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an award is tantamount to a decree, because, on that order being passed, "the award may be enforced as an award made under the provisions of this chapter," *i.e.*, "as other decrees of the Court" (Sec. 325).

Taking the order, then, to have the force of a decree it is appealable, under Sec. 23 of Act XXIII. of 1861, and this view seems to be in consonance with that expressed in the case of *Wolee Alum* v. *Bibee Misrun* (*b*).

We see, therefore, no grounds for holding that the Judge "exercised a jurisdiction not vested in him by law;" and as it has not been shown to our satisfaction that he misconstrued the submission-paper, and we have nothing to do with his appreciation of the evidence before him, we dismiss this application and saddle Lakshman Shiváji with the costs.

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Special Appeal No. 22 *of* 1870.

Jan. 30.

ARLAPÁ NÁYAK .....*Appellant.*

NARSI KESHAVJI AND CO. .....*Respondents.*

Contract—Variation in Time for Delivery—Custom.

Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of Kártik, but the agent entered into a contract for the delivery thereof by the middle of that month:

It was *held* that the agent exceeded his authority in such a manner as to exempt the principal from liability upon the contract.

Though the objection assigned by a principal for repudiating a contract at the time of such repudiation be unfounded, he is not precluded from subsequently availing himself of other valid objections.

A custom which allows a broker to deviate from his instructions is unreasonable, and the courts of law will not enforce it.

THIS was a special appeal from the decision of A. L. Spens, Judge of the District of North Cánará, in Appeal No. 110 of 1868, reversing the decree of the Principal Sadr Amin of Honore.

The special appeal was argued, on the 30th of November 1870, before GIBBS and MELVILL, JJ.

(*b*) 12 Calc. W. R., Civ. R. 59.

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The Honorable A. R. Scoble (Acting Advocate General) (with him *Dhirajlal Mathuradas*, Government Pleader) appeared for the appellant.

Anstey (with him *Shantaram Narayan*) appeared for the respondents.

The facts fully appear from the following judgment:—

MELVILL, J:—In this case the appellant authorised a broker, Krishnáppá, to contract on his behalf for the delivery of fifty *kandis* of cotton on certain terms.

Two of the conditions contained in the letter of instructions were that the cotton should be delivered by the end of the month of Kártik, and that half the purchase-money should be paid at once. Krishnáppá was further informed that the appellant would hold that the contract void unless he should receive intimation of its completion within eight days from the date of the appellant's letter.

Thereupon Krishnáppá entered into a contract with the respondents for the delivery of fifty *kandis* of cotton, not by the end of Kártik, but by the 15th of that month. The price fixed was Rs. 220 per *kandi*, or altogether Rs. 11,000. Instead of taking half this sum, or Rs. 5,500, from the respondents, Krishnáppá accepted a *hundi* for Rs 5,000 payable fifteen days after date. This he sent to the appellant, who wrote and repudiated the contract, not on the ground of any deviation from his instructions, but because, as he alleged, Krishnáppá's letter had not reached him within eight days. The appellant retained the *hundi* for a time, offering Krishnáppá the option either of having the *hundi* returned to him, or of receiving cotton to the value of Rs. 5,000

The Judge has found that Krishnáppá's letter did reach the appellant within eight days, and, therefore, that the appellant's avowed reason for repudiating the contract was unfounded. We do not, however, think that the appellant's omission to specify immediately all his objections to the contract prevents him from relying on those objections now

His silence cannot be construed into a ratification of anything that had been done, for he distnctly repudiated the contract *in toto*. His retention of the *hundi* was not a ratification for the appellant distinctly informed Krishnáppá that he retained it, not as part consideration for the contract which had been entered into, but as consideration for a new contract into which he was willing to enter. Nor are we able to find, in the examination of the appellent's Pleader, any sufficient grounds for the Judge's observation that the Pleader had in his examination (exhibit No. 21) altogether waived the objections which the appellant had raised in his answer.

Being, then, of opinion that if the act of Krishnáppá was unauthorised, there has been no such subsequent ratification by the appellant as would render the contract binding upon him, we have only to consider whether Krishnáppá exceeded the scope of his authority in such a manner as to exempt his principal, the appellant, from liability. The rule of law is very clearly laid down by Story in his work on Agency, Sec. 165 :—"It may be laid down as a general rule that, in order to bind the principal (supposing the instrument to be in other respects properly executed), the act done must be within the scope of the authority committed to the agent. In other words, the authority or commission must be punctiliously and properly pursued, and its limitations and exetent duly observed, although a circumstantial variace in its execution will not defeat it. If the act varies substantially (and not merely in form) from the authority or commission in its nature, or extent, or degree, it is void as to the principal, and does not bind him:" Now we find it impossible to say that in fixing the middle of Kártik, instead of the end of Kártik, for the delivery of the cotton, the agent in this case did not exceed his authority to a very material degree. The appellant's letter of instructions contains the following words :—"I will deliver the property at Kumptá by the end of the month Kártik. * * * It cannot be supplied in the month of Ashvin, for should the rain fall continually the time will be lost." There was, therefore, a good reason ofr fixing the end of Kártik, or middle of November, as the

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limit of time for delivery, and in the event of a late rainy season the appellant might have been seriously prejudiced if he had been obliged to make delivery by the end of October. We must hold that the contract varied substantially from the authority, and the respondent was perfectly aware that it did so, for the evidence shows that Krishnáppá's letter of instructions was shown to and deposited with the respondent.

The Judge alludes to the commercial custom among buyers and sellers of cotton at Kumptá, and on referring to the evidence for an explanation of this allusion we find that witnesses have been called to prove that, by the custom of Kumptá, a broker acting for a distant principal is allowed to deviate from his instructions if the state of the market appear to render it desirable. Witness No. 63 says that a broker, under such circumstances, may use his own direction, unless the principal expressly tells him that he will not be bound by any contract which is not in accordance with his instructions; and that even in that case the principal is bound by the contract, though he may recover damages from the agent.

Even if such evidence were sufficient to establish the existence of a custom, it would be impossible to hold such a custom to be reasonable custom, since it would deprive a principal of all security, and leave him at the mercy of his agent. In a recent case, *Ireland* v. *Livingston* (a), to which our attention has been directed by the learned Advocate General, an agent in the Mauritius was authorised by a principal in England to ship to England a cargo of five hundred tones of sugar. Instead of shipping a single cargo of five hundred tons, the agent shipped four hundred tons, in different vessels, and was about to complete the order when the contract was repudiated by the principal. The agent justified himself on the ground of the custom or course of business as the Mauritius; but, although the court was of opinion that the agent had acted *bona fide*, and that the defendant, the principal, "was taking advantage of what was an honest act for the purpose of relieving himself from

(a) L. Rep. 5 Q. B. 516.

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the consequences of a falling market, it was held that the defendant's letter was for a single cargo of five hundred tons in a single ship; and that, the order being unambiguous, the custom or course of business at the Mauritius could not affect the construction to be put upon it; and that the plaintiff's purchase and shipment of four hundred tons were not in compliance with that order. The judgment of the Court of Queen's Bench was, therefore, reversed, and judgment entered for the plaintiff.

In the present case we must reverse the judgment of the District Judge, and disallow the claim against the appellant, with costs on the respondent throughout.

Decree reversed.

Feb. 6.

Special Appeal No. 538 *of* 1870.

KHANDU valad KERU *et al.* .....*Appellants.*

TATIÁ valad VITHOBÁ .....*Respondent.*

Small Cause Court—Question of Title—Special Appeal.

A suit to recover the price of the skin and flash of an ox, brought by a Máhár who asserted an hereditary right to carry away dead animals of the village to which he belonged, and take their skins, is a suit for damages, and cognisable by a Court of Small Causes.

Although a question of title be incidentally gone into in such a suit, no special appeal lies, under Sec. 21 of Act XXIII. of 1861.

A decree passed in a suit of this nature is not a bar to a suit for a general declaration of title.

THIS was a special appeal from the decision of A. Bosanquet, Judge of the District of Ahmednagar, in Appeal Suit No. 333 of 1869, confirming the decree of the Subordinate Judge of Karád.

The plaintiffs brought this action in the Court of the Subordinate Judge of Karád to recover Rs. 6, being the price of the skin and flash of an ox belonging to the defendant, Tátiá, which died on the 28th of January 1869. The plaintiffs alleged that they, being the hereditary Máhárs of the village of Koregám, were entitled to carry away dead animals