P.R. and Co. Vs. Bhagwandas Chaturbhuj

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Court : Mumbai

Decided On : Oct-01-1908

Reported in : (1908)10BOMLR1113

Judge : Knight, J.

Appellant : P.R. and Co.

Respondent : Bhagwandas Chaturbhuj

Disposition : Appeal dismissed

Judgement :

Knight, J.

1. Plaintiffs sue to recover from defendant the price of a number of cases of Turkey red cloth which he contracted to buy from them on September 3rd 1907. The goods were being manufactured to plaintiff's order in England, and consignments of them began to arrive about a month after the execution of the contract. Defendant took delivery of four cases on October 9th, but professed himself dissatisfied with the quality of their contents. Negotiatinos with the vendors resulted in a settlement on November 23rd, when it was agreed that certain deductions should be made from the contract rates; but although this seemed to remove the causes of defendant's discontent, he failed, and eventually refused to take delivery of the remaining castes; and the present suit is the result.

2. The first and most important question of fact arises from the defence set up that the contract is void for vagueness. It is a clumsily worded document, and it contains one sentence which might well defy interpretation. But the parties are agreed as to the meaning of that particular clause, and the. rest of the document presents no real difficulty.

3. It commences by enumerating twenty-one varieties of Kasumba, or Turkey Red Cloth, of various dimensions and descriptions, priced at various rates, and in various quantities. One item will serve as an example of all:

Kasumba, cases 50 (containing). . . pieces, (measuring) 30 yards by 18 inches, 3 chairs, sized, at Rs. 2-3-9.

4. The succeeding items are similar, save in the number of cases, the dimensions, the 'chairs,' (an expression which I will immediately explain), and the rates. The number of pieces is not filled in against any of them, the cases as packed by the manufacturers being apt to exhibit slight variations in this respect, and the importers

being unable to tell beforehand exactly how many pieces each case will contain. In this detail the contract is in accordance with the trade custom and the defendant has not founded any objection on the apparent defect.

5. An examination of the twenty-one items will shew that they are divided into five classes, each of a particular set of dimensions; and that the items of each class are distinguished by the number of 'chairs' shown against them. Thus the first class comprises seven items, all of the dimensions of 30 yards by 18 inches, and each marked one 'chair' more than its predecessor. The first is 3 chairs, the second 4 chairs, and soon up to the 7th, which is 9 chairs. Similarly, the second class, 24 yards by 26 inches dimensions, comprises 5 items ranging from 3 chairs to 7; and so with the other three. Each class begins with a 3 chair item, and one chair is added with each successive item in the class. With this addition there is a progressive increase in the rates shewn against the item.

6. Now the ' chairs ' refer to the ticket or private trade mark that Messrs. Steiner and Co., the manufacturers of these goods, affix to certain of their wares. Goods so marked have acquired a favourable reputation in the Bomby market, and the presence of the chair tickets therefore conveys an assurance to the customers of a certain degree of excellence in the goods to which they are affixed. I must hereafter discuss the meaning that is to be attached to the mention of the tickets in the contract, a question which involves one of the principal points of contention in the suit. Before doing so, however, I will finish with the contract itself. Having enumerated the items, it states that plaintiffs had ordered the goods described from Messrs. Steiner & Co., and that they were to accord in one respect with a certain sample, known as No. 225. It is here' that the ambiguous, or rather unintelligible sentence, occurs; but the parties are agreed that it means that the first, or 3 chair item in each class was to count 2 threads less than No. 225 per quarter inch, and that each succeeding item was to be 2 threads more than the one preceding it. Thus the 4 chair items would be of the same count as No. 225, the 5 chairs 2 threads more, and so on. Then the contract recites that the goods were to be shipped between September and November, and it concludes with certain provisions as to allowances, to which no further reference need be made.

7. The chair question apart, there is no difficulty in understand ing this document. It says that plaintiffs had ordered out from Messrs. Steiner & Co. 440 cases of goods of the description detailed at the commencement; it provides that these goods were to be of a certain range of counts; and it adds that they were to be shipped during September-November. It is affirmatively proved, and it is not denied, that plaintiffs had ordered out these identical goods from Messrs. Steiner & Co. to be shipped during the months specified ; and it is these goods that were sold to the defendant. Defendant, however, contends that the mention of the chairs against the several items implied that the goods were to be of a certain quality, namely, of the quality of other Turkey Red goods of Messrs. Steiner & Co.'s, already on the market and bearing the same tickets and the same number of them. The goods tendered, he says, fell far short of this standard; and for this reason among others, he claims to be entitled to rescind the contract.

8. It is necessary to explain here that goods of the particular description covered by the contract were new to the Bombay market. These goods were to be ' hard finished,' or sized, and the market was hitherto familiar with nothing but the ' soft finished', or unsized. The thread standard, No. 225, is itself hard .finished, but it is

admittedly of an inferior description, and does not rank in the same class as Messrs. Steiner & Co's goods. Now the chair ticketed goods of Messrs. Steiner & Co. that bore so excellent a reputation were all soft finished, or unsized; and defendant says that in contracting to purchase these new importations from the plaintiffs, he agreed to buy goods of the same quality as Messrs. Steiner & Co.'s. soft finished wares. This the plaintiffs deny, contending that the mention of the chair tickets in the contract implied no more than that the goods should bear the warranty of Messrs. Steiner & Co.'s well-known trade mark.

9. I am satisfied that the plaintiffs' reading of the contract is correct. Messrs. Steiner & Co.'s Bombay Agent has deposed that a given number of chair tickets does not in itself denote any particular quality or fineness. Not only are there four different colours of chair tickets, but there is more than one quality among goods bearing the same number of chair tickets of the same colour. It is only when the dimensions, as well as the number of tickets, is known, that a particular quality can be predicated of a particular piece. The value of the tickets therefore, apart from the general assurance that the piece is of Messrs. iSteiner & Co's make, and, therefore intrinsically good, is relative and not absolute; and the number of the chairs serves only to distinguish the quality of one piece from another of the same dimensions. It affords no standard for comparison with pieces of other dimensions. This matter of dimensions, of the number of yards contained in each piece, that is to say, together with the width of the yard, is a detail of considerable importance in the piece goods trade; and it is proved that Messrs. Steiner & Co., had no unsized goods on the market of the dimensions assigned to those the subject of the contract. If therefore the Agent's evidence be accepted (and it stands entirely uncontradicted), three factors are necessary to the determination of the quality of Messrs Steiner & Co.'s goods; the colour of the chair tickets, their number, and the dimensions of the piece to which they are attached. It must follow that the mention of only one of the three in the contract cannot be interpreted as indicating a standard of quality. It is clear too that the defendant's interpretation encounters a special difficulty in connection with, the colour of the tickets. The parties are agreed that the tickets intended were of the green and gold variety, as indeed the plaintiffs' indents shew; but the contract makes no mention of the colour, and when therefore the defendant pleads that he understood 3 chairs, 4 chairs, and so on, to indicate a particular quality, he is bound to explain his omission particularize the colour of the tickets to which he was referring. Three chairs green and gold is not the same as three chairs purple and silver, or red, or pale blue. If then he meant the chairs to indicate a particular standard of quality, why did he not see to it that the contract set forth his intention He seeks to take refuge in the excuse that he had not long commenced to deal in this particular market and was not familiar with its technicalities; but I must regard the excuse as thoroughly artificial. He is a man of thirty or forty years' experience in the Bombay cotton trade, and although it may be true, as he says. that his experience in the piece goods market is of recent date, I decline to believe that in a contract involving a sum of over a lakh of rupees he would blindly commit himself to the guidance of an ignorant servant and an unscrupulous broker, or would bind himself in so heavy a liability without a clear idea of what he was undertaking. And, as I shall presently shew, his conduct when the dispute arose with the plaintiff, no less than his shifty and disingenuous behaviour in the witness box, were such as to imbue me with the strongest doubts of his honesty.

10. In one respect however the chairs did represent a standard, as the plaintiffs admit, a standard of colour. This quality is all important in Turkey Red goods, and

Messrs. Steiner's wares have attained their high reputation largely because of the rich and permanent colour they impart to them. All their goods, of whatever quality and whatever variety of ticket, bear this colour, so far as the fabric will allow them to take it; and in agreeing therefore to affix their chair tickets to the contract goods, it was understood that they would guarantee them to be of their standard dyeing. It is proved however that, whether owing to the sizing of the cloth or to other causes, the shade of the goods supplied fall somewhat short of this standard, but the circumstance does not affect this part of my argument, although I must recur to it at a later stage. I, therefore, find that the contract is free from any kind of vagueness or ambiguity. Plaintiffs agreed to sell, and defendant to buy, the particular goods ordered out from Messrs. Steiner. The quality of the goods, so far as regards colour, was to be determined by the chair standard, and their texture by comparison with No. 225. I am satisfied that both parties intended and executed the contract in this sease, and it is really unnecessary therefore, to debate the consequence of a finding that defendant was under a mistake in reference to the quality. If, however, it should be supposed that he genuinely believed that the quality of the goods was to be regulated in other respects by that of three chair soft finished goods, (a supposition wholly at variance with the indications afforded by the relative prices of the two), it would avail him nothing, unless he could also prove that his misunderstanding was due to plaintiffs' misrepresentation. This indeed he has endeavoured to do, and I must devote a few words to the evidence on the point.

11. It consists entirely of the depositions of his own servant Hirji, and of his broker Devchand, both of whom say that the plaintiff Kachara assured them that the goods would be of three chair ' soft finish quality. I do not believe them. Hirji is a deeply interested party, being on his own shewing the man principally responsible for his master's execution of the contract. Devchand broke down completely under examination, and it is necessary to a proper understanding of the conduct of the parties to explain the character of the collapse. It was part of defendant's original case that the contract was of a kind known in thetradeas ' invoice pher' (pher meaning '' difference'), a contract, that is, wherein the vendor importer agrees to sell the goods at a certain percentage above the rates charged him by the manufacturer. In order to substantiate this case, the defendant made strenuous efforts before the hearing to force the plaintiffs to disclose the rates at which they purchased from Messrs. Steiner, but I saw no reason to compel the discovery until he should first have laid the necessary foundation by evidence. When Devchand came into the witness box, he swore that the contract was on the invoice pher basis; but the assertion was not only false but stupid. For, on the face of it, it was manifest that the rates agreed to by the defendant were fixed, and bore no relation to other rates; and when the broker was asked to interpret the contract on the basis which he assigned to it, he had first to admit his inability to doso, and then to confess that his assertion was false. Thereby he,not only damned the rest of his evidence, but revealed himself as a reckless supporter of the defendant's case, and robbed all the statements that he made in his favour of any value that they might have possessed. Neither Hirji nor defendant himself played a very creditable part in the witness box, but they both steered clear of the invoice pher defence of which so much had been made at the outset, and tried to shift the responsibility for it on to Kachara and the broker. Kachara, I may observe, afforded a pleasing contrast under examination. Candid and straightforward, he did not shrink from making what might seem to be damaging admissions, and I felt no doubt of his entire truthfulness.

12. If then defendant was under a misunderstanding, the mistake was not caused by

anything for which plaintiffs are responsible, and it cannot affect the contract. In such a case, the circumstances would seeni to bear a close resemblance to those in Smith v. Hughes (1871) L.R. 6 Q.B. 597, where both parties were agreed as to the sale and purchase of a particular parcel of goods, and it was held that the mistake of the defendant as to their quality did not invalidate his contract.

13. I now pass to the proceedings subsequent to the contract. Early in October some of the goods arrived, and on the 9th of that month defendant took delivery of four cases. He was not satisfied with them, and communicated his objection to the plaintiffs through the broker Devchand. The further proceedings are related in the letter which they addressed to him on the 31st of the month, a letter wherein they refer to these objections and ask him to appoint a Surveyor to hold a joint examination of the goods together with their own expert whose name they communicated to him. Defendant replied to them next day through a solicitor (the correspondance is marked A2), declining to take delivery of the other goods, calling upon them to take back the four cases he had received, and ignoring the request for a joint survey.

14. One passage in the letter merits quotation; 'the difference which even in the colour was so glaring'-a sentence which clearly implies, as indeed does the whole letter, that defendant had more than one cause of dissatisfaction in the goods. Plaintiffs replied on November 19th (the cause of the delay is not clear) denying that there was any difference in the colour or that there was 'the slightest ground for dispute as to the quality or colour of the goods', and once more demanding a survey, which they fixed for the 23rd idem, again naming their surveyor. On the morning of the 23rd. the broker took defendant's Agent Hirji to the principal plaintiff Mr. Ghandi, Kachara also being present, and then and there it was agreed that the dispute should be settled by plaintiffs making certain rebates in their prices. The parties went forthwith to the offices of defendant's solicitor, and there the settlement (Ex. A. 3) was formally drawn up and signed by Hirji. It recites that ' disputes have arsen' in connection with the contract, and that 'we have decided those disputes 'in the manner detailed, namely, that a rebate of one anna per piece should be allowed in respect of some of the cloth, and of two annas per piece in respect of the rest.

15. Now in the face of the wording of this settlement and of his letter of the 21st October, and in spite of the fact that the four cases of the goods had been in his possession for six weeks and more at the date of the settlement, the defendant has had the hardihood to stand up and swear that at that date he had raised no objection to the goods, and was aware of no objection, save on the score of colour ; and that the settlement related to the rebate to be made on that account only. In this Hirji and the broker support him; and I need hardly characterize the assertions of all three as deliberate falsehoods. They pretend that it was not until after the settlement that they learnt of the defects of texture, length and selvedge which they now allege. The truth of the matter is of course that, owing to the partial failure of the monsoon and other causes, the depression under which the piece goods market still suffers had begun to make itself felt, and defendant, who had discovered perhaps that hard finished Turkey Red was not in any case likely to prove popular among consumers, was bethinking himself of means of evading the contract altogether. For even after the settlement, he still refrained from taking delivery, and when the plaintiffs wrote on December 12th and-reminded him of his obligations, he left their letter unanswered.

16. They waited for a month, and then wrote again (January 12th), and at last he

replied (January 17th) complaining that he had no basis sample with which to compare the goods, which sample he says, he had repeatedly and unavailingly demanded from the plaintiffs. Now the dishonesty of this letter is manifest from two facts; the first, that in his prior letter of November 1st he had stated that he had opened the cases and found the goods not to be 'in accordance with the sample '- a clear though indirect admission that the sample was then in his possession-and the second, that the basis sample alleged, whether it was three chairs soft finish goods or number 225, could be purchased in the bazaar by any one and at any time. It is noticeable too that in the witness box he speaks of samples in the plural, whereas he refers in his letter to sample in the singular.

17. However, the correspondence continued, defendant making the absence of the basis sample in the singular) the burden of his complaint throughout. Finally on February 18th plaintiffs proposed a fresh survey by two recognised surveyors on each side under the rules of the Chamber of Commerce, and sent defendant a piece of what he wanted as a basis sample. But still no reply came, and on the 29th the plaintiffs wrote again naming a date and hour for the survey, nominating their two surveyors, and making the reasonable proposal that the survey should be held at the office of Messrs. Steiner and Co., where the goods lay. To this defendant at last replied, with the amazing counter proposal, that he would consent to the survey provided it were held at the Piece Goods Association Hall, and that the settlement of November 23rd, were cancelled

18. Here I may quit the facts : they need no comment. I need only add that the survey was conducted on behalf of plaintiffs by two qualified English experts who have since given evidence on his behalf, and who have testified that the goods were up to the 225 sample, but that in colour they fell somewhat short of the three chair soft finish standard. This, Mr. Barraclough explained, was a natural consequence of the sizing. Defendant, I may add, also examined an expert, whose somewhat technical evidence did not materially conflict, so far as I could understand it, with the conclusions of Messrs. Barraclough and England. They did not invoke his services until the hearing of the case had commenced, and he did not complete his examination until after he had heard the evidence given by the plaintiff's experts.

19. I find on the issues of fact, (1) that defendant's version of the contract is not true, (2) and (10) that no market custom has been proved which affects the questions in suit, (3) that the contract was not subject to invoice pher, (4) and (5) that the contract bears the meaning attributed to it by plaintiffs and is not void for uncertainty, (6) that defendant was not under any mistake, (7) that the settlement binds defendant and that it covered all objections taken by him to the goods, (8) and (9) that colour apart the goods tendered were in accordance with the contract and not inferior to those contracted for, (11) and (12) that, colour apart, defendant's objections were not substantial, (13) that the evidence of Messrs. Barraclough and England is valid evidence, whether their survey were ex parte or no, (14) that defendant was bound to take delivery and pay, (15) that plaintiffs did not fail to perform their part of the contract save in respect of 22 cases, (16) that defendant is not entitled to his counterclaim.

20. On the facts therefore plaintiffs suceed in every detail. There remains however an issue of' law, on, which I am compelled to come to a conclusion that is fatal to their claim. After reciting the facts which I have discussed, the plaint goes on to state, that the goods have remained on the plaintiffs' hands, and the relief which it claims is the

recovery of the agreed price from the defendant. The plaintiffs have not followed the ordinary course of selling the goods and claiming the difference between the realizations and the contract price as compensation for loss or damage. They claim the price itself and the question is whether the Indian law entitles them to this remedy.

21. That such a claim is admissible in English law is beyond question. It will have been clear from my review of the facts that the goods were ascertained, and that there was an implied agreement between the parties that both payment and delivery should be postponed. Under Section 78 of the Indian Contract Act therefore the property in the goods had passed to the defendant. Now Section 49 of the English Sales of Goods Act, 1893, explicitly provides that ' where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.' This was the common law of England long prior to its codification in the Sales of Goods Act: Maclean v. Dunn (1828) 4 Bing. 722. But it is noticeable that until the passing of that Act, the vendor was not entitled to resell goods the property of which was in the buyer, unless the right to do so were expressly reserved to him by the contract. (See American and English Encyclopoedia of Law, xxiv, 1141, and the authorities therein cited). In this respect the Act of 1893 seems to have effected a modification of the pre-existing law, for Section 48 gives the unpaid vendor the right of resale when the goods are of a perishable nature, or when he has given due notice to the buyer of his intention.

22. Now the Indian Contract Act, designed as it was upon the lines of the English common law existing at its date, nevertheless presents marked divergences therefrom in these details. In the first place, it anticipated the Sales of Goods Act in expressly empowering (Section 107) the unpaid vendor to resell the goods after a reasonable lapse of time and notice to the purchaser. And in the second place, it contains no provision whatever sanctioning a claim for the price of undelivered goods. By Section 120 it is provided that if a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale. 'Sold' must be interpreted by the definition of sale in Section 77, as meaning 'exchanged for a price,' the ownership of the thing sold passing to the buyer. The remedy for a breach of such contract is set forth in Section 73. which enacts that the party who suffers is entitled to receive from the other compensation for loss or damage caused to him thereby. In the alternative, he is entitled to rescind the contract under Section 39; but he has no other remedy. Nowhere is it suggested or implied that he can maintain an action for the price.

23. Seeing what the English common law was at the date of the passing of the Contract Act, and what indeed it still is, I am unable to regard this omission from the Indian statute as other than deliberate and intentional. The Indian Act, as I read it, says that no one shall maintain an action for breach of contract unless he proves that he is damnified by that breach. Under Section 73, it is only a party who suffers by the breach who is entitled to demand relief, and the relief accorded to him is measured by the loss or damage that he has suffered. Illustration (h) to the section is especially significant here. It expressly recites that the vendor A would have secured a profit by his sale to the purchaser B if the latter had not refused to accept the goods. It illustrates not only B's breach of contract, but A's consequent suffering as well; and it is impossible to read it without realizing that the loss caused to A is an essential part of the conditions which it postulates. Studied in the light of this illustration, I am

convinced that the Indian Act does not sanction or permit an action for breach of contract of sale save where specific damage is proved to have resulted from that breach. Section 73 not only confines the right of relief to the party who suffers, but provides how his loss is to be measured, what it is to include and what to exclude, and what circumstances the Court must take into account in estimating the loss. For the party who does not prove that he has suffered and the unpaid vendor of undelivered goods may easily profit by the breach instead of suffering-it provides no relief whatever.

24. Other arguments may be adduced to fortify this conclusion. The second schedule to the Limitation Act, while prescribing the limitation for four varieties of suits for the price of goods sold and delivered (Arts. 52-55) makes no provisions for suits for the price of undelivered goods, The^circumstance is not without significance. It is more material however to observe that a suit of this latter kind is essentially indistinguishable from a suit for specific performance. Suppose that in the case before me plaintiffs were entitled to demand specific performance ; for what relief could they ask save that which they actually demand, viz. the recovery of the contract price from the defendant So far as they are concerned, the payment of that price would be a complete and literal fulfilment of the contract: for it matters not to them whether defendant should proceed thereafter to take delivery or not. It is clear to me therefore that the suit comes within the mischief of Section 21 of the Specific Relief Act: indeed, there is an illustration to that Section (the second under (a)) which virtually reproduces and prohibits it.

25. If therefore plaintiffs have no remedy under the provisions of the Indian Contract Act, are they entitled to go outside it and invoke the aid of the English Law? I have been referred to rulings of the Indian High Courts which might imply that they may. In Buchanan v. Avdall (1875) 15 B.L.R. 276 , for example, the learned Judge observed that in the circumstances of that case the plaintiffs might have insisted on defendant taking the goods sold, and sued him for the contract price. That judgment however was pronounced before the passing of the Specific Relief Act, and it may reasonably be doubted whether it correctly represents the existing law. Prag Narain v. Mulchand ILR (1897) All 535, which was quoted for the sake of a dictum from Mayne on Damages embodied in it, is hardly in point. There is no obligation on the unpaid vendor to resell, it is argued; but the answer is obvious. The law obliges no man to protect himself against loss, but Section 107 of the Contract Act gives the vendor the option of reselling in order to so protect himself if he choose. It was held in Buldeo Dass v. Howe ILR (1880) 6 Cal. 67 that Section 107 does not declare the vendor's only remedy; but his other remedy seems to lie in nothing but the rescission of the contract, and this appears to have been the alternative then suggested. The only other substantial argument, which the Counsel who has so skillfully argued the plaintiffs' case has been able to lay before me, is drawn from the skeleton plaint given in the fifth schedule to the Civil Procedure Code (Form No. 12), a form which is reproduced with little material alteration as No. 5 in the new Code. It certainly seems to suggest a case where the vendor sues for the price of undelivered goods ; but apart from the fact that the particular case is of a special and peculiar character, I am unable to regard the form as possessing the authority of substantive law, or as detracting from the force of the arguments which I have set forth above.

26. Returning however to the importation of English law into matters for which the Indian legislature has made explicit provision, I must refuse to recognise any such extraneous authority in the case now before me. Two recent pronouncements

emanating from the highest Court in the Empire, the one couched in general terms, the other stated in express reference to the Contract Act, must effectually close the door against all such attempted extensions. In the case of Gokul Mandar v. Pudmanand Singh (1902) 29 I.A. 202 : 4 Bom. L.R. 793, their Lordships of the Privy Council observed that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction. In Mohori Bibi v. Dharmodas ILR (1903) Cal. 548 : 5 Bom. L.R. 621, a case a year later in date, the same august authorities stated that in their opinion the Contract Act, so far as it goes, is exhaustive and imperative. Stronger words than these the English language does not contain: and as for the minor qualification that precedes them, it would be ridiculous to assert that the act does not 'go so far' as the question of the contractual relations between buyer and seller. To these quotations I may add another drawn from the case of Buldeo v. Howe, cited above, where Garth C.J. observed that the Court was bound to determine questions of sale, delivery and the like, by reference to the Contract Act and not to English law; and I may finally refer to the important remarks of Lord Herschell quoted by the present Chief Justice of Bengal in Lala Suraj Prosad v. Golab Chand ILR (1901) Cal. 577.

27. If then the plaintiffs' rights must be determined by reference to the Contract Act and to that alone, I am forced to the conclusion that their claim, just though it be, is one which Indian law does not recognise. They have not alleged that they suffered any loss through defendant's refusal to accept the goods; indeed, they are in the unfortunate position that, whatever liberty I might be persuaded to allow them, they are now unable to prove that they did suffer any loss. For goods of the particular species of those in suit were never on the Bombay market at all, and it is impossible to ascertain or even to surmise what they would have fetched if they had been put to auction two years ago.

28. For these reasons I hold on the seventeenth issue that the suit does not lie, and I must direct that it be dismissed. Under the circumstances of the case I direct that each party do bear his own costs.