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CHRISTIE v. ROBINSON.

Solicitors, for appellants, *Connelly & Crocker*, Melbourne.
Solicitors, for respondent, *Lamrock, Brown & Hall*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

BOWDEN BROTHERS AND COMPANY LIMITED . . . . . PLAINTIFFS, } APPELLANTS;

AND

ROBERT LITTLE, TRADING AS ROBERT LITTLE AND COMPANY . . . . DEFENDANT, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY.
April 3, 8, 9, 10, 11;
May 15.

Griffith C.J., Barton and Isaacs JJ.

Vendor and Purchaser—Sale of goods to be shipped abroad—Construction of c.i.f. contract—Obligations of vendor as to quality and condition of goods—Implied warranty.

A firm of merchants carrying on business in Japan agreed to sell to a purchaser in Sydney "450 tons of Japan onions" at certain prices "c.i.f. Sydney," the goods to be shipped by the vendors from Japan by certain ships on approximately specified dates. The vendors shipped from Kobe, Japan, to Sydney, a quantity of onions which, so far as condition and quality were concerned, were merchantable at the port of shipment, but on arriving at the port of destination were found to have become during the voyage rotten and unfit for sale. The purchaser rejected the goods and refused to pay the price.

In an action by the vendors to recover the price, and a cross-action by the purchaser for damages for non-delivery of onions in accordance with the contract:

Held, that the obligations of the vendors were fulfilled when they had put on board the ships, at the dates specified, onions of the kind and quality contracted for, and had paid the freight, insured the goods, and forwarded to the purchaser the bill of lading, policy of insurance, and all necessary shipping documents to entitle the purchaser to obtain delivery of the goods, and that thereafter the risk in the goods was wholly upon the purchaser.

Held, also, that it was a question of fact depending upon all the circumstances whether, and to what extent, the purchaser relied upon the skill or judgment of the vendors to supply goods fit for the purpose of shipment to Sydney; that it could not be implied, from the mere fact that the goods were, to the knowledge of the vendors, bought to be shipped abroad, that the vendors entered into any warranty except that the goods were merchantable; and that the question whether any and what further warranty should be implied depended upon the extent to which the purchaser did in fact rely upon the skill or judgment of the vendors.

Nature and extent of the various warranties, that might under similar circumstances be implied, discussed.

Statements by *Blackburn* J. in *Ireland* v. *Livingston*, L.R. 5 H.L., 395, at p. 406, and Lord *Davey* in *Ströms Bruks Aktie Bolag* v. *Hutchison*, (1905) A.C., 515, at p. 528, as to the incidents of a "c.i.f." contract, adopted.

Decision of the Supreme Court, *Little* v. *Bowden Bros.*, 23 N.S.W. W.N., 131, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

This was an action and cross-action upon a contract in the following terms:—

BOWDEN BROTHERS & COY. LTD.

Indent No. 522/05

Sydney, June 14th 1905
N.S.W.

On a/c of	From
Messrs. R. Little & Co.	Messrs. Bowden Bros. & Co. Ltd.
Sussex Street, Sydney	Kobe, Japan.
Prices c.i.f. Sydney.	Insurance as usual.
Marks. As usual.	
100 tons June	Finance, 30 days S/draft
225 tons "Australian" / "Waldemar"	against documents through Com. Bk. of Aus.
125 tons "Empire" & "Sigismund"	
Special conditions	In confirmation of cabled bookings.

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Sample No.	Goods.	Remarks.
	Four hundred and fifty (450) tons Japan onions as follows 100 tons @ £7 350 „ „ £6 15 0 } subject to a brokerage, if necessary, of 1%, provided we are not covered by cabled prices.	

Packing to be in usual open boxes.

Bowden Bros. & Company Ltd.
per Herbert Bowden.

Accepted
Robert Little and Co.

The first action was brought by the appellants. The declaration contained two counts, of which the first set out the contract in terms and alleged that the appellants shipped a portion of the onions in accordance with the contract, and alleged as a breach that the respondent did not accept the appellants' drafts against documents in respect of the onions shipped, but refused to accept the drafts and did not pay the appellants the price agreed upon. The second was the common count for goods bargained and sold and goods sold and delivered &c.

The respondent pleaded several pleas, of which only the fifth and sixth are material to this report. The fifth plea stated that it was a term and condition of the agreement that the appellants should deliver the onions at the place of delivery under the agreement in a merchantable condition, yet they did not do so but tendered onions that were in an unsound and rotten condition, wherefore the respondent refused to accept the onions or to pay for them or accept the drafts. The sixth plea alleged that it was a term and condition of the agreement that the onions should be shipped in such a condition that upon arrival in Sydney they would be in a merchantable condition, except for such deterioration as would be the necessary and inevitable result of the transit, yet the onions were not shipped in such a condition, but upon arrival in Sydney were not in merchantable condition except for

such deterioration, and were unsound and rotten and unmerchantable in condition, and that that condition was not occasioned by deterioration the necessary or inevitable result of the transit, wherefore the respondent refused &c. as alleged in the fifth plea.

In the action by the respondent, the declaration contained three counts, the first of which set out the contract as an agreement that the onions should be delivered by the appellants in merchantable condition, yet the appellants did not nor would deliver to the respondent the onions in accordance with the contract and delivered only a portion of them, and those delivered were not in merchantable condition and were unsound and rotten and unmerchantable whereby the respondent suffered loss and damage to the amount claimed in the action.

The second count alleged an agreement between the appellants and the respondent that in consideration of the respondent agreeing to buy from the appellants four hundred and fifty tons of Japan onions at certain prices upon the term amongst others that the onions should be shipped from Japan at the times and in the manner agreed upon, the appellants promised that the onions upon arrival in Sydney would be in merchantable condition except for such deterioration as would be the necessary and inevitable result of the transit, yet the onions upon arrival in Sydney were not in such condition, but were unsound and rotten not by reason of deterioration the necessary or inevitable result of the transit, whereby the respondent suffered the loss and damage stated in the first count.

The appellants in their pleas denied the alleged contract, traversed all the material allegations in the respondent's declaration, and set up exoneration and discharge as to a portion of the shipments and the acceptance of certain shipments in satisfaction and discharge of breaches in connection with certain other shipments and portions of shipments.

The two actions were consolidated, and were tried before *Cohen* J. and a jury. Certain special questions were put to the jury, in answer to which they made special findings. The material questions and answers are as follows:—

1. Having regard to all the surrounding circumstances leading

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up to the contract of June 14th 1905, did Little agree to take all the risk of transit ?

Answer : No.

2. Were the onions when shipped at Kobe (*a*) in merchantable condition ? (*b*) In a condition reasonably fit for a voyage from Kobe to Sydney ? (*c*) Saleable in the market at Kobe under the denomination mentioned in the contract, that is merchantable onions ?

Answer : (*a*) Yes, if for consumption in Japan. (*b*) No. (*c*) Yes, subject to the proviso mentioned in (*a*).

3. Were the onions delivered in Sydney in merchantable condition ?

Answer : No.

4. Was the condition in which they arrived due to necessary deterioration or to being shipped in faulty condition ?

Answer : The jury are of opinion that the deterioration of these shipments was due to the fact that the onions were not fit for an oversea voyage from Kobe to Sydney under the conditions of weather they were exposed to before shipment.

5. Is there a custom in the port of Sydney that under a c.i.f. contract without qualification made there for the purchase of goods of a perishable nature the risk of oversea transit is on the buyer ?

Answer : We find there are two customs in the port of Sydney with regard to a c.i.f. contract without qualification, viz., the Chamber of Commerce custom which casts the liability on the buyer, and the custom prevailing with the Sussex Street merchants which casts the liability on the shipper, but there is no evidence before the jury to show which custom has been longest in existence.

Acting under the direction of the learned Judge as to the construction of the contract, the jury found a verdict for the plaintiff in the respondent's action, assessing the damages at £3,729 15s. 10d., and a verdict for the defendant in the appellants' action.

The appellants moved the Full Court for a rule *nisi* for a new trial in both actions. A rule was granted in both actions on the grounds that the verdicts were against the evidence, and that His

Honor should have directed the jury that the Chamber of Commerce custom governed the transaction, and in the appellants' action on the additional ground that a verdict should have been entered for the plaintiffs. Several other grounds were taken, as to which the Court refused to grant a rule: *Little* v. *Bowden Bros.* (1), and from that refusal the present appeal was brought by leave of the High Court. The substantial grounds of appeal were, that the verdicts were against evidence, and that the learned Judge was in error in directing the jury that the appellants were bound to deliver the onions in a merchantable condition in Sydney except for inevitable deterioration in transit; that he should have directed the jury that there was no obligation on the appellants to deliver the onions in a merchantable condition in Sydney; that the risk of transit was on the respondent; and that the appellants would have fulfilled their contract by shipping onions of the kind contracted for at Kobe and forwarding the proper shipping documents to the respondent, and that on the findings of the jury the appellants were entitled to a verdict.

Knox K.C., *Lamb* and *Rolin*, for the appellants. The contract was an ordinary c.i.f. contract between parties in different countries for the supply of goods for shipment, without any special conditions as to the place where the goods were to be delivered. The vendors fulfilled their obligations when they put on board at the port of shipment goods of the contractual description, insured them, and forwarded to the purchaser or his order the policy of insurance, bill of lading, and all necessary shipping documents: *Ströms Bruks Aktie Bolag* v. *Hutchison* (2); *Ireland* v. *Livingston* (3); *Parker* v. *Schuller* (4); *Hamlyn & Co.* v. *The Griendtsveen Company* (5); *Tregelles* v. *Sewell* (6).

[ISAACS J. referred to *Wancke* v. *Wingren* (7); *Delaurier & Co.* v. *Wyllie* (8).]

Lorimer v. *Slade* (9) does not apply, because in that case other

(1) 23 N.S.W. W.N., 131.
(2) (1905) A.C., 515. at p. 528.
(3) L.R. 5 H.L., 395.
(4) 17 T.L.R., 299.
(5) 6 T.L.R., 274.
(6) 7 H. & N., 574, at p. 585.
(7) 58 L.J.Q.B., 519.
(8) 17 Court of Sess. Cas., 167.
(9) (1905) 5 S.R. (N.S.W.), 71.

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goods were involved and the ships were specially mentioned in the contract. If it decides that a c.i.f. contract, apart from special conditions, imports delivery at a place other than the port of shipment, it is inconsistent with the English decisions. The first finding of the jury must be taken as a finding that the respondent did nothing to alter the legal incidents of the contract as interpreted by the Judge. If the seller took the risk it is hard to understand why he should undertake to insure, and why there should be any stipulation as to the method of packing. The port of shipment being the place of delivery, the only question is whether the appellants supplied the goods contracted for at that place. Their only obligation as regards quality was to supply onions that were marketable there. If the respondent's contention is correct, it must be because there was an implied warranty. But no such warranty is to be implied unless the facts show that the purchaser relied upon the judgment or skill of the vendor to supply goods reasonably fit for the particular purpose for which they were required: *Jones* v. *Just* (1); *Benjamin on Sales*, 5th ed., pp. 622, 625; *Sale of Goods Act* (56 & 57 Vict. c. 71), sec. 14, sub-sec. (1). Whether the purchaser did so rely is a question of fact depending on all the circumstances: *Randall* v. *Newson* (2). No such question was put to the jury. [They referred to *Wren* v. *Holt* (3); *Wallis* v. *Russell* (4); *Chanter* v. *Hopkins* (5); *Gardiner* v. *Gray* (6); *Dickson* v. *Zizinia* (7).]

[GRIFFITH C.J.—I doubt whether a foreign voyage is a particular purpose within the meaning of the rule].

Assuming that point against the appellants (*Brown* v. *Edgington* (8)), they were not dealers in or manufacturers of the articles within the meaning of the rule, and there is no evidence that the respondent relied upon the appellants' judgment. The shippers were not left to select the best according to their judgment, but were bound to ship a certain quantity of an indicated class of onions.

[GRIFFITH C.J.—It is somewhat like a case of agency. The

(1) L.R. 3 Q.B., 197.
(2) 2 Q.B.D., 102, at p. 109.
(3) (1903) 1 K.B., 610.
(4) (1902) 2 I.R., 585.
(5) 4 M. & W., 399, at p. 404.
(6) 4 Camp., 144.
(7) 10 C.B., 602.
(8) 2 Man & G., 279.

vendor undertakes to select good articles of a particular class of goods on behalf of the purchaser.]

The evidence is overwhelming that the appellants did everything reasonably possible at Kobe to ensure that the goods should be of the proper quality. Even if there were evidence to the contrary, there should be a new trial to have the proper question tried.

[GRIFFITH C.J. referred to *Freeth* v. *Burr* (1)].

The evidence is all one way on the question whether the goods were warranted fit for shipment to Sydney, and the jury have found that the goods were merchantable at Kobe. If the respondent is wrong in construing the contract as requiring that the goods should be merchantable in Sydney he has failed in both cases, and the appellants are entitled to judgment.

[GRIFFITH C.J.—A possible definition of "merchantable" would be "onions of the agreed crop and of such a condition and quality that they did not appear on a reasonable examination unfit for shipment to Australia." The meaning of the word varies according to circumstances.]

At any rate there is no absolute warranty such as is necessary for the respondent to establish on the present pleadings. [They referred also to *Bentsen* v. *Taylor, Sons & Co.* (2); *Braithwaite* v. *Foreign Hardwood Co.* (3).]

As regards custom, the jury's finding shows that there was no custom binding upon the appellants, and it is irrelevant, if the appellants are right in their construction of the contract.

J. L. Campbell and *D. G. Ferguson*, for the respondent. The first count of the declaration in the cross-action left it open to the plaintiff to contend either that the delivery was to be at Sydney or that it was to be at the port of shipment. The Judge's ruling that delivery was to be at Sydney was not based upon the mere fact of the contract being c.i.f., but upon other considerations as well, *e.g.*, whether or not there was an appropriation of the goods to the contract at Kobe in such a way as to take the control from the shippers and give it to the purchaser. The

(1) L.R. 9 C.P., 208. (2) (1893) 2 Q B., 274.
(3) (1905) 2 K.B., 543.

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evidence showed that the goods were to be in the control of the shippers until delivery in Sydney. The property did not pass to the purchaser on shipment. The goods were not consigned to the purchaser but to the shippers' agents in Sydney. The risk was upon the person in whom the property was during transit. The fact of the contract being c.i.f. is not relevant to the question what was the place of delivery; the surrounding circumstances must be looked at in order to answer that question. *Ireland* v. *Livingston* (1), did not decide that c.i.f. means delivery at place of shipment.

[GRIFFITH C.J.—It was not a judgment on that point, but it was a clear statement of what the learned Judge understood to be the meaning of a c.i.f. contract.]

None of the cases go so far as to decide that the words c.i.f. settle the question of place of delivery. C.i.f. is really only a reference to the price and mode of payment. [They referred to *Jones* v. *Just* (2); *Delaurier & Co.* v. *Wyllie* (3).]

The property does not pass until the point at which the parties intended that it should pass: *Sanders* v. *Maclean* (4). The bill of lading in the present case was transmitted to the agent of the vendors. The naming of the ship by the purchaser did not make it his ship: *Benjamin on Sales*, 5th ed., p. 394; *Shepherd* v. *Harrison* (5). The shipowner was a mere bailee for delivery to the purchaser, and the property did not pass until the goods or the *indicia* of property in them were handed over to the purchaser in Sydney: *Mirabita* v. *Imperial Ottoman Bank* (6). Even if under the contract the purchaser might have to pay for the goods before delivery, that would not affect the question, what was the place of delivery. The contract was not to *ship*, but to *sell* onions.

[ISAACS J.—In *Lecky & Co. Ltd.* v. *Ogilvy, Gillanders & Co.* (7), a c.i.f. contract is referred to as imposing certain obligations.]

The c.i.f. is only one of the circumstances to be looked at in order to discover the intention of the parties. That is the effect

(1) L.R. 5 H.L., 395.
(2) L.R. 3 Q.B., 197.
(3) 17 Court of Sess. Cas., 167.
(4) 11 Q.B.D., 327, at p. 341.
(5) L.R. 4 Q.B., 196, 493; L.R. 5 H.L., 116.
(6) 3 Ex. D., 164, at p. 172.
(7) 3 Com. Cas., 29.

of the remarks of *Blackburn* J. in *Ireland* v. *Livingston* (1). If it were otherwise, *Ströms Bruks Aktie Bolag* v. *Hutchison* (2); and *Delaurier & Co.* v. *Wyllie* (3), could have been decided without argument. In *Tregelles* v. *Sewell* (4), the goods had been handed over to the purchaser in London and paid for. The receipt of the bill of lading did not constitute a delivery, because the goods might still be rejected if not of the kind contracted for. But, assuming that under the contract delivery was to be at Kobe, the evidence as to the condition of the goods on arrival in Sydney shows conclusively that, when shipped, they were not reasonably fit for the purpose for which they were purchased. A verdict the other way would have been unreasonable. The purchaser is entitled to rely upon the rule in sub-sec. (1) of sec. 12 of the *Sale of Goods Act* 1893, if that is taken to be a statement of the common law. The evidence shows that he relied upon the skill and judgment of the sellers. The sellers knew the purpose for which the goods were required, that is, shipment to Sydney for sale there, and were therefore bound to supply goods such as would reach Sydney in a merchantable condition.

[GRIFFITH C.J.—That raises a very difficult question. Is shipment to Sydney such a purpose as is contemplated in the rule? See *Dickson* v. *Zizinia* (5).]

That case is distinguishable. The goods there were only required to be of the average quality of shipments of that season, so that the warranty was expressly limited.

[ISAACS J.—But here the sellers were to ship at a particular date. They would not have been carrying out the contract if they had shipped goods at a different season: *Bowes* v. *Shand* (6).]

There is no evidence that that requirement was likely to result in unmerchantable onions being shipped.

[GRIFFITH C.J.—The obligation was either absolute or to take reasonable care to ship merchantable goods. If it was not absolute, it seems to me that the question as to reasonable care has not been submitted to the jury. I think that "merchantable" means, not such as will in fact carry to Sydney, but such as would be bought by merchants as goods that will carry.]

(1) L.R. 5 H.L., 395.
(2) (1905) A.C., 515.
(3) 17 Court of Sess. Cas., 167.
(4) 7 H. & N., 574.
(5) 10 C.B., 602.
(6) 2 App. Cas., 455, at p. 480.

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The jury have, in effect, found against the sellers on that point. At any rate the sellers were not absolved by merely shipping goods merchantable at Kobe. The purchaser is not driven to rely on a warranty, but may treat the contract as a contract to sell goods of a particular description within sub-sec. (2) of sec. 14 of the *Sale of Goods Act* 1893. The sellers were to supply goods fit for shipment to Sydney. In either case the purchaser is entitled to refuse the goods, whether they fail to answer a warranty or a description. [They referred to *Bowes* v. *Shand* (1); *Drummond* v. *Van Ingen* (2); *Davis* v. *Hedges* (3); *Mondel* v. *Steel* (4).]

[ISAACS J. referred to *Chalmers, Sale of Goods Act* 1893, 6th ed., p. 38; *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (5); *Bullen and Leake, Precedents of Pleadings*, 5th ed., p. 362.]

If the Court allows the appeal there should be a new trial in each action, and the respondent should be allowed to amend so as to raise what the Court holds to be the real question.

Knox K.C., in reply. No amendment should be allowed unless the Court sees from the evidence that there is a reasonable prospect of the respondent succeeding with the amended pleadings. There is no evidence that the appellants did not take reasonable care in selecting the goods.

Cur. adv. vult.

May 15th.

GRIFFITH C.J. This litigation between the appellants and respondent arises upon a contract for the sale of 450 tons of Japan onions. The appellants are a joint stock company registered in Queensland, carrying on business in Queensland and Japan, and having a branch in Sydney. The respondent is a merchant carrying on business in Sydney. The real transaction between the parties is embodied in a written contract dated 14th June 1905. [His Honor read the contract of that date, as already set out, and continued :] The onions were shipped from Japan and on arriving in Sydney were found not to be in merchantable condition, and the respondent refused to accept the

(1) 2 App. Cas., 455, at p. 480.
(2) 12 App. Cas., 284.
(3) L.R. 6 Q.B., 687.
(4) 8 M. & W., 858.
(5) (1896) 2 Q.B., 59.

drafts. Thereupon the appellants brought an action against the respondent to recover the contract price, and the respondent brought a cross-action against the appellants for a breach of the contract to deliver the onions. The appellants action was in form, as stated in the first count of the declaration, for refusing to accept the drafts or to pay the price, and the second count was a common money count for goods bargained and sold and for goods sold and delivered. [His Honor then read the material portions of the pleadings and continued:]

I remark as to the first count of the respondent's declaration that, if it was intended by it to allege that the onions were to be delivered in Sydney, then the question arises whether that was really the contract, while, if it was intended to allege that they were to be delivered in Japan, then on the jury's findings there was no breach.

At the trial voluminous evidence was given, and it appears that the learned Judge who presided at an early stage of the case directed the jury that upon such a contract as this, that is, to ship onions in Japan at a price c.i.f. Sydney, the risk of transit fell upon the vendor, and the vendor was bound to deliver them in a merchantable condition at the port of destination. He gave that ruling believing himself bound by the decision of the Supreme Court in the case of *Lorimer* v. *Slade* (1), and he adhered to that ruling when directing the jury. On His Honor's direction the jury were bound to find a verdict for the plaintiff in the respondent's action, in accordance with His Honor's direction as to the construction of a c.i.f. contract, and for the same reason were bound to give a verdict for the defendant in the appellants' action. They were asked some specific questions to which they gave answers, upon which the question now in debate depends to a great extent. [His Honor then read the questions submitted to the jury and the jury's answers and continued:] The jury, therefore, found that there were in existence in the port of Sydney two contradictory customs. On their answer to that question very little turns. But it appears to me that, if there are such inconsistent customs, there can hardly be said to be

(1) (1905) 5 S.R. (N.S.W.), 71.

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a custom at all in the sense in which that term is understood in law. Judgment was entered in accordance with the verdict.

A motion was made to the Supreme Court for a new trial in both actions, which had been treated as consolidated. The Supreme Court granted a rule *nisi* upon a subsidiary point, to which it is not necessary now to make any reference, but refused a rule upon the main point, the construction of a c.i.f. contract, considering themselves bound by the authority of an unreported case in the same Court in which they had followed *Lorimer* v. *Slade* (1). I am unable to derive any light from that case; it seems to me entirely distinguishable. We have not the advantage of knowing the reasons of the learned Judges. We must, therefore, deal with the matter at large.

The appellants appealed from the refusal by the Supreme Court to grant a rule *nisi*, having obtained leave from this Court. The question is what is the real nature of the contract, and what are the incidents of it.

In construing a contract regard must always be had to the surrounding circumstances. It appears from the documents that there had been some preliminary negotiations between the parties. The subject matter of the sale was Japan onions, as they were called, to be shipped at Kobe in Japan. It appeared upon the evidence that the only onions procurable at the time of the year at which they were to be shipped were *Sen Shin* onions, which were procurable only in the neighbourhood of Kobe. The ships by which the onions were to be sent were specified, so that the dates of shipment were approximately fixed. It appears also from the evidence oral and written that onions are a cargo which carries very badly at that time of year, so that there was a very great risk of deterioration on the voyage, and both parties were fully aware of this circumstance. It appears, therefore, that the contract was for shipment at Kobe, Japan, of that season's onions in specified ships leaving at approximately specified dates, and subject to the term c.i.f., whatever that may mean. C.i.f. means literally, of course, cost, insurance and freight. One of the recognized legal incidents of such a contract is "that the shipper fulfils his obligation when he has put the cargo on board

(1) (1905) 5 S.R. (N.S.W.), 71.

and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight." *Per* Lord *Davey* in *Ströms Bruks Aktie Bolag* v. *Hutchison* (1). In *Ireland* v. *Livingston* (2), *Blackburn* J. in giving his own opinion, in which *Hannen* J. concurred, stated the incidents of a c.i.f. contract in terms that have since then always been accepted as correct. He said:—"The terms at a price, 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price, (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and a policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped in the ordinary way." Price, of course, includes the total price on delivery at the port of destination. The same doctrine is expounded in the clearest manner in the Scottish case *Delaurier & Co.* v. *Wyllie* (3) to which my learned brother *Isaacs* referred in the course of the argument. That being the obligation of the shipper, it appears that the appellants shipped the cargo and sent the bill of lading, the policy of insurance, and other necessary documents. Their duty being to ship in Japan and not to deliver in Sydney,

(1) (1905) A.C., 515, at p. 528. (2) L.R. 5 H.L., 395, at p. 406.
(3) 17 Court of Sess. Cas., 167.

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any complaint against them for a breach of duty must be founded upon their acts of commission or omission in Japan. The cases of *Wancke* v. *Wingren* (1) and *Parker* v. *Schuller* (2) are clear authorities for that position. It follows, therefore, that the respondent's action, which complains of non-delivery in Sydney, was wrongly brought, unless it was a term of the contract that the goods should be at the appellants' risk during the voyage; that is equivalent to a warranty that they should arrive in good condition. The first finding of the jury, that, having regard to the surrounding circumstances, Little did not agree to take all risks of transit, cannot be construed as a finding that there was such a warranty on the part of the appellants. No reliance was placed upon it in argument, and, it must be taken, I think, as merely negativing an express agreement by the respondent to take the risk. The obligations of the parties being thus left to be determined by the rules of law applicable in the absence of express agreement, strictly speaking, the appellants are entitled to a non-suit in the action by the respondent, or at any rate to a new trial. But it was suggested that the whole matter was fought out at the trial, and that there ought now to be an amendment of the pleadings so as to raise the real complaint which the respondent may be entitled to make against the appellants. It would be somewhat novel in New South Wales, to grant a new trial on pleadings to be amended in order to try a case not made in any part of the original pleadings. But that difficulty may not be insuperable. The respondent asks, however, to be allowed to retain his original counts, upon which he has failed, and on which the appellants are entitled to a non-suit, and so to save the action alive, and then in the existing action to add any other counts that he may think fit, or that the Court may formulate for him. I think it impossible to allow him to retain his original counts. With respect to his desire to add other counts and so substitute what is practically a new case, I venture to adopt the words of *Bowen* L.J. in "*The Moorcock*" (3), as to the nature of implied warranties such as that which the respondent wishes now to be allowed to set up:—"Now, an implied warranty, or, as it

(1) 58 L.J.Q.B., 519.
(2) 17 T.L.R., 299.
(3) 14 P.D., 64, at p. 68.

is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." The warranties which the respondent wishes to be allowed to set up are founded upon the rules now formulated in sub-secs. (1) and (2) of sec. 14 of the English *Sales of Goods Act* 1893, which is not in force in New South Wales. It was assumed in argument (though I must not be taken to accept the assumption without qualification) that in this respect that Act only declares the common law as stated in the fourth and fifth rules laid down in *Jones* v. *Just* (1). In that case *Mellor* J. delivering the judgment of the Court, consisting of himself, *Cockburn* C.J. and *Blackburn* J. stated those rules in these words (2):—

"Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown*

(1) L.R. 3 Q.B., 197.

(2) L.R. 3 Q.B., 197, at p. 202.

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v. *Edgington* (1); *Jones* v. *Bright* (2). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendor has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing* v. *Fidgeon* (3). And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use: *Shepherd* v. *Pybus*" (4).

The application of the first of those rules depends upon the condition that the purchaser did in fact rely upon the judgment or skill of the seller. The question whether in a given state of facts it can or ought to be inferred that he did so rely may be one of great difficulty, but it is plain that the facts in any particular case may show that the purchaser did not so rely, or that his reliance was not absolute but qualified, or had reference to certain particulars of quality only. It cannot be implied, from the mere fact of a sale of goods to be shipped abroad, that the vendor enters into any warranty except that the goods shall be merchantable. The facts of the particular case may justify the implication of warranties of various effect. For instance, the circumstances might justify the implication of an absolute warranty that the goods shall be reasonably fit to undergo the risks of the particular voyage, or they might justify the implication of a warranty that the goods shall apparently be in that condition. Other warranties that might be implied from the circumstances are that the goods should be such in quality and condition as a reasonably prudent man, determined to make a shipment at that time, would ship on his own behalf, or that the vendors will take reasonable care that the goods when shipped shall be fit for shipment, or that they shall be as fit as is practic-

(1) 2 Man. & G., 279.
(2) 5 Bing., 533.
(3) 4 Camp., 169; 6 Taunt., 108.
(4) 3 Man. & G., 868.

able with respect to such goods under the particular circumstances. But which, if any, of these or any other warranties that may be suggested, is the one which ought to be implied must depend upon the extent to which the buyer is shown by the facts to have trusted to the judgment and skill of the vendor. The obligation cannot be put higher than if it had been a contract of agency, as was pointed out in *Ireland* v. *Livingston* (1), which was a case of a contract in many respects analogous to that now in question. In that view want of reasonable care would be the foundation of the claim.

I express no opinion as to the proper warranty to be inferred in the present case, beyond saying that there must of necessity have been some obligation on the part of the shippers, not less than an obligation to ship onions merchantable in Japan (which the jury found they performed), and not greater than an obligation to ship onions reasonably fit in fact for the voyage to Sydney.

As, therefore, this is not a case in which the plaintiff should have general leave to amend, and it is not desirable to single out any particular amendment as specially suggested by the evidence, I think the most just course will be to direct a nonsuit in the case of *Little* v. *Bowden Bros.* In the case of *Bowden Bros. & Co.* v. *Little* there should be a new trial, the costs of the first trial being plaintiffs' costs in the cause.

BARTON J. I am of the same opinion. I need not analyse again the respondent's declaration. It is sufficient to say as to the case of *Little* v. *Bowden Bros.*, that the first count has been treated all along by the plaintiff as a count for breach of a contract to deliver in Sydney, and so, of course, has the second. This is the impression that the respondent has left upon the case from end to end. The contract is what is here known as c.i.f., and in England as c.f.i. What such a contract means and implies has been already very fully stated. But I would mention the case of *Tregelles* v. *Sewell* (2), in which the plaintiffs bought from the defendants 300 tons of old bridge iron rails at so much per ton, which were, according to the contract, to be delivered at Harborough c.f.i., payment of net cash in London, less freight

(1) L.R. 5 H.L., 395. (2) 7 H. & N., 574.

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upon handing bill of lading and policy of insurance, a dock company's weight note or captain's signature for weight to be taken by the buyers as a voucher for the quantity shipped. It was held by the Court of Exchequer, and affirmed by the Exchequer Chamber, that according to the true construction of the contract the defendant did not undertake to deliver the iron at Harborough, but that, when he had put it on board a ship bound for that place and handed to the plaintiffs the policy of insurance and other documents, his liability ceased and the goods were at the risk of the purchasers. The next in order of the important cases on the point is *Ireland* v. *Livingston* (1), which His Honor has already cited. Then comes the case of *Wancke* v. *Wingren* (2). There the defendant had contracted to sell to the plaintiff certain goods c.f.i., and ship them at a port in Sweden for an English port. They were to be addressed to the plaintiff at the English port, and on arrival he was to adopt the charter-parties and bills of lading and to pay the price. The defendant failed to perform the main portion of his contract, and the plaintiff brought an action for damages in England and applied for leave to serve notice of the writ of summons upon the defendant out of the jurisdiction, under Order XI. The question then arose whether the breach had been committed within or without the jurisdiction. It was held that upon the true construction of the contract all the defendant had to do was to ship the goods on board at the Swedish port; accordingly the breach occurred there and not at the English port, and that, as no cause of action arose within the jurisdiction, no leave to serve notice of writ of summons under Order XI. could be granted. That is to say, this case is a reaffirmation of what is stated in the case last cited, that where in the ordinary way goods are to be supplied and entrusted to a carrier, the carrier is the consignee's agent, and where the contract is c.i.f., and in pursuance of that contract the goods are entrusted to the carrier, and the necessary documents to entitle the purchaser to obtain possession of the goods are sent, then the seller has performed his part of the contract, and the risk thenceforth is on the buyer. The last cited case rests on the authority of *Day* J. and *A. L. Smith* J. To the same effect are the cases of

(1) L.R. 5 H.L., 395. (2) 58 L.J.Q.B., 519.

Hamlyn & Co. v. *The Griendtsveen Co.* (1), and *Parker* v. *Schuller* (2), which need not be quoted at length. Then, in 1889, the same year as *Wancke* v. *Wingren* (3), came the case of *Delaurier & Co.* v. *Wyllie* (4), which was referred to by my learned brother *Isaacs* in the course of the argument. I intend merely to refer to the judgment of Lord *Trayner* in the Court below, because that judgment has practically the assent of nearly all the Lords of Appeal, and as to this portion of the case His Lordship said this:—"It (the coal) was sold to the pursuers by Stevenson & Co., as above mentioned, for a contract price, which included cost, freight, and insurance, and was shipped by Stevenson & Co. on board the 'George Moore' at Troon. The defenders maintain that under a contract c.i.f. the shipping of the goods is not delivery to the buyer; that such a contract imports an obligation on the seller to deliver at the port of discharge; that no delivery takes place till that port is reached; and that, consequently, there had been no delivery to the pursuers of the coal in question." (That is practically the contention set up on behalf of the plaintiff Little in this case). His Lordship continued: "It is not open to question that in the ordinary case of goods shipped by a seller to a buyer at a distance, delivery on board ship as for the buyer, along with the indorsation and delivery of the bill of lading to the buyer, is delivery, vesting him with the property of the goods and all risk attaching thereto" (that is where the bill of lading is indorsed). "But the defenders maintain that a contract for the sale of goods c.i.f. imports an obligation to deliver at the port of discharge, and that 'where the bargain is to deliver the commodity at a particular place, the risk is with the seller till delivery at that place, so that if it perish on the voyage it is lost to the seller.' I am of opinion that the defenders are wrong in their view of the construction and effect of a contract c.i.f., and they have cited no authority in support of it. It appears to me that a contract of sale c.i.f. is a contract under which the seller undertakes certain obligations which would not be incumbent upon him otherwise, but that these additional obligations have no reference to the

(1) 6 T.L.R., 274.
(2) 17 T.L.R., 299.
(3) 58 L.J.Q.B., 519.
(4) 17 Court of Sess. Cas., 167, at pp. 172, 173, 174.

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question of delivery. The additional obligations undertaken by the seller are that—(1) He will, in respect of the contract price, insure the goods for the voyage free of any further charge or premium; and (2) that he will pay for the carriage of the goods to their destination. As, however, these additional obligations make no reference to the delivery of the goods, I think the question as to what delivery is sufficient to free the seller of risk, and where such delivery is held to be made, are not affected by these additional obligations, but are to be decided according to the ordinary rules of law applicable thereto. In short, a contract c.i.f. is not to be read as importing any obligation or right which it does not express. Such a contract binds the seller to pay something which otherwise would fall on the buyer; but except in so far as it shifts the obligation to pay, it remains a contract of sale, subject to the ordinary rules of law which regulate the rights and obligations to which that contract gives rise. It was said that the view submitted by the defenders of the effect and import of a contract c.i.f. was that which mainly distinguished it from a contract f.o.b. These contracts are no doubt different and distinguishable. The contract f.o.b. directly stipulates for delivery at a certain place, namely, on board ship, and delivery there (free of charge to the buyer) is fulfilment of the seller's obligation. But granting that, the defenders are no further forward; for it still remains that the contract c.i.f. does not stipulate for delivery at a certain place. If the defenders had averred that by the custom of merchants a contract c.i.f. meant, and was universally recognized as meaning, a contract under which the seller bound himself to deliver at the port to which the goods were consigned, that would have been a different matter. But no such custom is averred. Mere delivery of the coal on board the 'George Moore' might not perhaps have been sufficient to transfer the property and risk thereon to the pursuers, seeing that the bill of lading is taken 'to order' and might therefore have been indorsed and delivered by Stevenson & Co. to some person other than the pursuers. But in point of fact, Stevenson & Co. indorsed and despatched by post the bill of lading for the coal in question to the pursuers within twelve hours or so after the vessel sailed, and debited the pursuers in

their books with the contract price. The letter containing the bill of lading was received by the pursuers in due course. In these circumstances, I entertain no doubt that the property in the coal was transferred to the pursuers at latest when the indorsed bill of lading was posted." The question in the present case is, where was the risk?

Now in the case of *Ströms Bruks Aktie Bolag* v. *Hutchison* (1), Lord *Davey* gave his opinion as to the meaning of a c.i.f. contract which has been cited by His Honor in the preceding judgment. There was, however, before that, in 1897, the case of *Lecky & Co. Ltd.* v. *Ogilvy, Gillanders & Co.* (2) which was a decision of the Court of Appeal. In the headnote of that case it is stated that under a c.f.i. contract of sale there is an absolute duty on the vendor to procure the shipment of the goods under such a bill of lading as will, subject to the exceptions therein contained, ensure their delivery at the port of destination mentioned in the contract. A c.i.f. contract provided for the sale of goods by the defendants to the plaintiffs, shipment to be from Calcutta to Tripoli. In that case a controversy had arisen out of the fact that there were two places called Tripoli, and the question arose whether the directions that the vendors had given did not mislead the carriers of the goods so that they brought about a delivery at the wrong Tripoli. In dealing with the meaning of the c.i.f. contract *A. L. Smith* L.J. said (3):—"The obligation of the defendants at Calcutta under the contract, which they had entered into with the plaintiffs, was to put the bags on board ship at Calcutta with such proper shipping documents as would ensure the bags getting to Tunis. If that was done, the defendants had performed their part of the contract." And *Collins* L.J. in delivering a concurring judgment said (4):—"The defendants, by their contract with the plaintiffs, were under an obligation to put the goods on board ship with such shipping documents as would ensure the goods being carried to the place mentioned in the contract, that is, Tripoli in Africa." Then he goes on to describe what happened afterwards as to the wrong direction of the goods, but that is not a matter with which we are now concerned. The judgments

(1) (1905) A.C., 515.
(2) 3 Com. Cas., 29.
(3) 3 Com. Cas., 29, at p. 33.
(4) 3 Com. Cas., 29, at p. 37.

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in these cases seem to me to show conclusively that under a contract of this kind the risk is on the buyer, when the goods are entrusted to the shipowners for transit, when they are placed on board by the vendor, and that the vendor does his part of the duty by procuring and forwarding every such document as in the ordinary course would ensure the delivery of the goods to the buyer. So much appears to have been done in this case. It seems to me, therefore, that the risk of the goods, if they answered the contract in other respects, was with Mr. Little upon their shipment at the port in Japan, Kobe.

Then the remaining question as to this part of the case is, what were the goods contracted for? Well, the contract says merely "Japan onions." It is obvious from the circumstances of the case that they were to be that season's onions; that they could not be anything else. And the question arises, inasmuch as the contract was not to deliver in Sydney, was there in terms of either of the counts of the declaration any breach of any stipulation as to the character or quality of the goods? I am unable to see that the proofs in this case support the plaintiff's declaration, and I am speaking now of the case purely in its aspect as it comes before us. Of course, if this case goes before a jury again the whole complexion of the case may be altered, so that nothing that may be said now must be taken to prejudice any right of either party, or to throw any obstacle in his way when he comes to assert his rights in future proceedings. But in this case, as the first count, and in fact the second, have been treated as counts for delivery in Sydney, and inasmuch as the contract was not for delivery in Sydney but in Japan, the plaintiff has not proved the contract relied on in his declaration. He has treated this as a contract with different incidents from those which the law attaches to it, where there are no controlling circumstances either in the contract itself or appearing from admissible evidence *aliunde*.

I am with His Honor the Chief Justice in thinking that, while some warranty must be presumed in this case, the matter is not before us in such a shape that we ought at this stage to state what the warranty is. He has stated it at its maximum and at its minimum. I think that some warranty must be presumed as

to the condition of the goods, and it does seem to me to be a probable thing that the warranty would be that the goods were, as far as the vendors could reasonably procure such a result, of a quality that rendered them merchantable at the point where the risk was taken by the buyer. I do not express that as an opinion that would control the case in the event of its going down for a second trial. The fact that it may do so is sufficient warrant for the bench not being too specific in reading a meaning into, or placing constructions upon, the case as it has come to us, because its complexion may vary in future proceedings. If a warranty of that kind is the warranty to be implied from this contract, then it seems that the plaintiff has not proved specifically any breach of it, any more than he has proved any breach of the more exacting warranty that possibly might be presumed from the contract. Thus again it seems to me that he fails in his proof so far. He has not proved the contract he set out, as regards the obligation to deliver and as to the risk; nor has he proved it so far as regards the quality and condition of the goods or the point at which that quality and condition should be determined. I therefore think that upon the mere general issue of *non assumpsit* the plaintiff must fail in this case.

As to the amendment, it seems to me that he cannot at this stage with any show of justice be allowed to displace the whole of the pleadings and the case that he has set up, and enter upon a wholly new case instead of the old one by way of amendment. I scarcely think that in any case that would be within one's ordinary notion of an amendment. At any rate he is not prepared to forego the two counts upon which his proof has obviously failed, in order to substitute something for the counts as to which he has failed, or to vary them, but wishes to keep them and to add something in addition. In other words he wants to eat his cake and have it, to keep his two counts and add two others founded upon expressions that have fallen from the bench during argument. I agree with His Honor that that ought not to be done. The juster way to treat the case, in my opinion, is to nonsuit the plaintiff. That leaves him a larger option as to the way in which he should shape his case in future; and, as regards costs following upon such a result, I do not think that on the whole he is in a

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much worse position than if the amendment were made. He is thus left at liberty to shape his case as he pleases either upon the facts as they have already come out, or upon any new ones which may cause him to vary his opinion, and, therefore, I think that the treatment by way of nonsuit is the fairest and most just way to meet the case. But it would not be fair upon the facts before us, notwithstanding our opinion as to the action of *Little* v. *Bowden Bros.*, to enter up judgment for the plaintiffs in *Bowden Bros. & Co.* v. *Little*, on this evidence, for the balance of the price, but, inasmuch as it will be at the respondent's option whether he brings his case on for a second trial or not, the fairer way, I think, is to order a new trial of the action, *Bowden Bros. & Co.* v. *Little*, and then upon the parties electing to fight out their battle again they would be placed in a position in which their rights can be most fairly ascertained.

I agree, therefore, that there should be a nonsuit in the one case and a new trial in the other.

ISAACS J. The contract, which is in writing and dated 14th June 1905, is between R. Little & Co., described as of Sussex St., Sydney, and Bowden Bros. Ltd., described as of Kobe, Japan. The goods are stated to be 450 tons of Japan onions as follows:— 100 tons at £7, 350 tons at £6 15s., subject to a brokerage if necessary of 1%. The prices are stated as "c.i.f." Sydney. The shipments were to be 100 tons in June, 225 tons by the "Australian" and "Waldemar," and 125 by the "Empire" and "Sigismund." The insurance was to be as usual and the finance is stated as "30 days S/draft against documents through Commercial Bank of Australia." The document also contained the following provision "packing to be in usual open boxes." It was signed by both parties. The onions arrived in Sydney in a very bad condition. Little sued Bowden Bros. for damages. The declaration set out the promise variously, the first count alleging a promise that the onions should be delivered in merchantable condition, the second count alleging the promise to be that upon the arrival at Sydney the onions would be in merchantable condition except for necessary and inevitable deterioration, the result of the transit. It was alleged that both these promises were broken. There was

a third count, which may be laid aside as immaterial in view of the course the case has taken. The defendants denied the promise and the breach. There was a cross action by Bowden Bros. against Little for the price of the onions, which Little refused to pay; his defence to this action being practically his allegations in his own action. At the trial the pleadings were not strictly adhered to. *Mr. Campbell* in opening the case for Little stated "That if the obligation of the defendants was to deliver at Kobe, the defendants were to deliver at Kobe onions fit for voyage to Sydney under ordinary conditions." The jury was asked to make special findings, which they did. [His Honor then read the special findings in answer to the first four questions and continued:] The other answers may be regarded as immaterial. The jury returned a verdict for Little in both actions, finding damages in his own action at £3,729 15s. 10d.; they added the following:—The jury find for the plaintiff in this action in accordance with your Honor's ruling as to the construction of the c.i.f. contract and award damages to the amount of £3,729 15s. 10d."

His Honor the presiding Judge directed the jury that Bowden Bros. were bound to deliver to the plaintiff Little merchantable onions in Sydney, except for such necessary and inevitable deterioration as would occur on the voyage. A rule *nisi* for a new trial was applied for to the Full Court on various grounds, but the Full Court, though granting a rule *nisi*, declined to include certain grounds, including one to the effect that the direction already mentioned was wrong. The appeal in this case included as one of the grounds that the direction was erroneous.

In my opinion that direction, having regard to the whole of the evidence, cannot be sustained. It was given upon what was understood to be the effect of *Lorimer* v. *Slade* (1). That case may be perhaps considered to turn on its special circumstances, but if it decides broadly that a c.i.f. contract requires the seller to deliver at the port of destination, it cannot be supported. A contract c.i.f. is well known, and its effect has been described by *Blackburn* J. in the case of *Ireland* v. *Livingston* (2) in the passage cited by the learned Chief Justice. It is plain from the statement of the law by that very learned Judge, whose opinions

(1) (1905) 5 S.R. (N.S.W.), 71. (2) L.R. 5 H.L., 395, at p. 406.

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upon such a subject are entitled to especial weight, that the vendor's part is performed by shipping the goods in conformity with the contract, first insuring them and procuring the bill of lading and policy of insurance, and then promptly despatching these to the purchaser. In 1889 the case of *Delaurier & Co.* v. *Wyllie* (1) was decided by the Scottish Court of Session upon a case submitted to an opinion of the Judges of the whole Court. The plaintiffs, who were French merchants, had purchased from Stevenson & Co., of Glasgow, 1,000 tons of Ayrshire coal "c.i.f. Rochefort." Stevenson & Co. shipped the coal on defendant's ship and insured it, the ship was lost with her cargo, and the action was brought against the shipowner on the ground that the loss was through the fault of the master or other servant of the defendant. It became necessary to determine the meaning and effect of a c.i.f. contract. There were thirteen Judges, and it was held by the Court, *dissentiente* Lord *Young*, that the coals became the plaintiff's property on shipment or endorsement of the bill of lading, as the seller's obligation to pay insurance and freight did not imply a suspension of delivery till the port of arrival, and the plaintiffs therefore had a title to sue. The case came originally before the Lord Ordinary (*Trayner*) who made a decree against the defendant. The important passage from His Lordship's judgment read by my brother *Barton* indicates with great clearness the meaning and effect of a contract c.i.f. In the argument before the Full Court of Session the dictum of *Blackburn* J. in *Ireland* v. *Livingston* (2) was referred to, and the following passage from the judgment of Lord *Wellwood* (3) states tersely the view taken by the majority of the Court on the question:—"The meaning and effect of the expression c.i.f. simply is that the sellers undertake to insure for the purchaser and include in the invoice price the cost of the cargo, the insurance premium, and the full freight. From this they deduct the amount of the freight to be paid at the port of discharge, and draw for the balance upon the consignee. In substance, therefore, as Lord *Blackburn* says in *Ireland* v. *Livingston* (4)

(1) 17 Ct. of Sess. Cas., 167.
(2) L.R. 5 H.L., 395.
(3) 17 Ct. of Sess. Cas., 167, at p. 189.
(4) L.R. 2 Q.B., 99, and L.R. 5 H.L., 395.

the 'consignee pays the same price as if the goods had been bought and shipped to him in the ordinary way.'" Lord *Shand* (1), says expressly that Rochefort was not the place of delivery under the contract. Lord *Lee* (2) said "In this case Messrs. Stevenson & Co. were the sellers of the coals, and I agree with the Lord Ordinary that the contract between them and the pursuers did not require that in order to transfer the risk to the pursuers the coals should be delivered at Rochefort. I think that the case was one in which Stevenson & Co. did all that was incumbent on them by arranging for the carriage of the coals, putting them on board of the vessel they had chartered, insuring them, and undertaking to pay the freight. The risk was with the buyer after such shipment, unless there had been a clear undertaking to deliver at Rochefort, implying that the risk was to remain with the seller until delivery at the place stipulated." The concluding words of the contract are of importance in connection with the first finding of the jury. As already pointed out, the same view has been put shortly by Lord *Davey* in *Ströms Bruks Aktie Bolag* v. *Hutchison* (3). It therefore seems clear that the sellers in this case did not agree to deliver in Sydney but at Kobe, and the only question is whether the goods they shipped at Kobe as in pursuance of the contract were of the proper description. The goods being described as Japanese onions, there was an implied condition that the goods should be of merchantable quality. The jury have found that they were of merchantable quality as understood in Japan; but the purchaser contends that, besides the condition of merchantability, the sellers were bound to put on board onions reasonably fit for the voyage from Kobe to Sydney under ordinary conditions. There has been no finding of fact that the purchaser made known to the seller the particular purpose for which the goods were required, so as to show that the buyer relied upon the sellers' skill or judgment. It was urged, however, on behalf of the purchaser that the mere fact that the contract stated that the onions were to be shipped to Sydney, and that the sellers knew that the onions were to be shipped to Sydney, was sufficient to

(1) 17 Ct. of Sess. Cas., 167, at p. 180. (2) 17 Ct. of Sess. Cas., 167, at p. 198.
(3) (1905) A.C., 515, at p. 528.

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establish in law the further implied condition that the goods should be reasonably fit for the purpose of the voyage so as to arrive in Sydney in merchantable condition, except for the necessary and inevitable deterioration caused by the voyage. At the trial, and in the argument before this Court, it was put on behalf of the purchaser that the implied condition referred to necessarily arose as a matter of law.

In my judgment that is not a sound position. The mere fact that in the written document itself the fact and dates of shipment are referred to does not conclude the matter, because that is common to all c.i.f. contracts, and, unless such an implied condition exists in every contract of the character, the position contended for cannot be maintained. But that cannot be the case. Sub-sec. 1 of sec. 14 of the English *Sale of Goods Act* 1893 has been held by the Court of Appeal to be the same as the common law: *Frost* v. *Aylesbury Dairy Co.* (1), and it is the common law which still exists in this State. The suggested implied condition of reasonable fitness for the purpose must arise, if at all, on facts showing that the purchaser not only made known to the seller the particular purpose for which the onions were required, but also did this so as to show he was relying on the seller's skill and judgment. That this is a question of fact appears from several cases: *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (2); *Frost* v. *Aylesbury Dairy Co.* (1). In that case *Collins* M.R. said (3):—"We arrive then at this result, that milk was supplied for a purpose known to the seller under circumstances which showed that the buyer relied on the seller's skill or knowledge," &c. In *Wallis* v. *Russell* (4), the Irish Court of Appeal dealt with this question exhaustively. *Walker* L.J. said (5):—"The buyer has made known to the seller the purpose for which the goods are required, viz., for eating, and she has, as found by the jury, made that known in a manner that showed that she relied on the seller's skill and judgment, and not on her own." *Holmes* L.J. said (6):—Sec. 14, sub-sec. 1, enacts that this implication will arise when the buyer directs the attention of the seller to the purpose for

(1) 1905) 1 K.B., 608.
(2) (1896) 2 Q.B., 59.
(3) (1905) 1 K.B., 608, at p. 612.
(4) (1902) 2 I.R., 585.
(5) (1902) 2 I.R., 585, at p. 627.
(6) (1902) 2 I.R., 585, at p. 635.

which the goods are required in such a way as to convey that he is relying on the seller's skill and judgment to select a suitable article." The quotation by *Fitzgibbon* L.J. from *Brown* v. *Edgington* (1), and by *Walker* L.J. from *Bigge* v. *Parkinson* (2) support the same position. It is, therefore, plain that the mere fact that the seller knows the purpose without more will not of itself raise the implication. Looking at the facts in this case to see whether they are such as would entitle the purchaser to a direction that he relied on the sellers' skill and judgment to select onions fit for the voyage, I am clear that on the evidence no such direction could be given. The facts are certainly open to the construction, if the jury thought fit, that the purchaser did not rely on the sellers' skill and judgment. In view of the order the Court now makes I abstain from weighing the evidence. There being, however, so far no finding in plaintiff's favor of the fact essential to raise the implied condition of reasonable fitness, and the evidence not entitling him to a direction, it follows that the verdict cannot be sustained, and the appeal must therefore be allowed. I have not overlooked the first finding of fact, but this cannot be taken as amounting to an agreement by the sellers that they would bear the risk of transit, or, in other words, warrant merchantable condition of the goods on arrival at Sydney. No reliance was placed on this finding during the argument, nor, in my opinion, would it bear the construction that the sellers understood the buyer to rely on their skill and judgment to provide onions reasonably fit for shipment to Sydney. The only question as to which I have any doubt is whether a new trial should be ordered in both actions or whether a nonsuit should be entered in Little's action, and judgment for the plaintiffs in the cross-action. Strictly speaking, and in the absence of amendment, the sellers are entitled to judgment, and the purchaser cannot complain of a mistrial on the ground that by a mischance or other miscarriage for which he is not responsible the necessary facts were not found. He never asked for or intended that the facts as to reliance on the sellers' judgment should be found by the jury, see *Nevill* v. *The Fine Art and General Insurance Co.* (3). The pleadings do not raise the issue, and even the extended form

(1) 2 Man. & G., 279. (2) 7 H. & N., 955. (3) (1897) A.C., 68.

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in which the case was treated at the trial did not include the question of fact whether the purchaser relied on the sellers' skill and judgment. To send the case down for trial again on the present pleadings, the defendants being under no obligation to travel beyond the issues as appearing on the records, would be futile; it would be only visiting the plaintiff with additional expense and exposing him to certain defeat. The Court offered the plaintiff an amendment so as to raise the necessary issue, provided he struck out the allegation as to delivery in Sydney which the Court considered untenable. This was refused, the plaintiff insisting on retaining his allegation of a contract for delivery in Sydney.

The Court must therefore deal with the matter as it stands. On that basis I agree to the order as proposed by the Chief Justice.

Appeal allowed. Order appealed from discharged. Verdict in respondent's action set aside and nonsuit entered, with costs, including the costs of the motion for a rule nisi in the Supreme Court. Verdict in the appellants' action set aside and a new trial ordered, the costs in that action to be the plaintiffs' costs in the cause.

Solicitors, for the appellants, *Sly & Russell.*

Solicitors, for the respondent, *J. S. Thom, Bros. & Co.*

C. A. W.