Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dibbs v. *The Colonial Sugar Refining Company, from the Supreme Court of New South Wales; delivered Tuesday, June 23rd, 1874.*

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE only question in this Appeal is whether the Supreme Court of New South Wales have erred in ordering a new trial.

The question arises in this way. A charter was made between the Colonial Sugar Refining Company, the Respondents, and the Plaintiff, a shipowner at Sydney. The Plaintiff chartered the "Clara Hargreaves" to the Sugar Company, and by the charter it was provided that the ship should go to Manilla and there load a cargo of sugar. The charter contained a clause that the ship should be tight, staunch, and strong, well manned, and found, and every way fitted for the voyage to the satisfaction of the charterer's agents, and should receive on board not exceeding 500 tons of sugar. It is obvious that this was a very onerous provision upon the owner of the ship, but he has chosen to enter into the contract, and he must submit to all the consequences of having made a contract which subjected him, no doubt, to the opinion of the agents of the charterer at Manilla as to the condition of his vessel.

No question arises in the Appeal as to the legal effect of that provision. The question was

raised in the cause upon demurrer whether it amounted to a condition precedent, and upon the demurrer the Court gave judgment for the Defendant that the clause did constitute a condition of the charter. No appeal has been made to Her Majesty from that judgment, and therefore it must be considered and taken for the purposes of the cause that the condition is a condition precedent.

That question having been settled by the demurrer, two issues went down to be tried by the jury, one, whether the ship was staunch and strong in point of fact, and the other, whether she was staunch and strong to the satisfaction of the charterer's agents. The jury found both issues for the Plaintiff. A motion was made to the Court, upon leave reserved at the trial, to enter a verdict for the Defendant on the plea alleging the want of satisfaction on the part of the charterer's agents, upon the ground that there was no evidence of such satisfaction; or for a new trial, on the ground that the verdict was against the weight of the evidence.

The Court, upon the hearing of the rule, discharged so much of it as asked for a non-suit, but the majority of the learned judges, who heard the rule argued, held that there ought to be a new trial, and made the rule absolute for a new trial. The Company did not appeal from the part of the rule which was discharged, and it must therefore be taken that the Court below have properly held that there was some evidence to go to the jury.

The only question for consideration is whether the Court have exercised a right discretion in sending the case down to a new trial. Now it is obvious that upon a question of that nature their Lordships ought to be perfectly satisfied that the Court is wrong before they overruled its judgment; and upon consideration of the

case their Lordships are not satisfied that the Court erred in directing a new trial. The question whether the agents were satisfied, or so acted that the Defendants are not at liberty to say they were not, must therefore go down to another jury.

The reasons why their Lordships are disposed to agree with what the Court have done are these. It is plain that there was no formal or definite expression of satisfaction, nothing that can be relied on as an express declaration that the agents were satisfied. But it has been contended for the Plaintiff that the acts and conduct of the agents amount to an expression of satisfaction, or if they do not amount to an expression of satisfaction, that they are of so decisive a nature as to preclude the Defendants setting up that such satisfaction did not exist. It is to be observed that the acts relied upon took place within a very short period of time. The lapse of time alone was not sufficient to found a presumption that the agents were satisfied with the ship. It is said that what occurred upon two interviews between the captain and the agents amounts to such an expression of satisfaction that when the captain acted upon what was then said by discharging the ballast, the Defendants ought not to be allowed to say that the agents were not satisfied. Now it seems that the first interview took place on the 30th January, the day after the ship arrived. The captain says that he gave a notice that the ship was ready to receive cargo to the agents, and that the agent, Mr. Heron, said he would send 500 tons on board as soon as the ballast was taken out of her, "and he told me to get the ballast out of "her." He says he discharged all the ballast. It is contended that in doing so he acted in

the belief that the agents had accepted the ship. Their Lordships are not at all satisfied that in what was said during that conversation the agents meant to express that they were satisfied with the ship, or that the captain so understood them. The conversation took place upon the day or the day after the captain reported the ship, when the agents had not seen her, knew nothing of her except what they had previously heard, and when the captain must have been aware that that was the state of their knowledge. Nothing passed in the conversation which had reference to this condition, or which showed that the minds of the captain and the agents were directed to it. It was an ordinary business conversation upon the arrival of the ship, each being desirous of getting her ready to receive cargo on board as soon as possible. The next conversation was after the ballast was out, when the captain told Mr. Heron that the ballast was out of her, and he said he would send the cargo. It is obvious that no change of position in respect to the ballast happened after that second conversation.

It is said, also, that the captain was put to expense in purchasing dunnage. If that really be so, there is no proof of it in the present record, which ought properly to have been laid before the jury.

As the case is to go down again, their Lordships are unwilling to say anything which should be decisive of the issue. They have pointed out what appear to them to be the reasons why the evidence, as it stands, is insufficient to support the verdict which has been given. No doubt parties may be held to be estopped by their acts and by their conduct from setting up that a particular state of things does not exist, but before a jury find that they are so estopped, they should be clearly satisfied that the other party ought

to have relied upon them, and did rely upon them and was misled. 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 and acted as to justify the captain, as a reasonable man, in supposing they were satisfied, and whether he thereupon acted and incurred expense, relying upon what had taken place as an expression of satisfaction.

Their Lordships think it right to say that they cannot agree with the learned Chief Justice that if satisfaction had been expressed it could have been retracted or revoked by the subsequent withdrawal of it. The satisfaction, if once clearly expressed and acted upon, would be binding upon both parties to the contract.

Their Lordships in the result will humbly advise Her Majesty to affirm the decree of the Supreme Court of New South Wales and with the usual consequence that the Appellant must pay the costs of the Appeal.