ORIGINAL CIVIL.

Before Mr. Justice Sale.

CLIVE JUTE MILLS Co., LD., *v.* EBRAHIM ARAB.* 1896 *Nov.* 25.

Contract—Appropriation by vendor—Passing of property—Power of resale—Contract Act (IX of 1872), section 107 and sections 77, 78, 79, 82 and 83—Measure of Damages—Changing shape of claim—Evidence.

The plaintiff under several contracts with the defendant produced by manufacture goods answering to the description of the contracts and appropriated them to the several contracts. On notice of the production of the goods being given to the defendant he directed the goods so appropriated to be marked and despatched for shipment according to certain instructions. The plaintiffs carried out these instructions, but the goods could not be shipped, as the vessels in which they were to be shipped were not available at their usual place.

Held: the ownership in the goods was transferred to the defendant and the plaintiffs became entitled, under section 107 of the Contract Act, after due notice to resell them on the defendant's refusal to take delivery, and to recover as damages the difference between the contract price of the goods and the price at which they were resold.

Semble—The proper course to be adopted, when it is sought to shape a claim for damages differently from what appears in the plaint, is to amend the plaint and add a claim for damages on the basis of that amendment. Then at the trial evidence may be given in support of the amended statement. But that course ought not to be allowed to be adopted after the plaintiffs have once closed their case and the defendants have been called on to meet the claim as originally framed in the plaint.

Yule & Co. v. *Mahomed Hossain* (1) followed.

THE plaintiffs produced by manufacture certain jute goods, and on giving notice of their production to the defendant received instructions for marking and shipping them. The goods were marked as required by the defendant, and were brought down in boats to the place where the vessels named by the defendant were ordinarily moored, but the shipment was not effected because the vessels were not there to receive the goods. The defendant thereupon cancelled the contract and declined to take delivery of the goods. The plaintiffs, after notice to the defendant,

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resold the goods and brought this suit, claiming by way of damages the difference in the prices of the goods calculated at the contract rates and at the rates at which they were resold. In the course of the opening of the defendant's case it was suggested by the Court that a question might arise as to the right of the plaintiffs to resell the goods and as to whether the plaintiffs ought not to have claimed as damages an amount represented by the difference between the contract price and the price calculated at the market rate at the date of breach. Thereupon, while the hearing of the defendants' evidence was proceeding, an application was made by the Counsel for the plaintiffs to be allowed to call evidence to show what the market rate was at the date of breach. This application was refused.

Mr. *Garth* and Mr. *Caspersz* for the plaintiffs.

Mr. *Dunne* and Mr. *Knight* for the defendant.

SALE, J. (after stating the facts as above, continued).—The next question is as to the damages recoverable by the plaintiff company. It seems that on the defendant cancelling his contracts and declining to take delivery of the goods, which in accordance with his directions had been marked and loaded in boats and despatched from the mill, the plaintiffs after notice to the defendant proceeded to resell the goods, and they claim by way of damages the difference in the prices of the goods calculated at the contract rates and at the rates at which they were resold.

The question is whether the plaintiffs have adopted the true measure of damages, or whether, on the other hand, the plaintiffs ought not to have claimed an amount represented by the difference between the contract prices of the goods and the prices calculated at the market rates at the date of breach.

It is fair to say that this question is not one which is raised in the written statement of the defendant, and indeed the question as to the right of the plaintiffs to resell the goods did not arise until it was suggested by myself in the course of the opening of the defendant's case. Subsequently, while the hearing of the defendant's evidence was proceeding, an application was made by Mr. Caspersz on behalf of the plaintiffs to be allowed to call evidence to show what the market rates for the goods were at the date of breach, that is to say, at the end of February. It seemed to me,

having regard to the observations of the Appeal Court in the case of *Yule & Co.* v. *Mahomed Hossain* (1) that it would not be proper to allow the plaintiffs at that stage to call evidence for the purpose of proving the market rate. The view of the Appeal Court as to the proper course to be adopted when it is sought to shape a claim for damages differently from what appears in the plaint, is thus expressed :—

"The proper course in this case would have been to amend the plaint by adding an averment that the market price at the time of the breach was less than the contract price and by adding a claim for damages on that basis. Then at the trial evidence might have been given of what the market price was at the time when the goods were refused, and the judgment should have been for the difference, if any was shown to have existed."

Accordingly, before the plaintiffs can be permitted to give the evidence which they now desire to do, it would be necessary in the first place to amend the plaint and to re-start the case on a new basis. I ought not, I think, to allow that course to be adopted after the plaintiffs have once closed their case and the defendant has been called on to meet the claim as framed in the plaint and supported by the evidence adduced at the hearing.

However, this matter is not of much consequence in this case, because the conclusion I have arrived at is that the plaintiffs were entitled to resell the goods which had been marked and despatched from the mill at the defendant's request. The right of resale is given by section 107 of the Contract Act. That section runs as follows :—

"Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may after giving notice to the buyer of his intention to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such resale."

The words of the section seem to imply that the right of resale only arises when the property in the goods has passed to the purchaser.

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It is obvious if the property in the goods is in the seller no such power as that contemplated by the section would be required by him to sell the goods.

This view of the section was taken by the Appeal Court in the case of *Yule & Co.* v. *Mahomed Hossain* (1), to which I have just referred. That case was one where the plaintiff purported to resell certain goods which the defendant had declined to accept, and then claimed the difference between the price at the contract rate and the price at which the goods were resold. The learned Judges held that the plaintiffs had no right to resell, as nothing had been done to pass the property in the goods from the seller to the purchaser. The observations of the learned Judges to which I refer are these :—

"The contract was for the sale of 15 bales of grey shirtings, and would have been satisfied by the delivery of any 15 bales which answered the description in the contract. It is found by the Judge that the 15 bales which were tendered by the plaintiffs did answer the description, but as they were at once refused by the defendants and were never taken by them into their possession the property in the goods never passed to the purchasers, but remained in the vendors in the same way that it was vested in them before the tender. The case is the simple one of a breach of a contract to accept and pay for goods sold by description at an agreed price in which the measure of the damage is the difference between the contract price and the market price at the time of the breach. As the property in the goods remained in the vendors that which took place at the sale had no effect whatever, as the plaintiffs were merely offering their own goods for sale, and when they were knocked down to their bid they only bought in their own goods. To such a case as this neither section 107 of the Contract Act, nor the proviso for resale in the contract itself, can have any application, as no such power is required to enable a man to sell his own goods. Such powers are required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money, and it is to that class of cases that both the proviso and the section apply."

The question which next arises for determination is whether

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under the facts as I have stated them it can be said that the property in any portion of the goods had passed from the plaintiffs who were the sellers to the defendant who was the purchaser.

The sections of the Contract Act which bear on the question are these: Section 77 defines what a sale is—"Sale" is the exchange of property for a price. It involves "the transfer of the ownership of the thing sold from the seller to the buyer" The next section 78 refers to ascertained goods, and shows that postponement of delivery does not necessarily prevent the property in the goods from passing to the purchaser.

Section 78 says:—

"Sale is effected by offer and acceptance of ascertained goods for a price. Or of a price for ascertained goods, together with payment of the price or delivery of the goods; or with tender, part payment, earnest or part deliveries or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed. Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid, or when the whole or part of the goods is delivered. If the parties agree, expressly or by implication, that the payment or delivery, or both shall be postponed, the property passes as soon as the proposal for sale is accepted."

Section 79 refers to the articles not ascertained at the date of the contract and provides as follows: "Where there is a contract for the sale of a thing which has yet to be ascertained, made, or finished, the ownership of the thing is not transferred to the buyer, until it is ascertained, made, or finished."

Sections 82 and 83 are important. Section 82 provides:—

"Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained."

Section 83 shews under what circumstances the goods may be said to become ascertained:—

"Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for

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the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

Can it be said on the facts of this case that any portion of these goods became ascertained goods, that is to say, was any portion of the goods appropriated to the contracts with the assent of the purchaser; because, if that be so, it follows that the sale as to that portion was complete, and, if complete, it involves the transfer of the ownership in the thing sold from the seller to the buyer.

Here what we have is that the goods answering to the description of the contracts have been produced by manufacture by the plaintiffs, and have been appropriated by them to the several contracts; that on notice of the production of the goods being given to the defendant the defendant directed the goods so appropriated by the plaintiffs to the contracts to be marked and to be despatched for shipment according to certain instructions. It is said that the defendant never inspected the goods, and that it might be that they did not answer to the description contracted for.

But the right to inspection may be waived by a purchaser, and if without inspection he either takes possession of the goods, or exercises proprietary rights over them, it seems to me he thereby gives his implied assent to the appropriation effected by the seller.

Now, here the plaintiffs were directed to mark the goods appropriated by them to the contracts in a particular way, and to despatch them from the mill in accordance with certain shipping instructions. The act of despatching the goods from the mill was, it appears to me, the act of the defendant through his agents, the plaintiffs, and this act of the defendant constituted an implied assent to the appropriation by the plaintiffs which then became no longer revocable. So far therefore as the goods actually despatched from the mill are concerned the ownership was transferred to the defendant, and the plaintiffs became entitled under section 107 after due notce to resell them on the defendant's refusal to take delivery.

It follows that the plaintiffs are entitled to recover as damages,

the difference between the contract price of the goods despatched from the mill and the price at which they were resold; the plaintiffs are also entitled to demurrage claimed and proved in respect of those goods.

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Attorneys for the plaintiffs: Messrs. *Morgan & Co.*

Attorneys for the defendant: Messrs. *Watkins & Co.*

S. C. B.

Before Mr. Justice Ameer Ali.

HARENDRA LALL ROY *v.* SARVAMANGALA DABEE AND OTHERS.* 1896 *January* 17.

Transfer of Civil Case—Letters Patent, High Court, 1865, clause 13—Grounds for Transfer—Practice.

In a suit for immoveable property instituted in the Dinagepur Court, the defendant applied for its transfer to the High Court under clause 13 of the Letters Patent, the grounds upon which the transfer was asked for being, that questions of difficulty arose in the suit; that the defendants' witnesses lived in Calcutta; that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expense; that an agreement upon which the suit was brought was executed in Calcutta; that the plaintiff resided and carried on business in Calcutta; and that all the persons who knew of the transactions in suit were residents of Calcutta or its neighbourhood. *Held*, under the circumstances, that the case was a proper one to be transferred to the High Court.

THE facts of this case are fully stated in the judgment.

The *Advocate-General* (Sir *Charles Paul*) who appeared with Mr. *O'Kinealy* to show cause against the rule, cited the following cases: *Mokham Singh* v. *Rup Singh* (1), *Khatija Bibi* v. *Taruk Chunder Dutt* (2), *Ojooderam Khan* v. *Nobinmoney Dossee* (3), *Doucett* v. *Wise* (4), and *Courjon* v. *Courjon* (5).

Mr. *Garth* in support of the rule cited the following cases: *Jotindro Nath Mitter* v. *Raj Kristo Mitter* (6), *In the matter of Kapil Nauth Sahai Deo* v. *Government* (7), *Ram Coomar*

* Rule calling upon the plaintiff in suit No. 957 of 1895 in the Court of the Subordinate Judge of Dinagepur to show cause why the said suit should not be removed to the High Court.

(1) I. L. R., 15 All., 352; L. R., 20 I. A., 127. (2) I. L. R., 9 Calc., 980
(3) 1 Ind. Jur. N. S., 396. (4) 1 Ind. Jur. N. S., 94, 227.
(5) 9 B. L. R., Ap. 10. (6) I. L. R., 16 Calc., 771.
(7) 10 B. L. R., 168.