

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Page v.
Covasjee Eduljee from Ceylon; delivered on the
21st February, 1866.*

Present :

LORD CHELMSFORD.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal from a Judgment of the Supreme Court of Ceylon reversing a Judgment of the District Court of Colombo in favour of the Appellant (the Plaintiff in the suit), and ordering Judgment to be entered for the Defendant (the Respondent), with costs.

The action was brought in the District Court to recover the balance of a sum of £1020, the amount at which a stranded ship called 'Nova Scotian' was sold by the Plaintiff, the master, and purchased by the Defendant under the following circumstances.

The 'Nova Scotian' had arrived at Colombo in the month of December 1862, and was lying there at anchor with a cargo of rice on board, when on the 18th of that month she was driven from her anchorage and stranded on the beach near the harbour.

Before her stranding, the 'Nova Scotian' appears to have been worth £9000, and she was under insurance for £7000, but the Plaintiff thought that her back had been broken by the stranding, and in his opinion it would have cost from £1500 to £2000 to get her afloat again.

Under these circumstances, the Plaintiff caused two surveys to be held on the 'Nova Scotian,' and acting upon the judgment of the Surveyors, and under their advice he advertised her with her

tackle and apparel for sale by auction on the 2nd and 3rd of January, 1863.

The sale took place on the days named. The property sold was arranged in 68 lots, the vessel being the last lot in the catalogue, and was offered for sale separately from her sails, stores, spars, hawsers, and rigging, which were included in prior lots.

The catalogue of sale was headed "Catalogue and Particulars of the Sale of the Ship 'Nova Scotian,' of Liverpool, 999 tons, built 1860, as she now lies stranded opposite the Racket Court, condemned on survey to be sold on account and for the benefit of the concerned, with all her sails, stores, etc."

The Conditions of Sale were printed at the foot of the Catalogue, and were read out in the room by the Auctioneer before the sale commenced. By one of these conditions a deposit of 25 per cent. was to be made on each lot, by another, all goods were to be at the risk of the purchaser from the time of sale, and by a third, all Customs duty was to be paid by purchasers. The Defendant's son-in-law attended the sale, and by his authority bought several of the lots, consisting of the tackle, sails, spars, and other articles belonging to the vessel, and the vessel herself was afterwards knocked down to him at the sum of £1020.

No memorandum was signed in the auction room either by the Auctioneer or by the Defendant's agent; but after the sale (whether on the same or a subsequent day does not appear) the Defendant's son-in-law, on his part, and the Auctioneer on behalf of the Plaintiff, signed a memorandum to the following effect:—"That Cowasjee Eduljee declared the highest bidder for and purchaser of the ship 'Nova Scotian' hereinafore described, at the sum of £1020 sterling, at which sum he the said Cowasjee Eduljee doth agree to become the purchaser thereof accordingly, and also agree on his part to perform the Conditions of Sale, and in consideration thereof the Vendors do agree to sell and convey the said vessel unto the said Cowasjee Eduljee, his heirs and assigns, or as he shall direct, according to the before mentioned conditions."

The conditions referred to in this memorandum, which were on the other side of the paper, varied

from the conditions read out in the auction room in these particulars. Instead of a deposit of 25 per cent. the purchaser was to pay only 10 per cent. There was no condition that the goods were to be at the risk of the purchaser from the time of sale. The purchaser was to pay Auctioneer's Commission as well as Customs duty, and this important condition was added:—"Should the purchaser neglect or fail to comply with these Conditions, his deposit money shall be forfeited, and the sale may be enforced, or the vessel may be resold at the option of the Vendors; and in case of a resale, the increase (if any) of the purchase money shall be retained by the Vendors, and the deficiency (if any) and all costs and expenses shall be made good by the defaulter at the present sale, and be recoverable as liquidated damages."

There is conflicting evidence as to whether these conditions were read out when the memorandum was signed. The Defendant's son-in-law, who signed for him, stated in his evidence that he "signed the memorandum while it was lying on the table, and did not know what was underneath." That "the only conditions which he knew anything about were those attached to the Catalogue."

The Defendant undoubtedly thought the sale was to be completed by his signing a memorandum upon the conditions contained in the Catalogue as appears from the fact of his having paid £250 immediately before the memorandum was signed, being a deposit of 25 per cent. upon the purchase money, in accordance with those conditions. It was also proved that when the £250 was paid a receipt was asked for, and the Auctioneer replied that it was unnecessary, as the memorandum to be signed would be enough, a representation which would materially strengthen the belief of the Defendant that the conditions contained in the Catalogue were those to which his purchase was subject.

The Defendant having received authority from the Auctioneer, went himself to take possession of the vessel, and directed two anchors to be put out, to prevent her drifting further on the shore. On the 8th of January he received a notice from the Board of Health to discharge the cargo of rice, which had become heated and was occasioning a nuisance.

This not having been done, the Board proceeded to destroy the vessel by firing into her.

A Bill of Sale was prepared by the legal agent of the Defendant, but before it was tendered for the Plaintiff's signature, a demand was made upon him to deliver the certificate of registry to the Defendant. The Plaintiff refused to comply with this demand, on the ground that the vessel having become a wreck, it was his duty to give up the certificate to the Collector of the Customs for transmission to England under the provisions of the Merchant Shipping Act, 1854.

On the 12th of January, 1863, the Auctioneers, Messrs. Ledward and Co., wrote to the Defendant the following letter:—"We have the honour to annex on the other side the particulars of the balance of our claim on account of the sale to you of the ship 'Nova Scotian,' which we have been required to settle forthwith, and we must request you will enable us to do so this day. We hereby undertake, on account of Captain Page and ourselves, to complete the Bill of Sale when tendered."

To this letter the Defendant replied on the 13th of January, "In answer to your letter of yesterday's date, I beg to inform you that the Captain having failed to comply with his agreement, and having sold the vessel under circumstances which led to its subsequent destruction, and being now, as you are aware, unable to carry out the agreement, I decline to pay the balance of the purchase money, and shall look to you and the Captain for the repayment of my deposit, and the damages which have occurred to me by reason of your default."

On the receipt of this letter, Messrs. Ledward and Co. wrote to the Defendant on the 14th of January in these terms:—"As in your letter of yesterday you decline to pay us the balance of the purchase money for the hull of the 'Nova Scotian' and other articles purchased by you at public auction, we beg to give you notice that the same, after due publication, will be resold at your risk in terms of the conditions of sale."

The ship was accordingly again put up to sale and sold for £500, and the Plaintiff brought his action to recover the difference between the original price and the sum realized upon the resale, together with the Auctioneer's commission, the balance

claimed after giving credit for the Defendant's deposit of £250 being £383. 11s.

The libel of the Plaintiff (to which was annexed the memorandum signed on the part of the Defendant and the conditions therein referred to, which the Plaintiff prayed might be taken as part of the libel) alleged that the Defendant agreed to purchase the hull of the ship 'Nova Scotian,' as she then lay stranded on the beach, for the sum of £1020, according to certain conditions thereunto annexed, and amongst them the stipulation that the purchaser should pay a deposit of 10 per cent. in part payment of the purchase money and should pay the remainder on the transfer deed being executed; but if the remainder of the purchase money should not be paid, interest at 10 per cent. should be paid by the Defendant until payment in full, but without prejudice to the right of the Plaintiff (in case the Defendant should fail or neglect to comply with the conditions) to treat the deposit money as forfeited, and to have the sale enforced or to have the vessel resold, at the option of the the Plaintiff, in terms of the conditions of sale. The libel then alleged the payment by the Defendant of the deposit of £250, his failure to pay the remainder of the £1020, and the resale of the vessel in terms of the conditions of sale, and claimed the deficiency of the resale, together with all costs and charges attending the same, as liquidated damages.

The Defendant's Answer, in the only parts of it necessary to be noticed, consisted of—1. A denial that he "purchased the vessel on the conditions in the libel mentioned, for that the vessel was put up for sale on entirely different conditions, to wit, the conditions appearing in the annexed document marked letter A" (being the catalogue and the conditions therein contained).

2. That although the Defendant was ready and frequently offered to pay the remainder of the purchase money, yet the Plaintiff would not convey the vessel nor furnish the Defendant with the necessary documents for the preparation of a legal conveyance.

3. That the Plaintiff had not at the time of the sale, and has never since had, the necessary power, right, and authority to sell the vessel or make a good conveyance thereof.

4. That the Plaintiff since resumed possession of the vessel and offered the same for sale.

And the Defendant prayed that the Plaintiff's suit might be dismissed with costs and the Plaintiff be condemned in reconvention to repay the deposit of £250, and to pay damages to the amount of £1000 for the loss of the profit and advantage which would have accrued to him from the vessel when repaired and floated, as well as from the loss of the tackle, implements, and other articles belonging to the said vessel and which have since become useless for that purpose.

The case was tried in the District Court of Colombo, witnesses being examined on both sides, and the Judge ultimately decided all the issues in favour of the Plaintiff.

He found that the Defendant purchased the vessel subject to the conditions annexed to the libel.

That the Plaintiff had authority as Master to sell.

That as the vessel was sold as a wreck, the Master was bound to forward her register to the Collector of Customs for transmission to the port of registry, and that it was not necessary for the Defendant to have the certificate in order to enable him to prepare the bill of sale.

And that the Plaintiff was justified by the terms of the contract of sale in resuming possession of the vessel and selling her, and he ordered judgment to be entered for the Plaintiff for £373. 1s., being the amount which he claimed, less £10. 10s. said to have been paid by him to counsel, which the Judge thought he was not entitled to recover from the Defendant.

Upon appeal by the Defendant from this Judgment to the Supreme Court, it was set aside and Judgment ordered "to be entered for the Defendant with costs." It was stated at the Bar that there was no other record of this Judgment than the one printed with the papers, and it was assumed on both sides that although it is in the general form just stated, it has the effect of entitling the Defendant to the return of his deposit and also to the damages of £1000, which he prays by his Answer.

The ground upon which the Supreme Court decided the Appeal in favour of the Defendant seems to have been that, the Plaintiff having founded his claim upon an agreement with conditions varying

from those in the catalogue, in respect of their containing a clause of resale, and the Court being of opinion that upon the facts proved the Defendant did not enter into an agreement containing any such condition; the Plaintiff, having wrongfully repossessed himself of the vessel and resold her, had deprived himself of his right to recover the price from the Defendant.

That this was the view of the case taken by the Court appears from the learned Chief Justice having adverted to the argument on behalf of the Plaintiff that the right of resale existed independently of the stipulations in the signed set of conditions of sale, which he showed not to be law by a reference to the case of *Martindale v. Smith*, 1 Q. B. 389, and other cases in Tudor's 'Leading Cases.'

As the District Judge decided in favour of the Plaintiff, there was no occasion for him to consider whether the payment by the Defendant of the £250, in part of the purchase money, did not bind the parties to the contract of sale as completely as if there had been a written memorandum. But the Supreme Court did take that fact into their consideration, and with reference to it the Chief Justice said, "After the sale the Defendant paid the deposit of 25 per cent. stipulated in the conditions which had been read out, and this payment satisfied the requisitions of the Ordinance 7, 1840, section 21, and the sale and purchase of the ship's hull were thereby made valid and completed according to our colonial laws, and unquestionably the sale and purchase were made and the deposit paid under the conditions of sale read at the auction, and not under those which the Plaintiff sets up."

The Supreme Court therefore must have been of opinion that there was a binding agreement for the sale of the vessel between the parties. If therefore the Plaintiff had correctly stated his claim in his libel and had founded it (as he ought to have done) upon a sale according to the conditions read in the auction room, he would clearly have been entitled to judgment, unless any of the objections contained in the Answer of the Defendant would have been available as a defence.

Their Lordships agree with the Supreme Court in thinking that there was no agreement substituted for the one commenced in the auction room and

completed by the payment of the deposit, but they must express their dissent from the opinion expressed by the Chief Justice that "if the Defendant knowingly signed conditions which imposed the new obligation on him of paying any loss arising from a resale, such fresh agreement would be insufficient to maintain an action, being entirely without consideration," as under such circumstances the relinquishment of the first agreement would undoubtedly amount to a sufficient consideration. Their Lordships do not doubt that the contract completed by the payment of the deposit might have been varied by the signature subsequently of a memorandum inconsistent with it. Their opinion is founded on the particular circumstances of this case—the acceptance of the deposit under the terms of the conditions read out in the auction room, the silence of the seller on the subject of any changes in the conditions, and the above mentioned conversation at the time of the receipt of the deposit.

If the Plaintiff had properly framed his libel, precisely the same defences might have been set up as are now contained in the Defendant's Answer, and therefore in order to prepare the way for a decision upon the real merits of the case it is necessary to consider the objections which the Defendant has urged to the Plaintiff's right to recover in the present action.

Taking these objections a little out of the order in which they are stated in the Answer, the first to be considered will be, whether the Plaintiff had power, right, or authority to sell the vessel. Upon this issue there seems to be no reasonable doubt that the Plaintiff could convey a good title to a purchaser as against his owner. The vessel was lying stranded upon the beach, without the possibility of getting her off, except by the expenditure of a large sum of money. The Plaintiff, not trusting to his own judgment alone, procured surveys to be made, and, proceeding upon the advice of the surveyors, determined to sell the vessel; a course which, it is reasonable to believe, the owner would have pursued upon a view of all the circumstances if he had been upon the spot. But supposing the Plaintiff to have acted upon a mistaken view of the necessity of the case, the Defendant could not insist upon there being any im-

plied warranty of title. The Plaintiff sold the vessel in the special character of Master, and not as owner, and acted upon a *bonâ fide* belief of his authority to sell. The vessel was advertised as a stranded vessel, and the Defendant had every opportunity of examining her, and ascertaining whether she had been brought into such a condition as to give the Master authority to sell her as a wreck.

The next point to be considered in the Defendant's Answer is the allegation that the Plaintiff did not convey the vessel, nor furnish the Defendant with the necessary documents for the preparation of a legal conveyance. This relates to the refusal of the Plaintiff to deliver the certificate of registry to the Defendant. According to the Ordinance No. 5, 1852, passed in Ceylon, the law to be administered in this case is the law of England. Now, by the 58th section of the Merchant Shipping Act, where a registered ship is actually or constructively lost, the register is to be sent to her port of registry. The Defendant could not therefore be entitled to demand its delivery to him, and to refuse to execute the Bill of Sale upon its non-delivery.

The next part of the Answer which requires attention is that in which the Defendant justifies his refusal to perform his contract, in consequence of the Plaintiff having resumed possession of the vessel, and offered her for sale. It was upon this ground that the Supreme Court considered that the Defendant was entitled to their judgment. If the Plaintiff could have proceeded upon a sale on the conditions annexed to the libel, in which there was a power of resale, this defence would necessarily have been excluded; but even if he had rightly claimed upon the contract which took place in the auction room, it would not have been a sufficient answer to the action. In this case the vessel had been delivered to the Defendant, and he was in complete possession. The act of the Plaintiff in retaking and selling her was wrongful, and entitled the Defendant to bring an action of Trover, but did not amount to a rescission of the contract. If, when the Defendant declined to pay the balance of the purchase money, and altogether repudiated the agreement, the Plaintiff had taken him at his word, and resumed possession without

anything more being said, the case might have been different; but, instead of the Plaintiff agreeing to take the vessel back, and rescind the contract, he gave express notice to the Defendant that the vessel would be resold at his risk, "in terms of the conditions of sale." There is no case to be found in the books where, after a sale and complete delivery of a chattel, and the price not paid, the vendor's taking the property out of the purchaser's possession has been held to amount to a rescission of the contract. *Martindale v. Smith*, 1 Q. B. 389, and other cases, have determined that, where there is an agreement to purchase property to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does, the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods will be resold. But the authorities are uniform on this point, that if before actual delivery the vendor resells the property while the purchaser is in default, the resale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *à fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser, and resells it.

Their Lordships have entered thus fully into the various defences contained in the Defendant's Answer, in order to show that the merits of the case are entirely with the Plaintiff; and that, if he had rightly conceived his action, he would have been entitled to recover; but he unfortunately has chosen to proceed upon a different contract from that which he established by proof. The Supreme Court rightly overruled the decision of the District Judge, and held that there was no other agreement between the parties than the one which proceeded upon the conditions read out in the auction room.

But, upon their view of the case, they ought to have directed a nonsuit to be entered, and not have given judgment for the Defendant, much less a judgment which, according to the admission of the counsel on both sides, gave the Defendant the whole of the damages claimed in his Answer. No evidence was given of any amount of damages having been sustained by the Defendant; and the claim, in respect of the assumed loss of the tackle, implements, and other articles belonging to the vessel, which were bought at the sale before the vessel herself was knocked down to the Defendant, cannot be entertained. It is impossible to sustain either the Judgment of the Supreme Court or that of the District Judge. If the Judgment of the latter were to be upheld, founded as it is upon the establishment by the Plaintiff of his right to resell the vessel under the power contained in the conditions of sale, the Judgment would be an answer to any action which might be brought by the Defendant for the wrongful act committed by the Plaintiff in selling his property.

It is unfortunate that the Plaintiff should have brought forward his undoubted claim upon erroneous grounds, and their Lordships wish it to be distinctly understood that in their opinion the Plaintiff would be entitled, upon a libel properly framed, to recover the price of the vessel, less the deposit; and that none of the defences pleaded would be available to the Defendant in such an action. The Defendant, on the other hand, would be entitled to recover damages in an action of tort founded on the retaking of possession and resale of the vessel; and these damages would probably be measured by the price which the vessel realized on the resale. Their Lordships therefore trust that the parties will see the propriety of preventing further litigation by an arrangement, of which the fair and just terms must be obvious. As the matter stands before them, they are compelled to recommend to Her Majesty that the Judgment of the Supreme Court, and that of the District Judge, be set aside, and a nonsuit be entered, and that there be no costs of this appeal on either side.

