in the hands of the latter; assets of the deceased for which he must account, and which he is liable to make good to the estate (1).

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SRIMATI JAY-KALI DEBI v. SHIBNATH CHATTERJEE.

Attorneys for the plaintiff : *Messrs. Owen and Bonnerjee.*
Attorneys for Shibnath Chatterjee : *Messrs. Beeby and Rutter.*
Attorneys for Jadunath Chatterjee : *Messrs. Swinhoe Law, and Co.*
Attorneys for Madhusudan Banerjee : *Messrs Curruthers and Co.*

Before Mr. Justice Markby.

SHEIKH FAIZULLA *v.* RAMKAMAL MITTER.

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Nov. 17.

Principal and Agent—Liability of Banian—Custom.

There is a presumption in Calcutta that where a vendor of goods deals with a banian of an European firm, *quâ* banian, he can only look to the banian for the price.

Paliram and Bydonath v. *Paterson* (2), and *Grant, Smith, and Co.* v. *Jugobandu Shaw* (3) followed.

THIS was a suit to recover the sum of Rs. 1,894-8, being the balance of the price of certain goood which the plaintiff alleged had been sold and delivered by him to two of the defendants.

The plaintiff was a dealer in hides, carrying on business in Calcutta. The defendant, Ramkamal Mitter, carried on business in Calcutta, as a trader and banian, and the other defendants were the members of the firm of D. McMurphy and Co., also carrying on business in Calcutta, as merchants and agents.

The defendants, Messrs. McMurphy, in their written statement, denied that there was any privity of contract between them and the plaintiff. They alleged that at the time the alleged transaction took place, Ramkamal Mitter was their banian ; and that he bought the goods, as such ; that they never authorized Ramkamal Mitter to pledge their credit for any goods

(1).—From this decision the defendant. Jadunath Chatterjee, appealed on two grounds :

1st.—That the judgment was erroneous, inasmuch as neither fraud nor breach of trust was proved against him, but the Court in effect found that he had acted *bonâ fide*.

2nd.—That the Court was in error in holding that the appellant had assisted the said Shibnath Chatterjee to effect a breach of trust which could not have been effected without a transfer of the nature described in the evidence, and that without a transfer and a renewal of the Government Security in his own name, the said Shibnath Chatterjee could not have effected the breach of trust in question. Whereas the said Shibnath Chatterjee could, as executor, have obtained a renewal of the Government Security in his own name, or could, as executor, have made a good title to a purchaser.

On the 28th September 1866, the appeal was dismissed with costs, and the decree of the Court below affirmed.

(2) 2 Boulnois, 203.

(3) Bourke, Pt. VII., 17.

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or to buy any in their name; that they paid the price of the goods purchased by their banian to him, and that they dealt with him alone in respect thereof.

The evidence sufficiently appears in the judgment.

Mr. *Jackson* for the plaintiff.

Mr. *Woodroffe* for the defendants, Messrs. McMurphy & Co.

The defendant, Ramkamal Mitter, did not appear.

MARKBY, J.—On behalf of the members of the firm of McMurphy and Co., no question has been raised as to the value of the goods. The only question raised is whether or not they are liable for the price of them. These two defendants are European merchants, and part of their business consisted in shipping hides to England. The course of business seems to have been that the firm, when in want of hides for shipment, gave directions to Ramkamal Mitter, and he went and purchased goods subject to inspection and approval by the firm, both as regards quality and price; and Ramkamal Mitter was entitled to receive from the firm a certain fixed sum, beyond the price, as his profit on the transaction. As to this being the course of business, there is no dispute. After the hides had been inspected and approved of by one of the firm, they were sent to the screw-house, and then shipped to England. It cannot be denied, that under ordinary circumstances, according to law, McMurphy and Co. would be liable, as vendees of the hides, whether their name had been used in the transaction by Ramkamal Mitter or not, for a man who purchases goods by an agent is liable for the price of them. But the defence is that in this case it is not so, owing to a particular custom in Calcutta, that when the agent is the banian of a European firm, the banian, and the banian alone, is liable to the vendors. And it is contended, that in this case the dealing between Ramkamal Mitter and McMurphy and Co. put him in the position of a banian with respect to that firm, and that, therefore, he alone is liable. If, as is contended, the custom exists, there can be no doubt as to the soundness of the argument. Where a custom exists among a well-defined and recognized class of persons, all contracts made by them are to be construed exactly as if that custom had been agreed tion-

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express terms in making the contract. That the custom does exist, that when a sale is made to a person occupying the position of a banian, the banian alone is liable, seems to me to be decided by authority which I ought not now to oppose. [*Paliram and Bydonath* v. *Paterson* (1) and *Grant, Smith, and Co* v. *Jugobandu Shaw* (2).] I consider I am bound in this case to start with the proposition that where a man deals with a banian, *quâ* banian, the principal does not incur any liability whatever. That this was so, under ordinary circumstances, was indeed admitted by the plaintiff's counsel, but it was denied that Ramkamal Mitter was a banian. I think, however, that he was. The plaintiff and the broker, who made the bargain, both call him a banian ; therefore on their evidence alone, if nothing further had transpired, I should have been bound to hold that being called a banian, he must be considered as such; and that, on the authority of the cases to which I have referred, the custom applied. The custom, among the class of persons who observe it, would not have been recognized by the Court as one of which, it would take judicial notice, unless that class of persons had been, considered as certain and well-defined ; and, therefore, when a man is called a banian, I am *primâ facie* bound to consider that he is in the ordinary position of persons so called. Mr. Woodroffe was, however, willing to show the exact relation between the parties, and wished to put in the document creating that relation. This was objected to by the plaintiff on the ground that the private arrangement between the defendants and their servant could not affect him. Mr. Woodroffe then went on to show in what way the defendants had dealt with Ramkamal Mitter, the plaintiff still objecting. I thought the evidence admissible, though I thought that the defendants were not bound to give it. There is nothing, however, in it which removes Ramkamal Mitter from the position of an ordinary banian. The evidence leaves him in that position. There is no doubt a great deal in the position of a banian which distinguishes him from a vendor, and it would be too much to say the firm and the baniuan were in the relation of vendor and vendee. I can look on the relation of the firm and the banian as no other than one of the forms of the relation of principal and agent, but the very gist of the argument is, that this is an exceptional case, and that the ordinary principles of law arising out of that relation do not apply.

(1) 2 Boulnois, 203. (2) Bourke, Pt. VII., 17.

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On the whole, assuming, as I consider I am bound to do, that the custom exists, I think the first question must be answered in favor of McMurphy and Co., that Ramkamal Mitter was a banian, and that the liability is his alone.

The other part of the case is still, however, left perfectly open. Although the plaintiff may not be able to say that Ramkamal Mitter was not a banian, and that he did not deal with him as a banian, yet he can say that he refused to make a bargain on any such terms as that the contract should be considered as made with Ramkamal Mitter, as a banian, and he may show that he insisted on having both the security of the European firm and of Ramkamal Mitter. There is nothing to prevent him from doing this. It is a question of fact what the conditions and terms were. What the plaintiff may have intended to do, and what security he may have intended to obtain, I am not called on to decide. There being this peculiar presumption in Calcutta, that the seller can look to the banian for his price, and to the banian alone, and it being shown that the plaintiff was dealing with a banian, it lies on him to show that the employers of the banian have consented to take on them a liability which, in ordinary cases, would not arise. The nature of a banian's business precludes him from having any general authority to pledge the credit of his principal. The plaintiff must then show either that the defendants consented to pledge their credit, or that they consented to take the liability on them. This the plaintiff has, in my opinion, failed to do. The fact that one of the defendants inspected the goods, is quite consistent with the employment of Ramkamal Mitter as a banian, and all their subsequent conduct, as stated by themselves, is consistent with the same position. An attempt has indeed been made by the plaintiff to prove that the defendants admitted their liability, and upon this point there is a considerable conflict of evidence. I am not satisfied of this; on the contrary I believe the denial of the two defendants that they did more than refer the plaintiff, and those who applied on his behalf, to the banian for payment; and that they made some endeavour to induce the banian to fulfil his duty as an honest man, and pay over to the plaintiff the money which he received from themselves.

Attorney for the plaintiff: *Mr. Gillanders.*

Attorney for the defendants: *Mr. G. J. Oliver.*