Privy Council Appeal No. 10 *of* 1918.

Edward Richard Denham and another - - - - *Appellants*

v.

Clan Line Steamers, Limited - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1918.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.

[*Delivered by* LORD SUMNER.]

This was an action brought against the Clan Line by indorsees of bills of lading, to whom the property had passed, for short delivery of maize in bags carried by the "Clan Sinclair" from Durban to Sydney, N.S.W. The jury answered the questions put to them in the plaintiffs' favour, but the consequent judgment was set aside by the Supreme Court of New South Wales (Gordon, J., dissenting), and the plaintiffs appeal.

A custom of the port of Sydney was proved, by which general ships, such as the "Clan Sinclair," discharge all the cargo deliverable at the port on to a wharf to some firm of wharfingers, out of whose hands, after sorting, the separate parcels are released to the holders of the bills of lading. This customary delivery is in lieu of discharge overside to individual consignees parcel by parcel, which the plaintiffs did not demand and never were ready and willing to take, and probably regular and frequent sailings by an important line of steamers would hardly be possible except upon some such terms. The custom being proved to exist in fact and not being inconsistent with the terms

of the bill of lading the plaintiffs were bound by it, and did in fact conform to it, but its effect was to interpose an interval of time, after discharge from the ship and before they reached the hands of the consignees, during which the contents of the bags of maize were exposed to risks of loss by pilfering, negligence and so on. In the present case all the maize was discharged from the ship, but during this interval a quantity covered by the plaintiffs' bills of lading disappeared somehow, and the first question is whether the ship was responsible for it, there being no evidence sufficient to justify a finding that the loss was the fault of the defendants' servants.

The bills of lading contained the words " In cases where the ultimate destination, at which the shipowners may have engaged to deliver the goods, is beyond their port of discharging, they act as forwarding agents only from the port, and in all cases the liability of the shipowners on account of all goods is to cease as soon as the goods are free from the tackles of the ship." Words not distinguishable from the second member of this sentence were the subject of a decision of their Lordships' Board under circumstances not dissimilar in the Chartered Bank of India *v.* The British India Steam Navigation Co. (1909 A.C., p. 369), and were held to be free from ambiguity and to mean exactly what they said. Lord Macnaghten commented ironically on the unprofitable ingenuity of the argument by which counsel in that case had endeavoured to raise doubts where none existed, and the ship was held discharged. On the present occasion their Lordships are not only bound by that decision, but are equally unwilling to favour artificial constructions of simple words. They hold that, as soon as the plaintiffs' bags of maize were free from the tackles of the ship, the defendants' responsibility for them ended so far as the bills of lading were concerned.

Though the bills of lading made the maize deliverable at Sydney the steamer was, in fact, proceeding to Queensland ports, and the plaintiffs desired, if possible, to get it carried on to Pinkenbah, in Queensland. They accordingly made a contract with the McArthur Shipping and Agency Company, Limited, that the " Clan Sinclair " should deliver these parcels at that port. The McArthur Company are described as " managing agents " for the Clan Line, but their authority to make such a contract on behalf of the defendants was traversed. The jury found that they had such authority, and the main controversy in this appeal is whether there was sufficient evidence, or, indeed, any evidence to support this finding of fact. The question is one of actual not of apparent authority, and the materials for the answer consist of the circumstances of their employment, the course of business and the inferences which it is proper to draw from them. There was a written agreement of agency between the Clan Line and the McArthur Company, but this referred to homewards loading only, under which they performed the important service of procuring cargo for the ships on their return voyages from Australia, attended to the shipment

and signed the bills of lading. In itself this agency neither referred to nor threw light upon the position and powers of the McArthur Company with reference to inwards cargo. It was also common ground that on the inwards voyages, when the steamers were consigned to them, which had but rarely happened, they attended to various matters of ships' business in the port of discharge, but, so far as the evidence goes, this was always confined to acts incidental to the accomplishment of the bill of lading contracts, except in one instance. This occurred about three and a-half months earlier than the case in question, when they arranged with a bill of lading holder that a considerable quantity of cargo deliverable at Sydney should be carried on to a Queensland port without further freight. There was, however, no evidence that the Clan Line or its managers in Great Britain were aware of this arrangement, and as evidence of actual authority from them to do acts of a similar kind, it failed. The term "managing agents," which the McArthur Company's directors employed, was in itself indeterminate, and it was only in view of relevant conduct given in evidence that the jury could be allowed to determine its extent and effect. The mere fact that the McArthur Company's officers made the contract in question without misgiving proved nothing, for it was equally consistent, to say the least, with mistaken belief as with actual authority. The plaintiffs discreetly refrained from making the Company's officials their own witnesses, or putting to them in cross-examination the question, "What authority had you?"

The contract to carry forward, which was made in fact, undeniably had two effects on the interests of the Clan Line, though otherwise and in itself reasonable and even lucrative enough. It involved an alteration of the bill of lading, if the voyage was regarded as a voyage from Durban to Pinkenbah; if it was a voyage from Sydney to Pinkenbah it involved the ship in carrying goods "from one State to another State" within section 4 of the Sea-Carriage of Goods Act, No. 14 of the Commonwealth Statutes of 1904. The bill of lading contained the words, "No officer or servant of the shipowner has authority to dispense with or vary these conditions," words which, in the absence of evidence to the contrary, were express notice of a limitation of authority in harmony with the well-known decisions that a master has no authority to vary contracts of carriage made by his employer, and there was nothing to show that the McArthur Company's powers in relation to inwards cargo were any higher than a master's. If the contract brought the ship under the Sea-Carriage of Goods Act the ship's contracts for inwards cargo would be automatically affected as regards excepted perils by the terms of the Statute and the shipowners' liability would be gravely enhanced. No power to do acts having such an effect could be spelt out of the authority actually enjoyed to do acts in implement of the inwards bills of lading as they stood. To engage the ship in coastwise trade would also have subjected

her owners to onerous provisions of Commonwealth legislation from which they would otherwise have been exempt. There was therefore equally little ground in the case of a voyage from Sydney and of a voyage from Durban to Pinkenbah to impute to the McArthur Company the authority, which it was incumbent upon the plaintiffs to prove. Their Lordships are therefore of opinion that there was no evidence to support the verdict of the jury in the plaintiffs' favour, and they will humbly advise His Majesty that the judgment of the Supreme Court of New South Wales was right, and that this appeal should be dismissed with costs.

In the Privy Council.

EDWARD RICHARD DENHAM AND ANOTHER

v.

CLAN LINE STEAMERS, LIMITED.

DELIVERED BY LORD SUMNER.

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