidence. To enforce the liability to account as a practice, would impair the mutual confidence and create friction, where smooth working is essential. Hence, it is easy to understand that though the liability to account is there, it would not be enforced so long as the parties had confidence in, and desired to continue to deal with each other. This consideration, it seems to me, destroys the force of the Hon. the Advocate-General's argument. That a liability to account was contemplated is, I think, clear from the words in the contract. "We agree to accept your or your agents' reports, decisions, *accounts*, &c., as conclusive and binding upon us."

Having considered these general arguments I come back to the real question whether the plaintiffs induced the defendant to enter into the contracts in the belief that they were commission agents. I have shown that the form of contract indicates that plaintiffs were to be commission agents. The actual course of dealing indicates the same, for, as has been explained, on any other hypothesis, the defendant was running greater mercantile risks than it is reasonable to suppose, he would be likely to undertake. The evidence of Messrs. Powell, Jivaraj Tokersey, F. D. Lalkaka and Thomas, who show that Messrs. David Sassoon and Co., E. D. Sassoon & Co, and

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Graham & Co. in similar dealings do act as commission agents and nothing else, supports this conclusion. The cumulative effect of these considerations tends clearly and definitely to the finding that plaintiffs would appear to the defendant to be commission agents. The plaintiffs could not fail to know this. It follows that they knowingly entered into contracts which could not bear any interpretation but that they were commission agents. What is there on the other side? Putting aside the general arguments, the most important of which have been discussed, there is the evidence of Mr. Schumacher which states that Worman and Co. bought out and out on their own account and did not act as agents in the transaction; that the 2 per cent. was trade discount and not commission; and implies that he did nothing to lead defendant to suppose Worman and Co. were acting as agents. There is also the evidence of the broker Pranshankar which is indefinite and does not, in my opinion, elucidate the matter at all. It is perfectly true that when Mr. Schumacher was examined the crucial points in the case were not so clearly understood as later, when the suit came on for trial; and that he was not questioned as to certain matters to which Meghji, the defendant, deposed; especially matters bearing on this question as to whether Mr. Schumacher led defendant to believe that the former was merely an agent to sell. Hence it is argued that either the defendant should not have been questioned on these points or that when defendant's case was closed the plaintiffs should have been allowed to adduce rebutting evidence. In my opinion, this argument cannot prevail. The issues indicated clearly enough what was in dispute. If matters came out in the evidence which plaintiffs had not foreseen, that was an ordinary incident of a trial. These matters were pertinent to the issues, they were an important support, not of a new case set up by defendant after the plaintiff's case was closed, but of defendant's case, as indicated in the second written statement and crystallized in the issues. Therefore, I do not think, plaintiffs were entitled to give rebutting evidence or that Macleod J. was wrong in refusing to allow it.

It only remains to add a few words as to Mr. Schumacher's evidence. Macleod J. who tried the case came to the conclusion

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that, whether consciously or not, Mr. Schumacher did obtain the contracts on the representation (whether by precise unqualified words or not does not matter) that he was to act as commission-agent. He does himself admit he did not tell the defendant he was buying out and out (page 34 of the Paper Book): this admission taken with the words of the contract, the course of dealing between the parties, and the course of dealing deposed to in similar transactions, convinces me that Macleod J. was right. That being so, the plaintiffs cannot claim under the contract, for they themselves set it aside. As purchasers out and out, the plaintiffs were themselves bound to accept, from the buyers in England, the price diminished by the amount of deductions there made. On what footing can they recover these deductions from the defendant? Not under the contracts, for these they themselves destroyed. If at all it is only, so far as I can see, by way of damages. But damages are neither claimed nor proved in the case. That they were not claimed, is clear from the course of the litigation. They are not proved, because the only evidence of them consists of reports and correspondence which would be conclusive, if the contracts could be appealed to, but which otherwise do not by themselves amount to satisfactory proof even if they are evidence at all.

Finally, the plaintiffs claim that they should be allowed to render an account; but that would be to assume that in fact they were agents, which they were not. They were in fact buyers out and out and went to trial and had issues framed on that assertion. They cannot now be allowed to rectify unforeseen losses by assuming the position of agents. The judgments in *Andrews* v. *Ramsay & Co.* [1] explain the principle on which the decree made by Macleod J. was proper. Therefore, I think, that decree should be confirmed and this appeal be dismissed with costs.

Decree confirmed.

Attorneys for the appellants: *Messrs. Bicknell, Merwanji and Romer.*

Attorneys for the respondent: *Messrs. Kanga and Patel.*

B. N. L.

(1) [1903] 2 K. B. 635.