Privy Council Appeal No. 39 of 1920.

The Australasian United Steam Navigation Company, Limited - *Appellants*

v.

John Linn Hunt - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF FIJI.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1921.

Present at the Hearing:
VISCOUNT HALDANE.
LORD ATKINSON.
LORD PHILLIMORE.

[*Delivered by* VISCOUNT HALDANE.]

This is the appeal of the defendants in an action from a judgment of the Supreme Court of Fiji. The claim in that action was for damage suffered by a consignment of bananas shipped by the respondent on a vessel belonging to the appellants. It was adjudged that the respondent should recover £547 14s. and costs.

The respondent is a planter residing and carrying on business in Fiji. The appellants are shipowners. No question now arises as to the fact of damage or the amount, or of such damage having been due to the unseaworthiness of the appellants' vessel, the "Levuka," on which the bananas were shipped in Fiji for delivery in New South Wales. The unseaworthiness consisted in the defective condition of the refrigerating chambers of the vessel, as established. But a question which remains is whether, by the terms of the two bills of lading, under which the fruit was carried, the appellants are freed from liability.

Before considering the terms of the bills of lading, their Lordships think it important to refer to the provisions of the Fiji Ordinance of 1906 relating to the sea carriage of goods. This Ordinance follows in substance the analogy of the well-known Harter Act of the United States, as well as that of the Sea Carriage of Goods Act, 1904, of the Australian Commonwealth. The Ordinance enacts (Section 4) that :—

> "Where any bill of lading or document contains any clause, covenant or agreement whereby (*a*) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability from loss or damage to goods arising from the harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or arising from negligence, fault or failure in the proper loading, stowage, custody, care or delivery of goods received by them, or any of them, to be carried in or by the ship; or (*b*) any obligations of the owner or charterer of any ship to exercise due diligence and to properly man, equip and supply the ship, to keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise weakened, lessened or avoided; or (*c*) the obligation of the masters, officers, agents or servants of any ship to carefully handle and stow goods and to care for, preserve and properly deliver them, are in any way lessened, weakened or avoided, that clause, covenant or agreement shall be illegal, null and void and of no effect."

By Section 5 the parties to any bill of lading are to be deemed to have intended to contract according to the laws in force at the place of shipment. By Section 7 (1) :—

> "In every bill of lading with respect to goods a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects, and properly manned, equipped and supplied."

The bills of lading provided that the goods were received for shipment subject to the terms, conditions and exceptions endorsed on the back, which were to form part of the contract. Along with these was a provision that the appellants received the goods to be forwarded subject to any statutory exemptions and limitations, and on the terms contained in the document, but that such terms were to be construed as qualified by the provisions of the Sea Carriage of Goods Act, 1904, already mentioned, which, as their Lordships have observed, is substantially the same in its provisions as the Fiji Ordinance of 1906. Among the terms endorsed were the exemption of the appellants from liability for loss or damage due to accidents arising from defects in the fittings or appurtenances of the ship. There was also a clause (No. 17) under which any claim for loss or damage to goods was to be restricted to the wholesale cash value at the port of discharge and must be made in writing within seven days from the date at which the cargo was or should have been landed. Otherwise such claim was not to be enforceable.

Reading the terms of the Ordinance, which are controlling, into those of the bills of lading, it is obvious that if the latter conflict with the former the former must prevail. This being so,

the first question which arises is whether there was imported into the bills of lading an obligation on the owners that the ship should be seaworthy, and in particular that the refrigerating chambers should be in adequate condition for the transport of the bananas. It is clear that this question must be answered in the affirmative, and that if the bills of lading contained any stipulation inconsistent with such a provision, the stipulation was inoperative.

The second question is whether the bills of lading actually contained any such inconsistent stipulation. What happened was that when the ship arrived at Sydney and Melbourne, her ports of destination in Australia, the fruit turned out to have been damaged on the voyage by the imperfect condition of the insulating chambers. But the respondent did not give notice of his claim within seven days of the arrival of the "Levuka" at the ports of discharge, and if the condition as to the necessity for this in Clause 17 of the bills of lading was operative, that fact would have exonerated the appellants from liability. The point is, therefore, whether the terms of the Ordinance have rendered the condition as to notice inoperative. Their Lordships think that this question must be answered in the affirmative. Reliance was placed for the appellants on decisions in the Courts of the United States, such as those in the cases of the "*Persiana*" in 1911 (185 Federal Reporter 396), the "*Westminster*" (127 Federal Reporter 680), and the "*St. Hubert*" (107 Federal Reporter 727), to which their Lordships would have attached much importance had the question been in reality analogous to that which arises in the appeal before them. But there the provision in the bills of lading was merely that the owner was not to be held liable for any damage to goods, notice of which was not given before the removal of the goods. This was held not to be inconsistent with the provisions of the Harter Act. In the case of such a provision it may be that it can be treated as not affecting the substantial right which that Act gives, but as restricted to the character of the evidence by which it is to be established, and therefore as confined to procedure and as not extending to interference with substantive title. In the present case the conditions contained in Clause 17 are that the claim is not only to be restricted, but that it must be made in writing and within seven days from the date of landing of the cargo. Their Lordships are of opinion that such conditions affect the substance of the right conferred by the Fiji Ordinance, which is to treat as void any condition by which the absolute right to recover for damage due to failure to keep the refrigerating chambers in good condition was "in any wise weakened, lessened or avoided." On this question the judgment of Horridge J. in *Hordern* v. *Commonwealth and Dominion Line, Ltd.* (1917, 2 K.B. 420), is instructive.

As they have already said, their Lordships also think that the same provision in the Ordinance rendered it impossible for the appellants to say that no warranty as to seaworthiness was implied. But it has been contended that it was open to them to stipulate validly that they should not be liable for damage arising from

defect in the fittings of the ship, if the stipulation was restricted to a warranty that was merely implied. Their Lordships might have called upon the respondent for an argument upon this point, but in the view which they take on the earlier question, which goes to the root of this appeal, they are of opinion that it is unnecessary to pronounce upon it.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

THE AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY, LIMITED,

v.

JOHN LINN HUNT.

DELIVERED BY VISCOUNT HALDANE.

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