

plication. The case of *Ex parte Johnstone (a)* is on all fours with the present case.

Latham for the respondent.

Marriott in reply.

PER CURIAM:—The order of the 24th of April must be discharged and the petition of the Insolvent restored to the board. Each party will bear his or their own costs of the appeal.

Ordered accordingly.

Attorneys for the appellants: *Shamaji and Thakurdas.*

Attorneys for the respondent: *Thacker and Chalk.*

1872.
DVA'RKA'
DA'S
LALUBHA'I
v.
GEORGE
BLACKWELL.

[ORIGINAL CIVIL JURISDICTION.]

Referred Case.

Oct. 3.

W. NICOL AND COMPANY.....*Plaintiffs.*

J. S. CASTLE.....*Defendant.*

Bill of Lading—“Weight contents and value unknown”—Action against Master—Assignee of Bill of Lading for value—Construction—Act IX. of 1856, Sec. 3.

A bill of lading purporting to be for 50 tons of coals and containing a printed clause “weight, contents and value unknown” and similar words written above the signature of the Master, does not amount to an admission by the Master that he has received 50 tons of coal on board.

Upon the true construction of the Bills of Lading Act (IX. of 1856) Sec. 3 a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the Master of the shipment of 50 tons.

THIS was a case stated for the opinion of the High Court, under the provisions of Sec. 55 of Act IX. of 1850, by N. Spencer, Third Judge of the Bombay Court of Small Causes.

(a) 31 L. J. Bank 63.

1872.

W. NICOL
AND COM-
PANY
v.
J. S. CASTLE.

The action was brought to recover Rupees 125 as damages for the non-delivery of five tons of coal part of a consignment of 50 tons alleged to have been shipped on board the Steam Ship "Hutton" of which the defendant was the master.

The following are the facts of the case as stated by the Judge of the Court of Small Causes :—

" There was shipped on board the " Hutton" at the port of Sunderland a quantity of coal and coke on account of Messrs. Smith, Fleming, and Company which was made deliverable by the bill of lading to Messrs W. Nicol and Company at Bombay. The mode adopted at Sunderland of weighing coal intended for shipment, which was followed in the present case, is for the tender in which the coal is loaded to be run on to a weigh bridge; the net weight of the coal is then ascertained by subtracting the weight of the truck; the trucks are then run on to a stage over the ship's hold into which the coal is tipped. The coals in question were stowed in the 'tween deck in a compartment by themselves and screened off from the rest of the cargo by plank partitions. In addition to the plaintiff's coal and coke there was shipped on board the 'Hutton' 1,200 tons of other coal and a general cargo. The loading of the ship was completed in two or three days. No person connected with the ship or on behalf of the master or owners was present when any part of the cargo of coal was weighed. The weight was taken from the agents of those employed by the shippers. During the voyage coal, it is admitted, loses in weight by evaporation and by being broken. The percentage of loss varies according to the quality of the coal. The coal in this case being 'double screened,' the loss, it is said, ought to have been very small. The defendant signed a bill of lading a copy of which is set out at the end of the case. Freight was paid in London on 50 tons. *

" Messrs. W. Nicol and Company (the plaintiffs) are consignees for value of the coal. On the arrival of the 'Hutton' in Bombay, Messrs. W. Nicol and Company addressed a

letter to Messrs. Thomas Stewart and Company, the consignees of the ship, stating that they were the consignees of 50 tons coal per S. S. 'Hutton,' and as the owners or agents had the option of delivering over the ship's side or on shore, requested to be informed what arrangements Messrs. Thomas Stewart and Company intended to make about weighing, as they (Messrs. W. Nicol and Company) would only take delivery per ton of twenty cwts. weighed over to them.

1872.
W. NICOL
AND COM-
PANY.
v.
J. S. CASTLE.

"Thomas Stewart and Company elected to avail themselves of the option given to them by the bill of lading and employed their own agents to land the cargo. The coal put into the lighters alongside the ship was, as averred by the defendant and proved by his witnesses, the whole that was shipped at Sunderland on account of Messrs. Smith, Fleming, and Company, but, as it was not then weighed, there was no evidence to show whether it was, or was not, less than 50 tons. When weighed in the wharf, however, and made over to the plaintiff's mucedum, there were only 45 tons.

"The only evidence given to show that 50 tons had been shipped was the bill of lading and an invoice forwarded by Messrs Smith, Fleming, and Company to Messrs W. Nicol and Company, in which the latter are debited with 50 tons. The invoice, it was stated by one of the witnesses for the plaintiffs, is usually prepared from the bill of lading.

"For the defendant it was contended that there was no evidence of the quantity shipped ; that although in the body of the bill of lading, in written words, the quantity was said to be 50 tons, this statement was qualified by the printed condition 'weight, contents and value unknown,' and again by the written words, 'weight unknown' above the signature, and that the defendant, by so signing, did not admit that 50 tons had been shipped. For the plaintiffs it was argued: (I.)—That the two statements in the bill of lading were inconsistent or repugnant ; that a master could not qualify a positive written statement in a bill of lading that a certain quantity of goods had been shipped by such general words as 'weight unknown,' and that these words, being in a foot note, must

1872.
 W. NICOL
 AND COM-
 PANY
 v.
 J. S. CASTLE.

not be taken to be part of the bill; and (II.)—Assuming that in an action by the shippers it was open to the defendant to show that the quantity mentioned in the bill had not been shipped, yet in an action by the plaintiffs, consignees for valuable consideration, under Section 3 of the Indian Bill of Lading Act (IX. of 1856), the bill was as against the defendant conclusive evidence of the shipment.

“I held: (I.)—That the two statements in the bill of lading were not inconsistent or repugnant; that the printed words ‘weight, contents, and value unknown’ controlled the written statements of weight; that the master, by signing the bill, did not admit that 50 tons had been shipped, and, therefore, there was no evidence as to the quantity put on board; and (II.)—That the bill, as qualified, did not represent that 50 tons had been shipped and that, as the plaintiffs had accepted the bill with the qualification, they were as much bound by it as the shippers.

“I non-suited the plaintiffs subject to the opinion of the Judges of the High Court on the following questions—

“I. Is the bill of lading in this case evidence that 50 tons of coal had been shipped?

“II. Is the bill of lading in the hands of the plaintiffs, consignees for valuable consideration, conclusive evidence as against the defendant of the shipment of 50 tons?”

The bill of lading was in the following form, the written portions of it being printed in italics:—

“SHIPPED in good order and well conditioned by *Messrs. Smith, Fleming & Co.* upon the steam ship ‘*Hutton*’ whereof *Castle* is Master, for this present voyage and now lying in the Port of *Sunderland* and bound for *Bombay* (viâ Suez Canal)—

Fifty tons coals,

One hundred and twenty-one tons, seven hundred weights, Ramsay’s Patent condensed coke.

GOSMAN & SMITH, 144 Leadenhall Street,
E. C.

Shippers are requested to note particularly the terms and conditions of this Bill of Lading with reference to the validity of their insurance upon their goods.

Shippers are cautioned against shipping goods of a dangerous or damaging nature as by so doing they become responsible for all consequential damage and also render themselves liable to penalties imposed by Statute.

tons
—
50
121-7

being marked and numbered, as per margin, and to be delivered subject to the exceptions and conditions at foot hereof in the like good order, and well conditioned, at the aforesaid Port of *Bombay* unto Messrs. *W. Nicol & Co.* or Assigns. Freight and Primage for

1872.
W. NICOL AND COM- PANY
v.
J. S. CASTLE.

the said Goods to be first paid in London, Ship lost or not lost, *at the rate of twenty-five shillings per ton of twenty hundred weights.*

IN WITNESS whereof the Master or Purser of the said Ship hath affirmed to Three Bills of Lading, all of this tenor and date; the one of which Bills being accomplished the others to stand void.

Dated in *Newcastle* 13th December 1871.

The following are the Exceptions and conditions above referred to :—
Weight, contents, and value unknown.

The Act of God, the Queen's Enemies, &c. [Then followed the Exceptions for which the master was not to be rendered liable and which are of no importance for this report.]

A written declaration of the contents and Value of Goods must be delivered by the shippers to the Owners, with the Bills of Lading, and an untrue declaration shall release the Captain and Owners of ship from all responsibility.

The ships are to be at liberty to sail with or without pilots, and to tow and assist vessels in all situations, and also to deviate from the Voyage for any purpose or to touch and stay at other ports either in or out of the way.

The Owners are to be at liberty to carry the said Goods to their port of destination by the above or other Steamer or Steamers, Ship or Ships, either belonging to the Owners or to other persons, proceeding either directly or indirectly to such Port, and to tranship, or land and store the Goods either on shore or afloat, and reship and forward the same at the Owners' expense, but at Merchants' risk.

In the event of transit to and from Suez and Alexandria, the Goods will be landed, forwarded, conveyed, or re-shipped at the Owners' expense,

1872

W. NICOL
AND COM-
PANY
v.

J. S. CASTLE.

but at Merchants' risk, and in no case will the Owners be responsible for accident, loss, damage, delay, or detention however caused in the course of such landing, transit or reshipment.

The Owners or their Agents shall have the option of making delivery of the Goods under this Bill of Lading either over the Ship's side, or from Lighters, or a Store Ship, or Custom House, or Warehouse, at Merchants' risk.

Consignees or their Assigns must be ready to take delivery of Goods as soon as the Ship is ready to discharge them, otherwise the Owners, or their Agents, shall be at liberty to land and warehouse or discharge them into a Store Ship at the Merchants' risk and expense, and shall have a lien thereon for such expense.

Weight unknown.

J. S. Castle."

The case came on for argument before SARGENT, Acting C.J., and BAYLEY, J., on the 20th of September 1872.

Anstey and Marriott for the plaintiffs:—The Bills of Lading Act (IX. of 1856), being a remedial statute, must be construed so as to give it the widest possible effect. Its object was to protect Assignees for value of Bills of Lading by preventing Masters of vessels from setting up the defence that, though they have signed for goods received on board, such goods have not been received. The only defence that a Master can now set up is that his signature was obtained by the fraud of the shipper or holder of the Bill of Lading, and without any default on the Master's part, and even that defence is not, we submit, valid against a *bonâ fide* consignee for value. In the present case, no fraud on the part of the shipper has been proved, and the Master was clearly in default in not ascertaining the weight of the coals before signing. It would defeat the whole purpose of the Act to allow the Master to protect himself by such a clause as he has introduced into this bill of lading. A similar clause would be inserted in all bills of lading, and the protection intended by the Act would be at an end. The case is one of first impression, for *Jessel v. Bath* (a) relied upon by the Judge of the Small Cause Court is not in point. The decision there rested upon the custom of the trade

(a) Law Rep. 2 Ex. 267.

that was proved. Here the coals were shipped before the bill of lading was signed, and the Master by inserting such a clause as this in fact questions the fact of such shipment. We also contend that the statement of the weight of the coals and the statement that the weight is unknown, are inconsistent, and that the words "weight unknown" must be rejected: Taylor on Evidence, para. 1033. The cases of *Meyer v. Dresser (b)* and "*The Helene*" (c) were also referred to.

1872.

W. NICOL
AND COM-
PANY

J. S. CASTLE.

There was no appearance for the defendant.

Cur. adv. vult.

SARGENT, C.J. :—This matter comes before the Court on a reference from the Third Judge of the Small Cause Court, and arises out of an action brought by the firm of Nicol and Co. to recover from the defendant, as Master of the steam ship "Hutton," damages for non-delivery of five tons of coal, part of a consignment of fifty tons said to have been shipped on board the above vessel.

The facts of the case, as stated by the Judge of the Small Cause Court, are as follows :—(His Lordship here read the case as stated and the questions proposed for the decision of the Court and proceeded) :—By the first of these questions I understand the Judge as asking whether, upon the proper construction of the bill of lading, it amounts to an admission by the Master that fifty tons of coal were shipped on board.

The answer to this question depends upon the effect to be given to the words "weight, contents, and value unknown" contained in the printed conditions at the foot of the bill of lading in qualifying the amount of coal inserted in writing. Now, the rule of evidence, when the instrument consists partly of a printed *formula*, such as a bill of lading, and partly of written words, was laid down by Lord Ellenborough in *Robertson v. French (d)*. He says, speaking of policies of assurance: "The only difference between policies of assurance and other instruments in this respect is that the greater

(b) 16 C. B. N. S. 646.

(c) L. Rep. 1 P. C. C. 231

(d) 4 East 136.

1872. part of the printed language of them, being invariable
 W. NICOL and uniform, has acquired from use and practice a known
 AND COM- and definite meaning, and that the words superadded in writ-
 PANY ing (subject indeed always to be governed in point of con-
 v. struction by the language and terms with which they are
 J. S. CASTLE. accompanied) are entitled nevertheless, if there should be
 any reasonable doubt upon the sense and meaning of the
 whole, to have a greater effect attributed to them than to the
 printed words, inasmuch as the written words are the im-
 mediate language and terms selected by the parties them-
 selves for the expression of their meaning, and the printed
 words are a general formula adapted equally to their case
 and that of all other contracting parties upon similar oc-
 casions and subjects.”

This rule is commented on by Blackburn, J., in *Gumm v. Tyrie (e)*. He says: “Then, with regard to the words that are printed, I quite agree with my brother Crompton; and I do not agree with the proposition that Mr. Lush puts his case upon, that the words so printed are to be treated less as part of the contract than the other words, because they are printed. I think where there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think, when one is to overpower the other and to have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract have been more considered and more thought of than those merely ordinary words, and no doubt these printed forms are customary and, consequently, the written terms would be more considered by him; and, if they conflict and cannot be reconciled, then the written terms, those more special terms thought of by himself, may be considered to be more thought of and, consequently, to have more weight by him.”

The question then is whether the two parts of this instrument are irreconcilable, or whether, on the contrary, the bill of lading admits of a reasonable explanation as a whole.

Now, it results from the evidence that coals are, in the usual course of trade, shipped on board vessels at Sunderland in the following manner. The coals are weighed in the trucks at some little distance from the ship and are thrown into the ship's hold by the trucks being run on to a stage projecting over the vessel. The Master, whose place is necessarily on his vessel receiving cargo, may well refuse to guarantee the exact weight of coal shipped; and the whole of the bill of lading may, therefore, be reasonably and fairly read as meaning that fifty tons have been received on board as represented to the Master by the shippers, but that he must not be understood as speaking from his personal knowledge or giving any undertaking that such is the exact amount. In *Jessel v. Bath (f)*, on which the Judge of the Small Cause Court relies, the bill of lading stated that a certain quantity of manganese had been shipped on board to be delivered at Swansea, the amount being in written words. At the foot of the bill of lading were the printed words "weight, contents, and value unknown"; and both the Chief Baron and Mr. Baron Martin expressed a clear opinion that the written and printed words were reasonably and fairly reconcilable.

1872.

W. NICOL
AND COM-
PANY

J. S. CASTLE.

In the present case there are the additional circumstances which make the meaning even clearer than in the case cited. *1st.*—That the words "weight, contents, and value unknown" are distinctly connected, as a qualification, with the written words by the latter being immediately followed by the words "to be delivered subject to the exceptions and conditions at foot hereof;" and *2nd.*—That the signature itself is accompanied with the words "weight unknown" in writing.

In *Haddow v. Parry (g)*, which was an action upon a policy of insurance upon specie or bullion, a bill of lading was offered in evidence to prove that the goods had been shipped on board Her Majesty's Schooner the "Rook," Captain Lawrence, and which was afterwards captured on her passage home. In the margin of the bill of lading was written "Bill of lading for 12,000 dollars, dated 12th Aug. 1808,"

(f) L. Rep. 2 Ex. 267.

(g) 3 Taunton 303.

1872. under which were copied the marks of the several chests and their numbers and contents describing them as containing 2,000 dollars each. The body of the bill of lading expressed to be shipped, in good order, six boxes containing 12,000 dollars, being marked and numbered as in the margin, and it was signed "contents unknown, James Lawrence, Lieutenant." It was held that the words "contents unknown" rendered the bill of lading no declaration of what the chests of dollars contained, and it was, therefore, no evidence. And so here the very form of signature might, by itself, be well deemed sufficient to render the bill of lading no declaration by the master of the amount of coal shipped.

W. NICOL
AND COM-
PANY
v.
J. S. CASTLE.

We can entertain no doubt, therefore, that the printed formula and the written words are, in this case, reconcilable, and that the bill of lading as a whole admits of a reasonable explanation. Our answer to the first question should, therefore, in my opinion, be in the negative.

The answer to the second question turns upon the construction to be put on the Indian Bill of Lading Act IX. of 1856. The English Act on the same subject, 18 & 19 Vict., C. 111, of which the Indian Act is a literal copy, has come under the consideration of the English Courts of Law on several occasions, but never, so far as we are aware, except incidentally, on the point on which this case turns, namely, the liability of the Master signing the bill of lading to a consignee for value under Sec. 3 of the Act.

Sec. 1 gives a consignee of the goods or indorsee of the bill of lading (to whom the property is intended to pass) the same rights of suit as if the contract had been with himself; and, therefore, in the present case, as the bill of lading does not amount to an admission by the master that fifty tons of coal were shipped on board, the plaintiff could not, as a simple consignee of the coal, recover, under that section, against the Master, without proving that the fifty tons were actually shipped.

Sec. 3, however, places a consignee of the goods or indorsee, who has given value, in a far better position as regards

the Master or other person signing the bill of lading. It says that in their hands the bill of lading, representing goods to have been shipped on board, shall be conclusive evidence of such shipment as against the Master or other person signing the bill of lading, notwithstanding that such goods or some part thereof may not have been so shipped, unless the holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not, in fact, been laden on board ; and leaves only one ground of defence open to the person, so signing the bill of lading, to plead, namely, that the misrepresentation was caused without his default and wholly by the fraud of the shipper.

The first important question, then, is—what was the amount of coal which this bill of lading represented as having been shipped? Did it represent to third persons who might deal with the shipper that the exact amount of fifty tons of coal had been shipped? If the written and printed words are reconcilable, as they must be taken to be for the purposes of this argument, we are at a loss to see on what ground it can be contended that the bill of lading, taken as a whole, represents to the public as a fact, on which they may rely, that fifty tons of coal had been shipped. Undoubtedly the bill of lading commences by representing that there have been shipped on board the steam ship “Hutton” fifty tons of coal ; but the “representation” referred to in Sec. 3 must, we think, mean the representation made by the whole instrument. This appears from the preamble, which says “whereas it frequently happens that the goods, in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden.”

Here, however, the bill of lading does not purport to be signed by the Master in respect of fifty tons of coal exactly. The object is to protect the *bonâ fide* holder without notice, and to make those persons liable who have represented to him through the bill of lading that a certain amount of goods

1872.

W. NICOL
AND COM:
PANY

J. S. CASTLE.

1872. have been shipped. Here, however, the bill of lading gives
 W. NICOL AND CO. him clear notice that the Master, upon whose signature he is
 PANY supposed to rely, does not admit that fifty tons were shipped.
 v. This conclusion follows irresistibly from the previous deci-
 J. S. CASTLE. sions as to the effect of the printed condition on the written
 words. If they are reconcilable and the bill of lading
 admits of a reasonable and fair explanation, it cannot be
 said that the bill of lading was signed by the Master in
 respect of fifty tons of coal. But it was said that the Act
 prevents the Master from guarding himself against the effect
 of the written words, or in other words, the object of the Act
 was to throw on him, as between himself and *bonâ fide*
 holders, the obligation of ascertaining the truth of the
 "written words." But this would be to put a construction
 on the Act far beyond the object as stated at length in the
 preamble, and would, in our opinion, require distinct words
 to that effect—words which are certainly not to be found in
 this Act..

This view of the Act is adopted by the Chief Baron and Mr.
 Baron Martin in the parallel case of *Jessel v. Bath*, already
 cited, although it was not necessary to decide the question,
 as the action was against a person who had not signed, and
 who was held by the Court not to be bound by the person
 signing. They both, however, expressed an opinion that no
 action could have been brought on the bill of lading, under
 Sec. 3 of the Act, even against the person signing.

We are of opinion, therefore, that the second question
 should also be answered in the negative. Costs of reference
 to be paid by the plaintiff.

Attorneys for the plaintiffs :—*Rimington, Hore and Langley.*