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5 B. 310.

"If the nazir were made by this Court trustee of every minor's estate, the 'manager' of which would not take out a certificate, it is probable that this difficulty would be got over, but it would not be without a great deal of unremunerated trouble to the nazir of the District Court, and it might probably also involve him in expense.

"Under these circumstances, I am obliged to ask for the opinion of the High Court, and would respectfully suggest a review of the decision in *Dhondiba* v. *Kusa* (1) which, I would submit, is hardly supported by Act XX of 1864."

There was no appearance of parties in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—This Court concurs with the District Judge in thinking that a certificate of administration cannot be forced on the mother of the infant, and is further of opinion that an order for the issue of such a certificate to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it. In the present case the order for the issue of the certificate appears to have been made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her. Such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party. If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge will be under the necessity of naming some officer of his Court or some respectable nominee of the suing creditor of the infant. Difficulty will sometimes arise in such cases: but this Court is inclined to think, and certainly hopes, that the instances will be rare in which a minor, whom it is worth the creditor's while to sue, will be so completely destitute of friends and relatives as that none can be found to protect his interest.

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[313] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice West.

CURSETJI RUSTOMJI SETNA (*Plaintiff*) *v.* THOMAS WILLIAMS (*Defendant*).* [28th and 29th April, 1881.]

Small Causes Court—Ship—Bill of lading—Charter party—Incorporation in bill of lading of terms of charter party—Cargo—Freight payable on intake measurement—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight.

K.V. at Moulmein consigned to the plaintiff at Bombay 135 logs of teak timber shipped on board the defendant's ship. The bill of lading, which was signed by the defendant, described the logs as marked K. V., and measuring tons 115-12-10, and it provided for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant, and was as follows :—"Marks, number, quantity and measurement unknown : all other conditions as per charter party." The charter party was expressed to be between the owners of the ship and Messrs. B. of Rangoon, as charterers of the whole ship, and provided for the payment of freight "at the rate of Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half

* Suit No. 30 195 of 1880.

(1) 6 B. H. C. R. A. C. J. 219.

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freight, by intake measurement." On arrival of the ship at Bombay, the plaintiff, as consignee of the timber and holder of the bill of lading, paid the defendant (the captain of the ship) Rs. 1,500 on account of freight, and took delivery of the 135 logs. On measuring them, he found that, according to his method of measurement, the total measurement of the 135 logs came only to tons 58-27-11-6 and not tons 115-12-10 as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the smaller quantity, (*viz.*, Rs. 995-8), and to recover from the defendant the difference, (*viz.*, Rs. 504-8), between that sum and Rs. 1,500 paid on account as for an overpayment of freight. It was proved that all the timber on board had been measured at Moulmein by an employee of the charterers acting apparently as agent of all the different shippers, and that the measurements in the bills of lading were supplied by this person to the defendant as the measurements of the different consignments. It was also proved that the 135 logs received and measured by the plaintiff in Bombay were the same logs that were shipped under the bill of lading, and that the plaintiff's measurement of them was correct according to the mode of measurement which he adopted. There was no evidence as to what was the mode of measurement followed at Moulmein, nor, except the statements in the bill of lading, as to what was the actual intake measurement of the timber there.

Held that the effect of the last clause in the bill of lading was to incorporate into that document the clause of the charter party which provided that freight should be payable on the intake measurement; that the burden [314] of proving what the intake measurement actually was, lay upon the plaintiff who sought to recover back money which he alleged he had paid in excess of what was due, and that, in the absence of such evidence on behalf of the plaintiff, the statement of quantity contained in the bill of lading was *prima facie* evidence of the intake measurement of the timber.

THE following case was stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by W. E. Hart, First Judge of the Court of Small Causes at Bombay:—

"The plaintiff Cursetji Rustomji Setna sued Thomas Williams, the captain of the ship *Abyssinian*, to recover the sum of Rs. 504-8 as an over-payment of freight under the following circumstances:—

"One Karanee Veeraswamy at Moulmein consigned to the plaintiff in Bombay 135 logs of teak timber, shipped on board the defendant's ship, and covered by a bill of lading signed by the defendant.

"The bill of lading, which is annexed hereto, describes the 135 logs as marked K.V., and measuring tons 115-12-10, and provides for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading is in the handwriting of the defendant, to the following effect: 'Marks, number, quantity and measurement unknown; all other conditions as per charter party.'

"The charter party, which is also annexed hereto, is expressed to be between the owners of the ship and the firm of Messrs. Bhagwandas of Rangoon as charterers of the whole ship, and provides (*inter alia*) for the payment of freight at the rate of Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half freight, *by intake measurement*.

"On arrival of the ship at Bombay, the plaintiff, as endorsee and holder of the bill of lading and consignee of the goods mentioned therein, paid to the defendant Rs. 1,500 on account of freight, and took delivery of the 135 logs. On measuring them, however, he found that, according to his method of measurement, which was to measure the length, breadth and thickness of each log separately, making no deduction for holes or fractures, the total measurement of the 135 logs came only to tons 58-27-11-6, and not tons [315] 115-12-10, as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the

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smaller quantity, Rs. 995-8, and to recover from the defendant the difference between that sum and Rs. 1,500 paid on account (Rs. 504-8) as for an over-payment of freight.

"It was proved before me that the ship took no part in the measurement of the timber at Moulmein, but that all the timber put on board was measured by an employee of the charterers acting apparently as the agent of all the different shippers, and that the measurements in the bills of lading were those supplied by this person to the defendant as the measurements of the different consignments.

"I also found as facts that the 135 logs measured by the plaintiff in Bombay were the same 135 logs as were shipped under this bill of lading, and that his measurement of them was correct according to the mode of measurement which he followed.

"There was no evidence as to what the mode of measurement followed at Moulmein was; nor, except the statements in the bill of lading, as to what was the actual intake measurement there of this particular consignment. Neither party would apply for a commission to Moulmein for the purpose of ascertaining these particulars, each contending that the burden of proof lay on the other.

"The following authorities were cited before me:—Maclaghlan on Shipping, p. 430; *Tully* v. *Terry* (1); *Buckle* v. *Knoop* (2); Leggatt on Bills of Lading, p. 338; and *Christy* v. *Ran* (3).

"I held—first, that the effect of the last clause in the bill of lading was to incorporate into that document the provision of the charter party that freight was to be calculated on the intake measurement; second, that the burden was on the plaintiff to show that the intake measurement was tons 58-27-11-6 only; and, third, on the authority of *Spaight* v. *Farnworth* (4), that the measurement by the plaintiff in Bombay afforded no criterion as to what was the intake measurement at Moulmein.

"**[316]** I accordingly directed a non-suit to be entered; but, at the request of the plaintiff's pleader, and on condition of the plaintiff depositing in this Court Rs. 50 to cover the costs of the reference, and Rs. 34, the certified professional costs of the defendant in this case, the order for a non-suit was made subject to the opinion of the High Court on points of law to be stated by the plaintiff's pleader within three days.

"These conditions have been complied with, and the points on which the plaintiff's pleader requires the opinion of the High Court, are the following:—

"1. Was not the burden of proving what was the intake measurement at Moulmein wrongly laid on the plaintiff, and should it not have been laid on the defendant?

"2. Ought the measurement mentioned in the bill of lading to be taken to be the intake measurement at Moulmein?

"3. Was not the Court in error in considering that the case of *Spaight* v. *Farnworth* was applicable to the present case?

"4. Inasmuch as the bill of lading contained an express provision for the payment of freight, was not the Court in error in holding that the words in the last clause, 'all other conditions as per charter party,' operated to incorporate into the bill of lading the provision in the charter party that freight was to be calculated on the intake measurement?"

(1) L.R. 8 C.P. 679.
(2) L.R. 2 Ex. 125.
(3) 1 Taunt. 300.
(4) L.R. 5 Q.B.D. 115.

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The bill of lading was in the following terms:—

"Shipped in good order and condition—by Karanee Veeraswamy in and upon the good ship or vessel called the *Abyssinian*, whereof T. Williams is master for this present voyage, and now lying in the river Solevem, and bound for Bombay—K. V. (135) one hundred and thirty-five teak square measuring tons 115-12-10, being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of Bombay (all and every dangers and accidents of the sea and navigation of whatsoever kind or nature excepted) unto order or to his assignee. Freight for the said goods payable there at the rate of Rs. (17) seventeen per ton of 50 cubic feet on right delivery with average accustomed. In witness whereof the master or [317] purser of the said ship or vessel both affirmed to two bills of lading, all of this tenor and date, one of which bills being accomplished, the rest to stand void. Dated in Moulmein this 20th September, 1880."

The following words were added in the handwriting of the captain:—

"Weight and contents unknown. Marks, numbers, quantity and measurement unknown.

"All other articles as per charter party."

Farran, for plaintiff.—The reasoning in the case of *Spaight* v. *Farnworth* (1) has no application to the present case. The ground of the decision in that case was, as stated on p. 120 of the report, that "errors of measurement in part would be corrected by opposite inaccuracies in another part." That would be so as between the charterer of the ship and the owners, but this is a case between the charterers and a consignee of a portion of the cargo, and if he is overcharged, he will not be compensated by the fact that another consignee may be undercharged for his part of the cargo. The words "all *other* conditions," added to the bill of lading, mean that all the conditions, *except the one relating to measurement*, are to be taken from the charter party. It is, therefore, necessary to measure the timber here, and the consignee has done so. In certain exceptional cases freight is payable on the measurement taken at the port of shipment, but the rule is that it is payable on the quantity actually delivered (Maclaghlan on Shipping, p. 430). Further, there is no evidence that the measurement, given in the bill of lading, is the intake measurement. The words added by the captain, declaring that the weight, &c., was unknown, operate to eliminate the figures given in the bill of lading, which must, therefore, be read as if they were altogether omitted. It is improbable that the shipper intended to be bound by measurements taken by a servant of the charterer, who would naturally make them as large as possible. Counsel referred to *Gibson* v. *Sturge* (2), *Spaight* v. *Farnworth* (1).

Kirkpatrick, for defendant.—The effect of the words added to the bill of lading by the captain is to incorporate the provisions [318] of the charter party. One of the conditions or terms of the bill of lading is that timber measuring 115 tons is to be delivered at Bombay. In his note to the bill of lading the captain in effect says: "I do not know whether the weight and measurement stated in this condition of the bill of lading are correct, but all other conditions are to be taken from the charter party." One of those *other* conditions is that freight is payable on intake measurement, and that condition accordingly is incorporated into the contract contained in the bill of lading. The parties chose to run risk of

(1) L.R. 5 Q.B.D. 115. (2) 10 Ex. 622.

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mistake in the measurement. Had the error been the other way, the captain would be the loser. It is to be remembered that the measurement was taken by the shipper's agent. The statement in the bill of lading is *prima facie* evidence of what the intake measurement was, and it rests with the plaintiff to rebut it. Counsel referred to *Tully* v. *Terry* (1), *W. Nicol & Co.* v. *J. S. Castle* (2), *Wegener* v. *Smith* (3).

JUDGMENT.

SARGENT, J.—The question in this case comes before us on a reference from Mr. Hart, the First Judge of the Small Cause Court, in a suit brought by the consignee of one hundred and thirty-five logs of timber shipped in the *Abyssinian* at Moulmein for conveyance to Bombay, to recover a sum which he has paid to the captain of the ship, but which he alleges was in excess of the amount properly payable as freight. There is no dispute as to the actual timber which was put on board. The logs which were shipped, appear to have been duly delivered at Bombay. The question turns on the measurement of the timber; the captain contending that by the contract of carriage the freight was to be calculated upon the intake measurement at Moulmein, and the consignor on his part contending that it is to be paid upon the actual measurement of the timber in Bombay, the port of delivery.

The *Abyssinian* was chartered in July, 1880, to Messrs. Bhagwandas of Rangoon, and the charter party contains the terms of the contract between them and the owners. The charterers subsequently proceeded to obtain cargo for the ship at [319] Moulmein, and goods of various shippers were received on board. Among them was the timber in question, which was shipped by one Karanee Veeraswamy, and consigned to the plaintiff at Bombay.

The measurement of the timber put on board by the shipper at Moulmein is stated in the bill of lading to be upwards of 135 tons, but the plaintiff alleges that upon its arrival and delivery at Bombay he himself measured it, and found the measurement to amount only to something above 58 tons, and upon this quantity, and not upon the amount stated in the bill of lading, he contends that he is liable for freight.

The bill of lading is as follows:—"Shipped in good order and condition—by Karanee Veeraswamy in and upon the good ship or vessel called the *Abyssiniam*, whereof T. Williams is master for this present voyage, and now lying in the river Salevem, and bound for Bombay—K. V. (135) one hundred and thirty-five teak square, measuring tons 115-12-10-0, being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of Bombay (all and every the dangers and accidents of the sea and navigation of whatever kind or nature excepted) unto order or to his assignee. Freight for the said goods payable there at the rate of Rs. 17 (seventeen) per ton of 50 cubic feet on right delivery with average accustomed. In witness whereof the master or purser of the said ship or vessel both affirmed to two bills of lading, all of this tenor and date, one of which bills being accomplished, the rest to stand void. Dated in Moulmein this 20th September, 1880.

"Weight and contents unknown.

"Marks, numbers, quality and measurement unknown."

(1) L.R. 8 C.P. 679. (2) 9 B.H.C.R. 329. (3) 15 C.B. 285.

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"All other conditions as per charter party."

It is these last words, added by the captain to the bill of lading, which have raised the question we have to decide. The defendant contends that their effect is to incorporate into the bill of lading the various conditions of the charter party, and, amongst them, the condition which provides that freight is to be payable "for all timber one rate throughout (except 100 tons broken stowage at half freight) *by intake measurement.*"

[320] Some reference was made in argument to the use of the word "conditions" in the written words at the foot of the bill of lading. We think, however, that it must be taken as equivalent to "terms," and that the phrase "all other conditions as per charter party" means simply that, except where other and inconsistent terms are expressly mentioned in the bill of lading, the terms of the contract between the charterer and the shipper for the carriage of the timber are to be the same as the terms of the contract contained in the charter party.

Now the bill of lading provides that the freight shall be payable at Bombay at the rate of Rs. 17 per ton of fifty cublic feet, but it states nothing as to the mode of measurement, nor does it indicate where the measurement is to be ascertained. When, however, we refer to the charter party, we find a term which expressly provides that the freight is to be payable "by intake measurement," and the case of *Spaight* v. *Farnworth* (1) decides that intake measurement means the measurement actually taken at the port of shipment.

The port of shipment in the present case was Moulmein, and, therefore, the intake measurement upon which frieght is made payable is the measurement actually taken at Moulmein.

Mr. Farran, however, urged that it was improbable that it was intended that freight should be payable upon measurements ascertained (as he said) by a servant of the charterers, whose object it would be to make the measurements as large as possible. But it appears that the person who measured at Moulmein, although an employee of the charterers, acted as agent of the shipper, and was, therefore, we must assume, a person in whom the shipper had confidence. It is clear that under these circumstances we cannot give much weight to the suggestion of improbability.

Mr. Farran also argued that the addition, by the captain, of the words "marks, number, quantity and measurement unknown" operated to eliminate altogether from the bill of lading, the statement of the quantity of timber shipped; that by these words the captain declined to be bound by the figures contained in the [321] bill of lading, and that, therefore, the bill of lading was to be read as if it contained no measurement at all. But we do not think that the addition of the words "measurement unknown" has this effect. These words are added for a limited purpose, *viz.*, to protect the captain from liability for short delivery; and, as shown in the case of *Tully* v. *Terry* (2), they do not nullify altogether the statement of quantity contained in the bill of lading.

We are, therefore, of opinion that the effect of the words added by the captain to the bill of lading was to incorporate the clause of the charter party which provided that freight should be payable on the intake measurement.

From the 5th para. of the case it appears that the plaintiff paid Rs. 1,500 to the defendant *on account*, but that, now being of opinion

(1) L.R. 5 Q.B.D. 115. (2) L.R. 8 C.P. 679.

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that he has paid too much, he seeks to recover a part of that sum. He must, therefore, prove that he has paid too much, and to do so must, if he disputes the accuracy of the statement in the bill of lading, show what the intake measurement really was upon which he is liable for freight. At the hearing, however, no evidence upon this point was given by the plaintiff, and he was, therefore, properly non-suited.

Of the questions referred to us, we answer the first in the affirmative. The second we answer also in the affirmative, as, looking to the sixth and eighth paragraphs of the case, we think there was evidence that the statement of quantity in the bill of lading was the intake measurement, and this evidence was not rebutted by the plaintiff. To the third question we do not think it necessary to give any answer; and the fourth we answer in the negative.

WEST, J.—I am of the same opinion. Apart from the decided cases, I should feel disposed to give to the disputed clause the effect which has been proposed by the plaintiff, and to hold that where the captain added such words as "weight, measurement, &c., unknown" to a bill of lading, there is no agreement as to the quantity shipped on board. But the authorities which bind us have laid down that these words do not cancel the statement of quantity contained in the bill of lading, but that under [322] their protection, if the captain deliver what was given to him, he is not bound by any clause in the bill of lading which purports to state the quantity of goods shipped. That being so, there is in this case some evidence that upwards of 115 tons of timber were shipped at Moulmein. The measurement appears to have been taken by some person acting as the agent of shipper, and the taking the bill of lading in this form argued that the same terms which were to govern the payment of freight as between the owners of the ship and the charterers upon the whole cargo should apply also as between the charterer and the shipper in respect of the payment of freight upon a particular portion of the cargo. The shipper ran the risk of the measurement being incorrect. That, however, was his own doing, and cannot now affect the captain's clause. I think the bill of lading is *prima facie* evidence of the intake measurement upon which freight was to be paid, and I agree in the answers made to the question referred to us.

Attorneys for the plaintiff: Messrs. *Nanu and Hormusji*.
Attorney for the defendant: Mr. *H. W. Payne*.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice M. Melvill.

THE COLLECTOR OF THANA (*Original Defendant*), *Appellant v.* KRISHNANATH GOVIND AND ANOTHER (*Original Plaintiffs*), *Respondents.** [6th December, 1881.]

Limitation—Act XIV of 1859, *s.* 1, *cls.* 12 *and* 16—*Grant by a Hindu sovereign to a Hindu temple—Applicability of Hindu law to determine questions of limitation—Antastha sadilwar — Kherij jamabandi parbhare paiki — Nibandh — What is immoveable property.*

The Peishwa, by a *sanad* dated 1790, granted to the temple of Shri Vyankatesh, at Mahim, an annual sum of Rs. 350 in cash out of the "antastha

* Second Appeal No. 12 of 1879.