Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kong Yee Lone and Company v. *Lowjee Nanjee, from the Court of the Recorder of Rangoon; delivered* 13*th June* 1901.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD ROBERTSON.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Lord Hobhouse.*]

The Respondent in this Appeal, who is Plaintiff in the original suit, sued the Defendants now Appellants in the Court of the Recorder of Rangoon for the recovery of money secured by two promissory notes. The Plaintiff is a rice trader carrying on business under the firm of Robert Sutherland & Co. in Rangoon. The Defendants carry on business with other persons under the firm of Kong Yee Lone as Rice Millers, General Merchants and Commission Agents.

The notes sued on are in the form following:—

"Rangoon, 11th September 1899.

"Rs. 1,27,820.

"On demand we the undersigned Kong Yee Lone and Co., "promise to pay to Messrs. Robert Sutherland and Co. or "order the sum of rupees One lac twenty-seven thousand and "eight hundred twenty only for value received in difference on "rice.

"Signed in Chinese character.

"(Sd.) KONG YEE LONE & Co. (in English).

"*Note.*—The translation of the above Chinese character is—

"'KWONG SHIP LOANG.'"

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" Rangoon, 11th September 1899.

" Rs. 5,198. 1. 0.

" On demand we the undersigned Kong Yee Lone and Co. " promise to pay to Messrs. Robert Sutherland and Co. or " order the sum of rupees Five thousand one hundred and " ninety-eight and anna one only for value received in " brokerage.

" Signed in Chinese character.

" (Sd.) KONG YEE LONE & Co. (in English).

" *Note.*—The translation of the above Chinese character is—

" 'KWONG SHIP LOANG.'"

The Defendants pleaded that the character signed to the notes indicates not their firm but somebody or something else; and further that the dealings on which the notes are founded were effected between the Plaintiffs and one Kaim Chiew who, though a partner, was not the manager of the firm and had no authority to bind it. A large part of the controversy in the Court below and at this Bar related to these two defences. Their Lordships will not discuss them further now. One turns on the niceties of Chinese handwriting; and the other on a variety of circumstances adduced to show the position of Kaim Chiew in the Defendants' firm. Both have been ruled by the learned Recorder in favour of the Plaintiff, and at the close of the argument their Lordships were clear that the evidence fully justified his rulings.

A more serious objection to the Plaintiff's suit is that the consideration for which the promissory notes were given was a gambling transaction. The law applicable to the case is the Indian Contract Act which enacts as follows:—

" 30. Agreements by way of wager are void; " and no suit shall be brought for recovering " anything alleged to be won on any wager, or " entrusted to any person to abide the result of " any game or other uncertain event on which " any wager is made.

This is substantially a transfusion of English law into the Indian statute book. Mr. Danckwerts urged that there is a difference between the expression "gaming and wagering" used in the English statute and in the earlier Indian Act XXI. of 1848 and the expression "by way of wager" used in the present Indian Act. Their Lordships are unable to perceive the distinction. Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market. The question is of which nature were the dealings which formed the consideration for the notes sued on. Were they for genuine purchases of rice or only for payment of money by one or the other according to the changes and chances of the market?

The contracts by which the Plaintiff purports to buy rice from the Defendants are broadly divisible into two classes. They are distinguishable on their face by what is called the option clause. In one class of contracts, shown in Exhibits D. 12 to D. 20, the seller has an option to deliver rice from a number of specified mills, among which that of the Defendants is not included. In the other class, shown in Exhibits D. to D. 11, the only mill specified is that of the Defendants. In fact this second class leaves no option to the seller, though the expression used in and appropriate to the first class is retained in the class where only the Defendants' mill is specified.

The Defendants' mill is a small one, capable, as the Plaintiff states, of putting out 30,000 bags in a month. Their partnership capital, too, is small, being fixed by their deed at a trifle more than a lac of rupees.

In the year 1899, by 14 contracts ranging in time from January to the end of August, the Plaintiff bought from the Defendants 22,250 bags of rice. All these contracts, which are set out in the record and are conveniently tabulated in the case lodged for this appeal, are contracts of the second class, viz. for rice from the Defendants' mill. All were duly fulfilled by delivery and payment.

Contracts of the first class are very different both in their character and in the treatment of them by the parties. The Plaintiff's clerk Sitaram produced an account (Exhibit I. Rec. p. 106) showing the dealings which took place between the parties from January 1898 to August 1899. They are very large, considerably exceeding half a million of bags. The witness was asked to mark the items for which the rice had been delivered. The items so marked (see Exhibit I. 1) consist of the 22,250 bags which fell under the contracts mentioned as of the second class, and 5,000 more which are the subject of other contracts made subsequently to the date of the promissory notes. It does not appear by the record whether those 5,000 bags were bought under the first or the second class of contract.

There is some difficulty in applying Sitaram's oral evidence to Exhibit I. because the exhibit relates to a wider range of dealings than those under discussion. The oral evidence is to the following effect.

"Out of 193,250 bags sold to Plaintiff 27,250 were "delivered.

"Of the amount in Exhibit I. put down as bought by "Defendants from Plaintiff, *i.e.*, 258,000 bags none at all were "delivered. These were re-sales for differences. On the 28th "June whoever acted for Defendants began a very heavy "speculation. On that day Defendants sold to the Plaintiff

"30,000 bags, on the 5th July 30,000, on the 10th July "10,000, on 16th 30,000, on 18th 15,000, 24th 30,000 for "delivery August—October.

"On 5th August Defendants bought 62,000 and 94,000 "bags. On 7th August 20,000. On 21st August Plaintiff "purchased 20,000 bags.

"Exhibit A. was given for differences on these sales."

Whether the differences were for the sales in August alone or for those in June and July also, is not clear, and there is a slight discrepancy in the figures. But that does not substantially affect the result of the witness's accounts and statements, which is clear enough. Out of the half million or more bags represented in Exhibit I. there were delivered prior to the date of the promissory notes 22,250 bags, every one of which was sold under the second class of contract. As to the other 5,000 delivered it is not shown that they were under the first class. For all that appears there has not been delivery of a single bag under the first class. During seven weeks in June July and August 1889 were made the contracts on which the notes in suit are founded. They are the last seven items in Exhibit I. They appear to be for 199,000 bags at various prices aggregating upwards of 5 crores of rupees. The latest delivery was to be on the 7th October.

Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts; and they had dealings with other persons besides the Plaintiff. The capital of the firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundred fold. It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact they never completed nor were they called on to complete any one of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are

compared; the one class suitable to traders such as the Defendants and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment; the rational inference is strengthened into a moral certainty. Their Lordships think that from these data it is unreasonable to draw any other conclusion than that the description which the larger promissory note gives of the consideration for it is the correct one. It is for "difference on rice"; not, as now contended, for the price of rice resold by the Plaintiff to the Defendants.

The judgment of the learned Recorder does not dwell on the above considerations. He quotes the judgment of Mr. Justice Cave in the case of *The Universal Stock Exchange* v. *Strachan*, L.R. 1896 Cas. 166, which, as their Lordships agree, lays down the law very clearly. He then asks whether there was in this case a common intention to wager; and he adds "I do not see how I can so hold, "having regard to the fact that the rice was in "certain instances delivered and paid for." But he does not observe that the instances all belong to the class of contracts as to which it is reasonable to infer that they were genuine contracts for the sale and delivery of goods.

Their Lordships hold that the consideration of the notes sued on was a number of wagering contracts within the meaning of the Indian Contract Act. They will humbly advise His Majesty so to declare, and reversing the decree below to dismiss the suit with costs. The Plaintiff must also pay the costs of this Appeal.