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I think that Haridas was bound to disclose the plaintiff's name and that the evidence is admissible either under section 62 or in accordance with the authorities above cited.

Attorneys for the plaintiff: Messrs: *Jehangir, Seervai, Minocheher and Hiralal.*

Attorneys for the defendants: Messrs.. *Edgelow, Gulabchand, Wadia & Co.*; Messrs. *Dastur & Co.*; Messrs. *Madhavji Kamdar and Chhotubhai.*

Suit decreed.

M. F. N.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

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February 8.

NISSIM ISAAC BEKHOR (PLAINTIFF) *v.* HAJI SULTANALI SHASTARY & Co. A FIRM (DEFENDANTS).*

Sale of goods—C. I. F. Contract—Insurance of goods against war risk without buyer's instruction—Buyer not obliged to pay for such insurance—Payment against documents—Bill of lading must be tendered—Bill of lading, what is a—War—Government proclamations prohibiting trading with the enemy—Effect of proclamations on contract, goods shipped in enemy Port—Performance of contract becomes illegal.

On the 9th June 1914 the defendants purchased from the plaintiff, 5 tons round copper bottoms c. i. f. Mahomerah, July shipment, and agreed to pay for the said copper in Bombay on being tendered the Bills of lading and other documents in respect thereof. The copper was shipped on board the S. S. Tangistan on or about the 28th July 1914 and the plaintiff obtained relative Bills of lading and insured the goods against ordinary marine risks. On the 5th August in consequence of war having broken out between Great Britain and Germany the plaintiff's agent in England, although not instructed to do so by the defendants, insured the copper against war risks and paid 10 per cent. premium. The documents arrived in Bombay on the 7th September whereupon the plaintiff tendered them to the defendants and demanded payment of the invoice price of the goods including the above mentioned extra premium of 10 per cent. in respect of insurance against war risks. The defendants refused to pay the amount demanded on the ground that they were not liable to pay the aforesaid extra premium.

* O. C. J. Suit No. 1309 of 1914.

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Held: In the absence of express instructions from the defendants to effect insurance against war risks the defendants were not liable to pay the extra premium.

By another contract dated 17th July 1914 the defendants purchased from the plaintiff 900 bags of sugar c. i. f. Mahomerah, July shipment, and agreed to pay for the said sugar in Bombay on being tendered the Bills of lading and other documents in respect thereof. The plaintiff got the sugar shipped at Hamburg on the S. S. Nicomedia on the 28th July 1914 and obtained, as he alleged, relative Bills of lading in respect thereof and he insured the goods. Subsequently after the documents relating to the said sugar had arrived in Bombay the plaintiff presented them to the defendants and demanded payment but the defendants refused to accept the documents or to pay the money on the grounds firstly, that by reason of the state of war which existed and the Government proclamations prohibiting trade with the enemy performance of the contract would be impossible, and secondly, that the documents which the plaintiff presented as Bills of lading were not Bills of lading and were not therefore the proper documents to be tendered in accordance with the terms of a c. i. f. contract.

Held, that in view of the Government proclamations the tender of the shipping documents was not a valid tender and that acceptance of and payment against the said documents would be a violation of the said proclamation.

Duncan, Fox & Co. v. *Schrempft & Bonke* [1] followed.

Held, also, that a Bill of lading as known to merchants is a receipt for goods actually delivered over and shipped on board the ship named therein and signed by the Captain or his representative, and that the documents tendered to the defendants as Bills of lading were not Bills of lading but mere receipts for warehousing or shipment. As such they were no evidence of any shipment and a purchaser under a c. i. f. contract, if tendered such a receipt, would be entitled to ask for a Bill of lading, for he is not obliged to pay upon proof merely that the goods had arrived at the port of departure.

THE facts appear fully from his Lordship's judgment.

Campbell and *Weldon* for the plaintiff.

Inverarity and *Setalvad* for the defendants.

MACLEOD, J.:—On the 9th of June 1914, the defendant-firm, carrying on business in Bombay, purchased from the plaintiff, a merchant, also carrying on business in Bombay, five tons round copper bottoms, c. i. f. Mahomerah, July shipment, by a contract in writing at the price and on the terms mentioned in the said contract.

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The defendants agreed to pay for the copper in Bombay against Bills of lading. The copper was shipped on board the steamer Tangistan on or about the 28th day of July 1914, and the plaintiff says he obtained the relative Bills of lading and also insured the copper against the ordinary marine risks. On the 5th day of August, in consequence of war having broken out between Great Britain and Germany, the plaintiff's agent in England insured the copper against war risks and paid 10 per cent. premium for such insurance. The documents arrived in Bombay on the 7th of September, whereupon, the plaintiff delivered three invoices for the copper to the defendants and called upon them to pay the invoice price and also the aforesaid premium for insurance against war risks. The defendants refused to pay the amount demanded on the ground that they were not liable to pay the aforesaid premium. By another contract in writing, dated the 17th July 1914, the defendants purchased from the plaintiff 900 bags of sugar, c.i.f. Mahomerah, July shipment, at the price and on the terms mentioned in the said contract. The defendants also agreed to pay for the sugar in Bombay against the Bills of lading. The plaintiff alleges that, in performance of the contract, he got the sugar shipped at Hamburg on board the steamer Nicomedia on the 28th of July 1914, and obtained the relative Bills of lading, and also insured the sugar against the ordinary marine risks. On the 29th of July, his agent in England insured the sugar against war risks and paid half per cent. premium for such insurance. He further alleges that the Bills of lading relating to the sugar arrived in Bombay on the 15th day of August. Thereupon, he delivered to the defendants an invoice of the sugar and called upon them to pay the sum of Rs. 19,251-15-3, being the price of the sugar inclusive of the aforesaid premium for insurance against war risks. He further alleges that he has tendered the

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Bills of lading for the sugar and the policy of insurance against war risks to the defendants, but they have failed to pay the amount claimed. Accordingly, he asks for a decree in this suit for the sum of Rs. 8,878-4-11, being the price of the copper with interest at 9 per cent. from the 7th of September, 1914, and the sum of Rs. 19,251-15-3, being the price of the sugar with interest at 9 per cent. from the 22nd of August 1914.

The defendants in their written statement deny that they were liable to pay the 10 per cent. premium for insurance of the copper against war risks. As a matter of fact, since the suit was filed, the defendants have paid the whole of the plaintiff's claim in respect of the copper without prejudice to their contentions in this suit in order to get delivery of the copper; and if their contentions are correct they will be entitled to a refund of the amount paid for the insurance against war risks. With regard to the sugar the defendants do not admit that the plaintiff got the sugar shipped at Hamburg on the 28th of July or that the plaintiff obtained the relative Bills of lading in respect of such shipment. Finally, they contend that, in view of the war and the proclamations that have been issued from time to time by the British Government, the contract between the parties has become impossible of performance.

Exhibits A and B are the contracts for the purchase of copper and sugar respectively. They are what are called c.i.f. contracts under which the purchaser is bound to pay the stated price for the goods on tender of the documents showing that the goods have been shipped for transit to the port of destination, duly insured according to the terms of the contract, and that freight has been paid. I think it is clear that under these contracts the seller was not bound to insure against

war risks. This was admitted by defendants' counsel, and by the plaintiff in his circular of the 28th July 1914 addressed to his constituents (Ex. D) whereby he drew their attention to the necessity of insuring sugar indented through him against war risks in view of the political situation in Europe. He also asked them to note that if he did not receive any instructions by 6 p. m., he would effect the necessary insurance against war risks on their sugar, and debit them with the extra premiums. Without receiving any instructions from the defendants the plaintiff cabled on the 28th to his agent in England to effect insurance against war risks, and I find that he was not justified in debiting the defendants with extra premiums in the absence of express instructions from them which, as a matter of fact, were not given. The sugar indented for under Ex. B was insured against war risks at ½ per cent. premium but it appears now that the condition for such insurance was that the sugar was to be shipped before the 1st August. The copper indented for under Ex. A was not insured until the 5th August when, owing to war having been declared between Great Britain and Germany, 10 per cent. premium was charged by the under-writers.

The invoices for the copper per SS. Tangistan were sent to the defendants on the 7th September and on the 9th September they write: "Again on the 7th Inst. you sent your invoices Nos. 522, 543, and 544 for shipment of copper by SS. Tangistan charging 10 per cent. extra insurance and we are surprised to see why you have put such extra amount. Please note that you have never informed us that you were going to insure copper against war risks before shipment up to the time of the invoices. We are quite prepared to pay you accordingly as soon as we are satisfied that the consignments have been really shipped as per invoice

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and are in course of transit." This might be construed as a consent on the part of the defendants to pay the 10 per cent. on being satisfied that the goods had been shipped, but the plaintiff's letter of the 10th shows that the plaintiff did not consider that the defendants had agreed to pay the 10 per cent. and in their letter of the 11th September the defendants definitely disclaim all liability for extra insurance. It was contended that the case fell within section 70 of the Indian Contract Act, but I do not think it does. The cases cited were cases in which a mortgagee was held entitled to charge his mortgagor for sums paid by him for land revenue to avoid the mortgaged land being sold for non-payment. The analogy would only hold good if the Tangistan had been captured and the defendants had claimed the benefit of the insurance against war risks. On the 21st October the defendants wrote that it had been mutually agreed that plaintff was to charge 10 per cent. for war risks on goods shipped per SS. Tangistan but plaintiff denied this in his solicitors' letter of the 28th October. It is evident that the defendants were perfectly willing, on a concession, to pay 10 per cent. but this was not accepted by the plaintiff, and it is impossible to find any substantial ground for the contentions in their letter of the 28th October that the defendants were bound to pay whatever premium the plaintiff might have paid on their behalf for the copper.

I find, therefore, that the defendants are entitled to a refund of what they have paid to the plaintiff for the insurance effected by him against war risks, in order that they might get delivery of the copper.

The next question is whether the defendants were entitled to refuse payment of the invoice amount of the sugar.

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It is admitted that the invoice (Ex. K) was delivered at the defendants' office by the plaintiff's clerk Saul on the 15th August on which day the English Mail arrived.

The invoice value was Rs. 19,146-3-3 to which was added Rs. 423 approximate insurance against war risks pending the arrival of policy from London. It is admitted that Rs. 423 was far in excess of what had been paid by the plaintiff's agent in London, and, therefore, in any event, the defendants were asked to pay more than what was due, but further there is a conflict of evidence as to whether the shipping documents were tendered on the 15th August, and I am satisfied that no such tender was made. The plaint carefully refrains from alleging they were, nor is any such suggestion made in the correspondence until the 16th November.

I do not believe the witness Saul who said that he tendered shipping documents to the defendants' Moonim together with the invoice on the 15th August. The documents were sent to the National Bank and it would be most unlikly that the plaintiff received them from the Bank on the same day that they arrived from England and this is supported by the plaintiff entering in his Bill-book the bill drawn against the sugar on the 18th August. It seems clear that the usual practice of the plaintiff was to send the invoices to his constituents, to inform them what was the amount payable, the documents thereafter either being sent with a covering letter, see Ex. 8, or being delivered over on payment of the invoice value.

But assuming that the shipping documents now produced in Court were actually tendered to the defendants on the 15th August, was there amongst them a Bill of lading against which only the defendants were bound

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to make payment? Ex. H collectively are the documents relating to the 900 bags of sugar issued by the Hamburg American Line which the plaintiff contends are Bills of lading. The writing on the face of the document is in German. On the back general rules are printed in German and English.

Each document which was issued in triplicate purports to be a receipt for the goods named therein from Messrs. Cohre and Amme for transport by the German steamer, Nicomedia, Captain—or subsequent steamer through the Suez Canal for Mohammerah to order or to be delivered to the order of—. I see no reason to doubt that the plaintiff has frequently received documents in a similar form purporting to be Bills of lading which he has handed over to his indentors and that, on presentation of such documents, the indentors have obtained delivery from the shipowners of the relative goods and that, therefore, such documents have performed the ordinary functions of Bills of lading. But it is indisputable that a Bill of lading, as known to merchants, is a receipt for goods actually delivered over and shipped on board the ship named therein signed by the Captain of the steamer or his representative, and no document which does not conform to these conditions can strictly be called a Bill of lading. It may be that, as a matter of convenience, ship-owners may issue to shippers receipts in triplicate for goods delivered at the warehouse for shipment, such receipts being accepted by the shippers in place of Bills of lading, forwarded to the consignee, and accepted by the ship-owners' agents at the port of delivery as entitling the consignee to delivery, and under ordinary circumstances no dispute would arise. But the fact remains that these receipts are not evidence of shipment and if such a receipt is tendered to a c. i. f. purchaser he is entitled to ask for a Bill of lading, for he is not bound

to pay upon proof merely that the goods have arrived at the port of departure. It has been contended that, under the contract in this case, the purchaser has agreed to accept the date of the carriers' or wharfingers' receipt as the date of shipment, and that, therefore, he is not entitled to say that the goods were not shipped on the 28th July, the date on which the documents (Ex. H) were issued. But that agreement is contained in the clause which absolves the seller from responsibility for late or non-arrival of the goods under certain circumstances and declares that the period during which such stoppage as is therein described continues shall not be considered to form part of the time mentioned in the contract for the completion thereof. Therefore, the sugar, having been received by the carriers at Hamburg on the 28th July, the purchaser could not contend that it was not July shipment, but the seller was not absolved from his obligation to tender a Bill of lading. If a Bill of lading had been tendered the purchaser would have been bound to pay the invoice value, though he would be still entitled to claim a refund if he could prove that, as a matter of fact, although the Bill of lading had been issued, the goods had not been shipped.

The defendants, before the hearing, took out a summons for the issue of a commission to examine witnesses in London, Dunkirk and Hamburg in order to prove that the Nicomedia left Dunkirk on the 30th July and arrived at Hamburg on or about the 31st July, but I do not think that they were entitled in this suit to ask for such a commission as the question whether the goods had been shipped could only be relevant in a suit to be filed by the defendants.

Mr. Inverarity produced certain copies of Lloyd's Weekly Index which showed that, according to the information received at Lloyds from their agents, the

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Nicomedia left Dunkirk on the 30th July, arrived at Hamburg on or about the 31st July and was still there in November. He admitted that the information contained in the Weekly Index was not evidence but it seems unfortunate that in a Court dealing with commercial cases it should not be permissible to rely on such a publication which is treated by business men as affording reliable information regarding the movements of ships on Lloyd's Register and that it should be necessary in order to prove where a ship was on a particular date to produce evidence of witnesses who had actually seen the ship. A special list for commercial causes was instituted so as to induce the confidence of the commercial world that their disputes would be adjudicated upon expeditiously and in accordence with the Law Merchant. The law of evidence has always been the despair of the business man and apart from the fact that a commercial cause is set down for hearing as soon as possible after the issue of the summons and takes precedence of other causes, there is little to be gained if a party is exposed to the ordinary delays of the law.

It is certainly desirable that a Judge trying a commercial cause should have a power to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence or otherwise.

The last question is whether if the Bills of lading had been tendered, that would have amounted to a valid tender having regard to the Proclamation issued by the British Government on the 5th August and published in the *Bombay Government Gazette*, on the 10th August (Ex. 9).

All persons resident carrying on business or being in British Dominions are warned not to supply to or

obtain from the German Empire any goods, wares, or merchandise or supply to or obtain the same from any person resident carring on business or being therein, nor to supply to or obtain from any person any goods, wares, or merchandisé for, or by any way of transmission to or from the German Empire or to or from any person resident carrying on business or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the German Empire or for or from any person resident carrying on business or being therein.

It is difficult to see how the acceptance of the shipping documents relating to the sugar by the defendants would be considered as not being a violation of this Proclamation.

In *Duncan, Fox & Co.* v. *Schrempft & Bonke* [1] the plaintiff had sold Chilian honey per steamer c.i.f. to Hamburg. The honey was shipped on a German steamer and on the 5th August what was admitted as a tender of the shipping documents was made. The defendants refused to accept the tender. On a special case stated by arbitrators it was held that such refusal was justified because by accepting the tender and obtaining the goooods the defendants would be carrying out a contract in violation of the proclamation against trading with the enemy. It seems that this decision must cover a case of goods coming from Germany.

The suit must be dismissed with costs, each party to pay his own costs of the summons for commission.

Defendants to be entitled to a refund of the amount paid for the 10 per cent. premium and interest, if any, with interest at 6 per cent. from date of payment.

Solicitors for the plaintiff : Messrs. *Judah & Soloman.*

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Solicitors for the defendants: Messrs. *Matubhai, Jamietram & Madan.*

Suit dismissed.

M. F. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

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June 30.

ACHUT RAYAPA SHANBAG (ORIGINAL DEFENDANT) APPELLANT v. GOPAL SUBBAYA SHANBAG (ORIGINAL PLAINTIFF) RESPONDENT.*

Limitation Act (IX of 1908), Schedule I, articles 92, 93—Suit to declare the forgery of an instrument—Attempt—Lease—Attempt to record a lease under the Record of Rights Act (Bom. Act IV of 1903) is not an attempt to enforce.

The defendant applied to the Mamlatdar to record, under the Record of Rights Act 1903, a lease under which he claimed to be entitled to a rent of 400 cocoanuts from the plaintiff. The application was made on the 4th August 1908 but the plaintiff having complained that the document was a forgery the Mamlatdar declined to record it. The defendant then applied to the Collector who on the 11th August 1909 ordered that the lease should be recorded. On the strength of the record, the defendant sued in the Mamlatdar's Court for the enforcement of the terms of the lease and recovered in April and July 1912 cocoanuts of the value of upwards of Rs. 40. Within three years of the recovery of these cocoanuts the plaintiff brought the suit to recover back the value of the cocoanuts on the footing of the alleged lease being a forgery. The defendant contended that the suit was barred under article 93 of the Limitation Act, on the ground that it was filed more than three years after the 4th August 1908, the date of an attempt to enforce it against the plaintiff.

Held, that the suit was not barred under article 93 of the Limitation Act, 1908, as the first real 'attempt to enforce' the lease took place when the defendant attempted to recover the rent under the lease and that attempt was made within three years of the institution of the suit. The attempt to get the lease recorded under the Record of Rights Act, could not be put higher than an unsuccessful attempt to have a document registered in a case in which registration was necessary (art. 92); and that such an attempt was not an attempt to enforce the lease.

* Appeal from Order No. 59 of 1914.