1891.

RÁMCHANDRA NARSINGRÁV v. TRIMBAK NÁRÁYAN ÉKBOTE.

either granted, or else so recognized and confirmed, by an authority binding on the appellant that he cannot oust the defendant, and deprive him of an office and function which the Government has conferred upon him, and still allows him to enjoy; and this being so, has not the right as against him to collect the allowance himself directly, either from the village officers or from the treasury.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *T. L. Wilson and Co.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1892.
January 1.

BEYTS, CRAIG & Co., PLAINTIFFS, *v.* OTTO MARTIN AND ANOTHER, DEFENDANTS.*

Shipping—Contract for freight—June shipment—Naming probable date of arrival of steamer—No new promise—Later arrival no breach—Estoppel—Notice of readiness to load.

The defendant in April, 1891, contracted with the plaintiff for freight for 375 tons seeds, wheat, &c., "by any first class steamer, &c., (subject to safe arrival). June shipment. Goods to be alongside in time to be all taken in on or before the second day after notice that steamer is ready for cargo; otherwise difference of freight at market rate to be payable on demand as liquidated damages," &c. On the 29th May defendant wrote saying he would be glad to know the name and probable date of arrival of the steamer. On the 3rd June the plaintiffs replied declaring the S. S. *County of York* against the engagement, and adding, in a postscript, that the steamer would be ready to load on or about the 12th instant. The S. S. *County of York* arrived in Bombay on the 10th June, but from unforeseen circumstances had not a berth in the dock, and was not ready to load until the 23rd instant. In the meantime, on the 18th June, the defendant repudiated the contract on the ground that, having been led by the plaintiffs to expect that the ship would be ready to load on the 12th instant, he had made telegraphic arrangements on that footing, and, the ship not being ready, he was compelled to ship his goods by other steamers in order to fulfil his engagements. The plaintiffs accordingly relet the freight on defendant's account, and brought this suit for the loss incurred in so doing.

* Small Cause Court Suit, No. $\frac{282}{1892}$ of 1891.

1892.

BEYTS, CRAIG & CO. v. OTTO MARTIN.

Held, that the plaintiffs were entitled to succeed, for that nothing had occurred to alter the original contract, which gave them the whole of June in which to provide a steamer. The statement made by the plaintiffs on the 3rd of June, (in answer to the defendant's enquiries as to the probable date of the arrival of the steamer), that the steamer would be ready to load on or about the 12th instant, was not a promise, but a mere expression of opinion. The question of estoppel did not arise.

On the 22nd June the plaintiffs gave their shippers, amongst others the defendant, a notice to the following effect:—"As the *County of York* will be in dock to-morrow ready to receive cargo, we have to request that your cargo be down not later than Wednesday the 24th instant, &c., &c."

Quære—whether this was a "notice that the steamer was ready for cargo" as required by the contract.

THIS was a re-hearing, under sections 38 and 39 of Act XV of 1882, of a suit originally brought in the Presidency Small Cause Court.

On the 13th April, 1891, the defendants engaged freight from the plaintiffs at the rate of £1-3 per ton for 150 to 175 tons of seeds, &c., by any first class steamer, or substitute, June shipment, 1891, and generally according to the terms of the following shipping order:—

"Subject to safe arrival.

"To

The Commanding Officer of the steam-ship ———, or any first class steamer or substitute.

"For Marseilles.

"June shipment, 1891.

"Sir,—Please receive on board from Messrs. Otto Martin & Co., who hereby contract to ship 150 to 175 (one hundred and fifty to one hundred and seventy-five) tons seeds, wheat, &c.; cargo to be specified and port to be named (if option of two ports) on demand on steamers being ready.

"Freight at £1-3-0 per ton as per Bombay Chamber of Commerce new tonnage scale.

"Goods to be alongside in time to be all taken in on or before the second day after notice that steamer is ready for cargo; otherwise difference of freight at market rate to be payable on demand as liquidated damages. Freight to be paid here at current rate of exchange for demand bank bills without any deduction."

On the 17th April, 1891, the defendants engaged further freight from the plaintiffs at the rate of £1-4-0 per ton for 175 to 200 tons seeds, &c., by any first class steamer or substitute, June shipment, 1891, and generally according to the terms of the shipping order granted on that day by plaintiffs to the defend-

1892.

BEYTS, CRAIG & Co. v. OTTO MARTIN.

ants. This shipping order was, in form, similar to the one above set forth.

On the 29th May, 1891, the defendants wrote the following letter to the plaintiffs :—

"Dear Sirs,—Relating to the shipping orders dated the 13th and 17th ultimo issued to me for June shipments I shall be glad to know probable dates of arrival and names of your said steamers.

"Yours truly,

"OTTO MARTIN."

In reply the plaintiffs wrote as follows to the defendant on the same day :—

"Dear Sir,—In reply to your memo., we will declare the name of the steamer and position if you inform us of the description of cargo.

"Yours faithfully,

"BEYTS, CRAIG & Co."

On the 3rd June, 1891, the plaintiffs wrote to the defendants as follows :—

"Dear Sirs,—With reference to shipping order for 375 tons granted you on the 13th and 17th April, we now beg to declare the S. S. *County of York* against the engagement. Kindly let us know the nature of the cargo you intend shipping.

"Yours faithfully,

"BEYTS, CRAIG & Co.

"*P. S.*—The steamer will be ready to load on or about the 12th instant."

The steam-ship *County of York* arrived in Bombay on the 10th June. On the 11th June, 1891, the defendant wrote the following letter :—

"*11th June 1891.*

"Dear Sirs,—Against one of your shipping orders I intend shipping wheat. I shall, therefore, thank you to let me know which shed is to be allotted to your steamer, as my cargo is ready.

"Yours truly,

"OTTO MARTIN."

The plaintiffs did not reply to that letter, and on the 18th June, 1891, the defendant wrote to the plaintiffs as follows :—

"Dear Sirs,—Referring to my several memos. you wrote me on the 4th instant declaring steam-ship *County of York* to be ready for loading on or about the 12th instant.

"I accordingly made my telegraphic arrangements with my home people for immediate shipment, and undertook to send them bill lading by to-morrow's mail.

1892.

BEYTS, CRAIG & Co. v. OTTO MARTIN.

Let me further point out to you that since the 12th instant I have been constantly making enquiries at your office about the probable date of steamer loading, and just now I am informed that the vessel will be ready to take cargo hardly on the 23rd instant. I am thus compelled to ship my goods by other ready steamers, in order to fulfil my contracts for prompt shipment.

"This is, therefore, to give you notice that by reason of your stating the *County of York* to be ready for loading on or about the 12th instant, and the steamer not taking cargo before the 23rd instant, as informed by you just now, I consider your shipping orders, dated the 13th and 17th April last, as cancelled, of which please take due note."

"I am,
"Dear Sirs,
"Yours truly,
OTTO MARTIN."

To that letter the plaintiffs sent the following reply to the defendant:—

"*18th June, 1891.*

"Dear Sir,—We are in receipt of yours of this day's date, and are surprised at its contents. On the 3rd instant, in reply to your enquiry, we declared the S. S. *County of York* as the vessel by which your 375 tons of cargo would be taken, and mentioned that she would be ready on or about the 12th instant for to receive cargo. At the time when we wrote this, there was every hope that she would be ready, but unforeseen circumstances, over which we have no control, has caused a delay. The vessel has applied for a berth in the docks, and it is very probable she will be received into dock to-morrow, when your cargo will have due attention.

"As regards any arrangement you may have made with others, or your contract for prompt shipment, that is no concern of ours. We must look to you to fulfil your engagement with us.

"Yours faithfully,
BEYTS, CRAIG & Co."

On the 22nd June, 1891, the plaintiffs wrote as follows to the defendants:—

"The S. S. *County of York* will be in the dock to-morrow and ready to receive your cargo. As the vessel will leave on Friday we have to request you that your cargo be down not later than Wednesday the 24th instant, failing which we shall without any further advice re-let the same at the best market price and hold you responsible for any or all losses, costs and expenses."

The following reply was sent by the defendant:—

"*22nd June, 1891.*

"In reply to your letters dated the 18th and 22nd instant I beg to refer you to mine of the 13th idem in respect of shipping orders for 375 tons issued by you. Let

1892.

BEYTS, CRAIG & Co. v. OTTO MARTIN.

me point out to you once more that on account of your failing to receive my cargo on board on the 12th instant as promised, I have been compelled partly to cancel my engagements, and partly to ship by other steamers to meet my engagements. You may, therefore, do what you like on your own responsibility.

"Yours faithfully,
"OTTO MARTIN."

The plaintiffs on the 24th June, 1891, re-let on account of the defendant 350 tons by S. S. *County of York* at 16*s.* 3*d.* per ton. They now sued to recover Rs. 1,870-1-7 as damages sustained by reason of the defendant's breach of contract.

At the hearing the defendant raised the following issues:—

1. Whether the plaintiffs were not estopped by their notice of 3rd June, 1891, from asking the defendants to accept a steamer ready to load at a date later than the 12th June, 1891?

2. Whether any valid notice was given to the defendants of the S. S. *County of York* being ready for cargo within the meaning of the shipping orders?

3. Whether the plaintiffs re-let the freight prematurely?

4. Whether the plaintiffs are entitled to a decree?

Scott for the plaintiffs:—He cited *Behn* v. *Burness*[1]; *Nelson* v. *Dahl*[2]; Pollock on Contracts, (5th Ed.), 507.

Melsheimer for the defendants:—He cited *Carr* v. *London and North-Western Railway Company*[3]; *Frost* v. *Knight*[4].

FARRAN, J.:—I took time to consider my judgment in this case, not because I entertained any doubt as to what my decision ought to be; but I thought that as there can be no appeal from it, it would be more satisfactory to the parties that I should state my reasons in writing.

The plaintiffs claim damages from the defendants for not shipping from 325 to 375 tons of seeds or wheat under their several shipping orders, dated, respectively, 13th and 17th April last, under which the defendants engaged freight in a steamer to be supplied by the plaintiffs. The shipping orders are in similar terms. The material part of them, for the purpose of the pre-

(1) 32 L. J. (Q. B.), 204.
(2) 12 Ch. D., 568.
(3) L. R., 10 C. P., 307.
(4) L. R., 7 Ex., 111.

1892.

BEYTS, CRAIG & Co. v. OTTO MARTIN.

sent case, runs as follows:—"To the commanding officer of any first class steamer for Marseilles. June shipment, 1891. Sir,—Please receive on board, from Messrs. Martin & Co.....tons seeds, wheat, &c. Goods to be alongside in time to be all taken in on or before the second day after notice that steamer is ready for cargo; otherwise difference of freight at market rate to be payable on demand as liquidated damages, to load in Prince's Dock if required by the captain." The orders are headed "subject to safe arrival."

From what I have read it will be seen that the plaintiffs undertook to have a steamer ready to receive the defendants' goods in time for June shipment, subject to safe arrival, (upon which no question arises here), while the defendants undertook to have the stipulated amount of goods alongside in time to be all taken in on or before the second day after notice that the steamer was ready for cargo. [His Lordship then referred to the correspondence above set out, and continued:—]

The first question which arises is, whether the defendants had a right on the 18th June to give notice that they cancelled the shipping orders. They could only do so if the plaintiffs had then broken the contract on their part. The contract gave the plaintiffs the whole of June to provide a steamer. The defendants, when the ship was still on her outward voyage, asked for information as to the probable date of the arrival of the steamer, and again for such information about the position of the steamer and time of loading as would enable them to make their arrangements. The plaintiffs, when declaring the steamer, added, in a postscript, that she would be ready on or about the 12th June. Had that the effect of altering the original contract and changing the plaintiffs' option to supply a steamer in June? In my judgment, plainly no. The original contract remained. The plaintiffs answered a question as to the probable date of arrival of the steamer and time of loading by saying "on or about the 12th June." The nature of the question, and the vagueness of the answer show that the parties had no intention of altering the original contract and substituting a new one for it. The question and reply have not, in law, that operation. It was not,

indeed, argued before me that they had, but I am compelled to consider the case in that aspect, because, if they do not operate as a contract, there is no way in which they can operate at all. No question of deceit arises. It is not alleged that the plaintiffs' answer was made otherwise than in good faith. The case has been put on the ground of estoppel. What is the estoppel? What thing, in fact, have the plaintiffs intentionally declared to be true? None. That the steamer will be ready to receive cargo on the 12th June, is neither a thing, nor a fact, but a statement of opinion in expectation. The doctrine of estoppel has no application to it. The whole subject is treated concisely in *Pollock on Contracts, (5th Ed.), pp. 505 and 507.* I extract the passage having the most direct bearing upon the case before me:—"If the statement is of something to be performed in the future, it must be a declaration of the party's intention, unless it is a mere expression of opinion. But a declaration of intention made to another person, in order to be acted on by that person, is a promise or nothing. And if the promise is binding, the obligation laid on the utterer is an obligation by way of contract, and nothing else. Promises *de futuro*, if binding at all, must be as binding as contracts. There is no middle term possible. A statement of opinion in expectation creates, as such, no duty. If capable of creating any duty it is a promise. If the promise is enforceable it is a contract." Here, as I have pointed out, there was no contract that the steamer would be ready on the 12th June. Consequently there could be no breach of that contract by the plaintiffs, and the defendants had no right to cancel the shipping orders on the 18th June because the steamer was not ready on the 12th.

The rest of the case may be more briefly disposed of. The plaintiffs did not at once accede to, and act upon, the defendants' cancellation of the shipping orders as they might have done (Indian Contract Act, section 39), but treated them as still subsisting, and thus, as correctly argued by Mr. Melshmier, kept the contract alive for the benefit of the defendants as well as their own—*Frost* v. *Knight*[1]. Owing to the crowded state of the dock, the *County of York* did not get in until the 23rd June.

(1) L. R., 5 Ex., p. 322; 7 Ex., p. 111.

1892.

BEYTS, CRAIG & Co. v. OTTO MARTIN.

She had been entered at the Custom House for outward loading on the 18th, and her berth was allotted to her on the 19th. On the 20th June the plaintiffs sent a circular to their shippers: "N shed, Prince's Dock, has been allotted to the S. S. *County of York*. Shippers are, therefore, requested to send down their cargo to this shed at once." The defendants refused to initial this circular. The plaintiffs, therefore, wrote to the defendants on the 22nd June: "The *County of York* will be in dock to-morrow and ready to receive cargo. As the vessel will leave on Friday, we have to request that your cargo be down not later than Wednesday the 24th instant, failing which we shall without any further advice relet the same (your shipping orders) at the best market rate, and hold you responsible for any and all losses, &c."

The defendants contend that the above is not such a notice as is contemplated by the shipping orders, which is a notice that the steamer is ready to receive cargo, and not that she will be ready for cargo on the next or any other day. They rely, in support of their contention, on Lord Justice Brett's judgment in *Nelson* v. *Dahl*[1]. The plaintiffs, on the other hand, contend that, inasmuch as a berth and shed had been allotted to the steamer, and as the dock authorities receive cargo for a vessel as soon as a berth is allotted to her, the circular of the 20th June, coupled with the notice of the 22nd June, amounts to a notice that the ship was ready for cargo within the meaning of their shipping orders; inasmuch as by the custom of the port a ship is considered ready for cargo as soon as a berth is allotted to her in the dock. With reference to this contention it is to be observed that no evidence has been adduced before me of such a custom. A dock officer only has been called, who deposes that the Port Trustees will receive cargo for a steamer as soon as a berth is allotted to her and without extra charge, provided there is room. In the absence of such evidence, and having regard to the proviso made by the Customs Office, I should feel it difficult to hold that a vessel is ready for cargo before she is berthed for loading. The clause of the shipping orders is a short one, and imposes a severe penalty on the shipper: "Goods to be alongside in time to be all taken in, on or before the second

(1) 12 Ch. D., at p. 480.

day after notice that steamer is ready for cargo; otherwise difference of freight to be payable on demand as liquidated damages." Before liability under that clause can arise it would appear to be necessary that the ship should be ready for cargo, and that the shipper should have notice that she is ready for cargo. It is not, however, necessary for me to determine the question in this case. The defendants on receipt of the plaintiffs' letter of the 22nd June, informing them that the steamer would be in dock ready to receive cargo the next day, replied, in effect, that they would not ship. They write: "In reply to your letter dated the 18th and 22nd July, I beg to refer you to mine of the 18th idem in respect of the orders for 375 tons issued by you." That letter had purported to cancel the shipping orders. "Let me point out to you once more that on account of your failing to receive my cargo on board on the 12th instant as promised, I have been compelled partly to cancel my engagements and partly to ship by other steamers to meet my engagements. You may, therefore, do what you like on your own responsibility." I can read that letter in no other sense than as a refusal on the part of the defendants to perform their contract. As such the plaintiffs accepted it and put an end to the contract, as, under section 39 of the Contract Act, they were entitled to do. They wrote: "In reply to yours of to-day's date we simply refer you to our shipping order, and inform you that we will relet on your account at best market price, and hold you responsible for any loss." After that it was not incumbent on the plaintiff to give a further notice on the 23rd that the steamer is ready for cargo, as no doubt they would have done had the defendants objected to the sufficiency of the notice of the 22nd, or allowed it to pass *sub silentio*. "When a party to a contract has refused to perform his promise in its entirety, the promisee may put an end to the contract" (section 39). The plaintiffs having done so, are now entitled to the damages which they have sustained from the defendants' refusal to perform. There is no question as to their amount. It is £118 9*s.* at 1*s.* 5¼*d.*, *plus* Rs. 81-4. Defendant to pay costs, Court fees on amount of judgment, Rs. 90 professional costs, and the taxed costs incurred by plaintiffs in the High Court.