[HIGH COURT OF AUSTRALIA.]

COHEN & CO. . . . . APPELLANTS;
PLAINTIFFS,

AND

OCKERBY & CO. LIMITED . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 26, 29, 30; *Nov.* 2.

Isaacs, Gavan Duffy and Rich JJ.

Contract—Sale of goods—Delivery f.o.b. at port—Demand by buyer for delivery elsewhere—Refusal by seller—Security for payment for goods—Failure of buyer to provide—Action by buyer against seller for non-delivery—Condition precedent—Non-performance by plaintiff.

By contracts in writing made during 1915 in Perth for the sale of flour it was agreed that the buyers, who were merchants in Egypt, should accept responsibility of providing freight; that the price should be £8 per ton f.o.b. Fremantle; that local credit should be established to enable sellers (a Western Australian company) to obtain payment in exchange for documents at Fremantle, and that the flour should be shipped during January 1916. The buyers arranged for the Bank of Australasia in Perth to negotiate, at the exchange of the day, the drafts, with recourse on drawers, of the sellers upon a bank in London, for account of the buyers payable at sight, against shipping documents relating to Australian flour f.o.b. Fremantle. Subsequently the buyers demanded delivery to the Bank of Australasia at Fremantle against payment; the sellers refused to make such delivery, and the buyers cabled insisting upon compliance with their demand. Thenceforth nothing further was done by either party until after the end of January 1916. An action was brought by the buyers against the sellers for damages for non-delivery of the flour to the bank at Fremantle.

Held, that on the true construction of the contracts the only obligation of the defendants as to delivery was to deliver flour free on board a ship or ships

provided by the plaintiffs; and, consequently, that the defendants were not bound to make the substituted delivery to the bank demanded by the plaintiffs.

Held also, that even if the defendants' refusal to deliver to the bank was not justified, the plaintiffs had neither established a local credit within the meaning of the contracts appropriate to the altered delivery, nor shown that they had been ready and willing to establish such credit but had been absolved from doing so by the defendants' refusal to deliver to the bank; and that, consequently, they were not entitled to sue the defendants for breach of contract.

Byrne v. *Van Tienhoven*, 5 C.P.D., 344, applied.

Decision of the Supreme Court of Western Australia: *Ockerby & Co. Ltd.* v. *Cohen & Co.*, 19 W.A.L.R., 40, affirmed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court by Maurice Cohen & Co., of Alexandria, Egypt, against Ockerby & Co. Ltd., of Perth, Western Australia, upon two contracts in writing for the sale by the defendants to the plaintiffs of certain flour, dated 15th and 16th October 1915 respectively.

The contracts were made by H. A. Evers & Co., brokers, of Perth, acting for both the plaintiffs and the defendants; and the terms of the two contracts, which differed only in respect to the quantity of flour sold—that in the contract of 16th October being £250 tons—are as set out in a contract note of 15th October, sent by the brokers to the plaintiffs, which was as follows:—"Contract Note.—To Messrs. Maurice Cohen & Co., Alexandria.—Dear Sirs,—We beg to advise that we have this day bought on your account from Messrs. Ockerby & Co. Ltd., Perth, in good order and condition as follows:—150 tons best Western Australian Roller Flour packed under buyers or sellers' brands, buyers' option as per clauses indorsed on back. Buyers to accept responsibility of providing freight. Price @ £8 per ton of 2,000 lbs. f.o.b. Fremantle basis sacks 107's. Terms of Payment: L/Credit to be established to enable sellers to obtain payment in exchange for documents at Fremantle. Shipment: During January 1916. Delivery: . Insurance: To be covered and charged to buyers.—H. A. Evers & Co., Brokers.

"Ockerby & Co. Ltd.—T. Ockerby, Managing Director."

(The expression "L/Credit" in this document was taken to mean "local credit.")

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The clauses indorsed on the back were as follows:—"Should shipment be prevented by blockade or war this contract or the then unfulfilled portion thereof to be cancelled. Seller shall not be answerable for loss damage or delay caused by strike or by combination of workmen. Should a fire or accident occur causing stoppage of milling or any other contingency happen whereby delivery of the goods may be hindered the seller may deliver in lieu of flour produced at seller's mill, flour of equal quality and at the contract price. War risk (if any) obtaining on day of declaration at port of shipment to be paid by buyer in addition to the named price. If through any action on the part of the Government sellers are prevented from shipping, they (the sellers) to be relieved of all liability."

On 7th December 1915 a letter was sent to the defendants by the Bank of Australasia, Perth, in which Mr. Palmer Kent, sub-manager, says:—"I beg to inform you that in terms of cabled credit of 4th ultimo (now confirmed) from our London office, we are authorized to negotiate, at the exchange of the day, the drafts, with recourse on drawers, of yourselves upon Banque Belge pour l'Etranger, London, for a/c of Maurice Cohen of Alexandria payable in London at sight, to the extent of £4,025 plus cost of insurance against full sets of shipping documents including invoices, bills of lading made out to order indorsed in blank policies of insurance covering marine and war risk relating to one or more shipments of a total of 500 tons (2,240 lbs. per ton) of Australian flour f.o.b. Fremantle. Shipments to be made during month of January 1916 to Port Said. Shipping documents to be hypothecated to the Bank."

On 19th January 1916 the plaintiffs sent a cable to the defendants in these terms: "Deliver on or before 31st January 400 tons flour our contracts 15th 16th October to Bank Australasia Fremantle against payment." To this the defendants replied on the following day: "Prepared deliver accordance contract and letter credit not otherwise." On 21st January the plaintiffs cabled: "Freight does not concern you unless you deliver as instructed hold you responsible."

No further correspondence passed between the parties, and nothing further was done by either of them, until 4th February 1916,

when the following documents were signed :—" Perth, 4th February 1916.—Under instructions from the Bank of Australasia London on account of Maurice Cohen of Alexandria we hereby tender payment of £3,200 sterling and demand delivery in Fremantle of 400 tons best roller flour. For the Bank of Australasia, Palmer Kent. L. W. Kell." " Tender not being in accordance with terms and conditions of contract we decline to deliver flour as requested.—Ockerby & Co. Ltd.—T. Ockerby, Managing Director.—4/2/1916." " We certify that we tendered £3,200 in Australian notes to Mr. T. Ockerby at the office of Ockerby & Co. Ltd., and demanded delivery of 400 tons best roller flour in Fremantle, and he refused to accept the cash tendered or to deliver the flour.—Dated this 4th February 1916.—Palmer Kent. L. W. Kell."

In their statement of claim the plaintiffs claimed £2,000 damages for non-delivery of the flour, being the difference between the contract price and the market price of the 400 tons of flour on 31st January 1916.

In their statement of defence the defendants said (*inter alia*) that the flour was sold under the said contracts for export f.o.b. Fremantle, shipment during January 1916; that it was a condition precedent to delivery under the contracts that the plaintiffs should provide freight, and a further condition precedent to delivery that the plaintiffs should establish a local credit to enable the defendants to obtain payment in exchange for documents at Fremantle; that the plaintiffs did not provide such freight and did not establish such local credit. They further said, in the alternative, that the shipment of the flour was prevented by the War and the said contracts were thereby cancelled.

The action was heard before *Northmore* J., who gave judgment for the plaintiffs for £2,000 damages and costs. The Full Court of Western Australia having reversed this decision, the plaintiffs now appealed to the High Court: *Ockerby & Co. Ltd.* v. *Cohen & Co.* (1).

Pilkington K.C. (with him *Cox*), for the appellants. The purchasers were entitled to waive the term of the contract requiring delivery " f.o.b. Fremantle," which was introduced solely for their

(1) 19 W.A.L.R., 40.

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benefit. All they were asking for was delivery at Fremantle to them or their agents. They were entitled to say that, not being able to provide shipping, they would have delivery at Fremantle. This would save the respondents the expense of putting the flour on board ship, and would, consequently, be an advantage to them. (See *Sutherland* v. *Allhusen* (1); *Wackerbarth* v. *Masson* (2).) If the parties intended to have a special provision for delivery in the contract, it would appear in the contract under the heading of "Delivery," and not merely by inference under the heading of "Price." The words "with recourse on drawers" in the letter of 7th December 1915 do not render the local credit bad within the meaning of the contract. Even without these words, there would always be recourse on the drawer. Before the necessity to provide the money arose, the respondents refused, by their cable of 20th January 1916, to carry out their part of the contract, and by their subsequent silence they maintained their refusal to the end of the month. This relieved the appellants from the obligation of performing their part. (See *Byrne* v. *Van Tienhoven* (3); *Cort* v. *Ambergate &c. Railway Co.* (4).) The cables of 19th and 21st January show the readiness and willingness of the appellants. After their cable of 21st January the appellants were justified in acting on the basis that they were not bound to proceed with the contract.

Draper K.C. and *Stawell*, for the respondents. The condition as to delivery in this contract was not solely for the buyers' benefit but was also for the benefit of the sellers. It is a question of fact in each case whether an f.o.b. provision is in favour of the buyer only. The onus of proof of showing that this condition is favourable to themselves only, is on the appellants, who allege it. (See *Wackerbarth* v. *Masson* (2); *Bowes* v. *Shand* (5).) This is a contract for the sale of flour for shipment. The flour must be shipped, otherwise there is a breach of the contract unless freight is unobtainable owing to the War, in which case the contract is at an end. After the heading "Delivery" in the contract is a blank, the only delivery contemplated being delivery f.o.b., that is, actually on board (*Stroud's*

(1) 14 L.T., 666.
(2) 3 Camp., 270.
(3) 5 C.P.D., 344, at pp. 349-350.
(4) 17 Q.B., 127.
(5) 2 App. Cas., 455, at p. 463.

Judicial Dictionary, sub "Shipment"; *Hobson* v. *Riordan* (1)). If there is no place fixed, the buyer has the option as to where delivery is to take place, but in this case the place of delivery is definitely fixed by the contract (*Sharp* v. *Christmas* (2)). There are two conditions precedent to the respondents' performance of the contract. The appellants must provide (1) freight and (2) a local credit; neither of these has been done (*Braithwaite* v. *Foreign Hardwood Co.* (3)).

[ISAACS J. referred to *Morgan* v. *Larivière* (4).]

The local credit established by the appellants did not comply with the form required. The only form of payment provided for was for cash against documents, and this was not applicable to the substituted form of delivery demanded by the appellants. The cable of 20th January was not a definite refusal to perform the contract: the appellants could still have had delivery f.o.b. If the appellants desired to cancel the contract on that ground, they should have given reasonable notice to the respondents (*Panoutsos* v. *Raymond Hadley Corporation of New York* (5)). In any event the appellants were not entitled to treat the cable of 20th January as a repudiation. It was their duty to wait till the 31st, and then they would be entitled to relief only if up till then they had been constantly ready and willing to take delivery.

Pilkington K.C., in reply, referred to *Sweet's Law Dictionary, sub* "Letter of Credit"; *Blythe & Co.* v. *Richards, Turpin & Co.* (6); *C. S. Wilson & Co.* v. *Tenants (Lancashire) Ltd.* (7).

Cur. adv. vult.

Nov. 2.

ISAACS J. read the following judgment:—This is an action for damages for non-delivery of goods under an f.o.b. contract. *Northmore* J. gave judgment for the plaintiffs for £2,000. The Full Court (*McMillan* C.J. and *Burnside* J.), on appeal, entered judgment for the defendants. The plaintiffs now appeal from the decision of the Full Court.

(1) 20 L.R. Ir., 255, at p. 271.
(2) 8 T.L.R., 687.
(3) (1905) 2 K.B., 543.
(4) L.R. 7 H.L., 423, at p. 432.
(5) (1917) 1 K.B., 767, at p. 770.
(6) 85 L.J.K.B., 1425.
(7) 85 L.J.K.B., 1320.

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The facts, which are of general commercial importance, are as follows :—On 15th and 16th October 1915, that is, during the War, two contracts in writing were made in Perth, by a broker acting for both parties, between the appellants, Cohen & Co., of Alexandria, Egypt, and the respondents, Ockerby & Co. Ltd., of Perth. The terms of the contracts, which may be treated as one, were, so far as material, that the appellants agreed to buy and the respondents to sell 400 tons of flour as per clauses indorsed on back of contracts. The following provisions appear in the contract :—" Buyers to accept responsibility of providing freight." " Price @ £8 per ton of 2,000 lbs. f.o.b. Fremantle basis sacks 107's. Terms of Payment: L/Credit to be established to enable sellers to obtain payment in exchange for documents at Fremantle. Shipment: During January 1916. Delivery: . Insurance: To be covered and charged to buyers." The clauses indorsed included the following :— " Should shipment be prevented by blockade or war this contract or the then unfulfilled portion thereof to be cancelled." " War risk (if any) obtaining on day of declaration at port of shipment to be paid by buyer in addition to the named price." " If through any action on the part of the Government sellers are prevented from shipping, they (the sellers) to be relieved of all liability." The expression " L/Credit " has been taken to mean " local credit." Cohen & Co. arranged with a Cairo bank, the Banque Belge pour l'Etranger, for a credit in Western Australia in favour of Ockerby & Co. The Cairo bank arranged with the Bank of Australasia in London, and the London General Manager of the Bank of Australasia on 4th November cabled and wrote instructions to the Perth branch of that bank, establishing a credit in favour of the respondents. On receipt of the cable, the bank telephoned its effect to Ockerby. On 7th December 1915, after the confirming letter was received, the Perth branch of the Bank wrote to Ockerby & Co. stating: " We are authorized to negotiate, at the exchange of the day, the drafts, with recourse on drawers, of yourselves upon Banque Belge pour l'Etranger, London, for a/c Maurice Cohen of Alexandria payable in London at sight, to the extent of £4,025 plus cost of insurance against full sets of shipping documents including invoices, bills of lading made out to order indorsed on blank policies of insurance covering marine and

war risk relating to one or more shipments of a total of 500 tons . . . of Australian flour f.o.b. Fremantle. Shipments to be made during month of January 1916 to Port Said. Shipping documents to be hypothecated to the Bank." On receipt of this letter Ockerby called at the Bank, and objected to it on the ground of the words " with recourse on drawers." He raised no objection to it on the ground that it merely undertook to discount his own bill on the Banque Belge at London ; but, passing by any objection on that ground, he objected to the Bank of Australasia treating him as an ordinary indorser with recourse against him if the Banque Belge did not honour the draft. The Bank here, notwithstanding this objection, has always insisted on the condition. Further, it has never varied the other condition as to shipping documents, which, indeed, are inseparable from the form of the letter of credit stipulating for a draft on the Banque Belge. There is nothing to show that the Bank of Australasia would have consented on any other terms to open a credit on behalf of Cohen & Co. in favour of Ockerby & Co. whereby the latter could get cash in exchange for the flour. Performance of the sellers' promise, according to the strict tenor of the contract, included putting the flour on board at their own expense. On January 19 Maurice Cohen sent to Ockerby a cable in these terms : " Deliver on or before 31st January 400 tons flour our contracts 15th 16th October to Bank Australasia Fremantle against payment." I conclude this was the outcome of Ockerby's statement in November to Kent that " there will probably be no shipment on that credit as we cannot get shipping space." Ockerby replied to Cohen on 20th January : " Prepared deliver accordance contract and letter credit not otherwise." On 21st January Cohen answered by cable : " Freight does not concern you unless you deliver as instructed hold you responsible." So the matter rested until January had passed.

It is evident that Cohen did not accept Ockerby's cable of 20th January as a renunciation of the contract. He held the respondents to the contract as a continuing obligation until its normal time for performance had expired. He also persisted in his demand for delivery to the Bank of Australasia, and excluded delivery according to the strict tenor of the bargain. As to strict delivery f.o.b. he

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not only failed to provide a ship, but insisted that that mode of delivery should not be followed.

Cohen & Co.'s cause of action, as stated in their pleadings, is for non-delivery to the Bank of Australasia. Unless that is a breach they cannot succeed.

The respondents, on the other hand, refused, and persisted all through in their refusal, to deliver to the Bank under any circumstances. They have insisted on delivery according to the strict verbally expressed requirements of the contract, meaning that delivery to Bank was not according to those requirements. Therefore, if that be a breach, they must be held liable unless relieved by some other consideration. They have set up in their formal defence (*inter alia*) the following defences: (1) the contract was for export f.o.b. Fremantle; (2) no freight provided; (3) local credit not established; (4) cancellation of contract because war prevented shipment. I propose to consider the first defence later.

As to the second defence—it is true but is irrelevant, because the breach alleged is not that there was no delivery on board. The third defence is true. A good deal of discussion took place as to the effect of "with recourse on drawers." If that were a relevant matter, I should agree with the respondents that their objection to it was good. But the point is irrelevant. The credit that was in fact established was for the purpose of a delivery on board, and was inconsistent with the changed requirement of a local delivery to the Bank of Australasia eliminating the shipment of the flour. The fourth defence is not sustained on the facts. Freight is not proved to have been prevented by the War from coming to Fremantle, though it is shown that whatever freight came was pre-empted by the Commonwealth (see *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.* (1)).

It is, however, agreed by both parties that the pleadings were not rigidly adhered to by them at the trial, but that the matter was treated as one in which the question was whether on the facts as proved the plaintiffs or the defendants should succeed. In argument before us on that basis, further points were accordingly raised.

(1) (1917) A.C., 495.

Seeing that Cohen, notwithstanding the sellers' explicit refusal, treated the contractual obligation as still continuing, and the performance as still prospective, whereby he reserved his right to such damages as he might sustain down to the end of the contract period, the further defence was set up that he had not provided for the security that was stipulated. The sellers say that they, having required a local credit to be established, he had not in fact at any time established one applicable to the substituted delivery he demanded. This, said the respondents, was a condition, probably precedent, of which they were entitled to notice before incurring the trouble and expense of commencing delivery, and at all events it was a condition concurrent with delivery.

It is admitted that no such credit was established, but it was contended for the appellants that, by reason of the continued and unretracted refusal to deliver to the Bank, the purchasers were absolved from establishing it. In support of this Mr. *Pilkington* relied upon *Byrne* v. *Van Tienhoven* (1).

I agree, so far, with his argument—if the refusal was unjustified. It cannot be justified on the ground that it required the sellers to do anything in the course of delivery they had not contracted to do. It was an absolute refusal to deliver to the Bank under any circumstances. If they had not so refused, Cohen & Co. could, and no doubt would, have gone on to direct delivery at the sellers' warehouse or on the wharf, or in some other way not being a *deviation* from the course agreed on. But incidents of delivery to the Bank were not in question: it was a refusal to deliver at all, except according to the strict and full obligation of the sellers, and they declined to recognize delivery to the Bank as within their obligation. I agree that the refusal of the defendants to deliver in a way I assume for the moment to be lawfully demanded, a refusal which was continued down to the end of January, completely absolved the buyers from incurring any trouble or expense in doing an act that, so long as the refusal continued, would have been nugatory. *Jones* v. *Barkley* (2), *Ripley* v. *M'Clure* (3), *Cort* v. *Ambergate &c. Railway Co.* (4) and *Bank of China, Japan, and the Straits* v. *American*

(1) 5 C.P.D., at p. 350.
(2) 2 Doug., 684.
(3) 4 Ex., 345.
(4) 17 Q.B., 127.

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Trading Co. (1) are clear authorities for this. In order to insist on the non-establishment of the credit in fact, notwithstanding refusal to perform, the sellers would have been bound to retract in time to give the buyers a reasonable opportunity to comply with their obligation (*Panoutsos* v. *Raymond Hadley Corporation of New York* (2)).

But does that establish Cohen's right to sue? This, perhaps, turns out to be the point of most general interest in the case. In my opinion *Byrne* v. *Van Tienhoven* (3) goes to show that a party so absolved, though he may defend an action against him, by merely showing he was so absolved, yet, if he sues the other party whose refusal he relies on, he must show he was ready and willing to perform his part, had he not been absolved from actual performance. "Readiness and willingness" is in that case a condition precedent. This Court so held in *Hensley* v. *Reschke* (4). In *Forrestt & Son Ltd.* v. *Aramayo* (5)—an authority not referred to in that case—the judgments of the Court of Appeal are decisive on this point. Lord *Halsbury* L.C. there says: "The party who brings the action must show that he was ready and willing to perform his part of the concurrent acts."

Now, as I have said, the appellants here have not shown their readiness and willingness to establish a local credit by which Ockerby & Co., on delivering the flour to the Bank, would have got cash in return. There is not a scrap of evidence to show that the Bank would have advanced the money for the foreign merchant on the simple security of the flour. Cohen's cable of 19th January does not—as is admitted—imply that he has already established the necessary credit. Apparently he was relying on the "shipment" credit as he (though erroneously) understood it then to be—namely, without recourse on Ockerby & Co.—but, as he was plainly abandoning shipment, that credit was in any case inappropriate, and so the appellants are left in the result without either the actual establishment of a credit, or proof that they were ready and willing to establish one to meet the altered delivery. It is something

(1) (1894) A.C., 266, at p. 274.
(2) (1917) 1 K.B., 767; aff. 33 T.L.R., 436.
(3) 5 C.P.D., 344.
(4) 18 C.L.R., 452.
(5) 83 L.T., 335, at pp. 337-338.

of a departure from the strict case as pleaded, even to consider this argument on the appellants' behalf, because the pleadings set up the actual establishment of a credit. But, as is just, the parties have relied on the facts as they actually appeared, and on the law as it really applies to them.

Consequently, assuming that Cohen & Co.'s demand for delivery to the Bank was primarily justified, they fail, in my opinion, in this appeal.

But was that demand justified ? This brings me to the consideration of the first defence.

In the case of a simple f.o.b. contract the purchaser may in some cases, in my opinion, claim delivery short of the ship. The universal principle (subject, of course, to any requirement of public policy) is that a man may renounce a benefit, but he cannot, without consent, impose a burden or disadvantage on another. If I contract to pay a certain sum to carry my goods two miles, I may dispense with the carriage of them after a mile, provided I pay the agreed price and occasion no burden or inconvenience to the carrier. If I purchase goods for a specified price to cover the cost of putting them over ship's rails for my benefit, I can pay the price and take them on the wharf or at the seller's warehouse, unless it can be shown that the seller thereby sustains some detriment. But is that the case having regard to the present contract ? I am not prepared to go so far with the respondents as to say that there was an undertaking on the part of the appellants to export the flour. It is not necessary to go so far. It is one thing to limit the buyer's right as against the seller to delivery on board, and another to impose on the buyer the obligation of sending and keeping the goods out of the country. If the narrower interpretation is correct, it is sufficient; if it is not correct, it is useless to inquire further.

Now, as to this, there are two cases dealing with interpretation of contracts of special application to this case. One is *Beacon Life and Fire Assurance Co.* v. *Gibb* (1). Lord *Chelmsford* observes (2): "As Lord *Denman* says, in the case of *Rickman* v. *Carstairs* (3), 'The question in this and other cases of construction of written

(1) 1 Moo. P.C.C. (N.S.), 73.
(2) 1 Moo. P.C.C. (N.S.), at p. 97.
(3) 5 B. & Ad., 651, at p. 663.

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instruments is, not what was the intention of the parties, but what is the meaning of the words they have used.' " The other is *The Teutonia* (1), where *Mellish* L.J., for the Judicial Committee, says: "Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties." That does not, of course, mean you are to stretch its terms in favour of one party against the other; but, reading the two cases cited together, it means that the expressions, and particularly any elliptical expressions, in a mercantile contract are to be read in no narrow spirit of construction, but as the Court would suppose two honest business men would understand the words they have actually used with reference to their subject matter and the surrounding circumstances.

The contract, as is seen, contains two stipulations of special importance: (1) "buyers to accept responsibility of providing freight," and (2) "should shipment be prevented by blockade or war this contract or the then unfulfilled portion thereof to be cancelled." Now, although the second provision did not, in the events shown to have happened, work a cancellation, it is important on the question of construction. The first provision is said to be only what is implied in every f.o.b. contract. In a sense that is true. The buyer has to provide a ship in which he can require delivery. In a sense that is his responsibility. But there are cases where he can get delivery without a ship at all, and there he may have no responsibility in respect of freight. It is in that sense a responsibility, only if he wants delivery on board. But there is here an express provision, unqualified by any express words, that the buyers are to "accept the responsibility of providing freight." And, on the other hand, the contract, which was made in war-time, makes express provision for the event of no freight being procurable by reason of war. In that case the contract is "to be cancelled," which means cancelled on the mere happening of the event (*Adamson* v. *Newcastle Steamship Freight Insurance Association* (2)). It is

(1) L.R. 4 P.C., 171, at p. 182.

(2) 4 Q.B.D., 462.

clear that if shipment is prevented by war there can be no right to delivery on board or otherwise than on board, because the contract is cancelled, and this saves the buyers from any claim against them for not providing freight. But it would be altogether absurd to interpret the bargain as denying to the buyer the right to get local delivery if he were prevented by war from getting delivery for export, and yet conserving to him the right to get local delivery when exportation was possible. As between an Egyptian buyer and a Western Australian seller that is such an absurd result that nothing short of absolute intractability of the language used would justify it. The clause as to "war risks" strengthens this view. It is a clause requiring adaptation to this class of contract. But it is based, I think, on the fact that freight, apart from special provision, means ordinary freight only, payable by the shipper (here the buyer) on delivery of the goods.

The agreed price is calculated to exclude any payment of freight by the sellers. But as the contract is in time of war, it is evident that the shipowner may require something extra for war risk (see *The Twilling Riget* (1)), and may want it in advance, and so it is provided that the seller may pay that and add it to the price stipulated. The word "declaration" seems to be the declaration by the buyers as to the ship. (See by analogy Commonwealth *Marine Insurance Act* 1909, sec. 35 (English Act, sec. 29).) This is an additional feature of the transaction showing how the parties contractually contemplated its performance.

In my opinion, applying the principle of construction laid down in *The Teutonia* (2), the agreement as to delivery was "free on board" a ship, to be provided by the buyers; that they were bound to provide such a ship, unless prevented by war, and in that event there was to be no delivery at all.

I agree, therefore, with the judgment of the Full Court, and think that this appeal should be dismissed.

GAVAN DUFFY J. read the following judgment:—The contracts which we have to consider are not ordinary f.o.b. contracts but

(1) 5 Rob. Adm., 82.

(2) L.R. 4 P.C., 171.

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contracts of a very special nature into which f.o.b. clauses have been introduced. I think that on their true construction the only obligation of the defendants was to deliver flour on board a ship or ships to be provided by the plaintiffs in the month of January 1916. As the plaintiffs did not provide any ship during that month, the defendants were not bound to deliver any flour.

If, as contended for the plaintiffs, the obligation was to deliver the flour in Fremantle and there put it on board ship if the plaintiffs so desired, and if the telegram of 19th January can be regarded as an intimation by the plaintiffs that they desired the defendants to deliver the flour in Fremantle but did not require them to put it on board ship, the position is this. The plaintiffs did not choose to act on the defendants' refusal of 20th January and treat the contracts as renounced or repudiated. By their telegram of 21st January they held the defendants to their bargain, and they were therefore themselves bound to perform their contractual obligations. They had undertaken to establish a credit to enable the defendants to obtain payment in exchange for documents at Fremantle, and if the undertaking is to be read as applying to the case of delivery other than on board ship the word "documents" must include documents other than shipping documents. The defendants were entitled to have that credit established before they delivered any flour, and they were not bound to accept the plaintiffs' promise of payment however trustworthy the plaintiffs might be. The plaintiffs did not establish such a credit before the end of January. The credit they established was subject to "recourse on drawers," and was only available if the flour had been shipped and shipping documents could be delivered to the Bank. It is said that the plaintiffs by their telegram of 19th January offered cash on delivery, and that the defendants could not be entitled to more than cash on delivery. If it was such an offer, the defendants under their contracts could not be bound to take the risk of transporting the flour to Fremantle on the bare promise of the plaintiffs to provide cash against delivery there.

In either view the result is that the defendants did not commit any breach of their contracts.

RICH J. I agree. After hearing the judgments just read, I find it unnecessary to deliver the judgment I have prepared.

H. C. OF A. 1917.

COHEN & CO. v. OCKERBY & CO. LTD.

Appeal dismissed with costs.

Solicitors for the appellants, *Haynes, Robinson & Cox.*
Solicitor for the respondents, *G. F. Boultbee.*

[HIGH COURT OF AUSTRALIA.]

THE MELBOURNE ELECTRIC SUPPLY COMPANY LIMITED . . . . Defendants, } APPELLANTS;

AND

OGDEN . . . . . Plaintiff, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Negligence—Employer and employee—Negligence of fellow servant—Finding of jury—System of supervision.

H. C. OF A. 1918.

MELBOURNE, *Feb.* 26, 28.

Barton, Gavan Duffy and Rich JJ.

In an action to recover damages for personal injuries sustained by the plaintiff while in the defendants' employment by reason of the alleged negligence of the defendants, it was proved that one of a number of poles of the defendants used for supporting electric wires broke off while the plaintiff was working on it, causing him to fall and be injured. One of the defences was that the negligence was that of a fellow employee. The jury found that the defendants did not take reasonable care to provide a proper supervision of