[HIGH COURT OF AUSTRALIA.]

PLAIMAR LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

WATERS TRADING COMPANY LIMITED . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1945.

PERTH, *Sept.* 11, 12.

SYDNEY, *Nov.* 23.

Rich, Dixon and McTiernan JJ.

Sale of Goods—Contract—C.i.f. terms—Shipment from original port—Insurance—War risk—Net cash against delivery order or bill of lading.

A contract for the sale of goods was in substantially the following terms:—(About) four tons Zanzibar clove oil packed in drums each approx. 5 cwts. Price eight shillings and a penny nett landed weight, cost insurance and freight Fremantle. Bank exchange Australia London to buyer's account. Shipment —per steamer during October November December 1941 from original port. Insurance W.P.A. for not exceeding the above value plus ten per cent. War Risk Insurance—if it can be arranged by seller war risk insurance is to be covered and charged to buyer's account. Terms nett cash against delivery order or bill of lading.

Held that the contract, in its leading terms, was a c.i.f. contract. The reference to the delivery order gave the seller an option either to wait until the goods had arrived and obtain a delivery order and tender that instead of the bill of lading, or to tender a bill of lading with the invoice and an insurance policy. The reference to net landed weight meant only that there might be a final adjustment as to price after the arrival of the goods and did not prevent the contract from being a c.i.f. contract.

The goods were shipped from Zanzibar on or about 27th November 1941, consigned to Fremantle by a ship bound for Singapore, there to be transhipped to a ship bound for Fremantle. The ship from Zanzibar arrived at Singapore late in December 1941, and the goods were not afterwards heard of, probably being lost because of the state of war then existing. The bill of lading contained clauses exempting the shipowner from liability for loss or damage at

the port of transhipment and placing it in the position of a forwarding agent only, the carriage of the goods after transhipment being governed by the terms of the bill of lading of the on-carrying ship.

Held, on the facts, that since the route was the only one available, the shipper could not be expected to obtain a more favourable bill of lading.

The policy of insurance taken out by the seller contained an exception in respect of loss at the port of transhipment after the expiry of fifteen days.

Held that this was the usual policy and that the buyer could not demand a more favourable cover.

Decision of Supreme Court of Western Australia (*Wolff* J.) varied.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court of Western Australia by Waters Trading Co. Ltd. against Plaimar Ltd. on a contract for the price of goods sold and to be shipped from Zanzibar to Fremantle. The contract was made on 22nd November 1941 in the following terms :—

"(About) 4 *tons Zanzibar Clove Oil* guaranteed 90/92% eugenol, packed in drums each approx. 5 cwts.

Price eight shillings and a penny (stg.) per lb. nett landed weight, cost insurance and freight Fremantle. Bank Exchange Australia London to buyer's account.

Shipment—per steamer during October November December 1941 from original port.

Insurance W.P.A. for not exceeding the above value plus 10%.

War Risk Insurance—if it can be arranged by seller war risk insurance is to be covered and charged to buyer's account.

Terms. Nett cash against delivery order or bill of lading.

Sellers not responsible for any loss or delay caused by strike direct or indirect fire force majeure and other circumstances beyond their control."

The respondent was a company incorporated and carrying on business in New South Wales as a merchant and the appellant was incorporated in Western Australia where it carried on the business of a manufacturer. The London agent of the respondent procured the goods and they were shipped at Zanzibar to Fremantle via Singapore on 27th November 1941. It appeared that the goods arrived at Singapore late in December 1941, but after that date they were not heard of, the probability being that they were lost because of the state of war then existing at Singapore. The bill of lading was issued to order and duly indorsed and was sent through the Bank of Australasia Ltd., Sydney. From Sydney, it was sent to Messrs. W. H. Evans Ltd., in Perth, who passed it on to Messrs. Grieve & Piper, customs

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and forwarding agents, on 19th January 1942. On or about 27th April 1942, the bill of lading, invoices and policy, together with a demand draft, were presented to the appellant. Payment was refused and the documents were rejected. The respondent claimed the price of the goods (£4,654 2s. 11d.) and the amount paid by the respondent on behalf of the appellant for war risk insurance (£187 5s. 4d.), totalling £4,841 8s. 3d., or, alternatively, damages for breach of contract.

In its particulars of defence, the appellant alleged that the bill of lading was not a proper and sufficient contract of affreightment; that it provided for the transhipment at Singapore; that responsibility for delay at the port of shipment was declined; that liability for loss or detention in respect of certain risks was excluded; that liability was excluded for damage, detention or loss occurring during transhipment and capable of being covered by insurance; that it provided for transhipment at the risk of the owner; that the shipowner granting the bill of lading should at the port of transhipment act as forwarding agent only, without further responsibility, except in regard to through-rate of freight; and that the goods were to be transhipped at the risk of the owners, and after transhipment were to be carried subject to the bill of lading on the on-carrying steamer.

It appeared that, originally, insurance had been effected under an open or floating cover and an insurance certificate obtained. The first copy of the bill of lading, the certificate of insurance and other documents had arrived in Sydney on 18th April 1942. On 20th April 1942, the insurance certificate was converted into a policy issued by the insurer expressing in full the terms of insurance. The appellant alleged that the insurance was insufficient, and in its particulars of defence gave the following grounds, viz., that the insurance was not effected by the respondent in conformity with the contract, that the policy tendered was not effected until 20th April 1942; that the claims thereunder were payable in Sydney; that the goods were then lost; that it was expressed to be understood and agreed to be subject to the English law and usages as to liability and settlement of any and all claims; that loss prior to being on board an overseas vessel was excluded; that loss at a port of transhipment to another overseas vessel after expiry of fifteen days was excluded; that it was warranted free of all claims arising from delay.

At the trial of the action before *Wolff* J., judgment was entered for the respondent for the amount claimed.

The appellant appealed from this decision to the High Court. The grounds stated in the notice of appeal were, *inter alia*, that his

Honour was wrong in holding that the respondent had carried out the terms of the contract and was entitled to payment of the whole or any part of the price of the goods ; that neither the bill of lading nor the policy of insurance was as required by the contract ; that the tender of documents was not made within a reasonable time ; that his Honour's finding that the bill of lading was the best that could be arranged or was usual or customary or sufficient was against the weight of the evidence ; that the policy of insurance was not a valid or effective policy ; that his Honour wrongly admitted and relied on evidence as to previous dealings ; that his Honour, having found that the contract was not a c.i.f. contract, should have entered judgment for the appellant ; that his Honour was wrong in holding that the risk in the goods passed to the appellant on shipment ; that there was no evidence that goods in accordance with the contract had been shipped ; and that his Honour should have found that the appellant was not liable to pay the price of the goods until they had arrived at Fremantle and had been landed and weighed.

H. P. Downing (with him *E. F. Downing*) for the appellant. (1) There is no evidence that the goods were shipped. (2) There is no appropriation of the goods. (3) There were no goods of contract description ever at the risk of the appellant. (4) The respondent was never at liberty to claim payment until it delivered goods of the contract quality to the buyer. (5) On the Judge's finding that no property passed, respondent is not entitled to recover. In the circumstances in this instance the property does not pass until the bill of lading and draft are accepted by the buyer. There is no risk until the goods are appropriated to the contract. The buyer would not know of their existence (*Bowes* v. *Shand* (1)). A policy has never been presented on any previous occasion to the appellant who has nothing to do with the open policy. The shipment of the goods is not admitted. The seller must show he has shipped the goods (*Bills of Lading Act* 1855 (Imp.), adopted here in 1856). The bill of lading is only evidence of shipment as against the master of the ship. There is no evidence of shipment other than the bill of lading. There is no evidence of transhipment (*James* v. *The Commonwealth* (2)). Goods must be shipped from the original port in which they are referred to.

[DIXON J. referred to *In re Denbigh Cowan & Co. and R. Atcherley & Co.* (3).]

(1) (1877) 2 App. Cas. 455, at pp. 467, 468.

(2) (1939) 62 C.L.R. 339, at pp. 376, 377.

(3) (1921) 125 L.T. 388.

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Kennedy on *C.I.F. Contracts*, 2nd ed. (1928), pp. 5 and 6; *Sale of Goods Act* (W.A.). Here the goods were never appropriated to the contract (*Manbre Saccharine Co.* v. *Corn Products Co. Ltd.* (1); *Anderson* v. *Morice* (2); *Zangtze Insurance Association Ltd.* (3)). Bill of lading here means delivery order; something which will enable the buyer to obtain delivery of the goods.

F. Leake K.C. (with him *Louch*) for the respondent.

The law as to proof of shipment is set out in *J. Aron & Co. Incorporated* v. *Comptoir Wegimont* (4); the *Hague Rules*; *Scrutton* on *Charter Parties and Bills of Lading*, 13th ed. (1931), p. 410. There was prima-facie evidence at least that the goods had been shipped in accordance with the contract. The question of appropriation does not apply where specific goods are involved. If this were not a c.i.f. contract, the risk of the goods passes to the buyer on shipment. The vendor sold at a composite price: *Kennedy* on *C.I.F. Contracts*, 1st ed. (1924), p. 79. Reasonable value of the shipment is the proper amount to be insured. The buyer insures his profits, hence the increase of ten per cent (*Castle* v. *Playford* (5)). The respondent did everything required of it. It shipped goods from the original port in November 1941 and insured goods for the amount as requested. It insured against war risks; it delivered the bill of lading in January 1942 as soon as it reached it by post. The bill of lading is symbolical of the goods while they are in transit by sea. The delivery order is also symbolical of the goods after they have been landed and replaces the bill of lading (*Barber* v. *Meyerstein* (6)). The respondent having fulfilled the contract could have claimed payment in January 1942; the property in the goods passed on shipment (*Martineau* v. *Kitching* (7)). Provision for payment on net landing weight at Fremantle does not mean that property has passed to the buyer: See ss. 17, 18, *Sale of Goods Act* (W.A.). In all the previous sixteen contracts, the respondent had never been paid for goods until the appellant had received the invoices, not on receiving the bill of lading. On the assumption that the contract is not c.i.f., the buyer assumed the risk after shipment: *Benjamin* on *Sale of Goods*, 6th ed. (1920), pp. 452, 453. As to incidence of risk, see *Diamond Alkali Corporation* v. *Bourgeois* (8); *In re Denbigh Cowan & Co. and R. Atcherley & Co.* (9)). The only way in which there can be a difference in shipped and landed net weights would be leakage covered

(1) (1919) 1 K.B. 198.
(2) (1875) L.R. 10 C.P. 609.
(3) (1918) A.C. 585, at p. 589.
(4) (1921) 3 K.B. 438.
(5) (1892) L.R. 7 Ex. 98.
(6) (1870) L.R. 4 H.L. 317, at p. 329.
(7) (1872) L.R. 7 Q.B. 436.
(8) (1921) 3 K.B. 443.
(9) (1921) 90 L.J. K.B. 836.

by insurance. Net landed weight did not detract from the c.i.f. nature of the contract: *Henry Dean & Sons (Sydney) Ltd.* v. *P. O'Day Pty. Ltd.* (1).

E. F. Downing, in reply. The contract must be looked at as a whole. The essential features of a c.i.f. contract are lacking. The seller can demand payment against delivery order. The price is based on landed weights and this also contemplates the arrival of the goods before the price can be claimed. The condition of landed weights put the responsibility for leakage on the seller. Insurance was solely for the benefit of the seller. The seller intended to place on the buyer all variations in freight and insurance rate. The ten per cent variation in value for insurance purposes is to fix an upper limit so that the buyer would be protected in case of increase of rate of premium. The war risk condition does not affect the position one way or the other. If the contract is c.i.f., the seller is bound to deliver certain documents, including the bill of lading concerning the goods from the port of shipment to the port of destination to the buyer: *Hansson* v. *Hamel & Horley Ltd.* (2). The bill of lading must provide substantial protection throughout the voyage; this bill of lading did not do so. No claim whatever can be pursued under the bill of lading after transhipment. The bill of lading falls short of the protection required in a bill of lading under a c.i.f. contract. This bill of lading throws upon the persons the liability of having all claims determined under Netherlands East Indies Law (clause 17, bill of lading, and also clause 14). There is nothing in the policy issued in April 1942 to connect it with the appellant's open policy. No specific policy was ever previously asked for by the appellant. The buyer is being asked to accept a policy in circumstances which would involve him in litigation. The policy presented is not an effective policy for the purposes of a c.i.f. contract. The insurance company relieves itself of responsibility after fifteen days from being unloaded for transhipment until it is shipped on the on-carrying ship. In these circumstances, the buyer would have no protection. No tender was made of the documents within a reasonable time of the goods being shipped. A specific policy required prompt notice of any loss. If the seller has any action here, it is for damages: S. 48 of the *Sale of Goods Act* (W.A.). Any appropriation made by the seller was conditional on acceptance of goods by the buyer: *Stein Forbes & Co.* v. *County Tailoring Co.* (3). It is not a c.i.f. contract because acceptance

(1) (1927) 39 C.L.R. 330, at pp. 344, 350, 358.

(2) (1922) 2 A.C. 36, at pp. 44, 45, 46.

(3) (1916) 86 L.J. K.B. 448.

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can be demanded against a delivery order : *Johnson* v. *Taylor Bros. & Co. Ltd.* (1) ; *Sea-Carriage of Goods Act* (1924), the Schedule, Articles. The bill of lading is the only evidence of acknowledgment of the receipt of the goods, namely eighteen drums of clove oil—the consignment might have been anything. It is impossible to find that any risk could have been assumed by the buyer in respect of these goods. They are not identified and there is no active appropriation by the seller. If the contract is not a c.i.f. contract, the seller has not fulfilled his part of the contract.

Louch (by leave). *Scrutton*, 13th ed. (1931), p. 198 ; *Kennedy, C.I.F. Contracts* 1st ed. (1924), pp. 41-42. It is sufficient if the bill of lading is one which is usual in trade or on the route concerned. According to practice and usage, the seller adopted the only practical way of transit to Fremantle. What happened on previous consignments is the best evidence of the practice and usage : *Scrutton*, p. 82 (through bills of lading). Limitation of liability on transhipment is a usual provision. The contract is a mercantile one and should be regarded from that standpoint. Insurance should be made in accordance with the custom of trade : *Kennedy*, p. 56. The usual clause is the negativing of liability after the goods are discharged for transhipment after fifteen days. An inseparable incident of a c.i.f. contract is that the buyer is to accept a policy not giving complete cover : *Kennedy*, p. 4. Protection to be afforded by a bill of lading must be such as is reasonable in a mercantile sense : *Kennedy*, p. 86. It was impossible at that time to get a better policy than that obtained. It is not possible to hold up a transaction under our system of commerce, when the documents are tendered, on the ground that there is no proof of shipment. The bill of lading is prima-facie evidence of shipment under the *Hague Rules*. Unliquidated damages would be the same as the price of the goods.

Cur. adv. vult.

NOV. 23. The following written judgment was delivered :—

RICH, DIXON and MCTIERNAN JJ. This appeal concerns the liability to the seller of a buyer of goods, to be shipped late in 1941 from Zanzibar to Fremantle, which, it is conjectured, were lost at Singapore while awaiting transhipment to Fremantle.

The buyer, a manufacturing company carrying on business in Perth, had been accustomed to purchase Zanzibar clove oil from the seller, a company carrying on a merchant's business in Sydney and elsewhere. The transaction now in question depends upon a written contract, dated 22nd September 1941. The seller claims that it

(1) (1920) A.C. 144.

amounts to a c.i.f. contract, or, if not that, at least one which places upon the buyer the risk of loss or damage to the goods during transit. Having tendered to the buyer, who rejected them, a bill of lading, insurance policy and invoice in respect of the lost goods, the seller sued in the Supreme Court of Western Australia for the price, for which it recovered judgment before *Wolff* J. From that judgment, the present appeal comes.

The contract is expressed in a letter from the seller confirming the buyer's order. It describes the order as one for four tons of Zanzibar clove oil packed in drums each approximately five hundredweights. Then under " price " it proceeds as follows :—" eight shillings and a penny (stg.) per lb. Nett landed weight Cost Insurance Freight Fremantle, Bank exchange Australia/London to buyers' account. This price is based on the current rate of freight and marine insurance, any variations to buyers' account."

Under " shipment " there is the statement :—" Per steamer during October/November/December 1941 from original port." Then follow references to " insurance " and " war risk insurance." " W.P.A. for not exceeding the above value plus 10%. If it can be arranged by sellers war risk insurance is to be covered and charged to buyers' account."

Next comes :—" Terms : nett cash against delivery order or bill/lading." The contract then concludes :—" Sellers not responsible for any loss or delay caused by strikes—direct or indirect—fire force majeure and other circumstances beyond their control."

A contract for the sale of goods upon c.i.f. terms places upon the seller an obligation to ship goods of the contract description to a destination, from a port and at a time indicated by the contract, to obtain a proper bill of lading and a customary insurance covering the ocean transit, to make out an invoice for the price showing what sum, if any, the consignee must pay for freight and giving the buyer credit for the amount, and, as soon as reasonably practicable, to tender these documents to the buyer in exchange for payment of the amount shown on the invoice, or acceptance of a bill of exchange therefor, as the contract may provide.

It is " a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself " : Per *Bankes* L.J., *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1). " It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination,

(1) (1916) 1 K.B. 495, at p. 510.

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and the ordinary contract of insurance of the goods on that voyage, and to tender these documents against payment of the contract price. The buyer then has the right to claim the fulfilment of the contract of carriage, or, if the goods are lost or damaged, such indemnity for the loss as he can claim under the contract of insurance " : Per *Scrutton* J. in *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1). " The condition of the goods at the time of the tender of the shipping documents is not material, nor is the value of the documents at the time of the tender material. In all such matters the risk is on the buyer. He may be obliged to pay for goods although they may be at the bottom of the sea, or although through some unforseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy " : Per *Bankes* L.J. (2). " In my view, therefore, the relevant question will generally be not ' what at the time of declaration or tender of documents is the condition of the goods ? ' . . . but ' what, at the time of tender of documents, was the condition of those documents as to compliance with the contract . . .? ' " : Per *Scrutton* J. (3).

The leading terms of the contract under our consideration are characteristic of a sale on c.i.f. terms and raise a presumption that it falls within that category. But it is claimed that a close examination of its terms show that some of them conflict with the basal conception and change the character of the contract into one in which the arrival of the goods is essential and the risk of their loss in transit is not accepted by the buyer.

In the first place, the words following the statement of money price " nett landed weight " are relied upon as showing that the price is only ascertainable after the goods are landed and that, at all events, risks of loss of weight, as by leakage, fall on the seller. Then, the use of the expression " not exceeding the above value plus 10% " in stating the amount of the insurance is used as an indication that, since the choice of amount lies with the seller, insurance must be his protection, not the buyer's, and since the clause fixes a maximum, the object of all the references to insurance must simply be to put the burden of the cost of it upon the buyer. In the third place, it is contended that, if payment may be against delivery order, the theory of the c.i.f. transaction is destroyed. Lastly, the *force majeure* clause is relied upon as another indication that the seller takes the risk and needs to be relieved in exceptional circumstances.

It is convenient to deal with these points in reverse order. The argument upon the *force majeure* clause is fallacious because it is

(1) (1915) 2 K.B 379, at p. 388.
(2) (1916) 1 K.B., at p. 510.
(3) (1915) 2 K.B., at p. 388.

referable to the obligations of the seller whatever they may be and throws no light on their extent or duration. It is entirely consistent with its terms to treat it as relieving him in circumstances beyond his control from the obligation of shipping the goods and forwarding and tendering the documents. It is comparable with the clause, a clause differently worded however, in *Diamond Alkali Export Corporation* v. *Bourgeois* (1).

The reference to the delivery order gives the seller a choice. If he finds it more convenient, because for example the bill of lading includes other goods, he can await the ship's arrival, obtain a delivery order and tender that instead of a bill of lading. It does not alter the conditions which the seller must fulfil if he chooses to tender a bill of lading and the obligations of the buyer, if that course is taken. The use of the words " not exceeding " does appear illogical for, if insurance is to protect the buyer, the naming not of a maximum but a definite amount would be expected. The reference, however, to war risk that immediately follows, is plainly on the footing that insurance is to protect the buyer and the clause making variations in insurance rates an affair of the buyer looks in the same direction. The addition of ten per cent, or some other percentage, to cover the buyer's profit or the increased value to him is a not uncommon practice, and, on the whole, it looks as if the clause is to express a limit of the amount of the responsibility of the seller to insure but, subject to that limit, to leave him under the same obligation of effecting a reasonable insurance as well as to amount as to other terms.

There is more cogency in the argument founded on the words " nett landed weight." If the landing of the goods must be awaited, how can the conditions imported by c.i.f. terms be complied with and how can the responsibility for risks ever arise ?

The provision is, of course, based on the assumption that the purpose of the contract will be fulfilled and the goods will be available for weighing. The real question is whether it imports an indispensable condition into the contract. It seems clear that one way open to the seller of performing his obligations under the contract is to hand over a bill of lading against payment. The goods could not be weighed before delivery to the consignee which, of course, means that the bill of lading is spent, even if not surrendered. It is evident that the weighing may be after payment of the price has been made against the bill of lading. In other words, just as under a c.i.f. contract examination of the goods for condition and quality must take place after the delivery of the bill of lading, so under this

(1) (1921) 3 K.B. 443.

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contract may the final computation of the quantity and adjustment of the price. It is a fair inference that arrival and weighing were not intended to be a condition of or precedent to liability. In *In re Denbigh Cowan & Co. and R. Atcherley & Co.* (1) the particular contract there in question was held to be on c.i.f. terms, notwithstanding that it provided for " net landing weights " and specified— " payment : cash (before delivery if required) against documents or delivery order." The Court of Appeal decided, accordingly, that the buyers were entitled to receive a policy of insurance, even although the goods arrived and the sellers chose to tender, not a bill of lading, but a delivery order. The purpose, according to counsel in that case, of giving the seller the choice of presenting a delivery order and not a bill of lading was to free him from difficulties when goods comprised in one bill of lading were sold in different parcels and so, too, with goods covered by one insurance. The Court of Appeal, however, on the terms of the particular form of contract, rejected the view that, if the seller chose to use a delivery order, that dispensed him from tendering a policy of insurance. In *Karinjee Jivanjee & Co.* v. *William F. Malcolm & Co.* (2), in dealing with a contract containing another divergence from what otherwise were c.i.f. terms, *Roche* J. said (3) : " There are many contracts of a mixed nature which contain elements proper to c.i.f. contracts and proper to contracts for actual delivery of goods ; but in its general scope this contract partakes far more of the elements and character which belong to c.i.f. contracts than to any other form of contract." This observation applies to the present case, in which the proper conclusion from the whole document appears to be that, in spite of the variations from type, the contract is in essence a sale upon c.i.f. terms, and that it casts an obligation on the buyer to pay the price on a tender in due time of proper shipping documents independently of the arrival of the goods.

It is, therefore, necessary to decide whether the seller did so tender proper shipping documents.

It was objected on behalf of the buyer that neither the bill of lading nor the insurance gave him adequate protection ; that a policy had not been obtained until after the loss of the goods ; that reasonable expedition had not been shown in forwarding and tendering the documents ; and that, at the trial, proof of actual shipment, at a proper port, of the contract goods had not been given.

The bill of lading acknowledges that, on 27th November 1941, eighteen drums, contents said to be clove stem oil, weight said to be

(1) (1921) 125 L.T. 388.
(2) (1926) 25 Ll. L. Rep. 28.
(3) (1926) 25 Ll. L. Rep., at p. 30

11 tons 2½ cwt., were shipped by the Clove Growers Association by a Dutch ship lying in Zanzibar for shipment to Fremantle, transhipment at Singapore, delivery to order. The Clove Growers Association, it is said, controlled the distribution of the East African cloves products.

In the language of the *Sale of Goods Act*, 1895 (W.A.), the seller must make such contract with the carrier as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. " The obligation is satisfied if the contract of carriage is in a form current in the trade or on the contemplated route. The seller is not called upon to procure a contract on more favourable terms than those usually contained in the ordinary bill of lading in use in the trade or on the route concerned. In any given case the test to be applied is whether it is in accordance with the usage and practice in the trade to carry goods of the contractual description shipped from and to the places in the contract under a contract of carriage such as that in question " : *Kennedy* on *C.I.F. Contracts*, 2nd ed. (1928), p. 41.

The buyer, in the particulars under its defence, has set out a number of objections to the conditions of the bill of lading. They are all governed by the consideration that, on the particular route, the shipper could not be expected to obtain a more favourable bill of lading and it is enough to mention the chief objection relied upon in the argument of the appeal. It relates to the transhipment provisions, and, no doubt, it is of practical importance in the application of the facts of the case. For it assumed, and with every probability, that the loss of the goods was occasioned by the state of affairs at Singapore, where they are thought to have arrived late in December 1941. The effect of the provisions in question, briefly, is to relieve the original shipowner of all liability for loss or damage occurring while the goods are in course of transhipment and to give him no greater responsibility than that of a forwarding agent, subjecting the goods to the terms of the bill of lading of the on-carrying steamer, to whose agents at the port of destination claims must be made. The practice apparently is for the consignee to secure delivery of the goods on production of the through bill of lading and to obtain the on-carrying bill of lading, or a copy of it, only if needed in connection with a claim for loss or damage. In *Hansson* v. *Hamel & Harley Ltd.* (1), a case of transhipment at Hamburg after a voyage from Braatvag, the bill of lading tendered was that of the on-carrying steamer granted after shipment of the goods, but it was headed " Through Bill of Lading " and acknow-

(1) (1922) 2 A.C. 36, at p. 45.

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ledged shipment in the first ship at Braatvag for Hamburg for transhipment there. The margin mentioned the first bill of lading and its date, thirteen days before the date of the second or ocean bill of lading. Lord *Sumner* said :—" A c.f. and i. seller, as has often been pointed out, has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination, and I think that this ocean bill of lading afforded the buyer no protection in regard to the interval of thirteen days which elapsed between the dates of the two bills of lading and presumably between the departure from Braatvag and the arrival at Hamburg " (1). The reasons for the conclusion that the ocean bill of lading gave insufficient protection during those thirteen days were summed up in a sentence :—" It is the contract of the subsequent carrier only, without any complementary promises to bind the prior carriers in the through transit " (2).

Although the facts are quite different, the buyer contends that Lord *Sumner's* general statement is applicable and that the goods were in substance unprotected after discharge at Singapore. The contention cannot prevail. The buyer is entitled only to that measure of protection which the seller can reasonably procure according to the usage and practice obtaining in the trade and with reference to the available routes : See *N. V. Meyer* v. *Aune* (3) and *Burstall & Co.* v. *Grimsdale & Sons* (4).

The evidence shows that there is no direct shipping available from Zanzibar to Fremantle, that the only practicable course was that adopted and that it involved the acceptance of the bill of lading in question as that of the only shipping line carrying cargo from Zanzibar to Singapore on through bills of lading to Fremantle. It also appears that, in a number of prior transactions, the sellers had shipped by the same route and, for what it is worth, under the same bill of lading.

It appears that the triplicate copy of the bill of lading reached Sydney on 5th January and Perth on 19th January 1942, and the first copy reached Sydney on 18th April 1942. The triplicate copy was not presented to the buyer, but it was handed at once to the customs agent with instructions to clear the goods on arrival. The insurance by which the goods were covered consisted in a floating policy and a declaration thereunder. On 18th April, too, there arrived the certificate of insurance, the weight specification, customs declaration and a statement of debits, including the amount of the exchange. The seller at once converted the declaration into a

(1) (1922) 2 A.C., at pp. 44, 45.
(2) (1922) 2 A.C., at p. 46.
(3) (1939) 3 All E.R. 168, at pp. 173, 174.
(4) (1906) 11 Com. Cas. 280.

policy, which he could tender, by obtaining from the insurers a policy expressing the conditions of the contract effected by the declaration. The fate of the goods was at the time unknown, as indeed it still is. An invoice was made up and the documents, the bill of lading, policy and invoice were presented to the buyer in Perth on 27th April 1942.

Objections, which again are stated in the particulars, are made to the adequacy of the cover afforded by the policy. One of these points calls especially for notice because it relates to transhipment. It is that at the port of transhipment the insurance ceases to attach at the end of fifteen days after arrival unless the goods are loaded on the on-carrying ship and does not re-attach till they are so loaded.

The limitation to fifteen days customary in transhipment clauses caused much difficulty during the period of the Japanese advance and, as from 13th August 1942, cover unlimited as to time was made available to insurers under an arrangement pursuant to the War Risks Re-insurance Scheme of the United Kingdom. This point is answered by the fact that no marine insurance could be obtained at the time of the transaction covering the goods for more than fifteen days pending transhipment or reloading.

The other objections made by the particulars against the cover afforded by the insurance fail for the reason that, according to the evidence, it was a usual policy.

The objection that the policy was not issued until 20th April 1942 is met by the fact that the goods had been covered from the commencement of the voyage and the policy amounted only to a more formal expression of the contract of insurance as affecting the goods. This consideration answers also the point made that the goods were known to be lost, if, indeed, it could be said that they are yet " known " to be lost.

The question whether less than reasonable expedition was shown in tendering the bill of lading is one upon which there seems to have been no express finding. But the seller did all that could reasonably be expected of him. The question really turns on the course taken by the seller with the triplicate copy received in January 1942. For no delay occurred in dealing with the documents received on 18th April once they arrived and there is no ground for supposing that they had not been transmitted to Sydney in the best way available. Delays in the course of post with Australia at that time were considerable. Ought the triplicate to have been tendered at once ? The answer lies in the fact that neither the insurance document nor the materials for making up the invoice had arrived and to tender the triplicate copy alone would not have fulfilled the seller's obligations

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nor have advanced their fulfilment. It is the practice to use the first or original copy and, as between the parties, it seems that the seller took the customary and practical course.

Two points remain. The first is that the seller failed to prove that the goods were actually shipped, a fact alleged in the statement of claim and put in issue by a denial of each and every allegation in the paragraph alleging it. *Wolff* J. considered that another paragraph of the defence impliedly admitted the fact, as indeed, having regard to the bill of lading, the defence might have been expected to do. But it is difficult to treat the defence in this way. The seller relied on rule 4 of Article III. of the *Hague Rules*, but they are rules governing the contract of affreightment and it is more than doubtful whether the particular rule can operate *adversus extraneos*.

The second point is that judgment ought not to have been given for the price but only for unliquidated damages. The property in the goods had not passed. The contract did not provide for payment for the goods on a day certain. The appellant is, therefore, right in saying that the remedy is in unliquidated damages. See per *Atkin* J., *Stain Forbes & Co.* v. *County Tailoring Co.* (1) and *Muller, Maclean & Co.* v. *Leslie & Anderson* (2).

If the holder of the policy of insurance can recover upon it or it is valued on that footing in assessing damages, the matter may be more than formal. But the point is not clearly and specifically taken in the notice of appeal and there is much reason to doubt its practical substance.

In all the circumstances, however, it is better to remit the cause to *Wolff* J. to deal with the two last mentioned points. It is difficult to see any merit in the first, but if the defendant persists in it evidence on commission may be necessary unless under the rules of the Supreme Court of Western Australia some such course can be taken as was adopted in *Murine Eye Remedy Co.* v. *Eldred* (3).

Otherwise the appeal should be dismissed.

Remit the action for further hearing upon the issue of the shipment of the goods in pursuance of the contract and upon the issue of damages and, for this purpose, set aside the judgment appealed against. Otherwise appeal dismissed. Costs of the appeal and of the trial costs in the cause.

Solicitors for the appellant, *Nicholson & Nicholson*, Perth.
Solicitors for the respondent, *Stone, James & Co.*, Perth.

(1) (1916) 86 L.J. K.B. 448.
(2) (1921) W.N. (Eng.) 235.
(3) (1926) V.L.R. 425.