10, 1971

IN THE PRIVY COUNCIL No. 6 of 1969

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N :

1. CHAN CHENG KUM
2. HUA SIANG STEAMSHIP COMPANY LIMITED — Appellants (Defendants)

- and -

1. WAH TAT BANK LIMITED
2. OVERSEA-CHINESE BANKING CORPORATION LIMITED — Respondents (Plaintiffs")

CASE FOR THE APPELLANTS

A 1. This is an appeal by leave of the Court of Appeal of the Federal Court of Malaysia from an order dated 7th July 1967. RECORD P.398

By the said Order of the Court of Appeal (Wee Chong Jin C.J., Tan Ah Tah F.J. and Chua J.)

B allowed the appeal of the Respondents from the Judgment of Mr. Justice Kulasekaram dated 30th December 1965, gave judgment in favour of the Respondents against the Defendants Hua Siang Steamship Company Limited for damages to be

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assessed and ordered that the issue whether or not the Defendant Chan Cheng Kum was liable to the Respondents in conversion be remitted for a re-trial.

2. The principal issues which arise upon the Appeal are as follows: (i) whether certain Mate's Receipts are, by virtue of a local trade custom, to be treated as documents of title; (ii) whether the said Mate's Receipts constituted an attornment to the Respondents by the person issuing the same; and (iii) whether the Appellants are estopped by the Mate's Receipts from denying that the Respondents were entitled to delivery of the goods.

3. The circumstances which gave rise to the Respondents' claim against the Appellants and to the Order of the Court of Appeal and to this Appeal are hereinafter in this Case set out.

4. The first-named Respondents (hereinafter called "Wah Tat") carry on business in Sarawak as bankers. The second-named Respondents (hereinafter called "OCB") are also bankers and were at all material times the correspondents of Wah Tat in Singapore. The Appellant Chan Cheng Kum was at all material times the owner of the motor vessels "Hua Heng" and "Hua Li" plying between

ports in Singapore and Sarawak. The Second Defendants Hua Siang Steamship Company Limited (hereinafter called "the Carriers") were at all material times in possession and control of the two vessels by crews employed and paid by them, and claimed to be demise charterers of the two vessels. RECORD

5. For some years before the events in question, it had been the practice of Tiang Seng Chan (Singapore) Limited, a company with its head office in Singapore and a branch office in Sibu, to purchase goods in Sibu for export to Singapore. Tiang Seng Chan (Singapore) Limited are hereinafter called "the Shippers". Most, although not all, of the goods so exported were carried on board vessels operated by the Carriers.

6. Wah Tat were the principal bankers in Sibu of the Shippers. By virtue of an oral agreement between Wah Tat and the Shippers, Wah Tat agreed to finance the purchase of goods by the Shippers for exportation to Singapore by advancing the funds necessary to pay the sellers. Pursuant to this agreement, it was the practice of Wah Tat when purchases were made to honour drafts drawn by the Shippers in favour of the Sellers, and to PP.629 63

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debit the Shippers' account with the amount of the relevant advances i.e. the amount of the drafts. Upon the shipment of the goods, the Shippers would tender documents akin to drafts, drawn on themselves, to Wah Tat together with (inter alia) Mate's Receipts in respect of the goods so shipped, whereupon Wah Tat would credit the Shippers' account with the amount of those documents, which are hereinafter called "drafts". The Mate's Receipts would be remitted to OCB in Singapore, but OCB would not take delivery unless

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the Shippers' drafts were not paid, in which case the understanding between Wah Tat and the Shippers was that Wah Tat through OCB could take and hold the goods until payment was effected.

7. The present dispute concerns four consignments of rubber and pepper carried in the "Hua Heng" and "Hua Li" on four voyages from Sibu to Singapore, during May and June 1961. The total value of the rubber, as alleged by the Respondents, was M $623,186.66. The actual value was quantified by the Registrar at $551,876.88.

Part II
PP.406-426

8. The said goods were shipped under a total of twenty Mate's Receipts (hereinafter called "the Mate's Receipts"). Each of the Mate's Receipts:-

(1) Was headed with the words "Mate's Receipt" and "Not Negotiable";

(2) Was headed with the name "Hua Siang Steamship Company" or "Hua Siang Steamship Company Limited";

(3) Contained the following words:

"Received from Tiang Seng Chan (S) Ltd." Part II PP 406-426

(4) Contained <u>either</u> the following words

"Consigned to Overseas Chinese Bank order/notify Tiang Seng Chan Limited"

<u>or</u> one of the following expressions

Mate's Receipt No. "	Consigned to	
03782	Oversea Chinese Bank Order/Notify Tiang Seng Chan (S) Ltd.	Part II P 406
03781	O-C-B/Tiang Seng Chan (S) Ltd.	P 408
03786	Oversea Chinese Bank/Tiang Seng Chan (S) Ltd.	P 409
03795	Oversea Chinese Bank/Tiang Seng Chan (S) Ltd.	P 411
03787	O-C-Bk/O/N Tiang Seng Chan (S) Ltd.	P 413
03887	Oversea Chinese Bank Order/Notify Tiang Seng Chan (S) Ltd.	P 416
2607	Oversea Chinese Bank Order/Notify Tiang Seng Chan (S) Ltd. "	P 424.

(5) Was signed by the Chief Officer of the vessel in question.

None of the Mate's Receipts contained any mention of Wah Tat.

9. Upon signature by the Chief Officer, the Mate's Receipts were retained by the Shippers until, in accordance with the aforesaid arrangements, they were delivered to Wah Tat in Sibu, together with drafts in favour of OCB. Wah Tat then sent on the Mate s Receipts to OCB, together with the drafts. Part II PP 427-451

10. Shortly after the arrival of the vessel at Singapore, the Carriers on the demand of the Shippers released all the goods covered by the Mate's Receipts, without requiring production or

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surrender of the Mate's Receipts. The Carriers took Letters of Indemnity from the Shippers, and three of the Shippers' directors.

11. The Shippers failed to honour their obligations under the drafts, and the goods being no longer available for delivery by the Carriers Wah Tat and OCB instituted the present proceedings on 30th September 1961, claiming against both Appellants delivery up of the goods, or the value thereof, and damages for breach of contract and/or duty and/or for wrongful detention and/or conversion. The Appellants thereupon joined the Shippers and the three directors of the Shippers as Third Parties.

Part I PP.1,2 & 3

Part I PP.25-27

12. In the course of the hearing at first instance before Mr. Justice Kulasekaram the issues of law referred to in paragraph 2 hereof were argued; evidence was adduced on the facts and also on the relationship between the two Appellants. Evidence was also led by both sides on the alleged local or trade custom, upon which the Respondents relied in support of their contention that the Mate's Receipts in question were documents of title.

13. In the course of the hearing at first instance the Third Party proceedings were

Part I PP.34 & 357 L.30

settled.

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14. On 30th December 1965 Mr. Justice Kulasekaram gave judgment dismissing the Respondents' claims with costs. The learned judge held that a local trade custom such as was alleged by the Respondents could not have the effect of converting the Mate's Receipts into documents of title. As to attornment, he held that the real test was whether the Respondents were justified in "resting satisfied" that the Carriers were holding the goods for them, and that the Respondents could not succeed without proving a clear understanding between the Respondents and the Carriers that the Carriers would be holding the goods for them. In the absence of any evidence of such an understanding, the plea of attornment failed. The learned Judge accordingly held that the transfer of the Receipts to the Respondents did not place the Carriers under an obligation to refuse delivery to the persons who owned and shipped the goods, and that accordingly the Carriers committed no wrongful act in delivering to the Shippers. In view of his conclusion on the main issues, the learned judge did not deal with the question which of the two Appellants would have been

Part I
PP 359-364

PP.361-362

PP.362-363

P.364
L.37

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liable if the claim had succeeded.

P.364
P. 366

15. The Respondents appealed to the Federal Court of Appeal. The appeal was allowed. The

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LL 31 to 39

Court of Appeal held that the Respondents were entitled to judgment against the Carriers for damages to be assessed, and ordered a re-trial of the issue whether or not the first Appellant was also liable for damages for wrongful conversion.

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16. The judgment of the Court of Appeal was

[1967] 2 Lloyds Rep. 437

delivered by Wee Chong Jin C.J. In summary the reasons for his judgment were as follows :

(1) There was no reason why a local trade

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custom or usage should not create a document of

[1967] 2 Lloyds Rep. at page 443

title in respect of the goods, and the example of a bill of lading indicated otherwise. As to the proof of custom, the learned Chief Justice found that the custom was proved, at least as far as the trade between Sarawak ports and Singapore was concerned; and that the rare instances where bills of lading were issued in

P.444-5

that trade were not such as to disenable him from coming to the conclusion that Mate's

ibid PP.444-5

Receipts were universally adopted by all those in that trade. As to the words "Not Negotiable" in the Mate's Receipts, the learned Chief Justice

found that everyone connected with the trade had ignored them. RECORD

(2) As to estoppel, the learned Chief Justice accepted the Respondents' contention that where a carrier who received goods from A for delivery to B issues a document in circumstances in which the bailee known that in the ordinary course of business the document is likely to be delivered by A to B and relied upon by B and the document contains a statement which amounts to a representation, then the bailee must be taken to have made the representation to B. The learned Chief Justice found that the Appellants knew that the Mate's Receipts would be delivered by the Shippers to OCB and held that by virtue of custom the statement that the goods were "consigned to B" was a representation to B that the carrier held the goods to his order, rather than merely a record of a contract between carriers and Shippers whereunder the Carriers had accepted the Shippers' instructions to carry to B. The learned Chief Justice rejected the Appellant's contention that there was no representation that the Carriers held for B at all, let alone that they held for B irrevocably. On these grounds the

P.386 & 387

(1967) Lloyds Rep. P.446

P.386 LI 30 to 37
(1967) Lloyds Reports P.446

P.387 LL 12 to 22
(1967) Lloyds Rep P.446

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learned Chief Justice accepted the argument based on estoppel.

(3) As to attornment, the learned Chief Justice held that where a shipper transfers a Mate's Receipt stating that goods have been consigned to a named consignee, with the intention of transferring to him the special or general property in the goods so as to appropriate them unconditionally to the contract between the shipper and the consignee, then (a) the shipper has lost his right to revoke or disturb the appropriation, and (b) if the shipper or carrier thereafter deals with the goods inconsistently with the rights of the consignee this is a wrongful conversion of the goods as against the consignee. The learned Chief Justice cited in support Bryans v. Nix (1839) 4 M.L.W. 774, 150 T.R. 1634; and Evans v. Nichol (1841) 3 M.L.G. 614, 133 E.R. 1286.

(1967) Lloyds Rep P.447

17. From the judgment of the Court of Appeal the Appellants now appeal. If the claim against the Carriers based upon custom, attornment or estoppel is unsound it would follow that any claim against the Appellant Chan Cheng Kum, even if not defeated for other reasons, must likewise fail.

A B C D E F

A 18. The nature of the Respondents' Case. RECORD

The Appellants respectfully draw attention at the outset to the fact that the case put forward by the Respondents during the hearings in the Court below was formulated solely in terms
B of conversion and detinue. This narrows the area of contention in two important respects.

19. In the first place, although the Respondents included in their Writ of Summons a claim for damages for breach of contract, they did not P.2.LL 30 & 31
C persist in this claim at the trial. The Appellants respectfully submit that a claim in contract would in any event have no prospect of success. The Respondents could not sue directly upon the contracts or carriage evidenced by the
D Mate's Receipts, since these contracts were made with the Shippers and it was not alleged that the Shippers contracted as agent for the Respondents. The Respondents could not sue as assignee, since no assignment of the contract was alleged or
E proved, nor was any notice of assignment given to the Carriers or Appellant before the Shippers varied the contract of carriage (or the instructions given thereunder) by instructing the Carriers to deliver the goods to the
F Shippers. Equally, the Respondents could not

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claim by virtue of a statutory assignment under the Bills of Lading Act, 1855, since (a) the Mate's Receipts were not bills of lading for the purposes of that Act, and (b) the Respondents (who claim at best to be only pledgees of the goods) were not persons "to whom the property in the goods passed upon or by reason of the consignment or indorsement" of the document: Sewell v. Burdick (1883) 10 Q.B.D. 363; Bank of China v. Brusgaard [1956] 22 M.L.J. 125 at 127-8.

20. Secondly, the Respondents' claim is purely for relief at common law - i.e. for delivery up of the goods or for damages. They make no claim for equitable relief, such as an injunction to prevent the Appellants from parting with the goods, or for the appointment of a receiver, or for an account.

p. 6 LL 42 & 43

21. It follows that in order to succeed in their common-law claim in tort the Respondents must prove either that their connection with the goods was such as to enable them to treat the delivery of the goods to the Shippers as a wrongful conversion, or that the failure to deliver them to OCB at Singapore was a detinue. For this purpose the Respondents must prove either that they had a proprietary interest in

A the goods at the relevant time, or that they had a right in rem to immediate possession of the goods. RECORD

22. The Respondents did not pursue at the trial their pleaded claim to be the owners of the B goods. But they claimed to be the "pledgees and/or persons entitled to the immediate possession of the said consignments". It is axiomatic that there can be no pledge in law without delivery of possession, either actual C or constructive: Official Assignee of Madras v. Mercantile Bank of India [1935] A.C. 53; 58 Dublin City Distillery v. Doherty [1914] A.C. 823, 843, 852. The Respondents never had actual possession of the goods. Accordingly, their D claim cannot succeed unless either (a) they obtained constructive possession by virtue of the transfer of the Mate's Receipts or (b) there was a constructive delivery to the Respondents by an attornment on the part of the Appellants, E or (c) the Carriers are estopped by having issued the Mate's Receipt from denying the Respondents' right to possession of the goods. P.5 L.37

23. The Transfer of the Mate's Receipts

In delivering the goods as they did, the F Carriers acted in compliance with the demand of

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the Shippers so to do. The Shippers at all material times owned the goods. In defending these proceedings the Appellants did so on the right and title of the Shippers and with their authority. Accordingly, before considering the argument based on the transfer of the Mate's Receipts, it is necessary to point out the tenuous connection between the Respondents and the goods and documents.

(a) OCB were not the owners of the goods. They were not named in the Mate's Receipts as Shippers. Although they were named as consignees, they took no part as principal or agent in the conclusion of the contracts of carriage, nor did they know of them at the time of shipment. They made no advance against any of the documents or the goods, nor did they give any consideration for their alleged rights. They had no contract with the Shippers, the owners of the goods. As against them, the Shippers had the better title, and even if the documents had been bills of lading the Shippers in any interpleader contest with OCB as to the right to possession of the goods would have prevailed. OCB have, of course, suffered no damage from the alleged tort.

(b) Wah Tat were not the owners of the goods.

A Although they financed the purchase, and subsequently obtained delivery of the Mate's Receipts, they had no contract with the Carriers. Wah Tat did not claim to be indorsees of the Mate's Receipts and indeed on the face of it B could not derive any rights in law from transfer thereof, in view of the words "not negotiable". In these circumstances, even if the documents had been bills of lading it is submitted that their transfer would have given to Wah Tat no C right exercisable in their own name against the Carriers. If Wah Tat had ever been given possession of the goods by way of pledge they would have retained their consequent rights even though they might later have for some limited D purpose parted with the custody of the goods to some bailee. Here they never got possession at all. They had, of course, their rights against the Shippers. They may have had an equitable pledge entitling them in an appropriate case to E equitable relief even against a third party. They no doubt justifiably expected OCB to exercise for the benefit of Wah Tat such rights as the Mate's Receipts might confer on OCB. But they themselves had, as against the Carriers, no F immediate right to possession of the goods.

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24. The Appellants respectfully submit that even if the Mate's Receipts could be treated as documents of title in the same manner as bills of lading, OCB have entirely failed to establish any sufficient interest in the goods or the documents to enable them to maintain a claim for conversion or detinue. The relationship between Wah Tat and the goods may on one view be less remote, since they at least agreed with the Shippers to advance money, and did in fact advance money, on the terms that they would subsequently obtain delivery of the Mate's Receipts. It is, however, clear that with the single exception of bills of lading the transfer of a document representing goods does not at common law change the possession of goods, unless the bailee or carrier attorns to the transferee. Hence, a loan upon the security of such documents is not more than a pledge of the documents themselves, and is not equivalent to a pledge of the ggoods; Official Assignee of Madras v. Mercantile Bank of India, supra at p. 59; Hathesing v. Laing (1873) L.R. 17 Eq. 92, 105. Thus, for example, a railway receipt or delivery order is not a document of title, but is no more than a mere token of authority to receive

possession of the goods: Official Assignee of Madras v Mercantile Bank of India, supra. Similarly, the Mate's Receipts in the present case were at most: (a) a record of the receipt of goods, (b) a memorandum of the contract between the Carriers and the Shippers, and (c) an intimation that the Shippers had instructed the Carriers to deliver the goods to the named consignees. Documents of this nature are no more efficacious than delivery orders to transfer possession by delivery, or to pass the property in the goods: Nippon Yusen Kaisha v. Ramjiban Serowgee /1938/ A.C. 429 at page 445, per Lord Wright.

25. Prima facie, therefore, Wah Tat were no more than persons in whose favour the owners of the goods had agreed to create a pledge, who would have obtained a pledge if and when the goods had been delivered into their possession. It is well established that an equitable or contractual interest of this nature does not found an action in conversion: see Nippon Yusen Kaisha v. Ramjiban Serowgee, supra, at pages 444-5 and 449 per Lord Wright. The position of Wah Tat in the present case is similar to that of Ramjiban Serowgee in the Nippon Case who also

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were in possession of Mate's Receipts issued by a carrier acknowledging receipt from another company, which company was the owner of the goods. The claim by Ramjiban Serowgee founded upon delivery to third parties failed. The present case is stronger, since the goods were delivered to the named Shippers and the party to be notified, named as such in the Mate's Receipts.

26. In these circumstances, the claim based upon the transfer of the Mate's Receipts must fail unless Wah Tat can, as a first step, make good the argument that by virtue of a trade custom such documents are treated as documents of title in the same way as if they were bills of lading. In relation to this argument it is necessary to consider the nature of the custom alleged; the evidence adduced in support of the custom; and the effect of the express words "not negotiable" on the face of the Mate's Receipt.

P.5 LL 15 to 36;

27. The custom is pleaded as follows :

> "It is a custom of merchants and ships dealing and plying between Sarawak Ports and Singapore that goods are accepted for shipment without the issue of a bill of lading but against mate's receipt only which is regarded as a document of title and goods are only delivered against its production "....

> ...."Alternatively it was at all material times a custom of merchants and ships dealing and plying between, Sarawak Ports and Singapore that Mate's Receipts were treated as documents of title and goods only delivered against their production to or to the order of the consignee named in such Mate's Receipts unless (in exceptional cases) bills oflading were requested and issued, in which event it was a custom as aforesaid only to issue such bills of lading against production and surrender of the corresponding Mate's Receipts".

28. As to the nature of the custom, it may be observed that the Respondents have not alleged or sought to prove a general custom of merchants such as was established in Lickbarrow v. Mason (1794) 5 T.R. 683 in relation to bills of lading. The documents issued by the Appellants in the present case differed in no significant respect from Mate's Receipts issued in large numbers throughout the world, as a preliminary to the issue of bills of lading, and it has never been alleged, and still less proved, in any English or Commonwealth reported case, that by general custom of merchants such documents are recognised as documents of title.

29. The more limited plea advanced by the Respondents relates only to "merchants and ships dealing and plying between Sarawak Ports and Singapore". The Appellants respectfully submit that a so-called custom of this nature, even if

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proved, is not capable of creating a document of title. The Appellants recognise that the usage of a particular market (which may be a local market) is capable of binding those who enter into contracts on that market. It may be that as between the parties to contracts of carriage the custom of the sea trade between Sarawak and Singapore is competent to bind the parties by annexing special terms to the contract. Such a custom may be justifiable on the ground that those who elect to deal in a local market must be taken to consent to the local customs, but even if this were so (which the Appellants do not concede) it is not the present case, since the alleged custom purports to confer benefits on persons who were not parties to the contracts. In effect, the custom purports to create rights in rem good against the world which pass with delivery of the document. Such a custom might be general (as in Lickbarrow v. Mason supra) if it were shown that wherever documents of the particular type were negotiated they were recognised as valid to transfer possession: for such a custom would be part of the universal law merchant, which forms part of the law of which the Courts take judicial notice. But there

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are objections both of principle and of practical convenience in allowing the same effect to a local trade custom. It is plain that no local or trade custom could in law give to any transferee of the document the right to sue on the contract evidenced thereby in his own name - a right which even the holder of a bill of lading did not have at common law, and which could not be created even by an express term in the document itself: Crouch v. Credit Foncier (1873) L.R. 8 Q.B. 374, 386; Thompson v. Dominie (1845) 4 M. & W. 403. A local custom cannot have this effect: see Hathesing v. Laing supra, where there was uncontradicted evidence of custom in terms similar to those of paragraphs 8A of the Further Amended Statement of Claim. Similarly, absurb results would follow upon the creation of a document of title by local custom; for if the custom be limited (say) to merchants carrying on business in Singapore, it would follow that if two mate's receipts were issued in identical form in respect of two consignments in the same vessel, one being negotiated in Singapore and one in London, the first would be a document of title and the second would not. The Appellants respectfully submit that in these circumstances

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the learned trial Judge was right in holding that a local trade custom cannot have the effect for which the Respondents contend.

30. Similar considerations arise from the nature of a purely trade custom. If the Mate's Receipts are documents of title by custom they must create a right in rem. Such a right must by definition be valid against the whole world; and cannot be valid merely against the members of a particular trade. It is therefore scarcely surprising that there is no reported English case which decides that a document of title can be treated by trade custom (neither Ex p. Watkins L.R. 5 Ch. App. 520, nor Merchant Banking v. Phoenix (1866) 5 Ch. D. 205 were concerned with the question whether the documents in question were documents of title).

31. The next issue is whether, if a custom such as the Respondents allege is capable of being enforced, the Respondents have in fact proved that a relevant custom exists. In the first place the Appellants respectfully observe that

Part I P.5

the custom is alleged in the Further Further Amended Statement of Claim in very imprecise terms. It is stated to be "a custom of merchants and ships plying between Sarawak and Singapore".

(No custom was alleged in respect of trade in the opposite direction, and the evidence showed clearly that none exists. This in itself demonstrates the difficulties inherent in the Respondent's plea of custom). A mere custom of ships plying between these ports cannot, in the Appellants' submission have any bearing on the status of a document of title - although it might have the effect of annexing terms to the contract of carriage, binding on those who are parties to such contract. But the custom will not avail the Respondents unless it also affects those who deal in, or advance money upon the Mate' Receipts: and this is no doubt the purpose of the reference to "merchants". But the merchants in question are not identified, either in the Pleadings or in the evidence. They are not identified in terms of geographical areas: so that if the custom is local the locality is undefined. It is not stated whether the custom applies to all merchants; or only to those in a particular trade: and if the latter, the trade is not identified (in this connection the Appellants respectfully draw attention to the fact that the Respondents are bankers, not merchants: so that even if the custom were proved in the terms alleged, the

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Respondents would derive no benefit from it). The Appellants submit that in view of this lack of precision the custom, even as alleged, does not possess the certainty required to make it enforceable in law. A

32. Quite apart from the terms in which the alleged custom is formulated, the Appellants respectfully submit that the evidence falls far short of the requisite degree of proof. As regards the claim of Wah Tat there appears to be no evidence that any person (other than Wah Tat) who was not a named consignee or an indorsee, has successfully claimed to be entitled to delivery of the goods. Moreover, it is not enough for the Respondents to show that delivery is usually made to the named consignee (which is explicable simply because shippers do not normally revoke their instructions), or that banks often lend money against such documents (for even without a custom the lender would obtain a good equitable pledge and banks frequently lend against purely equitable security such as a deposit of share certificates). There is a distinction between what is usually done and what is binding as a matter of custom. Nor does the opinion of witnesses prove the custom. B C D E F

What matters is whether there was proof of a uniform course of action consistent only with the existence of a binding custom. In order to establish the custom the Respondents would have to prove that the recognition of "non-negotiable" Mate's Receipts as effective documents of title is universal (which cannot be the case, in view of the use of bills of lading in an appreciable proportion of cases); that named consignees had claimed on the carrier when goods were delivered to others in accordance with the shipper's order; that in such cases after claims by named consignees or their transferees, the claim was paid because of the custom, or was settled on terms consistent with the custom and inconsistent with the general law: Halsbury Laws of England 3rd Edition, Volume 11, page 200; Bettany v. Eastern Morning and Hull News Co. (1900) 16 T.L.R. 401; Stag Line v. Board of Trade (1950) 83 Ll. L. Rep 356, 359-60. No, or no sufficient, evidence of this nature was adduced and evidence to the contrary was given. No witness had heard of a named consignee (not being also the shipper himself) under a Mate's Receipt whether marked "not negotiable" or otherwise claiming against a carrier who had delivered in accordance with the

PP.229/229; 234; 236; 214; 241.L3; 261 L36; 299 Ll; 306 L 21 70 LL 30 to 40/F

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instructions of his bailor, the shipper.

33. Finally, there is the important question whether the alleged custom can apply to the present case, in face of the words "not negotiable" in the Mate's Receipts. No allegation is made in the Pleadings that the custom extends to documents so marked, nor was it alleged or proved that the words "not negotiable" have a special meaning by the custom of the trade; and indeed the weight of the evidence is that a document so marked would not be regarded as transferring rights to a person to whom the document was transferred: see for example the evidence of R. Walker, M.W. Jarvis and Goh Leh; Tan Chia Kee; Kuek Ho Yao, Cheah Wee Hock.

P.P.163 L 35/F 169 LL: P.129 L 30 to L 38; 133 L 24/270LL 9 to 16; 282 L 33; 299L1

34. Furthermore, even if it were proved that the alleged custom applied to Mate's Receipts marked "not negotiable", the custom would not be valid in law. In the first place, it would contradict the express terms of the document: see for the general principle, Leopold Walford v. Les Affreteuls Reunis Societe Anonyme (1918) 2 K.B. 498, 506-7; also Hugh Mack & Co. v. Burns & Laird Lines (1944) 77 LL.L.Rep. 377, 383, where it was assumed that "not negotiable" in a shipowner's consignment note and receipt

prevented the document from being (in the words of Andrews C.J.) "a negotiable instrument, the indorsement and delivery of which may affect the property in the goods shipped". Secondly a custom cannot be binding unless it is reasonable. It is elementary knowledge, throughout the commercial world, that sea carriers issue (i) Mate's Receipts and (ii) bills of ladings and that until the mate's receipt has been exchanged for a negotiable bill of lading no real document of title will be in existence. The present Mate's Receipts are in a form entirely to be expected in relation to such document, from which bills of lading are normally made out. If it was desired to issue documents of title it would have been simple to describe them as bills of lading. Common sense strongly suggests that the plain purpose of boldly marking the documents "Mate's Receipts" and "Not Negotiable" was to prevent them from being effective to pass title. This is reinforced by the fact that both between Singapore and Sarawak, and between Sarawak and Singapore, these mate's receipts are from time to time issued to shippers who take the trouble of exchanging them for bills of lading. While it is accepted that in a substantial majority of

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cases shippers do not trouble to do this, all carriers on this sea route can and do issue bills of lading if asked. In the Court of Appeal it was accepted on behalf of the Respondents that bills of lading would be issued before the hearing of this case in roughly 5 - 10 per cent of shipments from Sarawak to Singapore and in roughly 20 - 25 per cent of shipments from Singapore to Sarawak. Bills of lading would always be issued for non-local cargo intended for a later destination. It is also noteworthy that all the witnesses employed the word "negotiable" in the sense in which it is commonly used in the context of shipping documents, i.e. as referring to the capacity of the shipper to whom it was issued or any subsequent holder to transfer rights in the goods themselves by transferring the document. Indeed, one of the only other two carriers operating this sea route marked only the copies (not the originals) of their Mate's Receipts "not negotiable", their manager explaining in evidence (Record pp. 163, 168) that "we wished to make to clear that the duplicate is not good for delivery". It cannot, in the Appellants' submission, be reasonable that where a shipowner marks a document with

(E.G.P.P.86 & 87,90, 103
133 L 26:/139 L 44
140 L2: 222/223
262 L 14;277/L42 to 278 L9
285 L2; 298 & 299
304,306 L21)

words meaning, and understood to mean, that it is not to be a document of title, it is nevertheless to be treated by custom as if the words were deleted. Furthermore, it would entail that a "not negotiable" Mate's Receipt would be a document of title, even though "not negotiable" copies of bills of lading, which are invariably issued as part of a set of bills of lading (see e.g. the evidence of H. Twist, W.J.V. Cook and M.W. Jarvis) are not a highly unreasonable result. RECORD PP. 90 L 17 94 L 13; 168 L 10 to 17

35. The Appellants accordingly submit that the custom alleged by the Respondents is neither established on the evidence or valid in law. But even upon the contrary view, there is one further aspect of the matter which is in the Appellants' submission sufficient to defeat the claim of Wah Tat: namely that Wah Tat was not named either as shippers or consignees in the Mate's Receipts. It is true that OCB were nominated by Wah Tat to take delivery of the cargo. This might have been sufficient to give Wah Tat a right of claim in contract as agents for OCB; although the Appellants would if necessary submit that Wah Tat had no such right, and in any event no such claim is advanced. But the present case is founded on tort, not upon contract, and to such

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a claim the doctrines of the unnamed and the undisclosed principal do not apply. Furthermore, it was not suggested by any of the witnesses that the alleged custom extended so far as to enable the Mate's Receipts to be treated as documents of title in the hands of persons who were not named in them at all.

36. For these various reasons, the Appellants respectfully submit that the Mate's Receipts were not documents of title, and had no more efficacy in transferring possession of title by delivery than (say) delivery orders. Accordingly any claim founded on the transfer of the Receipts by the Shippers is unsound.

37. Attornment

A contract of bailment imposes upon the bailee an obligation to deliver up the goods in accordance with the instructions of the bailor. The bailee is both entitled and bound to act on these instructions, and if he does so it is normally no conversion even as against the true owner of the goods, at all events if he does not purport by his acts to affect the title to the goods (Hollins v. Fowler (1874) L.R. 7 H.L. 757, at pp. 766-7); still less, as here, where the bailor is the true owner, and the Plaintiff

A has no legal title at all. There is nothing in law or in logic to say that instructions once given by the bailor are irrevocable. He can alter them at will, and the bailee must comply. Thus if at the time when the bailment was created the bailor B instructed the bailee to deliver to X, and thereafter changed his mind and ordered the bailee to deliver to him (the bailor), the bailee would be bound to act accordingly, and could not by doing so commit any breach of C contract or conversion as against X, with whom he had no contract and upon whose instructions he was not bound to act. This is so particularly in a case such as the present where X, does not take any precautions, such as the issuance of a D "stock notice" to warn the bailee that he does not consent to a change in the instructions. The fact that the bailee acknowledged in writing his receipt of the original instructions, even if the acknowledgment has come into the hands E of X, will make no difference, for the writing is merely a record of the instructions of the bailor which the bailee is contractually bound to obey: cf. Cowasjee v. Thompson (1845) 5 Moore 165; 13 E.R. 454, where delivery of the F goods to the shipper (see ibid page 169) was

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held no conversion as against the holder of the mate's receipts; and also Hathesing v. Laing supra. Indeed, in no case has a mere holder of a mate's receipt been preferred to a shipper with title, where the shipper had changed his orders to the carrier. A B

38. The Respondents must therefore seek to show that on the particular facts of this case the Shippers lost the right to change their instructions, and that the carriers came under a new obligation to the Respondents to treat the Shippers' original instructions as irrevocable. Such an alteration must necessarily take the form of a tri-partite agreement; to which the Shippers, the Appellants and the Respondents were all parties. The necessity for an agreement between the bailee and the third party is recognised by several authorities, including: Dublin City Distillery v. Doherty, supra, at pages 847, 852, 862-3; Farina v. Horne (1846) 16 M & W. 119, 153, E.R. 1124; Williams v. Everett 14 East 582, 597, 104 E.R. 725, 731; Laurie v. Morewood v. Dudin & Sons [1926] 2 KB. 223, 237; Pollock & Wright on Possession, p.73. An agreement of this nature must involve (a) a promise by the bailee to the third party to hold the goods at his disposition, C D E F

A the promise being either express or in the form RECORD of an act which is consistent only with attornment, and (b) communication of the promise to, and acceptance by, the third party. The Appellants respectfully submit that neither of these
B requirements is satisfied in the present case.

39. As to the first requirement, it is clear that the mere delivery to the Respondents of a document instructing the Appellants to hold to the order of the Respondents would not be
C sufficient: M'Ewan v. Smith (1849) 2 H.L. 309, 9 E.R. 1109. Nor does the act of issuing the Mate's Receipts constitute a promise by the Appellants to hold the goods as bailee for the Respondents. The only words which might be
D relied upon to produce this result are "consigned to". These did not impart a promise at all, but were merely a record that the goods had been consigned by the shippers to OCB: viz. they were merely an acknowledgment of the receipt
E from the Shippers of certain instructions as to delivery. Henderson v. Williams /1624/ 2 Q.B.521, 532. Moreover, any promise which may have been made was made to the Shippers, and did not operate to change the character in which the
F goods were held: see Farina v. Horne supra.

Indeed the wording of the Mate's Receipt indicates that the goods had not yet been delivered to the Respondents: cf. Dublin City Distillery v. Doherty, supra. at pp. 862-3. Such a promise, made to the Shippers, could not be transferred to the Respondents by a mere delivery of the documents, whether or not accompanied by an intention on the part of the Shippers to effect such a transfer. For even in the stronger case of a bill of lading, the Courts adhered to the common law rule that an assignee cannot sue in his own name (Thompson v. Dominy (1845) 14 M & W. 403, 153 E.R. 532, and the preamble of the Bills of Lading Act, 1855); and it is only by virtue of the Statute that the consignee is enabled to sue. This must be so more than ever in a case such as the present, where the documents are marked "not negotiable".

40. Furthermore, whatever the status of the Mate's Receipts vis-a-vis OCB they cannot in the Appellants' submission be construed as a promise to hold the goods on behalf of Wah Tat, for the documents do not mention Wah Tat, and there is no case in which a promise to deliver to A has ever been regarded as an attornment to B.

41. Similarly, the Appellants respectfully

submit that the second requirement - viz. acceptance by the Respondents - is also absent. OCB had no interest in the goods or in the transaction; their function was solely to act as instructed by Wah Tat, and there is no evidence that they would have acted differently even if they had not been named in the Mate's Receipts. This being so, there is no conduct on the part of OCB which could be construed as an acceptance of the Appellants' promise (if such it was) or of any communication of such acceptance to the Appellants. Likewise, no conduct of Wah Tat could be said to amount to a communicated acceptance.

42. The judgment of the Court of Appeal on the issue of attornment was founded to a substantial extent on two decisions: Bryans v. Nix (1839) 4 M & W. 774; 150 E.R. 1634 and Evans v. Nichol (1841) 11 LJCP6; 3 M & G. 613; 133 E.R. 1286. The Appellants respectfully submit that neither of these cases assist the Respondents. As to Bryans v. Nix, the Appellants submit that it is distinguishable: Tempany shipped two consignments of oats to Dublin on board barges numbered 604 and 54, obtaining receipts signed by the boatman. Tempany remitted receipts to the Plaintiffs, together with a draft which the Plaintiffs paid.

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After Tempany had sent the receipts to the Plaintiff, he instructed his brother in Dublin to deliver the oats to the defendants' agent. The loading of boat no.604 was complete when the receipts were forwarded to the Plaintiffs; that of boat no.54 was not. The Defendants' agent obtained delivery of the goods, and the Plaintiffs sued the defendants in trove. The Appellants respectfully draw attention to the fact that the action did not concern a claim against the carrier; the contest was between two persons, each claiming title to the goods, through the same person. The question was not whether an attornment by the carrier had given the plaintiffs a sufficient constructive possession to found a pledge and hence a claim against the carrier; but whether the Plaintiffs had obtained a proprietary right which defeated the Defendants' own rights. In the case of boat No. 604, the Plaintiffs succeeded because the Court held that the property passed to them immediately upon shipment: and this happened before Tempany purported to create any rights in favour of the Defendants. In the present instance, the Respondents have never claimed to be owners of the goods. Furthermore, it is

significant that the Plaintiff succeeded in respect of boat No. 604, where the instructions given to the carrier were never revoked, but failed in respect of boat No. 54, where they were. In these circumstances, the Appellants submit that the decision in favour of the Plaintiffs in Bryans v. Nix has no bearing in the present case, where the claim is brought by persons with no title to the goods against a carrier who has delivered in accordance with the instructions of the shipper. But if contrary to the Appellants' submission, the case is held to be in point, the Appellants respectfully submit that it is wrong, and should not be followed.

43. As to Evans v. Nichol, supra, the Appellants respectfully submit that it is entirely explicable on the ground, inter alia, that the consignor never revoked his instructions to the carrier to deliver the goods to the Plaintiffs. The judgment of Tindal C.J. in particular strongly suggests that if (as in the present case) the instructions had been altered, the decision would have been different.

44. Estoppel

Many of the arguments advanced in relation to attornment apply also to the allegation of

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estoppel. It is of the essence of an estoppel that there is a representation, and that the representation is acted upon by the person to whom it is made.

45. As to the first requirement, there was no representation to or about Wah Tat at all. And there was no representation as to the character in which the Appellants held the goods. The reference to OCB in conjunction with the words "consigned to", being in the Appellants' submission no more than a statement that the goods had been consigned to OCB, was entirely consistent with the Appellants holding the goods for the Shippers, particularly in view of the inclusion of the words "not negotiable". At most it was a representation that the Appellants so held the goods unless and until the Shippers changed their mind. If the statements in the Mate's Receipts were to be construed as a representation that the goods would be delivered to OCB, come what may, it would follow that the Appellants would be estopped even if the Receipts had been shown to the Respondents without being handed over, which in the Appellants' submission is too extreme a result to be acceptable. As to the second requirement, OCB

never acted on the representation, since if it acted at all, it acted only on the instructions of Wah Tat, and would have acted in the same manner whatever the terms of the Mate's Receipts and whatever documents had accompanied the drafts.

46. The Appellants accordingly submit that the pleas of custom, attornment and estoppel have not been established, and that the Respondents had no sufficient proprietary or possessory rights to found an action at common law in conversion or detinue.

47. The Appellants therefore respectfully submit that the appeal from the judgment of the Court of Appeal should be allowed and the judgment of Mr. Justice Kulasekaram should be restored, for the following (amongst other)

REASONS

1. BECAUSE the Respondents had no sufficient possessory or proprietary rights to sustain an action for damages for conversion or detinue.

2. BECAUSE prima facie a carrier who redelivers goods to the consignor who bailed them to him commits no conversion.

3. BECAUSE a mate's receipt is not a document of title at common law.

4. BECAUSE the Respondents have neither alleged

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nor proved that a Mate's Receipt is a document of title by the general custom of merchants. A

5. BECAUSE a document of title cannot be created by a local or trade custom.

6. BECAUSE the custom alleged by the Respondents is not certain. B

7. BECAUSE the custom alleged is not reasonable.

8. BECAUSE the custom alleged is not consistent with the express words of the Mate's Receipts.

9. BECAUSE the Respondents have failed to prove any or any material custom. C

10. BECAUSE the First Respondents were neither named in the Mate's Receipts nor indorsees thereof and can derive no title therefrom, even if the alleged custom be valid and proved.

11. BECAUSE the Second Respondents had no interest in the Mate's Receipts or the goods, advanced no money thereon, and suffered no damage by reason of the Appellant's alleged wrongful acts. D

12. BECAUSE the Carriers did not by issuing the Mate's Receipts, or in any other manner, attorn to the Respondents. E

13. BECAUSE an attornment could not exist without a tri-partite agreement to which the Shippers, the Carriers and the Respondents were parties, and no such contract was proved. F

14. BECAUSE the Mate's Receipts contained no promise or representation by the Carriers that the goods would be delivered to the Respondents or were held by the Appellants as bailees of the Respondents.

15. BECAUSE the Mate's Receipts were at most receipts coupled with an acknowledgment of revocable instructions received from the Shippers, or an acknowledgment of the Shippers' act in consigning the goods to the Second Respondents.

16. BECAUSE the Shippers' instructions to deliver the goods to the Second Respondents were revoked by the Shippers before the Second Respondents presented the Mate's Receipts.

17. BECAUSE a promise or representation that the goods are held for one party or deliverable to him, cannot create an attornment or estoppel in favour of a third party.

18. BECAUSE the words "not negotiable" prevented the Mate's Receipts from creating an attornment or an estoppel.

19. BECAUSE the Respondents did not accept the attornment or notify the acceptance thereof to the Carriers.

20. BECAUSE the Respondents did not act to their detriment on the facts of the alleged representations

RECORD in the Mate's Receipts. A

21. BECAUSE Bryans v. Nix and Evans v. Nichol are distinguishable or alternatively are wrong.

22. BECAUSE the Judgment of Mr.Justice Kulasekaram was right and should be restored.

23. BECAUSE the judgment of the Court of Appeal B was wrong and should be reversed.

R. A. MacCRINDLE

M.J. MUSTILL

No. 6 of 1969

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

1. CHAN CHENG KUM
2. HUA SIANG STEAMSHIP COMPANY LIMITED

Appellants (Defendants)

- and -

1. WAH TAT BANK LIMITED
2. OVERSEA -CHINESE BANKING CORPORATION LIMITED

Respondents (Plaintiffs)

APPELLANTS' CASE

LINKLATERS & PAINES,
Barrington House,
59/67 Gresham Street,
London, E.C.2.