

1870.
Dec. 3.

Suit No. 810 of 1870.

BLACKWELL AND CO.Plaintiffs.

JONES AND CO.Defendants.

Shipping—Charterparty—Nomination of Ship's Agents by Freighters—Right of Ship's Agents to sue on the Charterparty—Parties within the consideration of Charterparty—Mercantile expression "going seeking."

A Charterparty made between the defendants (the owners of the *Seaforth*) and H. & Co. (the freighters) provided that "the owners should employ at the ports of discharge the consignees nominated by the freighters to transact the ship business there inwards and outwards on the customary terms, not exceeding 2½ per cent. on amount of freight payable inwards and 5 per cent. outwards,

H. and Co. nominated the plaintiffs to transact the ship's business in Bombay (a port of discharge) with the knowledge and consent of the master of the *Seaforth*, and the plaintiffs accepted and acted under such nomination.

The defendants refused to pay the plaintiff's commission on the outward freight of the *Seaforth*, on the grounds that, under the circumstances under which such freight was procured, the plaintiffs were not, under the charterparty, entitled to receive commission on it.

Held that the plaintiffs were sufficiently within the consideration of the charterparty to maintain a suit for the breach of such clauses of it as were inserted for their benefit.

Meaning of the mercantile expression of (a) ship "going seeking" discussed.

THIS was a suit brought by the plaintiffs against Messrs T. C. Jones and Co., of Liverpool, owners of the ship *Seaforth*, and alleged to be carrying on business in Bombay by their agent, T. E. Terfry, the master of the *Seaforth*, to recover the sum of Rs. 2,363.

The defendants, Messrs. T. C. Jones and Co., for the owners of the ship *Seaforth*, entered into a charterparty, dated the 12th of April 1870, with Messrs. T. H. Haviside and Co., of London, to charter the *Seaforth* to them for a voyage from London to Bombay at the rate of thirty shillings per ton.

The charterparty, after providing that "the *Seaforth* (having taken in cargo in London as specified in the charterparty) should proceed therewith to Bombay *via* the Cape of Good Hope, and there deliver the same as customary" (the act of God, the Queen's enemies, &c., excepted), and,

after providing for the storage of the cargo, and for its delivery at Bombay, and for the payment of the freight, contained the following clause :--

"Owners to employ at the ports of discharge the consignee nominated by freighters to transact the ship's business there, inwards and outwards, on the customary terms, not exceeding $2\frac{1}{2}$ per cent. an amount of freight payable there inwards, and 5 per cent. outwards, which is to include all charge for Native brokerage, but ship not to be bound to load in Bombay, and to pay no outward commission if she goes away seeking."

The *Seaforth* arrived in Bombay in the early part of October 1870. On the 12th of August the freighters, Messrs. T. H. Haviside & Co., wrote a letter addressed to the plaintiffs in the following terms :--

Via Marseilles.

London, 12th August 1870.

Messrs. BLACKWELL & Co.,

Bombay.

DEAR SIRS,

We have the pleasure to introduce to you Captain Terfry, of the ship *Seaforth*, owned by Messrs. T. C. Jones and Co., of Liverpool.

We have loaded this vessel for Bombay, and, as empowered by Charterparty have much pleasure in naming you as Agents for the owners for the transaction of ship's business whilst in Bombay, and we have no doubt you will give your best attention to their interest, and extend, to Captain Terfry a share of your usual courtesies.

We remain, &c.,

For T. H. Haviside & Co.,

HENRY SMITH."

This letter was handed by Terfry, the master of the *Seaforth*, to the plaintiffs shortly after the arrival of the ship in Bombay.

The plaintiffs accepted this nomination, and under it transacted the ship's business in Bombay, and collected the freight there payable on the outward voyage, which was, however, very trifling in amount. About a fortnight after the arrival of the *Seaforth* in Bombay, Captain Terfry informed the plaintiffs that his ship had already been chartered in England, and showed them a charterparty made between the defendants and Messrs. Mohr Brothers & Co., dated the 4th of June 1870, which provided that the *Seaforth* should proceed to Bombay

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with cargo for the owners' benefit, and, having discharged the same, should sail and proceed to Akyab for orders to load, either there or at Rangoon or at Bassein, but to load at one port only, a cargo of rice or other lawful merchandise, at certain specified rates of freight, and then proceed to Cork or Falmouth for orders as to the port of discharge.

The plaintiffs were ready and willing to procure, and could have procured, a homeward freight for the *Seaforth* in Bombay. At the time the suit was filed, the *Seaforth* was about to sail to Akyab, under the above charterparty of the 4th of June. The plaintiffs claimed, under the charterparty of the 12th of April 1870, five per cent. commission on the amount of freight to be earned under the charterparty of the 4th of June 1870, which, according to the plaintiffs' particulars of demand, amounted to Rs. 2,337-8-0.

The plaintiffs also claimed Rs. 25-8-0, due to them for commission on inward freight collected by them, and for some small disbursement which they had made on account of the ship.

The latter sum (Rs. 25-8-0) the defendants tendered to the plaintiffs before action, and after suit paid it into court.

The defendants put in a written statement, in which they stated that the ship *Seaforth* was not about to load in Bombay, and that, under the terms of the charterparty in the plaint mentioned, the defendants were not liable to pay to the plaintiff any commission to be earned by the said ship under the charterparty of the 4th of June 1870.

By paragraph 5 of the written statement, the defendants submitted that the plaintiffs had no title in themselves wherein to maintain the suit, and no consideration moved from the plaintiffs for the payment of the sum claimed from the defendants by the plaintiffs.

The suit came on for hearing before GREEN, J., on the 1st of December 1870, when the following issues were raised :—

I. Whether the plaintiffs have any title to sue the defendants in respect of the causes of action alleged in the plaint other than in respect of Rs. 25-8-0.

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II. Whether the plaintiffs are entitled to recover the sum of Rs. 2,337-8-0 in the plaint claimed, or any part thereof.

Mayhew and Lang, for the plaintiffs, contended that the plaintiffs, though not originally parties to the contract, were yet entitled to sue upon it without joining Messrs. Haviside & Co. as co-plaintiffs, having been nominated under its provisions as agents for the owners. They cited *Jones v Robinson (a)*, *Robertson v. Wait (b)*.

The Honorable A. R. Scoble and Latham, for the defendants, relied upon *Tweddle v. Atkison (c)*; *Chitty on Contracts*, pp. 53-55 (8th ed.); *Additon on Contracts*, p. 1038 (8th ed.).

Cur. adv. vult.

Dec. 3. GREEN, J. (after stating the facts, as given above proceeded):—The issues settled at the hearing which took place on Thursday last, the 1st instant, are as follows:—(1) Whether the plaintiffs have any title to sue the defendants in respect of the causes of action alleged in the plaint other than in respect of Rs. 25-8-0; and (2) whether the plaintiffs are entitled to recover the sum of Rs. 2,337-8-0 in the plaint claimed, or any part thereof.

In reference to the first issue, it was contended, on the part of the defendants, that the plaintiffs, not being parties to the charterparty of the 12th of April, and being strangers to the consideration thereof moving to the defendants, are not entitled to sue, and that the suit, if maintainable at all, should have been brought in the name of Haviside and Co. I had felt some difficulty on this point when the plaint was first presented to me, but on further consideration the difficulty has been to a great extent removed. The provisions as to the

(a) 1 Exch. 454.

(b) 8 *Ibid.* 299.

(c) L. B. & S. 393.

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employment, as agents of the owners, of consignees nominated by the freighters, and payment of commission to them, seems to amount to this: "We, the owners, will employ such persons as agents as you, the freighters, shall name, and on their acceptance of the nomination and acting as agents we will allow a certain commission." The freighters then nominate the plaintiffs as agents, with the knowledge and assent, if not of the owners themselves, at least of the captain, and the plaintiffs accept such office, do such business as is necessary to be done, and are ready and able to perform the only remaining duty—namely, procure homeward freight for the ship—and the only reason they do not do this is that the owners chose to do it for themselves in England. This provision in the charterparty was, I consider, intended to be acted upon by the nomination of agents, and when so acted upon by the nomination of the plaintiffs as such agents became a provision for the benefit and on behalf of the plaintiffs, and in fact to the extent of the provision I consider that upon acceptance of such nomination there was constituted a valid and binding legal contract against the owners in favour of the plaintiffs as such nominees. Though the plaintiffs are not named parties to the contract, yet they are not in that sense strangers to the consideration of the contract as to prevent them suing on it in their own name as to such part as is for their benefit and on their behalf.*

With regard to the second issue, evidence has been given on the plaintiffs' behalf by three witnesses—Mr. Herring, one of the plaintiffs, Mr. Thomas Blay, a ship and freight broker, and Mr. Andrew Cuninghame, an assistant in the firm of Messrs. Wallace & Co. They have given evidence as to the usage of the port in regard to agents' commission on freight; but in the present case, where the claim is based on a written contract, the evidence of general usage is material only as showing the mereantile meaning or acceptance of any terms used in that contract. These witnesses all agree in this, that the term "a ship going seeking" means a ship leaving Bom-

* On this point see further *In re Agra and Masterman's Bank Ex. part 2*, *Asiatic Banking Corporation*, *Law Rep. 2 Ch. App. 39*.

bay in ballast or unfixed, and without a charter or freight provided for her, either here or at another port. Apart from any special mercantile use of the words, I should have thought that a ship goes seeking as well in the case of leaving the port without having loaded there, but with a certain expectation of finding freight elsewhere, as in the case where she so leaves without any such certain expectation. But the witnesses whom I have mentioned (and whose evidence has not been in any way contradicted, for the defendants have not called any witnesses) state that the mercantile meaning of the words is that a ship is said to go away seeking only where she leaves without any charter or freight having been engaged. If this be so, the *Seaforth* cannot be said to be now going seeking, as she is leaving the port under a charterparty by which she is to proceed to Akyab for orders, and there, or at certain other specified ports, to load for the homeward voyage—and indeed the freighters have the option of loading the ship at Bombay. It was urged (among other things), on behalf of the defendants, that the plaintiffs had done nothing whatever to earn any commission on homeward freight, and that the engaging or procuring of such freight is, as Mr. Herring states, the only duty an agent outwards has ordinarily to perform with respect to the ship. But I cannot consider that this is the test. The plaintiffs, according to the evidence, were willing and able to have procured homeward freight for the ship either from Bombay or from other ports in the East. Had the owners without any intervention of the agents procured a charterparty in Bombay for the ship to lead here, it is not, I suppose, disputed that the agents would be entitled to their commission on freight though they did nothing for it; and I cannot therefore, consider the question whether or not the agents in fact procured the freight as decisive on the question of their right to commission. On the evidence which has been given, I find myself unable to come to any other conclusion than that the plaintiffs are entitled to commission on the freight to be earned under the charterparty of the 4th of June. Evidence has been given as to the usual mode of estimating such commission, and that the amount claimed

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1870. is correct according to such mode of estimate. The claim
 Blackwell & Co. is based upon the lower rate of freight mentioned in the
 v. charterparty; and I must find the second issue in favour of
 Jones & Co. the plaintiffs, and make a decree in favour of the plaintiffs
 for Rs. 2,337-8-0, being the amount (Rs. 2,363) claimed, less the sum of Rs. 25-8-0 paid into court, and that the sum so paid into court be paid out to the plaintiffs, if not already paid, and costs,

attorneys for the plaintiffs: *Rimington, Hore, and Langley.*

Attorneys for the defend' ats: *Dallas and Lynch.*

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Dec 23.

Suit No. 179 of 1865.

LADKUVARÁÍ, widowPlaintiff.

GHOEL SHRI SANSANGJI PRATABSANGJIDefendant

Independant Sovereign Prince—Privilege from Suit—International Law—Palitana, Thakur of—Kattiwad, Chiefs of—Misdescription of Defendant—Decree made by mistake—Execution, Stay of.

An independant Sovereign Prince is privileged from suit in the Courts of British India.

The Thákur of Pálitáná is an independant sovereign prince.

A suit was brought against the Thákur of Pálitáná (his title being omitted from the plaint), and an *ex parte* decree was obtained against him. An application on the part of the Thákur to have the decree set aside was dismissed, and the plaintiff then sued out an attachment, but, failing to execute it within a year, was compelled to apply to the Court, under Sec. 216 of the Code, for leave to execute it. The defendant at the same time applied to have the attachment and all proceedings under it declared null and set aside.

The Court (without expressing an opinion as to whether the order dismissing the application to have the decree set aside would have prevented it from declaring the decree void *ab initio*) held that, as the decree was made erroneously and without jurisdiction, it would not, when apprised of the error, assist the plaintiff in carrying it into execution in a case in which lapse of time made it incumbent on the plaintiff specially to invoke the aid of the Court for that purpose.

THE plaintiff in this suit sued as widow and executrix of Ratanji Rupji Modi. She was described in the plaint as formerly residing in a house No. 18 in Baláji Shámset Street