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WILD
v.
TUCKER.

Atkin J.

that no variation of the composition should be made without a resolution of the creditors, and also as being a fraud upon the creditors. The principles applicable to an agreement for a composition do not appear to me applicable to the proceedings in this case under the Bankruptcy Act, 1883.

I do not think it necessary to consider here the history of the various statutory enactments dealing with promises to revive debts provable in bankruptcy after discharge. I am not prepared, in the absence of express authority, to invoke public policy in a new form to invalidate a contract between two business men of full capacity. There must be judgment for the plaintiff for 913*l.* 11*s.*

Judgment for plaintiff.

Solicitor for plaintiff: *A. F. V. Wild.*

Solicitor for respondent: *A. M. Armstrong.*

J. H. W.

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April 2, 3.

ANT. JURGENS MARGARINEFABRIEKEN v. LOUIS
DREYFUS & CO.

[1914 A. 81.]

Sale of Goods—Delivery Order—Document of Title—Delivery Order created and issued by Owner of Goods—Whether a “transfer”—Delivery Order not for Specific Goods—Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 1, 2, 10—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 25, 47, 62.

A delivery order was given by the defendants to F. for 2640 bags of mowra seed, which formed part of a consignment of 6400 bags. F. gave the defendants a cheque therefor and indorsed the delivery order to the plaintiffs, who took it in good faith and for valuable consideration. F.'s cheque having been dishonoured, the defendants refused to give delivery of the seed to the plaintiffs:—

Held, (1.) that the delivery order was a document of title to the goods which had been “transferred” by the defendants to F. within the meaning of s. 10 of the Factors Act, 1889, and s. 47 of the Sale of Goods Act, 1893, and having been transferred by F. to the plaintiffs, who took it in good faith and for valuable consideration, the defendants' right of lien as unpaid vendors was defeated; and (2.) that the delivery order

was valid notwithstanding that it related to goods which were not specific.

Capital and Counties Bank v. Warriner (1896) 1 Com. Cas. 314 followed.

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ACTION tried by Pickford J. without a jury.

The plaintiffs, margarine manufacturers carrying on business in Holland, sued the defendants, who were merchants carrying on business in London and Hamburg, claiming damages for the non-delivery of 2640 bags of mowra seed

The circumstances out of which the action arose were as follows. Henry Finkler & Co., Limited, in July, 1913, entered into contracts with the defendants for the purchase, "for account of principals," of certain mowra seed, "payment to be made in London on vessel's arrival before Hamburg by cash, less 2½ per cent. discount, in exchange for shipping documents and/or delivery order." The shipments were to be made from Bombay and/or Calcutta during September-October and October-November, 1913. Finkler & Co. wrote to the defendants stating that the buyers were the Niger Company, Limited, but for the purposes of this case Pickford J. treated it as immaterial whether Finkler & Co. were acting as principals or whether the Niger Company were the real principals. Finkler & Co. afterwards, namely, on November 25, 1913, entered into a contract for a sale to the plaintiffs of 500 tons of mowra seed at 12*l.* 12*s.* 6*d.* per 1000 kilos, ex ship Hamburg, "payment to be made in London on vessel's arrival before Hamburg by nett cash against documents on presentation in exchange for shipping documents and/or delivery order." Previous transactions had taken place between Finkler & Co. and the defendants, and the latter were content, for the purpose of the delivery of the documents, to accept Finkler & Co.'s cheque as equivalent to cash. In the case of the particular contract, the defendants, who had received a consignment of 6400 bags of mowra seed at Hamburg, accepted Finkler & Co.'s cheque for 2640 bags of the seed, and gave them two delivery orders in the following terms, addressed to their Hamburg house:—"To Messrs. Louis Dreyfus & Co., Hamburg. Please deliver to Messrs. H. Finkler & Co., Limited, or order against payment of

1914 freight the undermentioned goods ex s.s. *Hohenfels* ex B/L for L. D. M. S. 6400 bags of mowra seed dated Bombay 19.11.13 (L. D. M. S. 960 bags) nine hundred and sixty bags of mowra seed. Any excess or deficiency damaged or sweepings to be shared pro rata by receivers of bulk." The second delivery order, which was in a similar form, was given for the remaining 1680 bags. These two delivery orders were indorsed by Finkler & Co. and handed to the plaintiffs in fulfilment of the contract of November 25, 1913, the plaintiffs paying Finkler & Co. 1927*l.* 4*s.* 8*d.* for the same. Finkler & Co.'s cheque given to the defendants was dishonoured, whereupon the defendants immediately communicated with their Hamburg house, instructing them not to deliver the mowra seed. The plaintiffs being thus unable to obtain delivery brought the present action.

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Roche, K.C., and *Robertson Dunlop*, for the plaintiffs. The delivery orders given by the defendants were documents of title—see s. 1, sub-s. 4, of the Factors Act, 1889, and s. 62 of the Sale of Goods Act, 1893—and Finkler & Co., who were either the buyers from the defendants or were the buyers' mercantile agents, could, and lawfully did, transfer the delivery orders to the plaintiffs—see s. 2, sub-s. 1, of the Factors Act, and s. 25, sub-s. 2, of the Sale of Goods Act—and the plaintiffs having taken these documents in good faith and for value, the defendants' rights as unpaid vendors were defeated: see s. 10 of the Factors Act (1) and s. 47 of the Sale of Goods Act, 1893. (2)

- (1) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 10: "Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu."
- (2) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47: "Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto."
- "Provided that where a document of title to goods has been lawfully

Leck, K.C., and *W. N. Raeburn*, for the defendants. The defendants were unpaid vendors, and the question is whether they have lost their rights as such. It is not disputed that a delivery order may be a document of title, but the delivery orders in this case did not constitute documents of title. The document of title to the mowra seed was the bill of lading, and that was held by the defendants. Moreover, to satisfy s. 10 of the Factors Act and s. 47 of the Sale of Goods Act, there must be two transfers of a document of title. In this case there were not two transfers. The word "transferred" in the sections cannot be applied to the creation and issue of the delivery orders to Finkler & Co. What the sections refer to are documents of title which have come to the owners from some third person and then have been transferred. Furthermore, a delivery order must attach to specific goods, and the delivery orders in this case did not satisfy this requirement inasmuch as they were given in respect of a number of bags out of a larger consignment. [*Farmeloe v. Bain* (1) was cited.]

Roche, K.C., in reply. A bill of lading may be the document of title to the whole cargo, but the cargo may be split up into parcels and delivery orders given in respect of these. When the cargo is split up the bill of lading ceases to be the document of title. In this case the delivery orders were the documents of title to the goods in question; they were transferred by the defendants to Finkler & Co. and by the latter to the plaintiffs. It is unnecessary that the delivery orders should apply to specific goods: *Capital and Counties Bank v. Warriner*. (2)

PICKFORD J., after stating the facts, said: The question is whether the defendants were justified in acting as they did. For the plaintiffs it was argued that the defendants were not justified

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transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-

mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transitu is defeated, . . ."

(1) (1876) 1 C. P. D. 445.

(2) 1 Com. Cas. 314.

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in refusing to give delivery inasmuch as they had given delivery orders as documents of title, which were transferred by Finkler & Co., who were either the buyers from the defendants, or were the mercantile agents of the buyers, assuming the Niger Company were the real buyers, to the plaintiffs, who took them in good faith and for valuable consideration. It is not disputed that the plaintiffs acted in good faith, and as to Finkler & Co. the defendants say in one of their letters that the delivery orders were passed on to the plaintiffs by Finkler & Co. without any wrong intention. In answer to the plaintiffs' contention the defendants say first that the delivery orders are not documents of title at all, as there was a bill of lading in existence which was the document of title. I do not agree with this contention. The bill of lading may have been the defendants' document of title and the document by which they got possession of the cargo, but at this time they were in possession of the cargo by their Hamburg house and were distributing it to the different vendees under the different contracts. Each delivery order was, in my opinion, a document of title for each of those parcels. It was next said that these delivery orders were not documents of title within the meaning of the Factors Act, 1889, and the Sale of Goods Act, 1893, because they were created by the defendants themselves, and that as the documents did not come to them from some one else they could not be "transferred" by the defendants to Finkler & Co. I cannot accept that argument. A delivery order is not the less a document of title because it is created by the owner of the goods. It would be a curious result if the document by which the owner gets a title can, if passed on by him, give a title to some one else, but that a document created by himself cannot give a title when passed on because it is not a "transfer" but is only a delivery or issue. I cannot narrow the meaning of the word "transfer" in the way suggested. It seems to me that the delivery orders in this case were documents created by the defendants, the owners of the goods, for the purpose of transferring the title to the goods, and the handing of these to Finkler & Co. was a "transfer" of the documents just as much as if they had come into existence by the act of some one

other than the defendants, had been handed to the defendants, and by them been handed on. If that is so, this concludes the case, because I have no doubt that Finkler & Co. were either the buyers or were mercantile agents for the buyers, and they transferred the documents of title to the plaintiffs, who took them in good faith and for valuable consideration. The further argument that a document of title cannot operate because it is not given in respect of specific goods is answered by the case of *Capital and Counties Bank v. Warriner*. (1) There will be judgment for the plaintiffs.

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Judgment for plaintiffs.

Solicitor for plaintiffs: *C. J. Parker.*

Solicitors for defendants: *Coward & Hawksley, Sons & Chance.*

J. S. H.

EMBIRICOS v. SYDNEY REID & CO.

1914
 March 30 ;
 April 4.

Charterparty—Justification of Charterers' Refusal to perform—Restraint of Princes—Inability of Shipowner to carry Cargo to Destination—Frustration of Adventure.

By a charterparty made between the plaintiffs, the owners of a Greek ship, and the defendants as charterers, the plaintiffs' ship was to proceed to the Sea of Azoff, there load a cargo of grain, and carry it to a port in the United Kingdom. The charterparty contained an exception of restraints of princes. The ship arrived at the loading port on October 1, 1912, just before the war between Greece and Turkey broke out. She commenced to load, and on the following day, after she had loaded a small portion of the cargo, the defendants stopped further loading owing to the fact that the Turkish authorities were then seizing and detaining Greek ships arriving at the Dardanelles. War was declared on October 18. The lay days under the charterparty expired on October 22. On October 21 the defendants purported to cancel the charterparty upon the ground that the war had brought the adventure to an end, but the plaintiffs refused to accept such cancellation. The ship was unable to leave the Black Sea till September, 1913, when the war ended. In an action to recover damages for breach of the charterparty :—

Held, that the probability of the capture of the ship, if she attempted

(1) 1 Com. Cas. 314.