

House of Lords : Lord Buckmaster. Lord Blanesburgh. Lord Warrington of Clyffe. Lord Atkin. Lord Macmillan. 2<sup>nd</sup> February 1933.

**Lord Buckmaster.** MY LORDS,

The Appellants are an English company, and are the instruments of the Russian Government for the sale of their goods in this country. By two contracts, dated 13th November, 1929, they agreed to sell to the respondents a quantity of redwood and white-wood staves c.i.f. the River Thames. The staves were to be shipped during the summer of 1930, and were to be of the following dimensions : under one contract as to 90 standards they were to be of 1/2 in. thickness, 28 ins. in length, and 2 ins. to 5 ins. in breadth; and as to 10 standards, 1/2 in. thickness, 17 ins. in length, and 2 1/2 in to 5 ins. in breadth; and under the other, 135/180 standards were to be 1/2 in. by 28 ins. by 2 ins. to 5 ins.; 15/20, 1/2 in. by 17 ins. By 2 1/2 ins. to 5 ins.; 27, 1/2 in. by 28 ins. by 2 ins. to 5 ins.; 3, 1/2 in. by 17 ins. by 2 1/2 ins. to 5 ins. Each contract was in the same terms and provided that any dispute that should arise should be forthwith referred to the decision of a third party to be mutually agreed upon, or, in default, to two arbitrators.

The goods were shipped from Archangel on or about 9th October, 1930. The buyers rejected the documents when tendered, on the ground that the shipment was not a shipment during the summer of 1930 in accordance with the terms of the contracts.

This matter was referred to arbitration, and the Arbitrator, by his award dated 18th February, 1931, awarded that the Respondents were not entitled so to reject the goods. Since October, 1930, the goods which had been landed have lain exposed to the weather on the open wharf.

On 10th April, 1931, the Respondents demanded a further arbitration with regard to the quality and cutting of the staves. This was referred to two arbitrators, according to the contract, and they, having failed to agree, on 3rd July, 1931, appointed Mr. Vigers as umpire, who heard the evidence, inspected the goods, and made his award on 24th August, 1931. It is as to the meaning of the Award upon the true facts there found that this Appeal is concerned.

The real dispute was as to whether the goods satisfied the description as to measurement contained in the contracts, and upon this the arbitrator found as follows :-

"(2) *The goods tendered by the Sellers to the Buyers as aforesaid and invoiced as 28 in. staves (hereinafter referred to as the said 28 in. staves) were redwood and whitewood staves bundled and were in length not less than 28 ins. And not more than 28 1/8 ins.*

(3) *The said 28 in. staves are of the following thicknesses :*

*None are less than 1/2 in.*

*4.3 per cent, are 1/2 in.*

*85.3 per cent, are more than 1/2 in. and not more than 9/16 in.*

*9.4 per cent, are more than 9/16 in. and not more than 5/8".*

*1.0 per cent -are more than 5/8 in. and not more than 3/4 in.*

*None are over 3/4 in.*

(4) *All the said 28 in. staves were 2 ins. to 5 ins. In width.*

(5) *The goods tendered by the Sellers to the Buyers as aforesaid and invoiced as 17 in. staves (hereinafter referred to as the said 17 in. staves ) were redwood and whitewood staves bundled and were in length not less than 17 ins. And not more than 17 1/8 ins.*

(6) *The said 17 in. staves are of the following thicknesses :—*

*None are less than 1/2 in.*

*6.4 per cent, are 1/2 in.*

*75.3 per cent, are more than 1/2 in. and not more than 9/16 in.*

*18.3 per cent, are more than 9/16 in. and not more than 5/8 in.*

*None are over 5/8 in.*

(7) *With the exception of 2.159 standards 2 ins. In width all the said 17 in. staves were 2 1/2 ins. to 5 ins. in width. The tender of 2.159 standards of 17 in. staves 2 ins. in width was within the provisions of the contracts referred to in paragraph 5 (ii) of this award and constituted a good tender.*

(12) *It was admitted by the Buyers that some excess in thickness is permissible and I find that staves of thickness not exceeding 5/8 in. are fit for the purpose of making cement barrels whether as sides or headings.*

(13) *The said 17 in. and 28 in. staves are now swollen and in bad condition by reason of wetting since shipment. I cannot say with accuracy from their present size what was their thickness when shipped but I find that their thickness was closer to 1/2 in. when shipped than it is now and I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification. "*

and upon these findings he held that the Respondents were not entitled to reject the goods. The Award was in the form of a special case which came before Wright J. on 15th December, 1931, who referred it back to the arbitrator to say what was the evidence upon which he based his statement as to the admission by the buyers that some excess in thickness was permitted. To which the Arbitrator replied that that was his clear impression, but that his Award was not based on that admission, and that the buyers had in fact received the very goods that the contract had provided. Wright J. in his judgment decided "in favour of the buyers, upon the ground that the difference in the sizes was not of such a trivial character as would justify its being disregarded by the Court, that the finding as to measurement shows that the goods were

*not those contracted to be sold and that it was those goods and not their commercial equivalent that the buyers were entitled to demand.*" The Court of Appeal have confirmed this view.

It is not necessary to examine again the actual difference between the goods shipped and those defined in the specification; nor is it possible to fix the exact extent to which the exposure of the staves, for which the Respondents were responsible, has altered their size. For the real question is whether the statement of the Arbitrator that the staves, when shipped, were commercially within and merchantable under the contract shows that the Arbitrator has found that according to its proper construction the contract has been satisfied. The very wording of the phrase leads strongly to the conclusion that it does not bear that interpretation.

The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase "commercially" itself shows that while the goods did not in fact answer the description, they could, as a matter of commerce be so dealt with, but the rights of the buyers under the contract are not so limited.

If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

But for the decision in the case of *Vigers and Sanderson*, 1901, 1 K.B. 108, there could, I think, be little doubt about this matter. The learned Judge there held that the buyer was entitled to reject the goods, but he made a statement that the clause entitling the rejection does not operate so as to force the buyer to take the goods which are neither within nor about the specification, nor commercially within its meaning. That decision must be read in relation to the words of the contract then considered, which provided that the goods were to be "about" the specification stated, and no such word as "about" occurs in the present contract.

There is no room in this contract for any elasticity, and I agree with the judgment of Lord J. Scrutton in the case of *Green v. Arcos*, in 39 Lloyds List Reports, p. 229, at p. 231, that the phrase used by Bigham J. was only intended to cover cases in which the difference was so small that the law would not regard it.

The only part of this case that, in my opinion, presents any difficulty is the fact that some change of size took place owing to the exposure for which the Respondents were responsible, but I agree with the interpretation of the Court of Appeal upon the finding in this respect, namely, that though the staves were nearer to 1/2 in. when they were delivered, yet they did not then satisfy the specification, except by regarding the matter as one in which the commercial equivalent can be accepted for the actual description.

I can find no flaw in the reasoning of Wright J. and the Court of Appeal, and their unanimous opinion renders further discussion of the matter unnecessary.

**Lord Warrington of Clyffe.** MY LORDS,

The question in this Appeal from a unanimous Judgment of Scrutton, Greer and Slesser, L.J.J., affirming a Judgment of Wright, J., in favour of the buyers is whether on a sale of goods by description the implied condition that the goods shall correspond with the description (Sale of Goods Act, 1893, Section 13) has been performed by the seller so as to disentitle the buyer to reject the goods.

The facts and the law applicable to them have been or are about to be so thoroughly stated and discussed by other noble and learned Lords, whose opinions I have had the advantage of reading, that I propose to state quite shortly my reason for agreeing with their conclusion and that of the four learned Judges by whom the case was decided in the Courts below.

The contracts (there were two in identical terms) were for the sale by the Appellants as sellers to the Respondents as buyers of a quantity of Russian redwood and whitewood staves of certain specified dimensions in length breadth and thickness. As to length and breadth certain limits of variation were permitted by the contract and are specified in the description, but as to thickness this is to be in every case 1/2-inch without any qualification.

The goods were duly shipped and tendered but they were rejected by the buyers on the only ground material to this Appeal, viz., that they or a large number of them exceeded the contractual thickness and that the statutory condition was therefore not fulfilled.

Pursuant to the contracts the matter was referred to a commercial arbitrator who made his award in the form of a special case.

Under the contracts the staves were to be of a definite thickness of 1/2-inch, neither more nor less, and with no qualification such as "about" or "substantially" or "commercially" whatever may be the precise meaning of this last word. The sellers therefore were bound to tender 1/2-inch staves.

The actual results of the inspection of the staves given by the Arbitrator disclosed extensive variations in thickness always on the side of excess. The staves had, however, been exposed to weather since landing and were swollen and in bad condition.

Under these circumstances the Arbitrator stated "*I cannot say with accuracy from their recent size what was their thickness when shipped but I find that their thickness was closer to 1/2-inch when shipped than it is now.*" That is in my opinion a finding that staves now exceeding 1/2-inch were at shipment also in excess of that measure though not to the same extent. He then adds "*I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification,*" and he made an award in favour of the sellers.

In my opinion by acting as he did he has added to the description in the contract a qualification to which the contracting parties have not agreed, and which he was not entitled to add, and that the Courts below were justified in setting aside his award.

It is not suggested that this is a case in which the deviations from the contractual thickness were so slight as to be negligible. In such a case a simple finding that they answered the description would be proper without the addition of such a qualification as above mentioned.

I agree that the Appeal fails and should be dismissed with costs.

**Lord Atkin.** MY LORDS,

The question between the parties arises on an award stated in the form of a special case by an umpire appointed under a submission contained in two contracts for the sale of timber. The contracts were in the White Sea 1928 C.I.F. form and were between the appellants Arcos, Limited, sellers, and the respondents, E. A. Ronaasen and Son, buyers. It is unnecessary to set them out at length. The substance was that the sellers agreed to sell to the buyers "the wood goods hereinafter specified" subject to a variation of 20 per cent, in sellers' option on any item, to be shipped from Archangel "during the summer 1930." The first contract specified "Redwood and whitewood staves bundled 90 standards 1/2 in. by 28 ins. by 2 ins. to 5 ins. 10 standards 1/2 in. by 17 ins. by 2-1/2 ins. to 5 ins. Messrs. Arcos, Limited, promise to do their best to induce the shippers not to cut any 2 ins. in the 1/2 in. by 17 ins. headings, but should a few 2 ins. width fall buyers agree to take same at a reduction in price of 40s. per standard." There were further conditions on the back of the contract which it is unnecessary at present to consider. The second contract was in identical terms save as to quantities of standards and provided for 135/180 and 27 standards of 28 ins. length, and 15/20 and 3 standards of 17 ins. length. The staves were required by the buyers for making cement barrels and this was made known to the sellers in circumstances that implied a condition that they should be fit for that purpose. The goods in question were shipped under the contracts in October. When the shipping documents were tendered the buyers refused them on the ground that there had not been a summer shipment. There was an arbitration to determine this dispute, and the umpire held that the shipment was a summer shipment. The buyers thereupon examined the goods which had been landed and claimed to reject them on the ground that they were not of contract description. This dispute went to arbitration and the umpire made his award in the form of a special case in which, after stating the facts, he awarded subject to the opinion of the Court that the buyers were not entitled to reject. On the hearing of the special case Wright J., and on appeal the Court of Appeal, differed from the umpire and held that the buyers were entitled to reject. The simple question is whether the goods when shipped complied with the implied condition (Sale of Goods Act 1893, Section 13) that they should correspond with the description. When the umpire inspected them on July 9, 1931. some nine months after landing and exposure to rain, he found the actual measurements to be as follows -

28 in. staves.  
None less than 1/2 in.  
4.3 per cent. were 1/2 in.  
85.3 per cent. between 1/2 in. and 9/16 in.  
9.4 per cent. between 9/16 in. and 5/8 in.  
1 per cent. between 5/8 in. and 3/4 in.  
None over 3/4 in.

17 in. staves.  
None less than 1/2 in.  
6.4 per cent. were 1/2 in.  
75.3 per cent. between 1/2 in. and 9/16 in.  
18.3 per cent. between 9/16 in. and 5/8 in.  
None over 5/8 in.

He found that they were all fit for use in the manufacture of cement barrels. He was unable with accuracy to say what was their thickness when shipped, but "their thickness was closer to 1/2 in. than it *is now and I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification,*"

The decisions of the learned Judge and of the Court of Appeal appear to me to have been unquestionably right. On the facts as stated by the umpire as of the time of inspection only about 5 percent, of the goods corresponded with the description : and the umpire finds it impossible to say what proportion conformed at the time of shipment. It was contended that in all commercial contracts the question was whether there was a "substantial" compliance with the contract: there always must be some margin : and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does 1/2 in. mean about 1/2 in. If the seller wants a margin he must and in my experience does stipulate for it. Of course by recognised trade usage particular figures may be given a different meaning, as in a baker's dozen; or there may be even incorporated a definite margin more or less : but there is no evidence or finding of such a usage in the present case. No doubt there may be microscopic deviations which business men and therefore lawyers will ignore. And in this respect it is necessary to remember that description and quantity are not necessarily the same: and that the legal rights in respect of them are regulated by different sections of the code description by Section 13, quantity by Section 30. It will be found that most of the cases that admit any deviation from the contract are cases where there has been an excess or deficiency in quantity which the Court has considered negligible. But apart from this consideration the right view is that the conditions of the contract must be strictly performed. If a condition is not

performed the buyer has a right to reject. I do not myself think that there is any difference between business men and lawyers on this matter. No doubt in business men often find it unnecessary or inexpedient to insist on their strict legal rights. In a normal market if they get something substantially like the specified goods they may take them with or without grumbling and a claim for an allowance. But in a falling market I find that buyers are often as eager to insist on their legal rights as courts of law are ready to maintain them. No doubt at all times sellers are prepared to take a liberal view as to the rigidity of their own obligations, and possibly buyers who in turn are sellers may also dislike too much precision. But buyers are not as far as my experience goes inclined to think that the rights defined in the code are in excess of business needs. It may be desirable to add that the result in this case is in no way affected by the umpire's finding that the goods were fit for the particular purpose for which they were required. The implied condition under Section 14 (1), unless of course the contract provides otherwise, is additional to the condition under Section 13. A man may require goods for a particular purpose and make it known to the seller so as to secure the implied condition of fitness for that purpose : but there is no reason why he should not abandon that purpose if he pleases, and apply the goods to any purpose for which the description makes them suitable. If they do not correspond with the description there seems no business or legal reason why he should not reject them if he finds it convenient so to do.

Agreeing as I do with the reasoning of the judgments below, I find it unnecessary to say more than that I agree that the appeal should be dismissed with costs.