

## ORIGINAL CIVIL.

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

1916.  
March 23.

R. K. MOTISHAW & Co. (APPELLANTS AND DEFENDANTS) v. THE MERCANTILE BANK OF INDIA (RESPONDENTS AND PLAINTIFFS)\*

*Bill of exchange—Drawer of the bill, an alien—Bill drawn against goods consigned from an enemy port by an enemy steamer—Shipping documents signed by an alien—Acceptance of the bill by a British subject—Acceptance unqualified and unconditional—War breaking out after acceptance—The enemy steamer arriving at Bombay before the outbreak of war but subsequently harbouring in a neutral port to evade capture without discharging cargo—The Royal Proclamation dated 5th August warning persons not to obtain goods from the German Empire—Bill dishonoured by non-payment on due date—Shipping documents tendered by the holder of the bill—Proclamation dated 12th December 1914 authorising British subjects to obtain goods from an enemy steamer in neutral port—The Negotiable Instruments Act (XXVI of 1881), sections 32 and 43—Property in the goods vests in the acceptor, though the bill of lading remains with the holder of the bill of exchange to secure the price—Consideration does not fail if the acceptor is put in a position to take delivery of the goods.*

The plaintiffs were a British Bank carrying on business in London, Bombay, and elsewhere. The defendants were a firm of merchants, British subjects carrying on business in Bombay. On the 24th June 1914, one G. A., a German residing in Hamburg drew a bill of exchange upon the defendants in favour of the plaintiffs for £ 65-0-6 payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be drawn upon the defendants against 50 bales of goods per S. S. *Lichtenfels*, a German steamer. The bill was presented to the defendants for acceptance with the shipping documents relating to the bales of goods mentioned in the bill and was accepted by them on 20th July 1914 payable at the office of the plaintiffs in Bombay. The S. S. *Lichtenfels* reached Bombay just before the outbreak of war between Great Britain and Germany (i.e., 4th August 1914), and in order to evade capture left Bombay and took shelter in the neutral port of Marmagao. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. On the 12th December 1914, a Proclamation was issued by which all British subjects residing or carrying on business in British India were authorised to

\* O. C. J. Appeal No. 63 of 1915.

make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners resident in an enemy country. The plaintiffs filed this suit on the 30th September 1915 to recover the amount due on the bill, contending that the defendants' acceptance was unqualified and absolute and that, as the shipping documents for the goods mentioned in the bill of exchange were tendered at the time of presentation for payment, they were entitled to payment according to the terms of the bill and the acceptance. The defendants contended that the acceptance was qualified subject to the condition that the defendants should be put in a position to get the delivery of the goods referred to in the bill of lading, and that owing to the outbreak of war and the King's Proclamation published in Bombay on the 7th August 1914 warning persons not to obtain goods from any person resident in the German Empire the shipping documents ceased to be any consideration for the acceptance.

*Held*, (1) that in either view of the acceptance the plaintiffs were entitled to succeed, inasmuch as if the acceptance was unqualified the defendants were bound to pay on due date, and if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation of December 1914 whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports.

(2) The consideration for the acceptance did not fail as the last-mentioned Proclamation permitted performance before it was too late of the condition alleged.

SUIT to recover money on a bill of exchange.

The plaintiffs were a British Bank incorporated under the English Companies Acts and carrying on business in London, Bombay, and elsewhere. The defendants were a firm of merchants, British subjects, carrying on business in Bombay.

On the 24th June 1914, one George H. Alberti, a German merchant, resident in Hamburg, drew a bill of exchange upon the defendants in favour of the plaintiffs for £65-0-6 payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised.

The bill was purchased by the plaintiffs in London for its full value and sent out to the plaintiffs in Bombay. It was accepted by the defendants on the 20th July 1914 and was payable at the office of the plaintiffs in Bombay.

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The bill purported to be drawn against 50 bales of goods bearing a certain mark per S. S. *Lichtenfels*, Hansa Line which was a German ship. The ship arrived in Bombay shortly before war was declared between England and Germany on 4th August 1914, and left for the neutral port of Marmagoa before discharging her cargo with a view to evade capture. The ship remained lying at Marmagoa at the date of the suit.

The bill when presented at due date was dishonoured by non-payment by the defendants, in view of the Royal Proclamation published in Simla on the 10th August 1914 and in Bombay on the 13th August 1914 warning all persons not to obtain from the German Empire any goods, wares, or merchandise or obtain the same from any person resident, carrying on business or being therein, nor to trade in any goods, wares or merchandise coming from the said Empire or from any person resident, carrying on business or being therein.

By a Proclamation dated the 12th December 1914, all British subjects residing or carrying on business in British India were authorised to make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners resident in an enemy country.

The plaintiffs averred their readiness and willingness to hand over the shipping documents against payment of the amount due under the bill.

The suit was filed on the 30th September 1915 to recover the sum of Rs. 1,048-5-4 being the equivalent of £65-0-6 including interest thereon at the rate of 6 per cent. per annum from 22nd August 1914 till the 30th September 1915 and further interest at 6 per cent. till payment. The plaintiffs submitted that as the shipping documents for the goods mentioned in the bill of exchange were tendered at the time of presentation for

payment they were entitled to payment according to the terms of the bill and the acceptance. In addition they relied on the fact that at the date of the suit the British Government had made arrangements by which consignees of cargo per S. S. *Lichtenfels* could obtain delivery thereof.

The defendants contended *inter alia* that the drawer of the bill became an alien enemy at the outbreak of war and that their acceptance was a qualified acceptance subject to the condition that the documents should be tendered to the defendants by the plaintiffs and that the defendants should be put in a position to get the delivery of goods referred to in the bill of lading on C. I. F. C. I. terms. The defendants further submitted that in view of the Royal Proclamation issued on the 5th day of August 1914 and the ordinances and orders issued by the British and Indian Governments the defendants were precluded from accepting the shipping documents tendered against which payment of the bill was asked for and that consequently it became impossible for the plaintiffs to perform their part of the contract subject to which the defendants accepted the bill of exchange.

The suit came on for hearing before Beaman J. who delivered the following judgment in the plaintiffs' favour :—

BEAMAN, J. :—All the material facts are admitted. It appears that the defendants bought from one Alberti, a Hamburg merchant, certain goods which were shipped in the Hansa Line's S. S. *Lichtenfels* for Bombay. Alberti drew a bill on the defendants against the goods and shipping documents, and the plaintiffs discounted the bill in the ordinary course and obtained the shipping documents from Alberti. The transaction between Alberti and the defendants was C. I. F. C. I. in the ordinary form, and the plaintiff bank sent the bill out to its Bombay branch for acceptance by the defendants.

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On the 20th of July 1914 the bill, with the shipping documents accompanying, was presented to the defendants and duly accepted by them. The steamer *Lichtenfels* reached Bombay just before the outbreak of war. She put to sea hurriedly and took shelter in the neutral port of Marmagoa, where she has since been lying. The bill matured on the 22nd of August 1914, that is to say, eighteen days after the declaration of war. The plaintiffs now sue to recover the amount of the bill accepted by the defendants and the defendants' contention is that this being a qualified acceptance and the accepted condition not having been complied with, they are not liable. In other words, the defendants contend that owing to the outbreak of war and the King's Proclamation of the 5th of August 1914, published in Bombay on the 7th of August 1914, the shipping documents had become mere wastepaper and were no longer any consideration for the acceptance. Further, their accepting them would have amounted to a contravention of the Royal Proclamation and exposed the defendants to pains and penalties. The shipping documents consisted of the bills of lading which were in the circumstances naturally German bills of lading, an English policy of insurance and the invoice.

These, I think, are all the material facts which need be stated, and upon them I am asked to answer such questions of law as have been suggested by the learned counsel on both sides. I have listened very attentively to the arguments addressed to me on behalf of the defendants, because, from the moment all the admitted facts were stated, it certainly seemed to me as though the material question of law hardly admitted of doubt or argument at all.

First, I must point out that the foundation of the defence, namely, that the acceptance was a qualified acceptance, is not borne out by the bill itself except to this extent that

the payment is restricted to a particular place. There is nothing whatever in the acceptance by the defendants to support the contention that they had set up a condition that the shipping documents were to be delivered to them as a condition precedent for paying the bill. This can only be argued inferentially from the fact that the bill itself is drawn as it would naturally be drawn against the goods. Were that not so, the drawee would not be in a position to know why he was called upon to pay the bill. But, on the face of the bill itself, there is no qualified acceptance at all except in the one particular I have stated. My attention has been drawn to the cases of *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.*<sup>(1)</sup> and *Duncan, Fox & Co. v. Schrempft & Bonke*<sup>(2)</sup>, recently decided in the English Courts; and the defendants have argued upon these cases that the principles to which they give expression should be extended so as to cover a case of the kind with which I am dealing. But it appears to me that the facts are very easily distinguishable and that the law laid down in those cases would not necessarily apply to such facts as those with which I have here to deal. For a very little reflection upon what really happens in transactions of this kind and an analysis of the legal rights and relations thereon arising between parties situated as the plaintiffs and the defendants are here situated would, I think, show that very different principles of law need here to be applied. A discounting bank is only analogically (and that too by a very loose analogy) in the same position which a seller occupies to his buyer. What really occurs in transactions of this kind in normal conditions is that the bank to facilitate commercial dealings advances the price of the goods bought to the seller on the pledge of the shipping documents in anticipation of the said price being repaid to them by the

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(1) [1915] 2 K. B. 379.

(2) [1915] 3 K. B. 355.

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buyer. The bank has no desire to traffic in commodities of this kind and takes the shipping documents merely as a pledge to be handed over as soon as the buyer of the goods covered thereby has paid the price which the bank, in the first instance, has advanced to the seller. That being the course of transactions, it is clear that immediately a bill is thus drawn upon the purchaser by the vendor in favour of the discounting bank, the intention of all the parties is that the moment the bill is accepted the contractual relations with reference to the goods at any rate should be directly re-established as between the buyer and the seller and the bank should disappear from the dealing. The bill is in form an order to the buyer to pay to the bank against the goods supplied by his seller in fulfilment of a contract entered into between them, and the part the bank plays is, as I have said, really no more than that of the conduit pipe for the price, reimbursing itself, of course, for the accommodation thus afforded by discount. In every such case it appears to me that the law has long been clearly established and is in no way affected by the abnormal conditions brought into play by the outbreak of the European war. The bank as endorsee for value presents the bill to the defendants in Bombay accompanied by the shipping documents and the defendants thereon accept the bill. In the case before me they have introduced no exception of the kind upon which their entire defence is based. They are, therefore, clearly liable to pay, even apart from the delivery to them of the shipping documents. But even had such an exception been made, it still appears to me that the law long ago settled in such cases as those of *Robinson v. Reynolds*<sup>(1)</sup> and *Leather v. Simpson*<sup>(2)</sup> would govern the parties in the present case. The bank being an endorsee for value in all cases of the kind has really

<sup>(1)</sup> (1841) 2 Q. B. 196.

<sup>(2)</sup> (1871) L. R. 11 Eq. 398.

nothing to do with the validity or commercial value of the documents deposited with it as a pledge. It is not called upon to guarantee the validity of such documents. All that it is required to do is not to be privy itself to any fraud upon the acceptor. No allegation of that kind is made in the present case. The acceptors in this case were perfectly well aware of the contents of the shipping documents and the nature of their business transactions with Alberti at Hamburgh. They accepted unconditionally the obligation to repay the monies advanced really on their account by the bank to Alberti before the war broke out. The defendants accepted that obligation again before the war broke out and with full knowledge of the contents of the shipping documents with which they would later be supplied. There was, therefore, no deception or misrepresentation on the part of the bank; and the mere fact that, under the Proclamation of the 7th of August 1914, those shipping documents proved to be of little value to the defendants is, as far as I can see, no answer at all in law to the plaintiffs' claim. In these circumstances, I must hold that the defendants are liable to the plaintiffs for the full amount of the present claim.

I would only add that if I am wrong in this statement of the law, I do not think that the alternative case suggested, rather than insisted upon, by the plaintiffs would avail them at all.

There must be a decree for the plaintiffs for Rs. 1,048-5-4 with interest at six per cent. per annum from the 1st of October 1915 to this day. Costs and interest on judgment at six per cent. per annum.

The defendants appealed.

*Jinnah*, for appellants:—The bill of exchange was drawn against the shipping documents. The plaintiffs bought the bill with knowledge of its contents. The defendants accepted the bill against the documents.

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The acceptance was, therefore, qualified and conditional. On the outbreak of war the defendants could not accept goods from the alien enemy—they could not therefore validly accept the tender of the documents—a *fortiori* the plaintiffs could not legally tender the documents: see the Royal Proclamation, dated 5th August 1914 and subsequently published in Bombay, “warning persons not to obtain from the German Empire any goods”. Moreover, the shipper having taken the bill of lading to his own order or his assigns had virtually retained the property in the goods though they were shipped under a contract with the buyer; and acceptance of the goods on payment of the money would be a violation of the prohibition against entering into a new commercial contract with or for the benefit of any person resident, carrying on business, or being in the German Empire. Acceptance of the documents would be entering into an obligation to deal with the goods on a German ship: see *Mirabita v. Imperial Ottoman Bank*<sup>(1)</sup> and *Nissim Isaac Bekhor v. Haji Sultanali Shastary & Co.*<sup>(2)</sup>.

*Strangman with Campbell*, for respondents:—Acceptance of the bill of exchange is unqualified save as to place. The Proclamation relied on by the defendants does not make it illegal to pay nor does it prohibit the plaintiffs from making tender of the documents. The Bank does not guarantee the genuineness or validity of the documents: *Robinson v. Reynolds*<sup>(3)</sup> and *Leather v. Simpson*<sup>(4)</sup>. The Proclamation of 5th August 1914 should be read in the light of the subsequent explanatory announcement of the Treasury, on 22nd August 1914, and Press Note of the Bombay Government on 28th August 1914. In any event at the date of

(1) (1873) 3 Ex. D. 164.

(3) (1841) 2 Q. B. 196.

(2) (1915) 40 Bom. 11.

(4) (1871) L. R. 11 Eq. 398.

the suit the defendants could have taken delivery of the goods as the British Government had made arrangements by which the consignees of cargo by the S. S. *Litchenfels* could obtain delivery thereof: see Government Notification No. 1428 W., dated 12th December 1914.

*Jinnah* replied.

C. A. V.

SCOTT, C. J.:—The plaintiffs are a British Bank carrying on business in Bombay. The defendants are a firm of merchants, British subjects, carrying on business also in Bombay. On the 24th June 1914, George Alberti, a German, resident in Hamburgh, drew a bill of exchange upon the defendants in favour of the plaintiffs for £65-0-6 payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be drawn upon the defendants against 50 bales of goods bearing a certain mark per S. S. *Lichtenfels*, a German steamer. The plaintiffs allege, and it is not disputed, that the bill was purchased by them in London for its full value and sent out to the plaintiffs in Bombay. It was presented to the defendants for acceptance with the shipping documents relating to the bales of goods mentioned in the bill. It was accepted on the 20th July 1914 payable at the office of the plaintiffs in Bombay. The bill, therefore, would fall due for payment on the 22nd August. The S. S. *Lichtenfels* reached Bombay just before the outbreak of war and in order to evade capture left Bombay and took shelter in the neutral port of Marmagoa where she has since been lying. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. This suit was filed on the 30th September 1915, and it has

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been alleged in the plaint that the British Government had made arrangements by which consignees of cargo per *S. S. Lichtenfels* can obtain delivery, and the plaintiffs averred their readiness and willingness to hand over the documents against payment of the amount due under the bill.

The defence is contained in paragraph 4 of the written statement. It is to the following effect—that the documents consist of an invoice signed by an alien enemy, a bill of lading signed by the Captain of a German steamer with a blank endorsement thereon by an alien enemy, and an open policy of insurance of the North China Insurance Company countersigned by a German firm; and the defendants submit that the acceptance was a qualified acceptance subject to the condition that the documents should be tendered to the defendants by the plaintiffs and that the defendants should be put in a position to get the delivery of the goods referred to in the bill of lading on C. I. F. C. I. terms. They admit the presentation of the bill for payment on due date but submit that war having broken out in the meantime and in view of the Royal Proclamation issued on the 5th August 1914 and the Ordinances and Orders issued by the British and Indian Governments, the defendants were precluded from accepting the shipping documents tendered, against which the payment of the bill was asked for, and that consequently it became impossible for the plaintiffs to perform their part of the contract subject to which the defendants accepted the bill of exchange.

The Proclamation relied upon was published in Simla on the 10th of August 1914 and in Bombay on the 13th of August. It warns all persons not to obtain from the German Empire any goods, wares or merchandise, or obtain the same from any person resident, carrying on business, or being therein; nor to trade

in any goods, wares or merchandis  coming from the said Empire, or from any person resident, carrying on business, or being therein ; nor to enter into any new commercial, financial, or other contract with or for the benefit of any person resident, carrying on business, or being in the said Empire. By a Proclamation, dated the 12th December 1914, all British subjects residing or carrying on business in British India were authorised to make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners resident in an enemy country. At the time of suit, therefore, the plaintiffs were in a position to tender documents to the defendants under which the latter would be able to get delivery of the goods referred to therein.

The plaintiffs contend that the defendants' acceptance was unconditional and that, as the shipping documents for the goods mentioned in the bill of exchange were tendered at the time of presentation for payment, they are entitled to payment according to the terms of the bill and the acceptance.

They rely upon the cases of *Robinson v. Reynolds*<sup>(1)</sup>, *Thiedemann v. Goldschmidt*<sup>(2)</sup> and *Leather v. Simpson*<sup>(3)</sup>, all cases of bills drawn against bills of lading found to be forged and presented by indorsees for value. It is doubtful whether these cases can be used in favour of a party to a negotiable instrument. The plaintiffs here are the payees for whose protection the bill of exchange was drawn.

The law applicable to the case is contained in sections 32 and 43 of the Negotiable Instruments Act. Section 32 provides :—“ In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound

<sup>(1)</sup> (1841) 2 Q. B. 196.

<sup>(2)</sup> (1859) 1 D. F. & J. 4.

<sup>(3)</sup> (1871) L. R. 11 Eq. 398.

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to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand"; and section 43 provides:—"A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction."

The drawee's acceptance here may be regarded from two points of view. The plaintiffs say it is an unqualified and absolute acceptance as the acceptor has added no qualifying words. The acceptor says it is qualified being drawn on him against goods and he need not pay till he is put in a position to receive the goods.

From either point of view the plaintiffs are entitled to succeed. If the acceptance was unqualified the defendants were bound to pay on due date, as Beaman J. said "they accepted unconditionally the obligation to repay the moneys advanced really on their account by the Bank to Alberti before the war broke out,"—if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation of December whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports. Time is not of the essence and the claim of the plaintiffs may be enforced so long as it is not barred by limitation: see *Smith v. Vertue*<sup>(1)</sup>.

It was contended on the authority of *Mirabita v. Imperial Ottoman Bank*<sup>(2)</sup> that the property had not passed to the defendants who would not be entitled to claim the goods from the S. S. *Lichtenfels* as owners. But it is stated by Cotton L. J. in the case cited that

<sup>(1)</sup> (1860) 30 L. J. C. P. 56.

<sup>(2)</sup> (1878) 3 Ex. D. 164.

“if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price vest in him.” That is precisely the case here. The vendor dealt with the plaintiffs and drew the bill of exchange in their favour only to secure the contract price which was to be treated in the defendants’ accounts as paid to the vendor : therefore on payment to the plaintiffs the defendants can claim the goods.

The fact that by the declaration of war the German ship-owner’s contract became void is not conclusive of the case as it was in *Esposito v. Bowden*<sup>(1)</sup>, followed in the recent case of *Arnhold, Karberg & Co. v. Blythe & Co.*<sup>(2)</sup>. The contract here was between the British acceptor and the British payee subject possibly to a condition which might be fulfilled after due date. All that was necessary for the fulfilment of the condition alleged was a license to take delivery from the enemy ship. That license was conferred by the Proclamation of the 12th December 1914. The Proclamation is not retrospectively operative for the purpose of validating a contract rendered invalid by the war, but operates to permit performance before it is too late of the condition alleged. The consideration for the acceptance therefore did not fail.

As soon as the last-mentioned Proclamation was notified the plaintiffs were, to use the terms of the 4th issue, in a position to make a valid tender of the documents relating to the goods. There must be a decree for the plaintiffs. The plaintiffs’ suit was only filed, however, on the 30th September 1915. We think that a fair order regarding interest on the amount of the bill of exchange sued on will be that it should only

(1) (1857) 27 L. J. Q. B. 17.

(2) (1915) 60 Solicitors’ Journal 156.

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run from that date though it must not be inferred from this that the plaintiffs would not, in our opinion, be entitled to succeed but for the Proclamation of December. Subject to this variation, we affirm the decree and dismiss the appeal with costs.

Solicitors for appellants : Messrs. *Daphtary, Fareira & Diwan.*

Solicitors for respondents : Messrs. *Crawford, Brown & Co.*

*Appeal dismissed.*

G. G. N.

### CRIMINAL REVISION.

*Before Mr. Justice Batchelor and Mr. Justice Shah.*

IN RE JIVRAJ DHANJI.\*

1917.

March 14.

*City of Bombay Municipal Act (Bombay Act III of 1888), sections 418 and 461, clause (o)†—Bye-law for weights and measures—Validity of the bye-law—Recognition of certain measures only, for standardization—All measures in use should be recognised—Measures of phara and pyli—New measures of maplo and mapli.*

\* Criminal Reference No. 5 of 1917.

† The material portions of the sections run as follows :—

SECTION 418. (1) The Commissioner shall from time to time provide such local standards of measure and weight as he deems requisite for the purpose of verification of weights and measures in use in the City, and shall make such arrangement as he shall think fit for the safe keeping of the said standards.

(2) The Commissioner shall also provide from time to time proper means for verifying weights and measures by comparison with the said standards and for stamping the weights and measures so verified.

SECTION 461. The corporation may from time to time make bye-laws, not inconsistent with this Act, with respect to the following matters, namely :—

(o) preventing the use in any market of false or defective weights, scales or measures, and publishing a price current.