1881
AUG. 4.
ORIGINAL CIVIL.
5 B. 506.

of such parties. Nanabhoy Framji, as already mentioned, was stated by Mr. Latham to have two sons who have children, and, for aught I know, one or more of the other persons who signed the agreement may have had children whose interests are not at present represented in this suit.

For the above reasons I am of opinion that the special report of the Assistant Commissioner is correct, and that it must be confirmed, and I accordingly confirm it.

By consent of the parties it was arranged that the cost of all the parties appearing on this motion of and incidental thereto should be taxed as between attorney and client, and be paid out of the funds to the credit of the suit. I, therefore, make an order as to costs to that effect.

Solicitors for plaintiffs.— Messrs. *Crawford and Boevey.*

Solicitors for defendant, Nanabhoy Framji.—Messrs. *Tobin and Roughton.*

Solicitors for defendant, Hari Valabdas Kaliandas—Messrs. *Craigie, Lynch, and Owen.*

---

5 B. 539.

[539] ORIGINAL CIVIL.

Before Mr. Justice Bayley.

W. & A. GRAHAM & CO. *v.* MERVANJI NUSSERVANJI AND ANOTHER.* [5th and 6th August, 1881.]

Charter-party—"Safe port or as near thereunto as she may safely get always afloat"—Ship unable to enter port or lie there without previous lightening—Rights of parties.

Where a vessel is chartered to load a full and complete cargo and being so loaded to proceed therewith to a "safe port or so near thereunto as she may safely get, and deliver the same always afloat," the master is not bound to sign bills of lading for, or to sail to, a port where the vessel cannot, by reason of her draught of water, lie and discharge "always afloat" without being previously lightened, even if the cost of the requisite lightening would, by the charter-party, fall on the charterers.

By the terms of a charter-party a vessel was to take in a full cargo at Bombay, and therewith proceed to a "safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat." Marseilles was at first named as the port of discharge, but subsequently the vessel was ordered to Cette, a French port, a little to the west of Marseilles; and bills of lading, made out for Cette, were tendered to the master for signature. The master refused to sign the bills of lading, or sail, for Cette. The vessel's draught of water when loaded was such that she could not have entered or lain afloat in Cette harbour without discharging a portion of her cargo. The cost of lightening the vessel by lighters outside the harbour would, under the charter-party fall on the charterers, and they were willing to incur the expenses necessary for that purpose.

Held—that it was no breach of the charter-party by the master to refuse to sail to Cette, or to sign bills of lading for that port.

THIS was a suit brought by the charterers of the steam-ship *Ossian* against the agent in Bombay of her owners, and the master of the said vessel.

The plaint set out that on the 22nd of June, 1881, a charter-party was entered into between the plaintiffs and the first defendant, Mervanji Nusservanji, signing as agent on behalf of the owners of the steam-ship *Ossian*, by which it was agreed, *inter alia* that the said steamer

* Suit No. 320 of 1881.

1881
AUG. 6.
ORIGINAL
CIVIL.
5 B. 539.

should load from the charterers or their agents a full and complete cargo, and "being so loaded, should therewith proceed direct all the way under steam *via* Suez Canal, to a safe port in the Mediterranean (Spanish [540] ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat;" that for the purpose of entering the said ship out at the Custom house, Marseilles was named as the port of discharge; that subsequently and before the cargo was completely loaded, the defendants were informed that the destination of the said vessel would not be Marseilles but Cette; that defendants thereupon gave notice that they would refuse to take the ship to Cette, whereupon a dispute arose, and delay was incurred to the damage of the plaintiffs; that subsequently bills of lading for the cargo already loaded were made out for Cette, and were tendered to the defendants for signature, but they refused to sign the same, or to sign any bill of lading for any other port than Marseilles, which refusal was a breach of the charter-party; that Cette was a safe port, and one to which the steam-ship *Ossian* was bound to go under the charter-party; that the cargo was now almost completely loaded, and, unless the defendants were restrained by the order and injunction of the Court, they would carry out their avowed intention of taking the ship out of the jurisdiction of the Court to the port of Marseilles, in breach of their charter-party; that this would be to the great loss and detriment of the plaintiffs, and would leave them without attainable redress. The plaintiffs, therefore, prayed (1) that it might be declared that the plaintiffs were entitled to name the port of Cette as the port of destination of the steam-ship *Ossian*; (2) that the defendants be ordered to sign the bills of lading as tendered, or, in default, to pay damages; (3) that the defendants might be restrained by injunction from employing the said ship in breach of the charter-party.

On the 2nd August, the Hon'ble *J. Marriott* (Advocate-General) presented the plaint, and moved for, and obtained a *rule nisi*, calling upon the defendants to show cause why they, and each of them, should not be restrained by the order and injunction of the Court from removing the steam-ship *Ossian*, in the plaint mentioned, from the port of Bombay, or from employing the said ship in a manner inconsistent with, or which might prevent, or interfere with the performance of the charter-party.

[541] *Interim* injunction in the meantime.

August 5 and 6.—The rule came on for argument.

The facts of the case were shortly these:—On the 22nd of June, the charter-party, the material portion of which is set out above, was entered into between the plaintiffs and the first defendant, Mervanji Nusservanji, signing as agent of the owners of the steam-ship *Ossian*. The plaintiffs subsequently assigned their charter to Remington & Co., merchants of Bombay, who were the real plaintiffs in this suit. On the 14th July, Mervanji wrote to the plaintiffs that the *Ossian* had just arrived, and asked for what port he should enter her out at the Custom-house. The plaintiffs communicated with their sub-charterers, and forwarded to Mervanji, on the same day, Messrs Remington & Co's answer: "her port of discharge will be Marseilles." Marseilles was accordingly entered at the Custom-house as her port of discharge. On the next day, 15th July Mervanji, on behalf of the owners, entered into a contract with third parties to ship for Marseilles 23 tons of horns, intending to use them to dunnage the ship for the voyage. By the charter-party "all requisite dunnage was to be found by the steamer." The right to make such a

contract was at first disputed by the plaintiffs, but after a long correspondence on the point the plaintiffs finally gave way, under protest.

On the 16th of July, Mervanji telegraphed to the owners in London : "*Ossian* loading Marseilles."

On the 20th July, plaintiffs advised Mervanji that it was not at all certain that their sub-charterers would not change the ship's destination from Marseilles to some other Mediterranean port. On the next day, July 21, Mervanji replied that Marseilles having been named, the right given the plaintiffs by the charter-party had been already exercised, and no change in the destination of the ship could now be made.

On July 23, plaintiffs wrote Mervanji : "Steamer's destination will be Cette : please make necessary change at the Custom-house," and at the same time forwarded for signature bills of lading, for the goods already on board, made out to Cette. On the same day Mervanji replied that it was too late to change the steamer's destination ; that Marseilles had been named by the plaintiffs ; [542] that the owners of the ship had in consequence been informed by telegraph that she was ordered to Marseilles, and insurances probably ere this had been effected for that port ; that probably further engagements for the ship had also already been entered into on that understanding. Moreover, the cargo of 23 tons of horns (for dunnage) had been taken on board, and bills of lading for the same, for Marseilles, given. And, over and above the previous reasons for refusing to go to Cette, that port, he alleged, was one to which the ship was not bound to go under her charter-party, as it was not a "safe port" for a ship of her draught.

A long correspondence followed, and meanwhile the further loading of the vessel was discontinued by the shippers.

The plaintiffs asserted that Cette was a "safe port" for the *Ossian* into which she could enter fully laden or, at worst, by discharging a small portion of her cargo into lighters outside the port, and maintained that they had the right to change the port of destination up to the moment that the bills of lading were signed. The defendants maintained that there was only from 18 to 20 feet in the harbour, and the *Ossian* drew 21 feet 6 inches fully laden; that they were not bound to incur the risks attendant upon discharging in the open sea-way outside the harbour ; but they offered to take the ship to Cette if the plaintiffs would give an undertaking to indemnify the owners in respect of any loss that might occur from so partially discharging the cargo outside the port, as well as for any loss that might be caused by change of insurance (if any), or loss of charter, if any had already been entered into, and the cost of transhipment of the cargo of horns from Cette to Marseilles. These terms the plaintiffs refused ; and, having completed the loading of the cargo (2,900 tons of wheat) under protest they brought this action.

The evidence as to the character of the port of Cette adduced an affidavit, on one side and the other, was shortly as follows :—

A. Clark, Surveyor to Lloyds' Agency in Bombay, deposed that he was acquainted with the Mediterranean and its roadsteads ; that, to the best of his belief, the steam-ship *Ossian* could safely lie there fully laden ; that, particularly at that time of the year, he thought a steamer would be perfectly safe there, as, to the [543] best of his belief, there was no difficulty whatever, either as to anchorage, or otherwise.

J. R. Kirby Johnson, a partner of the firm of J. Mackintosh & Co., Ship-brokers, Bombay, deposed that he had a few months previously effected a charter of the steam-ship *Coniston*, 1,490 tons (the *Ossian* was

1881
AUG. 6.
ORIGINAL CIVIL.
5 B. 539.

of 1,211 tons (net) register) for Marseilles; and after the charter had been completed, at the request of the charterers, it had been altered so as to give the charterers the option of discharging at Cette, or Marseilles and Cette. This affidavit was answered by one on the other side which stated that 3*s*, 9*d*. extra freight had been charged by the owners of the *Coniston* for the above concession; that the *Coniston* had, as a matter of fact, cleared out for Marseilles alone, and had gone to Marseilles alone, and discharged all her cargo there. There was also some evidence of another steamer, the *Titania*, also somewhat larger than the *Ossian*, having cleared out from Bombay for Cette; but whether she went there or not or whether the charterers paid greater freight for sending her there, or what was the nature of the charter-party in other respects in that case, did not appear. The plaintiffs also filed two affidavits of merchants residing in Bombay to the effect that, in such a charter-party as this, it was a matter of right with the charterer to alter the destination of the ship as often as he pleased up to the time of signing bills of lading. This was denied by a partner of the firm of Mervanji Nusservanji & Co., who said no port need be named until the time came to sign the bills of lading: but if the port was named earlier, the charterers could not afterwards alter the destination, except with the ship-owner's assent. The captain of the *Ossian*, William Tillar, produced a volume of "Sailing Directions" (1) which he said was provided by the owners of the ship, and which was in the habit of being guided by. He also produced his chart of that portion of the Mediterranean in which Cette was situated. In the "Sailing Directions," p. 82, Cette harbour was thus described:—

"To the S.-E. of the mole is a long heap of stones, or jetty of rocks, which serves as a breakwater off the middle of the harbour, and forms two entrances thereto. The N.-E. mouth of the entrance, near the light-house or mole head, has a **[544]** depth of from 18 to 20 feet. At a short distance without the harbour is a shelf of sand, with only 3 fathoms over it, where the sea runs very high, with the winds from E.-S.-E. to S.- W.. which blow on this coast and so obscure it with haze that you cannot see the land until you are very near it.

The plaintiffs, on their side, produced a volume of a similar character, entitled "Dues and Charges on Shipping in Foreign Ports" (2); and a chart in which an enlarged map of the port of Cette was given. The "Dues and Charges," p. 73, thus described the port of Cette:—

"The port of Cette is divided into three basins: the Old Port, the New Port, and the Basin of the South Railway Station. The latter is in connection with the New Port by a large canal, the quays of this canal offer good berths for discharging and loading with great speed and economy of labour. The Old Basin or Port admits vessels drawing 18 feet, the New Port 15 feet, and the South Railway Basin is now dredged to the same depth of water. The harbour is protected by a breakwater running east to west, forming two entrances. The eastern is the best, and the only one practicable. During bad weather vessels drawing 21 feet can enter."

The chart produced by the plaintiffs showed the character of the port of Cette and the various soundings inside and outside of the breakwater which protected the mouth of the harbour. The greatest depth shown inside the breakwater was 19 feet; just in the mouth of the S.-W. entrance was marked 25 feet, and some little way outside the N.-E. entrance

(1) Published by R. H., Laurie, Fleet Street, London.
(2) 4th ed. by John Green, London, 1881.

1881
AUG. 6.
ORIGINAL CIVIL.
5 B. 539.

23 feet. At the hearing of the rule leave was asked on either side to examine witnesses orally on some points left in doubt by the affidavits, and two witnesses were called—William Tillar, captain of the *Ossian*, by the defendants: and J.R. Inch, captain of another steamer, by the plaintiffs.

W. Tillar stated that the *Ossian* was a ship of 1,211 tons (net) register. That he had now on board 270 tons of coal, enough for eighteen days only. That he carried less this season of the year (the monsoon) than at others, as he could not carry any coal on deck. That he should coal at Aden and Port Said; [545] then at Malta. That he should leave Malta with 330 tons (50 of which would be on deck) if going to Marseilles or Cette. He might possibly burn as much as 120 tons before he got to Cette. The French coal was so bad that it was far cheaper to take in coal enough at Malta to take the ship on to Gibraltar or wherever else she might be sent. That his ship drew 3 inches more in the Mediterranean than on this side of Port Said owing to the difference in the density of the water. That, consequently, his draught on arriving at Cette would not be less, if it was not indeed, more than it was now, 21 feet 6 inches. That it would not be safe to have less than 6 inches of water under the keel. That the equinoctial gales sometimes came as early as the beginning of September, and then the Mediterranean was a stormy and dangerous place.

J. R. Inch stated that he had been to Cette as master of a steamer of 900 tons register, drawing then 15 feet of water. When once within the breakwater a ship was in the port, and safe. The N.-E. entrance was the one for large vessels. The depth of water varied a good deal with the wind. No such depth as 25 feet was to be found there. He could not say what was the depth inside. He could not say whether or not vessels of 21 feet could enter. He also gave evidence which shewed that the probable effect in the case of a ship of the size of the *Ossian* of removing 100 tons of cargo or coal would be to lessen her draught by about 5 inches. He confirmed Tillar as to the occasional early occurrence of the equinoctial gales in the Mediterranean.

Inverarity (for the defendant) showed cause.—We have not broken, and do not intend to break, the charter-party. We are asked to go to Cette, and we are not bound to go to Cette under our contract. It is not a "safe port" for the *Ossian* within the meaning of the charter-party. That is my first point; and, if I am right on it, it will be unnecessary to consider the two other points in our case, *viz.*, that the charterers, having once named Marseilles as the port of discharge, could not afterwards order us to go to Cette; and next that, if they could have done so originally, they were estopped from doing so after that we, relying on their representation that Marseilles was to be our destination, had taken action and altered our position.

[546] I do not dispute the power of the Court to issue an injunction to restrain an intended breach of a charter-party; but the cases show that that will only be done on a very strong case being made out, and scarcely ever on an interolcutory application; at any rate, not unless the party applying for it gives an undertaking to be responsible for any loss or damage that may occur: *DeMattos* v. *Gibson*. (1). In that case there was such an undertaking given. None has been given here. The Court has a great reluctance to grant these injunctions, as it amounts, in effect, not to a mere restraint, but indirectly to compel the performance of some positive act: in this case to compel us to go to Cette if we don't care to

(1) 4 DeG. & J. 276.

1881
AUG. 6.
ORIGINAL CIVIL.
5 B. 539.

waste our time by remaining in Bombay; *Lidgett* v. *Williams* (1); *Blakemore* v. *Glamorganshire Canal Navigation* (2). It is an indirect manner of making us sign bills of lading in a particular way, as was said in *Grassmain* v. *Littlepage* (3).

Then on the merits it is for the plaintiffs to show that Cette is a "safe port," for such a ship as the *Ossian*, within the meaning of the charter-party. The material clause in our charter-party is practically identical with that in the case of the *Alhambra* (4); and it was there held, on appeal, reversing the decision of Sir. R. Phillimore in the Court below, that under such charter-party a ship is not bound to go to a port into which she cannot enter, or in which she cannot lie "always afloat" fully laden. L. J. James there says that "it is no answer to say that with a little manipulation of the cargo (outside) the ship can be made fit to go into the port. That is not the bargain" (5). That was a stronger case than this, as there a custom to lighten ships outside the port by lighters was proved; that has not been done here. Moreover, in that case there was also a good protected roadstead outside the port itself, which there is not here. The Lords Justices even held that evidence of such a custom could not be given, as it contradicted the plain meaning of the written contract. The evidence, even the plaintiff's own evidence, shows that the *Ossian* could not possibly enter Cette harbour, and lie afloat there fully [547] laden, even if there was no coal on board when she entered Cette, and the captain was entitled to take as much coal as in his discretion he thinks is for his owner's benefit. That being so, Cette is not a port to which we are bound to go.

[BAYLEY, J., referred to *Shield* v. *Wilkins* (6) cited with approval by Brett, L. J., in the *Alhambra*.]

That case was the converse of this. Rolfe, B. there says: "The word safely means safely as a loaded vessel."

This very point seems never to have arisen before the case of the *Alhambra*. Other cases that seem very like it have all been cases in which the shipowner has contracted, either by original agreement, or subsequent mutual assent, to go to a certain definite port, or as near thereto as the ship can safely get; and the only question has been what, in each case, amounts to fulfilment of that contract. Such are *Hillstrom* v. *Gibson* (7), *Capper* v. *Wallace* (8), and many others. Those cases would be in point if we had contracted to go to Cette, but we have not done so.

My next point is that having named Marseilles as the point of discharge, they cannot afterwards as of right, name another port. The charter-party, it is true, says "as ordered on signing bills of lading"; but that is a provision merely for the benefit of the charterer, which he can waive. If he names it earlier, he does waive it. Having once named the port of discharge, it is final. Such an alteration as is sought to be made here would amount to a new contract, and would, consequently, require our assent; *Hall* v. *Brown* (9): that has never been given.

Then assuming the charterers originally had this right, my next point is that they were too late in seeking to change the port of discharge, we having by that time taken action on their representation that Marseilles would be our destination. We have altered our position materially, and they are in consequence estopped. We had, several days before notice

(1) 4 Hare 455. (2) 1 Mylne & K. 154. (3) 3 W.R. 1 (Moulmien cases).
(4) L.R. 5 P. D. 256; 6 P. D. 68 (CA). (5) L.R. 6 P.D. 72.
(6) 5 Exch. 304. (7) 8 Scotch Cess. Cas. 3rd Series, 463.
(8) L. R. 5 Q. B. D. 163. (9) 2 Dow. 367.

1881
AUG. 6.
ORIGINAL CIVIL.
5 B. 539.

of the proposed change, telegraphed to our owners that the ship was loading for Marseilles, in order that insurances for that port might by effected. They would in the ordinary course be effected [548] without delay; and no doubt, though we do not know it as a fact, that has been done. It is more than possible, too, that new engagements for the ship on that understanding have been entered into. And, lastly, before we were required to go to Cette, we entered into a contract to carry 23 tons of horns to Marseilles, and shall be liable to an action for damages if we carry them to Cette. There was at one time a controversy as to whether we were entitled to enter into this contract, seeing we had chartered the whole ship to the plaintiffs. By the charter-party we were to daunnage the ship; and these horns were intended, and have been used to dunnage the vessel. The authorities show we are entitled to make profit, if we can, by the carriage of goods used as dunnage: Machlachlan on Shipping, p. 386 (2nd ed.); *Towse* v. *Henderson* (1); *Kinter's Case* (2).

The Hon'ble *J. Marriott* (Advocate-General) in support of the rule.—Our affidavits show it is common and customary in Bombay to change the destination of a ship up to the moment of signing bills of the lading, and that as a matter of right. The charter-party in this case is express on the point. There has been nothing like waiver in the case; Marseilles was named at the request of the defendants simply for the purpose of entering the ship as soon as possible at the Custom-house. That is generally done. And there has been no estoppel. If we had the right contended for, then the plaintiffs acted, as they did, at their own risk. At the very utmost it could only be ground for compensation. Then as to main question, as to whether Cette is or is not a port to which the defendants are bound to take this vessel, Captain Inch's evidence shows that, when once inside the breakwater, you are in the harbour, and perfectly safe. The utmost, therefore, that the defendants can demand is that the *Ossian* shall be able to get within the breakwater. That, as our chart shows, she can do. Just in the mouth of the S.-W. entrance the chart shows 25 feet; the next sounding shown is about the middle of the breakwater, just inside it, where there is 19 feet. From the entrance to that point the bottom must, of course, shelve, and half way between the two there must be about 22 feet. There the *Ossian* could lie, even with her present draught, and she [549] would be in the harbour even before she got to that point. Our book, too ("Dues and Charges"), says: "Vessels drawing 21 feet can enter." The *Ossian's* draught should be some inches less than 21 feet when she arrived at Cette. The master cannot claim to carry any more coal than absolutely necessary for the due safety of the ship. To claim more would be to claim the right of incapacitating himself from the due performance of his contract. He is bound to make every effort to carry out his contract. He can in no case claim to go into Cette with more coal than would be necessary to take him on to Gibraltar. His draught then would be some 6 inches less than 21 feet, and the evidence shows that then he could enter. So, even if the defendants are right as to the legal definition of a "safe port" under such a charter-party as this, we have still satisfied the condition imposed upon us, and shown Cette is a safe port, even in that sense. But that, I contend, is not the right definition in this case. The facts in the *Alhambra* (3) were different. There the ship drew

(1) 4 Exch. 890.
(2) Leonard's Rep. 46.
(3) L.R. 5 P.D. 256=L.R. 6 P.D. 68.

1881 AUG. 6. ORIGINAL CIVIL. 5 B. 539.

16 feet 6 inches; and the water in the harbour, at low tide, was but 11 feet. A very large portion of the cargo, therefore, would in that case have had to be taken out of the ship before she could have always lain afloat inside the harbour. Here it is not so. At the most, but a trifling amount of cargo would have to be removed by lighters outside, and it must be remembered that by the charter-party that would be done at our expense. We are quite ready to incur that expense. *Hillstrom* v. *Gibson* (1) is exactly in point. The report itself of that case is not procurable here, but the case is quoted at length in Machlachlan on Shipping, p. 356 (2nd ed.). There, as here, the port was not named in the charter-party, the ship was only bound to go to a "safe port, or as near thereunto as she could safely get," and it was held that if she could not get into the port (Glasgow) otherwise than by discharging outside what was necessary sufficiently to lighten her—in that case one-fifth of her cargo—she was bound so to lighten herself. So, too, *Capper* v. *Wallace* (2). Lush, J., at p. 166, says: "The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed, and the ship sufficiently lightened, without **[550]** exposing her to extra risk, or the owner to any prejudice, and without substantially breaking the continuity of the voyage; and in such a case, if the consignee is at hand to receive the surplus cargo, and so relieves the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom* v. *Gibson*" (1). All that is directly applicable here; consequently, it is clear that Cette is a port to which the *Ossian* was bound to go, and the Court will, therefore, grant the injunction asked for.

JUDGMENT.

BAYLEY, J.—The rule in this case calls upon the defendants to appear and show cause why they should not be restrained by the order of this Court from removing the steam-ship *Ossian* from the port of Bombay, or from employing the said ship in a manner inconsistent with, or which may prevent or interfere with the performance of the charter-party of the 22nd day of June, 1881. Now the material clause of that charter-party is to this effect: "And being so loaded, shall therewith proceed direct * * * * to a safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat, agreeably to bills of lading, on being paid freight, &c." The main question to be decided is whether, assuming the charterers or their assignees had power to alter the destination of the ship from Marseilles, the port of discharge at first named, they were justified in directing the ship to the port of Cette,—that is, in other words, whether the port of Cette is a safe port within the meaning of this charter-party. That, of course, is a question of evidence, and a good deal of evidence on the point has been given on either side. It rests on the plaintiffs, who assert it, to prove that Cette is 'a safe port' in that sense. They say that all that it is necessary for them to make out is that this ship can lie within the breakwater, and of that they have given good *prima facie* evidence such as the Court would be justified in acting on. Much reliance has been placed by the plaintiff on the affidavit of Mr. Clark as bearing upon the general character of the harbour of Cette; **[551]** but, besides the generality of the statements therein contained, I think there is another reason for not attaching much weight

(1) S. Scotch Sess. Cas., 3rd Series, 463. (2) L.R. 5 Q B.D. 163.

1881 AUG. 6. ORIGINAL CIVIL. 5 B. 539.

to Mr. Clark's evidence, I think, from expressions he makes use of Mr. Clark is not talking of the harbour itself, but of the bay or roadstead outside the breakwater. He says he believes "a steamer, particularly at this time of the year, would be safe there," and that, "to the best of his belief, there is no difficulty whatever either as to anchorage or otherwise" —of course, inside the harbour itself, there could be little question that a ship would be safe, and no question whatever of anchorage would then arise. For these reasons I cannot attach much weight to this affidavit. The other evidence on the point is documentary; and on that evidence what is the character of this port? Captain Tillar has produced a volume of "Sailing Directions" which he is in the habit of being guided by; and, on the other side, another book of somewhat similar character, but of more recent date, has been produced, entitled "Dues and Charges on Shipping in Foreign Ports." Either side has produced a chart of that part of the Mediterranean, and the chart plaintiff produces gives an enlarged chart of the harbour of Cette. From the "Sailing Directions" it appears that the N.-E. mouth of the entrance has a depth from 18—20 feet; the "Dues and Charges" says: "Vessels drawing 21 feet can enter," while the greatest depth inside the harbour that it gives is 18 feet. These are not very explicit or reliable statements; and I feel much more inclined to rely on the chart which plaintiff produces, which is of comparatively recent date, and shows an enlarged plan of this harbour. We learn from Captain Inch that there are two entrances: that for large ships at the N.-E. end, and that for smaller ships at the S-W. end of the breakwater. Now plaintiff's chart shows the soundings in the neighbourhood of those two entrances. Exactly at the mouth of the S-W. entrance, which is the one for smaller vessels, it must be remembered, 25 feet are recorded; just outside the N.-E. entrance, 23 feet; and inside the breakwater nowhere is there a greater depth recorded than 19 feet. Now, that a ship is not in this port unless she is within the breakwater, is clear. Outside it, Captain Inch's evidence shows, is nothing but open sea, the Gulf of Lyons. There is no protection of any sort outside the breakwater, and the evidence shows what a [552] stormy and dangerous place the Gulf of Lyons is. Now this vessel is of 1,211 tons' register, and has on board at the present moment 2,900 tons of cargo, and is drawing 21 feet 6 inches. Evidence has been given to show that if she carried into Cette no more coal than she would require in order to steam to Gibraltar after discharging her cargo, that her draught would be materially diminished. It was urged that the captain was bound to carry no more coal into Cette than was absolutely necessary for that purpose, however much it might be to his interest to do so, as in his evidence he showed that it would be. But there is nothing in the charter-party to prevent the owner carrying as much or as little coal as he thinks best for his own interests; and, if it were necessary to decide that point, I should probably hold that he was entitled to do so. But, however that may be, it is immaterial in this case; as it is clear that, even after all possible deductions are made, the *Ossian* with her present cargo on board could not go into Cette harbour without first discharging outside such a substantial part of her cargo as would materially lighten her. The chart shows only 19 feet inside the harbour; it is quite clear that, laden as she is, she cannot enter and lie afloat in no greater depth of watar than that. She could float where the 25 feet is marked in the chart—that is, at the mouth of the S.-W. entrance—but that is not a place where she could be allowed by the authorities to lie, to the hindrance and obstruction of the

1881
AUG. 6.
ORIGINAL
CIVIL.
5 B. 539.

use of the harbour by others. Nor could she then be said to be within the port. But it is said two steamers, the *Coniston* and the *Titania*, each of them larger than the *Ossian*, have lately cleared out from Bombay for Cette; but one of them we know never went to Cette, and as to the other we know nothing more whatever about her. We do not know her cargo, or whether she was to partially discharge first elsewhere or not. Nor do we know what the terms of the charter-party were in either case; if the master contracted to deliver those cargoes at Cette he must do so in the best way he can. Now, those being the facts, how stand the authorities on the point. In *Shield* v. *Wilkins* (1), a somewhat analogous case, Rolfe, B., said: "The word safely means safely as a loaded vessel." But a direct authority on the point is the late case of the [553] *Alhambra* (2), when before the Court of Appeal. I am quite unable to distinguish that case from the present, and every word of the judgments of the three Lords Justices is as applicable here as it was to the facts before them. The wording of that charter-party was almost identical, in this respect, with the wording of this: "always afloat" was amplified there into "always lay and discharge afloat." In that case evidence was given of its being a custom at the port of Lowestoft (the port in question) to lighten ships in the roadstead before bringing them in, and the charterers offered to lighten her at their own expense. But it was held that that was not the contract; James, L.J., says: "That is not the bargain the parties entered into. They never entered into a contract to go somewhere not a safe port, to go to a port which would be safe if they stopped at some other place near it, and with a little manipulation of the cargo made the ship fit to go into that port." Brett, L. J., says: "Secondly, it should be a port in which she might always lay and discharge afloat, and, according to my view, the meaning of that is, that it should be a port in which, from the moment she went into it, in the condition in which she was entitled to go into it, she should be able to lay afloat, and that she should be able to lay afloat until the time when she was fairly discharged. The condition in which she was entitled to go into this port was as fully loaded, and she was not bound to unload before she got into that port. Therefore the meaning of it is that she was entitled to be ordered to a port in which, when she was fully loaded, she would be ableto lay afloat, and a port which would remain in such a condition that she would be able to lay afloat from that moment until she was discharged in a reasonable way." Now the *Ossian* fully loaded draws 21 feet 6 inches, and she is entitled to be sent to a port "in which when fully loaded she would be able to lay afloat"; it is clear, then, that she cannot be ordered to go to Cette, where she would find, at most, but 19 feet of water to lay in.

Taking the view I do on this point in the case it will be unnecessary to go into the other points argued before me. I decide the matter on this short point alone, that, assuming the charterers had power to alter the destination of this vessel after they [554] had once named Marseilles—and the present inclination of my opinion is that they had that power under their charter-party—assuming that, still, they could only name a port that was a "safe port;" and on the evidence before me, and on that alone—other and different evidence, it may be, will be forthcoming at the trial—I am of opinion that Cette was not a "safe port," and that the *Ossian* was not bound to go there.

(1) 5 Exch. 304. (2) L.R. 6 P.D. 68.

I discharge the rule, therefore, and dissolve the injunction. Costs will be costs in the cause.

Solicitors for the plaintiffs—Messrs. *Crawford and Beevey.*

Solicitors for the defendants—Messrs. *Hore, Conroy, and Brown.*

5 B. 554=6 Ind. Jur. 92.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

DHONDIBA KRISHNAJI PATEL AND ANOTHER (*Original Plaintiffs*), *Appellants v.* RAMCHANDRA BHAGVAT AND OTHERS (*Original Defendants*), *Respondents.** [2nd March, 1881.]

Limitation—Act XV of 1877, *sch. II, art.* 49—*Time when "detainer's possession becomes unlawful"—Sale of immoveable property in the Mofussil—Decree for specific performance operates as a conveyance—Contract for sale of moveable and immoveable property combined—Indian Contract Act, s.* 85—*Joinder of causes of action—Objection, not taken in the Court of first instance, too late—Act X of* 1877, *s.* 44.

In the Mofussil of this Presidency the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself, does not wait for the execution of a conveyance—even if the vendor is required, as he seldom is, to execute such a conveyance—but is effected by the passing of the decree itself, coupled with the payment of the purchase-money.

A entered into an agreement with B for the purchase of moveable and immoveable property, and paid a deposit. Under such an agreement, by s. 85 of the Indian Contract Act, the ownership of the moveable property would not pass before the transfer of the immoveable property. B, instead of conveying to A the property agreed to be conveyed to him, conveyed it to C, and put him, C, in possession. A brought a suit against C and B, and obtained a decree setting aside the conveyance to C, and ordering B specifically to perform his contract and execute a conveyance of the property to himself, A. This decree was confirmed on appeal. B refusing to execute the conveyance to A, the conveyance was executed by the Court under the provisions of s. 202 of Act VIII of 1859. C still [555] detaining possession of the moveable and immoveable property in question, A brought this suit against him to recover possession of the same. The suit was brought within three years of the final decree of the Court of Appeal in the former suit, ordering a conveyance of the property to be executed to A, but not within three years of the date of the agreement to purchase, and it was contended that as to the *moveable* property the suit was time-barred.

Held that the suit for the possession of the moveable property was not time-barred, as the right to possession of both the moveable and immoveable property accrued to A, at the earliest, on the date of the final decree for specific performance of the agreement of sale, and it was from that time that the "detainers' possession" first became unlawful under art. 49, sch. II of Act XV of 1877.

An objection that the plaintiff has joined together causes of action which, by s. 44 of Civil Procedure Code, may not be joined together without leave first obtained, is taken too late if it is taken for the first time in the Court of Appeal after the case has been already heard on its merits.

[F., 16 A. 130; R., 12 A. 234 (285).]

THIS was an appeal from the decision of Rao Bahadur C. S. Chitnis, First Class Subordinate Judge of Poona, in Original Suit No. 52 of 1880.

The plaintiffs, Dhondiba and his partner, brought this suit to obtain possession of certain moveable and immoveable property situated in the village of Agar, near Junnar, in the district of Poona. The following are

* First Appeal No. 67 of 1880.