Present : Ennis A.C.J. and Porter J. 1923.

DARLEY, BUTLER & CO. *v.* SAHEED *et al.*

173—D. C. Colombo, 4,168.

Insurance—C. i. f. and c. contract—Indent for goods from abroad—No policy of insurance tendered to indentor—Is defendant bound to accept the goods ?

The commercial traveller of a foreign firm saw the defendants and entered into a bargain with them for the purchase of certain goods at a price agreed upon. Thereafter, the defendants entered into a c. i. f. and c. contract with the plaintiff company, whereby the plaintiffs agreed to indent for these goods from the foreign firm for the defendants. The goods duly arrived in Colombo and were tendered to the defendants, but no policy of insurance was tendered.

Held, that the defendants were bound to accept the goods, even though no policy of insurance was tendered.

" There is no reason why the plaintiffs should be regarded as other than agents of the defendants for the purpose of accepting a policy of insurance, and even if they had not accepted a policy of insurance under a c. i. f. contract of sale, the defendants would have to indemnify them, if, in the exercise of their discretion they accepted the goods as their agents."

Hayley & Kenny v. Kudhoos[1] distinguished.

THE facts are set out on the judgment of the District Judge (A. St. V. Jayewardene, Esq.) :—

The indent contract entered into by these parties is contained in the document D 1, and on this indent the defendants ordered, through the plaintiffs, seven pieces of flowered art silk and two varieties of crepe georgette—six and four pieces of each. The goods arrived in Colombo in two shipments, and the defendants took delivery of what arrived by the first shipment, viz., the seven pieces of flowered art silk and one piece each out of the crepe georgette. The balance of the goods, consisting of eight pieces of crepe georgette, arrived later, but the defendants refused to take delivery of these. Subsequently the eight pieces were sold, and after giving defendants credit for the price realized by the sale, the plaintiffs claim the balance of the price which includes, besides the cost of the goods, the charges for freight, insurance, and commission, the goods having been purchased on c. i. f. terms. To this claim the defendants raised various defences which were embodied in the issues framed, but at the end of the trial their counsel abandoned all these defences except the one which is contained in the fifth issue, which is as follows :—

'Did the plaintiffs duly tender to defendants the proper policy of insurance and the other necessary shipping documents in respect of the goods indented for ?

[1] *(1922) 24 N. L. R. 267.*

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As corrollaries to issue 5, the plaintiffs' counsel suggested, and I adopted, two issues marked 5 (*b*) and 5 (*c*), which are as follows :—

5 (*b*) Were the plaintiffs bound to tender any policy of insurance or any other shipping document ?

5 (*c*) And even if they were so bound, can the defendants disclaim liability to pay the amount claimed in the plaint ?

Mr. Hayley's contention for the plaintiffs is that the contract between the parties was a contract of agency, and that if the plaintiffs failed to insure the goods as defendants' agents, the defendants could only recover such damages as might result to them by such failure, and that the defendants were not entitled to reject the goods which had arrived safely and had been offered to them ; this they could do only if the parties were vendors and purchasers on a c. i. f. contract. All the terms of the contract, he urged, should be read together, and that, as by the indent in question, the defendants had expressly agreed to take delivery of such of the goods as are delivered from the vessel or vessels in which they are shipped ; the absence of a policy of insurance or of the other shipping documents would not justify their refusal to take delivery of goods arriving at Colombo. He also contended that the defendants had waived their right to have a policy of insurance tendered to them, both by the course of business obtaining between the parties and by the defendants' conduct after the landing of the goods when they acknowledged their liability to pay for the goods. All the questions involved in the case were ably argued by counsel on both sides. It is well-established law that in an ordinary c. i. f. contract the vendor is bound to tender a policy of insurance with the shipping documents ; he cannot withhold the documents and tender the goods.

To decide the main question whether the indent contract D 1 created a contract of agency or of sale, it is necessary to consider its terms, and in order to properly appreciate the terms, it is necessary to understand how indent contracts are entered into, and how business is transacted under them. In some cases the local merchant approaches the commission agent to ascertain whether he could obtain the goods he requires from a foreign country. The commission agent communicates the offer to the manufacturer or supplier by cable or by letter ; if the latter express his readiness to supply the goods, and the parties agree upon the price, an indent contract is entered into c. i. f. or f. o. b., and the commission agent also stipulates for a commission. In other cases the manufacturer's travelling agent arranges all the preliminaries, *i.e.*, the goods and their price, and then the contract is entered into between the indentor and the commission agent.

The commission agent then orders the goods referred to in the indent according to the terms of the contract. The goods are shipped and insured by the manufacturer or supplier who obtains a bill of lading and a policy of insurance which, with an invoice and a bill of exchange which includes the cost of the goods, charges for insurance, and freight, are sent to a local bank which is to deliver the shipping documents on acceptance or payment of the bill. If the indentor pays the amount due from him at once, either by giving a promissory note or in cash, the bill of lading or a disposal order is given to him to enable him to pay duty and remove the goods from the Customs. If the goods are not paid for, the commission agent proceeds to warehouse the goods at the risk and expense of the indentor, and to act under the terms of the contract. In these cases the commission agent does not benefit or suffer by the fall or rise in prices. He is only entitled to the commission

agreed upon. There are also cases where the commission agent buys the goods for himself and sells them to the local trader. In such cases he stands to gain or lose according to the variations in price.

In the present case the goods were selected and the prices fixed between the manufacturer's travelling agent and the defendants. The manufacturers were E. Cambefort & Co. of Lyons, and the defendants were fully aware of this fact. Thereafter, the defendants entered into the indent contract with the plaintiffs to import the goods they had arranged to purchase. The order was forwarded by the plaintiffs to Messrs. Cambefort & Co. at Lyons, who executed it, and sent the goods to Colombo. All this has been clearly proved. The plaintiffs say that a bill of lading and a policy of insurance were sent for these goods, but these documents are not now forthcoming and are said to be lost. I have no doubt that a bill of lading and a policy of insurance must have been sent out to the defendants, but, however that may be, it has not been proved that a policy of insurance was ever tendered to the defendants. The policies of insurance produced in respect of a large number of other indent contracts, of which X 4 is a sample, show that the manufacturers or suppliers effect the insurance and obtain the policy, and that the plaintiffs have nothing to do with the insurance of the goods. In doing so the manufacturers are not acting as the agents of the plaintiffs, for they are the vendors to the plaintiffs. The policy is endorsed by them and sent to a bank in Ceylon to be delivered on payment for the goods. This I find is the usual procedure, and was the procedure followed in executing the order on indent D 1. In this case, I also find that the plaintiffs were not to receive anything more than the commission stipulated for, and they would not be benefited or suffer if the prices fell or rose. But Mr. Koch contended, relying on some statements made in cross-examination by Mr. Foucar, who was at the time this indent contract was entered into, manager of the plaintiffs' import department, that in cases where the price is fixed the plaintiffs take the risk of the rise or fall in prices, but Mr. Foucar was there referring to orders which plaintiffs booked for themselves. Mr. Foucar, it is clear from his cross-examination, was speaking of three classes of contracts. First, where a limit is fixed and the plaintiffs have to buy at the best possible or lowest possible price; second, where the price is fixed after communication with the manufacturers (as in this case) or shippers; and third, where the price is fixed, but plaintiffs book the order for themselves and are in reality vendors to the indentors. The third class of case is very rare, and it is only in such cases that the plaintiffs take the risk of the rise or fall in prices. But, in the second class of case, the prices being fixed by the manufacturers or suppliers, the latter take all the risks, and the plaintiffs do not gain or lose by the variation in price. Mr. Foucar's evidence, it may be, is not very clear, but that is due to the nature of the cross-examination. Mr. Koch's contention is not in my opinion borne out by Mr. Foucar's evidence or the facts of this case. What I have said with regard to the policy of insurance applies to the bill of lading, see X 5. To come to the terms of this indent now, they are as follows:—

(1) The undersigned agree with Darley, Butler & Co. to indent for goods through them to be imported on his/their account and risk, and to accept delivery of such goods as are delivered from the vessel or vessels by which they are shipped, or shall be found in the packages in ordinary marketable condition, or shall not have been seized by the Customs authorities.

(2) Any special dates for shipment to be stated in indent.

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(3) C. i. f. c. means cost, insurance, freight, and all commission included, goods delivered into lighters, Colombo Harbour.

(4) F. o. b. c. means free on board steamer at port of shipment with all commission included.

(5) For goods purchased at first cost or f. o. b. 1 per cent. is to be charged by Darley & Butler, London, or the purchasing agent, and commission in Colombo according to terms agreed upon by Darley, Butler & Co., packing, freight, and all other charges in addition as customary. For goods purchased on c. i. f. terms the prices shall include London commission, and commission will be charged by Darley, Butler & Co. in Colombo as may be agreed upon.

(6) Payment to be made in cash or approved promissory note or notes at the option of Darley, Butler & Co., interest to be charged at the bank rate of interest.

(7) If for any reason delivery shall not be taken, the goods shall be detained at the risk of the indentor, who shall pay warehouse rent, fire insurance, and all other customary charges, with interest added at 12 per cent. per annum, and shall not be entitled to compensation for short deliveries or for any defect or damage, or Darley, Butler & Co. shall be free to either resell the goods on their own or indentor's account, and claim on indentor for any loss sustained, together with the additional payment of interest upon the value of the goods at 12 per cent. per annum from date on which delivery ought to have been taken.

(8) If the shipment or execution of any particular indent is to be suspended or delayed, notice has to be given by the indentor in writing. Suspension or delay can only be agreed to, provided the shipper elects to execute the balance of the order at the rate booked, and should the shipper refuse to suspend or delay shipments, the indentor will be held to his original contract.

(9) Indents can only be considered cancelled after notice has been given by the indentor in writing, and such cancellation has been agreed to by the manufacturer or his agent. In cases where compensation is demanded by the shipper for cancellation, the expenses to be borne by the indentor.

(10) All indents taken by travellers are at indentor's risk, and all claims arising therefrom owing to wrong execution can only be settled on full credit being received from the manufacturers or their agents, and Darley, Butler & Co. shall not be held liable for any non-settlement of claim on the part of the manufacturer.

(11) If any dispute should arise as to the quality or condition of the goods or any dispute whatsoever, it is agreed to refer same to arbitration of two merchants, one to be named by Darley, Butler & Co., as representing the manufacturers or suppliers of the goods, and one by the indentor, with power to the said arbitrator, in case they shall disagree, to appoint an umpire, and the decree of such arbitrators or umpire, as the case may be, shall be final and conclusive. If by mutual consent one arbitrator only has been appointed, his award shall also be final. In the event of neglect or refusal of either party to name an arbitrator within fourteen days, the other to appoint both.

(12) Should the goods from any unavoidable cause, such as strikes of operatives, dock labourers, carriers, seamen, accidents to railways or other conveyances, breakdown of machinery, war, or any *force majeure*, be shipped later than shipment dates contracted for, there shall be no right to cancel the indents or any portion thereof, nor shall there be any claim for loss of market by reason of such late shipments.

Then follow in writing the description of the goods ordered and their prices and the terms, "*Price per yard nett, c. i. f. and c., Colombo, usual terms.*" The clauses which I have marked (1) to (12) are in print, and clause (1) clearly creates a contract of agency between the parties; and I can see no term in any of the subsequent clauses, nor has defendants' counsel pointed out any which alters the position of the plaintiffs from that of agents to that of vendors.

Clause (11), the arbitration clause, is very significant, and emphasizes the position of the plaintiffs as mere agents. By it the parties agree to refer not only disputes as to quality or condition of the goods, but any dispute whatsoever which would necessarily include the failure to insure the goods and obtain a proper policy, and any such dispute is not to be regarded as one between the defendants and the plaintiffs but between the defendants and the manufacturers and suppliers whom the plaintiffs are to represent. This is a clear indication that in such a matter the personal liability of the plaintiffs is excluded, and that the plaintiffs would not be personally liable for not taking out a policy of insurance or obtaining a bill of lading. But defendants' counsel relies on the rule of law that a commission agent who imports goods for another becomes in law a vendor for otherwise there would be no vendor to pass the property in the goods to the purchaser, as there is no privity of contract between the manufacturer or supplier of the goods who is generally not known to the purchaser. See *Ireland v. Livingston*,[1] *Armstrong v. Stokes*,[2] and the local case of *Majeed v. Weiss*.[3] This rule does not appear to me to be an absolute one, and when there is a contract between the parties, their rights and obligations must be decided by a consideration of the terms of the contract especially, where as here, the commission agent is not resident in a foreign country, but resides in the same place as the purchaser. Mr. Koch basing his argument on the leading case of *Ireland v. Livingston* (*supra*) further contends that granting that the contract is one of agency, still at certain stages of the transaction, the commission agent becomes a vendor especially for the purpose of passing the property in the goods, and as such vendor it is his duty to obtain the necessary shipping documents, the bill of lading, and a policy of insurance. He also relies on *Hayley & Kenny v. Abdul Kudhoos* (*supra*) which was recently decided by the Supreme Court, and purports to follow *Ireland v. Livingston* (*supra*).

Now in *Ireland v. Livingston* (*supra*) the facts were that the defendant entered into a contract with the plaintiff, Ireland, who was at Mauritius to ship him 500 tons of sugar at 26*s.* 9*d.* to cover freight and insurance, "50 tons more or less of no moment." The plaintiff could only procure at the price mentioned about 400 tons, which he shipped to the defendant who refused to accept the cargo. Lord Blackburn (then Blackburn J.), in the course of his judgment advising the House of

[1] (*1872*) *L. R. 5 H. L. 395.*

[2] *L. R. 7 Q. B. 598.*

[3] (*1921*) *22 N. L. R. 449.*

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Lords, considered the position of a commission agent in two sets of circumstances :—

(1) Where the consignor or commission agent is a person who has contracted to supply goods at an agreed price c. f. and i. and charged no commission : Each party takes upon himself the risk of the rise or fall in price, and there is no contract of agency, and the parties are vendor and purchaser.

(2) Where the consignor or commission agent does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order : In such a case he is bound to get the goods as cheaply as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are to be forwarded by the consignor with the addition of commission. The fixing of a maximum limit shows that the order is of this nature. The limit fixed may be made to include cost, freight, and insurance.

In the latter case, said Lord Blackburn : "It is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplied bricks to a person building a house and the owner of that house. The property in the brick passes from the brickmaker to the builder and when they are built into the wall to the owner of that wall, and just so the property in the goods pass from the country producer to the commission merchant and then when the goods are shipped from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage *in transitu.* "I, therefore, perfectly agree with the opinion expressed by Baron Martin in the Court below that the present is a contract between vendor and vendee, but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission, but that this superadded sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could."

Lord Blackburn does not consider the case we have here where the price is fixed so as to include cost, insurance, freight, and commission, and the price is fixed not as a limit, but as the price at which the manufacturer or supplier undertakes to sell the goods c. i. f., and the commission agent, who is in the same place as the principal, is not affected by the rise or fall in prices and is not benefited by it. He earns his commission and that alone. He does not ship the goods, he does not

affect the insurance, and does not therefore obtain the bill of lading or the policy of insurance. All that is done by the shipper, the manufacturer, or supplier. So that the facts on which the observations of Lord Blackburn are based are not the same as the facts we have to deal with in this case. However, *in respect of* the second set of facts considered by him, Lord Blackburn says that the commission agent becomes a vendor in contemplation of law at two stages: First, when the agent executing an order ships goods to his principal; and second, for the purpose of exercising the right to stoppage *in transitu*.

This view did not commend itself to the House of Lords, and Lord Chelmsford, who delivered the main judgment, said: "I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the plaintiffs might in some respects be looked upon as vendors to the defendants, so as to give them a right of stoppage *in transitu*. But the transaction began as a contract of agency, and in that light I am disposed to consider it." A similar question arose in another case (*Cassaboglou v. Gibb* [1]) which Mr. Hayley cited, where the facts were as follows:—The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. The defendants upon such orders purchased and shipped to the plaintiff opium which they erroneously supposed to be of the description ordered, but which was really of an inferior quality. The plaintiff sought to recover from the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendant, on the ground that the relation between the defendants as commission agents and himself was that of vendor and vendee of the opium, but the Court held that the relation of the parties was that of principal and agent, and that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff, in consequence of the opium not being of the description ordered. I find that the case went before the Court of Appeal, see (*1883*) *11 Q. B. D. 797*, and Lord Esher (then Brett M.R.) and Fry L.J. commented on and explained the judgment of Lord Blackburn in *Ireland v. Livingston* (*supra*), Lord Esher said: "Mr. Pollard cited, however, in support of his contention, the authority of Lord Blackburn in his work on *Sales, at page 214*, and the case of *Ireland v. Livingston* (*supra*), and on a question relating to agency he could not have cited a higher authority, but Lord Blackburn has not said that as long as the contract of principal and agent is executory, the principal can sue the agent and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters, one with regard to the theory of passing the property in the goods, and the other as to the power of stopping the goods *in transitu*, and as to those two matters, he has said with reference to the first of them, that if the foreign commission agent has purchased the goods which he was ordered to purchase and has put them on board consigned to his principal, by that appropriation the property in the goods passed from the commission agent to the principal as if such agent were a vendor. Then, as regards the power to stop *in transitu* Lord Blackburn has said that if the commission agent abroad is bound to pay for the goods to the foreign seller of whom he bought them and, if after he has shipped them to his principal, such agent has not been paid, and his principal is insolvent, so that the foreign seller could only have the agent to look to for payment, the Courts have held that such agent may stop the goods *in transitu* as if

[1] (*1882*) *L. R. 9 Q. B. D. 220*

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he were a vendor, or in the position of a vendor. And that that is how it is understood as pointed out in *Benjamin on Sales, 2nd ed., p. 689*, where it is said 'stoppage *in transitu* is so highly favoured on account of its intrinsic justice, that it has been extended by the Courts to *quasi* vendors, to persons in a position similar to that of vendors.' But it is only said that the commission agent is to be as if he was a vendor who has bought for his principal the goods which were ordered was not the case here. . . . .

" It is obvious to my mind that the contract of principal and agent is never turned into a contract of vendor and puchaser for the purpose of settling the damages for the breach of duty of the agent."

Fry L.J. said : " Was the contract of principal and agent merged into that of vendor and purchaser ? This must be a question of fact, and as a matter of fact there was no such contract. It is said, however, that there must be such a contract inferred for two reasons : First, because otherwise the property in the goods would not pass to the English merchant for whom the agent abroad bought them. In my judgment the property would pass. If the article was specific it would pass by the purchase, and if not specific, but was appropriated by the agent for his principal, it would pass by virtue of the appropriation. The other reason for inferring the relation of vendor and purchaser was said to be because the foreign agent who has bought for his principal has the right of stoppage *in transitu*, but that, in my opinion, is no reason for such inference. Since the leading case on the subject, namely, that of *Lickbarrow v. Mason*[1] the person who stops goods *in transitu* must be a consignor, but there are numerous cases in which the right has been allowed of stopping *in transitu* without the relationship existing of vendor and purchaser," and referring to *Ireland v. Livingston* (*supra*) he observed : " No doubt in that case Lord Blackburn uses strong language, and says that ' the legal effect of the transaction is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage *in transitu*,' but by the legal effect of the transaction he means the legal effect of an analogous contract to that of a contract of purchase and sale. It is important also to observe that Lord Chelmsford in that case puts the matter so as to exclude the existence of any contract of purchase and sale. He says : ' I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the plaintiffs might in some respects be looked upon as vendors to the defendants, so as to give them a right of stoppage *in transitu*.' Therefore in such a case as the present, there is, in fact, no contract of vendor and purchaser, *Benjamin on Sales, 6th ed. p. 812*, referring to these two cases, says : " The dictum of Lord Blackburn was explained by the Court of Appeal in *Cassaboglou v. Gibb*.[2] Both Brett M. R. and Fry L.J. stated the contract between a commission agent and his foreign principal to be not one of seller and buyer *ab initio*, but a contract analogous thereto placing the commission agent after shipment of the goods in the position of a *quasi* vendor for certain purposes. Accordingly they held that upon breach of an executory contract by a commission agent to supply his correspondent with goods of a specific description, the damages were to be assessed as between principal and agent and not as between seller and buyer." Viewed in the light of these observations, the judgment of Lord Blackburn is not a strong authority, if an authority at all, for the propositions in support of which Mr. Koch has invoked

[1] *Sm. L. C., 8th ed., 753.* [2] *(1883) 11 Q. B. D. 797.*

it, and in the case of a commission agent shipping goods the relation of vendor and purchaser need not necessarily arise at any stage of the transactions prior to shipment. For, according to the opinion of Fry L.J. : " If the article was specific, it (the property) would pass by the purchase, and if not specific, but was appropriated by the agent for his principal if would pass by such appropriation " and it is necessary to constitute the agent a vendor for the purpose. This would be specially so in a case where the agent residing in the same place as the principal purchases goods in a foreign country, as has happened in this case. I find that indent contracts very similar to those in use in Ceylon are in common use in India, at Bombay, Calcutta, and Madras, and I think, it will be of interest and importance to ascertain how they have been construed there. I have come across three cases in which the question involved here has been discussed. The first case I would refer to, the earliest in date, is *Mohamedally Ebrahim Pirkhan v. Scheller Dasogne & Co.*[1] The indent in that case was addressed to the defendants by the plaintiff and the first clause was as follows :—" I hereby request you to instruct your agents to purchase for me (if possible) the under-mentioned goods on my account and risk upon the terms stated below." Among the other clauses which are similar to those to be found in the indent D 1 was one which required the goods to be insured on the best terms possible : " You are to be free of all responsibilities as regards this insurance." There was no express reference to c. i. f. terms, but the mode of payment was " draft at 30 days' sight with documents attached. On one of these indents the plaintiff ordered some zinc. The order was accepted through the defendants, by a firm in France, but was not executed within the stipulated time, and the manufacturers in France asked for an extension of time or for the cancellation of the indent. The plaintiff, when the time for fulfilment of the contract had expired wrote to the defendants informing them that he would buy similar goods at Bombay on the defendant's account and did so, and brought that action to recover the difference in the price as damages. The defendants pleaded that they were merely agents for the plaintiff and denied liability. The plaintiff, on the other hand, contended that the indent and certain other documents constituted a contract of sale by the defendants on behalf of the manufacturers of zinc in France. The Court held that the contract was one of agency, and that the action could not be maintained. Sargent C. J., delivering the judgment of the Court, referred to the judgment of Lord Blackburn in *Ireland v. Livingston* (*supra*), and said that : " That case came in succession before the Court of Queen's Bench, the Exchequer Chamber, and the House of Lords. The defendant was a merchant carrying on business in Liverpool, and instructed the plaintiffs, commission agents at Mauritius, to purchase for him 500 tons of sugar to cover cost, freight, and insurance 50 tons more or less of no moment ' if it enables you to get a suitable vessel." The plaintiffs were unable to execute the orders at the maximum price fixed, except to the extent of 393 tons, and having shipped these to England, drew bills against the shipment which were refused acceptance by the defendant, on the ground that a shipment of less than 500 was not a compliance with the order, and he was, therefore, not obliged to accept the sugar, or honour the draft. An examination of the judgments of the twelve Judges, who took part at some stage or other in the action, shows that, with the exception of Baron Martin, the transaction between the parties was regarded by the Judges as one between principal and agent, and was construed as such, and this was the view finally adopted by the House of Lords in deciding the case for the plaintiffs.

[1] *(1889) 13 Bom. 470.*

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Baron Martin, however, who had been a member of the Exchequer Chamber, and was also summoned to give his opinion in the House of Lords, held the relationship of the parties to be one of vendor and vendee, and construed the instructions on that assumption in favour of the defendants. Mr. Justice Blackburn, in delivering his opinion in the House of Lords, whilst agreeing with the majority of the Judges, made the following remarks which were much relied on by Counsel for the plaintiff." He then cited the passage from the judgment of Lord Blackburn which I have already cited and continued: "These remarks of Mr. Justice Blackburn, which were doubtless open to misconstruction, were afterwards the subject of discussion in *Cassaboglou v. Gibb* (*supra*), where the plaintiff, a merchant in London, sought to make the defendants, commission agents in Hong Kong, liable as vendors for the difference between the market value of the opium ordered by the plaintiff and that actually sent. But the Court held that the plaintiff could not treat the defendants as vendors, but only as agent who would be liable only for the actual loss sustained by the plaintiff through their negligence, and which was admittedly less than what the plaintiff claimed. Brett M.R. says: 'Lord Blackburn has not said that as long as the contract of principal and agent is executory, the principal can sue the agent, and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters only; one with regard to the theory of passing the property of the goods and the other as to the power of stopping the goods *in transitu*.' The same view was taken by Lord Justice Fry. This must be regarded as a conclusive authority that the relationship between the parties continues throughout, except for certain special purposes, to be one of principal and agent." That case clearly holds that the relationship between the parties to an indent contract continues through, except for certain special purposes, to be one of principal and agent. In the next case *Paul Beier v. Chotatal Jewards*[1] also, the construction of an indent contract was involved. But the Court refused to decide whether the contract between the parties was one of agency or of sale, as the terms of the contract were equivocal. The contract in one of its clauses referred to the parties as sellers and buyers, and no commission was provided for. The case was decided on the trade customs prevailing in Bombay. The last Indian case I shall refer to is the case of *Meredith v. Abdulla Sahib*,[2] and is the most important of the three. In that case the indent was in the usual form. It was addressed to Messrs. J. H. Elliott & Co., Ltd., whose liquidator the plaintiff was, and began thus: "Dear Sirs, I/we hereby request you to purchase and ship for me/us, if possible, the under-mentioned goods on my/our account and risk upon the terms stated below." The goods were purchased on c. i. f. and c. terms, and were shipped on board a German vessel, but, owing to the outbreak of war and transhipment at various ports, they arrived at Madras about two years after they had been shipped. The defendants refused to pay for and take delivery of the goods as the contract of affreightment was dissolved by war and the plaintiff could not tender them valid shipping documents, viz., a bill of lading. The Court held that, although in a case between an ordinary vendor and purchaser, the purchaser would have been entitled to reject the goods according to the judgment of the English Court of Appeal in *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.*,[3] still in that case as the contract created by the indent was one of agency and the goods were imported on account and risk of the defendant, the latter was not entitled to refuse to take delivery of the goods.

[1] (*1904*) *30 Bom. 1.* [2] (*1918*) *41 Mad. 1060.*

[3] (*1916*) *1 K. B. 495.*

Wallis C.J., in the course of his judgment, said : " Now, it is well settled that where goods are purchased in this way from a commission agent under a c. i. f. contract, though the agent is regarded for some purposes as a principal just as any other vendor under a c. i. f. contract, yet the relation of principal and agent still subsists. *Ireland v. Livingston* (*supra*), in which Blackburn J. (as he then was), gave his well-known explanation of the nature of a c. i. f. contract when advising the House of Lords, was a case of this kind and was disposed of by the House of Lords on a principle of the law of agency, viz., that, as the error arose from the principal's indistinctness of expression, he must bear the loss. The first case in which such an agent was assimilated to a vendor was *Feise v. Wray*,[1] where he was allowed to exercise the right of stoppage *in transitu* in respect of goods which he had bought and paid for, and the true principal would appear to be that the assimilation is only to be carried so far as is necessary to give business efficacy to the transaction. This I gather to have been the view of Brett M.R. and Fry L.J. in *Cassaboglou v. Gibb* (*supra*) where Lord Blackburn's observations in *Ireland v. Livingston* (*supra*) were considered. Otherwise the relation remains one of principal and agent as held in the last mentioned case in assessing damages." Then, after referring to the case of *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.* (*supra*), which he distinguished from the case before him, he continued : " In this case there is the express stipulation that the goods are to be purchased and supplied on the buyer's account and risk. The whole transaction being thus at the risk of the buyer, I see no reason for relieving him from the risk of what has happened. Even, if the word 'risk' were not mentioned in the contract, I think a special contract throwing this risk on the buyer could be inferred from the fact that the goods were to be purchased and shipped 'on account of' the buyer pursuant to the principle embodied in section 222 of the Indian Contract Act that—

> " 'The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him.'

" To throw these goods on the agent's hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to, and inconsistent with, the general principles of the law of agency."

I need hardly say that section 222 of the Indian Contract Act declares the common law on the point. Spencer J. agreed with the Chief Justice, and, in the course of his judgment, gave certain grounds for holding that the contract was of one agency, which apply with peculiar force to this case.

That case is, as I said, of importance and has a special bearing in the case before me. For although under the contract goods were purchased on c. i. f. terms, the commission agent was relieved of the necessity of tendering the shipping documents, and the purchaser was held bound to take delivery of goods that had arrived without such documents, as the contract between the parties was a contract of agency.

Lastly, I come to the local case of *Hayley & Kenny v. Kudhoos* (*supra*) recently decided by the Supreme Court. Mr. Koch relies very strongly on that case. There the plaintiffs who were commission agents sued the indentor on an indent contract which was headed " Indent for c. i. f. import business," and the terms of the indent are not materially different from those of the indent in this case. In the plaint they alleged that the plaintiffs had sold and the defendant had bought

[1] *(1802) 3 East 93.*

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12½ tons of galvanized plain sheets at £73. 4*s*. per ton c. i. f. and c., for which the defendant had agreed to pay on arrival. This the defendants failed to do, and the plaintiffs sold the goods in terms of the contract and claimed the difference between the contract price and the price realized at the sale. The defence was the same as the one raised here, that the plaintiff failed to tender a proper policy of insurance which is an essential requirement of a c. i. f. contract.

The plaintiffs contended there just as the plaintiffs are doing here, that the indent created a contract of agency,, and that the defendant is not entitled to repudiate the contract, and that his right is to recover any damages sustained by him by the plaintiffs' failure to insure the goods or tender a proper policy of insurance. The Supreme Court (De Sampayo and Schneider JJ.) held that the plaintiffs were to all intents and purposes in the position of vendors, and so bound to tender a proper policy of insurance, and as they had failed to do so they could not maintain the action. Mr. Hayley has attempted to distinguish that case from the present one on various grounds. The Supreme Court adopted the reasoning of Lord Blackburn in *Ireland v. Livingston* (*supra*), and gave three grounds for holding that the commission agents, the plaintiffs were in the position of vendors to the indentor, the defendant. The grounds are—

1st.—That the goods had been ordered at a fixed price, and the plaintiffs would again if they could procure the goods at a less price and would suffer loss if they had to pay a higher price. Thus the gain or loss would be the plaintiffs own. This is inconsistent with the essence of a contract of agency as explained by Lord Blackburn.

2nd.—The consignors in England were unknown to the defendant, and unless the plaintiffs are treated as vendors to the defendants there would be no one to pass the property in the goods.

3rd.—The plaintiffs themselves took up the position of vendors, for they alleged in the plaint that they had sold, and the defendant had bought the goods in question.

The last ground has no application to the present case. For the plaint is carefully worded, and avoids all reference to selling and buying. This, however, was the main ground of decision, as Their Lordships thought that the allegation that the plaintiffs sold and the defendant bought concluded all controversy on the question.

The first ground, too, has no application to the facts of this case as found by me. The rise or fall in price would not affect the plaintiffs. The gain or loss is borne by the manufacturer or supplier, and the plaintiffs are entitled to their commission and that alone. Then remains the second or the general ground that as the consignors in Europe were wholly unknown to the defendants, the plaintiffs must, "*to all intents and purposes,*" be regarded as the vendors to the defendants, as otherwise there would be no one from whom the property in the goods could pass to the defendants, and that, being vendors, the plaintiffs were bound to observe the obligations of a c. i. f. contract. To my mind, if I may say so respectfully, the proposition is stated too broadly. The case of *Cassaboglou v. Gibb* (*supra*), which explained Lord Blackburn's observations in *Ireland v. Livingston* (*supra*), does not appear to have been cited at the argument, and the attention of the Court had also not been invited to the Indian case I have referred to. As pointed out by Lord Esher in *Cassaboglou v. Gibb* (*supra*) the commission agent is treated by Lord Blackburn as being in a position analogous to that of a *quasi* vendor for

certain purposes after he had put the goods purchased on board consigned to his principal. By that appropriation the property in the goods passed from the commission agent to the principal, as if such agent were a vendor. Lord Chelmsford in *Ireland v. Livingston* (*supra*) and Fry L.J. in *Cassaboglou v. Gibb* (*supra*) did not consider it necessary to treat a commission agent as a vendor even for this purpose. Sargent C.J. in *Mohomedally Ebrahim Pirkhan v. Scheller Dasogne & Co.* (*supra*) was of opinion that in an indent contract the relationship between the parties continued throughout, except for certain special purposes, to be one of principal and agent, and in *Meredith v. Abdulla Sahib* (*supra*) also in the case of an indent contract, the Court thought that the assimilation is only to be carried as far as is necessary to give "business efficacy" to the transaction. In view of these authorities, can it be said generally that "to all intents and purposes" the commission agents is in the position of a vendor? It was perhaps unnecessary to state the proposition more definitely for the purpose of that case, as the decision really turned on the third ground, which, in the opinion of the Supreme Court, was conclusive.

Then comes the question which forms the crux of the present case. Is it necessary that for the purpose of effecting the insurance of the goods and entering into a contract of affreightment that the commission agent should be treated as a vendor, who would be bound to obtain a policy of insurance and a bill of lading? As will be seen from the decision cited above, the question so far as it relates to a policy of insurance is not covered by any direct authority apart from the local case. But as regard the bill of lading the Madras case, *Meredith v. Abdulla Sahib* (*supra*), shows that that under a c. i. f. contract the indentor is bound to take delivery of the goods which have arrived, although a valid bill of lading cannot be tendered, as the contract is one of agency.

It is also apparent from the authorities that Courts have been reluctant to regard the commission agent as a vendor except when it becomes absolutely necessary to do so. A policy of insurance is not necessary to pass the property in the goods, and forms no part of the contract of sale. It is an extraneous precaution taken after the sale of the goods and the property in them has passed, and the "business efficacy" of the sale transaction would not be effected if, for the purpose of insuring the goods, the commission agent be regarded as the agent of the purchaser. The same may be said of the bill of lading. I find therefore on the facts of this case and on the authorities that the assimilation of the commission agent to the position of a vendor need not be extended to cover the insuring of the goods or the entering into a contract of affreightment. The commission agent should for the purpose of obtaining these shipping documents be treated as the purchaser's agent. The plaintiffs were, therefore, acting as the agents of the defendants in the matter of the insurance of the goods and of the bill of lading, and the defendants are not entitled to repudiate the contract if the plaintiffs have failed in their duty to obtain and tender these documents, and the defendants' only right is to recover any damages sustained by them owing to the plaintiffs' breach of duty.

The second ground urged by Mr. Hayley which prevents the defendants from disclaiming their liability to pay for the goods is that even if the indent be construed as containing an ordinary c. i. f. contract between a vendor and purchaser, property so called, its express terms compel them to take delivery of such goods as arrive safely in Colombo, irrespective of whether a policy of insurance or a bill of lading is tendered or not. In short it is open to the seller to treat the indent as "an arrival contract." He relies on the following words of the first clause

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of the indent : " to be imported on their account and risk, and to accept delivery of such goods as are delivered from the vessel or vessels by which they are shipped. . . . "

This agreement in clause (1) seems to me to be absolute and unqualified and the very foundation of the contract between the parties. It is intended to protect the plaintiffs against the breach of any duty required by the contract to be performed by them, provided the goods arrive safely at their destination. Under an ordinary c. i. f. contract even when the goods arrive safely, the purchaser is not bound to take delivery unless the shipping documents are tendered to him (*Orient Co., Ltd. v. Brekke & Horlid*[1]). The words of clause (1) in my opinion relieve the commision agent of the necessity of tendering the shipping documents upon the safe arrival of the goods in Colombo. Such a provision seems particularly necessary and reasonable when one remembers that the bills of lading and the policies of insurance are obtained not by the plaintiffs or their agents, but by the manufacturers or the suppliers who ship the goods. That the terms of c. i. f. contract may be varied by the insertion of "arrival terms" is clear from the judgment of the Court of Appeal in *re Denbig Cowan & Co.* and *R. Atcherley & Co.*[2] The agreement that the purchaser should take delivery of such goods as are delivered from the ship being unqualified, and being subject to no condition, Mr. Hayley contends that the buyer or indentor should be kept to its terms. Mr. Koch's answer to this contention is that the agreement is quite consistent with all the terms of a c. i. f. contract being in force, and does not vary them in any way. I failed to appreciate Mr. Koch's argument on this aspect of the case. If his argument, so far as I can understand it, is sound, one must read the words " except in the case of c. i. f. contract " after the word " shipped," and an agreement which stands unqualified in the contract must be taken as subject to a condition which would rob it of almost all its effect. I cannot see any justification for qualifying the agreement as would be the result if Mr. Koch's argument is accepted. But the facts and circumstances of the execution of the indent order require that the undertaking should be treated as an absolute one. In the case I have already referred to, one of the terms of the contract was " Payment cash against documents or delivery order," and the seller was held to be relieved of his liability to tender a bill of lading. Therefore, even if the relation of vendor and purchaser has been created between the parties, the express agreement or undertaking binds the purchaser to accept delivery of the goods if they arrive safely whether the seller is prepared to tender the shipping documents or not.

Lastly, there remains the question of waiver, Mr. Hayley contends that the defendants has waived his right to demand a policy of insurance on two grounds :—

First, that during a long course of dealing between the parties, which extended over several years, the defendants never asked for a policy of insurance when they paid for or took delivery of goods. Therefore they have lost their right to demand the tender of a policy of insurance. It is however not correct to say that the defendants never asked for a policy, for Mr. Foucar says that the defendants did ask for insurance policies during the war. The contracts being c. i. f., the defendants were always paying for the insurance of the goods, and they were entitled to have what they were paying for. They may have presumed that the plaintiffs were fulfilling their part of the contract and insuring the goods and obtaining the necessary policies to be tendered to them if and when

[1] *(1913) 1. K. B. 531.* [2] *(1921) 90 L. J. K. B. 836.*

a demand was made. Dealing with the question of waiver in the case of a c. i. f. contract, Rowlatt J. said in *Orient Co., Ltd. v. Brekke & Horlid* (*supra*) that: "even if it could be made out that he had waived the actual tender of a policy, that alone would not help the seller. What had to be shown is that he waived the insurance itself." If that be the correct law, I do not think that even if the defendants had omitted to demand the tender of a policy on previous occasions, it could be said that they had waived a right which they had always stipulated for and paid for. It is clear the defendants had never waived the insurance itself.

The second ground urged in support of this plea is that after the arrival of the goods, the defendant promised to pay for them, asked for time to pay, and also entered into negotiations to give plaintiffs a mortgage bond in respect of his entire indebtedness to the plaintiffs which included the amounts due for these goods. If there had been a concluded compromise and a bond granted, matters might have been different. But the negotiations for the mortgage fell through. The bond was never signed. There is no proof that when the defendant promised to pay or asked for time, or entered into negotiations to give a bond they were aware that the plaintiffs were unable to give them the necessary shipping documents. If, knowing that the plaintiffs were not in a position to tender these documents, they had acted as they have done, I have no doubt there would have been a waiver. But the defendants might have presumed, as they were entitled to presume, that the plaintiffs had performed their part of the contract and would be ready to deliver to them a policy and a bill of lading whenever demanded. In not demanding the documents when they made the promise to pay, or to give a mortgage, they had acted as they had ordinarily done, and without any knowledge that the documents were not available for delivery to them. Waiver, like acquiescence, pre-supposes that the person sought to be bound is fully cognizant of the facts when he does the act by which he is to be affected. When a pro-note is given or a bill accepted, and even payment made, the buyer might still refuse to meet the note or bill or recover the money paid, if the proper shipping documents are not tendered. The grounds urged do not in my opinion constitute a waiver by the defendants of their right to have the shipping documents tendered if they are in law entitled to such tender.

My decision on the issues therefore is that the plaintiffs did not tender to the defendants a proper policy of insurance or a bill of lading in respect of the goods intended for, that the plaintiffs' failure to do so only amounted to a breach of duty on their part as agents of the defendants, and that the defendants would in law be entitled to recover any damages sustained by the plaintiffs' failure to tender these documents. The defendants were not entitled on that account to reject the goods which had arrived safely and which were offered to them. They were obliged to accept delivery of the goods and pay for them. Even if the plaintiffs are treated as vendors bound to obtain a bill of lading and to insure the goods, the defendants are not entitled to refuse to take delivery of the goods owing to the absence of the shipping documents, as they had expressly agreed—"to accept delivery of such goods as are delivered from the vessel or vessels by which they are shipped."

As the defendants have failed on the issues that were pressed, I give judgment for the plaintiffs as prayed for with costs.

Samarawickreme, for the defendants, appellants.

Hayley (with him *H. E. Garvin*), for the plaintiffs, respondents.

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November 1, 1923. ENNIS A.C.J.—

In this case the plaintiffs claimed Rs. 2,202·20 damages for breach of contract by the defendants on their refusal to accept and pay for certain goods indented for by them. Certain issues were framed in the Court below, but in the end they were limited to one, namely, the 5th issue: "Did the plaintiff duly tender to the defendants the proper policy of insurance and the other necessary shipping documents in respect of the goods indented for? And the secondary issues arising out of that issue were: "Were the plaintiffs bound to tender any policy of insurance or any other shipping documents. And if so, can the defendants disclaim liability to pay the amount claimed in the plaint?" A long legal argument appears to have been addressed to the learned District Judge in the Court below, covering much the same ground as the argument found in the case of *Hayley & Kenny v. Kudhoos*.[1] The learned Judge, however, held that the facts in the present case were not altogether the same as the facts in the case of *Hayley & Kenny v. Kudhoos* (*supra*). He held that the contract in this case was in form a contract of agency; and that the undertaking of the defendants to accept delevery of the goods as they were delivered from the vessel or vessels in which they were shipped distinguished this case from the prior one. In my opinion the learned Judge is right. We have been referred to a number of cases, namely, *Manbre Saccharine Co., Ltd. v. Corn Product's Co., Ltd.*,[2] *Wilson Holgate & Co., Ltd. v. Belgian Grain & Produce Co.*,[3] and *Orient Co., Ltd. v. Brekke & Horlid*[4] in support of the proposition that, where there is a c. i. f. contract of sale, delivery of the goods is not perfected unless accompanied by delivery of a policy of insurance. There seems to be abundant authority in support of that proposition. But it is to be observed that the proposition relates to the case of a c.i. f. contract for the sale of goods. Now the present contract, unquestionably in form is a contract of agency and not a contract of sale. Moreover, it is not exclusively a c. i. f. contract. It is said to be a c. i. f. and c. contract, namely, that the price fixed was to include not only cost, insurance, and freight, but also commission. In the case of *Hayley & Kenny v. Kudhoos* (*supra*) the Court was in the presence of a similar contract in this respect. But in that case it appears that the plaintiffs in their plaint admitted that they had sold the goods and asserted that the defendants bought them, so that, notwithstanding the form of the contract, it was held that it was in fact a contract of sale between the plaintiffs and the defendants. It has been strongly urged upon us that we should make the same finding in this case, not because the plaint is set out in similar terms to the plaint in *Hayley & Kenny v. Kudhoos* (*supra*), but because it is urged that the fixing of the price shows that the plaintiffs were in fact to

[1] (1922) 24 N. L. R. 267.
[2] (1919) 1 K. B. 198.
[3] (1920) 2 K. B. 1.
[4] (1913) 1 K. B. 531.

make what profit they could out of that figure, and that there was nothing in the nature of a commission, notwithstanding the terms of the contract. Such a contention is arguable. But, in my opinion, this case goes further. The terms of the indent are not only that the defendants are to accept delivery of the goods as they are delivered from the vessels, but also that in the event " of any dispute whatever " the parties agreed to refer the dispute to arbitration, the plaintiffs are to appoint one arbitrator on behalf of the suppliers of the goods, and the defendants to appoint the other arbitrator; in other words this arbitration clause indicates an arbitration of any dispute between the supplier and the defendants, rather than between the plaintiffs and the defendants. I need not go into all the cases which have been cited, as they have been fully dealt with in the judgment under appeal. It is sufficient to cite the Indian case of *Meredith v. Abdulla Sahib*[1] to show that there is authority for not extending the proposition expressed by Lord Blackburn in the case of *Ireland v. Livingston* (*supra*) that a contract of agency becomes at some time, in the course of its activity, a contract of sale. The later cases all seem to indicate that the proposition in *Ireland v. Livingston*[2] has but a limited application, and that a contract of agency remains throughout a contract of agency, but that for certain purposes it is assimilated to a contract of sale. I see no reason why in this case it should be in any way assimilated to a contract of sale. It appears from the evidence that the commercial traveller of the foreign firm himself saw the defendants and entered into a bargain with them, and the matter was subsequently put into the hands of the plaintiffs for intermediary purposes. That being so, the defendants were well aware of the foreign seller, and must have been aware that the plaintiffs themselves would not take out policies of insurance. It appears to have been taken for granted by the plaintiffs that there was a policy of insurance which they could not at the trial lay their hands on, one witness saying that had there been no policy of insurance, there would have been endless correspondence on the matter. There is no reason in this connection why the plaintiffs should be regarded as other than agents of the defendants for the purpose of accepting a policy of insurance, and even if they had not accepted a policy of insurance under a c. i. f. contract of sale, the defendants would have to indemnify them, if, in the exercise of their discretion, they accepted the goods as their agents. In the circumstances, I would dismiss the appeal with costs.

PORTER J.—I agree.

Appeal dismissed.

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[1] (*1918*) *41 Mad. 1060.*

[2] (*1872*) *L. R. 5 H. L. 395.*