No. 13 of 1954.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

M. TAKIM & COMPANY . . . . . . *Appellants*

AND

FAZAL KASSAM VELJI . . . . . . *Respondent.*

Case for the Appellants.

RECORD.

1. This is an appeal from a decree, dated the 1st November, 1952, of the Court of Appeal for Eastern Africa (Nihill, P., Worley, V.-P., and Pelly Murphy, Ag. C.J.), allowing an appeal from a decree, dated the 28th November, 1951, of His Britannic Majesty's Court for Zanzibar (Gray, C.J.), awarding the Appellants damages for breach of a contract for the sale of cloves. p. 27. p. 19.

2. By their plaint, dated the 15th May, 1951, the Appellants alleged that by a contract in writing dated the 20th June, 1950, they bought from the Respondent 20,000 lbs. of fair quality cloves at the price of 95/– per 100 lbs. to be delivered between the 1st and the 30th November, 1950. The Respondent did not deliver any of the cloves. The Appellants claimed as damages 8,800/–, being the difference between the contract price and the market price of cloves on the 30th November, 1950. By his amended defence, dated the 20th July, 1951, the Respondent denied that the document of the 20th June, 1950, had any legal effect; he alleged that it was a note or memorandum made by a broker and, not being duly stamped, was not admissible in evidence or enforceable in law. He also denied the failure to deliver and the Appellants' damage. pp. 1–2. pp. 6–7.

3. The statutory provisions relevant to this appeal are :—

Sale of Goods Decree (*Laws of Zanzibar*, 1934, *cap.* 81)

> 3.—(1) A contract for the sale of any goods entered into after the first day of October, 1921, of the value of one hundred rupees or upwards shall not be enforceable by suit in any court in the Protectorate unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay not less than ten per cent.

of the price thereof in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Stamp Decree, 1940.

A. *Of the liability of Instruments to Duty.*

4. Every instrument described in the First Schedule hereto shall, unless expressly exempted therefrom by this Decree, be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor—

(*a*) if it be executed in the Protectorate ; or

(*b*) if, being executed out of the Protectorate, it relates to any property situated therein or to any matter or thing to be performed or done therein :

Provided that no duty shall be chargeable in respect of any instrument executed by, or, on behalf of, or in favour of the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument.

* * * * *

6. Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Decree.

* * * * *

C. *Of the Time of Stamping Instruments.*

19. All instruments chargeable with duty and executed by any person in the Protectorate shall be stamped within thirty days of execution :

Provided that any instrument chargeable with duty of ten cents or twenty cents or promissory notes and bills of exchange shall be stamped at or before the time of execution, or the date of the instrument whichever shall be the earlier.

* * * * *

Instruments not Duly Stamped.

* * * * *

39. 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 the evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that—

(*a*) any such instrument not being an instrument chargeable with duty of ten cents or twenty cents only (other than a cheque) or a bill of exchange (other than a bill of

exchange presented for acceptance, accepted or payable elsewhere than in the Protectorate) or a promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of twenty shillings, or, when ten times the amount of the proper duty or deficient portion thereof exceeds twenty shillings, of a sum equal to ten times such duty or portion ;

* * * * *

FIRST SCHEDULE.

Stamp Duty on Instruments.

Description of Instrument	*Proper Stamp Duty.*
* * * * *	
5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT—	
(*a*) if relating to the sale of a bill of exchange ;	Twenty cents.
(*b*) if relating to the sale of a Government security, or share in an incorporated company or other body corporate ;	Twenty cents.
(*c*) if not otherwise provided for ..	One shilling.
Exemptions.	
(1) Agreement or memorandum of an agreement—	
(*a*) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under No. 41 ;	
* * * * *	
41. NOTE OR MEMORANDUM, sent by a Broker or Agent to his Principal intimating the purchase or sale on account of such Principal—	
(*a*) of any goods of the amount or value of forty shillings or over ;	Twenty cents.
* * * * *	

4. The Action was tried by Gray, C.J., on the 31st October, 1951. Evidence on behalf of the Appellants included evidence to the following effect :—

p. 9, ll. 20–39. (A) Akbar Rashid Nathani, a partner in the firm, said that in June, 1950, he had instructed his broker to get an offer of 20,000 lbs. of cloves. The broker had brought him the offer the same day, and he had confirmed the bargain. The next day the broker had brought him three copies of the contract, signed by the Respondent. The witness had signed all three copies, and his clerk stamped the one copy which the witness retained, returning the other copies to the broker. He produced the retained copy, which was admitted for purposes of identification (exhibit 1).

p. 10, ll. 1–10. The delivery period was the 1st–30th November, 1950, and no cloves had been delivered in that period. He claimed 8,800/–, the difference between the market price and the contract price

p. 10, ll. 10–14. on the 30th November. Exhibit 1 would not have been binding on him without his signature. If neither party had signed, the contract

p. 10, ll. 15–36. would not have been binding. Cross-examined, he said ex. 1 bore the signatures of the broker and the seller when the broker brought it to him. The broker had acted as a broker, not as an agent, and had negotiated the deal for him. If the broker made such an agreement, they had to accept it. He could not say if there had been any case in which the broker's authority had been repudiated. The contract had been settled between the sellers and the broker and brought to him as a contract. When the broker brought him the bid he had not been bound to accept it.

p. 33. (B) Exhibit 1 was a document headed " Local Contract Note." It was dated the 20th June, 1950, and recorded that the Respondent had, on certain conditions which it set out, sold to the Appellants 20,000 lbs. of cloves through a broker named Mohamed Saleh Bhaloo. Under the heading " Other conditions " appeared, *inter alia*, the words " The seller and the buyer have made bargain with signature." Below the broker's signature was a note of agreement and a clause dealing with loss through war or accident, and the signatures of the parties.

p. 11, ll. 1–17. (C) Mohammed Saleh Bhaloo, the broker, said Nathani had instructed him in June, 1950, to get an offer of 20,000 lbs. of cloves for delivery by the 30th November, 1950. The Respondent offered the cloves at that price, and on Nathani's instructions the broker completed the bargain with the Respondent. At first it was verbal. He wrote out the contract that evening and got the parties' signatures the next day. Nathani retained one copy and instructed his clerk to stamp it. After describing the Respondent's failure

p. 11, ll. 29–36. to deliver, the witness said that Nathani had not originally given him authority to buy, but had asked him to inquire the price. The deal was not complete without the signatures of the parties,

p. 11, l. 38–p. 12, l. 6. until then it was only a promise. Cross-examined he said he had filled up the three forms and signed them on the 19th June. He got Nathani's signature on the 20th June, and at that time there was no signature on the contract. When negotiating contracts

for the sale of cloves he acted as agent for one or other of the parties. In this case he had been the agent of the buyers, not the seller. The seller always paid the commission to him.

(D) Madhavji Kalidas said he had been a broker in Zanzibar for thirty-eight or thirty-nine years. Forward sales of cloves were made on forms like ex. 1. The buyer would tell him he wanted cloves, and he would look for a seller. When both parties had agreed to the price and the terms they signed the contract, and the seller gave commission of $\frac{1}{4}$ per cent. He had never entered into a binding contract of sale on behalf of a party. He signed only as broker. Cross-examined, he said the first negotiations would be conducted verbally by a broker on behalf of both parties. When the terms had been agreed, the broker would set them out in writing. If either party did not sign, the bargain would not be considered to be concluded. p. 12, ll. 19–29. p. 12, l. 31–p. 13, l. 15.

(E) Mohanlal Karunshankar Jani, a dealer in cloves, said forward sales of cloves were made on forms like ex. 1. He would instruct a broker how much he wanted. When the price was settled, the broker would write out a contract like ex. 1 and both buyer and seller would sign it. Unless they did so, the contract was not complete. The seller generally paid the broker's commission. Cross-examined, he said that in settling the terms of the purchase the broker acted for both parties. He knew of no instance in which a buyer or a seller had repudiated a contract after the broker had written out the terms. Re-examined, he repeated that if either party refused to sign, the contract would not be complete. p. 13, ll. 21–32. p. 13, ll. 34–44. p. 14, l. 2.

5. No evidence was given on behalf of the Respondent. p. 14, l. 4.

6. The learned Chief Justice delivered a reserved judgment on the 28th November, 1951. Having recounted the facts, he said the Respondent contended that ex. 1 was liable to duty under art. 41 of the first schedule to the Stamp Decree, had not been stamped at or before the time of execution, and so, under proviso (*a*) to s. 39 of the Decree, could not be admitted in evidence. If this was right, the Appellants had no evidence on which, under s. 3 of the Sale of Goods Decree, they could enforce their claim. On the other hand, the Appellants contended that ex. 1 was exempt from duty under art. 5 of the first schedule to the Stamp Decree, exemption 1 (*a*). He had been referred to the case of *Vagani & Co.* v. *Lakhani, Ltd.*, 16 E.A.C.A. 5, in which the East African Court of Appeal had held a somewhat similar document to be a broker's note. The document in that case had been headed " Sale Note," and the parties were described as " Sellers " and " Buyers " respectively. At its foot appeared the word " Confirmed by Sellers," " Confirmed by Buyers," and " Brokers " ; there was no printed note of agreement like that at the foot of ex. 1. The all important words in ex. 1 were those at the beginning, " Seth F. K. Velji has, on the following conditions, sold . . . " ; those, under the heading " other conditions," " The Seller and buyer have made bargain with signature " ; and the concluding words which the parties had subscribed, " The above-named goods have been sold on the conditions written above." In *Vagani's Case* it had been decided that the document p. 15, ll. 1–37. p. 15, ll. 38–52. p. 16, ll. 1–5. p. 16, ll. 6–11. p. 16, ll. 12–26. p. 16, ll. 31–38. p. 16, l. 39–p. 17, l. 5.

became a contract of sale when the parties signed it, but had originally been a broker's note. It was, therefore, a document " comprising or relating to several distinct matters," and so chargeable with the aggregate amount of the duty which would have been chargeable on separate
p. 17, ll. 10–39. instruments relating to each such matter. The Stamp Decree was a taxing law, so had to be construed strictly. The words " purchase or sale " in article 41 of the first schedule meant a sale effectual in law, so ex. 1 fell within article 41 only if it recorded an effectual sale or contract
p. 17, ll. 40–45. of sale. A broker's note was generally admissible, as recording an effectual contract, because the broker acted for both parties and bound
p. 17, l. 46– p. 18, l. 3. both by his signature, but there might be exceptions to this. Evidence had been called of what was locally regarded as the effect of a document such as ex. 1, but Nihill, P., had held in *Vagani's Case* that a local law merchant could not disguise the real nature of the document. The final
p. 18, ll. 15–36. words, " The above-mentioned goods have been sold . . . ", and the signatures converted the document into an effectual contract of sale; but to see whether the instrument was chargeable under article 41 it was necessary to look at the words above the broker's signature. It was clear from the statement, " The seller and buyer have made bargain with signature," that those words did not record an effectual contract. The broker was submitting proposed terms, for the parties to sign if they agreed
p. 18, ll. 37–47. to them. Consequently the document did not record an effectual contract, was not liable to duty under article 41, and could be received in evidence. The Respondent had offered no other defence, so the Appellants were
p. 18, ll. 48–49. clearly entitled to damages. The learned Chief Justice gave judgment for the Appellants for 8,750/– with interest and costs.

7. The Respondent appealed to the Court of Appeal for Eastern
p. 20. Africa. His memorandum of appeal, dated the 15th January, 1952, contained the following grounds: that ex. 1 was a broker's note liable to duty under article 41; that it came into existence as a " local contract note " evidencing an effective sale of goods; and that it could not be distinguished from the documents interpreted in *Vagani's Case*. The appeal was heard on the 27th October, 1952, and judgment was delivered on the 1st November, 1952.

p. 23, l. 27– p. 24, l. 6. 8. Nihill, P., said the point for decision was whether Gray, C.J., had been right in holding that ex. 1 did not attract stamp duty under article 41. Exhibit 1 bore a stamp, but it was not seriously disputed that this stamp had not been affixed " at or before the time of execution " as required by s. 19. If ex. 1 fell within the words of article 41 it was
p. 24, ll. 7–36. inadmissible, and the claim for damages must fail. In *Vagani's Case* the majority of the Court had held that the document in question, being in the first place a broker's note, was liable to duty, although the buyer and seller, by subsequently signing it, might have made it also an agreement of sale. Graham Paul, C.J., had dissented, holding that, since the document when produced in court was an agreement relating to the sale of goods, it was admissible unstamped. It remained to consider
p. 24, l. 37– p. 25, l. 38. whether Gray, C.J., had been justified in distinguishing *Vagani's Case*. He had done so because of the words, " The seller and the buyer have made bargain with signature," in ex. 1. The learned President felt difficulty in construing " have made bargain " as " will make bargain

hereafter " ; he regarded ex. 1, considered as a whole, as indistinguishable from the document in *Vagani's Case*. Exhibit 1 was an intimation of a sale sent by a broker to his principals. The broker had intended the parties to sign it, but that was merely a matter of local merchant custom. The document was therefore liable to stamp duty of 20 cents, and ought to have been stamped at or before the time of execution or its date, whichever had been the earlier. This had not been done ; for a broker's note was executed when the broker signed it, the broker had signed ex. 1 on the 19th June, and it had not been stamped until the following day. The learned Chief Justice had gone wrong in thinking that the document, above the broker's signature, had necessarily to record an effectual contract for purchase and sale of goods. The contract might not have been enforceable without the parties' signatures, but in ex. 1 the broker was purporting to intimate to his principals that he had arranged a purchase and sale on their account. Consequently the document ought to have been stamped ; and the Appellants, having no other evidence sufficient to support the contract, must fail.

p. 25, ll. 39–49.

p. 26, ll. 1–16.

9. Worley, V.-P., and Pelly Murphy, Ag. C.J., delivered judgments concurring in that of Nihill, P., and the appeal was allowed with costs.

pp. 26–27.

10. The Appellants respectfully submit that ex. 1 was never a document (in the words of article 41) " sent by a Broker or Agent to his Principal intimating the purchase or sale on account of such Principal . . ." The learned Chief Justice was right in holding those words to be appropriate only to a document reporting a completed bargain ; until there is a bargain binding buyer and seller there is no " purchase or sale " for the broker to intimate, but only an offer or a provisional arrangement. When the broker brought ex. 1 to the Appellants and to the Respondent there was no completed bargain, because, as appears from the words " The seller and the buyer have made bargain with signature," the signatures of the parties were needed to complete it. The past tense (" have made ") was used because the broker, when drawing up ex. 1, regarded it as having no effect until the parties should sign it. This is confirmed by the date of the document. The broker drew it up and signed it on the 19th June, but it is dated the 20th June, which was the day on which the parties signed it. It was, and was always intended to be, an agreement relating exclusively to the sale of goods, and so was exempt from stamp duty under article 5.

11. Furthermore, even if when exhibit 1 was signed by Nathani it could be construed as a broker's intimation to his principal of the contract then made, exhibit 1 was thereupon stamped and the Appellants respectfully submit that the instrument was thus duly stamped at execution within the meaning of Section 19 of the Stamp Decree, 1940.

12. In *Vagani's Case* the signatures of the parties appeared at the foot of the document opposite the words " Confirmed by sellers " and " Confirmed by buyers." In exhibit 1 the word " confirmed " is not used, and the signatures of the parties appear under a note which contains a term (about the effect of war or accident) which, on the face of the document, is distinguished from " the conditions written above." The

Appellants respectfully submit that, even if the broker did make a complete bargain in this case, it is to be distinguished from *Vagani's Case* on this ground. In *Vagani's Case* the parties merely confirmed the bargain made by the broker ; in this case they did not confirm the bargain made by the broker, but made a new bargain including a new term.

13. The Appellants respectfully submit that the learned Judges were wrong in excluding from their consideration the evidence of local mercantile custom. Such evidence was admissible to shew that a document apparently binding was by local custom inchoate ; and the evidence summarised in paragraph 4 (D) and (E) of this Case did shew that. Alternatively, the evidence was admissible in this case because exhibit 1 was ambiguous and evidence of custom was necessary to resolve the ambiguity and shew whether or not there was a contract before the parties had signed the document.

14. The Appellants respectfully submit that *Vagani's Case* was wrongly decided by the majority and the dissenting judgment of Graham Paul, C.J., was right. Section 6 of the Stamp Decree was not relevant to the case, because that section applies only to documents comprising or relating to several matters simultaneously, and not to documents which at one stage of their existence comprise one matter and at a later stage, as a result of an alteration or addition, comprise a different matter. Documents of the latter type are to be assessed to stamp duty according to what they comprise when submitted in evidence to the court. If an agreement or memorandum of an agreement relating to the sale of goods is submitted in evidence, it is admissible even though part of the document may at some earlier time have been an unstamped broker's note. The addition of the parties' signatures made the document in *Vagani's Case* into an agreement or memorandum of agreement relating to the sale of goods (as Nihill, P., was in the present case inclined to concede) ; so both that document, and exhibit 1 in this case, were exempt from stamp duty and ought to have been admitted in evidence.

15. The Appellants respectfully submit that the decree of the Court of Appeal for Eastern Africa was wrong and ought to be reversed, and the decree of His Britannic Majesty's Court for Zanzibar ought to be restored, for the following (amongst other)

REASONS

(1) BECAUSE exhibit 1 is an agreement or memorandum of an agreement for or relating to the sale of goods exclusively and therefore does not require a stamp.

(2) BECAUSE exhibit 1 is not, nor ever was, a note or memorandum sent by a broker to his principal intimating a purchase or sale on the principal's account.

(3) BECAUSE the contractual obligations evidenced by exhibit 1 only arose when exhibit 1 was signed by Nathani, and even if it could be construed as such a note or memorandum it was duly stamped.

(4) BECAUSE Gray, C.J., rightly held exhibit 1 to be admissible in evidence.

FRANK GAHAN.

J. G. LE QUESNE.

No. 13 of 1954.

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ON APPEAL

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AND

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Case for the Appellants.

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