KIRKLAND AND SON, ... APPELLANTS.

NISBET AND COMPANY, ... RESPONDENTS.

1859. *July 15th.*

Evidence.—A witness may be examined as to mercantile usage, or as to the meaning of a term of art; but he must not be asked, even upon cross-examination, to construe a written document.

THE Appellants, merchants in Glasgow, commissioned the Respondents, merchants at Madras, to purchase and ship for them a quantity of sugar. The order was in these terms:—

6th Sept. 1850.—We have again the pleasure of placing in your hands an order for sugar, of a quality not inferior to the two small shipments of last year. The quantity afloat we have no sample of, but from what you state we expect it will be found in every respect superior; and in your selection for our present order we crave great care, as dry as possible, and good colour, and to be shipped either to London, Liverpool, or Clyde:—quantity about six hundred (600) tons if to be had at or under 15*s.* p. cwt., free on board with freight; five hundred (500) tons if at 15*s.* 6*d.*; four hundred (400) tons at 16*s.*; three hundred (300) tons at 16*s.* 6*d.*; but two hundred (200) tons only if you must pay equal to 17*s.*; again we crave your attention to the selection of quality, and great care in the weight and condition. Value upon us as usual, and pray attend to insurance.

The Respondents having received the above order in India, wrote by one of their partners to the Appellants in Glasgow as follows:—

11th Dec. 1850.—I expected by this mail I should be able to advise you of my having made up a parcel of a few hundred bags of sugar for shipment in part of your order, but the samples I have seen of all that is at present procurable are so very inferior, and the prices so very high, viz., rs. 27 to rs. 28½ per candy, I therefore did not purchase any. I have, however, contracted with parties up country for the supply on the re-opening of the season of 600 tons, which

is the amo[t] of your order; and I am in hopes I shall be able to send you forward the above quantity at a much lower figure than your limits will allow me to buy it in for you at. It is uncertain when the first parcel will be ready for shipment, but I should think some time either in March or the beginning of April, or it may even be sooner, but no delay will be allowed to intervene which can be avoided consistent with your interests. Expecting to have this pleasure again soon, I remain, &c.

At the trial a witness skilled in the Madras trade was put into the box to prove mercantile usage. He was cross-examined on behalf of the Appellants, and upon such cross-examination his attention having been directed to the letter of the 11th December 1850, he was asked "What would the employer (the Appel-" lants) be entitled to expect?" This question was objected to as calling on the witness to put a construction on the letter.

The learned Judge (the *Lord President*) refused to allow the question to be put.

The Appellants' Counsel excepted; but the exceptions were disallowed by the Court of Session, and against this disallowance the present Appeal was tendered.

The *Lord Advocate* (*a*) and Mr. *Rolt* contended that as the witness had been called by the other side to prove the usage of trade, the question put in cross-examination was legitimate and competent. They insisted that they were entitled to ask him on cross-examination for an explanation in detail of that which he had stated in his examination in chief; "and " particularly for an explanation of the effect which " the information contained in the letter of the " 11th December 1850 would have, according to the " practice of trade, on the original order of 6th " September 1850."

(*a*) Mr. Moncreiff.

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Without, however, calling on the Respondents' Counsel, Mr. *Anderson* and Mr. *Manisty*, the House was satisfied that the ruling below was correct, and the Appeal unsustainable.

The following few remarks fell from the Law Peers :—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*) :

My Lords, I am clearly of opinion that this question was properly overruled by the Lords of the First Division, because it sought to obtain the opinion of the witness upon the construction of a written document. There is no doubt that evidence as to mercantile usage may be received ; there is no doubt that the meaning of any term of art may be asked of a witness ; and the Court and jury are to determine what effect is to be given to that evidence. But you cannot ask a witness what is the meaning of a written document, as is clearly sought to be done here. The letter is read over to the witness, or he is desired to read it, and then he is asked, what would the employer be entitled to expect ? Of course he would be entitled to expect what the letter imports ; and the question as to the contract between the parties depends upon the meaning of the words used. But the object of this question was clearly to lead the witness to put a construction upon the contract to govern the Court and jury. It gives me great satisfaction to find that the learned Judges in the Court below were unanimous, and were clearly of opinion that this question was not properly put. I submit to your Lordships that this Appeal ought to be dismissed with costs.

Lord BROUGHAM : My Lords, there can be no doubt upon this question. I entirely agree with my noble and learned friend.

(*a*) Lord Campbell.

Lord CRANWORTH: My Lords, I entirely concur.

Lord CHELMSFORD: I also entirely concur.

Interlocutor appealed from affirmed, and Appeal dismissed with Costs.

GRAHAME, WEEMS, & GRAHAM—J. WILSON NICHOLSON.