ORIGINAL CIVIL.

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

1916. March 23.

RUTTONSI ROWJI APPELLANTS (PLAINTIFFS) *v.* THE BOMBAY UNITED SPINNING AND WEAVING COMPANY, LTD., RESPONDENTS) (DEFENDANTS).*

The Indian Contract Act (IX of 1872), sections 1 and 118—The Indian Evidence Act (I of 1872), section 92—Contract for sale and purchase of piece-goods to be manufactured according to sample—Purchasers to clear goods within twenty-four hours of their being ready for delivery—Notice of the goods being ready for delivery tantamount to tender—Delivery to be taken by signing a delivery-order—Goods and price debited to purchasers on signing a delivery-order—Goods tendered different in quality and design from sample—Contract providing for reference to arbitration—Power of arbitrators to award an allowance in price when difference in quality not unreasonable—Parties requesting arbitrators to award an allowance, bound by the award—Custom of the trade permitting allowance if the difference in quality not unreasonable—Custom cannot vary written contract.

In September and October 1913, the defendants entered into seven contracts with the plaintiffs, referred to under the letters A to G, for the sale and delivery of piece-goods of certain specified descriptions. The contracts provided for delivery of the goods by instalments within a fixed period. As soon as the goods were ready for delivery the defendants sent a delivery-order to the plaintiffs whereupon the plaintiffs would either remove the goods from the defendants' premises or sign the delivery-order acknowledging that the goods had been taken delivery of and the price debited to them, in which case the goods remained with the defendants at the risk of the plaintiffs. The goods were subsequently cleared by the plaintiffs at their convenience on payment of the price, interest thereon at 9 per cent., warehouse rent and all other charges. A common feature of all the contracts was that the defendants had agreed not to give delivery of similar goods to other customers during the period fixed for delivery under the plaintiffs' contracts.

Contract A was for the 251 bales of which the plaintiffs took delivery of some while the contract was cancelled as regards others, and 84 bales remained the subject of dispute as the plaintiffs contended that the bales were inferior in quality and were not otherwise in accordance with the contract. The dispute was referred to the arbitration of two experts in the trade nominated by the parties. During the survey of the goods both parties being represented by

* O. C. J. Appeal No. 57 of 1915.

their respective salesmen, the arbitrators were asked by the plaintiffs to award an allowance in price in the event of their holding that the goods are different in quality from the sample. The arbitrators found that there was a difference in finish, quality, width and in some cases of design and colour and they decided that the plaintiffs were entitled to an allowance of 4 annas per piece but must take delivery of the 84 bales with the allowance. The plaintiffs however refused to take delivery of the bales with any allowance on the ground that they were not bound to do so under their contract and that the arbitrators had in fact acted beyond the scope of the reference under the contract. Contracts B, C and D covered 658 bales of which 159 were taken delivery of by the plaintiffs who refused to take delivery of the rest on the ground that the defendants had committed a breach of the condition not to give delivery of similar goods to other dealers during the period fixed for delivery under the plaintiffs' contracts. Contracts E, F and G covered 305 bales of which 150 were taken delivery of while as to 42 the contract was cancelled and the plaintiffs demanded the balance of 113 bales on payment of Rs. 7,236 being the amount due by them on an account being taken in respect of all the seven contracts. The defendants refused to deliver the 113 bales on receipt of Rs. 7,236 but claimed Rs. 34,734-7-6, the contract price thereof.

The plaintiffs thereupon filed a suit asking for delivery of 113 bales on payment of Rs. 7,236. The defendants pleaded that with respect to 84 bales under the contract A, the plaintiffs were bound by the award of the arbitrators, and that with respect to 499 bales under the contracts B, C and D the plaintiffs wrongly rejected to take delivery thereof, as the defendants had given delivery of goods to other customers by sending them delivery-orders and obtaining their signatures before the period of plaintiffs' contracts had began to run. The defendants counter-claimed Rs. 2,00,230-12-0 in respect of 722 bales of which the plaintiffs failed to take delivery. The defendants subsequently amended the written statement by pleading a custom of the trade that the buyer could not reject for difference in quality provided the same was not excessive or unreasonable, and could be met by an allowance in the price.

Held, (1) that the custom alleged by the defendants was inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price;

In re North Western Rubber Company, Limited and Huttenbach & Co.(1), followed.

In re Walkers, Winser & Hamm and Shaw, Son & Co.(2), not followed.

(2) that the plaintiffs were bound by the award of the arbitrators made in pursuance of their request and not objected to by their opponents;

(1) [1908] 2 K. B 907. (2) [1904] 2 K. B. 152.

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Re an arbitration between Green & Co. & Balfour, Williamson, & Co. (1), referred to.

(3) that the defendants had not committed a breach of the contracts B, C and D as the debiting of the goods to the buyers and their signing a delivery-order marked the period of delivery rendering them liable for not clearing the goods from the premises of the defendants who held as warehousemen and bailees for the buyers ;

(4) that the plaintiffs' suit should be dismissed and the defendants' counter-claim be allowed.

THE plaintiffs, Ruttonsi Rowji, were a firm of cloth dealers carrying on business in Bombay. For some years prior to the suit, they had purchased from the defendants various classes of goods manufactured by them. The usual course of business was as follows :—Contracts in writing were made from time to time for the purchase by the plaintiffs of various quantities and classes of piece-goods, on the terms and conditions and at the price mentioned in such contract. Each contract provided for delivery of the goods by instalments within a period fixed by such contracts. As soon as the goods were ready for delivery, the defendants sent a delivery-order to the plaintiffs whereupon the plaintiffs would either remove the goods from the defendants' premises or sign the delivery-order with an addition that the goods had been debited to them, in which case the goods remained with the defendants at the risk of the plaintiffs who would remove the goods whenever they found it convenient on the payment of the value, warehouse rent and other charges.

The suit referred to seven such contracts dated respectively, 1st October 1913, 23rd September 1913, 27th September 1913, 29th September 1913, 15th December 1912, 10th July 1913 and 6th September 1913. The contracts were marked in the suit under letters A to G.

(1) (1890) 63 L. T. 525.

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Contract A was for 251 bales of various classes of piece-goods manufactured therein, of which 90 bales were cancelled by agreement, 50 bales were removed by the plaintiffs from the defendants' premises and 27 bales had been debited to the plaintiffs' account in the defendants' books. As regards the remaining 84 bales, the plaintiffs refused to take delivery thereof, as they were inferior in quality to what had been agreed upon between the parties and were not otherwise in accordance with the contract. The plaintiffs thereupon claimed arbitration in the matter as provided for by the said contract, and the dispute was referred by the plaintiffs and the defendant company to the arbitration of their respective nominees Mr. Laljee Naranji and Mr. G. E. D. Langley. During the arbitration while the survey was proceeding, the plaintiffs asked their nominee, Laljee Naranji, to award an allowance in the hearing of Lakhmidas Vassanji, the defendants' salesmen, who represented them at the survey. The arbitrators thereupon made their award on the 31st of July 1914, whereby they decided that the goods tendered by the defendants were different in width, quality and finish and in some cases in design and colour from the goods they had contracted to sell. The arbitrators then proceeded to state that their award was that the plaintiffs were entitled to an allowance of 4 annas per piece on 84 bales only and must take delivery as per terms of contract with the allowance. They further stated that in their opinion these 84 bales should be free of interest to the buyer up to the 31st July 1914 and should be debited from that date. The plaintiffs, however, submitted that the arbitrators had no power to give an allowance, nor were the plaintiffs bound under the contract to accept delivery of goods on such an allowance. The plaintiffs strictly relied on the finding of the arbitrators that the goods were different in quality from what the defendant company had agreed to sell.

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Under the contracts B, C and D which were for the sale of 658 bales of piece-goods, 159 bales had been removed by the plaintiffs from the defendants' premises. The plaintiffs refused to take delivery of the rest on the ground that the defendants had in June 1914 committed a breach of the condition in the contract, not to give delivery of similar goods to other dealers during the period fixed for delivery under the contracts entered into with the plaintiffs. The plaintiffs further stated that on the 25th May 1914 the plaintiffs agreed to pay and did pay the sum of Rs. 20,000 to the defendants as a deposit or security for the due fulfilment of their seven contracts, and the defendant company agreed to extend the period of delivery of and payment for the goods by one year from the date of the said agreement. The plaintiffs submitted that in view of the said agreement and the breach by the defendants themselves, the defendants wrongly debited to them the price of 499 bales not taken delivery of by the plaintiffs. Under the contracts E, F and G which were for the sale of 305 bags, 150 bales had been removed by the plaintiffs while as to 42 the contract was cancelled and on 1st October 1914 the plaintiffs demanded delivery of the remaining 113 bales offering to pay the defendants Rs. 7,236-2-9. The aforesaid sum was offered on the footing that the plaintiffs were entitled to eliminate from consideration the 84 bales under the contract A and 499 bales under contracts B, C and D. The defendants declined to deliver the bales under the said terms.

The plaintiffs filed the suit on 27th November 1914 that the defendant company be ordered to deliver to the plaintiffs 113 bales in possession of the defendants on payment of the sum of Rs. 7,236-2-9 and such further sum by way of interest as might be found due.

The defendants in their written statement filed on 11th February 1915 submitted that with respect to

84 bales under contract A, the plaintiffs were bound by the award of the arbitrators and that they were not justified in refusing to take delivery of the said bales. They also submitted that the plaintiffs were not justified in eliminating 499 bales under contracts B, C and D as the goods they had delivered to other customers were in respect of contracts prior to the plaintiffs' contracts and were debited in fact to the account of those customers before the period of the plaintiffs' contracts began to run. The defendants however plainly admitted that through inadvertence 6 bales were delivered to two customers during the period of the plaintiffs' contracts but contended that such a breach was too insignificant to be taken into consideration and would not entitle the plaintiffs to rescind their contracts. With respect to the 113 bales under contracts E, F and G the defendants claimed Rs. 34,734-7-6 as the proper amount due by the plaintiffs and not merely Rs. 7,236-2-9 tendered by the plaintiffs. The defendants further counter-claimed a sum of Rs. 2,00,230-12-0 in respect of the 723 bales under the contracts of which the plaintiffs failed to take delivery.

On the 19th August 1915, when the suit came on for hearing and the issues were being settled, the defendants' counsel raised *inter alia*, the following issues:—

2. Whether by the custom of the trade the plaintiffs were not obliged to take the goods with an allowance provided the difference in width, quality, finish, design and/or colour was not excessive or unreasonable and was a matter which could be reasonably met by an allowance off the price?

3. Whether in fact the difference in width was excessive or unreasonable and was a matter which could be reasonably met by an allowance off the price?

The defendants had prior to the hearing given notice to the plaintiffs that they would set up the aforesaid custom of trade.

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The plaintiffs' counsel objected to the raising of the said issues, but on further argument the Court allowed the same on the defendants undertaking to amend the written statement. The suit was heard by his Lordship Macleod J. and the judgment after setting out the material facts as above provided as follows:—

MACLEOD, J.:—Under section 118 of the Indian Contract Act the plaintiffs were entitled to reject the goods if they were not up to sample. It is unfortunate that in section 118 the word 'warranty' is used in the wide sense of the 'condition' of the Sales of Goods Act, while in section 117 it is used in the strict sense of 'warranty' as used in the same Act.

As I shall have to refer to English cases I shall call the warranty of section 118, 'condition.'

Generally speaking when there is a clause in a contract that the goods contracted for shall be according to sample, such a clause is a condition going to the essence of the contract, when the contract is as to any goods (i.e., unascertained). But when the contract is as to specific goods the clause is only collateral to the contract and is the subject of a cross-action or matter in reduction of damages: see *Heyworth* v. *Hutchinson*[1]. If Exhibit A had been the only contract between the parties, the plaintiffs might have moved to set aside the award on the ground that the decision was outside the scope of the reference or they might have waited until the defendants sought to enforce the award. Indirectly by seeking to enforce contracts E, F and G only they are asking the Court to disregard the award as regards contract A, but the counter-claim now filed by the defendants brings that award directly in issue.

The arbitrators seem to have assumed that the custom existed and that they had jurisdiction to read the

[1] (1867) L. R. 2 Q. B. 447.

contract as if it contained a clause to the effect that the buyer was bound to accept the goods with an allowance, if the goods tendered could be considered a fair tender with such allowance. The first question is whether such a custom, even if it exists, can be proved under section 92 of the Indian Evidence Act on the ground that it is inconsistent with the written contract. The same question was considered in *In re North Western Rubber Company, Limited and Huttenbach & Co.*[1] and resulted in a difference of opinion amongst the Judges, although it may be said that as it was found as a fact that the custom did not exist their remarks were *obiter*. The contract in that case was for rubber fair quality Banjermassin Jelutong at £18-15 per ton. There was an arbitration clause as follows: "Any disputes on the contract to be settled by arbitration here in the usual way." A dispute arose as to the quality of the rubber tendered and the arbitrators found that the goods were not in accordance with the contract but must be accepted by the buyers at an allowance of 10s. per ton. Apparently the award was based on the existence of an alleged custom applicable to contracts for raw material shipped to England to the effect that the buyers should accept the goods with an allowance for inferiority of quality when that inferiority was not excessive or unreasonable. The buyer moved to set aside the award and contended that under the submission on the face of the written contract the arbitrators had no jurisdiction to inquire into the questions (*a*) whether the alleged custom existed, and (*b*) whether the contract was subject to such custom if it existed in fact. Walton J., delivering the judgment of the Divisional Court, said:—

"It seems to me impossible to resist the conclusion that in *Hutcheson* v. *Eaton*[2] the Court of Appeal held that under a submission to arbitration of all

(1) [1908] 2 K. B. 907. (2) (1884) 13 Q. B. D. 861.

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disputes upon a written contract the arbitrators have no jurisdiction in arriving at their award to inquire as to the existence of a custom to which no reference is made in the written contract and to decide that such contract is subject to such a custom."

However, after that judgment, it was agreed between the parties that an issue should be directed to determine the question of the existence of the alleged custom and alternately it was held on the evidence adduced that the custom did not exist. The sellers appealed, first, on the ground that upon the evidence the learned Judge should have found that the custom existed, secondly, on the ground that the arbitrators were within their jurisdiction in finding whether or not the custom existed. The appeal was dismissed. Vaughan William L. J. followed the decision in *Hutcheson* v. *Eaton*[1] and held that the arbitrators had no right to convert what was only a condition into a warranty. Fletcher Moulton L. J. expressed the opinion that the custom alleged contradicted the written contract. The contract required the goods to be in accordance with the description while the custom relieved the vendor from that obligation and entitled him to require the purchaser to accept that which was not in accordance with the description. Buckley L. J. agreed, relying only on the decision of *Hutcheson* v. *Eaton*[1] and the fact that there had been no appeal against the order for the trial of the issue. But the learned Lord Justice remarked that it was possible to differentiate the case before the Court from *Hutcheson* v. *Eaton*[1]. The question in that case was not as to the meaning of the language used in the body of the contract but as to the person liable under the contract, but as he considered the language of the majority of the Court might be taken as covering the case before the Court he thought he ought to apply

[1] (1884) 13 Q. B. D. 861.

it. But at page 923 of the report the learned Lord Justice expresses his own opinion :—

"Having regard to the fact that the persons who are speaking in the contract are proved (if the custom is proved) to mean by their language something which in the absence of evidence they *primâ facie* would not mean, then the construction of the contract necessarily involves, in my opinion, the consideration of the custom....If the construction of the contract is for the arbitrator, then, in a case where reliance is placed on a custom, I take it that it is for the arbitrator to determine whether the alleged custom in fact exists, and whether the construction of the language of the contract is affected by it. In such a case I do not see how, in determining the custom, it can be said that you are adding to or altering the contract; the question is what is the contract, having regard to the existence of the custom, if there be one ?"

The learned Lord Justice makes no reference to the case of *In re Walkers, Winser & Hamm and Shaw, Son & Co.*[1]. In that case there was a contract for the purchase of 500 tons barley about as per sample No. 373 and it was provided that any disputes arising out of the contract should be left to arbitration in London in the usual way. The arbitrators to whom a dispute regarding the quality of the barley was referred failed to agree and the award was made by the umpire who heard evidence as to the existence of a custom that by the usage of the London corn trade the buyer was not entitled to reject for difference of quality unless the same was excessive or unreasonable and directed subject to the opinion of the Court on a case stated that the buyer should take delivery with an allowance. It was argued in Court that the custom was bad in law as it contradicted the written contract. On this Channell J. remarked (p. 158) :—

"I think that that objection is answered by the fact that this particular custom, which it is sought to import into this contract, is imported or introduced into a large number of contracts in this trade, and that, when it forms part of the contract, it is not contended that it makes the contract insensible so that effect cannot be given to it. I do not think, therefore, that the custom is so inconsistent with the contract in this case that the contract cannot be acted upon."

[1] [1904] 2 K. B. 152.

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With due respect this argument hardly seems convincing. If a man contracts in writing to deliver unascertained goods according to sample under section 118, it is a condition under the contract that the goods shall be according to sample and if they are not the buyer can reject. It is open to the parties to insert a clause in the contract to the effect that if the goods are off sample the buyer must take them with an allowance if the goods can be considered a fair tender with such an allowance, but the insertion of such a clause entirely alters the contract as it stands without that clause and it seems safer to follow the opinions of Vaughan William and Fletcher Moulton L. JJ. and hold that when the contract is for unascertained goods and does not contain such a clause, evidence of a custom that the buyer must take with an allowance, if the allowance is not unreasonable, is inadmissible under section 92 of the Indian Evidence Act.

As, however, the evidence has been taken I may say that it conclusively proves that in the country piece-goods trade where a contract is made for unascertained goods either according to a particular sample provided by the buyer or according to a stock number of the manufacturer, and the contract contains an arbitration clause under which all disputes are to be referred to arbitration, the arbitrators proceed on the footing that under the reference they are to survey the goods and either award that the goods may be rejected or must be taken with or without an allowance. No case could be mentioned by any of the witnesses in which an award not made *ex parte* had been disputed.

[His Lordship after discussing evidence at this stage continued as follows :—]

The plaintiffs' issue is whether the defendants committed any breach of contracts B, C, D as alleged in

para. 5 of the plaint save as to 2 and 4 bales, respectively. Under clause 3 of Exhibit O the plaintiffs were bound to clear the goods within twenty-four hours of their being ready for delivery otherwise the goods remained at their risk and they were responsible for all kinds of damages.

Under clause 4 notice that the goods were ready was tantamount to a tender.

Under clause 5 the plaintiffs were bound, on the goods being tendered, to pay for and clear the same.

Under clause 6 if the plaintiffs did not clear the goods they were to pay interest at 9 per cent. and in addition godown rent, insurance charges and any other expenses which might be incurred.

Under clause 7 if the plaintiffs failed to clear the goods in time the defendants might sell the same at any time at the plaintiffs' risk and cost. If there was a loss the plaintiffs had to pay it. If there was a profit the plaintiffs had no claim to it.

Finally, no similar goods were to be delivered to any other person during the period fixed with the plaintiffs.

The defendants contend that when the goods were tendered and plaintiffs accepted them by signing the delivery-order but instead of removing the goods asked the defendants to retain them debiting the plaintiffs with the price, that amounted to delivery within the meaning of the contract. They further say that plaintiffs entered into the contract on those terms.

[At this point his Lordship again discussed the evidence and said:—]

Mr. Strangman also referred in confirmation of this contention to para. 4 of the plaint wherein the plaintiffs stated that they had taken delivery of 86 bales under

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contract A, though, as a matter of fact, they had only removed 50 bales from the defendants' godown and the remainder actually 27 bales had been debited to the plaintiffs.

Further it appears that the plaintiffs had contracted to purchase from Girdhardas a portion of the goods which were being manufactured for him by the defendants under the prior contracts, and actually took delivery from Girdhardas of certain bales during the periods of their contracts which they must have known were being removed from the defendants' godown during the said periods without raising any objection to such removal.

I have no doubt myself that it was only when these facts were presented to the plaintiffs' solicitors that it occurred to them to contend that the defendants had committed a breach of their contract.

It has been urged that 'delivery' in the contract can only mean 'delivery' within the meaning of section 90 of the Indian Contract Act. That is to say the goods had to come into the possession of the buyer or of some one authorised to hold them on his behalf. As the defendants' purchasers, when the goods were debited to them, agreed that the defendants should hold the goods as warehousemen Mr. Strangman argued that that constituted delivery within the meaning of this section. Mr. Setalvad contended by arguing that when the seller retained his lien for the unpaid purchase money, there could be no delivery.

This raises an interesting question whether an unpaid vendor who holds the goods sold as bailee still retains his lien.

Under the common law it appears that he did not: see *Elmore* v. *Stone*[1].

[1] (1809) 1 Taunt. 458.

In *Cusack* v. *Robinson*[1] the rule was stated to be as follows :—

"But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone ; and then there is sufficient receipt to satisfy the statute (of frauds)."

The case of *Dodsley* v. *Varley*[2] may also be referred to, as although in that case the goods had been delivered to a warehouseman who held them as the buyer's agent, it was agreed that the goods should not be removed until paid for and it was remarked that the vendor had not a lien but a special interest sometimes but improperly called a lien growing out of the original ownership independent of actual possession and consistent with the property being in the buyer.

But if the buyer became insolvent it would appear that the lien of unpaid vendor holding as bailee would revive : see *Grice* v. *Richardson*[3].

It was not until the Sale of Goods Act was passed that under section 41 of that Act a statutory lien was given to an unpaid vendor in possession of the goods as bailee for the buyer. Sections 95, 96 and 97 of the Indian Contract Act deal with a vendor's lien. Section 95, it is true, does not correspond with section 41 of the Sale of Goods Act and it follows that either it must be read as if it did so correspond or it would appear that the case of an unpaid vendor holding as bailee has not been provided for, in which case the common law would apply and he would have no lien. At page 400 of Pollock and Mulla's Indian Contract Act it is observed that the text of the Act throws no light on the position in this respect of a seller who has assented to hold the goods as bailee for the buyer and I

(1) (1861) 30 L. J. Q. B. 261 at p. 264. (2) (1840) 12 A. & E. 632.
(3) (1877) 3 App. Cas. 319.

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think this must be taken as the correct view. Therefore, when the goods under contracts B, C and D were debited the defendants lost their lien but they had a right to sell under clause 7, and it seems to follow, therefore, that when under the contract the goods were debited the defendants held as bailees for the plaintiffs and thus delivery in law took place, although the defendants had a special interest under the contract that the goods should not be cleared until paid for and might even be sold by the defendants if not cleared. It went further than a lien as any profit on a sale was to belong to the vendor. If I am right in this the defendants committed no breach of their contracts except as regards the six bales admittedly delivered during the plaintiffs' periods, and it is immaterial whether the plaintiffs thought that debiting was not delivery.

But I may refer to the contention of the defendants that plaintiffs understood perfectly well that debiting was delivery.

First, there is the admission in para. 4 of the plaint that certain bales debited under contract A were delivered. It might be said this was error of the draughtsman who misunderstood his instructions, but I was not asked to refer to the instructions, and I must take it that this admission stands. Then there are the delivery orders signed by the plaintiffs when the goods were debited. Against that it is said that more attention must be paid to the written words than to the printed words in the delivery orders. No doubt that is correct when there is an inconsistency, but there is nothing inconsistent in the goods being delivered to the buyer and yet being held by the seller as bailee. In the English case, to which I have referred, the question was whether there had been delivery to constitute receipt within the meaning of the Statute of Frauds and it was considered that there was delivery although the

goods remained with the seller as bailee. The fact that in the defendants' books the word 'delivery' was also used to record the facts that goods were actually removed from their godowns is immaterial, once it is recognized that in law there can be delivery without change of possession. But apart from all this I am satisfied that Rowji understood perfectly well that according to the usual practice which he followed as regards the removal of the goods, the goods were delivered when he signed the first delivery order whether he actually removed the goods or left them with the defendants at his risk to be removed when it suited his convenience, and he must have known that other merchants followed the same practice. He was a most unsatisfactory witness, prevaricating on many occasions and persisting in disputing the most obvious facts as long as possible. He had dealt with the defendants for a considerable period and knew that they only manufactured a particular kind of cloth for one dealer at a time. He knew that as he left goods with the defendants to suit his convenience after they had been debited, other dealers would do likewise. If his contentions were correct, dealer A would be unable to clear his goods after the following contract with dealer B began, and would never be able to clear off the goods unless he entered into another contract, at the expiration of the contract or contracts of B or the contracts of any other person or persons who might succeed B. It is not likely that he would have approved of this contention supposing at the end of his contract some of the goods remained with the defendants as warehousemen and similar contract had been given to another dealer. For he would clearly be entitled under his contract to clear his goods on payment, and it would be no answer on the part of the defendants to say that they had contracted with another party not to allow him to do so.

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His Lordship held that as regards the contract A the custom of trade set up by the defendants was proved; that the difference in width, &c., was not excessive or unreasonable and it was a matter which could be reasonably met by an allowance off the price; that the award of the arbitrators was binding on the plaintiffs; that the defendants committed no breach of the contracts B, C and D save as to 6 bales; that such breaches were committed unwittingly and they were not such as to entitle the plaintiffs to rescind; and that the plaintiffs were not entitled to the delivery of 113 bales on payment of Rs. 7,236 odd under contracts E, F and G.

The plaintiffs' suit was therefore dismissed, but the defendants' counter-claim was allowed.

The plaintiffs appealed.

Setalvad and *Desai* for the appellants.

Kanga with *Strangman*, for the respondents.

SCOTT, C. J.:—This is an appeal from the judgment of Mr. Justice Macleod in a suit filed by the plaintiffs in which they claimed delivery of 113 bales of piece-goods and tendered Rs. 7,236 as the price thereof. The defendants counter-claimed a sum of Rs. 2,00,230-12-0 which, they contended, was due to them by the plaintiffs in respect of goods not taken delivery of. Judgment was given for the defendants upon their counter-claim.

The defendants entered into various contracts, seven in number, in September and October 1913, for the sale and delivery of piece-goods of certain specified descriptions. The contracts will be referred to under the letters A to G.

Contract A was for the 251 bales of which the plaintiffs took delivery of some while the contract was cancelled as regards others and 84 bales remained the subject of dispute.

Contracts B, C and D covered 658 bales of which 159 were taken delivery of by the plaintiffs who refused to take delivery of the rest on the ground that the defendants had broken a condition not to give delivery of similar goods to other dealers during the period fixed for delivery under the said contracts.

Contracts E, F and G covered 305 bales of which 150 were taken delivery of by the plaintiffs while as to 42 the contract was cancelled and the plaintiffs demanded the balance of 113 on payment of the contract price Rs. 7,236.

The result, therefore, was that the plaintiffs claimed to eliminate from consideration the 84 bales under contract A and 499 bales under contracts B, C and D. The defendants' counter-claim is for payment of the bales which the plaintiffs claim to eliminate from consideration.

Dealing first with the disputed bales under contract A. By a contract, dated the first of October 1913, the plaintiffs stipulated that as regards the goods to be delivered the quality and width was to be given according to the 'Textiles' goods Nos. 299½, 999, 9,999 and 99,999 and reinforced the stipulation in his signature by repeating that 251 bales according to the 'Textiles' goods were to be taken. The price of the goods was fixed at Rs. 5-10-0 a piece, each bale containing 60 pieces. The agreement as to price and quantity was confirmed by the defendants' secretary in a document of the same date. The contract signed by the plaintiffs was in a printed form containing nine numbered clauses which appear in all the contracts the subject of this suit. For the purpose of the dispute regarding the 84 bales under contract A, it is sufficient to set out the 8th and 9th clauses.

"8. If we have any objection as to finish, quality, width, number, stamp and heading, we agree to refer the same to the arbitration of two members

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of the Bombay Mill Owners' Association. Out of them one member shall be of our selection and one member shall be of your selection. Should the arbitrators be not unanimous then they are to appoint an umpire and both the parties are to agree to the umpire's award.

9. As to the objection mentioned in the said clause 8, we are bound to make the same known in writing within eight days after the goods are tendered and should we fail to do so then we agree that our objection shall not at all prevail and we are bound to take delivery of the said goods."

After delivery of some of the goods had been taken under this contract, disputes arose, as the plaintiffs contended that the goods were not according to the contract. Upon this dispute a reference to arbitration took place under clause 8 of the contract. The defendants appointed Mr. Langley and the plaintiffs appointed Mr. Lalji Naranji as their respective arbitrators. The reference was made on the 8th of July 1914 in a letter addressed to the arbitrators by the plaintiffs' solicitors (Exhibit M) after a copy of it had been submitted to the defendants' attorneys on the 20th of June. The reference is in these terms :—

"Clause 8 of the contract provided for reference to arbitration of two members of the Bombay Mill Owners' Association if a difference arose between the parties. A difference has arisen between the parties under the above clause as to whether the goods tendered are in accordance with the contract and you gentlemen have been appointed arbitrators to decide the question. We understand you intend to make an appointment as to the time when you would go to survey."

The arbitrators were then requested to give timely intimation of the time of survey as it was necessary for the parties to be present.

On the 31st of June, the arbitrators published their award which states that they met to settle the dispute between the defendants and the plaintiffs regarding a contract which stipulated that the goods were to be of the same quality as the goods of the Textile Mill Nos. 299½, 999, 9,999 and 99,999, that pieces of the

Textile Mill manufacture were produced and inspected by both parties as a basis for arbitration and that in comparing them with pieces from the bales delivered by the defendants there was found to be a difference in finish, quality, width, and, in some cases, of design and colour. The arbitrators then proceeded to state that their award was that the buyer was entitled to an allowance of 4 annas per piece on 84 bales only and must take delivery as per terms of contract with this allowance. And they stated that in their opinion these 84 bales should be free of interest to the buyer up to the 31st of July and should be debited on that date.

Four days later the defendants' solicitors wrote to the arbitrators stating as follows :—

"With reference to your survey report of the 31st of July last regarding the dispute between our client and Mr. Ruttonsey Rowji, we are instructed to state that you were only requested to report on the quality, finish, &c., of the 84 bales in question. You had no right to state in the above report that in your opinion the said 84 bales should be free of interest to the buyer uptil the 31st of July and should be deibted on that date. Our clients therefore do not bind themselves to accept the above statement."

The defendants were not the only objectors to the award; for, on the 10th of August, the plaintiffs' solicitors addressed those of the defendants referring to the arbitration and the award as follows :—

"We must state at once that our client has been advised that the direction in the award that our client should take the goods at the allowance specified is outside the scope of the reference. Our client is not bound to take the goods on an allowance and declines to do so."

With regard to these two letters, it is to be noted that the defendants merely stated that they did not bind themselves to accept the statements about interest and that the plaintiffs' refusal to be bound to take the goods on an allowance was not communicated until five days or more after the declaration of the European war.

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The question is whether the plaintiffs are bound to take the 84 bales at an allowance reducing the contract price. There is no such provision in the contract and, so far as there is any indication as to the result of a successful objection regarding the quality, &c., of the goods tendered, clause 9 impliedly indicates that the plaintiffs would not be bound to take delivery. The defendants' case, however, does not rest upon the terms of the contract. A day before the hearing commenced in the lower Court the defendants' solicitors gave notice that at the hearing of the suit they would, if necessary, rely on a custom of trade in Bombay applicable to the sale of goods to be manufactured of the quality and description referred to in the contracts in this suit that a buyer has not a right to reject merely for difference in width, &c., provided that the difference is not unreasonable and is a matter that can reasonably be met by an allowance in the price.

At the hearing an issue was raised regarding the alleged custom. It was objected to by the plaintiffs but was allowed by the learned Judge subject to amendment of the written statement by the defendants. Thereafter, at the trial, evidence was given of the alleged custom.

It is not contended that such evidence was inadmissible provided the custom proved did not annex an incident to the contract repugnant to, or inconsistent with, the expressed terms: see section 92 of the Indian Evidence Act, proviso 5.

The defendants rely upon the custom alleged to avoid the ordinary consequence of a breach of contract for sale of goods according to sample, resulting from the provisions of section 118 of the Indian Contract Act. They contend that such a custom modifying the consequences resulting from the application of section 118 would not, within the meaning of section 1 of the

Indian Contract Act, be 'inconsistent with the provisions of the Act.' Nor do the plaintiffs, as I understood the argument, contend that the custom would be inconsistent with provisions of the Act. They insist, however, that it would be inconsistent with the provisions of the contract. The learned Judge held that the evidence conclusively proved that in the country piece-goods trade where a contract is made for unascertained goods either according to a particular sample provided by the buyer or according to a stock number of the manufacturer and the contract contains an arbitration clause under which all disputes are to be referred to arbitration the arbitrators proceed on the footing that under the reference they are to survey the goods and either award that the goods may be rejected or must be taken with or without an allowance. This is not a custom regulating the rights of parties under the contract so as to be inconsistent with its express terms but rather a customary incident annexed to the powers of arbitrators on their appointment under contracts of this description.

It appears to me that such a custom, as is alleged in the amended written statement, would be inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price. The same question has, in England, given rise to differences of judicial opinion. In *In re Walkers, Winser & Hamm and Shaw, Son & Co.*[1], it was argued that the introduction of a price is merely to set up a standard of value, that is, the value of goods corresponding to the sample, and there may be a consistent custom providing for the variation in price upon a variation in quality, and Mr. Justice Channel held that if the custom went to the length of saying that there should be no remedy for any

[1] [1904] 2 K. B. 152.

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variation in quality, it would be unreasonable but being simply a custom that the buyer takes the goods with a variation in price and with the limitation imposed by the words "unless the same is excessive or unreasonable" it would not be inconsistent with the written contract. On the other hand, Lord Justice Moulton in *In re North Western Rubber Company, Limited and Huttenbach & Co.*[1] expressed the opinion that such a custom contradicted the written contract relieving the vendor from his obligation and entitling him to require the purchaser to accept that which was not in accordance with the description.

It does not appear to me that the question whether such a custom, as is alleged, would be inconsistent with the written contract is affected in any way by the judgments of the House of Lords in the recent case of *Produce Brokers Co., Lim.* v. *Olympia Oil and Cake Co.*[2]

I agree with the learned trial Judge in preferring the reasoning of Lord Justice Moulton to that of Mr. Justice Channel.

This conclusion, however, by no means disposes of the question regarding the 84 bales. The arbitrator Langley has deposed that he and his co-arbitrator made their award upon the footing that a custom did exist that the buyer of local piece-goods must send the goods to be surveyed and is only entitled to reject if the surveyor decides the goods are so much off the sample that they are not saleable as of the quality ordered. If there is a difference which does not amount to this he is bound to take it on an allowance. Langley and his co-arbitrator understood they were to proceed with the reference in the usual way and did so awarding an allowance of 4 annas per piece. Lalji Naranji's

(1) [1908] 2 K. B. 907 at p. 922. (2) (1915) 85 L. J. K. B. 160.

evidence in examination-in-chief is to the same effect. The cross-examination was not directed to the practice before arbitrators but rather to the custom set up in the written statement.

It is permissible for arbitrators, who are experts in the trade in which the question referred to them has arisen, to act upon their own knowledge of the usages of that trade: see the judgment of Lord Loreburn in the case of *Produce Brokers Co., Lim.* v. *Olympia Oil and Cake Co.*[1].

It is, however, contended for the plaintiffs that the practice of arbitrators in fixing allowances, even if sanctioned by custom, is irrelevant in the present case owing to the restricted terms of the reference of the 8th of July. It is contended that the arbitrators had no authority to decide any question but that stated in the reference, namely, whether the goods tendered were in accordance with the contract. This contention receives support not only from the defendants' solicitors' letter of the 3rd of August and the *post bellum* repudiation by the plaintiffs' solicitors but also from the decision of the Court of Appeal in England in *Re an arbitration between Green & Co. & Balfour, Williamson, & Co.*[2], in which it was held that under a very similar reference the arbitrators had no jurisdiction to award that the buyer should take goods found to be not up to the sample with a reduction of price. It is apparent, however, from the judgments delivered in that case that evidence would be admissible to show that the arbitrators had in fact been asked to decide something more.

In the arbitration under contract A the facts are that at the survey the plaintiffs asked Lalji Naranji, who was his nominee, to award an allowance in the hearing of Lukhmidas Vussonji the defendants' salesman, who

[1] (1915) 85 L. J. K. B. 160 at p. 163. [2] (1890) 63 L. T. 325.

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represented them at the survey. No objection to such a course was taken by Lukhmidas nor have the defendants ever objected to the allowance made by the arbitrators. In this respect, therefore, they must be taken to have ratified the conduct of their representative in not objecting to the request of Rowji that an allowance should be made. Under these circumstances, I see no reason to differ from the conclusion arrived at by the learned Judge that it cannot be said that the question of the allowance was not properly referred to the arbitrators.

In this view of the case, the question whether the custom alleged would be inconsistent with the written contract standing alone, is not the crucial question. The plaintiffs are bound by the award made in pursuance of their request and not objected to by their opponents.

I may observe that there appears to me to be no foundation for the defendants' contention that the scope of the reference was not the subject of consideration in the trial Court. It is, I think, perfectly clear that the learned Judge was dealing with this point in the passage in which he discusses the conduct of the plaintiffs at the time of the survey. It is equally clear that the same point has been urged on behalf of the plaintiffs in clause 10 of the memo. of appeal.

For the reasons stated above, I am of opinion that the decision of the learned Judge regarding the 84 bales under contract A should be affirmed.

The remaining point is whether the defendants have broken the contracts B, C and D, of September 1913 in which they agreed as follows:—

"We are to give delivery of the goods which may have been sold before this contract but we are not to give delivery of the same during your period."

Prior to these contracts the defendants had entered into contracts on similar printed forms with two other dealers for delivery of similar goods over certain periods which were running in September 1913 but would expire before the periods for delivery of the plaintiffs' goods under contracts B, C and D would commence.

The common features of all the contracts material for the present point are clauses. 1, 3, 4, 5, 6 and 7 in Exhibit O1.

1. We have purchased the said goods under manufacture and we bind ourselves to take delivery of all the goods appertaining to this contract or a part thereof as you may give delivery.

3. Should we fail to clear the goods within twenty four hours of their being ready for delivery, then the goods shall remain at our risk and we are responsible for all kinds of damages.

4. Your giving notice of the goods being ready is tantamount to your tendering the same. On the notice being posted to our address the same would be considered to have reached us.

5. When you tender the goods we are bound to pay for and clear the same.

6. If we do not clear the goods then we are to pay interest at the rate of 9 per cent. from the date on which the same should have been cleared. So also we bind ourselves to pay godown rent, insurance (charges) and whatever other expenses may be incurred.

7. Should we fail to clear the goods in time then you may sell the same at any time you like either by public auction or by private sale in one lot or in pieces at our risk and cost; and as to whatever loss you may suffer thereby we are to pay the same without (raising) any objection and as to whatever profit may be made we shall have no manner of right thereon.

In practice the defendants about once each month would send the buyer a delivery order in respect of such of the contract goods as were ready for delivery in the Company's godown and the buyer would sign an acknowledgment of delivery of so many bales and the goods would be debited to him by the defendants. If his obligation to clear the goods within twenty-four hours under clause 3 was not discharged, interest

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would begin to run as well as godown rent for the storage in the defendants' godown and insurance, other charges under clause 6 to be followed on failure to clear and pay for the goods within a reasonable time by sale by the defendants at the buyer's risk and cost. Under clause 9 of the contract objections to the goods would not prevail if not made within eight days and the buyer would be bound to take delivery notwithstanding his objections.

The defendants contend that the debiting of goods to the buyer and sending him a delivery order for signature marks the period of delivery for within twenty-four hours the defendants would hold uncleared goods as warehousemen and bailees for the buyers.

In my opinion this contention is correct. 'Delivery' within the meaning of the added clause relates to some act to be done by the sellers but their obligations ceased with the debiting of the goods and their transference from the defendants' Mills to their godown. Thereupon constructive delivery took place. "It is a change of possession without any change of the actual custody....A seller in possession may assent to hold the thing sold on account of the buyer. When he begins so to hold it, this has the same effect as a physical delivery to the buyer or his servant, and is an actual receipt by the buyer:" see Pollock and Wright on Possession, p. 72. Holmes, in the Common Law, p. 233, remarks that:—

"Where goods remain in the custody of a vendor, appropriation to the contract and acceptance have been confounded with delivery. Our law has adopted the Roman doctrine, that there may be a delivery, that is, a change of possession, by a change in the character in which the vendor holds, but has not always imitated the caution of the civilians with regard to what amounts to such a change."

Here, in my opinion, the provisions of the contracts preclude the possibility of doubt as to the point of time

when the change occurs. It is not necessary to repeat the indications noted by the learned trial Judge of the understanding of the parties in the matter, but we may add that the award itself affords an instance of the practical effect of clause 9 of the contract. The arbitrators, experts in the practice of the trade, held that with regard to the bales debited on the 30th May and objected to on the 5th June interest should only run from the 31st of July, the date of the award upon the objections. This would be the period of change of possession if not of custody.

The decree of the lower Court must be affirmed and the appeal dismissed with costs on the appellants.

HEATON, J.:—I agree that the appellants' contention as to contract A fails and that Macleod J.'s judgment in this particular should be affirmed. But I am far from sure that it cannot be affirmed on the ground that there is not any contradiction or repugnance between the written contract and the contract as modified by the custom. Whenever a custom prevails it necessarily leads to the establishing of a contract different in some particulars from the written contract, otherwise custom would be useless and would never be relied on. Variation from the written contract is, therefore, inevitable where a custom has to be relied on. But variation need not be contradiction or repugnance; in some cases it is, in some, it is not. In this particular case I think it is not. I need not develop the point, as the judgment of Macleod J. is supported on other grounds.

As to the rest of the decision I agree.

Solicitors for appellants: Messrs. *Shroff, Dinshaw and Dharamsi.*

Solicitors for respondents: Messrs. *Payne & Co.*

Decree affirmed.

G. G. N.