1932 *Present :* **Akbar J. and Jayewardene A.J.**

## VAITALINGHAM *v.* HOLLAND-COLOMBO TRADING SOCIETY.

*185—D. C. (Inty.) Colombo, 41,358.*

*Contract—Sale of goods—Agreement to indent for goods—Terms of indent—Exemption from liability to damages.*

The defendant agreed to order and import for the plaintiff certain goods on account and risk of the plaintiff on the terms stated in an indent, and the plaintiff agreed to take delivery of the goods which may be delivered from the vessel on arrival and to pay the defendant the price mentioned together with his commission, the freight, and the other charges.

Clause 10 of the indent was as follows :—

"If the goods are not ready for shipment on the terms herein contained, I/we shall be at liberty to cancel or allow later shipment but on no account shall I/we be entitled to compensation for late delivery or non-delivery from this or any other cause whatsoever."

*Held,* that the defendant was not protected from liability by clause 10 of the indent, if he failed to deliver goods which had arrived in terms of the indent.

IN this action the plaintiff sued the defendant to recover a sum of Rs. 1,501.28 as damages by reason of defendant's failure to deliver 894 barrels of cement in terms of an indent entered into between the parties.

The defendant denied his liability and pleaded that it was expressly agreed under the indent that the plaintiff should not be entitled to compensation for non-delivery of the cement from any cause whatsoever.

The learned District Judge held that the action was maintainable.

*H. V. Perera* (with him *E. F. N. Gratiaen*), for defendant-appellant.—The plaintiff cannot maintain this action for non-delivery of the goods. Clause 10 of the indent stipulates that the plaintiff shall on no account be entitled to compensation for late delivery or non-delivery from the particular cause specified or from "*any other cause whatsoever*". The words "any other cause whatsoever" have been interpreted to exclude limitation or qualification (*Duck v. Bates*[1]). The words exclude the principle of *eiusdem generis,* and embrace any cause which the defendant considers a reasonable ground for refusal to deliver. Under clause 10 the defendant is constituted the sole judge as to the sufficiency of the reason for non-delivery (*Sun Insurance v. Hart*[2]).

The learned District Judge has erred in restricting the scope of clause 10 to cases where the defendant is *unable* to deliver. In contracts of "sales to arrive", the seller is in any event not liable for non-delivery if the goods do not arrive by vessel (*Benjamin on Sale, 7th ed., p. 608*).

[1] *(1884) 53 L. J. Q. B. 338, p. 394.*

[2] *(1889) 58 L. J. P. S. 69.*

[JAYEWARDENE A.J.—Is not the contract between the parties a contract of agency rather than of sale ?]

It is submitted that the contract is really one in terms of which the plaintiff agrees to purchase the goods in terms of his indent, while the defendant merely agrees to be bound by the purchase price mentioned in the indent if and when he chooses to sell the goods to the plaintiff (*vide "The Queen v. Demers"* [1]). There is nothing in the document to indicate that the defendant has entered into an unequivocal agreement to sell. He is therefore under no legal obligation to deliver the goods in terms of the indent, and clause 10 would appear to have been inserted in order to place the matter beyond doubt.

Even if the contract is one of agency, there is nothing to prevent a principal from contracting himself out of his normal rights ("*Griffiths v. Earl of Dudley*" [2]).

*N. Nadarajah,* for plaintiff-respondent.—The words "any cause whatsoever", should be interpreted "*eiusdem generis*", with the causes set out in clause 10 of the indent. The "*eiusdem generis*" rule is applicable to contracts as well as statutes. (*Chitty on Contracts, p. 104, 16 C. B. N. S. 678.*)

Even if the words are wide enough, they are unreasonable and ambiguous and therefore an interpretation favourable to the respondent should be given. (*Carver, pp. 180 and 111; Kearley and Tonge v. Peter* [3]). An ambiguous phrase is no protection.

In any case the words cannot be held to cover the default or fraud of the appellant.

The words "any cause whatsoever" have been considered in the following cases. (*Elderlie Steamship Co. v. Borthwick* [4]; *Nelson Line v. Nelson & Son* [5]; *Borthwick v. Elderlie Steamship Company* [6].)

The position taken up by the appellant, that the indent contains an agreement to buy without a corresponding obligation to sell, cannot be supported. It is submitted that the indent is a C.I.F. & C. contract creating a contract of agency as has been held in the following cases. *Darley Butler v. Saheed* [7]; *Gorden v. Rodrigo* [8]; *41 Madras 1,060; 13 Bombay 470.* There may be a contract of sale in order to pass property, but that does not alter the real nature of the contract. (*1672*) *L. R. 5 H. L. 395.* If the contract is one of agency, then the appellant cannot seek to escape liability by claiming that there is no obligation on him. Once he accepts the indent and orders the goods, he cannot seek to free himself from the position of agent. The case of *Queen v. Demers* [9] was considered in the local case (*Attorney-General v. Abram Saibo* [10]).

June 24, 1932. JAYEWARDENE A.J.—

The plaintiff sued the defendant to recover a sum of Rs. 1,501.28, being damages alleged to have been sustained by the plaintiff by reason of the defendant's failure to deliver to him 894 barrels of cement in

[1] *(1900) A. C. 103.*
[2] *(1882) 9 Q. B. D. 357.*
[3] *24 N. L. R. at p. 82.*
[4] *(1905) A. C. 93 at p. 95.*
[5] *(1908) A. C. 16.*
[6] *(1904) 1 K. B. 319.*
[7] *25 N. L. R. 353.*
[8] *30 N. L. R. 417.*
[9] *(1900) A. C. 103.*
[10] *18 N. L. R. 417.*

terms of an indent No. S 5,176, entered into between the parties. The defendant denied his liability to pay any damages at all, and pleaded *inter alia* that it was expressly agreed under the indent that the plaintiff should not be entitled to compensation from the defendant for non-delivery of the 1,200 barrels mentioned in the said indent or any part thereof from any cause whatsoever. Ten issues were framed at the trial but it was agreed that the Court should first try as a preliminary issue of law only the first issue, whether the plaintiff can maintain this action in view of the condition in clause 10 of the contract that he should on no account be entitled to compensation for the non-delivery of the cement " on any cause whatsoever ". The learned District Judge has held that the action was maintainable, and the defendant has appealed.

The important question arises whether the defendant is an agent of the plaintiff or whether he is in the position of a vendor of the goods. The indent is on a printed form apparently supplied by the defendant. The defendant undertook by it to order and import for the plaintiff certain goods on account and risk of the plaintiff on the terms stated in the indent and the plaintiff agreed to take delivery of the goods as may be delivered from the vessel on arrival and to pay to the defendant the price mentioned together with the defendant's commission (not fixed) and all freight dues, customs duties, and all usual charges. There are 23 printed clauses in the contract. At the foot of the document there is a typewritten description of the goods as follows :—

1,200 barrels " ENCI " cement, each barrel weighing gross 180 kilos nett 170 kilos.

*Price :* 9/6*d.* per barrel, C.I.F. & C. Colombo.
*Payment :* 60 days P/N and indent @ 6% for my account.
*Packing :* In strong barrels as supplied before.
*Shipment :* March 500 barrels.
April 350 barrels.
May 350 barrels.

The legal position arising out of C.I.F. (costs, insurance, and freight) contracts was considered by Blackburn J. in *Ireland v. Livingstone* [1] :—

" It is also very common for a consignor to be an agent who . . . merely accepts an order, by which he binds himself to use due diligence to fulfil the order . . . . The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in no ways an element in the limit . . . . The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission because there is a contract of agency . . . . It is quite true that the agent who, in thus executing an order, ships goods to his principal is, in contemplation of law, a vendor to him . . . . The legal effect of the transaction between the commission merchant and the consignee who has given him the

[1] *(1872) L. R. 5 H. L. 395 at 407.*

order is a contract of sale passing the property from one to the other; and, consequently, the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*.

"My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs (commission merchants) there was a contract of agency, by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this superadded sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could".

In *Cassaboglou v. Gibb*[1] the Court of Appeal explained the dictum of Lord Blackburn that the legal effect of the transaction is a contract of sale. Both Brett M.R. and Fry L.J. stated the contract between a commission agent and his foreign principal to be not one of seller and buyer *ab initio*, but a contract analogous thereto, placing the commission agent *after shipment* of the goods in the position of a *quasi*-vendor for certain purposes. Accordingly they held that upon breach of an executory contract by a commission agent to supply his correspondent with goods of a specific description, the damages were to be assessed as between principal and agent, and not as between seller and buyer.

The commission agent is in the position of a seller with regard to his principal for some purposes only, *e.g.*, so far as regards the passing of the property in the goods to the principal, and as regards stoppage *in transitu* by the agent; but that in other respects the contract remains one of agency.

In *Mohamed Ally v. Schiller Dosogne & Co.*[2], Sargent C.J. of Bombay reviewed the English cases and regarded the latter case as a conclusive authority that the relationship between the parties continues throughout, except for certain special purposes, to be one of principal and agent. In *Paul Beier v. Chotalal Iaverdas*[3] which was ultimately decided on appeal in the light of the custom of trade in Bombay, Russel C.J. held that the indent, which is like the present one created a relationship between the parties not of vendor and purchaser but of principal and agents.

Lord Blackburn also held in *Robinson v. Mollett*[4] that though there may be no privity between the manufacturer and the person abroad to whom the manufacturer has sent goods through an agent still it is perfectly consistent to hold that the relationship between the agent and indentor is that of principal and agent. In *Harry Meredith v. Abdulla Sahib*[5], certain commission agents, Elliott & Co., entered into a contract with the defendants under which they undertook to purchase and ship certain goods "on account and risk" of the defendants, and did ship under a C.I.F. contract on board a German ship. Owing to the outbreak of war during their transit, the goods did not arrive at

[1] *(1883) 11 Q. B. D. 797.*
[2] *(1889) 13 Bom. 479.*
[3] *(1904) 30 Bom. 1.*
[4] *(1874) L. R. 7 H. L. 802-810.*
[5] *(1918) 41 Mad. 1060.*

their destination, Madras, until long after due time. On defendants refusal to accept the goods, they were sold by the plaintiff, the liquidator of Elliot & Co., who sued the defendants for damages for breach of contract; the defendants denied the liability. Wallis C.J. said, " Now it is well settled that, where goods are purchased in this way from a commission agent under a C.I.F. contract, though the agent is regarded for some purposes as a principal just as any other vendor under a C.I.F. contract, yet the relation of principal and agent still subsists. *Ireland v. Livingstone* (*supra*) in which Blackburn J. (as he then was) gave his well known explanation of a C.I.F. contract when advising the House of Lords on a principle of the law of agency, viz., that, as the error arose from the principal's indistinctness of expression, he must bear the loss. The first case in which such an agent was assimilated to a vendor was *Feise v. Wray* [1], where he was allowed to exercise the right of stoppage *in transitu* in respect of goods which he had bought and paid for; and the true principle would appear to be that the assimilation is only to be carried so far as is necessary to give business efficacy to the transaction. This I gather to have been the view of Brett M.R. and Fry L.J. in *Casaboglou v. Gibb* (*supra*) where *Lord Blackburn's* observations in *Ireland v. Livingstone* (*supra*) were considered. Otherwise the relation remains one of principal and agent as held in the last mentioned case in assessing damages; and the agent remains accountable as held in *Williamson v. Barbour* [2] which has recently been applied to similar cases in this Court ".

In the local case of *Darley Butler v. Saheed* [3], the defendants entered into a C.I.F. & C. (commission) contract with the plaintiff whereby the plaintiff agreed to indent from a foreign firm for the defendants. The goods arrived in Colombo and were tendered to the defendants, but no policy of insurance was tendered. It was held that the defendants were bound to accept the goods, and that as the plaintiffs should be regarded as agents of the defendants for the purpose of accepting a policy of insurance, the defendants must indemnify them if, in the exercise of their discretion, they accepted the goods as their agents. A. St. V. Jayewardene J. then (District Judge of Colombo) in a learned judgment examined all the authorities and also the indent in question, and held that the first clause created a contract of agency between the parties. The present indent is similar in its wording, and the first clause is almost identical in both. The goods are to be imported on the indentor's account and risk, and he undertakes to take delivery of such goods as are delivered from the vessel. In appeal the Supreme Court did not go into all the cases which had been cited, as they had been fully dealt with in the judgment under appeal, but it held that the contract was unquestionably in form a contract of agency and not a contract of sale, and that a contract remains throughout a contract of agency although for certain purposes it is assimilated to a contract of sale. As I have already observed a consideration of the contract between the parties in this case affords sufficient grounds for thinking that the defendant was an agent for the plaintiff. The goods were to be ordered and imported on the

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

[2] (*1877*) *9 Ch. D. 529.*

[3] (*1923*) *25 N. L. R. 353.*

plaintiff's account and risk. The plaintiff was to take delivery from the vessel on arrival and pay the price with commission and all freight, dues, and other customary charges. The goods were to be insured in the plaintiff's interests and he was to pay the premiums. Under clause 15, should the defendant not choose to exercise his right to sell as provided for in the preceding clause, the goods were to be detained at the plaintiff's risk, and the plaintiff had to pay warehouse rent, fire insurance, and all other customary mercantile charges with interest. The terms of the indent D 1 seem to my mind to indicate clearly that the defendant was only an agent of the plaintiff in respect of these goods.

Clause 10 of the indent contains the words which have given rise to the issue which is now discussed, and runs as far as in material as follows : " If the goods are not ready for shipment on the terms herein contained, I/we shall be at liberty to cancel or allow later shipment but on no account shall I/we be entitled to compensation for late delivery or non-delivery from this or any other cause whatsoever ". The clause proceeds to state at length what is proof of shipment and contains provisions as regards prevention or delay of shipment in case of war, siege, riots, strikes, lockouts and other contingencies. It was argued for the defendant that the indent was so drawn up that the commission agent was always protected and that when he obtained the goods, he was to deliver the goods only " if he felt inclined to do so," and that the words " any other cause whatsoever " in clause 10 protected him in all cases. It was argued for the plaintiff that those words should be construed as being " *eiusdem generis* " with the *cause mentioned.* It is a well known canon of construction, that, where a particular enumeration is followed by such words as " or other ", the latter expression ought, if not enlarged by the context, to be limited to matters *eiusdem generis* with those specially enumerated. The canon is attended with no difficulty, except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend on the precise terms, subject matter and context of the clause under construction. *Sun Fire Office v. Hart*[1]. The words " any place or places of entertainment whatsoever " were construed in *Duck v. Bates*[2]. Fry L.J. thought that the words " any place " and the word " whatsoever " exclude any limitation or qualification and declare affirmatively that the genus of the place described is to prevail in its utmost generality, but the majority of the Court (Brett M.R. and Bowen L.J.), held that by a place of entertainment the Legislature meant a place assigned generally and habitually as a place of dramatic entertainment, a public or a *quasi*-public place of amusement where profit is made, and that a performance in a hospital for the delectation of the nurses, officials and persons who were conducting the ordinary business of the hospital and their families was not a public but a domestic performance and did not come within the purview of the Act.

In *Borthwick v. Elderslie Steamship Co.,*[3] Lord Alverstone in construing a bill of lading held, and his judgment was affirmed in the House of Lords[4], that regard must be paid to the position of the words " or

[1] *(1889) 58 L. J. P. C. 69.*
[2] *(1884) 53 L. J. Q. B. 338.*
[3] *(1904) 1 K. B. 319.*
[4] *(1905) A. C. 95.*

from any other cause whatsoever", and that the language could not be regarded as framed with a view to exclude once and for all any liability for loss or damage occasioned by unseaworthiness of the ship. He read the clause as protecting the shipowners from all liability for loss or damage arising from failure or breakdown of machinery, insulation or other appliances, and that the words "from any other cause whatsoever," must be construed as relating to matters *eiusdem generis* with such failure as a breakdown, and Lord Halsbury L.C. observed in the House of Lords, "one rule of construction which must prevail is that you must give effect to every part of a document if you can, you must read it as whole".

In *Nelson Lineld Ltd. v. James Nelson*[1] Lord Loreburn L.C., remarked that the parties to an agreement may contract themselves out of their duties, but, unless they prove such a contract, the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As Lord MacNaghten said in *Elderslie v. Borthwick* (*supra*) "an ambiguous document is no protection". He knew of only one standard of construction. "What do the words mean on a fair reading of the whole document?"

The learned District Judge has carefully considered the effect of the words "on no account shall I be entitled to compensation for late delivery or non-delivery from this or any other cause whatsoever" in relation to the context. His reasons are, in my view, sound. In *Paul Beier v. Chotalal Iaverdas* (*supra*) the indent contained a clause stating that the indentor could not claim any damages for total or partial non-delivery. The clause ran as follows:—

"It shall be optional for you to execute the whole or any part of this order; and if through the failure of the manufacturers or strikes or accidents of whatever nature, the goods or any portion thereof are not shipped or delivered at the stipulated time; or if you should have to reject the goods, or any portion thereof, on account of late or bad delivery, this indent, or such portion thereof remaining unexecuted or unshipped, may be considered cancelled, and we/I shall not be entitled to claim any damages for such total or partial non-delivery, notwithstanding your having previously advised us/me of having placed the order or any part thereof". The possible causes for non-delivery are there precisely stated. Although not stated clearly in the indent, yet on a proper reading of its terms in relation to its context the commission agent may not, in my opinion, capriciously or because prices have risen and merely for gain, refuse to deliver the goods which have already arrived on the indentor's order. I do not think that it can reasonably be contended that the commission agent was in all cases protected and that the indentor was entirely at his mercy or that he was liable to take delivery, but the commission agent had only undertaken to put himself in possession of the goods and to deliver them if he felt inclined to do so. *The Queen v. Demers*[2] was cited as a case where such an agreement was upheld. There the respondents undertook to print certain public documents at certain specified rates but there was nothing in the contract imposing any obligation on the Crown, the other party

[1] (1908) *A. C. 16.*

[2] (1900) *A. C. 103.*

to the contract to give to the respondents all or any of the printing work referred to in the contract, nor was there anything to prevent the Government from giving the whole or any of the work to any other printer. The Privy Council held that the Government was bound to pay for all work given to the respondent on the footing of the contract, but the contract imposed no obligation on the Crown to pay the respondents for work not given to them for execution. In my view that case hardly resembles the present one, where the defendant wishes to repudiate the contract after the goods ordered by the plaintiff had actually arrived. To use the words of Brett L.J. in *Johnson v. Raylton*[1]. "It seems to be more consonant with the ordinary simplicity of fair mercantile business and more in accordance with legal principles", to say that an importing firm is bound in law to deliver goods which have arrived on the order of an indentor. It is not necessary to consider the question whether the contract by the addition of this condition has not changed its intrinsic character and become so one-sided as to degenerate into injustice.

For the reasons I have stated, I am of opinion that the decision of the learned District Judge on the first issue is correct, and I would dismiss the appeal with costs.

AKBAR J.—I agree.

*Appeal dismissed.*