

AZÉMAR v. CASELLA AND ANOTHER.

Feb. 9.

Mercantile Contract, Construction of—Condition—Sale of Cotton “to arrive,” guaranteed equal to Sample—Allowance to be made for Inferiority of Quality—Bulk tendered of a different Kind.

The defendants, through a broker, bought of the plaintiff “the following cotton, viz. $\frac{D.C.}{C.}$ 128 bales, at 25*d.* per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our (the brokers’) possession. Should the quality prove inferior to the guarantee, a fair allowance to be made.” The sample was of “Long-staple Salem” cotton. The 128 bales marked $\frac{D.C.}{C.}$ which arrived by the *Cheviot* contained “Western Madras” cotton. Upon a special case, in which it was stated that “the cotton was therefore not in accordance with the sample; that Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and that the market-price of Western Madras was at the date of the contract only 23*d.* per lb.”—

Held, that the cotton tendered was not that which the defendants bargained for, and that they were not bound to accept it; for, that the allowance clause had reference only to inferiority of *quality*, and not to difference of *kind*.

ACTION to recover damages for breach by the defendants of a contract for the purchase of 128 bales of cotton. The action was commenced on the 21st of November, 1864; and the first count of the declaration contained breaches for not accepting and paying for the cotton, and for not referring to arbitration a dispute as to the allowance to be made by reason of the quality of the cotton being inferior to guarantee. The declaration also contained the common money counts.

The defendants pleaded, to the first count,—first, a denial of the contract,—secondly, a denial of the arrival of the cotton,—thirdly, that the cotton was not equal to sealed sample,—fourthly, a denial of the plaintiff’s readiness and willingness to perform the contract,—fifthly, as to the first breach, after setting out the contract, that the sample therein referred to was a sample of cotton of a particular kind and description, and that it was a condition of the contract that the cotton should be of that kind and description, but that, in fact, it was of a wholly different kind and description,—sixthly, as to the second breach, a denial of the dispute having arisen,—seventhly, as to the second breach, that a dispute also arose as to whether the defendants were bound to

1867
 AZÉMAR
 v.
 CASELLA.

accept the cotton, and that the plaintiff refused to refer the same, in consequence of which the defendants refused to refer the dispute as to the allowance,—eighthly, to the money counts, never indebted.

The plaintiff took issue upon all the pleas, and also demurred to the third, fifth, and seventh pleas. (1)

At the trial before Erle, C.J., at the sittings in London after Hilary Term, 1865, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following special case:—

1. The plaintiff is a merchant carrying on business in Mark Lane, London, under the firm of J. C. Azémar & Co., and the defendants are merchants in Lime Street, London, trading under the firm of A. Casella & Co.

2. In the summer of 1864, Messrs. De Souza & Co., correspondents of the plaintiff at Madras, shipped on board the *Cheviot*, under a bill of lading describing 201 bales, 128 bales of cotton, marked $\frac{D.C.}{C.}$, being the only bales with such mark on board the *Cheviot*. Neither the bill of lading nor the fact of there being no other cotton of the same mark on board the ship, was at any time made known to the defendants. De Souza & Co. consigned the cotton to the plaintiff, and they duly advised him of such consignment. They also sent him a sample of cotton by the overland mail. Such sample was a sample of a kind of cotton known in the London market as “Long-staple Salem cotton of fine quality.” The sample was in a paper which was marked on the outside “ $\frac{D.C.}{C.}$ 128 bales Western cotton, per *Cheviot*.” Upon receipt of the sample, the plaintiff took it in the said paper to Barber & Co., London cotton-brokers, and had a conversation with Barber. This conversation was given in evidence by Barber upon cross-examination by the defendants’ counsel. The plaintiff asked Barber whether he could sell that cotton “to arrive,” and what it was worth, and what sort of cotton he thought it was. Barber said it seemed to him to be “Long-staple Salem.” He pointed out to the plaintiff that it was described on the outside as “Western,” but repeated that in his opinion it was “Long-staple Salem,” and that, if then on the spot, it would be worth 25*d.* per lb. Barber

(1) A copy of the pleadings was annexed to the special case, and it was agreed that the demurrers should be argued with it.

asked the plaintiff what he would guarantee. The plaintiff answered he would guarantee the sample, and nothing else. Shortly afterwards the defendants saw Barber at Barber's office, and had with him the following conversation. This conversation was not made known to the plaintiff, nor were the communications between the defendants and their correspondents made known to the plaintiff. The plaintiff's counsel objected to any evidence of the same respectively being given. The evidence was, therefore, set forth, subject to the opinion of the Court whether it could properly be received. If the Court is of opinion that it should be received, then it is to be taken as part of the case; otherwise not. The defendants told Barber that they were in want of some Long-staple Salem cotton for correspondents. Barber answered that he thought he had some cotton "to arrive" which would suit them. Barber then shewed them the above-mentioned sample, still in the above-mentioned paper. Neither Barber nor the defendants took notice of the writing on the paper. Barber told the defendants that he would sell them the cotton to arrive, guaranteed equal to sample; but that the sellers would not sell otherwise than by sample, and would guarantee nothing but the sample. The defendants examined the sample, and asked Barber what cotton he called it. Barber answered that he considered it was Long-staple Salem. The defendants took a small portion of the sample, which they afterwards remitted to their correspondents at Augsburg, with a letter containing the following request:—"Telegraphiez si nous devons acheter 128 Salem, per *Cheviot*, parti 2 Juin. Echantillon, qui est de longue soie, garanti à 25½*d*."

3. In answer to this letter, the defendants received the following telegram:—"Accept 128 bales Salem, guaranteed long-staple, shipped 2nd June, 25½*d*. If possible, 25*d*. Do for the best." On receipt of this telegram, the defendants saw Barber and offered him 25*d*. per lb. for the 128 bales. Barber agreed to sell at that price, and again stated that the sellers had an objection to put into the contract that the cotton was "Long-staple Salem," or even that it was "Salem." The defendants then asked for the seller's name. Barber said that Azémar was the seller, that he was not in the cotton trade, and did not understand cotton, and that was the reason why he made such objection. The defendants then said

1867

 AZÉMAR
 v.
 CASELLA.

1867 that they knew Azémar was respectable; and asked, "Would he guarantee the cotton to be equal to the sample?" Barber replied "Yes."

AZÉMAR
v.
ASELLA.

4. Barber & Co. thereupon made the following contract, in which the words not underlined were in print, and the words underlined were filled up in writing:—

"Certified London Contract.

"London, 15 July, 1865.

"*Sold* by order and for account of *Messrs. J. C. Azémar & Co. to Messrs. A. Casella & Co.* the following cotton, viz. $\frac{D. C.}{C.}$ 128 bales at 25*d.* per lb. expected to arrive in London, per *Cheviot*, from *Madras*. The cotton guaranteed *equal to sealed sample in our possession*. Should the quality prove inferior to the guarantee, a fair allowance to be made. Any slight variation in marks not to vitiate this contract. The cotton to be warehoused at seller's expense in one of the public docks or customary wharves. The buyer to pay a deposit of 12*l.* per bale (to be returned in the event of loss by fire) on the second Saturday after the final day of landing, in exchange for dock or wharf weight-notes, and the remainder of the purchase-money at the expiration of the usual three months' prompt, or on delivery of the warrants; interest being allowed at the rate of 5 per cent. per annum for prepayment. The first and second-class sea-damaged bales (if any) to be made merchantable, and taken at $\frac{1}{8}$ per lb. less than the sound. The third and fourth-class sea-damaged bales (if any) to be taken at a fair allowance. The cotton after landing to be at the risk of the seller (only to the amount of this contract value) until the prompt-day or delivery of the warrants or orders of delivery, whichever may first happen. Should the cotton, or any portion thereof, not arrive by the above-named vessel, from loss of vessel or other unavoidable cause, this contract for such portion to be void: *but, should the cotton be transhipped and arrive in London by other vessels, this contract still to hold good*. In the event of any dispute arising out of this contract, the matter to be referred to two disinterested London cotton-brokers for arbitration, buyer and seller each nominating one.

"Brokerage, $\frac{1}{2}$ per cent. Guarantee, $\frac{1}{2}$ per cent."

5. This printed form was at the time in question a form commonly used in the London market, and known as "The Certified London Contract." A common mode in the ordinary course of business of filling up the form is, to fill up the blank after the words "the following cotton, viz." thus,— "128 bales $\frac{D.C.}{C.}$, at 25*d.* per lb.," and the blank after the words "the cotton guaranteed," thus,— "Fair Bengal," or "Good fair Tinnivelly." Sometimes the blanks will be filled up thus,—the first, "128 bales Bengal," and the second, "fair," or "good fair," or "fine."

6. If the sale is a sale by sample, then the second blank is filled up, as in the present contract, with the words, "equal to sample in our possession." At the time of the making of the said contract, and for some time previous, various kinds of cotton coming from different districts and countries had been imported into London, and were bought and sold in the London market. There were different cottons known on the market, and bought and sold under the following names :—There were "Surat cottons," divided into Saw-ginned, Broach, Oomrawuttee, Dhollerah, Mangarole, and Comptah. There were "Madras cottons," divided into Tinnivelly, Northern and Western Coconada, and Coumlatore and Salem. There were Scinde cotton, Bengal and Rangoon cotton, China, Japan, West Indian, Brazilian, Smyrna, and Greek and Sea Island cottons. Each and every of these different denominations or divisions is compared with a standard sample. There is a standard sample kept of each of these different denominations or divisions. Each kind when so compared is then divided into different divisions under the terms "ordinary," "low middling," "middling," "fair," "good fair," "fine," &c. The different denominations or divisions first above-mentioned, are quoted and sold at different prices on the same day; and the different divisions secondly above-mentioned are sold at different prices on the same day. On the same day, cotton quoted as for example "Western Madras," and "Middling," or as "Middling Western Madras," may be of higher price than "Good fair Scinde;" but "Fair Western Madras," would on the same day be always of higher price than "Middling Western Madras."

7. The defendants after the making of the above contract, without the knowledge of the plaintiff, made out contracts to corre-

1867

 AZÉMAR
 v.
 CASELLA.

1867

AZÉMAR
v.
CASELLA.

spondents of theirs for the sale to them of 64 bales of cotton on the same terms and at the same price as contained in the contract signed by Messrs. Barber & Co., with the exception that no marks were given; and they made out a similar contract for the other 64 bales to another correspondent of theirs, the defendants being entitled to a commission from their correspondents on the contracts being fulfilled.

8. The *Cheviot* arrived in London on the 14th of October, 1864, having on board several thousand bales of cotton, and amongst them the 128 bales shipped by De Souza, as already mentioned, which were the only bales marked $\frac{D.C.}{C}$. The 128 bales were landed and warehoused by the plaintiff at Cotton's and Dépôt Wharf, and weight-notes made out by the wharfingers in the ordinary way. The cotton had been previously examined by the wharfingers, for the purpose of ascertaining which of the bales (if any) were sea-damaged, and of classifying same, and for the purpose of making them merchantable where necessary and possible. This is done by removing the damaged portion of the bales; the portions so removed not being taken by the buyer, but remaining the property of the importer, and being sold for his account. Any of the bales which on such examination by the wharfingers turn out not to come up to the classification of third or fourth class sea-damaged, are altogether rejected from the parcel, and are not taken by the buyer, but remain the property of the importer, and are afterwards sold for his account. None of the 128 bales in question contained any damaged cotton. The landing of the cotton was completed on Wednesday, the 26th of October, 1864; and the deposit, amounting to 1536*l.*, would have become payable on Saturday, the 5th of November, 1864, and the prompt would have expired on the 28th of January, 1865. The wharfinger drew samples from the bulk in the ordinary way, which were shewn to the defendants by Barber & Co. The defendants upon seeing the bulk samples, at once stated to Barber & Co. that they claimed to reject the cotton, on the ground that it was not Long-staple Salem cotton, and that they required an arbitration on that point. *The cotton was not "Long-staple Salem," but was a particularly good sample of Western Madras. The cotton was therefore not in accordance with the sample.* Western Madras cotton is inferior to Long-staple

Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market price of Western Madras was at the date of the contract only 23*d.* per lb.

9. The defendants' correspondents have refused to accept the cotton by the *Cheviot* in fulfilment of the defendants' sale to them, on the ground that it was not Long-staple Salem, and that they could not employ it for the manufacturing purpose for which they had bought it; and the defendants have lost their commission, amounting to 80*l.* 12*s.* 3*d.*

10. The plaintiff having, on the 21st of October, 1864, received an intimation from Barber & Co. that, "in consequence of the samples of 128 bales of cotton per *Cheviot* sold by him on the 15th of July turning out different from the contract guarantee, the buyers had given notice that they threw up the contract," a correspondence ensued between the parties,—the plaintiff requiring that the arbitration should be confined to the allowance to be made, and the defendants insisting that the arbitrators should determine whether or not the buyers were entitled to reject the cotton on the ground that the bulk did not agree with the sample.

11. The arbitrators never agreed together upon any question with regard to the contract, and made no further attempt to meet; and the arbitration went off.

12. At the trial it was arranged that the same brokers should be appointed on each side as before (with power to appoint an umpire), to determine what was the fair allowance to be made (if any) if the bulk was not equal to the sample, having regard to the time of arrival. The brokers met, and disagreed, and appointed an umpire, who decided that the difference in value between the bulk and the sale sample was 3*d.* per lb.

13. The weights to be delivered of the 128 bales would have been 38,700 lbs.

14. On the 21st of October, 1864, the market-price of such cotton as was contained in the 128 bales was 15½*d.* per lb. On the 5th of November, 1864, it was 16½*d.* per lb. On the 28th of January, 1865, it was 17½*d.* per lb. On the 9th of March, 1865, the day on which the cotton was actually sold, the market-price was 13½*d.* per lb.

15. Interest on the amount of deposit from the date when the

1867

AZÉMAR
v.
CASELLA.

1867
 AZÉMAR
 v.
 CASSELLA.

deposit would have been payable if no dispute had occurred up to the trial, would be 23*l.* 7*s.* 6*d.*

16. The Court was to be at liberty to draw any inferences of fact in the same way as a jury would be entitled to do.

The question for the opinion of the Court was, whether the plaintiff was, under the circumstances of the case, entitled to maintain the action. If the Court should be of opinion in the affirmative, the verdict and judgment were to be entered for the plaintiff for such sum as the Court might direct. If in the negative, then for the defendants,—the different issues to be entered for plaintiff or defendants, according to the opinion the Court might entertain thereon.

Sir G. Honyman, Q.C. (with him *M. Leod*), for the plaintiff. The 128 bales of cotton which arrived by the *Cheviot*, and which the plaintiff was ready to deliver, were a compliance with the contract of the 15th of July, 1864; and the guarantee that the cotton was equal to sample does not amount to a condition, but the defendants were bound to accept it subject to a reduction to be settled by arbitrators. The contract was for the sale of the specific 128 bales on board the *Cheviot*, marked $\frac{D.C.}{C.}$, with a collateral warranty that the bulk should be equal to the sample. *Parsons v. Sexton* (1), and *Dawson v. Collis* (2), are expressly in point to shew that by such a contract the property passes to the vendee. And, assuming that the property did not pass, this was a mere collateral warranty, the breach of which will not avoid the contract, but merely give the buyer a remedy by cross-action or by reduction of price, according to the principles laid down by Lord Abinger, C.B., in *Chanter v. Hopkins* (3), and by Erle, C.J., in *Bannerman v. White*. (4) And see the elaborate judgment of Williams, J., in *Behn v. Burness*. (5) Applying those principles to the facts which appear upon this special case, it is clear that the stipulation that the cotton should be equal to the sample referred to, is not a condition, but a collateral engagement only, which may give rise to a cross-action, or may entitle the vendee to

(1) 4 C. B. 899; 16 L. J. (C.P.) 181.

(4) 10 C. B. (N.S.) 844; 31 L. J.

(2) 10 C. B. 523; 20 L. J. (C.P.) (C.P.) 28.

116.

(5) 3 B. & S. 751; 32 L. J. (Q.B.)

(3) 4 M. & W. 399, 404.

204.

a reduction of price. But, if the *Cheviot* arrived with any sort of cotton marked $\frac{D.C.}{C.}$, answering the description of that contracted for, and coming from Madras, the defendants were bound to accept it.

[WILLES, J. The question is, whether "quality" includes "sort" or "kind." According to your argument, if I contract for wine to be shipped from Bordeaux warranted equal to sample, and, the sample being Chateau d'Yquem, the bulk when tendered proves an inferior Medoc, I am bound to accept it.]

Two different constructions can hardly be given to the same word in the same sentence. If this is not a condition as to quality, neither can it be a condition as to the kind of cotton. The case finds that this was Western Madras cotton.

J. Brown, Q.C. (with him *Hawkins, Q.C.*, and *Hannen*), for the defendants. This was a contract for the sale of a kind of cotton known in the London market as "Long-staple Salem," and the bulk being of a different kind, viz. a kind known as "Western Madras," the defendants were not bound to accept it. If authority were needed to shew that the property in the goods does not pass upon a contract of this description, the case of *Logan v. Le Mesurier* (1) is in point. Looking at the terms and nature of this contract, and at the purpose for which the cotton was contracted to be bought, it is clear that the warranty amounts to a condition. The only question is, whether the allowance clause makes any difference in this respect. It is submitted that it does not, but that it applies to inferiority of quality only, and not to difference of kind. "Equal to sample, &c.," here means "of the same kind and quality as the sample." The cotton being at sea, the buyer had no opportunity for inspection; the case, therefore, differs materially from those where the contract has been for the sale of a specific article which the buyer might examine. The facts stated in the special case shew that the plaintiff is seeking to put upon the defendants an article which is substantially different from that which they contracted to buy.

[WILLES, J. In *Syers v. Jonas* (2), Parke, B., speaking of the usage in the tobacco trade, that all sales are by sample although not so expressed in the bought and sold-notes, says: "This undoubtedly amounts to a parol warranty or agreement that the bulk

1867

 AZÉMAR
v.
CASELLA.

(1) 6 Moore P. C. 116.

(2) 2 Exch. 111, 117.

1867

AZÉMAR
v.
CASELLA.

should correspond with the sample. If the goods have not been delivered, or the property has not passed by the bargain (a question depending upon the terms of the bargain for a specific chattel), this agreement authorizes the purchaser to refuse to receive the article sold, or complete the bargain. If he does receive it, or the property does pass, he may sue on the agreement, or give it in evidence in mitigation of damages, according to the authority of *Street v. Blay*." (1)]

What will justify a refusal to accept is now well settled. In *Behn v. Burness* (2), the rule is thus summed up,—“With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle as well as authority appears to be, generally speaking, that, if such descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour.” And, after referring to several cases, the learned judge goes on,—“Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee, having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract; see *Bannerman v. White* (3)); but must have recourse to an action for damages in respect of the breach of warranty. But, in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed.” The rule is similarly laid down in the notes to *Cutler v. Powell*. (4) Then, the allowance clause provides only

(1) 2 B. & Ad. 456.

(3) 10 C. B. (N.S.) 844; 31 L. J.

(2) 3 B. & S. 751, 755; 32 L. J. (C.P.) 28.

(Q.B.) 204, 206.

(4) 2 Smith L. C. 1, 27 et seq. 6th ed.

for inferiority of quality, and not for difference of kind. This is well illustrated by a reference to the rules which govern in the construction of compensation clauses in contracts for the sale of real property. These will be found in Dart's *Vendors*, pp. 86 et seq., 3rd ed. In *Nichol v. Godts* (1), Parke, B., takes this distinction,—“The evidence went to shew that the oil offered did not answer the description of the article sold, and the jury so found. The warranty affects only the *quality*, but not the *nature* of the article itself.” In *Wieler v. Schilizzi* (2), it was held that, even upon a sale not by sample, and without express warranty, of merchandize which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract. *Josling v. Kingsford* (3) is a remarkable instance of the distinction between quality and kind. It was there held that a contract for the sale of “oxalic acid” was not complied with by the delivery of an article which the jury found did not, in commercial language, come properly within the description of “oxalic acid,” even though the seller was not the manufacturer of the article, and at the time of contracting expressly declined all responsibility as to the *quality*, and the buyer had had an opportunity of inspecting it. In giving judgment, Williams, J., says: “We are all of opinion that, however completely the defendant may have guarded himself against contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce.” Erle, C.J., in delivering the judgment of the Court in *Bannerman v. White* (4), says: “This undertaking [viz. that no sulphur had been used in the cultivation of the hops] was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense, it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.” All the cases, including *Gompertz v.*

1867

 AZÉMAR
v.
CASELLA.

(1) 10 Exch. 191; 23 L. J. (Ex.)

(3) 13 C.B. (N.S.) 447; 32 L. J. (C.C.) 94.

314.

(4) 10 C. B. (N.S.) 844, 860; 31 L. J.

(2) 17 C. B. 619,

(C.P.) 28, 32.

1867

AZEMAR
v.
CASELLA.

Bartlett (1), seem to take a distinction between a different kind and a different quality of the same kind.

Sir G. Honyman, Q.C., in reply. The question is one of mere construction. The contract was for the sale of a specific parcel of cotton, described by certain marks, coming from Madras by a particular ship. The conversations as to the object for which the defendants bought the cotton, an object not communicated to the seller, can have no bearing on the question. The cases cited on the other side are all distinguishable. In *Nicol v. Godts* (2), the subject of sale was rape-oil; and the jury found that the article delivered was not rape-oil. So, in *Wieler v. Schilizzi* (3), and *Jostling v. Kingsford* (4), the articles tendered were not what were contracted for. And in *Bannerman v. White* (5), all that was decided was, that there was evidence from which the jury might infer that the hops were purchased subject to a condition. The question here is, was this a sale of specific bales of cotton, with a warranty superadded that it should be equal in quality to the sample? or, was it a sale subject to a condition that it should be Long-staple Salem? It is submitted that the contract cannot bear the latter construction, because of the stipulation for allowance in the event of the cotton proving to be inferior to the guarantee.

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought upon a contract for the purchase of cotton to arrive by the *Cheviot*, from Madras, and guaranteed equal to sealed sample in the possession of the sellers' brokers. Upon the arrival of the cotton, it was rejected by the purchaser, on the ground that it was not in accordance with the sample referred to in the contract; and an arbitration was suggested by the seller, to be limited to the question whether the quality equalled the sample; but the defendants insisted that there was another question to be determined, viz. whether the cotton tendered was the thing bought by them; and consequently the attempt to arbitrate failed. It is obvious to my mind that the defendants are

(1) 2 E. & B. 849; 23 L. J. (Q.B.) 65.

(4) 13 C. B. (N.S.) 447; 32 L. J.

(2) 10 Exch. 191; 23 L. J. (Ex.)

(C.P.) 94.

314.

(5) 10 C. B. (N.S.) 844; 31 L. J.

(3) 17 C. B. 619.

(C.P.) 28.

not answerable for the failure of the arbitration; and indeed it was not insisted for the plaintiff that there could be any recovery for the second breach. The defendants clearly were not bound to refer less than the whole dispute. The sole question to be decided, is, whether the defendants were right in their ground of rejection, viz. that the 128 bales by the *Cheviot* were not the cotton they contracted to receive and to pay for. Whether they were right in that contention, or the plaintiff right in saying that the defendants were bound to receive that cotton subject to an allowance for any inferiority of quality, must depend upon the terms of the contract itself. That was a contract by which Messrs. Barber, acting as brokers for both parties, bought for the defendants of the plaintiff 128 bales of cotton, marked $\frac{D. C.}{C.}$, expected to arrive in London per *Cheviot* from Madras, at 25*d.* per lb. If it had stopped there, it would have been, as was insisted by Sir George Honyman, a bargain for the purchase of 128 bales of cotton arriving with a particular mark in London from Madras. The description would extend to cotton generally coming so marked from Madras on board the ship named. The contract, however, goes on, "The cotton guaranteed equal to sealed sample in our possession." There we have for the first time a complete description of what the parties are bargaining about. Messrs. Barber, the brokers who signed for both sides, had in their hands a sample with reference to which the bargain was made. That, when looked at, turns out to be a sample of "Long-staple Salem cotton;" and we must therefore take it that the defendants bargained for "Long-staple Salem cotton." Then come the words,— "Should the *quality* prove inferior to the guarantee, a fair allowance to be made." The subsequent parts of the contract are clear to shew that the property in the cotton was not meant to vest in the buyers by the bargain alone. If it had been otherwise, there would have been considerable plausibility in the argument of Sir George Honyman, that, this being a sale of specific cotton, the property passed, and the defendants would have to resort to a cross-action in respect of any breach of the collateral warranty. It seems to me, however, that the contrary construction is the correct one, and that the property in the cotton did not pass by the contract. There was no delivery and no acceptance. The only questions, therefore, which we have

1867

AZÉMAR
v.
CASELLA.

1867
AZÉMAR
v.
CASELLA.

now to consider are,—first, whether the description “equal to sealed sample in our possession,” refers to the species of cotton to which the sample belonged, and whether the cotton which arrived by the *Cheviot* answered that description; and, if so,—secondly, it would be necessary to refer to the subsequent clause in the contract, to see how far it affected the question whether species was in the contemplation of the parties; and, lastly, we have to make up our minds on the construction of the contract, regard being had to the facts of the case, and particularly to those stated in the eighth paragraph.

First, as to the question whether the contract was for cotton of a particular species, I cannot entertain a moment’s doubt. I exclude the words “Should the quality prove inferior to the guarantee,” because they refer to an allowance to be made in money in respect of the article being of less value than that represented by the sample. In terms they do not extend to enforce on the buyers the acceptance of an article different from that which they bought. I would add that I am not led to this conclusion by any supposed similarity between a case of this sort and the cases as to the purchase of lands; for, in truth, those cases have very little bearing upon the question: but I found my judgment upon this, apart from all the authorities, that the stipulation as to allowance being made for inferiority of *quality* does not relate to a difference in *kind*, affecting the identity of the article itself. That being so, let us see whether the contract was for the purchase of a specific sort of cotton, or applies to cotton in general. That depends upon the language of the guarantee clause, “The cotton guaranteed equal to sealed sample in our possession,” which is to be construed by the facts existing at the time of the bargain, and by the surrounding circumstances so far as they are relevant to the dealings of the parties. Now, the first remarkable fact is the description of the sample itself; it was a sort of cotton well known, called Long-staple Salem cotton, which might have been expected to be shipped from Madras. What did the bulk consist of? and was it “Long-staple Salem cotton,” or was it a thing of the same species as Long-staple Salem cotton, so that the parties must be taken to have intended that it should be taken in satisfaction of the contract? Now, as to this the case (par. 8) finds that “the cotton was not

Long-staple Salem, but was a particularly good sample of Western Madras: the cotton, therefore, was not in accordance with the sample." Was that a mere difference in value which could be compensated for under the allowance clause? or was it an essential difference in the species, so that the contract was for one thing, and the article tendered another? That seems to me to be determined by what follows in the case,—“Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market-price of Western Madras was at the date of the contract only 23*d.* per lb.” Inferiority of quality and value might be compensated for by an allowance: but the question is whether difference of kind or species may be. I must own that it would have been more satisfactory to my mind to have had these questions disposed of by the verdict of a jury. In determining the question, it is impossible to exclude from one’s mind the fact that, when a man bargains for Long-staple Salem cotton, and the seller offers him cotton of a totally different kind, and cotton which requires a different description of machinery for its manufacture, he is seeking to compel him to accept X. when he bargained for Y. The conclusion at which, upon the whole, I feel myself compelled to come, is, that, taking the contract and the sample together, what the defendants agreed to buy was 128 bales of the species of cotton contained in the sealed sample. The allowance was to be in respect of inferiority of *quality*, and not of difference of *kind*; and the defendants were not bound to accept with an allowance cotton of a description different from that which they bargained for. I am confirmed in this view by the absence of any statement in the case (which has evidently been drawn with great care) that the cotton in question was not such as might have been expected to be produced at Salem. It would no doubt have been so stated if it could have been. Then, taking up the opposite phase of the question, I find that, though the bulk was a particularly good sample of Western Madras, it was inferior in value to Long-staple Salem by 2½*d.* per lb. I should therefore infer that Western Madras did not come within the description of the cotton which was contained in the sample; and I come to the conclusion that the cotton tendered to the defendants was not that which they

1867

 AZÉMAR
v.
 CASELLA.

1867

AZÉMAR

v.

CASELLA.

contracted to buy, and consequently that they are entitled to judgment.

MONTAGUE SMITH, J. I also am of opinion that the defendants are entitled to the judgment of the Court upon this special case. The question arises upon a contract which it is plain, on a fair reading of it, did not pass the property in the cotton. It was a contract for the sale of 128 bales of cotton of a particular mark, expected to arrive in London per *Cheviot* from Madras. If there had been no further terms contained in the contract, the plaintiff might have been entitled to recover. But one essential part of the contract was a stipulation in these words,—“The cotton guaranteed equal to sealed sample in our possession:” and the first question for our judgment is whether that is a condition, or merely a collateral agreement for the breach of which the defendants were to have a remedy by cross-action or a claim to a reduction of price. I am of opinion that it is a condition attached to the contract. In the ordinary case of a sale by sample, it is a condition of the contract that the bulk shall be equal to the sample. Here there is an express guarantee that the bulk shall be equal to the sealed sample. That clearly is a condition, for breach of which the defendants were entitled to disaffirm the bargain. But it is said that this absolute guarantee is qualified by what follows, and that upon the facts stated in the case the defendants were bound to take the cotton and the plaintiff to submit to an allowance. The question, therefore, turns upon the meaning of the words, “Should the quality prove inferior to the guarantee, a fair allowance to be made.” Now, in order to ascertain whether the cotton which arrived per *Cheviot* was inferior to the sample, we must ascertain what the sample was and what the bulk was, and also what was the meaning of the parties when buying and selling by sample with a guarantee that the bulk shall be equal to the sample. As I understand the argument of Sir George Honyman, he would admit that, if the words “guaranteed Long-staple Salem cotton” had been written in the contract, that would have been matter of description, and the plaintiff would not have performed his contract by a tender of the 128 bales which did come home by the *Cheviot*. I think the contract ought to be read as if those

words had been inserted in it. The seller guarantees that the bulk shall be equal to the sample; and the sample is of Long-staple Salem cotton. *Id certum est quod certum reddi potest.* The question thus becomes partly one of law and partly one of fact. It is clear that, upon a contract so expressly worded, or, what is equivalent, referring to a sample, the purchaser would be entitled to have an article of the sort or kind thus described, treating the sample as part of the contract. Was the article tendered such? Upon the facts, as stated in the case, I think it was not. It appears that there is cotton of several different kinds, each varying in quality; and that the several kinds are distinct with reference to the only purpose for which cotton is ordinarily used, viz. to spin and to weave into cloth. The case finds that the cotton contained in the sample was of a different kind from the Western Madras which arrived, and which required machinery for its manufacture different to that which is used for Long-staple Salem. The article tendered, therefore, was essentially different in kind from the article contracted for. Suppose a contract were made for the sale of "one hundred casks of spirits" guaranteed to be equal to a sample produced, and with a stipulation for an allowance should the quality prove inferior to the guarantee, and, the sample being brandy, the bulk tendered were to consist of rum, could the allowance clause be applied to such a case? The standard of comparison would be wanting there, as here. Western Madras cotton, however good, never could have been equal to Long-staple Salem. It would be straining the meaning of the word "quality" to hold it to extend to a difference of kind. If the bulk here tendered varied only in quality from cotton of the same kind as that contracted for, the difference would be the subject of an allowance: but it never could have been intended that the seller should have power to substitute one kind of cotton for another. A distinction in kind is shewn here, and therefore the condition is not complied with, and the defendants are entitled to judgment. The count for not proceeding to a reference has been very properly given up. The defendants were willing to refer the whole matter; but the plaintiff insisted that the reference should be limited to the question of allowance for inferiority of quality. The result is that there will

1867

AZÉMAR
v.
CASELLA.

1867
 AZÉMAR
 v.
 CASELLA.

be judgment for the plaintiff on the third plea, and for the defendants as to the residue.

WILLES, J. My Brother Keating desired me to say that his view, so far as he was able to form one from the portion of the argument which he heard, coincides with that of the rest of the Court.

Judgment accordingly. (1)

Attorneys for plaintiff: *Thomas & Hollams.*

Attorney for defendants: *W. A. Crump.*

(1) The plaintiff brought error, and the case was argued in the Exchequer Chamber on the 21st of June, 1867, when the Court, without hearing counsel for the defendants, unanimously affirmed the judgment of the Court below.

END OF HILARY TERM.