However, this article of the Land Code made no special provision for the ejectment of the cultivator of such lands, and it would appear that the remedy of the Crown to effect this would be by means of a civil action for trespass.

Inasmuch as the notice set out above, sought to prevent the cultivation of Erazi Mevat, which the Land Code clearly tended to encourage, we must hold that, as it had no legal force, it is not such an order, the disobedience to which would create an offence.

The Magistrate has, in stating the present case, propounded a series of questions of law, which, however interesting academically, cannot be said to arise directly from the charge on which the accused is being tried. We consider that Magistrates should confine themselves to questions of law strictly arising at a trial. Any decision given by this Court on questions Nos. 3 and 4 would only be " obiter."

Further as there is no necessity for the accused to appear or be represented before this Court at the hearing of a case stated, and, as a fact the present accused did not appear, we feel that to give a decision on the points of law raised, after hearing the arguments of one side only, would be unwise and we decline to do so.

In reply, generally, to questions Nos. 1 and 2, we say that the charge against the accused and the evidence adduced in support thereof does not in our opinion disclose any offence under Art. 254 of the Ottoman Penal Code.

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THE FIRM A. G. PILAVAKIS, OF LIMASSOL

v.

THE BANK OF ATHENS, LIMASSOL.

C.I.F. CONTRACT—CARGO—PARCEL—SALE OF CARGO—DELIVERY OF PARCEL—EFFECT OF—KNOWLEDGE OF PURCHASER WITHOUT ANY OBJECTION, AMOUNTS TO WAIVER—LIABILITY OF A HOLDER FOR VALUE OF A TRADE BILL—DOCUMENTS ATTACHED—GOOD " TENDER " OF DOCUMENTS—AS TO " TENDER " ON DUE DATE—" ON DOCKING OF STEAMER "—STEAMER DOCKED NOVEMBER 30TH—TENDER NOVEMBER 29TH, BAD—TENDER DECEMBER 3RD, BAD—AS TO TENDER OF NECESSARY DOCUMENTS—BILLS OF LADING AND/OR DELIVERY ORDER—POLICY OF INSURANCE AND/OR LETTER OF GUARANTEE—A " CERTIFICATE " BY HOLDER OF BILL NOT A " LETTER OF GUARANTEE "—A LETTER OF GUARANTEE MUST BE A DOCUMENT UPON WHICH THE GUARANTORS COULD BE SUED—MUST BE ISSUED BY UNDERWRITERS

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OR INSURANCE BROKERS—MUST STATE MATERIAL TERMS OF THE POLICY—BAD TENDER BY HOLDER OF BILL DEPRIVES VENDOR OF LEGAL REMEDY AGAINST PURCHASER—HOLDER OF BILL BECOMES LIABLE FOR DAMAGES, WHICH PURCHASER WOULD OTHERWISE HAVE BEEN LIABLE FOR—DAMAGES—BASIS OF—MARKET PRICE AT DATE OF BREACH—POSSIBILITY OF EFFECTING SALE IN LIMITED MARKET—LIABILITY OF CLAIMANT TO RESTRICT DAMAGES—INTEREST ON LOSS DISALLOWED—WHERE HOLDER OF BILL A BANK—BANKERS LIEN—EFFECT OF—BREACH OF DUTY BY AGENT—EFFECT OF—LIABILITY OF GRATUITOUS AGENT—NO LIABILITY IF GRATUITOUS AGENT NEGLECTS TO DO ANYTHING—WHERE ACT DONE IN FURTHERANCE OF THE OBJECT OF THE AGENCY—ORDINARY SKILL OF AGENT IN HIS OWN AFFAIRS EXPECTED—SALE OF GOODS ACT, SECTION 50, SUB-SECTIONS (1) (2) AND (3).

For Plaintiff (Appellant) *A. Triantafyllides*, with him *C. Lanitis*.

For Defendants (Respondents) *N. Lanitis*, with him *N. Chrysafinis*.

Judgment: This is an appeal from the judgment of the President of the District Court of Limassol, sitting in a foreign action, whereby he dismissed the Plaintiffs' (the Appellants') claim for damage against the Defendants (the Respondents) for negligence or breach of duty or breach of contract.

The plaintiff is A. G. Pilavaki, trading as a firm of merchants of Limassol, and is frequently addressed in the correspondence in the case as Rossides.

The plaintiff firm had been represented by a Mr. G. Th. Rossides in England, and was known in Liverpool as Rossides.

The defendants are the Bank of Athens, of Limassol, a corporation carrying on business in, among other places, London.

On the 23rd September, 1920, the plaintiff firm entered into a contract with Holgate and Sons, Ltd., of Liverpool, whereunder they sold to Holgates a cargo of 1,200 tons of carobs @ 225*s.* a ton, c.i.f., delivery to be effected at Liverpool per the steamship *Montcalm*.

The contract is set out in the exhibit A.A.P. (1) and provided, *inter alia*, that payment should be " net cash in Liverpool against documents, " Bill of Lading and/or Delivery Order, Policy of Insurance, and/or " Letter of Guarantee, on docking of the vessel in Liverpool."

The contract was arranged by a broker in Liverpool, J. Witcomb Baty, carrying on business as J. W. Baty & Co., and with " Witcomb " as his telegraphic address, and was signed by him on behalf of the contracting parties.

Baty had been appointed broker to the plaintiffs in Liverpool on the 11th June, 1920, on the terms set out in exhibit A.A.P. (161). It is clear from the correspondence (*see* among other letters A.A.P. 203,

A.A.P. 210, and M. 1) that at all material times in this action he was in close business touch with Holgate, and that he was used by Holgate as his medium of communication with the plaintiffs. In M. 1, and in A.A.P. 168 he describes Holgates as his " clients." And see his answer to question 194 in his examination on Commission four years after the material dates in this case, in which he said he was acting in the capacity of broker for both the plaintiffs and Holgate, " trying to do the best " for both."

The *Montcalm* sailed from Cyprus on the 9th November, 1920, with the 1,200 tons of carobs, together with a further parcel of 360 tons, and arrived at and was docked in Liverpool on the 30th November, 1920.

On the 19th October, 1920, a verbal understanding was arrived at between the plaintiffs and defendants which was reduced into writing by the defendants in a letter addressed to the plaintiffs dated the 20th October, 1920, exhibit A.A.P. 4, and accepted by the plaintiffs in a letter of the same date, exhibit A.A.P. 5.

A.A.P. (4) is as follows:—

Limassol, 20th October, 1920.

" Mr. A. G. Pilavaki,

" En Ville.

" Dear Sir,

" 1,000/1,200 tons of your carobs to be shipped on the *SS. Montcalm.*

" We confirm the having taken place between us yesterday's verbal " understanding on the undermentioned conditions:—

" 1st. We have undertaken towards you the obligation of buying " your draft, relative to the above shipment of carobs of total " value £8/10,000, accompanied by B/Ladings.

" 2nd. On this draft we shall charge you with commission and ex- " change totalling $2\frac{3}{4}\%$ (two and three quarters per cent.)

" 3rd. Since the day of your endorsing to us the said draft you will " be charged with interest of 8% (eight per cent.) annually till the " day after its collection at London.

" 4th. The relative Insurance Policy will be lodged at our London " Branch Office to your advantage.

" On this last condition we have to add that, in case the interruption " of the cable communication of our Island with the outside world " continues till the commencement of your carob shipment, you will

" authorize us to send a cable by the first foreign mail opportunity " to ours in London to effect themselves the Insurance and this for our " order's sake.

" Awaiting confirmation of the conditions of this letter within this " day for order's sake,

" We remain, yours truly,

"(*signed*) Bank of Athens."

A.A.P. (5).

Limassol, 20th October, 1920.

" Messrs. Bank of Athens,

" En Ville.

" Dear Sirs,

" In reply to your letter of this day in regard to your purchase of " my draft relating to my carob cargo per *SS. Montcalm*, I beg to " inform you that same is agreed upon.

" Yours truly,

" (*signed*) A. G. Pilavaki."

In other words the defendants agreed to purchase plaintiffs' draft (A.A.P. 2) on Holgate at an agreed rate of discount together with the bills of lading referring to their sale of carobs to him.

On the 22nd October, 1920, the plaintiffs became customers of the defendant Bank in Limassol, and began drawing cheques as appears in exhibit A.A.P. 183.

On the 10th November, 1920, the plaintiffs by letter (*see* exhibit A.A.P. 7) forwarded to the defendants the draft on Holgate drawn by Rossides to plaintiffs' order for £9,800 and the Bills of Lading for the 1,200 tons of carobs, with instructions to demand payment on the steamer's arrival at Liverpool through their London Branch. The Bills of Lading for the additional parcel of 360 tons were also sent to defendants.

It is important to note that under the heading of " assurance " very particular instructions were given in this letter to the effect that the policy of assurance taken out by the plaintiffs in London relating to the 1,200 tons should be sent to Liverpool and presented to Holgate together with draft and bills of lading. Separate instructions were given concerning the policy taken out in respect of the 360 tons.

Upon this letter the defendants wrote to their London branch on the 11th November, 1920 (exhibit A.A.P. 8), in which, in addition to instruc-

ting them as to the collection of the draft " on the arrival of the goods " in Liverpool," they informed them that the policy of insurance relating thereto has been already sent to them at plaintiffs' direction and in their (the defendant bank's) favour. They go further and (this again is a point to be particularly noted) they request them to attach the policy to the draft when presenting it.

The defendants on the 11th November, 1920, reply to plaintiffs' letter of the 10th November, 1920, (exhibit A.A.P. 7) by sending them exhibit A.A.P. (9), in which they acknowledge the receipt of the draft, with bill of lading on Holgate for the 1,200 tons, for £9,800. Deducting therefrom £269 10*s.* as what is described as the " agreed fee " (in A.A.P. 4 it was styled " commission and exchange ") they credit the plaintiffs with what is described as an open carobs account *Montcalm* value 12th inst. £9,530. Interest is stated to be payable @ 8% from 12th November till the day after the collection of the draft. Reference is also made to the lodgment, at plaintiffs' direction, of the policy of insurance at defendants' London branch at plaintiffs' order but to defendant's advantage (and see also exhibit A.A.P. 6 concerning insurance).

On the 27th November the defendants' branch in London forwarded the draft for £9,800 (A.A.P. 2) to Barclay's Bank, Liverpool, who were their agents there, for collection. (*See* A.A.P. 46). " Documents " against payment and payment on arrival of the steamer."

The following passage is to be noted. " Kindly note that the insur- " ance of this parcel has been covered by Messrs. P. W. Richardson & " Co. for the sum of £12,000, who undertake to hand us the documents " on their completion."

On the 29th November, that is, on the day before the arrival of the steamer in Liverpool, Barclays tendered the draft and bill of lading to Holgate, who refused them. He informed Barclays' representative that he was not interested in these carobs as the consignment was not in accordance with the contract.

The learned President in his judgment in the District Court when referring to the tender on this date says " It is proved that in lieu of a " policy of insurance a certificate that the bank were holding Lloyds & " Companies Marine Policies was tendered to the drawees."

With this we find we are unable to agree, inasmuch as from exhibits A.A.P. (214*a*) and (214*b*), which were not in evidence in the Court below, it is clear that the defendants' branch in London did not receive the policy covering the 1,200 tons (*i.e.* for £12,000) until the following day,

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the 30th of November. And *see* A.A.P. 48. This however is not a matter of importance, as the defendants have not attempted to dispute in this appeal the correctness of the contention of the plaintiffs that the tender of documents on the 29th was not a valid one. It was both out of time, the steamer not yet having arrived at Liverpool, and was made without the policy of insurance and/or letter of guarantee prescribed by the contract.

After the refusal by Holgate and on the same day, the 29th November, Baty telegraphed plaintiffs as follows:—

" Holgate do not accept tender *Montcalm* owing other beans shipped " not according to contract shall we submit matter to arbitration." (A.A.P. 23).

In this connection it is to be observed that under the contract between plaintiffs and Holgate (A.A.P. 1.) it was provided by condition XX. printed on the back thereof that in case of any dispute or question arising the matter should be referred to arbitration.

Plaintiffs telegraphed in reply on the 1st December (by A.A.P. 24).

" Surprised attitude Holgate *Montcalm* is according to contract " clause eleventh clear hold the buyers responsible for all consequences " if Holgate insists telegraph immediately urgent for my appointing " arbitrator."

Clause or rather condition XI. of the contract A.A.P. (1), it is to be observed, provides that when used in reference to quantity, the word " about " shall mean within five per cent. over or under the quantity specified.

From the correspondence between plaintiffs and Baty hereinafter referred to it would appear that the plaintiffs were under the impression that their shipment of the 1,200 tons under their contract with Holgate together with the extra parcel of 360 tons was quite in order, and that Holgate was aware of the extra parcel, but had not decided whether he would purchase it or not, though he had insisted on the first refusal, and that it should not be sold otherwise than through Baty.

On the 30th November the defendants' London branch wrote to Barclays stating *inter alia* " We now beg to hand you policies relating " to the £9,800 draft, which kindly deliver to Messrs. Holgate against " their payment of the draft." (A.A.P. 48.)

Barclays replied on the 1st December that they did not appear to have received them, and asked that the earliest attention be given to the matter. (A.A.P. 50.)

Barclays wrote another letter (A.A.P. 49) on the same day to the defendants in London as follows:—

" Collection No. 26977 £9,800 W. Holgate & Sons.

. . . . . .

" With reference to the above draft, kindly note that same is unpaid " at present. The drawees state ' shipment is not in accordance with " contract.' We are holding same for further presentation and await " receipt of your further instructions."

On the 2nd December defendants replied to these two letters with A.A.P. (51), in which they requested Barclays to re-present the draft and documents, and in case of non-payment to have the draft noted. They went on to say that " As regards the policies we find that owing " to an oversight in our mail department same were not enclosed. " As the draft has not been taken up we enclose a certificate and should " be glad if you would attach same to the draft before presentation."

The reference to the oversight in defendants' mail department is a clear admission of negligence on their part. At this point it is convenient to mention that it is agreed that at no material time in this case had the defendants seen the contract between plaintiffs and Holgates. They were not aware of the option given to the plaintiffs to present a letter of guarantee in lieu of a policy of insurance under clause (7) of the contract. The instructions they had received from plaintiffs were to present the policy.

The certificate forwarded by the defendants in London to Barclays is in the following terms:—

CERTIFICATE.

" This is to certify that we are holding Lloyds and Companies Marine " Policies totalling £12,000 on 1,200 tons locust beans per *SS. Montcalm* " from Cyprus to United Kingdom." (A.A.P. 51*a*.) It is signed by defendants' London branch.

On the 3rd December Barclays re-presented the draft and bill of lading with this certificate in lieu of the policy of assurance to Holgate, and Holgate again refused to take up the draft. The refusal was notarially noted and the plaintiffs informed accordingly.

This failure on the part of the defendants to present the policy of insurance and to tender at the proper time is the first of the two grounds upon which the plaintiffs base their claim for damages.

They assert in effect that this failure to make the due presentation provided under their arrangement with the defendants deprived them of the remedy at law which would otherwise have been open to them against Holgate for breach of his contract with them. They present their claim roughly as follows:—

Upon Holgate's rejection of the cargo sold to him by the plaintiffs, Baty lost no time in suggesting that the matter be referred to arbitration, as he telegraphed on the 29th November, after Holgate's first refusal of the tender of that day.

"Holgate does not accept tender *Montcalm* owing other beans "shipped not according to contract shall we submit to arbitration." (A.A.P. 23.)

From the telegrams sent by plaintiffs in reply to this and other telegrams from Baty during the next few days (*see* A.A.P. 24, A.A.P. 34) it is clear that the plaintiffs were greatly surprised and perplexed at the course things had taken, but Baty insisted on immediate action by cabling on the 4th December "arbitration to be settled in Liverpool, "arbitrator must have definite reply by Monday morning otherwise "broker's association will arbitrate for you." (A.A.P. 28.)

The plaintiffs failed to recognize at first that under the conditions attaching to their contract with Holgate all disputes were to be submitted to the arbitration of two members of the Liverpool Brokers Association, and cabled to a London firm, Pinnock & Co., whose telegraphic address is "Naviter," to act as their arbitrators. Situated as they were in a small town in a distant country, and with no friends or business connection in Liverpool (it was the first commercial transaction they had ever entered into in Liverpool) and with no means of placing their correspondence and documents in the matter before the arbitrators, their position was a desperate one. Pinnocks were not eligible to act, and Holgate, the head of an important Liverpool firm, was in a dominant position. The plaintiffs were compelled to leave it to Baty (who in a letter (M. 1) of the 2nd December spoke of Holgates as his "clients") to appoint their arbitrator, and he nominated as such a gentleman, whom he described in a letter to the plaintiffs (A.A.P. 168) as the person Holgate wanted to select as his representative. He sat with another friend of Holgate's in the arbitration, and, situated as they were, the plaintiffs had no opportunity of explaining the circumstances in which the extra parcel was shipped on the *Montcalm* with the cargo of 1,200 tons sold to Holgate.

The arbitrators appear to have decided offhand that Holgates were entitled to refuse the cargo, and there is no record of the proceedings apart from the statement that such was their finding. (A.A.P. 143.)

Baty reported the result of the arbitration on the 17th December, the day after it was held (A.A.P. 35) and intimated that it would be futile to appeal.

Upon this the plaintiffs cabled to their friends, Pinnock & Co. in London, in the following terms:—

"Surprised arbitration held before posted papers reached you "informed the arbitration is against us please send me award by next "mail appeal at once against decision but appeal must not be held "before I can receive award and send proof my case otherwise I take "the matter before the tribunal." (A.A.P. 36.)

In other words they wished to have the matter thrashed out before a Court of Justice.

On the 21st January, 1921, the Arbitration Appeal Board confirmed the finding of the arbitrators. Again there is no record of the proceedings, the decision alone being recorded without reasons given. (*See* A.A.P. 144.) On this appeal the plaintiffs were at a great disadvantage in being represented by Baty, the only person they knew in Liverpool, who was hand in glove with Holgate, as will be shown later, and who would certainly be most reluctant to disclose the circumstances in which the extra shipment was made, and Holgates knowledge thereof. Without this disclosure plaintiffs' case was hopeless. They had contracted to sell a cargo and had sent an extra parcel with it. As to this point see *Borrowman v. Drayton*, 2 Ex. D., 15, and *Krenger v. Blanck*, L.R. 5 Ex., 179.

The grounds of the decision were cabled by Baty to the plaintiffs in reply to their inquiry as follows:—

"Sold cargo tendered parcel." (A.A.P. 38.)

In other words, that Holgate, to whom they had sold the cargo of 1,200 tons of carobs on the *Montcalm*, was entitled to reject it as an extra parcel of some 360 tons of the same commodity was brought by that vessel.

In neither of the arbitrations were the plaintiffs—owing to distance and lack of time—in a position to prepare their case and support it with documents which would have placed the shipment of the extra parcel in an entirely different light from that in which it was presented to the arbitrators.

They were unable, especially with Baty as their representative, to explain, *inter alia*, the position of Baty in relation to Holgate throughout the transaction, and to raise and lay stress on the point that Baty had not only encouraged the plaintiffs to make the shipment of the extra parcel but had fully discussed it with Holgate, and the price to be

paid for it, and had laid plaintiffs' communications relating thereto before him, and had arranged with him that "in consideration of "Messrs. Holgate taking up their documents we must have confirmation "from you (*i.e.*, plaintiffs) without reserve that the consignment goods "(*i.e.*, the extra parcel) are to be sold by us (*i.e.*, Baty) and that they "shall not be put on the market through other channels; this is a "definite condition on which they (*i.e.*, Holgates) insist."

The letter A.A.P. 203, of 2nd November, 1920, from Baty to plaintiffs, from which the above passage is quoted, should be read in extenso, as it not only points to Holgate's knowledge that the extra parcel would be shipped and his acquiescence therein, but also to Holgate's laying down conditions how it was disposed of.

The last paragraph in the same letter by which it was proposed by Holgate that the contract concerning the 1,200 tons should be cancelled, illustrates clearly the very intimate terms on which Baty was with him, and that Holgate's one concern was the question of price, even to the extent of suggesting firstly that plaintiffs should make him some allowance off the price, and then of offering to cancel a contract solemnly entered into by him with them involving over £13,000, Baty being used as his intermediary and assistant.

This is quite inconsistent with the case presumably set up by him before the arbitrators that plaintiffs had broken the contract by reason of their shipping the extra parcel without his knowledge, and with what he said in the only letter he wrote to the plaintiffs (A.A.P. 188) on the 18th Argust, 1921: "the responsibility for your loss rests with your-"selves as you sold a cargo and shipped a parcel. We did not even "know you were shipping extra beans until the documents were "presented here." It is to be observed that in the same letter Holgates "strongly advise" the plaintiffs "to give up any idea" that they have any claim against Baty and against taking proceedings against him.

The fact was, Holgate entered into this contract when prices were high and rising, and as soon as they began to fall he sought by hook or by crook to get out of his bargain, and snatched at the opportunity of doing so by raising the point of extra parcel.

Apparently he was always ready to buy at his own price, and it is in evidence that 75% of the carobs landed in Liverpool passed through his hands, the market thus being a distinctly narrow one. A.A.P. 168, postscript.

It is to be observed that after rejecting the carobs which he had contracted to buy from the plaintiffs, he eventually purchased from

them the whole of them and also the extra parcel of 360 tons, save a small quantity purchased by another firm, at prices which enabled him to save over £4,000 by so doing.

In addition to A.A.P. 203 referred to above, the following letters call for close examination.

A.A.P. 198 in which Baty writes to plaintiffs as follows on the 4th October, 1920:—

" If you could offer us another cargo, we shall be able to find you " another buyer, failing a full cargo should the steamer *Montcalm* be " able to take a further parcel, and you could offer us something, we " will try and arrange to sell the lot to Holgate."

In other words he invited plaintiffs, if they could find room on the *Montcalm* for it, to ship an extra parcel, which was to be offered to Holgate.

This invitation, it is to be noted, is preceded by a letter he had written to plaintiffs ten days before (A.A.P. 210) dated 24th September, 1920, in which he said, *inter alia*, Holgates " understand that you will " not be shipping any other beans by this steamer (*i.e.*, the *Montcalm*) " other than what you have sold to them, as it is understood that when " you offer a cargo the whole cargo is theirs, otherwise you will stipulate " a ' parcel '."

He goes on to say " although we cannot get them to bid the same " price for a parcel for November, December, they say that if we can " get the offer they would be interested, and we have therefore cabled " you asking you to offer us cargoes for October, November and " December deliveries, but it must be distinctly understood that they " are not in any way to interfere with, or form part of '*Montcalm* " shipment without Holgate's permission '."

In other words he laid stress on their not shipping any extra parcel by the *Montcalm* without Holgate's permission. By inviting plaintiffs ten days later to send an extra parcel on her to be offered to Holgate (*i.e.*, by A.A.P. 198 of the 4th October, 1920 referred to immediately above) the plaintiffs assumed that Holgate approved of their so doing, and on the 26th October, 1920, plaintiffs wrote (A.A.P. 201) to Baty acknowledging the receipt of this letter (A.A.P. 198) and saying that they noted the contents, that is, the invitation to send the extra parcel, with thanks. They go on to say " I had to cable to you " to get Messrs. Holgates to allow me, if I substitute the *Montcalm* " (*i.e.*, for some other boat which had been alternatively suggested

" in her place) to ship not over 1,500 tons (*i.e.*, 300 tons in excess of the " 1,200 sold by the contract) and as regards the quantity over that of " the contract, to be stored by you for my account, if Messrs. Holgate " are not willing at present to buy it."

On the 5th November, 1920, plaintiffs wrote to Baty A.A.P. 200, as follows:—

" I have duly noted that if the *Montcalm* carries more than the " quantity declared and sold, I have to make out a bill of lading for " 1,200 tons, and a separate set for the balance, in perfect accordance " with my contract. If such be the case, you will kindly give the first " refusal to Messrs. Holgate as per our arrangement with them."

This letter was in reply to a cable from Baty to plaintiffs dated 2nd November, 1920, in the following terms:—

" Please refer to our letter of 24th September (*i.e.*, A.A.P. 210), " cash in exchange for documents upon arrival steamer 1,200 consign- " ment must be kept separate."

On the 18th November, 1920, by A.A.P. 202, Baty acknowledges the receipt of plaintiffs' letters of the 26th October (A.A.P. 201) and 5th November (A.A.P. 200) just referred to and says that the contents *thereof* have been passed on to Holgates.

In other words Baty says he has informed Holgate of the extra parcel on the *Montcalm* and of the separate bill of lading covering it.

He goes on to say that carobs have fallen to £9 a ton and speaks gloomily of market conditions. On the 20th November, 1920, Baty writes (and *see* also A.A.P. 202) in the same strain and of the lack of buyers and says " When this commercial depression has passed no " doubt we shall have a good demand, if there are other beans in the " *Montcalm* other than on Holgate's contract we fear you will have to " take less than the parity of £9 c.i.f."

It is particularly to be observed that in neither of these letters does he make any suggestion to the effect that Holgate had raised any sort of objection to the extra parcel about which he had been informed. He confines himself to the question of the price plaintiffs must be prepared to accept and suggests a figure very considerably below that which Holgates have contracted to pay them for the 1,200 tons. Clearly he is much worried about the break in prices, and in A.A.P. 203 of the 2nd November speaks of the heavy fall in values and, as indicated above, of Holgate's going so far as to talk about allowances and cancellation.

Having regard to these documents (A.A.P. 198 and upwards), which were not in evidence in the Court below, the question arises why did not the plaintiffs seek their remedy against Holgate in a Court of Law? How could he, in the face of them, have successfuly maintained that he was not informed by Baty of this extra shipment and invited to purchase it?

According to Baty, he knew all about it and about the separate bill for the extra 360 tons, certainly on the 18th November, that is, twelve days before the ship arrived (if not long before, as the correspondence would indicate) and stood by and took no sort of objection. The only difficulty suggested about this extra parcel was in connection with the price the plaintiffs would have to be prepared to accept.

The plaintiffs' answer is that the failure of the defendants to make a proper presentation of documents

1. At the right time;

2. With the proper documents, *i.e.*, their omission to present the policy of assurance, deprived the plaintiffs of all possibility of success in a Court of Law on appeal from the award of the arbitration appeal board or otherwise, inasmuch as this failure on defendants' part to make due presentation left it open to Holgate, if defeated on the point of extra parcel, to raise the point of bad presentation. This point, plaintiffs assert, would be fatal.

The plaintiffs maintain that having regard to Holgate's attitude in relation to his purchase of the *Montcalm* cargo as disclosed by the correspondence in the case, his eagerness to secure with the help of Baty an allowance off the agreed price or even to cancel the contract altogether (he stood to lose between £2,000 and £3,000 on it as prices were at the time of the arrival of the ship), and his repudiation of the contract on the ground of the extra parcel in the circumstances set out above, it would be idle to contend that he would not take advantage of any defence open to him.

The defendants maintain that Holgates would not have been in a position to raise the point of bad presentation, inasmuch as he elected to reject the cargo on the ground that an extra parcel had been shipped with it, and did not look at the documents when they were tendered to him, and that by so doing he waived his right to object to the tender. They also refer to an answer he gave when his evidence was taken on commission, " We never considered the documents at all because we " were declining to take the stuff (question 98). If that (the matter of " the insurance policy in lieu of which a certificate signed by the

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" defendants was tendered) had been the only thing in question we " should have taken the cargo" (question 99). In answer to question 83 he said " I am quite sure that the policies had not come down with the " documents, and the Bank offered instead of a policy a letter of " indemnity." Question 84 runs—in continuation—" What is des- " cribed as a certificate ? " Answer " Yes, and that would not have " stopped us taking the cargo."

These answers were given, it is to be observed, some four years after the rejection of plaintiffs' cargo and long after all danger of the plaintiffs' appealing from the arbitration award to a Court of Law had passed. He was nominally called by the plaintiffs, but it is (*see* defendants' solicitor's bill of costs) in evidence that he was closeted in lengthy conference with the defendants' solicitors immediately before he gave his testimony before the commission, and his friendly relations with them are borne out by the questions put to him in a so-called cross-examination and his answers thereto.

We are invited by counsel for the defendants to accept these answers as conclusive on the point that Holgate would not have raised the point of bad presentation in connection with the policy of insurance. This we emphatically decline to do, and we attach little or no weight, in the face of contemporaneous documentary evidence, to what he said years afterwards when the possibility of an appeal against the award in his favour had disappeared. We are satisfied he would have raised any defence open to him if plaintiffs had appealed from the award to a Court of Law. (*See* A.A.P. 166, Baty to plaintiffs, dated 30th November, 1920. " Unfortunately in a falling market buyers are not disposed " to overlook " a departure from the contract.)

(This letter is interesting as it was written after the rejection of the first tender, and on the day the ship was docked, after a long and full discussion of the situation and review of the correspondence with Holgate, and refers to an agreement under which plaintiffs were allowed by him to ship a further parcel. He goes on to say " Subsequently " however this agreement fell through.")

(In our view this is nothing more than an obvious attempt to escape from A.A.P. 203. We have nothing before us to show how the agreement fell through, either in the correspondence or in the conduct of the parties after A.A.P. 203 was written. Everything points the other way.)

That he would have been entitled to do so in law, *i.e.*, to raise any defence open to him, is abundantly clear on the authorities. (See

Manbre Saccharine Co. v. Corn Products Co. (1919) 1, K.B. 198.) In this action it was held that under a c.i.f. contract the vendor is bound to tender to the purchaser a proper policy of insurance together with the other shipping documents, and that obligation is not performed by the vendor guaranteeing to hold the purchaser covered by insurance in accordance with the terms of a policy of insurance in the vendor's possession. The plaintiffs had rejected the tender of documents on a ground which the Court held to be insufficient, but McCardie J. in his judgment at p. 204 says: " It is clear, of course, that the plaintiffs " are not, by their rejection of a tender on an insufficient ground, " precluded from supporting the rejection on other and valid grounds," and cites *Sanders Brothers v. Maclean & Co.* (1883) 11 Q.B.D. 327, per Brett M.R. at p. 333, and the judgment of Bailhache J. in *Furness Withy & Co. v. Rederiaktiebolaget Banco* (1917) 2 K.B. at p. 876.

In the present case plaintiffs contend that owing to the default of the defendants in the matter of the presentation of documents Holgate was left with the two defences available, either of which would have been open to him had plaintiffs gone to a Court of Law and succeeded against him on the point of extra parcel.

It is also quite clear in law that when by reason of a breach of a duty or obligation on the part of A to B, B is deprived of his remedy by action at law against X, the onus is not on B to show that he must inevitably have succeeded in his action, but on A to show affirmatively that B could not possibly have suffered any loss in consequence of his (A's) breach, *i.e.*, that B could not possibly have succeeded. (See *Godefroy v. Jay* (1831) 7 Bing. 413, and cases cited on p. 459 of Mayne on Damages, 9th Edition, and compare those cited in connection with actions against the Sheriff for some neglect of duty which deprives a creditor of his proper remedy against a debtor.)

The principle is that where A has been in fault, B is entitled to be placed in the same position by means of damages, as if A had done what he ought to have done.

Before dealing with the question of the alleged breach of duty or obligation on the part of the defendants in the matter of presentation of documents it is to be observed that, in our view, when the defendants purchased plaintiffs' draft on Holgate (A.A.P. 2) they became holders for value in the ordinary sense of the term. They were transferees, taking the property in the instrument.

The draft was payable at sight, and made with the bill of lading and policy of insurance, a documentary bill. It was the duty of the defendants to present on the arrival of the ship at Liverpool. They bought

the draft with this condition attaching to it. Obviously if it were not presented when the ship arrived, expenses would be incurred in the shape of handling and moving the cargo, including putting into sacks and porterage and quay rent, and warehousing. Clearly it was not a bill to which days of grace were applicable. The draft and other documents had to be presented on the arrival of the ship at Liverpool and at no other time.

As already indicated, the presentation on the 29th November before the ship arrived, apart from the fact that no document referring to insurance was with the documents, was not a presentation at all. The defendants presumably recognized this; hence the tender of documents on the 3rd December.

In this connection it is to be noted that on the 22nd March, 1921, that is, within a short time of the decision of the Arbitration Board on appeal upholding Holgate's rejection of the cargo on the ground of the extra parcel, Baty wrote in A.A.P. 150 to plaintiffs as follows:—

"Documents were presented by the Bank for acceptance before "the steamer arrived, this again was a breach of (the) contract, which "provides that cash will be paid against documents after arrival of the "steamer."

It may fairly be presumed that this point had been considered by Holgate or his legal advisers, and this letter adds force to what has already been said as to the extreme improbability of Holgate's not taking advantage of every legal loophole to escape from his contract with plaintiffs such as invalid tender, whether in the matter of time or documents.

The presentation of the 3rd December, *i.e.*, on the third day after the arrival of the ship, on the 30th November, was also out of time. As the process of discharging the cargo started as soon as the ship was docked, expenses in connection therewith had necessarily been incurred before this presentation took place.

The fact that a premature and incomplete presentation of documents had been attempted on the 29th November, and that Holgate had declined to have anything to do with them, did not relieve the defendants from the obligation to make a proper tender of all the necessary documents on the following day, the due date, or at latest on the morning of the 1st December. As holders of the draft it was their duty so to present. In breach of that duty they presented on the 3rd December.

As to the failure of the defendants to tender the proper documents, the defendants were instructed to present the policy of insurance. As has been already explained, they knew nothing about the option

given to plaintiffs to present a " letter of guarantee " in lieu of the policy. It was their duty to get the policy covering the cargo on the *Montcalm* from the insurance brokers with whom they had been placed in communication by the plaintiffs. Their first omission was not to enclose it in their letter to Barclays, their agents in Liverpool, of the 30th November (A.A.P. 48) although they state therein, as already mentioned, " We now beg to hand you policies relating to the £9,800 " draft which kindly deliver to Messrs. Holgate against their payment " of the draft."

On Barclay's calling attention to their omission they admit that their mail department had been careless. Even then they do not send the policy to be attached to the draft before representation. They send instead the so-called certificate (A.A.P.51*a*) which has been already set out in full.

Holgate, as mentioned above, in answer to question 83 said he was quite sure the policies had not come down and that the Bank had offered instead a letter of indemnity but that would not have stopped him from taking the cargo.

It is easy for him to say this long after the event, and after he has successfully got out of his contract and has bought the cargo up at his own price, but it is difficult to believe that a hard-headed man of business (*see* Baty's letter A.A.P. 213, in which he speaks of Liverpool buyers being " hard business men," whereas in London they were " a more indulgent crowd ") who was eager to escape from his contract would have been satisfied with a bare assertion, especially when an amount of some £13,500 was at stake, that the holders of the draft, who happened to be a foreign corporation, were " holding Lloyds and " Companies Marine Policies totalling £12,000 on 1,200 tons locust " beans per *SS. Montcalm* from Cyprus to United Kingdom." We are satisfied he would have taken strong objection to it, and would have declined to accept it.

This " certificate " gives no particulars of the policies; it does not incorporate the terms of the policies; it does not state whether the goods which made up the cargo were covered by them up to dock side, or warehouse, or any other point. Would it be necessary to take out further or additional policies to cover quayside and unloading risks ? It could not for a moment be contended that the certificate contained all the terms of the insurance. The certificate could not operate to transfer the policies to the drawee. Did these policies, whatever they were, cover only the goods mentioned in the bill of lading ? As McCardie J. says in *Manbre Saccharine Co. v. Corn Products Co.* (1919)

1 K.B. at p. 205, " A purchaser under a c.i.f. contract is entitled to " demand, as a matter of law, a policy of insurance which covers and " covers only the goods mentioned in the bills of lading," and refers to the decision of the Court of Appeal in *Hickox v. Adams* (1876) 34 L.T. 404.

The learned Judge proceeds to say that " Unless the purchaser gets " a policy limited to his own interests he would become one only of those " who are interested in the insurance; and he is entitled, in my view, " to refuse to occupy a position which may give rise to obvious com- " plications—*see* per Turner L. J. in *Ralli v. Universal Marine Insurance* " *Co.* (1862) 6 L.T. at p. 37."

The holders of the draft were a bank: it was possible they might set up a claim to the policy by way of lien, under the law merchant, the plaintiffs being their customers to whom they had made large advances. Perhaps that is the reason why they did not send the policy to Barclays.

It is to be borne in mind that a c.i.f. contract, such as the present one, is a contract for the sale of goods to be performed by the delivery of documents (See *Arnhold Karberg Co. v. Blythe Green Jourdain & Co.* (1915) 2 K.B. at p. 388, and (1916) 1 K.B. at pp. 510 and 514), and the contingency of loss, which can only be provided against by proper insurance, is within and not outside the contemplation of the parties to the contract.

It is of the first importance to the buyer to know exactly how he stands in the matter of insurance, for, if the documents presented to the buyer at the proper time are in order, he must pay the full price for them.

(The judgments of Hamilton J. and Kennedy L. J. in *Biddell Brothers v. E. Clemens Horst Co.* (1911) 1 K.B. at p. 219, and pp. 958 and 960 in which the " established principles and rules of law " attaching to c.i.f. contracts are discussed, may profitably be consulted in this connection. They were fully supported by the House of Lords in their judgment in this case.)

If the proper documents including those relating to insurance in this case, had been presented to Holgate at the proper time he would have been bound in law (apart from the alleged breach of contract by the plaintiffs in the matter of the extra parcel) to pay the price he had agreed to pay plaintiffs for their 1,200 tons of carobs, even if these carobs were going up in flames at the quayside at the time or immediately afterwards, or were sinking under the water of the dock.

Scrutton on Charter parties, 8th Edition, p. 167, is illuminating on this point, and the following passage may be quoted:—

" There may be cases in which the buyer must pay the full price for " delivery of the documents, though he can get nothing out of them, " and though in any intelligible sense no property in the goods can " ever pass to him—*i.e.*, if the goods have been lost by a peril excepted " by the bill of lading, and by a peril not insured by the policy, the bill " of lading and the policy yet being in the proper commercial form " called for by the contract."

But though it was the duty of the defendants to present the policy of insurance, and though they had been definitely instructed to attach it to the draft, and though admittedly they failed in their duty in these respects, they maintain that by presenting their " certificate " to the effect that they held Lloyd's policies of insurance they had presented a " letter of guarantee " within the meaning of the contract. In other words Holgate had had tendered to him the document of insurance to which he was entitled under the contract.

With this proposition we find we cannot agree. The judgment of McCardie J. in *Diamond Alkali Export Corporation v. Fl. Bourgeois* (1921) 3 K.B. 443, should be read in this connection, although it refers to an ordinary c.i.f. contract. In this case it was held that a document of insurance—a certificate issued by an insurance company—is not good tender in England under such a contract unless it be an actual policy, and unless it falls within the provisions of the Marine Insurance Act, 1906. The learned Judge after having, as he states, considered all the cases on the rights and obligations of buyer and seller under c.i.f. contracts from *Ireland v. Livingston* L.R. 5 H.L. 395 to *Johnson v. Taylor Bros. & Co.* (1920) A.C. 144, and the cases set out in Benjamin on Sale VIth Edition pp. 850 *et seq.*, declares that the law is settled and established and that a " policy of insurance " is an essential document unless express provision has been made by the contract to the contrary. The document of insurance tendered in this case was a certificate issued by a well-known American Insurance Co., and signed by its managers, declaring *inter alia*, that a specially numbered policy covering specific goods for a certain amount on a certain ship for a definite voyage had been issued by the Co. to X and that loss was payable to the order of the assured, on surrender of the certificate, also that it represented the policy and conveyed all the rights of the original policy holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy direct to the holder of the certificate.

Although American Certificates of Insurance of this kind had been referred to by Bailhache J. in the Wilson, Holgate & Co. case (1920)

2 K.B. at p. 7 as standing on a special footing and as " equivalent to " policies, being accepted in this country as policies," the learned Judge (McCardie) pointed out at p. 455 of his judgment that the word " accepted " does not mean that buyers are " bound to accept " them, and declined to regard such a certificate as sufficient under an ordinary c.i.f. contract. He also declined to accept the dictum in Scrutton on Charter-parties 10th Edition, p. 185, note (e) where it is said " A certi- " ficate of insurance, issued by an insurance company under a floating " policy, upon which document the company can be sued, would suffice " in any case."

He also pointed out, " it seems plain, that a mere written statement " by the sellers that they hold the buyers covered by insurance in respect " of a specified policy of insurance " is not a policy of insurance within a c.i.f. contract. (*See* Manbre Saccharine case (1919) 1 K.B. 198.) It is to be observed that the defendants in the present case in their " certificate " do not even declare that they hold the buyers covered nor do they specify the policy.

The learned Judge further states that " a broker's cover note or an " ordinary certificate of insurance " is not equivalent to a policy.

It is to be observed these two documents, cover note and certificate of insurance, are both in this case and in the Wilson Holgate's case coupled together, and it is to be assumed that they would be issued in this country by an Insurance Broker (*see* p. 9 of Bailhache J.'s judgment in the Wilson Holgate & Co. case (1920) 2 K.B. where the broker is spoken of as issuing " his cover note or his certificate of insurance ") and in America by an Insurance Company. Defendants' so-called certificate of insurance has no resemblance to the certificate of insurance spoken of by the learned Judge at p. 7 and elsewhere.

How can it be said to be a " letter of guarantee ? " Under the contract the buyer is to be tendered a " policy of insurance and/or letter of " guarantee." " He is entitled to have a document of the very kind " which he has agreed to take, or at least one which does not differ from " it in any material respect," (per Bailhache J. at p. 9 in the Wilson, Holgate & Co. case, and cited by McCardie J. in his judgment in Diamond Alkali case at p. 456.) " A document other than a policy can only be " forced upon him if it is a document of the kind he has agreed to take. " He cannot be compelled to take a document which is something like " that which he has agreed to take." (ib.)

In our view this bare assertior by defendants that they hold policies is not even " something like " a letter of guarantee within the meaning of the contract. Of course a guarantee in the ordinary sense is a promise

in writing to answer for the debt of another, made to a person to whom that other already is, or is about to become, liable, and it must be signed by the guarantor or his authorized agent.

Mr. Lanitis for the defendants, in reply to the Court, submitted that Holgate would have been compelled to accept under the contract any letter signed by the person whoever he might be into whose hands the draft had come as holder for value which guaranteed that a policy of assurance on these goods existed.

With this we cannot agree. The holder for value might be a person or corporation of substance or of no financial strength whatever. In the case of his being a banker the possibility of difficulty arising in connection with the setting up of a lien has already been mentioned. Other possible difficulties have also been referred to. In our view " and/or " letter of guarantee " following the words " policy of insurance " in this contract means a document signed by a responsible insurance broker guaranteeing the shippers against loss in respect of the particular goods by undertaking to hold for their account a specified policy in the form recognized or usual in c.i.f. contracts and sufficiently setting out the terms of the insurance. Or possibly a letter signed by the underwriters undertaking to hold them covered and stating the material terms of the policy would be sufficient, though that could not strictly be described as a guarantee. It must be a document upon which the guarantors could be sued.

The defendants have failed to satisfy us that the document they offered instead of the policy they were instructed to offer, is a letter of guarantee within the contract.

We therefore hold that the defendants failed to make a proper tender both in the matter of time of tender and of documents to be tendered and that the plaintiffs suffered damage in consequence.

The defendants by their default deprived the plaintiffs of the remedy which would otherwise have been open to them by action at law on appeal from the arbitration award, inasmuch as it would have been open to the buyer, in the event of his being defeated on the point of the extra parcel, to raise the fatal objection of invalid tender.

The plaintiffs are entitled to be placed in the same position, by means of damages, as if the defendants had done what they ought to have done.

The question as to what the damages should be will be discussed later.

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The second of the two claims set up by the plaintiffs in this action may be summarized as follows:—

The plaintiffs maintained that they had suffered damage by reason of the defendants negligently or in breach of their duty to plaintiffs as their bankers or agents failing to communicate to them a proposal made by Holgate on the 2nd December through Baty to defendants' agents in Liverpool (Barclays) and to defendants' London branch under which he expressed his readiness to take up the documents at once upon certain conditions.

The defendants denied that it was their duty to submit the proposal, and maintained it was Baty's and his alone, as agent for plaintiffs, to do so; they submitted that the proposal was communicated to the plaintiffs when Holgate made it to their agent, Baty, and that it was vague and indefinite in its terms and varied and then revoked by Holgate, and that they never received any consideration for acting in the matter and never assumed any duty in connection with it as gratuitous agents or at all.

The plaintiffs reply and say alternatively that if the defendants were gratuitous agents they assumed a duty and took steps in part discharge thereof and were guilty of gross negligence in connection therewith.

The proposal in question was made by Holgate through Baty to the defendant's agents (Barclay's Bank) in Liverpool on the 2nd December, 1920, that is, three days after Holgate's refusal to have anything to do with the documents when they were brought to him on the 29th November by Barclays. It was made first verbally and secondly by letter (M. 1).

The ship had arrived on the 30th November, and obviously Holgate, who continued in close touch with Baty, had been thinking the matter over and had decided upon arbitration. (*See* A.A.P. 54 of 2nd December "drawees insist on arbitration," and the reference in M. 1 to plaintiffs' naming their arbitrator, and A.A.P. 55 of 3rd December, as to Holgates "claiming an arbitration.") By A.A.P. 58, on the 4th December, Baty to the defendants London Branch, Holgate withdraws from this position, and apparently desires to appear as the defendant in the arbitration and thus to make his refusal of the tender seem as categorical as possible, for Baty says, "we notice a clerical (*sic*) error was made in "the letter of yesterday, we said Messrs. Holgate claimed an arbitration, "this is not so, as a matter of fact Messrs. Holgate refused the tender "for the *Montcalm*, but this is a highly honourable firm, and if

" Mr. Rossides names his arbitrator, they will submit the case to the " arbitration and get the matter out of the way on the lines already " indicated."

What the concluding words " get the matter out of the way on the " lines already indicated " mean, is clear from M.1 referred to above. It is dated 2nd December, 1920, and from Baty to Barclay's Bank, Liverpool, and is headed:

" Foreign Department. Attention of the Manager."

. . . . . .

and runs as follows:—

" The writer confirms conversation with you to-day with regard to a " bill of lading for 1,200 tons of locust beans shipped by the steamer " *Montcalm* during which we told you that our clients Messrs. " Holgate and Sons, Ltd., have instructed us to tell you that they are " prepared to take up their documents on condition that Mr. Rossides " will name his arbitrator, and that you will give them an indemnity " guaranteeing to return to them any difference which may be due to " them on the subsequent arbitration award.

" We mentioned that we were sending an urgent cable to Mr. Rossides " to-day to this effect.

" We omitted to tell you but will place on record now that our friends " will only pay 90% of the amount due until the weighing and sampling " has been finished, and the account sales rendered; this is a condition " of the United General Brokers Association Contract, on which it was " sold and agreed upon."

In other words Holgate offered to take up the documents, *i.e.*, honour plaintiffs' draft and take immediate delivery, if Barclays would undertake to refund any moneys which might be allowed him off the contract price in a proposed arbitration between him and the plaintiffs.

Barclays immediately and on the same day, 2nd December, informed their principals, the defendants' London Branch, of this offer by sending them A.A.P. 54, which runs as follows:—

" We beg to inform you the above draft is still unpaid and we are " informed the drawees (*i.e.*, Holgates) are quite willing to take up the " documents to-morrow, provided they obtain a guarantee from us that " we will refund any portion of the amount which may be decided in a " proposed arbitration.

" They state that the goods have been sold subject to no other beans " being on the steamer, whereas 360 tons have been shipped in excess. " The drawees insist on arbitration, and the broker of the drawees is in

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" communication by urgent cable with Limassol insisting on the said " arbitration.

" We shall be glad to receive your instructions in the matter."

By way of P.S. the writers add:—

" We would further remark that if you decide to grant guarantee as " above, possibly your own guarantee to the drawees would meet the " case, as under the circumstances, we as a Branch are not empowered " to issue such a guarantee without sanction from our Head Office."

It is to be observed that Barclays refer to Baty as Holgate's broker in this letter to their principals, and indicate that the matter about which Baty is represented as being in urgent communication with defendants at Limassol is the proposed arbitration.

The defendants' London Branch replied to this letter promptly by sending Barclays, Liverpool, on the following day, 3rd December, A.A.P. 57, in which, after stating they have given it their best attention, they go on to say:—

" We do not feel disposed to give the guarantee requested by the " drawee, a guarantee which would in the ultimate entail for us full " responsibility for due fulfilment of the contract.

" We have already cabled our Limassol Branch in the matter and shall " doubtless receive their instructions very shortly.

" Meanwhile we would add for your information we have insured and " arranged for the warehousing of the parcel."

In this letter the defendants' London Branch clearly intimate to their agents (obviously with the intention that " the drawees' broker " should be so informed) (1) that they will not give the guarantee required themselves, but (2) that they have lost no time in cabling to their Limassol Branch about the guarantee and expect to learn from them very shortly what they are to do about it, and (3) that they regard the matter as urgent and important, and that the heavy cost of the warehousing they refer to must have been present to their minds.

The words " in the matter " immediately following the words " we " have cabled Limassol," and the sentence in which the question of giving a guarantee is discussed, obviously refer to the guarantee upon which everything turned.

On the same day, the 3rd December, Baty wrote the following letter to the defendants in London (A.A.P. 55) which is important enough to set out in extenso:—

" As agents of Mr. G. Th. Rossides, we sold a cargo of 1,200 tons of " beans to Messrs. W. Holgate & Sons, Ltd., but shippers put on a

" further 360 tons. According to the contract they have a right to " exceed the quantity by 5% but not 25%; in consequence Messrs. " Holgate have claimed an arbitration.

" We were instructed by Messrs. Holgate to see Messrs. Barclay's " Bank, Ltd., who presented the documents, and to say that if they " would give an indemnity to Messrs. Holgate to return any balance " of money due to them (if any) on the subsequent arbitration award, " buyers would take up the documents forthwith.

" We saw the Bank this morning and they told us they could not " move in the matter.

" Being anxious to save unnecessary expenses such as demurrage " and quay rent, etc., we wired you : ' *Montcalm* locust beans, as " shippers' agent anxious save unnecessary charges kindly wire a " decision indemnity Barclays, Liverpool, Witcomb.'

" You will distinctly understand that whoever loses will pay these " charges, and we are anxious to save either Mr. Rossides or Messrs. " Holgate, and hope you have been able to arrange the matter. Our " position is difficult, as we are very anxious to protect seller's interest, " but at the same time to do what is fair and right by Messrs. Holgate.

" Of course you will distinctly understand that before Messrs. Holgate " will take up the bills of lading, they must be satisfied that the arbitra- " tion will immediately take place, and an indemnity given, that any " money they pay in excess will be returned, and we thank you for your " reply, and trust you have taken the matter up with Limassol, so that " in the event of Mr. Rossides appointing an arbitrator we can get the " documents taken up, and suggest an urgent cable."

In this letter, it is to be observed, Baty describes himself as plaintiffs' agent. It is also to be noted that the burden of this letter is the same as that contained in the telegram set out in it " To save unnecessary " charges wire decision indemnity." He urges defendants to settle the matter with Limassol by urgent cable.

To the telegram concerning the indemnity just referred to, the defendants replied on the afternoon of the day of its receipt, the 3rd December, by the following telegram (A.A.P. 56A):—

" Yours to-day unable give indemnity without authority Limassol " Branch."

Also by the following letter (A.A.P. 56) of the same date which must be read in connection with it:—

" We were given to understand that drawees' brokers were already " in urgent cable communication with shippers and we have also our- " selves wired for instructions.

" We presume therefore that we shall shortly receive instructions " from our principals . . . . . "

This is a definite statement and representation made to the person who represented himself to be plaintiffs' agent to the effect that on the question of the indemnity defendants had cabled to Limassol and expected to receive instructions.

The defendants replied to Baty's letters A.A.P. 55 of 3rd December, and A.A.P. 58 of 4th December (in which there is a postscript to the effect " We have sent three urgent cables, the last told him he must " name an arbitrator before he could arrange payment and await his " reply,") by A.A.P. 59 of the 6th December, in which they tell him " We anticipate shortly receiving instructions from our Limassol Office, instructions which we hope will enable the matter to be quickly settled."

Though in effect defendants in London tell plaintiffs' agent, Baty, they cannot give the indemnity Holgate asks for without the authority of their Limassol Branch, who would of course be fully informed as to plaintiffs' financial position at the time, and though they clearly represent to him, and to their agents, Barclays, in Liverpool, who were in communication with him, that they have cabled to Limassol for instructions concerning the offer of indemnity, and invite him to hope that the matter will soon be adjusted on the basis of an indemnity, this proposal or offer of Holgates was not communicated by defendants.

This we find as a fact, and it is clear the first the plaintiffs heard anything about it was in a letter from Baty to plaintiffs dated 1st April, 1921, (A.A.P. 160) in which he says " Messrs. Holgate in the first place " offered to take up the goods under an indemnity." To this on the 15th April, 1921, plaintiffs sent a categorical reply by A.A.P. 148: " I have never received such a proposal from you or Messrs. Holgate, " directly or indirectly, but I had to store the beans."

In other words plaintiffs say that they would not have been foolish enough to incur the heavy expense of storing the beans if they had heard from any source that Holgate had expressed his readiness at this early stage to take delivery of them against an indemnity.

We would add that we are satisfied that the plaintiffs were not given any information by Baty about this proposal to take up the documents against a banker's indemnity. He confined his cables to plaintiffs

at the time he submitted the proposal to the defendants in London to the point that immediate arbitration was urgently necessary.

We would also add that we are satisfied beyond all reasonable doubt, as the result of careful consideration, that the letter J.W.B. 2 of the 7th December, 1920, alleged by Baty to have been sent by him to plaintiffs was never, as plaintiffs positively assert, received by them.

We would also point out that plaintiff's letter of 26th December, 1920, J.W.B. 3, is clearly written in reply to another letter from Baty A.A.P. 197, dated also 7th December, 1920, and not in reply to J.W.B. 2, about which we entertain grave suspicion. If J.W.B. 3 had been written in reply to J.W.B. 2, it would certainly have contained some reference to Holgate's proposal, a matter of supreme interest to the plaintiffs. As already indicated, we are entirely satisfied that the first the plaintiffs heard of the proposal was when they received Baty's letter A.A.P. 160 of 1st April, 1921, to which they replied by A.A.P. 148.

It is clear on the evidence, and we find as a fact, that at the time this proposal was made by Holgate, and at all material times thereafter so far as it is concerned, the defendants at Limassol had funds and security belonging to the plaintiffs in their hands available and amply sufficient to cover any indemnity Holgate could reasonably require in connection with taking up this contract and particularly the banker's indemnity he asked for through Baty.

We are satisfied that, had this proposal or offer been cabled to Limassol, as defendants in London informed plaintiffs' Liverpool agent had been done on or about the 3rd December, and been conveyed to plaintiffs by defendants' Limassol Branch, the plaintiffs would have accepted it with alacrity, and would have furnished a banker's guarantee acceptable to Holgate for, *inter alia*, the following reasons: (*a*) they would have been paid the draft (*b*) they would have been relieved from the heavy charges in connection with handling and warehousing from the date of acceptance, which might possibly have been as early as the 4th or 5th December (*c*) they were clearly under the impression that Holgate was in the wrong in rejecting the cargo and that they would succeed in the arbitration.

Into the reasons why defendants in London failed to communicate this offer to Limassol we need not inquire. It may however be observed that long after this, in September, 1922, in A.A.P. 147, the defendants in London write to their Limassol branch in the following terms:—

" On referring to the correspondence we find, that we cabled you on " the 2nd December, 1920, advising that the draft was unpaid owing

" to the shipment not being in accordance with the terms of the contract, " that we were re-presenting the draft and that in case of need we should " protect the goods: as bankers for collection of the draft this completed " our duties to you and your customer and it did not rest with us to " interfere in the realization of the goods represented by the documents " attached to the draft when the seller's agents here were according " to our information in direct communication by urgent cable with " Limassol on the subject."

The " direct communication by urgent cable on the subject " would appear to refer to the statement in Barclay's letter A.A.P. 54 set out and discussed above: " The drawees insist on arbitration, and the broker " of the drawees is in communication by urgent cable with Limassol " insisting on the arbitration."

The words " on the subject " in this context seem quite inapplicable to the question of giving an indemnity, or to anything outside the proposed arbitration.

In the first place, was there any legal obligation on the defendants in London to communicate this offer to the plaintiffs through their Limassol Branch ? Obviously if there were, they would have to forward it by cable, as the only means of communication appropriate to the circumstances. The matter was one in which things had to be done as quickly as possible.

The relationship of banker and customer existed between defendants and plaintiffs, and we have found that in relation to the draft on Holgate defendants occupied the position of holders for value. It was their duty to make a proper tender of documents at a certain time and in a certain way and to give notice of dishonour if they were not taken up. They made a tender which we have held to be invalid, and they gave notice of dishonour. What obligation in law was there on them as holders for value of a dishonoured draft to forward to plaintiffs, even though they were their customers, an offer of this description ?

It is true plaintiffs' broker, Baty, asked them to send an urgent cable to Limassol and obtain a definite answer as to the giving of indemnity Holgate required. In our view it was not defendants' duty, whatever their obligation other than legal to plaintiffs in the matter might be, in law, as bankers to plaintiffs, or as holders for value of plaintiffs' draft on Holgate, to forward this proposal to plaintiffs in Limassol. They had not received any consideration and it is doubtful whether they could claim any for forwarding it.

But it is an elementary principle of law that when a person undertakes gratuitously to do something for another person he must exercise in the

discharge of the duty he has assumed such skill as he actually possesses or such care and diligence as he would exercise in his own affairs. If he omits to do so he is responsible to the principal for the consequence. For mere non-performance of that which he has undertaken to do gratuitously he is not liable. In other words he is only liable for misfeasance.

Did the defendants in London undertake to communicate this proposal about the indemnity or otherwise to Limassol on plaintiffs' behalf ?

In our view they did. By their letter A.A.P. 56, their telegram A.A.P. 56A and their letter A.A.P. 59 to plaintiffs' agent or broker, Baty, and their letter A.A.P. 57 to Barclays, Liverpool, they make it clear that they have assumed an active part in connection with the communication of the proposal to the plaintiffs, particularly in so far as it concerns their indemnity.

In A.A.P. 56 on 3rd December they say: " We have also ourselves " wired for instructions," after referring to Baty's telegram of that date asking for an immediate decision *re* the indemnity to be sent to Barclays in Liverpool, and that they expect to receive instructions from their principals.

In A.A.P. 57, also written on the 3rd December, they inform Barclays they are not disposed to give the guarantee or indemnity and give their reasons, and then go on to say " We have already cabled our Limassol " Branch in the matter and shall doubtless receive their instructions " very shortly."

" In the matter " clearly refers to the acceptance or otherwise of the proposal particularly so far as it concerns the indemnity.

And then again in A.A.P. 59 they tell Baty they hope to see the matter quickly settled on instructions which they anticipate shortly to receive. This amounts to a distinct representation that, having put the proposal by cable before Limassol, they expect to receive instructions which will allow the draft to be taken up without delay on the lines suggested by Holgate.

A person who has acted or assumed to act on behalf of another person cannot be allowed to deny, or in other words is estopped from denying, in an action by such person, that the agency in fact existed, or that he acted on such person's behalf.

We are satisfied on the evidence before us that the defendants acted or assumed to act on behalf of the plaintiffs in connection with the

forwarding of this proposal, and that in so doing they were negligent in failing to exercise the care and diligence or skill which it is incumbent on a gratuitous agent to exercise. In other words they were guilty of gross negligence by reason whereof we find the plaintiffs have suffered damage. For this damage we find the defendants must be held responsible.

The fact that the proposal in question might be, as the defence submits, revocable and vague and uncertain in its terms, does not, in the particular circumstances of this case, appear to us to make any difference.

The defendants in London assumed the duty of communicating it, such as it was, by cable to the plaintiffs, and took certain steps in the matter representing themselves as having cabled to Limassol about it, and thus it would appear they induced plaintiffs agent or broker to believe it had been sent on, with the result that he did not think it necessary to cable about it himself, and that the plaintiffs were not informed of it at all. In consequence of this plaintiffs were deprived of the opportunity of arranging terms of settlement with Holgate whereby they would have saved at least a portion of the expenses incurred by them in the matter of warehousing and storing. As we have already indicated, it is not necessary to inquire why defendants did not forward the proposal.

It is possible the defendants in London overlooked the fact that when they cabled to Limassol they had not mentioned the proposed indemnity, or possibly, as Mr. Triantafyllides for the plaintiffs suggests, the defendants in London decided, upon reflection, that it would be more to their advantage not to communicate the proposal to plaintiffs, and, instead of forwarding it, to take upon themselves the selling of the rejected cargo on commission. This however is little more than matter for speculation which cannot be fruitfully pursued.

The fact remains they did not forward it, after clearly representing they had done so.

On the question of the amount of damages which should be awarded to plaintiffs in respect of defendants' failure to make a proper presentation of documents, the damages must be dealt with under two heads.

Firstly, as to the difference between the contract price and the market or current price at or about the time of the breach.

By s. 50 of the Sale of Goods Act it is provided:—

"1. Where the buyer wrongfully neglects or refuses to accept and "pay for the goods, the seller may maintain an action against him "for damages for non-acceptance.

"2. the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"3. Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

In this case the time fixed for acceptance was on the docking of the ship at Liverpool, *i.e.*, the 30th November. Had defendants discharged their obligation they would have tendered on that day. They made an incomplete tender the day before, and the buyer intimated his intention not to accept. They did not however treat this intimation as an operative anticipatory breach, and, presumably recognizing the tender was out of time and without a document of insurance, they re-tendered on the 3rd December.

The date however of the breach of contract by Holgate must, for the purpose of measuring the damages in this connection, be taken to be the 30th November, the time expressly appointed for tender and delivery.

It then became incumbent on the plaintiffs, as sellers, to act reasonably by way of minimizing the loss caused by the buyer's refusal to accept and pay for the goods.

The rule is that a seller, in the case of a breach by the buyer, is under no obligation to postpone a re-sale in the hope of obtaining better prices; if however he should do so, and obtain better prices than at the date of the breach, the buyer is not entitled to the benefit: on the other hand, the buyer is not subjected to a greater loss if the course of the market is downward since the breach (*Jemal v. Moola Dawood & Co.* (1916) I. A.C., 175 P.C.).

Mr. Lanitis, for the defendants maintains that it was clear the plaintiffs were unduly sanguine and held on in a spirit of speculation for a rise in prices, and there appears to be considerable force in this submission. *See* A.A.P. 19 in reply to A.A.P. 17; A.A.P. 20, A.A.P. 21 and A.A.P. 35.

But could the plaintiffs have sold on or about the 30th November, or within a very few days of that date, if they had used all reasonable endeavour to do so ?

In our view the answer is in the negative.

As has already been indicated, the market for carobs in Liverpool, and also, it would appear, elsewhere, was a very narrow one, and easily glutted at the times material to this case.

Shipments had been coming forward in unexpected volume, and prices were falling shortly before this cargo arrived; *see* Baty's letters A.A.P. 202 and A.A.P. 211. The so-called market consisted practically of Holgate. The correspondence indicates that he had overbought at this time. He was the only buyer of large parcels; the others dealt in small quantities only. (*See* postscripts to Baty's letter A.A.P. 168).

Having broken his contract, and with the prospect of a possibly successful arbitration within a few days before his eyes, he certainly would not want to buy. If the arbitrator decided he was entitled to reject the cargo on the ground of the shipment of the extra parcel, he could rely on being able to buy it afterwards at his own figure, as indeed he did. On the other hand if they held he was only entitled to an allowance off the price, any such allowance would be based upon the price prevailing at the time of the award, and hence it would obviously not be to his advantage to do anything to help the market, quite the contrary.

With Holgate out of the way, who was there ready to buy this large consignment of 1,200 tons suddenly and unexpectedly thrown on the market ? It must have been known that an even larger shipment by the plaintiffs, per *SS. Siptah*, was due shortly to arrive, and that it would be offered in the open market.

Buyers ready and willing to take the *Montcalm* cargo were obviously not to be found: to sell at all clearly required time and negotiation.

We at satisfied that it would not have been possible for the plaintiffs to have sold these 1,200 tons within less than about fourteen days of their arrival, and even then we do not believe, on the evidence before us, that they would have been able to obtain more than between £8 10*s*. and £9 10*s*. a ton, or on an average more than £9 5*s*. a ton for the whole amount.

With Holgate out of the way, they would have to do much hunting after possible buyers, and be content to sell in small parcels. The defendants had clearly been making anxious inquiries for offers, but nothing apparently was forthcoming in this connection until the 11th December, when the defendants in Limassol were informed by cable from their Liverpool Branch (A.A.P. 17) that " buyers indicate about 190*s*. c.i.f. Liverpool."

Though they also recommended an immediate sale, and though it was clearly the duty of plaintiffs to sell then if they could (*see* A.A.P. 19)

it by no means follows that this "indicated" price could have been obtained, or that they would have been able to sell then or even during the next two or three days at a slightly lower price. For it has to be borne in mind that the first firm offer (A.A.P. 21) of any kind was not received until the 18th December for 1,000 tons out of the 1,200 at £9 a ton "buyers paying charges after date of contract," *i.e.*, leaving the burden of handling and warehousing expenses up to that date to the plaintiffs to discharge.

It is also not without significance that by this time the award of the arbitrators had been announced, and Holgates, having succeeded in establishing his claim to reject the cargo, was apparently once more in the market, as Baty cabled by A.A.P. 35 on the same date as A.A.P. 21, "We can offer £9 5*s*. c.i.f. terms *Montcalm*," *i.e.*, £2 a ton less than the contract price, plaintiffs paying all charges incurred up to that date.

In all the circumstances we feel fully justified in holding, as we have done, that the plaintiffs could not have found buyers for this cargo in less than about fourteen days from the date of the arrival of the ship, and that they would not have been able to obtain a higher average price than £9 5*s*. a ton for the whole amount.

As the contract price was £11 5*s*. a ton the plaintiffs' loss was £2 a ton, or £2,400. This the defendants must make good.

Secondly, as to the expenses which plaintiffs incurred in consequence of the rejection of the cargo in connection with handling and discharging and warehousing it.

These expenses represent another item of loss directly and naturally resulting from the breach, and one which Holgate well knew would inevitably fall on the plaintiffs if he refused to accept the cargo. (*Vide* his proposal through Baty to take up the draft on a guarantee so as to save warehousing expenses, and A.A.P. 55).

As we have already indicated, it was out of the question to sell the cargo *ex* ship then and there on its arrival. To find buyers was a matter of time and trouble. The ship had to be cleared promptly, and the discharge of the cargo began on the 1st December. The carobs were in bulk, and had to be put into sacks. They could not be allowed to remain on the quay more than a very short time, and the "Penalty Quay Rent" charged for this was heavy. Labour was scarce and extremely dear at the time.

The statement of charges on the 1,560 tons *ex Montcalm* (*i.e.*, the 1,200 tons of cargo plus the 360 tons extra parcel) attached to

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A.A.P. 153 includes the following items which, in our view, are chargeable in respect of the period of fourteen days from the docking of the ship within which we have found it would have been reasonably possible for the plaintiffs to sell the cargo of 1,200 tons.

	£	s.	d.
Penalty Quay Rent	245	0	0
Cartage to Warehouse	480	16	9
Storing, delivering and filling bags	1,389	7	1
Dock and Town dues	155	14	10
Sacks ties, etc	54	11	8
Fire insurance, supervising	40	0	0
Porterage	784	4	11
	£3,149	16	3

	£
The proportion of the above total chargeable to the 1,200 tons is approximately...	2,420
To this must be added:	
Rent @ 8d. a ton per week 6 to 13 Dec.	40
Watching fees	15
Making a total of	£2,475

	£
To this must also be added:	
Baty's commission in respect of sale to Holgate per contract of the cargo	135
Arbitration fees	40
Cables, etc.	30
Total	£205

Adding this amount of £205 and £2,475, expenses of handling and storing, etc. and £2,400, the difference between the contract price and the price which we have held might have been obtained within the fourteen days following the breach, together, the total is £5,080.

We therefore find that the plaintiffs are entitled to recover from the defendants this sum as damages in respect of the defendants' failure to make a proper tender of documents.

Having regard to this finding, it is not necessary to deal at much length with the damages which, in our view, are payable by defendants to the plaintiffs in respect of their failure to forward Holgates' proposal to take up the draft and accept delivery on conditions. They are covered by the damages we have already awarded.

As under the terms of the proposal or offer, M.1, the arbitrators were to fix the amount of the allowance to be made to Holgate on account of the shipment of the extra parcel, and as the current price of carobs on the day the arbitrators sat was about £2 to £2 5*s*. a ton below the contract price, it seems clear to us that they would have fixed the amount of such allowance at the difference between the contract and the current price, and we therefore find the plaintiffs did not suffer damage, as far as the price of the carobs is concerned, through the failure of the defendants to forward the proposal.

We find however that the plaintiffs would not have been compelled to pay the whole of the heavy expenses mentioned above in connection with handling and storing had the defendants cabled the proposal to Limassol as they led plaintiffs' agent, Baty, to believe they had done on the 3rd December.

The plaintiffs having ample funds in defendants' hands to cover the guarantee required, could have cabled their acceptance and have delivered the documents covering the 1,200 tons to Holgate on the 6th December, if not before. We are satisfied Holgate did not withdraw his proposal before that date and that it was still open for plaintiffs to accept at the time.

A.A.P. 151 shows the discharge of the 1,560 tons *ex Montcalm* started on the 1st December, and finished on the 8th December. We think therefore it may be safely assumed that the 1,200 tons sold to Holgate could not have been stored before the end of the 7th December.

Inasmuch as the 1st December must have been fully occupied with discharging *ex* ship on to the quay side, little or no storing can have taken place on that day.

We have therefore not appropriated to that day any portion of the handling and storing expenses applicable to the period from the 1st to the 7th December, which we estimate at £2,420, and have divided them equally among the remaining five working days, the 5th December being a Sunday, at the rate of £484 a day. We think that the plaintiffs are entitled to be allowed the expenses incurred and paid by them in respect of the 6th and 7th December, which in our view, they would have been saved if defendants had notified them by cable of the proposal on or about the 3rd or 4th December, that is ... £968

To this must be added Rent 6th to 13th December ...	40
Watching fees, say	10
Making a total	£1,018

We find therefore that the plaintiffs would be entitled to recover this amount, £1,018 from the defendants as damages in respect of their failure to forward the proposal.

The appeal is allowed, and we give judgment in favour of the plaintiffs (appellants) for £5,080, with interest thereon at the rate of 9% per annum from the date of judgment, with costs in this Court and in the Court below, including costs and expenses of and incidental to the taking of evidence on Commission in England.

In our view the fee which should be allowed to the advocate who discharged the burden of presenting the plaintiffs' case should be fixed at £20 in respect of each day's hearing of this appeal, the Court holding that it is a case of special importance or difficulty within Schedule "C" (Part I.) of the Court Costs Rules, 1911. We also allow a fee of £8 to Mr. Costa Lanitis, as second advocate for plaintiffs, in respect of each day's hearing.

We take this opportunity of expressing our appreciation of the assistance rendered to the Court in this case by Mr. Triantafyllides, and Mr. C. Lanitis for the plaintiffs, and Mr. Nicola Lanitis and Mr. Chrysafinis for the defendants, and congratulate them upon the ability and thoroughness with which they discharged their duty as advocates to their respective clients.

It only remains for us to say that having regard to the nature of this case we have thought it necessary to set out our judgment at unusual length.