[HIGH COURT OF AUSTRALIA.]

SAFFRON . . . . . APPELLANT;
DEFENDANT,

AND

SOCIETE MINIERE CAFRIKA . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13, 14, 15, 18; *Nov.* 14.

Dixon C.J., McTiernan and Menzies JJ.

Contract—Sale of goods—Payment of price—Establishment of letter of credit—Delivery of goods by seller to buyer—Expiry of letter of credit without payment against it of price—Action by seller to recover price—Denial of liability by buyer—Claim that letter of credit exclusive source of payment—Primary but not exclusive source—Agreement to buy unascertained goods—Whether translated into sale on delivery—Issue not litigated on trial of action as commercial cause—Not open on appeal—To allow point to be taken would destroy value of commercial causes procedure—Appropriation of goods to contract—Passing of property.

A. contracted to sell certain chrome ore to B. and stipulated for payment of the price in the words " payment by opening a letter of credit with the Banque de l'Indochine = 80% on shipment; 20% on delivery " which was assumed between the parties to require an irrevocable but not a confirmed credit. The seller gave delivery of goods to the buyer but payment therefor was not met out of the letter of credit. The seller sued to recover the price but the buyer disputed his liability to pay, alleging that it had been agreed between the parties that unless payment came from the letter of credit then the seller was not entitled to be paid for the goods.

Held, that the stipulation for payment by letter of credit did not go beyond requiring the establishment of such a letter as the primary but not the exclusive source of payment, and, accordingly, the seller was entitled to sue for and recover the price.

Observation upon the question whether a seller who stipulates for or agrees to payment by letter of credit can enforce payment directly against the buyer in the event of payment not being received out of the letter of credit.

It would be wrong and would destroy the value of the commercial causes procedure if a court upon the hearing of an appeal in an action heard as a

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commercial cause were to decide the appeal by reference to matters which were not raised as issues at the trial.

Accordingly where parties to a commercial cause confined themselves at the trial to issues which assumed both sale and delivery and left for determination the obligation of the buyer to pay the seller having regard to the terms of the contract, and the buyer on appeal sought to argue that on the evidence there was no sale and delivery of the goods in question to him.

Held, that the argument ought not to be entertained and that, in any event, it was unsound.

Observations upon delivery of goods pursuant to f.o.b. contracts.

Decision of the Supreme Court of New South Wales (*Kinsella* J.), affirmed.

APPEAL from the Supreme Court of New South Wales.

Société Minière Cafrika commenced proceedings in the Supreme Court of New South Wales against Abraham Gilbert Saffron to recover from the defendant the sum of £5,919 15s. 4d. being the price of a certain quantity of chrome ore sold and delivered by the plaintiff to the defendant.

The action was entered in the list of commercial causes pursuant to the *Commercial Causes Act* 1903 (N.S.W.) and at the trial of the action, which was heard by *Kinsella* J. sitting without a jury, the parties reduced their differences to two issues, the second of which was stated in alternative ways. These issues were: " (i) Did the plaintiff agree with the defendant that unless payment came from letter of credit no. 35/80069 for the ore the plaintiff was not to be entitled to any payment at all ? " (ii) As stated for the plaintiff: " If question (1) be answered yes, do the causes of the unavailability of the letter of credit afford an excuse to the defendant for non-payment ? " and (ii) As stated for the defendant: " Has any act or omission of the defendant in breach of his contract with the plaintiff resulted in the plaintiff not being paid by the said letter of credit ? "

Kinsella J. answered the question raised in the first issue in the negative and, although he took the view that this answer necessitated judgment for the plaintiff, he also answered the second issue, in its alternative ways, favourably to the plaintiff. Judgment was accordingly entered in favour of the plaintiff for the amount claimed.

From this decision the defendant appealed to the High Court.

The relevant facts are fully set out in the judgment of the Court hereunder.

M. F. Loxton Q.C. (with him *M. H. Byers*), for the appellant. In dealing with the first issue the trial judge applied principles which are peculiar to bills of exchange. [He referred to *British Imex*

Industries Ltd. v. *Midland Bank Ltd.* (1); *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* (2) and *Ian Stach Ltd.* v. *Baker Bosley Ltd.* (3). Those principles are not applicable to letters of credit which are entirely different, because they introduce into a transaction a person of undoubted credit, either a well-established mercantile house or a banker. The rule as to conditional payment is confined to bills of exchange and there is no such bill here. A letter of credit transaction is akin to one of barter, the buyer offering in exchange for the goods not goods of a different kind but property of a different kind, and it is out of that chose in action that the seller must obtain his payment. The onus of proving that he had a contract entitling him to payment was on the plaintiff and the trial judge wrongly placed that onus on the defendant. The evidence here supports the view that the parties agreed to look to the letter of credit as the exclusive source of payment. His Honour erred in his answer to the first question and on the evidence the second question in its first form should be answered—yes, and in its second form—no. [He then sought to argue that on the evidence there was no sale and delivery of the goods and was permitted to elaborate such argument in some detail. This portion of the argument does not call for report.]

Dr. *F. Louat* Q.C. (with him *R. T. H. Barbour*), for the respondent. Whether the contract between the parties is contained only in the cables between them or in those documents together with the conversation between the defendant and Caillard, such contract contains no term warranting an interpretation that the letter of credit was to be the sole source of payment to the plaintiff. The parties had done no business together before the instant transaction and the claim of the defendant is against both the evidence and the probabilities. The later letters do not alter the contractual arrangement between the parties. Merely because the seller allows his goods to be loaded without retaining control of them by having the bill of lading issued to him he does not thereby disentitle himself to payment. [He referred to *Schmitthoff, The Export Trade* 3rd ed. (1955), pp. 20, 60.] Nothing is said in the express terms of the contract as to who was to procure the bill of lading and it becomes necessary to discover the implied intention of the parties. There was no obligation on the seller here to make himself the shipper. [He referred to *Carver's Carriage of Goods by Sea* 10th ed. (1957), pp. 37, 38; *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (4).] In the

(1) (1958) 1 Q.B. 542, at pp. 551, 552.
(2) (1958) 2 Q.B. 127, at p. 129.
(3) (1958) 2 Q.B. 130, at pp. 137, 138, 139, 140.
(4) (1954) 2 Q.B. 402, at p. 424.

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present case there must be implied a term that neither party intended the goods to be parted with without payment. The authorities cited by the appellant do not assist in the present case, because what is there spoken of is a confirmed letter of credit which is assignable whereas here the letter of credit was unassignable. What the plaintiff was asked to accept was not a letter of credit in the ordinary sense, but the defendant's rights under the credit together with the probability that he would be able to perfect those rights. The intention to take a bill in absolute payment for goods must be clearly expressed: see *Benjamin* on *Sale* 8th ed. (1950), p. 787. [He referred to *Gunn* v. *Bolckow, Vaughan & Co.* (1) and *Davis* on *The Law Relating to Commercial Letters Of Credit* 2nd ed. (1954), pp. 45-48.] Here the plaintiff never had control of the means of payment. The letter of credit was never to be the exclusive source of payment for the goods. Even if it was to be such a source, what was being accepted was not merely so much money as the letter of credit would produce but all the documents and acts necessary to ensure payment out of the letter of credit as equivalent to payment. The defendant had to make the letter of credit available or else find some other means of payment. Not having done so the second question should be answered against him, even if the first be answered in his favour. The trial judge's finding ought not to be interfered with: see *Paterson* v. *Paterson* (2). The appeal should be dismissed.

M. F. Loxton Q.C., in reply.

Cur. adv. vult.

Nov. 14.

THE COURT delivered the following written judgment:—

The respondent Société Minière Cafrika (the plaintiff) sued the appellant Saffron (the defendant) for £5,919 15s. 4d., the price of chrome ore sold and delivered by the plaintiff to the defendant, and the action was tried in the Supreme Court of New South Wales as a commercial cause. There were points of claim and points of defence which are not before this Court because upon the trial the differences between the parties were reduced to two issues the second of which was stated in alternative ways. These issues were as follows: (i) Did the plaintiff agree with the defendant that unless payment came from letter of credit no. 35/80069 for the ore the plaintiff was not to be entitled to any payment at all? (ii) As stated for the plaintiff: If question (i) be answered yes, do the causes of

(1) (1875) L.R. 10 Ch. App. 491, at p. 501.

(2) (1953) 89 C.L.R. 213, at p. 224.

the unavailability of the letter of credit afford an excuse to the defendant for non-payment ? and (ii) As stated for the defendant : Has any act or omission of the defendant in breach of his contract with the plaintiff resulted in the plaintiff not being paid by the said letter of credit ? The learned trial judge found the first issue in favour of the plaintiff, answering the question in the negative. Although he considered that this finding disposed of the case he thought it advisable to determine the second issue as well and this too he decided in favour of the plaintiff, considering that the two formulations raised the same question and finding that the defendant was responsible for the letter of credit not being an effective source of payment. Judgment for £5,919 15s. 4d. was entered for the plaintiff. It is from this judgment that this appeal is brought.

It is necessary in the first place to set out as shortly as possible the somewhat complicated facts of the case.

In July 1955 Kinsho Trading Co. Ltd. Japan agreed to buy 2,000 long tons of manganese ore from Nielson & Maxwell Ltd., an English company carrying on business in Sydney, and chartered the ss. *Chowa Maru* to carry this cargo from New Caledonia to Japan. To meet its obligations under its contract Nielson & Maxwell Ltd. agreed to buy 2,000 tons of manganese ore from Peter Turnbull & Co. Pty. Ltd. of Sydney. The burden of any dead freight as between Kinsho Trading Co. Ltd. and Nielson & Maxwell Ltd. and as between Nielson & Maxwell Ltd. and Peter Turnbull & Co. Pty. Ltd. lay in each case with the vendor. By the end of July it seemed likely that 2,000 tons of manganese ore would not be available for loading into the *Chowa Maru* and to mitigate its position and that of Peter Turnbull & Co. Pty. Ltd., Nielson & Maxwell Ltd. was pressing Kinsho Trading Co. Ltd. to buy 700 tons of chrome ore to be carried on the *Chowa Maru* from Noumea. This was eventually arranged at a price of about 24 dollars per long ton and on 16th August the Nippon Kangyo Bank Ltd. upon the instructions of Kinsho Trading Co. Ltd. opened through the Commonwealth Trading Bank of Australia, Sydney, an irrevocable and assignable letter of credit no. 35/80069 in favour of Peter Turnbull & Co. Pty. Ltd. or their assignees for 18,480 U.S. dollars covering 80 per cent of the provisional invoice cost of 700 dry long tons (5 per cent more or less allowed) of chrome ores in bulk f.o.b. Noumea per ss. *Chowa Maru.* This letter of credit provided for sight drafts on Banque de l'Indochine, Noumea Branch, accompanied by the following documents : (i) a commercial invoice indicating the import licence no. IL(5-2)-F(8)-00109 ; (ii) full set of clean on board ocean bills of lading marked " freight collect " made out to the order and blank

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endorsed ; and (iii) certificate of weight and analysis. It is to be observed that upon its face the letter of credit was not intended to cover the full price of the chrome ore but only 80 per cent of the provisional invoice cost. There was, however, an instruction that accompanied the letter of credit which contained the following provision : " Final payment of any balance under this credit due and allowable to seller after final determination of weight and analysis to be available by seller's final invoice and a cable from buyer confirming the amount of final payment ". On the same day the charter-party was altered to provide for the *Chowa Maru* to be loaded with about 700 tons of chrome ore at Noumea and manganese ore not less than 500 tons at Gatope. Some time prior to 16th August the defendant had entered into the picture. In July he was in Noumea and had negotiated with one Caillard who represented the plaintiff for the purchase of 700 tons of chrome ore at round about 22 dollars a ton. The defendant returned to Sydney and on 12th August cabled Caillard as follows : " Will you accept 21 dollars ton chrome 45 per cent bonus 60 cents penalty 90 cents unit other conditions same tonnage 700 cable reply ", and on the next day Caillard cabled " We accept ". On 13th August the defendant wrote to Peter Turnbull & Co. Pty. Ltd. referring to previous correspondence and discussion (as to which the evidence is silent) confirming the offer of 700 tons of chrome ore and at least 500 tons of manganese ore and saying that both offers were subject to suitable letters of credit. On 17th August 1955 Peter Turnbull & Co. Pty. Ltd. assigned to the defendant letter of credit no. 35/80069 and the defendant acknowledged that he received " the abovementioned assigned letter of credit ". Notification of this assignment was given to the Commonwealth Trading Bank of Australia and to Banque de l'Indochine, Noumea. On or about 17th August the defendant visited Noumea again and between 17th and 20th August he had a conversation with Caillard about the purchase of the chrome ore in the course of which Caillard requested the defendant to open an account in a bank in Noumea for the purchase price. The defendant said he could not do that and that the only way he could buy the chrome was from the proceeds of the letter of credit. Caillard admits that the defendant showed him the letter of credit no. 35/80069 but says that he saw it only fleetingly. This the defendant did not dispute. Shortly after this conversation and because of difficulties that it was anticipated would be encountered by the defendant as a foreigner in obtaining a licence to export the chrome from New Caledonia, a letter which was antedated to 28th July was prepared. This letter from the plaintiff to the defendant was

intended to put on record the terms of Caillard's earlier offer to sell chrome ore to the defendant. So far as material it was as follows: "Following our conversations we offer you, subject to confirmation:

Chrome 45%

Grade: CR203 = 45% basis (refusal point 44%)

Tonnage: 700 tons (5% more or less)

Price: For 45% grade = U.S. $22 per metric ton f.o.b. Noumea

Bonus: 60 cents per unit above 45%

Penalty: 60 cents for 44% grade

Payment: by opening a letter of credit with the Banque de l'Indochine = 80% on shipment; 20% on delivery.

Commission: We want a net price of $22, i.e. you must take your commission over and above our fixed price."

It was common ground that these conditions were to be treated as the conditions referred to in the cable from the defendant to Caillard of 13th August. This letter was taken by Caillard and the defendant to the export authorities at Noumea and with its aid any difficulties about obtaining an export licence were satisfactorily surmounted. On 22nd August the defendant wrote the plaintiff a letter in the following terms: "Following our conversations concerning the payment of your lot of about 700 tons of chrome which you are to load aboard the *Chowa Maru*, I hereby confirm that: 1. The letter of credit being in my favour, I undertake to forward to your firm, as soon as you have the documents in hand, a letter requesting the Banque de l'Indochine Noumea, to pay you: (a) 80% of the value amount represented by the tonnage of chrome ore shipped on the basis of $21 f.o.b. per dry *metric ton*, for 45% of Cr203 and not per long ton as stipulated in my letter of credit, the bonus and penalty rates being as per our agreements, which were specified in my cable of 12.8.55 from Sydney and which will be detailed in this letter; (b) 20% of the value amount represented by the tonnage of ore (in metric tons) upon receipt and verification which must take place before the expiry of the letter of credit. 2. In these conditions, I shall myself bear the difference between the long and the metric ton, as our agreements have always been based on the metric ton." This letter was followed by a letter dated 23rd August from the defendant to the Manager of the Banque de l'Indochine, Noumea, as follows: "Would you kindly credit the Société Minière Cafrika with the sums I will draw on letter of credit no. 35/80069, as per the following conditions: 1. 80% of the amount of the value represented by the tonnage of chrome ore shipped on the following basis:

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$21 f.o.b. per *metric ton* for 45% of Cr203, ratio 2.60—Boni : 60 cents per unit above 45%, fractions pro rata—Penalties : 90 cents per unit under 45%, fractions pro rata—rejection point 44%. 2. The balance, after checking of the weight and analysis in Japan, on the same abovementioned basis."

It is now necessary to refer to the scanty evidence about what happened after the *Chowa Maru* arrived at Noumea to load the chrome ore. The ship arrived and began loading on 24th August and finished loading on 27th August. When loading finished it was found that there had been loaded only 645 metric tons, the equivalent of 637 long tons. The defendant pressed Caillard for further ore but this was not available. A weight certificate showing the tonnage loaded in metric tons was signed by the master and as shipper the defendant signed "Peter Turnbull" and underneath "A. G. Saffron". It seems likely that there were at the ship the defendant, Caillard, the ship's agent, Hagen, and one Coursin, who was the defendant's representative. There is no direct evidence to show who it was that received the weight certificate but it seems likely that it was given after Caillard had left the ship. It also appears that on 14th September it was taken by Coursin to the Banque de l'Indochine from whose custody it was produced at the trial. The defendant in evidence gave no explanation why he signed it as he did. What happened after the giving of the weight certificate is even more obscure because the bill of lading signed by the master and dated at Noumea on 27th August named Peter Turnbull & Co. Ltd. as the shipper. Again there is no direct evidence as to how this happened but there is no doubt that it was not done upon the instructions of the plaintiff. The trial judge was prepared to infer that it was the work of the defendant, relying for that inference upon the following circumstances : (1) that the bill of lading could only have been prepared by some one with access to the letter of credit ; (2) that upon the weight certificate the defendant did sign "Peter Turnbull" ; (3) that the weight certificate was in the defendant's control. The later dealings with the bill of lading are not satisfactorily explained. After the departure of the ship it was held by Hagen who it seems was prevailed upon by Caillard and Coursin to go with them to the Banque de l'Indochine for the purpose of drawing on the letter of credit. This was on 14th September. When the bill of lading was produced with other documents the bank very properly refused to pay for two reasons : (1) that 637 long tons, instead of the minimum of 665 long tons, were all that had been loaded, and (2) that the bill of lading was not blank endorsed by the person to whom it had been made out. At

this point it is necessary to go back to the part played by Coursin. He acted as the defendant's agent and was, at any rate by 9th September, authorised to sign invoices on his behalf. His relationship with Peter Turnbull & Co. Pty. Ltd. appears less clearly. On 12th September that company notified the Commonwealth Trading Bank of Australia that it authorised Coursin to endorse bills of lading and to sign weight certificates and any other necessary documents in connexion with shipments made against letter of credit no. 35/80069 on *Chowa Maru* and requested that this authority should be cabled to the Banque de l'Indochine, Noumea. There is no evidence whether this was done but at some time which cannot be identified but which may have been 14th September when the documents were produced to the bank, Coursin did sign his own name on the back of the bill of lading. All that can be said definitely is that this was done before 15th September. The copy of the bill of lading that was produced in evidence came from the Banque de l'Indochine, Noumea. What happened to the other copies is not known but it is common ground that the chrome ore was carried to Japan and that possession of it was obtained by Kinsho Trading Co. Ltd. The defendant gave evidence that he had not been paid for the chrome ore.

Upon this evidence the trial judge made the following finding: "In my opinion Saffron directed, or at least knowingly permitted, the bill of lading to be made out to Peter Turnbull & Co. Ltd. and therefore there was the obligation on him to see that the company endorsed in blank so that it might be valid for the purpose of the letter of credit and his failure to do so was a breach of his contractual duty to the plaintiff."

As has already been stated, however, the naming of Peter Turnbull & Co. Pty. Ltd. as shipper in the bill of lading and the lack of its effective endorsement in blank was not the only reason why the bank would not pay against the letter of credit upon the documents submitted. The letter of credit was upon its face for 18,480 dollars to cover 80% of the provisional invoice cost of 700 dry long tons, 5% more or less, that is, 665 to 735 tons. All that was shipped, as the weight certificate showed, was 645 metric tons, equalling 637 long tons. There was therefore a significant deficiency. This deficiency was due to the plaintiff and had the documents been otherwise in order the bank would certainly have refused to pay because of it. As to this deficiency representations were made to Kinsho Trading Co. Ltd. for the amendment of the letter of credit. The plaintiff pressed the defendant to get the letter of credit modified and the defendant asserted that he had requested Japan to make the

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necessary modification. At the same time Peter Turnbull & Co. Pty. Ltd., both directly and through Nielson & Maxwell Ltd., was pressing to ensure that Kinsho Trading Co. Ltd. would refuse any modification which did not provide for the deduction of the dead freight from the purchase price of the chrome ore. It seems that in the contest, if there was one, the representations of Peter Turnbull & Co. Pty. Ltd. were given the greater weight because the amendment which was made to the letter of credit on or about 23rd September 1955 was to the effect that 11% should be substituted for the 5% more or less but that this was subject to the condition that 8,977 dollars should be deducted from the amount of 80% of the provisional invoice amount. No advantage was taken of this modification because apart from anything else it left the amount available insufficient to credit the plaintiff in accordance with the defendant's instructions set out in the letter of 23rd August.

In due course the letter of credit expired without any payment against it having been made.

The amount for which the plaintiff sued the defendant was the full price of the chrome ore shipped on the footing that if the 80% referred to in the letter of credit was owing, so too was the balance of 20% since the ore had been delivered in Japan and was in accordance with specifications. There was no issue as to this.

Before considering the judgment appealed against it is desirable to refer to an argument addressed to this Court on behalf of the appellant to the effect that upon the evidence there was no sale and no delivery of the chrome ore to the defendant. It was said that there was an agreement to buy unascertained goods; that goods were never ascertained and appropriated to the contract; that what had occurred did not amount to delivery and that the property in the chrome ore shipped on the *Chowa Maru* never passed from the plaintiff to the defendant and that the defendant is not liable to pay for it. To all this there are two answers. The first is that having regard to the way in which the trial was conducted this argument is not open upon appeal; and the second is that in any case it is unsound. The parties at the trial confined themselves to issues which assumed both sale and delivery and left for determination the obligation of the buyer to pay the seller having regard to the terms of the contract. It would be wrong and would destroy the value of commercial causes procedure if a court upon appeal were to decide a case by reference to matters which were not raised as issues upon trial. But having said so much it is desirable to point out why the argument is unsound. It is convenient to consider the matter firstly independently of the fact that the plaintiff loaded only 637 long tons instead of the minimum of 665 long tons

which the contract required and then taking that deficiency into account.

The contract between the plaintiff and the defendant was an f.o.b. contract. In what has been called the " classic " type of f.o.b. contract it is the duty of the seller both to put the goods on board and procure a bill of lading but this is not always the case. As was pointed out by *Devlin* J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1) the f.o.b. contract has become a flexible instrument and in some cases the seller discharges the whole of his duty by putting the goods on board on account of the buyer and putting the buyer in a position to obtain a bill of lading. The case his Lordship takes as an example is as follows : " Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading ; if freight has to be paid in advance this method may be the most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate's receipt and handing it to the forwarding agent to enable him to obtain the bill of lading." (2) In *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* (3) Lord *Wright*, speaking for the Judicial Committee, thus described a mate's receipt : " The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, prima facie evidence of the quantity and condition of the goods received, and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him." (4) The weight certificate given here though not in the form of a mate's receipt was signed by the master and is of the same character.

In this case the seller had nothing to do with arrangements for the carriage or the insurance of the goods to be shipped or with the payment of freight ; its obligations were fulfilled when it put the goods on board and allowed the buyer by virtue of his possession of the weight certificate to obtain such bill of lading as he wanted. Although the issue of sale and delivery was not before him the evidence at the trial did satisfy the trial judge not only that the seller did put the goods on board but that it allowed the buyer to get such bill of lading as he wanted. This finding was open upon the evidence. It is true that the course which the seller adopted was, as the events show, an improvident one. It put the buyer in a

(1) (1954) 2 Q.B. 402.
(2) (1954) 2 Q.B., at p. 424.
(3) (1938) A.C. 429.
(4) (1938) A.C., at p. 445.

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position to procure a bill of lading which would give him control of the goods and yet would not comply with the terms of the letter of credit, so that the seller unnecessarily lost all control of the goods without payment or assurance of payment.

The problems associated with the passing of property in goods shipped in performance of a contract for unascertained goods were examined by *Dixon* J. in *James* v. *The Commonwealth* (1) where it is pointed out, *inter alia*, that the final test of the stage when the transfer of property in the goods takes place is the intention of the seller, and in cases where there is an unconditional appropriation of goods the presumption is that property should then pass. On the facts here the inference is irresistible that when the seller put the ore on board the *Chowa Maru* and left the rest to the buyer there was such an appropriation. The statement of *Dixon* J. : " If he " (that is the seller) " does not reserve the right of disposal of the goods, as it is called, his delivery of the goods to the shipowner as a carrier for the purpose of transmission to the buyer is deemed an unconditional appropriation of the goods to the contract " (2) applies with additional force in the present case where the buyer was present on the ship and obtained control of the weight certificate. In *Schmitthoff, The Export Trade*, 3rd ed. (1955) p. 60, after discussing rules applicable where it is the duty of a seller to deliver a bill of lading, the author says : " These rules apply to all contracts where it is the seller's duty to deliver a bill of lading. In cases where that duty does not exist, e.g. in ex works, strict f.o.b. or free delivered contracts, the delivery of the goods to the buyer or to the carrier is presumably the act which passes the property to the buyer." In this quotation the word " strict " is used in the sense that the buyer is to make arrangements for freight and insurance ; see *op. cit.* p. 17. What is there said would apply to this case. It follows therefore that unless the short delivery referred to previously is of decisive importance there was a completed sale and delivery of the amount loaded.

For the present purposes the significance of the short delivery to which reference has been made is that it would prevent the delivery on board that was in fact made from amounting to a complete or sufficient appropriation of the goods to the contract so as to pass the property independently of subsequent acceptance. The proper conclusion is, however, that the defendant, having the control of the weight certificate for 637 long tons, used it to obtain a bill of lading made out to Peter Turnbull & Co. Ltd. and at no time restored that

(1) (1939) 62 C.L.R. 339, at pp. 377-380.

(2) (1939) 62 C.L.R., at p. 378.

bill of lading to the plaintiff in a condition to enable it to exercise dominion over and the disposition of the goods. There was therefore acceptance by the defendant of the tonnage shipped by the plaintiff. In these circumstances it is not a matter for surprise that the issue of sale and delivery was not raised at the trial.

The case was therefore one where the plaintiff sold and delivered goods to the defendant and unless there was a term in the contract excusing payment the price was recoverable. The defendant said there was such a term and to this contention the first issue was directed. The general question whether a seller who stipulates for or agrees to payment by letter of credit can enforce payment directly against the buyer in the event of payment not being received out of the letter of credit is one which has been raised but not decided. In a book by Dr. *A. G. Davis, The Law Relating to Commercial Letters of Credit*, 2nd ed. (1954), p. 42, the question is stated in these terms: "A question of much greater importance so far as the relationship between the buyer and the seller is concerned is whether the seller, by demanding 'payment by bankers' credit', agrees thereby to release the buyer from liability for payment under the sales contract; whether, in other words, the seller agrees to take the letter of credit as absolute payment or whether it constitutes conditional payment only." This question is discussed and such authority as exists is cited and the author concludes by saying that although *dicta* favour the conclusion that the seller does not take a draft drawn under a letter of credit in absolute payment of the buyer's obligation to pay for the merchandise "until the point is raised in an action between buyer and seller, it cannot be said to be settled definitely." The question could only arise in special circumstances, e.g. if the bank responsible for the credit were to become insolvent or, as here, where notwithstanding that the documents tendered were not in conformity with the letter of credit, the seller had lost control of the goods to the buyer. As such contingencies are not likely to have been within the contemplation of either the seller or the buyer when they made their contract, the inquiry as to what they intended in such circumstances must inevitably be somewhat artificial. It would in any event be wrong to consider the question without regard to the kind of letter of credit for which the contract provides. A provision for payment by revocable letter of credit could hardly be regarded in any circumstances as negativing payment in the event of revocation. At the other end of the scale a provision for payment by irrevocable and confirmed letter of credit which in words taken from *Gutteridge & Megrah*, on *The Law*

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of Bankers' Commercial Credits, (1955) p. 13, is "an absolute undertaking by the banker to honour all drafts complying with the terms of the instrument creating the credit, subject only to limitations as to the amount and the period of time for which it is to be available", might perhaps not unreasonably be regarded as a stipulation for the liability of the confirming bank in place of that of the buyer. Where the stipulation is for an irrevocable but not confirmed credit there would be less reason for regarding the provision of the credit as being all that is required by the buyer in any circumstances. This is not, however, the place to determine the general question propounded by Dr. *Davis* and it is undesirable to go beyond what is necessary for the determination of this case.

The contract here is to be found in the cables of 12th and 13th August and the letter dated 28th July, all of which so far as they are relevant have been set out previously. The stipulation contained in the words "payment by opening a letter of credit with the Banque de l'Indochine = 80% on shipment; 20% on delivery", which was assumed to require an irrevocable but not a confirmed credit, does not go beyond requiring the establishment of a letter of credit as the primary but not the exclusive source of payment. If the conversation between Caillard and the defendant on the occasion between 17th and 20th August were to be regarded as forming a part of the contract it would not make any difference. It is not reasonable to suppose that the parties here intended that in the unlikely circumstance that the buyer got the chrome but payment therefor against the letter of credit was refused, the seller should not be paid. The trial judge reached the conclusion that the letter of credit was not intended to be the exclusive source of payment, with the assistance by way of analogy of the rules relating to the acceptance of negotiable instruments as conditional or absolute payment. This analogy is no doubt useful and is one to which Dr. *Davis* (*op. cit.*) refers and cites *Maillard* v. *Duke of Argyle* (1) as authority for the proposition that an intention to take a negotiable instrument in absolute payment must be strictly shown and will not be deduced from ambiguous expressions such as "in payment".

The answer given by the trial judge to the first issue was clearly right and upon the basis on which the action was conducted that would in strictness seem to be the end of the matter.

Had the issue been, however, whether the letter of credit was intended as the primary source of payment, the answer would have been that it was. In that event, the further question would have arisen whether the circumstances in which that primary source of

(1) (1843) 6 M. & G. 40 [134 E.R. 801].

payment failed excused the defendant from payment altogether. It would seem that the only possible ground upon which the seller could have been defeated in his claim for the price would have been that the seller was solely responsible for the failure of the primary source of payment. It is not necessary in the present case to determine whether in such circumstances the buyer who has received the goods could successfully resist a claim for payment of the price because there is here the finding of the trial judge, to which reference has already been made, that the defendant was responsible for the bill of lading being made out as it was and that this of itself and independently of the deficiency in quantity would have made payment out of the letter of credit impossible. Moreover, as has already been stated, the defendant accepted delivery of the actual amount loaded by the plaintiff and did not restore to the plaintiff dominion over the goods shipped.

The trial judge was therefore correct in his answer to the first issue and even if that issue had been differently framed to raise the question whether the letter of credit was intended to be the primary source of payment and had been answered affirmatively, the answer to the second question would have been that the defendant was not exonerated from liability to pay for the goods by reason of the failure of the primary source of payment because he had accepted the goods shipped and had caused the bill of lading to be made out in such a way that the letter of credit could not be utilized as a means of payment for the goods sold and delivered to him.

The appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *W. H. Clark.*
Solicitors for the respondent, *Laurence & Laurence.*

R. A. H.