

that portion of that fund. This error should not be, hereafter, repeated. The trust deed seeks to hold the trustees responsible for any diversion of the fund. This portion of the fund must not be chargeable with any expenses which are properly chargeable against the half provided for said church, and it should not be charged with more than its proportionate share of those expenses which are chargeable against the entire fund.

4. I find against the prayer of Humboldt College for decree directing payment to J. N. Prouty for labor and services, and for money expended in matters of tax sales, etc. The evidence shows that such services and payments were intended by him to be a gift to said college. His act and intent in the matter are highly commendable, but I find no basis for making such payments a charge against the trust fund.

5. Complainants, as heirs of said donors, were justified in bringing this action, and thus making this trust fund operative. The evidence does not satisfy me that the trustees of this fund have discharged their whole duty with reference to the trust committed to them. The fund has apparently been well invested, and made remunerative. But the trustees, in the more than 10 years since Humboldt College ceased its active existence, should have applied for directions as to the use to be made of this fund. Nevertheless, I do not find this a case requiring or justifying the imposing on them of the costs herein. They have not improperly resisted herein, and they have, since action brought, apparently been sincerely desirous of obtaining and obeying the decree to be rendered herein. I find, therefore, that the reasonable expenses of this action should be paid out of this fund, which their reports show has been retained in the trustees' hands, and which I find, to wit, the income, was, on November 19, 1892, \$2,153.98; that is that a reasonable solicitor's fee to solicitors for complainants as also to solicitors for respondent trustees of said church, and the costs and fees properly taxable in this case, should be paid out of said trust fund.

Let decree be drawn in accordance with these findings. If the solicitors' fees above named can be mutually agreed upon, the amounts so agreed may be submitted with the draught of decree for consideration of this court; and, in connection therewith, the clerk of this court will submit statement of all other costs and fees taxable herein, so that the court may be fully advised with reference to the amounts which will, under these findings, be chargeable against said trust fund as expenses of this action.

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POTTSVILLE IRON & STEEL CO. v. ASCHERSON et al.  
(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 18.

SALE BASED ON OCEAN FREIGHT RATE—CONSTRUCTION OF CONTRACT—DISPATCH MONEY.

In a sale of ores to be imported by the seller, a stipulation that the price is based on a specified ocean freight, buyers to receive or pay the

difference between that and the rate named in the "bill of lading," does not entitle the buyers to receive dispatch money earned under charter parties, although each bill of lading, after specifying the freight rate, contains the words "all other conditions as per charter party." *Earnshaw v. McHose*, 56 Fed. Rep. 606, distinguished.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

At Law. Action by the Pottsville Iron & Steel Company against Edward Ascherson and others for recovery of money. A verdict was directed for defendants, and from the judgment entered thereon plaintiff brings error. Affirmed.

A. H. Wintersteen and Wayne MacVeagh, for plaintiff in error.

Samuel Dickson and John G. Johnson, for defendants in error.

Before ACHESON, Circuit Judge, and BUTLER, District Judge.

ACHESON, Circuit Judge. This action was brought to recover the sum of \$5,881.41, alleged to have been wrongfully retained by the defendants from the plaintiff in settlements for foreign iron ore bought by the plaintiff from the defendants, deliverable at Philadelphia. By the terms of the written contract between the parties, dated December 3, 1885, the defendants agreed to sell to the plaintiff about 9,000 tons of ore, at a stipulated price; but this was qualified by the following distinct clause:

"Price based on freight of nine shillings per ton, buyers receiving or paying differences between that and the rate specified in bill of lading."

The sum sued for is the amount of dispatch money allowed by the terms of the several charter parties for quick dispatch in loading and unloading the carrying vessels, which the defendants had taken and retained in good faith. The circuit court excluded the evidence offered by the plaintiff to show the amount of dispatch money so received by the defendants, and directed a verdict in their favor. The judge below was of the opinion that this case is distinguishable from that of *Earnshaw v. McHose*, 56 Fed. Rep. 606, in which this court held that the buyer was entitled to have the dispatch money accounted for. There the clause of the contract of sale upon which the question arose was in these words:

"The above prices are based on an ocean freight rate of twelve shillings per ton; all freight over twelve shillings to be added to the invoice as part of the price of the ore, and all freight under twelve shillings to be deducted from the invoice."

The difference in the language of the two quoted clauses justifies, we think, the distinction which the circuit court made. The court read the clause here in question according to its natural meaning. Certainly, on their face, the words "the rate specified in bill of lading," in the connection in which they stand, import that the rate of freight mentioned in the bill of lading shall be controlling. That was the agreed basis of settlement. It must be presumed that the parties deliberately chose these words as the expression of their intention, and we are not at liberty to disregard or modify

them. No bad faith, it will be noticed, is imputed to the defendants. It is not pretended that the rates of freight specified in the bills of lading were unfair.

It is, indeed, earnestly contended on behalf of the plaintiff in error that, because each bill of lading refers to a charter party, the two instruments are thereby so connected that for the purposes of this case all distinction between them is obliterated. Quoting from one of the bills of lading, as a sample of all, we find this language, (referring to the consignees, the defendants:)

"He or they paying freight for the said goods ten shillings and six pence per ton of 1,015 kilos delivered, and all other conditions as per charter party, dated London, 31 December, 1885."

The argument based on this phraseology is not convincing. We do not see that the words "the rate specified in bill of lading" must mean the rate of freight indicated by both the bill of lading and the charter party, taken together. The two papers, while closely related, are yet distinct instruments. This the parties here have plainly recognized.

It is to be observed that we are dealing with a question of the construction of a clause of the contract of sale. What did the parties mean by the language they have seen fit to employ? They have particularized the bill of lading, and expressly made the freight rate specified therein one of the terms of their contract. It is to be assumed that they had a purpose in so doing. If they had intended to contract with reference to the rate specified in the bill of lading as it might ultimately be affected by the allowance of dispatch money under the provisions of the charter party, presumably they would have used language different from that which they adopted.

The judgment of the court below is affirmed.

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PRESS CO., Limited, v. CITY BANK OF HARTFORD.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 17.

1. NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASERS — FOREIGN CORPORATIONS.

It is no defense against negotiable paper in the hands of an innocent purchaser that the payee was a foreign corporation, which had failed to comply with the statutory conditions for doing business in the state, and that the paper grew out of business transacted there by it. 56 Fed. Rep. 260, affirmed.

2. SAME—PLEADING AND PRACTICE.

Under the system of pleading established by the Pennsylvania statute of 1887, plaintiff's averment that he obtained negotiable paper sued on, before maturity, for value, is sufficient, when not denied, to establish bona fides; and, on a rule for judgment for want of a sufficient affidavit of defense, he is not required to further show that he was unaware of the particular illegality set up.