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tion to rule 1 the word 'proposed' has not been inserted. It is also clear that at the time an application is presented there is no suit in existence. But the only suit that can be referred to in the explanation to rule 1 is the suit which may be instituted under the rule, and to put any other interpretation on the term 'the suit' would make it meaningless. The words 'such suit' in the first part of the explanation clearly refer to the suit which may be instituted by a pauper as soon as his application to sue as a pauper has been accepted. As a matter of drafting, it was not necessary to use the word 'such' a second time. There was, therefore, no necessity to use the word 'proposed' in the explanation, though it was necessary in rule 5 (*e*). However, on the first ground which was not decided by the Prothonotary, I think the application must be rejected as the allegations contained therein do not show a cause of action. But the rejection will be without prejudice to the applicant's right to make another application which does show a cause of action. She must, however, as a condition precedent, pay the respondents' costs of opposing this application.

Attorneys for the petitioner:—Messrs. *Jehangir, Mehta and Somji.*

Attorneys for the respondents:—Messrs. *Mulla and Mulla.*

K. McI. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.
February 28.

BAPUJI SORABJI FRAMJI AND OTHERS, APPELLANTS AND PLAINTIFFS, *v.* THE CLAN LINE STEAMERS, LIMITED, AND OTHERS, DEFENDANTS AND RESPONDENTS.*

Stoppage in transitu—*Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), sections 45 and 47.*

The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed

* Original Suit No. 366 of 1908.
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in the following manner. M. & Co., on shipping the goods, handed over the complete shipping documents to B, and received from him an advance of 65 per cent. of the invoice price. B then handed over the shipping documents to the National Bank of India in England, and himself received a similar advance by drawing on a credit opened with the Bank by the plaintiffs. The Bank then forwarded the shipping documents to India, where they were handed over to the plaintiffs in exchange for a trust receipt, the plaintiffs becoming responsible to the Bank for any short fall in the advances made to B.

On 12th February 1907 M. & Co. contracted to purchase from L. & Co. 250 boxes of tin plates, delivery to be F. O. B. Newport in four or five weeks after date. On 26th February M. & Co. wrote to L. & Co. enclosing instructions and marks for shipment of the 250 boxes to Bombay, and on 2nd March requested them to forward the goods to W. & Co. at Newport in time for shipment in S. S. Clan Macleod for Bombay. On 21st March L. & Co. enclosed to M. & Co. an invoice for 200 boxes and on 27th March another invoice for the remaining 50 boxes, the material part of the invoice in each case being "No claim concerning these goods can be recognized unless made within fifteen days from delivery to Messrs. W. & Co., Newport, for shipment on your account."

The 250 boxes were put on board the steamer by W. & Co. as the agents of L. & Co., but in obtaining a bill of lading for 500 boxes (including the 250 in question) W. & Co. acted as the agents of M. & Co.

The steamer left Newport on 4th April. Following the usual course of business as above described, M. & Co. handed over to B the shipping documents relating to the 500 boxes and obtained an advance of £255-5-2 (being 65 per cent. of the invoice value). B, on the 6th April, obtained a similar advance from the Bank. On the same day M. & Co. suspended payment, and on 9th April L. & Co., as unpaid vendors of 250 boxes, notified the steamship owners, the first defendants, to stop these goods in transit.

The S. S. Clan Macleod arrived in Bombay on 13th May, and the bill of lading which had been duly handed over by the Bank to the plaintiff on 29th April, was in due course presented by the latter. They were informed, however, of the stop put on the 250 boxes, and were offered a delivery order for the remaining 250 alone. This they declined, refusing to accept anything but the full payment of the advance or the full amount of the goods. On 29th June the plaintiffs repaid the Bank the amount of the advance, and the trust receipt of 29th April was duly cancelled.

On the plaintiffs' subsequently suing the steamship owners and their agents for damages,

Held, that the transit did not cease at Newport, and L. & Co. were entitled to stop the goods after they had started for Bombay.

Ex parte Golding Davis & Co.(1) followed.

(1) (1880) 13 Ch. D. 628.

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Held, further, that the plaintiffs were, after 29th June,—on which date they had fulfilled their obligations to the Bank,—pledgees for value of the bill of lading, if indeed they did not occupy that position from 29th April, being transferees of the Bank's rights in respect of the advance as against the defendants.

Held, further, that the plaintiffs were entitled to join both defendants in the suit.

The utmost benefit which the defendants were entitled to obtain from the position of L. & Co. as sureties [*sc.* to the plaintiffs for the advance made by the latter to M. & Co.] was the right to the security of the 250 boxes which they were willing from the outset should be received by the plaintiffs..... The plaintiffs by refusing to take delivery of the 250 boxes had omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission had resulted in loss, the surety was discharged.

In re Westzinthus(1) discussed.

IN and prior to the year 1907 the plaintiffs carried on the business of importing hardware into Bombay for sale on commission. Among their constituents in England were Millerson & Co. of Manchester. The course of business followed by the parties and the arrangements by which Millerson & Co. were financed were as follows. Millerson & Co. on shipping goods handed over the complete shipping documents to one Bloch, and received from him an advance of 65 per cent. of the invoice price of the goods. The business was at the risk of Millerson & Co. who were responsible to Bloch for any short fall resulting from the goods realising less than the amount advanced. Bloch's commission, in consideration of his financing the business and bringing Millerson & Co. into direct communication with the plaintiffs in India, was 3½ per cent. on the invoice value of the goods. Bloch then handed over the shipping documents to the National Bank of India in England, and himself received an advance of a similar amount by drawing on a credit opened with the Bank by the plaintiffs. The shipping documents were then forwarded by the Bank to their Bombay branch and handed over to the plaintiffs in exchange for a trust receipt, under which the plaintiffs became absolutely responsible to the Bank for any short fall in the advances made to Bloch. The plaintiffs then realised the goods at the best price obtainable, and rendered account sales for the same. If any short fall

(1) (1833) 5 B. & Ad. 817.

resulted on realisation the plaintiffs held Millerson & Co. in the first instance, and, in default of them, Bloch as guarantor liable to make good to them the amount of the advance. By a contract dated 12th February 1907 Lloyd & Co., sold to Millerson & Co., 250 boxes of tin plates, the terms of the contract providing for delivery F. O. B. Newport in four or five weeks from date and payment less 4 per cent. discount in fourteen days. In a letter of 26th February Millerson & Co., gave instructions to Lloyd & Co. and enclosed marks for shipment of the goods to Bombay, and in a subsequent letter of 2nd March instructed them to forward the goods to Whittingham & Co., at Newport in time for shipment to Bombay in S. S. Clan Macleod. An invoice for 200 boxes was sent by Lloyd & Co. to Millerson & Co., on 21st March and a further invoice for the remaining 50 boxes on 27th March. The material parts in each invoice were:—

"No claim concerning these goods can be recognized unless made within fifteen days from delivery."

"F. O. B. Newport."

"To Messrs. Whittingham & Co., for shipment on your account."

Whittingham & Co., acting as agents of Lloyd & Co., put the goods on board, but they obtained the bill of lading (which related to a total consignment of 500 boxes) as agents of Millerson & Co. The S. S. Clan Macleod left Newport on 4th April 1907, and on the following day Millerson & Co. handed Bloch the shipping documents, and, according to the usual course of business, requested an advance of £255-5-2, being 65 per cent. of the invoice price. This advance was duly made, and on 6th April Bloch handed the documents to the National Bank and himself received an advance of a similar amount. The Bank thereupon forwarded the documents to India, and handed them over to the plaintiffs in exchange for a trust receipt dated 29th April 1907.

Meanwhile, on the same day on which the Bank had made the advance to Bloch, Millerson & Co., suspended payment and called a meeting of their creditors for 12th April. On 9th April Lloyd & Co. gave notice to the owners of the S. S. Clan Macleod to stop the 250 boxes of which they were the unpaid vendors.

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This notice was communicated to Bombay, and when on the arrival of the steamer the plaintiffs presented the bill of lading they were informed by the shipowners' agents of the stop put upon the goods and were offered a delivery order for the remaining 250 boxes alone. This they refused to accept, demanding either delivery of the whole consignment or payment in full of the advance. On 29th June 1907 the plaintiffs repaid to the Bank the amount due on account of the advance and interest, and the trust receipt of 29th April was duly cancelled. On 5th May 1908 this suit was filed, against the shipowners and Messrs. Finlay Muir & Co., their agents, for the recovery of £255-5-2 with interest. The suit came before Mr. Justice Macleod, and was dismissed with costs, the learned Judge holding (*inter alia*) that Lloyd & Co. were the unpaid vendors and the goods were in transit when the notice to stop was received; that the plaintiffs had no cause of action against the second defendants; that the transfer to the plaintiffs of the bill of lading was not by way of pledge or other disposition of value; and that in any event the plaintiffs were bound to exhaust their other securities before proceeding against the goods stopped.

The plaintiffs appealed.

Strangman (Advocate General), with *Inverarity* and *Cohen*, for the appellants.

The reasons of the learned Judge for holding that the second defendants were wrongly joined are not apparent. They refused to give up the goods, and it is immaterial that they were agents acting on the instructions of their principals: *Cranch* v. *White*[1] and *Davies* v. *Vernon*[2]. An agent who converts goods under orders from his principal is liable for the conversion severally and jointly with the principal. The goods in question, after being placed on board the ship at Newport, ceased to be in transit from Lloyd to Millerson. The contract contained the provision that delivery was to be F. O. B. at Newport and that payment was to be made fourteen days after delivery. The notice requiring claims to be made within fifteen days of delivery

(1) (1835) 1 Bing. N. C. 414. (2) (1844) 6 Q. B. 443.

at Newport is also significant. The bill of lading was made out in the name of Millerson and not Lloyd, and included goods which were not Lloyd's. Delivery was thus clearly given to Millerson at Newport. If Whittingham & Co. were acting as agents of Lloyd, they were doing so only for the purpose of giving delivery to Millerson on the steamer named by Millerson. The case is on all fours with *Cowasjee* v. *Thompson*[1], where, although, as here, the seller had put the goods on board, they were held to be no longer in transit. See also *Schotsmans* v. *Lancashire and Yorkshire Railway Co.*[2] and *Ex parte Miles*[3]. It is not disputed that Millerson pledged the goods to Bloch and that Bloch pledged them to the Bank. If it is argued that the Bank took the pledge on their own account and not on the plaintiffs, then by delivery in exchange for the trust receipt they transferred to the plaintiffs all their rights as pledgees. Thus the goods covered by the bill of lading were specifically pledged to the plaintiffs, and apart from the question of duration of transit they were entitled to receive from the defendants either the goods or their invoice value or the sum for which they were pledged. With regard to marshalling the defendants are clearly not entitled to put forward any claim. The doctrine of marshalling only applies to securities within the control of the Court: see *Webb* v. *Smith*[4]. Further, the point was not raised in the written statement, and the plaintiffs' position with regard to the goods must have changed between the date of the arrival of the ship and the time when the point was taken.

Robertson, with *Lowndes*, for the respondents.

The master of the Clan Macleod received the goods merely as carrier to Millerson. The goods were *sold* F. O. B., but transit did not end till the termination of the voyage. Lloyd had marked the goods for Bombay and the ship was bound for Bombay: see *Berndtson* v. *Strang*[5]. The case of *Cowasjee* v. *Thompson*[1] is not really a case of stoppage *in transitu* at all. The case turned on the point that the goods had been paid for. So in

(1) (1845) 3 Moo. I. A. 422.
(2) (1867) L. R. 2 Ch. 332.
(3) (1885) 15 Q. B. D. 39.
(4) (1885) 30 Ch. D. 192.
(5) (1867) L. R. 4 Eq. 481.

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Ex parte Miles[1] the facts were such as to show that the transit ended on shore. The cases of *Bethell* v. *Clark*[2], *Berndtson* v. *Strang*[3] and *Ex parte Rosevear China Clay Co.*[4] all show that it does not matter whether Whittingham & Co. took out the bill of lading as Millerson's agent or not. See also as to duration of transit *Jackson* v. *Nichol*[5], *Spalding* v. *Ruding*[6] and *Kemp* v. *Falk*[7]. Again, the plaintiffs were only factors, not *bonâ fide* pledgees for value. In any case they were not pledgees till 29th June 1907. The defendants can claim the right to marshal. And this right extends not only to the other 250 cases but to all other goods of Bloch's which are in the plaintiffs' possession: see *In re Westzinthus*[8]. *Webb* v. *Smith*[9] has no relation to this case. When the shipmaster receives notice to stop, he is bound to deliver to the unpaid vendor: Sale of Goods Act, section 46 (2). See also *The Tigress*[10].

Strangman in reply cited *Kendal* v. *Marshall Stevens & Co.*[11], *Ex parte Gibbes*[12], *In re Winkfield*[13] and *Cahn* v. *Pockett's Bristol Channel Steam Packet Company, Ltd.*[14].

SCOTT, C.J.:—The first question which has been argued in this case is whether at the time when Lloyd & Co. gave a notice to the "Clan Macleod" at Liverpool on the 9th of April 1907 to stop the goods which they had despatched under a contract of sale to Millerson & Co. the goods were in transit or had reached the possession of Millerson & Co. or any person on their behalf.

The contract for the sale of the 250 cases supplied by Lloyd & Co. was made in England and the obligations incidental to that contract must be decided according to the law of England.

Section 45 (1) of the Sale of Goods Act, 1893, is as follows:—

"Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the

(1) (1885) 15 Q. B. D. 39.
(2) (1888) 20 Q. B. D. 615.
(3) (1867) L. R. 4 Eq. 481.
(4) [1879] 11 Ch. D. 560.
(5) (1839) 5 Bing N. C. 508.
(6) (1843) 6 Beav. 376.
(7) (1882) 7 A. C. 573.
(8) (1833) 5 B. & Ad. 817.
(9) (1885) 30 Ch. D. 192.
(10) (1863) 32 L. J. Ad. 97.
(11) (1883) 11 Q. B. D. 356.
(12) [1875] 1 Ch. D. 101.
(13) [1902] P. 42.
(14) [1899] 1 Q. B. 643.

purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier."

This appears to be a codification of the case law of England upon the subject.

The appellants are the holders of a bill of lading issued by the agents of the "Clan Macleod" in favour of Millerson & Co. acknowledging the shipment by them on board that steamer of 500 boxes of tin plates of which 250 are the boxes which the vendors gave notice should be stopped *in transitu* on the 9th April 1907.

The contract under which these goods were sold to Millerson & Co. provided that delivery should be F. O. B. Newport in four or five weeks from the 12th of February 1907—terms of payment less 4 per cent. discount in fourteen days.

On the 26th of February 1907, Millerson & Co. wrote to Lloyd & Co. as follows:—

"Herewith we beg to hand you instructions and marks for our shipment to Bombay. We have received a call from Messrs. Whittingham's agents, who tell us that the goods were too late to be shipped on the boat leaving Newport on the 28th instant. We have instructed Messrs. Whittingham and given marks same as we give to you. We hear from them that the next boat from Newport sails the third week in March, kindly have our order ready for this boat and oblige."

To that letter was appended a diagram of the mark to be put upon the cases by Lloyd & Co. which indicated that the cases were to be shipped to Bombay.

On the 2nd of March 1907, Millerson & Co. again wrote to Lloyd & Co.:—

"We have this day received notice from Messrs. W. M. Whittingham that the next steamer leaving for Bombay is the "Clan Macleod" closing on the 30th inst. Kindly forward goods to them in time for a shipment by this steamer and oblige."

On the 21st of March 1907, Lloyd & Co. enclosed to Millerson & Co. an invoice for 200 out of the 250 boxes contracted for, of which the material parts are as follows:—

"No claim concerning these goods can be recognised unless made within fifteen days from delivery to Messrs. W. M. Whittingham & Co., Newport, for shipment on your account."

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That was followed on 27th March by an invoice in the same terms relating to the 50 boxes remaining to make up the total amount contracted for.

Messrs. Whittingham & Co. were the agents of Lloyd & Co. for the purpose of putting the 250 boxes upon the steamer under the contract for delivery F. O. B. and they were paid by Lloyd & Co. for that service. It is, however, not disputed that Whittingham & Co. also did some work for Millerson & Co. for they obtained from the agents of the steamer the bill of lading above referred to relating to the 250 boxes supplied by Lloyd & Co. and 250 belonging to Millerson & Co. received from other suppliers. Under these circumstances the appellants contend that the transit from Lloyd & Co. to the buyer ended at Newport, the place designated in the contract for delivery; although Bombay had been mentioned subsequently to the sellers as being the ultimate destination of the goods. It is urged that the bill of lading shows clearly that the goods had reached the hands of an agent on behalf of the buyers who was required to do something on account of the buyers in order to forward them to their ultimate destination, that it cannot be said that in obtaining the bill of lading Whittinghams' servant was the agent of the sellers inasmuch as the bill of lading related to 250 boxes with which the sellers were in no way concerned. Reliance is also placed upon the clause in the invoice that no claim concerning these goods can be recognised unless made within fifteen days from delivery, that is, from delivery at Newport, and it is said that the sellers cannot be allowed to say that all their obligations end within fifteen days from delivery at Newport if for the purpose of transit the place of delivery is to be taken to be Bombay. With regard to this clause in the invoice it is to be observed that it is no part of the contract. It is a warning of a kind which sellers often put in bills and invoices but it does not follow that it is anything more than a *brutum fulmen*. If this clause is eliminated from consideration it is difficult to find any point relied upon by the appellants which was not also present in the case of *Ex parte Golding Davis and Co.*[1], a case which bears a singularly close resemblance to that

(1) (1880) 13 Ch. D. 628.

which we have now under consideration so far as the question of transit is concerned. There the contract was made between the suppliers and their buyers for delivery of 100 drums per month; shipment F. O. B. Liverpool, and the buyers actually had a branch at Liverpool. After the contract was made, the buyers' Liverpool branch sent instructions to the suppliers to ship 100 drums on board a named ship for New York then lying at Liverpool. The goods were accordingly shipped by the suppliers. The wharfinger's receipts stated that they were received for shipment on board the ship on account of the buyers at Liverpool. That receipt was handed to the shipping brokers of the ship who then procured the signature of the master of the ship to the bill of lading, the bill of lading stated that the goods were shipped by Taylors and Sons, who were buyers from the original buyers to be delivered unto order or to assigns at New York. The original buyers having suspended payment the suppliers served a notice of stoppage *in transitu* on the master of the ship, the ship's agents and the brokers for the ship. The Registrar in Bankruptcy held that the notice was of no effect, on the ground that, the bill of lading being in the name of sub-purchasers the property in the goods was transferred to them, and the *transitus* was at an end as between the suppliers, and the original buyers, when the goods were placed on board and the bill of lading was made out. An appeal was preferred and it was argued for the respondents that what took place was equivalent to a delivery of the goods to the original buyers at Liverpool and a sending of the goods on a new *transitus* and that the signing of the bill of lading by shipmaster in favour of the sub-purchaser was a complete attornment. James, L. J., however, said:

"A mere transfer of a bill of lading or any other sale of the goods, though it transfers the whole property in the goods, does not determine the *transitus*. And it seems to me that the goods now in question were clearly *in transitu* at the time when the transaction took place between Knight and Son and Taylor and Sons. They left the vendors' warehouse for the purpose of their being put on board a ship which was to deliver them in New York. That *transitus* was never altered and never ceased, because the goods have since been delivered in New York accordingly. There was a *transitus* continuing from the vendors' warehouse to New York."

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Cotton, L. J., said :

"The journey indicated by the contract between the original vendors and the purchasers was still continuing, there had been no new or different journey, indicated, and that entirely distinguishes the case from that which possibly was in the mind of the Registrar, where on the original purchase one journey had been contemplated, but in consequence of a contract between the original purchaser and the sub-purchaser he directs that the goods shall go to a different terminus. In such a case, of course the right of stoppage *in transitu* is at an end, because what is done is equivalent to the original purchaser taking possession of the goods and dealing with them by means of that possession. It was urged by Mr. Winslow that what occurred in the present case was equivalent to that, but, in my opinion, that view cannot be sustained. I think that what was done had just the same legal effect as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers. There was nothing done by the purchasers to alter the destination agreed upon between them and the original vendors, no actual taking possession of the goods, and, in my opinion, there was nothing which can be considered as equivalent to their doing that, and then starting the goods as from their possession on a different and new voyage."

The decision in that case was attacked subsequently on a different point, but it has never been doubted that the judgments with regard to the question whether the transit had ended were correct. In the subsequent case of *Ex parte Falk*[1], Baggallay, L. J., said :

"I desire to add that the doubts which, in *Ex parte Golding Davis & Co.*, I said that I had entertained during the argument turned entirely upon the special circumstances of that case. My doubt was whether the goods had not been delivered at Liverpool to Knight and Son and then started on a fresh *transitus*. Upon consideration I was satisfied that that was not the right view of the facts."

Even if the position of Whittingham & Co. in the present case were less equivocal and if they had been employed solely on behalf of the buyer and not on behalf of the sellers it would not be conclusive in favour of the appellants' contention.

Mr. Justice Mathew in *Bethell v. Clark*[2] said :

"The authorities show that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit."

(1) (1880) 14 Ch. D. 446. (2) (1887) 19 Q. B. D. 560.

For these reasons, we think, that the learned Judge of the lower Court was right in holding that the transit did not cease at Newport and that Lloyd & Co. were entitled to stop the goods as they did after they had started on a voyage to Bombay.

The next question which arises is whether the right of stoppage exercised by Lloyd & Co. is limited by the existence of any rights in the plaintiffs. The proviso to section 47 of the Sale of Goods Act, 1893, is as follows:—

"Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller's right of lien (or retention) or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien (or retention) or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

It is to be observed that the terms of that proviso do not apply to the facts of the present case for, here the bill of lading has not been "transferred" to any person as buyer or owner of the goods. It was issued by the agents of the ship to the buyers and by them endorsed as security for advances made. It is, however, we think, clear that the position of a pledgee of a bill of lading issued on behalf of the ship to the buyer is not worse as against an unpaid seller stopping *in transitu* than the position of a pledgee from a buyer of a bill of lading issued originally to the seller and transferred by him to the buyer of the goods. Thus in *Kemp* v. *Falk*[1], a case in which the rights of the pledgee of a bill of lading were given effect to in priority to an unpaid seller stopping *in transitu*, Lord Blackburn stated that bills of lading were made out which were signed not as is usual by the master but by the shipowner himself and that Mr. Kiel (the buyer) got those bills of lading.

The question then is whether the plaintiffs represented any interests acquired by way of pledge of the bill of lading.

(1) (1882) 7 A. C. 573.

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The plaintiffs had prior to 1906 business dealings with one Albert Bloch selling goods for him on commission. In July 1906, Bloch arranged with Millerson & Co. a hardware consignment business to Bombay on terms set out in his letter of the 30th July 1906. The business was to be at risk for account and debit of Millerson & Co. who were to consign the goods. Millerson & Co. were to hand to Bloch complete shipping documents in exchange for 65 per cent. of the amount of the invoice. Should the goods after deducting all charges realise less than the 65 per cent. advanced Millerson & Co. were to refund to Bloch any short fall; on the other hand, any surplus that might arise was to be credited to Millerson & Co. in account. In consideration of Bloch putting Millerson & Co. in direct communication with his constituents in India and of his financing the business his commission was to be 3½ per cent. on the invoice value of the goods to be paid when the advance should be made. It was agreed that when account sales were rendered from India the goods would be charged with the selling commission, etc., of 3½ per cent. in addition to Bloch's commission as well as out of pocket and customary incidental expenses in India; interest at 6 per cent. being charged on the sums advanced; all goods were to be sold on or before arrival and in no case were any goods to remain unsold for a longer period than three months from date of shipment. Bloch then arranged with the plaintiffs to finance him and to sell Millerson & Co.'s goods. The terms of this business are set out in a letter addressed by the plaintiffs to Bloch dated the 23rd of November 1906.

> We now beg to enumerate the terms of this business as settled by our Mr. K. S. Framji and shall thank you to confirm same.
>
> (1) You are to receive from the National Bank of India, Ltd., on handing over to the Bank complete shipping documents of the goods shipped to us as consignments by Messrs. A. Millerson & Co., 65 per cent. of the invoice value of the goods.
>
> (2) We are to realise these goods at best price that we can obtain for them at our discretion and render account sales for same. Should there be any short fall in the amount advanced as above the same is to be made good to us by Messrs. A. Millerson & Co., in the first instance, failing which you are to make good the same as you guarantee these friends.

(3) We are to deduct from the sale-proceeds all charges, interest, incurred upon the goods plus a commission of 3½ per cent. on all goods (including ½ per cent. for finance commission), and a commission of 2½ per cent. (including finance) on all yarns.

(4) We are to finance this business to such amounts and to such extent as we may deem right.

(5) The above terms also apply to manufacturers, direct business to India.

The second term is important. The plaintiffs' duty was to realise the goods and any short fall on realisation in the amount advanced was to be made good to plaintiffs in the first instance by Millerson & Co., failing which, Bloch was to make it good as guarantor.

In order to carry out these arrangements the plaintiffs arranged with the National Bank of India in London to finance the consignments that might be sent to the plaintiffs by Millerson & Co. through Bloch by paying to Bloch 65 per cent. of the invoice value of the goods on his handing to the Bank complete shipping documents for the same, the Bank being bound to hand over the documents to the plaintiffs' firm in Bombay upon the terms existing between them for that class of business and up to the amount of the cash credit allowed to them by the Bank. The plaintiffs were also to be responsible to the Bank for any short fall in the advances made by them to Bloch.

On the 5th of April 1907, Millerson & Co. delivered to Bloch bills of lading and invoices for the 500 boxes of tin plates already referred to shipped by "Clan Macleod," to the plaintiffs in Bombay and requested payment of the advance of 65 per cent. upon the invoice value amounting to £255-5-2. On the same day Bloch acknowledged the receipt of the documents and enclosed his cheque for £255-5-2. That cheque was received by Millerson & Co. on the 6th of April. On the 5th April Bloch handed to the National Bank the documents for the 500 cases and requested payment of a cheque for £255-5-2 being 65 per cent. of the invoice value. A cheque for this amount was sent to Bloch on the 6th of April. On the same day Millerson & Co. called a meeting of their creditors for the 12th of April and on the 9th of April Lloyd & Co. notified the first defendants to stop

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the 250 cases supplied by them to Millerson & Co. The shipping documents after being received by the Bank were transmitted in the usual course of business to Bombay and were handed to the plaintiffs on the 29th of April in exchange for a trust receipt of that date, whereby the plaintiffs undertook in consideration of the Bank handing to them the shipping documents held as security for the payment of £255-5-2 to land, store, and hold the goods until sale, and sell the goods as the agent or trustees of the Bank, and until such sale to hold the goods and afterwards the sale-proceeds thereof as the property of the Bank, and subject to the Bank's security thereon, and to hand the proceeds of sale to the Bank advising them in respect of what shipment the payment was made, so that, they might apply the payment to its appropriate advance undertaking that the proceeds of the goods should be treated by plaintiffs as belonging to the Bank and earmarked as the Bank's property until the advance should be fully paid and satisfied by the plaintiffs, and the plaintiffs undertook that if the goods covered by the trust receipt should not be sold for cash, or if in the case of any goods delivered against Bazaar chits or promissory notes, the Bazaar chits or promissory notes should not be realised in sufficient time to permit of the advance being paid at the due date to hand to the Bank within sixty days the full amount of the advance money with interest at 7 per cent. running from the 6th of April 1907 up to the approximate date of arrival of remittance in London, such payments to be made in sterling.

We entertain no doubt that Bloch was the pledgee of the bills of lading from Millerson in consideration of the advance of £255-5-2; that the National Bank were pledgees of the bills of lading from Bloch in consideration of the advance to Bloch of that sum at the request of, and for and on account of, the plaintiffs, and that the plaintiffs were the holders of the bills of lading under their arrangements with the Bank being bound to repay to the Bank the full amount of the advance made to Bloch by the 29th of June 1907. There is no question but that the plaintiffs fulfilled their obligations to the Bank by handing to them on that date a demand draft on London in return for which they received the shipping documents together with the

trust receipt duly cancelled; and they were after that date the pledgees for value of the bill of lading if indeed they did not, being the transferees of the Bank's rights in respect of the advance of £255-5-2 as against the defendants, occupy that position from the 29th of April.

The "Clan Macleod" arrived in Bombay on the 13th of May and the plaintiffs duly presented the bill of lading for the 500 boxes of tin plates. The second defendants, however, as agents for the owners stated that with reference to the bill of lading they had been asked by Messrs. Lloyd & Co. in London to put a stop on 250 boxes marked F.E.L.S. The plaintiffs then by their letter of the 15th of May gave the second defendants the option of either delivering the whole consignment of 500 boxes on presentation of the bill of lading or making good to them the amount of the advances "paid by them" namely £255-5-2 on those goods. The second defendants, however, replied that they had been advised to deliver 250 boxes out of the 500 to Messrs. Glade & Co. and for the balance enclosed a delivery order to enable the plaintiffs to take delivery. The plaintiffs then by their solicitor's letter of the 18th of May pointed out that they had made an advance upon the whole of the 500 boxes constituting the consignment and the bill of lading, for all those boxes were assigned to them by way of pledge; that the advance was made in good faith; and that Lloyd & Co. were not entitled even though they might be unpaid vendors to stop the goods in transit except on payment or tender to the plaintiffs of the advance which had been made. The only reply from the second defendants was that they had given the plaintiffs a delivery order for 250 boxes out of the consignment under instructions from the owners of the steamer and beyond that they were not prepared to accept any responsibility. The plaintiffs having declined to accept anything but the full payment of the advance or the full amount of the goods mentioned in the bill of lading, the 250 boxes, which were not the subject of Lloyd & Co.'s stoppage orders, were eventually sold, and realised about Rs. 600.

It appears that the defendants refused delivery to the holders of the bill of lading under an indemnity received from Lloyd

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& Co. But as they had not offered to discharge the lien of the defendants for £255-5-2, Lloyd & Co. were not entitled to receive the goods and the shipowners, namely, the first defendants and their agents, the second defendants, are liable for conversion and the plaintiffs are entitled to join them both in this suit: see *Bates* v. *Pillings*(1); *Leslie* v. *Wilson*(2).

The next question which arises is: What is the amount of the liability? The case was argued on the footing that the defendants, though bailees, were entitled to set up against the plaintiffs a *jus tertii*, namely that of Lloyd & Co. It was urged on behalf of the defendants, and the argument found favour with the learned Judge, that assuming the plaintiffs at the date of suit to be the pledgees of the bills of lading the liability of the defendants is nil, because the plaintiffs had other means of securing payment of the advances made by them through the National Bank to Bloch. In support of this argument the case of *In the matter of Westzinthus*(3) has been referred to. In that case the contest was between the unpaid seller of certain oil and the assignees of the bankrupt buyers. The pledgee of the bills of lading for the oil had held a quantity of other goods of the buyers all of which he had realised for a sum in excess of the advances made by him, and the point which was decided in the case was whether the goods of the unpaid seller could be brought into the bankrupt buyers' estate for distribution among their creditors when the pledgee of the bills of lading, who was the only person having a right superior to the unpaid seller, had already been satisfied out of the bankrupt's own assets. It was held that once the pledge had been satisfied the goods or their value must be restored to the unpaid seller.

The contention that the plaintiffs are bound to realise and enforce all other securities at their disposal before resorting to the goods of Lloyd & Co. mentioned in the bill of lading is based upon a passage in the judgment of Lord Denman where he says:

"If, then, *Westzinthus* had an equitable right to the oil, subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become

(1) (1826) 6 B. & C. 38. (2) (1821) 6 Moore 415.
(3) (1833) 5 B. & Ad. 817.

a surety to *Hardman* for *Lapage's* debt, and would then have a clear equity to oblige *Hardman* to have recourse against *Lapage's* own goods, deposited with him, to pay his debt in case of the surety; and all the goods, both of *Lapage* and *Westzinthus*, having been sold, he would have a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance to the payment of the debt."

The learned Judge in the lower Court treating Lloyd & Co. as sureties has held that any loss, which may have been suffered by the plaintiffs owing to their inability to apply the proceeds of the goods stopped by Lloyd & Co. in satisfaction of their advance upon the bill of lading, can be made good by charging Bloch for the same in account. He says that the plaintiffs have actually debited Bloch in account with the amount of the advance. We have been unable to find in the evidence anything to support this statement. The plaintiffs' clerk Anandrao Harishankar states: "We have not got back the advances made on the 500 cases in suit." Similarly Bloch has not recovered the amount of his advance from Millerson & Co. He states that at the time when Millerson & Co. suspended payment, the amount due to him for advances was £7,640-14-0 including the advance of £255 against the bill of lading. He also says that he thinks he will be a loser on the whole business with Millerson & Co.; that although he had bought the estate (meaning thereby the margins payable to Millerson & Co. on realisation) it has turned out a failure. If, however, we assume that the plaintiffs have debited Bloch in account with the amount advanced against the bill of lading, there is nothing to show that they have recovered it or will recover it without objection from Bloch: it is not clear how Bloch is liable in respect of it under the terms of his agreement with the plaintiffs so long as they have not realised the goods against which the advances were made, for Millerson & Co. were to be responsible for any short fall on realisation in the first instance and Bloch was to be liable on their default for the same short fall. Bloch as a guarantor would be entitled to insist that the goods, the sale of which was contemplated, should be realised before he could be charged with liability. Again, even if Bloch is liable to the plaintiffs in respect of the advance, it does not appear to us that Lloyd & Co. would be entitled to any

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remedy against Bloch as they have not paid or performed all they were liable for as sureties. See Contract Act, section 140. The utmost benefit, we think, which the defendants are entitled to obtain from the position of Lloyd & Co. as sureties is the right to the security of the 250 boxes which they were willing, from the outset, should be received by the plaintiffs and which were, therefore, available for sale in or towards satisfaction of the advance made against the bill of lading. This, we think, follows from either section 139 or section 141 of the Contract Act. The plaintiffs by refusing to take delivery of the 250 boxes have omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission has resulted in loss the surety is discharged.

Now the value of the 250 cases not shipped by Lloyd & Co. was, according to the invoice, £194-15-10. The goods were sold during the progress of the suit in February 1909 for Rs. 1,625-8-0 from which Rs. 1,022-12-7 were deducted for customs duty, Port Trust, and King's warehouse charges, leaving a surplus of Rs. 602-11-5.

We do not think that it can be fairly assumed against the plaintiffs that the full invoice value would have been realised upon a forced sale of the 250 boxes in order to ease the surety. At the same time it may be that the sale in February 1909 is not a fair criterion of the price the goods would have realised if they had been sold at once after their arrival in May 1907. In the absence of evidence upon the point we allow Rs. 2,000 as the price which might have been realised at a forced sale in May 1907; and of that sum Rs. 602-11-5 is in the hands of the Collector of Customs.

It is obvious that this amount of Rs. 2,000 is not sufficient to discharge the claim of the plaintiffs for £255-5-2 and interest at 6 per cent. per annum and no offer or tender has been made by the defendants in respect of the plaintiffs' claim.

We, therefore, hold that the plaintiffs are entitled to recover from the defendants the difference between Rs. 2,000 and £255-5-2 calculated at 1*s.* 4*d.* per rupee with interest at 6 per cent. per annum and costs properly incurred in the realisation of

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their security. They are, however, not entitled to recover such costs as are attributable to their unsuccessful contentions upon the issue of stoppage *in transitu*. These costs we assess at one-third in each Court.

We, therefore, reverse the decree of the lower Court and decree that the defendants do pay to the plaintiffs the sum of Rs. 1,828-14-0 with interest thereon at 6 per cent. per annum and two-thirds of the costs of this suit throughout. The respondents must assign to the appellants the Rs. 602-10-7 in the hands of the Collector of Customs.

Decree reversed.

Appellants' solicitors:—Messrs. *Craigie, Blunt & Caroe.*

Respondents' solicitors:—Messrs. *Crawford, Brown & Co.*

K. MCI. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

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July 7.

IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877 AND IN THE MATTER OF SARAFALLY MAMOOJI.

IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877 AND IN THE MATTER OF JAFFER JUSUB.

*Specific Relief Act (I of 1877), section 45—General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), sections * 33 and 34.*

A Municipal election petition having been lodged with the Chief Judge of the Small Ca ses Court, the latter unseated two of the successful candidates

* Section 33. (1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal election roll may, at any time, within fifteen days after the result of the election has been declared, apply to the Chief Judge