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C.A.14 of 57, 12

Judgment
14, 1959

IN THE PRIVY COUNCIL No. 20 of 1958

ON APPEAL
FROM THE COURT OF APPEAL
OF THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE

B E T W E E N:-

SZE HAI TONG BANK LIMITED (First Third Party) Appellants

- and -

RAMBLER CYCLE CO., LIMITED (Plaintiffs) Respondents

SOUTHERN TRADING COMPANY (Second Third Party) } Pro Forma Respondents.
GLEN LINE LIMITED (Defendants) }

RECORD OF PROCEEDINGS

LAWRANCE, MESSER & CO.,
16, Coleman Street,
London, E.C.2.
Solicitors for the Appellants.

INGLEDEW, BROWN, BENNISON & GARRETT,
136-138, Minories,
London, E.C.3.
Solicitors for the Respondents.

IN THE PRIVY COUNCIL No.20 of 1958

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- and -

RAMBLER CYCLE CO., LIMITED (Plaintiffs) Respondents

SOUTHERN TRADING COMPANY (Second Third Party)
GLEN LINE LIMITED (Defendants)
} Pro Forma Respondents.

RECORD OF PROCEEDINGS

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DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Documents
Notes in the High Court of the Colony of Singapore and in the Supreme Court of the Colony of Singapore. In the Court of Appeal Suit No. 1329/55 ranging from 29th August 1955 to 9th December 1957 regarding pleadings, orders, summons, etc.
Affidavits
Petition.

In the High Court of the Colony of Singapore.

No. 1.

Writ of Summons.

29th August, 1955.

No. 1.

WRIT OF SUMMONS

IN THE HIGH COURT OF THE COLONY OF SINGAPORE

ISLAND OF SINGAPORE

1955 No. 1329

Between

Rambler Cycle Company Limited Plaintiffs

- and -

Glen Line Limited Defendants

"ELIZABETH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith".

To, Glen Line Ltd., (Incorporated in England) and having a place of business at Union Building, Collyer Quay, Singapore.

We command you, that within eight days after service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in a cause at the suit of Rambler Cycle Company Ltd., a company incorporated in England and carrying on business at Beaver Road, Ashford, Kent, England; and take notice that in default of your so doing the Plaintiff may proceed therein to judgment and execution.

WITNESS the Honourable Sir Charles Murray Murray Aynsley, Knight, Chief Justice of the Colony of Singapore the 29th day of August, 1955.

ALLEN & GLEDHILL,
Solicitors for the Plaintiffs.

We accept service of this Writ of Summons on behalf of the Defendants herein and undertake to enter an appearance in due course.

Dated this 29th day of August, 1955 at 4.10 p.m.

Sd. by C.H.S.
Solicitors for the Defendants.

In the High Court of the Colony of Singapore.

No. 1.

Writ of Summons.

29th August, 1955 - continued.

The Plaintiffs' claim is for damages for breach of contract and/or duty in, and about, the carriage of goods by sea, and the delivery thereof and/or for damages for the loss and/or conversion and/or non-delivery of such goods.

This writ was issued by Messrs. Allen & Gledhill of No. 61 The Arcade, Raffles Place, Singapore, Solicitors for the said Plaintiffs carrying on business at Beaver Road, Ashford, Kent, England.

The address for service is No.61 The Arcade, Raffles Place, Singapore. 10

This writ was served by on (the defendant, one of the defendants) on the day of 195

Indorsed the day of 195 .

No. 2.

Order of Court.

4th November, 1955.

No. 2.

ORDER OF COURT

BEFORE THE HONOURABLE CHIEF JUSTICE IN CHAMBERS

UPON the application of the Defendant above-named made this day by way of Summons in Chambers 20 No.1177 of 1955 and upon hearing the Solicitor for the applicant and the Solicitor for the Plaintiff and the Solicitors for the Third Parties and by consent IT IS ORDERED that the Defendant do deliver a Statement of Claim to the above-named Third Parties within Twenty-one (21) days from the date hereof who shall plead thereto within Twenty-one (21) days AND IT IS FURTHER ORDERED that the said Third Parties shall be at liberty to appear at the trial of this action and take such 30 part as the Judge shall direct and be bound by the result of the trial AND IT IS LASTLY ORDERED that the question of the liability of the said Third Parties to indemnify the Defendant be tried at the trial of this action, but immediately thereafter.

DATED this 4th day of November, 1955.

Sd. T. Kulasekaram

Dy. Registrar.

No. 3.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 3.

Statement of Claim.

7th November, 1955.

STATEMENT OF CLAIM

IN THE HIGH COURT OF THE COLONY OF SINGAPORE
ISLAND OF SINGAPORE

Suit No. 1329 of 1955

Between: Rambler Cycle Co., Limited — Plaintiffs

- and -

Glen Line Limited — Defendants

- and -

1. Sze Hai Tong Bank Limited,
2. Southern Trading Co. — Third Parties

1. By a Bill of Lading dated 30th July, 1954 and Numbered A.3 the Defendants acknowledged to have been shipped in apparent good order and condition on board their steamship Glengarry then lying at London forty cases of bicycle parts and bicycle hub-brakes as therein more particularly described to be safely and securely carried by the Defendants to Singapore and there delivered unto the order of the Plaintiffs or their assigns at the freight and upon the terms and conditions therein mentioned.

2. The Plaintiffs are and were at all material times the owners of the said goods and the holders of the said Bill of Lading and the only persons properly entitled thereunder to the delivery of the said goods in accordance with the provisions of the said Bill of Lading.

3. In breach of the contract contained in and/or evidenced by the said Bill of Lading and/or negligently and/or in breach of their duty in the premises as common carriers and notwithstanding the demands of the Plaintiffs for the delivery of the said goods in accordance with the provisions of the said Bill of Lading the Defendants have failed to carry the said goods safely or securely or at all and/or have failed to deliver the said goods or any of them to the Plaintiffs and have converted the same to their own use.

4. By reason of the premises the Plaintiffs have suffered damage amounting to £3,005.11.6d. as follows :-

In the High Court of the Colony of Singapore, Island of Singapore.

No. 3.

Statement of Claim.

7th November, 1955 - continued.

Particulars

1000 sets 28/1⅛ Chrome Rims 32/40H with Roadster tyres and tubes and tapes. C.I.F. Singapore 35/6d per set ...	£ 1,775. -. -	
400 sets AB/BF 3 speed Hub brakes, 60/6d ...	1,210. -. -	
Insurance on Hub brakes, 3d..	5. -. -	
	£ 2,990. -. -	
90 days extended insurance	14. -. 6	
Ad valorem stamp ...	1.11. -	
	£ 3,005.11. 6	

The Plaintiffs claim:-

(1) The equivalent in Singapore currency at the rate of exchange current as on the date of the Judgment of the said sum of £3,005.11.6 with interest on the said sum at the rate of 8 per centum per annum from the date of the arrival of the said goods in Singapore or alternatively from the date of the conversion of the same by the Defendants up to the date of payment or judgment.

(2) In the alternative for an enquiry by the Registrar of this Honourable Court as to the extent of the damages suffered or sustained by the Plaintiffs in the premises and for Judgment for the amount so certified by him.

(3) Costs.

(4) Further and other relief.

DATED and DELIVERED this 7th day of November, 1955, by

Sd. Allen & Gledhill,
Solicitors for the Plaintiffs.

To the above-named:-
Defendants and their Solicitors, Messrs.Donaldson & Burkinshaw, Singapore.
Third Party, Sze Hai Tong Bank Ltd., and their Solicitors, Messrs. Sisson & Delay, Singapore.
Third Party, Southern Trading Co., and their Solicitors, Messrs. De Souza & Abishega-Naden, Singapore.

No. 4.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 4.

Defence.

25th November, 1955.

DEFENCE

1. The Defendants admit the allegations contained in Paragraph 1 of the Statement of Claim.

2. The Defendants have no knowledge of the matters alleged in Paragraph 2 of the Statement of Claim and do not admit the same and put the Plaintiffs to proof thereof.

3. As to Paragraph 3 of the Statement of Claim the Defendants deny that they have been guilty of any breach of contract and/or negligence and/or breach of duty as alleged or at all. The Defendants deny that they have failed to carry the goods referred to in the Statement of Claim safely or securely or at all. The Defendants deny that they have converted the said goods to their own use. The Defendants deny that they are common carriers.

4. The Defendants deny that they did not deliver the said goods to the Plaintiffs, and say that they did in fact deliver the goods to the Plaintiffs by their representatives in Singapore, namely, to the Southern Trading Co., with the knowledge and approval of one Mr. R.W. Saul who was at all material times the Far East Manager in Singapore of the Plaintiffs.

5. The bill of lading referred to in the Statement of Claim sets out the terms and conditions on which the Defendants contracted to carry the said goods to Singapore. Condition 2 of the said bill of lading contains a provision that the responsibility of the Defendants whether as carriers or as custodians or bailees of the said goods should be deemed to cease absolutely after the goods are discharged from the vessel on which the goods were carried. The said goods have in fact been discharged from the said vessel at Singapore into the custody of the Singapore Harbour Board and the Defendants rely on the said condition and say that they are not liable to the Plaintiffs in any respect whatsoever and the Plaintiffs are not entitled to the relief claimed by them herein.

6. The Defendants deny that the Plaintiffs have suffered damage either as alleged or at all. The

In the High Court of the Colony of Singapore, Island of Singapore.

No. 4.

Defence.

25th November, 1955 - continued.

said goods were delivered to the custody of the Singapore Harbour Board who subsequently delivered the said goods to the Plaintiffs' representatives, namely, Southern Trading Co., of Singapore. The said Southern Trading Co., is at present carrying on business in Singapore and is, in fact, the 2nd Third Party herein. The Plaintiffs were at all times aware that the Defendants were delivering the Plaintiffs' goods shipped prior to the shipment of goods in respect of the claim herein to the Plaintiffs' representatives, the said Southern Trading Co., and thereby assented to such method of delivery.

7. The Defendants will rely on Article 3 Rule 6 of the United Kingdom Carriage of Goods by Sea Act 1924 and will contend that the Defendants are discharged from all liability in respect of the matters alleged in the Statement of Claim herein.

8. Save as is expressly admitted or denied the Defendants deny each and every the allegations contained in the Statement of Claim as though the same had been set out in detail and specifically denied.

Dated and Delivered this 25th day of November, 1955.

Sd. Donaldson & Burkinshaw,
Solicitors for the Defendants.

No. 5.

Statement of Claim by the Defendants against Sze Hai Tong Bank Ltd., and Another.

25th November, 1955.

No. 5.

STATEMENT OF CLAIM BY THE DEFENDANTS, GLEN LINE LIMITED, AGAINST THE THIRD PARTIES, SZE HAI TONG BANK CO., LIMITED and SOUTHERN TRADING CO., DELIVERED PURSUANT TO ORDER OF COURT HEREIN DATED THE 4th NOVEMBER, 1955.

1. The Plaintiffs claim against the Defendants herein, as appears from the Writ of Summons a copy whereof was delivered to the Solicitors for the first Third Party on the 16th day of September, 1955 and to the second Third Party on the 7th day of October 1955, is for damages for breach of contract and/or duty in about, the carriage of

goods by sea, and the delivery thereof and/or for damages for the loss and/or conversion and/or non-delivery of such goods.

2. The Defendants dispute the Plaintiffs' claim but in the event of the Defendants being held liable to the Plaintiffs, they, the Defendants, are entitled to be indemnified by the Third Parties, the above-named Sze Hai Tong Bank Limited and Southern Trading Co., against such liability.

3. In the month of July 1954 the Plaintiffs shipped from London to Singapore by the Defendants' vessel s.s. "Glengarry" 40 cases of bicycle parts to their order and in respect of which shipment the Defendants on the 30th day of July 1954 issued and delivered to the Plaintiffs a bill of lading.

4. In consideration of the Defendants releasing for delivery to Southern Trading Co., of Singapore, the 2nd Third Party herein, the said 40 cases of bicycle parts of which the said 2nd Third Party claimed to be rightful owners, without production of the relevant bill of lading, both the Third Parties herein undertook and agreed to indemnify the Defendants fully against all consequences and/or liabilities of any kind whatsoever directly or indirectly arising from or relating to the said delivery and immediately on demand against all payments made by the Defendants in respect of such consequences and/or liabilities, including costs as between solicitor and client and all or any sums demanded by the Defendants for the defence of any proceedings brought against the Defendants by reason of the delivery without production of the said bill of lading as aforesaid. As consideration of the said indemnity the Defendants released the said goods for delivery to the said Southern Trading Co.

5. The goods referred to in Paragraphs 3 and 4 above are the subject of the Plaintiffs' claim against the Defendants.

The Defendants claim against the Third Parties :-

(1) A declaration that they are entitled to be indemnified by the Third Parties in accordance with the hereinbefore recited Indemnity.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5.

Statement of Claim by the Defendants against Sze Hai Tong Bank Ltd., and Another.

25th November, 1955 - continued.

(2) Judgment for any amount that may be found due from the Defendants to the Plaintiffs.

(3) Judgment for the amount of any costs which the Defendants may be ordered to pay to the Plaintiffs and for the amount of the Defendants' own solicitor and client costs of the Defence and proceedings against the Third Parties.

Dated and Delivered this 25th day of November, 1955.

Sd. Donaldson & Burkinshaw,

Solicitors for the Defendants.

No. 6.

Particulars of Defence.

28th December, 1955.

No. 6.

PARTICULARS OF THE DEFENCE

Under Paragraph 4 of the Defence.

(a) The said goods were delivered on or about the 3rd day of September 1954 by the Singapore Harbour Board to the Southern Trading Co., (the 2nd Third Party above-named) who at all material times were the representatives of the Plaintiffs in Singapore.

(b) The said Southern Trading Co., represented the Plaintiffs in the manner set out and particularised in an Agreement in writing dated the 1st July 1953 and made between the Plaintiffs of the one part and the said Southern Trading Co., of the other part.

(c) The knowledge of the said Mr. R.W. Saul is to be implied from the fact that he was resident in Singapore and was in the employ of the Plaintiffs at all material times as their Far East manager and was looking after the Plaintiffs' interest generally.

Under Paragraph 5.

The said goods were discharged into the custody of the Singapore Harbour Board on or about the 1st day of September 1954 pursuant to Clause 10 of the relevant Bill of Lading which provides

that the goods may be discharged into store or other places at the Defendants' option and at the risk and expense of the owners of the goods.

Under Paragraph 6.

(a) The deliveries of the Plaintiffs' goods to the Southern Trading Co., referred to in the last sentence of Paragraph 6 were as follows :-

Vessel	Goods		B/Lading No. (London)	Date Delivered to S.H.B.
"Denbighshire"	120 cases	Bicycle parts	72	2/5th July 1954.
"Breconshire"	40 "	"	6	2/4th Apr. 1954.
"Glenearn"	80 "	"	113	20th Dec. 1953.
"Glengarry"	120 "	"	258	3/4th Dec. 1953.

(b) The method of delivery referred to in the last sentence of Paragraph 6 to which the Plaintiffs assented was by discharge into the custody of the Singapore Harbour Board and by subsequent delivery without production of the relevant bills of lading but on a guarantee by Sze Hai Tong Bank Limited.

(c) The Plaintiffs were aware that the Defendants were delivering the Plaintiffs' goods shipped prior to the shipment of goods in respect of the claim herein to the Southern Trading Co., because the Plaintiffs' representative one Mr. R.W. Saul was in Singapore at all material times and his knowledge of the deliveries is to be implied from the fact that he was resident in Singapore and was in the employ of the Plaintiffs at all material times as their Far East manager and was looking after the Plaintiffs' interest generally.

Dated and Delivered this 28th day of December, 1955.

Sd. Donaldson & Burkinshaw,
Solicitors for the Defendants.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 7.

Defence of 1st named Third Party Sze Hai Tong Bank Ltd.

8th February, 1956.

No. 7.

DEFENCE OF THE FIRST NAMED THIRD PARTY SZE HAI TONG BANK LIMITED.

1. The First named Third Party denies that the Defendants are entitled to be indemnified as alleged or at all. The relief claimed is denied.

2. The allegations contained in paragraph 3 of the Statement of Claim are admitted subject to formal proof and subject to the production of the relevant Bills of Lading and reference thereto for their full terms and effect.

3. The First named Third Party further admits the allegations contained in paragraph 4 of the Statement of Claim subject to production of the relevant instruments of indemnity and reference thereto for their full terms and effect.

Dated this 8th day of February 1956.

Sd. Sisson & Delay.

Solicitors for the 1st Third Party.

No. 8.

Further Amended Reply.

3rd November, 1956.

No. 8.

FURTHER AMENDED REPLY.

1. With reference to paragraph 4 of the Defence, the Plaintiffs admit that by a written agreement dated 1st July, 1953, they appointed Southern Trading Co., to be their representatives in Singapore and elsewhere for the sale of Rambler Cycles and frame sets upon the terms and conditions in the said agreement set out. The Plaintiffs deny, however, that by the said agreement or by any other authority, express or implied, they authorised Southern Trading Co., to accept the goods, the subject matter of this suit, from the Defendants without production to the Defendants or their agents of the relative Bills of Lading.

2. With further reference to Paragraph 4 of the Defence the Plaintiffs admit that Mr. R.W. Saul

No. 8.

Further Amended Reply.

3rd November, 1956 - continued.

was at all material times their manager in the Far East, but they deny that the said Mr. R. W. Saul knew and/or approved of the deliveries of the goods by the Defendants to Southern Trading Co., as pleaded by the Defendants nor do they admit that the said R.W. Saul was in Singapore at the material times when delivery was effected. The said R.W. Saul had no authority express or implied from the Plaintiffs to approve of deliveries of the goods to Southern Trading Co., without production of Bills of Lading.

3. With reference to Paragraphs 3, 4 & 7 of the Defence the Plaintiffs say that by delivering the goods in the Bill of Lading mentioned to Southern Trading Company without production of the relevant Bill of Lading the Defendants committed a fundamental breach of the contract of carriage and in the premises they are not entitled to rely upon Condition 2 of the Bill of Lading or upon Article 3 Rule 6 of the U.K. Carriage of Goods by Sea Act 1924 as pleaded in Paragraphs 5 & 7 of the Defence. The Plaintiffs accepted the Defendants' acts as a wrongful repudiation of the said contract of carriage by the issue of the writ in this action.

4. Save for the facts expressly admitted by paragraphs 1 and 2 hereof, the Plaintiffs join issue with the Defendants upon their Defence.

Dated and Re-Delivered this 3rd day of November, 1956.

Sd. Allen & Gledhill,
Solicitors for the Plaintiffs.

No. 9.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

6th November, 1956.

NOTES ON EVIDENCE - THE HONOURABLE MR. JUSTICE WHITTON.

Coram: Whitton, J.

Massey with Chee for Plaintiffs.

C.H. Smith for Defendants.

Seth with Maxwell for 1st Third Party.

De Souza for 2nd Third Party

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

6th November, 1956.

Plaintiffs Evidence.

Montague Edward Burnham

Examination.

Plaintiffs Evidence

P.W.1. Montague Edward Burnham -

Examination

At present residing in Singapore. Ordinary residence Aldington, near Ashford, Kent. Export Manager of Rambler Cycle Co. I am in charge of export department of that company. Have been in charge of it since about 1950. Mr.Saul, Far East Manager of Rambler Cycle Co. He came home in 1953. I know Southern Trading Co. They are importers of Rambler Cycles and at same time commission agents for Rambler cycles which at same time enables them to book orders from other importers. Mr.Saul holds no Power of Attorney from Plaintiff Company. He has no written contract at all. He is paid merely on a commission basis. His duties cover Singapore, Malaya, Siam, Vietnam, Cambodia, Hongkong and Indonesia. His job is to promote sales in these territories. He is not authorised to deal with shipping arrangements in goods shipped to this territory - we ship from London and make the arrangements there. With regard to terms of sales and shipments to Southern Trading Co., Mr.Saul has nothing to do. He has no authority to extend time of bill of exchange - these instructions come solely from us in England. He has no authority to increase the credit granted, for instance, to Southern Trading Co.

Q. Has he authority to release goods from the shipping company to Southern Trading Co. before they have brought the bill of Lading?

A. Certainly not.

Mr. Saul has no office in Singapore, he works at his private address. He travels around South East Asia.

Q. Under your Agreement with Southern Trading Company were they entitled to take any goods from you without payment for them?

A. Certainly not. The Agreement provides payment ninety days documents against payment.

Q. Does that mean they would not obtain the goods without payment?

A. Yes. Except for two special instances in which

by correspondence they were authorised to receive the goods on acceptance of the bill of exchange.

There were many shipments to Singapore from Southern Trading Co. Thirty or forty shipments in twelve months.

Q. Was it in accordance with terms of your agreement that in this present instance Southern Trading Co., took delivery without bringing the bill of lading?

A. Certainly not.

Q. In this particular instance would you have ever authorised them to take possession of these goods without first bringing the bill of lading?

A. No.

Our practice in dealing with Southern Trading Co., as follows: First we would receive from them a signed order. We would then manufacture the goods and pack them suitably. Then arrange shipment on the first available vessel. When the goods had been shipped we would obtain through our shipping agents in London bills of lading. In every case I think bills of lading showed our names as the shipper's and were made out to order. We obtained insurance certificate from Lloyd's brokers. We would then send to the collecting bank the full set (normally three) of bills of lading, the insurance certificate in duplicate, a first and second bill of exchange drawn on Southern Trading Company, invoices covering the shipment and a covering letter to the bank giving any special instructions which there might be. These would all be sent to Bank of China in London to pass out to Bank of China in Singapore for collection.

Q. The Bank of China were your collecting agents?

A. Yes. We were requested by Southern Trading Co., to collect through Bank of China and we agreed to the request.

Q. Did the Bank of China acquire any property in these bills of lading? Did they purchase them?

A. No. Certainly in case of this particular shipment they did not purchase the goods.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

6th November, 1956.

Plaintiffs Evidence

Montague Edward Burnham.

Examination - continued.

Q. So that the Bank's job was simply to collect payment of the draft and to hand over the documents?

A. That is right.

Q. Was that the normal procedure?

A. That was normal procedure.

Q. So far as you were concerned you dealt with the Bank of China London and they dealt with the Bank of China Singapore?

A. Always.

Q. In these circumstances would the Bank of China in Singapore take any instructions from Mr. Saul?

A. No.

Q. The documents having reached Bank of China in Singapore they would on payment of draft and charges, release the documents to Southern Trading Co.?

A. That was the procedure.

Q. The usual certificate of insurance for the voyage and ninety-days?

A. Usually for voyage only but in case to Southern Trading Co., on account of the ninety days extension we insured for the voyage and ninety days - for as long as the goods were there we covered them.

Q. Supposing further insurance extension beyond the 90 days necessary who would arrange it?

A. I would, from London.

Q. In the case of this particular consignment can you say was arranged by you?

A. In first instance the voyage and ninety days, and later two further periods of thirty days each consecutively. This brought us up to about end of January or 1st February.

Q. Had you been aware these goods had been delivered to Southern Trading Co., on 3rd September 1954 would you have extended the insurance cover on these goods?

A. Certainly not - I should have had nothing to insure.

Shown invoice (p. 308 A.B. - C.H.W.) £14.0.6 plus £9.7.0. making £23.7.6. in all was insurance paid in respect of this consignment. We paid out this sum. Insurance on Hub 3d. = 5/- in S.C. is part of invoice value. These goods were shipped in the Glengarry on 30th July 1954. Value of goods at date of shipment was £2990 plus insurance costs. We paid the "ad valorem" stamp £1.11.0. That was on the Bill of Exchange. Normal rates of interest payable on these bills of exchange is six per cent. Six per cent from date of bill unless otherwise stated. In this case not stated so from the date of the bill. The goods which are subject matters of this claim have never been paid for. Nor have we been repaid the other charges we incurred. The original bill of lading is in the possession of the Plaintiffs - I have it here. We got it back from the Bank of China. In April or May 1955 - about the middle of the year.

Q. Did you know these goods you had shipped had been released to Southern Trading Company without payment? (To Court I refer to these particular goods).

A. No. The first suggestion I had of that was in January 1955.

Q. From whom did you find out?

A. Mr. Saul wrote in to say he had been advised to check stocks.

After that enquiries made. Mr. Saul was asked to make general enquiries as to what had happened to the goods and my company addressed specific enquiries on the points to the shipping company. I would add I am not sure if it was on his own initiative he made the enquiries or we asked him. I rang up the Glen Line Company in London - Mr. Baxter Jones of McGregor, Gow and Holland. McGregor Gow and Holland are the Glen Line agents in London.

Q. What did this gentleman give you to understand?

A. Over two or three telephone conversations at least it was admitted the goods had been released against an indemnity?

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

6th November, 1956.

Plaintiffs Evidence.

Montague Edward Burnham.

Examination - continued.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

6th November, 1956.

Plaintiffs Evidence.

Montague Edward Burnham.

Examination - continued.

Q. Have you ever received these goods from the Glen Line Co.?

A. No.

I was never at any time aware of any method as is alleged by the Defence whereby on previous occasions consignments had been released on production of a banker's indemnity. With regard to shipments under paragraph 6 of Statement of Defence I can say that in all four cases the goods were paid for. In respect of "Denbighshire" consignment payment was by Letter of Credit opened in our favour with the Bank of China. It's date 13th May 1954. This means that we were paid in respect of this consignment when we presented the documents to the Bank in London.

(To Court: By the documents I here mean the bill of lading, insurance in duplicate etc. I have already described). We got the money on presenting the documents to Bank of China in London. Amount of that particular payment was £6248.19.1. We sent it to the Bank in London on 11th June and we were paid within a few days. Glenearn payment also a Letter of Credit payment opened by Lee Wah Bank Singapore through the Chase National Bank London, the date of the credit 18th November 1953 and the amount we were paid £2,983.6.3, payment being received a few days after November 9th, 1953. Glengarry consignment delivered S.H.B. 3/4th Dec. 1953 also by Letter of Credit opened by Lee Wah Bank upon Chase National Bank London on 12th November 1953 and the amount we were paid £4,713. 9. 0, within a few days of November 19th, 1953. Breconshire consignment was 90 days cash against documents terms. It has been paid. It was paid on due date. Amount £1,285.3.4.

Cross-Examination. (Smith)

Cross-Examination (Smith)

Agreement of 1st July 1953 correctly sets out the relationship between the two parties. It is in existence today. It has not yet been brought to an end. Rambler Cycle Company are still operating under this Agreement. (Referred to letter p.206 A.B. bottom of third paragraph - C.H.W.). I agree it was my understanding all along that the shipments would be in Custom's Warehouse, Singapore. I am aware Custom's Warehouse is not Shipping Company's Warehouse. I repeat it was my understanding the goods were in the Custom's Warehouse. I am aware

Custom's Warehouse under control of the Government, the Customs Authorities. Supposing I had received the goods from warehouse if I had received them shortly after shipment their value to me would be the same as at date of shipment.

Q. The figure you mention in your claim includes your profit?

A. Yes.

Q. Your claim is based on assumption you have sold the goods and at a profit to yourself?

A. Yes. We had sold them at a profit.

Q. What was value of goods without profit?

A. I am sorry I cannot say. I do not know the margin of profit. My job is to sell the goods at prices that I am given.

Q. Were your bicycles selling freely in Singapore at time this consignment arrived?

A. Yes, but mainly to Southern Trading Company.

Now 12.55 to 2.30

Sgd. C.H. Whitton.

2.30. (Smith resumed).

I have no idea if goods in Singapore released against a Bank guarantee in the three cases mentioned.

Cross-Examination - Seth:

I think it was mid-summer 1952 my company did business with Southern Trading Co. direct. We came to deal with Southern Trading Co. direct as result of Mr. Lee visiting us personally in Ashford and asking us not to supply through merchant shippers, as we had been doing previously. On further reflection I think it was mid-summer 1953 not 1952. I think Mr. Saul had personally travelled in the area to make a survey. It was not necessarily result of Mr. Saul's report that we appointed Mr. Lee our representative - his account agreed with ours that Southern Trading Company was a good company. We made enquiries as to financial standing of Southern Trading Company. Results of enquiries favourable. We did not take any security from

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Cross-Examination (Smith) - continued.

Cross-Examination (Seth)

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them. I believe it was as result of (1) Bank of China recommending them for credit to extent of £30,000 and of (2) merchant shippers having outstanding £25,000 due to them by Southern Trading Co., and were not a bit worried about it that decided us to extend credit to Southern Trading to the extent of £30,000. I would qualify this statement by saying in only two instances have we given them credit D/A terms, and that was because there were special circumstances. Mr. Lee does not speak English well. On both occasions he has been to see us in England he has brought his own interpreter. Referred to the Agreement dated 1st July 1953 not true to say terms not agreed until December - what happened was 90% of terms were standard terms for our company in agreements of this kind and 10% were prepared by me to meet the special circumstances of the particular case. When he left London Mr. Lee knew terms substantially as they had been so agreed upon verbally. (Seth refers witness to Agreement - C.H.W.). I agree under paragraph 1 Southern Trading Company was to be our representative. I agree under paragraph 3 best way to promote our business would be to sell our bicycles as widely as possible. If Mr. Lee went to any business house and said he was the Representative of Rambler Cycle Co., it would be quite correct. Referred to paragraph 8 we never called for a report from him about position of all shipments of cycles we had made. Referred to paragraph 12 I agree the Representative had to pay for the maintenance of Mr. Saul and his family in Singapore.

Q. Why necessary to have Representative and Manager in this country?

A. Partly because we were interested in the sale of Norman bicycles as well as Ramblers, and partly because we had not had a Chinese Representative in Singapore before and we thought it advisable to have a manager to look after our interests as well. I would agree that it was for Mr. Saul to keep an eye on our Chinese representative - as far as Rambler bicycles were concerned. £1,500 per year was sum first agreed upon for maintenance under paragraph 12, and after two months it was reduced to £1,000 per annum. Paragraph 13 means we would have to wait 90 days and what amounted to 100 days in all when time for sending correspondence by air is taken into

account. That limit of £30,000 shortly increased to £50,000.

Q. Does that mean at any time you might have £50,000 worth of bicycles in Singapore waiting for delivery to be taken by Southern Trading Co.?

A. That is correct.

By Court: For which you had received no payment?

A. That is correct.

It was unprecedented for company in London to have manager and representative in Far East, I agree. I sent Mr. Saul copies of my letters to Southern Trading Company. I was aware he had received copies of letters sent to us by Southern Trading Co., because it was so notified at the bottom of their letters. I am aware Mr. Saul used a desk in Southern Trading Co. I addressed letters to him to his private address. I agree three Suits including this one by Rambler Cycle Company to recover money from Southern Trading Company. I agree they cover twenty-nine shipments of value over £56,000. (Seth tenders extracts in tabulated form from these three Suits. Admitted Ex. TP 1, no objection - C.H.W.).

I agree the broad allegation we make is that our bicycles were taken delivery of by our Representative without paying for them. We have not brought any action against him for his default in paying us this money. I agree he owes the money.

Q. Why don't you sue him?

A. Because I think if we did we would be very lucky to get our money.

Q. Do you think circumstances exist for terminating his representation of your firm?

A. Yes, I do. And I have written to tell him so.

Q. But he is still your representative?

A. Yes.

In my view Shipping Co., had broken a contract with us - I am not concerned with whether they had an indemnity from a bank or not - and after obtaining legal advice we took action against them.

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Cross-Examination (Seth) - continued.

Q. Can you say approximately when shipment in present case made - about 30th July?

A. Yes.

I agree not very long after we started making shipments to Southern Trading Co. that the £30,000 maximum reached.

Q. Generally he was asking for extensions of time?

A. No.

I agree that prior to this particular shipment fourteen previous shipments had been made which had not been paid for. Many previous shipments had been made which had been paid for. (Adds - Of the fourteen nine not due for payment as 90 days not up). I would agree first six on Ex TP 1 had not been paid. I agree that shipments of 25.9.53 and 14.10.53 valued at £9,180 had not been paid for.

Q. Would you agree bills due on first six items in Ex TP 1 about £19,000 not paid?

A. Yes.

Q. Long overdue?

A. I would not say long overdue. Some had become due recently. There were special circumstances in these six cases. Southern Trading Co., had made representations to effect that customers were unwilling to take the cycles in these consignments because they lacked "transfers" and therefore they doubted if genuine Rambler bicycles, and accordingly asked us to extend the time for payment. We agreed to leave these shipments pending until we were in a position to send out the transfers to stick on the bicycles.

Q. How would he know these bicycles had no transfers if they were in the godowns?

A. He took up one shipment and found no transfers - and so made his representations to us.

Q. By "agreeing to leave these shipments" you mean would not press for payment?

A. Yes. We thought they would remain in the godowns until they got the transfers sent out.

Q. Did you anticipate storage charges for those consignments not taken up?

A. Certainly not. Under the terms of agreement it was his job if there was expensive storing.

Q. Did you think with twenty-nine shipments of bicycles in storage your representative not looking after your interest by failure to take up these shipments?

A. Yes.

Q. How?

A. Apart from the six shipments affected by special circumstances, we were influenced by two factors which decided to go on making shipments to Southern Trading Company. In the first place about May 1954 Mr. Lee came and saw us in England and after apologising about delays produced two letters of credit to the value of £30,000 which to us indicated he was a man of financial substance, and secondly October or November 1954 he took up and paid for bicycles to the value of about £5,000. We had also realised the £30,000 represented by the letters of credit.

Q. He was paying in advance when payment made by the letters of credit?

A. I agree - but nevertheless in that period we had got in £35,000. We posted one lot of transfers by air. They arrived in August 1954. These were affected by humidity. We had to send out another lot which arrived, as far as I remember, about October or November 1954. I think the £5,000 was a payment from Singapore. With his permission it was arranged we should hold the money standing to his credit in his commission account to be debited against orders made for further bicycles. (To Court: He got five per cent commission on every Rambler bicycle sold in these territories) (Seth refers to letter at p.105 A.B. C.H.W.). That £5,216.4.10. is not the £5,000 I have referred to earlier. I agree that this £5,216 was used to pay off some of the money owing by him. I agree in spite of owing £60,000 I continued to make shipments to November 1954 - I anticipated, however £20,000 would be paid on the receipt of the transfers by Mr. Lee. (Seth refers to letter at p.253 AB. C.H.W.)

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I had in mind that temporary accommodation in the financial sense sometimes given.

Q. It never occurred to you with all these shipments and all the delays in payment that possibly this chap had taken these goods on an indemnity?

A. I am sorry - it never occurred to me.

Q. Do you agree you had the opportunity to make a check through the Bank of China?

A. I agree the opportunity was available. I never availed myself of it. I never thought of making such a check.

Now 4 o'c. To November 7th 10.30.

Sgd. C.H. Whitton.

Wednesday November 7th.

Cross-Examination - Seth resumed.

I think Bank of China would have given Mr.Saul such information had he asked for it.

Q. Do you not think "keeping an eye on them" extended to checking up on what was happening to your goods?

A. In light of what we know now yes. At time no doubt in our minds. We held the bills of lading.

Q. Was condition of cycles not a matter for concern - rusting perhaps?

A. As far as we knew they were in the custody of the shipping companies and fully covered against all risks of any nature.

The Shipping company had given us receipts for the goods. And the bill of ladings. By receipts I mean the bills of lading. I agree it was a condition of the Bill of Lading the Shipping Company had the right to put the goods into a store or godown. The Manager had no authority on our behalf to inspect goods. I would not have the goods opened for examination of that nature - they would never be repacked in a way suitable for further

transmission. I disagree that if ordinary prudence shown there would have been brought to light what had occurred. It never occurred to me there was any need to make any enquiry - we held the bills of lading secure. Between July 1953 and January 1955 Saul only came to England once in my recollection - about May 1954. I think he did pay us a visit in early part of 1955. I think I discussed with him business of indemnities when he visited us in 1955. I do not think he told me the Sze Hai Tong Bank pressing for the return of these indemnities.

Q. When limit provided for by agreement extended and goods not taken up why did you not ask for letters of credit?

A. He could not open letter of credit to pay for past shipments.

Q. Why in September when amount outstanding about £50,000 did you not ask for further letters of credit?

A. Because the matter had already been settled, and the real amount outstanding in view of that settlement was only about £30,000.

(Seth refers to letter p.128 A.B.) - C.H.W.).

He did not give us the Letters of Credit we then suggested. As history has shown perhaps we were too indulgent to him. I quite agree if investigations made his method of taking delivery would have been discovered. The last four shipments on Ex. TP 1 took place in the following circumstances. £5,000 had materialised by the consignee paying drafts to the value of nearly £5,000. In view of these payments we considered it a justifiable business risk to send these four shipments in the "Corfu". I agree that restored position to about £56,000 outstanding. I call that a justifiable risk. I agree we had extended the original 90 days very very considerably.

No Cross-Examination by de Souza.

Re-Examination - Massey.

I do not call extending time in this way giving credit. We had shipped goods in large quantities

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before. Always before goods had been secured - no cause to worry. (To Court: We have overseas markets in about one hundred countries. That applies to all parts of the world when goods shipped on these terms). When I used the terms "customs" warehouse I was not thinking particularly carefully about the word I was using - I was using the term loosely. I was sure I could get production of the goods from the shipping company on production of the bill of lading. My experience had led me to believe my goods would be properly looked after until delivery was taken. The goods were fully covered against all risks. Had Mr. Saul demanded inspection he could not have repacked them - he could only report to us and we would have informed insurance company who might have required general survey - I do not know. (To Court: I think it is possible shipping companies would have allowed him to inspect had he asked to do so). Such an inspection would not in my experience be normal business practice. Ordinary business procedure would be if goods found damaged by buyer for a claim to be made. Invoice value includes our profit. Southern Trading Co., would sell the bicycles at a further profit. Figure mentioned in Statement of Claim is cost price plus our profit and costs of shipment. The value of similar goods is higher now than when those were shipped. I could obtain present invoice value of the goods. I would estimate about 10 per cent increase in value.

To Court: Referred to my statement in Cross-examination Smith yesterday "I believe it was as a result .... to the extent of £30,000" normal procedure is Bank of China hands over to consignee on payment the bills of lading etc. but in the D/A terms hands them over merely on the consignee endorsing the draft with understanding to pay later. In each case our instructions must be obtained before Bank would agree to D/A terms. We give specific instructions to terms of collection in every case.

(Witness adds - I would like to point out Court's use of term credit in passage quoted not correct. It was not credit in as much as we were relying on our bills of lading - it was a question of allowing that amount of money to be outstanding on documents against payment terms.

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Examination.

Evidence of Robert William Saul - a.s. in English.

I live at 5-1 Parbury Avenue Singapore. Far East Manager Rambler Cycle Company Ltd. I have been in Singapore nearly four years. I have no written agreement with the company. A verbal agreement between the company and myself. I hold no Power of Attorney from the company. I have no office in Singapore - I use my own house. I am acting as Far East Manager of Rambler Company and in that capacity travel around South East Asia appointing agents on behalf of the company, and generally taking instructions from the company. I had nothing to do with shipments from England intended for Southern Trading Co. I had nothing to do with financial arrangements between Rambler and Southern Trading Co. Rambler Company did that - I had no authority whatever to do so. I knew arrangements made between Rambler and Southern Trading Company from normal correspondence. I travel very frequently. I have prepared statements of periods I was in Colony and out of it. I know Mr. Lee of Southern Trading Co. It was not part of my duty to check his stocks. I was not aware in 1954 that Southern Trading Co. were taking delivery of bicycles without producing bills of lading and on production of bankers' guarantees - I first became aware of this in January 1955. I never in any way expressly or impliedly approved any such method of delivery. I would not have had authority to do so. On finding this out in January 1955 I communicated what I had learnt to my Head Office.

No Cross-Examination Smith.

Cross-Examination (Seth).

Cross-Examination Seth

I first met Mr. Lee very early in 1953. I was sent out to make a survey and report of market in Far East for sale of Rambler Cycles. Mr.Lee asked me to recommend him as the company's representative. I reported favourably on him. I made no enquiries about his financial stability. I had no instructions from my company to make enquiries of that nature. I did not make any independent enquiries because we had been trading with the company previously through somebody else. I was in London when Lee negotiating to become representative. I did not know at that time the terms on which he was going to be appointed were 90 days D/P. I think 60 days was mentioned in my presence as the D/P terms, but later I was told 90 days. I am not

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sure when - I would say towards October or November 1953. I attested Lee's signing of the agreement. I read it. I did not discuss its terms with him. I never discussed them with him. My duties in relation to Southern Trading Co., was to promote sales of Rambler bicycles in markets to which agreement referred, and so to assist Lee. I would say sale in Malaya and Singapore mainly through Chinese companies. I agree he was Chinese and I was to assist him selling to his own people. I did not feel I could do that better than he could himself.

Q. Was not your appointment superfluous then?

A. No, I am also representative of Norman bicycles.

Q. Not superfluous as far as Rambler bicycles?

A. No.

Q. Why not?

A. At that time we got many enquiries coming into the office in English. I would follow up these matters. Also in certain countries i.e. Indonesia it was possible for me by my contacts to further sales when Mr. Lee could not. So consequently he would benefit directly from my assistance.

Q. He had to pay £1,500 per year for maintenance of you and your family in Singapore?

A. Yes. Later reduced to £1,000.

Q. You visited his office daily?

A. Quite frequently.

Q. And you used his office as an office?

A. No.

Southern Trading Co. never my postal address. I agree I was to supervise activities of Mr. Lee as Rambler's representative - on sales. I would agree most effective way to promote sales would be to effect deliveries.

Q. Did you consider non-delivery of large shipments of cycles was promoting the products of Rambler cycles?

A. No. There were, of course, extenuating circumstances. Our representative by not taking delivery was holding up our sales.

Q. Was not attempt made to find someone who could pay?

A. No. Mr. Lee said he would pay up when he got payment from his Indonesian customers.

Q. Did he ask you to get extensions for him?

A. He did, and asked me to get extensions from the company for him. I put forward to the company his views and representations to me.

Q. Did you have copies of all correspondents from Rambler Cycle to Lee and vice-versa?

A. At the material times and up to this year, yes.

Q. Are you still being paid £1,000 per annum by Mr. Lee although he gets no cycles now?

A. Yes. But there are shipments under other orders on which he gets his commission.

Q. He is still paying same sum for your maintenance as when he was getting these shipments of bicycles.

A. At present yes.

Q. Did Rambler seek your advice on financial aspects of the matter?

A. They asked me to do my best to get Lee to take up the shipments.

I had no authority to attend to the financial side of the matter.

(Seth refers to p.67 A.B. - C.H.W.)

Q. Why did you write that letter?

A. I was requested to do so by Mr. Lee.

Q. But you have no authority?

A. This is no authority but a request.

I say "instruct" here means "request". The Bank of China could have disregarded my request - they acted only on instructions from London. I was assisting Mr. Lee as best I could in this matter.

Q. Although you had no authority from Rambler Company to do anything in connection with the financial aspects of their dealings?

A. Correct.

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Cross-Examination (Seth) - continued.

(Seth refers to letter p.117 A.B. C.H.W.)

Q. What enquiries did you then make on the point?

A. I forget. If I saw my reply it would refresh my memory.

Q. So you did reply. I do not see copy of it in Agreed Bundle.

A. I always reply to my letters.

Q. Will you produce it after lunch?

A. I don't think I will have time. I will try.

(Seth refers to letter p.156 A.B. "Please look for your letter of 20th October as well". Seth refers to p.157 - C.H.W.)

Q. Why did you suggest Mr.Lee should have at least some deposit for shipping to Indonesia?

A. That means if I had been Mr.Lee I would in view of existing conditions have required some security before shipping goods to Indonesia.

Q. Where is your reply to that letter?

A. I doubt if I had replied to that letter.

Q. You think you ignored that letter?

A. I cannot remember. This is two years ago. I will check on my files.

Q. You are aware none of the bills has been protested?

A. Yes.

Q. And that the amount referred to in this letter still outstanding on date first shipments made to him (November 8th)?

A. Yes.

Q. When you got all these letters expressing uneasiness and many consignments not taken up, did it not occur to you to make check?

A. No. There was no reason to. I was satisfied in my mind they were stored either by the shipping company or the Bank. I believed goods when taken off ship normally put in Harbour Board godown.

Q. Are you aware Harbour Board charge for storage?

A. Aware normally.

Q. And that rates get stepped up steeply after three weeks?

A. Yes.

Q. You assumed the bicycles would be removed somewhere else?

A. Yes.

I had no reason to make enquiries about the goods. (To Court: I considered that as it was the responsibility of the shipping company or bank or both to look after the bicycles until payment was made I need not concern myself with the point. In my previous experience they had always been taken care of, whenever did so).

Q. Have you had experience on any other occasion of such large consignments accumulating and not delivered?

A. Not out here.

Q. This was your first experience in Singapore?

A. Yes.

Q. Who did you think was paying storage charges?

A. If in Shipping Company's godowns they would pass the charges on when consignee collected the goods - or through the bank.

I did mention to Lee storage and insurance charges must be piling up. He gave the same story - that he was awaiting payment from his clients in Indonesia. I have been to Sze Hai Tong Bank myself. In late February or in March 1955. I have visited it three times in all. First is that I have mentioned when I saw the Secretary. Second was when I saw Mr.Yap Pheng Geck, managing director. Third was in company of Mr. Lee to see Mr.Yap Pheng Geck - two days before I went to London in April 1955 - the last Saturday in April. I saw Mr.Yap on third occasion. I saw him twice and the Secretary once. I did not go to the Bank in October or November 1955. I did not know of any indemnities at that time. (To Court: It was in January 1955 I first heard of them). As result of information I got

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from Bank of China I asked Mr. Lee had he taken goods on indemnities. As result of what Lee told me I went to Sze Hai Tong Bank to check up on this point. The Secretary told me he could not tell me. When a week or so later I saw Mr. Yap Pheng Geck all I wanted to know was whether they had issued indemnities against these shipments for delivery and he told me they had. I did not tell Mr. Yap Pheng Geck to take no action against Southern Trading Co.

Q. Was not whole attitude of Rambler Cycle Company "let us not bust Southern Trading Company and let us not allow anyone else to do so"?

A. No.

Now 12.45 to 2.30.

Sgd. C.H. Whitton.

Resumed 2.30.

Cross-Examination Seth resumed.

(Seth refers witness to letter at p.208 A.B. Reads first four paragraphs p.209 except that beginning "Bank of China ... - C.H.W.)

I agree that we wanted to keep Mr. Lee going and at no cost was he to be made bankrupt. I did not visit the bank at end of October or early November 1954. Put to me I went to see the Secretary at that date about pressure on Lee for indemnities I still deny that. I did not see the Bank in January either. Put to me I saw Mr. Yap Pheng Geck about 20th January I was not in Singapore about that period. (Witness corrects himself - 1955. I agree in Singapore about 20th January 1955). I did not see Mr.Yap Pheng Geck there. The third visit was at request of Mr.Lee. During that visit I informed Mr.Yap I was going to London. Mr.Yap then asked would I enquire from my company if they would accept the sum of £30,000 and allow Southern Trading Company further time to pay off the balance in instalments. I told Mr.Yap I would do that before my company directors. Put to me not a word of truth in what I have just said I say it is true. I did not see Mr. Yap Pheng Geck again after my return from London.

Q. Did you ever put the proposition to Mr. Yap

Pheng Geck that the Bank should pay one third of the loss, that one-third be waived and that Mr.Lee should be made to pay one-third?

A. No. I had no authority to make such a proposal.

I did reply to letter of 7th September 1954. (at p.117 A.B.) I produce now the reply dated 13th September. This letter was in my file today - I collected it today. I did ask the Bank of China if they had released the goods on trust receipts. They replied certainly not. (Letter dated 13th September from Mr.Saul to Rambler Cycle Co., admitted No objection - Ex. T.P.2. - C.H.W.) At that stage I did not ask them where were the goods. "I think they do release them, but have not bothered myself to go into this" - I do not agree this shows there was suspicion on my part. I had heard that goods could be released on bank receipts - and that was reason I wrote that sentence.

Q. In the light of that information do you not think it would have been prudent to investigate further?

A. No.

Q. Who is "they" in phrase "they do release them"?

A. I meant banks generally.

Q. In addition to enquiring from the Bank as you did do you not think it would have been prudent to ask the Bank where they were?

A. It might have been, but I did not pursue the enquiry further. I have with me in my file letter dated 15th September 1954 to which has report that I would like referred to. (Seth comments on failure of Plaintiffs to disclose all relevant correspondence - C.H.W.) (After examining this letter - C.H.W.) (To Court: I cannot remember if I ever did make a report to my company on that point). I think I told my company that Bank had said they had not released the goods.

Q. Where is the letter in which you told them that?

(After referring to the correspondence - C.H.W.).

A. I don't think I ever told my company I had made enquiry of bank and they had replied they had not released the goods.

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Q. Did you not think that matter of utmost importance?

A. No. I assumed once the bill of lading with bank the matter was all right. It is correct the matter was dropped then. It is not true the report of the goods having been released revealed such an alarming possibility that I was afraid to report it to my London Office. The Bank of China told me they had not released the goods but that it was possible by means of trust receipt to get release of the goods without production of the bill of lading. I agree that meant it was possible for shipping company or whoever had got the goods to release them without original bill of lading being produced. I had no authority "to chase up" shipping companies to enquire if they had released the goods.

Q. Why didn't you go?

A. I am a very busy man. I travel a lot. I did not worry about it. I agree the goods were at stake. I agree I had been advised they could have been taken delivery of without payment.

(Seth asks leave to see file of witness since two documents now come to light not disclosed in affidavit of documents. Mass y no objection. Seth resumes further Cross-examination after examination if necessary - C.H.W.)

(Massey submits that De Souza should not be allowed to cross-examine unless admits liability - only embarrasses Plaintiffs and increases the costs. Southern Trading Company were brought into proceedings at instance of Defendants - as were first Third Party.

Smith points out Seth has admitted liability to Defendants, but no intimation as to whether second Third Party does.

De Souza - "The second Third Party admits liability to the Defendants and to the first Third Party on account of the indemnity".

Massey withdraws his objection - Sgd.C.H.W.

Cross-Examination (De Souza)

Cross-Examined (De Souza)

I presumed goods purchased by Lee from my firm

for re-sale to his customers in the Far East. I was not aware of and had no interest in, the terms on which Mr. Lee sold to his customers. Mr. Lee mentioned to me personally he had had difficulty in getting his money from customers in Indonesia. I assumed from that he was selling to his customers in Indonesia on credit. I understand his trade in Far East to be with Chinese in Indonesia I did consider the D/P 90 days terms were advantageous to Lee bearing in mind he was selling to customers in Indonesia on credit. I cannot say if it was to his disadvantage. He would know the risks he would be taking. Lee did not tell me at any time he would be resorting to bankers' assistance to meet the payments. I never heard him say anything about restoring to bankers' assistance to obtain delivery of the goods before payment.

(Massey asks leave to postpone re-examination until further examination if any, completed.

Smith asks Counsel to admit following facts -

(1) That Glengarry arrived on 1st September, 1954.

(2) That it discharged its cargo i.e. these goods into the Harbour Board godowns on 2nd and 3rd September.

(3) That on 3rd September an indemnity received by the Shipping Company and delivery order issued by them to the Southern Trading Co.

(4) That on 4th and 6th September the goods were received from the Singapore Harbour Board by the Southern Trading Company.

Massey, Seth, De Souza all admit all these four facts.

Massey states asked to produce First of Exchange by Seth. Has received cable to effect bill of exchange accepted 3rd September.

Smith, Seth and de Souza admit this fact.

- C.H.W.).

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Cross-Examination (De Souza) - continued.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

8th November, 1956.

Plaintiffs Evidence.

Robert William Saul.

Re-examination by Massey.

Now 4 o'c. To November 8th - 10.30.

Sgd. C.H. Whitton.

Thursday, 8th November 1956.
Contn. S. 1329/55.

Seth does not wish to cross-examine further.

Re-examined Massey -

Ref. letter at p.67 AB I heard nothing further about letter I sent quoted - I was going to England myself at that time. They did pass my letter on to Bank of China in London for instructions. My main duties out here are sales. I do not regard dealing with shipping or the import of the goods here as part of my duties unless I am specifically instructed to do so.

Sgd. C.H. Whitton.

(Released - C.H.W.)

Case for the Plaintiffs

Defendants Evidence.

Defendants Evidence

Smith opens

Wilfred Leslie Perera.

D.W.1. Wilfred Leslie Perera - a.s. in English.

Examination.

164 Prince Phillip Avenue, Singapore. In Shipping Department Boustead & Co. since 1947. They are Singapore Agents of the Defendant Company. In 1954 I was in charge of transhipment Department. I also assisted in Cargo department. One of my duties was to sign delivery orders. I recall arrival of Glengarry on 1st September 1954. Prior to Glen vessel's arrival we receive copy of manifest indicating what goods are on board. Goods subject to this claim were on the relevant manifest. We have records as to when goods discharged from the ship into Harbour Board godowns. Of this consignment four cases were put in Harbour Board godown on 2nd September. On morning of 3rd by 11 a.m. a further thirty-five cases had been put into H. Bd. godown. Remaining case discharged between 1 and 5 p.m. same day. In addition to manifests we get copies of bills of lading. At

times they arrive before the ship at times not. I cannot remember what happened in this particular case. We get them straight from London. I saw on this particular bill of lading "Notify Southern Trading Co." We received a letter of Indemnity in this case. Page 312 A.B. a copy. From general practice being dated 3rd September I would say it would be received after 11 a.m. that day. Next step to keep the letter of indemnity until the person who signed the indemnity calls. He would call some time later in the day. I cannot recollect seeing Southern Trading Company representative in this case. I did issue delivery order the same day. Page 313 A.B. a copy of it. "Notifying" in most cases is to people who come in to get delivery. We write to the party to notify them the goods have arrived. I mean in most cases the people who come to take delivery are those who have been notified. If the consignee is specified I would give delivery to no other person on a letter of indemnity but the specified party. We would also allow notified party to take delivery on an indemnity. The ship does not know what delivery orders I have given to the Harbour Board. Supposing consignee named or person notified wants to take delivery direct from the ship in these circumstances I would issue delivery order addressed to the chief officer of the vessel. When goods are released on an indemnity we usually get the bill of lading at a later date, which thus releases the indemnity. If we do not get bill of lading after goods released on an indemnity we write to the consignee after one or two months bringing the matter to his notice. If no named consignee we write to person signing the guarantee. It is in fact in all cases to person who signs the guarantee we write.

Cross-Examination Massey.

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. 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

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

8th November, 1956.

Defendants Evidence.

Wilfred Leslie Perera.

Cross-Examination (Massey) - continued.

indemnity because we are doing something we know we should not do - but it is common practice. It is an everyday occurrence.

Q. When the bill of lading is produced by someone other than the person to whom the goods have been given do you ask the bank to give you fresh indemnity?

A. We rely on the bank's guarantee.

In this case we have told Sze Hai Tong Bank we hold them responsible. They admitted liability yesterday. I had not seen Mr. Saul before he was in Court yesterday. When we issued the goods my company did not know whether Mr. Saul approved or not of what we were doing. We had never heard of Mr. Saul. No negotiation between us and bank before we get indemnity and release the goods.

No cross-examination Seth or De Souza.

No Re-examination.

To Court: When delivery taken direct from ship all chief officer requires is our delivery order to release the goods.

Sgd. C.H. Whitton.

(Released - C.H.W.)

Smith - "I propose to call another witness at the request of the Third Party and to allow Mr. Seth to examined him".

Now 12.50 to 2.30.

Sgd. C.H. Whitton.

Resumed 2.30.

Yap Pheng Geck.

Examination.

Evidence of Yap Pheng Geck - a.s. in English -

14 Mount Elizabeth. Director and Manager of Sze Hai Tong Bank Limited, Singapore. There is a practice in this Colony for banks to give importers indemnities to enable the latter to get delivery of their goods without production of the bill of lading. It is a facility - really a service - to help flow of trade when bills of lading have not arrived. My bank signs such indemnities, for specially selected customers. Advantage has been taken of the practice but

generally speaking it has worked well in securing trade particularly during the time there was congestion in the S.H. Board. Before selecting customers for this facility the bank first satisfies itself as to the customer's bona-fides i.e. that the customer is continuously getting supplies of this type of goods and that the type of goods is a main line of business with him. Having so satisfied itself next step is the customer applies to his bank on a particular form - I think it is a uniform type approved by all the banks and known as a counter-indemnity. This is a specimen form (Marked Ex. TP 3 - C.H.W.) The customer signs this form. This is a specimen form of indemnity given by our bank - and by all banks in Singapore (Marked Ex. TP 4 - C.H.W.) My understanding is that the Bank joins in the indemnity but not in the warranty, and that this is unlimited as to time and amount. I know Southern Trading Company. They are customers of my bank. Mr. Lee Boon Hui is the proprietor. My bank has joined with Southern Trading Company in a number of indemnities given to various shipping companies in Singapore. We keep what we call a shipping guarantee register of every indemnity we join in. In respect of Southern Trading Company almost invariably the indemnities were in respect of goods described as "bicycle parts" from Rambler Cycle Co., Ltd. This is original Indemnity relating to present case. (Seth - Page 312 A.B. Tendered and admitted Ex. TP 5, no objection - C.H.W.) Speaking generally most of the indemnities come back to our Bank. Most of them are surrendered voluntarily by the customers. If they are outstanding we enquire from our own customer reason for delay in returning them to us i.e. the applicant to us for an indemnity. About the time this particular indemnity issued i.e. 3rd September 1954 there were quite a number of indemnities from this particular customer outstanding. My bank has half yearly audits 30th June and 31st December. Position was continuing new indemnities and continuing releases from them. My practice has been one month before main audit on 31st December to get all records checked. I recall in November or thereabouts being annoyed with my Secretary on checking and finding indemnities given as long previously as October 1953 which had not been returned. I then pressed the Secretary to get back at least the out-dated indemnities, because while I was aware of indemnities

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton

8th November, 1956.

Defendants Evidence.

Yap Pheng Geck.

Examination - continued.

standing for a long time and eventually getting lost sight of, I wanted for audit purposes to get in as many as possible. I believe he took action (Seth - "I am calling Secretary") The Secretary came to me some time in November and told me the earlier indemnities were not available because Rambler London had not released them. He said he had had a visit from a certain Mr. Saul, the Manager of Rambler Ltd., who had called and explained matters. The explanation given to him as reported to me was there was some misunderstanding in London as to bills of lading, and he (Mr. Saul) would try and get them released as soon as possible. To get indemnities paid it would be necessary first to get the bills of lading released. As result of that information I did not take any action as I trusted my Secretary, but I asked him to refer to me in future all applications for indemnities from Southern Trading Co. I met Mr. Saul to talk to for first time in my office some time in January, 1955. Some time in second half of January. I went away on 29th January. I went to London. Mr. Saul said to me "I cannot understand what London is doing. All these bills are so long overdue and would not have got lost. I will do my very best to get your indemnities released from you. I have written many letters to London to that effect, and if necessary I will go to London myself to clear up matters". I infer that visit due to pressure put on Mr. Saul by my Secretary. In December I had authorised one further indemnity - on 24th December - to Southern Trading Co., on the understanding they would return several outstanding indemnities. At that time I thought Mr.Saul must have known all about the indemnities. Mr. Saul was trying to help Southern Trading Co. I saw Mr. Saul again after Easter 1955. I came back from Europe at end of February. It must have been some time in May I saw him. By that time I had already been notified by the Bank of China that they held the bills. This time Mr. Saul called on me without request from us. (To Court: The first occasion Mr. Saul had come and seen me it was at the Bank's initiative). I was very annoyed at seeing him because I had had a sheaf of advices from the Bank of China to effect they had numerous documents of consignments. I asked him what he meant by saying he would get London to settle the bills of lading. Then Mr. Saul made to me a very fantastic proposition. He said:

"Southern Trading are your good customers, they are also our good customers, and between us (the Bank and Rambler) we should try and help him over a difficult time. He said Southern Trading had ample funds with Rambler as commission - he mentioned the figure £10,000 - and that there was lots of money owing to Southern Trading from Indonesia. Would the Bank be prepared to help - to pay one third of Southern Trading Company's liability, Rambler to write off one third, Southern Trading Company be required to pay the remaining third. The Bank was eventually to recover their third from Southern Trading Company. I lost my temper with Mr. Saul and told him to get out. That was last I saw of Mr. Saul. I never made any suggestion to Mr. Saul that my Bank would pay £30,000 to Rambler Company to reduce the indebtedness of Southern Trading. It is the practice that the indemnity signed by the Bank must be delivered direct by the bank to the shipping company. If indemnity dated 3rd September it must have been signed by us that day and if signed in morning it would have been delivered by our morning delivery which is at 11.30, and if signed in the afternoon by the afternoon delivery which is at 3.30.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

8th November, 1956.

Defendants Evidence

Yap Pheng Geck.

Examination - continued.

Cross-Examination Massey

Cross-Examination (Massey).

I do not know when it was delivered. I lost my temper because I had found out what Mr.Saul said about London was not true. I do not regret now I did not accept Saul's offer. I agree that eventually the value of the goods determines the amount of our liability, if any. Value of goods in respect of this particular consignment given us by Southern Trading Company is $2,500.
(To Court: That was what they filled in in Ex. TP 3.) Customer usually gives us the invoice value, but we also check up on the description of the goods. We accepted the figure $2,300 as bonafides. Our Bank did not see the invoice in this case. They did not see them in any case with Southern Trading. I would agree now that I have seen the invoices that the declaration of value made by customers was wrong. Very wrong. My Secretary apparently thought $2,300 correct from his own check. I agree now that valuation was totally wrong. I agree all twenty-six outstanding indemnities valuation are hopelessly wrong, now that I have had the opportunity of looking through

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

8th November, 1956.

Defendants Evidence.

Yap Pheng Geck.

Cross-Examination (Massey) - continued.

them. I think my customer was dishonest with me. I think now if my liability is established it is round about £50,000. I agree I have a big interest in this matter. Glen Line did ask us would we admit liability. I said I wanted all the circumstances of the case brought out. We have now admitted liability. It may be so that my Bank is the real Defendant in this case.

Q. You have refused to admit liability in these cases because of the large amount involved?

A. Not true.

Q. Do you normally fight these indemnities?

A. No.

Q. You usually pay up?

A. Yes.

Q. But not in this case?

A. No.

Q. If the Shipping Company loses this case you will have to pay?

A. Yes.

First indemnity to Southern Trading Company after they were made agents to Rambler Cycle Co. was 2nd July 1953. Thereafter we continued to grant these indemnities regularly. Before annual audit in 1953 we called upon Southern Trading Co., to get releases from us. They did give us some releases in 1953 - they regularly do so. I knew many of these bills of lading were arriving in Singapore. Customer comments that bills of lading have not yet arrived when he makes application for indemnity. I agree in normal practice bills of lading arrive from London before the goods. I do not agree put on enquiry when customer says bills of lading from London not arrived. I now say I cannot say if normal practice. I say. If letter of credit opened here I would say in normal practice bills of lading would arrive before the goods from London, but if no letter of credit quite possible goods would arrive first. The documents usually come by air. I do not agree when customer tells me bill of lading from London from big company has not yet arrived I am immediately put on enquiry. I

am prepared to accept statements of my customers that bills of lading held up for six months. Because I trust them - particularly in a case like this when a manager, and a European manager at that, comes forward to tell me. I say that in this case I particularly trusted my customer because European manager came forward. Up to 1st November I made these advances solely because I trusted my customer. On that date value of outstanding indemnities $70,000 or $80,000. Declared values. On that date about sixteen indemnities outstanding. Only one issued after that. I agree all these indemnities except one issued on my responsibility before we had any contact with Mr. Saul at all.

November 8th 10.30.

Sgd. C.H. Whitton.

Friday, 9th November, 1956.

S. 1329/55 (Part heard).

Yap Pheng Geck - resumed.

The responsibility for granting the indemnities mine. Routine is I give a certain limit and Secretary works within that limit. In this case limit I authorised $100,000. I agree there have been some big blunders by the Bank in this matter, subject to saying we only learnt about the declared values being largely false later. I agree that if the bank staff had made proper examination of the invoices we would not have been taken in in this matter, but as Ramblers as principal sending out large consignments to Southern Trading Company as their agents continuously we thought that sufficient to rely on without particular examination of invoices of consignments. Our impression was invoices would come with the documents later - after the goods. I never saw the invoices. I agree that if my staff had had adequate knowledge of bicycle parts my bank would not have been let in.

Q. Would you not say it shews great negligence on somebody's part if the bank was taken in by issuing indemnities in respect of goods valued about $500,000 when in fact bank thought worth only about $80,000?

A. No.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

9th November, 1956.

Defendants Evidence.

Yap Pheng Geck.

Cross-Examination (Massey) - continued.

I do not agree that by reason of that I attempted yesterday to pin the blame on Mr. Saul. I agree many of the indemnities months outstanding.

Q. I suggest to you it was negligent to let the matter stand when these bills of lading had not arrived after a long time.

A. We press for return of indemnities after a month or so as a general rule, and in view of assurances from the customer in this case I think we were entitled to trust him.

I am not blaming Mr. Saul at all in any way for the indemnities issued before he came first to the Bank. I am blaming him for coming to the bank and his representing there was still confusion in London about these bills. I do not blame him for the giving of these indemnities by the bank. I blame him for coming to the bank and asking to carry on as usual. I do not agree that the bank must take the blame squarely on their shoulders for the issuing of these indemnities. I only blame Mr.Saul in respect of issue of the last one. If Mr.Saul had told me these bills outstanding for several months I would have consulted my solicitors at once. I say that as a banker I do not know whether it was open to me to sue Southern Trading Co., or not. On 1st November 1954 Southern Trading Company owed us money about $90,000 on current account. We were partially secured by mortgage, pledges and guarantees. This was quite apart from our shipping guarantee account. Southern Trading Company owed us nothing on the shipping guarantee account. (To Court: Nothing in debit would arise then until we had satisfied an indemnity on which Southern Trading Co., had defaulted). I took legal advice in March about making Southern Trading Co., bankrupt. I have not made him bankrupt. It would not have been in my interest to make him bankrupt. Had I information on 1st November anything wrong I would have taken advice from my solicitors. I think it is more than curious that Mr. Saul should have made the representations to me in view of contents of his letter to London of 20th January 1955 (p. 201 A.B. - C.H.W.) It is not true Mr. Saul said did not say to me what I allege. When I saw Mr. Saul in May I had to some extent knowledge of bank's liability. I knew all the goods covered by our indemnities had been released. I did not know what the invoice values were then. I say I had

not then taken the trouble to find out the invoice values - no means of finding out. We could have asked the bank of China for invoice values. In March 1955 I made full enquiries to ascertain extent of bank's liability. I agree I knew in May bank's liability possible about £56,000. I do not agree settlement I say Saul suggested would have been extremely favourable settlement to us. I absolutely disagree that I would have jumped at such a chance. I agree liability about £56,000. I say that in rejecting Mr. Saul's proposal the money consideration did not influence me at that time, but I must see my solicitors on the subject because something very wrong had come to light. I felt that in view of the abuse that had occurred of the facilities given by shipping companies and banks in this line in this case that I would be acquiescing in the malpractice if I acceded to Mr.Saul's request. I do not agree I then disclaimed my indemnity - I chose the right time to admit it. I did so on legal advice. Not blaming my solicitors - my solicitors my best friends. I repeat Mr.Saul did make such a proposal.

Re-examined:

The main consideration in our embarking on this service to Southern Trading was that they were the sole representative of Ramblers and supervised by an Eastern Manager. The business of Rambler Cycles in this territory was believed to be a thriving one. I agree that when I issued last indemnity on 24th December 1954 the time for taking up last shipment - the one in this case - by Southern Trading Company had not elapsed. I agree therefore this shipment was on that date still outstanding.

(Seth refers to letter at p.209 and reads paras. 1 and 2 from top of page-C.H.W.) I would say that most consistent with Mr. Saul pressing the bank not to press Mr. Lee for the return of the indemnity. At time Saul's proposal made in May I humbly thought the bank would be absolved from liability.
(To Court: My knowledge of law imperfect but I could not see that a bank could be made liable for a guarantee between a principal and an agent in these circumstances). Primary liability was Southern Trading Co., to Rambler. I meant I could not see how this indemnity could be treated as a guarantee of this primary liability.

Sgd. C.H. Whitton.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

9th November, 1956.

Defendants Evidence.

Ee Peng Hian.

Examination.

Evidence of Ee Peng Hian - a.s. in English.

Examination.

235-3, Balestier Road. Secretary Sze Hai Tong Bank Ltd. Secretary of this Bank about 20 years. My bank gives shipping indemnities to special customers. Southern Trading Company one of these customers. They have been our client since the re-occupation. I knew they get their bicycles from Rambler Cycle Co. I knew that in latter part of 1953 Southern Trading Co. appointed sole representative in Far East. Also learnt Mr. Saul appointed as manager and to assist Southern Trading Co., I saw Mr. Saul once. I point him out in Court. I first saw him about November 1954. He came to see me at the Bank. He came to make enquiries about the outstanding indemnities of Southern Trading Company. He asked us not to press Southern Trading Company too hard for their outstanding indemnities, and said he would write to London to get the release of these outstanding indemnities. At that date we still trusted Southern Trading Co., and we agreed to Mr.Saul's request to wait. I reported this discussion to our manager. The bank calls for return of outstanding indemnities from August in October and November to prepare for audit. He never came to see me after the first occasion.

Cross-Examination.

Cross-Examination

I did not see him in March 1955. At time I saw Mr. Saul in November my Manager had already told me to do something about the outstanding indemnities of Southern Trading Co. I do not know if he was annoyed with me when he told me to press for the return of the old indemnities. I signed the indemnities. The bank gave them. When customer asked for an indemnity I saw the indemnity form properly signed by the customer together with the warranty. My assistant actually saw the customer. In case of Southern Trading Co. Manager fixed a limit for which indemnities had to be given, and I had to see not exceeded. Limit was $100,000, then increased to about $120,000, then to about $150,000. It was only after this case cropped up I knew values given by the customer were wrong. I did not check the values. I did the routine work. In case of Southern Trading Company I only checked the limits. I do not know if anyone checked the values. I do not know if my

assistant checked the values. I think he was supposed to check them. My assistant clerk typed out the indemnities. I agree in November a large number of outstanding guarantees and my duty to get them in. If I did not get them in hand to give excuses about it to the Manager. My story of what Mr. Saul said not untrue. Put to me I never saw Mr. Saul in November at all I say I did. I have no note or memorandum of this interview. I deny I was getting into any trouble with my manager because so many guarantees outstanding.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 9.

Notes on Evidence - Mr. Justice Whitton.

9th November, 1956.

Defendants Evidence

Ee Peng Hian.

Cross-Examination - continued.

Re-Examination.

Re-Examination:

This is counter-indemnity in this case (Admitted Ex. TP 6 - C.H.W.)

Sgd. C.H. Whitton.

Case for Defence

Smith - "Seth to address the Court on facts. Do not propose to address Court myself again on law unless Mr. Massey introduces some fresh matter to which might wish to reply".

Seth addresses Court:

Massey in reply:

Judgment reserved.

Sgd. C.H. Whitton.

No. 10.

No.10.

JUDGMENT OF WHITTON, J.

Judgment of Whitton, J.

17th January, 1957.

By a Bill of Lading dated 30th July, 1954 the Defendants acknowledged the shipment in apparent good order and condition on board their steamship Glengarry at London of forty cases of bicycle parts and hub-brakes for carriage to Singapore and for delivery there to the order of the Plaintiffs or their assigns at the freight and upon terms and conditions therein specified. The Plaintiff Company were the manufacturers of the goods, and the

In the High Court of the Colony of Singapore, Island of Singapore.

No.10.

Judgment of Whitton, J.

17th January, 1957 - continued.

intended consignees were the Southern Trading Company, to whom the Plaintiffs had been sending similar shipments for a year or more before July 1954. The practice followed by the Plaintiff company in these transactions was as follows - In the first place there was a written agreement dated 1st July 1953 between these two parties which, "inter alia", prescribed terms of payment for shipments. Then whenever an order from the Southern Trading Company arrived the Rambler Cycle Co., manufactured the goods and as soon as these were ready arranged shipment. In each case the Plaintiffs obtained a Bill of Lading through their London shipping agents and this, together with an insurance certificate, invoices and other relevant documents, was forwarded to the London branch of the Bank of China for transmission to their Singapore branch with a view to collection. The next step, if the procedure envisaged by the Plaintiffs was followed, was that Southern Trading Company in due course made payment to the Bank of China for the consignment, and thereupon the bill of lading was released to them. In the present case what happened was this. The Glengarry arrived in Singapore on 1st September 1954. The goods in question were discharged into the Harbour Board godowns on September 2nd and 3rd. An indemnity issued by the Sze Hai Tong Bank Ltd., in respect of the goods was received on September 3rd by the agents of the Defendant company, and they issued the same day a delivery order in favour of Southern Trading Company. As may be inferred from this the bill of lading had not been produced. On September 4th and 6th the goods were removed from the Harbour Board premises by Southern Trading Company. These goods have never been paid for, and the original bill of lading relating to them was subsequently received back by the Plaintiffs from the Bank of China.

These facts are either common ground or have not been challenged, and I hold them to have been proved.

The Plaintiffs maintain that the delivery of the goods to the Southern Trading Company without production of the bill of lading constituted a fundamental breach of the law of carriage, and also conversion, on the part of the Defendants. The first and second Third Parties have both admitted

liability to the Defendants in the event of the latter being held liable to the Plaintiffs.

One ground put forward by the Defendants in their defence was that they did in fact deliver the goods to the Plaintiffs by their representatives in Singapore, namely the Southern Trading Company, with the knowledge and approval of Mr. R. W. Saul, the Far Eastern Manager in Singapore of the Plaintiffs. It will be convenient at this stage to examine this contention which depends upon facts that are in question before proceeding to the legal problems the case raises. It is clear from the agreement to which I have already referred that from July 1953 Southern Trading Co., was the Representative of the Plaintiff Company in an area covering the Malay Peninsula, Singapore, Hongkong, China, Indonesia, Thailand and parts of Borneo. It is also clear that throughout the material period one Robert William Saul was what has been described as Far Eastern Manager of the Plaintiff Company. According to Mr. Burnham, their export manager, Mr. Saul's main function was to promote sales in the area, but Mr. Burnham conceded that it was also part of his duty to keep an eye on Southern Trading Company, which was in fact more or less a one man show run by a Chinese named Mr. Lee. I accept this description of Mr.Saul's responsibilities. Mr. Burnham also stated that Mr. Saul had no authority to intervene in the shipping arrangements of goods sent to this territory, nor had he anything to do with terms of sales and shipments to Southern Trading Company. I also accept this statement, both because I was favourably impressed with Mr. Burnham's demeanour and because it seems consistent with the evidence generally. It is also borne out by a statement made by Mr.Saul in a letter dated 4th January 1955. Now there is no doubt that this was by no means the first shipment sent by the Plaintiffs of which Southern Trading Company had received delivery on production of an indemnity issued by the Sze Hai Tong Bank Ltd., instead of the bill of lading. The first such indemnity had in fact been given, the Court was told by Mr. Yap Pheng Geck, the manager of that bank, on 2nd July 1953 and the same witness stated that on 1st November 1954 the value of outstanding indemnities was $70,000 or $80,000. The Plaintiffs assert they had no knowledge of this practice before January 1955, and that they believed all unpaid for consignments were still undelivered, since

In the High Court of the Colony of Singapore, Island of Singapore.

No.10.

Judgment of Whitton, J.

17th January, 1957 - continued.

the procedure they had adopted meant no delivery should be made without production of the bill of lading, which in its turn would not be handed over by the Bank of China until they had received payment. For the Defence it was submitted Mr. Saul at least must have known what was going, since, if the position had been what the Plaintiffs say they thought it to be, it must have meant there had developed an extensive hold-up of the distribution of their products in this part of the world, and it was not credible that Mr. Saul should not have made enquiries as the result of which the actual situation must have become known to him long before he says it did. In deciding this issue of fact the Court has available to it the oral evidence of Messrs. Burnham and Saul, and a considerable amount of relevant correspondence. In my view the correspondence conclusively proves that Mr.Burnham did not know that the consignments were being released on the strength of the letters of indemnity. The correspondence between Mr.Burnham and Mr. Lee reveals a long history of pressing for payment on the part of the former with requests for time and occasional complaints about the goods supplied on the part of the latter, but there is not the slightest hint Mr. Burnham suspected any goods had got into the possession of Mr. Lee before they had been paid for, and specific references to extended insurance (letters 14th July and 1st September, 1954) to storage "if the worst happened" (letter 25th October 1954) a passage in his letter to Mr. Saul of 10th December 1954 and his letter of 26th January 1955 to the Manager of the London branch of the Bank of China abundantly confirm to my mind what Mr. Burnham said himself in the witness-box, that the first suggestion he received the goods had been released to Southern Trading Company without payment was in January 1955. About Mr.Saul I find it harder to make up my mind. Apart from his denials in the witness-box there are, I think, two points in the correspondence which tend to show Mr. Saul lacked knowledge shipments were being released on indemnities. The first point involves the assumption that if Mr. Saul did know he must in all the circumstances of the case have been in league with Mr. Lee to deceive his own company in London. It is that in the Autumn of 1954, as appears from the letters of 22nd September and of 5th October of that year Mr. Lee was seeking to discredit Mr. Saul with the Plaintiffs in England, a course which

hardly suggests collaboration between them. The second point is that in my view the letters dated 12th and 20th January 1955 respectively from Mr. Saul to Mr. Burnham ring genuinely as the letters of a man who has received information which for the first time makes him suspicious of the existence of a disturbing state of affairs, and his subsequent letter of February 2nd is consistent with this. If these letters were designed by Mr.Saul to lead his principals in England to think he had only just learnt about a state of affairs he had in fact known to exist for some time they disclose an artfulness and ingenuity on Mr. Saul's part I would not be disposed to ascribe to him from what I have seen of him. In forming these impressions I have not overlooked the circumstance that at stages of his cross-examination Mr. Saul was not very convincing, and the consideration it may well appear strange that a manager part of whose task it was to maintain a supervisory eye should not have discovered how matters really stood. I have also borne in mind that if the evidence of Mr. Ee Peng Hian, the Secretary of the Sze Hai Tong Bank, is to prevail it follows that Mr. Saul knew about the indemnities in November 1954. This is a case of one man's word against the other's, and particularly as neither party can be regarded as disinterested, I am not prepared to hold that Ee Peng Hian's word can be accepted to the exclusion of Mr. Saul's when he says the latter came to make enquiries about the outstanding indemnities, or that he first visited the bank about November 1954. There are also other features of the matter which I find it difficult to assess. As appears from the letter Ex. TP 2 dated 13th September 1954, Mr.Saul as early as that date had formed some idea that banks in Singapore sometimes release goods on what he calls "trust receipts". He said in the witness-box he subsequently in accordance with the intention expressed in that letter asked the Bank of China had they so released the goods. One would have thought that had he made such an enquiry, and even if he had been satisfied with the Bank of China's negative reply he would have been put onto the scent of the possibility of the goods having been released through some other bank, and have consequently learnt the actual position. Again the completely contradictory versions of Mr. Saul and Mr. Yap Pheng Geck, the manager and a Director of the Sze Hai Tong Bank Limited, as

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to what was said at their meetings makes it difficult to determine what part Mr. Saul played at that stage of the matter. It is again a case of one man's word against another's and I regret to say I frankly do not know which was telling the Court the truth. These meetings were, however, certainly several months after the arrival of the Glengarry in Singapore with the consignment in question. Again it is perhaps a matter of some significance that Mr. Saul, or even his existence, appears to have been unknown to the local agents of the Glen Line. After weighing these various considerations I think the probabilities are that Mr.Saul did not definitely know until January 1955 that the Rambler goods were being released on indemnities. With greater confidence I hold that no knowledge or approval of the release of the goods which form the subject-matter of this action on the part of either the Plaintiffs or of their agent Mr. Saul has been proved.

The first submission on law advanced on behalf of the Plaintiffs was that the delivery by the Defendants without the production of the bill of lading was both a breach of contract and a conversion of the goods unless it could be shown some exception clause applied. I think this submission is undoubtedly correct, and indeed it is on what are in effect certain exception clauses in the bill of lading that the Defendants rely. The following passage in the judgment of Wright J. (as he then was) in Skibsaklieselskapet Thor Thoresens Linje v. H.Tyrer & Co., Ltd. (35 Ll. L. Rep. 170) is perhaps particularly apt with regard to this aspect of the case:

> " Now under those circumstances it is said on behalf of the Plaintiffs that the bank had a right of action against the shipowners in conversion because the goods had been delivered to someone other than the rightful owner, and without the bank's authority. It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract in the bill of lading is to deliver to the person named in the bill of lading; and when I say "named in" the bill of lading I mean "named in" or "entitled under" the bill of lading. In this case it was to shipper's order" -
>
> <u>in our case also it is to order</u> -

"and the bill of lading was endorsed in blank, and the bank were the original holders".

The position is stated in Scrutton on Charter parties (13th Ed. p.369) in the following terms:

" He (the shipowner or master) is not entitled to deliver to the consignee named in the bill of lading, without the production of the bill of lading, and does so at his risk if the consignee is not in fact entitled to the goods".

Now, as I have indicated the Defendants rely on certain conditions in the bill of lading, to be precise Conditions numbers 2 and 10. They say that Clause 10 gives them an option as to the way in which delivery is made, and that if they exercise and carry out that option - as they maintain they have done in this case - they have completed their contract. They say that Clause 2 in conjunction with clause 10 exempts them from liability. Clause 10 reads as follows:

"10. 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, lazeretto 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, hulk, lazeretto 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 consignee 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 this Bill of Lading."

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Clause 2 deals with the periods before the goods are loaded onto and after they are discharged from the ship, and after providing for certain circumstances which it has not been suggested apply to the present case, states:

"In all other cases the responsibility of the carrier whether as carrier or as custodian or as 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 Defendants cite in support of their contentions the Privy Council case of Chartered Bank of India, Australia and China v. British India Steam Navigation Company (1909 A.C. 369) which they submit is absolutely in point. In my opinion Conditions 2 and 10 on any ordinary construction must effectively protect the Defendants from liability, and to succeed I think the Plaintiffs must show that these conditions are not enforceable in the circumstances of this case, and this involves the proposition that the Privy Council case is not applicable.

The next submission on behalf of the Plaintiffs, which does indeed lead ultimately to the contention that Chartered Bank of India, Australia and China v. British India Steam Navigation Company is not an authority for the present case was that delivery other than in accordance with the bill of lading was a fundamental breach, and as such disentitled the party in breach to rely on the exceptions to the bill of lading. This submission rests on the principle or rather on the modern extension of it which Scrutton L.J. referred to in the following terms in Giraud v. G.E.R. Co. (1921 2 K.B. 427 at 435):

> " The principle is well known, and perhaps Lilley v. Doubleday is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it."

Now the law relating to exempting clauses has been much developed in England in recent years, as was observed by Denning L.J., in the recent case of Karsales (Harrow) Ltd., v. Wallis (1956 1 W.L.R. 936 at 940). In his judgment he states the present position, at least as far as printed exempting clauses are concerned, as follows :-

> " Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. The thing is to look at the contract apart from the exempting clauses and see what are the terms express or implied, which imposes an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses."

Denning L.J. was dealing with a case in which the point arose over a printed clause in a hire-purchase agreement relating to a car, but the language seems to me to be sufficiently wide to cover all types of contract. Applying the principle to the present case I think that if a manufacturer in England contracts with a shipping company to transport a consignment of his goods to Singapore and to deliver them to a consignee to be specified, delivery to the party specified there is something which goes to the very root of the contract. If this view of the matter requires authority I suggest one need look no further than the words of Wright J. in the Skibsaklieselskapet case I have already quoted - "the contract in the bill of lading is to deliver to the person named in the bill of lading". The fundamental nature of this element in a contract of this kind is perhaps particularly well illustrated by a case like ours where a manufacturer depends mainly for payment of the goods he has sent half way across the world on delivery in accordance with the bill of lading. He is hardly likely to enter into such contracts if the assurance provided by the bill of lading in this respect

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is not forthcoming. Delivery then by the Defendants without production of the bill of lading, was, in my opinion, by the test laid down by Denning, L.J. in Karsales (Harrow) Ltd. v. Wallis a fundamental breach. In this connection I do not think the circumstances that the Defendants' agents delivered the consignment to the same persons as they would have probably been authorised to deliver them to in due course on production of the bill of lading alters the legal position.

The next step is to consider whether the principle enunciated in Karsales (Harrow) Ltd. v. Wallis is properly applicable to the bill of lading in our case. In this respect I have been very conscious of the difficulty which confronts me of determining, in the absence of precise authority on the point, how far this doctrine of fundamental breach, expanded as it has been by the English Courts in the very recent past, applies to the carriage of goods by sea, and in particular to the law governing bills of lading. Again if the doctrine does apply the question arises how far the conditions on which the Defendants rely are exempting clauses.

As to the first of these questions the language used by Denning L.J. is in my opinion, as I have indicated, sufficiently comprehensive to include any form of contract with printed conditions. Bills of Lading, however, have their own special place in the law, and one cannot lightly assume a doctrine which governs a hire purchase agreement will equally govern them. I think it is true, however, to say the principle of fundamental breach has received some recognition in maritime cases, as for instance Compania Importadora De Arroces Collette Y Kamp S.A. v. P. & O. Steam Navigation Co. (28 Ll. L. Rep. 63) to which I shall refer more fully in a moment. If the logical basis of the doctrine is, that, in the words of Devlin J. in Hanscomb & Co., Ltd. v. Sassoon I Selty & Son & Co. (No.1) (1953 1 W.L.R. 1468), "It is, no doubt, a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract", there would appear to be no reason why it should not apply to bills of lading as much as to railway tickets or hire-purchase agreements.

But even if it is conceded that the doctrine can be applied to bills of lading it remains to consider whether Clauses 2 and 10 are in fact exception clauses. Clause 2 - or that portion of it with which we are concerned is up to a point at least certainly one. But I feel that some difficulty in this connection is presented by the circumstance that the clause does not avoid liability in respect of anything done by the Defendants before the goods are placed on their ship or after they are taken off. If it affords protection to the Defendants it is not because it exempts them from liability when they are in breach of the contract over delivery, but because it limits the duration of such liability to a time outside which the misdelivery occurred. Is it then open to the Defendants to say that a condition which limits liability to the time the goods are actually on the ship is not an exempting clause within the meaning of the cases we have been considering for the purpose of misdelivery from a godown, even though it might well be one for a case of fundamental breach during the period the goods were on board. Perhaps the most useful authority in considering this point is Compania Importadora de Arroces Collette Y Kamp S.A. v. P. & O. Steam Navigation Co. (28 Ll. L. Rep. 63). It contained a condition substantially the same as the first provision of our Clause 2. The condition reads :-

> "In all cases the Company's liability is to cease as soon as the goods are lifted free from and leave the ship's deck."

This exception failed to avail the shipping company for reasons which appear in Wright J's judgment (p.69):

> "At Hamburg in the circumstances of this case the goods, it appears to me, were simply given to the wrong person, and the wrong person may be assumed to have been standing at the ship's side expectantly receiving the goods as they left the ship's deck and came to him. I think, in those circumstances, that it would be true to say that the company's liability was complete before the goods left the ship's deck with the intention which was never departed from of delivery to the wrong person".

Mr. Smith for the Defendants makes what I consider

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a valid distinction that in our case the intention of the persons on board the ship was to deliver the goods into the Harbour Board godowns. I agree that as far as that went there was no question of misdelivery, and, moreover, I appreciate the language in the passage I have just quoted may suggest the exception clause might have saved the shipping company had misdelivery not started before the goods left the ship's deck. Wright J. in the course of his judgment also considered, however, Chartered Bank of India, Australia and China v. British India Steam Navigation Company, and with reference to a similar exempting clause in that case said: "The Privy Council in the opinion delivered by Lord Macnaghton held that in that case the clause was effective; but it seems that such a clause has never become extended to a simple case of misdelivery." So, apart from modern "dicta", it seems doubtful if this type of clause has ever effectively protected a shipping company where there has been misdelivery. In the final analysis the issue appears to be whether once a fundamental breach has occurred can the party in breach ever avail themselves of a printed condition in the contract, whether it purports to cover the contingency in which the breach occurred or not, to evade the liability flowing from the breach? As I understood the principle underlying the authorities I have considered the answer is that, they cannot. If this opinion is correct and the view there was a fundamental breach on the part of the Defendants is accepted it would certainly seem to follow that the present case is one in which by reason of the doctrine of fundamental breach the Defendants are not entitled to rely on the clause. This conclusion must be subject, however, to the question of repudiation which I shall shortly consider. It also follows I think that the present case can at this juncture be distinguished from the Chartered Bank of India case in which the loss was due to fraud on the part of landing agents. As was observed by Denning L.J. in J. Spurling Ltd. v. Bradshaw (1956 1 W.L.R. 461 at p.465) negligence by itself, without more, is not a breach which goes to the root of the contract. It seems to me that even less so can it be said that the fraud of a third person, even if such person is an agent, could be correctly regarded as a fundamental breach on the part of an innocent party to a contract. In the first place the agent's

conduct in such circumstances would be outside and, indeed, contrary to his authority, and, therefore, would not, I think, commit his principal. Secondly it seems clear that before the doctrine can apply one of the parties must be guilty of repudiation.

Now with regard to Clause 10 the considerations are, I think, different. It confers upon the Defendants considerable latitude as to the time and manner in which the goods may be discharged and delivered. It is not an exemption clause, except that it stipulates discharge and delivery shall be at the owner's risk and expense, but as the discharge and delivery it covers is that of the goods from the ship to (in our case) godown, and no suggestion is made this was not done in proper fashion, I do not consider it is affected by the submission of fundamental breach. On the other hand I do not think that by itself this clause can avail the Defendants. It clearly contemplates delivery being taken by the consignees, and its scope falls short, therefore, as I see the matter, of conferring upon the Defendants any discretion as to whom delivery may be actually made.

I now turn to consider whether these findings can be affected by the question of repudiation. As was held in Woolf v. Collis Removal Service (1948 1 K.B. 11), referred to recently by the learned Chief Justice in Bank of China v. Brusgaard Kiosterud etc. (1956 22 M.L.J. 124), a breach of a term going to the root of a contract does not of itself have any effect on the existence of the contract, but the party not in default has the choice of treating the contract as terminated, and if he so chooses the party in default loses the benefit of exception clauses inserted for his protection by way of variation or limitation of his common law liability. Mr. Smith contends, in the first place, there was no repudiation on the part of the Defendants, and relies on a passage at page 203 of Halsbury 3rd Ed. Vol. 8, which reads:-

> "In order to amount to repudiation there must be conduct showing clearly an intention not to fulfil the contract when the time comes, and a party is not bound before the time fixed for performance to give a definite answer as to whether he intends to fulfil the contract or not."

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As far as it goes I would be prepared to concede that by this test the Defendants did not repudiate, but I think the correct view of the matter is that Halsbury is here considering breach by anticipation. It seems to me, however, there can also be repudiation even in a purported act of performance. The Court said in Woolf v. Collis Removal Service with regard to a speech by Lord MacMillan in Heyman v. Darwine Ltd. (1942 A.C. 356): "Lord MacMillan is speaking of repudiation of a contract, in a sense not of the denial of the existence of the contract, but of conduct evincing an intention no longer to be bound by it." The Court went on to observe that deviation was a form of repudiation of a contract. Following the same line of reasoning I think that when the Defendants through their agents decided to hand over the consignment on the strength of the indemnity instead of on production of the bill of lading there was a repudiation on their part. Mr. Smith went on to argue that, if the Court held there had been a repudiation on the part of his clients then the Plaintiffs had not elected to treat the contract at an end, and, consequently, the repudiation remained unaccepted with the effect the exception clauses continued in full force. He argued that the Plaintiffs had approbated and not reprobated the contract, and relied on the Statement of Claim in support of his argument. For the Plaintiffs it is submitted that the Defendants' repudiation was accepted by the issue of the writ. There is no doubt that the issue of a writ can constitute acceptance of repudiation (Woolf v. Collis Removal Service), but I feel that one must look to all the circumstances before deciding whether in any particular case acceptance of repudiation occurred. In this case the Plaintiffs first found out in January 1955 their goods had been released without production of bills of lading. On receiving this disturbing information they got in touch with the Bank of China and according to Mr. Burnham he made telephone enquiries as to the position from Messrs. McGregor Gow and Holland, the Defendants' London agents, as well as instructing Mr. Saul to find out what he could in Singapore. On 19th April they formally wrote to the Defendants requesting that if the consignment had been released without production of the relevant Bill of Lading immediate payment in full of the invoice value should be arranged. Further telephone conversations appear

to have followed, and on 13th June the Plaintiffs sent a further letter to the Defendants repeating their request for payment in full. The Defendants replied on 29th June denying liability. On 1st July the Plaintiffs repeated their claim through their London Solicitors. Further correspondence was exchanged between the parties' solicitors before the writ was filed on 29th August, but if it is conceded that a party to a contract who regards himself as the victim of a breach is entitled to endeavour to settle the matter by negotiation or to restore his damaged position without necessarily committing himself to a definite legal standpoint, then I think there was nothing in what passed between the parties or their solicitors which suggested the Plaintiffs were prepared to regard the contract as other than terminated. It is true that the Statement of Claim did not specifically allege fundamental breach, and the line now taken by the Plaintiffs was not formally adopted until the Amended Reply filed a few days before the hearing commenced, but nevertheless in the Statement of Claim the Plaintiffs made it clear their claim was based on the failure of the Defendants to deliver the goods in accordance with the provisions of the Bill of Lading. In the light of these considerations it seems to me the Plaintiffs did accept repudiation of the contract.

A further line of defence put forward on behalf of the Shipping Company was that any loss the Plaintiffs had incurred was due to the act of their Representatives in taking delivery and that consequently by virtue of Article IV Rule 2 (i) of the Carriage of Goods by Sea Act, which applied to this case under Condition 1 of the Bill of Lading, the Defendants were not responsible for any loss or damage arising or resulting from such act. In support of this submission reliance was placed on paragraph 21 of the agreement dated 1st July 1953 to which I referred in the opening sentences of my judgment. It reads:

> "This agreement shall not be deemed in any way to create a partnership between the Company and the Representative but shall wholly be an Agreement of Representation in which the property of all products and all books ..... shall remain in the Company until the same shall have been delivered or sent to the customer by whom the same shall have been procured through the Representative."

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There is, I think, a distinction to be drawn between Southern Trading Company as the Representatives of the Plaintiffs as far as customers in these territories are concerned, in which connection they undoubtedly held that role, and Southern Trading Company as the recipients of shipments of Rambler cycle parts in Singapore in which connection they were, in my opinion, simply consignees. If this was not the case the system whereby the Bank of China in Singapore was to release the bills of lading to Southern Trading Company in Singapore on payment for consignments would appear to be largely pointless. The matter might still, perhaps, be viewed in a light favourable to the Defendants if they could show that they had been induced, wholly or in part, to make delivery by Southern Trading Company putting themselves forward in the capacity of the Plaintiffs' representative. It is quite obvious, however, that the production of the indemnity issued by the Sze Hai Tong Bank Ltd., was the determining, if not the sole factor, in securing the release of the goods. Mr. Perera of Boustead & Co., the Defendants' Singapore agents, stated with accuracy I am sure both the general practice and the procedure followed in this instance when he said in the witness-box:

> "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 did not suggest that in the issue of the delivery order in favour of Southern Trading Company for which he was responsible he was influenced by any consideration to the effect they were the representatives or agents of the Plaintiff company; and I think it is safe to conclude from his evidence that no such consideration entered his head. For these reasons I do not think this submission can succeed. In view of this conclusion it is perhaps unnecessary to consider the difficult point whether had delivery been made to the Southern Trading Company by reason of their coming forward as representatives of the Plaintiff company the Defendants would still have been guilty of a fundamental breach.

I now come to a defence put forward by the

first Third Party, the Sze Hai Tong Bank Ltd. They say frankly that it is a practice for banks in this Colony to give importers indemnities to enable the latter to get delivery of their goods without production of the bill of lading. The Sze Hai Tong Bank indeed have their own printed form specially for the purpose. To the present claim, however, in addition to associating themselves with the defences put forward by the Glen Line Ltd., they put forward the defence of acquiescence. In Duke of Leeds v. Earl of Amherst (41 E.R. 886 at p. 888) acquiescence is described in the following terms:

> "If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."

The Sze Hai Tong Bank submits that the Plaintiffs approved of the release of the goods on production of an indemnity in the sense they did not protest, and abstained from protecting their interests in circumstances amounting to acquiescence. I believe that even after the release of consignments on indemnities was discovered by them they were greatly concerned to keep Mr. Lee going financially and to avoid his being adjudicated a bankrupt. But for this submission of the first Third Party to succeed they must in my opinion, establish acquiescence in relation to the particular release of the consignment to which this suit relates, though, of course, it would no doubt be sufficient if it could be shown the Plaintiffs had prior to the material date acquiesced in the practice. As I have said earlier, however, I do not think either the Plaintiffs in England or Mr. Saul knew about the release of this or other consignments on indemnities until January 1955, four or five months after the consignment with which we are concerned was released. But even if I am wrong about the date of Mr. Saul's acquisition of knowledge in the matter I think this submission must fail, because, if I am wrong on this, it follows Mr. Saul in his correspondence was wilfully misleading his principals at home as to what was going on, and in these circumstances the Plaintiff company would not, in my opinion, be bound by any conduct amounting to acquiescence on the part of Mr. Saul. In this connection I would

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refer to Bowstead on Agency Ed. 11 Art. 110 (p.232) where it is stated that where an agent is privy to the commission of a fraud upon or misfeasance against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal. It seems indeed arguable on the authority of J.C. Houghton & Co. v. Northand, Lowe and Wills (1928 A.C. 1 at p.18) that the knowledge of the directors would have to be established before the Plaintiffs could be said to have had notice of the indemnity practice.

I think I now have covered all the arguments addressed to the Court. For the reasons I have given I am of the opinion the Plaintiffs are entitled to succeed and I give judgment for them in the sum of the equivalent in Singapore currency at the date of this judgment for £3005.11.6. The question of whether they are entitled to interest on this sum was not argued before me, and I am prepared to hear argument on the point if any of the parties so desires. I also make a declaration that the Defendants are entitled to be indemnified by the Third Parties in accordance with the terms of the Indemnity. I make a further declaration that the first Third Party is entitled to be indemnified by the second Third Party.

I make the following order as to costs. The Plaintiffs are awarded party and party costs against the Defendants. The first Third Party to pay the Plaintiffs' costs as between party and party and the Defendants' costs as between solicitor and client. The second Third Party to pay the First Third Party's costs on a party and party basis.

Sd. C.H. Whitton,

Judge.

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Order

23rd January, 1957.

Amended Order.

1st March 1957.

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AMENDED ORDER OF COURT

BEFORE THE HONOURABLE MR.JUSTICE WHITTON IN OPEN COURT

THIS action coming on for hearing the 5th, 6th, 7th, 8th and 9th days of November, 1956, in the

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Order 23rd January, 1957.

Amended Order. 1st March 1957 - continued.

presence of Counsel for the Plaintiffs and for the Defendants and for the 1st Third Party and for the 2nd Third Party and upon Counsel for the 1st Third Party admitting liability to indemnify the Defendants against all sums found to be due by them to the Plaintiffs in these proceedings including the costs thereof and upon Counsel for the 2nd Third Party admitting liability to indemnify the 1st Third Party for all sums for which they might become liable to the Defendants by reason of any Order made against the Defendants in these proceedings including costs and upon hearing the evidence adduced for the Plaintiffs and for the Defendants and what was alleged by Counsel for all parties THIS COURT DID ORDER that this cause should stand for judgment and upon the same standing for judgment the 17th day of January, 1957, and this day, in the presence of Counsel as aforesaid THIS COURT DOTH ORDER AND ADJUDGE that the Defendants do pay to the Plaintiffs the sum of £3,014.18.6. (or $25,958.10) and their costs of these proceedings to be taxed between Party and Party on the Higher Scale of costs AND THIS COURT DOTH FURTHER DECLARE that the Defendants are entitled to be indemnified by the 1st Third Party for all sums found to be due by the Defendants to the Plaintiffs in these proceedings and for costs payable by the Defendants to the Plaintiffs AND DOTH ORDER AND ADJUDGE that the 1st Third Party do pay to the Defendants the said sums and the said costs so paid by them AND THIS COURT DOTH FURTHER ORDER that the 1st Third Party do pay to the Defendants their costs of the proceedings between the Plaintiffs and the Defendants and between the Defendants and the 1st Third Party as between solicitor and client on the Higher Scale of costs AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the 2nd Third Party do pay to the 1st Third Party all sums ordered to be paid by the 1st Third Party to the Plaintiffs and to the Defendants in these proceedings including costs AND THIS COURT DOTH FURTHER ORDER that the 2nd Third Party do pay to the 1st Third Party their costs of the proceedings as between Party and Party to be taxed on the Higher Scale of costs AND THIS COURT DOTH CERTIFY for two Counsel for the Plaintiffs and for the 1st Third Party and upon the application of the 1st Third Party for a stay of execution upon the amount awarded to the Plaintiffs in these proceedings THIS COURT DOTH ORDER that upon the Defendants or the 1st Third Party forthwith paying into

In the High Court of the Colony of Singapore, Island of Singapore.

No.11.

Order.
23rd January, 1957.

Amended Order.
1st March 1957 - continued.

Court the sum of £3,014.18.6. (or $25,958.10) being the amount awarded to the Plaintiffs in these proceedings no proceedings be taken by the Plaintiffs to enforce payment of the amount awarded to them by the judgment herein until the expiry of the time limited for the Defendants to file Notice of Appeal herein.

Dated this 23rd day of January, 1957.

Sd. Tan Boon Teik,
DY. REGISTRAR.

Entered in Volume LXXI Page 138 and 139 at 3.30 p.m. this 19th day of February, 1957.

Amended as shown in red ink pursuant to Order of Court dated the 1st day of March, 1957 this 7th day of March, 1957.

Sd. Tan Boon Teik,
Dy. Registrar.

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.12.

Memorandum of Appeal.

16th March 1957.

No. 12.

MEMORANDUM OF APPEAL

The Sze Hai Tong Bank Limited, the abovenamed first Third Parties appeal to the Court of Appeal in Singapore against that part of the judgment of the Honourable Justice Whitton delivered herein on the 17th day of January, 1957 which awarded damages and costs against the Defendants in favour of the Plaintiffs on the following grounds:-

1. That 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 Bill of Lading.

2. That the learned Judge was wrong in law in finding that the terms and conditions of the Bill of Lading did not operate to discharge the Defendants from liability to the Plaintiffs.

DATED this 16th day of March, 1957.

Sd. Sisson & Delay,
Solicitors for the abovenamed Appellants.

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.13.

Supplemental Record Bill of Lading.

30th July 1954.

No. 13.

SUPPLEMENTAL RECORD BILL OF LADING

THE GLEN LINE AND SHIRE LINE SERVICE
Owners:- GLEN LINE, LTD.

OUTWARD

CARRIAGE OF GOODS BY SEA ACT, 1924.

OUTWARD LOADING BROKERS: McGREGOR, GOW & HOLLAND, LTD., 16, St. Helen's Place, London, E.C.3.

SHIPPED in apparent good order and condition unless otherwise stated hereon by THE RAMBLER CYCLE COMPANY LTD., on board the ship GLENGARRY in or off the port of LONDON FORTY (40) PACKAGES and/or PIECES, marked and numbered as under to be conveyed by the above and/or any vessel or vessels to which transhipment may be made by the route and/or methods of conveyance and subject to the conditions and exceptions both general and special hereinafter mentioned and to be delivered subject to the like conditions and exceptions at the port of Singapore or so near thereto as she may safely get, unto ORDER or his or their assigns.

PARTICULARS DECLARED BY SHIPPER:-

Notify: Southern Trading Co.
C Short Street,
Singapore.

S / S.T.C. R 12. \ T

Co
SINGAPORE

Nos.141/180. 40-Cases Bicycle Parts and Bicycle Hub Brakes.

£140.0.0. 663'4".
663'4" c 150/- £124. 7. 6
9½% 11.16. 4

£112.11. 2

Intld:

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.13.

Supplemental Record Bill of Lading.

30th July 1954 - continued.

FREIGHT PREPAID.

In accepting this Bill of Lading the shipper, consignee and/or the owners of the goods, and the holder of this Bill of Lading, expressly accept and agree to all its stipulations, conditions and exceptions, whether written, printed, stamped or incorporated on the front or back hereof, as fully as if they were all signed by such shipper, consignee, owner or holder. This Bill of Lading shall be construed and governed by English Law, and shall apply from the time the goods are received for shipment until delivery, but always subject to the conditions and exceptions of the carrying conveyance; it shall be given up, duly endorsed, in exchange for delivery order if required.

IN WITNESS whereof the master or agent of the said ship has signed THREE Bills of Lading, all of this tenor and date, one of which being accomplished, the others shall stand void.

Dated at LONDON 30 JULY 1954.

COPY
NON-NEGOTIABLE

IT IS MUTUALLY AGREED THAT :-

1. This Bill of Lading is to have effect subject to the provisions of the Rules in the Schedule to the Carriage of Goods by Sea Act, 1924 as applied by that Act and the Carriers shall be entitled to all the privileges rights and immunities contained in that Act and the Schedule thereto as if the same were specifically set out herein; but nothing herein contained shall be deemed to be a surrender by the Carrier of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the said Rules as so applied; provided that (a) if any clause covenant or agreement herein in part contravene the Rules and in other part is capable of being construed so as not to contravene and is permissible under the Rules such last mentioned part shall be deemed to be included in the agreement between the Carrier and the Shipper, and that (b) any agreement stipulation condition reservation or exemption herein contained which is capable of application to the custody and care and handling of the goods prior to the loading on and

subsequent to the discharge from the ship on which the goods are carried by sea shall be deemed to apply thereto notwithstanding that it may contravene the Rules affecting any other part of the transit.

2. 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) so long as the goods remain in the actual custody of the carrier or his servants (otherwise than as mentioned in sub-clause (b) hereof), the carrier shall not be liable for loss damage or detention arising or resulting from the act neglect or default of the servants or agents of the carrier nor from any other cause whatsoever arising without the actual fault or privity of the carrier nor in any event for an amount exceeding the declared value of goods paying freight on an ad valorem basis or the invoice value whichever shall be least or in the case of other goods the invoice value or £100 per package or unit or £25 per cubic foot or half hundredweight, whichever shall be least. Liability for partial loss or damage shall be adjusted at such proportion as the percentage of loss or damage bears to the sum which would have been payable in the event of total loss. (b) Whilst the goods are being transported to or from the ship by lighter or other craft whether owned by the carrier or not or are being loaded or unloaded on or from such craft and such transport or loading or unloading is done by the carrier it shall be done at the sole risk of the owners of the goods including risk of unseaworthiness or unfitness of lighter or other craft (c) in all other cases 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.

3. Route. The carrier does not contract to proceed by the shortest or by the geographical or customary or advertised route (if any) and the ship or other method of conveyance may for any purpose whatsoever whether connected with the joint adventure or not and whether before the beginning or at any time or stage of the voyage proceed by any course or route whatsoever although in a contrary

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direction to or out of or beyond the direct or geographical or customary or advertised route to the place of delivery once or oftener in any order backwards or forwards without notice to shippers or consignees and for any such purpose may call and/or remain or omit to call and/or remain at any port or ports place or places whatsoever and may carry the goods back to the port of loading or to any port or place whether beyond the port of delivery or not and may make any delay whatsoever at or in sailing from the port of loading or any such port or place as aforesaid The said goods or any part thereof may at the carrier's option at any time or times during the transit whether before or after shipment be carried in a substituted ship or transhipped to any other ship or landed or stored or put into hulk or craft or lighter or re-shipped on the same or any other ship or ships proceeding by any route or may be forwarded by lighter rail or any other conveyance belonging to the carrier or not and even though the said goods or any part thereof are detained or delayed in the course of such shipment transhipment landing storage or re-shipment.

For the purpose of this contract all such proceedings and calls and all such departures from the direct geographical customary or advertised route and all such delays detentions shipment transhipment landings storages reshipments and forwarding shall be included in the contract of carriage herein provided for and shall form part of the contractual voyage notwithstanding any reference to the place of shipment or delivery or any other provision whatsoever herein contained.

4. The ship shall have liberty to tow and assist vessels in all situations to be towed to sail with or without pilots adjust compasses to dry dock with the goods on board to carry cargo of all kinds dangerous or otherwise and to comply with orders given or purporting to be given by any Government Harbour Dock or Canal Authority. Anything done or not done in pursuance of the clause shall be deemed to be within the contract of carriage herein provided for and to form part of the contractual voyage.

5. If the loading carriage discharge or delivery is impeded or if there are reasonable grounds for anticipating that the same is or threatens to be

impeded by the imminence outbreak or existence of war whether international or civil or by any control over the use of or movements of the vessel exercised by any Government or other Authority (which expression throughout this clause shall be deemed to include any body or organization purporting or claiming to exercise the powers of a Government or Authority) or by the prohibition of intercourse commercial or otherwise, or by the restriction or control of such intercourse by any Government or other Authority or by measures taken by any Government or other Authority in consequence of or connected with any of the above matters or by quarantine sanitary customs or labour regulations lockouts strikes or disturbances ice bad weather or by absence from any cause of facilities for loading discharge or delivery or congestion or difficulties in loading or discharge the carrier and/or his agents and/or the Master may (if in his or their uncontrolled discretion he or they think it advisable) at any time before or after the commencement of the voyage abandon or suspend the voyage alter or vary or depart from the proposed or advertised or agreed or customary route and/or delay or detain the vessel at or off any port or place and/or tranship and forward subject to the provisions of Clause 9 hereof or put into hulk lighter or craft or land or store or otherwise dispose of the cargo at any port or ports place or places without being liable for any loss or damage whatsoever directly or indirectly sustained by the owners of the goods and all at the risk and expense of the owners of the goods. In the event of any detention to the vessel due to any of the aforementioned causes demurrage is payable at the rate of 1/- per gross registered ton per day or portion of day. The shippers consignees holders of bills of lading receivers and/or owners of the goods shall be jointly and severally liable for the total demurrage hereinbefore mentioned and all charges and expenses incurred by the Master or Carrier acting as above notwithstanding that their several liability may be based on a division pro rata according to the freight charged on the goods, even if owing to any of the aforementioned causes the vessel has to omit calling at the port of discharge or having called there does not discharge the goods but carries them to a safe and convenient port or keeps the goods on board for discharge at the port of discharge on the return voyage. Anything done

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or not done in pursuance of this clause shall be deemed to be within the contract of carriage herein provided for and to form part of the contractual voyage.

The ship, in addition to any liberties expressed or implied herein, shall have liberty to comply with any orders or directions as to landing, departure, routes, ports of call, stoppages, transshipment, discharge, arrival or destination, or otherwise howsoever given by any Government or any Department thereof having authority, or by any person acting or purporting to act with the authority of such Government or department thereof or by any Committee or person, having under the terms of the War Risks' Insurance on the vessel, the right to give such orders or directions and if by reason of and/or in compliance with any such orders or directions anything is done or is not done it shall be deemed to be within the contract of carriage herein provided for and shall form part of the contractual voyage.

The ship is free to carry contraband explosives munitions or warlike stores and may sail armed or unarmed.

6. Average, if any, shall be adjusted according to York-Antwerp Rules, 1950, but General Average loss shall be borne by those on whom it has fallen unless an adjustment is required in writing by interests which would be entitled to receive in the aggregate, per adjusters' estimate, not less than £3,000 net. In the event of accident danger damage or disaster before or after commencement of the voyage resulting from any causes whatsoever whether or not due to negligence or unseaworthiness initial or otherwise for which or for the consequences of which the carrier is not responsible or is exempted from responsibility by law or contract or otherwise the shippers consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices losses or expenses of a general average nature that may be made or incurred and shall pay any salvage and special charges incurred in respect of the goods.

In case of casualty or claim the carrier, master or agents shall represent and bind the owners

of the goods with liberty to sue for, defend or settle claims to be borne pro rata by the interests involved. The carrier, master or agents may require deposits against salvage or average charges, including legal costs, without liability for interest, and such deposits shall be made before delivery of the goods. Passengers shall not pay any General Average contribution in respect of luggage or personal effects. Claims for services by other vessels belonging to the carrier, wherever rendered, may be adjudicated upon in the English Law Courts whose decisions shall bind the owners of the goods. The carrier may charge interest at the rate of five per cent per annum on his advances for salvage or average.

7. Any goods deteriorating through inherent defect, quality or vice, and being in the master's opinion likely to damage the ship or crew or other goods, may, without compensation to the owners and without consulting them, be jettisoned or destroyed or at the risk of the owners of the goods discharged at any port, but in any of the above events, freight thereon, if not prepaid, and all loss or damage, costs or expenses caused to the ship or crew or other cargo, or to any interest whatsoever, shall be paid or refunded by the owners of the goods. The carrier or his agents may at their discretion sell goods so discharged for account of the owners thereof, and at their expense.

Shippers whether principals or agents shall be liable for loss or damage to any person or interest whatsoever caused by dangerous or injurious goods shipped without full disclosure of their nature whether shippers were aware thereof or not.

8. If the goods are loaded or unloaded by the shippers or consignees or persons appointed by them, such persons shall be deemed to be servants of the owners of the goods and not of the carrier.

9. Transhipment and Forwarding. The responsibility of each carrier acting as such is limited to that part of the transit actually undertaken by him. The shipper or consignee constitutes the carrier his agent to enter into contracts with others for the prior and/or subsequent transport of the goods and/or storing lightering transhipping or otherwise dealing with them prior to or in the

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course of or subsequent to such transport without responsibility for any act neglect or omission on the part of the carrier who may as such agent take contracts of carriage from the forwarding conveyance in any form which shall comply with the law at the port or place from which the goods are shipped or forwarded even though the terms of such contracts of carriage be less favourable in any respect whatsoever to the shipper or consignee than the terms of this Bill of Lading. Unless the value of the goods is declared at the time of shipment and is stated hereon and extra freight as may be agreed upon is paid, the carrier shall in no event be under any obligation to declare to the oncarrier any valuation of the goods even though the oncarrier's contract of carriage contains a valuation or limitation of liability less than that contained in this Bill of Lading. If the goods cannot be forwarded immediately to destination any charges incurred for storage shall be borne by the owners of the goods. If the goods are forwarded by more than one conveyance consignees must take delivery of each portion immediately after arrival. Goods forwarded by rail are deliverable at any railway station within or nearest to destination and must be taken away by the consignees immediately after arrival.

10. 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, hulk, 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 this Bill of Lading.

11. Notification. Any clause hereon giving names of parties who desire to be notified of ship's arrival at destination is solely for the information of ship's agents and failure to notify shall not involve the carrier in any responsibility or relieve the consignees from any obligations hereunder.

12. Master Porterage and Wharfingering. Notwithstanding any custom of the port to the contrary the carrier, master or agents may appoint any firm or persons to receive, remove, sort, stack, watch, weigh, measure and deliver the goods on behalf of the consignees, who shall pay to such firm or persons the current rate for all work performed on their behalf and indemnify the carrier from all risks and expenses incurred.

Where, under any Statute or regulation at the port of discharge, goods carried hereunder are delivered to a Licensed Wharfinger as custodian or bailee thereof whether as agent to the carrier or otherwise, the shipper consignee and/or owner of the said goods shall not make against the Wharfinger aforesaid whether as custodian bailee agent or otherwise any claim howsoever arising for an amount exceeding the declared value of goods paying freight on an ad valorem basis or the invoice value whichever shall be least or in the case of other goods, the invoice value or £100 per package or unit whichever shall be least and further the shipper consignee and/or owner aforesaid shall indemnify the carrier against all or any liability whatsoever to the said Wharfinger arising by reason of any such claim having been made or satisfied including liability arising from any express indemnity in respect of such claims given by the carrier to such licensed Wharfinger.

13. Where Customs at port of transhipment or delivery require any bond or undertaking before permitting the landing or forwarding of dutiable goods the carrier, master or agents are hereby authorised to give such undertaking on behalf of owners of the goods who shall indemnify the carrier from all risks and expenses incurred. The carrier and/or master porter are authorised by the ownere of dutiable cargo at any port, during and after discharge,

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at their sole discretion, to incur and pay Customs charges for watching such cargo which charges the owners thereof undertake to repay, any custom of the port to the contrary notwithstanding.

14. Goods not permitted to be landed at destination may be discharged at any other port or ports or returned to the port of loading by land or water, all at the risk and expense of the owners of the goods, who shall pay freight for return carriage.

15. A valuable package is one of which the contents exceed in value twenty-five pounds sterling per cubic foot, if measurement cargo, or per half hundredweight, if weight cargo. The shipper shall declare to the carrier before shipment the nature and value of goods contained in all valuable packages shipped by him. Consignees must take delivery of valuable packages from on board during ship's stay in port, failing which they may be landed and stored or carried on at the risk and expense of the owners thereof.

16. Choice of Rates and Limits of Liability. For the purpose of determining the rate of freight and the liability of the carrier in respect of the goods hereby receipted for, it is mutually agreed that the value of such goods does not exceed £100 per package or unit and that in consideration of the rate of freight at which this shipment is accepted no greater value shall be placed on said goods in computing any liability whatsoever of the carrier in respect thereof, as carrier or otherwise, than the invoice value not exceeding such limitation, provided that if the shipper in booking shipment of said goods has declared to the carrier a greater value and freight in accordance with carrier's valuable cargo tariff in excess of the ordinary tariff rate has been paid or agreed to be paid and the nature of the goods and such greater value are declared before shipment and inserted in this Bill of Lading, then in such case the liability of the carrier in respect of said goods shall be computed on the basis of the invoice value not exceeding such greater declared value.

17. Claims. Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only. In no

circumstances shall liability exceed the actual loss or damage sustained; the carrier shall not be liable for any consequential or special damages and shall have the option of replacing any lost or damaged goods. Any sums paid to or recovered by Customs Authorities under any Bond for exportation given by the shippers or owners of goods shall not be considered to form part of any actual loss or damage sustained by or in connection with such goods for which the carrier is or shall be liable.

If the ship comes into collision with another ship as a result of the negligence of the other ship and/or the negligence of any ship or ships other than or in addition to the colliding ship and any act neglect or default of the Master, Mariners, Pilot or the servants of the carrier in the navigation or in the management of the ship the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the non-carrying ship and/or any other ship or ships as aforesaid or her or their owners in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owners of the said goods paid or payable by the non-carrying ship and/or any other ship or ships as aforesaid or her or their owners to the owners of the said goods and set off recouped or recovered by the non-carrying ship and/or any other ship or ships as aforesaid or her or their owners as part of their claim against the carrying ship or carrier.

At any port where, in accordance with Customs regulations, the goods have to be landed into the charge of the Customs or other Authorities no claims for shortage or damage will be considered by the carrier, beyond that noted by the Authorities at the time of receiving the goods into their charge.

18. Apportionment. Unidentifiable or surplus goods may be apportioned amongst claimants, if any, for short or incorrect delivery of like goods, who shall accept such apportionment to the extent thereof. The carrier or his agents may at their discretion sell unclaimed perishable goods forthwith and other unclaimed goods after three months from date of discharge, and payment to the owners of the goods of the net proceeds of the sale less freight and charges, if any, shall free the carrier from all liability.

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19. Breakage of Glass, China, Castings, and other goods of a brittle or fragile nature shall be taken to be due to inherent defect, quality or vice of the goods or insufficiency of packing in the absence of evidence of negligence fault or failure in the duties and obligations of the carrier.

20. Goods are not to be deemed sufficiently marked unless their destination is distinctly marked upon them by the shipper before shipment, in letters at least two inches high, in such a manner as will remain legible until delivery. In no case can the carrier accept responsibility for delivery to other than leading marks.

21. Where packages are wired or sealed or otherwise specially secured to prevent pilferage the carrier takes no responsibility for the condition of such fastenings unless (a) his attention is specially drawn to them before shipment, and this Bill of Lading claused accordingly, and (b) any defect is brought to his notice in writing before the removal of the goods.

22. Any statement hereon that Iron, Steel or Metal goods of any description have been shipped in apparent good order and condition does not involve any admission by the carrier as to the absence of rust, or fresh water damage or other deterioration between Tinplates, Galvanised Iron or Metal Sheets, for which the carrier accepts no responsibility. The carrier is not responsible for correct delivery of Iron and Steel worked or unworked shipped loose or in bundles and all expenses incurred at port of discharge consequent upon insufficient securing or marking will be payable by consignees unless every piece is distinctly and permanently marked with oil paint and every bundle is securely fastened, distinctly and permanently marked with oil paint and metal tagged, so that each piece or bundle can be distinguished at port of discharge.

23. Any statement hereon that Timber has been shipped in apparent good order and condition does not involve any admission by the carrier as to the absence of stains, warps, shakes, splits, holes or broken pieces, and this clause shall be deemed to constitute express notice to all persons taking delivery on the terms of this Bill of Lading that such timber does or may contain pieces so affected.

24. Boilers and similar articles may be plugged and put into water at ship's expense but at the risk of the owners thereof.

25. Options are only granted if arranged before shipment. Destination must be declared at least 48 hours before ship's arrival at the desired port, or at the port of call at which the goods have to be transhipped for that port. Failing such declaration the goods will be carried on in the ship and landed at the final optional port or at the port of call at which the goods have to be transshipped for that port.

26. Delivery expenses at current rate must be paid by the consignees of cargo for Netherlands and Indonesia whether taking delivery overside or on the quay. Consignees to pay Quay Dues at Hamburg any Port Regulations to the contrary notwithstanding.

27. If at a port of discharge in Western Australia no one presents himself duly authorised by the owners of the goods to give the master a receipt for same when discharged, or if being authorised he declines or is unable for any reason to do so, then the usual record of discharge, as kept by the ship's officers, shall be held to be a sufficient delivery in good order.

28. Freight if prepaid is due and payable at the time of receipt of the cargo for shipment, and is not returnable if ship and/or cargo be lost or not lost. Freight not prepaid is due and payable without deduction either on ship's arrival at the port of destination or on demand at carrier's option ship and/or cargo lost or not lost. Where payment of freight is delayed beyond the due date, interest will be payable to the carrier at the rate of 5 per cent per annum. Freight charged on the basis of delivered weight or measurement will be adjusted on the outturn figures whether prepaid or not. Freight on Timber will be charged on the overall measurement of bundles or pieces.

29. If freight be underpaid owing to the weight, measurement, contents, nature or value of the goods having been misstated by the shipper, any monies so paid shall be deemed a payment on account only, and it is hereby expressly agreed that freight calculated upon the correct weight, measurement,

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contents, nature or value of the goods shall then become and be due and payable at double the rate ordinarily charged and a certificate from the carrier or his agents shall be conclusive evidence as to the amount and/or balance due.

30. Any reference on the front hereof to weight, measurement, contents, quality or value is as declared by the shipper, and involves no admission by the carrier as to the correctness thereof and constitutes no part of the carrier's description of the goods.

31. The cost of repairs to packages and/or the cost of collecting escaped contents and supplying new containers, provided such expenditure is in the carrier's opinion necessary for safe carriage or delivery, and does not arise from any cause for which he is liable, also the expenses of weighing or measuring cargo for any purpose and the expenses of stacking on the quay before weighing or measuring, shall be paid or refunded by the owners of the goods.

32. When cargo is discharged into craft or lighter in consequence of insufficient quay space at berth, all expenses shall be paid by owners of such cargo or at the option of the carrier or his agents and in proportions determinable by them shall be borne by the owners of all cargo for the port.

33. Fines, expenses and losses by detention of ship or cargo, caused by incorrect marking or by incomplete or incorrect description, or by shippers' or consignees' failure to comply with requirements of the Authorities at the ports of shipment, call or discharge, or with local regulations affecting the packages or Bills of Lading, shall be borne by the owners of the goods.

34. Any duty, tax, surtax, tariff, charges or impost, levied on the goods under any name and of whatever nature, by reason of their having been transhipped during the voyage, or carried or discharged under quarantine, or for any other reason, shall be borne by the owners of the goods.

35. The carrier shall have a lien on the goods for unpaid and additional freight, demurrage, and all charges, including Customs duties, expenditure, damages and interest becoming due hereunder, while

on shore or in the carrying vessels, or in hulk, craft or store, including the costs and expenses of exercising such lien, with the right of sale to satisfy any such lien.

36. Any right of sale given to the carrier under this Bill of Lading shall be in addition to rights conferred by law, and the carrier or his agents in exercising same may sell by public auction or by private treaty, and may at their discretion, dispense with notices and advertisements.

37. If the ship is not owned by or chartered by demise to the Company or Line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the owner or demise charterer as the case may be, as principal made through the agency of the said Company or Line who act as agents only and shall be under no personal liability whatsoever in respect thereof.

No. 14.

DECREE.

24th SEPTEMBER, 1957.

THE APPEAL of the 1st Third Parties/Appellants against the Judgment of the Honourable Mr. Justice Whitton delivered on the 17th day of January, 1957, coming on for hearing on the 23rd and 24th days of September, 1957, before the Honourable Clifford Knight, Esquire, Acting Chief Justice of the Colony of Singapore, the Honourable James Beveridge Thomson, Esquire, Chief Justice of the Federation of Malaya, and the Honourable Frederick Arthur Chua, Esquire, Puisne Judge, and upon reading the Memorandum of Appeal and the Supplemental Memorandum of Appeal, and the Record therein, and upon hearing Counsel for the Appellants and for the Plaintiffs/Respondents, and what was alleged by such Counsel as aforesaid THIS COURT DOTH ORDER that the appeal do stand dismissed out of this Court AND IT IS FURTHER ORDERED that the costs of the Plaintiffs/Respondents of and incidental to the said appeal

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.14.

Decree.

24th September, 1957 - continued.

be taxed on the Higher Scale and be paid by the 1st Third Parties/Appellants to the Plaintiffs/Respondents AND THIS COURT DOTH CERTIFY for two Counsel for the Plaintiffs/Respondents AND IT IS LASTLY ORDERED that the Accountant-General do pay out to the Plaintiffs/Respondents or to their Solicitors, Messrs. Allen & Gledhill, the sum of $500 being the security paid in by the 1st Third Parties/Appellants to account of the said costs so to be paid by the 1st Third Parties/Appellants as aforesaid.

ENTERED this 11th day of October, 1957, at 3.20 p.m. in Volume LXXIII Pages 11 & 12.

Sd. K.T. Alexander,

Dy. Registrar.

No.15.

Judgment of Knight, Acting C.J.

30th September, 1957.

No. 15.

JUDGMENT OF KNIGHT, ACTING, C.J.

The Appellants, the first Third Party in the Court below, appeal against that part of the judgment of the learned trial Judge which awarded damages and costs against the Defendants in favour of the Plaintiff for which they (the appellants) admitted liability under a letter of indemnity should judgment be awarded against the Defendants.

The facts material to this appeal and not in dispute. By a Bill of Lading dated 30th July, 1954 the Defendants acknowledged to have been shipped in apparent good order and condition on board their Steamship Glengarry in London certain bicycle parts to be carried to Singapore and on reaching there to be delivered to the order of the Plaintiffs or their assigns. On 1st September, 1954 the Glengarry reached Singapore and discharged the Plaintiffs' goods into a Harbour Board Godown on, or about, September 3rd 1954. On that same day at the application of the Southern Trading Company (to whom the goods had been consigned) an executive of Boutstead & Co., Ltd., (agents of the Defendants) issued a delivery order to that Company, whose servants promptly collected the goods from the godown. To cover themselves, as the Bill of Lading

had not been produced to them, Boustead & Co. Ltd. received a letter of indemnity which had been issued by the first Third Party in this suit (the Sze Hai Tong Bank) at the request of the Southern Trading Company, one of their customers. Mr. Perera (of Bousteads) admitted in his evidence that in issuing a delivery order without the Bill of Lading he was acting improperly, but he explained that this was a common commercial practice in Singapore and was indeed an everyday occurrence. I cannot but comment that it is nevertheless a practice which the Courts have condemned for many years.

Some weeks later the Bill of Lading was returned to the Plaintiffs unpaid and when it was subsequently ascertained that the Southern Trading Company was without financial substance the Plaintiffs instituted these proceedings against the Defendants, who brought in the Sze Hai Tong Bank and the Southern Trading Company as Third Parties.

In a very carefully considered judgment the learned trial Judge dealt with the many authorities which were cited to him and reached the conclusion that the Defendants could not claim exemption from liability under Clause 2 (c) of the Bill of Lading as they had committed a fundamental breach of the contract in not delivering the goods to the order of the Plaintiffs on production of the Bill of Lading.

The same authorities have been cited in this Court - many are bailment cases, which the Appellants have sought (unsuccessfully in my opinion) to distinguish from contracts of Carriage by Sea - and nearly all of them (and particularly Thor's case 35 L.L.R. 170) indicate that the trial Judge's interpretation of the law was perfectly correct. The case upon which the Appellants really rely, however, is the Privy Council case of The Chartered Bank of India, Australia and China v. British India Steam Navigation Company (1909 A.C. 369) in which on facts very similar to those of the present case it was held that the Defendants were exempted from liability for delivery without a Bill of Lading under one of its clauses which read as follows :-

> "In all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle ....."

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.15.

Judgment of Knight, Acting C.J., 30th September, 1957 - continued.

These words closely resemble those of Clause 2 of the Bill of Lading in this case and at first sight the Chartered Bank case appears to be exactly in point.

In my opinion, however, it should be distinguished. In the present case the goods were perfectly properly discharged by the Defendants into the godown where they would have stayed until released by the Defendants' agents, Boustead & Co. Ltd. But it was at this stage that the mischief arose, as the latter Company in their capacity as agents of the Defendants released them to the Southern Trading Company without the Bill of Lading. Mr. Seth, it is true, argued for the Appellants that Bousteads must be deemed to have acted as principals in so doing and not as agents. It suffices, however, to say that this is nowhere pleaded and that Mr. Perera's evidence that "In issuing Delivery Orders and in everything we do we act as agents of the Glen Line" was quite uncontradicted. There can thus be no doubt that it was as a result of the Defendants' own action in improperly releasing the goods (through their agents) that this unfortunate situation arose. The facts of the Chartered Bank case in this regard are quite different. There the loss arose through a fraud in which the landing agents participated and although both parties maintained that those agents were the agents of the other party, Lord MacNaghten held that in fact they "seemed to be in the position of intermediaries owing duties to both parties". Quite certainly, however, and ex facie, when they perpetrated the fraud they could not be deemed to be acting on their principal's behalf as Bousteads, the Defendants' agents, were acting in this case.

In my opinion Clause 2 (c) of this Bill of Lading would exempt the Defendants from liability if the goods had been improperly removed from the godown by e.g. the Harbour Board or by anyone else, but not by someone authorised by the Defendants (through their agents) so to remove them. In issuing such authority, moreover, the Defendants had clearly re-assumed dominion over the goods thereby extending the duration of the contract to carry and deliver. In these circumstances, as I see it, the Chartered Bank case has no application.

From the proceedings in the Court below it would appear that the first Third Party issued the

letter of indemnity as a result of representations made by a dishonest customer. These things have happened before and no doubt, will happen again - but neither in law nor in common sense can their misfortune be shouldered by the Plaintiffs.

The appeal is dismissed with costs - there will be a certificate that this is a proper case for two counsel.

Sd. Clifford Knight,
AG. CHIEF JUSTICE,
SINGAPORE.

SINGAPORE, 30th September, 1957.

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.15.

Judgment of Knight, Acting C.J., 30th September, 1957 - continued.

No. 16.

JUDGMENT OF THOMSON C.J.

No.16.

Judgment of Thomson, C.J. 30th September, 1957.

I have had the advantage of reading the judgment of the learned President of the Court in this appeal with which I am in entire agreement and have nothing to add.

Sd. J.B. Thomson,
CHIEF JUSTICE,
Federation of Malaya.

SINGAPORE, 30th September, 1957.

No. 17.

JUDGMENT OF CHUA, J.

No.17.

Judgment of Chua J. 30th September, 1957.

I have read the judgment of the learned President of the Court with which I agree and have nothing to add.

I also agree that there should be a certificate that this is a proper case for two Counsel.

Sd. F. A. Chua,
JUDGE.

SINGAPORE, 30th September, 1957.

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.18.

Order of Court of Appeal granting Leave to Appeal to Her Majesty in Council.

13th December, 1957.

No. 18.

ORDER OF COURT OF APPEAL

BEFORE THE HONOURABLE MR.JUSTICE KNIGHT IN OPEN COURT

UPON Motion made unto this Court this day by Counsel for the Sze Hai Tong Bank Ltd., the 1st Third Party Appellants and upon hearing Counsel for the said Appellants and for the Respondents Rambler Cycle Company Limited and upon reading the Petition filed herein on the 9th day of December, 1957 IT IS ORDERED that the 1st Third Party Appellants be at liberty to appeal to Her Majesty in Council AND THIS COURT DOTH CERTIFY that this case as regards value amount and/or nature is a fit one for appeal to Her Majesty in Council.

DATED this 13th day of December, 1957.

Sd. Tan Boon Teck,
DY REGISTRAR.

No.19.

Extract from Notes of Argument in Court of Appeal.

28th May, 1958.

No. 19.

EXTRACT FROM NOTES OF ARGUMENT IN COURT OF APPEAL.

In the course of his argument before the Court of Appeal, Counsel for the Third Party/Appellants intimated that he would reply upon the construction of Clauses 2(a) and 2(c) of the relevant Bill of Lading. Counsel for the Plaintiffs/Respondents objected to argument being raised with regard to Clause 2(a), and after considering the point the Court of Appeal upheld the objection.

The following is a certified copy of the relevant part of the Notes of Argument taken by the President of the Court of Appeal when the point was raised and argued:

"2.30 p.m. (as before)

Atkinson: Seth depends on Clauses 2(a) or (c) to avoid liability. In Court below 2(c) was

relied upon exclusively. Had 2(a) been relied upon further evidence would have been called. Nothing in pleadings or argument as to 2(a).

Seth: Admit it was never argued specifically that 2(a) relieved D's. - costs could become material. Document must be looked at as a whole. I cannot be precluded from relying upon it as it is part of the document which the Court is asking (sic) to construe.

Atkinson: This is not only a point of construction. No evidence was led on the two points of fact.

Order: Seth is instructed that he should restrict his argument to Clause 2(c).

Signed C. Knight.

No. 20.

ORDER OF COURT OF APPEAL

Application No.1 of 1957 Suit No.1329 of 1955.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE

ISLAND OF SINGAPORE.

IN THE COURT OF APPEAL

BETWEEN:- RAMBLER CYCLE CO. LTD. Plaintiffs Respondents

- and -

GLEN LINE LIMITED Defendants

- and -

1. SZE HAI TONG BANK LTD. (Amended by Order of Court dated the 23rd day of September 1957)

2. Southern Trading Company Third Parties

- and -

IN THE MATTER of Section 36 of the Court Ordinance and Order LVII Rules 3 and 4 of The Rules of the Supreme Court 1934.

In the Court of Appeal of the Colony of Singapore, Island of Singapore.

No.20.

Order of Court of Appeal.

23rd June 1958 - continued.

BEFORE MR. JUSTICE AMBROSE. IN CHAMBERS.

Upon the application of Sze Hai Tong Bank Limited, the first above-named Third Party made by way of Summons in Chambers No.600/58 this day and upon reading the Affidavit of Khoo Heng Keng sworn to and filed herein on the 20th day of June 1958 and the exhibits thereto and upon hearing the Solicitors for the applicant and for the above-named Plaintiff/Respondent IT IS ORDERED that the appeal herein to Her Majesty in Council be admitted and that the costs of and incidental to this appeal be costs in the Appeal. 10

Dated this 23rd day of June, 1958.

(Sgd.) Tan Boon Teck,

Dy. Registrar.

IN THE PRIVY COUNCIL — No. 20 of 1958

ON APPEAL
FROM THE COURT OF APPEAL
OF THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE

B E T W E E N:-

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.

RECORD OF PROCEEDINGS

LAWRANCE, MESSER & CO.,
16, Coleman Street,
London, E.C.2.
Solicitors for the Appellants.

INGLEDEW, BROWN, BENNISON & GARRETT,
136-138, Minories,
London, E.C.3.
Solicitors for the Respondents.