[HIGH COURT OF AUSTRALIA.]

McGREGOR AND ANOTHER . . . . APPELLANTS; PLAINTIFFS,

AND

HUDDART PARKER LIMITED . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1919.

MELBOURNE, *June* 10, 11, 13.

Barton, Isaacs, and Rich JJ.

Ship—Carriage of goods—Damage by sea-water—Perils of the sea—Seaworthiness—Onus of proof—Bill of lading—Sea-Carriage of Goods Act 1904 (*No.* 14 *of* 1904), *sec.* 8.

Practice—High Court—Appeal from Supreme Court of State—Special leave—Rescission.

Sec. 8 (2) of the *Sea-Carriage of Goods Act* 1904 provides that "In every bill of lading with respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped, and supplied, neither the ship nor her owner, master, agent, or charterer shall be responsible for damage to or loss of the goods resulting from . . . (*b*) perils of the sea or navigable waters," &c.

Held, that under that provision it is a condition precedent to exemption from liability for such damage that the shipowner shall establish that the ship was at the beginning of the voyage seaworthy.

Where, on an appeal by special leave from the Supreme Court of a State, it was doubtful whether there had or had not been a finding on a question of fact against the appellants which would conclude their appeal, and where a new trial would in one event have been necessary, and the amount at stake was small, the High Court declined to consider the question whether in view of the provisions of sec. 8 (2) of the *Sea-Carriage of Goods Act* the respondent was entitled to rely on an express exception of perils of the sea in a bill of lading, and rescinded the order granting special leave to appeal.

Special leave to appeal from the decision of the Supreme Court of Tasmania (*Nicholls* C.J.) rescinded.

APPEAL from the Supreme Court of Tasmania.

In an action in the Supreme Court of Tasmania in its Local Courts Act jurisdiction Albert Ernest Livingston McGregor and Alexander McGregor, trading as McGregor Bros., sought to recover from Huddart Parker Ltd. the sum of £18 15s. in respect of damage caused by sea-water to certain bags of sugar which had been carried for the plaintiffs by the defendant in its ship *Riverina* from Sydney to Hobart under a certain bill of lading. The Commissioner found a verdict for the defendant, and an appeal from his decision was dismissed by *Nicholls* C.J.

The material facts are stated in the judgment of the High Court hereunder.

From the decision of the Supreme Court the plaintiffs now, by special leave, appealed to the High Court.

In view of the decision of the High Court to rescind the special leave, the arguments of counsel are not reported.

H. I. Cohen, for the appellants.

Starke, for the respondent.

During argument reference was made to *Local Courts Act* 1896 (Tas.), secs. 62, 123 ; *Steel* v. *State Line Steamship Co.* (1) ; *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2) ; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) ; *Thomas Wilson, Sons & Co.* v. *Owners of the Cargo per the Xantho* (4) ; *The Europa* (5) ; *Dobell & Co.* v. *Steamship Rossmore Co.* (6) ; *Australasian United Steam Navigation Co.* v. *Hiskens* (7) ; *Kopitoff* v. *Wilson* (8) ; *The Wildcroft* (9) ; *The Glendarroch* (10) ; *Rowson* v. *Atlantic Transport Co.* (11) ; *Lewis & Sons* v. *Mayor of Swansea* (12) ; *McFadden* v. *Blue Star Line* (13) ; *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (14) ; *The Northumbria* (15).

Cur. adv. vult.

(1) 3 App. Cas., 72, at p. 88.
(2) 12 App. Cas., 484, at p. 502.
(3) 12 App. Cas., 518, at p. 526.
(4) 12 App. Cas., 503, at p. 509.
(5) (1908) P., 84.
(6) (1895) 2 Q.B., 408, at p. 413.
(7) 18 C.L.R., 646.
(8) 1 Q.B.D., 377.
(9) 201 U.S., 378, at p. 386.
(10) (1894) P., 226, at p. 232.
(11) (1903) 2 K.B., 666, at pp. 676, 680.
(12) 4 T.L.R., 706.
(13) (1905) 1 K.B., 697, at p. 707.
(14) (1914) 1 K.B., 419 ; (1915) A.C., 705, at p. 715.
(15) (1906) P., 292.

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The judgment of the COURT, which was read by ISAACS J., was as follows :—

This is an appeal from the Supreme Court of Tasmania dismissing an appeal from the decision of the Commissioner sitting in the Police Court, Hobart. The action was brought on a bill of lading to recover £18 15s. for damage caused to sugar carried by the respondent in an inter-State voyage from Sydney to Hobart. There was no question as to the bailment or the fact or amount of damage. The defence was that the injury was caused by (1) perils of the sea and (2) water getting into the hold, both of which causes are included in clause 9 of the conditions as exceptions to responsibility for damage. The Commissioner found, what was really not disputed, that the damage was caused by sea-water dashing over the side of the ship and finding its way into the hold where the sugar was stowed. He held that the water so getting in was *primâ facie* the result of perils of the sea. So much is beyond cavil. But he went on to hold that, inasmuch as the facts showed the injury was *primâ facie* caused by the perils of the sea, the respondent must succeed unless the appellants, on the principle of *The Glendarroch* (1), satisfied the onus of displacing the *primâ facie* conclusion by showing negligence of the respondent as the proximate cause. He held that there was no evidence to satisfy that onus, and, after observing that seaworthiness was not in issue, gave judgment for the respondent. The learned Chief Justice of Tasmania followed the same lines, and upheld the decision.

Before us several points were argued, some of great public importance.

The first point argued for the appellants was that under sec. 8 (2) of the *Sea-Carriage of Goods Act* 1904 it is a condition precedent of exemption from liability for any of the causes set out in that sub-section, that the shipowner shall establish that the ship was seaworthy. Ultimately the respondent did not contest that view. It is clearly right. The immunity given by the sub-section is all conditioned by the word " if " and what follows that word. If any authority direct or by analogy were wanted, it is found in the cases of *Dobell & Co.* v. *Steamship Rossmore Co.* (2) ; *McFadden*

(1) (1894) P., 226. (2) (1895) 2 Q.B., 408.

v. *Blue Star Line* (1); *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (2), per *Hamilton* L.J. and per Lord *Dunedin*. The case of *The Wildcroft* (3) is directly in point. *The Glendarroch* (4) has no application to the sub-section referred to.

The case, however, does not rest there. It is contended on behalf of the respondent that in fact the Commissioner found the ship seaworthy, notwithstanding his observation that seaworthiness was not in issue. Under the Tasmanian Act (*Local Courts Act*) there is no appeal on facts, and therefore it becomes crucial to see whether the necessary facts were actually found by the Commissioner. If the Commissioner did find seaworthiness, the appellants must fail, for the finding could not be reviewed. If he did not, the case might have to go back to have that fact determined. It would not be just to give the appellants another opportunity to fight the other questions already fought out and decided; and so it would have to be considered whether a new trial could be ordered on one issue or not.

But the respondent raises another serious question of law under the express terms of its contract. The bill of lading contains a provision in these words: "The Company receives goods to be forwarded subject to the exceptions and exemptions to be implied pursuant to sec. 8 (2) of the *Sea-Carriage of Goods Act* 1904, and any other statutory exemptions or limitations, and in addition thereto the terms, conditions and exceptions hereinafter mentioned, but such last mentioned terms, conditions and exceptions are to be construed as qualified by the provisions of the *Sea-Carriage of Goods Act* 1904 so that any term or clause therein is to be interpreted so as not to include or cover anything declared illegal by that Act." Under that provision the respondent claims that the express exception "perils of the sea" contained in clause 9 of the terms, conditions and exceptions is not declared illegal by the Act, and therefore it by its express contract—as distinguished from its statutory implied exemption—is entitled at common law to succeed in the absence of the plaintiffs' showing unseaworthiness or negligence as the proximate cause of loss. The respondent relies on *Australasian*

(1) (1905) 1 K.B., at p. 707.
(2) (1914) 1 K.B., at p. 436; (1915) A.C., at p. 715.
(3) 201 U.S., 378.
(4) (1894) P., 226.

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United Steam Navigation Co. v. *Hiskens* (1) to support its contention. Before this case could be sent for new trial that contention would have to be settled. Yet *Hiskens's Case* was apparently never referred to in the Courts below. In dealing with the last-mentioned contention, a question as to vagueness or uncertainty (see *Davies* v. *Davies* (2)) might require consideration.

The determination of these latter points is so important to the whole community that, particularly in view of the fact that *Hiskens's Case* (1) was decided by a larger Court than the present, the matter should receive the consideration of the Full Bench. On the whole, in view of the unsatisfactory state of the findings (which leave it somewhat doubtful whether the whole case does depend on a question of fact), of the necessity of a new trial in one event, and of the smallness of the amount at stake, we think this is not a proper case in which to investigate the further very far-reaching question raised under the *Sea-Carriage of Goods Act*, and consequently have come to the conclusion that the order of 11th December 1918 giving special leave to appeal should be rescinded.

Order for special leave to appeal rescinded.

Solicitors for the appellants, *Frank Brennan & Rundle*, for *Okines & Ogilvie*, Hobart.

Solicitors for the respondent, *Malleson, Stewart, Stawell & Nankivell*, for *Perkins & Dear*, Hobart.

B. L.

(1) 18 C.L.R., 646.

(2) 36 Ch. D., 359, at p. 387.