13 B. 392=Chitty's S. C. C. R. 199.

1889
MAY 3.

ORIGINAL CIVIL.

ORIGINAL CIVIL.

13 B. 392=Chitty's S. C. C. R. 199.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

VOLKART BROTHERS AND OTHERS (*Plaintiffs*) *v.* NUSSERVANJI JEHANGIR KHAMBATTA (*Defendant*).* [3rd May, 1889.]

Demurrage — Sale of cargo by consignee—Several purchasers—Contract incorporating the charter party—Liability of one purchaser for delay of all—Contract absolute.

On the 2nd June, 1888, the defendant entered into two contracts with the plaintiffs, the consignees of the cargo, each for the purchase of 500 tons of coal *per* S. S. *Dunedin*, then in harbour. The contracts provided (*inter alia*) "delivery to be taken at a rate of not less than 200 tons *per* day. All conditions in the charterparty to be binding on the purchaser." The charterparty stated, "Cargo to be discharged, whether permitting, at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £ 30 *per* working day, or *pro rata*." Previously to the 2nd of June the rest of the cargo had been sold by the plaintiffs to three other purchasers, and the lay days had already partially expired; but as regards neither of these facts did the defendant ask, or were they given information. The *Dunedin* discharged at only three of her four hatches, and so discharging was able to give delivery of something more than 300, but less than 400 tons a day. Delivery was given to whichever of the four purchasers was the first to come alongside. At the expiration of the lay days (being the days required to discharge the whole cargo at the average rate of 300 tons a day) the cargo had been completely discharged, with the exception of 264 tons, which remained to be delivered to the defendant. The cargo to be discharged subsequently to the 2nd of June would have been discharged within the lay days, [393] but for the want of lighters on the part of the purchasers of the cargo generally. It occasionally happened, however, that a ligter was kept idle waiting for its turn at one of the three hatches. The plaintiffs paid one day's demurrage in respect of the delay in discharging the 264 tons, and now brought an action to recover the same from the defendant.

Held, that the defendant was liable. The contract of the defendant (by incorporation of the charterparty) to take delivery within the lay days, or to pay demurrage, being absolute, he could only excuse non-performance of his contract by showing it was due either to default of the captain of the ship, or of the plaintiffs themselves, neither of which had been shown.

The plaintiffs were not to blame for any difficulties occurring by reason of there being other purchasers. That was the well-known nature of the trade, and it was for the defendant, if he desired protection in this respect, to provide for it in his contract.

Neither were the plaintiffs bound to be able to deliver to the defendant at the rate of 400 tons a day under his two contracts. The stipulation in each of the two contracts, that delivery should be taken at a rate of not less than 200 tons *per diem*, was not one on which the defendant could insist, but was an independent stipulation in favour of the owners of the cargo.

REFERENCE from the Court of Small Causes :—

The facts of the case are fully set out in the following case stated for the opinion of the High Court by W. E. Hart, Chief Judge :—

"The following extracts from my judgment on the rule for a new trial briefly set forth the facts admitted or proved. I respectfully submit the case for the opinion of the Honourable the Judges of the High Court on the following questions submitted to me by the defendant :—

"(*a*) Whether the First Judge of the Small Cause Court was right in holding that the defendant was bound to take delivery, under his contracts with plaintiffs, at the rate of 400 tons *per* day from the 4th June?

* Small Cause Court Suit, No. 12960 of 1888.

1889
MAY 3.

ORIGINAL CIVIL.

13 B. 392 = Chitty's S. C. C. R. 199.

"(*b*) Whether the plaintiffs were bound to see that four hatches were open for working, and were worked ?

"(*c*) Whether the plaintiffs were bound to be ready and willing to deliver at least 400 tons *per* day ?

"(*d*) Whether the plaintiffs are not liable for the delay and the consequent demurrage occasioned by the plaintiffs having sold other portions of the cargo to persons other than the defendant ?

[394] "(*e*) Whether the fact, that a written notice of the commencement of the lay days had been waived by plaintiffs, affected the contracts between the plaintiffs and defendant ?

"(*f*) Whether the said Judge was right in passing a decree for plaintiffs for one day's demurrage ?

"2. The plaintiffs were the consignees of a cargo of 2,519 tons of coal on board the steamer *Dunedin*, which arrived in Bombay harbour on the 29th May, 1888, under a charterparty dated 28th March, 1888.

"3. The charterparty provided for delivery as directed by the consignees, to whom twenty-four hours' written notice was to be given of the vessel being ready to discharge, and 'the cargo to be discharged, weather permitting, at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £30 *per* working day, or *pro rata*.'

"4. No written notice of the arrival of the steamer was given to the plaintiffs. But the captain called at their office about noon of the 30th May, and verbally informed them that the steamer was ready to begin unloading, and the plaintiffs admit that they accepted such verbal notice as sufficient.

"5. On the 31st May the captain of the steamer *Dunedin* published in the English daily newspapers in Bombay the following advertisement:—'Warning to consignees. A full cargo of coal shipped by Messrs. Hickie, Borman & Co., London, *per* steamer *Dunedin*, arrived yesterday from Cardiff. Steamer is now ready to discharge, and her time for doing so will commence to-day. Apply to Captain Cumming, care of James Mackintosh & Co.'

"6. No coal was discharged on the 31st May. On the 1st June, 192 tons were discharged, and on the 2nd June, 319 tons.

"7. On the 2nd June the defendant entered into two contracts with the plaintiffs each for the purchase of 500 tons of coal 'per steamer *Dunedin* in harbour,' and each providing 'delivery to be taken at a rate of not less than 200 tons *per* day—all conditions in the charterparty to be binding on the purchaser.'

"8. The rest of the coal was sold on the same terms, but in smaller quantities, to three other purchasers. But the defendant [395] was not expressly informed of this by the plaintiffs at the time he entered into his contract with them.

"9. On the day on which the defendant entered into his contracts with the plaintiffs, the 2nd June (a Saturday,) he received a notice from plaintiffs to begin taking delivery of his coal on Monday, the 4th June. He did so, and continued, together with the three other purchasers, to take delivery until the evening of Saturday, the 9th June, by which time the others had received the whole of their respective lots, but there remained 264 tons of the defendant's coal undelivered.

"10. During the whole time that delivery was being given to all four purchasers, the *Dunedin* was lying in the stream discharging her cargo into the purchasers' lighters alongside. In so doing she never worked

1889
MAY 3.

ORIGINAL CIVIL.

13 B. 392 = Chitty's S. C. C. R. 199.

more than three of her four hatches, nor had on board more than three gangs of coolies to handle the coal, nor more than three scales with which to weigh it into the purchasers' lighters.

"11. As there were four persons to take delivery and only three hatches at which it was given, the rule followed in giving delivery at each hatch was 'first come first served'. It thus occasionally happened that a lighter was kept idle waiting for its turn at one of the three working hatches, but no appreciable delay was ever caused to any of them by the weather.

"12. After all the cargo had been discharged, except the last 264 tons of the defendant's coal, the *Dunedin* was moved into the Prince's Dock, and laid alongside the quay. In this position she could not discharge into the defendant's lighters from more than two hatches, *viz.*, those on the side further away from the quay against which she was lying.

"13. By special arrangement between the plaintiffs' manager, the defendant, and the captain the steamer, the work of unloading was carried on during Sunday, the 10th of June. But only 198 tons were discharged on that day; the remainder of the cargo (66 tons) was delivered on the following day, and the ship was fully discharged at 3-30 P.M. on Monday, the 11th June.

"14. The captain of the steamer claimed to be entitled, under the charterparty, to two and a half days' demurrage, from noon on [396] Saturday, the 9th June, but ultimately agreed to forego one and a half days of this, and to accept one day's demurrage, £30, in full satisfaction of his claim.

"15. This the plaintiffs paid to him, and then brought this action to recover from the defendant, under his contracts of 2nd June, Rs. 446-8-0, as the equivalent of the said sum of £30; Rs. 90 as the charges incurred for the extra work done on Sunday, the 10th June, and paid by the plaintiffs, but alleged to be payable by the defendant under the terms of the special arrangement above-mentioned between him, the plaintiffs' manager, and the captain of the steamer; and Rs. 38-8-0 for dock charges, also paid by the plaintiffs, but alleged to be payable by the defendant,—thus making up altogether the sum of Rs. 575-0-2."

"16. At the first hearing I held that the defendant had notice of the charterparty, and that the terms thereof were incorporated into his contracts with the plaintiffs whereby he had unreservedly bound himself to take delivery at the aggregate rate of 400 tons *per* day from Monday, the 4th of June. I was, therefore, of opinion, on the authority of *Straker* v. *Kidd* (1) and *Porteus* v. *Watney* (2), that the defendant would be liable for demurrage if he failed to take delivery at the stipulated rate, no matter what occasioned his default, provided the delay was not occasioned by any act or default of the plaintiffs or the ship.

"17. But, finding that the ship had not worked all her hatches, and that, in consequence thereof, she had not been ready and willing to give delivery to the defendant at the rate that he was bound to accept (400 tons *per* day,) I dismissed the suit.

"18. In so doing I overlooked the fact that though the defendant, by the terms of his contracts with the plaintiffs, was bound to accept delivery, if offered to him, at the rate of 400 tons *per* day, yet the ship by the terms of the charterparty incorporated in those contracts was under no obligation to deliver more than 300 tons *per* day.

(1) L. R. 3 Q. B. Div. 223. (2) L. R. 3 Q. B Div. 227; on appeal p. 534.

1889
MAY 3.
ORIGINAL CIVIL.
13 B. 392 = Chitty's S. C. C. R. 199.

[397] "19. On this ground Mr. Payne, for the plaintiffs, obtained a rule for a re-hearing. In showing cause against that rule, Mr. Hemming argued that the defendant, as assignee of the consignees, was not in the same position as the defendants in the two cases cited, and that those cases were, therefore, distinguishable from this. He further argued that by the defendant's contracts with the plaintiffs embodying the terms of the charterparty the defendant was entitled to take advantage of all its benefits while accepting the burden of its obligations. Therefore he had the right to insist that the ship should have discharged at the average rate of 300 tons *per* day from the time that her lay days commenced under the charterparty. But he said that the lay days never had commenced, and, therefore, there could be no demurrage, for want of the written notice to the consignees provided by the charterparty, which admittedly had never been given, and which could not be waived by the consignees to the prejudice of their assignee. He further insisted that by the charterparty providing for the discharge of 300 tons only *per* day, which must be taken to be the full extent of the ship's powers of delivery, the plaintiffs by their several contracts with their four purchasers had bound the purchasers to accept, and, therefore, themselves to deliver 600 or 700 tons *per* day, a condition impossible of fulfilment, while the term in each of those contracts, 'delivery to be taken at not less than 400 tons *per* day,' also meant that delivery was to be given at the same rate. Next, he urged that plaintiffs had been guilty of fraud in importing into their contracts with defendant the terms of the charterparty without giving him notice (1) that they had waived the condition as to written notice; (2) that the lay days had commenced; (3) that they had sold to three other purchasers on similar contracts as to rate of acceptance, making a total of more than 600 tons *per* day, while the charterparty provided for delivery only at the rate of 300 tons *per* day; (4) that at the time of contracting with defendant they were themselves already in default, under the charterparty, in not having taken delivery at an average rate of 300 tons *per* day. Lastly, he said the defendant, having taken on him the burden of the charterparty, was entitled also to its benefit; and should, therefore, be allowed eight and a half lay days from which the [398] 11th June, being a Sunday, should be excluded, so that the steamer never was, in fact, on demurrage at all.

"20. As regards the applicability of the two cases of *Straker* v. *Kidd* (1) and *Porteus* v. *Watney* (2), I think the principle there enunciated must govern the present case, notwithstanding that the defendant is not the first consignee of the coal. Those cases show that where a consignee unreservedly contracts to take delivery of his consignment within a certain time, he is liable for the demurrage occasioned by his failure to do so, although the delay arises from causes beyond his control, provided it is not the result of any act or default on the part of the ship.

"21. As to the rest of Mr. Hemming's argument, it seems to me to proceed principally on three fallacies: *first*, that the defendant is the plaintiffs' assignee of rights under the charterparty; *second*, that there is a contradiction between the terms of the charterparty and of the defendant's contracts with plaintiffs of the 2nd June 1888, which prevents their being read together as one entire contract; *third*, that there was any obligation on the plaintiffs to disclose to the defendant, at the time of their contract with him, either their then position with regard to the charterparty, or their relations to other purchasers.

(1) L.R. 3 Q. B. Div. 223. (2) L.R. 3 Q. B. Div. 227; on appeal at p. 534.

1889
MAY 3.

ORIGINAL CIVIL.

13 B. 392 = Chitty's S. C. C. R. 199.

"22. The defendant was not an assignee of the charterparty, but a purchaser from the plaintiffs of a part of their consignment under a contract which embodied, as against him, certain provisions of the charterparty. So read those provisions of the charterparty which might otherwise appear to be contradictory of the express terms of the defendant's contracts with the plaintiffs of 2nd June, 1888, became quite consistent with them. The entire contract, then, though expressed in three documents, amounted to nothing more than one for the sale of 1,000 tons of coal, with a provision that delivery is to be given at a rate of not more than 400 or less than 300 tons *per* day at the option of the vendors.

"23. On this construction the defendant is not entitled to refer to any breach or waiver of the terms of the charterparty already **[399]** complete before he entered into his contracts. By this contract he was to begin receiving 1,000 tons of coal on the 4th June, and was not entitled to insist on having delivered to him more than 300 tons *per* day on an average, but was obliged, if called on, to accept up to 400 tons *per* day, and if he failed to do so was liable for demurrage at the rate of £30 *per* working day.

"24. As to the fraud, it is not pretended there was any other than the constructive legal fraud to be imputed to the plaintiffs by reason of their silence on the four points I have mentioned. But before mere silence can be construed into fraud it must be shown that there was a duty to speak. Now, what obligation was there on the plaintiffs, expressly and unasked, to inform the defendant as to any one of those four points? By the terms of his contract he had notice of the charterparty, and of the *Dunedin* being in harbour. He knew, moreover, that the unloading had already commenced, and that he was himself the purchaser of a portion only of the cargo. He had thus been informed of quite enough to put him on enquiry if there were any points on which he required further information before binding himself. That he did not enquire, should be ascribed rather to the fact that he chose to act on his own judgment as a large dealer in coal of considerable experience, than to the presumption that he was misled by the silence of the plaintiffs on points as to which there does not seem to me any necessity that they should have spoken.

"25. In these circumstances, I am still of the same opinion that I was when I first heard the case, that the principal point to be considered is whether the plaintiffs, or the ship on their behalf, were ready and willing to give delivery at the rate agreed on. But that rate should be taken, I think, not at 400 tons *per* day, (the rate which I originally took as the rate for delivery as well as for acceptance), but 300 tons *per* day, the rate for delivery provided by the charterparty, and incorporated by reference into the contract.

"26. Now, the evidence shows that though, as I found in the Court below, the ship was not ready and willing to deliver at the rate of 400 tons *per* day, yet she was ready and willing, though **[400]** working three hatches only till moved into dock, and then only two, to deliver at an average rate of 300 tons *per* day, from the time when the defendant began to take delivery on the 4th June; and that she did not, in fact, do so, was owing to the deficient supply of lighters by the purchasers during the earlier portion of the delivery.

"27. But for the deficiency in the supply of lighters the ship could, from the 4th to the end of the 9th of June, have delivered 370 tons in excess of the 300 tons *per* day required by the charterparty. But when she stopped work on the evening of the 9th June there were, as a

1889
MAY 3.
ORIGINAL CIVIL.
13 B. 392 = Chitty's S. C. C. R. 199.

fact, only 264 tons left on board. So far as the ship then was concerned, she was ready and willing to deliver at such an average rate in excess of the stipulated rate of 300 tons *per* day as would have cleared the whole cargo out of the ship within the period of the lay days allowed by the charterparty, which expired on Saturday, the 9th June.

"28. Now it is beyond dispute that the defendant did not take delivery, not only at the rate of 400 tons *per* day stipulated in his contracts with the plaintiffs, but even at the less rate at which the ship was ready and willing to deliver.

"29. Whether this was his fault or his misfortune I think, on the authority of the two cases cited, matters not, in the face of his absolute unreserved undertaking.

"30. The ship carrying 2,519 tons of coal to be discharged at the rate of 300 tons *per* working day had about 8½ lay days under her charterparty. These commenced at noon on the 31st May, 24 hours after the verbal notice given by the captain which the plaintiffs accepted in lieu of written notice. The lay days would, therefore, expire on the evening of Saturday, the 9th June; for we must exclude Sunday, the 3rd, as a non-working day. The ship, therefore, came on demurrage on Sunday, the 10th June, and so remained till 3-30 P.M. on Monday, the 11th.

"31. It is true that the charterparty provides that demurrage is only to be paid in respect of working days, and ordinarily Sunday is not one. But by special agreement between the parties, Sunday, the 10th of June, was made a working day. **[401]** Demurrage, therefore, can be claimed in respect of the Sunday as well as for the portion of Monday, the 11th.

"32. My former judgment on the first item of the claim and costs should be reversed, and the plaintiffs should have judgment for the sum of Rs. 446-8-2, the equivalent of one day's demurrage, which is all that is claimed out of that found to have been incurred, together with costs on that sum, and Rs. 30 professional costs, and Rs. 30 professional costs of this rule."

Russell, for defendant.—The ship in the first two and a half lay days, *i.e.*, by the evening of the 2nd June, had only delivered 511 tons. She should have delivered, at the least, 750 according to the terms of the charterparty. The defendant had a right to suppose, when he made his contract, that that had been done, unless he was told anything to the contrary. If that quantity had been delivered, this claim would not have arisen, for the ship could then have been cleared on the 9th June. He cited *Stirling* v. *Maitland* (1); Leake on Contracts, p. 708. But it was the duty of the ship to be ready and willing to deliver 400 tons a day, which admittedly she was not. She should have opened her fourth hatch, and more lighters would then have come alongside.

[SARGENT, C.J.—We must assume, on the case as stated, that, if there had been lighters alongside, the ship was ready and willing to deliver in such a way as would have cleared her of all cargo within the lay days.]

Starling, for plaintiffs.—The ship is not bound to deliver 400 tons a day even if the consignees are ready to take it, which the case shows they were not. She is not even bound to be ready to deliver 300 tons a day. The terms as to the amount to be taken delivery of were inserted for the

(1) 5 B. & S. 840 (852).

protection of the ship and the vendor. But for the default of the purchasers of the coal there would have been no demurrage. He referred to *Straker* v. *Kidd* (1) and *Porteus* v. *Watney* (2). The defendant is clearly liable.

1889
MAY 3.
ORIGINAL CIVIL.
13 B. 392 = Chitty's S. C. C. R. 199.

JUDGMENT.

3rd May. SARGENT, C.J.— This reference from the Court of Small Causes arises out of a suit brought by the consignees of a [402] cargo of 2,519 tons of coal by the ship *Dunedin* to recover damages from the defendant for failure to take delivery of 1,000 tons of coal under two contracts dated the 2nd June, 1888. Each of the contracts was for the purchase by the defendant of 500 tons of coal per steam-ship *Dunedin* in harbour. The coal to be of the description known as 'Inysfeied Cardiff' and to be delivered into the purchasers' boats alongside at Rs. 22¼ *per* ton, "delivery to be taken at a rate of not less than 200 tons *per diem*. All conditions in the charterparty or bill of lading to be binding on the purchasers." One of the conditions of the charterparty was in the following terms:—"The cargo to be discharged, whether permitting, at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £30 *per* working day, or *pro rata*," except in certain cases, which it is not necessary to mention. It is found by the case that the ship began to unload at midday of the 31st May, and that the lay days terminated on the evening of Saturday, the 9th June, by which time all the coal had been discharged, excepting 264 tons of the coal purchased by defendant, which were discharged on Monday, the 11th. The plaintiffs were obliged to pay £30 for that day's demurrage, and now claim it as damages from defendant for non-performance of his contract.

The provision in the contract of purchase that "all conditions in the charterparty or bill of lading are binding on the purchaser" incorporated those conditions into the contracts, and by so doing imposed the obligation on the defendant of removing his 1,000 tons of coal before the expiration of the lay days, unless, indeed, he was prevented from doing so by default of the captain of the ship, or of the plaintiffs themselves.

The case finds that there was no such default on the part of the ship, and that all the coal which was in the ship on the morning of the 4th June, when the defendant had notice from plaintiffs to take delivery, might have been discharged by the evening of the 9th, if there had not been a deficiency of lighters.

Can it, then, be said to have been owing to the plaintiffs' default that the defendant failed to remove his coals by the evening of the 9th? It was scarcely contended that the plaintiffs could [403] be held liable for any delay caused by the mere circumstance of there being other purchasers taking delivery of their coals at the same time. This was the well-known nature of the trade, and the defendant's obligation to remove his coal before the expiration of the lay days was an absolute one. If they had wished to guard themselves against a possible difficulty arising from the above circumstance, they should have provided for it in their contract; as was pointed out by the Court in *Straker* v. *Kidd* (1) and *Porteus* v. *Watney* (2), where the plaintiff was prevented from taking delivery of his goods by reason of their being beneath the goods of other holders of bills of lading.

(1) L.R. 3 Q.B. Div. 223. (2) L.R. 3 Q.B. Div. 227; on appeal, p. 534.

1889
MAY 3.
ORIGINAL
CIVIL.
13 B. 392=
Chitty's
S. C. C. R.
199.

The defendant, however, contends that the plaintiffs were in default, as they were not able to deliver him 400 tons *per diem*, as it is alleged they were bound to do by the two contracts, and that, therefore, they cannot hold him liable for the delay which occurred in discharging the cargo. This must depend on the question whether, upon the true construction of the contract, the stipulation "delivery to be taken at a rate of not less than 200 tons *per diem*" was one on which the defendant could insist, or was only in favour of the plaintiffs; and we think that, looking at the circumstances under which contracts of this description are made in the coaling trade, the clause was an independent stipulation in favour of the owners of the cargo, and intended to give them the power of resisting, if they thought proper, on the coals being cleared out at the above rate *per diem*. As an illustration of such a distinction, we may refer to *Neill* v. *Whitworth* (1), where there was a clause "that the cotton should be taken from the quay," which was held to be solely in favour of the vendors, and not a condition precedent of the purchase.

Lastly, it was said that the plaintiffs should have informed the defendant, when they entered into their contracts, that only 511 tons had been taken delivery of on the 1st and 2nd June instead of 750, as contemplated by the charterparty. The finding, however, of the Judge, that all the coal might have been cleared out during the remaining lay days if there had been sufficient lighters, makes it unnecessary to consider this [404] question, as it is plain that the above circumstance did not in any way prevent the defendant from complying with his obligation to take delivery before the evening of the 9th. Lastly, the circumstance of the plaintiffs having waived a written notice of the commencement of the lay days could not affect the contracts between the plaintiffs and defendant. The plaintiffs could of course waive a written notice, and their doing so prior to the sale to the defendant was a matter in which the latter had no concern.

Questions (*b*), (*c*), (*d*) and (*e*) must, therefore, be answered in the negative and question (*f*) in the affirmative.

Plaintiffs to have their costs of this reference.

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

Attorneys for defendant:—Messrs. *Macfarlane, Edgelow, and Hemming.*

(1) 18 C.B.N.S. 435.