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THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, (DEFENDANTS) ..... APPELLANTS; *Mar. 7, 8. *May 15.

AND

GORDON DRYSDALE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Shipping—Bill of lading—Limitation of time to sue—Damage from unseaworthiness—Construction of contract.

On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date after which the same should be completely barred.

Held, reversing the judgment appealed from (8 B. C. Rep. 228) Mills J. dissenting, that this limitation applied to a claim for damage caused by unseaworthiness of the steamer.

APPEAL from a decision of the Supreme Court of British Columbia (1), reversing the judgment at the trial in favour of the defendants.

This is an action brought to recover the sum of $1416.18, being the admitted value of certain dry goods shipped by the plaintiff upon the defendants' steamship "Cutch" on the 5th June, 1899, to be transported from Vancouver, B.C., to Skagway, Alaska, for which the defendants issued a bill of lading, dated 5th June, 1899.

The plaintiff's goods were, during the voyage, completely destroyed by salt water, and he claims that the incursion of salt water was due to the fact that, at the time the goods were shipped and the voyage com-

*PRESENT:—Sir Henry Strong C J., and Sedgewick, Girouard, Davies and Mills JJ.

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menced, the "Cutch" was in an unseaworthy condition, and the plaintiff's cause of action is based upon the existence of an implied warranty that the vessel should be seaworthy at the time the voyage began.

The evidence, which is hereafter referred to in detail, clearly established the fact that the "Cutch" was unseaworthy and that the damage to the plaintiff's goods was directly caused by this unseaworthiness.

The conditions indorsed on the shipping receipt are as follows:—

"If the consignee is not on hand to receive the goods, package by package as discharged, then the master may deliver them to the wharfinger or other party or person believed by said master to be responsible, and who will take charge of said goods and pay the freight on the same, or deposit them on the bank of the river, or other usual place for delivering goods. The responsibility of said master shall cease immediately on the delivery of the said goods from the ship's tackles.

"The steamer on which the within goods are carried shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamer or steamers; to lighter from steamer to steamer or from steamer to shore; to deliver to other steamers, companies, persons or forwarding agents any of the within goods destined for ports or places at which the vessel on which they are carried does not call. The master and owners shall not be held responsible for any damage or loss resulting from fire at sea, in the river or in port; accident to or from machinery, boilers or steam, or any other accident or dangers of the seas, rivers, roadsteads, harbours, or of sail or of steam navigation of what nature or kind soever.

"It is expressly understood that the master and owners shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss or damage aris-

ing from insecurity of package, or damage to cargo by vermin, burning or explosion of articles or freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, effects of climate, or for unavoidable detention or delay, nor for the loss of specie, bullion, bank notes, government notes, bonds or consols, jewellery, or any property of special value, unless shipped under proper title or name and extra freight paid thereon.

"Live stock, trees, shrubbery, and all kinds of perishable property at owner's risk. Oil and all other liquids at owner's risk of leakage, unless caused by improper stowage.

"It is hereby understood that wool in bales, dry hides, butter and egg boxes, and all other packages, must be, each and every package, marked with the full address of the consignee; and if not so marked, it is agreed that the delivery of the full number of packages as within mentioned, without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this receipt.

"It is agreed that in settlement of any claim for loss or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

"It is agreed that the person or party delivering any goods to the said steamer for shipment is authorized to sign the shipping receipt for the shipper.

"On delivery of the goods within enumerated, as provided herein, this receipt shall stand cancelled, whether surrendered or not.

"In consideration of the goods being carried by the company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded by statute or otherwise to hold the company responsible in any manner for the keeping,

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or safe or prompt carriage of the goods, and waives and abandons all advantage and benefit accorded by the statute, 37 Vict. c. 25, to the shipper, and himself accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness, or want of skill of the company's officers, servants, or workmen, but which shall have occurred without the actual fault or privity of the company.

"It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise must be presented to the master or owners thereof within one month from date hereof; and that after one month from date hereof no action, suit or proceeding in any court of justice shall be brought against the said steamer or the owners thereof for any damage to or loss of said merchandise; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof for any such damage or loss."

The action was not brought within one month from the date of the bill of lading and was held by the trial judge to be too late. The full court reversed this, judgment, holding that the limitation did not apply to damage by unseaworthiness. The defendant appealed.

Davis K.C. for the appellant. The question is merely one of construction. We rely almost entirely upon the judgment of the Divisional Court in *Tattersall* v. *The National Steamship Co.* (1), and upon *The "Maori King"* v. *Hughes* (2). Seaworthiness is always supposed to be before the minds of the consignor and

(1) 53 L. J. Q. B. 332: 12 Q. B. D. 297.

(2) 65 L. J. Q. B. 168; [1895] 2 Q. B. 550.

owner, and, the agreement contained in the bill of lading is made upon the basis of that understanding. The implication, indeed, only arises because it must necessarily be presumed that the contracting parties had the thing implied in their minds and contracted upon that basis, just as clearly and specifically as if it were set out in the written agreement. The condition limiting the time within which action must be brought, is intentionally inserted by the shipowners so that they may know, within a limited time, what claims may be brought against them for damages. The reason for the condition and its effect should not be limited in the manner suggested. It is nothing more than a statute of limitations concerned not with cases where there is no liability by reason, of the preceding clauses in the indorsement, but only with those cases where a liability has arisen, and, therefore, it must refer to something not mentioned in the preceding provisions of the indorsement. There is no cause of liability mentioned in the indorsement, and the paragraphs which treat of this subject merely provide for cases in which there shall be no liability. We must look outside of the conditions contained in the indorsement in order to get something for this limitation to operate upon, and it is shewn by the preceding condition that everything is eliminated except liabilities due to actual fault or privity of the company itself, such as not supplying a ship reasonably fit for the purpose for which it is required.

The distinction between the *Tattersall Case* (1) and the present, in short, is that the words "under no circumstances" are shewn by the context in that case to have a meaning limited as therein pointed out, whereas here, there is nothing in the context to limit the

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actions against the ship to which clause 10 applies except, of course, that they must be actions for damage to or loss of merchandise shipped.

It is submitted that Mr. Justice Martin errs in assuming, as he apparently does, that all exceptions in the bill of lading stand on the same plane, and that they all necessarily refer to what takes place during the voyage. Whether they do or not is merely a matter of construction, and every clause in that respect must stand on its own basis.

Some of the conditions indorsed on the shipping receipt here refer to various matters, such as what happens if packages are not properly addressed; other conditions deal with the question of certain circumstances under which the shipowner shall not be responsible for the loss of or damage to goods, but the last condition, the one in question, does not deal with the question of liability at all. It only comes in force when a liability has arisen, and deals with that separate branch, and that alone, stating that, under those circumstances, a liability having arisen (and there is nothing to limit the way in which such liability has arisen), the action must be commenced against the company within one month and not afterwards, and that the lapse of such month shall be deemed a conclusive bar and release of all right to recover against the steamer or the owners.

Sir Charles Hibbert Tupper K.C. for the respondent. The trial judge has, in effect, found that the ship was unseaworthy, and this finding was distinctly affirmed by the majority of the court appealed from which also decided that the damage resulted from such unseaworthiness, and that the condition in the bill of lading relied upon by defendants did not afford any ground of defence.

The judgment appealed from is right, chiefly upon the grounds that in cases of this kind there is always an implied warranty that the ship undertaking to carry goods is seaworthy and fit to perform the service at the time the service begins; that the clauses in the bill of lading limiting the liability of the carrier only come into force when a seaworthy ship has been provided, and cannot be pleaded as a defence to an action based solely upon the implied warranty of seaworthiness; and that the clause limiting time for the presentation of the claim stands precisely upon the same footing as any other clause in the bill of lading.

The bill of lading does not affect the primary duty of the shipowner respecting seaworthiness unless expressly so stated; MacLachlan on Shipping (4 ed.) p. 426. It is evidence of a contract to carry, but is not the contract; *Crooks & Co.* v. *Allan* (1); *Sewell* v. *Burdick* (2); *Schmidt* v. *The Royal Mail SS. Co.* (3), at p. 648; *Kopitoff* v. *Wilson* (4). The obligation of the shipowner to warrant the fitness of the ship when she sails is not as carrier, but as shipowner. The courts lean against exceptions; *The Glengoil Steamship Co.* v. *Pilkington* (5). See also Carver on Carriers, p. 77; Scrutton on Bills of Lading, pp. 72, 171, 185, and *The "Glenfruin"* (6), per Butt J. at p. 108. Exceptions are not applicable when the ship is unseaworthy at starting through latent defect. *The Cargo ex "Laertes"* (7); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (8); *Gilroy Sons & Co.* v. *Price & Co.* (9); *The "Maori King"* v. *Hughes et al.* (10); *Queensland National Bank* v. *Peninsular & Oriental*

(1) 5 Q. B. D. 38.
(2) 10 App. Cas. 74.
(3) 45 L. J. Q. B. 646.
(4) 1 Q. B. D. 377.
(5) 28 Can. S. C. R. 146.
(6) 10 P. D. 103.
(7) 12 P. D. 187.
(8) 12 App. Cas. 518.
(9) [1893] A. C. 56.
(10) 65 L. J. Q. B. 168; [1895] 2 Q. B. 550.

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Steam Navigation Co. (1); *Thames & Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.* (2). The bill of lading must expressly refer to conditions respecting primary obligation to enable defendants to take advantage; *Phillips* v. *Clark* (3); *Czech* v. *General Steam Navigation Co.* (4).

As to warranty of seaworthiness, we refer to MacLachlan on Shipping, (4 ed.) pp. 383, 426 427 and *Lyon* v. *Mells* (5). Seaworthiness is an implied term as the foundation of the contract for carriage by sea; *Steel* v. *The State Line Steamship Co* (6).

The case of *Tattersall* v. *National Steamship Co.* (7) is conclusive that limitations or other conditions in the bill of lading, have no application to the claim for damages by reason of the breach of the warranty of seaworthiness. *The Glengoil Steamship Co.* v. *Pilkington* (8) had to do with a clause relating to negligence on the part of servants of the shipowner and does not directly deal with the point at issue here. So far as that case applies, it favours the respondent, as it is held there that the contract against liability for fault of servants did not affect the question of defective stowage. See remarks of Taschereau J. at pp. 158, 159, 160. We also rely upon the decisions in "*The Glenfruin*" (9); *Cargo on Steamship* "*Waikato*" v. *New Zealand Shipping Co.* (10); *Gleadell* v. *Thomson* (11).

The judgment of the majority of the court was delivered by:

DAVIES J.—The sole question argued before us was whether the 10th clause of the Shipping Receipt which

(1) [1898] 1 Q. B. 567.
(2) 56 L. J. Q. B. 626.
(3) 26 L. J. C. P. 168.
(4) L. R. 3 C. P. 14.
(5) 5 East, 428.
(6) 3 App. Cas. 72.
(7) 12 Q. B. D. 297.
(8) 28 Can. S. C. R. 146.
(9) 10 P. D. 103.
(10) [1898] 1 Q. B. 645.
(11) 56 N. Y. 194.

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contained the contract between the parties applied so as to exempt the carriers from liability for having provided an unseaworthy ship in which to carry the plaintiff's goods. It is a pure question of construction. The learned counsel for the appellant, Mr. Davis, based his argument upon the ground that if the warranty of seaworthiness had been expressly written in the contract the limitation of time within which suit was to be brought for damages sustained by the shipper would necessarily apply and he argued that, *a fortiori*, the limitation must be held as applicable to an implied warranty. Sir Hibbert Tupper, for the respondent, in whose favour the judgment of the court below was given, contended that the implied warranty of seaworthiness was a duty or obligation cast upon the shipowner outside of and independently of the contract and not affected or controlled by its provisions, the limitations of which only came into force when a seaworthy ship had been provided.

The learned judges of the court below felt themselves bound by what they held to be the decisions of the courts in England specially in the cases of *Steele* v. *The State Line Steamship Co.* (1); *The "Maori King"* v. *Hughes* (2); and *Tattersall* v. *National Steamship Co.* (3). But with every deference to the opinion of these learned judges, I am of opinion that these cases are clearly distinguishable from the one now before us. In all those cases it will be found that the actions were brought upon bills of lading which began to operate when and after the cargo was placed on board; and as was said by Lord Justice Smith in the quotation from his judgment in the case of *The "Maori King"* (2), made by Mr. Justice Martin:

> The exceptions in the bill of lading will apply after the ship sets sail. They are exceptions during the voyage when if any of the matters

(1) 3 App. Cas. 72. (2) 65 L.J.Q.B. 168; [1895] 2 Q.B. 550.
(3) 12 Q. B. D. 297.

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mentioned take place, the ship owner is not liable. But if there is, as I think there is, an implied warranty that the machinery shall be fit for its purpose when the ship sets sail, then the exceptions do not apply and are no answer to a claim by the owner of the goods founded on the original unfitness of the machinery.

Now I do not presume to question that the above extract contains a correct declaration of the law as applicable to the document the learned judge had before him. That law is too well settled by a long and well known line of cases beginning with *Steele* v. *The State Line SS. Co.* (1) to permit of doubt being cast upon it. But does it apply to the contract we have before us? Is this shipping receipt which contains the contract between the parties on this appeal one which applies only when and after the ship sets sail? I think not. I think it was intended to cover and did cover all the period of time from and after the delivery of the goods by the shipper to the shipowner, even if that period should be partly anterior to the loading of the goods aboard the ship in which they might be placed. It reads as follow :

UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED.

No. VANCOUVER, B.C., June 5th, 1899.

From Geo. V. Fraser, to be shipped on board the Union Steamship Co's (Ltd.) steamer *Cutch*, whereof Capt. Newcombe is master, or on board any other steamer of the company, or on board of any steamer the company may employ, the following property in apparent good order, except as noted, (value, weight, contents and condition, being unknown to said master), marked as indicated below, to be delivered at S. P. Brown, in transit to Dawson, for Geo. V. Fraser or assigns, care subject to the conditions printed on back of this receipt.

Here follows a description of the property.

The 10th clause of the conditions, printed on the back of this receipt and on the construction of which he dispute arises, reads :

It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise mus

(1) 3 App. Cas. 72.

be presented to the master or owners thereof within one month from date hereof; and that after one month from date hereof no action, suit or proceeding in any court of justice shall be brought against the said steamer or the owners thereof for any damage to or loss of said merchandise; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof for any such damage or loss.

Now when does the liability of the steamship company arise under this receipt? Clearly not from the sailing of the ship on board of which the goods might be loaded or from the loading of the cargo aboard, but from the receipt of the goods. They were received by the company *to be shipped* on board one or other of their ships as soon as reasonably possible. They might remain for sometime in the warehouse of the company before being shipped. Would not the liability of the company attach from the moment they received the goods? Clearly in my opinion it would. The cases therefore which were cited and relied upon by the respondent and which were each and all based upon the proposition that the liability of the shipowner on the respective bills of lading, on which the several actions were brought, did not attach until after the loading of the goods aboard the ship, and cannot apply to the case of this shipping receipt where the liability began the moment the goods were received by the shipowner. The conditions limit the company's liability very much. The condition preceding the one as to the time within which any suit must be brought declares (*inter alia*) that, in consideration of the goods being carried at a reduced rate, the shipper himself

accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness, or want of skill of the company's officers, servants, or workmen, but which shall have occurred without the actual fault or privity of the company.

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It was argued, with some force, that this exempts the company from all liability except that arising from their own actual fault or privity and that they were practically liable for little or nothing beyond their liability to provide a seaworthy ship on which to load the goods, or a suitable warehouse in which to keep the goods till shipment, and that the next clause limiting the time for bringing an action, in cases where there was a liability, was practically confined to just such a case as this is, viz. failure to provide a seaworthy ship. But without placing too much reliance on that argument, I desire to base my decision upon the construction I give to the shipping receipt sued upon and holding, as I do, that the shipowner's liability under this contract arises from the moment of the receipt by him of the goods and that, if the goods were damaged through his privity or default after such receipt and before they were loaded he would be liable, it follows that his obligation or duty, afterwards, to load the goods aboard of a seaworthy ship is a subsequent and not an antecedent duty or obligation, that it is such arising out of the contract made and not independently of it, and being so is within and covered by the limitation of the 10th clause as to the time within which a suit may be brought.

MILLS J. (dissenting).—This case came before Mr. Justice Irving on the 5th of June, 1899, who gave judgement in favour of the appellants. It was heard by the Supreme Court of British Columbia, in April, 1901, and the full court gave judgment in favour of the steamship company, Chief Justice McColl dissenting. The plaintiff, Mr. Drysdale, here the respondent, is a merchant in the City of Vancouver who shipped by the steamer goods to the value of $1,478.18 to Skagway, thence to be forwarded to Dawson, in the Yukon

country. The company contracted with him to carry the goods to Skagway upon the conditions set out in the bill of lading. These goods were shipped on board upon conditions, the chief of which are the following:

The steamer on which the within goods are carried shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamer or steamers; to lighter from steamer to steamer or from steamer to shore; to deliver to other steamers, companies, persons, or forwarding agents, any of the within goods destined for ports or places at which the vessel on which they are carried does not call. The masters and owners shall not be held responsible for any damage or loss resulting from fire at sea, in the river or in port; accident to or from the steamer, boilers or steam or any other accident of dangers of the seas, rivers, roadsteads, harbours or of sail or steam navigation of what nature and kind soever.

It is expressly understood that the master and owners shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss or damage arising from the insecurity of package or damage to cargo, by vermin, burning or explosion of articles of freight, or otherwise, or loss or damage on account of inaccuracy, or omission in marks or descriptions, effects of climate or from unavoidable detention or delay, nor for the loss of specie, bullion, bank notes, government notes, bonds or consols, jewellery, or any property of special value unless shipped under proper title or name and extra freight paid thereon. * * * * *

In consideration of the goods being carried by the company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded by statute or otherwise, to hold the company responsible in any manner for the keeping or safe and prompt carriage of the goods, and waives and abandons all advantages and benefit, accorded by the statute, 37 Vict. c. 25, to the shipper, and himself accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses from whatever cause arising, including delays, loss or damage arising through negligence, or carelessness or want of skill, of the company's officers, servants or workmen, but which shall have occurred without the actual fault or privity of the company.

It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise, must be presented to the master or owners thereof within one month from the date hereof; and that after one month from date hereof, no

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action, suit or proceeding in any court of justice shall be brought against the said steamer or the owners thereof for any damage to or loss of the said merchandize; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof, for any such damage and loss.

The goods were placed on board the steamer. The sea-cock by which water is admitted into the water tank at the bottom of the ship was not properly closed before the ship sailed. The man-hole at the top had not the India rubber, which is under the cover, in its place, and when the goods arrived at Skagway they were in several feet of water. The boxes in which the goods were packed weighed far more at Skagway than at Vancouver, additional freight had to be paid for their carriage through to Dawson in consequence, and when they reached their destination, they were found upon being unpacked, to be absolutely worthless, but the month mentioned in the bill of lading had expired, and the company have since been told that Mr. Drysdale had absolutely bound himself by his agreement not to bring any action against the company for the damage and loss which had been sustained. The words are very comprehensive, and if the seaworthiness of the vessel is embraced in its terms, the right of action is undoubtedly gone. The question is one of not a little difficulty. This is evident from the fact that the judges in the Supreme Court of British Columbia were equally divided upon the subject. It will, therefore, become necessary to examine the cases with care and to see whether the contract or bill of lading does really have the effect of preventing any redress being had.

There are many cases in which it has been held that agreements exempting the owners of a ship from liability because of the carelessness of those in charge do not apply to questions relating to the seaworthiness of the ship when she begins her voyage, but these cases

do not apply to the present, because what is here done, is not to take away the remedy, but to shorten the period within which redress may be had. Our business is to see whether this attempt to escape responsibility has been successfully accomplished.

In the case of *Steel et al.* v. *The State Line Steamship Co.* (1), that company agreed to carry a cargo of wheat in a steamship called "The State of Virgininia," from New York to Glasgow, providing by the bill of lading that they should not be accountable for leakage, breakage, etc., however caused; not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or persons in the service of the ship, or for whose acts the ship owner is liable, or otherwise, namely, risk ofcraft, hulk, or transshipment, explosion, heat or fire at sea in craft, hulk or on shore, boilers, steam and machinery, or from consequence of any damage or injury thereto, however such damage or injury may be caused, collision, straining or other perils of the sea, rivers, navigation or land transit of whatever nature or kind soever, and however caused, excepted. One of the port holes had been left open. The sea had come in, and the cargo was greatly injured. The owners of the ship refused to pay for the damage, and in January, 1877, the case was tried before Lord Young and a verdict returned in which it was found that the orlop deck ports had been insufficiently fastened whereby the sea water was admitted. The jury found that, as the ship was loaded, the said port was about a foot below the water line and that had it been sufficiently fastened it would have been water-tight and the wheat would have sustained no damage. It was argued that the negligence which gave rise to the

(1) 3 App. Cas. 72.

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loss occurred before the wheat had been put on board; that the loss, therefore, was not due to the perils of the sea, but because the ship as loaded was not seaworthy and fit to carry the cargo; that the charterers had undertaken to supply, and there was an implied promise, on the part of the shipowners, that the vessel was fit for the purpose for which she had been employed.

The case was considered by the House of Lords, and Lord Cairns said:

I did not understand the learned counsel for the respondent to be able to say that that was not the relative position of the owner of the goods and the shipowners; that, on the one hand, the owner of the goods was not entitled to refuse to put his goods on board, and on the other hand, the owner of the ship did not incur liability by not having a ship fit to fulfil the engagement he had entered into. But my lords if this is so, it must be from this, and only from this, that in any contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle, I think, there can be no doubt that this would be the meaning of the contract, and it appears to me, that the question is really concluded by authority * * *

I will assume in favour of the respondent that everything which is mentioned between the words "not responsible" and the word "excepted" is meant to be matter in respect of which there is to be no liability on the part of the shipowner * * *

But it appears to me obvious that what is here referred to as a peril of the sea is, as described, something which happens on the transit, whether land or sea transit, and that of course does not commence until the ship leaves the port. Therefore, if it be the case, as I submit to your Lordships it is, that there is in the early part of the bill of lading an engagement that the ship shall be reasonably fit to perform the service which she undertakes, there is, in my opinion, nothing in the later part of the bill of lading which qualifies that engagement. * * * Consistently with this verdict, it might have been that there was no want of fastening the port-hole when the ship sailed, that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and, if so, probably that would be a matter which would be covered by the exception in the bill of lading as a case of negligence occurring during the transit of the

goods. Or it may be, that if the port-hole (still looking at this verdict alone) was unfastened at the time of the sailing of the ship, the port-hole may have been so situated and the access to the port-hole such as that, at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken.

Lord O'Hagan ;—

I shall only say that I entirely concur in the view that a ship-owner who accepts goods, which he is to deliver in good order and condition, impliedly contracts to perform the voyage in a ship which is seaworthy.

Lord Selborne ;—

It was suggested by Mr. Matthew, in his able argument, that the bill of lading covered risks, by way of exception, some of which might occur during the loading of the cargo on board and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear, on the face of the bill of lading, that it represents the goods as already shipped. It is given in duplicate, in the ordinary course, and I also find that it is expressly stated by the pursuers in their condescendence, that the wheat had been loaded on board the ship before, and on the day which is the date of the bill of lading. I, therefore, quite agree that all the perils which are excepted are perils subsequent to the loading of the wheat on board the ship, and that they are capable of and ought to receive a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken * * *

It was assumed by those learned lords, (in the court of session), and I should think by all the lords, that the contract of the shipowner was to provide "a seaworthy ship, tight, staunch and strong, well-manned and equipped for the carriage of the goods," and that if he did not do that, there was nothing, (I should so read the judgments), in the exception in the bill of lading, to relieve him from that liability.

Lord Blackburn ;—

I take it my lords to be quite clear both in England and in Scotland that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be

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stipulated which should prevent it, that the ship shall be fit for its purpose. * * *

In the case of *Kopitoff* v. *Wilson*, (1) where I had directed the jury that there was an obligation, I did certainly conceive the law to be that the shipowner in such a case warranted the fitness of the ship when she sailed, and not merely that he had loyally, honestly and *bonâ fide* endeavoured to make her fit. * * *

Now my lords, taking that to be so, it is settled that in a contract where there are excepted clauses, a contract to carry the goods except the perils of the seas, and except breakage and except leakage, it has been decided both in England and Scotland that there still remains a duty on the shipowner not merely to carry the goods, if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods and shall not be negligent. * * *

I think myself that the proper and right way of enunciating it would be, in such a case, to say if, owing to the negligence of the crew, the ship sinks while at sea, although the things perish by a peril of the sea, still inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. It matters not whether that would be the right mode of expressing it or not, that is clearly established. They may protect themselves against that, and they do so in many cases, by saying that these perils are to be excepted, whether caused by negligence of the ship's crew or the shipowner's servants or not. When they do so, of course that no longer applies. * * *

So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the sea, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.

Now my lords, I perfectly agree with what has been said by the noble and learned lords, who have already addressed you on the construction of this contract, that it does not provide at all for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated if they had pleased (I know no law that would hinder them) we will take the goods on board but we shall not be responsible at all though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship that is your lookout; you shall not have any remedy against us if we do. I say they might have so contracted, and perhaps in some cases they may actually so contract. I do not know. Or the shipowner might,

(1) 1 Q. B. D. 377.

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and that would have been more reasonable, have said, I will furnish a seaworthy ship, but I stipulate that although the ship is seaworthy, and although I have furnished it, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy ; and I will protect myself against any perils of the seas, though the loss should be produced in consequence of or caused by the unseaworthiness.

In the head note of this case (1) it is stated that :

In every contract for the conveyance of merchandise by sea, there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that the vessel is seaworthy.

In an action to recover damages for the loss of iron armour-plates, which were lost on board the defendants' ship, it appeared that the defendants, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bonâ fide* endeavour to make her fit, and left to them the questions : Was the vessel at the time of the sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season ? Secondly,—If, she was not in a fit state, was the loss that happened caused by that unfitness ?—

Held, that the direction was right, and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier.

Mr. Justice Field, who gave judgment in this case (1), said, at page 378 :—

Three armour plates of great weight, from 18 to 15 tons weight each, were delivered by the plaintiff to the defendants for shipment, and were by them shipped, on the 15th of September in the defendants' own steamship "*Walamo*" under a bill of lading containing many exceptions. The defendants themselves by their own servants stowed the ship. The armour plates were by them placed on the top of a quantity of railway iron and then secured there by wooden shores. There was a conflict of testimony as to whether this was or was not the proper mode of stowing them. It was not disputed that the steamship was in herself a good ship, but it was contended, on behalf of the plaintiff, that the mode of stowing these plates adopted by the

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defendants made her unseaworthy on this voyage. On getting out to sea she encountered bad weather, the wind being high and the sea rough, and she rolled heavily. There was conflicting evidence as to the degree of this bad weather, and the cause of this rolling; the plaintiff contending that the wind and sea were no more than at that season were to be expected, and that the rolling was owing to the improper stowage of the vessel; the defendants contending that there was an unusual sea that would have made any ship, however well stowed, roll. After the ship had been out at sea for some hours, one of the armour plates broke loose and went through the side of the ship, which in consequence went down in deep water, and was totally lost with all her cargo on board. The plaintiff's contention was that the breaking loose of the plate was because it was improperly stowed and secured; the defendants', that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. These contentions raised questions of fact for the jury. Leave was reserved at the close of the case to enter a non-suit if the exception in the bill of lading protected the defendants under the circumstances.

The case was thus left to the jury. The learned judge told the jury as a matter of law, and not as a question for them, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bonâ fide* endeavour to make her fit, and after explaining to the jury what "reasonably fit" meant with reference to a North Sea voyage, and the other facts in the case, left the following questions to the jury:

Was the vessel at the time of her sailing in a state as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt?

Second. If she was not in a fit state, was the loss that happened caused by that unfitness?

These questions were put in writing and handed to the jury, and on that paper the judge put in writing what he had previously stated in his summing up, that they were "to understand (in answering this second question) that though the disaster would not have happened had there not been considerable sea, yet it is to be considered as caused by the unfitness, if they, (the jury) think that the plates would not have got adrift when they did, had the stowage been such as to put the ship in a fit state. The jury answered the first question in the negative, and the second in the affirmative. * * * We hold that in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to war-

rant that the ship is good, and is in a condition to perform the voyage then about to be undertaken or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea, and other incidental risks to which she must of necessity be exposed in the course of the voyage * * *

And at page 382,—

Holding as we now do the result is that the merchant by his contract with the shipowner, having become entitled to have a ship to carry his goods, warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by the contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship.

In *Tattersall* v. *The National Steamship Company*, (1), the plaintiff shipped certain cattle on board the defendants' ship, for carriage from London to New York, under a bill of lading which provided:—

these animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners or their agents or servants are, as respects these animals, in no way responsible, either for their escape from the steamer, or for accidents, disease, or mortality, *and that, under no circumstances, shall they be held liable for more than five pounds for each of the animals.*

The head-note, after quoting from the bill of lading as above, goes on to say:—

The ship had, on a previous voyage, carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than £5 for each of the said cattle. *Held*, that the provision in the bill of lading, limiting liability to £5 for each of the cattle, did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle, which they had contracted to carry.

Mr. Justice Day, in giving judgment in this case, said:—

I take it to have been clearly established, if not previously, at any rate, since the case of *Steel* v. *State Line Steamship Co.* (2), that where

(1) 12 Q. B. D. 297. (2) 3 App. Cas. 72.

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there is a contract to carry goods in a ship, there is in the absence of any stipulation to the contrary an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purpose of such carriage. In this case, it is clear that the ship was not reasonably fit for the carriage of these cattle. There is therefore a breach of the implied engagement by the defendants, and the plaintiff having sustained damage in consequence must be entitled to recover the amount of such damage unless the defendants are protected by any express stipulation. * * *

If the goods had been damaged by any peril in the course of the voyage which might be incurred in a ship, originally fit for the purpose of the carriage of the goods, the case would have been wholly different, but here the goods were not damaged by any such perils, or by any peril which, in my opinion, was contemplated by the parties in framing the bill of lading. They were damaged simply because the defendants' servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation, and, therefore, I think our judgment upon the question submitted us must be for the plaintiff.

A. L. Smith J. said:—

I am of the same opinion. The real question is what is the true meaning of a very special bill of lading relating to the carriage of certain cattle and other animals; and whether under that bill of lading the plaintiff can recover more than £5 damages in respect to each animal. * * *

The terms of the bill of lading which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not in my opinion relate to anything before the commencement of the voyage * * *

I take the meaning of the whole to be that they are not to be liable for accidents, disease or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease or mortality so occasioned, they shall only be liable to the amount of £5. So construed, the stipulation in no way restricts or affects the primary obligation of shipowners to have the ship reasonably fit to receive the goods.

Blackburn J. thinks that

a shipowner warrants to the person who ships goods that the vessel is seaworthy.

Lord Tenterden, in Abbott on Shipping (1), states the law thus:—The first duty is to provide a vessel, tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage. For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body of the vessel there may be latent defects unknown to both. The French ordinance directs that if the merchant can prove that the vessel at the time of sailing was incapable of performing the voyage the master shall lose his freight and pay the merchant his damages and interest. Valin in his commentary on this article, cites an observation of Weytsen,—"that the punishment in this case ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that the ship is good and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages and interest." And he himself adds that this is so although before its departure the ship may have been visited according to the practice in France, and reported sufficient; because, on a visit, the exterior parts only of the vessel are surveyed so that secret faults cannot be discovered, "for which by consequence," says he, "the owner or master remains always responsible, and this more justly because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he must still answer being necessarily bound to furnish a ship good and capable of the voyage" (2).

In *Lyon* v. *Mells* (1) Lord Ellenborough in delivering the judgment of the court says:

(1) Abbott on Shipping (14 ed.) pp. 488, 489.

(2) 5 East 428 at p. 437.

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In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman *implied by law*, that his vessel is tight, and fit for the purpose, or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect on the part of the carrier without any actual proof and every reason of sound policy and public convenience requires that it should be so. The declaration here states such a promise to have been made by the defendant and it is proved by proving the nature of his employment; or in other words *the law* in such a case without proof *implies* it.

In *Gibson* v. *Small* (1), Baron Parke says:—

The shipowner contracts with every shipper of goods that he will make the ship seaworthy. The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence the usual course being that the assured can and may secure the seaworthiness of the ship, either directly if he is the owner or indirectly if he is the shipper, it is by no means unreasonable, to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it.

It appears from this that this most learned judge thought it clear that the undertaking of the shipowner to the shipper of goods, as to seaworthiness, is co-extensive with the undertaking of the shipper of the goods to his insurer.

In *Stanton* v. *Richardson* (2), and *Richardson* v. *Stanton* (2), the charter-party provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, or measurement goods. It likewise specified different rates of freight for dry and wet sugar. The usual words as to the vessel's being tight, staunch and strong, were not in the charter-party, but it was provided that the vessel should be a good risk for insurance, before and when receiving cargo, and that the master should provide a survey report declaring

(1) 4 H. L. Cas. 353. (2) L. R. 9 C. P. 390.

her to be so. The ship proceeded to her port of loading and having been surveyed was reported to be a first class risk. The cargo of wet sugar was provided for her by the charterers. A great deal of moisture drained from wet sugar, and when the cargo had been nearly all shipped it was found that there was an accumulation in the hold the result of drainage from the sugar, mixing with the ordinary leakage of the ship, which the pumps were unable to deal with, from the nature of the material, and which rendered the ship unseaworthy for the voyage if she proceeded in her then condition. The ship was perfectly seaworthy, except with respect to this particular cargo and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or provide any other cargo. Cross-actions were brought, the one by the shipowner against the charterer for refusing to provide a cargo and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her. At the trial the jury found that the cargo of sugar offered was a reasonable cargo to be offered; and the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not be made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not without new pumps and with a reasonable cargo of wet sugar on board have been seaworthy:

Held, affirming a decision in the court below, that the shipowner by the charter-party undertook that the ship should be fit for the carriage of a cargo of wet sugar and that the charterer was entitled to succeed in both actions. (1).

The question here is whether the contract entered into between the shipper and the shipowner either

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exempted the shipowners from all responsibility for having furnished an unseaworthy ship, and whether the limitation of time within which an action may be brought took away any right of action which the shipper may have had against the shipowner. I do not think the terms of the contract removed the responsibility which the shipowners incurred in furnishing an unseaworthy ship. So far as that feature of the contractual relations are concerned, I am of opinion that there is nothing in the contract which exempts the shipowners from liability for having furnished an unseaworthy vessel or which limits the right of action on this antecedent obligation to the period of the month. If the question of the unseaworthiness of the ship remains antecedent to and outside the contract between the shipper and the company, then I think it follows that the terms of limitation upon the time within which suit may be brought, though very broad, cannot be held to embrace anything outside of the contract, and as the question of seaworthiness remains untouched by it, the right of action arising from having furnished an unseaworthy ship is not a matter affected by the limitation clause of the contract and that this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Tupper, Peters & Gilmour.*