[PRIVY COUNCIL]

1954 *Present :* **Lord Asquith of Bishopstone, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

HOLLAND COLOMBO TRADING SOCIETY, LTD.
Appellant, *and* S. M. K. ALAWDEEN *et al.*, Respondents

PRIVY COUNCIL APPEAL No. 30 OF 1953

S. C. 311—D. C. Colombo, 20,182

Contract—Sale of goods—C. I. F.—Bill of lading—Tender of goods—Tender of documents.

(i) Although a written contract for the sale of textile goods cited, on the face of it, a price in terms " c.i.f. Colombo " and " Payment " was expressed to be by " Cash against documents ", Clause I diverged sharply from the typical c.i.f. terms in so far as it provided for " Payment to be made in cash on or before arrival of the goods . . . . Any tender or delivery of the goods, or of the bill of lading or of such delivery order or other document or documents as will enable the buyers to obtain possession of the goods shall in every case constitute a valid tender or delivery ". Clause 4 stated, *inter alia*, that " Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms, the buyers shall not be entitled to demand nor shall the sellers be bound to tender or deliver to the buyers any insurance policy, bill of lading invoice or other document or documents whatsoever but any such tender or delivery as described in Clause 1 hereof shall be a good and valid tender or delivery ". Under Clause 2, on receiving notice of the arrival of the goods the buyers undertook to pay all landing or similar charges and remove the goods from the " ship or wharf or store " within two days, and presumably to pay the price which was payable " on " (if not paid before) arrival.

The sellers shipped the goods at Rotterdam on the s.s. " Laurenskerk " taking a bill of lading from its owners for the transit from Rotterdam to Colombo. The Bill of Lading provided, *inter alia*, that the carrier could, if he thought it necessary or expedient, arrange for the goods to be transhipped at any stage of the voyage under a fresh contract with the subsequent carrier. It purported to absolve the owners of " Laurenskerk " from all liability in respect of the goods if transhipped, as from the time of transhipment. It was also subject to the Hague Rules of October, 1923, " unless otherwise provided for in this Bill of Lading ".

Near Genoa, an explosion occurred on board the " Laurenskerk " and the goods were transhipped to the s.s. " Triport ". There was no evidence that there was a contract of carriage with the " Triport " or that the " Triport " issued bills of lading to the " Laurenskerk " or to anyone at all in respect of the goods transhipped into her. On arrival at Colombo the " Triport " did not wait for presentation of any document. She had the goods landed and placed in a customs warehouse at the Port, and departed. The buyers, however, refused to take delivery of the goods in spite of notice given to them by the sellers not only as soon as the " Triport " reached Colombo harbour but also when the goods had been placed in the customs warehouse. There was also evidence that, on February 26, 1948—shortly after the transhipment and before the " Triport " reached Colombo—and subsequently, the sellers demanded payment from the buyers against documents and that the tender of the documents was rejected by the buyers. In the circumstances the sellers instituted action

2——J. N. B 44995-1,502 (8/55)

for damages for non-acceptance of the goods, and the issues, stated shortly, were (1) whether there was a valid tender by the sellers to the buyers of documents against which they were bound to pay the purchase price, or, alternatively (2) whether there was a valid tender of the goods themselves, creating an obligation to pay such price.

Held, (*a*) that a contract containing the formula " c.i.f. " is not necessarily such in substance or effect. The contract of sale in the present case was clearly not a c.i. f. contract.

(*b*) that, in view of Clause 2 of the contract, there was a valid tender of the goods themselves, entitling the sellers to payment of the contract price. The sellers were not bound to clear the arrived goods from the customs warehouse before offering them to the buyers.

Semble : As the contract was not a c.i.f. contract, the real question, quoad documents, was whether there was a sufficient tender of documents within the terms of the actual, non c.i.f. contract. The tender of the Bill of Lading issued by the " Laurenskerk " was a good documentary tender under this particular contract.

Obiter : Assuming that the contract was c.i.f., the Bill of Lading offered on February 26, 1948, and re-offered subsequently was not a document against tender of which the buyers were bound to pay. A Bill of Lading with a transhipment clause is not necessarily a bad tender under a c.i.f. contract : but it must in some way give " continuous documentary cover " in respect of the goods over the whole transit ; and a Bill of Lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such " continuous " cover. Further, the Bill of Lading was not so affected by the Hague Rules as to become part of a good documentary tender under a c. i. f. contract.

(ii) By Clauses 26 and 27 of the aforementioned Bill of Lading it was provided as follows :—

" 26. *Law of Application.*—In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of the Netherlands shall apply.

27. *Jurisdiction.*—All actions under this contract of carriage shall be brought before the Court at Amsterdam or Rotterdam and no other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto. "

Held, that the Clauses might well be important if the action were one between shipper and carrier based on the Bill of Lading viewed as a contract of carriage or affreightment. But in proceedings between seller and buyer, the exclusive jurisdiction of Dutch Courts and the residual application of Dutch law would not be attracted, the action not being on the contract of carriage but on that of sale.

APPEAL from a judgment of the Supreme Court reported in *51 N. L. R. 289.*

A. A. Mocatta, Q.C., with *Stephen Chapman*, for the plaintiff appellant

P. A. Quass, Q.C., with *Carl Jayasinghe*, for the defendants respondents.

Cur. adv. vult.

July 21, 1954. [*Delivered by* LORD ASQUITH OF BISHOPSTONE.]

The plaintiffs are appellants on this appeal and were sellers to the defendant-respondents under a written contract for the sale of textile goods. On 7th December, 1949, they obtained against the respondents from the District Judge in Colombo, judgment for Rs. 13,000 as damages for non-acceptance of the goods in question. On 18th August, 1952, the defendants, the buyers, on appeal, obtained a judgment of the Supreme Court reversing this judgment. The plaintiffs now appeal to this Board against the decree of the Supreme Court.

The issues in the case stated shortly are (1) whether there was a valid tender by the plaintiffs to the defendants of documents against which they were bound to pay the purchase price, or, alternatively, (2) whether there was a valid tender of the goods themselves, creating an obligation to pay such price.

The contract between the plaintiffs as sellers and the defendants as buyers consisted of a lengthy written proposal by the defendants (referred to in the evidence as an "indent" and dated 5th September, 1947) and a short note by the Plaintiffs accepting that proposal without qualification (dated 25th September, 1947).

The terms of the contract are accordingly to be sought in the so-called indent of 5th September, 1947. This document contained on one side of it a comparatively short entry, on the other a voluminous aggregation of printed conditions. The short entry on the one side was as follows :—

"DESCRIPTION OF GOODS

Indent No. HCTS/85

Commodity : 300 pieces 43 inches × about 40 yards White Shirtings (Dutch) ' Lucine '.

Price : 40d. per yard c.i.f. Colombo.

Payment : Cash against documents.

Shipment : October/in one lot, January, 1948.

Licence : Against Dealers Textile Licence No. 914/C 914

H.C.T.S.
Marks : S.S.K.H.A.
& SONS

COLOMBO

Among the printed conditions on the other side the following are the most material and those italicised are those which in their Lordships' view have an intimate bearing on this case :—

" 1. Payment to be made in cash on or before arrival of the goods and I/we shall not be entitled to call for or await tender before payment ; any giving of credit or acceptance of a promissory note for the

amount due to be entirely in your discretion and interest at the rate of—per cent. per annum to be charged by you after the expiration of two days from the receipt of notice of arrival whether credit is allowed or not. Any tender or delivery of the goods or of the bill of lading or of such delivery order *or other document or documents as will enable me/us to obtain possession of the goods* shall in every case constitute a valid tender or delivery. You are not responsible for loss sustained through the late arrival or non arrival of documents. (The italics here and below are their Lordships'.)

2. On receiving notice from you that the goods or any part of them have arrived, I/we shall remove the same from the ship or wharf or your store or any place named by you within two days of such notice at my/our expense and risk and I/we shall pay all customs duties, dues, landing, warehouse and other customary charges. On all goods of which delivery is not taken within such time I/we shall pay insurance at a rate of not less than ¼th per cent. and godown rent at the rate ruling for bonded warehouses.

. . . . . .

4. The goods to be insured against loss and such risks as you may think best for my/our interest and I/we undertake to pay the premiums in respect of such insurance. I/we further agree to bear all loss or damage to the goods which is not recoverable under such insurance. You or your agents or the manufacturers or suppliers of the goods are at liberty to effect the insurance in any manner which you or they may desire including insurance under a policy covering other goods not belonging to me/us and insurance under a floating policy. *Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms, I/we shall not be entitled to demand nor shall you be bound to tender or deliver to me/us any insurance policy, bill of lading, invoice or other document or documents whatsoever but any such tender or delivery as described in clause 1 hereof shall be a good and valid tender or delivery.* In the event of my/our suffering loss recoverable from the insurer, you shall be at liberty either to deliver to me/us a policy under which the goods are insured or to claim the amount of the loss from the insurer on my/our behalf.

. . . . . .

11. The expression 'bill of lading' herein shall include any document issued as or purporting to be a bill of lading containing an acknowledgment by the ship owners or their agents of the receipt of the goods whether on board the ship or for shipment or otherwise and whether alone or with other goods."

It will be gathered from the provisions recited above that though the provisions on the face of the document cite a price in terms "c.i.f. Colombo" and "Payment" is expressed to be by "Cash against

documents ", this is not in substance a c.i f. contract. A contract containing the formula " c.i.f. " is not necessarily such in substance or effect. (*The Julia*[1]). Clause 4 proclaims as much in the passage beginning " Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms " ; and the words, already quoted, which follow. Clause 1 again diverges sharply from the typical c.i.f. terms in so far as it provides for " *Payment to be made in cash on or* before arrival of the goods, ... Any tender or delivery of the goods, or of the bill of lading or of such delivery order or other document or documents as will enable us to obtain possession of the goods shall in every case constitute a valid tender or delivery ".

The natural meaning of Clause I taken by itself, is that the sellers are to have an option to tender documents (no doubt the only means of obtaining payment during the transit), or to tender the goods themselves once they have arrived.

Clause 2 seems to be in the main an amplification of the words " tender or delivery of the goods ", and to deal with the rights of the parties after the goods have arrived. On receiving notice that the goods or any part of them have arrived, the buyers must, under Clause 2, pay all landing and similar charges, and remove them from the " ship or wharf or store " within two days ; and presumably pay the price which is payable " on " (if not paid before) arrival. It is no doubt implied in the obligation to remove the goods *from the ship* that the buyers should be furnished with some document which would enable them to secure delivery from the ship. In the present case this exigency did not arise since at the material time the goods had, before any demand was made on the ship, already been landed from it, and were in a customs house in the port. In such a case there would no doubt again be an implied obligation on the sellers, acting under Clause 2, to enable the buyers to perform their obligation under this clause, viz., the obligation to remove the goods from the " wharf or store ". But whether that would involve supplying the buyers with a bill of lading or some other and what document, or merely with non-documentary evidence of title, is a question with which their Lordships will deal later. To continue the narrative of the facts :—

On 29th January, 1948, the plaintiffs shipped the goods at Rotterdam on the s.s. Laurenskerk taking a bill of lading from its owners for the transit from Rotterdam to Colombo.

The relevant terms of the Bill of Lading include the following :—

By Clauses 26 and 27 it is provided as follows :—

" 26. *Law of Application.*—In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of the Netherlands shall apply.

[1] *(1949) A. C. 293.*

27. *Jurisdiction.*—All actions under this contract of carriage shall be brought before the Court at Amsterdam or Rotterdam and no other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto."

These Clauses might well be important if the action were one between shipper and carrier based on the Bill of Lading viewed as a contract of carriage or affreightment. But the present proceedings are between seller (shipper) and buyer: and in so far as in relation to such proceedings the Bill of Lading is merely a document passing between seller and buyer, the exclusive jurisdiction of Dutch Courts and the residual application of Dutch law would not be attracted, the action not being on the contract of carriage but on that of sale. These Clauses can accordingly be ignored for the present purpose.

By Clause 2—

"This Bill of Lading is subject to:

(*a*) The Hague Rules of October, 1923, *unless otherwise provided for in this Bill of Lading;*"

Clause 16 of the Bill of Lading provides as follows:—

"16. *Forwarding and Transhipment.*—The cargo or any part thereof may, at the option of the carrier and as often as may from any cause be deemed expedient, be carried in a substituted ship or lightered and/or landed and/or stored for the purpose of oncarriage in the same or other ship or by any other means of conveyance.

The responsibility of the carrier shall be limited to the part of the transport performed by him on the ship under his management and no claim will be acknowledged by the carrier for damage and/or loss arisen during any other part of the transport, even though the freight for the whole transport has been collected by him.

The shipper authorizes the carrier to enter into contracts on his behalf for the precarriage and/or oncarriage of the goods and/or storing, lightering, transhipping, or otherwise dealing with such, prior to, or in the course of, or subsequent to the carriage in his ship without responsibility for any act, neglect, or default on the part of the carrier even though the terms of such contracts be less favourable in any respect whatsoever to the shipper than the terms of this Bill of Lading."

Such was the Bill of Lading issued by the Master of the s.s. Laurenskerk on behalf of its owners, a Dutch Shipping Coy. referred to in the B/L as the "Carrier", to the plaintiffs at Rotterdam on 29th January, 1948. Their Lordships will resume the narrative at that point and pursue it to its end before dealing with the legal issues to which it gives rise.

The Laurenskerk left Rotterdam laden with the material goods on 29th January, 1948, and bound for Colombo: but met with misfortune. At some time about the middle of February, near Genoa, she caught fire or suffered from the effects of an explosion. She transhipped the goods to the s.s. Triport. The Triport carried them on to Colombo, arriving there on the 2nd April, 1948 (Clause 16). It will be remembered that the transhipment Clause in the Laurenskerk's Bill of Lading purported to absolve that vessel's owners from all liability in respect of the goods if transhipped, as from the time of transhipment. The same Clause gave the Laurenskerk's owners—the "Carrier"—authority on behalf of the shippers to negotiate a contract of carriage with the oncarrying ship. But there is no evidence that she did so, or that the Triport issued Bills of Lading to the Laurenskerk or to anyone at all in respect of the goods transhipped into her.

On arrival at Colombo the Triport did not wait for presentation of any document. She had the goods landed and placed in a customs warehouse at the Port, and decamped without more ado.

It is necessary to advert to what was happening meanwhile in Colombo.

Before the arrival on 2nd April of the Triport, but after the casualty to the Laurenskerk and the transhipment—actually on 26th February, 1948—the sellers' Colombo agents demanded payment from the buyers against documents. Their demand was made in the following letter:—

"26th February, 1948.

Messrs. S. S. K. Haja Alawdeen,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—300 Pieces White Shirtings (Dutch)

Referring to our letter of the 13th instant, we have received the documents relating to the above shipment from our London office with instructions to present them to you for payment.

We are forwarding you herewith our Invoice No. 13,096 for Rs. 25,742·72 covering the shipment and shall be thankful to have your cheque by return to enable us to hand you the necessary documents.

The carrying steamer, we gather from the local Agents, is expected here on or about the 28th instant.

Yours faithfully,

(Sgd.) (Illegibly)"

The buyers, in answer to this and subsequent demands, rejected the tender of the documents and refused payment on the wholly untenable ground that the contract of sale provided that the goods must *arrive*

before the end of January ; whereas it is obvious, and is now conceded, that the goods need under that contract only be *shipped* before the end of that month. It is not surprising to learn that the market had fallen. The sellers continued to press the buyers for payment. The correspondence which followed in the next few weeks or months speaks for itself. Their Lordships cite the following further letters from the sellers' Colombo branch to the buyers :—

" 3rd April, 1948.

Messrs. S. S. K. Haja Alawdeen & Sons,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85.

Further to our letter of the 9th ultimo, we write to advise that the 6 bales of White Shirtings shipped by s.s. 'Laurenskerk ' against your above indent have arrived, transhipped by the s.s. ' Triport ' which steamer is in harbour.

Please let us have your remittance by return for the amount of our bill so that we may hand over documents to you without further delay.

Yours faithfully,

Sgd. (Illegibly) "

(Before the next letter the ship appears to have discharged the goods)

" 12th April, 1948.

Messrs. S. S. K. Haja Alawdeen & Sons,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Six Bales White Shirtings *ex* s.s. ' Triport '

We refer to our interview in connection with the above and note that you are expecting your proprietor, who is stated to be arriving from India very shortly, and that you would arrange for taking up the documents on the arrival of this gentleman.

Meantime we would point out that the goods which are lying at your risk at Wharf are already on rent, and we shall be thankful to know the definite date when your proprietor in India is expected to arrive.

Yours faithfully,

Sgd. (Illegibly)

for Holland-Colombo Trading Society Ltd. "
" Our Ref : HP/BE.

17th April, 1948.

Messrs. S. S. K. Haja Alawdeen & Sons,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Holland-Colombo Trading Society Ltd.

We are instructed by our clients Messrs. Holland-Colombo Trading Society Ltd., in regard to the above indent for 300 pieces white shirting which goods have, as already intimated, arrived in Ceylon but have not been taken delivery of.

We enclose our client's bill for Rs. 25,742·72 being the amount due thereon. Should you fail to make payment of the amount due herein by the 20th instant, our clients will have no option but to sell the goods in terms of the indent against you at your risk and on your account and claim any damages they may sustain.

Yours faithfully, "

(This letter is not from the sellers themselves but from the sellers' proctors)

The sellers received no answer to any of these three letters other than what transpired at the interview referred to in the letter of 12th April. On 5th May they instructed auctioneers to sell the goods against the contract, and on 6th May notified the buyers of such their intention, and of their right to damages in respect of any loss on the sale. After one abortive auction (11th May) the goods were sold on 11th June for Rs. 14,052·84, i.e., at a loss (which as to amount is not disputed, if there is liability at all) of Rs. 13,697·06. (In the interval the goods had been formally "entered" in the warehouse books, on 31st May, 1948, by the plaintiffs as having arrived " in the vessel Triport from Rotterdam ".)

Right up to the last letter in the record—dated 10th September, 1948, from the proctors for the buyers—the point is still relied on by the latter that the goods arrived in Colombo too late ; though the fact of transhipment is relied on also, latterly.

Their Lordships revert to the two issues which they have indicated at the outset as raised by this litigation, namely :—

(*a*) Was there a valid tender of documents, entitling the plaintiffs—the sellers—to payment of the contract price ? Alternatively,

(*b*) Was there a valid tender of the goods themselves, entitling the plaintiffs to such payment ?

By their Plaint of 6th October, 1948 (paragraph 5), the plaintiff sellers, after reciting the facts, claimed *inter alia* that the defendants had wrongfully and unlawfully failed or refused to accept the said goods. By paragraphs 5 and 6 of the Answer the defendants (apart from raising bad points) deny all averments in paragraph 5 of the Plaint. Issues

were framed, the pertinent ones being Nos. 11 and 12, viz :—" 11 : Did the defendants refuse to accept the said goods ?" " 12 : Were the defendants justified in refusing to accept the said goods ? "

On these issues the District Judge found in favour of the plaintiffs, answering No. 11 "Yes " and No. 12 " No ". The learned Judge was much influenced by the fact that the defendants' ground for refusing to take delivery was throughout the invalid ground that the goods did not arrive in Colombo by the end of January, 1948. Their Lordships do not view this as in itself a decisive factor.

On appeal, the judgment of the Supreme Court, reversing that of the District Judge, was delivered by Gratiaen, J. His ground for so deciding was that while the contract gave the plaintiffs an option to demand payment on fulfilment of either of two conditions, they fulfilled neither. The *first* condition—tender of the goods—could, in his view, only be fulfilled if the plaintiffs cleared the arrived goods from the custom house and then offered them to the defendants. The plaintiffs had not done this.

The *second* and alternative condition, so he held, could only be fulfilled by tender of the documents specified in Clause 1 of the contract : but such document or documents must, so the learned Judge held, entitle the defendants to enforce delivery of the goods *from the ship in which they arrived at Colombo,* and in this case (there having been transhipment) there was no document which the plaintiffs could offer, issued by the Triport or binding upon that vessel.

As to the first of these conditions the learned Judge appears to their Lordships to have overlooked the provisions of Clause 2 of the contract : which seem not to limit a valid tender of the goods themselves to a tender of them after the plaintiffs have "cleared " all customs and landing charges, but on the contrary, assumes that the defendants may be bound to take delivery of arrived goods and pay these charges themselves. Their Lordships will revert to this point later.

There is in their Lordships' view more substance in the Supreme Court's suggestion under the *second* head—tender of documents : namely, that the Bill of Lading offered on 26th February when the goods were still in transit and re-offered subsequently was not a document against tender of which the defendants were bound to pay.

Their Lordships repeat that this is not a c.i.f. contract. It was argued for the appellants that even if it had been, there would have been a sufficient documentary tender to satisfy such a contract. Their Lordships are not of that opinion. A Bill of Lading with a transhipment clause is not necessarily a bad tender under a c.i.f. contract : but it must in some way give " continuous documentary cover ", in respect of the goods over the whole transit (*Hansson v. Hamel and Horley* [1]) ; and a Bill of Lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such " continuous " cover. It was argued for the appellants that the defect was cured by Clause 2 (*a*) of the Bill of Lading which incorporates the Hague Rules ; and that the effect of their

[1] *(1922) A. C. 36.*

incorporation is to override, and impliedly delete from the Bill of Lading the peccant transhipment provisions. But the Hague Rules are only incorporated "unless otherwise provided in the Bill of Lading", hence the provisions of the Bill of Lading prevail in case of conflict. It is true that Clause 2 (*b*) makes all "compulsory provisions" of the law to which the carriage might be subject prevail over contrary stipulations in the Bill of Lading. The only relevant "compulsory provisions" in this case are the Hague Rules themselves and these are not in the present case "compulsory". For although by 1948 they had been incorporated in the English Carriage by Sea Act, 1924, that Act only applies to transit from United Kingdom ports, not to a transit from e.g., Rotterdam: and (if Netherlands law be relevant) at the time in question the "Hague Rules" would appear not to have been incorporated into the Statute Law of the Netherlands (Scrutton Charterparties pp. 440-441). Hence their Lordships are of opinion that the Bill of Lading is not so affected by the Hague Rules as to become part of a good documentary tender under a c.i.f. contract.

Their Lordships have dealt with this point at length in deference to the considerable body of learned argument which was directed to it. In fact the contract clearly not being a c.i.f. contract, the real question, quoad documents, was whether there was a sufficient tender of documents within the terms of the actual, non c.i.f. contract. As to documents, it is important to bear in mind that the rights primarily involved are rights as between seller and buyer, not rights as between shipper and carrier. Under this contract deliberate pains seem to have been taken to provide that a document which does not necessarily transfer effective rights under a contract of carriage or "affreightment", shall be a sufficient tender as between seller and buyer, provided it "enables" the buyer to obtain delivery of the goods. Would the Bill of Lading—the only relevant document in this case—if it had been taken up on 26th February by the buyers when first tendered, or after that but before arrival of the ship, have enabled the buyer, on its arrival, to obtain delivery? True it is, (*a*) the Bill of Lading was issued not by the Triport, the vessel in which the goods arrived, but by the Laurenskerk, (*b*) by its express terms the Laurenskerk Bill of Lading excludes liability on the part of its owners for damage to the goods except as to that part of the transit which was covered by the Laurenskerk, viz., Rotterdam to Genoa, (*c*) as a vehicle of rights in respect of any destruction of or damage to the goods on the residue of the transit—Genoa to Colombo—the Bill of Lading was a broken reed. But these infirmities all relate to the Bill of Lading in its character as a contract of carriage. It does not seem to their Lordships to follow that under the terms of this very special contract between seller and buyer the actual Bill of Lading employed would not qua document evidencing title have enabled the buyer to obtain delivery from the ship if it had been presented on the ship's arrival. The matter was never put to the test since the buyers had on an unjustifiable ground refused to take up the Bill of Lading from the time of its first tender onwards, and the ship in fact landed the goods in the Customs House without presentation of any document or evidence of title, no doubt doing so

"for whom they might concern" or for anyone who could satisfy the Customs of his title. Their Lordships are by no means satisfied that the tender of the Bill of Lading, though it would not have been a good tender between seller and buyer under a c.i.f. contract, in respect of which the validity of the Bill of Lading qua transferable contract of carriage is crucial, was not a good documentary tender under this particular contract. They consider that if the Bill of Lading had been taken up when tendered, and presented to the ship when the goods arrived, it would most probably have enabled the buyers on such arrival to obtain de facto possession from the master of that vessel. The master must have been abundantly aware of the material facts relating to this shipment. He knew the goods were originally shipped on the Laurenskerk. He knew how they had been transhipped on to the Triport at Genoa. He knew their identity, marks and history. He must have expected someone in Colombo to be in possession of the Bill of Lading issued by the Laurenskerk, and that that person would be the person entitled to the goods. Hence there are some grounds for thinking that this Bill of Lading would under this unusual contract have been a good documentary tender.

It is, however, unnecessary to decide this difficult point. Since their Lordships are of opinion that there was a valid tender of the goods themselves on the 3rd April, the 17th April and later. They have already indicated that it is in their view wrong to hold as the Supreme Court did that no good tender of the arrived goods could be made unless and until the sellers had cleared them from the Customs House and paid all dues and charges. So to hold is to ignore Clause 2 of the Contract of Sale. No doubt if the sellers' co-operation was necessary to enable the buyers to obtain delivery from the Customs House, there was an implied condition that it should be forthcoming in the form, e.g., of giving evidence of title. The sellers themselves procured the delivery of the goods from bond for sale by auction by providing the auctioneers with no other document of title but the Bill of Lading (Letter P1, Record page 88). They had regularly offered the Bill of Lading to the buyers. There is not the slightest doubt that the sellers could and would have used or furnished this (or any other necessary) evidence of title in their possession to procure delivery to the buyers and that their efforts to that end would have been as successful in favour of their buyers as they were in favour of their own auctioneers.

A great many authorities were cited to their Lordships in the course of the very helpful argument of Counsel. If these are not referred to in the preceding observations it has not been because they have not been carefully considered, but because the contract and the circumstances in this case were so special as to make most of the authorities unhelpful.

In the result their Lordships will humbly advise Her Majesty that the appeal should be allowed, the decree of the Supreme Court set aside, and the decree of the District Court restored. The respondents must pay the appellants' costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed.