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litigation, in the course of which the whole estate would probably be wasted.

I find on the issues—1, that the trust created by the fourth clause of the will of Manchárám in favour of the male issue of Jamnádás is void, but that the other trusts thereby declared were not void; 2, that the power of appointment given by the clause operated to confer ownership in the residue upon Jamnádás after the death of Jávervahoo upon his executing his will; 3, that the provisions contained in the will of Jamnadás are valid, and effectually dispose of the residue of the property left by Manchárám, subject to the life-interest of the plaintiff therein; 4, that Manchárám did not die intestate in respect of any of his property.

No finding on the other issues. Decree for the plaintiff, declaring that she is entitled to a life-interest in the property left by Manchárám Pitámbar, and that, subject to such life-interest, the said property after her death has been validly disposed of by the will of Jamnádás Pitámbar. Parties to bear their own costs.

Attorneys for the plaintiff:—Messrs. *Chitnis, Motilál and Málvi.*

Attorneys for the defendant:—Messrs. *Jefferson, Bhúishankar, Dinsha and Kángá.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1890.

September 8.

LÁLCHAND BALKISSAN, PLAINTIFF, *v.* JOHN L. KERSTEN, DEFENDANT.*

Contract of sale—Delivery—Contract time for delivery—Delivery on Sunday—Custom as to delivery.

Where the defendant, a European, was sued for damages for non-delivery of goods, and contended that he was not bound to deliver on Sunday,

Held, that delivery on Sunday was not unlawful, and that, in the absence of custom to the contrary, the defendant was bound to deliver the goods on that day if they had not already been delivered.

SUIT for Rs. 2,500 damages for non-delivery of goods.

* Suit No. 229 of 1890.

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The plaintiff sued as the assignee of a contract made by the defendant with Messrs. Hursámal Mádhaorám on the 6th April, 1889. By this contract the defendant agreed to sell to Messrs. Hursámal Mádhaorám one hundred tons rape-seed at Rs. 6-1 per cwt. "Delivery May June, 1889."

The plaintiff alleged that Messrs. Hursámal Mádhaorám demanded delivery on the 29th June, 1889, but the defendant failed to deliver. Messrs. Hursámal Mádhaorám accordingly by their attorneys' letter of the 4th July, 1889, demanded payment of Rs. 2,500 as damages, "being the difference between the contract price on the 30th June, 1889, but the defendant by his letter of the 5th July, 1889, repudiated his liability, on the ground that the said Hursámal Mádhaorám failed to comply with the terms of the contract."

On the 11th October, 1889, the said Messrs. Hursámal Mádhaorám assigned the said contract to the plaintiff.

The following paragraphs of the defendant's written statement set forth the defence raised in the suit :—

"4. On the 24th day of June, 1889, the defendant received from the plaintiff's assignor the letter, dated 22nd June, 1889, requiring the defendant to deliver one hundred tons of rape-seed before the due date of the contract, which the defendant submits he was not bound to do.

"5. The defendant was ready and willing to deliver the said one hundred tons within the contract time, and, having elected to deliver the same at the buyer's godown, requested the plaintiff's assignor to let the defendant know where the godown of the plaintiff's assignor was, in order to enable him to deliver the goods there.

"6. The plaintiff's assignor sent no reply to the said letter at all until half-past four o'clock in the afternoon of Saturday, June 29th, 1889, when the defendant received a letter requiring the defendant to deliver to Messrs. Sállegrám Khunnah and Company at their godown one hundred tons of rape-seed. The said letter was accompanied by an order purporting to be signed by Sállegrám Khunnah and Company addressed to Kessowji Hansráj, requesting him to receive the one hundred tons rape-seed and to pay the defendant only ninety per cent. of the purchase-money.

"7. The defendant says that there was no sufficient time to deliver the said one hundred tons as requested, the said letter being received at half-past four o'clock in the afternoon on the last day for delivery. The defendant further says that, according to the true construction of the contract, he was not bound to deliver at the godown of Messrs. Sállegrám Khunnah and Company at all, nor was

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he bound to deliver on payment of only ninety per cent. of the purchase-money as he was required to do."

Lang and *Vicáji* for plaintiff.

Latham (Advocate General) and *Anderson* for defendant.

The following authorities were referred to :—Indian Contract Act IX of 1872, secs. 48, 49; Benjamin on Sales, pp. 48, 686; *Borrowman* v. *Free* (1).

FARRAN, J :—This is a suit in which the plaintiff seeks to recover the sum of Rs. 2,500 from the defendant as damages for the non-delivery by the defendant of one hundred tons of rape-seed.

On the 6th April last the defendant contracted to sell to one Hursámal Mádhaorám one hundred tons of Delhi brown rape-seed at Rs. 6-1 per cwt., delivery in Bombay at the railway station or buyer's godown, packed in good new Calcutta bags. Refraction three per cent. Ninety per cent. on railway receipt. Delivery May June, 1889 (Ex. A). Under a contract in this form it is admitted that the vendors can tender delivery at any time during the months of May and June. The vendee cannot claim delivery until the end of the contract time.

On the 22nd June Hursámal wrote to the defendant, reminding him of the contract and calling for delivery before due date, (*i. e.*) before the expiration of the contract time. On the 26th June the defendant wrote, asking Hursámal the whereabouts of the latter's godown to which the defendant was to cart his goods. The defendant states that he did not, though he had made enquiries, know the position of Hursámal's godown. Hursámal answered this enquiry on the 29th June in the following terms :—"In reply to your memo. of the 26th instant I shall thank you to send the one hundred tons rape-seed to Messrs. Sállegrám Khunnah and Co.'s godown, as I have sold this rape-seed to them. Their *mukádam* is Mr. Kessowji Hansráj, who will take delivery from you." An order signed on behalf of Sállegrám to Kessowji Hansráj to take delivery of, and to pay ninety per cent. of the purchase-money for the one hundred tons of rape-seed, accompanied this letter. This letter was

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received by the defendant at his office at 4-30 P.M., on Saturday, the 29th June, when he wrote the following reply :—

"Dear Sir,—In reply to your letter of date I have to state that in the first place I object to deliver the rape-seed to Messrs. Sállegrám Khunnah and Company, as this firm is unknown to me in the seed and wheat business. Secondly, in terms of contract I will only deliver the stuff to you.

"It is quite ridiculous to send delivery order at 4-30 in the evening of Saturday, and it is the last day of delivery; the one hundred tons could not be delivered in half an hour."

The defendant's counsel stated that he had purchased rape-seed to meet the above contract, but for some reason or other fancying or hoping that Hursámal would not call on him to complete, he had re-sold it to some one else. At the end of June the defendant had no rape-seed in his godown or elsewhere to deliver to Hursámal. Accordingly he tells us that on receipt of the letter of 22nd June he told his broker, Champsi, to have the stuff on hand ready to be delivered on receipt of delivery order, which, I presume, means that he was to contract with a native or natives to deliver if called on to do so. European firms, it appears rarely, if ever, sell these goods ready.

Several defences have been raised, but they of necessity, upon the evidence given in the case and upon the law applicable to t, have been properly abandoned by counsel for the defendant. The defence left to be disposed of is that Hursámal named his godown so late that it was unreasonable to require the defendant to deliver in it during the period left of the contract time. In fact, that the non-delivery was owing to Hursámal's default The plaintiff is the assignee of Hursámal. It is argued on the other side that there was nothing to prevent the defendant sending a delivery order to Hursámal, and that, if he did not wish to deliver on Sunday, or late on Saturday, he ought to have done so, as is usual in the trade, before those days. There would seem to be weight in this argument, as it was the defendant's business to tender the stuff: see Contract Act IX of 1872, sec. 47 The defendant excuses his doing so on the ground that the correspondence above set out was going on, and that he did not so

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it, as he was waiting to learn the locality of Hursámal's godown. His not knowing where that godown was, possibly brings the case within the purview of section 49 of the Contract Act.

There was no physical difficulty in delivering the one hundred tons in the month of June after 4-30 P.M. on Saturday the 29th. The delivery could have begun on that evening and been completed on Sunday morning. If instead of writing to Hursámal the defendant had written to Champsi, his broker, and told the latter to have the stuff delivered, it would have, no doubt, been delivered.

But the defendant urges that he was not bound to deliver on Sunday, and that it was too late to deliver on Saturday; that Saturday was, in fact, the last day for delivery under the contract, Sunday being a *dies non* in this trade when a European is one of the contracting parties.

It appears that European godowns are, as a rule, open on Sundays, and that work goes on in them; but that on Sundays, as a general, but not invariable, rule, so far as the outer world is concerned, only "ready" goods to be prepared for shipment are received in such godowns, and that goods are only sent out of such godowns for the purpose of being shipped when a vessel is by permission being loaded. It is clear, upon the evidence, that the above practice is very usual, though, according to the evidence of Mr. W. Lang, not universal, in this the wheat and seed trade, and that, in consequence of such practice and the difficulty, no doubt, as regards payment, for European offices are all closed on Sundays, contract deliveries are rarely made or received by *mukádams* of European firms on Sunday; but the question as to the right of a contracting party to make or demand delivery on Sunday has never been raised. As a fact, deliveries are not made or received, and so the occasion for raising the question of right has not, so far as the evidence goes, arisen. No custom in the trade can, therefore, be established in the usual way in which such customs are proved; but, on the other hand, it may be that the custom in the trade is so clear that no one even thought of disputing it. In the latter way the defendant seeks to establish one in the present case. As the

alleged custom is, however to receive "ready" goods, and not "contract" goods, to deliver on board ship, and not into a godown, it seems somewhat vague and uncertain, if not unreasonable. The "Lord's Day Act" does not apparently apply to India; and certainly not to the defendant, who is a German; and so delivery on Sunday in this case is not unlawful. If the defendant had pressed delivery on Hursámal on the 30th June, I think, upon the evidence, that the latter having his godown open on that day, would have been bound to accept it. Is Hursámal not entitled to say to the defendant: "You have not taken steps to tender the goods to me before that day. Therefore deliver on that day. You enter into contracts on that day. Your godowns are open on that day. Why, then, should you not perform your contracts on that day?" Is it a sufficient answer to say that it is not the practice for a European firm to deliver on that day? According to the Cotton Trades' Association rules, delivery of cotton is not made or received on Sundays. When contracts are made subject to such rules, the rules, of course, are binding upon the parties. It does not, however, appear from the evidence whether the rule to this effect was made because the custom in that trade was clear, or because, it not being clear but disputed, the necessity for providing for it by rule arose. It would seem hard upon the defendant—a Christian—to tell him that he is bound to perform his contract with a Hindu on Sunday, but it is at least equally hard on the Hindu to tell him that he cannot call for delivery of his goods on the last day on which he has contracted for their delivery, though the defendant is carrying on business in his godown. The *onus*, no doubt, lies on the defendant to establish that a custom on this point exists and is in his favour.

I do not consider that it is necessary for me to decide in this case whether he has done so, for I hold that it has not been proved that delivery could not reasonably have been made on Sunday. Champsi, the broker who made arrangements for delivering the stuff, has not been called, and we do not know what arrangements he made. Godowns do not close before 7 P. M. usually, and not before 6 P. M. on Saturdays, and considerably later if there is pressure of work. If Champsi had arranged with

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two or three vendors to deliver the goods, there would have been no difficulty in completing delivery within godown hours, for the whole delivery could be made by a single firm in three or four hours. If Champsi had tried and failed to made delivery within godown hours, another question might have arisen; but, putting another reason forward for non-delivery, the defendant did not instruct Champsi to deliver the goods at all; and whether he (Champsi) could have done so without unreasonable difficulty depends upon conjecture. It was for the defendant to prove it. The defendant obtained the requisite information to enable him to deliver when in office and within godown hours. A letter putting his native agency into operation would have ensured the delivery within contract time, and the defendant has not shown that it would not have ensured the delivery on Saturday, as it certainly would on Sunday. I hold that the defendant has not established his technical defence, and that a decree must pass in favour of the plaintiff. Decree for plaintiff for Rs. 2,500 and costs.

Attorneys for the plaintiff:—Messrs. *Pestonji and Rustim.*
Attorneys for the defendant:—Messrs. *Wádia and Ghandy.*

CRIMINAL REFERENCE.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1890.
January 27.

QUEEN-EMPRESS *v.* NA'GAPPA'.*

Penal Code (Act XLV of 1860), *Sec.* 378—*Theft—Dishonest intention—Wrongful gain—Wrongful loss.*

A charge of theft will lie under section 378 of the Indian Penal Code (Act XLV of 1860) even where there is no intention to assume entire dominion over the property taken, or to retain it permanently.

When a person takes another man's property, believing, under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss within the meaning of the Indian Penal Code.

The accused was the brother of a farmer or contractor of a public ferry on the Tadri river. He seized a boat belonging to the complainant while conveying passengers across the creek which flows into the river at a point within three miles

* Criminal Reference, No. 165 of 1889.