14, 1959

IN THE PRIVY COUNCIL No. 20 of 1958

55523

ON APPEAL

FROM THE COURT OF APPEAL

OF THE COLONY OF SINGAPORE, ISLAND OF

SINGAPORE.

BETWEEN :-

SZE HAI TONG BANK LIMITED
(First Third Party) Appellants

- and -

RAMBLER CYCLE CO. LIMITED
(Plaintiffs) Respondents

SOUTHERN TRADING COMPANY
(Second Third Party)

GLEN LINE LIMITED
(Defendants) Pro Forma Respondents

CASE FOR RESPONDENTS

RECORD

1. This is an Appeal by leave of the Court of Appeal of the Colony of Singapore, Island of Singapore, from a Decree of the Court of Appeal dated the 24th September 1957 whereby the Court of Appeal unanimously dismissed the Appellants' appeal from a Judgment of Mr Justice Whitton delivered on the 17th January 1957 in the High Court of the Colony of Singapore, Island of Singapore, and from an Amended Order made by Mr.Justice Whitton on the 23rd January 1957. By the said judgment and order it was adjudicated that: (p.84 11.1-20; p.85 1.17 - p.86 1.15; p.79 1.21 - p.80 1.15; p.45 1.25 - p.62.1.37; p.62 1.37 - p.64 1.17)

(a) the Defendants, Glen Line Limited, do pay to the Plaintiffs, the present Respondents, Rambler Cycle Co. Limited, the sum of £3,014.18. 6. (or Singapore $25,958.10) with (p.63 11.18-23)

costs as between Party and Party;

p.62 ll.31-37 (b) the First Third Parties, the present Appellants, Sze Hai Tong Bank Limited, do indemnify the Defendants against the Defendants' aforesaid liability to the Plaintiffs with costs as between Solicitor and Client, and

p.63 ll.40-44 (c) the Second Third Parties, Southern Trading Company, do indemnify the said First Third Parties against the First Third Parties' aforesaid liability to the Defendants with costs as between Party and Party. 10

The Respondents will hereinafter for convenience refer to the parties to these proceedings as follows:

Sze Hai Tong Bank Limited: "the Appellants"

Rambler Cycle Co. Limited: "the Respondents"

Glen Line Limited: "the Defendants"

Southern Trading Company: "the Second Third Parties".

p.64 ll.17-38 2. Only the Appellants appealed to the Court of Appeal against the said Judgment and Order of Mr. Justice Whitton, and only the Appellants are now appealing against the dismissal of the said appeal by the Court of Appeal. The Defendants have not at any time appealed against the said Judgment and Order in favour of the Respondents against the Defendants. In the course of the proceedings in the High Court, the Appellants admitted their liability to indemnify the Defendants against any (p.10 ll.12-17 (p.40 ll.7-9 (p.63 ll.3-7 liability under which the Defendants might be held to be to the Respondents by reason of the Respondents' claim against the Defendants, and the (p.32 ll.39-41 (p.63 ll. 7-12 Second Third Parties made the same admission to the Appellants in respect of any liability under which the Appellants might be held to be to the Defendants. The Second Third Parties also p.32 ll.39-41 admitted their liability to indemnify the Defendants. 20 30

3. The circumstances which gave rise to the Respondents' claim against the Defendants and to the Defendants' claims against the Appellants and to the Appellants' claims against the Second Third Parties, and to this Appeal, are hereinafter in this Case set out. 40

4. By a bill of lading dated the 30th July 1954 the Defendants acknowledged the shipment by the Respondents on the Defendants' vessel s.s. "Glengarry" of 40 cases of Bicycle Parts and Bicycle Hub Brakes in apparent good order and condition for delivery in Singapore to the order of the Respondents or of their assigns in consideration of pre-paid freight in the sum of £112.11.2d. The said bill of lading provided that it was to be construed and governed by English law, and that it was to apply from the time the goods were received for shipment until their delivery. By virtue of the Carriage of Goods by Sea Act, 1924, and by virtue of the express terms of the said bill of lading, the said bill of lading was subject to the terms of the said Act and of the Schedule thereto. The intended consignees of the goods shipped under the said bill of lading (hereinafter referred to as "the said goods") and the persons to be notified of the arrival of the said goods were the Second Third Parties.

p 65-p.79 1.20
p.66 1.9-12
p.66 11.24 - 27
p.65 11.24-26

5. Prior to the said shipment in July 1954 the Respondents had made a number of similar shipments intended for delivery to the Second Third Parties. All the said shipments were made pursuant to a written agreement dated the 1st July 1953 (which is not included in the Record) between the Respondents and the Second Third Parties. The practice which had been adopted between the Respondents and the Second Third Parties in relation to these transactions, and which the Respondents intended to be adopted in the present case, was shortly as follows. Whenever the Respondents received an order from the Second Third Parties, the Respondents would manufacture the goods ordered and arrange for their shipment as soon as they were ready. The Respondents would thereupon obtain bills of lading through their London shipping agents in which the Respondents were named as the shippers and which made the goods deliverable to the order of the Respondents. These bills of lading, accompanied by a certificate of insurance, invoices and a first and second bill of exchange drawn on the Second Third Parties by the Respondents, payable in 90 days, would then be forwarded by the Respondents to the Bank of China for presentation by the Singapore branch of the Bank of China to the Second Third Parties, who would thereupon accept the bill of exchange. The next intended step was then that, on the date of the maturity of the bill of exchange (usually 90 days after acceptance), the Bank of China's Singapore

p.45 1.35 - p.46 1.4
p.46 11.6-9
p.13 11.18-26
p.46 11.9-23
p.13 11.24-31
p.33 11.36 - 39
p.12 11.39-40

branch would collect payment of the amount of the bill of exchange from the Second Third Parties and thereupon release the documents, including the bills of lading, to the Second Third Parties. The Respondents' intention and understanding was that, pending such payment, the goods would remain in a warehouse in the port of Singapore, and it was therefore the Respondents' practice to insure the goods for the duration of the voyage to Singapore and ninety days thereafter. Accordingly, the Respondents' intention and understanding was that the Second Third Parties' payment for the price of the goods upon the maturity of the bill of exchange was secured by the possession by the Singapore branch of the Bank of China of the bills of lading which covered the goods.

p.13 l.36 - p.14 l.19
(p.16 l.43-p.17 l.2
(p.20 ll.40-41
(p.22 ll.3-7
(p.28 ll.33-37
(p.14 ll.20-29
(p.22 ll.2-24
(p.23 ll.3-5
(p.24 ll.8-12

6. In fact, however, there appears at all material times to have been a practice in Singapore whereby the agents of shipowners of vessels carrying goods to Singapore were willing to release the goods to persons claiming to be the intended consignees against a letter of indemnity, supported by an indemnity or guarantee provided by a Singapore bank, to the effect that the intended consignees and the bank would indemnify the Shipowners against any liabilities which the Shipowners might incur by reason of the release of the goods without the production of the bills of lading covering the goods. It also appeared at the trial that, without the knowledge or consent of the Respondents, this practice had previously been adopted in relation to a number of shipments by the Respondents which were intended for delivery to the Second Third Parties. The practice was that the Second Third Parties would give an indemnity to the Appellants, and the Appellants and the Second Third Parties would thereupon both give an indemnity to the Singapore agents of the shipowners in question, in consideration whereof the said agents would release the goods to the Second Third Parties without the production of the bills of lading. Thereafter, when the Second Third Parties ultimately paid to the Bank of China the amount of the bill of exchange, and thereby obtained the bills of lading, the Second Third Parties would surrender the bills of lading to the Shipowners' agents and in return obtain the release of their and the Appellants' indemnities in favour of the Shipowners. Finally, the Second Third Parties would thereupon return the Appellants' indemnity in favour of the Shipowners to the Appellants, and the Appellants would thereupon release the Second Third Parties' indemnity in favour of the Appellants.

(p.36 l.33 -
(p.37 l.19
(p.61 ll.1-7
(p.19 ll.17-23
(p.22 ll.2-12
(p.24 ll.24-29
(p.37 ll.19-28
( p.35 ll.28-38
( p.37 ll.32-37

7. In a number of cases, however, including the present case, the Second Third Parties failed to make the required payment against the bills of exchange upon their maturity, but having nevertheless previously obtained possession of the goods by means of the procedure referred to in Paragraph 6 hereof, as the result whereof about £56,000 had become owing to the Respondents by the Second Third Parties prior to the trial. The present Appeal, however, only directly relates to the said goods shipped on the s.s. "Glengarry" under the aforesaid bill of lading. p.15 ll.16-18 (p.19 ll.19-21 (p.23 ll.36-37

8. The events which took place in relation to the shipment which is the subject matter of this Appeal were as follows. The Respondents sent the bill of lading to the Bank of China together with the other documents hereinbefore referred to for collection of the price of the said goods through their Singapore branch in accordance with the procedure referred to in Paragraph 5 hereof. The "Glengarry" arrived in Singapore on the 1st September 1954 and discharged her Singapore cargo, including the said goods, on the 2nd and 3rd September 1954 into godowns owned or under the control of the Singapore Harbour Board. On the 3rd September 1954 the Defendants' Singapore agents, Messrs. Boustead & Co., accepted indemnities or guarantees (which do not appear in the Record) from the Appellants and the Second Third Parties, in consideration whereof the said agents issued to the Second Third Parties delivery orders covering the said goods addressed to the Singapore Harbour Board. It appears that the Appellants had previously taken an indemnity from the Second Third Parties (which is also not included in the Record) in consideration of the Appellants giving the aforesaid indemnity or guarantee to Messrs. Boustead & Co. as agents for the Defendants. In pursuance of the said delivery orders, the Singapore Harbour Board thereupon released the said goods to the Second Third Parties on the 4th and 6th September 1954. No bill of lading covering the said goods was ever presented to the Defendants or to Messrs. Boustead & Co.; the Respondents never received payment for the said goods from the Second Third Party or from anyone else; and the said bill of lading was ultimately returned to the Respondents by the Bank of China. The value of the said goods C.I.F. Singapore, together with the additional insurance charges covering the period of 90 days after arrival and the ad valorem stamp duty on p.15 ll.3-21 (p.33 ll.22-25 (p.46 ll.24-27 (p.33 ll.27-30 (p.35 ll.5-13 (p.46 ll.27-31 (p.32 ll.39-41 (p.37 ll.3-14 (p.33 ll.31-33 (p.46 ll.33-39 (p.15 ll.15-21 (p.46 ll.32-39

(p.4 ll.1-12 the bill of exchange, was £3,005.11.6d., and
(p.15 ll.8-16 it appears that the difference between this sum and the sum of £3,014.18.6d., for which judgment was given in favour of the Respondents, represents
p.62 ll.18-22 interest.

9. There are two further facts which the Respondents submit are of cardinal importance in the present case.

First, the Defendants at no time suggested that their Singapore agents, Messrs. Boustead & Co., acted without the Defendants' authority or approval in delivering the said goods to the Second Third Parties without requiring the production of the said bill of lading. On the contrary, Mr.Perera, an employee of Messrs. Boustead & Co., who was called as a witness for the Defendants, said the following
p.35 ll.39-42 in his evidence: "In issuing delivery orders and in everything we do we act as agents of the Glen Line. It is an accepted fact that in absence of bills of lading goods are released on an indemnity."

Secondly, Mr.Perera admitted that it was wrong to release the said goods to the Second Third Parties without production of the said bill of lading. The notes of Mr.Justice Whitton of
p.35 l.42-p.36 l.3 Mr.Perera's evidence on this point are as follows: "I agree we are supposed to deliver the goods on the bill of lading being produced to us. I agree that when we do not have the bill of lading produced we cover ourselves by getting an indemnity. Suggested to me we get these indemnities because we know we are doing what we should not do I say that if no risk we would not need indemnity. I agree we get indemnity because we are doing something we know we should not do - but it is common practice. It is an everyday occurrence."

Mr.Perera's evidence was not challenged in cross-examination by the Appellants or the Second Third Parties.

10. By their Statement of Claim the Respondents contended that, by failing to deliver the said goods to the order of the Respondents or their assigns,
p.3 ll.28-38 as required by the said bill of lading, the Defendants committed a breach of the contract contained in or evidenced by the said bill of lading and converted the said goods to their own use.

By their Defence, the Defendants denied the said breach and conversion, and further relied upon
p.5 ll.18-25 the following defences:

(a) The Defendants contended that they were absolved from liability by Clause 2 of the said bill of lading, as hereinafter referred to.

(b) The Defendants further contended that the delivery of the said goods to the Second Third Parties without the production of the said bill of lading (i) constituted a good delivery to the Respondents on the ground that the Second Third Parties were at all material times the Respondents' representatives in Singapore, and (ii) was made with the knowledge and assent of the Respondents.

(c) The Defendants further relied upon Article III Rule 6 of the Schedule to the Carriage of Goods by Sea Act, 1924, but this defence does not appear to have been pursued and is not referred to in the judgment of Mr. Justice Whitton or in the judgments of the Court of Appeal.

(d) In the course of the proceedings, the Defendants also relied upon three other defences, viz. (i) Clause 10 of the said bill of lading, as hereinafter referred to, (ii) Article IV Rule 2(i) of the Schedule to the Carriage of Goods by Sea Act, 1924, and (iii) the allegation that the delivery of the said goods to the Second Third Parties without the production of the said bill of lading was made to the knowledge and with the assent of one Saul, the Respondents' Singapore representative. These additional defences are reflected in the judgment of Mr.Justice Whitton. p.47 l.3 - p.50 l.20 (p.57 ll.6-24 (p.59 l.29 - (p.60 l.46

By their Further Amended Reply the Respondents relied upon the following additional contentions in reply to the Defendants' Defence; viz:

(a) that the Second Third Parties had no authority from the Respondents to take delivery of the said goods otherwise than upon production of the said bill of lading, p.10 ll.22-34

(b) that the said Saul did not know of or assent to the delivery of the said goods to the Second Third Parties without production of the said bill of lading, and in any event had no authority so to assent, p.10 l.35 - p.11 l.11

(c) that by delivering the said goods to the Second Third Parties without production of the said bill of lading, the Defendants committed a fundamental breach of the contract of carriage and were p.11 ll.12-24

accordingly not entitled to rely upon Clause 2 of the said bill of lading or upon Article III Rule 6 of the Schedule to the Carriage of Goods by Sea Act, 1924; and that the Respondents accepted the Defendants' conduct as a wrongful repudiation of the contract of carriage by the issue of the writ herein.

11. By their Statement of Claim against the Appellants and the Second Third Parties, the Defendants relied upon the aforesaid indemnities which had been received from these parties in consideration of the release of the said goods without the production of the said bill of lading, as referred to in Paragraph 8 hereof.

p.6 l.28 - p.7 l.39

By their Defence, the Appellants admitted their said indemnity in favour of the Defendants, but otherwise denied that the Defendants were entitled to any relief in this case. As appears from the judgment of Mr. Justice Whitton, the Appellants further relied upon the defence that, by reason of the aforesaid practice in Singapore to release goods against indemnities without requiring the production of bills of lading, the Respondents had acquiesced in this method of delivery in the present case. The Defence of the Second Third Parties to the Defendants' Statement of Claim does not appear in the Record; nor does the Record contain the pleadings between the Appellants and the Second Third Parties. However, it appears from the admission made on behalf of the Second Third Parties in the course of the hearing and from the Order made by Mr. Justice Whitton on the 23rd January 1957 that, by reason of an indemnity given by the Second Third Parties to the Appellants, the Second Third Parties were liable to indemnify the Appellants against any liability under which the Appellants might be to the Defendants herein.

p.10 ll.1-16

p.60 l.47 - p.61 l.23

p.32 ll.39-41

p.63 ll.36-44

12. The provisions of the said bill of lading upon which the Appellants relied in the High Court and in the Court of Appeal are Clauses 2 and 10 thereof. The material terms of Clause 2 are as follows:-

p.67 ll.6-41

"During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this Bill of Lading that may be inconsistent therewith, viz.

(a) .....

(b) .....

(c) ... the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom."

The terms of Clause 10 of the said bill of lading are as follows:-

"Discharge and Delivery. The goods may be discharged from the ship as soon as she is ready to unload and as fast as she is able continuously day and night, Sundays and holidays included, on to wharf or quay, or other spaces, open or covered or into store, hulk, lazaretto or lighters, whether insulated, bonded or not, at ship's option and at the risk and expense of the owners of the goods, any custom of the port to the contrary notwithstanding, and always subject to the regulations and conditions of any such wharf or quay, spaces, store, bulk, lazaretto or lighters, whether the property of the carrier or other persons, to which regulations and conditions the owners of the goods hereby authorise the carrier to agree on their behalf. If discharge is impeded by consignees not taking delivery as fast as the ship can discharge, such consignees shall pay the carrier demurrage at the rate of 1/- per gross registered ton per day for any detention caused to the ship, and the goods may at carrier's discretion be carried on and discharged at the first convenient port, which shall for all purposes be considered the port of discharge under the Bill of Lading." p.72 l1.28 - p.73 l.2

13. In his judgment, Mr. Justice Whitton made the following findings of fact and arrived at the following conclusions of law:

(i) The learned Judge found that neither one Burnham, the Respondents' Export Manager, nor the said Saul, the Respondents' Singapore Manager, knew of or assented to the release of the said goods to the Second Third Parties against indemnities without the production of the said bill of lading, and found that it had not been established that the Respondents assented to the said release. p.47 l.3 - p.50 l.20 p.60 l.47 - p.62 l.12

p.50 l.21 - p.51 l.9

(ii) The learned Judge held, on the authority of Skibsaktieselskapet Thor v. Tyrer (1929) 35 Ll.L.R. 163 at p.170 and Scrutton on Charterparties 13th ed. p.369 (at p.339 in the 16th ed.), that the delivery of the said goods otherwise than against production of the said bill of lading constituted a breach of contract and a wrongful conversion of the said goods by the Defendants, in respect whereof the Defendants were liable to the Respondents unless the Defendants were exempted from liability by some provision in the said bill of lading.

p.52 l.23 - p.54 l.49

(iii) Applying the principle that a party who commits a fundamental breach of a contract is not entitled to rely upon the exceptions clauses in the contract, the learned Judge held that this principle applies to bills of lading as it does to contracts in general. In this connection the learned Judge applied the principles stated in Gibaud v. Great Eastern Railway Co. [1921] 2 K.B.427 at p.435 (C.A.), Karsales (Harrow) Ltd. v. Wallis [1956] 1 W.L.R. 936 at p.940 (C.A.), the Thor Case (supra), Compania Importadora De Arroces Collette Y Kamp S.A. v. P.& O. Steam Navigation Co. (1927) 28 Ll.L.R.63, and Smeaton Hanscomb & Co.Ltd. v. Sassoon I. Setty & Son & Co (No.1) [1953] 1. W.L.R. 1468.

p.55 l.1 - p.56 l.35

(iv) Following the decision of Mr. Justice Wright (as he then was) in the Compania Importadora Case (supra), the learned Judge held that the Defendants were not protected by Clause 2 of the said bill of lading even if, as they contended, the said Clause was not properly describable as an exceptions clause for the purpose of the authorities referred to in sub-paragraph (iii) hereof.

p.56 l.38 - p.57 l.5

(v) The learned Judge distinguished the decision of the Privy Council in Chartered Bank of India, Australia and China v. British India Steam Navigation Company [1909] A.C. 369 from the present case on the ground that in that case the wrongful delivery of the goods without production of the bill of lading occurred by reason of a fraud on the part of the landing agents to which the shipowners were not a party, with the result that the shipowners in that case did not commit a fundamental breach of the contract of carriage and were consequently entitled to rely upon a clause in the bill of lading similar to Clause 2 in the present case.

(vi) The learned Judge held that Clause 10 of the said bill of lading was not an exceptions clause, but that it did not contain anything which protected the Defendants in respect of a wrongful delivery of the goods. p.57 ll.6-23

(vii) The learned Judge held that the misdelivery of the said goods by the Defendants constituted a wrongful repudiation of the contract of carriage and that the Respondents accepted such misdelivery as a wrongful repudiation by the issue of the writ In this connection the learned Judge based his conclusion upon the decision in Woolf v. Collis Removal Service [1948] 1. K.B.11. p.57 l.24 - p.59 l.28

(viii) As regards the defence based upon Article IV Rule 2(i) of the Schedule to the Carriage of Goods by Sea Act, 1924, ("loss or damage arising or resulting from the act or omission of the shipper or owner of the goods, his agent or representative"), the learned Judge held that the Second Third Parties were not the Respondents' representatives for the purposes of this provision, but were simply the intended consignees; and, further, that it was not the relationship between the Second Third Parties and the Respondents which induced the Defendants' said agents to release the said goods without the production of the said bill of lading, but the indemnity which they received from the Appellants p.59 l.29 - p.60 l.12 p.60 ll.12-40

On the basis of the foregoing conclusions of fact and law the learned Judge gave judgment to the effect referred to in Paragraph 1 of this Case. p.62 ll.12-27

14. As mentioned in Paragraph 2 of this Case, the Defendants did not appeal against any part of the judgment of Mr. Justice Whitton. Only the Appellants appealed against the said judgment. The Appellants' appeal to the Court of Appeal was limited to two contentions, viz. that (i) the learned Judge was wrong in law in finding that the Defendants had committed a fundamental breach of the contract of carriage so as to disentitle them from relying upon the terms and conditions of the said bill of lading, and (ii) the learned Judge was wrong in law in finding that the terms and conditions of the said bill of lading did not operate to discharge the Defendants from liability to the Respondents. The judgment of Acting Chief Justice Knight, with which Chief Justice Thomson p.64 ll.20-31 p.64 ll.32-35 p.80 l.18 - p.83 l.5

p.83 ll.15-37 and Mr.Justice Chua expressed their concurrence, dealt only with these contentions on the part of the Appellants. The Respondents accordingly submit that no other points are open to the Appellants in the present Appeal.

15. In his judgment, the learned Acting p.80 l.25 - Chief Justice shortly reviewed the material p.81 l.19 facts and expressed his concurrence with the conclusions of Mr.Justice Whitton as summarised p.81 ll.20-35 in Paragraph 13 (ii), (iii) and (iv) of this Case. The learned Acting Chief Justice then also dis- p.82 ll 5-35 tinguished the Chartered Bank Case (supra) upon the ground that, whereas in the Chartered Bank Case the wrongful delivery of the goods occurred by reason of a fraud to which the shipowners were not privy, in the present case, upon the uncontra- p.35 l.39 - dicted evidence of the said Perera of Messrs. p.36 l.3 Boustead & Co., the wrongful delivery was made with the authority of the Defendants and was the result, p.82 ll.36-46 in effect, of the Defendants themselves re-assuming dominion over the said goods after their discharge. In these circumstances the Chartered Bank Case p.83 ll.14-27 (supra) had no application. Chief Justice Thomson and Mr.Justice Chua expressed their entire p.79 l.24 - agreement with this Judgment. The appeal was p.80 l.13 accordingly dismissed with costs.

16. The Respondents respectfully rely upon the whole of the judgments of Mr. Justice Whitton and of Acting Chief Justice Knight in support of their submission that this further appeal by the Appellants should be dismissed. In addition, the Respondents will (if necessary) rely upon the following further submissions:

(i) If further authority is required for the proposition that the delivery of cargo carried under a bill of lading otherwise than against presentation of the bill of lading constitutes a breach of the bill of lading contract and a wrongful conversion of the cargo in question, this may be found in The Stettin [1889] 14 P.D.142, Bristol and West of England Bank v. Midland Railway Co. [1891] 2 Q.B. 653 (C.A.), and Hannam v. Arp (1928) 30 Ll.L.R. 306 (C.A.)

(ii) If further authority is required for the proposition that a bailee, who has delivered the goods bailed to him to an unauthorised person and has thereby committed a breach of the contract of bailment and a wrongful conversion of the goods, is not thereafter entitled to rely

upon the exceptions clauses of the contract of bailment as a defence to a claim in respect of such breach and wrongful conversion, this may be found in Alexander v. Railway Executive [1951] 2 K.B. 882. The Respondents submit that such cases are a fortiori cases involving a fundamental breach of the contract of bailment when they are considered in comparison with the well-known line of cases in which carriers were held not to be entitled to rely upon protective clauses in the contract on the ground that they had deviated from the contractual route, even though they did thereafter deliver the goods to the proper person, as illustrated by London and North Western Railway Co. v. Neilson [1922] 2 A.C.263 and Tate & Lyle Ltd. v. Hain Steamship Co. Ltd. (1936) 41 Com.Cas. 350.

(iii) In addition to the grounds upon which the decision in the Chartered Bank Case (supra) was distinguished below in the High Court and in the Court of Appeal, the Respondents submit that this decision is distinguishable from the present case upon the following further grounds:

(a) As appears clearly from the report of Counsel's argument in that case ([1909] A.C.369 at pp.370 and 371) and from the judgment (at p.375), it was not argued in that case on behalf of the Appellants, the bill of lading holders, that the Respondents, the shipowners, had committed a fundamental breach of the contract of carriage which disentitled them from relying upon the material exceptions clause in the bill of lading. The argument and the judgment were confined to a consideration of the question whether, upon its true construction, the exceptions clause relieved the shipowners from liability in respect of a wrongful delivery of the goods after their discharge, such wrongful delivery being made as the result of a fraud to which the Shipowners were not parties. This question was decided in favour of the Shipowners, but the Respondents submit that the authority of the case is limited to that question alone

(b) The Respondents submit that, although the principle of wrongful deviation in relation to contracts of bailment has long been recognised, it is only comparatively recently, and more recently than 1909 when the Chartered Bank Case (supra) was decided, that it has been invoked and applied as an answer to a defence based upon exceptions clauses in the contract

in question. The first and leading authority, which is usually cited in support of the principle that exceptions clauses provide no defence in such a case, is the judgment of Scrutton L.J. in 1921 in Gibaud v. Great Eastern Railway Co. (supra). The 19th century cases on this topic, of which the leading ones were Davis v. Garrett (1830) 6 Bing. 716 and Lilley v. Doubleday (1881) 7 Q.B.D. 510, did not give rise to a consideration of the effect of express exceptions clauses in the contract in question in relation to a breach of the character of a wrongful deviation, or other fundamental breach. The Respondents submit that this may be an additional reason why the doctrine of fundamental breach was not considered in the Chartered Bank Case (supra).

(c) The Respondents further submit that the Chartered Bank Case (supra) may also be distinguished from the present case upon the grounds upon which Mr. Justice Wright (as he then was) distinguished it in the Compania Importadora Case (supra), which was referred to by Mr. Justice Whitton. Mr Justice Wright distinguished the Chartered Bank Case on the ground that in the Compania Importadora Case (supra, at p.69) the misdelivery of the goods after their discharge from the vessel had in effect already been decided upon by the shipowners before the goods were discharged, and that the exceptions clause could not protect the shipowners in such a case. The Respondents submit that, similarly, the evidence of Mr.Perera on behalf of the Defendants in the present case made it clear that it was at all material times the settled practice of the Defendants, acting through Messrs. Boustead & Co. as their agents, to release goods without requiring the production of the bills of lading whenever a satisfactory indemnity was provided, and that it was the practice of the Second Third Parties to obtain delivery of goods in this manner without production of bills of lading. The Respondents submit that Clause 2(c) of the said bill of lading cannot absolve the Defendants from the consequences of carrying on this wrongful practice.

p.55 11.30-46

p.35 1.39 - p.36 1.3

p.37 11.19-28

(iv) The Respondents further submit that, on its true construction, Clause 2(c) of the said bill of lading does not protect the Defendants against a wilful misdelivery of the goods, viz. it does not protect the

Defendants in a case like the present, where the Defendants knowingly and wilfully deliver the goods against an indemnity without requiring the production of the bill of lading. The Respondents submit that, where the Defendants wilfully effect a misdelivery in this manner, Clause 2(c) has no application upon its true construction, since it is expressly limited to cases involving "the responsibility of the carrier whether as carrier or as custodian or as bailee of the goods." Being an exceptions clause the Clause should be construed strictly, against the Defendants, and no more widely than is necessary. In order to give the Clause the wide meaning for which the Appellants contend, the Respondents submit that the Clause would have to apply to all cases of wilful conversion, and even fraud, which goes far beyond a reasonable construction of the Clause. A reasonable construction of the Clause, as the Respondents submit, is to limit its application to cases of loss of or damage to the goods caused by negligence, but not caused by wilful misconduct: J. Spurling Ltd. v. Bradshaw (1956) 1. W.L.R. 461 and Woolmer v. Delmer Price Ltd. (1955) 1 Q.B.D. 291. Alternatively, if, contrary to the Respondents' submission, Clause 2(c) can properly be construed to apply to cases of wilful misdelivery, then the Respondents submit that it is null and void and of no effect by virtue of Article III Rule 8 of the Schedule to the Carriage of Goods by Sea Act, 1924, to which the said bill of lading was subject, on the ground that it relieves the Defendants from liability to a greater extent than is permitted by Article VII of the Schedule. Article VII provides:

p.67 11.37-41

p.66 11.24-27

"Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

The Respondents submit that a provision exempting shipowners from liability in respect of a wilful misdelivery of goods entrusted to

them would confer a far greater exemption from liability than an exemption from liability "for the loss /of goods/ in connection with the custody and care and handling of goods .... subsequent to the discharge .....", which is the limit of the exemption permitted under Article VII.

(v) The Respondents will further respectfully submit, if necessary, that Mr. Justice Whitton was wrong in the view that the wrongful delivery of the said goods by the Defendants to the
p.58 ll.29-36 Second Third Parties, without the production of the said bill of lading, could not be treated by the Respondents as a fundamental breach of the contract of carriage unless it was accepted by the Respondents as a repudiation of the contract of carriage. The Respondents submit that a final wrongful delivery of the goods carried under a contract of carriage is a final breach of the contract of carriage, which, by its nature, necessarily puts an end to the contract of carriage, without requiring the person entitled to delivery of the goods expressly to treat such a breach as a repudiation of the contract.

17. The Respondents accordingly submit that this Appeal should be dismissed with costs for the following (amongst other)

R E A S O N S

(1) BECAUSE the delivery of the said goods by the Defendants to the Second Third Parties without presentation of the said bill of lading was a breach of the contract contained in or evidenced by the said bill of lading and a wrongful conversion of the said goods on the part of the Defendants, in respect whereof the Defendants are liable in damages to the Respondents.

(2) BECAUSE the aforesaid breach and wrongful conversion on the part of the Defendants constituted a fundamental breach by the Defendants of the contract contained in or evidenced by the said bill of lading which disentitled the Defendants from relying upon any of the exceptions clauses in the said bill of lading in order to seek to avoid liability in respect of the said breach and wrongful conversion.

(3) BECAUSE, alternatively, upon their true construction, Clauses 2(c) and 10 of the said bill of lading do not exempt the Defendants from liability in respect of the aforesaid breach of contract and wrongful conversion.

(4) BECAUSE, in the further alternative, if the said Clauses of the said bill of lading are on their true construction capable of exempting the Defendants from liability in respect of the aforesaid breach of contract and wrongful conversion, then the said Clauses are null and void and of no effect by virtue of Article III Rule 8 of the Schedule to the Carriage of Goods by Sea Act, 1924.

(5) BECAUSE the judgment appealed from is right and should be affirmed.

MICHAEL KERR.

DAVID CAIRNS

No.20 of 1958

IN THE PRIVY COUNCIL

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O N  A P P E A L

FROM THE COURT OF APPEAL

OF THE COLONY OF SINGAPORE,

ISLAND OF SINGAPORE

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B E T W E E N :-

SZE HAI TONG BANK LIMITED
(First Third Party)
... ... Appellants

- and -

RAMBLER CYCLE CO. LIMITED
(Plaintiffs)
... ... Respondents

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SOUTHERN TRADING CO.
(Second Third Party) } Pro Forma

GLEN LINE LIMITED
(Defendants) } Respondents

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CASE FOR RESPONDENTS

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INGLEDEW BROWN BENNISON & GARRETT,
136/138 Minories,
London, E.C.3.