DICKINSON, ACTING C.J. & THOMAS, ACTING P.J. 1927. April 21.

[DICKINSON, ACTING C.J. AND THOMAS, ACTING P.J.]

THE FRENCH CIGARETTE PAPER Co., LTD. OF LONDON

v.

MARSELLOS AND SAVIDES.

C.I.F. CONTRACT—ENGLISH LAW GOVERNS—CONTRACTUAL RELATIONS—CYPRUS COURTS OF JUSTICE ORDER, 1882, CLAUSE 25—DELAY IN DELIVERY—WAIVER—ESTOPPEL—ACCEPTANCE OF PART OF THE GOODS—RIGHT OF CANCELLATION—NOTICE MUST BE IN TIME—" STOP EXECUTION," ORDER—" DAMAGES " OR " PRICE OF GOODS "—GOODS, NO VALUE IN OPEN MARKET—PARTNERSHIP—CHANGE IN THE PARTNERS OF A FIRM—LIABILITY OF A NEW PARTNER—HOLDING OUT—ADMISSIBILITY OF EVIDENCE—STATEMENTS BY COUNSEL, EFFECT OF—POINTS OF LAW RAISED ON APPEAL, NOT TAKEN IN LOWER COURT—RULES OF COURT, 1886, ORDER VIII., RULE 3.

HELD: Where under a c.i.f. contract the buyer and seller are resident, one in Cyprus and the other abroad, their relations under the contract are governed by English law.

FURTHER: Where a buyer accepts delivery of less than the whole of the goods contracted for, he waives his right to refuse to accept the balance of the goods if delivered within the time stipulated.

FURTHER: Where part of a continued correspondence between a foreign seller and his agent in Cyprus is relied on by a Cypriot buyer to prove his defence, the whole correspondence between seller and agent is admissible to explain the transaction.

Where A. and B. are partners in a firm and undertake a liability to X., and then A. sells his interest in the firm to C. and C. to B. publish the change in the partnership, X. may sue A., B. and C. on the original liability, or may elect to sue any one of them unless he has expressly released A. from his liability, when he can only sue the new partners C. and B.

Where goods sold under a c.i.f. contract are of no possible use to any one but the buyer, the measure of damages in an action for breach brought by the seller against the buyer will be the full value of the goods.

APPEAL of the defendants from the judgment of a District Court, dated 25th June, 1926.

Triantafyllides for appellants (defendants).

Clerides for respondents (plaintiffs).

The facts of the case appear sufficiently from the judgment of the Court.

DICKINSON, ACTING C.J. & THOMAS, ACTING P.J.

THE FRENCH CIGARETTE PAPER CO., LTD. OF LONDON v. MARSELLOS & SAVIDES.

Judgment: This is an appeal by defendants from the judgment of a District Court whereby defendants were ordered to pay £289 odd together with interest and costs, being the price of the balance of certain cigarette packet cartons ordered by defendants from plaintiffs in August, 1919.

Plaintiffs are a firm of cigarette paper manufacturers carrying on business in London.

Defendants are the partners of the firm Marsellos and Savides, cigarette manufacturers of Larnaca.

The firm who gave the order to plaintiffs through a firm of commission agents, Loizides and Co. of Famagusta and Larnaca (the plaintiffs' agents in Cyprus) was called " Zannettos and Savides."

The partner Zannettos on May, 1922, sold his interest in the business to Marsellos, and the firm was then styled " Marsellos and Savides."

Since the action was commenced Marsellos has died and his heirs have been joined as defendants.

When Zannettos sold his interest in the cigarette factory to Marsellos, it was agreed, *inter alia*, that Marsellos took over all Zannettos' share of the liabilities of the old partnership.

On August 29th, 1919, one Vovides, a clerk in the employ of Zannettos and Savides, who generally signed letters on behalf of his firm, gave a written order to plaintiffs, to one Contopoulos, the Larnaca representative of Loizides and Co., for half a million cartons (used for the lids of cigarette packets) printed with various designs and bearing the name of the firm " Zannettos and Savides."

The plaintiffs in reply to a cable from Contopoulos, cabled that they would ship the goods in about two months, at the same time quoting the price, 21*s*. a 1,000.

Defendants received these terms from Contopoulos and accepted them in a letter dated September 1st, 1919, agreeing that delivery should be made in two consignments the first " quickest possible," and the second " one month later."

A small delay was caused by plaintiffs sending (at defendants' request) a specimen carton, to see that the Greek type was correct.

There is no evidence as to there being any correction to be made in the specimen sent, as the defendants were anxious to get these cartons (*vide* terms of their acceptance) we do not think the small delay caused would have been more than one month at the outside.

Nevertheless the plaintiffs did not commence shipping these cartons till the 17th November, 1920, over 14 months after the " firm " acceptance was in their hands.

Defendants in the meantime (according to the evidence) had to purchase cartons from Egypt in small quantities and at very enhanced prices.

In our opinion defendants would have been entitled to rescind the contract on the grounds of this delay considerably earlier than the date on which the first consignment was despatched to them.

They did not do so however, but contented themselves with making many verbal expostulations to Contopoulos, and later by writing two letters to Loizides and Co., one on July 7th, 1920, and the second on August 7th, 1920, both threatening to cancel the contract because of the delay in delivering the cartons, and to sue the plaintiffs for various expenses they had been put to in consequence. Contopoulos soothed the defendants and after that they waited until the arrival of the first consignment of 70,000 cartons at Larnaca in January, 1921, and they paid for and took delivery of them.

It is in evidence that defendants' factory was working 5,000 okes of tobacco a month when the order was given. This would necessitate the use of about 200,000 cartons a month and thus the order only covered a supply sufficient to last for less than three months.

The partner Zannettos was absent for considerable parts of the years 1919, 1920 and 1921, and during that period the work of the factory at Larnaca was carried on by Mrs. Zannettos as his representative.

It is stated that sometimes after September 1st, 1919, Mrs. Zannettos signed a " formal order " on plaintiffs, but this order is not produced, and we think it was introduced into the case merely with a view to showing that Vovides had only a " limited " authority to sign for his firm. The evidence shows that Mrs. Zannettos used to request Vovides to sign for the firm, and as a fact all the correspondence produced in the case was signed by Vovides, although on many occasions these letters were of the highest importance and unquestionably binding on the firm.

The partner Savides lives in Nicosia, and only visited the factory at Larnaca once or twice a month.

From the whole of the evidence we have no doubt that Vovides had full authority to bind the defendants' firm, and that defendants are bound by all the letters or documents written by him that are in evidence.

In April, 1921, a second consignment of 70,000 cartons was shipped by plaintiffs; these arrived at Larnaca in June, 1921, and defendants paid for and took delivery of this consignment.

It is urged by defendants that plaintiffs have broken the contract by not sending the whole order in two consignments only. We find that defendants are estopped from raising this defence, as they knowingly accepted less than the whole order in these first two consignments, and must, therefore, be held to have waived their rights. What *defendants in effect, did, when they accepted the two* 70,000 consignments, was that they agreed to vary the contract by allowing the whole order to be shipped in more than two consignments.

On the 18th June, 1921, defendants wrote to Loizides and Co., a letter cancelling the balance of the order on the grounds of delay, and asking Loizides to cable plaintiffs to stop the further execution of the order. This Loizides did, and he received a reply cable from plaintiffs saying "Zannettos' order awaiting shipment." This can only mean that plaintiffs had finished printing the whole order of 500,000 cartons.

Whether this statement was substantially true or not we have no means of ascertaining from the evidence, but we do know that it was not accurate as some 69,000 cartons were never printed at all.

Loizides must have informed defendants of the contents of this cable from plaintiffs, because that alone could account for the short note Vovides sent to Contopoulos undated, but from the contents written within a day or two of plaintiffs' cable. By this note Vovides says:—

"Dear Metro,

To the firm of the boxes write that as it has executed the whole order not to ship it till we shall inform him."

Vovides signed this in his Christian name only, but put the firm stamp "P. P. Zannettos and Co," above his name. It is submitted that the note was written in consequence of Loizides' statement that he had informed Vovides that all the order was ready for shipment.

It is asserted by plaintiffs that this note withdrew the order of cancellation of the 18th June, 1921, defendants, however, assert that this was a tentative offer to negotiate a new contract between the parties which, as it was not accepted by plaintiffs or by Loizides on plaintiffs' behalf, became a mere policitation, and is in no way binding on the defendants.

The offer contained in this note was never accepted, nor acted on by plaintiffs, and, in the absence of any definite withdrawal of the cancellation order of the 18th June, 1921, we cannot see how this note affects the position of the parties.

The contract had been definitely cancelled before and we think the submission of the defendants that was a mere policitation for a new agreement, which until acceptance was in no way binding on the firm of the defendants, is correct.

Now it is a fact that before the cable was sent by Loizides to plaintiffs at defendants' request cancelling the balance of the order the plaintiffs had shipped a third consignment of 70,000 cartons which arrived in Cyprus sometime in late June or July, 1921 (the exact date is not in evidence).

Defendants refused to take delivery of this consignment and the goods remained in the Customs. It seems strange that no evidence of the date of this definite act of the defendants had been adduced. If we are to hold that defendants have broken the contract of September 1st, 1919, this refusal is the breach. The amount of the draft which accompanied the bill of lading for this third consignment forms the first part of plaintiffs' claim.

It is difficult to believe that plaintiffs had really printed some 300,000 cartons by the date of their cable, for if they had, they would certainly have shipped a larger third consignment than 70,000 in the middle of May, and in the absence of some more convincing testimony than their cable to their agents, we do not feel justified in believing that this was even an approximately true statement.

Beyond confirming the two cables in June, the plaintiffs never acknowledged the receipt of the tentative offer containined in Vovides undated note, and apparently they adopted the view that nothing had happened to the original contract until defendants refused to take delivery of the fourth consignment of 217,000 which was shipped in December, 1921, and arrived in January, 1922.

Between June, 1921, and January, 1922, Loizides and Co. state they tried to get defendants to take up the third consignment, but there is no written evidence which we think can be held binding on the defendants, that defendants ever consented to do so at any time during that period.

Contopoulos says Vovides on several occasions agreed to do so, which Vovides denies "*in toto*," and in fact goes on to say that he and Contopoulos never spoke about it at all.

We think it hardly likely that some conversation on this matter did not take place between these two men who were on intimate and " Christian name " terms, but by the Cyprus Courts of Justice Order, 1882, Clause 196, we are precluded from finding that the fact that, defendants did agree to take this third consignment, is established in the absence of any real corroboration. We may say here that we cannot hold that letters which passed between Loizides and Co. and plaintiffs amount to any appreciable corroboration. We shall deal later with the admissibility of these letters.

After the refusal of defendants to take delivery of the fourth consignment in January, 1922, the goods remained in the Customs and nothing material happened until the change of the partnership set out above.

This occurred in May, 1922. Mr. Marsellos almost immediately after buying Dr. Zannettos' interest in the factory fell ill of a mortal ailment, and for practical purposes he never exercised any control in the conduct of the business. He placed his son, P. Marsellos, a young man of 24 or 25, in the factory as his representative.

Loizides apparently was satisfied that Mr. Marsellos was a person of substance, but there is nothing on record that the plaintiffs recognized the change in the partnership. In fact almost the latest document in the case, an account issued by plaintiffs in respect of the outstanding draft bills, was made out in the name of Zannettos and Savides, dated August, 1922.

Shortly after P. Marsellos entered the factory as his father's representative on June 11th, 1922, Loizides wrote to Marsellos and Savides a letter as follows:—

" Messrs. Marsellos and Savides, Larnaca.

Our friends, Messrs. the French Cigarette Paper Co., inform us that your two drafts of £76 14*s.* 6*cp.* and £210 17*s.* 1*cp.* still remain unpaid and that the merchandise remain in transit so beg you to inform us regarding this, when approximately will the drafts in question be settled, so that we may know and inform the above gentlemen accordingly."

It is to be noted that in this letter Loizides does not refer to " cartons " but to the merchandise of the French Cigarette Paper Co. Ltd. It is suggested that P. Marsellos took this word " merchandise " as being " cigarette paper " from the name of the firm, and that he was under that

impression when he caused the following letter to be written by Vovides to Loizides:—

> " With reference to your letter of the 11th instant we inform you that the cigarette papers in question which are to be found in transit, after an understanding with the former company, we shall take delivery of them from the Customs in parts (case by case) upon payment of their value."

Loizides says that he did not communicate the offer in this letter to plaintiffs.

Vovides admits he knew there was no " paper " on order from plaintiffs, and, of course, it is equally clear that Loizides and Co. knew it also.

We can understand Mr. P. Marsellos making such a mistake as he was then a young man, whose father had just broken down in health, and he was probably very unhappy in consequence, and further he had no experience in the business, but it certainly strikes us as extraordinary that Vovides should not have corrected his mistake. But still more extraordinary it is that Loizides should not have done so at once, for this letter was opening up a way of insuring to him his commission, and it was of the highest importance that nothing at all dubious should be left outstanding.

We think that as the offer of this letter was not acted upon by the plaintiffs, at any event before the letter amending it, dated July 6th, 1922, was written and delivered to Loizides, that the defendants were entitled to withdraw or vary their offer. The letter of July 6th, 1922, runs as follows:—

> " Messrs. P. J. Loizides and Co., Larnaca.
>
> We beg to inform you that after we examined well our correspondence, we find out that the goods you mention are not cigarette papers but cigarette boxes, which you know well from the old firm have not arrived in time. Part of this order has been taken delivery exceptionally, and we do not hold ourselves responsible for the rest.
>
> After our verbal understanding with our Mr. Sofocles and as we look forward to future business between us, and for your sake and as a favour, we may take delivery of them at the price of the paper, you are requested to give us quotations so that we should know.
>
> We beg to remain,
>
> (*Signed.*) P. P. Marsellos and Savides."

It is admitted by Loizides and Co. that between the 24th June, 1922, and the 6th July, 1922, nothing can be said to have happened which would cause the defendants to withdraw their offer, and the correcting letter, it seems to us, must be regarded as withdrawing the letter of June 24th, 1922.

Having arrived at that decision, the position is as if the letter, dated June 24th, 1922, had never been written. We have, therefore, disposed of the two offers made by plaintiffs in writing after the letter cancelling the order in June, 1921. It only remained to refer to an offer made by defendants in their letter of July 6th, 1922, to take cartons at the price of paper. This was definitely refused. It is to be noted that the cartons are cardboard and not paper.

The defendants were still refusing to pay for the third and fourth consignments and the plaintiffs sued them to recover the price of these goods on the 23rd May, 1923.

Plaintiffs offered to allow defendants a reduction of 10 per cent. off the fourth consignment, but this offer was not accepted. Plaintiffs further admitted that some 69,000 cartons were never printed and, according to plaintiffs' letter, this was because the "stone" was not set, and it would have been an expensive matter to reset it for such a small number of cartons, and, therefore, they (plaintiffs) thought fit to cancel that part of the order.

Many interesting points of law have been discussed in this appeal, but we do not think it will be necessary to deal with all of them.

The advocate for defendants made a statement towards the end of this appeal that the Marsellos' family are Greek subjects, and consequently that the formation of the District Court which tried the action was wrong.

We find, however, that this question of jurisdiction should have been raised at the first sitting of the District Court hearing the action and not later. Further we are of opinion that there must be some evidence to this effect before we could reverse the judgment of the District Court on these grounds. It has been held that on certain occasions the statements of counsel are binding on the party they represent, but it has never been averred that such statements are binding on the other party or the Court. We hold, therefore, that there is no evidence on which we can find that the District Court as constituted had no jurisdiction.

Plaintiffs submitted that English law would not necessarily apply and tried to introduce argument based on the definition in the Mejellé of the word "havale" or transfer

of debt. We are of opinion that when two parties enter into a c.i.f. contract for the sale of goods they may be presumed to have intended that their contractual relations under that contract shall be determined by English law. The Ottoman Commercial Code knows nothing about a " c.i.f. contract."

Another interesting point argued by defendants or rather by the Marsellos' heirs, is that as plaintiffs did not themselves recognize the firm Marsellos and Savides, Marsellos cannot be held liable.

When Marsellos bought out Zannettos, Marsellos and Savides issued a circular advertising the fact, and we find this such a holding out that if there is any liability attaching to defendants' firm at all that Marsellos' estate is liable. It was sought to prove that Marsellos had no knowledge of this outstanding contract with its possible liability when he purchased Zannettos' share in the business, but we hold that whether he may have a claim against Zannettos or not on this alleged misrepresentation, he cannot escape from the liability towards outside business people due to his holding out. We say, therefore, that the defendants are rightly cited.

It is submitted by plaintiffs that because defendants accepted the first and second consignments under the contract after great delay, they were obliged to accept the whole of the contracted goods and had no power to cancel the contract in spite of the fact that they were shipped many months afterwards (particularly so in the case of the fourth consignment).

It seems to us that it would be inequitable to force a buyer to accept perhaps years later a balance of goods sold under a contract, because he had accepted something less than the whole of the contracted goods at an earlier date.

We are of opinion that defendants were entitled to cancel the balance of the contract in June, 1921, but as the third consignment had already been shipped, and the plaintiffs could not recall it when the notice of cancellation was received by cable, we hold that defendants' notice of cancellation was not in time in respect of that consignment.

As to the fourth consignment which was shipped in December, 1921, we hold that defendants' notice of cancellation was in time. We have already pointed out we are not satisfied that the bulk of those cartons were finished when plaintiffs cabled " Zannettos' order awaiting shipment." Plaintiffs should have proved that they had substantially completed the order at that moment, and this they failed to do. We think, therefore, plaintiffs cannot recover the price of the fourth consignment.

As to the admissibility of the correspondence defendants gave notice that they would call for this correspondence at the trial. At the hearing a bundle of letters between Loizides and plaintiffs were produced by plaintiffs. Some of these were tendered in evidence by plaintiffs, and objected to by defendants. Court allowed them to be put in after plaintiffs had sworn that the contents of such letters had been communicated to defendants. There is evidence that defendants had seen some of this correspondence, and this fact is relied upon by counsel for the defence as an explanation as to how letter " S " came to be written. That is defendants required, in order to establish their own case, one of the letters in the bundle of documents which they claimed to be inadmissible.

Following the principle laid down in *Sayer* v. *Kitchem*, 1 Esp. 210 (still relied upon by Taylor and Phipson) and having in view the fact that these documents form a series which cannot be looked at separately, we hold that these documents were rightly admitted as an essential explanation of the rest of the correspondence between the parties.

It must not be forgotten that the defendants did write letters to Loizides and Co., and that these letters were all written in Greek, which required some elucidation before the contents could be understood by the plaintiffs in England, and it was important for the Court to know whether Loizides forwarded the contents to plaintiffs or not. How could this be proved until the correspondence between Loizides and plaintiffs was before the Court?

Greek letters would scarcely be understood in plaintiffs' office, so that Loizides could not come in the witness box and say " I sent on Zannettos and Savides' (or Marsellos and Savides') letter of a particular date to plaintiffs," because the Court knows that nothing could be more calculated to cause muddle than to leave an English firm to grapple with letters in modern Greek.

Such letters as are complained about must be examined by the Court, but no Court would hold that they were binding on a party who had never seen them.

As to the facts that plaintiffs always wrote of the defendants' firm as Zannettos and Savides, and the submission of the defendants' counsel that this showed that plaintiffs had elected to regard Zannettos as their debtor, and that this relieved Marsellos from any liability, we think that the plaintiffs did not, in the absence of any evidence to the contrary, object to the change in the partnership, but that, as in accordance with English law, both the old partners and the new partners are liable for

debts incurred before the change in a partnership, unless the old partners are specifically released, they intended to retain their rights against Zannettos, if necessary, and not to release him definitely from liability under the contract.

As Zannettos is absent from Cyprus and the new partners are solvent people the plaintiffs contented themselves with suing Marsellos and Savides.

The point which was raised by the defendants that the claim in this action should have been for damages and not the full price of goods sold might be a difficulty. The authorities cited in support of this contention were based upon the Sale of Goods Act, 1893, Section 49 (2), which is not in force here.

In this case as the goods are of no possible use to any one but the defendants and never were, it would be impossible to get a price quoted for them in open market and, therefore, the only basis of damages in this case must be the full value of the goods.

We do not think any hardship occurs to the defendants thereby, and, if necessary, we would give leave to make any necessary amendment of the claim.

The appellants contended before this Court that there had been no tender of documents. Although this point was not raised in the Court below, appellants say they are entitled to raise it now. They allege that since at issues they denied the contract generally the burden was placed upon the plaintiffs of proving all facts entitling them to recover. The settlement of issues takes the place of pleadings under English practice. Order 8, Rule 3 of the Rules of Court, 1886, requires the parties to state at issues the material facts on which they base their claim or defence. The tendency in this country is for counsel to present their cases at issues entirely contrary to the spirit of the Rules of Court; that is they endeavour to conceal their case, instead of each party making a fair disclosure of his case.

The reason suggested for this most unfortunate practice is that if a party fairly discloses his case at issues, evidence will be manufactured by the opposite party. The practice of not fully stating at issues the material facts supporting the claim or defence is a constant source of embarrassment to the Court which hears the case. The defendants' general denial of the contract at issues is contrary to the elementary principle of pleading which requires a defendant to make specific denials in defence to the claim. The defendants when asked at issues to give particulars of the breach of contract, alleged to have

been committed by plaintiffs, said they were not obliged to do so, but alleged that the agreement was not executed within the stipulated time.

There is no doubt that this Court may allow parties to raise points not taken in the Court below. The authorities show that this is a question of discretion. Such an important question as non-tender of documents, which, if proved, would entirely defeat plaintiffs' claim, should most certainly have been raised at issues by a specific allegation.

No questions were put in cross-examination to plaintiffs' witnesses touching this point: had this question been raised the plaintiffs could have called evidence to establish the fact of tender. We cannot do better than cite the observations of Lord Herschell in The Tasmania (15, Appeal Cases, p. 225) which have been approved by the House of Lords.

> " A point not taken at the trial and presented for the first time in the Court of Appeal ought to be most zealously scrutinised. A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as would have been the case if the controversy had arisen at the trial, and next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been offered them when in the witness box."

Both the conditions laid down by Lord Herschell to entitle an appellant to raise new points in appeal are absent in the present case. It would be most unfair to decide a point against a party who had been given no opportunity of meeting the allegation. For these reasons we decline to allow the appellants to raise on appeal a totally new defence which they ought to have raised specifically at issues.

We find that plaintiffs are entitled to recover the value of the third consignment, but not that of the fourth consignment, from defendants.

We allow appeal to that extent and we enter judgment for plaintiffs for £76 14*s.* 6*cp.* with interest at 9 per cent. from 18th May, 1923.

We order the plaintiffs to pay to defendants the costs of this appeal, and defendants to pay to plaintiffs one-half of their costs in the Court below.

We allow the advocates engaged here fees on the highest scale.