Present: De Sampayo and Schneider JJ.

1922.

HAYLEY & KENNY *v.* KUDHOOS.

302—D. C. Colombo, 3,120.

Insurance—C.i.f. Contract—Indent for goods from England—No separate policy of insurance—Arrival of goods—Tender of goods, but no policy of insurance—Is defendant bound to accept goods?

The plaintiffs and defendant entered into a c.i.f. contract, whereby the plaintiffs agreed to indent for certain goods from England for the defendant. The goods duly arrived in Colombo, and were tendered to the defendant, but no policy of insurance was tendered. The defendant failed to take delivery, but did not state the absence of a policy of insurance as a ground of refusal.

Held, that the defendant was not bound to accept the goods.

In accordance with the ordinary incidents of a c.i.f. contract, the plaintiffs were bound to effect a separate insurance over the goods ordered by the defendant, and tender to him the policy of insurance before they sought to enforce the contract against him.

The tender of a certificate of insurance instead of a policy of insurance is not a compliance with the requirements of c.i.f. contract.

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THE facts are set out in the judgment.

Drieberg, K.C. (with him *Hayley*), for plaintiffs, appellants.

Samarawickreme (with him *F. H. B. Koch* and *Canakeratne*), for defendant, respondent.

Cur. adv. vult.

December 21, 1922. DE SAMPAYO J.—

This case involves a question as to the rights and obligations arising out of a contract entered into by the defendant with the plaintiffs, Messrs. Hayley & Kenny, on April 19, 1920. The plaintiffs are a firm of merchants, and part of their business is to indent for goods from England and elsewhere in Europe on the orders of local traders. The defendant is a hardware merchant, carrying on business in the Pettah of Colombo. The contract is contained in the document marked A, which is in the printed indent form of the plaintiffs, with the description of the goods and certain other particulars written at the bottom. As much of the argument on the appeal related to the construction of this document, it is convenient to quote it in full. It is as follows:—

INDENT FOR C.I.F. IMPORT BUSINESS.

(1) I/we, the undersigned, I. L. Abdul Kudhoos, hereby request Messrs. Hayley & Kenny to order and import for my/our account and risk the whole or any part of the goods mentioned hereinafter at the prices and on the terms noted below.

(2) Price to include cost, freight, and insurance, but duty and all landing and Customs charges to be paid by the indentor. Payment cash in Colombo in Ceylon currency on presentation of shipping documents, or should such documents be delayed. payment to be made on the day goods arrive in Colombo. Messrs. Hayley & Kenny are not responsible for loss sustained through the late arrival of documents.

(3) For goods sold in sterling currency the current rate of exchange on the day of payment will be taken.

(4) Should I/we fail to pay for the goods as arranged above, Messrs. Hayley & Kenny may land, clear, and store the goods at my/our expense and risk, and may at any time thereafter and without only special notice to me/us sell the goods on my/our account and risk, either by auction or by private sale, and I/we agree to make good to them immediately any loss and expenses incurred thereby, and also to pay them in addition 3 per cent. *re* sale commission and ½ per cent. *re* sale brokerage.

(5) Messrs. Hayley & Kenny are not responsible for late or non-shipment of goods in consequence of war, accidents, or loss during sea and/or land transport, ice blockades, quarantines, strikes, bankruptcy, fire at manufacturer's works. breakdown of machinery, or other causes of *force majeure*.

I/we agree that we will not make any claim for late shipment if same be only two weeks after the specified time. The date of the bill of lading will be accepted by me/us as conclusive evidence of the date of shipment without further proof being required. If goods were ready for shipment within contract time, and were shut out or have to wait for the steamer, such goods to be shipped by the first available steamer, and I/we agree to accept them without making a claim. Should the goods be shipped before the time stipulated, I/we agree to pay for them as arranged above, but with an allowance for interest at the rate of 6 per cent. per annum for the time shipped too early.

(6) The weight of the goods as specified in the shipper's invoice shall be accepted by me/us as the correct weight thereof, and the goods shall be paid for on that basis, any loss in weight being borne by me/us.

(7) Messrs. Hayley & Kenny or their agents are to effect marine insurance F. P. A. on the said goods with some good Insurance Co., the solvency of which they shall, however, not be deemed to guarantee for the full invoice value of the said goods (unless otherwise agreed in writing), otherwise all goods shall be at my/our sole risk from the time when same shall be put on board ship at the port from which shipment is first made, and Messrs. Hayley & Kenny shall be in no way responsible therefor.

(8) All complaints regarding the goods to be made in writing within seven days from arrival of the goods.

(9) Each shipment and/or separate item under this order to be separate contract.

(10) Messrs. Hayley & Kenny are not responsible for any errors caused by mutilated or incorrectly interpreted telegrams.

(11) Disputes of whatever nature arising out of this contract to be referred to the arbitration of two gentlemen from the list of surveyors and arbitrators nominated by the Ceylon Chamber of Commerce, one to be chosen by each party, whose decision I/we agree to accept as binding and final, but should the two arbitrators be unable to agree, they shall refer the case to an umpire, whose decision shall be final and binding upon both parties. If by mutual agreement only one arbitrator is chosen, his decision shall be final and binding upon both parties.

In case I/we fail to nominate an arbitrator within three days from the time, I/we have been requested by Messrs. Hayley & Kenny in writing to do so, Messrs. Hayley & Kenny are at liberty to nominate an arbitrator for me/us, and I/we agree to accept his decision on my/our behalf.

Arbitrator's fees are to be borne by the party against whom the decision is given.

The acceptance of this order shall be made known to me/us by Messrs. Hayley & Kenny within . . . . days from the date hereof, failing which, this order shall be deemed cancelled. Notice of acceptance shall be taken as sufficient if sent by post to my/our place of business.

Messrs. Hayley & Kenny shall be entitled to receive from me/us a commission of . . . . per cent. on the full invoice amount, whilst their European or other representatives have to find their remuneration on the selling prices of the goods.

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We hereby bind ourselves jointly and severally to perform the several conditions and covenants hereinbefore contained.

Anything written in the vernacular, except a plain signature, shall be null and void.

I/we undertake to give Messrs. Hayley & Kenny full instructions as to get-up, stamping, marking, packing, &c., of the goods, immediately after acceptance of the order, but should I/we fail to do so, Messrs. Hayley & Kenny are at liberty to use their own discretion in these matters.

(Sgd.) I. L. ABDUL KUDHOOS.

FROM WILLIAM TELL BRAND.

12½ Twelve and a half tons galvanized plain sheets, sizes as below at seventy-three pounds four shillings.

£73. 4*s*. per ton c.i.f., &c.

8 tons 3 × 8 = 26 gauge.
4 tons 2 × 8 = 26 do.
½ ton 2½ × 8 = 26 do.

12½

Shipment : As soon as possible.

Terms : Payment in cash before delivery, or at seller's option by approved pro-notes at 90 days' sight at ruling rate of bank interest.

Mark :

(Sgd.) T. MURUGESU.

Accepted 20/4/20.
Per pro HAYLEY & KENNY,
(Sgd.) ——

The plaintiffs allege that the goods arrived at Colombo on or about October 13, 1920, and were duly tendered to the defendant, and that the defendant in breach of his contract failed to take delivery of and pay for the same, and they claim Rs. 7,332.57 being the difference between the contract price and the amount realized when they were sold by auction at the defendant's risk, together with a certain sum as interest. The defendant pleaded, *inter alia*, that the plaintiffs could not and did not tender an effective policy of insurance covering the galvanized sheets ordered by him, and he was, therefore not bound to accept the goods. The District Judge upheld this ground of defence, and dismissed the action with costs, and the plaintiffs have appealed.

It is admitted that no policy of insurance was tendered to the defendant, and that the insurance which the plaintiffs effected covered not alone the goods in question, but also other goods

ordered by others on separate indents. The law is clear that in the case of c.i.f. contracts a policy of insurance must be delivered by the vendor together with the ordinary shipping documents. *Mambre Saccharine Co., Ltd., v. Corn Products Co., Ltd.*,[1] and *Wilson Holgate & Co. v. Belgian Grain & Produce Company*.[2] The first of these cases shows that the purchaser is entitled to have delivered to him a policy of insurance which covers only the goods mentioned in the bills of lading and invoices. But it is contended on behalf of the plaintiffs that the indent constituted a contract of agency, and not a contract of puurchase and sale, and that the defendant could not refuse to accept the goods, but would have only a claim for damages if the plaintiffs had violated any part of their duty, and the judgment of Lord Blackburn in the leading case of *Ireland v. Livingstone* [3] is cited in this connection. The indent in this case no doubt is in form a contract of agency, but it is noticeable that the order is to supply the goods at a settled price, which is to cover cost, insurance and freight, and commission. Thus, if the plaintiffs were able to procure the goods at a less price, they would be under no obligation to reduce their claim, nor, if they had to pay a larger price, would they be able to claim anything more than the price agreed upon. The gain or loss, as the case may be, would be the plaintiffs' own, and this is inconsistent with the essence of a contract of agency, as explained in *Ireland v. Livingstone* (*supra*). In this, as in that case, there is no relation between the defendant and the consignor in England, who was wholly unknown to the defendant, and unless the plaintiffs were considered the vendors to the defendant, there would be no one from whom the title to the goods could pass to the defendant. I think that the plaintiffs, to all intents and purposes, are in the position of vendors to the defendant and are bound to observe the obligations of a contract on c.i.f. terms. Even if the contract were really one of agency, there is, I think, no difficulty in attaching to the plaintiffs the same obligations. Any controversy on this head, however, is concluded by the position which the plaintiffs themselves took up in bringing the action, for their plaint stated that by the indent in question "the plaintiffs sold and the defendant bought 12½ tons of galvanized plain sheets at £73. 4s. per ton c.i.f. and c." I think that in accordance with the ordinary incidents of a c.i.f. contract, they were bound to effect a separate insurance over the goods ordered by the defendant, and tender to him the policy of insurance before they sought to enforce the contract against him.

The plaintiffs, however, pressed two points which they contended relieved them from that obligation. They sought to establish a custom among merchants in Colombo, according to which the merchant who executes an indent may effect one policy of insurance over the goods of several parties and likewise retain the policy and

[1] *(1919) 1 K. B. 198.* [2] *(1920) 2 K. B. 1.* [3] *41 L. J. Q. B. 205.*

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recover on it in case of necessity on behalf of the indentors and not deliver it unless asked for. The evidence on this point is, I think, insufficient to establish a definite invariable custom, even if a local custom can override the general rule of mercantile law. The witnesses called were Mr. C. G. Simpson, an assistant in the plaintiff's firm, and Mr. K. G. Carolis Silva, a clerk employed by the plaintiffs, and Messrs. Joliffe, Cunningham, and Thalmand, members or assistants of three other firms. Mr. Simpson says: "The policy was in London. We had a certificate of insurance. It is kept with us in case of a claim on the part of defendant. We would have a claim on the insurance company . . . . It has never been the practice to give the actual policy to the indentor," and in another passage he says: "He (the defendant) never at any time asked for the policy of insurance." Mr. Carolis Silva says: "The policy of insurance or certificate of insurance is usually held in the office till it is called for by the buyer. If the goods are damaged, and the buyer wants to make a claim, he asks for the insurance policy. If not, he does not ask for it. We have not had claims. Unless asked for we do not tender the policy of insurance." The defendant's counsel objected to any question regarding any custom. The District Judge overruled the objection, and the witness was asked: "As far as you know, is it the custom to surrender the certificate or policy unless they are asked for?" His answer was "No." Mr. Joliffe says: "We have never handed the policy of insurance to the buyer. We have never been asked for it . . . . As far as my knowledge is concerned, I should say that it is not the custom for firms and importers to hand over the insurance policy to the indentor." Mr. Cunningham says: "The insurance policy is very seldom asked for, and we never tender it unless asked for. We very seldom get the actual policy. Our agents in England have a floating insurance, against which they issue a certificate . . . . If the indentor of goods insured with a floating policy asks for the policy, we present him with the certificate." Mr. Thalmand, who is an assistant of Messrs. Volkart Bros., says: "I am well acquainted with the method of their import business . . . . We never give him (the indentor) the insurance policy . . . . The indentor has not the right to ask for the policy, but the giving of the certificate would be sufficient compliance with the request." The last witness called for the plaintiffs is Mr. C. E. Ekanayake, who is a clerk of Messrs. Darley, Butler & Co. He says: "Sometimes we get the actual policies of insurance, sometimes certificates . . . . I do not remember a case in which I gave a policy or certificate of insurance. In that case, if he asked for the insurance policy, I would give him the certificate."

It seems to me that these witnesses practically speak of the practice of their respective firms, and not of a general local custom, and there does not appear to be any uniformity in the practice.

As regards the giving of a certificate of insurance, it is clear law that the tender of a certificate, instead of a policy of insurance, is not a compliance with the requirements of a c.i.f. contract. *Diamond Alkali Export Corporation v. Bourgeois.* [1] In answer to the difficulty that the policy effected by the plaintiffs was not over the defendant's goods only, but covered other goods, counsel for the plaintiffs stated that if a proper policy had been asked for, they might have got one from the Insurance Company and given it to defendant. The possibility of this is problematical, and, moreover, the question is not what the plaintiffs might have done, but what they did or rather what they did not do before they claimed damages from the defendant.

The other point relied on by the plaintiffs is one of estoppel. The galvanized sheets ordered by the defendant were of the "William Tell" brand. The plaintiffs' agents in England in September informed the plaintiffs that the goods were shipped by the ss. " Dorsetshire, " and the plaintiffs passed on that information to the defendant. But it was soon discovered that the plaintiffs' agent had made a mistake, that the galvanized sheets shipped by the ss. " Dorsetshire " were of the " Sunflower " brand intended for another indentor, and that the " William Tell " sheets were coming by the ss. " Makalla. " The defendant was notified of this and when the ss. " Makalla " with the defendant's goods arrived, they were tendered to the defendant. The defendant took up the position that the ss. " Dorsetshire " shipment had been tendered to him in execution of his indent, and he refused to accept the ss. " Makalla " shipment. The plaintiffs contend that the absence of a policy of insurance not being stated as the ground of refusal there was a waiver, and the defendant is estopped from setting up his present defence. It is a well-known rule of law, however, that a party who gives a wrong reason for his refusal is not thereby deprived of a justification which in fact existed. *Braithwaite v. Foreign Hardwood Company,* [2] which has been cited is no real authority to the contrary. That case was explained in *Taylor v. Oakes* [3] as deciding no more than that " a buyer cannot justify his refusal of an offer to deliver goods under the contract by proving that if he had not refused the goods when delivered would not have been in accordance with the contract, " and as not being intended to decide that if goods are tendered for acceptance to the buyer and refused by him for an untenable reason, he is liable for damages for his justifiable refusal, because he gave a wrong reason for it. I think, therefore, that the plaintiffs' plea of estoppel fails.

In my opinion the appeal should be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

[1] *(1921) 3 K. B. 443.*
[2] *(1905) 2 K. B. 543.*
[3] *(1922) Times Law Reports, 349.*