Present : Jayewardene A.J. 1923.

THE COLOMBO ELECTRIC TRAMWAYS AND LIGHTING CO., LTD., *v.* PEREIRA.

151—C. R. Colombo, 6,102.

Failure to reply to letters—Presumption of admission.

Observations as to when failure to reply to a letter may be construed to amount to an admission of a claim made therein.

THE facts appear from the judgment.

Mervyn Fonseka (with him *Garvin*), for appellant.

R. L. Bartholomeusz (with him *Keuneman*), for the respondent.

July 20, 1923. JAYEWARDENE A.J.—

At the argument of this case I was much impressed with the contention for the appellant that the learned Commissioner had come to a wrong conclusion on the facts, but on a closer examination of the evidence, specially the documents, I am convinced that the finding of the lower Court is correct, although not exactly for the reasons given in the judgment. The principal question is whether the defendant agreed to pay a two-third or a half share of the cost of installing an underground main for the supply of electric current to the house of one Fernandez through the defendant's premises. The installation was arranged with the plaintiff company through one Braid, an architect, who constructed the house on Fernandez's premises, and who had supplied plans for the construction of two bungalows on defendant's premises. I have no doubt that in the transaction Braid acted as the agent of both defendant and Fernandez. The cost of the installation was agreed on at Rs. 1,600. The defendant's two-thirds share comes to Rs. 1,066·66. He has paid Rs. 800 as half share of the cost, which he says was the share he agreed to pay. The plaintiff company sues him for the balance, Rs. 266·66. A question was raised as to whether the contract was a joint one, in which case the plaintiff contends that he is entitled to recover the full cost (Rs.1,600) from either Fernandez or the defendant, and so the defendant is bound in any case to pay the balance, Rs. 266·66. I need not discuss this contention in the present case, as I have come to a conclusion adverse to the defendant on another point. It also raises very difficult questions on which I have not heard any argument. The installation of the main

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appears to have been completed in June or early in July, 1922. The plaintiff company sent their bill to Braid for Rs. 2,010, which included the cost (Rs. 410) of certain wire fittings for which Fernandez alone was responsible. Braid replied by P 7 on July 24, 1922, asking the plaintiff to send two distinct accounts as indicated in that letter, which he said he would pass on to his clients, or which the plaintiff company might render direct to the defendant and Fernandez, if it so preferred. This letter shows that the defendant and Fernandez were each charged Rs. 800, that is, half the cost. Separate accounts were evidently sent by the plaintiff to Braid, who sent defendant's account to him enclosed in a letter dated July 26 (P 17). This bill also showed that the amount due from the defendant was only Rs. 800. Fernandez handed to Braid either the account sent to him or the one sent to the defendant, and evidently complained that he had been called upon to pay half share, when the agreement was that he should pay only one-third, for, on July 29, Braid wrote P 14 to the defendant. In this letter Braid states : " This account (that is, one for Rs. 800), we regret, was sent in error, as the arrangement between Mr. Fernandez, yourself, and the signer at the time this was agreed was that you should contribute two-thirds this cost of Rs. 1,600. He asked him to forward a cheque for Rs. 1,066·66. Defendant sent no reply to this letter. Braid wrote again to the defendant at the end of August (D 2) asking him to send the plaintiff a cheque for Rs. 1,066·66, which he said was considerably overdue, and for the settlement of which the plaintiff was pressing. To this letter, too, no reply was sent. Fernandez paid his one-third share on September 15 (P 8). On September 19 the plaintiff company wrote P 4 to the defendant demanding payment of Rs. 1,066·66, and threatening to sue him unless the amount was paid by the 21st of that month. On September 22 the defendant wrote to Braid for the first time, apologizing for not acknowledging his letters earlier and stating that the arrangement he made with Fernandez was to pay half the cost of laying the main, and enclosing a cheque of Rs. 800, which Braid sent to the plaintiff. Braid replied by P 16 of September 23, stating that the arrangement between plaintiff and Fernandez was that defendant should contribute two-thirds the cost of Rs. 1,600, and that the defendant had not previously disputed this point, although Braid had approached him several times for settlement on that basis. To this letter defendant replied through his proctors on October 2 (D 3), stating among other things that the defendant had never employed Braid as his agent, and that he was the agent of Fernandez, and that he entered into no agreement with Fernandez to pay two-thirds of the cost. There are some letters in which Fernandez agrees to pay the sum in question, but that was done to induce defendant to pay half the cost of a boundary wall between his and the defendant's premises.

The failure of the defendant to reply Braid's letter of July 29 (P 14), in which it was clearly stated that defendant had agreed and was liable to pay two-thirds of the cost of the installation until September 22 after he had been threatened with an action, amounts, in my opinion, almost to an admission in law of his liability to pay a two-thirds share of the cost. This letter must have conveyed to the defendant the impression that Fernandez himself supported Mr. Braid's view, as the letter P 14 was written in consequence of a visit to Braid by Fernandez, who handed him the account showing his liability to pay half the cost. Defendant did not protest to Fernandez either. Mr. Braid also points out in P 16 that the defendant did not previously dispute his liability to pay two-thirds of the cost, although he had approached defendant several times for settlement on that basis. It has been held in *Wiedeman v. Walpole* [1] that in certain circumstances the failure to reply to a letter amounts to an admission of a claim made therein. Lord Esher. M.R. there said :—

> Now there are cases—business and mercantile cases— in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it, if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, " but you promised me that you would do this or that," if the other does not answer that letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement.

And Kay L.J. said :—

> There are certain letters written on business matters, and received by one of the parties to the litigation before the Court, the not answering of which has been taken as very strong evidence that the person receiving the letter admitted the truth of what was stated in it. In some cases that is the only possible conclusion which could be drawn, as where a man states, " I employed you to do this or that business upon such and such terms," and the person who receives the letter does not deny the statement and undertakes the business, the only fair way of stating the rule is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission.

[1] *(1891) 2 Q. B. 534.*

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This principle was followed locally in *313—D. C. Colombo, 27,445.*[1] I think that in this case, if the defendant had not expressly or tacitly agreed to pay a two-thirds share of the costs, he would have replied to Braid's letter, P 34, of July 29, pointing out that he only agreed to pay a half share, especially as it contained a correction of a previous letter which showed his liability to pay only a half share. Or, at least, he would, on the receipt of this letter, have pointed out to Fernandez what the real agreement was, but he did neither. He says he felt offended when he received P 14. In all the circumstances, I feel that this is a case in which a reply to Braid or a protest to Fernandez might have been properly expected. His failure to do so supports the plaintiff's contention that defendant agreed to pay a two-thirds share of the cost. I therefore dismiss the appeal, with costs.

Appeal dismissed.