Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Durga Prosad Sureka and Others v. *Bhujan Lall Lohea and Others, from the High Court of Judicature at Fort William in Bengal; delivered the 23rd March* 1904.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

The facts in this case, as found by both Courts, are simple and very cogent.

In October 1899 (the matter being brought to a final conclusion on 30th October 1899), the Appellant Sureka bought from the Respondents the whole of a certain cargo of Russian kerosene oil, which the Respondents had themselves bought from merchants named Graham & Co. at 50 pence per case. Seeing that the market was rising, and repenting them of their bargain, the Respondents, by fraud, inserted in the bought and sold notes the figures 100,000 cases, as descriptive of the quantity of oil sold, whereas the truth was that the cargo amounted to 125,000. This opportunity of fraud came the Respondents' way, because the original sellers (Messrs. Graham & Co.) did not fall in with, or at least were said by the Respondents not to fall in with, the arrangement first proposed, viz., that the original sale by them should be simply transferred to the Appellant Sureka as buyer. Accordingly, the bought and sold notes were

31022. 125.—3/1904. [16]

signed, the Appellant Sureka only discovering afterwards that instead of recording the contract they falsely stated it.

In this state of the facts, the right of the purchaser was indisputable, viz., to have the whole cargo, or damages. The trick practised on him in the bought and sold notes had no legal effect on his original right. Nor did that right depend either for constitution or for evidence on the bought and sold notes. In India a contract of sale of goods can be proved by parol; and, the bought and sold notes having in this instance been falsified, the aggrieved purchaser was entitled to disregard them and prove his contract by other and antecedent material. This he has done conclusively, by the evidence of the broker and by the telegrams.

The Appellant Sureka came into Court on 15th January 1900 with a plaint, in which he prayed, *inter alia* :—

(*a*) That it be declared that under the said contract entered into by and between him and the Defendants, dated the said 1st day of November 1899, the Plaintiff is entitled, at the rate of 50 pence per case, to the whole of the said cargo sold to the Defendants as aforesaid.

(*b*) That the Defendants be decreed to make over possession to the Plaintiff of the whole of the said cargo, on his paying them for the same at the rate of 50 pence per case, which payment the Plaintiff had always been and is now ready and willing and hereby offers to make.

(*c*) That, if necessary, the said bought and sold notes be rectified and varied by the substitution of words and figures "one full cargo containing say about (125,000) one lac and twenty-five thousand," in place of the words and figures "(100,000) one lac," now appearing therein.

* * * * *

(*h*) That the Plaintiff may have such further or other relief as the nature of the case shall require.

Upon this prayer, now that there has been all this litigation about it, it may be remarked that the Plaintiff treats the falsified bought and sold notes with more ceremony than they deserve; that his first prayer ought to have made no reference to the date of those documents as the date of the contract, and that the second prayer was unnecessary. But their Lordships see no room for question that the prayers quoted afforded adequate means for rendering justice.

On 25th July 1900, Mr. Justice Sale gave Sureka a decree declaring that by virtue of the agreement between the Appellant Sureka and the Respondents on the 30th October 1899, Sureka was entitled to the entire quantity of cases of kerosene oil mentioned in the contract between the Respondents and Messrs. Graham & Co., and giving the Appellant (Sureka) damages.

On the case coming by Appeal before the High Court a view of the case was taken which their Lordships consider much too narrow. The High Court treated the action as founded on the bought and sold notes; and, holding the Appellant to his reference to them by date (1st November 1899), in prayer (*a*), and to his application, in prayer (*c*), that those should be rectified, they pointed out that he had been refused this relief and had not appealed against the refusal, or objected to the decree under Section 561 of the Code of Civil Procedure. Accordingly the High Court expressed their rather surprising conclusion as follows: "We "think therefore that, inasmuch as under the "circumstances it is not now competent to us to "rectify the bought and sold notes, and since the "Plaintiff is precluded from proving his contract

" by any evidence other than the document itself, " the Appeal must be allowed and the suit " dismissed."

The learned Counsel for the Respondents did not support this ground of judgment. The High Court was completely possessed of the case of the Appellant Sureka; his case rested not on the falsified bought and sold notes, which he was there to repudiate, but on the perfectly competent evidence which, while disproving the bought and sold notes, proved the contract which they falsely purported to record. For this case no rectification was needed, and it was not touched by the 92nd Section of the Evidence Act. Nor did the misconception which led to the mention of the 1st November 1895 create any substantial obstacle in the way of justice being done or necessitate so unsatisfactory a conclusion as that which has led to this Appeal.

In default of any defence of the Judgment of the High Court, the learned Counsel for the Respondents suggested one topic which may be disposed of in a sentence. The telegrams, it was said, do not set out a complete contract, and, in particular, do not import the conditions of Graham & Co.'s contract. This argument, if it had any effect, is irreconcileable with the concurrent findings of both Courts. But the answer is that if the telegrams do not prove what is said to be wanting, the broker's evidence does.

Their Lordships will humbly advise His Majesty that the Appeal ought to be allowed and the Decree of the High Court reversed with costs, and the Decree of Mr. Justice Sale restored. The Respondents will pay the costs of the Appeal.