

**Fleming Vs. Koegler**

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**SooperKanoon Citation :** [sooperkanoon.com/856586](http://sooperkanoon.com/856586)

**Court :** Kolkata

**Decided On :** Jul-24-1878

**Reported in :** (1879)ILR4Cal237

**Judge :** Richard Garth, C.J. and ;Markby, J.

**Appellant :** Fleming

**Respondent :** Koegler

**Judgement :**

Richard Garth, C.J.

1. I think that the learned Judge in the Court below has arrived at a just conclusion in this case.

2. The suit was brought by the plaintiffs, Messrs. Nicol, Fleming & Co., for the breach of a contract made with them by the defendants on the 16th of July 1877, and which is in these words:

Calcutta, 16th February 1877.

Hooper Section to arrive after completion of two country voyages for London.

Graf and Banziger.

1,300 tons oil-seeds or wheat.

3-12-6, oil-seeds.

3-10, wheat.

On notice in May or June.

First notice to be given for this cargo 20 cwt.

Nicol, Fleming & Co.

3. The only question in the case depends upon the true meaning of the words 'after completion of two country voyages'; and we have to put a reasonable construction upon these words, having regard to the state of circumstances at the time when the contract was made,

4. The defendant is a German merchant carrying on business here under the name of 'Graf and Banziger.' Mr. Krieg, one of the assistants in that firm, had been enquiring for steam tonnage for May and June shipments of wheat or seeds; and he had applied to a Mr. Guyon, a freight-broker, with that object. Mr. Guyon went to the plaintiffs, and obtained from them the refusal of the Steamship 'Hooper,' then to arrive from England, for 1,300 tons of wheat or seeds at a certain freight. A memorandum was then first submitted by the broker to Mr. Krieg, which contained no mention of the two country voyages; and the shipping order, which was afterwards drawn up, and which forms the contract between the parties, was also silent in the first instance as to these voyages. This is a fact admitted by both sides; but there is a serious difference between them as to how the words came to be inserted. Mr. Guyon says that they were put in by Mr. Taylor, the plaintiffs' shipping assistant, by way of giving the plaintiffs the option of going two country voyages before the ship was placed at the defendants' disposal. Mr. Krieg, on the other hand, says that they were inserted at his express instance, after a conversation with Mr. Guyon, in which the latter had informed him of the plaintiffs' intentions with regard to the ship.

5. A good deal of discussion has taken place here, as well as in the Court below, as to which of these statements is correct; and as the learned Judge in the Court below thought it right to deal with that question, and has laid some stress upon the

defendants' version being the correct one, we have not precluded the appellants' counsel from discussing it. But I confess it appears to me that in point of law we are bound to construe the instrument, without regard to the question whether the clause was inserted at the instance of one party or the other. The words must surely mean the same, and be construed in the same way in either case. It cannot be that they mean one thing if they were inserted at the instance of the plaintiffs, and another thing if at the instance of the defendants.

6. What we have a right, and are indeed bound to look to, are the circumstances under which the contract was actually signed.

7. Now it appears from the plaintiffs' own evidence that Mr. Krieg was informed by the broker before the transaction took place that the ship was on her way from England to Calcutta, and was to arrive in March; that she was then intended by the plaintiffs to take two country voyages; and it appears also that a calculation had been made between the broker and Mr. Krieg, the result of which was that, after the completion of the two country voyages, the ship would be ready for the defendants by about the 15th or the 25th of May.

8. In this state of things the contract was entered into; and the way in which the dispute afterwards arose between the parties is this:

9. The 'Hooper' arrived from England on the 10th of March; she was then sent on a country voyage, from which she returned on the 9th of May.

10. On the 30th of April the plaintiffs wrote to the defendants a letter in these terms:

Calcutta, 30th April 1877.

Messrs. Graf & Banziger.

Dear Sir

Referring to our shipping order per 'Hooper' Section for London for 1,000 tons oil-seeds or wheat, we beg to inform you that this steamer left Colombo yesterday for Calcutta, and we shall likely give you notice for the shipment of above cargo on

her arrival.

Yours faithfully.

(Sd.) Nicol, Fleming & Co.,

p. I.E.W.

This letter led to the following correspondence:

No. 1, Council House Street,

Calcutta, 1st May 1877.

Messrs. Nicol, Fleming & Co.,

Agents, Section S. 'Hooper.'

Dear Sirs,

Your letter of the 30th April was received by us late last evening; we fancy there must be some mistake. Our shipping order on the 'Hooper' is after completion of two country voyages; as far as we are aware, the 'Hooper' is returned from her first voyage only.

Please look into this, as we have relet a portion of our shipping order on precisely the same terms as stated above.

Yours faithfully,

pp. Graf & Banziger, A. Krieg,

Dear Sirs,

With reference to your enquiry about the 'Hooper's' home loading, we do not think there is much chance of her taking another country voyage, and we shall therefore most likely ask to ship for London; we do not anticipate shippers will have any objection to the arrangement.

Yours faithfully,

(Sd.) Nicol, Fleming & Co.,

Agents, 'Hooper.'

Calcutta, 8th May 1877.

Messrs. Graf & Banziger.

Dear Sirs,

We expect the 'Hooper' to arrive in two or three days now; and as she is to go on her berth for London at once, and we are anxious to give her despatch, we shall be obliged if you will have your cargo ready for shipment on our giving you notice of her arrival.

Yours faithfully,

Nicol, Fleming & Co.,

p. I.E.W.

Calcutta, 9th May 1877.

Messrs. Graf & Banziger.

Dear Sirs,

We shall feel much obliged by your placing alongside the Section S. 'Hooper' cargo as under-noted, in terms of shipping order dated 16th February:

1,000 tons wheat or oil-seeds.

We are, Dear Sirs,

Yours faithfully,

brfor Nicol, Fleming & Co.,

I.E.W.,

Agents.

No. 1, Council House Street,

Calcutta, 9th May 1877.

Messrs. Nicol, Fleming & Co.,

Agent, Section S. 'Hooper.'

Dear Sirs,

We beg to return your notice of shipment: our shipping order provides that notice is to be given after completion of two country voyages; now as the 'Hooper' has made only one country voyage, your notice is premature.

We decline therefore to accept it.

Yours, &c.;

pp. Graf & Banziger,

A. Krieg.

From

Graf & Banziger.

1, Council House Street,

To

Messrs. Nicol, Fleming & Co.,

Agents, Section S. 'Hooper.'

Calcutta, 9th May 1787.

Dear Sirs,

In reply to your memo received late last evening, we hold a shipping order on the 'Hooper' after completion of two country voyages, and we have relet a portion on the same terms; we have already mentioned to Mr. Guyon that in order to avoid unnecessary trouble, we are ready to cancel the shipping order, although it is a cheap one, provided you can arrange similarly with the firm to whom our relet has been effected.

Yours faithfully,

Pp. Graf & Banziger.

Calcutta, 10th May 1877.

Messrs. Graf & Banziger.

Dear Sirs,

We have received your note of 7th May returning shipping notice per 'Hooper.' We do not wish to enter into any argument about the matter but by the present we hereby beg to give you notice to ship the cargo of the above steamer. Failing your complying with the terms of the shipping order granted, we shall take such steps as we may be advised to adopt to protect ourselves from the consequence of the non-fulfillment of contract on your part.

Yours faithfully,

(Sd.) Nicol, Fleming & Co.,

Agents, 'Hooper.'

No. 1, Council House Street,

Calcutta, 10th May 1877.

Messrs. Nicol, Fleming & Co.,

Agents, Section S. 'Hooper.'

Dear Sirs,

We are in receipt of your letter of to-day, and in reply inform you that we will not ship on the 'Hooper' except on terms of shipping of order, which distinctly provides that notice is to be given after completion of two country voyages. If you choose to send the 'Hooper' direct to London without reference to our shipping order, you do so at your risk; and we will hold you responsible for any loss we might sustain.

Yours faithfully,

Pp. Graf & Banziger,

A. Krieg.

11. Upon this the plaintiff's relet to other parties the space which had been taken by the defendant for the best freight they could get, and brought this suit against the defendant for the difference between the amount so obtained and the freight contracted for, viz., Rs. 5,800-9-9.

12. The defendants say that they were not bound to ship their goods until after the 'Hooper' had completed two country voyages.

13. The learned Judge in the Court below has taken that view, and that is the first point which we have now to decide on appeal.

14. Now, in construing this contract, we must assume that the clause in question was inserted by the parties for some good purpose, and with some definite meaning. As observed by Lord Cairns in the case of *Bowes v. Shand* (L.R., 2 App. Cal., 425), which has been so often referred to during the argument: 'This is a mercantile contract; and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.'

15. Let us see then what the plaintiff's explanation is of the meaning of these words.

16. I consider that for this purpose we have no right to look to the evidence to see what Mr. Guyon's views were on the one hand, or Mr. Krieg's on the other, as to the intention of the parties at the time when the contract was made. The argument upon this head has probably been allowed to proceed, both here and in the Court below, much further than it ought to have done. To enquire into what the parties said, or intended, when the contract was made, is obviously in my opinion to let in oral evidence to explain a written contract. The explanation which we do naturally and properly look to, is that which the parties themselves submit to us as the right one through their counsel, and which presents itself to our own minds as the true construction of the contract. Now both in the Court below and in this Court the contention of the plaintiffs has been that the words in question were inserted purely for their own benefit, to give them an option of employing the ship, if they thought proper, upon two country voyages, between the time of her arrival here in March, and the time when she was to take the defendant's cargo in May or June.

17. But is there any sufficient reason for the insertion of the clause? The plaintiffs would clearly have had a right to employ the ship as they chose after her arrival in Calcutta, whether these words had been inserted or not. Their insertion, in point of fact, would rather have the effect of controlling the plaintiff's rights in that respect than of extending them. They might without any such clause have sent the ship for any number of country voyages without consulting the defendants, provided she were ready to take the defendants' cargo in the months of May or June; and the insertion of the clause, if it affected their rights at all, could only have prevented them from going more than two country voyages.

18. Mr. Phillips has certainly in his arguments raised a point (which so far as I can find was not suggested in the Court below), that the meaning of the clause might have been to protect the plaintiffs from any claim by the defendant in the event of the ship being lost during one or other of the country voyages, and so not being available for the purposes of the contract. But he did not refer us to any authority in which the word 'to arrive' have been held to mean the same in the case of a contract of affreightment as they do in the case of the sale of goods 'to arrive'; and I am certainly not disposed to attach much weight to a construction which has thus been suggested towards the close of the argument, and had apparently never

occurred to the plaintiffs or their counsel at any earlier stage of the case.

19. On the other hand, let us see the meaning which the defendant attaches to the clause in question. His case is that it was inserted for his benefit to indicate approximately the time when he might expect the ship to be ready to take his goods; and when we look at the position in which he was placed, it seems impossible to deny that for this purpose the stipulation might be of great value.

20. The only time fixed by the contract was 'May or June.' This leaves of course a very long period at the option and disposal of the ship-owner. 1,300 tons of seeds and wheat is a large quantity. The shipper had to supply himself with these, and to make arrangement as to their carriage to Calcutta. It might, therefore, be of great consequence to him to have the time when the ship would be ready more clearly defined, and this object would undoubtedly be effected by the clause in question. The defendant could ascertain without difficulty the course and probable direction of any country voyage which the ship might take. It would have been easy for him to learn within a few days when she would be likely to arrive, and he would thus have an opportunity of making his arrangements, so that his goods should reach Calcutta by the time when the ship would be prepared to receive them.

21. It was argued by the appellants' counsel that, if the clause in question had been intended to serve any purpose of this kind, the object would have been attained in a simpler and more natural way, by a stipulation that a certain number of days' notice (say twenty) should be given by the plaintiffs to the defendant as to when the ship would be ready to receive cargo; and this is very true. It is quite possible that other stipulations might have been adopted to answer the same purpose as this one, and it is also possible that some of them might have been more convenient to the defendant than the clause which was here used.

22. But to the plaintiffs, on the other hand, had they carried out what was their intention at the time when the contract was made, the clause adopted might probably have been more convenient than a direct stipulation for twenty days' notice; because if their ship was engaged in a country voyage, it might have been difficult for them to calculate three or four weeks beforehand the precise time when she would be ready.

23. But whether any other stipulation as to time would or would not have been more simple or convenient, the parties to this contract have chosen to adopt this clause. I consider that one plain object and intention of that clause was to indicate approximately to the defendant the time when the ship would be ready; and that, construing it in that sense, it was as essential a part of the contract, and as binding upon the plaintiffs, as any other more direct stipulation as to time which may have been inserted with the same object.

24. Now I take it to be perfectly clear law that when a ship-owner has contracted to give a certain notice to the charterer, or to do any other act, with a view to inform the charterer when the ship will be ready the charterer is not bound to ship his goods until the ship-owner has given him that notice, or has done that act.

25. Some of the cases have gone very much further than this. Thus in *Gladholm v. Hays* (2 M. & G., 257), where it was agreed that a ship should proceed from England to Trieste, and there load a cargo upon certain terms and there was a provision in the Charter-party that the vessel was to sail from England 'on or before the 4th of February next,' although the vessel was detained by foul and contrary winds and proceeded to Trieste as soon as she possibly could after the 4th February, yet as she did not actually sail from England by that day, it was held that the charterer was exempted from liability to load a cargo.

26. So again, in *Ollive v. Booker* (1 Exch., 416), when a ship was to proceed to Marseilles, and there take a cargo from the defendants, and there was a statement in the Charter-party that the ship 'was now at sea, having sailed three weeks or thereabouts,' and it turned out that the vessel at the time of the making of the Charter-party had not been three weeks at sea, but in fact had sailed a week later than was represented, the charterer was held absolved from his liability to load. The Court considered in that case that the statement as to the position of the ship at the time when the contract was entered into was intended to indicate to the defendant the time when the ship would probably arrive at Marseilles; and as that statement was untrue, the defendant was held not bound by his bargain. [See also the case of *Oliver v. Fielden* (4 Exch., 135)].

27. In the generality of these cases, the question has arisen whether the ship has been behind her proper time; but there is much more reason why in such a case as this the rule as to time should be strictly observed. When it is agreed that a ship should be ready on a certain day, and she is a few days after her time, the only inconvenience to the freighter usually is that the shipment of the goods is delayed, and he has to pay so much for wharf age or demurrage, as the case may be

28. But where notice has to be given, or some act has to be done by the ship-owner before the freighter is to load at all, the latter cannot reasonably be expected to have his goods ready for shipment till the notice has been given, or the act done.

29. But then it was argued by the plaintiffs' counsel that even though the plaintiffs were in default in not having gone the second voyage, the case of *Tyers v. The Ferry Hill Iron Company* (L.R. 10 Exch., 195) shows that the defendants were not justified in refusing to perform their contract altogether.

30. Now I confess it appears to me that the case of *Tyers v. The Ferry Hill Iron Company* (L.R. 10 Exch., 195) shows nothing of the kind, and that when properly understood, that case has no application to the present.

31. There the defendants had contracted to supply the plaintiffs with 2,000 tons of iron, by equal monthly deliveries extending over the year 1871. By mutual arrangement between the parties, the stipulation as to the time of the delivery was departed from, and a much smaller quantity than was agreed was delivered up to the month of December. The plaintiffs then required the whole balance of the iron to be delivered in December, and the defendants not only refused to do this, but said that beyond the stipulated quantity which they were bound to deliver in the month of December they would deliver no more. This was in fact refusing to complete the contract in any way, or by any deliveries, merely because the stipulation as to the time and quantity of the deliveries had been departed from by mutual consent. The Exchequer Chamber held that this refusal could not be justified. The Chief Justice (Cockburn) seemed to think that they were bound to complete the deliveries according to the measure of the stipulated monthly instalments. Mr. Justice Blackburn's view was that they were bound to deliver the

remainder of the iron within a reasonable time. But the whole Court was agreed that the defendants were wrong in refusing to complete their contract, merely because the previous departure from the contract had been assented to by both parties.

32. Now here the stipulation as to time was never departed from by the assent of the parties. If the plaintiffs were bound by it, as I consider they were, they were wholly in default. There was no refusal to complete on the defendants' part. All they said was, 'Your notice to ship is premature. We are not bound to ship our goods till you have first done what you contracted to do.' In this it appears to me they were quite right.

33. I do not enter into the question as to whether any offer of time by the plaintiffs would have been equivalent to taking a second voyage,--1st, because no such offer was made; and 2ndly, because I do not consider that we have any right to make a new contract for the parties.

34. It certainly seems unfortunate that some attempt at an arrangement was not made, instead of both parties holding one another at defiance, as they did; but they have taken their own course in that respect, and we have only to determine which is in the wrong.

35. In my opinion, for the above reasons, the appeal should be dismissed with costs on scale 2.

**Markby, J.**

36. In this case we have to put a construction upon a document which is not grammatical in form, consisting, as it does, of a number of words and figures without a single connecting verb throughout. There is not, however, any doubt that it contains the terms of an agreement between the plaintiffs and the defendant, and that the plaintiffs thereby agree to find for the defendant accommodation for certain description of goods in a certain ship, and that the defendant agrees to ship those goods after notice in May or June, paying a certain freight. The ship is described (I am reading from the contract itself) as 'the Steam Ship Hooper to

arrive after completion of two country voyages for London,' which means, I take it, that the ship is expected to arrive in Calcutta and that, having taken two country voyages after her arrival in Calcutta, she will then sail for London.

37. This being so, of course it was necessary in this suit against the defendant for not shipping the goods according to contract for the plaintiff's to show that they offered the defendant a ship substantially answering to this description; and every part of this description is beyond all doubt a material part, except the words upon which the present dispute arises, namely, the words,--'After the completion of two country voyages.' The question is whether those words are also material, and that is the sole question in this case. For if these words are material, the ship offered, not having two country voyages after her arrival in Calcutta, but only one such voyage, did not answer the description in the contract, and the plaintiffs must fail.

38. If, on the other hand, these words are not material, then the ship did substantially answer the description given in the contract, and the plaintiffs must succeed.

39. I do not think that there is any ground upon which we could say that these words are not a material part of the description of the vessel. The only ground suggested why they should not be so was the improbability that the plaintiffs would undertake to send a very large steamer like the 'Hooper' two country voyages merely in order to secure this contract for freight. I do not think that this is a consideration upon which we are at liberty to enter. Probably the plaintiffs would not have inserted the clause if it had struck them in this light, but they did insert it, and they must be bound by it if upon the true construction of the contract they promised to provide a vessel of this description.

40. It is said that these words are not part of the description of the vessel at all, and that they were merely intended to give the plaintiffs the option of giving two country voyages if they chose to do so. But these words are so mixed up with other words, which are obviously words of description, that I think they must be taken as part of the description of the vessel which was the subject of the contract.

41. That seems to me to be the literal meaning of these words. It certainly is not their literal meaning that the plaintiffs are to have an option of sending the ship two country voyages if they thought fit; but were to be under no obligation to do so.

42. None of the evidence seems to me to be of the slightest use in helping us to come to a conclusion as to what the words mean; there is no evidence of any mercantile usage which would control the literal meaning of the words; and the argument that the words having been suggested by the plaintiffs must be taken as intended solely for their benefit seems to me to be fallacious. the fact (if it were a fact) that the clause had been inserted at the request of the plaintiffs could not alter its meaning, or relieve the plaintiffs from any obligation which the terms of the contract literally construed would impose upon them.

43. I, therefore, concur in thinking that the appeal should be dismissed with costs.

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