ORIGINAL CIVIL.

Before Mr. Justice Macleod.

W. & A. GRAHAM AND CO. (PLAINTIFFS) *v.* CHUNILAL HARILAL AND CO. (DEFENDANTS).*

1909. *July* 24.

Practice—Third party procedure—Directions, refusal to give—Discretion.

The general principle on which a Court will issue third party directions is:—

(1) That there must be a clear case of contribution or indemnity from the third party,

(2) that all the disputes arising out of a transaction as between the plaintiff and the defendant and between the defendant and a third party can be tried and settled in one suit, and

(3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party.

Under the rules now in force the third party cannot be cited so as to be bound by the trial of one particular question which is identical as between the plaintiff and the defendant and as between the defendant and the third party.

Baxter v. *France* (*No. 2*) (1) followed.

ON 30th January 1908 the plaintiffs entered into a contract with the defendants under the terms of which the latter agreed to purchase 50,000 tons of coal, and to take delivery thereof in 10 monthly shipments of 5,000 tons each. This original contract was subsequently slightly varied, but the variation was immaterial.

The first shipment (of 5,080 tons) arrived in Bombay on 16th January 1909, and a delivery order was duly tendered by the plaintiffs to the defendants. The latter handed the delivery order over to Messrs. Karaka and Co., with whom they were under a contract, and this firm took delivery of 400 tons. The balance of the cargo was re-sold by the plaintiffs at the defendants' risk, and was in fact ultimately bought by the defendants. The plaintiffs then sued the defendants for the price of the 400 tons of which delivery had been taken, and for damages for the loss incurred by the refusal to take delivery of the balance.

* Suit No. 399 of 1909.

(1) [1895] 1 Q. B. 591.

1909.

W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co.

The defendants thereupon obtained an order for the issue of a third party notice to Messrs. Karaka and Co., and, after duly serving the same, took out a summons for third party directions.

Cohen for the plaintiffs submitted to the order of the Court.

Jardine for the third parties showed cause :—

This is not a case for third party directions. We are not aware of the terms of the contract of 30th January 1908 between the plaintiffs and the defendants, nor of their arrangements with regard to bunkering. No question of contribution or indemnity arises. Our contract with the defendants was wholly distinct, originating in and continuing generally from an arrangement made in November 1908 with regard to the bunkering of S. S. Singapore. We have disputes with the defendants, but they have nothing to do with the plaintiffs, and cannot be disposed of in this suit.

The defendants can give evidence of the quality of the coal better than we can, as they bought all but 400 tons.

Counsel cited the following cases : *Speller* v. *Bristol Steam Navigation Co.* (1), and *Baxter* v. *France* (*No. 2*) (2).

Robertson for the defendants in support of the summons :—

Messrs. Karaka and Co. had knowledge of the contract of 30th January 1908, and by their subsequent agreement with us—which was not in the same terms as the original agreement with regard to S. S. Singapore, as they allege,—clearly became liable to indemnify us. If this suit does not dispose of all questions between the third parties and us, it will at least dispose of all that arise out of this transaction. Specially important is the question of the quality of the coal, and the evidence of the third parties is necessary on this point. Finally, the plaintiffs themselves have no objection to the third parties being brought in.

MACLEOD, J.—The plaintiffs have filed this suit against the defendants to recover damages suffered by them in consequence of the defendants not taking proper delivery of a cargo of coals as they were bound to do under a contract made between the plaintiffs and defendants on the 30th January 1908.

(1) (1884) 13 Q. B. D. 96. (2) [1895] 1 Q. B. 591.

1909.

W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co.

The plaintiffs say that by that agreement the defendants agreed to purchase from the plaintiffs 50,000 tons of coals, shipment January to May and August to December 1909, 5,000 tons monthly. I am told this agreement has been altered so as to extend the time to delivery of 25,000 tons in 1909 and 25,000 tons in 1910. But that is not material for the purpose of the summons.

On the 16th January 1909, the plaintiffs gave notice to the defendants that the S. S. Blake had arrived in harbour with a cargo of 5,080 tons of coal; and tendered a delivery order in pursuance of the above mentioned agreement.

Delivery was taken of only 400 tons by the defendants or their assigns and the balance of the cargo was sold at the defendants' risk. Hence the suit.

On the 25th day of May, the defendants obtained an order for the issue of a third party notice to Messrs. J. F. and B. F. Karaka, partners in the firm of Messrs. J. F. Karaka & Co.

The third party notice was issued on the 26th May. Messrs. Karaka filed their appearance on 31st May.

On the 7th June the defendants took out a summons for third party directions. At the argument of the summons before me the plaintiffs adopted a purely neutral attitude; they did not allege that they would be in any way prejudiced or embarrassed by the introduction of the third parties into the suit.

Messrs. Karaka and Co. strongly objected to any directions being given on the summons.

Very lengthy affidavits have been filed but the main dispute between the defendants and the third parties appears to be that while the defendants set up a contract between them and the third parties whereby the third parties agreed to buy from the defendants the coals of which the defendants were under contract with the plaintiffs to take delivery in 1909, the third party deny that any such contract had been made between them and the defendants and assert that the contract which did exist between them and the defendants was of quite a different nature. The general principle on which a Court will issue third party directions seems to be (1) that there must be a clear case of contribution or indemnity from the third party, (2) that all the disputes

1909.

W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co.

arising out of a transaction as between the plaintiffs and the defendants and between the defendants and a third party can be tried and settled in one action, and (3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. In this case if directions are given there must be a preliminary issue tried as regards the terms of the contract or contracts which existed between the defendants and the third parties. Until that has been decided it is impossible to say whether the contract between the plaintiffs and the defendants has been imported into a contract between the defendants and the third parties. This alone would be sufficient reason for the Court declining to give directions. But even if there was a clear case of indemnity, I am satisfied that all the disputes between the defendants and the third party could not be jointly determined in this action: *Baxter* v. *France*(*No. 2*) (1). It has been urged by the defendants that there is one question which is common as between the plaintiffs and the defendants and as between the defendants and Messrs. Karaka and Co., namely, the quality of the coal which arrived in the S. S. Blake and that if this were so, it was most undesirable that this same question should have to be decided twice over in different suits. It was further urged that Messrs. Karaka and Co. knew all about the quality of the coal ex S. S. Blake as they had taken delivery of some of it and the defendants had only passed on to them the delivery order from the plaintiffs. The answer to this is that as the defendants themselves bought all the coal ex-S. S. Blake except the 400 tons taken delivery of by Messrs. Karaka and Co., they are in a better position to lead evidence as to its quality than Messrs. Karaka and Co. In England before 1883 if there was one question in the action, identical as between the plaintiff and the defendant and as between the defendant and the third party, the third party could have been cited so that he could be bound by the trial of that particular question, but that can no longer be done under the rules now in force, however desirable it might be, and the rules of the High Court are practically the same as the English rules.

(1) [1895] 1 Q. B. 591.

1909.

W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co.

In my opinion, this is clearly a case in which the Court should exercise its discretion in refusing to give third party directions. The summons is discharged and the third parties must be dismissed from the action. The defendants must pay the costs of the third parties and the plaintiffs.

Attorneys for plaintiffs: Messrs. *Craigie, Lynch & Owen.*

Attorneys for defendants: Messrs. *Little & Co.*

Attorneys for third parties: Messrs. *Thakurdas & Co.*

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1909.
August 28.

DULLABHJI SAKHIDAS SANGHANI, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.*

ANNA RANU, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.†

Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.

The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened.

* Original Suit No. 706 of 1908. † Original Suit No. 751 of 1908.