ORIGINAL CIVIL

Before Mr. Justice Rangnekar.

BURJOR F. R. JOSHI *v.* ELLERMAN CITY LINES, LTD.*

1927
July 1

Bill of lading—Shipowners' liability for damage to goods through unseaworthiness of vessel—Validity of condition requiring notice of damage in particular time.

Where the loss complained of by a charterer is due to unseaworthiness, then the shipowners are not entitled to claim the benefit of any of the special clauses in the charterparty or the bill of lading, and any conditions as to notifying the damage or stipulating that notice of damage should be given within a particular time or of a similar nature, cannot defeat the right of action, unless there is in the bill of lading or charterparty an express clause as to unseaworthiness.

Where goods are shipped on board a ship there is an implied condition of seaworthiness which forms the basis of the contract, and where there is a breach of that condition and loss arises on that breach the shipowners cannot rely upon the special conditions of the contract. Where, however, the charterparty or the bill of lading contains an express condition as to unseaworthiness, this express condition will be taken to override the implied condition.

SUIT to recover damages.

On August 11, 1922, one Fioriula De Luca caused about 280 tons of potatoes to be shipped at Naples for Bombay on board the defendant's ship "The City of Calcutta." The master of the ship received the same to be carried to Bombay upon the terms stated in the bill of lading which he signed. In or about the end of August 1922 the bill of lading was endorsed to the plaintiff. The goods arrived in Bombay on or about August 28, 1922, when it was found that nearly 80 per cent. of the goods were totally damaged and unfit for any use.

The plaintiff filed the present suit to recover Rs. 66,360 as damages from the defendants alleging that the damage was due to the fact that the said ship was not fit to carry such cargo and the defendants failed to take proper and reasonable care of the goods. The defendants contended that the suit was bad for want of

*O. C. J. Suit No. 3550 of 1923.

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notice in writing as provided in clause 14 of the bill of lading. Clause 14 *inter alia* provided that " the shipowners and their agents shall not be responsible for any damage where notice in writing of the claim is not given before removal of the goods." They also denied that the ship was not fit to carry the cargo in question, and that they failed to take proper and reasonable care of the goods.

Engineer, for the plaintiff.

Daphtary, for the defendants.

RANGNEKAR, J. :—The plaintiff is an endorsee of a bill of lading dated August 1922, and has filed this suit for damages against the defendants who are the owners of the steamer on which the goods comprised in the said bill of lading were shipped. The plaintiff's case is that the damage was due to the fact that the ship was not fit to carry the particular cargo in question, and the defendants failed to take proper care of the said goods. By an order made by the learned Chamber Judge two preliminary issues have been set down for trial. The issues are as follows :—

(1) Whether notice in writing of his claim subject to this suit is given to the defendants or their agents by the plaintiff referred to in paragraph 6 of the plaint as required by clause 14 of the bill of lading ?

(2) If the issue (1) is answered in the negative, whether the plaintiff is entitled to maintain the suit ?

The plaintiff contends that notice of his claim in writing has been given and that is denied by the defendants. [His Lordship examined the evidence led on issue No. 1; and was of opinion that the plaintiff had failed to prove that he had given a notice in writing of the loss to the defendant. The issue was therefore found in the negative.]

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The second issue is whether if no notice was given as required by the bill of lading, the suit is maintainable. If clause 14 of the bill of lading applies, the answer of course would be in the negative. But the auhtorities show that where the loss complained of by a charterer is due to unseaworthiness, then the shipowners are not entitled to claim the benefit of any of the special clauses in the charterparty or the bill of lading, and any conditions as to notifying the damage or stipulating that notice of damage should be given within a particular time or of a similar nature, cannot defeat the right of action, unless there is in the bill of lading or charterparty an express clause as to unseaworthiness. Where goods are shipped on board a ship there is an implied condition of seaworthiness which forms the basis of the contract, and where there is a breach of that condition and loss arises on that breach the shipowners cannot rely upon the special conditions of the contract. But of course where the charterparty or the bill of lading contains express condition as to unseaworthiness, this express condition will be taken to override the implied condition. This seems to me to be the principle deducible from the authorities.

In *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.*[1] a ship was chartered for a voyage from Rasario to Hull with a full cargo of linseed. The charterparty provided for the reference of all disputes under a contract to the final arbitrament of two arbitrators, one to be appointed by each of the parties, with power to appoint an umpire, and clause 39, which referred to this, further provided " any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and

[1] [1922] 2 A. C. 250.

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absolutely barred." In an action against the shipowners in respect of damage alleged to have been occasioned to a part of the cargo during the voyage by reason of the unseaworthiness of the ship at the commencement of the voyage, the shipowners pleaded that the charterers had failed to act in accordance with clause 39, and that therefore the action was not maintainable. It was held by the House of Lords that inasmuch as the claim in the action was founded upon a breach of the implied condition of seaworthiness, there being in the charterparty no express provision relating to unseaworthiness, the shipowners were not entitled to the benefit of the term in the clause restricting the time within which the action could be brought, and that consequently the claim was not barred by the arbitration clause. The correct position is put by Lord Sumner (p. 260) :—

"By the charter the shipowner undertakes to load and carry the cargo and to deliver it at the destination for a freight payable (except as to advances) on right and true delivery. The undertaking is, of course, subject to numerous exceptions of a usual character. Unseaworthiness itself is nowhere mentioned, nor is liability for the consequences of it excepted under any other term. The fact that the words in clause 39 which are relied on—namely, 'any claim must be made in writing and claimants' arbitrator appointed within three months'—are in quite general terms, does not avail, for such mere generality has long been held, in connection with specific excepted perils, not to be inconsistent with liability for the particular clause of loss—namely, unseaworthiness.

The shipowners' general liability in respect of damage due to the ship's unseaworthiness, accordingly, remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case.

This principle of construction has not been confined to excepted causes of loss; it has been extended to provisions which limit the amount to be paid in satisfaction of the loss, for these equally, though in another way, limit *pro tanto* the shipowners' liability. There is no difference in principle between words which save them from having to pay at all and words which save them from paying as much as they would otherwise have had to pay. In *Tattersall* v. *National Steamship Company*[1] the words 'under no circumstances shall they be held liable for more than 5*l*. for each of the animals' were held inapplicable to

(1) (1884) 12 Q. B. D. 297.

protect the shipowners from liability for the full value of animals lost by the ship's unseaworthiness, in spite of the apparently unrestricted generality of the words 'under no circumstances,' and in spite of the fact that they recognised liability up to 5*l*. a head, and did not purport to exclude it altogether. That such words do not avail, where loss is due to unseaworthiness, was virtually recognised in *Baxter's Leather Company* v. *Royal Mail Steam Packet Company*[1] and held in *Wiener* v. *Wilsons and Furness-Leyland Line*[2]. Bailhache J. expressly so held in *Bank of Australasia* v. *Clan Line Steamers, Limited*,[3] and the Court of Appeal in reversing his decision recognised that it would have been correct but for a circumstance which he had overlooked—namely, that unseaworthiness was the subject of an express provision and therefore the underlying or implied provision with regard to it was ousted.

My Lords, in principle I think that clause 39, in so far as the parties, as it was said, provided their own statute of limitations, is unavailable to the shipowners as an answer to a claim for damage caused by unseaworthiness. It does not make any difference that the time allowed is considerable or the formality to be complied with not unreasonable, or that the clause, being a mutual clause, might apply to protect the charterer in certain events, for example, against a claim for demurrage. The effect is not that the clause is deleted from the charter altogether. The shipowners gain no advantage against the charterer from their neglect to make the ship seaworthy; they merely cannot pray the clause in aid in that case. Nor are the words in question inapplicable because they occur in a mutual arbitration clause and are partly procedural. Even if they are read as meaning 'I will be liable for three months and no longer and then only in an arbitration'—they still remain words, which except out of the shipowners' general liability certain losses—namely, losses the assertion of which is belated."

In *Tattersall* v. *National Steamship Company*[4] some cattle had been shipped on board the defendants' ship for carriage from London to New York under a bill of lading which contained a clause limiting liability to 5*l*. a head. It was argued that the plaintiff could not recover the damage at a greater rate than 5*l*. a head by reason of the express stipulation in the bill of lading. It was held that there being no express contract as to unseaworthiness, the implied contract applied. After pointing out that in such a contract 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 purposes of such carriage, Day J. said (p. 301) :—

"I have considered the terms of the bill of lading, and, as I construe it, its stipulations which have been relied upon all relate to the carriage of the goods

(1) [1908] 2 K. B. 626 at p. 632.
(2) (1910) 15 Com. Cas. 294.
(3) [1916] 1 K. B. 39 at p. 40.
(4) (1884) 12 Q. B. D. 297.

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on the voyage, and do not in any way affect the liability for not providing a ship fit for their reception. 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 peril, 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."

In *Bank of Australasia* v. *Clan Line Steamers, Limited*,[1] *Tattersall's case*[2] as well as *Morris and Morris* v. *The Oceanic Steamship Company (Limited)*,[3] were considered by the learned Judges. In that case clause 12 of the bill of lading ran as follows.—

"No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there."

Clause 14 ran thus :—

"The shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage. But any latent defect in hull, machinery, equipment or fittings shall not be considered unfitness or unseaworthiness; provided the same do not result from want of due diligence of the shipowner or of the ship's husband or manager."

Bailhache J. having found that the ship was unseaworthy and that damage was caused by unseaworthiness, held that clause 12 had no operation where the damage was caused by unseaworthiness. Said the learned Judge (p. 42) :—

"The law, as I understand it, is that when goods are damaged by unseaworthiness, unless there is an exception of unseaworthiness in the charterparty or the bill of lading, the shipowner will be liable; the ordinary exceptions and the ordinary conditions and other clauses in the bill of lading do not apply for the reason that it is assumed that the contract between the shipowner and the shipper of the goods or the charterer, as the case may be, is a contract proceeding on the basis that the charterer says to the shipowner 'if you will supply me with a seaworthy ship I will contract with you on the terms of your bill of lading'; and the bill of lading contract is dependent upon the provision by the shipowner of a seaworthy ship."

He, therefore, gave judgment for the plaintiff. In appeal all the learned Lord Justices accepted the principle, but as pointed out by Lord Sumner in *Atlantic*

(1) [1916] 1 K. B. 39 at p. 40. (2) (1884) 12 Q. B. D. 297.
(3) (1900) 16 T. L. R. 533.

Shipping & Trading Co., v. *Louis Dreyfus & Co.*,[1] they held that the special clause 12 did apply as the bill of lading *in fact* was subject to the express condition making the shipowner liable for damage resulting from unseaworthiness. This was clause 14 which curiously enough was not noticed at the trial of the action. The principle in *Tattersall's case*[2] was approved of and *Morris case*[3] which was supposed to be in conflict was explained. The observations of Pickford, L. J., are important. Said the learned Lord Justice (p. 51) :—

" To my mind what you have to do in every one of these cases is to look at what the contract before you means, what the bill of lading upon which the action is brought means. There is nothing in law to prevent a shipowner from putting an exception into his bill of lading which will relieve him from all the consequences of unseaworthiness wherever and whenever it exists. The only question in each case is whether he has done it or not; you have to look at the particular document before you, and the cases which have been decided are only of assistance so far as they lay down principles, if they do lay down principles, which ought to be applied to the construction of the document. Now the two cases which are always cited on the one side and on the other in these matters are the cases of *Tattersall* v. *National Steamship Company*[2] and *Morris and Morris* v. *The Oceanic Steam Navigation Company (Limited)*[3]. They do not, either of them, seem to me to help very much in the construction of this document. I agree that really what the decision in *Tattersall* v. *National Steamship Co.*[2] comes to is this : that upon that contract, which the Court had before it in that case, the exceptions in the bill of lading only applied to the contract of carriage, to the carriage of goods, and therefore they did not affect the obligation to provide a seaworthy ship, which was different from and antecedent to the obligations of the contract of carriage. The case of *Morris* v. *Oceanic Steamship Co.*[3] certainly presents difficulties when you take the facts of the contract with the construction which the learned judge seemed to put upon them. There were no express words there which imposed liability for unseaworthiness, and all that there was in the bill of lading or the charter (I forget which it was) which related to unseaworthiness was an exception from liability in respect of unseaworthiness provided due care had been taken to avoid it. That was an exception and nothing more, and when it was shown that due care had not been taken, and therefore the condition upon which the exception rested was not fulfilled, I should have thought that the result was what was expressed in the words of Fletcher Moulton, L. J. in the case of *James Nelson & Sons, Limited* v. *Nelson (Liverpool), Limited (No. 2)*[4]; ' The jury have found '—in the case of *Morris* v. *Oceanic Steamship Co.*[3] it was not a jury, but a Judge—' that in this case all reasonable means to that end had not been taken. The

[1] [1922] 2 A. C. 250.
[2] (1884) 12 Q. B. D. 297.
[3] (1900) 16 T. L. R. 533.
[4] [1907] 1 K. B. 769 at p. 781.

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exception therefore disappears, and the obligation of initial seaworthiness remains.' And again : ' Here the jury have found that the condition was not in fact satisfied, and the case is therefore reduced to one which is subject to the ordinary obligation to supply a seaworthy ship.' I should certainly have thought that that was the true view to take of the position of things in *Morris* v. *Oceanic Steamship Co.*(1). But it seems to me quite clear that the learned judge who decided it did not take that view. He took the view that there was in that contract an express provision that the shipowners should exercise due diligence to avoid unseaworthiness. I cannot see anything of the kind. There was a provision that they should not escape liability for unseaworthiness unless they exercised due diligence, but I cannot see that that made a contract that they should exercise due diligence. They might not do so. Then they would remain liable. However, the learned judge so construed it, and so construing it he came to the conclusion that the exception, which was one of value in that case, applied to that express contract which he thought to exist in the bill of lading. That was the explanation of it given by Hamilton J. in the case which has already been referred to of *Wiener* v. *Wilsons and Furness-Leyland Line.*(2) ''

With regard to the clause in *Morris' case*,(1) which was similar to the clause in the bill of lading in the present suit, Buckley J. made the following observations (p. 46) :—

'' It has been supposed that *Morris* v. *Oceanic Steamship Co.*(1) contains something which is in conflict with *Tattersall's Case.*(3) In *Morris* v. *Oceanic Steamship Co.*(1) the relevant clause was : ' The carrier shall not be liable for loss or damage occasioned by any latent defect in hull, machinery or appurtenances or unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy.' So there was there an express contract as to unseaworthiness in an event—provided they had exercised due diligence. They had not exercised due diligence. There was, therefore, a contract as to unseaworthiness in an event which had not happened. It may be said that under those circumstances there was no contract as to unseaworthiness. If the case be regarded from that point of view, then it was the same as *Tattersall's Case,*(3) in which there was no contract as to unseaworthiness. In *Morris* v. *Oceanic Steamship Co.*(1) Mathew J. held that the clause of limitation of liability did apply; but of course if the case be regarded from that point of view, then, as Hamilton J. pointed out in *Wiener* v. *Wilsons Line,*(2) the two cases are in conflict. There is no question about that. But to my mind that is not the decision. I do not see any conflict, for the reasons I am about to state. It will be remembered that the provision was that the carrier should not be liable for unseaworthiness in an event. There was no obligation that he should exercise due diligence to make the vessel seaworthy; there was only a provision that, if he did not do that act, then a consequence should ensue, but there was no contractual liability to make the vessel seaworthy. If he used due diligence, he was

(1) (1900) 16 T. L. R. 533. (2) (1910) 15 Com. Cas. 294.
(3) (1884) 12 Q. B. D. 297.

relieved from liability for unseaworthiness. There was no obligation on his part to use due diligence. If he did not use it, the clause did not apply, and he was left to other consequences."

It is argued by Mr. Daphtary that clause 1 expressly excepted unseaworthiness, but on the authorities, to which I have referred, it is clear that the clause must be construed as a whole, and construed in that way, the clause means, in my opinion, that it was an exception from liability in respect of unseaworthiness provided the shipowners exercised due diligence to make the ship seaworthy. Therefore, before the defendants can get over their liability consequent upon the damage to the goods by reason of unseaworthiness, they will have to prove as required by the clause that they have used due diligence to avoid unseaworthiness. That is a question of fact. If they do, then all the other clauses in the bill of lading would apply and of course the plaintiff's claim would disappear *in toto*, because then there would be an express condition as to unseaworthiness. But if they do not, then in the words of Fletcher Moulton, L. J., cited with approval by Pickford, L. J., in *Bank of Australasia* v. *Clan Line Steamers, Limited*,[1] (p. 52), the exception disappears and the obligation of initial unseaworthiness remains. Then the special condition in clause 14 cannot, in my opinion, apply and the defendants cannot claim the benefit thereof. The plaintiff's claim in this case is founded upon the allegation that the damage to goods was due to the fact that the ship was not fit to carry such cargo and the defendants failed to exercise due diligence to make the ship seaworthy. Therefore, in my opinion, on the issue as framed and in the absence of further evidence, it is difficult to see how it can be contended that the suit is not maintainable. As the issue stands, I have no alternative left, but to find it in the affirmative on the

[1] [1916] 1 K. B. 39.

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authorities to which I have referred. But in doing so I must make it clear that I find the issue in the affirmative only on the record before me, and on the construction of clause 1 in the bill of lading; I express no opinion as to the proviso to that clause.

Mr. Daphtary argues that as the plaintiff is an endorsee of the bill of lading, he cannot rely on clause 1 and the proviso to it. In *Bank of Australasia* v. *Clan Line Steamers, Limited*,[1] the action was brought by an endorsee of a bill of lading and the principles as to the liability of a shipowner which I have summarised above were also laid down in that case. The point was not seriously pressed and there is nothing in it.

Attorneys for plaintiff : Messrs. *Payne & Co.*

Attorneys for defendants : Messrs. *Crawford, Bayley & Co.*

Findings accordingly.

J. S. K.

[1] [1916] 1 K. B. 39.

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Before Mr. Justice Rangnekar.

SADANAND PANDURANG MHATRE *v.* PARASHRAM PANDURANG MHATRE.*

1927

October 7

Solicitors' common law lien—Lien does not attach to immovable property—Is particular lien and does not extend to solicitors' general costs for all business done by them for client—Does not prevail against mortgagee who lends money to pay off prior incumbrances.

In Bombay, solicitors have a common law lien for their costs over property recovered or preserved or the proceeds of any judgments obtained for the client by their exertions. But this lien is a particular lien, and is not available for the general costs for all business done by them for the clients, but only extends to the costs of the suit in which the property has been acquired or preserved by their exertions.

Tyabji Dayabhai & Co. v. *Jetha Devji & Co.*,[1] followed.

This lien does not attach to immovable property but, with this exception, it applies to property of every description including costs ordered to be paid to the client.

*O. C. J. Suit No. 680 of 1926.

[1] (1927) 51 Bom. 855.