1919.
July 5.

[CIVIL JURISDICTION.]

[ACTION NO. 34, 1918.]

HUNT *v.* THE AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY LIMITED.

Negligence causing damage to bananas shipped per s.s. " Levuka " to Australia owing to defective condition of the refrigerating chambers—as to implied warranty in bill of lading that vessel is seaworthy, see sections 4 and 7 (1) of Ordinance No. 14 of 1906. (Since replaced by Ordinance No. 1 of 1926.)

Held, conditions affecting provisions of the Ordinance not applicable.

Sir CHARLES DAVSON, C.J. Plaintiff claims damages for negligence and breach of duty on the part of defendants in and about the carriage and delivery of bananas by the s.s. " Levuka." Some of the fruit was for Sydney and the rest for Melbourne, and there is a bill of lading relating to each lot. Some of the fruit was carried on the cattle deck of the ship, but the larger portion was placed in the insulating chamber, for which a higher rate of freight was charged. That which was carried on the cattle deck arrived in good order and condition, but that in the insulating chamber became so damaged that part of it had to be destroyed and part fetched very low prices. Plaintiff's loss on the shipment amounted, as admitted by defendants, to £547 14s. Defendants say they did all that it was their duty to do in respect of the shipment and that the loss was due to perils of the sea and, or in the alternative, to inherent vice in the bananas. Plaintiff joins issue on this, and the substantial question between the parties is that plaintiff alleges that the insulating machinery on this voyage was incapable of doing, and did not do, its work efficiently, and that the fruit was, in consequence, damaged; while defendants say that the machinery was in good order and worked efficiently and that the bananas, when shipped, were not in good carrying condition.

By section 7 (1) of Ordinance No. 14 of 1906 (the Sea Carriage of Goods Ordinance 1906) there is, in every bill of lading, an implied warranty that the ship shall be, at the beginning of the voyage, seaworthy in all respects; and it is further enacted, by section 7 (2), that if the ship is so seaworthy the owner shall not be liable for damage to the goods resulting from, among other things, perils of the sea, and inherent vice. " Seaworthiness " is not, of course, limited to mere fitness to encounter sea perils, but would include, in

the present case, the fitness of the machinery controlling the insulating chamber.

But in paragraph 10 of their statement of defence defendants raise a point which must be dealt with before the merits of the case are considered. They contend that plaintiff cannot bring this action because he did not give notice of his claim within seven days of the arrival of the "Levuka" at the port of discharge, as required by clause 17 of the bill of lading. If this clause is applicable the contention is good and the plaintiff is out of Court, for, in view of the existence of the means of telegraphic communication, I do not think the condition is unfair or unreasonable, nor am I satisfied that there was any waiver of it: but plaintiff contends that it is not applicable where the damage is due, as he alleges is the case here, to the unseaworthiness of the ship. This leads to the question, "What was the contract between the parties"? The contract, so far as it is expressed, is contained in the bill of lading (there are two bills, but they are in the same form and, for convenience, I speak of them in the singular), but, by virtue of section 7 (1) of the Ordinance, there is also, as we have seen, an implied warranty of seaworthiness. The bill of lading is headed by a provision in heavy type that the shipping company receives goods subject to the exceptions to be implied pursuant to section 8 (2) of the (Commonwealth) Sea Carriage of Goods Act 1904. This form was, presumably, drafted for use in Australia and would apply to shipments from the Commonwealth, but the Act, as such, can have no application to shipments from this Colony (see section 5 of our Ordinance): this, however, is of no practical importance, because the provisions of our Ordinance governing shipments from the Colony are indentical with those of the Commonwealth Act.

An examination of the bill of lading shows that it contains no stipulation as to seaworthiness: such a stipulation might have been inserted, but, as it was not, it must, by section 7 (1), be implied. Defendant's counsel did, indeed, suggest that, by virtue of the heading, the warranty of seaworthiness was expressed in the bill, it seems sufficient to point out that the heading itself expressly speaks of an implied contract; the heading is, in its nature, declaratory, and calls attention to an enactment, identical with that in our Ordinance, which would apply whether the heading were there or not.

The question then, is whether the condition as to the notice applies where the damage arises through a breach of the implied warranty of seaworthiness.

1919

HUNT v. THE AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY.

This point was dealt with in *Tattersall* v. *National Steamship Company* (12 Q.B.D. 297), and *Morris* v. *Oceanic Steamship Company* (16 Times L.R. 533), and was very fully discussed and decided by the Court of Appeal in the *Bank of Australasia* v. *Clan Line* (1916, 1 K.B. 33). This last case is, as to the principle to be applied, absolutely in point, the clause limiting liability being one requiring a claim to be made within seven days of the arrival of the ship at the port of destination. There was, however, as is not the case here, a clause in the bill of lading imposing liability in case of unseaworthiness, and the Court held that the clause limiting liability applied to the contract as to seaworthiness because such contract was expressed in the bill of lading, but that it would not have applied if such contract had been merely implied. The principle on which this decision rests is made clear in the judgments and I cannot do better than quote this passage from that of Bankes, L.J.:—

> Every contract for the carriage of goods by sea is, unless it is expressly excluded, subject to the implied condition as to the seaworthiness of the vessel (such an exclusion would be illegal under section 4 of our Ordinance). The bill of lading may be silent as to the implied condition or it may refer to it. In cases where it is silent the contract between the shipowners and the holder of the bill of lading consists partly of the implied contract and partly of the express contract. It is quite true that the implied contract is just as binding as the express contract and the written contract must be read as though the implied contract was written in it. The implied contract is, however, free from conditions; consequently if it is to be written into the express contract it must be written in, in such a way as to make it plain that the conditions contained in the express contract do not apply to it. Unless this is done, the contract which is written in is not the implied contract but something different. This is, I think, an explanation of the decisions which hold that where the bill of lading is silent as to conditions of seaworthiness the conditions in the bill of lading are not to be applied to the implied contract.

Nothing could be clearer than this, or more easy to apply to the present case. I hold, therefore, that the provision in the bill of lading as to giving notice of claim does not apply to this action, founded on a breach of the implied warranty of seaworthiness, because that warranty is not (as Pickford, L.J., puts it, p. 53) " an express term of the bill of lading."

Apart from the authority of the Clan Line case it was argued for plaintiff that the clause for requiring 7 days' notice was void under section 4 of Ordinance No. 14 of 1906 as weakening, lessening or avoiding the obligation on the owners

to provide a seaworthy ship. This view was contested by the other side, and the point is open to argument. I am inclined to agree with plaintiff's contention, but, in view of the decision I have arrived at, as above stated, I do not pause to examine the questions.

This brings me to the substantial question at issue. Was the Levuka at the beginning of this trip seaworthy, in the sense that her insulating chamber and its controlling machinery were fit to receive and carry the fruit shipped. If she was, then defendants would not be liable for damage due to any of the causes set forth in section 7 (2) of the Ordinance, one of which is inherent vice or defect in the fruit shipped. If the defendants had been able to satisfy me that the insulating apparatus was in good order and that they had done all they were bound to do, I might have been driven to the conclusion that the only possible cause of the damage was the inherent vice of the fruit (*Kendall* v. *London and South Western Railway Company*, 7 Ex. 373). Not only have defendants not so satisfied me, but the evidence, and particularly the records of the ship itself, satisfy me that the insulating apparatus was not, either at the commencement or during the continuance of the voyage, able, under the conditions then existing, to do the work required of it. Further, it has been proved affirmatively to my satisfaction that the fruit shipped was in good carrying condition, and as regards that in crates, properly packed. Without going into details, I find the evidence on this point so strong as to be practically conclusive. If I had had any doubt it would have been set at rest by the fact that the two lots of fruit, belonging to the same shipment, which were not carried in the insulating chamber arrived at their destination in good order. I refer to (*a*) the bananas carried on the cattle deck of the "Levuka," and (*b*) those which were crowded out of the "Levuka" and taken to New Zealand by another steamer.

On many previous voyages, under happier climatic conditions, the insulating machinery had been able to do its work; on this occasion the breaking point was reached and the machinery failed.

There must, therefore, be judgment for plaintiff for £547 14s., with costs.

Note.—The above judgment was affirmed on Appeal to Privy Council (17th June, 1921) see L.R.A.C., 1921, Vol. 2, p. 351.