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DEFFELL v. BROCKLEBANK.

ENGLAND.

COURT OF KING'S BENCH.

JOHN HENRY DEFFELL, - *Plaintiff in Error*;

THOMAS BROCKLEBANK, - *Defendant in Error.*

By mutual covenants in a charter-party of affreightment it was agreed on the part of the ship-owner, that he should provide a ship, which should proceed to Jamaica, and receive on board, from the agents of the shipper, a cargo to be provided by him, according to his covenant after mentioned, and should sail with the June convoy, &c. provided the ship arrived out, and was ready to load sixty-five running days before the sailing of the convoy, which were to be accounted from the day of arrival, and being reported ready to receive goods, &c.; and on the part of the shipper, that he would provide 650 casks of produce in time for the ship to load the same, and join the June convoy, provided she arrived out and was ready to load, and notice thereof given by the agents of the shipper sixty-five running days before the sailing of the convoy, &c. and should pay, &c.

It was further provided by the charter, that if any hurricane, insurrection or invasion should happen, &c. that upon notice, the obligation of the shipper under the charter-party should cease, &c.

In an action of covenant brought by the ship-owner upon this charter-party, the declaration, after reciting the substance of the indenture, stated that the ship arrived at Jamaica, on the 27th of April, &c. and upon her arrival was seaworthy, &c. and ready to receive a cargo of, &c. according to the charter-party, whereof notice was given to the agents of the freighter, and that the ship did at, &c. receive such cargo as his agents thought fit to load on board, &c. and delivered such cargo, &c. according to the charter-party. The declaration then assigned, as a breach, that although no hurricane, &c. prevented, &c. the freighter did not

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provide 650 casks of produce, &c. but, &c. a much smaller quantity; that is to say, &c. being a very insufficient cargo, &c. contrary to the covenant, &c. whereby the ship-owner was prevented earning profit to the amount of 2,500 *l.*

The declaration then assigned, as a further breach, that although no hurricane, &c. and although the ship arrived, &c. and was ready, &c. and notice, &c. sixty-five running days before the sailing of the June convoy, &c. the freighter did not provide a sufficient cargo to be laden, &c. in time sufficient for the ship to join the June convoy, &c. but detained the ship thirty days after the sailing, &c. whereby the (shipowner) lost the use, &c. was put to expense, &c. and prevented earning freight, &c. to a large amount, to wit, 2,500 *l.*

To this declaration the Defendant pleaded eleven pleas, the substance of which, as applicable to the first breach, was, that the ship did not arrive, or was not ready, or reported ready, to receive a cargo sixty-five running days before the June convoy was appointed to sail, or did actually sail, and that therefore the charter-party was void; and further, that the Defendant sailed of his own accord with an insufficient cargo.

As applicable to the second breach, the substance of the eighth and eleventh pleas was, that the Defendant did not detain the ship for any time after the sailing of the June convoy, in manner and form alleged.

To all the pleas, but the first, seventh, and ninth, the Plaintiff demurred generally. On the first plea of *non est factum*, the Plaintiff joined issue. The replication to the seventh plea was, that the ship was reported ready to load sixty-five days before the sailing of the June convoy. To the ninth plea, that the master sailed of his own accord with the short cargo, the Plaintiff replied, that after notice of the ship being ready to load, a reasonable time elapsed to deliver 650 casks of produce, &c. On the replications to the seventh and ninth pleas, the Defendant joined issue.

Held that the provision as to the sixty-five running days was not a condition precedent to the obligation of the freighter to furnish a cargo of 650 casks of produce, but applied only to the obligation of the ship-owner, that the vessel in such case should sail with the June

convoy; therefore that it was not necessary, in the assignment of the first breach, to aver that the ship arrived out, and was ready to load sixty-five days before the sailing of the June convoy.—Held also, that the substance of the assignment of the second breach was the failure to produce a cargo, and not the detention of the ship; and that the plea, by taking issue on an immaterial part of the plea, admitted the material part.

THIS was an action of covenant brought in the court of King's Bench. The declaration stated, by a certain charter-party of affreightment, made on the 13th of January 1812, between the Defendant in error, therein described as part and managing owner of the ship Balfour, of the one part, and the Plaintiff in error of the other part; it was witnessed, that the Defendant in error had let, and the Plaintiff in error had taken and hired the said ship to freight for the voyage, and upon the terms and conditions therein contained, whereupon the Defendant in error did thereby covenant, promise, and agree to and with the Plaintiff in error, that the said ship should proceed from Whitehaven (with liberty to call at Cork if required) to Montego Bay, and upon arrival there she should be made tight, staunch, strong, and in all respects sea-worthy, and be well manned, victualled, equipped, provided, and furnished with all things needful and customary for such a vessel and her intended voyage thereinafter mentioned, and should thereupon take and receive on board from the agents or assigns of the said Plaintiff in error, in Montego Bay aforesaid, from and out of the usual barquadiers, with the assistance of the ship's boats and people, and at the ship's ex-

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pense and risk, the quantity of 450 casks of sugar and 200 puncheons of rum, and such a quantity of wood as might be requisite to stow the cargo (provided the agents of the said Plaintiff in error gave to the master notice of such their intention within ten days after his arrival) for which the master of the said ship should and would sign the accustomary bills of lading, and the said ship being therewith despatched, should set sail with the convoy that should depart from Jamaica for England in the month of June then next; provided the ship arrived out and was ready to load sixty-five running days previous to the sailing of such convoy, which days were to be accounted from the day of her arrival at Montego Bay aforesaid, and being reported ready to receive goods, and proceed under sailing instructions from the said convoy back to the port of London, and upon her arrival there deliver the said cargo in the West India Docks, agreeable to bills of lading and to the custom of the said Docks, and thereupon the said intended voyage was to end (the act of God, enemies, restraint of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and of navigation; of what nature or kind soever, excepted), in consideration whereof the said Plaintiff in error did thereby covenant, promise and agree to and with the said Defendant, not only to provide 650 casks of produce as above stated, for the said ship Balfour, to be laden at the usual barquadiers in Montego Bay as aforesaid, and such a quantity of wood as might be requisite to stow the cargo for the port of London, and in time for her to load the same and

join the June convoy for England, provided she arrived out and was ready to load, and notice thereof was given to the agents of the Plaintiff in error sixty-five running days previous to the sailing of the said convoy, and on her arrival in the West India Docks, London, receive the said cargo out of her, agreeable to the bills of lading, and according to the custom of the port of London, but also well and truly to pay or cause to be paid unto the Defendant in error, or his order, in full, for the freight of the said cargo, the same freight and primage as should be given to other vessels that should load at Montego Bay for London at the same time as the said ship, to be paid at and in the usual and customary time and manner of paying such freights in the West India trade, and general average to be as customary should any accrue; provided always, and it was thereby agreed and understood by and between the said parties, that if any hurricane, insurrection, or invasion by an enemy should happen in the said island of Jamaica, so as to interfere with or prevent the intention and undertaking of Plaintiff in error, his agent or assigns should not be bound or obliged to give said ship the before-mentioned quantity of goods, but, on the contrary, it should be lawful for him or them in that event to cancel and annul the said charterparty, upon giving notice in writing to the master of the said ship of the determination so to do within ten current days after the said ship's arrival at Montego Bay, in the said island, upon which said notice the said charterparty, and every thing thereinbefore contained, should cease and be utterly void as if the same had never been made or

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entered into, and the Defendant in error should have no claim whatsoever for freight in respect of same.

The declaration then stated, that on the 30th January 1812, the ship did sail and proceed from Whitehaven aforesaid upon her said voyage to Montego Bay, and arrived there on the 26th April 1812, and upon her arrival there was made tight, staunch, strong, and in all respects sea-worthy, and was well manned, victualled, equipped, provided, and furnished with all things needful and customary for such a vessel and for the said voyage, and was also ready to receive, and take, and load on board, from the agents or assigns of the Plaintiffs in error in Montego Bay aforesaid, a cargo of sugar, and of rum, and of wood, to stow the said cargo according to the meaning and effect of the said charterparty, whereof notice was given to the agents of the said freighter; that the said ship did, at Montego Bay aforesaid, receive and take, and load on board, such a cargo of sugar, and rum, and of wood, to stow the said cargo, as the agents or assigns of the Plaintiff in error thought fit to load on board of her, for which the master of the said ship signed the accustomary bills of lading, and the said ship being therewith despatched, afterwards set sail and departed therewith from Montego Bay aforesaid, back to the said port of London, where the said ship afterwards arrived and delivered such cargo as had been so laden on board her in the West India Docks, agreeably to bills of lading and to the custom of the said Docks, and upon such delivery ended and terminated her said voyage, according to the intent and meaning of the charterparty.

The declaration then assigned a breach, that, although no hurricane, insurrection, or invasion by an enemy happened in the said island of Jamaica, so as to interfere with or prevent the intention and undertaking of the Plaintiff in error to load the said ship, in the charterparty mentioned, with a sufficient cargo, according to the terms and stipulations thereof, yet the Plaintiff in error did not provide, or cause to be provided, the said 650 casks of produce, as and for the cargo of the said ship, to be laden on board thereof at the usual barquadiers in Montego Bay aforesaid, and such a quantity of wood as was requisite to stow the said cargo for the port of London, but, on the contrary, loaded on board the said ship a much smaller quantity of produce, that is to say, 156 hogsheads of sugar, and twenty-four puncheons of rum, the same being a very insufficient and incomplete cargo for the said ship, and contrary to the true intent and meaning of the said charterparty, and of the said covenant of the Plaintiff in error, so by him in that behalf made as aforesaid, whereby the Defendant in error was prevented from earning and recovering so much freight and primage as he otherwise might and would have done to a large amount, to wit, to the amount of 2,500 *l.*

The declaration then assigned as a further breach, that although the Plaintiff in error was not prevented from loading the said ship in manner above agreed upon, and although the said ship arrived out at Montego Bay, and was ready to load there, and notice thereof was given to the agent of the Plaintiff in error sixty-five running days previous to

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the sailing of the June convoy from Jamaica for England, in the said charterparty mentioned, yet the Plaintiff in error did not provide, or cause to be provided, a sufficient cargo of produce to be laden on board the said ship at the usual Barquadiers in Montego Bay aforesaid, in time sufficient for the said ship to join the said June convoy from Jamaica to England on her homeward-bound voyage to the port of London aforesaid; but the Plaintiff in error detained the said ship for a long space of time, to wit, the further space of thirty days after the sailing of the said June convoy, contrary to the form and effect of the said charterparty, and of the covenant of the Plaintiff in error in that behalf, whereby the Defendant in error during all that time not only lost the use and benefit of the said ship or vessel, but was also put to greater expense in and about the maintaining and paying the crew thereof, and was likewise prevented from earning and recovering so much freight and primage as he otherwise might and ought to have done to a large amount, to wit, to the amount of 2,500 *l.*

And the Defendant in error laid his damages at 3,000 *l.*

To this declaration the Plaintiff in error pleaded 1st, *non est factum.*

2d. That the ship upon her arrival at Montego Bay was loaded with a cargo of coals, which was not discharged from the ship for a long space of time after her arrival; and that there did not elapse sixty-five running days from the time the ship discharged the said cargo of coals, and was ready to receive a cargo of sugar and rum, to the time

of the sailing of the June convoy from Jamaica for England.

3d. That at the time when the ship was reported ready to receive goods, to wit, on the 27th of April in the year aforesaid, the June convoy stood appointed to sail on the 20th June following; and inasmuch as sixty-five running days could not elapse between the 27th April and 20th June, the charter-party became void.

4th. That the ship was reported ready on the 27th April in the year aforesaid, and that such ships and vessels of the June convoy as departed and sailed from Montego Bay for England departed from thence on the 29th June, and within the period of sixty-five days from the day when the ship was reported ready, whereby Plaintiff in error was discharged from his covenant in that behalf.

5th. That the ship was not reported ready sixty-five running days before the June convoy was appointed to sail and depart.

6th. That the ship was not reported ready sixty-five running days before the ships of the June convoy at Montego Bay departed and sailed from thence.

7th. That the ship was not reported ready to receive goods sixty-five days before the convoy was appointed to sail, or actually did sail; and that the master of the Balfour voluntarily remained at Montego Bay after the sailing of the convoy.

8th. After protesting that the ship did not arrive out, and was not ready to load, sixty-five running days previous to the sailing of the June convoy, avers that Plaintiff in error did not detain the said ship at Montego Bay for any time whatever after the

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sailing of the said June convoy in manner and form alleged.

9th. That the master, after receiving on board the ship the goods mentioned in the declaration, before the residue of the cargo could be procured, of his own accord sailed with the part cargo.

10th. That the Plaintiff in error was not bound to provide the cargo for the said ship in time for her to load the same and join the June convoy, unless the ship should arrive at Montego Bay, and be there reported ready to load in sufficient time before the sailing of the said convoy, to be and remain in Montego Bay for the purpose of loading there sixty-five running days before the ship should be obliged to leave in order to join the June convoy. That the ship did not arrive, and was not reported ready to load in sufficient time before the sailing of the June convoy to have enabled the said ship to be and remain in Montego Bay sixty-five running days, for the purpose of loading there, in case the ship had joined and sailed with the June convoy.

11th. That the plaintiff in error did not detain the ship for any space of time after the sailing of the June convoy as alleged in the declaration.

To the 2d, 3d, 4th, 5th, 6th, 8th, 10th, and 11th pleas, the Defendant in error demurred generally, and the Plaintiff in error joined in demurrer. The demurrers came on for argument in the Court of King's Bench in Easter Term 1814, and were allowed:

Upon the 1st plea the Defendant joined issue. As to the 7th, he replied that the ship was reported ready to receive goods sixty-five days before the

June convoy actually did sail. As to the 9th plea, he replied, that after the ship was ready to receive a cargo, and notice thereof given, a reasonable time elapsed to deliver 650 casks of produce, &c.; and that before the ship sailed the Plaintiff in error did not deliver 650 casks, &c. but refused, &c.

On the replications to the 7th and 9th pleas the Plaintiff in error joined issue. The issues were tried at the Sittings after Michaelmas Term 1814, when a verdict was given for the Defendant in error, and general damages assessed upon both breaches.

In Easter Term 1817, the judgment of the Court of King's Bench upon a writ of error, sued out by the Plaintiff in error, was affirmed in the Exchequer Chamber.

Upon these judgments a writ of error, returnable in Dom. Proc. was sued out in May 1817.

For the Plaintiff in Error:—The *Solicitor General* and Mr. *Bickersteth.*

The covenant to load the ship with 650 casks of produce, &c. is discharged by the circumstance of sixty-five days not having elapsed between the time when the ship was ready to receive that cargo and the sailing of the June convoy from Jamaica, or between the time when the ship was reported ready to receive that cargo and the time when the June convoy was appointed to sail, and the Plaintiff in error was at liberty to send his produce by any other vessel: The judgments are erroneous, because it is not averred in the assignment of the first breach that the ship arrived out, and was ready to load sixty-five

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running days previous to the sailing of the June convoy, which, according to the fair construction of the charterparty, was a condition upon which the obligation of the freighter to load the ship depended, there being no covenant to load her for any other than the June convoy. The second breach being confined to the detention of the ship is answered by the 8th and last pleas, which are admitted by the demurrer. And because the damages being general upon the whole declaration, if any one breach is bad, or is sufficiently answered by the plea, the judgment for the Defendant in error is erroneous.

If this be a condition precedent, the declaration is bad because it is not set forth *. The condition is material and important, as preventing the necessity of stipulation and questions in respect of demurrage. With respect to the goods actually put on board, it was under a new agreement, upon which freight might be recovered. The assignment of the second breach, if not bad for duplicity, as being precisely the same as the first, is qualified by the circumstance of time. It must be proved as qualified, and is limited by the qualification †. In the last plea issue is taken upon the fact of the detention, as qualified in the breach. If the breach is not assigned in the terms of the covenant, it is sufficient for the Defendant by his plea to traverse it as laid. It is said that it is laid under a *videlicet*, but that applies only to the number of days, not to the main fact of detention.

* *Shadworth* v. *Higgins*, Campbell, p.

† *Harris* v. *Mantle*, 3 T. R. 307.

For the Defendant in Error, The *Attorney General* and *Serjeant Bosanquet.*

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It was not a condition precedent to the obligation on the Plaintiff in error to load the ship with 650 casks of produce, that there should be sixty-five days between the ship being ready, or reported ready, to take in the cargo, and the time of the June convoy sailing, or being appointed to sail from Jamaica, and he was not thereby discharged from his covenant, but only excused for not doing so in time to enable the ship to sail with the convoy.

The proviso has reference merely to the sailing with the convoy in case the ship arrived and was ready sixty-five running days before that time, which appears as well from the construction of that part of the contract, as from the covenant on the part of the shipper. In certain events he is excused from the payment of freight; but no provision is made for avoiding the contract in case the ship should not sail with the convoy, or not arrive and be prepared in time to do so sixty-five running days before the sailing of the convoy. It is a general rule that a covenant is not to be construed as a condition precedent unless it goes to the whole of the consideration. Where it extends only to part, it gives merely a right of action. As to the objection in point of form, the second breach consists of parts; that the cargo was not provided; that it was not provided in time; and that the ship was detained. The plea, by taking issue on the latter part, admits the former. The detention is immaterial, as being under a *videlicet*, and issue cannot be taken on a fact so pleaded,

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the matters therefore alleged in the pleas as to the detention of the ship are no answer to the breach, the substance of which is the not providing a sufficient cargo.

26th March 1821.

The *Lord Chancellor*, on mentioning the cases which stood over for judgment, observed as to the case of *Deffell* v. *Brocklebank*, that it had been stated that the twelve Judges had agreed in their judgment upon the questions raised in the case; but as he had doubts upon the subject, it was necessary that he should consider the case fully before he could advise the House to affirm the judgment.

The case was afterwards mentioned by the *Lord Chancellor*, and notwithstanding the doubt expressed on the former mention of the case, it was affirmed without any material observation.

25th May 1821.

Ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed.