HERBERT E. VIPOND (PLAINTIFF)...APPELLANT;

AND

FURNESS, WITHY AND COMPANY (DEFENDANTS).....RESPONDENTS.

1916

*Nov. 9, 10.
*Dec. 30.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Carrier—Bill of lading—Perishable cargo—Climatic conditions—Exemption from liability for negligence—Parties.

A consignment of fruit was shipped during the winter season at a port in Italy for London, Eng., to be transhipped thence by another line to St. John, N.B. The bill of lading for the voyage to St. John provided that the fruit would be delivered there in the like good order and condition as when received subject to exceptions and stipulations including injury from "effects of climate" or from negligence. The ship stopped for some hours at Halifax, opened the hatches and discharged other cargo, and, either while at Halifax or before arriving at St. John, the whole consignment was frozen.

Held, affirming the judgment appealed from (Q.R. 25 K.B. 325), that the injury to the fruit was due to the effects of climate and the terms of the bill of lading relieved the shipowners from liability therefor even though they may have been guilty of negligence.

The consignee of the fruit, who alone brought action against the carriers, had a dormant partner entitled to share with him the profits of the transaction.

Held, per Fitzpatrick C.J., that the proper parties were not before the court.

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec(1), reversing the judgment of the Court of Review in favour of the plaintiff.

The material facts are stated in the above headnote.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) Q.R. 25 K.B. 325.

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The Chief Justice.

H. N. Chauvin K.C. and *E. G. Vipond K.C.* for the appellant.

A. Chase Casgrain K.C. for the respondents.

THE CHIEF JUSTICE.—This is an action brought to recover the value of a shipment of lemons which were frozen while in the possession of the respondents as common carriers.

When the lemons were delivered to the respondents at Liverpool in January it appears by the bill of lading that some of the original packages were in a very frail condition, stained and recoopered and consequently more liable to be affected by frost. Immediately a special marginal note was made on the bill of lading to the effect that the company would not be responsible for the condition of the goods on their arrival.

The ship sailed in the beginning of January, arrived at Halifax on the 16th of that month and at St. John, N.B., a few days afterwards. The lemons were frozen in transit. There is no satisfactory proof of the time at which the frost reached the goods. The bill of lading, however, contains clauses and stipulations which in terms cover the alleged cause of injury if we are to believe the port-warden who saw the goods when the hatches were first opened immediately on the arrival of the ship at Halifax. He says that several of the boxes of lemons which he then examined were frozen.

The bill of lading exempts from liability for loss or damage resulting from "effects of climate" and from "perils of navigation." The port-warden says that the lemons were carefully stowed in the proper place in the ship and there is no evidence of negligence except that given by Mr. Vipond who expresses the opinion

that lemons could not freeze when stowed between decks and he adds that the injury to the lemons must have been caused by leaving the hatches open after the arrival at Halifax. As against this we have the evidence of the port-warden who testifies to the condition in which he found the lemons on the arrival of the ship. There is in the bill of lading a negligence clause which extends the scope of the exception with respect to liability to acts of negligence of the company's servants or employees.

The law applicable to the facts of this case is very clearly stated by Lord Loreburn in *Nelson Line* v. *Nelson & Sons*(1), at pages 19 and 20:—

> The law imposes on ship-owners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of their duties, but unless they prove such a contract the duties remain; and such contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie S.S. Co.* v. *Borthwick*(2), at p. 96:—"An ambiguous document is no protection."

Here we have, as I have already said, in the bill of lading exceptions and stipulations which in terms cover the injurious effects of climate, insufficient ventilation and heat holds. There is further the special entry on the bill of lading that respondent was exempt from responsibility on account of the bad condition of the goods when received and in addition a negligence clause couched in singularly clear and unambiguous terms: The bill of lading says the Steamship Company shall not be responsible for the

> injurious effects of CLIMATE, insufficient ventilation or heat holds, risk of craft, of transhipment and of storage afloat or on shore * * * whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise FROM ANY ACT OR OMISSION, NEGLIGENCE, DEFAULT OR ERROR IN JUDGMENT of the master, pilot, whether compulsory or not, officers, mariners, engin-

(1) [1908] A.C. 16.

(2) [1905] A.C. 93.

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eers, refrigerating or otherwise, crew, stevedores, ship's husbands or managers, or other persons whatsoever whether on board said ship or on shore.

The binding effect of such a clause cannot be doubted. *Vide* Halsbury, vol. 26, p. 116, par. 197, and Fuzier-Herman, Répertoire, vbo. "Armateur," No. 178:—

178.—L'armateur peut donc, comme le commissionnaire de transport, et même à plus forte raison, stipuler l'affranchissement complet de la responsabilité des fautes du capitaine ou de l'équipage, "responsabilité purement civile et au second degré, en présence de laquelle subsiste la responsabilité engagée du garant direct, le capitaine." Cette doctrine développée, pour la première fois en 1869, par M. l'avocat général de Raynal a été, depuis, consacrée par de nombreuses décisions de la Cour de Cassation, et l'on peut dire que la jurisprudence est aujourd'hui définitivement fixée en ce sens.—V. les conclusions de M. de Raynal, sous. Cass., 20 janv. 1869, Messageries impériales (S. 69. 1. 101, P. 69, 247, D. 69. 1.94).

I would have also been prepared to dismiss the appeal on the ground that the proper parties are not before the court.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant by his accepting the first bill of lading given in Italy in order to secure a through rate, bound himself to accept such bill of lading (no matter how heavily laden with conditions or exceptions) as any intermediate carrier, for example a shipping company at London, in the course of through transportation contemplated, chose to impose.

The contract which thus came to be made at London is no doubt most onerous and at first blush somewhat ambiguous.

It was clearly intended thereby, that the carrier should run no risk, and the unfortunate shipper should, if possible, bear all the risks, of every kind that the long experience of generations of carriers have discovered might be run by them in the course of their

business. It seems clear from reading this wonderful instrument that so soon as a new risk had been discovered, some new words were introduced into the form of bills of lading used by these carriers. Thus there had grown as quaint and complex a document as legal knowledge of decided cases and mariners' experience could suggest, well suited to entrap the unwary shipper tempted to accept a through rate and shut his eyes to all implied therein.

The courts have occasionally found some of such-like bills of lading ambiguous, and been enabled thereby to do justice by holding the respective carriers using them liable. For although these English carriers may contract themselves out of almost any liability, yet they are told by English courts of justice that the attempt to do so must be in such clear and explicit terms that those they contract with should, if they took care, be enabled to understand that they were doing so, or at least so far as the particular risks involved in the contract were in question.

The railway companies in this country and shipping carriers in the United States have been restrained by legislation from carrying the law of contract so far as the respondent's bill of lading now in question has attempted.

I think in this case now presented for our consideration the respondent carrier has accomplished its purpose and so framed its contract that it is not possible for me to hold that the language is, when closely studied and carefully weighed, so ambiguous that I am unable to give it the meaning respondent stoutly contends for.

Moreover we must observe the following stipulations in the contract:—

> Any claim or dispute arising on this Bill of Lading shall, in the option of the Shipowner, be settled with the Agents of the Line in

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London according to British Law, with reference to which Law this Contract is made to the exclusion of proceedings in any other country. General average payable by cargo according to York Antwerp Rules, 1890.

In accepting this Bill of Lading, the Shipper or other Agent of the Owner of the Property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

Why in the face of a contract, presumably under the circumstances made in London, and so expressly declared to be made in reference to British law we should have such profuse references to another law, I am not able to understand. Doing so only confuses things. Had the action arisen out of something happening on our railways then our Canadian legislation or Canadian law might perhaps have been instructive even if not directly binding the parties.

As the case stands I see nothing for it but that the appeal should be dismissed with costs.

DUFF J.—The principal point made by counsel for the appellant is that the two bills of lading, that dated the 9th December, 1910, and that dated January 2nd, 1911, must be read together and that the effect of clause ten in the earlier bill of lading is to qualify the terms of the second bill in such a way as to limit the operation of the exceptions set forth in the second paragraph of it to cases in which the causes to which injury to the shipments are ascribed could not have been counteracted by proper diligence on the part of the carriers. This argument must, I think, be rejected because it appears to me to be very plain that paragraph 10 in the earlier bill of lading is a provision in favour of the owner and not of the shipper; and I think their full normal effect must be given to the words in the 2nd paragraph,

effects of climate * * * whether or not occasioned by * * * any act or omission, negligence, default or error of judgment of the

* * * persons * * * for whose acts they would otherwise be liable,

and that these words must relieve the respondents from any liability which they might otherwise have been subject to.

Some question was raised as to the law applicable. The second bill of lading contains a paragraph plainly indicating that the intention of the parties is that it is the law of England by which the construction and effect of this instrument are to be governed. Such a stipulation is conclusive both under the law of England; *Hamlyn & Co.* v. *Talisker Distillery*(1); and under that of Quebec; Art. 8 C.C.; Savigny (Guthrie's translation, 2 ed.) secs. 369, 370, pages 194 and 197; sec. 372, page 221 (note A.), page 227; *Royal Guardians* v. *Clark*(2), at page 251; Lafleur's Conflict of Laws, at page 149.

The appeal should be dismissed with costs.

ANGLIN J.—Assuming that it is fully established that the freezing of the appellant's shipment of lemons was due to negligence of the respondents' servants, liability for such negligence is, in my opinion, clearly excluded by an express provision of the bill of lading under which the respondents carried this cargo. It is conceded, and in view of the terms of the original bill of lading with The General Steam Navigation Company it could not well have been contended otherwise, that the latter company had authority to tranship the appellant's goods at London, and to accept on his behalf from the forwarding steamship company a bill of lading in its customary form. It was in pursuance of this authority that the bill of lading in question was

(1) [1894] A.C. 202.

(2) 49 Can. S.C.R. 229.

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taken from the respondents and it is binding upon the appellant. It is not suggested that it is not in the respondents' usual form or that its acceptance was procured by any imposition, misrepresentation or concealment.

The question presented is solely one of construction. There is no ambiguity or inconsistency whatever in the terms of the bill of lading. I am unable to agree with the appellant's contention that it incorporates the provisions of the bill of lading issued by the original shippers, The General Steam Navigation Company. The clause relied upon for that purpose, viz.:—

> Through goods are also subject to all conditions of the company or companies which assist in their conveyance,

in my opinion, refers solely to conditions of any company or companies which might take over the goods from the respondents for the purpose of forwarding them to destination. That this is the meaning of the clause invoked is, I think, sufficiently clear from its own terms. But if not, it is made so by the fact that it immediately follows another clause which stipulates that:—

> In arranging for through carriage the liability of the Furness Line is to be that of forwarding agents only.

No sufficient ground has been advanced for relieving the appellant from the clear and explicit provision of the bill of lading taken on his behalf.

For the foregoing reasons as well as those assigned by Mr. Justice Cross in the Court of King's Bench I am of the opinion that under the special terms of their bill of lading the respondents were exempt from liability for injury to the appellant's cargo due to climatic conditions although that injury was occasioned by negligence of the respondents' servants.

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BRODEUR J.—The appellant claims damages for lemons which were frozen in transit between London and St. John, N.B., on a ship belonging to the respondents.

The respondents contend that they are not responsible for the condition of those goods because by the bill of lading they were exempted from liability for damages caused by frost.

Those goods were shipped from Italy to Montreal on a through bill of lading issued at Milazzo, Italy, by the General Steam Navigation Company. It was provided in the bill of lading issued by the latter company that those goods could be transhipped in England. When they reached England, the goods were handed over to the respondent company for the purpose of being transported to St. John, N.B.

One of the conditions of the new bill of lading was that the respondent company should not be responsible for injurious effects of climate whether or not

> the loss or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, etc.

It appears that when the ship came near Newfoundland they encountered a pretty severe frost and it is likely that the lemons got frozen at that time though the goods seem to have been stowed at the place where they should have been. It is in evidence also that when the ship reached Halifax the hatches were open for the purpose of discharging the cargo and that the lemons might then have got frozen.

However, the respondents claim that according to their contract they could not be held liable for negligence, default or error. Their bill of lading was

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accepted without any objection and became the contract determining the rights and obligations of the parties. It was provided also by that bill of lading that it would be interpreted according to the laws of England and it has been proved in the case that under the provisions of that law that bill of lading with such a clause was good and valid.

But it was contended on the part of the appellant that the new bill of lading issued in London by the respondent company was subject to the conditions and clauses of the original bill of lading. It appears in the original bill of lading issued in Italy that the vessel owners undertook to exercise care and diligence in the carrying of goods and that the latter clause would then be contrary to the provisions of the second bill of lading issued by the respondent company.

I am unable to find in the latter bill of lading any provisions by which all the conditions and obligations mentioned in the original bill of lading would affect the respondent company. It was even stipulated in the original bill of lading that in the event of transhipment the clauses, conditions and restrictions of the ship or other conveyance by which the goods are forwarded to destination were included in the original bill of lading in addition to the conditions therein stipulated.

The contract then could be modified by any new ship owner; and as in the present case the respondent company undertook to carry the goods but with the condition that it should not be responsible for the injurious effect of climate even if the loss arose from its own negligence or the negligence of its employees, it constituted a contract which unfortunately in the circumstances of the case would not give any relief to the appellant. Those conditions might be very unjust;

but they are the stipulations accepted by the parties and the courts are bound to give effect to them.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Vipond & Vipond.*

Solicitors for the respondents: *Casgrain, Mitchell, McDougall & Creelman.*