

HEATON, J. :—I concur in the decree which is to be made and I have very little to add. I do think it necessary to point out that apparently on the strength of the case of *Jijibhai v. Nagji*⁽¹⁾ there is a tendency to assume that because an agreement is in fact void, it follows without more ado that it is discovered to be void within the meaning of section 65 of the Contract Act. Personally I do not think that any such thing necessarily follows. As my learned colleague indicates, in every case the circumstances of the case have to be looked to, and it has to be determined whether in that particular case section 65 of the Contract Act can properly be applied.

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ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

S. AMERCHAND & Co. (APPELLANTS AND 2ND DEFENDANTS) v. RAMDAS
VITHALDAS DURBAR (RESPONDENT AND 1ST DEFENDANT)*

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AND

CHHAGANLAL PITAMBER (APPELLANTS AND 2ND DEFENDANTS) v.
RAMDAS VITHALDAS DURBAR (RESPONDENT AND 1ST DEFENDANT).†

*Contract Act (IX of 1872), sections 4, 61 and 103—Transfer of Property Act
(IV of 1882), section 137—Stoppage in transit—Instruments of title—
Railway receipts, effect of assignment of.*

A, from Bagalkote, consigned to B at Bombay certain consignments of bales of cotton. These consignments A entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay, which was effected

* Suit No. 668 of 1911 : Appeal No. 4 of 1912.

† Suit No. 670 of 1911 : Appeal No. 7 of 1912.

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by rail, as far as Murmagoa on the lines of that Company and afterwards from Murmagoa to Bombay by sea by ships of the Bombay Steam Navigation Company. The Railway Company issued in respect of these consignments receipts to A which A handed over to B as the consignee of the goods in exchange for hundies for the amount of the value of the goods drawn by B in favour of A. These Railway receipts contained *inter alia* the following condition :—

“That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

“If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company.”

While the goods were in transit and in the possession of the Bombay Steam Navigation Company B became insolvent and some of the hundies given by him to A in respect of the goods in transit were dishonoured. A thereon purported to stop the goods and gave the Steamship Company instructions not to deliver them to B but to C.

In the meantime B had borrowed monies from D and E and had transferred to D and E respectively the Railway receipts for certain of these consignments as security. On the arrival of the bales at Bombay they were claimed by D and E respectively and also by C.

The Bombay Steam Navigation Company filed two suits, one against A, B and D and the other against A and E claiming that the defendants in each suit might be restrained from taking proceedings against the plaintiff Company in relation to the bales, and that the defendants in each suit might be required to interplead together concerning their claim to the goods in question in such suit.

Held, that reading section 103 of the Contract Act in conjunction with section 137 of the Transfer of Property Act (as provided for by section 4 of the Transfer of Property Act) Railway receipts must be taken to be mercantile documents of title fulfilling one or other of the conditions specified in the explanation to section 137 of the Transfer of Property Act, viz., proving in the ordinary course of business the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented, and that

under the third condition of the Railway receipts in question it was clear that those documents fell under the latter class.

Great Indian Peninsula Railway Company v. Hanmandas Ramkison and Virji Hansraj⁽¹⁾, not followed.

Simultaneously with these suits D had filed a suit against A and B to recover the monies advanced by him against the Railway receipts transferred to him. Subsequently the entries in the general account of B in D's books showed that various sums were credited to B which, if the rule laid down in section 61 of the Contract Act were applied, would extinguish that debt.

Held, that the intention of D as indicated by his suit to enforce his claim against the proceeds of the bales of cotton covered by the Railway receipts in question negated the application of the rule.

Held, accordingly, that D and E were respectively entitled to the benefit of section 103 of the Contract Act as against A and, the bales having been sold, that the persons in whose hands the sale-proceeds were should hand over the net sale-proceeds to D and E deducting any charges justly due.

CHHAGANLAL Kalidas and Lilachand Kalidas were brothers and carried on business in partnership in Bombay as cotton merchants under the name of Chhaganlal Kalidas. In or about April 1911 the firm through Lilachand Kalidas purchased cotton from the firm of Ramdas Vithaldas Durbar at Bagalkote in the Bijapur District. The course of business was that the cotton was kept in the custody of the firm of Ramdas Vithaldas Durbar before being despatched to Bombay to which place it was conveyed by rail by the Madras and Southern Mahratta Railway Company as far as Murmagoa and thence to Bombay by the ships of the Bombay Steam Navigation Company. When the goods were railed the Railway Company made out receipts for them in the name of the firm of Ramdas Vithaldas Durbar as consignors and in the name of the firm of Chhaganlal Kalidas as consignees and issued the same to the consignors who delivered them to the consignees in exchange for hundies for the value of the goods drawn

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in their favour and payable on demand. One of the conditions of the Railway receipts was to this effect :—

3. That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company.

Besides other consignments the firm of Ramdas Vithaldas Durbar in the manner above mentioned forwarded on the 24th of July 1911 a consignment of 73 bales, and on the 28th of July 1911, two consignments of 100 and 35 bales of cotton respectively to Chhaganlal Kalidas and obtained and handed over to the latter the Railway receipts for such consignments in return for hundies for the value of the goods.

The firm of Chhaganlal Kalidas thereon borrowed Rs. 8,800 from the firm of Chhaganlal Pitamber and as security assigned to the latter the goods covered by one of the Railway receipts, namely, the consignment of 73 bales and transferred to them the Railway receipt. The same firm also borrowed Rs. 15,000 from the firm of S. Amerchand & Co., and as security assigned to the latter the goods covered by two of the Railway receipts, namely, the two consignments of 100 and 35 bales and transferred to them the Railway receipts.

Subsequently the firm of Chhaganlal Kalidas became insolvent and the hundies given by them in respect of these three consignments of cotton were dishonoured by them. The firm of Ramdas Vithaldas Durbar thereon attempted to stop the consignments in transit and gave instructions to the Bombay Steam Navigation Company,

who were in possession, to deliver to Gangaram Chabildas and not to the insolvent firm.

On the arrival of the consignments at Bombay they were claimed by Gangaram Chabildas as the nominee of the consignors and the firms of Chhaganlal Pitamber and S. Amerchand & Co. respectively claimed the goods of which the Railway receipts had been transferred to them as the assignees for value of the goods from the firm of Chhaganlal Kalidas.

The Bombay Steam Navigation Company filed two suits, one against the firms of Ramdas Vithaldas Durbar and S. Amerchand & Co., and Chhaganlal Kalidas and Lilachand Kalidas in respect of the two consignments of 100 bales and 35 bales of cotton, and the other against the firms of Ramdas Vithaldas Durbar and Chhaganlal Pitamber in respect of the consignment of 73 bales of cotton, in each suit praying *inter alia* that the defendants might be restrained by injunction from taking proceedings against the plaintiff Company in relation to the said consignments, and that the defendants might be required to interplead together concerning their claim to the consignments.

After the suits were filed the firm of Ramdas Vithaldas Durbar carried on both suits as if they had been the plaintiffs and the nominal plaintiffs took no further active steps in the suits.

The suit against the firms of Ramdas Vithaldas Durbar and S. Amerchand & Co., and Chhaganlal Kalidas and Lilachand Kalidas came on for hearing before Mr. Justice Macleod who held that the firm of Ramdas Vithaldas Durbar was entitled (whether regarded as factors or quasi-vendors) to stop the consignments as against the consignees.

On the question as to how far the right of the consignors was affected by the transfer for value of the

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Railway receipts for the consignments by the consignees to the firm of S. Amerchand & Co., the learned Judge held as follows :—

It remains to consider what was the effect of the endorsement and delivery by defendant 3 of the Railway receipts for the 135 bales to the 2nd defendant to secure an advance of Rs. 15,000.

Condition 3 on the back of the Railway receipts is as follows (reads it).

It will be noticed that this condition contemplates delivery only to the consignee or his endorsee as his agent if he is unable to attend to take delivery. It does not even contemplate the sale of the consignment of the Railway receipt and endorsement of the Railway receipt to the purchaser as the Railway receipt did in the *G. I. P. Railway Company v. Hanmandas*⁽¹⁾, so that there can be no doubt that the Railway receipts in suit are not instruments of title within the meaning of section 103 of the Contract Act. It was contended that Railway receipts are now instruments of title by virtue of section 137 of the Transfer of Property Act which has been applied to Bombay since the decision in *G. I. P. Railway Company v. Hanmandas*⁽¹⁾. The last chapter of the Transfer of Property Act deals with the transfer of actionable claims and after it has been enacted how such claims are to be transferred, section 137 says that nothing in the preceding section applies to stocks, shares, etc., or to any mercantile document of title to goods. The explanation says "the expression mercantile document of title to goods" includes a bill of lading, Railway receipt, etc.

Railway receipts are therefore excepted from the provisions of that chapter, but it cannot be argued from that circumstance that the Legislature has definitely enacted that Railway receipts are instruments of title within the meaning of section 103 of the Contract Act.

If that was the case Sargent, C. J., would have said in the last paragraph of his judgment that all that was required to satisfy the wishes of the commercial community was to make the Transfer of Property Act applicable to Bombay.

But it was argued that by the custom of the trade the title to the goods covered by the Railway receipts passed by endorsement and delivering of the receipt for valuable consideration.

A custom was proved in *G. I. P. Railway Company v. Hanmandas*⁽¹⁾ to prevail amongst merchants in Bombay engaged in the grain trade that Railway receipts endorsed from one holder to another were considered as representing the goods and entitling the last endorsee to delivery : see paragraph 13 of the case stated by the Chief Judge of the Small Causes Court, but the appeal Court held that that did not affect the rights of an unpaid vendor to stop the goods in transit.

(1) (1889) 14 Bom. 57.

Assuming for the purposes of my judgment that a custom has been proved that in Bombay Railway receipts do pass amongst merchants by endorsement and delivery and that Railway receipts so endorsed are considered as representing the goods, I am bound by the decision in the abovementioned case to hold that the endorsement and delivery of the Railway receipts to defendant 2 could not affect the right of defendant 1 to stop the goods.

A custom prevailing amongst buyers in Bombay cannot make a Railway receipt negotiable as against the vendors if it is not negotiable at law. There seems to be a considerable confusion of thought involved in such a contention. A relation of contract is established between the vendor and the purchaser, and the terms of the contract depend on what has been agreed upon between them and not on a custom which may prevail amongst purchasers in general and the persons with whom they deal.

In the *Merchant Banking Company of London v. Phoenix Bessemer Steel Company*⁽¹⁾, it was proved that the vendors and purchasers in the iron trade had instructed counsel to prepare a particular form of warrant which should be given to the purchaser by the vendor as representing the goods referred to therein. The warrant was in fact an order to deliver to bearer and the Court held that a vendor who parted with such a warrant must be taken to have special notice and special knowledge that the warrant was intended to be used for the purpose of raising money on it.

The facts of this case are very different. The 1st defendants contracted with the Railway Company to carry the goods to Bombay and delivered the Railway receipt given to them by the Railway Company to defendants 3 and 4 to enable them or their agents to get delivery of the goods. The Railway receipt was not an order for delivery to bearer and there is nothing whatever to show that the 1st defendants intended to preclude themselves from stopping the goods in transit if defendants 3 and 4 did not pay for them. Assuming that 1st defendants were aware that Railway receipts passed by endorsement and delivery amongst merchants in Bombay that would not affect their rights as against their purchasers unless they expressly or impliedly agreed to forego such rights in the event of the Railway receipt so passing. It is not a question of custom but of contract.

It has been suggested that vendors and purchasers generally in the cotton trade have come to an agreement regarding the negotiability of Railway receipts, it is difficult to see how any such agreement could be arrived at except perhaps in individual cases. This subject is constantly appearing in one form or another in our Courts, but as far as I can see merchants who advance money on Railway receipts have no remedy against an unpaid vendor so long as the Legislature does not enact that Railway receipts are instruments of title.

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The firm of S. Amerchand & Co. appealed against this judgment.

The suit against the firms of Ramdas Vithaldas Durbar and Chhaganlal Pitamber came on for hearing before Mr. Justice Beaman. After some evidence had been taken, in view of the decision in the other case the firm of Chhaganlal Pitamber agreed to take a decree *per invitum* on the basis of the decree of Mr. Justice Macleod and to await the result of the appeal against that learned Judge's decision. A decree was given in that suit accordingly in favour of the firm of Ramdas Vithaldas Durbar.

The firm of Chhaganlal Pitambar appealed against this judgment.

The appeal filed by the firm of S. Amerchand & Co. came on for hearing on the 2nd and 3rd of September 1912 and subsequently by an order of the appellate Court, dated the 13th of September 1912, the suit was remanded to the Court below for the purpose of recording evidence on the following issues which had been framed in the lower Court :—

7. Whether the 2nd defendant advanced in good faith Rs. 15,000 on the terms set in paragraph 4 of his written statement and whether the Railway receipt in respect of the 135 bales was not duly assigned and transferred to the 2nd defendant on security for repayment of the said sum.

8. Whether the 1st defendant was not aware that it was the usual course of business of defendants 3 and 4 to raise money by pledging the Railway receipt for the goods covered by them . . .

9. Whether by the custom of the trade Railway receipts are not treated as instruments of title to the goods covered by them within the meaning of section 103 of the Contract Act.

Further evidence was accordingly recorded on these issues by Mr. Justice Macleod who on the 17th of December 1912 delivered a judgment on remand in which he recorded the following findings on the issues in question :—

I find on issue 7 that the 2nd defendant advanced in good faith Rs. 5,000 and that the Railway receipts for the 135 bales were endorsed to them as security for the general balance due to them in account by defendants 3 and 4 including the 15,000 rupees.

I find on issue 8 that the 1st defendant was not aware that it was the usual course of business of defendants 3 and 4 to raise money by pledging the Railway receipts for the goods covered by them.

The 2nd defendant therefore has failed to produce evidence of a single instance of the usage which they have attempted to set up being acted upon. It is contrary to positive law and the cotton merchants and commission agents are perfectly made aware of that. If such an usage did exist and had been acted upon evidence must have been forthcoming considering that advances to the extent of crores must be made by commission agents against Railway receipts during a single season. The question whether Railway receipts are instruments of title by trade usage stands exactly where it did in 1889. Merchants think that Railway receipts ought to be made instruments of title by statute. They know that without legislation there is always a risk where they make advances against Railway receipts. But by the exercise of a little care and by paying attention to ordinary business principles that risk can be made infinitesimal. They are obliged to take that risk if they want to do business but they know they have to be careful to take endorsements only from persons who are known to be responsible and substantial. That this care is exercised is abundantly clear from the evidence. I find issue 9 in the negative.

The appeals in the two suits came on for hearing on the 18th, 25th and 27th of March 1913.

Mulla, with him *Setahwad*, for the firm of S. Amerchand & Co., appellants in Appeal No. 4 of 1912.

Strangman, with *Jinnah*, for the firm of Ramdas Vithaldas Durbar, respondents in Appeal No. 4 of 1912.

Desai, with him *Setahwad*, for the firm of Chhaganlal Pitamber, appellants in Appeal No. 7 of 1912.

Jinnah, with him *Bahadurji*, for the firm of Ramdas Vithaldas Durbar, respondents in Appeal No. 7 of 1912.

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The judgment of the Court was delivered by
SCOTT, C. J.:—In both these appeals the appellant is an endorsee of a Railway receipt from the firm of Chhaganlal Kalidas who purchased the cotton bales men-

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tioned in the receipts from Ramdas Vithaldas of Bagalkote.

Chhaganlal Kalidas having become insolvent Ramdas Vithaldas, as unpaid vendor, stopped the cotton in the hands of the Bombay Steam Navigation Company before it had been delivered to the respective endorsees. In each case the Steamship Company has interpleaded. The first question in each case is whether the endorsee made the advance which he seeks to recover specifically upon the Railway receipt or receipts.

In Appeal No. 7 the fact of such advance is not disputed but in Appeal No. 4 it is contended that the advance of Rs. 15,000 was not made specifically against the two Railway receipts for 135 bales because the advance is entered in the general account of Chhaganlal and the proceeds in ordinary course would have been held as security not only for the advance of Rs. 15,000 but also for any general balance of account. But it is quite clear from the evidence that the appellant declined to advance the Rs. 15,000 until the Railway receipts were endorsed as security as a large sum was already due on the account. We cannot doubt that the endorsing of the Railway receipts as security was what induced the advance and that the advance was, therefore, made specifically upon them.

It is not disputed that in each case under appeal the advance was made in good faith.

In Appeal No. 4 it is further contended that the advance has been repaid before decree.

The facts are that on the 15th August 1911, *i. e.*, simultaneously with the Steamship Company's interpleader suit, the appellant filed a suit against the respondent Ramdas Vithaldas and also against the endorser to recover the Rs. 15,000 advanced against the Railway receipts. Some months later the entries in the

general account of Chhaganlal in the appellant's books show that various sums were credited to the latter which, if the rule in *Clayton's case*⁽¹⁾ and the rule of section 61 of the Contract Act were applied, would extinguish the debt of Rs. 15,000; but the application of the rule is always subject to the condition that the parties have indicated no intention inconsistent with its application.

It is clear from the appellant's suit that he intended to enforce his claim for the Rs. 15,000 against the proceeds of the 135 bales of cotton covered by the Railway receipts in question. This is sufficient indication of intention to negative the application of the rule.

It was further suggested that the rule in *In the matter of Westzinthus*⁽²⁾ should be applied by marshalling any surplus assets in favour of the unpaid vendor, Ramdas, in the event of the question as to the applicability of section 103 of the Contract Act being decided against him. But the simple answer is that there are no surplus assets.

The question common to both appeals remains to be dealt with: Are the Railway receipts instruments of title within the meaning of section 103?

The Railway receipts are issued by the Madras and S. M. Railway Co. in the following form:—

The Madras and Southern Mahratta Railway Company Limited.

RECEIPT.

From Bagalkote to Bombay H. R. on B. S. N. Railway *via* M. R. H.

Sender's name, Ramdas Vithaldas. To whom consigned, Chhaganlal Kaldas.

Then follows a tabular statement of particulars relating to the goods, below which it is stated "these goods are accepted for conveyance subject to the conditions printed on the back herein".

(1) (1816) 1 Mer. 572 at p. 608.

(2) (1833) 5 B. & Ad. 817.

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Condition 3 is as follows:—

“ That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Company or the Railway Company may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company.”

The 9th condition provides that the goods should be subject to the rules and conditions printed in the Railway Company's Goods Tariff and to the rules and regulations and wharfage and other charges in force on such railways and shipping lines over which they might be conveyed.

The holders of the Railway receipts in each case presented them not to the Railway Company which issued them but to the Bombay Steam Navigation Company which was the shipping line by which the goods were conveyed during the last part of the transit, *i. e.*, from Murmagoa to Bombay. The Railway receipt was a document under which the goods were received for a mixed transit by land and sea. There can be no doubt that in America such a document would be treated as, and probably called, a bill of lading: see *St. Louis, Iron Mountain and Southern Railway Company v. Knight*⁽¹⁾, where the Court after stating the nature and effect of a bill of lading said: “ The doctrine is applicable to transportation contracts made in that form by Railway Companies and other carriers by land as well as carriers by sea.” This point was taken by Mr. Robertson in the

⁽¹⁾ (1887) 122 U. S. R. 79 at p. 87.

lower Court but the Judge said: "The document is a Railway receipt and cannot become a bill of lading because the Railway Companies employed the Bombay Steam Navigation Company to carry the goods for part of the distance." I understand that the learned Judge meant only that the document would not be a bill of lading within the meaning of section 103 of the Contract Act, so that its assignment to a pledgee would defeat the unpaid vendor's right of stoppage in transitu. But according to section 103 it is not only a bill of lading but any other instrument of title to goods which may be assigned with the same effect as results from the assignment of a bill of lading, and it is material to remember that the transit from Bagalkote to Bombay *via* Murmagoa is a transit identical in its nature for part of the distance with the transit of goods shipped by a consignor in Murmagoa under a bill of lading for delivery in Bombay; and I think that for this reason, on the special facts of these cases, the Railway receipt if assignable by endorsement would be an instrument of title to the goods under section 103 of the Contract Act. It is true that in *Great Indian Peninsula Railway Company v. Hanmandas Ramkison and Virji Hansraj*⁽¹⁾, it has been held a Railway receipt transferable by endorsement by the terms of the contract was not an instrument of title within the meaning of section 103. That was a case of conveyance by land from Bijapur to Bombay and in that respect the element of voyage by sea under a combined receipt and contract issued by the carrier was absent. It is also important to note that since the date of that decision the chapter of the Transfer of Property Act relating to the assignment of contractual claims has been recast and is now applicable to the Bombay Presidency. By section 137 it is provided that—

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Nothing in the foregoing sections of this chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression “mercantile document of title to goods” includes a bill of lading, dock-warrant, warehouse-keeper’s certificate, Railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

This is one of the sections of the Transfer of Property Act relating to contracts which under section 4 is to be taken as part of the Indian Contract Act. We have, therefore, an express statement by the Legislature that Railway receipts shall be taken to be mercantile documents of title fulfilling one or other of the two specified conditions, *viz.*, proving in the ordinary course of business the possession or control of goods, or authorising or purporting to authorise either by endorsement or by delivery the possessor of the document to transfer or receive the goods thereby represented. Under the third condition of the Railway receipts in these cases it is clear that the documents fall under the latter class. The significance of the division into two classes of mercantile documents of title mentioned in section 137 of the Transfer of Property Act (which with the exception of its reference to Railway receipts is taken verbatim from section 4 of the English Factors Act of 1842 and reproduced in the Factors Act of 1889, section 1 (4), and applied in the Sale of Goods Act, 1893, section 62) is explained by the following passage from Blackburn on Sale, second edition, at page 415 :—

“ There have been some attempts made to give the same effect to the indorsement of dock warrants, wharfingers’ receipts, delivery orders, and similar documents, as is given to the indorsement of a bill of lading.

Those documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to

deliver them, and in so far they greatly resemble bills of lading ; but they differ from them in this respect, that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights ; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."

It was perhaps this distinction that the Court had in mind in *Great Indian Peninsula Railway v. Hanmandas Ramkison and Virji Hansraj*⁽¹⁾ when declining to apply, as Mr. Justice Farran had done, the English definition to "instruments of title" in section 103 of the Contract Act although admitting that it might be applied to the expression "document showing title" in section 108 on the ground that dealings by factors entrusted with documents showing title were a different subject-matter to assignments of instruments of title by the buyer of goods in transit.

It is clear that no distinction can be drawn from the difference of wording as in section 102, which also relates to assignments by the buyer during transit, the expression used is "document showing title".

It seems to me that section 137 of the Transfer of Property Act puts an end to the question. It recognises that since the passing of section 45 of the Sale of Goods Act, 1893, in England there is no force in the distinction drawn by Sir Charles Sargent in *Great Indian Peninsula Railway Company v. Hanmandas Ramkison and Virji Hansraj*⁽¹⁾. It is to be noted that sections 102 and 103 are the only sections of the Contract Act which refer to assignment of documents of title and that section 137 of the Transfer of Property

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Act which must be taken as part of the Contract Act occurs in the chapter relating to the assignment of claims.

I am of opinion, therefore, that the appellants in each of these appeals are entitled to the benefit of section 103 of the Contract Act against the unpaid vendor.

In Appeal No. 4 of 1912, the case was remanded to the lower Court for evidence upon certain issues of which issue 9 was :—

Whether by the custom of the trade Railway receipts are not treated as instruments of title to the goods covered by them within the meaning of section 103 of the Contract Act.

The evidence recorded as to the custom of merchants regarding Railway receipts is very much to the same effect as that recorded in *Jethmal v. B. B. & C. I. Railway*⁽¹⁾, the effect of which was stated by Tyabji, J., as follows :—

“There is a great deal of evidence to show that there is a general practice prevailing amongst merchants and commission agents in Bombay to treat Railway receipts as documents of title, representing the goods mentioned therein, upon which advances can be obtained to the extent of 80 or 90 per cent. of the value, that these receipts are usually endorsed in blank by the consignee and that such endorsements are recognised by the Railway Companies in Bombay and delivery is given accordingly.”

Mr. Justice Macleod thus states the result of the evidence taken on remand :

“The buyer's name appears in the Railway receipt and as a rule he advances to the vendor 80 or 90 per cent. of the value of the cotton when he gets the Railway receipt, but some contracts, mostly those for Bengal cotton, are made on Railway terms by which it is meant that the buyer contracts to advance 90 per cent. as soon as he gets the Railway receipt. Such receipts pass from hand to hand by endorsement and the evidence shows that buyers consider that the Railway receipt gives them a title to the goods though as a matter of fact, they take care to see that their endorser is a respectable person.

⁽¹⁾ (1901) 3 Bom. L. R. 260 at p. 263.

Commission agents advance from 80 to 90 per cent. on Railway receipts. Their constituent is either up country in which case no question of unpaid vendor arises, or a holder of a Railway receipt in Bombay who endorses it over to them. None of the second defendant's witnesses lent money on Railway receipts merely to earn interest. This, as far as the evidence goes, is only done by the Banks and they invariably require the cotton to be the Banks' Jetha or godown as security for the advance. It has then been proved, as was proved in *G. I. P. Railway Co. v. Hanmandas*⁽¹⁾, that amongst merchants and commission agents dealing in cotton in Bombay, Railway receipts endorsed by one holder to another are considered as representing the goods and entitling the last endorsee to delivery. But it does not follow from that that there is a usage that the last endorsee is entitled to delivery as against an unpaid vendor who stops the goods in transit."

In connection with this last observation we may refer to the judgment of Ashhurst, J., in *Lickbarrow v. Mason*⁽²⁾:

"The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect therefore this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only; but he has made it an indorsable instrument. So it is like a bill of exchange; in which case, as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law."

The learned Judge has overlooked the form of the issue remanded which is, whether by the custom of the trade Railway receipts are not treated as instruments of title to the goods covered by them within the meaning of (*i. e.*, in the sense in which that expression is used in) section 103 of the Contract Act. The result of the Railway receipt being such an instrument of title as against the unpaid vendor does not depend upon custom but is a matter of law which is stated in the section.

(1) (1889) 14 Bom. 57.

(2) (1787) 2 T. R. 63 at p. 71.

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& Co.

v.

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VITHALDAS.

CHHAGANLAL
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v.

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For all the above reasons I am of opinion that the decision of the lower Court in Appeal No. 4 should be reversed; and for the reasons based both upon the special facts of the case and on section 137 of the Contract Act I am of opinion that the decision of the lower Court in Appeal No. 7 should also be reversed. In each case the unsuccessful respondent must pay the costs throughout, except that in Appeal No. 4 the unsuccessful respondent Ramdas will have his costs of issues 1 to 5 and 8 against the appellants. In each case the person, in whose hands the sale-proceeds are, must hand over the net sale-proceeds, deducting any charges justly due, to the successful appellants.

In Appeal No. 4 of 1912—

Attorneys for the appellant: *Messrs. Jamsetji, Rustomji and Devidas.*

Attorneys for the respondent: *Messrs. Edgelow, Gulabchand, Wadia & Co.*

In Appeal No. 7 of 1912—

Attorneys for the appellants: *Messrs. Matubhai, Jamiyram and Madan.*

Attorneys for the respondent: *Messrs. Edgelow, Gulabchand, Wadia & Co.*

Decrees reversed.

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1913.

August 1.

B. A. BRENDON, COLLECTOR OF BELGAUM, AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. SHRIMANT SUNDARABAI, HUSBAND'S NAME LINGAPPA
JAYAPPA SAR DESAI, AND OTHERS (ORIGINAL PLAINTIFFS). RESPONDENTS.*

*Regulation XVI of 1827—Bombay Act XI of 1843, section 2—Summary
Settlement Act (Bom. Act II of 1863), section 12—Hereditary Offices Act*

* First Appeal No. 80 of 1912.