

MADRAS RECORD OFFICE.

Government of Madras.

Marine DEPARTMENT.

G.O. No. <i>197</i>	Press Mis.
Dated <i>25-5-1858</i>	

Not to be folded or roughly handled

Fort Saint George, Marine Consultation, 25th May 1858.

No. 9. From J. R. BOYSON, Esq., Honorable Company's Solicitor; to the Chief Secretary to Government, Fort Saint George, dated 5th May 1858, No. 216.

SIR,

I have the honor to acknowledge the Extract Minutes of Consultation noted in the margin with it enclosures.

Extract Minutes Consultation, dated 1st May 1858, No. 156, Marine Department.

I submitted same together with the correspondence relating to the same matter, formerly laid before the Advocate General and his first opinion for the further consideration and advice of the Advocate General, and

I now beg to forward a copy of his further opinion.

I also return the enclosures above mentioned.

COPY OPINION.

In compliance with the request contained in Extract Minutes of Consultation, dated 1st May 1858, (Marine Department, No. 165,) received this day, 4th May, I proceed at once to give a further opinion on the subject therein referred to and particularly on Mr. Franklin's Minutes as to which (except upon one point containing *new matter not before submitted* to me) but for the Extract Minutes of Consultation, I should have considered it sufficient to say that I saw nothing in it to alter my previous opinion and that I do not feel called upon to discuss points of law with Mr. Franklin, or to defend my opinion because he entertains a different one.

Mr. Franklin has most gratuitously stated that I "*entirely overlooked* the fact" that the Coals were represented to be at Bimlipatam, he further "has to observe" that I "*entirely set aside* the fact of there having been a conversation previous to the Note; and after stating certain points some of which were formerly laid before me and fully considered by me, and one of which is now stated to me for the *first* time, he pronounces them all to be "most important for the case on one side, but which Mr. Advocate General appears to think *unworthy of notice*." If Mr. Franklin here means the same thing as by his former remarks, *viz*, that I have "entirely overlooked" the contents of the correspondence upon which I gave my former opinion; I have only to say of it, as I do most plainly of the two former assertions, that they are as untrue in point of fact as the imputation of carelessness and negligence which they convey is unwarrantable.

To a person in Mr. Franklin's position it is no reproach to be ignorant of the law but unfortunately he seems by no means aware of the extent of his ignorance, if he were so, he would probably have refrained from stating, that he considers it hard to conceive one thing or inconceivable to believe "another or that one fact had *undue*" weight attached to it "or that a verbal contract has, I believe, equal force with a written one."

The latter assertion seems to stand at the root of much of Mr. Franklin's misconceptions in the present case, and is a proof of the proverbial danger of "a little knowledge."

It is true in some cases and not in others a verbal contract has equal force with a written one *provided* that nothing passes except by word of mouth, but not otherwise to use the words of Lord Tenterden "where the whole matter passes in parol all that passes together may *sometimes* be "taken together as forming parcel of the contract *though not always*, because matter talked of at "the commencement of a bargain may be excluded by the language used at its termination. *But* "if the contract been in the end reduced into writing *nothing* which is *not found in the writing can* "be conserved as a *part of the contract*," and another case, which comes still nearer to the present one, has decided that parol testimony shall be received to *add* to a written agreement even "a term or stipulation which the parties *before* or at the time the bargain was reduced into writing *agreed, verbally, should be* parcel of the written instrument, but which was *not* introduced "therein *for* this would be in effect to *alter* such agreement."

This is the law of the case and these rulings applied to the written tender of Messrs: Arbuthnot and Co., and to Mr. Franklin's written acceptance thereof, and to the fact that his words requesting them to put their tender in an official shape do not amount to a *condition* to which such acceptance was to be subject must govern the decision of the case. If Mr. Franklin *meant* it as a condition as most probably he did, he should have *said* so.

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The other contract which Mr. Franklin refers to, about Coals to be landed at Cocanada, is not a case in point, he would fain make it appear so by assuming contrary to the fact that the same conditions exist in both cases. In the Cocanada case he says he agreed to take Coals provided a Tender in the usual way was forwarded," but in the Bimlipatam case there is no such proviso expressed in his letter; and to that letter Government will be tied down if they defend the case: the last ruling that I have cited, shows that no previous conversation can be given in evidence to contradict, add to, or qualify, the contents of that letter. This is the law however inconceivable to believe Mr. Franklin, may find it."

In giving their opinions Counsel do not usually, very seldom indeed, cite cases, or the decisions of Judges, merely to show that their opinions are not wholly destitute of foundation or wholly unsupported by authority, I have done so at present to enable the Right Honorable Governor in Council to weigh their opinion's (the former Lord Tenterden's, the latter that of Lord Denman and Justices Littledale, Parke and Patteson) against those so confidently expressed by Mr. Franklin.

Neither is it usual for Counsel to allude separately to each particular fact stated, in order to prove that he has not "entirely overlooked it" but I will now state that I did not "overlook" I will not say the fact, but Mr. Franklin's assertion, that the Coals were stated, in conversations previous to Messrs: Arbuthnot's letter of the 18th November to be at Bimlipatam. What the assertion on the other side might be on this point, I have no means of knowing, but it is wholly immaterial for the Court could not go into the question at all, and there is nothing whatever to bear out Mr. Franklin's assertion that "the Coals were required immediately" but quite the contrary; for Mr. Franklin's reply not only does not say so, not only omits to specify any time for delivery, but does say that, when delivered, the coals were to be "kept till required." This certainly does not look like any immediate urgency. All the questions that Mr. Franklin, says "would naturally have arisen" would still arise if Mr. Franklin's letter had stated what it does not state, viz., either that the Coals were to be delivered immediately or had fixed a time for their delivery, and the delivery had been delayed, or the time not been adhered to; but still the question would have been whether the Coals were delivered at Bimlipatam at the proper time so long as they were delivered at the appointed place, by the appointed time it matters not whether they were at Kamskatka when Messrs: Arbuthnot and Co. wrote: nor if the Coals were not so delivered would their previous location at Bimlipatam avail Messrs: Arbuthnot and Co. one jot. It is really tedious to dwell on points that no Court would waste time in listening to.

The whole matter has arisen from Mr. Franklin's ignorance of what most Mercantile men know, that when a correspondence amounts to a contract, the contract must be collected from that correspondence only, and not from any previous conversations; and from his neglect of the common precaution of stating that he accepted the tender provided the Coals were delivered at some fixed time, and provided the tender were made in an official form.

As little did I "entirely set aside" the fact that there had been previous conversations before Mr. W. Arbuthnot wrote his note of the 18th, but it was unnecessary to consider what might be the effect of such a conversation, even if Mr. W. Arbuthnot were to admit it, and to admit that in it, Mr. Franklin, had expressly made it a condition that an official tender should be made, when I knew that no such conversation was legally admissible in evidence.

The suppression by Messrs. Arbuthnot & Co. of the first two lines of Mr. Franklin's note, he seems to consider an act of bad faith on their part, and as indicating a consciousness on their part that his acceptance of their tender was conditional on their sending in an official tender. This may be so, or it may not, or it may have proceeded from a reluctance on their part to show that they had forgotten or neglected to comply with his request; but whatever the motive that led Messrs. Arbuthnot & Co. to omit these two lines from the copy, or Extract they gave, their motive cannot alter either the fact or the Law.

The fact is, that Mr. Franklin's acceptance was not in his letter, conditional on Messrs Arbuthnot and Co. sending in an official tender, the law is that if any such condition was previously verbally expressed, no such conversation can be received in evidence to qualify a written contract.

I was never before informed, what Mr. Franklin now states, that Mr. W. Arbuthnot, if put on his oath in the witness box, must admit that Mr. Franklin had informed him more than

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once "that the purchase would not be concluded without the submission of a formal tender in the usual way."

Had I been so, I should at once have advised that Mr. Franklin should be directed, instead of carrying on a formal official correspondence in the name of the Marine Board, to obtain an admission in writing to that affect in a private and friendly way, from that gentleman, and if he obtained such an admission, verbally or in writing, (the latter being most satisfactory as *litera scripta manet* and cannot alter, as the most honest man's recollection may do) to put it to him and the Firm, as gentlemen, whether, under such circumstances, they could insist on a strict legal right arising from an incautiously worded letter addressed to Mr. W. Arbuthnot, as a private friend, in the full belief that he knew, and would comply with Mr. Franklin's meaning as expressed in previous conversations.

In point of law however, if the case were in Court, no such admission could be made. The Plaintiff's Counsel would object to any such evidence, and the Court must allow the objection; moreover it is unsafe in the extreme, when a Plaintiff is seen resolved to prosecute a claim to rely on a mere statement from a person who is substantially the defendant, that the Plaintiff if pressed will admit that he has morally speaking no claim at all. If Mr. W. Arbuthnot were to admit what Mr. Franklin says, he must admit it placed on his oath, I should be very much surprised if the Firm with such an admission before them were to insist on the claim they now make.

I retain my opinion as to the importance of the fact, admitted by Mr. Franklin, that he told Messrs. Arbuthnot, that "he considered it would have been a breach of faith if the Coals "had been sold to a third party"; for this simple reason, that such a sale to a third party could not, possibly have been a "breach of faith," unless there had been a previous complete contract for them (verbal or written) between Messrs. Arbuthnot and Co. and Mr. Franklin.

"The above are the points which appear to me" (to use Mr. Franklin's words with the addition of a "not") not "to warrant" any "expectation" that the Government would "have a fair chance of resisting the claim if Messrs. Arbuthnot and Co. venture to bring such a case into a Court of Justice."

(Signed) T. SYDNEY SMYTH,

Advocate General.

May 4th, 1858.

No. 10. From J. R. BOYSON, Esq., the Honorable Company's Solicitor; to the Chief Secretary to Government, dated Madras, 17th May 1858, No. 247.

SIR,

I have the honor to forward, for the consideration and orders of Government, a copy of a letter to my address from Messrs. Wilkins and Shaw, received this morning, relative to the Coal which Messrs. Arbuthnot & Co. allege they sold to the Marine Board on behalf of Government in March last, but which sale the Marine Board disputes.

From Messrs WILKINS AND SHAW, to J. R. BOYSON, Esq., Honorable East India Company's Solicitor; dated Madras, 15th May 1858.

SIR,

We are instructed by Messrs: Arbuthnot, and Co. to apply to you on behalf of the East India Company for immediate payment of the sum of Rupees 15,435, the price at which the East India Company in March last purchased from our Clients 441 Tons of Coal together with the amount due to our Clients for Godown rent at the rate of one Rupees per ton per mensem from the 3rd of March last, when the Coal was ready for delivery till the whole of the Coal is removed.

And to inform you that unless this demand is complied with on or before Wednesday next, the 19th Instant, legal proceedings will be immediately instituted against the East India Company to enforce compliance.

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No. 11. ORDER THEREON, No. 197; dated 25th May 1858.

The Advocate General in his opinion forwarded with the first of the above letters, having after full consideration of the papers laid before him under the orders of Government of the 1st Instant, stated that, in his judgment, the Government would not "have a fair chance of resisting the claim made by Messrs: Arbuthnot and Co. on account of their Coal, if they should bring their case into a Court of Justice," the Government, deferring to the view of their legal Adviser, resolve to admit Messrs: Arbuthnot and Co's claim,* and request that the Marine Board will settle it accordingly.

For 441 Tons at Rupees 35 per Ton, Rs. 15,435,
and Godown rent at one Rupee per Ton per
mensem.

2. The Right Honorable the Governor in Council does not doubt that what has occurred on the present occasion will show the Marine Board the necessity of great caution in their future transactions with Messrs: Arbuthnot and Co.

(Signed) T. PYCROFT,
Chief Secretary.

Marine Department

No. 152

From

The Ponnai Company

Solicitor

Dated 5th May 1858

For Orders

Referring to the above - I think there can be
no doubt - that the said Co. had not go
into Court.

None!

I would offer to
refer the matter to arbitration

was Mr. F. - was present to
the Board, he was the Secretary
to the Board - do not forget
A & P. - know that all are
2. That must be ascertained
by the Mr. F. before they can
be deemed binding - have
not all voluntarily previous
to this one been so made
with their firm - all that
would be taken into consideration
2. how by the Act of the Board -
Stephen Bayne & others
had advised A & P. in this

case - before they took the
step they now have done
well,

12th

Marine Department

No 197

Extract from the Minutes of Consultation
Dated 25 May 1858.

Read the following
letters from the Attribe Co's
Solicitor.

Here entered 5:47 May 1858
J. W. 216. 247.

The Advocate General
in his opinion forwarded
with the first of the above
letters, having, after full
consideration of the papers
laid before him under the
orders of Govt of the 1st Inst^t,
stated that, in his judgment,
the Govt would not "have
a fair chance of resisting
the claim made by Messrs
Arbutnot & Co on account
of their coal, if they
should bring their case
into a Court of Justice"
the Government, deferring
to the view of their
legal adviser, resolve
to

At
W
Hall

For 441 tons at R 35 per
ton R 15,435 - and
lodown and at one
rate per ton per mile -

to admit Mr. P. Arthur
H. G. claim, and request
that the Marine
Board will settle it
accordingly -
JP

2. The R H the Girl
does not doubt that
what has occurred
on the present occa-
-sion will show the
Marine Board the
necessity of great
caution in their
future transactions
with Messrs Arthur
and Co

added under order
received in Council
25/5/58.

To the Marine Board - Dispt. 20th
the order only not the
papers -
JP
H. C. Arthur

The conduct of the R H & Co has in this trans-
action been in my opinion so objectionable & un-
fair - that I should mislead the Marine B
to refer all cases for the future and from entering
into any part of business with them as a result

I would add a piece
 to the said offer
 of 1859
 24th July 1859
 the copy of the
 for the said date
 of 1859
 I have
 1859

Received by
 1859

Over 25 years
 Marine 1850 & 1856

1859

1859

1859

1859