[CIVIL JURISDICTION.]

1921.
June 6.

[ACTION No. 53, 1920.]

THE PUBLIC TRUSTEE OF FIJI *v.* EDWARD SANDAY, CHARLES HENRY SANDAY, LILY ALAMEDA PEARSON, JONATHAN BYRNES AND STEPHEN SANDAY.

Will construction of—person intended—error of demonstration.

Sir CHARLES DAVSON, C.J. Testator named, as a beneficiary under his will, " my son Charles Henry Sanday of Ebenezar, Hawkesbury, New South Wales," and the question is whether the person intended was his son Stephen Sanday of Hornsby, New South Wales or his brother Charles Henry Sanday of Ebenezar, Hawkesbury.

We have here a demonstration, a name and an address. The demonstration points to the son and not to the brother, the name and the address both point to the brother and not to the son.

The maxim that a name shall prevail against an error of demonstration (*veritas nominis tollit errorem demonstrationis*) will apply, but I can only give effect to it if I find that there has been an error of demonstration. (*Drake* v. *Drake*, 8 H.L.C. 172, 11 Eng. Rep. 392).

The evidence contained in the affidavits and the diary leads me, after some hesitation, to the conclusion that there has been an error of demonstration, and I order the share of the estate in question to be paid to testator's brother Charles Henry Sanday.

[CIVIL JURISDICTION.]

1921.
Nov. 7.

[ACTION No. 4, 1921.]

MORRIS, HEDSTROM LIMITED *v.* JOHN BURNS & COMPANY LIMITED.

" Delivered weights " as opposed to " shipping weights "—meaning of in contract for carriage of copra. When freight earned and due—implied authority to contract according to the usage of the trade.

Held, where contract silent weights should be taken at port of destination. Freight earned by the carriage and arrival of the goods ready to be delivered.

Sir CHARLES DAVSON, C.J. By the indorsement on the writ in this case plaintiffs claimed £2,757, but since the issue of the writ defendants have paid £1,474 odd and have brought

1921

MORRIS, HEDSTROM LIMITED v. JOHN BURNS AND COMPANY LIMITED.

into Court £145 odd, so that the amount actually in dispute is £1,136.

The contract out of which this action arises is the result of a proposal made orally by Mr. J. H. H. Millett, Managing Director of A. M. Brodziak Ltd., agents for the defendants, to Mr. J. M. Hedstrom, Managing Director of Morris, Hedstrom Ltd., the plaintiffs, and is contained in two letters: one from plaintiffs and Messrs. Brown & Joske dated 17th June, 1919, to A. M. Brodziak Ltd., setting out the terms of a contract by which defendants were to carry 1,000 tons of copra for plaintiffs and Messrs. Brown & Joske, together with some of their own, from Suva to London and to sell the same on joint account, and the other from A. M. Brodziak Ltd. to plaintiffs and Messrs. Brown & Joske dated 20th June, 1919, confirming the arrangement set out in the first letter.

Defendants carried and delivered the copra as agreed on and in pursuance of the contract as to sale communicated with Messrs. Brown Douglas & Co. of London who, as their agents, made a contract dated 2nd July, 1919, with the Produce Brokers Co. Ltd., under which the copra was sold subject to the conditions therein set forth. Defendants say that this (which I will call the " London contract " as distinguished from the " Suva contract ") was ratified by the plaintiffs, but plaintiffs contend that they are not in any way bound by the London contract except in so far as it may be deemed to have been authorised by the Suva contract.

The letter of the 17th June so far as is at present material is as follows:—

> Dear Sirs,
>
> This is in confirmation of our verbal arrangement. We understand that you have the option of chartering a steel sailing ship to carry about 2,000 tons of copra to London; expected to load at Suva late August or early September, rate of freight being £12 per ton of 2,240 lb, delivered weights. You have suggested that we should join you in making up this shipment and we—Morris, Hedstrom Limited and Brown & Joske—jointly have agreed to ship 1,000 tons of copra, subject to the following stipulations:—
>
> (*a*) * * * * * *
>
> (*b*) * * * * * *
>
> (*c*) The shipment is to be sold on joint account at not less than fifty-three pounds ten shillings per ton (£53 10s.) per ton, in London, from which will be deducted only the actual expenses (freight, insurance, exchange and ordinary commission and landing charges in London, no commission being charged either in New Zealand or Suva).
>
> (*d*) * * * * * *
>
> (*e*) * * * * * *

This arrangement is subject to your confirmation reaching us by noon on Saturday, 21st instant.

Yours faithfully,

MORRIS, HEDSTROM LIMITED.

J. M. HEDSTROM,
Managing Director.

The issues between the parties arise mainly out of the interpretation of the contract contained in this letter and fall under two heads:—

(*a*) the method of calculating the freight payable by plaintiffs for the carriage of the copra; and

(*b*) the deductions to be made by defendants from the selling price under clause (*c*) quoted above.

(*a*)—As regards (*a*), the rate of freight is fixed by the letter at "£12 per ton . . . . . delivered weights." Copra is a commodity which shrinks in transit and the weight of a shipment is less at the port of destination than at the port of shipment. Plaintiffs contend that "delivered weights" mean weights at the port of destination, as opposed to "shipping weights" which means weights at the port of shipment, while defendants insist that "delivered weights" means the same thing as shipping weights.

If I had to decide this point according to the plain ordinary meaning of the words I should have no hesitation in adopting the meaning contended for by the plaintiffs, and the evidence satisfies me that this is the sense in which the term is used among business men.

Mr. Millett himself said in cross-examination that delivered weights meant weights at the port of destination, but he said he considered these words inconsistent with clause (*c*), and that the only operative part of the contract was that coming after the word "stipulations." I cannot see the inconsistency, and if the clause relating to freight is inoperative we have a contract for the carriage of goods which specifies no rate of freight and is silent as to whether the weights on which freight is to be paid are to be taken at the port of shipment or at the port of destination. Where a contract is thus silent it seems to be clear law that, in a case such as this, the weights should be taken at the port of destination on the principle that freight is payable on what is "shipped, carried and delivered." *Gibson* v. *Sturge*, 24 L.J., Ex. 121; *Coulthurst* v. *Sweet*, C.P.C. 649; *Buckle* v. *Knoop*, 2 Ex. 125).

It is not, however, necessary to labour this as I find that the contract is expressly one for payment of freight on weights taken at the port of destination.

1921

MORRIS HEDSTROM LIMITED v. JOHN BURNS COMPANY LIMITED.

No better example of the use of the two phrases " shipping weights " and " delivered weights " could be found than in clauses 6 and 7 of the London contract itself.

The next point, (*b*), relates to the deductions to be made under clause (*c*) from the selling price of the copra. That clause provides for the deduction (among other things) of insurance: it is clear that this applies to insurance on the copra, but defendants contend that it includes also insurance on the freight. This would be, presumably, for the protection of the buyer, but freight was not payable in advance (the contention that it was was expressly abandoned by counsel during the argument) and neither buyer nor seller had an insurable interest in it. Defendants, however, rely on clause 3 of the London contract: the first part of this requires the sellers to insure the amount of the contract price, less freight plus 5 per cent., and the clause proceeds:—

> In addition, sellers shall effect insurance (on free from particular average terms) for the amount of the freight from the time that the freight becomes due, until the termination of the risk as provided in this clause, and shall undertake that their policies are so worded that in case of a P.A. or G.A. claim the buyers shall be put in the same position as if the c.i.f. value were insured from the time of shipment.

Assuming this clause to be binding on plaintiffs and that it requires a marine insurance of freights they say (1) that there was no insurance of freight *eo nomine* as required by law. (Arnould, 9th Edition, 233; 17 Halsbury, 719), and (2) that the general policies on the goods were not (as defendants admit) sufficient to cover the freight and that a mere guarantee to hold a purchaser covered is not sufficient. (*Manbre Saccharine Company Ltd.* v. *Corn Products Company Ltd.* (1919) 1 K.B.D. 198).

These points appear to me to be well taken, but I do not consider it necessary to dwell on them because in my opinion clause 3 of the London contract, assuming it to bind plaintiffs, does not require any marine insurance of freight. Freight is to be insured " from the time that it becomes due." Mr. Ellis submitted that though freight was not " payable " until the arrival of the ship at the port of destination it was " due " when the goods were shipped. I cannot accept this view. Freight is earned by the carriage and the arrival of the goods ready to be delivered (*London Transport Co.* v. *Trechmann Bros.* (1904) 1 K.B. 635), and in the absence of any special agreement is only then due and payable.

The insurance of freight referred to at the end of clause 3 is not a marine insurance. The buyer might be called upon

to pay freight on the arrival of the goods at the port of destination and the goods might be destroyed before delivery to him, he, therefore, to protect himself insures the freight (the rate for this risk being very small) and clause 3 requires this to be done at the expense of the seller. No such insurance was effected and, therefore, there can be no deduction from the selling price on account of insurance on freight.

There remains the item of £60 which defendants claim to deduct from the selling price of the copra. This arises from the fact that, through shrinkage amounting to more than two per cent., there was short delivery and that the buyer had the right to buy in the open market (a rising market) to the extent of the shortage and charge the seller with the difference. I have had considerable difficulty in arriving at a conclusion on this point. There is nothing in the Suva contract, if that stood alone, which would justify the deduction, but defendants claim to make it by virtue of the London contract. Plaintiffs, as I have said above, plead that they are not bound by this contract except in so far as it " may be deemed to be authorised by the Suva contract." In my opinion such authorisation is to be presumed as far as this point is concerned. Defendants (or their agents) in effecting the sale had an implied authority to contract according to the usages of the trade; the London contract was made, and I do not think plaintiffs dispute that it was properly made, under the rules and according to the form of contract of the London Copra Association and the provisions relating to this question are clause 6 of the contract and rule 18. Clause 6 provides for a cash payment by the buyer of 98 per cent. " of the provisional invoice amount . . . . . on shipping weights less freight," and this is in compliance with rule 18 which says that the calculation of the provisional payment shall be based on the " nett shipping weight." It may be that these provisions are capable of more than one interpretation and that the shipper might in his provisional invoice insert something short of the nett shipping weights, but the correct view seems to me to be that submitted on behalf of defendants that the provisional payment is to be calculated on the total nett shipping weight.

The usage is a reasonable one, it regulates, as regards payment, the mode of performing the contract, but does not in any way change its character. It is reasonable because the precise amount of shrinkage in transit cannot be ascertained before the copra is weighed at the port of destination, and the buyer is entitled to know approximately the quantity he is buying, so that he may effect his sales. It was urged for

1921

MORRIS HEDSTROM LIMITED v. JOHN BURNS AND COMPANY LIMITED.

plaintiffs that the first clause of the contract allowed a large margin as to weight—from 1,500 to 2,000 tons—and that the sellers need not have specified the weight further than this, but I cannot accept this view; though of course the nett shipping weight must be within the limits prescribed by the contract.

This was a joint venture: the copra of plaintiffs, defendants, and Messrs. Brown & Joske was, under the Suva contract, to be shipped in bulk and sold on joint account, and whether defendants were, strictly speaking, agents of plaintiffs or not (plaintiffs in their reply plead that they were not), I am of opinion that the deduction of £60 was properly made and that plaintiffs must bear this share of the loss due to short delivery.

On the matters in issue I therefore give judgment as follows:

1. I allow defendants' claim of £60 10s. 5d. for loss through short delivery.

2. Defendants are entitled to deduct freight on the weight as ascertained at the port of destination and not on the shipping weights.

3. Defendants are entitled to deduct insurance on selling price, less freight, plus 5 per cent.

4. Defendants are entitled to deduct exchange on the amount advanced plus insurance, not including insurance on freight.

Judgment for plaintiffs for £935 5s. 10d. with costs.

1921.
Dec. 23.

[APPELLATE JURISDICTION.]

[ACTION NO. 11, 1921.]

RAGHUBAR *v.* PIARI LAL.

And in the matter of an appeal of Raghubar from the conviction of Ernest Arthur Barnett, Esquire, District Commissioner for the district of Ba.

Application of section 29 of Ordinance 5 of 1876 in cases where

(i) the ownership of goods is in dispute;
(ii) whether the word "goods" includes cattle; and
(iii) meaning of the word "owner."

Held, (1) wording of the section wide enough to include case where ownership of goods is in dispute;
(2) the word "goods" includes "cattle"; and
(3) "owner" includes "person entitled to possession."

Conviction amended by insertion of the word "due" before "notice" and by striking out the penalty imposed thereby.