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however, is strongly confirmatory of my conclusions. The case of *Williams* v. *McIntosh* (1), which was referred to by *Rich* J. on the application for leave to appeal, was decided on an enactment more closely resembling the Queensland Act than the statute of Geo. IV. The reasoning of *A. H. Simpson* C.J. in Eq. is in line with the English authorities.

In my opinion, the appeal should be allowed.

Appeal dismissed with costs.

Solicitor for the appellant, *W. F. Webb*, Crown Solicitor for the State of Queensland.

Solicitors for the respondent, *Atthow & McGregor.*

(1) 9 S.R. (N.S.W.), 391

[HIGH COURT OF AUSTRALIA.]

BERGL (AUSTRALIA) LIMITED . . . APPELLANT;
PLAINTIFF,

AND

THE MOXON LIGHTERAGE CO. LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 22, 23, 25.

Knox C.J., Isaacs and Gavan Duffy JJ.

Carrier—Lighterman—Contract—Lightering goods—Liability for loss or damage—Unseaworthiness of vessel—Negligence—Exemption from liability for insurable risks.

The defendant, a lighterage company, agreed to lighter the plaintiff's goods upon (*inter alia*) the following conditions :—" The rates are for conveyance only. Every reasonable precaution will be taken to ensure the efficiency of craft used for the service, also for the safety of the goods whilst in craft, but

the lighterage contractor will not be liable for any loss or damage, including negligence or the result thereof, which can be covered by insurance." During the lighterage operations the defendant's lighter sank, owing, it was alleged by the plaintiff, to its unseaworthiness or its unfitness for the purpose of lightering the goods, or to the defendant's negligence in handling and transporting the goods and in conducting and controlling the vessel; and some of the goods were lost or damaged. The risks causing the loss or damage could have been insured against.

Held, that even if the plaintiff's allegations were proved, the defendant was exempted from liability by the contract.

Rosin and Turpentine Import Co. v. *B. Jacob & Sons*, 102 L.T., 81, followed.

Decision of the Supreme Court of Queensland (*Real* J.) affirmed.

APPEAL from the Supreme Court of Queensland.

In an action brought in the Supreme Court by Bergl (Australia) Ltd. the plaintiff claimed from the Moxon Lighterage Co. Ltd. damages for loss of and injury to plaintiff's goods.

Under an agreement made between the plaintiff and the defendant on or about 13th January 1919, the defendant was to lighter from the s.s. *Camira*, then at Birt's Wharf, South Brisbane, to the s.s. *Anglo-Chilian*, then at Mercantile Wharf, Bulimba, Brisbane, certain goods "on the customary conditions of lighterage for the Port of Brisbane" —which, as set out in the lighterage order signed on behalf of the plaintiff, were (*inter alia*) as follows:—"The rates charged are for *conveyance only*. Every reasonable precaution will be taken to ensure the efficiency of craft used for the service, also for the safety of the goods whilst in craft, but the lighterage contractor will not be liable for any loss or damage, including negligence or the result thereof, which can be covered by insurance. . . . Note.—In accepting this receipt the owner of the goods carried and/or customer expressly accepts and agrees to all its conditions, stipulations and exceptions."

In pursuance of this agreement the goods were received on board the lighter *Edith* (provided by the defendant) from the s.s. *Camira* on or about 15th January 1919; whilst engaged in the work of lighterage the *Edith* commenced to sink and was beached; she subsequently became submerged, and large quantities of the plaintiff's goods were lost or damaged. The risks that caused such loss or damage could have been insured against.

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In the statement of claim it was alleged (par. 4) that the vessel supplied and employed by the defendant as a lighter was not at any material time a seaworthy vessel or reasonably fit for the purpose of lightering the goods in accordance with the said agreement; and further (par. 6) that whilst the defendant was engaged in the said work of lighterage and had the custody and control of the goods, the defendant was guilty of negligence in and about the conduct and control of the said lighter: and that by reason thereof large quantities of the plaintiff's goods were lost or damaged. In its defence the defendant, as to any loss or damage caused by the alleged unseaworthiness, unfitness or negligence (which were denied), claimed exemption from liability therefor under the conditions, stipulations and exceptions set out in the lighterage order.

The action came on for trial before *Real* J. and a jury, and at the close of the plaintiff's case his Honor directed that judgment be entered for the defendant, on the ground that, on the contract between the parties, the plaintiff could not recover.

From this decision the plaintiff now appealed to the High Court.

Stumm K.C. and *H. D. Macrossan*, for the appellant. At common law a lighterman has the liability of a common carrier. There is a fundamental obligation on him to supply a seaworthy vessel. If he wishes to relieve himself from that obligation, he must do so in the clearest language: in case of ambiguity the loss falls on him. Seaworthiness includes fitness to receive cargo and to encounter perils of the sea. A lighterman or shipowner is not relieved of liability unless the expression "seaworthiness" or "defect in hull" is used in the provision exempting him from liability. In the contract as set out in the lighterage order, the obligation of initial seaworthiness is not excepted. If "efficiency" is wide enough to cover "seaworthiness," it must be shown that every reasonable care was taken to ensure efficiency. The contract is so ambiguous in this case that the defendant should not be relieved. If the vessel was not seaworthy, the exemption does not apply to the carrier. If the carrier desires to relieve himself from the duty of care, he must do so in express and unambiguous terms. [Counsel referred to

Price & Co. v. *Union Lighterage Co.* (1); *James Nelson & Sons Ltd.* v. *Nelson Line (Liverpool) Ltd.* [*No.* 2] (2); *The Schwan* (3); *Owners of Cargo on Ship Maori King* v. *Hughes* (4); *Rathbone Brothers & Co.* v. *D. MacIver Sons & Co.* (5); *Pyman Steamship Co.* v. *Hull and Barnsley Railway Co.* (6); *Joseph Travers & Sons Ltd.* v. *Cooper* (7); *Rosin and Turpentine Import Co.* v. *B. Jacobs & Sons* (8).]

Macgregor, for the respondent. The statement that reasonable precaution will be taken directs attention to the fact that the warranty of seaworthiness is being excluded, and it merely points out that the contractors are careful people. The second part of the clause is the governing part. (See *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.* (9); *Rosin and Turpentine Import Co.* v. *B. Jacobs & Sons* (8).)

Stumm K.C., in reply.

Cur. adv. vult.

June 25.

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

By the statement of claim the appellant claims damages for loss of or injury to goods by reason of (1) the unseaworthiness of a lighter and (2) negligence in handling and transporting the goods and in the conduct and control of the lighter. The defence, among other grounds, rests on the express provisions of the contract of lighterage. Those provisions are that the defendant Company was authorized "to take delivery of the . . . goods from s.s. *Camira* and transport same on the customary conditions of lighterage for the Port of Brisbane, which are as follows:—Marks, contents, quality, value and condition unknown. The rates charged are for *conveyance only*. Every reasonable precaution will be taken to ensure the efficiency of craft used for the service, also for the safety of the goods

(1) (1903) 1 K.B., 750; (1904) 1 K.B., 412.
(2) (1906) 2 K.B., 804; (1907) 1 K.B., 769; (1908) A.C., 16.
(3) (1908) P., 356; (1909) P., 93; (1909) A.C., 450.
(4) (1895) 2 Q.B., 550.
(5) (1903) 2 K.B., 378.
(6) (1914) 2 K.B., 788.
(7) (1915) 1 K.B., 73.
(8) 26 T.L.R., 259.
(9) (1908) A.C., at p. 19.

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whilst in craft, but the lighterage contractor will not be liable for any loss or damage, including negligence or the result thereof, which can be covered by insurance." At the trial it was admitted that the risks causing the damage could have been insured against. The learned trial Judge (*Real* J.), at the conclusion of the plaintiff's case, gave judgment for the defendant on the ground that, assuming the allegations proved, the contract as quoted was in itself a protection against the claim.

The plaintiff has appealed, and now contends that the judgment is wrong on the ground that (1) the primary obligation of a sea-carrier, namely, to provide a seaworthy vessel in the sense of a watertight ship, is not excluded by the contract; (2) there is a promise of reasonable care as to efficiency of craft and the safety of goods on the craft, and the exemption from liability, properly construed, applies to damage occurring otherwise than during actual conveyance on the lighter—that is to say, before deposit on the lighter and after discharge therefrom; (3) if the exemption applies on its true construction to all insurable damage, it is repugnant to the obligation created by the promise of reasonable care.

As to the first point, there is no doubt that in the case of lighterage, apart from special stipulation, a fundamental obligation of the shipowner is to provide a seaworthy vessel (per Lord *Sumner*, for Lord *Parker*, *Warrington* J. and himself, in *The Galileo* (1), affirmed in the House of Lords (2)). Further, it is well established law that exemption from that obligation is not ordinarily accorded by mere general words of exemption, which may consistently receive a more limited construction. But, as Lord *Reading* C.J. says in *Pyman Steamship Co.* v. *Hull and Barnsley Railway Co.* (3), " even so it is quite plain that in law the language used may be sufficient to exclude the shipowner even from such an obligation. It may be by express words; it may be by necessary implication to be gathered from the language which has been used in the contract; but in any event you must find in the contract words which would justify the exemption of the shipowner for a breach of that obligation, and unless you do find them quite clearly the Courts have said that he is to be held

(1) (1914) P., 9, at p. 25. (2) (1915) A.C., 199.
(3) (1915) 2 K.B., 729, at pp. 734-735.

liable." That passage sums up the effect of many decisions on the point, and makes extended reference to them unnecessary.

With reference to one branch of the appellant's argument it may be added that the initial warranty of seaworthiness extends to the fitness of the vessel " for the purpose " (per Lord *Blackburn* in *Steel* v. *State Line Steamship Co.* (1)), including both fitness to encounter sea-perils (*Steel's Case*) and fitness for the safe carriage of the goods to their destination (*Stanton* v. *Richardson* (2)). It is therefore equivalent to what is described in the contract as " the efficiency of craft used for the service." We have to see whether, as appellant contends, this initial obligation, notwithstanding the express provisions of the contract, exists in the present case as an implied basic provision, with all the ordinary consequences of a breach of that obligation. It is urged, in the first place, that the contract is not sufficiently clear on the point to exclude the common law obligation. This contract should be construed by the Court as the parties engaged in their respective businesses should be taken to have understood the words used, having regard to the subject matter (see *Butterley Co.* v. *New Hucknall Colliery Co.* (3)). So reading it, the meaning of the document seems very clear. A firm of merchants in Brisbane employ a lighterage company there to get some goods on board the steamer *Camira* and to transport them to the steamer *Anglo-Chilian*, not on the tacit basis of the general common law obligations of carriers, but " on the customary conditions of lighterage for the Port of Brisbane." If the document stopped there, evidence would be necessary to prove what those " customary conditions " were. To avoid any misapprehension the document proceeds to say " which are as follows," and then we read the enumeration of the " customary conditions." They are stated as the complete code of conditions constituting the obligations of the carriers. That is the conclusion which one would naturally arrive at from reading the initial statement as to the " customary conditions." But further, the statement that " every reasonable precaution will be taken to ensure the efficiency of craft used for the service " would be unnecessary if the primary common

(1) 3 App. Cas., 72, at p. 88. (2) L.R. 7 C.P., 421.
(3) (1910) A.C., 381, at pp. 382-383.

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law obligation of a seaworthy ship were included. The first impression is thereby confirmed; and it results that there is no implied warranty of seaworthiness. That, if correct, puts an end to the main claim; for, if there is no obligation to provide a seaworthy ship, par. 4 of the statement of claim necessarily fails. There is no claim for negligence to provide an efficient craft, and, as the pleadings stand, no such case can be insisted on. There is, however, as will presently be seen, another answer to the main claim even if the primary obligation exists.

The second ground relied on by the appellants has been stated above. The statement that "every reasonable precaution will be taken to ensure the efficiency of craft used for the service, also for the safety of the goods whilst in craft," is primarily the language of promise. If the common law obligation to provide a seaworthy ship be superseded by this statement, it follows almost automatically that these words supersede that duty as a contractual obligation: otherwise there is none, and consequently no liability for damage non-insurable. The observations of *Buckley* L.J. in *Joseph Travers & Sons Ltd.* v. *Cooper* (1) support the view of contractual obligation. The *Rosin and Turpentine Import Co.'s Case* (2) is distinguishable on this ground by reason of the fact that the prefatory words here as to "customary condition" do not there appear, and there the words are "is taken" while here they are "will be taken." There the Courts treated the words in the invoices, &c., as not excluding the basic obligation of seaworthiness, looking only to see if liability for breach of it was excluded in the case of insurable risk. But both *Bray* J. in the primary Court (3) and Lord *Shaw* in the House of Lords (4) referred to the absence of the word "but," which has here been inserted. Further reference to the *Rosin and Turpentine Import Co.'s Case* will be made in connection with another point. It is immaterial to observe that there is evidence which a jury might think supported a breach of this obligation as to the ship, for as already mentioned no such allegation is made. The rest of the second point, if correct, might enable the appellant to succeed on

(1) (1915) 1 K.B., at p. 84.
(2) 100 L.T., 366; 101 L.T., 56; 102 L.T., 81.
(3) 100 L.T., at p. 367.
(4) 102 L.T., at p. 82.

the sixth paragraph of the statement of claim, that is, as to damage during conveyance. But it is not sound. The words of exemption are so large as to cover all loss and damage whatever, arising from want of reasonable care in respect of ship and goods as well as accident, provided it can be covered by insurance. It is admitted that there is no evidence of damage occurring except on the craft. There is therefore no necessity to consider what would in that case be the effect of the words "conveyance only." It may be that those words limit the liability as carriers to the "conveyance" only, other operations taken being "subsidiary" only in the sense stated by Lord *Sumner* (then *Hamilton* J.) in *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (1); and see per Lord *Wrenbury* (then *Buckley* L.J.) in *Joseph Travers & Sons Ltd.* v. *Cooper* (2).

That leaves the third point for consideration, namely, whether the provision is repugnant, and, of course, the effect of repugnancy. The case of *Rosin and Turpentine Import Co.* v. *B. Jacob & Sons* (3) does not decide that it would be repugnant to the law. In one sense any provision cutting down the liability of a person for negligence is repugnant to his full obligation to take due care. But it is not obnoxious to law. The cases of *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (4), *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (5) and *Grand Trunk Railway Co. of Canada* v. *Robinson* (6) are sufficient authorities. In the House of Lords the question considered in the *Rosin and Turpentine Import Co.'s Case* (7) was not repugnancy but ambiguity. The clause as to care and the clause as to exemption were not connected by any conjunction. They afforded room for argument and ultimate difference of opinion, as to their independence and consequent inconsistency. Even there the view prevailed that they were not independent and were consistent. There seems to be no room for ambiguity in the present case. Reasonable care is promised, and to this the law generally attaches liability for damage caused by want of that care. But the contract provides that the liability shall be limited to such damage

(1) (1910) 2 K.B., 395, at p. 400.
(2) (1915) 1 K.B., at pp. 83-84.
(3) 101 L.T., 56; 102 L.T., 81.
(4) 3 Moo. P.C.C. (N.S.), 272, at pp. 293-294.
(5) (1908) 2 K.B., 626, at pp. 630, 633.
(6) (1915) A.C., 740, at p. 744.
(7) 102 L.T., 81.

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as cannot be covered by insurance. In other words, the owners of the goods are to be guarded against loss—first by insurance, effected by themselves, and, so far as the loss cannot be covered by insurance, then by indemnity from the lighterage company. There is nothing unreasonable in that. As *Real* J. says, in effect, lighterage rates are naturally fixed to correspond with liability as well as labour; what is saved in lighterage rates may be paid for insurance, and, in the result, the owners of the goods, if they choose, are fully protected against loss. The business meaning is clear, and there is no repugnancy to the law. In *Rosin and Turpentine Import Co.'s Case* (1) Lord *Loreburn* L.C. says with reference to the exemption for liability for loss :—"If the absence of a light, therefore, is to be regarded as unseaworthiness then this clause equally exempts Jacob & Sons from unseaworthiness. I think that there is no objection to a man saying that he accepts no risks and that the other party to the contract must insure, and that seems to me to be exactly what this clause says." The majority of the House agreed with the Lord Chancellor. The exemption clause in the present case, construed in the same way, is equally an answer to the whole claim.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *J. F. Fitzgerald & Walsh.*

Solicitors for the respondent, *Chambers, McNab & McNab.*

(1) 102 L.T., at p. 82.