

CANADA / JUDGMENT

Winchester v. Busby

(1889) 16 SCR 336

COURT

Supreme Court of Canada

DECIDED

18 March 1889

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Winchester v. Busby

Collection

Supreme Court Judgments

Date

1889-03-18

Report

(1889) 16 SCR 336

Judges

Strong, Samuel Henry; Ritchie, William Johnstone; Taschereau, Henri-Elzéar; Gwynne, John Wellington; Patterson, Christopher Salmon

On appeal from

New Brunswick

Subjects

Transportation

Decision Content

Supreme Court of Canada

Winchester v. Busby (1889) 16 SCR 336

Date: 1889-03-18

Jacob R. Winchester (Defendant)

Appellant

And

William L. Busby (Plaintiff)

Respondent

1888: Nov. 17; 1889: Mar. 18.

Present—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Ship and shipping—Charter party—Delivery of freight—Payment—Concurrent acts—Tender—Trover for cargo—Lien.

A cargo of coal was consigned to B. and the master of the vessel refused to deliver it unless the freight was pre-paid, which B. in his turn refused but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel and stored, whereupon B. tendered the amount of the freight and demanded it, but the agent still refused to deliver unless the cost of storage was also paid. In trover against the master:

Held, affirming the judgment of the court below, Gwynne J. dissenting, that the refusal of the agent after tender of the full freight was a conversion of the cargo for which trover would lie.

Held, per Patterson J., that trover would lie, but not against the master who was only the servant of the agent and acting under his directions.

Held, also, that an action ex delicto for breach of duty in not delivering the coal according to the bill of lading would not lie.

Appeal from a decision of the Supreme Court of New Brunswick[1] affirming a verdict for the plaintiff entered at the trial by consent, with leave to both parties to move.

The plaintiff was consignee of a cargo of coal carried in plaintiff's vessel from Cape Breton. The charter party required the master of the vessel to deliver the coal on payment of the specified freight, and the consignee refused to pay the freight before delivery, but offered to pay it ton by ton as the cargo was landed. The customary mode of discharging coal at St. John, N.B., the port of discharge, was by taking it out of the vessel in tubs and loading it into carts in which it was carried away as the consignee should direct.

The agent of the owner of the vessel refused to deliver the coal until the full freight was paid, and after some discussion on both sides the coal was landed and "stored by the agent. When it was all in the warehouse the consignee tendered the full amount of the freight, which was refused unless the costs of storage were also paid. The consignee then brought an action against the master of the vessel, his declaration containing three counts on the bill of lading and a count in trover. The defendant demurred to the former and his demurrer was sustained. On the trial on the trover count a verdict was entered by agreement for the plaintiff for damages assented to, with leave to the plaintiff to move to amend his declaration by adding a count for special damages, and to the defendant to move for a new trial or a verdict. The Supreme Court of New Brunswick affirmed the verdict. The defendant then appealed to the Supreme Court of Canada and the plaintiff filed a

cross-appeal from the judgment on the demurrer to the declaration.

Weldon Q.C. for the appellant. The English cases show that the two acts, delivery of the goods and payment of the freight, are concurrent acts, and all that is necessary is that the parties shall be ready and willing to perform their respective acts. *Paynter v. James*[2]; *Kirchner v. Venus*[3]; *Gilkison v. Middleton*[4].

The master could not comply with the proposal to pay the freight on each ton as delivered, as he would lose his entire lien by delivering a part of the goods. *Neill v. Reed*[5]. There was no evidence of conversion, and the plaintiff could not succeed on the count in trover. *Jones v. Hough*[6]; *Milgate v. Kebble*[7].

W. Pugsley and C. A. Palmer for the respondent. There is no right in the vessel to pre-payment of freight. *Meyer stein v. Barber*[8].

In the English cases referred to the goods were out of the vessel and in a position to be delivered as soon as the freight was paid. *Paynter v. James*[9]. And the American law is precise on the subject. *Brittan v. Barnaby*[10].

The learned counsel also referred to *Brown v. Tanner*[11].

Even if the master had a right to retain the goods for his freight he had no lien for the cost of storage. *Kerford v. Mondel*[12]; *Jones v. Tarleton*[13].

Then as to the cross-appeal. By the practice in New Brunswick the form of action in actions *ex contractu* and *ex delicto* is the same[14]. And see *Cato v. Irving*[15].

Sir W. J. RITCHIE C.J. concurred in dismissing the appeal and affirming the judgment of the court below in every respect.

STRONG J.—I see no inconsistency between the charter party and the bill of lading in any respect which is material in the present action. The appellant was bound to deliver the cargo to the holder of the bill of lading at the port of discharge upon such holder paying the freight, and a refusal by the appellant so to deliver upon a tender of the amount due for freight would *prima facie* be in law a conversion of the property for which the holder of the bill of lading would be entitled to recover damages. It has never been questioned that the title to, and property in, the cargo had vested in the respondent as the indorsee of the bill of lading. Further there never has been any dispute as to the amount properly payable for freight, this being, as is admitted on all hands, \$637.10. And it is not disputed that this sum was duly tendered by the respondent to Schofield (in whose charge the appellant had left the cargo when he went away to Digby) and refused by him Schofield claiming in addition to a lien for freight, a lien also for expenses incurred in landing and warehousing the cargo. It is clear upon authority that, in the absence of any statutory provision similar to that which exists in England, authorising the master to land and warehouse the goods and to retain possession for the expenses of so doing, he has no right to a lien, beyond the freight, for the latter charges, though he may be justified in landing the cargo and depositing it in a suitable place, either in the warehouse of the shipowner or in that of a

general warehouseman or wharfinger; in either of which cases, however, the master would himself retain the constructive possession and thus be in a position to answer the demand of the holder of the bill of lading[16]. For the charges incidental to such landing and warehousing the master must, however, look to the personal liability of the cargo owner, his right of retention by way of lien being at common law confined strictly to the amount due for freight. The decision of this appeal must therefore depend altogether upon the answer to a single question namely; Was Schofield, whom the appellant placed in charge of the cargo and who also happened to be the managing owner of the vessel, a person for whose acts the appellant was responsible? For if he was there was plainly a conversion for which the respondent was entitled to recover.

The appellant, according to well established principles of mercantile law for which it would be a mere parade, serving no useful purpose, to cite authorities, having received the goods in pursuance of a contract, evidenced by the bill of lading which he had signed, had no right to deliver the goods specified in it to any person other than a legal holder of that bill of lading. Then what took place between the appellant and Schofield either amounted to a delivery of the cargo to the latter for purposes inconsistent with the rights of the respondent, or Schofield was merely placed in charge as the custodian of it, the constructive possession remaining vested in the appellant. The appellant in his deposition says in so many words that he "delivered up" the cargo to Schofield. If this piece of evidence is literally and strictly construed against the appellant such delivery would of itself have constituted a conversion: the appellant, however, is entitled to a more favorable interpretation of his conduct, and we must therefore regard Schofield as having been placed in possession of the cargo, merely as the agent or caretaker of the appellant who could not lawfully part with the possession of it to any one but the holder of the bill of lading. It follows that the appellant still retained the constructive possession and that he is therefore responsible for the wrongful acts of Schofield, and Schofield having been guilty of a conversion in refusing delivery upon the tender of the freight, the appellant has been rightly held answerable in damages for this wrongful act of his agent. The judgment of the Supreme Court is therefore, in my opinion, in all respects right and should be affirmed with costs.

The cross appeal is entirely unfounded. As the declaration was originally framed in contract, it disclosed no cause of action in the respondent, the indorsee of the bill of lading between whom and the appellant there was no privity, and the judgment on demurrer is therefore unimpeachable. The cross appeal must also be dismissed with costs.

TASCHEREAU J.—Concurred in affirming the judgment of the court below.

GWYNNE J.—The only question on the principal appeal (of the defendant) is as to the right of the plaintiff to recover upon the count for trover, and I am clearly of opinion that no case whatever of conversion was made out against the defendant. Upon the arrival of the vessel at her destination in St. John, New Brunswick, the vessel and her cargo were delivered over by the master, the above appellant, to Schofield, managing owner of the vessel and with whom the plaintiff had signed a charter party under which the cargo was conveyed to St. John, and thereafter the master never had any control over or possession of the cargo. At the expiration of a week, the cargo not having been taken by the plaintiff and the freight paid (it is unnecessary to refer to what took

place between the plaintiff and Schofield in the interim) the managing owner, Schofield, placed the cargo in a storehouse in St. John. Now, the only evidence of conversion offered was of the tender of the freight made by the plaintiff to the managing owner Schofield and a demand upon him for the cargo, and his refusal to deliver it unless the charges attending the storing the cargo should be paid; for this refusal it is sufficient, in my opinion, for the determination of this case to say that the defendant Winchester, who had at that time no control over or possession of the cargo, and to whom the freight was not tendered and upon whom no demand for delivery of the cargo was then made, and who, consequently, did not refuse to deliver what he had not, can not be made responsible. It is idle to say that Schofield, who did make the only refusal of which there was any evidence, and who alone had control over and possession of the cargo, and who, as the person who, as manager and part owner of the vessel, had entered into the charter party with the plaintiff, was acting as the agent of his servant the defendant. The appeal of the defendant must, in my opinion, be allowed, and the cross-appeal of the plaintiff dismissed—both with costs.

PATTERSON J.—The respondent, who is plaintiff in the action, obtained a verdict against the appellant for \$1,138.90. The appeal is from the refusal of the court in banc to enter a non-suit, and there is a cross-appeal by the plaintiff from a judgment on demurrer to some counts of his declaration.

The defendant was captain of the brigantine Curlew, and was not owner or part owner.

The managing owner was Mr. Schofield, of St. John. The plaintiff lives at St. John, and desiring to have a cargo of coal brought from Cape Breton to St. John, he made an agreement with Mr. Schofield, which was set out in a charter party in these words:—

It is this day mutually agreed between Mr. S. Schofield, managing owner of the good ship or vessel called the "Curlew," J. R. Winchester master, of the measurement of 330 tons, or thereabouts, now at Sydney, C.B., and Mr. W. L. Busby, of this city, merchant, and charterer, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall proceed to Little Glace Bay, and there load from charterer or agent a full and complete cargo of coal, under deck, not exceeding what she can reasonably stow or carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to St. John, n.B., or so near thereto as she may safely get, and deliver the same, on being paid freight, as follows: One dollar and fifteen cents per ton, of 2,240 lbs., mine weight, etc.

Dated 2nd September, 1886.

In pursuance of this agreement the Curlew received at Little Glace Bay, C.B., on the 9th of the same month of September, from the Caledonian Coal and Railway Company, a cargo of coal.

Donald Carmichael is agent at St. John for the Caledonia Company, and is the person mentioned in the bill of lading signed by the defendant, which reads as follows:—

Shipped by the Caledonia Coal and Railway Company for account of D. Carmichael, Esq., in good order, on board the brigantine "Curlew," whereof the undersigned is master for the present voyage, now lying in Glace Bay, C.B., and bound for St. John, N.B. To say:

Five hundred and fifty-four (554) tons, more or less, of coal from the Caledonia Coal Mine, which I promise to deliver in like good order and condition at the port of St. John, N.B. (the dangers of the seas only excepted) unto D. Carmichael, Esq., or to his assigns, he or they paying freight for the same at the rate of per charter party on the amount so delivered.

In witness whereof, the master of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one being accomplished the others to stand void.

Dated at Glace Bay, C.B., this ninth day of September, 1886.

J. R. WINCHESTER.

The vessel duly arrived with the cargo at St. John, and after her arrival the events happened out of which this action has arisen.

The plaintiff, as is not disputed, was owner of the coal and entitled, as between himself and the Caledonia company, to receive it. He had given his note to Mr. Carmichael, "as usual," as that gentleman says, for the cargo, and Carmichael had indorsed the bill of lading to him either on the day the vessel arrived or the day before.

It will be worth while to glance at the evidence respecting the date of the arrival of the vessel and the transactions that immediately followed, for there is a little confusion in it. The defendant says he arrived on the 16th of September, and that is borne out by other facts. But he also says that he arrived on Friday, while by the almanac the 16th was Thursday. The discrepancy does not appear to have been detected at the trial, and it is carried into the appellant's factum.

The defendant further says he hauled to the wharf on the day of his arrival, which he again calls Friday, and that on Saturday about noon he left for Digby, in Nova Scotia, where he remained four weeks. He must have left on Friday, the day after his arrival, and when (giving his evidence eleven months afterwards) he calls it Saturday, he does so from a lapse of memory, intending to say it was the day after his arrival. He tells us that the bill of lading was not presented to him before he left; that he did not know the plaintiff; and that he does not recollect seeing the plaintiff.

The plaintiff, on the other hand, says he saw the captain and mate at the vessel on the Saturday morning and spoke to the captain. If the incident occurred, and occurred on Saturday, the plaintiff must have mistaken some one for the captain; but as Saturday was the 18th and as the plaintiff received a letter, which I shall notice, from Mr. Schofield on the afternoon of Friday the 17th, and had also more than one interview with Mr. Schofield's clerk on that afternoon, it is as plain as possible that his recollection is at fault when he says he asked the captain at the vessel on Saturday morning, when on his way to his office, when the vessel would be ready to discharge.

The matter deserves attention only in connection with the fact that the defendant took no part, personally, in any of the doings on which the plaintiff founds his action.

Whether Schofield's sins of commission, if the plaintiff was sinned against, are to be imputed to the defendant, or whether he is chargeable with sins of omission, will have to be considered. When the defendant went to Digby he left the vessel in charge of the managing owner, Mr. Schofield.

These are some of his replies to questions put on reexamination by counsel for the plaintiff, by whom the defendant was called as a witness:—

Q. In whose charge did you leave the vessel? A. Mr. Schofield's.

Q. There must have been some one on board of the vessel in charge? A. The mate had charge, under Mr. Schofield's direction.

Q. And you delivered the cargo up to Mr. Schofield, as you have said? A. Yes.

It had been arranged between the plaintiff and Mr. Schofield, before the arrival of the vessel and before the bill of lading was indorsed to the plaintiff, that she was to go to Magee's wharf, and not to the next wharf which the plaintiff had leased but which had not sufficient length for the vessel. On Friday the 17th Schofield wrote to the plaintiff a letter which the plaintiff received at 4.30 in the afternoon, stating that the Curlew was then in a discharging berth at Magee's wharf and ready to commence discharging the cargo of coal in accordance with the charter party. Later in the same afternoon, Mr Miller, a clerk of Mr. Schofield's, called on the plaintiff, who showed him the bill of lading which had been indorsed to him. Miller said it would have to be exchanged for the unindorsed bill which Mr. Schofield had, but the plaintiff refused to give up his indorsed bill until he received the cargo. An hour or so afterwards Miller came again and told the plaintiff that if he did not give up the indorsed bill of lading Schofield would demand payment of the freight before the delivery of the coal. At another time, which the plaintiff puts as about 9.30 on Saturday morning, Miller again urged the giving up of the indorsed bill of lading, and the plaintiff still refusing, Miller told him that Schofield might take an indorsed acceptance at ten days for the freight; but that also the plaintiff declined to give, saying it would virtually be paying the freight.

Schofield then wrote to the plaintiff the following letter:—

I beg to direct your attention again to the fact that the brigantine 'Curlew' is in a discharging berth at Magee's slip, and ready to deliver the cargo of coal to you in accordance with the charter party.

I enclose a bill of the freight, amounting to \$637.10, and have again to request payment of the same from you.

I also hereby give you notice that unless the freight is paid to me by five o'clock this evening I shall then make arrangements to land and store the cargo at your expense and risk.

To this the plaintiff replied on the same afternoon—Saturday the 18th—having in the mean time been verbally informed by Mr. Miller that they were going to store the cargo:—

I am in receipt of your favors of the 17th, and also that of the 18th inst., with enclosure as stated; and in reply beg to say that I am, and have been, ready to receive and take delivery of the cargo per brigantine 'Curlew' since nine o'clock this morning, and to pay freight on same, as delivered, to the master, owners, or other persons entitled to receive the same, but up to the present am without any proof that you are entitled to receive the same.

I now hereby beg to give you notice, that if you land and store the cargo I will hold you and the master and owners of the said vessel answerable for all losses and damages that I, the owner of said cargo, may sustain by your action. And unless the master and owners of the said vessel proceed forthwith to deliver me the said cargo in suitable hours and weather I shall hold them liable for all damages and losses that I may sustain by reason of their failure to deliver me the said cargo in accordance with the terms and conditions of the charter party, dated 2nd September, 1886.

On the morning of Monday the 20th the vessel began discharging the coal which was carted to a store-house under Schofield's directions, and the whole cargo was so discharged and stored by the following Friday. There had been no tender of freight in the mean time, though an oral proposal had been made on the part of the plaintiff, but not acceded to by Schofield, that the coal should be delivered to the plaintiff on his paying freight for each ton as delivered. That delivery would have been the delivery from the vessel into the plaintiff's carts.

The only tender of freight was when the last cart load was being removed to the store. The plaintiff then tendered \$657.10, the full amount originally claimed, and demanded his coal, but Schofield refused unless a further amount for storage, &c., was paid, and he afterwards sold the coal.

Schofield is not a party to this action which is against Winchester alone.

The declaration originally contained three counts, all of them being upon the bill of lading. The first alleges a promise to the Caledonia Coal and Railway Company to deliver the coal to D. Carmichael or his assigns; the other two allege the promise to have been made to Carmichael, differing from each other only in the statement of the consideration for the promise. Each count of the three avers that Carmichael indorsed the bill of lading to the plaintiff, whereby the property in the coal passed to the plaintiff; and each count concluded by alleging that:—

The delivery of the said goods, as aforesaid, was not prevented by any of the perils or casualties aforesaid. And all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said goods delivered to him at the port of Saint John, N.B., aforesaid, yet the said goods were not delivered to the plaintiff at the port of Saint John, N.B., aforesaid, whereby the same were wholly lost to the plaintiff.

These counts were demurred to on the ground that the contract with Carmichael did not pass to the plaintiff by the indorsement of the bill of lading, as it would do in England under 18 and 19 Vic. ch 111, and were held bad on the law laid down in such cases as *Thompson v. Dominy*[17] and *Howard v. Shepherd*[18]; the principle being that which was thus tersely expressed by Lord Loughborough when giving the judgment of the Exchequer Chamber in *Lickbarrow v. Mason*[19]:

—

The indorsement of a bill of lading differs from the assignment of a chose in action, that is to say, of an obligation, as much as a debt differs from effects.

One of the learned judges in the court below was of opinion that the counts might be sustained as counts in tort, and that position has been urged before us. Upon this question it is unnecessary to add to what was said in the court below by the learned Chief Justice, who showed, conclusively, that the contention was untenable. It is not a question of the form of the action but of the allegations of fact; and there is nothing that can be construed into an allegation that the defendant failed in any duty except the duty to fulfil his promise to Carmichael to deliver the goods to him or his assigns.

The plaintiff's cross appeal must therefore be dismissed.

A count in trover was added by the plaintiff by leave of the court, and his verdict is upon that count.

The judgment from which the defendant appeals proceeds upon the grounds that the defendant is responsible for the acts of Schofield, as a principal is responsible for the acts of his agent; and that the conduct of Schofield amounted to a conversion of the coal to the use of the defendant.

With great respect for the learned judges whose opinions we have now to review, I think they have been led into a fallacious course of reasoning on the first point from regarding the rights of the parties as depending principally, if not altogether, on the bill of lading, and from not attaching sufficient importance to the circumstance that there was a direct contract between the plaintiff and Schofield created by the charter party, and that the defendant, when he left for Digby, after having moored the vessel, did not leave Schofield there as his agent, but, as the plaintiff proved by the evidence I have quoted, and as, under the circumstances, would have been sufficiently evident without formal proof, he delivered over the vessel and her cargo to his employers, leaving them to carry out their contract to deliver the coal to the plaintiff. The defendant's connection with and control over the cargo appears to have ceased as completely as if he had died; or if, as for aught that appears in the evidence may have been the case, he had been discharged by his employers. The idea of his continued responsibility must be due to a lingering impression that he was in some way answerable to the plaintiff upon the contract on which the action was launched.

No authority has been adduced for the proposition that, under such facts as we have, the managing owner became the agent of the master, and I have not met with any in the course of my examination of the matter.

There certainly was no express delegation. If the responsibility exists, it must be because, by some inference of law, the principle respondeat superior applies, and very convincing authority would be required to warrant its application as contended for by the plaintiff.

I think that on the ground that no conversion was committed by the defendant, who did nothing with the coal that was in any respect inconsistent with the plaintiff's ownership, or that was out of the direct line of his own duty as captain of the vessel, he is entitled to succeed on this appeal and to have a non-suit entered.

If this were not so, and if the defendant could properly be held answerable for Schofield's acts, then I think the verdict should stand on the ground that there was no lien on the coal for anything beyond the freight, and therefore the refusal to deliver from the warehouse on tender of the freight, was not justified, nor, a fortiori, was the subsequent sale.

Up to the time of that refusal I think Schofield was in the right and the plaintiff in the wrong.

The only room for argument to the contrary is derived, as it appears to me, from taking the rights of the parties to be governed by the words in the bill of lading, "he or they paying freight for the same at the rate per charter party on the amount so delivered," and taking those words to import a delivery before payment of the freight.

I am not prepared to accede to the contention that that is the true effect of the words, and I do not think the cases of *Paynter v. James*[20] or *Black v. Rose*[21] which have been so much relied on, go the length required to support that contention.

The suggestion that unloading the coal upon the wharf, or any kind of delivery except hoisting the coal in tubs and delivering it over the ship's side into the plaintiff's carts, was contemplated or would have satisfied the contract to deliver, belongs to the region of imagination and not of reality; and it is opposed to the evidence furnished by the plaintiff himself by his conduct as well as by his examination at the trial. To have landed the coal on Magee's wharf, if that had been practicable, would have been a breach in place of performance of the contract.

It is clear enough upon the evidence that Schofield was always ready and willing to deliver in the ordinary way if the freight had been paid, and that the plaintiff refused to "pay in advance" as he repeatedly calls it in his evidence. Paying in advance means, as he used the term, paying before the coal had reached his possession. This is borne out by the proposal, which from his point of view was a concession, to pay for ton by ton as delivered from the vessel into his carts, paying for none while the lien for the freight remained on it. His original refusal was to pay anything before the whole was delivered. Regarding the cargo as a whole, and the delivery contemplated by the contract as one act, the clear effect of the plaintiffs own evidence is that he was not ready and willing to pay the freight. A question might be raised whether the terms of the bill of lading which made the freight payable on the quantity delivered, would not, on the principle of *Black v. Rose*[22] where the bill of lading was in similar terms, entitle the consignee to insist on treating each parcel delivered as separable from the bulk. It is not improbable that the question, if raised, would have to be decided adversely to the claim of the consignee, on the ground that the option

to have delivery by parcels was with the shipowner and not with the consignee; but we need not trouble ourselves with the question for two reasons.

One, is the insufficiency of the evidence of readiness and willingness to pay for each ton as delivered. The plaintiff says nothing about it himself. The proposal was made by a Mr. Cullinan under instructions from the plaintiff's legal adviser, but, so far as disclosed by the evidence, without authority from the plaintiff. The other and the more important reason is that the contract that governs is that which is expressed in the charter party, and not that imported by the bill of lading. How it would be if the coal had been sold to a stranger and the bill of lading indorsed to him (as in *Chappel v. Comfort*[23]) we need not inquire. Here the plaintiff was the real consignee of the coal, the nominal consignment to Carmichael being obviously for the security of the company he represented in respect of the purchase money. The coal was carried in pursuance of the plaintiff's personal contract with Schofield, evidenced by the charter party. The plaintiff acted upon a perfectly correct apprehension of the matter when, in his correspondence during the dispute, e.g., in his letter of Saturday the 18th of September already quoted, and in another written the following Monday, he spoke of being prepared to pay freight "in accordance with the conditions of charter party dated September 2nd, 1886," not of the bill of lading signed on the 9th of that month. In his evidence he also uses the same expression.

The doctrine which applies is stated in the following passage which is found in all the editions of *Abbott on Shipping*. I read from the 12th edition at p. 214[24]:

When goods are put on board in pursuance of a charter party, the master is to sign for them bills of lading to the effect mentioned in the fourth chapter of this part, the charter party being the instrument and evidence of the contract for the conveyance, and the bill of lading the evidence of the shipping of the particular merchandise to be conveyed in pursuance of the contract.

See also *Corner on Shipmasters and Seamen*[25].

That the master has no implied authority to vary the contract made by the principals may be said to be an elementary proposition. It will be found in more than one place in *Abbott on Shipping*, as at p. 89 of the 12th edition, and it is enunciated and illustrated by many recent cases which have turned on the effect of the two documents, the charter party and bill of lading, when read together as they must be when one refers to the other, as is done by the phrase "paying freight as per charter party" or other similar expression.

See the judgment of Sir R. Phillimore in *The Patria*[26]; *Chappel v. Comfort*[27], particularly the judgment of Willes J.; *Barwick v. Burnyeat*[28]; *Gray v. Carr*[29]; *Porteus v. Watney*[30]; *Gullischen v. Stewart*[31]; *Gardner v. Trechmann*[32]; *The San Roman*[33]. In the last mentioned case the bill of lading had the words: "The dangers of the seas only excepted," while the charter party excepted other dangers, and amongst them "restraints of princes or rulers." These words were held to be imported by reference into the bill of lading and to justify delay caused by the master remaining in a neutral port for fear of capture by French cruisers, France being at war with Germany, the vessel belonging to Hamburg, and her owners being subjects of the North German Confederation.

By the charter party before us, the agreement is to deliver the coal on being paid freight at \$1.15 per ton of 2,240 lbs. mine weight. This differs materially from the bill of lading, if I correctly understand the expression "mine weight," inasmuch as it calls for payment of freight on the amount acknowledged to have been received on board, which payment would not interfere with any claim in respect of short delivery.

That was the freight demanded by Schofield and which the plaintiff refused to "pay in advance," as he phrased it—and it was the amount ultimately tendered after the warehousing of the coal.

There can be no question of the right of the shipowner, in the absence of stipulations which are not contained in this charter party, to retain his lien, or in other words to retain possession of the goods until the freight is paid. He must be ready and willing to deliver the goods before his claim for freight is complete, but the freight must be paid before he can be required to part with his possession. That doctrine is affirmed by numberless cases and is laid down in every work of authority on the subject. The appellant refers in his factum to passages from judgments delivered in *Cargo ex Argos*[34]; *Kirchner v. Venus*[35]; *Black v. Rose*[36]; *Duthie v. Hilton*[37]; *Paynter v. James*[38]; *Perez v. Alsop*[39]. Those citations are all in point. The rule is well expressed by the Chief Justice of New South Wales in the judgment which was the subject of appeal in *Black v. Rose* (3), in a passage which, as correctly printed at p. 660 of Mr. Carver's treatise, seems to have received the approval of the judicial committee.

When there is no express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid.

The learned author proceeds[40] to discuss the cases where freight is not payable till complete delivery, one instance being found in *Brown v. Tanner*[41]; there being in those cases no lien for the freight; and[42] he remarks that

The shipowner in enforcing his lien for freight may retain possession of all the goods in respect of which it is payable until the whole has been paid.

Citing *Perez v. Alsop*[43], and adding, on the authority of *Black v. Rose*[44]:—

Or he may give delivery by instalments and require the freight on each instalment to be paid concurrently with the delivery of it.

The case in the Supreme Court of the United States, *Brittan v. Barnaby*[45] does not lay down any doctrine on this point inconsistent with the English decisions. A great part of the discussion in the case related to a memorandum which had been stamped in red ink on the back of the bill of lading. That was held not to be incorporated with the bill of lading, which then became simply a contract to carry goods from New York to San Francisco at fixed rates of freight, with primage and average accustomed, with the promise of the shipper to pay the freight. On arrival at San Francisco notice was given to the consignee, in which notice the consignee was required to pay the freight of the goods as they should be landed from the ship on the wharf, with an intimation that if it was not paid and the goods received before four o'clock of the day, such of them as had been landed would be placed in a warehouse for safe keeping, at the expense of the consignee.

The goods were landed in parcels during three days, and the consignee was ready and willing to pay the freight on each parcel in conformity with the notice, but that was refused, freight on the whole being demanded before delivery of any part. The goods were warehoused and, as in this case, a tender of the whole freight was afterwards refused because no tender was made of the expenses of warehousing, &c.

In deciding against the ship-owner great stress was laid on his having receded from the terms of the notice he had given, and I understand the decision to have really turned on the force given to that notice as settling the rights of the parties. The general law as laid down by the court distinctly affirms the right of the ship-owner to preserve his lien by retaining possession of the whole cargo until the freight is paid or secured.

It asserts the right of the consignee to inspect the goods in order to see that the contract to carry has been fulfilled, before the carrier can demand payment of the full freight, but meets the interference with the right of lien which that process would work by affirming the right to security for the payment. The case does not aid the present plaintiff.

It was doubtless a matter of prudence on the part of Schofield to warehouse the coal in place of keeping the vessel idle, particularly as he had not stipulated for the payment of demurrage; but he would not, in the absence of an agreement to that effect, have had a lien on the cargo for demurrage, and he had none for the expense incident to the alternative course of warehousing the coal. His right to recover those charges from the plaintiff by action is a different matter.

This point is dealt with in *MacLachlan on Merchant Shipping*[46] in the following passage:

"The master may assert his lien for freight by detaining of the goods on board, keeping his ship on demurrage, at all events for a reasonable time. If the port be a British possession where the common law prevails he may discharge the cargo into a warehouse subject to his lien, giving the freighters notice thereof. But as he cannot hold it for the warehouse rent and other charges, he must give it up on payment of the freight and rely on his action for his other demands if not paid. He is, however, under the responsibility, since he assumes the character and functions, of warehouseman. See the elaborate judgment of Willes J. in *Meyerstein v. Barber*[47]; *Mors-le-Blanch v. Wilson*[48]."

The plaintiff thus seems to have a right of action for the conversion of the coal; but, on the ground first discussed, I think he has no right against this defendant, and that the appeal should therefore be allowed with costs and a nonsuit entered.

Appeal and Cross-appeal dismissed with costs.

Solicitors for appellant: Weldon & McLean.

Solicitor for respondent: C. A. Palmer.

[1] 27 N. B. Rep. 231.

[2] L. R. 2 C. P. 348.

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- [3] 12 Moo. P. C. 361.
- [4] 2 C. B. N. S. 134.
- [5] 4 All. (N.B.) 246.
- [6] 5 Ex. D. 115.
- [7] 3 M. & G. 100.
- [8] 1. r. 2 c. P. 50.
- [9] 1. r. 2 c. P. 348.
- [10] 21 How. 527.
- [11] 3 Ch. App. 597.
- [12] 28 L. J. N. S. (Ex.) 303.
- [13] 9 M. & W. 675.
- [14] Cons. Stats. N.B. c. 37 s. 46.
- [15] 5 De G. & Sm. 224.
- [16] Meyerstein v. Barber L. R. 2 C. P. 38 in a judgment of Willes J. at P. 55; Mors-le-Blanch v. Wilson L. R. 8 C. P. 229.
- [17] 14 M. & W. 403.
- [18] 9 C. B. 297.
- [19] 1 Sm. L. C. 9 ed. 760.
- [20] L. R. 2 C. P. 348.
- [21] 2 Moo. P. C. N. S. 277.
- [22] 2 Moo. P. C. N. S. 277.
- [23] 10 C. B. N. S. 802.
- [24] Pt. 4 ch. 1 s. 7.
- [25] Page 152.
- [26] L. R. 3 A. & E. 436.
- [27] 10 C. B. N. S. 802.
- [28] 36 L. T. 250.
- [29] L. R. 6 Q. B. 522.

- [30] 3 Q. B. D. 534.
- [31] 11 Q. B. D. 186; 13 Q. B. D. 317.
- [32] 15 Q. B. D. 155.
- [33] L. R. 3 A. & E. 582.
- [34] L. R. 5 P. C. 134.
- [35] 12 Moo. P. C. 361.
- [36] 2 Moo. P.C. N.S. 284.
- [37] L. R. 4 C. P. 144.
- [38] L. R. 2 C. P. 356.
- [39] 3 F. & F. 190.
- [40] At p. 661.
- [41] 3 Ch. App. 597.
- [42] At p. 662.
- [43] 3 F. & F. 188.
- [44] 2 Moo. P. C. N. S. 277.
- [45] 21 How. 527.
- [46] At p. 405, 2nd ed.
- [47] L. R. 2 C. P. 38.
- [48] L. R. 8 C. P. 227.

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