[HIGH COURT OF AUSTRALIA.]

BURNS PHILP & COMPANY LIMITED . . APPELLANT;
PLAINTIFF,

AND

THE WEST AUSTRALIAN STEAM NAVIGATION COMPANY LIMITED AND ANOTHER . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1923.

PERTH, *Sept.* 12.

SYDNEY, *Nov.* 27.

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

Bill of Lading—Contract—Goods shipped under deck—Transhipment of goods—Dangerous cargo—Goods placed on deck—Condition of transhipment—"On deck at shipper's risk"—Fire on ship—Goods jettisoned—Liability of shipowners.

Certain wax matches consigned to Western Australia were shipped under deck at London on ship A, whose destination was, to the knowledge of the shippers, the port of Singapore. Pursuant to liberty contained in the bill of lading the goods were transhipped at Singapore to ship B for carriage to Fremantle—ship B receiving them subject to a stipulation that they were to be stowed "on deck at shipper's risk," which was a usual stipulation for carriage of dangerous goods such as wax matches between Singapore and Fremantle. The matches were necessarily jettisoned between those ports because of a fire on board, and the indorsee of the bill of lading claimed damages for the loss from the owners of both ships.

The bill of lading contained (*inter alia*) the following stipulations:—"Transhipment of cargo for ports where the ship does not call, or for shipowners' purposes, to be at the risk of the owners of the goods from the time goods leave the ship's deck, where ship's responsibility shall cease. . . . Goods forwarded by steamship or otherwise for shipment or after transhipment to be subject to the conditions and exceptions of the forwarding conveyance, and at the risk of the owners of the goods. . . . This bill of lading shall constitute the contract between the owners of the goods and the shipowners; it shall be construed and governed by English law, and shall apply throughout the transit but always subject to the conditions and exceptions of the carrying conveyance."

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Held, by *Knox* C.J. and *Starke* J. (*Gavan Duffy* J. doubting), that the effect of these stipulations was that the shipper in the case of transhipment for shipowners' purposes was bound by all the conditions affecting carriage usually required by the forwarding vessel, that the goods were rightly jettisoned, and that the shipowners were therefore not liable.

Decision of the Supreme Court of Western Australia (*Burnside* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

In an action in the Supreme Court of Western Australia against the West Australian Steam Navigation Co. Ltd. and the Ocean Steamship Co. Ltd., the plaintiff, Burns Philp & Co. Ltd., sought to recover from the defendants the sum of £310 10s. as damages for the loss of 30 cases of vestas which were shipped on board the steamer *Kleist* at the port of London by R. Bell & Co., for carriage to and delivery at Fremantle to their order, under the terms and conditions of the bill of lading, which was indorsed to the plaintiff. The *Kleist* carried the vestas as far as Singapore, where they were transhipped into the *Gorgon* for transport to Fremantle. The vestas were placed on the deck of the *Gorgon*; and, a fire having occurred on the voyage to Fremantle, they were jettisoned and totally lost. On the transhipment at Singapore, the agents for the *Kleist* accepted from the master of the *Gorgon* a shipping receipt marked "On deck at shipper's risk." It was admitted that the West Australian Steam Navigation Co. Ltd. carried the vestas in the *Kleist*, and the Ocean Steamship Co. Ltd. carried them in the *Gorgon*. The case was heard by *Burnside* J., who gave judgment for the defendants with costs.

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

Other material facts appear in the judgments hereunder.

Sir Walter James K.C. and *F. Leake*, for the appellant. Judgment should be entered for the appellant. The bill of lading was a through bill from London to Fremantle, and the bill of lading attached to the goods whatever ship carried them. The question is what was the voyage intended? [Counsel referred to *Leduc & Co.* v. *Ward* (1) and *Margetson* v. *Glynn* (2).] There was no satisfactory evidence given by any shipper, consignee or insurance agent in the

(1) (1888) 20 Q.B.D., 475, at p. 480. (2) (1892) 1 Q.B., 337.

West Australian-Singapore trade of any custom to carry vestas on the deck. Appellant had no knowledge of any such custom. The indorsement on the bill of lading controls the place where the vestas were to be stowed. The evidence supporting the practice of stowage of vestas on deck by the *Gorgon* is not sufficient (see *Newall* v. *Royal Exchange Shipping Co.* (1)). Appellant's evidence contradicts any such usage or custom, and, if there is any such usage or custom, this contract excludes its operation (*In re Walkers, Winser & Hamm, and Shaw, Son & Co.* (2)).

J. P. Dwyer (with him *Thomas*), for the respondents. Under the bill of lading there is a power to tranship; and it was a condition of the forwarding conveyance of the cargo that it was to be carried on deck at the shipper's risk. The bill of lading expressly applies throughout the transit. There is no special restriction as to transhipment (*Halsbury*, vol. XXVI., p. 234, art. 328). Each successive carrier is only responsible for his portion of the route. The goods have been forwarded under specified condition, on a particular occasion, and at shipper's risk. The *Gorgon* was entitled to stow the vestas on deck at owner's risk. This is a general condition; exceptions are imposed on all shippers during all voyages. It is not necessarily an arbitrary condition in the bill of lading. The respondents are protected by conditions and exceptions and the custom in this trade to carry these goods on deck, and the learned Judge found that there was such a custom, and this custom is a well-established and well-known practice in these ports. The stowage on deck did not nullify other exceptions in the bill of lading (*Royal Exchange Shipping Co.* v. *Dixon & Co.* (3)). The vestas were rightly jettisoned; the jettisoning did not arise from breach of contract of stowage (*The Europa* (4); *Kish* v. *Taylor* (5)).

Sir Walter James K.C., in reply. The question of the measure of damages in *Dixon's Case* (3) arose from improper stowage of cargo. As to the bill of lading, the case of *London and North-Western Railway*

(1) (1885) 33 W.R., 868.
(2) (1904) 2 K.B., 152, at p. 159.
(3) (1886) 12 App. Cas., 11.
(4) (1908) P., 84.
(5) (1912) A.C., 604.

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Co. v. *Neilson* (1) is on the question of misconveyance. The present case should be treated as if one ship carried the goods: it should be treated by the Court as a through bill of lading to be performed by these companies.

Cur. adv. vult.

The following written judgments were delivered:—

KNOX C.J. AND STARKE J. This is a claim for loss of goods shipped in the port of London for delivery at Fremantle wharf, Western Australia. The goods were shipped on the ss. *Kleist*, but the bill of lading gave liberty, as regards the whole or any part of the goods and at the risk of the owners before shipment, or at any time during transit, as often as might be deemed expedient, to ship by, or to tranship to, any other vessels. The ss. *Kleist* was owned by the West Australian Steam Navigation Co. Ltd., but her destination was Singapore, and the parties to the bill of lading knew that she was not intended to go on to Fremantle. The goods were transhipped at Singapore, pursuant to the liberty contained in the bill of lading, on to the ss. *Gorgon*, owned by the Ocean Steamship Co. Ltd. The agents of the West Australian Steam Navigation Co. Ltd. (Boustead & Co.) at Singapore issued a note to the commanding officer of the ss. *Gorgon*, requesting him to receive the goods on freight for Fremantle. But those in charge of the ss. *Gorgon* added to the note the words "On deck at shipper's risk." The goods were wax matches, and this stipulation was usually, and indeed we may say invariably, required in contracts for the carriage of dangerous goods—which include wax matches—between Singapore and Fremantle. And the goods were undoubtedly placed on board the ss. *Gorgon* subject to this stipulation. A fresh bill of lading was not issued.

There was, so far as the plaintiff is concerned, but one contract of carriage, with one entire consideration for the whole transit from London to Fremantle wharf. It was between the owners of the ss. *Kleist* on the one hand and R. Bell & Co. Ltd., the consignee, or its assigns, on the other. The bill of lading is the contract which governs the rights of the parties. Now, this contract, in the absence

(1) (1922) 2 A.C., 263.

of custom or express stipulation to the contrary, imported a duty on the part of the owners to stow the goods under deck and not on deck (*Royal Exchange Shipping Co.* v. *Dixon & Co.* (1)). But it is claimed that this contract does negative any responsibility for the goods being carried on the deck of the ss. *Gorgon*, or at all events adds to the provisions of the bill any extra conditions or protection imposed by the owners of the ss. *Gorgon* in the carriage of the goods. The argument is rested upon two clauses in the bill. One provides as follows :—" Transhipment of cargo for ports where the ship does not call, or *for shipowners' purposes*, to be at shipowners' expense, but at the risk of the owners of the goods from the time goods leave the ship's deck, where ship's responsibility shall cease. . . . Goods forwarded by steamship or otherwise for shipment or after transhipment to be subject to the conditions and exceptions of the forwarding conveyance, and at the risk of the owners of the goods." The first limb of this clause applies to risks arising out of the act of transhipment, but it does not further qualify the bill of lading (*Stuart* v. *British &c. Co.* (2)). But the second part is the more important, and it must be coupled with another provision, namely, the second of the two clauses above referred to, which provides : " This bill of lading shall constitute the contract between the owners of the goods and the shipowners ; it shall be construed and governed by English law, and shall apply throughout the transit but always subject to the conditions and exceptions of the carrying conveyance." The words in these clauses cannot " negative the whole tenor of the bill of lading," " eat up the contract " ; but they do assure to the shipowner some benefit or protection in addition to the provisions of his own bill of lading (*The Galileo* (3) ; *Stuart* v. *British &c. Co.* (2)), and the question is what is the extent of that additional benefit or protection. It seems to us that the clauses mean that shippers, in the case of transhipment authorized by the bill, shall be bound by all clauses and conditions affecting carriage usually required by the forwarding vessel. (See *Hadji Ali Akbar* v. *Anglo-Arabian &c. Co.* (4).) What cases of transhipment, therefore, are contemplated

(1) (1886) 12 App. Cas., 11.
(2) (1875) 32 L.T. (N.S.), 257.
(3) (1914) P., 9 ; (1915) A.C., 199.
(4) (1906) 11 Com. Cas., 219.

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by the clauses under consideration? If these cases do not embrace the full scope of the liberty to tranship, given in the earlier part of the bill of lading, they do at least include all cases in which transhipment is for ports where the ship does not call or for shipowners' purposes. In our opinion, the case before the Court is a case of transhipment for shipowners' purposes, and it is unnecessary, therefore, to consider other possible cases. We have not omitted to notice the provisions for transhipment in cases of impeded loading, carriage and discharge, dealt with in another part of the bill of lading (see *Wiles & Co.* v. *Ocean Steamship Co.*. (1)), and, though those cases may be instances of transhipment for shipowners' purposes, still the provisions of the clauses under discussion are not limited to such cases, and there is no apparent reason why they should be so limited.

In the present case, the owners of the ss. *Kleist* undertook to carry the goods from London to Fremantle, but their ship did not voyage so far, and they took advantage of the clauses enabling them to tranship the goods to another vessel for the purpose of completing the contract. Such a transhipment was for the shipowners' purposes: it was for the purpose of performing on their part the contract of carriage, and for no other purpose. But for the very wide liberty to tranship contained in the bill of lading, the goods must have been brought on to Fremantle in the ss. *Kleist*. The transhipment of the goods to the ss. *Gorgon* was therefore authorized by the bill of lading. The forwarding vessel, the ss. *Gorgon*, imposed its usual condition that the goods be carried on deck. The carriage of the goods is then by force of the bill of lading subject to this condition. They were in fact dangerous goods—wax matches—and were, upon an outbreak of fire on the ss. *Gorgon*, jettisoned, off the coast of Western Australia, for the safety of the vessel, and thereby lost. The exception in the bill of lading covers the act of jettison, but in any case a shipowner is not answerable for goods stowed on deck pursuant to the stipulations of the contract of carriage, which have been rightly jettisoned in a case of necessity.

Apart from the stipulations of the bill of lading, reliance was placed upon a custom of stowing wax matches on deck between Singapore

(1) (1912) 107 L.T., 825.

and Fremantle. The learned trial Judge found this custom proved. It is unnecessary, in the view we take, to pass a final opinion upon the evidence adduced in support of this custom, but, as at present advised, we consider that the evidence falls short of proof of its existence.

The appeal ought to be dismissed.

GAVAN DUFFY J. The bill of lading in this case contains a contract not merely to carry the goods from London to Fremantle, but to carry them "under deck" during the whole of the transport (*Royal Exchange Shipping Co.* v. *Dixon & Co.* (1)); and I am disposed to think that the condition of carriage on deck sought to be imposed during the transport on the *Gorgon* is not justified by any provision in the bill of lading, because it is inconsistent with the essence of the contract. However, the Chief Justice and my brother *Starke* think otherwise, and I am not prepared to dissent from their judgment.

GAVAN DUFFY J.

Appeal dismissed with costs.

Solicitors for the appellant, *Stone, James & Co.*

Solicitors for the respondents, *Dwyer, Unmack & Thomas.*

(1) (1886) 12 App. Cas., 11.