

T. S. RICHARDS and Another v. M. P. HAYWARD.

In a correspondence in which it is proposed to the defendant to go out as surgeon to the plaintiff's emigrant ship, it is stated that the ship belongs to a certain class, and that the appointment must be subject to the approval of certain commissioners. The proposal is accepted.

ASSUMPSIT. The declaration stated that before the making of the defendant's promise, the plaintiffs had chartered a vessel called the *Orissa*, to convey passengers and goods on freight from *London* to certain parts beyond the seas, to wit, to *South Australia*, *Port Adelaide*, and *Port Phillip*, and which vessel was then intended shortly to sail to the places above-mentioned with a surgeon on board thereof, that thereupon, heretofore, to wit, on the 21st day of *August* 1839, in consideration that the plaintiffs, at the special instance and request (a) of the defendant, would take out the defendant as surgeon for the voyage aforesaid, in and on board the said vessel, on certain terms, that is to say,—in case of the defendant's occupying a cabin in the cuddy, of and in the said vessel, for his sole use during the said voyage, the plaintiffs would charge him

Neither the quality of the ship nor the approval of the commissioners is a condition precedent to the obligation to go out as surgeon.

A representation that a ship "will carry emigrant labourers not over forty," is satisfied if no more than forty labouring *men* are taken, although with their wives and children that number is exceeded.

A negotiation respecting an appointment as surgeon to a ship was held, under the circumstances, to have terminated in a complete contract.

(a) As to a request where the contract is executory, see *antè*, Vol. I. p. 265. 810.; *antè*, 530.

for his passage a certain sum of money, to wit, 5*l.* 10*s.* in lieu of the full and usual charge of 10*5l.*, and in case of the defendant's making the said voyage in the said vessel in company with another person, and both occupying only one cabin in the cuddy of the said vessel, that the plaintiffs would charge him a certain sum of money, to wit, 168*l.* for himself and such other person, and deduct therefrom the sum of 52*l.* 10*s.* for the services of the defendant as such surgeon, — the defendant accepted the appointment and situation of surgeon for the said voyage, in and on board the said vessel so about to sail as aforesaid, and then promised the plaintiffs to sail in and on board the same, as such surgeon to the said vessel on the voyage aforesaid; and although the plaintiffs, confiding in the said promise of the defendant, were then, and thenceforth continually until the sailing of the said vessel as hereinafter mentioned, ready and willing to perform and fulfil the said agreement in all things on their part and behalf to be performed and fulfilled, and to take out the defendant as such surgeon as aforesaid, upon the terms aforesaid; whereof the defendant then had notice; and although the said vessel afterwards, to wit, on the 15th day of *October* 1839, sailed on the voyage aforesaid; yet the defendant did not nor would, although often requested so to do, perform or fulfil the said agreement on his part and behalf to be performed and fulfilled, and sail on the voyage aforesaid, in and on board the said vessel, as such surgeon as aforesaid, although the plaintiffs reserved for him such cabin in the cuddy of the said vessel for the said voyage, but wholly neglected and refused so to do; and thereby the plaintiffs not only lost, and were deprived of the services of the defendant as such surgeon in and on board the said vessel as aforesaid, and were put to great trouble and expense of their moneys in and about endeavouring to procure and procuring another surgeon

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to sail in and on board the said vessel as such surgeon on the said voyage, but were also forced and obliged for that purpose to engage and did engage a surgeon, to wit, one *J. Greenwood*, as such surgeon, at a greater and higher rate, and for greater fee and reward to him in that behalf, to wit, of 100*l.* more than the services of the defendant would have cost them, if the defendant had performed his said promise.

Second count, upon an account stated.

Pleas: first, non assumpsit; secondly, that the defendant did not accept the appointment and situation of surgeon for the said voyage, in and on board the said vessel so about to sail as aforesaid, *modo et formâ*; thirdly, that the plaintiffs were not continually until the time of the sailing of the said vessel ready and willing to perform and fulfil the said agreement in all things on their part and behalf to be performed and fulfilled, and to take out the defendant as such surgeon as aforesaid, upon the term aforesaid, nor did the plaintiffs reserve for the defendant such cabin in the cuddy of the said vessel for the said voyage, *modo et formâ*; fourthly, that the plaintiffs caused and promised the defendant to enter in the said agreement, and to promise as in the first count alleged, and the defendant was induced to enter into and to make the said agreement and promise, through and by means of the fraud carried, and misrepresentations of the plaintiffs. Verification.

The replication joined issue, upon the first three pleas, and took issue upon the fourth plea, by alleging that they did not cause, &c., nor was the defendant induced, &c., through or by means of the fraud, covin, or misrepresentation of the plaintiffs, *modo et formâ*.

By their bill of particulars the plaintiffs demanded 53*l.* as the amount of actual loss, in difference of passage money and expenses, sustained in consequence of the defendant having refused to perform on his part the

agreement, stated in the first count of the declaration to go out as surgeon in the *Orissa*, chartered by the plaintiffs to convey passengers and goods on freight from *London* to *South Australia*. Of this sum 52*l.* 10*s.* was claimed in respect of the difference of passage money, the plaintiffs having been obliged to allow to the surgeon employed to go out as surgeon in the vessel in the place of the defendant his whole passage money of 105*l.* instead of the sum of 52*l.* 10*s.*, which was to have been allowed the defendant as such surgeon out of his passage money; and 10*s.* the balance of the said sum of 53*l.*, was claimed in respect of the cost of advertising for another surgeon in the place of the defendant, and other petty expenses occasioned by such refusal of the defendant to go out as surgeon in the vessel.

At the trial before *Maule J.*, at the sittings at *Guildhall*, after *Hilary* term 1840, the plaintiffs, in support of the affirmative of the first three issues, put in the following correspondence in pursuance of a judge's order to admit under *Reg. H. 4. W. 4.*

The correspondence commenced with the following letter, addressed by the plaintiffs to the defendant at his residence at *Stroud*, on the 31st *July* 1839.

“ We merely write to inform you, that if you have not yet decided on a ship, we shall be happy to give you any particulars you can desire as to the accommodation in our ship the *Orissa*, which we shall dispatch early in *September* for *Ports Adelaide* and *Phillip*. The arrangements will be the same as those in the ‘*Caroline*’ (which vessel we sent from *Plymouth* fourteen days since), which were quite to the satisfaction of the passengers.

“ P. S. The *Orissa* is 490 tons, *British* built.”

The next letter was the following, addressed to the plaintiffs by the defendant on the 10th of *August*.

“ In answer to your letter of the date of *July* 31st,

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you will oblige me by writing me full particulars respecting the passage to *Adelaide* and *Port Phillip* in the *Orissa*, viz. what you would allow me as surgeon to that vessel; what kind of cabin I should have; whether there are emigrant labourers taken out, &c. I also wish to know your charge for a single person in best cabin; also the charge for two in one cabin.

“ I have several friends who intend emigrating to some part of the continent of *New South Wales* this autumn, and although I could not promise you even one passenger (were you to appoint me surgeon), but of course I should endeavour to prevail upon them to accompany me for the sake of society. If your fare is moderate I have little doubt but I could persuade one or two to sail in the *Orissa* if she is a well built and convenient vessel, &c. You will oblige me by returning an answer as soon as convenient.”

On the 12th of *August* the plaintiffs wrote to the defendant as follows:—

“ SIR, — We have to say in reply to your favour of the 10th current, that a gentleman has been proposed to us as surgeon to the *Orissa*, but that it is probable nothing will be settled immediately. Our intention is to conclude with whoever first accepts our terms, which we will proceed to state to you.

“ A cabin in cuddy for two persons (gentleman and wife), 150 guineas.

“ A cabin in cuddy for two persons (two gentlemen), 160 guineas.

“ A cabin in cuddy for one person (a gentleman), 100 guineas.

“ A cabin in cuddy for one person (a lady), 90 guineas.

“ We propose to give you a 100 guinea cabin, and allow you for your services as surgeon 50 guineas off same. The *Orissa* is A. 1, and all that a vessel should be. The provisions in cuddy or cabin equal to those

provided by us for the "*Caroline*," lately sailed. On this head you shall be satisfied. The duties of surgeon will be light, as we do not take (of emigrant labourers) over forty. We embark them at *Plymouth* towards latter end of *September*. In the other emigrant ships there will be from 200 to 300 labourers.

"Besides the 50 guineas allowance from us, there is an allowance from the commissioners, payable on landing in *South Australia*, of 8s. per head for each emigrant; any appointment we make must be subject to the approval of the *South Australian* commissioners.

"The last surgeon we appointed was Mr. *J. A.*, son of Colonel *A.*, of *S.* He paid us 100 guineas for his cabin, and for self and lady; that is, we allowed him 50 guineas from 150 guineas. Should you know any of his friends, we think they will say how pleased he expressed himself to be, that he took his passage in a vessel with few emigrants.

"P. S.—If you are married we should make you some proposal, as was accepted by Mr. *A.*"

On the 15th of *August* the defendant wrote as follows:—

"In reply to your letter of the 12th instant, I beg to say I shall be most happy to accept the appointment of surgeon to your vessel, the *Orissa*, which leaves *England* the latter end of *September*. And I consent to give you 40 guineas and my services as surgeon for the voyage (of course independent of the commissioners' pay), unless a friend accompanies me to *Adelaide*, when we should require only one cabin; then I should agree to your terms, viz. 160 guineas for both, deducting 50 guineas for my services; and I have every reason to think that at least one of my friends will go out with me.

"P. S.—I shall of course make final arrangements with you regarding my or our cabin in the *Orissa*,

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when I have seen and decided with my friends; and then I shall call and see you in town. You will oblige me by answering this early, and informing me what articles for cabin or berth, &c. I shall require to find myself. Of course surgical instruments, drugs, &c. you will provide for me."

On the 18th the plaintiffs wrote as follows: —

"We regret that the alteration you propose in terms, prevents our closing with you as surgeon to the *Orissa*, at least *till receipt of your reply to this*, which we trust will be immediate. We are so situated with another party, that we cannot alter the terms proposed in ours of the 12th current. As it is likely a friend will accompany you in the same cabin, it is really a pity you should have proposed any deviation. Your cabin fittings you will in a day or two arrange when in *London*. Drugs we find, but not surgical instruments. You, in case of need, must have your own for use. If you decide upon accepting the appointment, you will be pleased remit one third the amount of passage money.

"On our part we promise to do all in our power to make your appointment agreeable to you."

On the 21st of *August*, the defendant wrote to the plaintiffs from *Gloucester* as follows:

"In answer to your last letter, I beg to say that I will accept the appointment of surgeon to your vessel on the terms you propose, viz. 50 guineas, &c.; if I should not have a friend to accompany me, when, of course, it would be 160 guineas for both, &c. I should have answered your letter before, but a friend of mine was going to *London*, and proposed calling on you, but for some reason was prevented, as his stay in town was but for a few hours. I expect to be in *London Saturday or Monday*, when I will call on you and make *final arrangements*; for I cannot possibly do so sooner for many reasons. I am daily expecting to hear from some

friends who are going to *Australia* this autumn, and whom I have requested to accompany me."

The next letter was of the 5th of *September*, from the plaintiffs, as follows:—

"We expected to have seen you ere this. However it does not matter, as we shall not be able to get the *Orissa* off till the 25th from *London*. We think it right to give you an early intimation of this.

"P.S. Let us, if you please, hear in a day or two when you will be up, and if any of your friends accompany you."

Then followed a letter from the defendant of the 8th of *September*.

"My delay in answering yours of *Thursday* is owing to my being from home yesterday and *Friday*. In consequence of my receiving no answer to my last letter to you, dated *August* 21st, I, of course, concluded that you had made arrangements with the other party who had been proposed to you as surgeon to the *Orissa*, particularly as you required from me a deposit of one third passage money, and also an immediate reply to your letter of 16th instant, which I could not answer till the 21st; especially, too, as I observed afterwards in a *London* newspaper that your ship *Orissa* would sail punctually on the 15th of *September* (whereas, in your second letter, I understood she would not leave till the end of *September*), and consequently I should not have had time to prepare myself to join her. I regret exceedingly that I should have caused you any inconvenience regarding the surgeoncy to the *Orissa*, but I certainly must now decline the appointment."

The correspondence closed with the following letter from the plaintiffs, dated 9th of *September* 1839:

"We were much surprised on receiving your letter dated 8th of *September*, to find you declined going as surgeon to the *Orissa*, and the more so on account of

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the explanation you offer. We have, under advice, to inform you that we hold the situation for you under your letter of the 21st of *August*, and shall, in the event of your declining to go in the vessel, hold you liable for all damages we may sustain through the same. Should you not have a copy of your own letters they shall be sent you on application. We leave the *St. Katherine's Docks* early in *October*, not later, we believe, than the 4th."

On the 14th of *September* 1839 the defendant was informed by the plaintiffs' attorney that the *Orissa* would leave the docks on the 14th of *October*, and that unless within a week he withdrew his letter and remitted one third of the passage money, the plaintiffs would proceed to fill up the appointment, and hold the defendant responsible for any loss.

To this application no answer was returned.

No evidence was called by the defendant to support the fourth plea; but it was contended by *Whateley* that the plaintiffs ought to be nonsuited on the ground of variance, the contract declared on being absolute, that evidenced by the correspondence, conditional. The learned judge overruled the objection, but gave leave to the plaintiffs to amend the declaration by qualifying the statement in the declaration of the terms of the consideration by inserting the words "amongst other things," and to the defendant, to move to enter a nonsuit, in case the court should consider that there was a variance, and that such variance was too material to be a proper subject for amendment. The jury having returned a verdict for the plaintiffs, damages 5*l.* 16*s.*,

Wilde, Solicitor General, in *Easter* term last, obtained a rule nisi for entering a nonsuit, on the ground that the correspondence shewed that the matter had rested

merely in negotiation, and that, if it shewed any contract, it was not that declared upon.

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Channell Serjt. now shewed cause. The rule for a nonsuit was moved for upon two grounds; but the leave reserved applies to the latter of those grounds, variance, only. The first ground of variance insisted on at the trial was, that, in the contract proved, it was a condition precedent, that not more than forty emigrant labourers should be taken out, but that such qualification of the contract was not noticed in the declaration. It is submitted that the contract was absolute; and that it was proved as laid. By the defendant's letter of the 5th of *September*, he accepted the offer in the alternative. The terms of that letter would be well understood by both parties, the alternative having been suggested before. It is no objection that the defendant did not at that time remit the passage money. A remittance would probably have been made if the acceptance of the engagement had not been so worded as to leave it open to the defendant afterwards to decide whether he went out alone. Nothing can be clearer than that here there was a distinct offer and as distinct an acceptance of the appointment. If any new terms had been introduced it might have been necessary that the acceptance should be repeated; but none were proposed. The defendant puts his refusal upon an extraordinary ground: "Particularly as you required from me a deposit of one third passage money, and also an immediate reply to your letter of the 16th instant, which I could not answer till the 21st." Yet in that very letter of the 21st, which he thus represents as being too late, he says, "I accept the appointment of surgeon to your vessel on the terms you propose." The substance of the contract was, the amount of passage-money to be charged, and the amount of deduction to be made in respect of the defendant's services as sur-

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geon to the vessel. All other matters were merely collateral, and do not affect the merits of the case. The declaration was therefore capable of being amended. But it is submitted that no amendment was necessary, the alleged omissions being merely in matters of representation, or the subject of minor arrangement. (a) The statement of the class and tonnage of the *Orissa* was perfectly immaterial. Neither were the plaintiffs bound to obtain the approval of the commissioners.

Bompas, contra, in support of the rule. It is necessary to look to the position which these parties were in at the time the correspondence between them took place. The plaintiff, being in the country, first writes up to inquire. The letters of the 15th, 18th, and 21st are all that it will be necessary to consider. It will not be contended that any contract was entered into after the 21st. [*Maule J.* The subsequent correspondence consists in getting further apart. *Tindal C. J.* I think the letter on the 21st overleaps that of the 15th. *Maule J.* It is not suggested that the contract was complete on the 15th.] To make a complete contract there should have been the same power to sue in the defendant as in the plaintiffs; unless both parties were bound there could be no agreement. There was nothing to prevent the plaintiffs from writing on the 22d, that all the cabins were engaged, and they might have concluded a bargain with another surgeon as early as the 20th. [*Tindal C. J.* That was not a question of law, it was for the jury to say whether there had been a waiver. An alteration not objected to must be taken to have been agreed to.]

The contract was misdescribed in the declaration. In the letter of the 12th of *August*, it is said the *Orissa* is A. 1. That statement, as well as the previous statement,

(a) *Vide post*, 588. (a)

the *Orissa* is 490 tons burthen, amounted to a warranty, the omission of which in the declaration could not have been made the subject of amendment under the 3 & 4 *W. 4. c. 42. s. 23.* [*Maule J.* The statement implies that some person has entered the *Orissa* as a vessel of that description.] The vessel might have been insured at a different rate in consequence of that description. Such insurance would have been void if it had turned out, as the fact here was, that the vessel was not A. 1., and was not of the burthen described; yet if this does not amount to a warranty, the defendant would have no remedy even against the plaintiffs for the loss of his insurance contract.

The approval of the *South Australian* Commissioners appears by the letter of the 12th of *August* to have been a condition precedent. The clause in the letters of the 12th of *August*, which states that the appointment was to be subject to their approval, ought to have been stated as part of the contract. [*Maule J.* It is like saying you must get proper clothes for the voyage. *Tindal C. J.* If a condition at all, it is a condition subsequent, a nonperformance of which must be shewn by the other party. (a) Supposing such an averment to be necessary, the declaration might now be amended on payment of nominal costs.]

In the letter of the 12th of *August* it is said, "The duties of the surgeon will be light, as we do not take of emigrant labourers over forty." That was a condition precedent which should have been set out as part of the contract. It would then have been necessary to allege performance of that condition, which allegation the defendant might and would have traversed, as a greater number were taken out. [*Tindal C. J.* That was matter of representation, not amounting to a condition; we must

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(a) See *Wynne v. Wynne*, *antè*, p. 8.

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look at the substance of the contract. *Maule J.* The number of it might, no doubt, have been made part of the contract, that not more than forty labourers should be taken out by the *Orissa*, the question is whether the contract to be extracted from the letters does in fact make this statement a part of the contract.] The variances between the contract proved and the contract declared upon could not properly be amended, according to the decision of this court yesterday in *Smith v. Knowelden*. (a) Nor would the introduction of the words “amongst other things” have removed the difficulty; the necessity of averring performance would still have remained. (b) An action for not going before the *South Australian* commissioners for their approval would have been an action of a totally different form from the present. There was no contract to go until the approval of the commissioners had been obtained.

TINDAL C. J. The plaintiffs have declared upon a contract, that in consideration the plaintiffs would take out the defendant as surgeon for a voyage from *London* to *South Australia* in a certain ship on certain terms, the defendant accepted the appointment and promised the plaintiff to sail in the same as such surgeon on the said voyage, but that the defendant wholly refused so to do. The defendant has pleaded non assumpsit; and that he did not accept the appointment, together with other pleas upon which no point was raised. Two objections are raised to the plaintiffs’ right to retain the verdict which has been found for them: first, it is said that there was no contract, and all that passed between the parties proceeded no further than a negotiation for a contract, and that, therefore, the defendant was entitled to a nonsuit upon the first issue. The second objection

(a) *Antè*, 561.

(b) *Ughtred’s case*, 7 *Co. Rep.* 9 b.

was, that between the contract declared on and the contract given in evidence there was a variance, and of such a nature as not to be amendable under 3 & 4 *W.* 4. c. 42. s. 23.

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As to the first objection, it is to be observed that this is not a contract drawn up in express terms, but one which is to be collected from a correspondence, the terms of which are to be considered in connection with the situation of the parties at the time at which the different letters were written. The case for the plaintiffs as well as that for the defendant was put upon that ground. It was a question for the jury whether the parties had finally agreed or not; and I think they came to a correct conclusion. The plaintiffs' letter of the 16th of *August* proposes terms which vary a little from those contained in the defendant's letter of the 15th, and it requests the defendant, if he decides upon accepting the appointment, to remit the plaintiffs one third of the passage money. In answer to which the defendant writes on the 21st, "I beg to say that I will accept the appointment of surgeon to your vessel on the terms you propose, viz. fifty guineas, &c. if I should not have a friend to accompany me, when of course it would be 160 guineas for both, &c. I should have answered your letter before, but a friend of mine was going to *London*, and proposed calling on you, but was prevented. I expect to be in *London Saturday or Monday*, when I will call on you and make *final arrangements*." It is insisted that as the defendant did not remit the one third of the amount of the passage money, there was a non-compliance with a condition precedent to the completion of the contract. This does not appear to me to be a sound argument. Supposing the plaintiffs might have insisted upon the remittance as a condition precedent, it does not follow that they might not waive the performance of that condition; and from the uncon-

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ditional language in which the defendant accepted the appointment, it is evident that he contemplated that the plaintiffs might not insist upon an immediate remittance. Then it is said that there could have been no complete contract, because the letter of the 21st of *August* speaks of the *final arrangements* as yet to be made. It appears to me that that part of the letter refers only to the minor arrangements connected with such a voyage. (a) I cannot think that the defendant was dealing very fairly with the plaintiffs in saying that he concluded that they had made other arrangements. (b)

The next question is, whether the contract was misdescribed, and if so, whether any of the variances insisted on were of such a nature as not to be amendable under the statute. First, it is said that the declaration should have stated as part of the contract, that the *Orissa* was a ship that was A. 1. It appears to me that this was mere matter of representation, not amounting to a warranty; and that the only effect of such representation was to give an action to the defendant for any damages which he might sustain in consequence of such representation turning out to be false, provided it could be shewn to have been fraudulently made. (c) I do not think that it can be inferred from the correspondence that the parties contemplated a warranty.

I am also of opinion that the statement with respect to the forty emigrant labourers (d) was mere matter of representation, and did not amount to a warranty.

Then it is said that the contract should have been declared upon as being subject to the condition of approval on the part of the *South Australian* commis-

(a) Besides which, it was to be finally arranged whether the defendant was to go out with a companion or alone:

(b) *Vide antè*, 581.

(c) *Vide antè*, 475. (a), 507.

(d) *Antè*, 579.

sioners. (a) That approval, however, was to be obtained subsequently to the contract, and before the defendant entered upon the duties of his appointment. The appointment would, therefore, be defeasible by the non-performance of the condition subsequent. It is not necessary for the party who pleads a conveyance or a contract to set out a condition which goes in defeasance of such conveyance or contract. If such condition exist, it should be stated by the other side, with an averment of the non-performance of the condition; agreeably to the known distinction between conditions precedent and conditions subsequent. (b)

I am of opinion that there was no necessity for any amendment of the declaration; and that the verdict ought not to be disturbed.

BOSANQUET J. This is an action upon a contract to be collected from letters which have passed between the plaintiffs and the defendant. I think the jury have rightly found that these letters amount, not to a mere negotiation, but to a contract.

Then it is said that, supposing a contract to have been made, there were several circumstances mentioned in the course of the negotiation which formed part of the contract, and ought to have been stated in the declaration. Some of these circumstances do not go to the whole consideration of the defendant's promise, and therefore cannot form conditions precedent. Suppose the vessel had turned out to be 489 tons burthen instead of 490, the inaccuracy of the statement might, under certain circumstances, have given the defendant a cause of action, if he had sustained any damage in consequence of the mis-statement, but would not justify a refusal to go out as surgeon to the vessel.

(a) *Antè*, 579.

(b) See *Wynne v. Wynne*, *antè*, p. 8.

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I think the term "emigrant labourers" applies to men only; and, if so, less than forty men were taken out. But, supposing forty-one men had been taken out, I think that no objection could be raised to the declaration on that ground, because I am of opinion that the number of labourers was merely matter of representation. (a)

Then it is said that the contract was not absolute, as stated in the declaration, the appointment being defensible by the non-approval of the *South Australian* commissioners; but the contract was first to be made, and it was made, between the parties: the approval of the commissioners was to be obtained afterwards. If such approval was a condition at all, it was a condition *subsequent*; and as a condition subsequent it would not be necessary to set it out in the declaration.

I am therefore of opinion that a contract was proved, and that that contract was truly stated in the declaration.

MAULE J. The defendant appears to have made a hard bargain with persons better acquainted than himself with the terms on which such services were to be obtained. It is clear that they could not get another surgeon upon the same terms (b) as they had made with the defendant. That could be no defence at the trial; and his counsel set up several defences which he would never have thought of.

The first question is, whether there was evidence to go to the jury of an actual contract. The plaintiffs' case was not a case of a written contract to be construed by the court. It was one in which it was the business of the jury to infer, from all the circumstances

(a) *Suprà*, 588.

(b) It was stated at the trial that the defendant was arrested at *Gravesend*, on board the *Rajasthan*, in which he was engaged as surgeon, on the same terms as the plaintiffs paid to *Greenwood*.

of the transaction, whether there was a contract, and what that contract was. The defendant's letter of the 21st of *August* was as conclusive an acceptance as can well be conceived. A contract having been proposed by the plaintiffs and accepted by the defendant, nothing more was required. It was for the jury to say whether the words "final arrangements," meant the concluding of a contract, or referred to minor arrangements (a), such as the defendant choosing his berth on the star-board or larboard side of the ship.

It was for the jury to say whether the statement that the *Orissa* was A. 1., formed part of the contract. If I had been on the jury, I should have said that it did not. If the plaintiffs had *deceived* the defendant with respect to the class to which the ship belonged, or as to the amount of her tonnage, and the defendant had sustained damage in consequence of such false description, an action would have lain against them; but I think the representation was not a warranty, and therefore formed no part of the contract.

With respect to the number of emigrant labourers, I think it was a question for the jury, whether that statement was intended as a warranty. If it was a question for our determination, I should have no doubt that it amounted to nothing more than a representation. Whether the term "emigrant labourers" excluded women and children, was also a question for the jury; and it is one which admits of little doubt. But even if the whole sixty-three were to be considered as labourers, it would make no difference, so far as this action is concerned, supposing the statement to be merely matter of representation.

With regard to the engagement to supply drugs, if the plaintiffs had omitted to supply them, the defendant

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(a) *Vide antè*, 588.

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The plaintiffs told the defendant that his appointment would be subject to the approval of the *South Australian* commissioners: and being so informed, he entered into the contract. In case such approval had been withheld, that fact might have been an answer to an action by the plaintiffs against the defendants for not proceeding on the voyage; and it certainly would have been an answer to an action by him against them, for not allowing him to go out with the vessel. (a)

I am of opinion that a contract was proved, and that the contract so proved was complete and final.

Rule discharged.

(a) As to the difference between conditions precedent and conditions subsequent, see *Wynne v. Wynne*, *antè*, p. 8. *The Fishmongers' Company v. Staines*, *post*, T. T. 1842. And as to the analogous distinction in the law of *France* between *conditions suspensives* and *conditions résolutoires*, see *Pothier, Traité des Obligations*, No. 202. and No. 224., &c., *Code Civil*, No. 1181, 2. No. 1183, 4.