Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Houlder Brothers and Company, Limited v. *The Commissioner of Public Works, and, as such, representing the Colonial Government; and of The Commissioner of Public Works, and, as such, representing the Colonial Government* v. *Houlder Brothers and Company, Limited, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 2nd April* 1908.

Present at the Hearing:

THE EARL OF HALSBURY.
LORD MACNAGHTEN.
LORD ATKINSON.
SIR ARTHUR WILSON.

[Delivered by Lord Atkinson.]

In these consolidated Appeals from a Judgment of the Supreme Court of the Cape of Good Hope, sitting as a Court of Appeal, dated the 27th November 1906, varying, as therein appears, the Judgment of Buchanan, J., dated the 1st March 1906, two questions arise for decision, namely, (1) whether Houlder Brothers and Co., Limited (who will be referred to as the Appellants) are entitled to demurrage upon certain sailing ships chartered by them to fulfil a contract made by them with the Commissioner of Public Works (who will be referred to as the Respondent) for the sale and

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delivery of coal to the Respondent at Cape Town, and, if so, upon what principle such demurrage is to be calculated; and (2) what (if anything) ought to be allowed to the Respondent in reduction of demurrage, or by way of damages, by reason of the arrival at Cape Town of several of these ships within the same month at intervals of only a few days.

The decision of the first question turns wholly, that of the second question mainly, upon the construction of the contract in writing into which the parties entered. That contract is contained in the Appellants' letter to the Respondent, dated the 7th August 1901, accepted by the Respondent by letter of the next day.

The former letter is in the terms following:—

"London, 7th August, 1901.

"To the Agent-General for the Cape of Good Hope,
100, Victoria Street, Westminster.

Requisition, Cape Town, 7685.
Requisition, Algoa Bay, 7686.

"Sir,

"We have the honour to acknowledge the receipt of your favour of the 2nd instant, enclosing us copy of cable received by you from the Hon. The Commissioner of Public Works, in which our terms and prices as cabled out by you for the supply of coal has been accepted.

"You ask us for a copy of a tender, evidently under a misapprehension, as the only offer we made was the cable just referred to; and, although that was for a 12 months' supply at the rate named, we are willing to accept in our turn six months' supply, on the following detailed terms:—

"(1) That we are to supply 54,000 tons of Welsh coal for Cape Town at £1 16*s.* 5*d.* per ton c.i.f. and 60,000 tons for Port Elizabeth at £1 17*s.* 5*d.* per ton c.i.f. on monthly shipments for six months, such shipments to commence to Cape Town in February, 1902, and to Port Elizabeth in October, 1901.

"(2) That the railway authorities are to accept delivery immediately on arrival in Table and Algoa Bay respectively, at the rate of 120 tons per day for sailers, and 250 tons per day by steamers, or the authorities to be liable for demurrage at 4*d.* per net registered ton per day for sailers, and 6*d.* per net registered ton per day for steamers.

"(3) Payment to be made two thirds in cash by you within 7 days of the receipt of policies, etc., and the remainder within 7 days after the production of the certificate as to delivery.

"(4) In the event of this country being at war, other than with the Transvaal, or other causes, including strikes, beyond our control, our liability to cease.

"We would thank you to kindly confirm this at your convenience, meantime we are purchasing the coal and making early arrangements for the commencement of the shipments to Algoa Bay in October.

"We are, Sir,
"Your obedient Servants,
"HOULDER BROTHERS & CO., Limited,
"T. P. W. FORRESTER,
"Managing Director."

The coal to be delivered at Cape Town under this contract was dispatched in 18 sailing vessels which arrived at Table Bay in the months of May, June, July, August, October, and December 1902 respectively, with cargoes varying in weight from 4,280 to 2,006 tons.

The quantity arriving in each of these several months was in tons as follows:—May, 2,944; June, 10,072; July, 9,865; August, 22,496; October, 7,409; December, 2,006.

The Respondent, or those acting on his behalf, accepted delivery of these cargoes, though they complained of the inequality of the monthly supplies.

The Appellants claimed demurrage amounting to 10,788*l.* 14*s.* 4*d.* in respect of eight of these ships, one of which sailed on the 31st May and the seven others at different dates in the month of June 1902. The three vessels which sailed on the 31st May and 1st June arrived at Cape Town in the last week of the month of July, and the five others at different dates between the 16th and 27th August following, both inclusive. The cargoes of these eight ships amounted in the aggregate to 26,380 tons, and if their rate of discharge be measured by

the terms of the contract, as the Appellants contend it should, they were each detained upon demurrage for a certain number of days, varying from 29 to 53. If the demurrage in respect of this detention be calculated at 4*d.* per registered ton per day (as provided in the contract) it amounts, on the registered tonnage of the eight vessels, to the sum sued for.

The Appellants admit that this sum exceeds the sum recoverable, under the several charter-parties into which they have entered, for demurrage in respect to these eight ships, but they claim to recover it on the ground that each of these several instruments is, as between themselves and the Respondent, *res inter alios acta;* that the Respondent has no concern with it and no rights under it; and that the mutual rights and obligations of the Respondent and themselves are to be regulated by the terms of the agreement into which they have entered, and by these alone. The Respondent, on the other hand, now contends that he is, as regards chartered ships, only liable to pay the amount of demurrage due under the terms of the several charter-parties, that the agreement of the 7th August 1901 is, as respects demurrage, only an indemnity contract (as it is styled)—that is, it fixes a maximum for anything beyond which he cannot be made liable—and that it is to be construed, in effect, in regard to all chartered ships, as if certain words had been written into it, and its second clause had run somewhat thus:— "That the railway authorities are to accept delivery immediately on arrival in Table and Algoa Bay respectively at the rate *mentioned in the charter-party, under which any ship may be chartered to carry said coals, not to exceed* 120 tons per day for sailers and 250 tons per day by steamers, or the

authorities to be liable for demurrage at the *rate mentioned in such charter-party, not to exceed* 4*d.* per net registered ton per day for sailers and 6*d.* per net registered ton per day for steamers," so that, in the result, the Appellants could never make anything under this demurrage clause, but might lose much.

This contention is an afterthought on the Respondent's part. Up to the commencement of this action the construction, now insisted upon by the Appellants, not only of the contract sued upon but of several similar c.i.f. contracts earlier in date, was in letter after letter expressly admitted by the Respondent to be their true construction.

The point now relied upon was not specifically raised in the pleadings, or dealt with by the trial Judge, though it was stated by Counsel at the hearing of the appeal in the Colony to have been mentioned to him. The plea filed by the Respondent was not, that the contract sued upon was an indemnity contract, in force up to the last, whose function it was to fix the maximum limit of his liability, but a kind of plea of novation, to the effect, that by the endorsement and delivery to him of the eight bills of lading for the cargoes of these ships, only three of which documents, however, incorporated the conditions of the charter-parties, he (the Respondent) became bound by the obligations the several charter-parties imposed as to the rate of discharge of the chartered ships, and as to the demurrage claimable in respect of them, but freed and discharged from the obligations imposed by the contract sued on in respect of these very same matters. Both the Colonial Courts held, in their Lordships' opinion rightly, that this plea could not be sustained, and in

the argument of these Appeals nothing was urged in defence of it. Indeed, on the facts and documents proved in evidence it is clear to demonstration, whatever may be its effect, that in order to construe the contract of the 7th August 1901 as an indemnity contract in the manner suggested, it is necessary to attribute to the parties to it an intention which, neither before nor at the time they entered into it, did they in fact entertain—an intention, moreover, which at all times down to the trial of the action they both, in effect, repeatedly disclaimed.

There is no doubt that the construction of a contract cannot be affected by the declarations of the parties made subsequent to its date, as to its nature or effect, or as to their intention in entering into it. But it is equally true that, where the words of the contract are ambiguous, the acts, conduct, and course of dealing of the parties before, and at the time, they entered into it may be looked at to ascertain what was in their contemplation, the sense in which they used the language they employ, and the intention which their words in that sense reveal. It is therefore necessary to consider what the action and course of dealing of the parties in this case was.

The Appellants had for a length of time, in the course of their business, sold and delivered to the Respondent at Cape Town and other ports in the Colony large quantities of coal, and up to the outbreak of the war in the Transvaal the Appellants were bound to discharge this coal into railway trucks, or on the quays of the particular ports. This obligation, of course, made them liable for any demurrage the owners of the chartered ships which carried the coal might be entitled to, in respect of their detention.

With the outbreak of the war everything was changed. It was seen that it might cause freights, rates of insurance, and demurrage to rise. Crowding at the South Africa ports, which was almost certain to occur, might render prolonged detention of vessels bound there very probable.

To meet this altered state of things, the parties (as was but natural) entered into special contracts in writing, nine in number, all c.i.f. contracts of the same general character, all given in evidence at the trial and printed in the Respondent's Appendix. The first of these is dated the 29th August 1900, the last the 22nd September 1902.

Under these contracts, considerably more than half a million tons of coal were contracted to be sold and delivered to the Respondent at different ports in Cape Colony.

In the first three the demurrage clauses are practically identical. They provide for the rate of discharge, and therefore for the number of lay days, but apparently not for the charge to be made per registered ton per day, and end with the words, so much relied upon by the Respondent, "failing which, demurrage to be for "and on account of the Cape Government "Railways." In the fifth contract, dated 5th July 1901, the clause regulates the rate of discharge, but, like the three first, does not fix the charge per ton, and the words above quoted are omitted, while the fourth, dated the 20th June 1901, the sixth (which is the contract sued upon), and the seventh, eighth, and ninth fix, by reference to the rate of discharge, both the number of lay days and the charge per registered ton per day, the seventh containing also in this connection the words "for account of railway." It appears from the correspondence

which took place between the parties in reference, both to the making of these several contracts and to their fulfilment, that questions arose as to whether the liabilities of the Respondent should be regulated by the provisions of his own contracts, or by those of the different charter-parties into which the Appellants had entered, for the hire of the ship employed. The contention put forward by the Appellants now was as distinctly and expressly put forward then, and as distinctly and expressly admitted by the Respondent to be just and sound. This fact was not controverted in argument before their Lordships, and it is therefore unnecessary to quote the letters at length.

And not only is this so, but from first to last, the course of action pursued by them was consistent with the Appellants' present contention, and inconsistent with the Respondent's. The charter-parties were never given, or shown, to him by the Appellants. He never demanded to see them, or inquired as to their contents, but accepted as a grace, and with expressions of gratitude, what he now demands as a right. He never paid freight or demurrage to the shipowners, or entered into any correspondence or negotiations with them in reference to either of these matters. Everything was settled between the Appellants and Respondent without the intervention of third parties representing the shipowners.

The conduct of both parties in reference to the contracts earlier in date than that of the 7th August 1901, but similar in character, would certainly appear to be explicable only on the assumption, that they considered that their respective rights and obligations were measured and determined by those instruments, to the

exclusion of all others. It appears, therefore, to their Lordships, having regard to all that passed before the 7th August 1901, to be impossible to contend that the contract of that date was not entered into by the parties to it in the belief, and with the intention, common to both of them, that the Respondent would be bound by it to pay demurrage in conformity with its provisions, irrespective of the terms of any charter-party into which the Appellants might enter.

But though the Appellants throughout these transactions persistently insisted, to the full, on their legal rights, were profuse in the expressions of a desire to treat the Respondent liberally, and only claim from him, in respect of demurrage, the sums they themselves had paid, or were under the charter-parties liable to pay, they, apparently, managed to reconcile their generosity with their self-interest, by overstating the amounts and thus making a handsome profit out of the transaction.

After the present action had been instituted, the Respondent sued the Appellants, in England, to recover the sums so overcharged, not on the ground that he had been induced to part with his money by the false and fraudulent representations of the Appellants, nor yet (as he might have done if his present contention be well founded) on the ground that he was only liable for demurrage to the amounts claimable under the charter-parties, but on the ground that he (the Respondent) had paid the larger sums in ignorance of the fact that they exceeded the amounts represented by the Appellants to be payable by them to the shipowner under the charter-parties. The case was tried before

Channell, J., who, apparently, decided that the present Respondent was entitled to recover the overplus thus paid by him, up to the month of September 1901, but that, as it appeared upon the evidence that he had then notice of the fact that the Appellants were obtaining from him more than they paid themselves, he could not recover anything in respect of payments made after that day. Against this decision the present Appellants appealed. The Appeal was heard before the Lord Chief Justice and Buckley and Kennedy, L.JJ. Their judgments, which are relied upon by the Respondent, are printed in his Appendix.

The decision of Channell, J., was in effect upheld, and the true construction of the contract of the 29th August 1900, and indeed of all the other eight contracts entered into, was held to be that contended for by the Respondent in the present Appeals. The Lord Chief Justice and Buckley, L.J., referred in their judgments to a letter of the 13th September 1900, written by the Appellants to their own agents, a fortnight after the date of the first contract, and appear to have attached importance to it, as indicating what was the intention of the Appellants in entering into this, and the subsequent, contracts. Whatever be the true meaning and construction of this letter, and whatever its value, it has not been given in evidence in the present case, and their Lordships cannot, therefore, allow their decision to be in any way influenced by its contents.

It is conceded—and was apparently held by the Court of Appeal in this country—that if the Appellants had employed their own ships, or if they had taken up ships which they had chartered under time charters, they would

under these c.i.f. contracts have been carriers as well as vendors, and their rights to demurrage would have been regulated by the terms of the written contracts into which they had entered. But it is urged that the nature of these c.i.f. contracts is such, that the vendor, *primâ facie*, charters a ship for a voyage to carry the goods sold, as agent for the vendee; that by the transfer of the bill of lading to the latter, whether it incorporates the conditions of the charter-party or not, or by the receipt of the cargo, the vendor makes his principal (the vendee) a party to the obligations of the charter-party, whether the charter-party be made known to, or be delivered to, the vendee or not; that the word "demurrage" when used in the contract sued upon can only mean the demurrage for which the vendee as transferee of the bill of lading, or receiver of the goods shipped, so became liable; and that the agent cannot make a profit out of a demurrage clause such as that contained in this agreement, though if it amounted to a contract of indemnity, as it was held it did, he might sustain a considerable loss. The learned Chief Justice of the Supreme Court in his Judgment sums up the argument in favour of the construction of the contract sued upon, in the following sentence:—

> "The more reasonable construction of the contract would, in my opinion, be to confine the Defendant's liability for demurrage to the amounts payable by the Plaintiffs themselves, not exceeding 4*d*. per net registered ton.
>
> "The price fixed in the contract was to cover cost, insurance, and freight, and whatever rate of liability the Plaintiffs might incur for demurrage, the Defendant was not to be liable for more than 4*d*. per ton per day."

The Lord Chief Justice of England at p. 14 of his Judgment deals with contracts such as that sued on in the following passage:—

> "I think that under the later contracts as under the earlier contracts they were cost, freight and insurance

contracts ; they did contain obligations which the vendor could enforce against the purchaser to take at a certain rate, and that if damage was caused to the vendor by the cargo not being taken out at that certain rate, they were to pay damage calculated on the basis of 6*d.* and 4*d.*"

According to this passage it would appear that the rate of discharge mentioned in the contract, and therefore the number of lay days, bind the consignee, even though that rate exceeds the rate mentioned in the charter-party, and the number of lay days thus fixed by the latter exceed the number fixed by the former. It was apparently found impossible to strike the provision as to the rate of discharge out of the contract altogether, though why this should not be done, if the charter-party alone is to bind the consignee on this question of demurrage, is not clear.

It is, moreover, difficult to see how the principle here laid down would work in practice. For instance, suppose a sailing ship, carrying a cargo of 1,200 tons of coal under this contract, were by the charter-party bound to discharge at the rate of 100 tons a day or pay demurrage at the rate of 3*d.* per registered ton per day. Under the contract she would have but 10 days to discharge, as she was obliged to discharge at the rate of 120 tons per day. Under her charter-party 12 days. Assume that she is detained in unloading for 14 days. Damage would thereby be caused to the vendors, but are they to receive demurrage for two days or for four? If the former, then the clause as to the rate of discharge is in effect struck out of their contract. And again, is the rate to be 3*d.* or 4*d.* per ton per day? If the former, then the damages are not calculated at the rate of 4*d.* a day, as it is laid down that they should be, and, if the latter, then the charter-party

is superseded. The transferee of a bill of lading containing no provision touching demurrage, like five out of the eight given in evidence in this case, no doubt becomes liable for damages in the nature of demurrage if he should detain a ship beyond a reasonable time, but he is not, by reason of being such transferee, bound by the special provisions of a charter-party unless they are in some way incorporated in the bills of lading.

It is clear from the Judgment of Lord Blackburn in *Ireland* v. *Livingston* (L.R., 5 H.L. 395, at p. 407) that where the consignor of goods under a c.i.f. contract executes an order received by him from another, he is, though a vendor, at the same time an agent, bound, for reward, to obtain the goods at the best price he reasonably can, and have them insured, carried, and delivered to his principal on the best terms he reasonably can. But where no commission is charged, the vendor takes upon himself the risk of a rise or fall in the price of the goods, or of freight for their carriage, or of the rate of insurance, and there is not, as to either cost or freight or insurance, any trust or contract of agency between them.

It may well be that, under a normal c.i.f. contract, the vendor who charters a ship for the carriage of the goods sold, acts in so doing as the agent of the consignee, and, in the absence of any special agreements between them, is, under Section 32, Subsection 2 of the Sale of Goods Act, 1893, bound to make a reasonable contract in that regard. But the contract sued on in this case is not a normal c.i.f. contract. Nor, as has been already pointed out, was it ever carried out by the parties to it as such contracts

are and should be carried out. The fact that one-third of the price is not to be paid till the cargo has been delivered, though according to the authorities it does not prevent the property in the goods from vesting in the consignee, yet gives the consignor a direct interest in the safe carriage and delivery of the goods, and so far differentiates this contract from a normal contract. And no reason is suggested why, if the Appellants acted merely as agents for the Respondent in chartering these ships, they should enter into an indemnity contract subjecting them to possible loss. There is, however, no rule of law that the vendor in a c.i.f. contract may not secure for himself a profit under a demurrage clause contained in it. Neither is there any indisputable presumption of law that the parties to such a contract did not intend that he should receive such a profit. To use the words of Lord Blackburn in *The Calcutta and Burmah Steam Navigation Company* v. *De Mattos* (32 L.J., Q.B. 322, at p. 328), in such contracts "there " is no rule of law . . preventing the parties " making any bargains they please."

And, with all respect to the learned Judges sitting in the Court of Appeal in Cape Colony, as well as to those sitting in the Court of Appeal in England, it does not appear to their Lordships that the words of the contract of the 7th August 1901—whether they be regarded as in themselves plain and unequivocal or as ambiguous—yet explained by the action, conduct and mode of dealing of the parties antecedent to its date, can have imported into them the qualifications already suggested, or be read subject to a condition to the like effect. So to construe this contract is, in effect, to make a new contract for the parties, which it is clear they

never up to the commencement of the litigation believed they had made for themselves. It may well be that the contract, as interpreted by both Courts of Appeal, would be more equitable as regards the Respondent than if interpreted as their Lordships think it must be; but the answer to that is that the parties must be bound by their own words, that the language they have chosen to employ is too precise and unequivocal, and their course of action too suggestive and uniform to permit a modification of the Respondent's obligations in the direction desired. Their Lordships are therefore of opinion, that the decision on the construction of the contract appealed from by Houlder Brothers was wrong.

With regard to the Appeal of the Commissioner of Public Works, their Lordships are of opinion that delivery of the several cargoes of coal shipped under the contract sued on having been accepted at Cape Town, the breach of contract of which he complains does not preclude the Appellants from recovering demurrage for the detention of the ships carrying those cargoes; that his only remedy is in damages for breach of contract, and that the decision appealed from on this point is right.

Their Lordships will therefore humbly advise His Majesty that the Appeal of Houlder Brothers and Company Limited ought to be allowed and the Appeal of the Commissioner of Public Works dismissed, that the Judgment of the Supreme Court (sitting as a Court of Appeal) of the 27th November 1906 ought to be discharged, and that in lieu thereof the Appeal of the Commissioner of Public Works from the Judgment of the Supreme Court of the 1st March 1906 ought to be dismissed with costs and the last-named Judgment restored.

The Commissioner of Public Works will pay the costs of these Appeals.