

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

MARSHAL & Co. (PLAINTIFFS) v. NAGINCHAND FULCHAND (DEFENDANTS).^o

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July 24.

C. I. F. Contracts—Addition of C. I. to C. I. F. in indent form—Bill of Exchange presented along with shipping documents and accepted by the merchant in India—Goods shipped on an alien ship—War between the Governments of the shipper and the shipmaster—The alien ship seized as a prize—Bill not paid at maturity, the acceptor not receiving goods—Release of the alien ship and delivery of the goods to the acceptor—Acceptor refusing to pay interest and notarial charges held liable to pay the same—Bill of Exchange presented without shipping documents after the outbreak of war—Shipping documents becoming void after the outbreak of war—Consequent failure of consideration for the acceptance of the bill—Acceptance conditional—Non-liability of the acceptor to pay the principal amount of the bill, interest and notarial charges—The Indian Contract Act (IX of 1872), section 56—The Negotiable Instruments Act (XXVI of 1881), section 43.

The plaintiffs were merchants doing business at Glasgow. The defendants, merchants in Bombay, ordered through the plaintiffs' agent in Bombay, fifty cases of Aluminium circles to be delivered at Madras on C. I. F. C. I. terms. The first shipment was to be of fourteen cases, and the remaining ones of twelve cases each. The first consignment of fourteen cases was in due course received and paid for by the defendants. The second and third consignments of twelve cases each were shipped from a German port on the 16th and 25th July, 1914, respectively, on two German vessels S.S. "Barenfels" and S.S. "Kybfels," Hansa Line. The shipping documents in respect of the "Barenfels" goods were duly delivered to the defendants along with the bill of exchange which the defendants accepted on 31st July 1914. On the 9th October 1914, the plaintiffs drew another bill of exchange in respect of the "Kybfels" goods which the defendants accepted on the 10th November 1914. The shipping documents for the said goods were not however received by the defendants at the time of the acceptance of the bill, but were tendered by the plaintiffs sometime after the filing of the suit. The two bills became payable on the 2nd October 1914 and 12th January 1915 respectively, but were not met by the defendants by payment. War being declared between Great Britain and Germany, S.S. "Barenfels" was in August 1914 seized on the voyage as a prize and on her release by the prize Court allowed to proceed to Madras where she unloaded her cargo on 8th June 1915 when the defendants obtained possession of their goods

^oO. C. J. Suit No. 149 of 1915.

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on payment of the principal amount due under the first bill but not the interest from the date of maturity to the date of payment. The plaintiffs sued on 2nd February, 1915 to recover from the defendants (1) the interest due on the first bill from the date of maturity to the date of payment together with notarial charges, and (2) the amount due on the second bill with interest.

Held, (1) that under the first bill inasmuch as the defendants obtained all that they were entitled to obtain under the C. I. F. contract when the bill was presented to them for acceptance, that is to say, good shipping documents, the risk after the acceptance was entirely their own and that having refused payment on maturity they were liable to pay over-due interest after that date and the notarial charges incurred by the plaintiffs ;

(2) that under the second bill inasmuch as the bill of lading had become a void contract before it was tendered to the defendants, on the 10th November 1914, there was at that time a failure of consideration for the acceptance of the bill and they were not bound to pay at maturity.

Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co; Theodor Schneider & Co. v. Burgett & Newsam⁽¹⁾, followed.

It is an accepted principle of maritime law that all contracts of affreightment are put an end to by the outbreak of hostilities between the Governments of the shipper and the shipmaster.

Esposito v. Bowden⁽²⁾, followed.

SUIT to recover money.

The plaintiffs, Marshal and Co. were a firm of merchants carrying on business at Glasgow. The plaintiffs received orders for specified goods from Bombay and other places through their accredited agents on C. I. F. C. I. terms.

On the 18th April 1914, the defendants ordered through the firm of Abdul Kader Noorbhoy and Sons, the plaintiffs' agents in Bombay, fifty cases of Aluminium circles on C. I. F. terms and conditions set out in an indent form signed by the defendants. The said order was accepted by the plaintiffs, and the plaintiffs' agents communicated the acceptance to the defendants on or about the 10th May 1914. Under the aforesaid indent

⁽¹⁾ [1915] 2 K. B. 379.

⁽²⁾ (1857) 7 El. & Bl. 763.

the fifty cases were agreed to be shipped to Madras in four lots, the first lot was to be of fourteen cases to be shipped within four to six weeks from the date of acceptance of the order and the remaining three lots were to be of twelve cases each to be shipped at the interval of four weeks each.

The defendants accepted a bill of exchange drawn by the plaintiffs for Rs. 611-14-7 against the first shipment of fourteen cases, got delivery of the said goods and paid the amount of the said bill.

On the 30th July 1914, the defendants accepted the bill of exchange dated 16th July 1914 on the representation made by the plaintiffs' agent that the twelve cases referred to in the said bill of exchange had been shipped and that the same would be delivered to the defendants in or about the middle of August 1914 and before the due date of the said bill of exchange. The said twelve cases were shipped on board a German ship named "Barenfels." On the acceptance of the bill of exchange presented by the Hongkong and Shanghai Banking Corporation, the defendants received the bill of lading, the policy of insurance and the invoice. The bill became payable on the 2nd October 1914, but the defendants declined to pay the amount due thereunder as they did not receive the goods. Owing to the outbreak of war between Great Britain and Germany on the 4th August 1914, S. S. "Barenfels" was captured as a prize in the Mediterranean and taken to Alexandria. Eventually she was released by the prize Court, sent on her voyage to Madras, her original port of destination, and the defendants obtained possession of the goods. The defendants paid Rs. 4,461, being the equivalent of the principal amount of £294-10-0 under the bill on the 8th June 1915. The defendants, however, refused to pay interest between the date of maturity and the date of the taking of goods, and the usual notarial charges. Another

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shipment of twelve cases was put on board a German ship named "Kybfels" on 25th July 1914. On the 9th October 1914, the plaintiffs drew a bill of exchange in respect of the said goods for £294-10-0 against the defendants who accepted the same on 10th November 1914. At the time of acceptance of the said bill of exchange, no bill of lading or other document relating to the said cases was handed to the defendants but the same was promised to them. The bill became payable on the 12th January 1915, but the defendants declined to pay the amount under the bill.

The plaintiffs filed the present suit on 2nd February 1915 against the defendants to recover (1) Rs. 191-9-6 being the amount of interest under the first bill from the date of its maturity to the 8th June 1915, together with Rs. 10; notarial charges, and (2) Rs. 4,452-4-6 with interest due on the second bill. In their amended plaint the plaintiffs put forward an alternative case that in despatching goods they acted as the agents of and under the instructions of the defendants and that as such they claimed to be indemnified by the defendants in the sums sued for by them. The defendants contended, *inter alia*, that the acceptance of the bills of exchange by them was conditional, the condition being that the plaintiffs or their agents the Hongkong and Shanghai Banking Corporation should place the defendants in a position to demand and take delivery of the said goods, that in any event they were not liable on the second bill as the shipping documents were not delivered on the acceptance of the bill, nor tendered even afterwards. The defendants further denied that the plaintiffs acted as the agents of the defendants. The plaintiffs not only acted as principals, but got the shipping documents entered in their own name and to their own order with a view of not parting with the ownership of the goods until they received the price of the goods.

Some months after the filing of the suit, the plaintiffs tendered the shipping documents in respect of the "Kybfels" goods but the defendants refused to be bound by them.

Binning, with *Strangman*, for the plaintiffs.

Wadia, *Desai* and *Tarapore*, for the defendants.

BEAMAN, J. :—The plaintiffs, Messrs. Marshal & Co. of Glasgow, sue the defendants, Naginchand Fulchand a firm, upon accepted bills of exchange drawn by the plaintiffs upon the defendants in respect of two cargoes shipped on the Hansa Line "Barenfels" and Hansa Line "Kybfels"—terms C.I.F.C.I., goods Aluminium circles—date of shipment on "Barenfels", 15th July 1914—date of shipment on "Kybfels", 25th July 1914.

The plaintiffs' general allegation for the purposes of this suit is that they were never principals but merely defendants' agents for the purpose of these goods. That was not the form in which they originally brought the suit, and there cannot be the least doubt that they have had recourse to this line of attack as the result of a judgment recently delivered by the Chief Judge of the Small Cause Court. In my opinion, after hearing Mr. Binning's argument upon this point, the alternative case is entirely without foundation. I cannot discern any feature of agency or in the least resembling agency in the transactions between the plaintiffs and the defendants revealed by the evidence in the present case. The only agent in the matter was Abdul Kader and he was the plaintiffs', not the defendants', agent. Colour may always be given to forlorn hopes of this kind by the inclusion in the Indian indent forms of C.I. in addition to the C.I.F. universally used and understood throughout the commercial world. It is only necessary to look at the original plaint, the evidence of Abdul Kader and the invoice for the goods per S.S. "Kybfels"

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to see how unsubstantial the plaintiffs' contention is that they were, by some process altogether unexplained and inexplicable, as far as I can see, 'converted into defendants' agent. In truth, both the transactions are ordinary commercial dealings between principal and principal on C.I.F. terms and the additional C.I., I presume, is intended for the benefit of Abdul Kader. Whether it be or whether it be not would not affect my conclusion in the slightest degree that neither were the plaintiffs ever in fact defendants' agents nor ever thought themselves to be so until they were probably advised that their position as principals in a litigation of this kind was insecure. It is plain enough that, up to the 17th September 1914, the plaintiffs had a truer idea of their own rights and liabilities in these transactions than that of the legal advisers whom they then consulted. This change of front appears to have occurred between the 17th September and 9th October upon which date they resolved to send on the somewhat belated shipping documents relating to the "Kybfels" shipment of Aluminium circles and get the defendants' acceptance of the bill drawn against those goods. The points raised in the argument are points of very great interest and subtlety.

But before disposing of them it is necessary to clear the ground by dealing with and laying out of the case, the claim in respect of the shipment per S.S. "Barenfels" of the 16th July 1914. As to that, the position now appears to me to be simple and clear both in law and fact. The goods were duly shipped by the German steamer "Barenfels" which put to sea before the outbreak of war. The shipping documents, that is to say, the invoice, insurance policy and bill of lading were duly presented to the defendants, Naginchand Fulchand, in Bombay, along with the bill of exchange for acceptance on the 31st July 1914. The terms agreed

upon by the parties to these dealings were clearly D/A or acceptance against documents. The defendants duly accepted against these documents which were at that time in good order and all quite legal and valid. That being so the property in the goods thereon passed to the defendants and the plaintiffs disappear from the transaction. That is to say, they would have disappeared but for the happening of an untoward event and the subsequent refusal by the defendants to pay the bill on maturity. The "Barenfels" appears to have been captured in the Mediterranean and taken as prize into Alexandria. Eventually she was sent on her voyage to Madras, her original port of destination, and the defendants obtained possession of their goods. But they refused to pay the plaintiffs' interest between the date of maturity and the date of the taking of the goods as well as the small sum of Rs. 10, notarial charges. Having regard to the true nature of C.I.F. contracts about which I entertain no doubt, it appears to me that upon these minor heads the defendants have no case. They obtained all that they were entitled to obtain under the C.I.F. contract when the bill was presented to them for acceptance, that is to say, good shipping documents. They accepted against them and thereafter the risk was entirely their own and they were not entitled to refuse payment on maturity, and having refused payment on maturity they are clearly liable for overdue interest after that date. And that, I think, sufficiently disposes of the claim in this suit in respect of the first cargo.

The case is much more complicated with regard to the "Kybfels". There appears to be no doubt but that the shipping documents were duly obtained on the 25th and 31st July; that is to say, a German bill of lading on the 25th and an English policy of insurance on the 31st. Strictly speaking, that is all that the plaintiffs were required to do in the ordinary course of dealings

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under a C.I.F. contract, provided, of course, that they forthwith forward such shipping documents to their purchasers along with their bill to be accepted by the latter. The terms may be D/A or D/P. But in the present case there is no doubt that the understanding of the parties was that acceptance was to be against documents. Unfortunately long before these shipping documents could have reached the defendants in Bombay a state of war had broken out between His Britannic Majesty and the Empire of Germany. And the question then arises: What are the resultant legal rights and liabilities of parties under C.I.F. contracts situated as the plaintiffs and defendants were here? Speaking generally, we may adopt the judgment of Kennedy L. J. in the case of *Biddell Brothers v. E. Clemens Horst Company*⁽¹⁾, unqualifiedly approved in the House of Lords as finally and satisfactorily determining what is the course of business and what are the rights and obligations of parties to and under such C.I.F. contracts. The more delicate questions which have been argued here with considerable skill on behalf of the plaintiffs do not, however, arise under normal conditions but are dependent upon variations introduced by the existence of a state of war. Taking it as settled law that in the ordinary course of business a seller on C.I.F. terms is entitled to be prepaid by his buyer on presentation to the latter of valid and legal shipping documents, the question to be answered here is: How is that course of business affected by, and in the eye of the Courts by what rule should it be governed under, war conditions? In the first place what is to be examined is the effect of war upon contracts made between the subjects of belligerent States before war was declared. As a general legal proposition the Courts appear to have accepted this, that contracts entered into between

⁽¹⁾ [1911] 1 K. B. 934 at p. 954.

subjects of countries, which were at peace when the contracts were made, are not necessarily abrogated by the breaking out of hostilities between those countries. The general rule appears to be that unless the contracts are of a very special kind, the effect of war is not to avoid them totally but merely to suspend the remedies of one or other of the parties to them. Such contracts would doubtless remain in abeyance during the continuance of hostilities but upon their ceasing no good reason can be shown why the rights still enforceable should not be duly enforced, the Governments of the parties to such contracts having now re-established all peaceful and normal relations. But there are exceptions to be engrafted upon these general rules. Some of those depend upon the very special features of the contracts under consideration, and a better illustration perhaps could not be found than in the case, recently decided by Rowlatt J., of *Distington Hematite Iron Company, Limited v. Posschl & Co.*⁽¹⁾ The *ratio decidendi* in all cases of that kind is a rule of common sense rather than law and is referable to this dominating consideration that if the contract is of a kind requiring continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the continuance of a war, and further suspension of such mutual rights and obligations for an indefinite period going much beyond merely placing the contract in abeyance, the result in the eye of the law would be that the original contract is void inasmuch as taking it up upon cessation of hostilities would be something more than renewing it, would, in fact, be substituting for it an entirely new contract. A like rule would doubtless be applied to the case of partnerships between subjects of belligerent states and many other special cases might be given. The particular

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contracts, however, with which I am here concerned, seem to have been excepted in the earlier judgments of the Courts almost as matters of course and without reference to any special considerations of this kind. In his judgment in the case of *Esposito v. Bowden*⁽¹⁾, Willes J. lays it down as an accepted principle of the maritime law that all contracts of affreightment are put an end to, by the outbreak of hostilities between the Governments of the shipper and the ship-master. In all such cases, he adds that it is the duty of the shipper to unload his goods and of the master to find a new employment for his ship. Obviously, however, that would be quite impossible in a great number of cases under conditions such as those which subsisted at the time when the "Kybfels" took her cargo on board. Nor is it easy to say why a contract of affreightment should necessarily be put an end to by the outbreak of hostilities between the Government of the ship-master and the government of the port of its destination. Doubtless no captain could be expected in such circumstances to carry out a voyage at once and so far as his liability for freight money paid to him extends he would have the ordinary excuse excepted in almost every bill of lading that the fault was not his but referable to restraint of Princes. As far then as the mere obligation of a shipper, who has received freight to make the voyage, extends, this may be a case which, in the eye of the law, becomes impossible of fulfilment, and time being of its essence, the result is not merely to suspend but entirely to avoid the contract. It may, however, be doubted whether the holder of the bills of lading, as evidence of such contract of affreightment, would not still retain some valuable rights against the ship-master upon the cessation of hostilities, and it can hardly be said that looking upon the bill of lading rather as a

⁽¹⁾ (1857) 7 El. & Bl. 763.

receipt for goods than as imposing any continuous obligation upon the captain of a ship to carry them to a distant port, that document would still not retain some commercial value. Willes J. indicated a doubt whether the same sweeping legal proposition would be applicable to cases such as the case of the "Barenfels" in which the voyage had been commenced before the outbreak of hostilities. In principle I confess I can see no distinction between the two classes of cases though the practical results might be different. In point of fact the whole of the "Barenfels" cargo was duly received at the port of destination so far as this consignee was concerned after her capture as prize by the British authorities. But left to herself there can be no question that the "Barenfels" would not have continued her voyage or taken the risk of capture by the enemy. So that, viewed merely from the theoretico-legal stand-point, I cannot myself say that any valid distinction can be drawn between cases in which the voyage had, and cases in which it had not, begun. Indeed in the latter case the remedy suggested by the learned Judge must, where the ship is still lying in a hostile port, be entirely beyond the reach of the shipper. Taking it, however, to be settled law that contracts of affreightment, entered into in time of peace between the subjects of countries which go to war while part at least of that contract is executory, are thereby immediately and finally avoided, it is to be seen how that rule would operate upon parties to C.I.F. contracts one of whom is obliged to supply the other with shipping documents before that other can be compelled to repay him his outlay. It is not uncommonly said that in cases of this kind, which are partly no doubt cases under the general law of contract, but partly and I think I may say in a much larger degree, governed by special War Proclamations prohibiting trade with the enemy, viewed

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in the first light the rights of parties fall to be regulated under sections 32 and 43 of the Negotiable Instruments Act. I think, however, that those sections so far from exhausting do not really touch the point of difficulty with which I am dealing. The consideration for the acceptance of the bill of exchange under C.I.F. contracts D/A according to all mercantile usage and as is now established and well-understood law, is no more than the production of good shipping documents, and if those documents are good shipping documents and valid at the time they are proffered to the buyer, then the fact that they become invalidated and void by the subsequent outbreak of war, so making the case appear to fall under section 43 of the Negotiable Instruments Act, would have, as far as I can see, neither logical nor legal bearing upon the already established rights and liabilities of the parties to C.I.F. contracts. For it is clear that eliminating all war conditions, once the buyer has accepted the bill of lading and the insurance policy and has paid against them, his only remedy is under the one or the other of these contracts and he has no right to recover against the vendor should the terms of either of them be infringed either by the ship-master or the Insurance Company. It is only, I suppose, when, upon arrival, the goods themselves should be found to be of an entirely different or inferior quality from the goods ordered, or not be the goods ordered, or in extreme cases of that kind, that a case for damages against the C.I.F. seller might be made out. I am not, however, concerned with circumstances of that kind. What I wish to emphasize is that the insurance, freight and invoice papers, all at the time in due order, legal and valid, having been tendered to the buyer and the buyer having accepted the seller's bill against them, the matter is, so far as the C.I.F. contract may be taken to run its normal course, finally concluded between the seller and buyer. This hardly needs illustration, as,

for example, in the not uncommon case of the ship having actually become a total loss before the shipping documents reached the buyer. Nevertheless no one shall say that he is thereby absolved from his liability to the seller on C.I.F. terms, nor has any such contention, I think, ever been raised. But one would have thought that so common and staring a feature of contracts of this kind would have led to a little more careful and searching analysis of the extent to which the same principle governs or is modified by the sudden introduction of an entirely new element such as the outbreak of war and the terms of War Proclamations against trading with the enemy. We have no greater authority on this branch of the law than Scrutton L. J., who, as Scrutton J., decided the very interesting and instructive case, referred to him by arbitrators, of *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.*; *Theodor Schneider & Co. v. Burgett & Newsam*⁽¹⁾. There Scrutton L. J. lays it down that the key to many of the difficulties arising in C.I.F. contracts is, in his opinion, to hold firmly before the mind this point that in law what is contracted to be sold and paid for is not the goods but the shipping documents. And he goes on to say that it is not essential that if the goods do not arrive, the buyer should have a good claim on one of the contracts, but it is essential, in his opinion, that before the buyer can be asked to accept the bills drawn against such shipping documents, the contracts he is thus asked to take over substituting himself thereunder for his seller should be good legal contracts such as he may lawfully enter into. Upon the first point, the Court of Appeal consisting of Swinfen Eady L. J., Bankes L. J. and Warrington L. J. dissented from Scrutton J. while, upon the second point, they unanimously agreed with him. This has caused me the

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greater difficulty because while upon analysis I should have thought that there was little doubt that the first dictum for all practical purposes was correct, I think there was as little doubt that the second was at least arguable. But in all cases of this kind which are cases of contracts governed by the Royal Proclamation, there can be very little doubt that what would have been comparatively easy perhaps to analyse and understand had become somewhat confused by the literal adhesion of Courts to every word of that somewhat loosely phrased and sweeping Proclamation. For example, in such a case as that of *Duncan Fox & Co. v. Schrempft & Bonke*⁽¹⁾, there can be no doubt but that the decision was mainly influenced by the consideration that the bills of lading were for a voyage terminating at a German port, and, therefore, the Judges had no hesitation whatever in finding that as between the plaintiff and defendant in the suit before them, compelling the defendant to accept against such shipping documents would be the same thing as compelling him to trade with the enemy. The goods were clearly, in the opinion of the Court, in course of transmission to an enemy port. Doubtless, if they had got there and had been of service, use and comfort to the enemy, any mercantile transaction which could have contributed to that result would have been within the spirit as well as the letter of the Proclamation. But when we come to analyse what has really occurred in all dealings of this kind notwithstanding the ease with which the result is brought within the actual language of the Proclamation, it may, I think, be fairly debateable whether that Proclamation has, in law any decisive bearing upon the rights established between the seller and buyer, situated as were the seller and buyer in *Duncan Fox & Co. v. Schrempft & Bonke*⁽¹⁾. For in all

⁽¹⁾ [1915] 1 K. B. 365.

cases of that kind there is really a double contract, the latter part of which may or may not be trading with the enemy but has really nothing to do with the contract originally entered into between the parties before the war broke out. Thus, before the outbreak of hostilities, let us say, A buys from B certain goods to be consigned to a destined port. B procures the goods at his own cost, puts them on a vessel, obtains the shipping documents and sends his bill to A for the price C.I.F. and along with his bill he sends the shipping documents. Now, here is a complete contract between A and B, and certainly B, the seller, can have no intention of trading with the enemy or trading with anybody but A. A may have had it in his mind to trade with the enemy or anybody else, but what concern is that of B's? B is out of his money for the goods purchased on C.I.F. terms in the course of business for A and by his order. Unfortunately, war breaks out and the destination of the ship happens to be an enemy port and A desires to avoid the contract (although he might, in the particular case before the Court, very easily have deflected the course of the voyage or unloaded his goods), relying upon the language of the King's Proclamation, and seeks to be released from his lawful obligation to B, upon the ground that he had the unlawful intention himself of trading with the enemy which he cannot now carry out. So in a recent Bombay case, that of *Nissim Isaac Behchor v. Haji Sultanal Shastary & Co.*⁽¹⁾, where the goods were apparently to be shipped from Germany, although the point which Macleod J. discussed in the greater part of his judgment was entirely different, he appears to have entertained no doubt that the presentation of such shipping documents was no consideration for the acceptance of the seller's bill. He dismisses the subject in a sentence, merely saying that he cannot understand

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how such operations could be said not to violate the provisions of the Proclamation. The matter has here to be very much more minutely considered and it does not appear to me to admit of such easy and, if I may say without offence, summary treatment. It is quite true that having regard to the current of authorities in England, the words of the Proclamation have been enforced with rigorous exactness to the letter, which in such cases as *Rex v. Oppenheimer*⁽¹⁾, certainly seems to go very much beyond the spirit. That was the case of one prosecuted criminally under the Proclamation for obtaining goods, wares and merchandise from the enemy's country; and it was found as a fact that the goods he obtained were his own although he doubtless obtained them from the enemy's country. That was held to be no justification in law. He was convicted at the Assize and the Court of Appeal felt no doubt in confirming the conviction. Yet one would have thought that looking to the spirit and intention of the Proclamation the words relied upon by the trial Judge Atkin J. for his ruling of law, which was approved upon the same phrase in the Court of Appeal, would, in their natural context, mean obtaining goods, wares or merchandise of and from the enemy's country. For it could hardly be contended that, if the thing could be done, obtaining one's absolute property, which had happened to be left at the outbreak of war in the enemy's country, from that country, could either in theory or practice, in letter or spirit, be a violation of the King's Proclamation. That Proclamation has been extended in every direction to matters which are not strictly speaking within the ordinary meaning of trade and commercial relations, so as to prohibit every kind of intercourse between the King's subjects and the enemy. But all those extensions have been upon a very definite

(1) (1915) 31 T. L. R. 369.

principle which is entirely different from the rigorous application of the words in the manner and sense in which they were enforced in *Oppenheimer's case*⁽¹⁾. And if we look at the scheme of the Proclamation as a whole, particularly with reference to the preamble, we find that it rests mainly upon the old common law, and after reciting the dates upon which war broke out, or a state of war existed between His Britannic Majesty's Dominions and those of the German Empire and the Dual Monarchy, respectively, it goes on to say that it is contrary to law for any person, &c., to trade with or have commercial transactions with, &c. Then follow many specific prohibitions, of which those contained in the seventh clause are by far the widest and cover almost every conceivable case of illegitimate trading or having commercial relations with the enemy. Still, speaking generally and having regard to the object of the Proclamation, I should suppose that it was intended to prohibit actual trading or the institution or maintenance of commercial relations with the enemy, on and after the date of the existence of a state of war. It is true that special reference is made to certain continuing contractual relations, particularly those under life insurance policies and the like. But I should doubt whether merely taking over a suspended contract, the completion of which, if it ever could be completed, could not by any means augment the enemy's wealth or increase his efficiency, would be any contravention of the principle, at any rate, of this Proclamation. It would be otherwise if in order to effect the completion of such a contract it were necessary to do anything to the detriment or diminution of His Britannic Majesty's resources and the corresponding increase of those of the enemy. And if that be the true scope and intention of the Proclamation, then it would be a

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question of some nicety whether in the case of contracts made between an Englishman and a German before the outbreak of the war, the taking over by another Englishman, from the original contracting Englishman of that contract, would in itself constitute disobedience to the King's orders, that is to say, if the party so taking over were content to await the termination of the war on the chance of then obtaining his rights, and particularly where the contract was of such a character, that only the executory part must of necessity advantage the King's subject and correspondingly diminish the resources of the enemy.

Referring now to the second dictum of Scrutton J. in the trial of *Arnhold Karberg Company's case*⁽¹⁾, the learned Judge has laid it down that, in C. I. F. dealings, while it is not essential that the buyer should have a good claim on the contracts sent him by the seller, it is essential that those contracts should be of a kind into which he could lawfully enter. In this and all cognate cases the logical infirmity of the conclusion never appears to have given the English Courts any trouble, even assuming that it was present to the minds of the Judges. For, in all cases of the kind the contracts of which Scrutton J. was speaking are contracts not between the C. I. F. seller and buyer, but really between the C. I. F. buyer and third parties, that is to say, the ship-master and the insurance company; and those contracts at the time they are made are made by the seller in pursuance of the ordinary course of business, not for himself, but for his buyer with the intention of passing them on to him as soon as they can be carried. In a very large number of cases, bills of lading are made out in the name of the buyer, directly, and in all such cases the contract between himself and the ship-master is concluded on the day of

⁽¹⁾ [1915] 2 K. B. 379.

the execution. It appears to me in theory to make not the least difference, though their transmission may be delayed by days or weeks or according to distances even by months. Is it then a case of compelling buyers to enter into contractual relations with the enemy subjects in contravention of the King's Proclamation? This appears to me to be the real ground of the leading English decisions on the point. Quite apart from any consideration of policy, quite apart from any consideration whether or not what remains to be done under the contract, assuming that it can possibly be done, would be to the advantage of the enemy country, the Courts appear to have gone upon what looks like rather a sentimental reason, namely, that in this peculiar form of dealing, the buyer is not to be forced into contractual relations with an enemy, before his contract with his seller is completed. But upon the line of reasoning I am following, there need be no such renewal or substitution of such contractual relations where the bill of lading and the insurance policy are in the first place taken out in the name of the buyer even for a moment. With the taking out and execution of them, all the contractual relations which ever will exist between the buyer, the ship-master and the insurance company, are already in existence. And the mere forwarding of the documents makes no substantial alteration in what has already passed. Doubtless there would be a difference if after the outbreak of hostilities the seller had taken out an insurance policy with the enemy or received a bill of lading from the master of an enemy ship. Both these contracts would have been in their inception illegal, and not such contracts as could be proffered by way of consideration for the payment of the price of the merchandise. When Scrutton J. says that contracts entered into by the seller, on behalf of the buyer, meaning of course the ordinary shipping documents, must be contracts which the latter

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could lawfully enter into, it appears to me that it is only in the case I have suggested that that dictum could invariably be applied. For, even where the bill of lading is not taken out in the name of the buyer but in that of the seller, according to the decision of Kennedy L. J. in *Biddell's case*⁽¹⁾ the property in the goods still passes from the moment of shipment, and the only effect of the seller getting the shipping documents in his own name is that he retains a *jus disponendi* until he has endorsed them over to the buyer. But this *jus disponendi* is something different from what the law means by property in the goods, and there can be no question, I think, but that even where the seller has so obtained the shipping documents in his own name, as soon as he afterwards hands them over to the buyer, the property in the goods in law must be taken to have passed from the moment of shipment. The transfer of the documents by endorsement either direct to the buyer or in blank and so conveyed to the buyer merely eliminates the *jus disponendi* which up to that moment the seller had retained. And I am now to examine whether in such a case there is any real renewal of a contract between the buyer and him who, in the first instance, executed the shipping documents to the seller. I have already shown that this need not necessarily be so. Is it in fact ever so within the meaning of the proclamation? I confess I entertain grave doubts. It is not for himself that the seller has made these contracts. He is to take no benefit under them. He merely acts pursuant to the ordinary course of business in this matter, for and on behalf of the buyer, and the substitution of the real for the apparent relation seems to me to leave the matter exactly where it was at the time the shipping documents were obtained.

⁽¹⁾ [1911] 1 K. B. 934.

This brings me to my last criticism and clear statement of what I conceive to be the logical infirmity underlying all these cases. It turns upon an exact view of the importance of the time element. If I am correct in the first part of my judgment, and I have no doubt I am, in holding that a tender of shipping documents which at the time they are so tendered are in all respects good and in order, finally completes the contractual relations up till then existing between the seller and the buyer, so far, that is to say, as any obligation of performance still rests on the seller, it is obvious that where war is imminent according to the decisions of the English Courts everything depends upon the precise moment of time at which the shipping documents passed into the hands of the buyer. If they come into his possession as good contracts before the declaration of hostilities then the decision in such cases as *Arnhold Karberg & Company's case*⁽¹⁾ certainly could not apply to them and the fact that war broke out almost immediately afterwards would not, in my opinion, absolve the buyer from his obligation to pay the bill which he had accepted against these shipping documents. But if that be so, then it is clear that in effect, from the first, no logical ground could be assigned for drawing a distinction in the rights and obligations of the parties to each other in C. I. F. dealings according as the shipping documents, all good legal contracts at the time, either were or may happen to come into the hands of the buyer before or after some wholly unexpected supervening condition has rendered them void. In a case, for example, such as that with which I am dealing, suppose the parties had been within three days' post of each other, the plaintiffs might have sent the shipping documents relating to the cargo aboard the "Kybfels" to the

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defendants just one day before the outbreak of the war. In every other respect the relative position of the parties would have been exactly the same. Every fact would have remained unaltered. And if the defendants had accepted against these documents on the 3rd August, I do not see how they could have been heard to say afterwards that they were not obliged to pay on maturity. It is clear, therefore, that so far as the first and by far the most important stage of these transactions is concerned, there was nothing wrong with the documents which the plaintiffs obtained, nor would their transmission to, and acceptance by, the defendants at any point of time before the 4th August 1914, have enabled them to say that by substituting the real and intended contractual relations between themselves and the shipping master, for those which nominally appeared in the first instance on the papers between the plaintiffs and the shipping master they were entering into contractual relations with the enemy or in any other sense contravening the words or intention of the King's Proclamation. Now, see how finely these two conflicting results can be brought together in point of time. What would have been in all respects perfectly good consideration on Wednesday, let us say, may be a very bad consideration, according to the decisions of the English Courts, on Thursday; and between these two days we may still further narrow the line of distinction. I confess that when the subject is approached in this way the substantial ground upon which most of the English cases rest seems to me to become extremely infirm and insecure. In the first place because, as I have said, it is not really a case of a person entering into new contractual relations with an enemy, as is always assumed in the judgments of the English Courts. Rightly analysed they were, and were intended to be, his contractual relations and no body else's from the moment that the papers of the contract

were duly executed, and, secondly, because I do not think that if that be really so, it can be a case of the kind contemplated by section 56 of the Indian Contract Act. It is not according to my understanding, as between the seller and the buyer on C. I. F. terms, the case of a contract good at its inception becoming void by the supervening of new conditions; for as between the seller and the buyer with whom alone I am concerned, the particular contracts under examination do not exist and never have existed, and I have already shown that this must be so, the commonest cases which may occur often introducing no special difficulties due to the outbreak of war. In no C. I. F. contract that I have heard of, once the shipping documents had been obtained in good order and made over to the buyer, has the seller any further concern with them whatever. But it is said that he must tender, as consideration for the buyer accepting his bill, valid, legal and existing contracts. I really do not see that that consists with the theory of C. I. F. dealings. Certainly they must have been at the time they were made legal and valid contracts. Else, doubtless, they would form no consideration whatever for the buyer parting with his money before the receipt of the goods, but once they fulfil those conditions they are in themselves the consideration for which the buyer pays his money; and the fact that owing to the length of time required for their transmission and the supervening of altogether unexpected and paramount conditions, they have unfortunately become void before they reached the buyer, appears to me on a strict analysis to be a question as much between him and the other parties to those contracts, and one from which the seller is entirely excluded as though the supervening of those conditions had been postponed till, say, one minute after the shipping documents had come into the buyer's hands. If the true view of the law be that the seller

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has completed all that he was bound to do under a C. I. F. contract by procuring for the buyer valid and legal bills of lading and a valid and legal insurance, then it may be argued, as it has been argued here, and I think that the weight of logic and reason is in favour of that argument, that he has done all that he was required to do under the contract and is entitled to claim immediate payment. He cannot have immediate payment owing to intervening conditions of space and time which prevents the documents being instantly transferred to the buyer; but for the sake of theoretical exactness I should have thought that that consideration might have been ignored and the result regarded as being wholly unaffected by it. Such, however, does not appear to have been the view of the Courts in England. They appear to have thought that the contract between the shipper and the insurance company and the buyer was in the first instance a contract between the shipper and the insurance company and the seller, and that if it should unfortunately become void before it could reach the buyer, the resultant loss was to be the seller's and not the buyer's. But that presupposes that which is not in fact true, namely, that these contracts are really in the first instance contracts made for the benefit and advantage of the seller and that there is a real transference and in substance the making of a new real contract, between the buyer and those who in the first instance contracted with his seller. It is there, I think, the fallacy underlying all these decisions can be exposed.

I have endeavoured to lay this matter out in some detail because I wish in the first instance to disentangle the decision of cases of this kind from considerations drawn from section 43 of the Negotiable Instruments Act and section 56 of the Indian Contract Act. Next, because I do not think that the cardinal principle upon

which all these cases have to be decided is really affected in the slightest degree by the prohibition of the King's Proclamation. And lastly, because in certain of the more recent cases there seems to me to have been considerable confusion of principles, some drawn from the common law and some from the King's Proclamation to which Courts have referred as the ground of their decisions. That has made the subject difficult and complicated. But it does appear to me to have been too hastily assumed that in every case of this kind buyers are at liberty to resile from their contracts when loss is inevitable, merely because the shipping documents, perfectly good at the time they were made, have become void as between those who are the true parties to them, and in this manner to shift what ought to be the buyer's loss to the seller.

Such are my own views at present and expressed with the greatest deference to English authority upon this somewhat vexed question. Nevertheless I should hesitate to give effect to them in a case of this kind which is exactly covered by a decision of the English Court of Appeal. There is in fact no point which I can discover upon which it would have been differentiated upon principle from the decision in *Arnhold Karberg & Company's case*⁽¹⁾. That case was decided by the most eminent authority in England upon this particular branch of law. His opinion was confirmed by three eminent Judges of appeal; and it would seem to be merely inviting appeal and further expense if I were to set up my own opinion against such high authority. Considering the case undistinguishable in all essentials from *Arnhold Karberg & Company's case*⁽¹⁾, I think it would really be to the interest of all parties to hold myself bound by that decision, and, therefore, to say that inasmuch as the bill of lading had become a void

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contract before it was tendered to the defendants on the 10th November 1914, there was at the time a failure of consideration for the acceptance of the bill of exchange and they were, therefore, not bound to pay at maturity. It has been contended that their acceptance was unconditional and, therefore, in any event they were bound to pay. That cannot be. The plaintiffs have never denied that they were bound to supply the ordinary shipping documents according to the custom of C. I. F. dealings. They cannot contend that the defendants would have been equally bound to pay at maturity if they had not supplied them with any shipping documents at all. That would have been a case of making a negotiable instrument without any consideration whatever. So it is clear, and that is the footing upon which the case has been mainly argued, that the plaintiffs were bound to supply the defendants with good, legal contracts under the heads I. and F.

I think I have sufficiently indicated my own opinion, had the matter been *res integra*, that the plaintiffs had completely met their obligations and would have been entitled to immediate payment on maturity. But in view of the great authority the other way, I shall not give effect to what I have tentatively expressed in the form of a reasoned criticism of the matter but shall abide by the current of decisions in the English Courts. I must, therefore, hold that in respect of the shipments of Aluminium circles per S. S. "Kybfels" the defendants were justified in refusing to pay at maturity and that the plaintiffs in respect of so much of their claim have no case, and the suit must, therefore, be dismissed with all costs, save and except such costs as may on taxation be held to have been incurred over so much of the claim, viz., Rs. 201, as in the first part of this judgment I have decreed to the plaintiffs. Those costs the plaintiffs will have from the defendants.

The amount deposited by the defendants in Court, viz., Rs. 4,001, the defendants to have liberty to withdraw.

Solicitors for the plaintiff: Messrs. *Little & Co.*

Solicitor for the defendant: Mr. *M. B. Chothia.*

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ORIGINAL CIVIL.

Before Mr. Justice Kemp.

ABDUL RAZAK ABDUL GAFOOR (PLAINTIFF) v. MAHOMED HUSSEIN DALVI (DEFENDANT).^o

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October 10.

Contract—The Indian Contract Act (IX of 1872), sections 65, 73—Breach of promise to marry, parties being Konkani Mahomedans—Suit for damages for breach of promise to marry as under English law not maintainable under Mahomedan law.

Under Mahomedan law in a suit for breach of promise to marry the plaintiff cannot recover the damages peculiar to an action for breach of promise under the English law.

The action under the English law though based upon the hypothesis of a broken contract is attended with some of the special consequences of a personal wrong and damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner. This anomaly should not be introduced in the case of Mahomedans whose views of the relationship of the married parties to one another are so different to those of persons governed by the English law.

SUIT for damages for breach of promise to marry.

Abdul Razak bin Abdul Gafoor the plaintiff and Mahomed Hussein the defendant were Konkani Mahomedans of Bombay residing at Mahim.

In July 1915, the defendant agreed to give his daughter Mariambai a minor in marriage to the