

We must, therefore, confirm the decree with the above variation, reserving the right to the defendants to dispute the plaintiff's right to carry the eaves of his house as far as he has done in the new house.

Parties to pay their own costs of this appeal.

Attorneys for the appellants :—Messrs. *Bicknell and Mervánji*.

Attorney for the respondent :—Mr. *Allan F. Turner*.

1891.
 ESUBÁI
 v.
 DÁMODAR
 ISEVARDÁS.

ORIGINAL CIVIL.

Before Mr. Justice Ferran.

HAJI ABDUL RAHMA'N ALLA'RAKHIA AND ANOTHER, PLAINTIFFS, v.
 THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY,
 DEFENDANTS.*

1892.
 April 22, 23.

*Shipping—Charter-party—Mistake in date—Mistake mutual or unilateral—
 Rectification or rescission.*

The plaintiffs required a steamer to sail from Jeddah "fifteen days after the *Háj*," in order to convey pilgrims returning to Bombay. They chartered a steamer from the defendants in June, 1891, for that purpose. The defendants chartered their steamers by English dates. The date inserted in the charter-party was "the 10th August 1892 (fifteen days after the *Háj*.)" "The 10th August, 1892" was given or accepted by the plaintiff, in the belief that it corresponded with the fifteenth day after the *Háj*. The defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892, and not the 10th August, 1892, in fact corresponded with the fifteenth day after the *Háj*. On finding out the mistake in March, 1892, the plaintiff brought this suit for rectification of the charter-party by the insertion of the correct date, the 19th July, 1892, instead of the erroneous date the 10th August, 1892. Meanwhile the defendants had let all their steamers, and could not give the plaintiff one for the 19th July, 1892.

Held, that the agreement was one for the 10th August, 1892, and that as that date was a matter materially inducing the agreement, there could be no rectification, but only cancellation, even if both parties were under a mistake.

Held, further, that the mistake was not mutual, but on the plaintiffs' part only and, therefore, there could be no rectification.

A plaintiff seeking rectification must show that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that such contract is inaccurately represented in the instrument.

* Suit No. 161 of 1892.

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THIS was a suit brought to rectify an alleged mistake occurring in a charter-party entered into by the plaintiffs with the defendants.

By a charter-party, dated the 15th January, 1891, made between the plaintiffs and the defendants, the plaintiffs chartered from the defendants one of their steamers to proceed from Bombay to Jeddah for the conveyance of pilgrims, and back from Jeddah to Bombay *viâ* Karáchi—"the steamer to sail from Jeddah on or about the 31st July, 1891, (fifteen days after the *Háj*) for Bombay." A memorandum of agreement, dated the 6th June, 1891, and endorsed on the charter-party, provided as follows:—

"In reference to the clause on the other side in this charter-party, dated the 15th January, 1891, regarding the conveyance of returning pilgrims from Jeddah to Bombay *viâ* Karáchi on or about 31st July, 1891 (fifteen days after the *Háj*) at Rs.15 per head all round, it is hereby mutually agreed that the said clause shall stand void for the purposes of its execution or fulfilment this year, and, further, that the Bombay and Persia Steam Navigation Company, Limited agrees to give, and Háji Abdul Rahmán Allárahkia agrees to take, in fulfilment of the aforesaid clause next year, for the purposes of the conveyance of returning pilgrims from Jeddah to Bombay *viâ* Karáchi, on or about the 10th August, 1892, (fifteen days after the *Háj*), subject to all the terms and conditions as set forth in this charter-party, the S. S. *Sculptor* or any other steamer of about the same capacity as the *Sculptor*."

This was signed by the first plaintiff and the agent of the defendants.

The *Háj* in 1892 would fall on the 4th July, and the fifteenth day after the *Háj*, therefore, would be the 19th July. At the time the above-mentioned agreement was made, *viz.*, the 6th June, 1891, the calendar for 1892 was not out, and it was not then known exactly when the *Háj* in 1892 would fall. The 31st July, 1891, accurately represented fifteen days after the *Háj* in that year. The plaintiffs' case was that the intention of both parties in making the agreement of the 6th June, 1891, was simply to put 1892 for 1891, and the date representing fifteen days after the *Háj* in 1892 for the 31st July 1891; that the date inserted, the 10th August, 1892, was a mere error in calculation made by the defendants' clerk, which neither party detected, the English date being wholly unimportant and subsidiary to the real date with reference to which both were contracting, namely, the fifteenth day after the *Háj*. The correct English date was the 19th July,

1892,—the *Háj* in 1892 falling on the 4th July,—and the plaintiffs prayed that the contract might be altered and rectified by the substitution of that date for the 10th August, 1892.

The first plaintiff's account of the interview of the 6th June, 1891, with the defendants' agent, at which the terms of the new arrangement were arrived at, differed very materially from the account which the latter gave of the same interview.

The plaintiff stated that he asked for a steamer for the next year, and described what then occurred as follows :—

"He agreed to give me a steamer for the next year. He called a clerk and asked him to make the writing for the next year. The clerk made the writing. The agent told the clerk that a ship was to be given to me next year, and that to that effect a writing was to be made. The agent also told the clerk that the steamer was to leave Jeddah fifteen days after the *Háj*. The clerk then wrote the memorandum, and it was read out to me. I cannot read English, but I hear English dates. * * * * * When the memorandum was read to me I heard that the steamer was to sail fifteen days after the *Háj*, and I also heard the date 10th August, 1892. I thought that the dates were the same * * * * *

In the charter-party 31st July was entered. That was correct, as the calendar was out when it was made. When the memorandum was made, the clerk made a calculation and put down 10th August, 1892. I said : 'I don't know if that is correct,' as there was no calendar. The clerk said : 'It does not matter : as we have put down fifteen days after the *Háj*.' Then we signed the memorandum. * * * * * I did not direct the clerk to put in 10th August in the memorandum."

In cross-examination he added :—

"I have taken a great many charters of steamers from the defendant company. In the charters the English date of sailing is invariably stated. The Arabic date is not always given."

In his examination he also stated :—

"The pilgrims generally return from Mecca to Jeddah twelve or fifteen days after the *Háj*. When they reach Jeddah they stay one or two days and then go on board the steamer. These are the pilgrims who return to India direct. Others go to Medina and return by Mecca and Jeddah. They reach Jeddah about fifty-four or fifty-five days after the *Háj*. Pilgrims do not usually embark thirty-five or thirty-six days after the *Háj*, but some poor pilgrims might do so. The wealthy class of pilgrims would not stop so long. I have never chartered a steamer to leave thirty-five or thirty-seven days after the *Háj*. If I had known that the 10th August corresponded with thirty-five or thirty-six days after the *Háj* I would not have allowed the date to be put in. I would have corrected the date. I would not have made a charter-party to leave Jeddah 14th or 15th Muharrum."

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The agent, on the other hand, gave the following account, in which substantially he was corroborated by his clerk:—

“The plaintiff said that he could not go to Jedda that year, and that I should, as a kindness, give him the next year. I agreed to that. I asked plaintiff for what date he wanted it. He said for about 10th August. I agreed to this. I sent for my clerk and directed him to write out accordingly. The memorandum was written outside and sent in for my signature. I was not present. I did not tell the clerk that the steamer was to sail fifteen days after the *Haj*. The conversation with the plaintiff was to this effect that he did not require the ship before the *Haj*, but any time fifteen days after the *Haj*. He fixed the date 10th August himself. Nothing else occurred. I was under no misapprehension as to the date 10th August. We always transact business according to the English date. I know English, but not very well. Our books are kept in English. We make up our books to 31st December. When the memorandum was written, I knew nothing about the *Haj* beyond this that I knew that plaintiff wanted a steamer not earlier than fifteen days after the *Haj*. Pilgrims continue to return up to four months after the *Haj*.”

In cross-examination he added:—

“The plaintiff asked for the 10th of August. If he had asked for the 19th July I should have given it. We could have given him steamers at intervals of fifteen days. I read the memorandum before I signed it. I saw the expression ‘fifteen days after the *Haj*.’ I did not notice whether the 10th August was equivalent to fifteen days after the *Haj*. If I had found that 10th August did not correspond with fifteen days after *Haj*, and if plaintiff had asked that it should be changed, I would have done it. I go by English dates. I have nothing to do with ‘fifteen days after the *Haj*.’”

The following issues, amongst others, were raised:—

- (1) Whether the date 10th August, 1892, was inserted by mistake in the memorandum of charter?
- (2) Whether such date was not inserted by the direction of the first plaintiff?
- (3) Whether the said date is not the true date?
- (4) Whether (if there was a mistake) the result is not that there is no contract concluded between the parties?
- (5) Whether the plaintiffs are entitled to any and what relief in this suit?

Badrudin Tyabji and *Anderson* for the plaintiffs:—It is obvious that the *Haj* was all along understood on both hands to be the ruling date. It is inconceivable that the plaintiff should have named the 10th August. His account is far the more probable

one of the two. But, even if he did, it was clearly by mistake. Both meant to contract for the fifteenth day after the *Háj*—in fact, to write in 1892 into the charter-party instead of 1891—and whoever it was that added 10th August did so by mistake. The contract, therefore, should be rectified.

Latham (Advocate General), *Jardine* and *Russell* for the defendants:—We were never under any mistake. We contracted for the 10th August; whether it was or was not fifteen days after the *Háj* we did not know or care. The mistake, if there was one, was unilateral. The remedy in that case is rescission, not rectification—*Paget v. Marshall*⁽¹⁾. It would be most inequitable now to alter the contract. If the plaintiffs had asked earlier the defendants would have accommodated them, though not bound to do so. Now they have made their season's arrangements, and cannot give them a steamer for the date they ask.

FARRAN, J. (after stating the facts His Lordship continued):—First it is necessary to determine what the agreement actually is. Of this, I think, there can be no reasonable doubt. It is that the chartered vessel should sail from Jeddah on or about the 10th of August, 1892. From the words which follow it would seem, and the oral evidence shows, that the parties to the agreement were under the impression that the 10th of August, 1892, corresponded with the fifteenth day following the *Háj* which will take place in this year. It is, therefore, probable that, if the parties had known that the fifteenth day following the *Háj* would occur, as in fact it will occur, on the 19th July, 1892, they would have fixed the sailing of the steamer for that day, but they did not know it. The verbal arrangement, prior to the contract, was, I consider, upon the evidence, that the vessel should sail on the 10th of August, but that date was fixed upon for an erroneous reason. In such a case as that the Courts do not rectify the instrument, though in a proper case they may cancel it. Kerr on this point says: "Nor can there be a rectification, although both parties may have been under a mistake, if the mistake be in respect of matter materially inducing the agreement." Kerr on Fraud, 2nd Ed., 507. See

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Carpmeal v Powis⁽¹⁾. Courts of Equity do not rectify contracts. They may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument—*Mackenzie v. Coulson*⁽²⁾.

The first plaintiff in this case says that he contracted to charter the vessel for the fifteenth day after the *Háj*. I am inclined to think that he intended to charter the vessel for that date, but that what he really did was to charter it for the 10th of August, believing that date to correspond with the fifteenth day after the *Háj*, but I assume that he believed that he was contracting to charter for the fifteenth day after the *Háj*.

We must, then, consider what the defendants' agent was contracting for. Upon this there can be no doubt upon his evidence. He was contracting for the 10th of August. He knew, presumably, that the considerations which operated on the first plaintiff's mind were considerations connected with the pilgrims returning from the *Háj*, and that the date was fixed with reference to these considerations, but with these considerations he had nothing to do. He had steamers which would be returning at certain intervals, and he was willing to let the plaintiff have whichever of these he wished, but he desired to know what English date the plaintiff wanted his vessel for. When he learned this he had the contract made accordingly. It was clearly not his intention to contract for the fifteenth day after the *Háj*. If that had been his intention he would have instructed his clerk to draw up the contract for the fifteenth day after the *Háj*. I am clear that he did not do so, but that he instructed him to draw up the contract for the 10th August. To have done otherwise would have been to reverse the almost universal practice of the office. Even assuming, therefore, that the plaintiff believed that he was contracting for the fifteenth day after the *Háj*, I am of opinion that the instrument before me cannot be rectified, since the defendants' agent was not under that belief. The rectification which the plaintiffs really

(1) 10 Bear., 36.

(2) L. R., 8 Eq., 368.

should ask the Court to sanction, is not to insert in the contract the date 19th July, which was a date which never occurred to the parties at the time of contracting, but to transpose the words in the contract, and to make the day of sailing fifteen days after the *Hij*, placing the English date, 10th of August, in a parenthesis. That, in my opinion, was not the contract which both the parties actually orally made, though, as I have said, No. 1 plaintiff may possibly have supposed that such was the contract he was entering into.

I have little doubt that, if the defendants had been asked to vary the memorandum, in the manner desired by the plaintiffs, they would have done so if they had been asked before they had made their season's arrangements. But they made those arrangements in the view of their contract with the plaintiffs being what on its face it purported to be, and it would now be inequitable to compel them to break their other engagements, in order that the plaintiffs might avoid the consequences of their own error.

As, however, the defendants are willing that the contract should be cancelled, and as the plaintiffs desire this to be done, I shall direct the contract to be cancelled. Plaintiffs to pay the costs of the suit. The Rs. 2,500 received by the defendants to be repaid to the second plaintiff.

Attorney for the plaintiffs:—Mr. *Frámji Dorábji*.

Attorneys for the defendants:—Messrs. *Crawford, Burder Buckland and Bayley*.

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