SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

JELLICOE AND OTHERS (PLAINTIFFS) *v.* THE BRITISH INDIA STEAM NAVIGATION CO. (DEFENDANTS.)*

1884 *February* 22.

Bill of Lading—Exemption from damage occasioned by neglect of Company's servants—Suit to recover goods destroyed.

The plaintiff shipped two plate glass show cases from Calcutta to Rangoon by a steamer of the defendant Company, and signed a bill of lading which contained the following clause: "Carried and delivered subject to the conditions after mentioned..................loss or damage for any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, &c., excepted." In landing the two cases, one of them was entirely destroyed owing to the carelessness of the Company's servants. The plaintiff sued the Company, setting out that the damage was occasioned by the negligence of the Company's servants. The defendant Company (who were not subject to the Carriers' Act) relied on the abovementioned clause in their bill of lading. *Held*, that the defendant Company were protected by their bill of lading, the terms of which had been accepted by the plaintiff.

THIS was a reference to the High Court under s. 617 of Act XIV of 1882. The facts of the case are fully set out in the following order of reference of the Judge of the Small Cause Court:—

"'The plaintiffs' cause of action, as set out in their plaint, is in these terms:—

"That they despatched on the 31st March 1883 two plate glass show cases from Calcutta to Rangoon by the S.S. *Chanda* belonging to the defendant Company on payment of freight.

"'That the first plaintiff was personally present at Rangoon to receive delivery of the said cases to whom the said cases were consigned.

"'That the officers of the said vessel in landing the cases did so in such a careless and negligent manner as to completely smash one of them.

"'The value of the case so smashed and damaged is Rs. 500, for which sum with all costs the plaintiffs pray for judgment.'

* Reference from the Calcutta Court of Small Causes by R. S. T. MacEwen, Esq., one of the Judges of that Court.

"The defendant Company put in the following defences to the action:—

"'(1.) Deny carelessness and negligence as alleged in the plaint. (2.) The cases were landed in the same good order and condition that they were received in, and the Company are not responsible for the contents. (3.) Company not responsible for damage or breakage or any other consequence from insufficiency of package. (4.) Under the contract of carriage the Company's liability ceased as soon as the packages were free of the ship's tackle, after which they are not responsible for any loss or damage, howsoever caused. (5.) Company not responsible for any loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company. (6.) Damages, if any, excessive.'

"On this statement of the defence I directed the attention of the plaintiffs' pleader to the third para. of the plaint, which sets out that the damage was caused by the carelessness and negligence of the ship's officers, and to the fifth plea of the defendants, and the exemptions in the bill of lading. The clause, so far as it is necessary to set it out, is in these terms: '*Carried and delivered subject to the conditions after-mentioned. Accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, &c., excepted.*'

"In reply the plaintiffs' pleader said that his case certainly was that the damage had been caused by the neglect and default of the Steam Company's officers and servants, and that the evidence which he would offer would support and prove the allegation contained in the third para. of the plaint, and that that was his case.

"The attorney for the defendant Company thereupon asked me to hold that the clause in the bill of lading above set out was a sufficient answer to the plaintiffs' suit, which ought to be dismissed.

"The plaintiffs' pleader applied that the question might be submitted for the opinion of the High Court. As his witnesses would prove what he alleged, it would be a useless proceeding going into evidence if in the end the result would be to prove the defence set up by the defendants.

"In this view I concurred, and eventually it was agreed between the pleader and attorney of the parties with my consent that I should hear them on the question of law, and that the plaintiffs should submit a statement of the facts in writing, which for the purpose of this reference is to be taken as the finding on the facts. It will be noticed that the defendant Company denies the carelessness and negligence alleged, so that their defence amounts practically to a demurrer to the case set up by the plaintiffs.

"The plaintiffs' statement of facts is shortly as follows :—

"'W. E. Jellicoe, one of the plaintiffs, states that on the arrival of the steamer at Rangoon he went on board and saw the second officer who was in charge of the after-hatch in which the cases were stowed, and obtained from him a promise that he would not land the cases until he (Mr. Jellicoe) returned to superintend the process; that on returning to the steamer after a short absence he found that the cases had been landed and that one of them had been damaged; that he remonstrated with the second officer about his carelessness and the accident; that the officer expressed regret for not having kept his promise, but excused himself on the plea that he did not recognise them until it was too late, and said they were handled like a baby; that the durwan left on board contradicted the statement and said he had tried to prevent the accident, but the officer replied: 'Who is going to delay the work and find special coolies for you, *Chalao*;' that thereupon the coolies heaved the case over and smashed it; that the two cases were put into one sling and lifted and were lowered on the wharf; on opening the sling the ship's coolies employed to clear it heaved the top case over which fell upside down upon the wharf, from the height of the lower case, the fall being accompanied by a crash of breaking glass; the lower case was then lifted and carried away properly and was uninjured; that the landing was carried out under the immediate superintendence and direction of the second officer and in his presence. The plaintiffs therefore say that the damage was caused by the negligence and default of the ship's officer in landing the cases.'

"It is hardly necessary to say that the defendant Company do not come within the provisions of the Indian Carriers' Act, III of 1865,

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and that the recent decision of the High Court in *Mothoora Kanto Shaw* v. *The India General Steam Navigation Company Limited* (1) is not an authority in favor of the plaintiff's contentions in this case. The main argument for the plaintiffs is, that the clause in the bill of lading on which the defendant Company rely should not be upheld by the Courts on the ground that it is contrary to public policy. The policy of the English law, in so far as it applies to common carriers, is very fully set out in the early part of the judgment of the Chief Justice in the case just mentioned, and the effect of the Indian Contract Act, s. 152, is also explained. Upon grounds somewhat similar to those set forth by the Chief Justice in explaining the reasons why common carriers under English law were held, within certain limits, to be insurers of the goods they carried, it was argued that the defendant Company could not get rid of its liability under s. 152 of the Contract Act by a clause in the bill of lading such as that now set up. But this argument overlooks not only a series of decisions bearing upon the point, and to which reference will presently be made, but certain observations of the Chief Justice in the case just mentioned and which touch on this very point. Referring to s. 152 of the Contract Act and the Bombay case the Chief Justice says: "If the Bombay Court is right any contract or usage of 'trade which is inconsistent with the general law laid down by the Contract Act is invalid'—(and here it is argued that the clause in the bill of lading is inconsistent with the English law relating to common carriers and to the provisions of s. 151 of the Contract Act). 'Now it seems to me impossible to suppose that this was intended. The Act only lays down certain general rules which, *in the absence of any special contract or usage to the contrary*, are binding on contracting parties. But it could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or customs which may prevail in any particular trade or business.' That it seems to me is the whole point, and it is fully answered by the observations of the Chief Justice in this case. Parties are always free to make their own contracts, and if they have made a special contract they are bound by it.

"The only case cited by the plaintiffs' pleader in his argument

(1) I. L. R. 10 Calc, 166.

was *Phillips* v. *Clark* (1), and it was contended, on the judgment of Cockburn, C.J., that as in that case, so in this, the contract is susceptible of two constructions, and that the more reasonable one should be placed upon it, *viz.*, that it was not to be supposed that the plaintiffs intended that the defendant Company should be exempted from the duty of taking ordinary care of the goods,—the care required by s. 151 of the Contract Act, but that it was only meant to exempt them from ordinary common law liability, or here from liability when they had exercised the care imposed by s. 151. In other words that the clause of the bill of lading should be taken only in so far as it was consistent with the section of the Contract Act, and that it could never have been intended to relieve the Company from the responsibility for damage resulting from the direct negligence of their own officers and servants.

"It seems to me the distinction is plain enough. On the bill of lading in *Phillips* v. *Clark* (1) the owner was not to be accountable for 'leakage or breakage,' *i.e.* leakage or breakage caused in the ordinary course of shipment and landing or from unpreventible causes during the voyage, 'the result of mere accident where no blame was imputable to the master and for which, but for the stipulation in question, he would still have been liable,' in the words of Crowder, J.; but there was nothing in that contract which exempted the owner generally from the negligence of his officers or servants, and Chief Justice Cockburn in his judgment admits that 'a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms.' *Grill* v. *The General Iron Screw Collier Company* (2) and *The Duero* (3) support this view. In the last case it was said a shipowner was not in the category of a common carrier. Sir R. Phillimore said: 'Assuming, for the sake of argument, that the shipowner was in the category of a common carrier still it would be competent to him, under the authorities, to have protected himself from liability by such a bill of lading as this

(1) 2 C. B. N. S. 156. (2) 37 L. R. 3 C. P. 205.
(3) L. R. 2 Admr. 393.

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at all events, if not to have protected himself from the negligence of the servants whom he employed.' It must be observed that it must be presumed that this bill of lading was accepted deliberately by the plaintiffs, though it was, of course, competent to them to have refused so to accept it. The contract does not appear to me in itself to have been unreasonable. There is also a decision of the High Court of Bombay, *Graham* v. *Hill* (1), in which it was held that as no negligence had been proved the master was not protected by the exception 'damage from negligence.' The converse of course holding good that if he had proved negligence he would have been protected.

"It was stated in the argument for the defendants that the High Court of Calcutta, in the case of *Nund Coomar Dutt* v. *The P. and O. Co.* (an unreported case) decided by Mr. Justice Phear on 14th January 1876, had also held to the like effect on a similar clause in the bill of lading.

"It appears to me to be beyond all doubt settled that a ship-owner may limit his liability in respect to lo s of or damage to goods which he contracts to carry, and that the Court will not go into the reasonableness or unreasonableness of the contract.

"The plaintiffs have submitted ten questions, but it appears to me that the answer to the second question is practically an answer to the whole of them. The answer to that question, in my opinion, is that the defendants can, by a special contract, such as this bill of lading, get rid of their liability. The other questions only set out the arguments which were advanced for the plaintiffs in support of their contentions.

"With regard to the third and fourth questions it may be observed that the practice with regard to the granting of bills of lading was not in dispute, but the mate's receipt states that packages are received 'subject to the conditions in Company's form of bill of lading to be granted for these goods.' This notice is sufficient to put a shipper on enquiry, and the plaintiffs admitted that they took no exception to the terms of the bill of lading when it reached them. It must, therefore, I take it in the words of Sir R. Phillimore, be presumed that 'the bill of lading was accepted deliberately.'

(1) 10 Bom. H. C. 60.

"On the facts as set out and relied on by the plaintiffs I was of opinion that the defendant Company was entitled to the judgment of the Court, and that the suit should be dismissed, and I have accordingly dismissed it subject to the opinion of the High Court on the question, whether on the facts as stated by the plaintiffs the defendant Company is not exempted from the damage caused by the neglect and default of the officer of the ship and the other servants of the Company in landing the show case.

"It may be that if the plaintiffs had framed their cause of action differently and had *not* alleged and undertaken to prove carelessness and negligence on the part of the servants of the defendants but had thrown upon them the onus and odium of proving negligence of their own officer and servants as an answer to the claim, the result might have been different or if the officer had been sued instead of the Company. But when the plaintiffs undertake to prove the negligence of the defendant's servants they in effect establish the Company's defence. In the Bombay case the defendant failed to prove his own negligence; he failed to show that he was a person not to be trusted with the carriage of goods, and as a consequence he had to pay. This may seem an extraordinary and not altogether satisfactory state of things, but it would appear to be the law on the cases cited. Mr. Leggett in his work on Bills of Lading, p. 245, points out that there is something to be said for the ship-owners' view and in favour of the decisions which have been quoted. For the ship-owners it was said: We find sea-worthy vessels with certificated masters, mates and engineers, we do our best to secure immunity from sea-damage, but if our servants act negligently and injure our interests, and at the same time inflict loss upon the goods on board, the fault does not rest with us, and we will not convey merchandise by our ships unless we are exonerated from all liability for the acts of the masters and crew over whom, when they leave port, we have no further control.' And the learned author goes on to point out that 'the question was then narrowed to that of a contract for the carriage of goods under conditional terms. The merchant was not compelled to forward nor the ship-owner to carry the goods; but if the former consented to the terms of

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the latter, then the agreement rested on the limitation of liability as expressed in the bills of lading. A ship-owner insures his vessel against perils of the sea, but the destruction inflicted by winds and the waves does not include the at times equally disastrous losses brought by the carelessness or ignorance of his servants.'

"The costs of the reference have been deposited by the plaintiffs."

Mr. *Barrow* appeared for the defendant Company.

No one appeared for the plaintiffs.

The opinion of the Court (GARTH, C.J., and CUNNINGHAM, J.) was as follows:—

The Small Cause Court Judge having found as a fact that the plaintiffs in this case accepted the terms of the bill of lading, we think that we cannot do otherwise than confirm his judgment.

The defendants of course are not subject to the provisions of the Carriers Act; and they have a right to impose upon shippers any terms, however unreasonable, which the latter think proper to accept. They may thus free themselves from the consequences of their own negligence or default, however gross or wilful.

So long as the law allows one class of carriers to insist upon contracts of this kind, and the public submit to have their goods carried upon such terms, Courts of Justice are quite powerless to protect them.

Judgment affirmed.

Attorneys for the defendants: Messrs. *Barrow & Orr*.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

1884 *February* 12.

PANYE CHUNDER SIRCAR AND OTHERS (PLAINTIFFS) *v.* HURCHUNDER CHOWDHRY AND ANOTHER (DEFENDANTS.)*

Right of Suit—Sale in Execution of Decree—Right of purchaser under previous private sale—Notice of transfer—Landlord and Tenant—Bengal Act VIII of 1869, *s.* 26.

The plaintiff purchased under a private conveyance from the registered tenant of a permanent transferable interest in land such as is described in s. 26 of Bengal Act VIII of 1869, but no notice of the transfer was

* Appeal from Appellate Decree No. 1127 of 1882, against the decree of J. M. Kirkwood, Esq., Judge of Mymensingh, dated the 31st March 1882, affirming the decree of Baboo Jogendra Nath Mukherji, Munsiff of Ghosegaon, dated the 28th February 1881.