1936

LOUIS DEITCHER AND JACOB DEITCHER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DEITCHER BROTHERS (DEFENDANTS) ..... APPELLANTS;

* Apl. 28, 29.
* May 27.

AND

MYER WHITZMAN AND EDWARD WHITZMAN (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC.

Contract—Sale of goods—Contract for sale of scrap steel, accumulated on a certain wharf, to be loaded there on ship—Clause providing that weight of goods be ascertained by checking ship's draft—Subsequent arrangement for transferring goods and loading at different place—Change in circumstances—Conduct of parties—Dispute as to weight of goods loaded—Method of ascertainment—Evidence to prove weight.

Defendants contracted to purchase from plaintiffs certain scrap steel, part of which was on a wharf at Dartmouth and part at Halifax, and which was to be loaded on a steamer chartered by defendants. The contract provided: "Railway weights to govern settlement on all material loaded in Halifax. For material loaded in Dartmouth, weight to be obtained in accordance with ship's draft. [Plaintiffs] have the right to appoint Lloyd's Agents to act on [plaintiffs'] behalf as regards to checking the draft for weight purposes, and [defendants] are appointing ship's chief officer for the same purpose." The intention that the steamer should take on the Dartmouth cargo from said Dartmouth wharf was frustrated by the ship captain's fears that there was not sufficient depth of water for that to be done safely. The parties then made an agreement whereby the Dartmouth scrap was loaded into lighters and transported to the ship's side at a pier in Halifax. It was loaded and stowed in the steamer from these lighters while the Halifax scrap was being put on from the pier. Plaintiffs did nothing as to checking the ship's draft, nor did defendants or the ship's officer notify them that the draft was to be checked for the purpose of ascertaining the weight of the Dartmouth scrap. The main dispute was as to the weight of the scrap brought from Dartmouth, to prove which weight the plaintiffs at the trial adduced evidence of the lightermen and others. The jury's finding of the weight was in plaintiffs' favour, and judgment was given accordingly, which was affirmed on appeal. Defendants appealed to this Court.

Held: In the circumstances the above quoted weight clause respecting the Dartmouth scrap in the original contract could not fairly be held to have been incorporated as an implied term of the new arrangement made for its loading: checking its weight by the displacement method within the true meaning of said weight clause became impossible owing

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

1936

DEITCHER v. WHITZMAN.

to the simultaneous loading (which the clause could not be taken as contemplating) of Halifax and Dartmouth scrap at Halifax; further, the clause contemplated concurrent checking and raised a duty in each party to co-operate with the other in the checking of the draft. It was therefore competent to plaintiffs to prove by the best available testimony the weight of the Dartmouth scrap actually delivered; and the evidence adduced warranted the jury's finding.

Judgment of the Supreme Court of Nova Scotia en banc, [1936] 1 D.L.R. 780, affirmed.

APPEAL by the defendants from the judgment of the Supreme Court of Nova Scotia en banc (1) affirming (Ross J. dissenting) the judgment of Hall J. at trial, on findings of a jury, in favour of the plaintiffs. The action was mainly for the price of goods sold and delivered, and the main question in dispute was the quantity (weight in tons) of scrap steel delivered by plaintiffs to defendants. The material facts of the case and questions in dispute are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

D. McInnes and *S. E. Schwisberg* for the appellants.

J. A. Walker K.C. for the respondents.

DUFF C.J.—The appeal should be dismissed with costs.

The judgment of Cannon, Crocket, Davis and Kerwin JJ. was delivered by

CROCKET J.—The defendants, a firm of Montreal exporters, entered into a contract in writing with the plaintiffs, junk dealers of Halifax, in May, 1934, for the purchase of approximately 1,500 tons of scrap steel at the price of $8.50 per ton and approximately 100 tons of skeleton scrap at $7.50 and $6.50 per ton, loaded on a steamer (SS. *Lina L.D.*), which the defendants had chartered to load at the ports of Montreal, Quebec and Halifax for a voyage to Japan. Part of the purchased scrap had been accumulated on the French Cable Company's wharf at Dartmouth and part was in Halifax, and the contract stated that the defendants expected the steamer in Halifax about the middle of July. The written contract contained the following provision:

Railway weights to govern settlement on all material loaded in Halifax. For material loaded in Dartmouth, weight to be obtained in

(1) [1936] 1 D.L.R. 780.

accordance with ship's draft. You have the right to appoint Lloyd's Agents to act on your behalf as regards to checking the draft for weight purposes, and we are appointing ship's chief officer for the same purpose.

The intention of the parties obviously was that the *Lina L.D.* should dock at the wharf, where the Dartmouth scrap was located, and the scrap loaded and stowed on the steamer directly from the wharf. The steamer arrived in Halifax harbour on July 22, but the intention of the parties that she should take on the Dartmouth cargo from the French Cable wharf was frustrated by reason of the fears of the captain that there was not a sufficient depth of water to enable her safely to do so. The result was that the parties entered into a new agreement regarding the Dartmouth scrap, and the steamer proceeded to Pier No. 3 on the Halifax side of the harbour, where she docked and next day began taking on the scrap, which had been brought there in railway cars. The Dartmouth scrap was loaded into lighters at the French Cable wharf, transported to the ship's side and loaded and stowed in the steamer from these lighters, while the Halifax scrap was being put on from the pier. A dispute arose between the parties as to the weight of the steel scrap which was brought from Dartmouth, the defendants claiming that it weighed only 464 tons, and the plaintiffs that it weighed 867 tons.

The plaintiffs consequently brought this action to recover the balance alleged to be due to them for goods sold and delivered under the written contract and for the cost and expenses of the transportation of the Dartmouth scrap to the steamer's side. The plaintiff Edward Whitzman also claimed $495 in addition for supervising the loading of 1,980 tons of scrap iron at Halifax under a special agreement made with the defendants in June. The total amount claimed by the plaintiffs was $15,364.13, upon which they credited payments to the amount of $6,271.25, leaving a balance claimed of $9,092.88.

The action was tried at Halifax before Mr. Justice Hall and a jury. The jury, in answer to questions submitted by the learned Judge, found that the defendants agreed to pay the plaintiffs the cost of transferring the Dartmouth scrap from the Cable wharf to the ship's side; that the *Lina L.D.* could have loaded 920 tons at the Cable wharf in safety; and that 875 tons of scrap steel were delivered by lighters to the ship's side. The jury also found that

1936

DEITCHER v. WHITZMAN.

Crocket J.

the cause of the delay in loading the steamer was the transferring of the material in scows from Dartmouth to Halifax. The last mentioned finding bears only on the question of the defendant's counter-claim for demurrage. Upon these answers the learned trial Judge directed a verdict for the plaintiffs for $7,091.04, which was affirmed on appeal to the Supreme Court en banc by Sir Joseph Chisholm, C.J., and Graham and Doull, JJ.; Ross, J., holding that the verdict should be reduced to $4,048.04. All four Appeal Justices held that the jury's finding that the defendants agreed to pay the cost of the transferring of the Dartmouth scrap to the steamer's side at the Halifax pier could not be set aside, though Ross, J., remarked that it was not very strongly supported.

As this finding is one which depends entirely upon the credibility of evidence, I think it must be taken as conclusive upon the question. The finding on the question of delay disposes of the claim for demurrage.

The substantial attack on the trial and appeal judgments centres entirely around the construction and application of the weight clause above quoted, and the evidence upon which the plaintiffs relied to prove the weight of the scrap which was delivered to the steamer in lighters from the French Cable wharf. All this evidence was objected to on the trial as an attempt to vary the terms of the written contract regarding the method of ascertaining the weight of this material, which method, the defendants contended, was still applicable notwithstanding the alleged new agreement for the loading at Halifax from the lighters. If this contention is sustained, the finding of the jury as to the weight of the Dartmouth scrap delivered cannot, of course, stand. If it is not sustained, the jury's finding is fully warranted by the evidence relied on.

I concur entirely in the view of the majority of the Supreme Court en banc as expressed by Mr. Justice Graham, that the weighing clause did not in the circumstances apply to the Dartmouth scrap as loaded. The defendants having loaded their own scrap at Halifax at the same time that the loading of the Dartmouth scrap was proceeding under the new agreement, it became quite impossible to check the weight of the Dartmouth scrap by the displacement method within the true meaning of the

weight clause. Such a thing as the simultaneous loading of the Halifax and Dartmouth material at Halifax was surely never contemplated by either party. The displacement method was prescribed for ascertaining the weight of the Dartmouth scrap separately, and obviously could not be used to determine the weight of a mixed shipment.

I also fully agree with the view stated in the majority judgment on appeal that, even if it should be held that the weight clause was not affected by this complete change of conditions, as written in the original contract, it contemplated concurrent checking and raised a duty on the part of each to co-operate with the other in the checking of the steamer's draft. The checking contemplated was not a mere observation of the draft of the vessel as she lay in the water before and after the loading of the material. The clause says:

> You have the right to appoint Lloyd's Agents to act on your behalf as regards to checking the draft for *weight purposes,* and we are appointing ship's chief officer for the same purpose.

The checking, as is clearly shewn on the record, involves the ascertaining of all fuel and ballast aboard immediately before loading commences and also immediately after its completion and the sounding for this purpose of all tanks, peaks, bilges, etc. The importance of an accurate checking as to all these points is evident from the fact, which was pointed out in the record, that every inch of additional draft in the water represented an addition of 44½ tons of cargo. It is quite true that the plaintiffs did not themselves appoint anyone to act for them in the checking of the draft or request an opportunity of checking it for themselves, but they were never notified by the defendants or by the ship's officer that the draft was to be checked, as provided by the weight clause, for the purpose of ascertaining the weight of the Dartmouth material, and it seems to me in all the circumstances that it cannot fairly be held that the weight clause of the original contract was incorporated as an implied term of the wholly new arrangement which the jury found was entered into between the parties with respect to the loading of the Dartmouth scrap. This clause, in my opinion, is not applicable for the reasons stated, and it was therefore quite competent to the plaintiffs to prove by the best available testimony the weight of the material which they actually delivered to the de-

1936

DEITCHER v. WHITZMAN.

Crocket J.

fendant's chartered steamer. The evidence of the lightermen and others which they did adduce for this purpose, in my judgment fully warrants the finding which the jury made that at least 875 tons were supplied to the steamer from Dartmouth. For this the defendants should be required to pay.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondents: *W. N. Wickwire.*