1934 *Present:* **Macdonell C.J. and Garvin S.P.J.**

BRITISH CEYLON CORPORATION LTD. *v.* THE UNITED SHIPPING BOARD *et. al.*

45 (Inty.)/193 (Final)—D. C. Colombo, 33,424.

Contract—Agreement to ship cargo—Vessels owned by United States of America and managed by the defendants—Breach of contract—Cause of action—Appeal—Appellants join in one petition—Treated as two petitions—Stamps—Respondents' objection to decree—Evidence on commission—Civil Procedure Code, ss. 755, 756, and 772.

Where the plaintiffs entered into an agreement to ship cargo between Colombo and New York with the agents of the second defendant-Steamship Company, which operated and managed vessels owned by the United States of America, under the direction and control of the first defendant-corporation,—

Held, that the second defendant was liable for the damage sustained by the plaintiff for breach of contract and that the plaintiff had no cause of action against the first defendant.

Where the plaintiff obtained judgment against the second defendant and his action was dismissed as against the first defendant with costs, and where the defendants filed a joint petition of appeal in which they sever in their averments but join in their prayer, the first defendant adding a prayer of its own,—

Held, that the appeal of the defendants, though stated in one document, was severable and should be treated as two petitions and that it offended against the law as the stamp was only sufficient to cover one petition. In the circumstances the petition of appeal should be rejected.

Held, further, that it was competent for the plaintiff to file an objection under section 772 of the Civil Procedure Code against the decree dismissing his action as against the first defendant with costs, although the latter's appeal was limited to the reversal of the order depriving him of his costs.

Where an application is made by a defendant to issue a commission to examine witnesses in a foreign country, the loss, inconvenience, and delay that may be caused to the plaintiff are factors that should be considered before the application is granted.

N this action the plaintiff company averred that on March 17, 1928, a contract was entered into by Lionel Edwards Ltd. as agents of the defendants and the American-India Steamers of which the defendants were owners, to carry from Colombo to New York, for the plaintiff company, 50 tons of general cargo monthly, from the month of May, 1928, to the month of December, 1928, and that on April 26, 1928, the contract was repudiated and that by reason thereof the plaintiff had suffered loss and damage. Each defendant filed an answer.

The first defendant denied that it was the owner of the vessels and stated that the second defendant managed and operated under its direction the said vessels, which were owned by the United States of America.

The second defendant also denied that it was the owner of the vessels which it operated under the direction of the first defendant. As a special plea, this defendant pleaded that at all times material to the action it acted to the knowledge of the plaintiff company as the agent of the first defendant, and that therefore the plaintiff company had no cause of action against the defendant. They denied that there was a breach of the

contract or that the plaintiff sustained any damages. They further pleaded that if there was a valid agreement the plaintiff committed a breach thereof, whereby they became entitled to claim from the plaintiffs damages.

The learned District Judge entered judgment for plaintiffs as against second defendant, the latter's claim in reconvention being dismissed and with costs. Plaintiff's action against the first defendant was dismissed and the first defendant's claim in reconvention was also dismissed.

H. V. Perera (with him *Choksy* and *D. W. Fernando*), for defendants, appellants.—The contract sued upon made through the medium of the firm of brokers Keel & Waldock between the plaintiff and Lionel Edwards Ltd. as agents for the second defendant, was marked 'provisional'. and the plaintiff was under no obligation to ship the full 50 tons a month. It was at best only a continuing offer by the second defendant to carry 50 tons a month which matured into a binding contract when the plaintiff offered the 50 tons every month to be carried. (*Burton v. The Great Northern Railway*[1].) There was no consideration to keep the offer continuing and the second defendant was free at any time to revoke the offer. (*The Queen v. Demers*[2]; *Anson on Contracts (13th ed.), p. 39; Offord v. Davis & Lloyd*[3]). Even if the contract is deemed to be a binding contract Lionel Edwards Ltd. had no authority to reduce rates. They were the second defendant's agents for engaging freight and loading vessls and when they purported to reduce rates they were acting clearly beyond their authority. Plaintiff's action as against the first defendant has been dismissed without costs and the first defendant has appealed from that order as to costs. The plaintiff is now seeking under the provisions of section 772 of Civil Procedure Code to apply for relief from the decree dismissing his action against the first defendant. The provisions of section 772 are available to an opposite party only when a decree is under appeal. The first defendant's appeal is from the order as to costs, and an order as to costs is no part of the decree. (*Ram Menika v. Dingiri Banda*[4].) Though the first and second defendants have joined in presenting one petition of appeal the petitions are severable and may be treated as two petitions of appeal.

[GARVIN J.—If that is so, then there would be two petitions under one stamp which would offend against the provisions of the Stamp Ordinance.]

In that case this appeal may be treated as that of the second defendant rejecting the appeal of the first defendant.

Hayley, K.C. (with him *Garvin*), for the plaintiff, respondent.—This is a contract which is based on the brokers' note and parol evidence is admissible to ascertain the terms of the contract. (*Robson v. Aitken Spence & Co.*[5]; *Durga Prasad v. Baggan Lal.*[6]) The evidence clearly shows that the plaintiff was bound to ship a minimum of 50 tons a month and the second defendant's ships were bound to carry the same. Lionel Edwards Ltd. were the agents of the second defendant to engage freight. Engaging freight must include fixing the amount to be paid for freight.

[1] *(1854) 9 Ex. 507.*
[2] *(1900) A. C. 103.*
[3] *(1862) 6 L. T. R. 579.*
[4] *25 N. L. R. 465.*
[5] *13 N. L. R. 9.*
[6] *8 C. W. N. 489.*

Every agent who is authorized to do any act in the course of his business as agent has implied authority to do whatever is usually incidental, in the ordinary course of such business, to the execution of his express authority. (*Bowstead on Agency, 7th ed., p. 85*).

The words of section 772 are quite clear. Where there is an appeal, whether against a decree or an order, objection may be taken to anything appealable in the decree out of which the appeal arises. If this petition of appeal is treated as two petitions, then it offends against the provisions of the Stamp Ordinance. There would be two petitions under one stamp which is only sufficient to cover one appeal. It is settled by the judgments of this Court that when it is found that a petition of appeal was not stamped or not duly stamped at the time it was presented, the appeal is not duly presented according to law and must be dismissed—such a petition may not be stamped after the expiry of the appealable time. (*Salgado v. Peiris*[1]; *Sinnatamby v. Tangamma*[2]; *Hurst v. Attorney-General*[3]; *Sathasivam v. Cadiravel Chetty.*[4])

H. V. Perera, in reply.—In *Salgado v. Peiris* (*supra*) and *Sinnatamby v. Tangamma* (*supra*) it was held that the proper stamping of a petition of appeal within time is a condition precedent to its acceptance, but section 37 of the Stamp Ordinance provides that an instrument once admitted in evidence is not, save as provided in the section, to be called in question later in the suit or proceeding on the ground that it has not been properly stamped. "A plaint is a document produced for the inspection of the court"—*per* Ennis J. in *Jayawickrama v. Amarasooriya.*[5] If section 37 applies to a plaint, then it must also apply to a petition of appeal.

Cur. adv. vult.

May 18, 1934. MACDONELL C.J.—

In this case the plaintiff company sued the first and second defendants for Rs. 5,026.18 as damages for breach of contract. The material paragraphs of their plaint filed on June 28, 1929, are as follows:—

"2. The first and second defendants (or one of them) are the owners of certain vessels trading between India and Ceylon and the United States of America. The said vessels are referred to by both the first and second defendants as the 'American-India Line' and are known as such in the said trade. The second defendant company purports to operate and carry on the said trade for the first defendant.

"3. The contract sued upon was made and the cause of action hereinafter set out arose at Colombo within the jurisdiction of this Court.

"4. On or about March 17, 1928, Lionel Edwards Limited, a company carrying on business at York street, Colombo, acting as agents for the defendants and for and on behalf of the American-India Line agreed, *inter alia,* to carry from Colombo to New York for plaintiff company 50 tons of general cargo monthly from the month of May, 1928, to the month of December, 1928, in consideration of the plaintiff company paying freight therefor at the rate of 25s. per ton of general cargo.

"5. On or about the 26th April, 1928, the said Lionel Edwards Limited acting as agents as aforesaid repudiated the contract referred to in the

[1] (*1909*) *12 N. L. R. 379.*
[2] (*1912*) *1 C. A. C. 151.*
[3] *4 C. W. R. 265.*
[4] (*1919*) *21 N. L. R. 93.*
[5] *17 N. L. R. 174.*

preceding paragraph hereof and refused to accept the plaintiff company's cargo for shipment at contract rates.

"6. By reason of the aforesaid breach of contract by the defendants the plaintiff company has suffered loss and damages which amount to Rs. 5,026.18 made up as follows:—

"Estimated difference between current and contract rates of freight in respect of July, August, September, October, November, and December shipments of 50 tons of general cargo a month £375

at exchange 1/5 29/32=Rs. 5,026.18."

The first and second defendants denied liability, filing on February 28, 1930, answers identical, save for a special plea by the second defendant (to be set out later) and also filing identical counter-claims as follows:—

"7. If there was any valid contract as is pleaded in the plaint and by which this defendant was bound, this defendant states that the plaintiff company committed a breach thereof in that it failed to duly tender for shipment under the said alleged contract 50 tons of general cargo a month during the months of May to December, 1928. This defendant states that the failure of the plaintiff to tender the said cargo or in fact to ship 50 tons of cargo per month from month to month between May and December, 1928—

" . . . . (d) entitled this defendant to claim from the plaintiff company the sum of £123. 10*s*. equivalent to Rs. 1,620.74 either by way of set off or counter claim by way of damages for the above breaches."

The action was tried by the District Judge of Colombo on May 8, 1933, and the following days, and on May 12, 1933, he gave judgment as follows:—

"Enter judgment for plaintiff against second defendant as prayed for with costs and dismissing second defendant's claim in reconvention.

"Plaintiff's action against first defendant is dismissed and first defendant's claim in reconvention is dismissed. As between the plaintiff and first defendant each party will pay his own costs."

It is from this judgment that the present appeal is brought.

The appeal raises a number of questions. First, what was the contract, if any, upon which the plaintiff sued? Next, whether the agent with whom that contract was made had authority to bind in making it either the first defendant or second defendant, and further, if both these questions be answered in plaintiff's favour, was the first defendant or the second defendant the party liable on the contract or were they both liable ?

The first defendant and the second defendant have also appealed against a decision of the same District Judge dated January 16, 1933, refusing their petition for a commission to take evidence in America. This petition and the decision thereon will be discussed later. There was yet a further question under the Stamp Ordinance arising out of the case itself which again will be stated and discussed later.

This case will be more readily intelligible if the events therein are stated in chronological order. In March, 1928, the date of the contract sued on, there was a firm, Lionel Edwards & Co., Ltd., with its head office at Calcutta and a branch office at Colombo, of which firm the witness Lionel Edwards was Managing Director (he gave evidence on January 16, 1933, and following days in another case, D. C. Colombo,

No. 42,969, but of consent this evidence is to be taken as part of this case). He stated: "In Calcutta in 1926 we were acting as agents in all capacities for the Roosevelt Steamship Company. We did general agency for the Roosevelt Line. I engaged freight and loaded vessels and attended to all matters appertaining to engaging freight and loading vessels." (The shipping order (P 1) of March 17, 1928, headed "The American-India Line" and issued at Colombo is signed thus: "for Roosevelt Steamship Co., Inc., New York. Lionel Edwards Ltd., H. Harger, Agent".) Mr. Lionel Edwards also stated in his evidence "The company is known as the Roosevelt Steamship Co. Inc. The line of vessels that they form is for convenience sake known as The Roosevelt Line and therefore in an advertisement or anything of that description it is called the Roosevelt Line . . . . The American-India Line is one of the services operated as the Roosevelt Line. The Roosevelt Steamship Co., Inc. ran the Roosevelt Steamship Line which included the American-India Line . . . . Those vessels in this line belonged to the Government" (the United States of America). "The United States Shipping Board Merchant Fleet Corporation represents the Government. No, if I may qualify that, the Shipping Board represents the Government. The Fleet Corporation represents the Shipping Board. The Merchant Fleet Corporation appointed the Roosevelt Steamship Co. as their agents for the purpose of operating and managing among others the American-India Line. I know now that the Roosevelt Steamship Co. Inc. was appointed agents by the Merchant Fleet Corporation by writing . . . . The final instructions were in December, 1927. On that occasion I discussed with the Directors of the Roosevelt Steamship Co. Inc., ways and means of increasing the volume of business done by the vessels. As a result of these discussions by the Board, and representations made by the Roosevelt Steamship Co. Inc., it was decided that unless the lines operating in the trade would permit the Shipping Board Line known as the Roosevelt Line to trade on certain adjusted terms, the Roosevelt Steamship Co. Inc., was to be given discretion to name the rates which would affect the trade in such manner as would bring about to the Shipping Board in the guise or under the name of the Roosevelt Steampship Co., that authority of the trade which they considered should be carried on the American Flag tonnage between India and Ceylon and America; and then the Roosevelt Steamship Co. Inc. in New York cut rates and I was instructed by the Roosevelt Steamship Co. Inc., to advise my house in Calcutta that the rates had been cut and that they were to quote equal rates and were authorized to enter into contracts even for long periods. My company accordingly cut the rates between Calcutta and New York. Those instructions were (given) for the first time in December, 1927." He had said that these instructions were given by the Shipping Board, and went on: "When I spoke of the resolutions of the Board which I cabled to Calcutta, they were resolutions empowering the cutting of rates and entering into contracts over long periods for that service which included also Colombo; not only confined to Calcutta"; and he said that those instructions were not cabled to Colombo, but that he gave them in person to the Colombo office when he was here in March, 1928. On his arrival in Colombo on March 12,

1928, he came to the conclusion that it would be a good thing to cut rates to Halifax also, and cabled to the Roosevelt Steamship Co. in New York for authority to do so, receiving that authority on March 13, 1928. His evidence quoted shows that he had authority already to cut rates to New York and on March 14, 1928, he cabled to the Roosevelt Steamship Co. Inc., New York, D 3 as follows:—

> "Many thanks message. From to-day to end of year, rates from Colombo for Boston, Philadelphia, New York are tea 30/-, general cargo 25/-, Halifax 10/-." . . . .

He said further: "On hearing from the Director of the Roosevelt Co. I instructed my Manager at Colombo to cut rates at Colombo to New York, Philadelphia, Boston, and Halifax. I think I instructed him on March 14, 1928." The contract the subject of this case was made between March 17 and 19, 1928, therefore if Mr. Edwards' evidence is correct he had authority at that time to cut rates and to enter into freight contracts for long periods between Colombo and New York and had given his local agent authority so to do. He also says: "As agent my business was to arrange freights for vessels, and in the course of trade merchants would accept the terms we offered without asking us to refer to principals . . . . I should think so far as brokers are concerned they accept the word of the shipping agent as to what the rate is to be."

The evidence of this witness that I have quoted is involved and not too well expressed, but it seems to say this. There is an entity representing the United States Government called the Shipping Board. There is (or seems to have been) another entity representing the Shipping Board called the Merchant Fleet Corporation. The Merchant Fleet Corporation handed over to another entity, the Roosevelt Steamship Co. Inc., certain vessels the property (it is said) of the United States Government called the "American-India Line" for the Roosevelt Co. Inc. to "operate and manage". It would not perhaps be incorrect to say that the Merchant Fleet Corporation had "chartered" those vessels to the Roosevelt Co. At the time material the Roosevelt Co. was operating and managing those vessels. What does this mean? Presumably, that the Roosevelt Co. would arrange for the voyages, the provisioning, and the activities generally of those ships, including contracts as to cargo. The ships would be in their possession for one thing, and they were a "Company Incorporated" which would seem to be in American terminology the same as "Company with limited liability", in any event a legal entity or *persona*. If the Roosevelt Co. Inc. ordered certain food supplies for these ships, presumably the Roosevelt Co. Inc. would be the entity liable to pay for them and conversely would be the entity that would sue in the event of short weight or inferior quality. That surely is the meaning to be put upon the words "operate and manage", and one would suppose that if a shipper did not pay his freight, it would be the Roosevelt Co. Inc. which would sue for the non-payment of same.

But it would seem that there was one thing on which the Roosevelt Co. Inc. was not its own master, but had to comply with the orders of an entity external to itself, the Shipping Board, and that was the fixing of freights. The reason seems to be stated in the evidence of Mr. Lionel

Edwards. There were "Lines operating in the trade" which were not "Shipping Board Lines" and if the Shipping Board Line known as the Roosevelt Co. Inc. were at liberty to fix freights of its own volition, there might be difficulties with the non-Shipping Board Lines, consequently the Shipping Board kept the fixing of freights in its own hands. The Roosevelt Co. Inc. had to obtain leave, through its Calcutta and Colombo agent, Lionel Edwards Ltd., to quote lower than current rates, and according to the evidence it obtained that leave. Does that fact make the Shipping Board the principal to sue and be sued on such freighting contracts as the Roosevelt Co. Inc. might thereafter make? One has heard of shipping pools. Supposing the Cunard Co., the White Star Co., and a number more shipping lines agree that no one of them will alter freights without the leave of an entity called the Shipping Pool, does that fact make the Shipping Pool the principal to sue and be sued on freight and other contracts which the Cunard Co., or the White Star Co., enters into? And does it make any difference that here the ships earning that freight were the property not of the shipping line the Roosevelt Co. Inc. nor of the Shipping Board giving the orders, but of a third entity, the United States Government?

The evidence shows that the Roosevelt Steamship Co. Inc. had authority through its agent, Lionel Edwards Ltd. to cut rates and enter into freight contracts for long periods, and that it was for and on behalf of that Roosevelt Steamship Co. the second defendants, that Lionel Edwards Ltd. now acted on that authority; they were his principals on whose behalf he acted. This is the effect of Mr. Lionel Edwards' own evidence, and the then Colombo Manager, Mr. Harger, was in Colombo when Mr. Lionel Edwards gave his evidence in January, 1933. He, Mr. Harger, was not called, so presumably was not in a position to deny what Mr. Lionel Edwards had said.

The Colombo branch must have informed the local freight brokers that they were willing to book freights at low rates and over a period of time. Mr. Bostock of the firm of Keel & Waldock, Freight Brokers, says in evidence: "The offer to plaintiffs was made on Lionel Edwards' instructions . . . . I was told to go round and book as much as I could. He said, do as much as you can. That is, to book for freight in advance, forward contracts". Mr. Young (plaintiff's manager) said in evidence: "This was rather unusual. To my knowledge it never happened before . . . . The American-India Line were not getting any cargo. What they wanted to do was, they thought it was better to have some cargo with half rates than no cargo at all. They got a lot of freight". Later on Mr. Bostock was asked, did he make inquiries as to whether Lionel Edwards had authority to make this offer, and his answer was: "We are not accustomed to doubting good offers made by European firms in this Port. That is the only reason why I did not make inquiries. I would not have dreamt of asking". Mr. Young, the Manager of the plaintiff's firm to whom Mr. Bostock made this offer, says also: "He told me that Lionel Edwards Ltd. were offering freight to New York up to the end of the year at half the current rates. That was 25 shillings". (The current rates, it is stated, were 50 shillings.) "He asked me if I would like to take advantage of it . . . . I instructed him to book

on our account 50 tons a month from May to December. I said we would do probably more. I was not prepared to commit the company at the moment to more than 50 tons. He promised to book it at 25 shillings . . . . . We regarded ourselves bound to ship 50 tons a month. This was impressed on me at the time by Mr. Bostock. I understood whether we shipped 50 tons or not we had to pay for it in consideration of the Shipping Line's obligation to take the goods at reduced rates. It was a novel procedure to have an agreement with regard to freight at a future date . . . . . The ordinary method is to book at the current rate at the time of shipping . . . . . Possibly rates may go up or drop. By this agreement both parties agreed to take risks one way or the other," and in cross-examination he added, "I definitely accepted 50 tons a month from May to December. I told Mr. Bostock that. I further told him, well, I will consider whether I will accept more." The broker's notes issued by Mr. Bostock in evidence of this transaction have been put in. They are in the ordinary form, and the first one D 4 of March 17, is marked "Provisional" and is as follows:—

"PROVISIONAL."

Colombo, March 17, 1928.

Messrs. Lionel Edwards & Co.

DEAR SIRS,—We beg to advise having booked/applied for the under-mentioned cargo per ss. ——— about ——— for Boston and N. Y. on Ceylon tonnage scale.

Yours faithfully,
(Sgd.) KEEL & WALDOCK.
Freight Brokers.

With whom.	Cargo.	Rate per ton.
British Ceylon Corporation Ltd.	50 tons of General Cargo— May/December Boston/N. York . . . . Halifax	 @ 35*s.* @ 35*s.*

On carrying rates as at present.
Subject to lower freight not being available."

As to this word 'Provisional' Mr. Young, the plaintiff's Manager, says as follows:—"The contract note is for 50 tons general cargo from may to December. It is not an accurate description. It is really 50 tons monthly. To prevent any mistake on March 19, I asked Messrs. Keel & Waldock to send me an amended note which was sent", D 5, and is as follows:—

"AMENDED."

Colombo, March 19, 1928.

Messrs. Lionel Edwards & Co.

DEAR SIRS,—We beg to advise having booked/applied for the under-mentioned cargo per ss. ——— due about ——— for Boston/N. York on Ceylon tonnage scale.

Yours faithfully,
(Sgd.) KEEL & WALDOCK,
Freight Brokers.

With whom.	Cargo.	Rate per ton.
The British Ceylon Corporation Ltd.	50 tons of General Cargo monthly May/December Boston/N. York . . . . Halifax . . . . (or lower if available). "Provisional."	 @ 25*s.* @ 35*s.*

Mr. Young also said "The word 'Provisional' at the top of P 3A (*i.e.*, D 5). We expected to be in a position to place a larger quantity than 50 tons . . . . I had accepted 50 tons definitely. The contract rate was 25 shillings. We booked 50 tons definitely at 25 shillings a ton. The rate was fixed. There was no necessity to put the word 'Provisional' at all. I had communicated with Mr. Bostock". Later on in cross-examination he says, "My instructions to Mr. Bostock were to book 50 tons from May to December. These instructions were final. There was nothing provisional about it, quite definite."

It will be noticed that even the amended brokers' note, P 3A (D 5), has the word "Provisional" at the bottom of it, and on being asked, Mr. Young said, "It was a definite booking of 50 tons and indicates that we might be booking more". As to this amended brokers' note, Mr. Bostock says, "That contract was made by me on the instructions of Lionel Edwards for freight for those amounts. They were prepared to accept it".

It is to be observed that the words "booked, applied for", in these brokers' notes are left as printed, neither word having been struck through, initialed, or touched in any way. I connot discover that any question was asked of any witness in the case as to this fact. Presumably then the defendants did not base any argument upon it.

Returning to March 17, the date of the first brokers' note: on that date Lionel Edwards Ltd. sent to the plaintiff the shipping order P 1 already referred to. It is headed "The American-India Line," and is signed "For Roosevelt Steamship Co. Inc., New York, Lionel Edwards Ltd., H. Harger, Agent", and is addressed to the commanding officer of a steamer left blank. The important portions of it are as follows:—

"READY TO LOAD MAY/DECEMBER, 1928.

SIR,—Please receive on board your steamer the under-mentioned goods from Messrs. The British-Ceylon Corporation Ltd., and grant receipts for same: for New York.

Shipping Tons.	Description of Goods.	Rate of Freight.
50	General Cargo, monthly	.. 25*s*."

(The document P 2 headed "American-India Line operated for United States Shipping Board Merchant Fleet Corporation, by Roosevelt Steamship Company Inc., New York—India to United States of America, and/or intermediate Ports; Agents in Colombo, Lionel Edwards Ltd.", and signed, weight, contents and value unknown. "Owners, United States Shipping Board Merchant Fleet Corporation, for Roosevelt Steamship Co. Inc., N. Y., *per pro* Lionel Edwards Ltd." put in at the trial by the plaintiff company as appears from the record and from its exhibit mark P 2 but is nowhere, that I can discover, referred to in the evidence. There

seems no evidence that it was seen by the plaintiff's firm, at any rate until after the contracts sued upon had been made.)

There seems then to have been a contract made through the medium of this firm of brokers, Keel & Waldock, between the plaintiff company and Lionel Edwards Ltd., as agent for the second defendant, whereby the plaintiff company bound themselves to ship a minimum of 50 tons general cargo monthly from May to December, 1928, by the second defendants' ships to New York, and the agents of the second defendant bound themselves to receive and carry those 50 tons monthly from Colombo to New York at 25 shillings a ton. There was also a clause in the contract that the second defendants would carry that cargo for less than 25 shillings a ton if the current rates fell below that figure.

Was his contract a written contract to be found in the brokers' notes and not elsewhere, or was it a contract parol evidence of which was admissible outside those notes to ascertain the terms of the contract? *Robson v. Aitken Spence & Co.*,[1] decided, on the analagous question of a broker's bought and sold notes, that such notes do not constitute the contract. *Per* Hutchinson C.J. at p. 14: "What are these notes? They are in form and substance information given by the broker to his principal of what is done on his behalf, to the buyer what the broker has bought for him, and to the seller what he has sold for him, so much at such a price. They are not a contract but a memorandum that a contract has been made", and Middleton J. at p. 17, summarizing the decision of the Privy Council in *Durga Prasad v. Baggan Lal*,[2] says, "Bought and sold notes do not constitute the contract of sale but are mere evidence that may be looked to for the purpose of ascertaining that there was a contract and what the terms of the contract were." Brokers' freight notes seem analoguous to brokers' bought and sold notes, and you conclude then that to discover what was the contract in this case you can take into account what the parties said at the time so as to discover what they bound themselves to. I have summarized above the effect of the agreement of the parties. The only word leaving any doubt is the word "provisional". Mr. Young's evidence for the plaintiff and the heading to P 1 sent him by the second defendant on March 17, seem to make it perfectly clear that both parties understood the contract as meaning that there was to be a definite shipping every month from May till December of 50 tons, but that the plaintiffs reserved to themselves the right to ship at the rates given more than those 50 tons if they were able to do so. The parties seem to have been *ad idem* and there seems to have been mutuality, the plaintiffs binding themselves to ship not less than a certain quantity each month and the second defendants binding themselves to receive that quantity or more if necessary, at an agreed on rate. No one of the witnesses suggested in their evidence that there was any uncertainty as to the terms of the contract or that there was not *consensus ad idem* or that mutuality was absent—more, both sides acted on the contract.

[1] *13 N. L. R. 9.*

[2] *8 C. W. N. 489.*

The next event was a letter from Lionel Edwards Ltd. of April 26, 1928, to the plaintiffs, P 4:—

"April 26, 1928.

Messrs. The British-Ceylon Corporation Ltd.,
Colombo.

AMERICAN-INDIA LINE

DEAR SIRS,—We refer you to your forward bookings made by vessels of the above Line, and we now wish to advise you that we have received cable instructions to cancel all forward bookings with immediate effect.

We have advised brokers of this, and ss. 'Oakpark', which vessel is due here on the 27th instant, will now only accept cargo for Halifax and the United States, at 70*s.* tea and 60*s.* general cargo for the former place, and 60*s.* tea and 50*s.* general for America.

Yours faithfully,
per pro LIONEL EDWARDS LTD.,
H. HARGER,
Acting Manager."

To this plaintiffs replied by P 5 of April 27, 1928:—

"April 27, 1928.

Messrs. Lionel Edwards Ltd.,
Colombo.

DEAR SIRS,—We are in receipt of your letter of the 26th instant and note cancellation of all forward bookings with the American-India Line with immediate effect.

We can only express our surprise at the action taken by your Principals and as we have acted in good faith on the bookings made with you, we must reserve the right to claim on you for any loss sustained by our future commitments.

Yours faithfully,
BRITISH-CEYLON CORPORATION LTD.,
Sgd. ————,
Managing Director."

Mr. Young, the plaintiff's Manager, put in a statement P 6 as to the tonnage shipped by his firm on the second defendant's ships, showing in June 8.8 tons, in July 46.5, in August 145, in September 50, in October 80, in November 42.5 and in December 32.5, total 405.3 tons for the seven months June to December, and says, "In May, according to this statement, 251 tons were shipped"—but in the ships of other lines, be it noted. "After the defendants had made the contract with us, the freights of other lines did not come down. In May we had a special rate of 25 shillings. That was from June on. In May we shipped at 25 shillings by other lines. We are not asking for damages in respect of May because we were able to ship by other lines at the same rate. In out plaint we start our claim as from July. We only shipped a very small amount in June, 8 tons. From July onwards we were not able to get that 25 shillings rate from other firms or from the defendants. We claim in respect of 300 tons for 6 months, July to December. We had to pay 50 shillings, which makes our loss £375 at the rate of 25 shillings per ton, equivalent at the then rate of exchange to Rs. 5,026.18. In June we did ship a small quantity by the 'Easterling' . . . . 8 tons. I produce the bill of lading for that shipment in which freight had been calculated at 25 shillings on the margin. That is done in our office. That has been scratched out and the rate calculated at a higher

rate of 50 shillings. That was not done in our office. Probably done by Lionel Edwards." The plaintiffs followed up this June shipment by sending on June 15, a debit note to Lionel Edwards for the difference between the rate of 25 shillings a ton and the rate of 50 shillings. To this, Lionel Edwards Ltd. replied on June 16, asking the plaintiffs to "forward your claim in quadruplicate addressed to ourselves as Agents for the Roosevelt Steamship Co. Inc., Managing Operators for the United States Shipping Board, when this claim will be put before them for their immediate attention." On the same day the plaintiffs preferred a further claim arising as they said out of the cancellation of their shipping order of March 17, as Lionel Edwards Ltd. for the second defendants had definitely repudiated the agreement of March 17. The plaintiffs treated the repudiation of the shipping order of March 17 as definite and on August 1, 1928, sent to "Messrs. Lionel Edwards Ltd., Colombo, Agents of Roosevelt Steamship Co. Inc., Managing Operators for the United States Shipping Board" a debit note for Rs. 5,026.18, the amount claimed in their plaint. A letter of demand was sent on June 24, 1929, and plaint was filed four days later.

The answers of the first and second defendants were filed on February 27, 1930. They define their position in paragraph 2 of that answer in which each defendant denies "that it is the owner of vessels trading as alleged in paragraph 2 of the plaint". Each defendant then states "that the second defendant manages and operates under the direction and control of the first defendant the said vessels which are owned by the United States of America".

I have endeavoured above to give some meaning to these words as interpreted by the evidence of the witness Lionel Edwards. *Primâ facie* and unexplained by that evidence, they might well have meant that the person who "directs and controls" is the principal to sue and be sued and that the one who "manages and operates" is the agent, but the plaintiff-respondents contended in the appeal that both defendants were liable as being in the position of co-principals. I am doubtful of this argument for a short and simple reason. The plaintiffs are suing on a freight contract made between March 17 and 19, 1928, partly parol, namely, the words used between Mr. Waldock the Broker and Mr. Young the plaintiffs' Manager, and partly in writing, namely, the brokers' notes handed by Mr. Waldock to the plaintiffs and to Lionel Edwards Ltd., and the document P 1 the shipping order of March 17, the material portions of which have been quoted above. Now taking the contract so made—and I would emphasize that the parties immediately concerned seem to have been in no doubt whatever as to its terms or as to the parties thereto—it is clear that this was a contract made between the plaintiff company on one side and the Roosevelt Steamship Co. Inc., New York, on the other. Those were the parties to that contract which must be held to have been concluded at latest on March 19, 1928, the date of the amended brokers' note. At that time there is no evidence that the plaintiffs knew anything whatever about the first defendant or that Lionel Edwards Ltd., agents for the second defendant, had suggested to the plaintiffs in any way that the first defendant was their principal. Can the plaintiffs now say that at a later date the real principal, namely,

the first defendant, was disclosed to them and that they sued it accordingly? If so, then, surely they should have brought their action against the first defendant, but they have not done so. They have very properly included the second defendant as at least a party liable and it is against the second defendant, it seems to me, that their action lies. Do the words " manage and operate under the direction and control " imply a joint or co-responsibility? I have suggested that *primâ facie* and unexplained they would not, but that the entity which directs and controls would be the superior, if the word may be used, and that the person managing and operating would be the subordinate. If that be so then, as said above, the plaintiffs should have sued the first defendant solely. But their contract was, it seems to me, with the second defendant and with the second defendant alone. If it be said that that second defendant now discloses the fact that behind him is the real principal, namely, the Shipping Board, my answer would be that the contract was made on March 17 to 19, 1928, with the second defendant and not with any other party, and that it is open to the plaintiffs to sue that second defendant as they have done in this action. But for the reasons given above I do not think that an action against the first defendant will lie because there is no evidence of any co-liability of these two defendants, the first and the second. Conversely, I do not think it would be open for the first defendant now to come forward and say that it was the real defendant and that the action must be brought against it solely. The judgment appealed from dismissed plaintiffs' claim as against the first defendant and I cannot see that that judgment was wrong. But with the second defendant the plaintiffs do seem to have a binding agreement which it is not open to the first defendant to invalidate by coming forward now and claiming to be the real principal. It is perfectly clear from the evidence in this case that there is no mention at all of the first defendant as party to the agreement of March 17 to 19, 1928, until sometime after that agreement had been made; P 2 upon which much argument was based was not shown to the plaintiffs until after their contract was made. These considerations then seem to dispose of paragraph 2 (*b*) in the second defendant's answer to this effect: " As a special and distinct plea the second defendant pleads that at all times material to this action and in all matters relevant thereto it acted to the knowledge of the plaintiff company as the agent of the first defendant and that the plaintiff company has therefore no cause of action against this defendant who was acting for a disclosed principal ". That, it seems to me, is exactly what the evidence does not prove. The whole evidence is to the effect that if any contract was made it was made on March 17 to 19, 1928, between the plaintiffs and the second defendant and that it was only after the conclusion of that agreement that the first defendant was mentioned at all. The law on the point can be found in *Firm of R. M. K. R. M. v. Firm of M. R. M. V. L.*[1]—*per* Lord Atkinson at p. 770 a case cited to us in argument.

The normal meaning of the evidence led was that Lionel Edwards Ltd. had express authority to bind his principal the second defendant by the agreement made with plaintiffs. But the argument before us was in the main that Lionel Edwards Ltd. had no implied authority to make this

[1] *(1926) A. C. 761.*

particular contract on behalf of the second defendant. That argument relies on the admissions of Mr. Young, the plaintiffs' Manager, that the offer from Lionel Edwards Ltd. to book freights over a considerable period was "surprising" and "unusual". It relies also on the evidence that "the ordinary method is to book at the current rate at the time of shipping". Mr. Young qualifies this somewhat, by saying "It is not the invariable rule for a broker to book freight in a particular ship. It is usual but not invariable". The evidence in this case was certainly not strong enough to prove anything that could be called a custom binding at the Port of Colombo. Admittedly the offer was an unusual one and it was therefore argued that there could be no implied authority on the part of Lionel Edwards Ltd. to make it; the plaintiffs would be put upon inquiry and would have themselves to thank if it turned out that Lionel Edwards Ltd. had no authority in fact. The answer to this seems to be furnished not merely by Mr. Bostock's words that he as a broker would never dream of questioning an offer made by a firm of good standing, but more especially by the words of Mr. Lionel Edwards himself "We did general agency for the Roosevelt Steamship Line. I engaged freight and loaded vessels and attended to all matters appertaining to engaging freight and loading vessels". Engaging freight must include fixing the amount to be paid for freight. If the current rate in March, 1928, was 50 shillings a ton for this particular voyage, could it be contended that Lionel Edwards Ltd. had not the implied authority to alter the rate (say) to 60 shillings on one side or 40 shillings on the other? We were referred to *Bowstead on Agency* and to the cases on implied authority collected therein. That work (7th ed., p. 85) lays down the rule as follows:—"Every Agent who is authorized to do any act in the course of his trade, profession or business as agent has implied authority to do whatever is usually incidental in the ordinary course of such trade, profession or business to the execution of his express authority, but not to do anything which is unusual in such trade, profession or business or which is neither necessary for or incidental to the execution of his express authority". Clearly the fixing of the amount of freight was "necessary and incidental" to the express authority of Lionel Edwards Ltd. Could the sudden dropping of the amount of freight by half be said to be something "unusual"? No case was cited to us to show that it would, and the cases collected in *Bowstead* (*ut supra*) to which we were referred certainly do not go this length. They are cases where an agent takes some specific step outside the ordinary course of his express authority. For instance, if a broker is authorized to effect a policy he is not held to have implied authority to cancel the same after having made it. If a solicitor is authorized to receive payment of interest, he has not implied authority to receive payment of the principal. These things would be specific acts outside the course of his express authority and it is in that sense that the passage referred to in *Bowstead* seems to use the word "unusual". These things could not be put under any of the divisions or headings that together comprise that express authority, and would be "unusual" in the sense that the agent by doing them would thereby be adding on his own responsibility, something to the categories that make up the express authority given to him. That

express authority, reasonably analysed, will comprise authority to do certain things, and things falling outside that analysis will be outside the express authority. Here, Lionel Edwards Ltd. had express authority to quote freights and to demand and receive the same, and it was certainly not argued to us that quoting freights and demanding and receiving them were outside the express authority of that firm. But it was argued to us, and the argument had to go that length, that if Lionel Edwards Ltd. quoted freights varying in any respect from the normal or current freights of the moment, this put the shippers on inquiry as to what his express authority was and that they could not be heard to say that alteration of freights was within the implied authority of his firm. Yet if an agent, held out to obtain cargo, to quote, demand and receive freight therefor—and there was no suggestion but that this was what he was held out to do—could not alter from time to time the freights he was quoting, it is difficult to see how he could carry out the agency that confessedly he was undertaking.

If however one has interpreted correctly the evidence of Mr. Lionel Edwards as set out above, it is difficult to draw from it any other conclusion than that he had in March, 1928, an express authority to cut rates between Colombo and New York, and also to book freight contracts over a period.

On these considerations, if then one has correctly apprehended the terms of this contract and the authority under which it was made, it is difficult to see that the decision appealed from in giving the plaintiffs judgment as against the second defendant is wrong.

The plaint was filed on June 28, 1929, and on September 2 evidence was taken from a Mr. Brown who had been Manager of Messrs. Lionel Edwards Ltd. since April that year. That evidence does not carry matters further than the evidence quoted from of Mr. Lionel Edwards himself, but Mr. Brown also says that his firm is agent for the Roosevelt Steamship Co., and has authority from them to book freights. Following on this evidence there was an argument as to whether the defendants had been properly served, and the learned District Judge in an order of September 9, 1929, decided that the service in this case was good. An appeal against this order was dismissed on December 12, 1929. The defendants filed their answer on February 28, 1930, the material portions of which have been set out above. On November 7, 1930, it was agreed by both parties that the present case should be postponed *sine die* until such time as a final decree had been given in case No. 30,616 of the District Court of Colombo, since the main issues in the two cases were the same. On January 22, 1931, the plaintiff company's Proctors moved that as judgment had by then been entered for the plaintiff in this case for the amount claimed, decree be entered as prayed for with costs; alternatively, in the event of the defendants failing to settle, that the case should be fixed for trial. Nothing seems to have been done for exactly a year, when on January 28, 1932, the plaintiff's Proctors moved to issue notice on the defendants, presumably of their application of exactly a year before. On February 29, 1932, the case was fixed for trial for May 8, 1933, and the following days, until concluded. It gives some idea of the congestion of work in the District Court of Colombo, that to be perfectly certain of getting a clear date for the hearing of this

case, one had to be taken fifteen months ahead. On December 21, 1932, the defendants moved to amend their plea. Their amendment affected paragraph 5 of their answer and was a denial that Lionel Edwards Ltd. "had any authority to enter into any contract or agreement as is referred to in the plaint or otherwise howsoever to bind either first or second defendant whether expressly or impliedly, to any such contract as is pleaded in the plaint". The defendants further stated "that the said Lionel Edwards Ltd. had no authority of whatsoever nature or kind, whether express or implied, to enter into contracts or agreements to carry cargo at any rates less than those current at the dates material to this action and more particularly at rates less than those current at or about the date of the alleged contract . . . . called and known as . . . . current rates". If this amended answer is compared with paragraph 5 of their original answer of February 28, 1930, nearly three years before, it will be seen that there is a marked difference. The original paragraph 5 of the answer simply denied that "there was any agreement or contract entered into as is pleaded in the plaint of which the defendants were parties or whereunder they could in any way be rendered liable to the plaintiff company". The defendants had also "denied that they had committed a breach of any such contract or of any contract to which they were parties or whereunder they could in any way be rendered liable". It may be argued that the earlier paragraph 5 is implicitly a denial of authority on the part of Lionel Edwards Ltd. to bind them or either of them, but it certainly does not say so explcitly. There might be other ways by which it would be impossible for them to be bound under the contract pleaded in the plaint. It is not the least remarkable feature in the case as presented for the defendants that it was only at the last moment, ten months after the day for hearing had been fixed, that they for the first time pleaded definitely that Lionel Edwards Ltd. had no authority to bind them—the point more than any other upon which the case and this appeal were argued. If Lionel Edwards Ltd. had no authority, express or implied, to enter into the contract of March 17 to 19, 1928, then the defendants would have known that fact in ample time to insert it in their original answer of February 28. 1930. These considerations are material in vew of the next step taken by the defendants. The day following their motion to amend answer, on December 22, 1932, the first and second defendants filed jointly a petition and affidavit asking for a Commission to take evidence in America. The affidavit and petition are in identical terms and state that to enable them to establish their case they will have to prove *inter alia*.—

"10. (*a*) That the vessels of the American-India Line are owned by the United States of America and are operated and managed by the second defendant as the agent of the first defendant and under the first defendant's management and control.

"(*b*) That the said Lionel Edwards Ltd. had no authority to enter into any such contract as is pleaded in the plaint or otherwise howsoever to bind the defendants expressly or impliedly to any such contract or to enter into any contracts or agreements to carry cargo at any rate other than the current rate.

" (c) That the plaintiffs have not shipped from Colombo to New York between May and December, 1928, 50 tons of general cargo from month to month and that for this it will be necessary for the defendants to produce documents and lead evidence of witnesses who are resident in America,"— and for this purpose clause II of the affidavit gives the names of a number of witnesses in America whose evidence they ask should be taken on commission.

This petition and affidavit call for several remarks. These documents aver definitely that the Roosevelt Co., second defendants, were agents of the Shipping Board Corporation, first defendants. No such averment had been made in the answer filed on February 28, 1930. Again, if the fact was that the second defendant was the agent acting for first defendant the principal, then that fact was perfectly well known long before the date of the original answer of February 28, 1930, and one is at a loss to see why that averment was omitted from the answer of February 28, 1930. Further, one would suppose that the question whether the plaintiffs had or had not shipped 50 tons monthly from May to December, 1928, by the defendants' ships could be very much better answered in Colombo, confessedly the port shipped from, than in New York. Further, it is nowhere stated in the petition or affidavit that it is impossible for the witnesses named or for one or more of them to come to Colombo and give evidence. The question of authority was one to be gathered from the evidence of witnesses in Colombo supported by documents, the originals of which no doubt are in America, but which, so far as one sees, could without much difficulty or expense have been produced here, and there is nothing in the case that I can discover showing that the plaintiffs were asked to admit those documents. It is another remarkable fact that the affidavit is not sworn to by anybody who is or claims to be a member of either of the defendant corporations. It is sworn to simply by their Proctors in Colombo. When petitions are lodged asking for permission to take evidence outside the jurisdiction, it is usual, I apprehend, that they should be authenticated in some manner by the parties themselves. There is absolutely nothing in the present petition and affidavit to prevent the defendants hereafter repudiating what has been said and sworn to on their behalf by their Proctors. It has been pointed out that the petition and affidavit were filed at a very late stage in the case. Petitions for a commission to take evidence must be *bona fide* and reasonable, and filed in proper time. The learned Judge in an order of January 16, 1933, refused this application for a commission and against this refusal appeal is now brought. No sufficient reason has been shown to us that the learned District Judge was wrong in his refusal and the appeal against it must be dismissed.

On the same day, and following days, on which order was made refusing this commission, the evidence was taken of Mr. Lionel Edwards himself. The material portions of that evidence have been set out and commented on above. The evidence, as I have said, was taken in another case, namely, D. C. Colombo, No. 42,969, but is by consent incorporated in the present case. Finally, on May 8, 1933, and following days, the case was heard and on May 12, 1933, judgment was given for the plaintiffs for the amount claimed against the second defendants, against which judgment the present appeal was brought.

The petition of appeal against that judgment states, paragraph 5 (*n*), "that the plaintiff company is not entitled to recover any damages because they made no effort to minimize the damages", and, paragraph 5 (*o*), "that the plaintiff company failed to place before the Court evidence on which the Court could have assessed the damages". But the argument addressed to us was directed to prove that the first defendant and second defendant were not, either of them, bound at all by any contract with the plaintiff company and did not as I understood it, deal with these paragraphs in the petition of appeal as to damages. There was evidence before the learned trial Judge from which he could conclude that the damages to the plaintiff company were as alleged by them.

The judgment appealed from dismissed the second defendant's claim in reconvention with costs and no argument as far as I could gather, was addressed to us that this portion of the judgment was wrong.

The judgment also dismissed the plaintiff company's action as against the first defendant and likewise the claim of the first defendant in reconvention but ordered that as between the plaintiff company and first defendant each party should pay its own costs. The first defendant has appealed against this last, asking to be given its costs below. On this portion of the appeal a point arises which require separate consideration.

The first defendant appealed in time against this order depriving it of costs below. After the time for appeal had elapsed the plaintiff company filed a cross-objection under section 772 of the Civil Procedure Code, which section reads as follows:—

> "Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his Proctor seven days' notice in writing of such objection.
>
> "Such objection shall be in the form prescribed under head (*e*) of section 758", that is—
>
> "(*e*) a plain and concise statement of the grounds of objection to the judgment, decree or order appealed against—such statements to be set forth in duly numbered paragraphs."

The ground of objection here assigned was that the judgment was wrong in dismissing the plaintiff company's action as against first defendant, and that judgment ought to be given against the first defendant, as well as against the second defendant, and it was argued for the first defendant that it was not competent for this Court to entertain that objection: "having failed to get judgment against first defendant, below, plaintiffs cannot try to get it on a cross-objection under section 772. We are entitled to our costs, but the plaintiffs are not entitled to object to the decree itself. This that we appeal against is an order as to costs, and an order as to costs is no part of the decree". *Ram Menika v. Dingiri Banda*[1], which was cited to us, decides that an order for costs is not a decree save in certain excepted cases of which the

[1] *25 N. L. R. 465.*

present objection is not one. But I am doubtful if that case was directed to rule the point now raised to us. The order as to costs appealed from was connected with the decree dismissing the action as against first defendant. That order could not be separated from the decree in favour of first defendant—this was very candidly conceded in argument—or treated as something self-subsisting apart from that decree and if so I cannot see how the respondent can be debarred from objecting under section 772 that the decree from which that order as to costs cannot be separated, was itself wrong. No case was cited to us to show that the respondent could not and the words of the section seem to allow it. The section contemplates an appeal, and an appeal may be brought (section 754) against " any judgment, decree or order of any original Court "; the term appeal is wide enough to cover appeal against any one of these things, and the present appeal is one against an " order " of an original Court. But then section 772 goes on to say that the respondent, though he may not have appealed against any part of the decree, may yet on giving seven days' notice " take any objection to the decree which he could have taken by way of appeal ". The objection now taken is an objection to the decree in so far as it dismissed the action as against first defendant, and that dismissal of first defendant was beyond question part of the decree and not a mere " order ". Then the section seems in terms to give to a respondent the right to take such an objection as the plaintiff company now seeks to take. To hold the contrary, it would be necessary it seems to me, to interpret the section as follows. Its opening words :— " any respondent, though he may not have appealed against any portion of the decree ", would have to be read with the addition " provided the appellant has appealed against some portion of the decree ", in other words the rights secured to the respondent by the section would only enure where the appeal itself was against the decree itself or a portion thereof and not where, as here, the appeal is, strictly, not against the decree but against an order appurtenant thereto. But this would be reading into the section words which are not there and which are not required for the understanding of the section; it makes perfectly good sense without them. The section seems to say that where there is an appeal, whether against a decree or an order, objection may be taken to anything appealable in the decree out of which the appeal rises.

Apart however from this, an order for costs is something so connected with, so appurtenant to, the decree to which that order is annexed that it seems to me it would be giving an unnecessarily narrow scope to this section 772 if, on appeal as to costs, the respondent were to be debarred from objecting to the decree itself. I am of opinion then that it was permissible to the plaintiff company to bring this objection, namely, that the decree was wrong in dismissing its claim as against the first defendant, and to have it determined. For reasons given earlier the decree dismissing the action against the first defendant seems correct, and the plaintiff company's objection fails and must be dismissed.

The question arose in argument whether the petitions of appeal in this case were sufficiently stamped and the facts answering that question are these. There was a joint petition of appeal dated January 26, 1933, filed by both defendants, first and second, against the order of January 16,

1933, dismissing their petition for a commission to take evidence in America. In this petition the two defendants, first and second, make averments and prayer, textually identical. This petition of January 26, 1933, bears a 12-rupee stamp which is by Part II. of Schedule B of the Stamp Ordinance, No. 22 of 1909 (Ordinances, vol. II., p. 943) the prescribed stamp for a single petition of appeal involving as here over Rs. 5,000 but less than Rs. 10,000. There was also a joint petition of appeal dated May 13, 1933, filed by both defendants, first and second, against the judgment and decree of May 12, 1933, dismissing the action as against first defendant without costs and allowing the action as against second defendant with costs. At paragraph 5 of the petition the defendants sever in their averments, the second defendant solely averring the matters contained in paragraph 5, (*a*) to (*o*), and the first defendant thereafter also solely averring certain matters. They join in their prayer but the second defendant adds solely a prayer of its own. This petition of May 13, 1933, also bears a 12-rupee stamp which again is the prescribed stamp for a single petition of appeal involving over Rs. 5,000 but less than Rs. 10,000. Each of these appeals is furnished with a Certificate in Appeal of the respective date, January 26, 1933, May 13, 1933, as required by section 756 of the Civil Procedure Code, each such certificate bearing a 12-rupees stamp, again the prescribed stamp for a single certificate in appeal involving the above amount. The proper stamp on the blank form of Supreme Court judgment required to be sent with the petition of appeal is one of 21 rupees and this was duly deposited as appears from a journal entry of January 26, 1933; see Ordinances, vol. V., pp. 942 and 946.

Now the petition of appeal of January 26, 1933, relating to the commission to take evidence in America would seem to be two petitions of appeal, for it is possible that a Court of Appeal might have refused the commission to one of these two defendants but have allowed it to the other. The petition of appeal of May 13, 1933, that against the judgment and decree in the action generally is by its content, and *ex confesso*. two appeals. No attempt was made in argument to maintain that it was one appeal only. It would seem to follow then that these petitions of appeal, of January 26, 1933, and of May 13, 1933, were insufficiently stamped in that they and the respective certificates in appeal accompanying them bore each a stamp of 12 rupees where each such petition and certificate should have borne two stamps of that amount or stamps of 24 rupees in all. If these be the facts and if this be the correct conclusion of law from these facts, namely, that the present appeals were insufficiently stamped, what is the duty of this Court?

The answer seems to be given by the case of *Sathasivam v. Cadiravel Chetty*[1]—a two Judge decision—and by the authorities therein cited. In that case Schneider J. says as follows :—

> "The petition of appeal was filed in the lower Court, according to the journal entry in the case on January 17, 1919, and there is an entry on the record that no stamps were tendered for judgment of the Supreme Court and for the certificate in appeal. On the record there is a certificate in appeal stamped and dated February 18, 1919. There is

[1] *(1919) 21 N. L. R. 93.*

nothing to show that stamps for the copy of the Supreme Court Judgment have been supplied up to date. A preliminary objection was taken that the appeal should not be heard, because of the omission to supply the stamps for the certificate and for the copy of the Supreme Court judgment, together with the petition of appeal. This objection was raised upon the provisions in the Stamp Ordinance, schedule B in Part II., head 'Miscellaneous': 'Provided also, that in appeals to the Supreme Court the appellant shall deliver to the Secretary of the District Court or Clerk of the Court of Requests, together with his petition of appeal, the proper stamp for the decree or order of the Supreme Court and certificate in appeal which may be required for such appeal.'

"The question, therefore, is whether the omission to supply the stamps was so fatal as to wreck the whole appeal. There is no direct authority either in the Stamp Ordinance or in the provisions of the Civil Procedure Code for the proposition that the omission to supply the stamps would entail as a consequence the dismissal of the appeal; but our attention was invited to two cases—*Cornelis v. Ukku* (*1867, Ram. (1863-1868), 278*), decided in 1867, where it was held that the omission to supply stamps for the decree or order of the Supreme Court within the time limited by the rules for perfecting an appeal was fatal to the appeal. The reason given for that decision was that otherwise injustice would be caused to the respondent by his being kept out of his judgment. The other case was that of *Don Mathes Bandara v. Babun Appu* (*1892, 1 Matara cases, 203*) which we ascertain by a reference to the Minutes of this Court had been decided by the Full Court in 1892, where it was held that the stamps for the decree of the Supreme Court and certificate in appeal not having been furnished till the day after the petition of appeal was filed was fatal to the appeal, and the appeal was on that account rejected, with costs. We are bound by the decision of the latter case, and for the reasons given in that case we reject the appeal in this case, with costs."

It is to be noted that in that case the stamps required on the petition of appeal itself seem to have been furnished in due time, and the same in the *Don Mathes Bandara* case (*supra*) relied on by Schneider J., and it would seem to follow then that the facts here are stronger in that the stamps required on the petitions themselves have not been furnished in due time. These authorities are binding upon us and have been followed in *Sinnatamby v. Tangamma*[1] and in *Hurst v. Attorney-General*[2] and require us to say that these appeals not having been properly stamped must be rejected.

As to the course of practice on this point it would appear that the words of Grenier J. in *Salgado v. Peiris*[3], are as applicable now as when they were uttered. He was dealing with an insolvency appeal, but mentions interlocutory appeals also—such as the joint one of January 26, 1933—and I understand that his statements are equally correct of final appeals such as the joint one of May 13, 1933. He said as follows:—

"I may say that in my experience, both at the Bar and on the Bench of the District Court, appeals in insolvency cases have been treated

[1] [illegible] C. 1 C. 151.

[2] 4 C. W. R. 265.

[3] (1909) 12 N. L. R. 379 at 381.

on the same footing as those in interlocutory matters. The Secretary of the District Court of Colombo has never yet to my knowledge accepted a petition of appeal in an insolvency case unless it was properly stamped at the time of presentation, according to the provisions contained in Chapter LVIII. of the Civil Procedure Code.

"I have never known of any case where such a petition of appeal has been allowed to be stamped at any time subsequent to the date of presentation. There has been an uninterrupted practice for nearly twenty years at least, from the time the Civil Procedure Code came into operation, of stamping petitions of appeal in insolvency cases, and then presenting them to the Court through the Secretary. It would lead to much confusion and delay if this practice was now altered, and the appellant given liberty to stamp his petition of appeal whenever he liked."

Reverting to *Sathasivam's* case (*supra*) it may be as well to discuss the words in it of Schneider J., "There is no direct authority either in the Stamp Ordinance or in the . . . . Civil Procedure Code for the proposition that the omission to supply the stamps would entail as a consequence the dismissal of the appeal."

Section 4 of the Stamp Ordinance, No. 22 of 1909, is as follows: "Subject to the provisions of this Ordinance and the exemptions contained in schedule B"—these exemptions do not affect the present matter—"the following instruments and documents shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say: (*a*) Every instrument mentioned in that schedule which, not having been previously executed by any person, is executed in Ceylon; and every document mentioned in parts II., III., IV., and V. of that schedule which, not having been previously executed, issued, presented, made, or filed, is executed, issued, presented, made, or filed in Ceylon". "Document" is not defined in the Ordinance but "instrument" is defined by section 3; it "includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished, or recorded". As the word "include" implies that there may be other instances of the subject defined than those mentioned—*cf.* the definition in the same section of the Ordinance of "person" as including "any company, corporation or society", it must certainly include any individual human being as well—this definition of "instrument" will be wide enough to include the documents under discussion, petition of appeal and certificate in appeal. Section 33 is as follows: "Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument chargeable in his opinion with duty is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same", but impounding a document decides nothing as to its ultimate validity or the reverse. The duty to examine instruments to see if they are sufficiently stamped is imposed by section 34 (1): "For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order

to ascertain whether it is stamped with a stamp of the value and description required by the law in force in Ceylon when such instrument was executed or first executed". Section 36 enacts that "No instrument chargeable with duty shall be admitted in evidence . . . . unless such instrument is duly stamped", but goes on to make provision for stamping such instruments (with a penalty) even after their production unstamped, and section 37 provides that an instrument once admitted in evidence is not, save as provided in the section, to be called in question later in the suit or proceeding on the ground that it has not been properly stamped, but I am inclined to agree with Pereira J. in *Jayawickrama v. Amarasooriya*[1] that section 37 of the Ordinance—and *semble* section 36 also—do not apply to pleadings, and if so, then not to petitions of appeal. "It (*i.e.*, section 37) refers" says Pereira J. "to instruments tendered in evidence and clearly a plaint does not answer to that description of document". A petition of appeal and its accompanying documents are the foundation of the appeal, things without which that appeal is not and I think it would be a straining of words to describe the documents now in question as documents in evidence or tendered in evidence. If, however, I am wrong and the opinion of Ennis J. in the same case is to be preferred where he says: "The plaint is, to use the words of the Evidence Ordinance (see section 62); a document produced for the inspection of the Court. It contains admissions, and is a means by which a matter of fact may be proved as against the party making the admission", still I am doubtful of the applicability of sections 36 and 37 of the Stamp Ordinance to this matter (I have cited all the sections of the Ordinance that can refer to it) in the face of section 755 of the Civil Procedure Code which is as follows: "All petitions of appeal shall be drawn and signed by some Advocate or Proctor, or else the same shall not be received. Provided always that any party desirous to appeal may within the time limited for presenting a petition of appeal, and upon his producing the proper stamp required for a petition of appeal, be allowed to state *vivâ voce* his wish to appeal together with the particular grounds of such appeal, and the same shall (so far as they are material) be concisely taken down in writing from the mouth of the party by the Secretary or Chief Clerk of the Court in the form of a petition of appeal, when it shall be signed by such party and attested by the Secretary or Chief Clerk, and be received as the petition of appeal of such party without the signature of any Advocate or Proctor". The meaning of this section 755 is perfectly clear. Normally all petitions of appeal are to be drawn and signed by an Advocate or Proctor or they are not to be received. But as there may be people unable or unwilling to engage an Advocate or Proctor, such people are to be allowed to state their wish to appeal and their grounds of appeal *vivâ voce* to the Secretary of the Court who is to take these down in writing, the writing when signed and attested to be received as a petition of appeal even without the signature of any Advocate or Proctor, subject however to this, that the party, before the Secretary can be required to take down his appeal and its grounds, must produce to him the proper stamp; without he does this, he is not allowed to state his wish to appeal or the grounds of the appeal, and the Secretary has no

[1] 17 *N. L. R.* 174.

power to write them down at all and without such writing there will be no appeal in existence. As Grenier J. says of this section in *Salgado v. Pieris* (*supra*), "The Secretary cannot receive a petition of appeal without stamps", their production is, as Hutchinson C.J. impliedly says in the same case, "a condition precedent to the petition being received", and in *Sinnetamby's* case (*supra*), Lascelles C.J. says the same explicitly, proper stamping of a petition of appeal within time is a condition precedent to its acceptance. Can it be contended that this requirement applies to the party who cannot afford Advocate or Proctor and that it does not apply to the party who can, that though the former must produce the right stamp before his petition of appeal can be received, yet the latter though furnished with Advocate and Proctor, is exempt from this requirement? It does not seem so. The section seems to say, explicitly with regard to the appellant who has no Advocate or Proctor, implicitly with regard to the appellant who has them, that the production of the proper stamp is condition precedent to a petition of appeal being received. If the above conclusions are correct, then possibly there is more authority in the Civil Procedure Code, read with those portions as above of the Stamp Ordinance affecting these documents, that an appeal not properly stamped cannot be received than the remark of Schneider J. at 21 N. L. R. 93 suggests. One would point out that while the Supreme Court has power since 1921 to grant relief for failure to comply with the provisions of section 756, the power by section 765 to admit a petition of appeal though the provisions of sections 754 and 756 have not been observed, there does not seem anywhere to be power to relieve from the non-observance of the provisions of section 755, which seem to be peremptory.

The result then of these appeals is that the decisions in the Court below must be affirmed. The appeals against the order of January 16, 1933, refusing a commission to take evidence, must be dismissed with costs. The appeal of second defendant against the judgment of May 12, 1933, on claim and counter-claim, must also be dismissed with costs. The cross-objection by the plaintiff company to the dismissal on May 12, 1933, of their action against the first defendant, must also be dismissed.

There only remains the question of the costs of the first defendant. It obtained judgment below but with order to pay its own costs. It appeals against that order as to costs, and on the cross-objection it keeps the judgment in its favour below. Now in the action below it made common cause with the second defendant in advancing and pressing numerous objections to the plaintiff company's claim as against second defendant as well as against itself and those objections, save on one matter—a matter, certainly, affecting the first defendant only—have failed. Also the two defendants, first and second, were jointly represented both below and on appeal, and the arguments for them were jointly urged. These things furnished grounds for the exercise by the learned trial Judge of a discretion as to the costs of first defendant. In the exercise of that discretion the Judge refused first defendant its costs. and I do not feel disposed to interfere with the way he has exercised that discretion even if I have the power to do so.

By parity of reasoning the plaintiff company seems entitled to the costs of this appeal. It has succeeded on all points save one and again,

here as below, the two defendants have made common cause in their objections to the plaintiff company's claim. Decree affirmed and appeals dismissed with costs.

As to the separate question of the appeal in this matter not having been properly stamped, authority which is binding upon us declares that appeals not properly stamped cannot be received. These appeals have not been properly stamped and therefore cannot be received, then they must be struck out with costs.

GARVIN S.P.J.—

The defendants in this case have together filed two petitions of appeal. The first relates to an order made in the course of the case refusing an application for a commission to examine witnesses in America. The second relates to the decree entered after trial, whereby the Court awarded the plaintiffs a sum of Rs. 5,026.18 as damages for breach of contract to be paid by the second defendant, while dismissing the action as against the first defendant but without costs. There is also a petition by the plaintiffs-respondents purporting to be made in pursuance of the provisions of section 772 of the Code praying that the decree in so far as it dismisses their action as against the first defendant be set aside and that judgment be entered against the first defendant as well.

By agreement the appeals entered in this case were listed on the same day and heard together.

This action was instituted on June 28, 1929. The plaintiff company pleaded that on March 17, 1928, a contract was entered into by Lionel Edwards Ltd., acting as agents of the defendants, and the "American-India Line" of steamers of which the defendants were owners, to carry from Colombo to New York for the plaintiff company 50 tons of general cargo monthly from the month of May, 1928, to the month of December, 1928, in consideration of the plaintiff company paying freight therefor at the rate of 25*s.* per ton: that on April 26, 1928, the contract was repudiated and that by reason thereof the plaintiff company had suffered loss and damages in the sum of Rs. 5,026.18.

Each defendant filed an answer and both answers are dated February 28, 1930. The first paragraph and the rest of the answer commencing with paragraph 3 are identical in terms, and the pleas are as follows:—

(1) A denial that there was any agreement or contract entered into to which the defendant was a party and a denial of a breach of contract:

(2) A denial that the plaintiffs sustained damages as alleged in the plaint and a denial that the plaintiffs did in fact ship 50 tons of general cargo a month from May to December, 1928;

(3) A plea that if there was a valid contract as averred in the plaint, the plaintiffs committed a breach thereof in that they failed to tender 50 tons of cargo monthly from May to December, whereby the defendants became entitled to claim from the plaintiffs damages in the sum of Rs. 1,620.74.

The second paragraph of the first defendant's answer is as follows:—

"This defendant denies that it is the owner of vessels trading as alleged in paragraph 2 of the plaint. This defendant states that the

second defendant manages and operates, under the direction and control of this defendant, the said vessels which are owned by the United States of America".

The second paragraph of the second defendant's answer is in the following terms:—

(*a*) "This defendant denies that it is the owner of vessels trading as alleged in paragraph 2 of the plaint. This defendant states that this defendant manages and operates, under the direction and control of the first defendant, the said vessels which are owned by the United States of America.

(*b*) "As a special and distinct plea this defendant pleads that at all times material to this action and in all matters relevant thereto it acted to the knowledge of the plaintiff company as the agent of the first defendant and that the plaintiff company has therefore no cause of action against this defendant who was acting for a disclosed principal".

The answer of the second defendant read with these special pleas shows that the principal ground upon which that defendant denies liability is that "at all times material to this action and in all matters relating thereto" it acted to the knowledge of the plaintiff company as agent for a disclosed principal the first defendant. The position of the first defendant corporation is not as clearly defined inasmuch as it is not specifically admitted that the second defendant was its agent or that "at all times material to this action and in all matters relating thereto" the second defendant company was acting as its agent. It merely states that the second defendant company manages and operates under the control of the first defendant corporation the vessels referred to and indicates the United States of America as the owners of the vessels.

The pleadings were closed in February, 1930, and the trial fixed for November 7, of that year. But the trial so fixed was postponed *sine die* of consent until decree was entered in another similar case bearing No. 30,616 then pending in the same Court. After the decision of that case the Court on February 29, 1932, fixed this action for trial on May 8, 1933. On December 21, 1932, nearly three years after the filing of their answers and ten months after the order fixing the trial for May 8, 1933, the defendants moved the Court for permission to amend the answer. Upon notice the plaintiff company consented to the amendment but without prejudice to their right to object to the issue of a commission to America for which the defendants also proposed to move the Court. The defendants were allowed to amend the answer but their application for the issue of a commission to take evidence in America was refused. The amendment for the first time set up the defence that Lionel Edwards Ltd. had no authority to make the contract pleaded in the plaint as far back as June 28, 1929.

The learned District Judge refused the application for a commission to take evidence in America and the first appeal is from that order. On January 16, 1933, the learned District Judge after hearing Counsel made the order under appeal. The issue of a commission is in the discretion of the Judge and for my part I see no reason for saying that in this case his

discretion was not properly exercised. The main points on which it was proposed to lead the evidence which it was said could only be obtained by issue of a commission to America are summarized in the application made by the defendants as follows:—

For the purpose of establishing—

(*a*) that the vessels of the American-India Line are owned by the United States of America and are operated and managed by the second defendant as the agent of the first defendant and under the first defendant's management and control;

(*b*) that the said Lionel Edwards Ltd. had no authority to enter into any such contract as is pleaded in the plaint or otherwise howsoever to bind the defendants expressly or impliedly to any such contract or to enter into any contracts or agreements to carry cargo at any rate other than the current rate;

(*c*) that the plaintiffs have not shipped from Colombo to New York between May and December, 1928, 50 tons of general cargo from month to month.

As to the matters set out in paragraph (*a*) they relate to pleas taken by the defendants as far back as February 28, 1930. The defendants were made aware by the plaint filed on June 28, 1929, that it was alleged that these contracts were made by Lionel Edwards Ltd. as their agents. The authority of Lionel Edwards Ltd. to make such a contract was not specially denied until the middle of December, 1932, when we find an amendment filed in which it is specifically and categorically denied. The allegations in paragraph (*c*) might quite easily, if they were in accordance with fact, have been established by the evidence of the local agents and the production of the usual records and documents.

The inordinately long delay in applying for a commission to record evidence which the defendants must be taken to have known over two years previously was required to establish the defences taken by them is a matter to which a Court should give due weight especially where, as here, a very real risk of a further postponement of the trial and determination of this long pending action is involved.

Judging from the large number of witnesses whom the defendants desired to examine on commission and the lengthy references to documents, it would seem that what the defendants were seeking was an opportunity to have all their evidence recorded in America on commission. This is confirmed by their failure to call a single witness at the trial—not even the local manager of Lionel Edwards Ltd., even then the local agents for this line of steamers, who was at the time in Colombo. It would be manifestly unsatisfactory that an action of this nature should be determined upon oral evidence taken abroad on commission. The learned District Judge has recorded an admission by Counsel with reference to a number of documents, production of which he desired, that they " will not bear on the question of authority ". The point to which it was intended to direct the oral evidence of the six witnesses mentioned was that oral instructions were given to Lionel Edwards Ltd., which would show that in respect of these contracts he had no authority. I am not satisfied that all these witnesses are necessary to prove the instructions given to Lionel Edwards

Ltd., and that they could not have been proved by the evidence of one or some of these gentlemen or that it would be unreasonable to expect one or some of them even at some inconvenience to attend here to give evidence. Besides, business is being done here by the local agents of the line of steamers in which these defendants are interested and the plaintiff is one of numerous persons here with whom business was done. In these circumstances the loss, inconvenience, and delay to the plaintiffs are also factors to be considered before such an application is granted.

The learned District Judge refused this belated application and I think he was right.

In due course the action was tried. Judgment was entered for the plaintiffs against the second defendant as prayed for and the second defendant's claim in reconvention was dismissed.

Plaintiffs action against the first defendant was dismissed and so also was the first defendant's claim in reconvention.

The only respect in which the first defendant complains of this judgment is that no award of costs in its favour has been made. This is a matter which will be noticed later in connection with the cross-objection filed by the plaintiffs.

The principal appeal is that of the second defendant who impeaches the whole decree and contends generally that the judgment is wrong. The facts of this case must be gathered from the evidence given by Mr. Young, the Manager of the plaintiff company, Mr. Bostock a partner of Messrs. Keel & Waldock, Brokers, who put through this contract, and Mr. Lionel Edwards, Managing Director of Lionel Edwards Ltd. Mr. Young's evidence as to the contract and the circumstances under which it was made is as follows:—

> "Mr. Bostock told me that Lionel Edwards Ltd. were offering freight to New York up to the end of the year at half the current rates. That was 25 shillings. He asked me if I would like to take advantage of it. The offer interested me. I instructed him to book on our account 50 tons a month from May to December. I said we will do probably more but I was not prepared to commit the company at the moment to more than 50 tons. He promised to book it at 25 shillings. I said I would see if I could make it more. He sent me the broker's note on the same date".

Later he says,—

> "We regarded ourselves bound to ship 50 tons a month. That was impressed on me at the time by Mr. Bostock. I understood whether we shipped 50 tons or not I had to pay for it in consideration of the shipping line's obligation to take the goods at the reduced rates".

Mr. Bostock was instructed by Lionel Edwards Ltd. to make forward contracts for freight at half rates. His offer was accepted by Mr. Young and the resulting contract according to the evidence was the one spoken to by Mr. Young. That this was the contract is further established by the document P 1 which relates to the shipment of 50 tons of general cargo monthly at 25 shillings per ton to New York and is signed by Lionel Edwards Ltd. as agents for the Roosevelt Steamship Company.

Not a single witness has been called to deny that this was the contract, or that its terms were in any respect different or even to support the suggestion that there was any misunderstanding as to the contract or its terms. But our attention was drawn to certain features of the broker's notes sent to the parties by Mr. Bostock and it was argued that the arrangement was only provisional and did not amount to a binding contract, that the contract was bad for uncertainty, that there was an absence of *consensus ad idem.*

On March 17, Mr. Bostock sent Mr. Young a note in the form D 4. On the top of the note the word "provisional" appears. On receipt of this note Mr. Young noticed that the cargo to be shipped was described as follows:—

50 tons of general cargo
May/December.

Inasmuch as the contract was to ship 50 tons monthly he returned it for amendment. On March 19, he received a note in the form D 5 which was headed, "Amended.". The word "provisional" appeared at the bottom of this note.

Mr. Young was cross-examined at great length in regard to the circumstance that the word "provisional" appeared on these notes. He was strongly pressed in the endeavour to elicit an answer to support the contention that no contract had been concluded. But his evidence clearly and unmistakeably shows that so far as he was concerned the contract was final and binding and that his instructions to Mr. Bostock were final. In explanation of the word "provisional", there is a suggestion in the evidence that "the word" was possibly used in view of his observation to Mr. Bostock that, while the contract was to be for 50 tons monthly which, for the time being, was the amount for which he was prepared to contract, he hoped to be able to make a contract for a larger amount later.

In cross-examination Mr. Young was asked—

Q.—"What was your object in reserving the right to accept more freight later?"

The answer was—

"I did not reserve the right to accept freight later." After lengthy cross-examination Mr. Young in answer to the question what interpretation he placed on the word "Provisional", answered "You must ask Mr. Bostock why he put in that word 'provisional'".

When Mr. Bostock followed Mr. Young in the witness-box he was not asked why he placed the word "provisional" on the note nor was he asked any question on the various points connected with these notes upon which arguments were addressed to us. There is therefore no explanation other than the one suggested by Mr. Young as to why the word "provisional" appeared on the note. There is specific evidence that it was not intended by Mr. Young to indicate a tentative arrangement and not a binding contract. There is no witness called by the defendants, not even the Manager of Lionel Edwards Ltd., who signed the document P 1, to tell us that it was not understood that their offer had been accepted and a definite contract made. But on the other hand, there is the document P 1

which is a clear indication that Lionel Edwards Ltd. were satisfied that their offer had been accepted, and the letter P 4 dated April 26, 1928, addressed to the plaintiff company with reference to their "forward bookings" in which they intimate that they have received instructions to cancel all forward bookings. There is nothing in this letter which suggests any doubt or uncertainty as to the contract or its terms; indeed, the letter refers without ambiguity to the "forward bookings" made.

The opening sentence in the broker's note commences with the words "We beg to advise having booked/applied for the under-mentioned cargo . . . .". It so happened that in this case the writer of the letter addressed to the Shipping Company omitted to score off the inappropriate words. This was doubtless due to inadvertence which might even be characterized, as the Judge has done, as carelessness on the part of the broker. Nor do I think the words "subject to lower freight not being available" altered to "or lower if available" gave rise to any misapprehension in regard to the freight which the shipper was to pay. Mr. Young says he was bound to ship 50 tons monthly and to pay 25 shillings per ton as freight, and the document P 1 shows that Lionel Edwards Ltd. clearly apprehended the terms of the contract.

The parol evidence as to the contract and its terms is clear and unambiguous. That the parties were agreed is further evidenced by the documents P 1, the letter of Lionel Edwards Ltd., P 4 and their letter P 9 of January 16, requesting the plaintiffs to send in their claim for breach of contract in quadruplicate addressed to them as agents for the Roosevelt Steamship Co., managing operators for the United States Shipping Board when the claim "will be put through for their immediate attention".

As between the plaintiff company and Lionel Edwards Ltd. who were acting as agents a definite contract had been made. It is also established that the contract was made by Lionel Edwards Ltd. as agents for the Roosevelt Steamship Company Incorporated of New York, the second defendant company. They did not purport to act for the first defendant company nor is there any evidence to support the second defendant company's plea that "in all matters relevant to this action it acted to the knowledge of the plaintiff company as agent of the first defendant".

If then Lionel Edwards Ltd. were the agents of the second defendant and it was within the scope of their authority actual or apparent to make this contract the second defendant would clearly be liable for the damages sustained by the plaintiffs by the breach of the contract.

Mr. Lionel Edwards gave evidence in a connected case and the evidence so given has been admitted as evidence in this case. He tells us that in 1926, his company was appointed agents in Calcutta for this line of steamers. In 1927, after a visit to America, where he met the Directors of the Roosevelt Steamship Co., he was requested to take over their agency in Colombo from Messrs. Volkart Bros. and he did so.

Lionel Edwards Ltd. were thus agents in Colombo of the second defendant company at all dates material to this action. As to the nature and scope of the agency, the witness tells us that his instructions were "the general instructions given by a steamship company to agents to carry on these matters which appertain to the engaging of freight and loading of vessels". He also said "As agent my business was to arrange freights for vessels

and in the course of trade merchants would accept the terms we offered without asking us to refer to principals but I know nothing of this. I am not well versed in Colombo matters. In Calcutta I am well versed. Contracts would ordinarily be made by brokers in Calcutta. I should think so far as brokers are concerned they accept the word of the shipping agent as to what the rate is to be ".

The evidence of Mr. Bostock would seem to show that the practice in Ceylon is much the same as in Calcutta—freight is booked by brokers—and to quote his own words he " would not have dreamt of asking " whether Lionel Edwards Ltd. had authority to make the offer as to freight which resulted in this contract. " We " said Mr. Bostock " are not accustomed to doubting good offers made by European firms in this port ".

That Lionel Edwards Ltd. had been appointed the local agents of the second defendant company is beyond question, and it is equally clear that as such they had the same general authority as the agents of other steamship companies in all matters appertaining to the booking of freight. As such they had authority to make contracts for freight and they must be presumed to have had power to fix the rate to be paid by the shipper.

It was urged, however, that Lionel Edwards Ltd. as local agents had no power to make forward contracts and no power to make any contracts except at what has been referred to as the current rate. There is no evidence of any such limitation of the authority of local agents of steamship companies. While it may be presumed that local agents would be in close contact with their principals and would in their own interests obtain specific instructions on all such matters, the effect of the evidence both of Mr. Lionel Edwards and of Mr. Bostock would seem to be that it is assumed that local agents of steamship companies have general power to make contracts for freight without any such limitation as is here suggested. Nor does the evidence tell us anything about " current rates ", how they are to be ascertained or by whom and how they are fixed.

Forward contracts such as the one under consideration are evidently unusual but there is a passage in Mr. Bostock's evidence which suggests that such contracts were not unusual during the period of the war. However that may be, the evidence does not in my opinion establish that the general authority of local agents of steamship lines does not extend to the making of such contracts or that the offer to make a contract such as the one under consideration would raise a doubt in the mind of shippers as to the authority of a local agent to make such a contract.

But in the case before us there is evidence that Lionel Edwards Ltd. had express authority to make such contracts. When speaking of his interview with the representative of the second defendant company at New York, Mr. Lionel Edwards said " I was instructed by the Roosevelt Steamship Company Incorporated to advise my house in Calcutta that the rates had been cut and that they were to quote equal rates and were authorized to enter into contracts even for long periods. My company accordingly cut the rates between Calcutta and New York. These instructions were for the first time in December, 1927 ", and later in his evidence, " When I spoke of the resolutions of the Board which were cabled to Calcutta, they were resolutions empowering the cutting of rates and

entering into contracts over long periods for that service which included also Colombo, not only confined to Calcutta".

Mr. Lionel Edwards spoke in greater detail of his interview in New York and referred to telegraphic communications between him and his principals the second defendant company touching this matter of reduced rates and forward bookings. It is hardly necessary to deal more fully with his evidence since it is quite clear that if his testimony is to be accepted he had the fullest authority to make this contract. There is nothing to contradict his testimony nor is there any reason apparent why it should not be accepted and acted upon.

The contentions advanced in support of the second defendant's appeal therefore fail.

The appeal of the first defendant Corporation relates solely to the question of costs. It is evident from their answer and the proceedings had in the case that they joined in traversing and raising issues upon every argument material to the plaintiff's claim. The plaintiffs succeeded upon every point save that they failed to establish that the relations between Lionel Edwards Ltd. and the first defendant were those of agent and principal. The position of the second defendant company was that the first defendant Corporation was their principal. The first defendant Corporation, however, was evidently not prepared to take up that position. Their exact legal relationship was peculiarly within their knowledge but no previous information on the point was vouchsafed to the Court by the first defendant. Moreover, the first defendant Corporation made an alternative claim in reconvention based upon an alleged breach of contract by the plaintiffs which they wholly failed to establish.

Under such circumstances I am not prepared to interfere with the discretion exercised by the District Judge in this matter of costs.

The cross-appeal of the plaintiffs from the decree in so far as the action against the first defendant was dismissed fails for the reason that the evidence does not sufficiently establish such a relationship between Lionel Edwards Ltd. and the first defendant Corporation as would render that Corporation liable on this contract.

An objection was taken to the plaintiff's application for relief from the decree so far as his action against the first defendant was dismissed. This application for relief was entered under the provisions of section 772 of the Civil Procedure Code; no regular appeal had been filed. Counsel urged that the first defendant Corporation's appeal was not from the decree but from the refusal or failure of the District Judge to make an order for costs in their favour, and objected that the provisions of section 772 were only available to the opposite party when a decree was under appeal.

The evidence which it became necessary to consider in connection with the second defendant's appeal made it apparent that no objection by the plaintiffs against the dismissal of the action as against the first defendant could be upheld and that their appeal therefore failed. It is not necessary to consider the objection which was only taken after the merits of the case had been fully explored.

But it is necessary to refer briefly to a matter which emerged in the course of the argument in support of the objection. The second defendant had clearly asked for a reversal of the decree and both defendants had

joined in presenting one petition of appeal. Counsel, however, urged that the petitions of the two defendants though written on the same paper were severable and invited us to treat them as two petitions. Assuming such a course to be practicable, Counsel was constrained to admit that there would then be two petitions under one stamp.

What is contemplated and provided for in sections 754 and 755 of the Civil Procedure Code is that a person aggrieved by a decree or order may appeal therefrom by presenting a written petition of appeal within the time specified or within such time on production of the proper stamp state *vivâ voce* to the Secretary of the Court his wish to appeal and the grounds of such appeal.

As an inference from these sections and section 760 of the Code it follows that every person desirous of appealing must file a separate petition save only that " Where there are more plaintiffs or more defendants than one in an action, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be ". This is not such a case.

The petition of appeal entered in this case offends against the provision of the Code in this respect. If the document be treated as containing two separate petitions it offends against the law in another respect in that the stamp is only sufficient to cover one appeal. It is well settled by the judgments of this Court that when it is found that a petition of appeal was not stamped or not duly stamped at the time when it was presented, the appeal is not duly presented according to law and must be dismissed—such a petition may not be stamped after the expiry of the appealable time (*Salgado v. Peiris* [1]). That judgment which proceeded on the Stamp Ordinance, No. 3 of 1890, since repealed and replaced by Ordinance No. 22 of 1890, has however been consistently followed. The judgments in the later cases so far as it was necessary to have recourse to the new Stamp Ordinance are based on section 36 which is as follows :—

> " No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped. "

The proper stamping of a petition of appeal is a condition precedent to its acceptance under the Civil Procedure Code—*vide* Lascelles C.J. in *Sinnathamby v. Tangamma* [2].

These cases were followed in *Hurst v. Attorney-General* [3] by Ennis and de Sampayo JJ. and the appeal dismissed on the ground that the petition of appeal was insufficiently stamped—Ennis J. who delivered the judgment of the Court remarking " I would add that section 36 of the Stamp

[1] *(1909) 12 N. L. R. 379.* [2] *(1912) 1 C. A. C. 151*

[3] *(1917) 4 C. W. R. 265.*

Ordinance (9 of 1909) prohibits the Court from acting upon the instrument . . . ." Sections 754 and 755 of the Code read together require a petition of appeal to bear the proper stamp at the time of presentation.

The law as stated in these judgments has been consistently followed.

Counsel then invited us to treat the appeal as that of the second defendant and reject the appeal of the first defendant. I cannot well see how we can adopt such a course. There is nothing which enables one to say that this is the second defendant's petition of appeal and not that of the first defendant. It purports to be the petition of appeal of both of them. Had this been a case which came within the exception created by section 760 of the Civil Procedure Code it might reasonably have been contended that there could be no objection to their joining in one petition. This however is not such a case.

Then inasmuch as the petition offends against the law in more than one respect it should, I think, be rejected. The appeals are dismissed with costs.

Appeals dismissed.