the owner of goods in the hands of a millowner can have this done. When the numbers are attached to the goods in that way, the view their Lordships entertain is correctly expressed in the judgment of the High Court printed at p. 45 of the record :—

"The numbers put by the mills on the bales at the request of the original purchasers would convey no meaning to an outsider. To Ghya & Coy. they indicated the width of the pieces in each bale. When the bales passed out of their hands, they were merely reference numbers. It would have been just the same if the numbers had been 501 and 502. There was no evidence that it was recognised in the market that the last two digits in the number of a bale would indicate the width of each piece."

In their Lordships' view, the numbers, when so put on, indicate really nothing except the fact that the purchaser has purchased these particular goods. They do not give any warranty or indication of the quality or description.

Their Lordships will, therefore, humbly advise His Majesty that the appeal fails ; that the decree of the High Court should be affirmed and this appeal dismissed with costs.

Solicitors for appellants : Messrs. *Hallowes & Carter.*

Solicitors for respondents: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

K. McI. K.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1924. *March* 18.

M. B. MEHTA & Co. (ORIGINAL DEFENDANTS), APPELLANTS *v.* JOSEPH HEUREUX (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Sale of goods—c. i. f. contract—Passing of property—Intention of the parties—Consignee not bound to accept draft which includes sums not agreed upon—Suit cognizable by Small Cause Court instituted in High Court—Presidency Small Cause Courts Act (XV of 1882), sec. 22—Discretion of Appeal Court—Civil Procedure Code (Act V of 1908), sec. 35.

*O. C. J. Appeal No. 90 of 1923 ; Suit No. 1372 of 1923.

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The question whether the property in goods agreed to be sold under a c. i. f. contract has passed or not is in each case ultimately a question of fact as to the intention of the parties. Where it is obvious on the evidence or on inferences to be drawn from the situation or conduct of the parties that the consignor did not in fact intend the goods to be delivered until the relative draft was accepted, the property therein cannot be held to have passed on shipment.

Where, in the case of such a contract, the terms arranged are that the documents will not be delivered until acceptance of the relative draft, that draft should not include amounts which may be due to the consignor on other accounts.

Where a suit, cognizable by the Small Cause Court, is instituted in the High Court and the trying Judge passes a decree, but that decree is reversed in appeal, the appeal Court is competent to certify that the suit was one fit to be brought in the High Court and, exercising its discretion under section 35 of the Civil Procedure Code, may pass an order dismissing the suit without costs.

SUIT to recover the loss on resale of goods bargained and sold by the plaintiff to the defendants.

The plaintiffs (Joseph Heureux) were a London firm trading in soft steel plates. The defendants (M. B. Mehta & Co.) carried on business as commission agents and merchants in Bombay.

In February 1921, the plaintiffs opened negotiations with the defendants in Bombay, as a result of which certain terms were arranged on which business was to be done between the parties. The following were amongst the terms of business thus agreed upon :—

(1) Each party to defray the cost of their respective cables ;

(2) All prices quoted by the plaintiff to be C. I. F., C. I., Bombay ;

(3) The said prices to include five per cent. commission for the defendants and such commission to be credited to the defendants and remitted by the plaintiffs every six months in July and January.

(4) The relative documents to be covered by a draft at 60 days' sight, documents against payment.

On February 28, 1921, the defendants sent to the plaintiffs order No. 2063 for 35 tons of soft steel plates of certain dimensions and asked the plaintiffs for a quotation. The price quoted, however, was unacceptable and no immediate business was done.

On November 5, 1921, the plaintiffs received from the Eastern Telegraph Company an unsigned cable, dated at Bombay November 3, 1921, and, on instructing the Telegraph Company to ascertain from Bombay by cable the name of the sender, were subsequently informed that the cable came from the defendants. The plaintiffs paid the said Telegraph Company 15s. for their cable of inquiry and debited the amount to the defendants. The cable in question contained an inquiry as to prices generally. About the same time, however, a fresh offer came from the defendants relating to their previous order No. 2063 but the plaintiffs refused it and made a counter-offer to the defendants. Eventually the plaintiffs by their cable, dated November 14, 1921, accepted the order in the following terms :—

"35 tons mild steel plates as per order No. 2063. Price £9-10-0 per ton c. i. f. c. i. Bombay including war risk. Shipment January/February. Draft at 60 day's sight, documents against payment."

The goods were duly shipped from London by the steamer S. S. *Trifels* on February 28, 1922, copies of the invoices together with a detailed account being sent to the defendants. To the invoice price of £ 334-8-11 was added an independent item of 15s. (being the cost incurred by the plaintiffs in connection with the unsigned cable above-mentioned) thereby making a total of £ 335-3-11.

The plaintiffs drew a bill of exchange for £335-3-11 and sent the same together with the relative shipping documents to the Eastern Bank. The bank duly presented the bill to the defendants for their acceptance

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but the latter declined to accept on the ground that the bill was irregular and cabled to the plaintiffs on April 14, 1922, as follows :—

"Order No. 78 (35 mild steel plates). Shipment late. Draft irregular. Refused acceptance. We offer £ 50 less including commission. If you agree, ask Bank. Receiving accordingly. Without prejudice your rights and contentions if any."

The plaintiffs refused to listen to this, and insisted on payment in full. On April 20, 1922, the defendants wrote to the plaintiffs as follows :—

"You might possibly like to know the reason why we had to refuse your draft. It was an irregular draft. The amount you wanted us to pay was more than you were entitled to, adding to your draft some amounts which we were not bound to pay and which we never agreed to pay."

Finally as the defendants did not accept the draft, the plaintiffs sold the goods in Bombay on the defendants' account, the sale resulting in a short fall of £ 125-8-6.

The plaintiffs filed the suit in the High Court to recover the said amount from the defendants.

The trial Judge (Mulla J.), holding (*a*) that the plaintiffs were entitled to include the amount of 15s. in the draft and (*b*) that the property in goods had passed to the defendants immediately the goods were shipped, passed a decree for the plaintiffs for Rs. 1,500, an agreed figure.

The defendants appealed.

Campbell, for the appellants.

Ghaswalla, for the respondents.

MACLEOD, C. J.:—The plaintiffs in this case are a firm trading in London. In February 1921, they opened negotiations with the defendants' firm in Bombay for the purpose of entering into business relations with them. Certain terms were arranged on which business was to be done. One of the terms was that each party

was to defray the cost of their respective cables. All prices quoted by the plaintiffs were to be c. i. f. c. i. (c. i., that is, commission and interest) Bombay. The price was to include five per cent. commission for the defendants. The commission was to be credited to the defendants and was to be remitted to them by the plaintiffs every six months in July and January. The relative documents were to be covered by a draft at sixty days' sight, documents against payment.

On February 28, 1921, the defendants sent to the plaintiff order No. 2063 for thirty-five tons of soft steel plates of certain dimensions. The price quoted by the plaintiffs being unacceptable no immediate business resulted.

On November 3, 1921, the defendants cabled an offer relating to their order No. 2063, but the plaintiffs refused this offer and made a counter-offer to the defendants who in turn cabled in reply on November 12 making a modified offer, and eventually the plaintiffs by their cable of November 14, 1921, finally accepted the order in the following terms:—

"35 tons mild steel plates as per order No. 2063. Price £9-10-0 per ton c. i. f. c. i. Bombay including war risk. Shipment January/February. Draft at 60 days' sight, documents against payment."

The goods were shipped by the steamer S. S. *Trifels* sailing on February 28, 1922, and copies of the invoices together with a detailed account were sent by the plaintiffs to the defendants. The total invoice price was £334-8-11 and to this was added an independent item of 15s. making a final total of £335-3-11. This sum of 15s. was the cost incurred by the plaintiffs in ascertaining whether an unsigned telegram sent from Bombay on November 3, 1921, was as a matter of fact sent by the defendants.

There had been correspondence between the parties with regard to these 15s. as the defendants had

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refused to pay the whole amount. The plaintiffs drew a bill of exchange for £335-3-11 and sent that together with the relative shipping documents to the Eastern Bank. The bank duly presented the bill to the defendants for their acceptance, but they refused to accept the bill on the ground that the bill was irregular.

The defendants cabled to the plaintiffs on April 14, 1922:—

"Order No. 78 (35 tons mild steel plates). Shipment late. Draft irregular. Refused acceptance. We offer £50 less including commission. If you agree ask bank. Receiving accordingly. Without prejudice your rights contention if any."

The plaintiffs replied:—

"Referring to your telegram of 14th decline to act as suggested. If you do not pay in full I will sell elsewhere. Suing you loss on."

On April 19, 1922, the plaintiffs wrote to the defendants with regard to this exchange of cables:—

"I beg to enclose copies of telegrams exchanged and I note from your telegrams of 14th instant your flippant remarks with regard to your order No. 78. You state that the shipment is late, which statement I entirely repudiate, as these goods were booked for shipment January/February, viz., it was in my option to ship the goods any time between January 1 and February 28. Shipment was duly effected and bill of lading dated February 21 so that the contract time was only [duly ?] complied with.

Then with regard to your statement that the draft is irregular I do not follow same and as for my allowing you £50 same is too ridiculous to comment upon."

The defendants wrote to the plaintiffs on April 20, also with regard to the cables that passed:—

"You might possibly like to know the reason why we had to refuse your draft. It was an irregular draft. The amount that you wanted us to pay was more than you are entitled to, adding to your draft some amounts which we are not bound to pay and which we never agreed to pay. When we sent you our cable dated 14th instant the steamer was then expected in our harbour, and in order that no extra charges might run against the goods we at once notified to you that we are not legally bound to pay the draft which was

presented to us by the bank as it was an irregular draft and in order that there may not be any extra charges on the goods we requested you to instruct the bank to deliver us the documents against the said goods by accepting from us the market rate of the day namely the amount of the draft less £50."

It was owing to the unfortunate dispute with regard to these 15s. that the defendants refused to accept the draft, and eventually the plaintiffs sold the goods, and then filed this suit to claim the difference. The first issue at the trial was whether the plaintiffs were entitled to include the amount of 15s. in the draft. The learned Judge found that in the affirmative. But it is difficult to find in the judgment the reasons for that conclusion. The Judge said :—

"I think that the cable of inquiry which the plaintiffs instructed the Eastern Telegraph Company to ascertain from Bombay and the cable which the company received in reply must be treated as supplemental to the defendants' unsigned cable of November 3, 1921."

As a matter of fact the plaintiffs' inquiry was not with regard to the telegram relating to the thirty-five tons of steel plates, but with regard to another telegram which appears at p. 24 of Part III of the Printed Book, which was a telegram containing a general inquiry as to prices. The Judge, however, found that the real reason why the defendants refused to accept the draft was because they wanted an abatement of £50 which included the item of 15s. and their commission of £13-7-7. Consequently the Judge found that the defendants were wrong in refusing to accept the draft, and the plaintiffs were entitled to succeed. He held the property in the goods had passed to the defendants immediately the goods were shipped, and on that finding it was agreed between the parties that the compensation to be paid to the plaintiffs should be Rs. 1,500. If the property had passed, then the plaintiffs were entitled to sue for the price and not for compensation. But in our opinion on the facts of this case it is clear that the property did not pass when the

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goods were shipped, as the shipper had not parted with the control of the shipping documents. Those were sent to his bank in Bombay to be delivered only on acceptance of the draft.

This question was discussed in *Bank of Morvi, Ltd.* v. *Baerlein Brothers*[1]. At that time the decision of the Privy Council in *The Kronprinsessan Margareta, The Parana, etc.*[2] was not cited to us. But the passage in the judgment at p. 511 is directly in point :—

"The passing of property being a question of intention is ultimately a question of fact. There is no evidence of the intention of these parties beyond the inferences to be drawn from their situation and interests and from the mercantile operations which they conducted."

And at p. 514 :—

"Two things are quite plain. The consignors did not propose at any time to rely for payment on the mere personal credit of the consignees, and they carefully kept the bills of lading in their own agents' hands until the draft was met...But for the absence of a policy of insurance they strictly pursued the same course of dealing with the documents, as if there had been a c. f. and i. sale.

In these circumstances what can be inferred as to the passing of the general property ? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention? The appellants, Messrs. Lundgren & Rollven, have to show that it passed to them and passed, too, before the beginning of the voyage. If it did, then the consignors no longer owned the goods and had nothing to show against them except a draft of their own, which could not be enforced, and a bill of lading, which would not entitle them to delivery of the goods, though its retention might seriously inconvenience the new owners, the consignees."

Really, therefore, in each case it is a question of fact what was the intention of the parties as would appear from the evidence, and in this case it is obvious that the consignor did not intend to deliver over the goods until the draft was accepted. But with all respect we cannot agree with the decision of the learned Judge

(1) (1923) 48 Bom. 374.

(2) [1921] 1 A. C. 486.

that the plaintiffs were entitled to include the amount of 15s. in the draft. In the first place it was one of the terms of the business that the parties should pay the cost of their respective telegrams. Secondly, there was a dispute with regard to these 15s. so that the plaintiffs were wrong in including that amount in the draft of thirty-five tons steel plates, and lastly that charge, even if they were entitled to recover it from the defendants, did not relate to this particular consignment of goods, so that the draft was not in order and the defendants, therefore, were not bound to accept it.

is quite true that no case has been cited to us in which a draft in respect of goods which have been consigned on c. i. f. terms has been refused, because it was in excess of the sum due for costs, insurance and freight. But it seems obvious to me that when the terms arranged are that the document will not be delivered until acceptance of the relative draft, that draft should not include amounts which may be due to the consignor on other accounts. The defendants had already objected to pay these 15s. so that the plaintiffs were not entitled to add this amount to the amount properly due for the cost, insurance and freight for the goods ordered and then in effect compel the defendants to pay the disputed amount if they wanted to get possession of the shipping documents. We think, therefore, that the defendants were entitled to refuse to accept the draft as it did not comply with the terms of the contract. That being the case the plaintiffs cannot succeed on the ground that there had been a breach of the contract, and the proper order which should have been made in the Court below was to dismiss the plaintiffs' suit. At the same time it cannot be said that the defendants' conduct was justified by the facts of the case. The reasons given in their cable for refusing to accept the draft cannot be supported and they only

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succeed now because the amount of the draft was in excess of what it should have been. If the case had been before me, I should have dismissed the suit without costs.

Mr. Campbell has argued on the question of costs that as we have dismissed the plaintiffs' suit, the defendants must be entitled to their costs as between attorney and client under section 22 of the Presidency Small Cause Courts Act, and that we are not justified in dismissing the plaintiffs' suit without costs. The question is: what are our powers in appeal with regard to costs, when we set aside a decree which has been passed by the lower Court, before which the question whether section 22 of the Presidency Small Cause Courts Act applied would not be relevant owing to the decision being in favour of the plaintiff? In ordinary circumstances we should be justified in exercising our discretion with regard to the costs in the lower Court under section 35, Civil Procedure Code. But if it is contended that section 22 deprives the Court in certain circumstances of its discretion when the plaintiff's suit is dismissed, it is still open to the Court to certify that the case was one fit to be tried in the High Court, in which case the previous provisions of section 22 cease to be applicable. I think if Mr. Justice Mulla had taken the view which we have now taken of the plaintiff's case and dismissed the plaintiff's suit, he would have certified that the case was one fit to be tried in the High Court, and I think we are entitled, as we now dismiss the plaintiff's suit, to take that view. Otherwise our powers with regard to the question of costs would be fettered in a way which has not been contemplated by the Legislature. Therefore the suit is dismissed without costs in the lower Court. The appellants to get their costs of the appeal.

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SHAH, J.:—I agree.

Solicitors for appellants: Messrs. *Khandvalla & Chhotalal.*

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

Appeal allowed.

V. G. R.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Fawcett.

1924. *February* 29.

RUKMINI KOM VITHU MOTHER'S NAME SAGUNA MALWANKARIN (ORIGINAL DEFENDANT) APPELLANT *v.* RAYAJI DATTATRAYA PAI (ORIGINAL PLAINTIFF), RESPONDENT*.

Landlord and Tenant—Suit in ejectment—Alleged disclaimer—Elements of—Waiver of forfeiture—Finding in previous suit in Court of Small Causes—Question of res judicata*—Civil Procedure Code (Act V of 1908), section 11—Provincial Small Cause Courts Act (IX of 1887), section 33.*

In 1913, the plaintiff Pai filed a suit against the defendant for arrears of rent before the Subordinate Judge exercising the powers of the Small Cause Court, alleging that the defendant was an annual tenant. The defendant then pleaded as follows. "I have never paid rent to plaintiff Pai. Pai now claims that he is entitled to the rent and Ghurye claims likewise. I do not know who is rightfully entitled. I am ready to pay rent at annas five per year to either of them as the Court directs". A decree was passed against the defendant for payment of rent on the footing that the defendant was a tenant of plaintiff. On July 28, 1916, the plaintiff served the defendant with a notice to vacate. The defendant having failed to deliver possession as demanded, the plaintiff sued to eject the defendant, basing his claim on the grounds, viz., first, that there had been forfeiture of the tenancy by virtue of the defendant's denial of plaintiff's title as landlord in the suit of 1913 and secondly, that if the denial was not established, his notice of July 28, 1916, should be treated as a notice terminating annual tenancy as from July 1, 1917. The lower Court decreed the suit holding that the question of tenancy was *res judicata* because the Small Cause Court in suit of 1913 had passed a decree against the defendant on the footing that she was a tenant of plaintiff; that on evidence the defendant was not a permanent tenant of plaintiff; that the written statement filed by her in the suit of 1913 was a disclaimer of the landlord's title and that the plaintiff was justified in forfeiting the tenancy. On appeal by the defendant,

* Letters Patent Appeal No. 19 of 1923.