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in dealing with the causes for which a non-suit may be set aside, quotes the words "in any case of mistake, surprise or accident" as "large enough to embrace every contingency to which the failure may be attributed which reasonably entitles the plaintiff to have the validity of his demand effectually tried." I will put the question, whether there is any ground for relief on account of surprise or accident, which were the grounds of relief in two cases in the reports, *viz.*, *Rowley v. Carter* (1) and *Attorney-General v. Fellows* (2). I think not. The applicant was not taken unawares. What happened was due to his own rashness, (Story's Equity Jurisprudence, s. 250, note). No accident intervened such as a sudden event, or illness, or stoppage of means of communication. The applicant was under no compulsion to leave the Court-house: nor was his absence due to any weighty cause, as in *Hale v. Lewis* (3), where the affidavit states that the plaintiff's solicitor was compelled, on the day upon which the cause came on to be heard, to attend at the trial of an indictment involving the life of a person. I am of opinion that in leaving the Court-house [15] as he did, the applicant accepted the risk of the case being called on in his absence, that he was not "prevented" from appearing when the suit was called on for hearing, and that he was absent by his own act. I therefore refuse to make an order to set aside the dismissal of his suit.

Application refused.

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Before Mr. Justice Scott.

NUSSERVANJI JEHANGIR KHAMBATA (*Plaintiff*) *v.* VOLKART BROTHERS (*Defendants*).^{*} [26th and 27th July, 1888.]

Contract to deliver—Suit for non-delivery—Agreement exempting from liability in case of loss of carrying ship—Necessity for declaring name of carrying ship to purchaser—Loss of ship, what is a—July—August shipment, what amounts to.

The defendants agreed to sell to the plaintiff 500 tons of coal *per steamer* July-August shipment. The last clause of the agreement was as follows:—"In the event of the ship being lost, this contract to be null and void." The coal was put on board the *S. S. Rubens* by the defendants at Sunderland on the 30th and 31st August. On the 1st September the *Rubens* was sunk by collision in dock, and remained at the bottom in twenty-three feet of water for sixteen hours, when she was raised and her cargo discharged. The coal was pronounced unfit for a voyage to Bombay. Extensive repairs to the ship were found necessary, and she was useless until the 6th October. The plaintiff sued for damages for non-delivery of the coal. The defendants relied on the last clause of the agreement as exempting them from liability.

Held, that the defendants were not liable. The *Rubens* was lost for the purpose for which she was required under the contract, *viz.*, for a voyage in fulfilment of a July-August shipment, and the defendants, having proved that the coal had been duly shipped on board the vessel so lost, were exempt under the last clause of the agreement from liability for non-delivery.

It was argued that until the name of the carrying ship was declared to the plaintiff as purchaser neither the ship nor the coal was assigned to the contract, and therefore the loss could not be within the contract.

^{*} Suit No. 486 of 1887.

(1) 1 Y. & J. 511.

(2) 6 Madd. 111.

(3) 2 Keen, 218.

Held, that if such a condition was intended it should have been expressed. The appropriation of certain goods to the contract by the vendors (the defendants), the placing them on board the *Rubens*, and doing all in their power to despatch them to Bombay in fulfilment of the contract, were enough to entitle them to the protection of the last clause of the agreement.

[F., 22 B. 189 (195).]

[16] SUIT for damages for non-delivery of coal.

The plaint stated that by two separate agreements in writing, dated respectively the 23rd and 27th June, 1887, the defendants agreed to sell to the plaintiff 400 tons and 100 tons of coal respectively, ten *per cent.* more or less, at the rate of Rs. 16-14-0 *per ton*. The said coal was to be *per steamer July-August shipment via canal* and of the description known as South Hutton Double-screened Smithy Nuts, and to be delivered into purchaser's boats alongside. The plaintiff alleged that the defendants had failed to deliver the said coal whereby he had suffered damage to the extent of Rs. 2,700-14-11, which he sought to recover in this suit.

The two contracts were in precisely the same form. The contract of the 23rd June was as follows:—

“*Bombay, 23rd June, 1887.*

“*Coal contract.*

“The undersigned have this day sold to Messrs. Nusservanji & Co., a quantity of coal *per steamer July-August shipment via canal* amounting to 400 tons, ten *per cent* more or less.

“The coal to be of the description known as South Hutton Double-screened Smithy Nuts, and to be delivered into purchaser's boats alongside at Rs. 16-14 *per ton*.

“Delivery to be taken at a rate not less than 100 tons *per diem*.

“All conditions in the charter party as to demurrage, &c., to be binding on the purchaser.

“Terms office cash before delivery, or if buyers require to land the coal in charge of seller's *mukadam*, buyers paying landing, ground-rent, watching and interest at 9 *per cent. per annum* from final date of discharge and extra two annas *per ton* for the seller's *mukadam* for guarantee and one rupee deposit on the arrival of the steamer.

“Should the purchaser fail to take delivery within one day of receipt of notice that the ship is ready to discharge, it shall be optional with the vendors to resell from alongside or land and afterwards resell the said coal, after giving one clear day's notice [17] of their intention to do so; and the purchaser hereby holds himself, his heirs, representatives, or executors, responsible, and oblige himself or them to forfeit any advantage or to make good any loss or difference that may arise through such resale.

“Should the vessel put back or put into any port through stress of weather or any other cause, the terms of this contract shall not be prejudiced thereby.

“*In the event of the ship being lost, this contract to be null and void.*”

The defendants in their written statement admitted the making of the agreements as alleged in the plaint, and stated that in fulfilment thereof they had caused the coals to be shipped on board the S.S. *Rubens* in August 1887, and on the 3rd September, 1887, by letter of that date gave the plaintiff notice thereof.

They further alleged that on the evening of the same day, *viz.*, 3rd September 1887, they received a letter from their London agency informing

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them that the said S.S. *Rubens* with the said coal on board had been sunk.

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It appeared that on the 1st September the *Rubens* was sunk by collision in dock at Sunderland, and remained at the bottom in twenty-three feet of water for sixteen hours when she was raised and her cargo discharged. The coal was pronounced unfit for a voyage to Bombay. Extensive repairs were found necessary for the ship, and she was useless until the 6th October. The defendants contended that the ship was lost, and that under the last clause of the agreement they were discharged from their obligation to the plaintiff.

Jardine and Russell, for the plaintiff.—They cited the Contract Act IX of 1872, s. 83, and s. 56; *Alexander v. Vanderzee* (1); Benjamin on Sales (3rd ed.), p. 281; *Atkinson v. Bell* (2); *Taylor v. Caldwell* (3).

Latham (Advocate General) and *Anderson*, for the defendants. They cited Benjamin on Sales (3rd ed., p. 560—568; *Busk v. Spence* (4); *Graves v. Legg* (5); *Bowes v. Shand* (6); Contract Act [18] IX of 1872, s. 56; *Cossmann v. West* (7); *Calcutta and Burmah Steam Navigation Co. v. DeMattos* (8); *Sutherland v. Prat* (9); *Smith v. Myers* (10).

JUDGMENT.

SCOTT, J.—The facts of this case are as follows:—Messrs. Volkart entered into two contracts to supply the plaintiff, a coal merchant in Bombay, with 500 tons of coal in lots of 400 and 100 tons respectively. The contracts were in writing, and their terms were identical. The coal was to be "South Hutton Double screened Smithy Nuts," at Rs. 16-14-0 per ton, and the delivery was to be "per steamer July-August shipment into purchaser's boats alongside." The last clause of the contract runs as follows:—"In the event of the ship being lost, this contract to be null and void." From the evidence of Mr. Ward, of Messrs. Killick, Nixon & Co., this is the ordinary form used in Bombay for coal shipment contracts. The vendor undertakes to deliver the goods in the ordinary course of navigation, but protects himself from any obligation to deliver if that ordinary course is interrupted by the loss of the ship on which he has put the goods.

A commission was issued at the instance of the defendants, and the evidence taken at Sunderland proves that 1,032 tons of coal of the quality stipulated was put on board the S. S. "Rubens" on the 30th and 31st August; that a bill of lading given for the 1,032 tons included 500 tons purchased by the defendants' house in England for the purpose of fulfilling this contract; and that the S. S. "Rubens" was chartered for Bombay to carry this coal. On the 1st September the "Rubens" was sunk by collision in dock at Sunderland, and remained at the bottom in 23 feet of water for 16 hours, when she was raised and her cargo discharged. Extensive repairs were found necessary, and she was useless till the 6th October. On the 3rd September, before the defendants became aware of this disaster, the plaintiff wrote asking the name of the ship by which the coal was to arrive. The defendants gave the name "Rubens," but said they would not guarantee that name until the telegram giving it was

(1) L.R. 7 C. P. 530.

(2) 8 B. C. 277.

(3) 3 B. & S. 826.

(4) 4 Camp. 329.

(5) 9 Exch. 709; 23 L. J. Ex. 228.

(6) L.R. 2 App. Cas. 455.

(7) L.R. 13 App. Cas. 160.

(8) 32 L. J. Q. B. 322-335.

(9) 11 M. & W. 296.

(10) L. R. 5 Q. B. 429=L.R. 7 Q. B. 139.

confirmed by letter. That telegram is a most important piece of evidence in the case. [19] It was received by the defendants on the 30th August in cypher, and when interpreted it informed them that "the two contracts for 500 tons South Hutton Smithy Nut coals were shipped per S. S. *Rubens*." The evidence on the commission confirmed this telegram. Thus the vendor had put on board a certain vessel, before the end of August, certain specific goods for the performance of these two contracts. But the plaintiff refused to consider the contract null and void under these circumstances, although the ship was sunk. On the 8th September he offered in Bombay to receive the damaged coal. That offer would reach England about the 25th. But on the 26th the coal at Sunderland was surveyed and pronounced unfit for a voyage to Bombay on account of its damp condition, and the surveyor further said he must have held this opinion had he surveyed the coal immediately after that accident, as the coal which had been under water any length of time must be wet and consequently unfit for a long voyage. Such are the material facts. The defendants claimed under the last clause of the contract to be discharged from their obligations by the sinking of the ship. The plaintiff says the case is not within the last clause, and has brought this suit for damages.

It was first argued that there was no July-August shipment within the meaning of the contract. But, I think, this contention fails. *Bowes v. Shand* (1) decides that such a contract is satisfied (I use the words of Lord Blackburn, p. 481) "where (in a contract for March shipment) a parcel of goods is begun to be put on board, so that the shipping is entirely completed before the 31st of March, there can be no doubt that this is a March shipment." It is sufficient, as Mr. Benjamin says in his work on Sales (4th ed.), p. 568, "that the goods shall be placed on board ship during the time specified." The defendants, therefore, performed their contract as regards July-August shipment. They also performed their contract as regards the quantity and quality of coal to be shipped.

The next question to be considered is whether—supposing the ship was lost—the case comes within the last clause. It was argued that until the ship was *declared* to the purchaser, that [20] clause did not come into force. The first answer to that argument is that the parties made their own agreement by which they provided in express terms that upon the happening of a certain event—to wit, the loss of the ship—the contract is determined and is discharged. There is no clause to the effect that the name of the ship must be declared to the purchaser. The plain meaning of the contract is that the agreement is at an end if the ship carrying the goods is lost. The burden of proof lies on the defendants to show that the "*Rubens*" was the ship carrying the goods. But on satisfactory evidence of that fact I think the last clause applies. If the parties had not intended the condition contained in the last clause to operate in the case of the non-declaration of the ship they would have made that an express condition. Such was done by the parties in the two cases of *Busk v. Spence* (2) and *Graves v. Legg* (3), and an express stipulation that "as soon as the seller knows the name of the vessel he is bound to mention it to the buyer," was held a condition precedent. But I find no such stipulation in the present agreement. No doubt the coal was bought for the purpose of reselling it in the course of the plaintiff's business, and if it was to be sold in large quantities before arrival, it might be necessary to have the name of the vessel. But, as Mr. Ward's

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(1) 2 Ap. Ca. 455.

(2) 4 Camp. 329.

(3) 9 Exch 709=23 L. J. Ex. 228.

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evidence shows, that difficulty is met by the practice, in the trade, of obtaining the name as soon as the period of shipment is past. Still such a practice does not create a legal obligation to declare, as long as such an obligation is not made a term of the contract. It was argued that until declaration of the ship to the purchaser neither the ship nor the coal was assigned to the contract, and, therefore, the loss could not be within the contract. I cannot follow that argument. If such a condition was required it should have been expressed, as in *Busk v. Spence*. It seems to me that the appropriation of certain goods to the contract by the vendors, the placing them on board the "Rubens," and doing all that lay in their power to despatch them to Bombay in fulfilment of the contract, was enough to entitle them to the protection of the last clause.

[21] To sum up my opinion, the defendant, in order to entitle him to the benefit of the "loss" clause, was bound to prove (a) that he had put on board a certain ship chartered for Bombay before the 1st September 500 tons of the coal specified for delivery to the plaintiff; and (b) that the ship was lost. I do not think it was the intention of the parties, so far as that intention may be gathered from the written terms to which they agreed, that the defendant was also bound to prove that he declared the name of the ship to the plaintiff. I believe that if in this case the defendants had bought other coal and shipped it in another ship the plaintiff would have at once, if the coal market had gone down, taken shelter under the terms and repudiated the consignment. When parties put their contracts into writing, they must be held bound to the terms agreed upon.

It was also agreed that the accident which occurred did not amount to a "loss." I think the word must be taken in its ordinary sense, and not in the technical sense in which it is used by the underwriters. That being so, the evidence of Mr. Pharson on commission is conclusive. He says the ship had a hole knocked on her side big enough for a man to walk in, and that she was useless and remained useless until the 7th October. I think that must be held to be a loss, in the sense that she was lost for the purpose required—that is, for a voyage in fulfilment of July-August shipments. It was contended that the defendants ought to have found other coal and another ship. But I think they were released from any such obligation by the terms of the contract. My judgment is for the defendants with costs.

Judgment for defendants.

Attorneys for the plaintiff :—Messrs. *Hore, Conroy, and Brown.*

Attorneys for the defendants :—Messrs. *Payne, Gilbert, and Sayani.*