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was suggested that the additional tax was properly assessed. That failing, the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant, *Biddulph & Salenger.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

HENRY DEAN & SONS (SYDNEY) LIMITED . APPELLANT; PLAINTIFF,

AND

P. O'DAY PROPRIETARY LIMITED . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 30, 31; *May* 6.

KNOX C.J., ISAACS, HIGGINS, POWERS AND STARKE JJ.

Sale of Goods—C.i.f. contract—Action for non-delivery—Readiness and willingness of buyer—Refusal to take up draft—Goods shipped not in accordance with contract—Invoice not covering goods.

By a contract in writing the respondent agreed to sell and the appellant to buy "150 bales first selection Liverpool wheat-sacks" of a specified quality at a certain price per dozen "c.i.f.e. Sydney." Delivery was to be during November 1925 and the terms were "net cash against bill of lading or ship's order which will enable buyers to obtain delivery of the goods." On 10th November 1925 the respondent shipped in Melbourne certain sacks for delivery in Sydney in alleged performance of the contract, but the sacks were in fact not in accordance with the contract. On the same day the respondent sent to the appellant an invoice in which the goods were described as "150 bales Liverpool sacks," and drew on the appellant through a bank for the amount

of the invoice, the bill of lading and insurance policy being attached to the draft. The appellant did not accept the draft. In an action in the Supreme Court of New South Wales by the appellant against the respondent to recover damages for the non-delivery of the goods the respondent pleaded that the appellant was not ready and willing to perform the contract. The trial Judge having found a verdict for the appellant, the Full Court on appeal set the verdict aside and entered a verdict for the respondent, being of opinion that the appellant was not ready and willing to perform the contract inasmuch as it insisted, as a condition of acceptance of the draft, on having inspection of the goods. On appeal to the High Court,

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Powers* JJ. dissenting), that the verdict of the trial Judge should be restored:

By *Knox* C.J. and *Higgins* J., on the ground that under a c.i.f. contract providing for payment against documents the purchaser is under no obligation to take up documents that do not in fact relate to goods of the description contracted for, and therefore the appellant's refusal to take up the draft did not prove that it was not ready and willing to perform the contract;

By *Starke* J., on the ground that, although, if the appellant had refused to accept any documents tendered to it under the contract unless it had an inspection of the goods, such refusal would have established that it was not ready and willing to perform the contract, yet, upon the evidence, the appellant had not refused to take up the draft, but before taking it up, having a reasonable doubt as to whether the invoice represented goods of the description contracted for, required, as he properly might, assurance that the goods were of that description; and accordingly that, upon the evidence, the appellant was ready and willing to perform the contract.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Henry Dean & Sons (Sydney) Ltd. against P. O'Day Pty. Ltd. in which the plaintiff claimed £375 damages for the breach by the defendant of a contract for the purchase by the plaintiff from the defendant of certain wheat-sacks, the breach alleged being a refusal to deliver the sacks in accordance with the terms of the contract. One of the defendant's pleas was that the plaintiff was not ready and willing to perform the contract. The defendant, also, by way of cross-action, claimed damages for the breach of the same contract by the plaintiff, the breaches alleged were refusal to accept the goods or to pay for them and repudiation of the contract. The action was heard by *Gordon* J. without a jury, and he found a verdict for the

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plaintiff for £343 5s. and dismissed the cross-action. On appeal by the defendant the Full Court made an order setting aside the verdict of *Gordon* J. and ordering that a verdict be entered for the defendant.

From that decision the plaintiff now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Halse Rogers K.C. (with him *Owen*), for the appellant. Under a c.i.f. contract the seller's first duty is to ship goods which are in accordance with the contract. If he fails to carry out that duty no obligation is imposed upon the buyer to be ready and willing to perform the contract. The decision in *E. Clemens Horst Co.* v. *Biddell Bros.* (1) does not conflict with that proposition. What the appellant did in the present case did not amount to a breach of his duty to be ready and willing to pay for the goods contracted to be sold on tender of the proper documents. All that is proved is that the appellant was unready and unwilling to take up the documents relating to the particular shipment of goods on the *Suva*, and, since the goods shipped on the *Suva* did not comply with the contract, the appellant's refusal to take up those documents did not establish unreadiness and unwillingness to take up documents representing goods which were contracted to be sold. In an action for goods sold and delivered the buyer need not give evidence of his readiness and willingness to pay until the seller gives evidence that he was ready to deliver (see *Great Northern Railway Co.* v. *Harrison* (2); *Chalmers' Sale of Goods*, 9th ed., p. 81). If it is proved that no goods were shipped in accordance with the contract, the buyer's readiness and willingness would be of importance only if the seller could show that he was exonerated; but there is no question of exoneration in this case. [Counsel also referred to *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (3); *British and Beningtons Ltd.* v. *N.W. Cachar Tea Co.* (4).]

[ISAACS J. referred to *Hansson* v. *Hamel & Horley Ltd.* (5).]

(1) (1912) A.C. 18.
(2) (1852) 12 C.B. 576, at p. 599.
(3) (1916) 1 K.B. 495, at p. 510.
(4) (1923) A.C. 48, at p. 64.
(5) (1922) 2 A.C. 36.

E. M. Mitchell K.C. (with him *Barton*), for the respondent. Where a plaintiff sues for non-delivery of goods it is obligatory upon him to show that if the goods and the documents had been in order he was ready and willing to do his part. If the position is one in which there must be a concurrence of readiness and willingness of both parties, then if neither is ready and willing neither can sue for a breach by the other (*Chitty on Contracts*, 17th ed., p. 830; *Cohen & Co.* v. *Ockerby & Co.* (1)). Upon a proper construction of the letters and telegrams and the effect of the oral evidence the proper conclusion is that, whether the goods shipped were or were not in accordance with the contract, the appellant insisted on something to which he was not entitled under the contract, namely, that before taking up the documents he should have inspection of the goods or proof that they were in accordance with the contract. All that the appellant was entitled to have were the customary shipping documents, and those documents are sufficient if their terms are not inconsistent with the contract (*Re Denbigh, Cowan & Co. and R. Atcherley & Co.* (2); *Ireland* v. *Livingston* (3); *Manbre Saccharine Co.* v. *Corn Products Co.* (4)).

[STARKE J. referred to *Tamvaco* v. *Lucas* (5).]

An invoice is sufficient if it indicates to the buyer that the goods to which it refers are the goods which have been contracted to be sold. In every action for breach of contract the onus is on the plaintiff to establish his readiness and willingness (*Jefferson* v. *Paskell* (6); *Forrestt & Son Ltd.* v. *Aramayo* (7)).

Halse Rogers K.C., in reply, referred to *Johnson* v. *Taylor Bros. & Co.* (8); *Wilks* v. *Atkinson* (9).

Cur. adv. vult.

May 6.

The following written judgments were delivered:—

KNOX C.J. By a contract in writing dated 30th October 1925 the respondent agreed to sell and the appellant to buy "150 bales first selection Liverpool wheat-sacks . . . turned mended and

(1) (1917) 24 C.L.R. 288.
(2) (1921) 125 L.T. 388, at p. 390.
(3) (1872) L.R. 5 H.L. 395, at p. 406.
(4) (1919) 1 K.B. 198.
(5) (1862) 31 L.J. Q.B. 296.
(6) (1916) 1 K.B. 57.
(7) (1900) 83 L.T. 335, at p. 337.
(8) (1920) A.C. 144, at p. 155.
(9) (1815) 1 Marsh. 412.

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sound. Price—9s. per dozen c.i.f. & e., Sydney. Delivery—during November 1925. Terms—net cash against bill of lading or ship's order which will enable buyers to obtain delivery of the goods." On 10th November 1925 the respondent shipped in Melbourne 150 bales of sacks for delivery in Sydney in alleged performance of the contract and on the same day sent to the appellant an invoice for "150 bales of Liverpool sacks at 9s. c.i.f.e. £1,687 10s.—Per s.s. *Suva*" and drew on the appellant through a bank for the amount of the invoice, the bill of lading and insurance policy being attached to the draft. On 12th November the appellant wrote to the respondent as follows:—"This boat will not be in until next Monday. Meanwhile will you please let us know whether these sacks have been cleared in Melbourne, i.e., whether they have been passed by the inspectors. Otherwise we may have difficulty in getting them landed here without the original invoice and declaration of freedom from disease. We would like you to send us the original invoice showing that they are first selection bags packed by Messrs. Martin or Levy Bros. & Knowles according to our purchase." "Next Monday" was 16th November. On 13th November the respondent replied by telegram: "Liverpools cleared Customs here. All you have to do is pay wharfage. Bags are in accordance with contract." The appellant did not accept the draft, and on 16th November respondent telegraphed to appellant as follows, namely: "Bank advises payment draft refused. Please note unless documents now lying Commercial Bank Sydney are accepted and paid for before three same will be sold against you." On the same day appellant replied by telegram: "We have not refused payment your draft. Your documents do not identify goods as being according contract. Draft will be accepted soon as goods proved equal description purchased. Boat due to-day. Expect examine to-morrow. We wrote you for oversea invoices which you have not provided." And on the same day respondent replied by telegram: "Draft has been presented and payment in accordance contract not made. Documents are complete. Your action breach contract. Selling documents unless conditions of our wire of to-day complied with." On 19th November appellant inspected the goods shipped and found they were not of the description contracted for, and on

20th November wrote to the respondent a letter containing the following passage, namely :—" Altogether they are a very inferior lot and certainly not according to contract and we have consequently refused to accept them against our contract. If you have imported these bags yourself or if you know anything about Liverpool bags, you must have known that these were not first selection Liverpool wheat-sacks. Your refusal to give us the evidence we asked for, namely, the overseas invoices describing the pack, leads us to believe that you had knowledge that these bags were not what you sold us. This class of business is no use to us and, unless you can give us a satisfactory explanation of your actions over this shipment, we shall have to avoid doing business with you in future." On 24th November appellant telegraphed to respondent : " Referring contract 30th October 150 bales first selection Liverpool wheat-sacks sold to us delivery during November when are you delivering ? Reply." On 25th November respondent replied by letter :—" This telegram is apparently an afterthought. We had one contract with you which we carried out and under which you refused to do your part." On 25th November appellant wrote confirming the telegram of the 24th and asking by what steamer respondent intended delivering, and on 26th November wrote in reply to the letter of 25th November that unless respondent delivered sacks in accordance with the contract appellant would claim damages for breach of contract.

The appellant having sued for damages for non-delivery, the respondent pleaded (*inter alia*) that the appellant was not ready and willing to perform the contract. On the trial of the action before *Gordon* J. without a jury a verdict was found for the appellant for £343 5s. On appeal by the respondent to the Supreme Court in Full Court the verdict was set aside and a verdict entered for the respondent. This is an appeal from that decision, and the only question is whether on the evidence the appellant was ready and willing to perform the contract.

At the trial the managing director of the appellant was cross-examined as to his attitude. I agree with the learned trial Judge in thinking that the oral evidence was in accordance with the correspondence above referred to. He found, and it is not now

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denied, that the goods shipped were not in accordance with the contract. The meaning of the averment of readiness and willingness is that the non-completion of the contract was not the fault of the plaintiff and that he was disposed and able to complete it if it had not been renounced by the defendant (*Cort* v. *Ambergate &c. Railway Co.* (1)). The demand for delivery contained in the letter of the appellant dated 26th November is prima facie evidence that the appellant was ready and willing to perform the contract (*Squier* v. *Hunt* (2)). The question is whether that evidence is rebutted by the refusal of the appellant to take up the documents. The inference which I draw from the whole of the evidence is that the appellant in refusing to accept the draft acted on the belief or suspicion that the goods shipped were not goods of the description contained in the contract. This belief may have been induced by the form of the invoice sent by the respondent, but, however that may be, the appellant took the risk and the belief proved to be well founded. The position, then, is that the only documents presented to the appellant did not in fact relate to goods of the description required by the contract and no such goods had in fact been shipped by the respondent. In these circumstances is the refusal of the appellant to take up the documents evidence that the appellant was not ready and willing to perform the contract? I think not. It was argued for the respondent that the appellant was under an obligation to take up the documents tendered in this case because they were proper or usual shipping documents, being documents of the nature required, namely, invoice, bill of lading and policy of insurance, and containing a description of the goods to which they related not inconsistent with the description contained in the contract. In my opinion something more is necessary to constitute them proper shipping documents—they must in fact relate to goods of the description contained in the contract which have been shipped. The purchaser under a c.i.f. contract providing for payment against documents undertakes to pay the contract price of the goods on presentation to him of documents relating to goods of the description contained in the contract which have in fact been shipped. If no such goods had in fact been shipped,

(1) (1851) 17 Q.B. 127, at p. 144.

(2) (1816) 3 Price 68.

the purchaser, in my opinion, is under no obligation to take up documents presented to him, even if such documents purport to represent goods of that description. If the goods shipped, not being goods of the contract description, were truly described in the invoice and other documents, it would be apparent that the goods to which the documents related were not the goods which the purchaser had agreed to buy, and in that case it would be ridiculous to treat a refusal to pay the contract price on presentation of those documents as a breach of contract by the purchaser, or as evidence that he was not ready and willing to perform the contract. If this be so, I am at a loss to understand why the position of the purchaser in this respect should be changed for the worse by the fact that the documents contain an incorrect description of the goods to which they relate. This view is, I think, supported by the decisions in the two cases *Tamvaco* v. *Lucas* (1). In the first case the description contained in the invoice was in accordance with the contract but the description in the bill of lading showed a quantity in excess of that agreed to be purchased, and it was held that the purchaser was entitled to refuse to accept the documents. In the second case the documents represented the cargo to be in accordance with the contract, but the purchaser pleaded that the cargo was in fact below the minimum quantity contracted for and that therefore he was not bound to accept the documents, and this was held on demurrer to be a good plea. In delivering judgment *Wightman* J. said (2):—"In the case which came before us upon a precisely similar contract (3), the shipping documents themselves showed, upon the face of them, an excess above the prescribed maximum; and we held that the purchasers were not bound, upon the tender of those documents, to accept them, or liable to pay for the cargo. In the present case the shipping documents, upon the face of them, show a quantity within the prescribed limits; but the amount actually shipped is below them: and the question here, therefore, is whether, if the shipping documents untruly represent the cargo as being within the limits, and the cargo, as the plea alleges, is really not within them, the purchasers are bound to accept the cargo. If,

(1) (1859) 1 E. & E. 581, 592. (2) (1859) 1 E. & E., at p. 595.
(3) (1859) 1 E. & E. 581.

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as I suggested in the course of the argument, the plea had expressly alleged that the shipping documents, by mistake, stated a cargo within the limits, and that the actual cargo was below them, that would surely be a substantial defence, and the plaintiffs could not contend that the documents were conclusive for the purpose of acceptance of and payment for the cargo. The plea here does not expressly allege such misstatement in the documents: but I think that, as it stands, it substantially raises the same defence, and shows that the purchasers were not bound to accept." In *Benjamin on Sale*, 6th ed., at p. 846, it is said: "When delivery is to be made by a bill of lading, the rule is that the seller makes a good delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading, whereunder the buyer can obtain delivery, duly indorsed and effectual to pass the property in the goods, made out in terms consistent with the contract of sale, and purporting to represent goods in accordance with the contract, *and which are in fact in accordance therewith.*" This passage is quoted, apparently with approval, by *McCardie* J. in *Diamond Alkali Export Corporation* v. *Fl. Bourgeois* (1). The decision in the second case of *Tamvaco* v. *Lucas* (2) seems to show that a purchaser under a c.i.f. contract commits no breach of his obligations by refusing to take up documents which do not in fact relate to goods of the description contained in the contract. The reason for this must be that he is under no obligation to take up such documents; and if this be so I am unable to understand how his refusal to take them up can be regarded as evidence that he was not ready and willing to perform the contract. A purchaser who refuses to pay on presentation of documents purporting to relate to goods of the contract description no doubt takes the risk that the description contained in the documents may prove to be correct, but in the present case the risk taken was justified by the result. The respondent in this case committed a fundamental breach of its contract by failing to ship the goods which it had contracted to sell. Adapting the language of Lord *Atkinson* in *Johnson* v. *Taylor Bros. & Co.* (3), the respondent by doing so made the creation, and of course the tender, of the shipping

(1) (1921) 3 K.B. 443, at p. 451. (2) (1859) 1 E. & E. 592.
(3) (1920) A.C., at p. 158.

documents impossible, that being a necessary consequence of the main and substantial breach of its contract. In other words, " proper shipping documents " were not and could not have been tendered to the appellant and his refusal to take up documents which were not proper shipping documents affords no evidence that he was not ready and willing to perform the contract or that it was his fault that the contract was not performed.

For these reasons I am of opinion that the appeal should be allowed and the verdict found by *Gordon* J. restored.

ISAACS J. In my opinion the unanimous judgment of the Full Court of New South Wales was correct and should be affirmed.

When resolved into its simplest elements this case is, as I think, of an elementary character. It ultimately raises no question but this: Is the buyer of goods c.i.f. who on tender of proper shipping documents persistently refuses to receive them and pay the stipulated price except on inspection of the goods, or other proof of their compliance with the contract, entitled to recover damages from the seller because it is afterwards discovered that the goods shipped were not in accordance with the contract? However great the failure of the vendor to perform his primary duty, the question I have stated must, in my opinion, be answered in the negative. Cross-actions were brought: seller sued buyer for non-acceptance, and properly failed; buyer sues seller for non-delivery, and claims that the seller's breach of his duty to ship the goods, not only disentitles the seller to recover damages for the buyer's refusal above stated, but also prevents that refusal from being wrongful. This is a rather novel and, from a mercantile standpoint, a somewhat disturbing contention, and so needs a little careful examination. First, it is said that, where under a c.i.f. contract the seller fails to ship goods in conformity with the contract, the " documents " never can be proper, because they cannot in the nature of things represent contractual goods, and therefore, whatever reason actuates the buyer in refusing to pay, that refusal is rightful within the contemplation of the contract. No authority was, or could be, cited for that position. No doubt the formal accuracy of the documents would be unavailing to the seller if, after provisional acceptance and payment, the buyer found

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that the goods were not in fact in conformity with the contract and had exercised its undoubted right to reject the goods and demand a return of the money paid (see sec. 37 (1) of the *Sale of Goods Act* 1923 (No. 1 of 1923) (N.S.W.); and *Polenghi* v. *Dried Milk Co.* (1)). In that sense, the main provision being broken by the seller, the documents would be worthless. But that is not the same as saying they were defective as "ordinary and usual shipping documents" (see per *Cockburn* C.J., in *Tamvaco* v. *Lucas* (2)), and therefore not the documents contracted for. I am very distinctly of opinion that to say so is wholly inconsistent with the true notion of a c.i.f. contract. Doubtless any refusal by the buyer to accept and pay on receipt of the shipping documents may escape pecuniary consequences, if it be shown that the seller by his own breach has disentitled himself from complaining. But that does not divest the buyer's failure of any wrongfulness which it may have, when judged by the standard of the obligations he has assumed. The propriety of the documents as documents must be judged of apart from such a consideration. If, on their face, they show a departure from the contract, they are not such as are contemplated by the bargain. If they are in the usual form of such documents, and would be proper if the contract were so far performed as to ship goods in conformity with the contract, then no objection can be made on the ground only that the documents are not those stipulated. Any objection made to the documents must be considered on its own footing. An objection may be to something which a reasonable man might fairly question and require to be cleared up — as, for instance, an apparent alteration. Or, if the invoice were such that a merchant buyer could, according to mercantile practice, reasonably require it to be more explicit and he did require it to be made more explicit, no one would regard such objections as any evidence of want of readiness and willingness on the part of the buyer to perform the contract.

But here the position is wholly different. First of all, there was nothing wrong, or even apparently wrong, with the documents. Even now no particulars of disconformity with the contract are pointed to with respect to the policy and the bill of lading. The

(1) (1904) 10 Com. Cas. 42.

(2) (1861) 1 B. & S. 185, at p. 197.

invoice is the only possible source of complaint. The contract was for "150 bales, first selection Liverpool wheat-sacks. When new 41 in. x 23 in. 8 porter 9 shot. 300 to the bale. Original weight about 2¼ lbs. shipped at Calcutta fair average. Turned mended and sound." Now that is the description of the sacks, all of which could be insisted on by the buyer. Then the contract said: "Price —9s. per dozen c.i.f. & e. Sydney." "Terms—net cash against bill of lading or ship's order which will enable buyers to obtain delivery of the goods." The invoice said:—"To 150 bales Liverpool sacks at 9s. c.i.f.e. £1,687 10s.—Per s.s. *Suva*." That invoice was enclosed in a letter the first paragraph of which was:—"We enclose herewith invoice amounting to £1,687 10s., for 150 bales Liverpool sacks which have been shipped to Sydney per s.s. *Suva* in fulfilment of your esteemed order through Messrs. C. H. Wood & Co." As no challenge was made and no evidence was given with respect to the necessity of saying in the invoice "first selection," I am not, nor can a Court possibly be, in a position to say whether those words were essential according to mercantile custom, or whether they would have been sufficient. No such issue was raised. So far as I can see, even apart from the appellant's failure to raise it at the trial, the invoice was sufficient for its purpose. It indicated the class of goods, it connected up with the other documents, and, reading it and the letter, there is no doubt in my mind—in the absence of mercantile evidence to the contrary—that the seller indicated and represented to the buyer that the sacks shipped were in accordance with their contract. That was tacitly admitted by the buyer in its reply letter of 12th November. That letter began the *ultra* demand by asking for the original invoice. The seller would not comply, and the buyer refused payment. On 16th November the seller threatened to sell against buyer. Then the buyer telegraphed that "documents do not identify goods as being according to contract." And it added, "Draft will be accepted as soon as goods *proved* equal description purchased. . . . We wrote you for oversea invoices which you have not provided." I have italicized the word "proved" for a reason which will be presently apparent. Refusal continued, the ship arrived, the goods were examined, found not to be in accordance with contract, and rejected on that

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ground. The letter of refusal said (*inter alia*): "Your refusal to give us *the evidence we asked for*, namely, the overseas invoices describing the pack," &c.

At the trial before *Gordon* J., the appellant's case was that the seller's failure to ship goods in accordance with the contract was decisive as to the buyer's right to recover damages. The learned Judge said: "Assuming, but without deciding the point, that the request by the purchasers (the plaintiffs) for further *proof* was not such as they were entitled to make under the contract, I am of the opinion that by so doing . . . they have not precluded themselves from maintaining the present action." It is fair to the learned Judge to say that he adds, "the question is not free from difficulty." The breaches of contract by the sellers, as found by the learned Judge are: (1) Disconformity of goods shipped; (2) tender of documents not covering any goods coming within the contract. The second breach was regarded as a necessary consequence of the first, the learned Judge saying: "the vendors had already shipped and forwarded goods not as specified in the contract." But his Honor also found, with respect to the buyer's attitude, what to my mind is ultimately decisive against the buyer. He found: "The purchasers refuse to accept these documents and pay for the goods under the contract *on the ground* that they decline to accept the documents or pay for the goods *without an inspection of the goods themselves*, which is undoubtedly *a wrong position* by the purchasers to take up under such a contract as the present one." *Gordon* J. could not have held the position of the purchaser "a wrong one" if he had thought the invoice itself an insufficient document. The dilemma is, either its insufficiency was not raised or the learned trial Judge has decided against it. The first alternative is, I think, correct, the action being conducted on the basis that the only objection of the buyer was the disconformity of the goods, and that it was entitled to some *proof* of conforming beyond the usual documents before payment. I extract the following from the judgment of *Gordon* J., and italicize certain words. After referring to demand for payment, the judgment proceeds:—"The plaintiffs refused to do so and asked for *proof* to be furnished to them that the goods shipped on board the *Suva* were goods in accordance

with the description contained in the contract. Ralph Wilson Dean, managing director of the plaintiff company, gave evidence and in answer to Mr. *Barton*, counsel for the defendants, stated as follows: —Mr. *Barton* asked him this question: 'Your attitude from the first was this, wasn't it, that you wanted some *evidence or proof* that these sacks were in accordance with the contract before you would take up the documents?' to which Mr. Dean answered, 'Yes, quite so.' Further on in his evidence the same witness stated, 'I wanted *proof* of what I was paying for.' Mr. *Barton* asked him: 'Before you would accept the goods, you wanted *proof* that you were getting what you were paying for?' to which he answered, 'Yes, that is so.' I think that evidence given orally was in accordance with the attitude taken up by the plaintiffs, and appearing in the correspondence which was put in evidence before me." That is to say, the buyer demanded proof, obviously outside the contract, and was not seeking a better invoice. Even assuming the invoice insufficient, nothing warranted the buyer in demanding more than a sufficient invoice. He cannot, in my opinion, say:—" Because you have so far fallen short in supplying an invoice in customary form, I will not be satisfied now even with a proper invoice. I require something in the nature of proof, which the contract does not provide for." If he could so insist, then the accidental omission or insertion of a word by a clerk, a mistake easily rectified, would seriously alter the distinctive nature of the contract and embarrass mercantile operations. Each party to a contract is entitled to all it gives him; if he insists on something plainly outside the bargain, he declines to be bound by the contract, and is not ready and willing to perform it.

I have first to test the contention that documents are necessarily defective if the goods turn out to be in disconformity with the contract. To test that, we must assume the goods themselves were, when shipped, in conformity with the contract. If they were, there is no question the bill of lading protected the buyer throughout, and would have entitled the buyer to obtain them, pursuant to his contract, the identification of the goods shipped with those described in the bill of lading not being challenged. Nor is there any suggestion that if the goods as shipped were lost, the buyer would have met with any obstacle in recovering on the insurance policy. The invoice,

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as it seems to me, described the goods in a manner that no merchant could misunderstand or fail to see that they had reference to the goods contracted for, for there is no suggestion of any other contract to which they could be referable. If it did not as a matter of law, then it must be because the goods must be fully described, for in law one part of the description is as vital as another, and every particle of the description of the goods should have been inserted. In short, but for the fact that the goods as shipped did not answer to the contractual description, the seller must have succeeded in its action. This conclusion is so important to the mercantile community that I venture to refer to some legal authorities, including some cases already mentioned by the Supreme Court.

The standard repositories of the seller's obligations under a c.i.f. contract are : *Ireland* v. *Livingston* (1), and *E. Clemens Horst Co.* v. *Biddell Bros.*, in the various Courts, culminating in the House of Lords (2). To those should now be added the recent authority of a unanimous House of Lords in *Hansson* v. *Hamel & Horley Ltd.* (3). Nevertheless, room seems left for the argument to which I have referred ; and therefore it is not undesirable to state why I consider the decided cases support the conclusion I have arrived at. It is not unimportant to observe that where the relation between the parties is simply that of seller and buyer, no commission being charged by seller against buyer, there is no question of trust or agency between them (*Houlder Bros. & Co.* v. *Public Works Commissioner* (4)). The contract of sale is, in that case, itself the sole measure of their mutual rights. Again, the nature and contents of the documents must be such as are appropriate to the particular contract (*Yangtsze Insurance Association Ltd.* v. *Lukmanjee* (5)). This particular contract contains two relevant express statements. First, it declares the price is " c.i.f. & e. Sydney." Next, it states : " Net cash against bill of lading or ship's order which will enable buyers to obtain delivery of the goods." I will assume—since it is not necessary to do more—that the combined effect of these two provisions is that the ordinary c.i.f. documents are required, with one possible

(1) (1872) L.R. 5 H.L. 395.
(2) (1912) A.C. 18.
(3) (1922) 2 A.C. 36.
(4) (1908) A.C. 276, at p. 290.
(5) (1918) A.C. 585, at p. 589.

variation at the option of the seller, namely, the substitution of a ship's order for the bill of lading. The primary result of that is that "the ordinary shipping documents" were to be delivered to the purchaser (per Lord *Cairns* L.C. in *Hickox* v. *Adams* (1)). The modified result is that, in the absence of any express stipulation and in the absence also of any proved mercantile usage to the effect that any other documents are deliverable for the purpose (see *Wilson, Holgate & Co.* v. *Belgian Grain and Produce Co.* (2); and per *Scrutton* L.J. and *Atkin* L.J. in *Malmberg* v. *H. J. Evans & Co.* (3)), the documents required to be delivered are (says *Bailhache* J. in *Wilson, Holgate & Co.* v. *Belgian Grain and Produce Co.* (4)) "a bill of lading, an invoice and a policy of insurance, and it is well understood that under a contract of that kind these are the documents which the seller is required to tender." Naturally, the invoice is for purposes which are confined to the personal relations of buyer and seller, which are already definitely settled by the terms of the contract itself. But the other two documents have probably other purposes and may have to bring the buyer into possible relations with other persons. It is as to these that Lord *Sumner*, in his judgment in *Hansson* v. *Hamel & Horley Ltd.* (5), refers in a passage of importance. His Lordship says:—"When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout. He is not buying a litigation, as Lord *Trevethin* (then *A. T. Lawrence* J.) says in the *General Trading Co.'s Case* (6). These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so *conform to the accustomed shipping documents* as to be reasonably and readily fit to pass current in commerce." There is not a word there about any assurance in the shipping documents that the goods are in conformity with the contract between buyer and seller. Such an assurance, even by description, would be out of place between shipowner and seller, or between insurer and seller, and equally so

(1) (1876) 34 L.T. 404, at p. 407.
(2) (1920) 2 K.B. 1, at p. 8.
(3) (1924) 41 T.L.R. 38, at pp. 39, 40.
(4) (1920) 2 K.B., at p. 7.
(5) (1922) 2 A.C., at p. 46.
(6) (1911) 16 Com. Cas. 95, at p. 101.

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between buyer and his sub-purchaser. In each of those cases the description of the goods must be relative to the particular contract it is connected with. As between the buyer and seller the shipping documents must give the proper protection to the seller in respect of the dangers of carriage and the perils insured against, and of course they must not be inconsistent with the buyer's rights. The documents must be such as are customary as between the shipowner or insurer on the one hand, and the owner of the goods on the other. But by the nature of the contract of sale the buyer must trust to the seller's promise that the proper goods will be shipped and to whatever is customarily included in the documents to show they have been shipped. If he mistrusts the seller, then he may take the risk of refusing to pay on presentation of documents in proper form. The refusal may turn out to be actionable or to be non-actionable by the fault of the seller. But even if non-actionable for that reason, it may be a refusal that affords unanswerable evidence of inability or unwillingness to pay, whatever the seller has done. Suppose, for instance, the present appellant on presentation of the documents had said expressly: "We are neither in a position to pay, nor are we willing to pay, and therefore we refuse acceptance of the documents." Then, suppose they discovered a week afterwards that the seller's goods were not up to the contract. No doubt the seller must fail, as it has failed, in a claim for damages. But could the buyer succeed in a cross-action? And if not, why can it succeed now? *Gordon* J., as I have shown, has found as a fact why the buyer refused: not because it found any fault in the documents, not because the goods shipped were not in accordance with the contract, but because, as the goods *might* not be in accordance with the contract, the buyer required inspection of the goods themselves. This attitude was maintained for many days, and although the vendor made more than one attempt to overcome the refusal it was adhered to; and finally the vendor declared the transaction at an end. At that time there was no knowledge that the goods were not in accordance with the contract, and therefore there must have been some other reason for the buyer's persistent attitude. The reason was that stated, namely, insistence on inspection of goods that might or might not be up to contract. That was legally

unjustifiable (*E. Clemens Horst Co.* v. *Biddell Bros.* (1) and per *Scrutton* L.J. in *Malmberg's Case* (2)). Ultimately the seller terminated the contract, as it had a right to do. On a turn of the market the buyer demanded performance, but, in the circumstances, necessarily without relation to the document tendered and refused. I see no escape from the conclusion that the refusal, which became irrevocable, cannot be regarded in law as anything but want of readiness and willingness on the buyer's part to perform an essential obligation on its part—the most characteristic duty of a buyer under such a contract—even though the seller had not done all that the contract demanded of it. The subsequent demand for performance, besides being a pure afterthought and deserving no consideration, was utterly ineffectual to influence the contract or its performance.

The appeal, in my opinion, should be dismissed.

HIGGINS J. A purchaser of wheat-sacks brings an action against the vendor for not delivering the goods. The only plea of the vendor with which we are concerned is the third—that the purchaser was not always ready and willing to perform the agreement. Everything but one points to readiness and willingness on the part of the purchaser to take and pay for the wheat-sacks in pursuance of the contract; and that one thing is that he hesitated and delayed in taking up the usual papers—the bill of lading and the policy of insurance—and in honouring the draft of the vendor for the price until he made sure that the goods were of the description for which he contracted. It turns out that the goods were *not* of that description, but inferior; and now it is urged that the purchaser must be treated as being not ready and willing to carry out his contract because he failed to accept and pay for goods for which there was no contract. He contracted, as it were, to buy cement; and he was offered sand. Is it true, as the vendor insists, that we are bound by the authorities to hold under such circumstances that the purchaser was not "ready and willing to perform *the agreement*?"

It seems to be assumed that under what is called a c.i.f. contract —costs, insurance, freight—there is an absolute duty on the part

(1) (1912) A.C. 18.

(2) (1924) 41 T.L.R. 38, at p. 40.

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of the purchaser to pay the purchase-money and take up the documents sent by the vendor when they arrive at the destination, whether the goods contracted for are sent or not. It must follow that even if the purchaser learn by accident that the goods shipped are not the goods contracted for, he is not at liberty to refuse to pay and to take up the documents. No case has been cited which directly establishes such an extraordinary result; but there are cases which show that delivery of the goods to the master of the ship on behalf of the purchaser is delivery to the purchaser, and that it is the duty of the purchaser, under ordinary circumstances, to pay when he is advised of the consignment. But these cases apply only on the assumption that the proper goods, the goods the subject of the contract, have been put on board.

In the case of *Wait* v. *Baker* (1) the position was explained clearly by *Parke* B. The contract was for the sale of 500 quarters of corn of a certain description. The vendor was free to select any 500 quarters that answered the description in the contract; and therefore no property in any corn passed by the mere contract. *Parke* B. said (2): "It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected *in pursuance of the contract*, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee . . . then there is no doubt that the property passes by such delivery to the carrier. *It is necessary, of course, that the goods should agree with the contract.*"

The same qualification of the rule appears in *Benjamin on Sale*, 5th ed., at p. 743: "When delivery is to be made by a bill of lading, the rule is that the seller makes a good delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading, duly indorsed and effectual to pass the property in the goods, purporting to represent goods in accordance with the contract, *and which are in fact in accordance therewith.*" As for the

(1) (1848) 2 Ex. 1. (2) (1848) 2 Ex., at p. 7.

case of *E. Clemens Horst Co.* v. *Biddell Bros.* (1) on which so much reliance has been placed, it is absolutely consistent with these statements of the law. The primary Judge, *Hamilton* J. (now Lord *Sumner*), laid down the five duties of the vendor on c.i.f. terms who claims payment on tender of the documents; and he puts in the forefront, as an essential condition, his duty "to ship at the port of shipment *goods of the description contained in the contract*" (2). "Such terms," he adds, "constitute an agreement that the delivery of the goods, *provided they are in conformity with the contract*, shall be delivery on board ship at the port of shipment." The case turned on the fact that no time was specified in the contract when the cash price was to be paid. Sec. 28 of the (English) *Sale of Goods Act* says that payment is to be against delivery; and it was held in the House of Lords, which accepted the views of *Hamilton* J., and in the Court of Appeal of *Kennedy* L.J., that the delivery of the bill of lading *when the goods are at sea* can be treated as delivery of the goods themselves. In that case there was no question as to the goods at sea answering the description in the contract; but the phrase used by Lord *Loreburn*, "when the goods are at sea," does not apply when other goods than *the* goods are being sent to the destination. The case of *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (3), before the Court of Appeal, was a war case. War had broken out between Germany and England. The bill of sale had been made void by the War; and it was held that it was not a sufficient compliance with the usual c.i.f. rule to tender such a bill of sale; for the documents tendered must be valid and *effective* documents—that is to say, valid and effective to pass to the purchaser the goods contracted for. In the present case, the documents, if taken up by the purchaser, would not have been valid and effective to pass to the purchaser the goods for which he had contracted. If the proper goods have been shipped, and if they have been lost at sea, the purchaser has to look to his policy of insurance to secure to him payment for the value; "if the vendor fulfils his contract *by shipping the appropriate goods* in the appropriate manner under a proper contract of carriage, and if he also obtains

(1) (1911) 1 K.B. 214, 934; (1912) A.C. 18.

(2) (1911) 1 K.B., at p. 220.

(3) (1916) 1 K.B. 495.

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the proper documents for tender to the purchaser, I am unable to see how the rights or duties of either party are affected by the loss of the ship or goods" (per *McCardie* J. in *Manbre Saccharine Co.* v. *Corn Products Co.* (1)).

That the shipping of the proper goods is a condition precedent to the right of the vendor under a c.i.f. contract to claim the price is quite clear. But what is the position when the purchaser for some reason has become suspicious that goods of the description for which he contracted are not on their way, but other goods, and documents which *on their face* are consistent with the contract, are presented to him? If he decline to pay when the documents are tendered, he takes the risk of breaking his contract if the goods turn out to be right; but he cannot be treated as not ready and willing to perform his contract if the goods turn out to be wrong. The goods here have turned out to be wrong. This is clearly laid down in *Sanders* v. *Maclean* (2). In that case, there were three bills of lading from Russia, and two only were presented to the purchaser in London. *Cotton* L.J. said (3): "If the purchaser chooses to refuse to accept the cargo, because he does not know whether in fact the tender does comply with the terms of the contract, and whether the other part of the bill of lading has been parted with or not, . . . and if it should turn out on investigation that in fact what was tendered to him was an effectual bill of lading effectual to pass the property in the cargo then he broke his contract by not paying the money and by refusing to accept the cargo when such effectual bill of lading was tendered to him." In that case, the third bill of lading was in the hands of the shipper, unendorsed and ineffective; and it was held that the tender of the only effective originals of the set was a sufficient tender, and put the purchaser in the wrong. As *Bowen* L.J. said (4):— "The person who rejects effective and adequate documents of title on the ground that another document may possibly be outstanding, does so at his own risk. If his surmise turns out to be well founded, his rejection of the tender would be justified. But if it is a mere surmise and has no foundation in fact, he has chosen, by excess of caution, to place himself in the wrong."

(1) (1919) 1 K.B., at p. 203.
(2) (1883) 11 Q.B.D. 327.
(3) (1883) 11 Q.B.D., at p. 339.
(4) (1883) 11 Q.B.D., at p. 343.

Now, in the present case, the purchaser, when the invoice was sent to him, and he was asked to honour the draft through the Commercial Bank, and to take up the bill of lading and the insurance policy, did suspect that something was wrong. The invoice was certainly consistent with the description in the contract; but it spoke of "150 bales Liverpool sacks," and did not say "150 bales *first selection* Liverpool *wheat*-sacks," as the contract said. In acknowledging the letter of the vendor with the invoice, before the boat reached Sydney, the purchaser wrote: "We would *like* you to send us the original invoice" (the goods came from England) "showing that they are first selection bags packed by Messrs. Martin and Levy Bros. & Knowles according to our purchase." The vessel reached Sydney on 16th November, and payment of the draft was refused; and the vendor telegraphed that unless the documents were "accepted and paid for before three same will be sold against you." This threat led the purchaser to telegraph immediately (16th November):—"We have not refused payment your draft. Your documents do not identify goods as being according contract. Draft will be accepted soon as goods proved equal description purchased. Boat due to-day. Expect examine to-morrow. We wrote you for oversea invoices which you have not provided." The vendor telegraphed at once to the purchaser that its action was a breach of contract, and that the vendor was "selling documents unless our conditions of to-day complied with." On the 17th the goods on the vessel were inspected, and were found not to be "first selection" bags, but rejections from the "first selection," including, as it appears, malt bags, flour bags, pea bags, potato bags. The trial was before a Judge, without a jury, who found for the plaintiff; it is our duty to weigh the evidence; and, so far as I can see, the purchaser never wavered from the position which it took up in its telegram of 16th November. It wanted to carry out the contract. The vendor had, under the contract, all the month of November in which to deliver; and in a letter of 26th November the purchaser said:—"We still require you to complete your contract and deliver to us 150 bales first selection Liverpool wheat-sacks. Unless you deliver us these sacks in accordance with the contract, we shall be compelled to claim upon you for damages for breach of contract . . . as

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there are only three working days left now in November, and we may have to go on the market and buy to complete our engagements."

There is no doubt that the plaintiff right through the transaction was ready and willing to perform the contract in the ordinary sense of the words, and that the contract was not performed because of the defendant's fault in sending the wrong goods. The defendant contends, however, that it was the duty of the plaintiff to pay the draft and to take up the bill of lading and documents, and that, if the goods supplied were wrong, the plaintiff had a remedy only in an action to recover the money. No case has been cited which supports this contention; the shipping of goods of the description in the contract is, in my opinion, a condition precedent to the liability to pay.

It may be taken for granted that the plaintiff had no right to demand to see the overseas invoice, or to demand inspection of the goods before payment. I do not regard the letter of 12th November as a demand, but merely as an expression of what the plaintiff would "like" in view of the ambiguity of the invoice; but counsel for the defendant, by an ingenious cross-examination, led the plaintiff's managing director to admit that "nothing short of the overseas invoice or an inspection of the goods would have satisfied him *at that period*" (after the ambiguous invoice). But it is not a question as to the state of mind of the managing director: it is a question as to what the plaintiff or the defendant did, or failed to do; or, finally, was the plaintiff ready and willing to perform the contract. There certainly was no repudiation of the contract in the sense of *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1), and the vendor had no right to treat the contract as at an end after the 16th November. Mr. *Mitchell* has put his client's case frankly and fairly before us; but, in my opinion, the plaintiff has amply satisfied the burden of proof that he was always ready and willing to perform the contract; and the appeal should be allowed, and the judgment of *Gordon* J. restored.

POWERS J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales granting the appeal by

(1) (1884) 9 App. Cas. 434.

the respondent from a judgment for plaintiff (appellant) given by *Gordon* J. on 9th July 1926 for £345 5s. The Full Court of New South Wales set aside the verdict on appeal and ordered a verdict to be entered for the defendant (respondent on this appeal). The action tried by *Gordon* J. (without a jury) was one arising out of a contract for the sale of wheat-sacks (generally called "corn-sacks" in England). The contract was a c.i.f. contract, and the terms, so far as payment is concerned, were :—"Net cash against bill of lading or ship's order which will enable buyers to obtain delivery of the goods." "Delivery during November 1925."

The Full Court, in its judgment, concisely sets out the position and the one question to be decided on this appeal in the following words :—"The plaintiffs sued for non-delivery of the goods ; the defendants by a plea of cross-action claimed damages for non-acceptance. The learned Judge dismissed the defendants' claim, finding on the evidence that the goods tendered by them were not in accordance with the contract. This finding is not challenged by the defendants. His Honor found a verdict for the plaintiffs on their claim, and assessed the damages as upon a breach committed on 30th November, the last day for delivery under the contract. The defendants appeal upon several grounds, which in effect resolve themselves into one—that the plaintiffs were not ready and willing to perform the contract." It was common ground that the "usual documents" were tendered, namely, a bill of lading, an invoice showing the price of the goods and an insurance policy. The plaintiff contended they were not "proper" documents for reasons mentioned later on. When the documents were presented it is admitted that the plaintiffs refused, on 11th November 1925, and continued to refuse to accept them at all times until the contract was ended on 16th November, or to pay for the goods referred to in the documents until supplied by the respondent with further evidence that the goods were in accordance with contract, either by delivery of the overseas invoices or by inspection of the goods. The plaintiff claimed this new condition, not on the ground that the invoice submitted was not the usual one, but on the ground that it required to see from the original invoices whether the goods were first selection wheat-sacks packed by Messrs. Martin or Levey Bros. & Knowles

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—a condition not included in the contract. No complaint was made at that time, or later on, that the bill of lading or insurance policy did not describe the goods in the ordinary way.

The question to be decided by the Court is whether a buyer of goods under c.i.f. contract, who buys on terms net cash against *bill of lading or ship's order*, can be held to be ready and willing to complete that c.i.f. contract and recover damages in an action for breach of the contract if he does refuse to pay on tender of the "proper documents" describing generally the goods purchased, even if the buyer considers that he is entitled to a fuller description or specification of the goods in the invoice, or wishes to delay payment, and it is afterwards found that the goods were not according to contract. A c.i.f. contract has been described as a "sale of documents," but it is in reality a sale of goods to be paid for on tender of documents instead of on inspection or delivery of the goods. The appellant contends that, although it is admitted the seller cannot recover damages for breach of the agreement in such a case, the buyer cannot, if he commits a breach of the agreement by refusing payment "against the bill of lading" until new conditions are complied with, claim damages on the ground that he was ready and willing to carry out the c.i.f. contract in question. If the buyer had completed his part of the contract, he would have had the right to sue for damages for any loss sustained by him if the goods shipped were not in accordance with the contract. If the buyer was not ready to carry out the c.i.f. contract, it is admitted the appeal should be dismissed. The plaintiff (the appellant) must prove that he was ready and willing to carry out the c.i.f. contract in question. The Full Court of New South Wales has found that he was not ready and willing to carry out the c.i.f. contract without imposing new conditions not set out in the c.i.f. contract.

Before the question can be decided the Court must decide (1) whether a buyer under a c.i.f. contract (such as the one in question) can, without committing a breach of the contract, impose new conditions when the bill of lading and usual documents are tendered before paying in accordance with the contract if the invoice, although it describes the goods correctly, does not give all the particulars the buyer thinks fit to demand; (2) whether the plaintiff in this

case did impose new conditions and refuse to pay on tender of the bill of lading and usual documents until those conditions were complied with ; (3) whether the bill of lading and other documents tendered were usual and proper documents in the circumstances.

As to the first question it is not disputed that a buyer under a c.i.f. contract cannot impose new conditions and must pay on tender of proper documents, namely, the bill of lading, the policy of insurance and an invoice setting out the goods generally and the price of the goods.

The second question to decide is : Did the plaintiff in this case impose new conditions and refuse to pay on tender of the bill of lading and usual documents until these new conditions were complied with ? On 10th November the respondent (defendant) wrote to the plaintiff in Sydney :—" We enclose herewith invoice amounting to £1,687 10s. for 150 bales Liverpool sacks which have been shipped to Sydney per s.s. *Suva* in fulfilment of your esteemed order through Messrs. C. H. Wood and Co. We are drawing upon you through the Commercial Bank of Australia Ltd. ; with bill of lading and insurance policy attached and commend draft to your usual kind protection on presentation." On 12th November the plaintiff wrote : " We would like you to send us the original invoice showing that they are first selection bags packed by Messrs. Martin or Levey Bros. & Knowles according to our purchase." Under the contract in question the plaintiff was not entitled to the original invoices or to see them or proof that the goods were packed by Martin or Levey Brothers & Knowles. In this letter it only asked for the original invoice but in the telegram of the 16th the original invoices were again referred to by it as a reason for the delay in payment. On 13th November the defendant telegraphed to the plaintiff as follows :—" Bank advises payment of draft refused. Please note unless documents now lying Commercial Bank Sydney are accepted and paid for before three same will be sold against you." The plaintiff on 16th November replied :—" We have not refused payment your draft. Your documents do not identify goods as being according contract. Draft will be accepted soon as goods proved equal description purchased. Boat due to-day. Expect examine to-morrow. We wrote you for oversea invoices which you have not

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provided." The words "draft will be accepted soon as goods proved equal description purchased" are conclusive, I think, that they were insisting upon a condition not in the contract, and one they were not entitled to on the c.i.f. contract. On the same day (16th November) the defendant telegraphed:—"Draft has been presented and payment in accordance contract not made. Documents are complete. Your action breach contract. Selling documents unless conditions of your wire of to-day complied with." Nothing was done by the plaintiff on that day but subsequently, on the 17th, the goods were examined by the plaintiff and it was found that the sacks did not comply with the description in the contract. If there was any doubt from the correspondence alone about the imposition of new conditions by the plaintiff and the intention of the plaintiff to require them, it is cleared away by the oral evidence of the managing director of the plaintiff company. Included in that evidence the following questions and answers appear:—"Your attitude from the first was this, wasn't it—that you wanted some evidence or proof that these sacks were in accordance with the contract before you would take up the documents?—Yes, quite so. . . . You understand what I am putting to you, don't you? You would not have been satisfied *even if our invoice had copied out the contract description of the goods* ?—I do not know; we might not have—we might have wanted to see: anyone could write anything on an invoice like that—We would have been satisfied with *proof from the oversea shippers because we know the packers well.* But nothing short of the overseas invoice or an inspection of the goods would have satisfied you at that period, would it?—No, that is generally demanded by everybody in the trade. . . . Before you would accept the goods you wanted proof that you were getting what you were paying for?—Yes, that is so. You wanted either the overseas invoices or an inspection of the goods before you would take up the documents?—Yes, and I might say that the overseas invoices were very necessary, too, for the Customs. . . . And a mere statement in our invoice would not satisfy you, would it?—Well, it would not be anything to go on, would it? Exactly, it would not satisfy you because it would not be anything to go on—that is, a mere statement in our invoice that the goods were according

to contract; that is so ?—Yes. That was your attitude from the outset, was it ?—Yes, and in my correspondence; it is all set out there." It is true that after the contract had been determined on 16th November the plaintiff, on 24th November, when the price of the goods had risen considerably, sent the following telegram to the defendant: "Referring contract 30th October 150 bales first selection Liverpool wheat-sacks sold to us delivery during November when are you delivering ? Reply." The plaintiff, however, did not by that telegram or in any other way withdraw the new conditions imposed by him or agree, if the goods were offered, to pay on presentation of the usual documents without inspection or without the overseas invoices being produced.

The third question to be decided is: Were the bill of lading and other usual documents tendered in the circumstances usual and proper documents or were they clearly inconsistent with the description of the goods in the contract ? The description of the goods in the c.i.f. contract was "150 bales first selection Liverpool wheat-sacks. When new 41 in. x 23 in. 8 porter 9 shot 300 to the bale. Original weight about $2\frac{1}{4}$ lb. shipped at Calcutta fair average. Turned mended and sound." It is common ground that it was not necessary to put all those particulars in the bill of lading, or in the insurance policy or in the invoice setting out the price which usually accompanies the bill of lading. The invoice which was tendered with the bill of lading and insurance policy was as follows: "To 150 bales Liverpool sacks at 9s. c.i.f.e. £1,687 10s.—Per s.s. *Suva*."

There is nothing in the invoice inconsistent with the description in the contract. In the bill of lading and in the insurance policy the description contained less information because the goods were only described as "150 bales secondhand corn-sacks."

The objection to the "documents" tendered was confined to the wording of the invoice. It was not contended in the Supreme Court or in the Full Court that the bill of lading or the insurance policy did not describe the goods in the usual and proper way by calling them secondhand corn-sacks. The plaintiff proved that the goods bought were wheat-sacks which had been used originally when new to take wheat to other countries and they were then sent out

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for sale again. They were therefore properly described as secondhand *wheat-sacks* (or corn-sacks). In the evidence of the managing director of the plaintiff company he referred to the goods in question as secondhand wheat-sacks. His principal expert witness, Christopher Edgar Holgate, did so also. No exception was taken at the trial to any witness for the plaintiff or the defendant who referred to them in the same way as secondhand wheat-sacks or secondhand corn-sacks. The goods were therefore described in the correct and usual way in the bill of lading and in the insurance policy and in the invoice, and they were all consistent with the description of the goods in the contract.

It was not contended that, if the goods shipped had been in accordance with the contract, the plaintiff would not, on the refusal to pay on tender of the bill of lading in question, have been liable to an action for breach of contract. Proper documents—" that is, such documents as are usual and proper in c.i.f. contracts "—were tendered to the plaintiff.

I also agree with the Full Court's finding on the other questions referred to on the appeal to that Court.

It is clear to me, from the evidence, for the reasons mentioned, that the plaintiff was not ready and willing to carry out the c.i.f. contract or to pay on tender of documents, or to pay at all, without imposing new conditions not in the contract. He cannot, therefore, recover damages for a breach by the defendant of that contract, although he could not in the circumstances be made to pay damages for his breach or be made to pay for the goods.

I hold that the appeal should be dismissed.

STARKE J. Under a c.i.f. contract a seller is bound to ship goods according to the contract description, and a buyer is bound to pay the price on tender of the usual or customary mercantile documents. It is sometimes a question of fact whether particular documents are, or are not, usual or customary in relation to the contract (*Tamvaco* v. *Lucas* (1)).

In the present case the seller did not ship goods of the contract description, but tendered to the buyer documents for the goods

(1) (1862) 31 L.J. Q.B. 296.

it had in fact shipped. If the buyer had paid for the goods on the presentation of these documents, it would not have been precluded from subsequently rejecting the goods, and recovering the moneys paid and damage for the breach of contract (*Biddell Bros.* v. *E. Clemens Horst Co.* (1)). If the buyer had rejected the goods on tender of the documents for an untenable reason, it might still justify its act " on other and valid grounds " (*Tamvaco* v. *Lucas* (2) ; *Manbre Saccharine Co.* v. *Corn Products Co.* (3) ; *Taylor* v. *Oakes, Roncoroni & Co.* (4) ; *Kennedy on C.i.f. Contracts*, pp. 168-169).

Owing to the form of invoice in this case, the buyer, I gather, suspected that goods had not been shipped in accordance with the contract description and it rejected the documents tendered unless it had an inspection of the goods shipped. By the terms of the contract, however, the buyer was not entitled to insist upon inspection before payment (*Biddell Bros.* v. *E. Clemens Horst Co.* (5)).

Nevertheless, it is clear upon the authorities that the buyer can, upon the facts proved in this case, justify its rejection of the documents, and that the seller cannot succeed in an action against the buyer for the price or for damages.

It is said, however, that the acts of the buyer establish the fact that it was not ready and willing on its part to pay for the goods on tender of documents, in accordance with its obligation under the contract. Now, if the proper conclusion from the acts of the buyer be that it would not accept any documents tendered under the contract unless it had an inspection of the goods, I agree that the argument is well founded, and that the buyer could not recover in this action ; but that is not, I venture to think, the proper conclusion from the evidence. The learned trial Judge (*Gordon* J.) does not, I think, expressly state his opinion upon this aspect of the case, though it is clear enough that his verdict involves the necessary finding of fact in favour of the buyer. His Honor certainly negatives the view that the rejection of documents which were not in accordance with the obligations of the contract necessarily establishes any unreadiness or unwillingness on the part of the buyer

(1) (1911) 1 K.B. 934, per *Kennedy* L.J. ; (1912) A.C. 18.
(2) (1859) 1 E & E. 592.
(3) (1919) 1 K.B. 198, at pp. 202 et seqq.
(4) (1922) 38 T.L.R. 349, 517.
(5) (1911) 1 K.B. 934.

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to perform its part of the contract. He also relies upon the fact that the buyer subsequently called upon the seller to fulfil the contract and to ship goods in accordance with the contract and that the seller refused to do so. Thus I gather that the learned Judge did reach the conclusion that the buyer was ready and willing to perform its contract according to its terms though the process whereby he reached that conclusion is not fully stated.

The learned Judges of the Full Court were of opinion that the buyer was not ready and willing to perform its contract according to its terms. Their view, I gather, is that the buyer declined to take up any documents under the contract unless it first had obtained an inspection of the goods. In this Court, however, we are in as good a position as the Judges comprising the Full Court were to reach a conclusion upon the matter and are bound to exercise our own independent judgment upon the evidence as it stands.

The question is, in truth, one of fact. The goods the subject of the contract of sale were 150 bales first selection Liverpool wheat-sacks. " First selection " is a most material part of that description. The invoice tendered with the bill of lading and policy of insurance was as follows: " To 150 bales Liverpool sacks at 9s. c.i.f.e. £1,687 10s." In my opinion, any reasonable business man would regard that description with well-grounded suspicion, and be uncertain whether the documents tendered to him represented goods in conformity with the contract. The buyer evidently was suspicious for it wrote to the seller as follows: " We would like you to send us the original invoice showing that they are first selection bags packed by Messrs. Martin or Levey Bros. & Knowles according to our purchase." Apparently the buyer thought, as was the fact, that some, if not all, of the sacks had been imported from abroad; hence the reference to the original invoice. The seller telegraphed a reply that the bags were in accordance with contract. This was untrue. Later it threatened to sell against the buyer, which thereupon defined its position in a telegram as follows:—" We have not refused payment your draft. Your documents do not identify goods as being according contract draft, will be accepted soon as goods proved equal description purchased. Boat due to-day expect

examine to-morrow. We wrote you for overseas invoices which you have not provided." The seller insisted that this action on the buyer's part was a breach of contract and sold the goods against it.

The correspondence certainly lends no support to the view that the buyer would not accept any documents tendered under the contract unless it had an inspection of the goods. Its position was that it was ready and willing to perform the contract according to its terms but is uncertain whether the documents tendered to it related to goods of the contract description and required assurance of this before payment.

The managing director for the buyer, however, gave oral evidence, and upon the effect of a skilful cross-examination by Mr. *Edmund Barton* the case really turned. Some passages in his cross-examination there are which do support the view that the buyer required the overseas invoices or inspection of the goods before it would take up any documents, but the general trend of the deponent's evidence is that the buyer made its position plain in the correspondence and still adhered to that position. Thus, in various questions to the witness Mr. *Barton* suggested that the buyer was not prepared to take up the documents tendered unless it had either the overseas invoices or inspection of the goods; the answer, in substance, was always in the affirmative: "to show us," as the witness said, "what we were paying for." These answers, however, as it seems to me, were always given in reference to the particular documents which had been tendered to the buyer and of which he was personally suspicious owing to the form of the invoice. An early question put to the witness suggested that his attitude from the first was that he wanted some evidence or proof that the sacks were in accordance with the contract before he would take up *the* documents; the witness assented, but the question related to the documents actually tendered to the buyer and rejected by him. Somewhat later Mr. *Barton* suggested that the buyer wanted either the overseas invoices or an inspection of the goods before it would take up *the* documents; again the witness assented, but again the question related to the suspected documents. The matter concluded with the question: "That was your attitude from the outset was it?" and the answer, "Yes, and in my correspondence: it is all set out there."

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So we are again brought back to the telegram in which the buyer asserted that it had not refused payment of the seller's draft, but that owing to the form of the invoice it required some assurance that the documents tendered covered goods of the contract description.

In my opinion, then, the evidence supports the conclusion that the buyer was ready and willing on its part to perform the contract according to its terms and therefore the verdict of *Gordon* J. for the plaintiff should be restored.

Appeal allowed. Order appealed from discharged. Verdict of Gordon J. restored. Respondent to pay costs in Supreme Court and High Court.

Solicitors for the appellant, *Sly & Russell.*
Solicitors for the respondent, *W. C. Forsyth & Co.*

B. L.