

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
the Colonial Sugar Refining Company v.
George Richard Dibbs, from the Supreme
Court of New South Wales; delivered
10th February 1876.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

IN this case the learned Chief Justice who presided at the second trial appears to have put the question to the jury in the way in which it was intimated in their Lordships' judgment upon the first appeal that it should be put. In the former judgment of this tribunal it is thus stated:—"In the present case the points for
" consideration are, whether the agents meant
" to say, or to lead the captain to understand
" they were satisfied with the ship, or if that
" be not so, whether they so spoke or acted as to
" justify the captain, as a reasonable man, in
" supposing they were satisfied, and whether he
" thereupon acted and incurred expense, re-
" lying upon what had taken place as an
" expression of satisfaction." Upon the first trial the jury found for the Plaintiff, and the Defendant then applied to the Court for a new trial, upon the ground that there was no evidence of satisfaction which the learned judge ought to have submitted to the jury; secondly, that if there were some evidence, it was too slight to sustain the verdict. The Court discharged so much of the rule as related to entering the verdict

on the ground that there was no evidence to go to the jury, and the Defendants did not appeal from that decision. It must therefore be taken for the purpose of the cause that there was evidence upon the first trial to go to the jury. The Court, however, thinking that the evidence was slight, and the verdict therefore unsatisfactory, granted a new trial. The Plaintiff appealed to Her Majesty from that decision, and upon the appeal coming on here, this tribunal agreed with the Court below in thinking that the evidence as it then stood was slight, and gave reasons, particularly with reference to the first interview between the agents and the captain, for coming to the conclusion that what occurred at that interview did not in their view amount to an expression of satisfaction. Their Lordships, agreeing that it would be right that a second jury should exercise their judgment upon the case, allowed the rule to stand as it had been framed in the Court below for a new trial. On the case going down again the former evidence was given, but it was added to in a material respect. It was shown that after the two conversations between the agents and the captain, the one on the 30th January, and the other on the 1st of February, the master had gone to some considerable expense in purchasing dunnage for the ship suitable to a cargo of sugar.

The learned Chief Justice, in his reasons for discharging the rule, has stated in a summary way the effect of the evidence. He says:—"On the 30th January, the day after the arrival of that vessel at Manilla, the captain gave the agents notice of his arrival and readiness to receive cargo, and one of those agents told the captain that he would send 500 tons on board as soon as the ballast was taken out; this the captain did, and he thereupon"—

that is on the second interview, on the 1st of February—"informed the agent that he was "ready to receive the cargo, and the agent "said that he would send it." Now the question whether these conversations led the captain to suppose that the agents were satisfied, arose on the first trial, but it was said and argued at the bar here on the former appeal, that if that were so, it would not be sufficient to bring the case within the rule in *Picard v. Sears*, unless it were shown that the captain had, in consequence of them, incurred some expense, or in some respect altered his position. On the former trial it did not appear that anything of that kind had happened. The ballast had been taken out before the second interview, and there was then no evidence that the dunnage had been bought. On the second trial the important fact was proved, that dunnage was purchased for the ship at Manilla after these interviews, and that some expense at all events—the amount is immaterial—had been incurred by the captain.

That being so, it seems to their Lordships that a material fact was proved on the second trial which was not proved on the first. Mr. Gibbs has argued that it was the duty of the master to find dunnage, and therefore that his situation was not changed by his having purchased it after the conversations which might have led him to suppose that the agents were satisfied; but although he was bound to provide dunnage for the ship, he was only obliged to have it ready when the sugar was put on board. He would have satisfied every obligation under the charter regarding dunnage if it was on board when the sugar was ready to be shipped. Where a charter is framed in these terms, giving the agents the option of accepting the ship or not, it may be a prudent thing for a

captain not to purchase dunnage for the particular cargo until he has reason to know that the agents are satisfied with the ship. The case really comes to this, that the judges, thinking there was some evidence after the first trial, but being of opinion that it was slight, ordered a new trial. The Judges below still think the evidence is slight, but they have rightly considered that the case is one peculiarly for a jury. Men of business can understand the import of conversations of this kind, what would be the impression made upon the mind of the captain, and what the agents meant—they can more readily understand the true import of the conversations and conduct of the parties than the Judges. The jury being the proper tribunal, and two juries having found in favour of the Plaintiff, their Lordships think it is impossible for this Court upon Appeal to interfere with the second verdict and with the judgment of the Court below, which has refused to grant a third trial.

Mr. Gibbs has said everything that could be said in favour of his client on what is, under the circumstances, a hopeless appeal.

In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this Appeal, with costs.