[HIGH COURT OF AUSTRALIA.]

WILLIAM HOLYMAN & SONS PROPRIETARY LIMITED . . . . . Defendant, } Appellant;

AND

FOY & GIBSON PROPRIETARY LIMITED . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1945.

MELBOURNE, *Oct.* 25, 26.

SYDNEY, *Dec.* 13.

Latham C.J. Rich, Starke, Dixon, McTiernan and Williams JJ.

Shipping—Sea-carriage of goods—Bill of lading—Limitation of liability to fixed sum—"Agreed that the value of each package . . . does not exceed" £5 unless value declared—Agreement inconsistent with statute—Sea-Carriage of Goods Act 1924 (*No.* 22 *of* 1924), *s.* 4, *Schedule Art. III., r.* 8*, Art. *IV., r.* 5*.

A package of goods of the value of £57 was shipped at Melbourne for delivery at Hobart under a bill of lading which contained clauses to the effect that "It is mutually agreed that the value of each package or parcel receipted for . . . does not exceed the sum of £5 (unless otherwise stated herein) on which basis the rate of freight is adjusted." The carrier "is not accountable . . . beyond such mutually agreed value for any parcel or package . . . unless the same shall have been booked with a declaration of the true character and value thereof and the bill of lading signed in accordance therewith and extra freight paid prior to receipt thereof for shipment and then not beyond such declared value." There was no declaration of the value of the package in the bill of lading.

Held that the clause was inconsistent with article IV., rule 5, in the schedule to the *Sea-Carriage of Goods Act* 1924, and, by s. 4 of the Act, was therefore void; accordingly (subject to the limitation as to amount provided by rule 5) the shipper was not barred from claiming as damages for the non-delivery of the package shipped the actual value of the package.

Australasian United Steam Navigation Company Limited v. *Hiskens*, (1914) 18 C.L.R. 646, distinguished.

Decision of the Supreme Court of Victoria (*Martin* J.), *Foy & Gibson Pty. Ltd.* v. *William Holyman & Sons Pty. Ltd.*, (1946) V.L.R. 26, affirmed.

* These provisions are set out in the judgment of *Latham* C.J., *post*, pp. 626-627.

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria against William Holyman & Sons Pty. Ltd. the plaintiff, Foy & Gibson Pty. Ltd., claimed by way of damages for breach of contract £57 12s. 7d., the value of a carton of drapery shipped on the defendant's ship at Melbourne for delivery at Hobart and not delivered. The goods were shipped under a bill of lading which provided: "1. Marks, weight, measure, contents, quality, value and conditions unknown. 2. The company may charge freight by weight, measurement or value, and may at any time re-weigh, re-measure, or re-value, or require the goods to be re-weighed, re-measured, or re-valued, and charge proportional additional freight accordingly. . . . 14. (*a*) It is mutually agreed that the value of each package or parcel receipted for as above does not exceed the sum of £5 (unless otherwise stated herein) on which basis the rate of freight is adjusted. (*b*) The company is not accountable . . . beyond such mutually agreed value for any parcel or package . . . unless the same shall have been booked with a declaration of the true character and value thereof and the bill of lading signed in accordance therewith and extra freight paid prior to receipt thereof for shipment and then not beyond such declared value and subject to all other terms and conditions of this contract." There was no declaration of the value of the carton in the bill of lading.

In its defence the defendant alleged that its liability was limited by clause 14 of the bill of lading to the agreed value of £5, inasmuch as no other value was stated in the bill of lading, no declaration of the true character and value of the goods was made and no extra freight was paid.

The plaintiff alleged in its reply that clause 14 was void because it was inconsistent with the rules in the schedule to the *Sea-Carriage of Goods Act* 1924.

Martin J. held that the clause was inconsistent with rule 5 of article IV. of the schedule and was therefore void, and he gave judgment for the plaintiff for the amount claimed.

From this decision the defendant, by special leave, appealed to the High Court.

Reynolds K.C. (with him *Sholl*), for the appellant. Clause 14 of the bill of lading is not inconsistent with article III., rule 8, in the schedule to the *Sea-Carriage of Goods Act* 1924. It is not a clause relieving from liability within the meaning of that rule. In *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1) it was so held,

(1) (1914) 18 C.L.R. 646: See pp. 649, 659, 678, 690.

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

under s. 5 of the *Sea-Carriage of Goods Act* 1904, on a clause substantially the same as the present clause 14; and in the United States, under the *Harter Act* (*Calderon* v. *Atlas Steamship Co. Ltd.* (1)), and in England (*Anthony Hordern & Sons Ltd.* v. *Commonwealth & Dominion Line Ltd.* (2); *Studebaker Distributors Ltd.* v. *Charlton Steam Shipping Co. Ltd.* (3)) similar decisions have been given. The reference in the present rule 8 to "lessening" of liability is new, but this does not alter the effect of the rule. The reasoning of the decisions shows that clause 14 is not inconsistent with article IV., rule 5, either. The rule deals with a subject matter which is different from that of clause 14. The rule is a provision of a general character which operates (apart from a declaration of value) to lessen the amount for which the carrier would normally be responsible. That is to say, it is a provision actually limiting liability. On the other hand, clause 14 does not involve any lessening of the amount for which the carrier would normally be responsible. The maximum amount for which the carrier could in any case be liable would be the actual value of the goods. If the parties agree that the goods are not of a greater value than £5, they do not in any relevant sense limit liability; they do no more than put a value on the goods. [He referred to *Stag Line Ltd.* v. *Foscolo, Mango Co. Ltd.* (4).] The shipper is not obliged to agree that any goods are of a value no greater than £5; it is open to him to declare the actual value as provided in clause 14. Sub-clause (*b*) of that clause is expressed in terms suggesting that it might be open to attack as limiting liability; yet such clauses have been held not to be open to that attack, and sub-clause (*a*) is an *a-fortiori* case. Thus, clause 14 cannot be regarded as an attempt to amend rule 5 of article IV. by substituting "five pounds" for "one hundred pounds"; it is directed to a different subject matter. Accordingly, the clause is consistent with the Act and is valid. [He referred to *Scrutton* on *Charterparties and Bills of Lading*, 14th ed. (1939), p. 560.]

Coppel K.C. (with him *P. D. Phillips*), for the respondent. Clause 14 is not an agreement as to the value of particular goods. It does not value any goods. It fixes a maximum value, obviously for the purpose of liability; it could have no other purpose. Any agreement which has the effect of fixing an upward limit at less than £100 is necessarily inconsistent with article IV., rule 5, and that is precisely what clause 14 does. Moreover, article III., rule 8, is sufficient to

(1) (1898) 170 U.S. 272: See pp. 277, 278 [42 Law. Ed. 1033. See p. 1035].
(2) (1917) 2 K.B. 420: See pp. 421, 424, 425.
(3) (1938) 1 K.B. 459: See p. 467.
(4) (1932) A.C. 328, at p. 340.

invalidate the clause. The authorities relied on by the appellant were decided under legislation which differs from the present Act, and they are not consistent. *Anthony Hordern & Sons' Case* (1), for instance, is inconsistent with *Hiskens' Case* (2). Notwithstanding the authorities on the earlier provisions, the clause now in question undoubtedly lessens the carrier's liability for loss by providing that the carrier shall not be liable beyond £5, whereas rule 8 (except in so far as it is qualified by other provisions of the Act) contains no limit short of the damage actually suffered. [He referred to *Stag Line Ltd.'s Case* (3); *Australasian United Steam Navigation Co. Ltd.* v. *Hunt* (4).]

Reynolds K.C., in reply.

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered :—

LATHAM C.J. The respondent company shipped at Melbourne, for delivery at Hobart, a carton of women's underwear by the steamship *Lanena* under a bill of lading issued by the appellant company. The goods were not delivered, and the respondent sued the appellant for damages for breach of contract, claiming the value of the goods, which was proved to be £57 12s. 7d. The defendant relied upon a provision in the bill of lading whereby it was agreed that the value of each package receipted for did not exceed the sum of £5 (unless otherwise stated in the bill of lading) on which basis the rate of freight was adjusted, and upon a further provision that the shipping company was not accountable for any package or parcel beyond the mutually agreed value unless the package had been booked with a declaration of its true character and value and the bill of lading signed in accordance therewith and extra freight paid prior to receipt for shipment, and then not beyond such declared value. There was no declaration of value of the carton. The shipping company contended that its liability was limited to £5 as the agreed value of the goods. The learned trial judge, *Martin* J., held that this provision was null and void, because it was inconsistent with the rules relating to bills of lading contained in the schedule to the *Sea-Carriage of Goods Act* 1924. It is provided in s. 4 of the Act that the rules contained in the schedule shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port, whether in or outside the Commonwealth. The learned judge

(1) (1917) 2 K.B. 420.
(2) (1914) 18 C.L.R. 646.
(3) (1932) A.C., at pp. 342, 350.
(4) (1921) 2 A.C. 351.

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

Latham C.J.

therefore gave judgment for the plaintiff for the amount claimed—the true value of the goods. The shipping company has appealed to this court.

The bill of lading contained the following provisions :—

"1. Marks, weight, measure, contents, quality, value and conditions unknown.

2. The company may charge freight by weight, measurement or value, and may at any time re-weigh, re-measure, or re-value, or require the goods to be re-weighed, re-measured, or re-valued, and charge proportional additional freight accordingly.

. . . .

14. (*a*) It is mutually agreed that the value of each package or parcel receipted for as above does not exceed the sum of £5 (unless otherwise stated herein) on which basis the rate of freight is adjusted.

(*b*) The company is not accountable for any package or parcel containing gold silver bullion specie watches clocks jewellery precious stones glass china furs silk quinine precious metals opium bank notes bonds or securities for money paintings sculptures or other work of art beyond such mutually agreed value nor beyond such mutually agreed value for any parcel or package of any other kind whatsoever unless the same shall have been booked with a declaration of the true character and value thereof and the bill of lading signed in accordance therewith and extra freight paid prior to receipt thereof for shipment and then not beyond such declared value and subject to all other terms and conditions of this contract."

The schedule to the *Sea-Carriage of Goods Act* 1924 contains rules which apply to all bills of lading which are subject to the Act. Reference has already been made to s. 4. Section 6 provides that every bill of lading in the Commonwealth which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the rules as applied by the Act. The bill of lading in the present case contains the provision required by s. 6.

Rule 8 of article III. of the rules in the schedule is as follows :—

"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect."

This provision is similar to that contained in the *Sea-Carriage of Goods Act* 1904, s. 5, which rendered null and void clauses in bills of

lading whereby the carrier was relieved from liability for loss or damage arising from (*inter alia*) negligence, fault or failure in the proper loading, stowage, custody, care or delivery of goods received to be carried, or whereby the obligations of the master, officers, agents or servants of any ship (*inter alia*) to properly deliver goods were in any wise lessened, weakened or avoided. This provision is substantially the same as provisions contained in the United States Act of Congress 1893 generally known as the *Harter Act*.

The *Sea-Carriage of Goods Act* 1924 introduced provisions which were not contained in the 1904 Act (repealed by the 1924 Act) or in the *Harter Act*. One of these provisions is article IV., rule 5 :—

> " Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding one hundred pounds per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.
>
> By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.
>
> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connexion with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading."

The learned trial judge held that clause 14 in the bill of lading was inconsistent with article IV., rule 5, and was therefore null and void.

The defendant's case is quite simple—the maximum liability of a carrier in the case of non-delivery is measured by the value of the goods ; the value of the goods in the present case is agreed as not exceeding £5 ; therefore clause 14 does not in any way relieve the carrier from liability or lessen his liability ; accordingly, there is no infringement of article III., rule 8, and, as the greatest possible liability of the carrier in any case is the value of the goods, there is no provision in the bill of lading as to maximum liability which is inconsistent with article IV., rule 5, for that rule does not in any case impose any greater liability than a liability up to the value of the goods.

The defendant relies on cases decided under the *Sea-Carriage of Goods Act* 1904 and under the provisions of the *Harter Act*, either

H. C. OF A. 1945. WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD. Latham C.J.

upon the Act itself or upon the clauses of the Act as introduced into bills of lading. In *Calderon* v. *Atlas Steamship Co. Ltd.* (1) the Supreme Court considered a provision in a bill of lading that the carrier should not be liable for any goods of any description which were above the value of 100 dollars per package unless a special agreement was made in relation to those goods. This clause was construed as excluding all liability in respect of goods over 100 dollars in value, and not as limiting the liability of the carrier to 100 dollars. Such a provision (where it applied) purported to relieve the carrier altogether from liability for non-delivery of goods, and was therefore void under the *Harter Act*. But the court recognized the authority of cases in which it was held that it was competent for carriers to agree with shippers upon the valuation of the property carried with a rate of freight based on the condition that the carrier assumed liability only to the extent of the agreed valuation.

Anthony Hordern & Sons Ltd. v. *Commonwealth & Dominion Line Ltd.* (2) was a similar case where the bill of lading contained a clause to the effect that the shipper would not be accountable for any one package which was of a value more than £100 unless the value was declared and extra freight agreed upon and paid. This provision was an exclusion of all liability in certain cases and was held to be inconsistent with a provision of the bill of lading which incorporated the *Harter Act* into the contract between the parties.

In the latter case also a distinction was drawn between clauses which (where they applied) excluded all liability of the carrier, and clauses which contained an agreement as to value and a limitation of the liability of the carrier by reference to the agreed value. In *Hordern's Case* (2) reference was made to *Morris* v. *Oceanic Steam Navigation Co. Ltd.* (3) and *Tuck* v. *America Levant Line* (4). In each of those cases there was a clause in the bill of lading, similar to clause 14 (*a*) in the bill of lading in the present case, by which it was mutually agreed that the value of each package receipted for did not exceed the sum of 100 dollars unless otherwise stated in the bill of lading, and it was declared that the rate of freight was adjusted on that basis. In each of these cases it was held that there was an agreement as to the value of the goods and no relieving from liability or lessening of liability.

Studebaker Distributors Ltd. v. *Charlton Steam Shipping Co. Ltd.* (5) was another case in which a clause in a bill of lading was held to amount to an agreement as to value, so that if the shipper accepted

(1) (1898) 170 U.S. 272 [42 Law. Ed. 1033].
(2) (1917) 2 K.B. 420.
(3) (1900) 16 T.L.R. 533.
(4) Unreported.
(5) (1938) 1 K.B. 459.

liability up to the agreed value there was no relieving him of or lessening his liability. If a higher value had been declared the shipper would have had to pay a higher freight, and the liability of the carrier would then not have been subject to the limit which would have applied in the absence of such a declaration of value.

In *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1) this court considered a bill of lading which provided that the company should not be accountable beyond the sum of £10 for any package unless the package had been booked with a declaration of the nature and value thereof and extra freight paid, and that then the carrier should be liable only for the declared value. *Griffith* C.J., *Isaacs* and *Powers* JJ. expressed the opinion *obiter* that this clause amounted to an agreement as to value and accordingly did not purport to create any exemption from liability and was not invalidated by s. 5 of the Act of 1904.

The appellant relies upon these cases as showing that clause 14 is not inconsistent with any of the rules contained in the schedule to the 1924 Act, and contends that it provides a good defence to the action.

If the present case fell to be decided under the 1904 Act the court would, in my opinion, be bound in accordance with the foregoing authorities to hold that clause 14 was not invalidated by the Act.

But in my opinion the provisions of article IV., rule 5, in the schedule to the 1924 Act completely change the position with respect to agreements as to maximum liability of the carrier. This rule contains a provision that the carrier shall not be liable for loss or damage to goods in an amount exceeding £100 unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. The third paragraph of rule 5 provides that by agreement between the carrier, master or agent and the shipper, another maximum amount than £100 may be fixed, provided that such maximum shall not be less than £100.

I compare the position of the parties under article IV., rule 5 with the position of the parties under clause 14 of the bill of lading if that clause is held to be valid. Under the rules, if there is no declaration of the nature of the goods in a particular package and of their value, the liability of the carrier in respect of that package is limited to £100. That limit of £100 cannot be reduced (though it may be increased) by any provision in the bill of lading. On the other hand, if the clause is held to be valid, if there is no declaration of the true character (i.e. the nature) of the goods and of their value, the liability of the carrier is limited to £5.

(1) (1914) 18 C.L.R. 646.

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

Latham C.J.

The effect of clause 14, therefore, is that, although the result is achieved by two separate paragraphs, and not by a single provision, the sum of £5 is substituted for £100 in the first paragraph of article IV., rule 5. Clause 14 of the bill of lading does not declare "the nature and value of such goods" within the meaning of the first paragraph of article IV., rule 5. Such a declaration must be specific. It must state the nature as well as the value of the goods. A statement that none of the goods exceed £5 in value does not declare either the nature or the value of any goods. What clause 14 does is to make an agreement between the carrier and the shipper which provides for a maximum amount, namely £5, other than the amount mentioned in the rule. That amount is less than the amount mentioned in the rule, and any such agreement between the parties is prohibited and is null and void.

The carrier can protect himself by requiring a declaration of the nature and value of the goods and inserting it in the bill of lading. He is entitled to do this—see *Riley* v. *Horne* (1), quoted by *Isaacs* J. in *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (2). If he does not do so, article IV., rule 5 applies in his favour and he is entitled to refuse to pay more than £100 in respect of any package or unit, unless a greater amount of maximum liability has been agreed between the parties. But in the absence of a declaration of the nature and value of the goods, the parties cannot make a valid agreement fixing maximum liability at less than £100.

I am therefore of opinion that even if clause 14 could have been held to be valid under the 1904 Act in accordance with the reasoning contained in the decisions to which I have referred, it cannot be held to be valid under the 1924 Act. The decision of the learned judge was right and the appeal should be dismissed.

RICH J. In this appeal there was a failure to deliver the goods the subject of this controversy. The matter then falls to be decided by the rules contained in the schedule to the *Sea-Carriage of Goods Act* 1924 and the bill of lading must be read so as to harmonize with these rules. In the final analysis the question to be determined is whether clause 14 (*a*) of the bill of lading can be reconciled with rule 5 of article IV., which limits the liability of the carrier and the ship for loss or damage and fixes the amount of liability at £100 sterling per package or unit unless the nature and value of the goods have been declared before shipment and inserted in the bill of lading. Furthermore, by agreement a maximum amount other than that

(1) (1828) 5 Bing. 217 [130 E.R. 1044].

(2) (1914) 18 C.L.R., at pp. 678, 679.

mentioned in the rule may be fixed so long as it is not less than £100 sterling. A comparison of clause 14 (*a*) with rule 5 leads to the conclusion that it is vitiated under rule 5 of article IV. because it purports to fix a maximum of £5, although the nature and value of the goods have not been declared before shipment and inserted in the bill of lading. Accordingly, the damages to be assessed for non-delivery are not limited to £5. I should, perhaps, observe that in the *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1) the Court considered that a limitation upon value expressed in the bill of lading did not lessen the liability because it was no more than an agreement as to value. The Court did not say or mean that it was a valuation or an agreed value. Article IV., rule 5, which, of course, did not then exist, relates to agreements as to value in the sense of limitation upon the amount at which the goods may be valued, and it prevents the imposition of a limitation below the maximum it prescribes. The question does not arise how it operates where there is an actual agreed value—what I may call in the language of another branch of the law a genuine pre-estimate of the actual value of the package or unit.

In my opinion the appeal should be dismissed.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of Victoria in favour of the respondents here in respect of the non-delivery of certain goods, which were shipped on board the appellant's ship at Melbourne for carriage to Hobart under a bill of lading in the form of a receipt for the goods, but were not delivered.

The only question for our consideration is whether clause 14 of the bill of lading is inconsistent with what are known as the Hague Rules scheduled to the *Sea-Carriage of Goods Act* 1924.

By clause 14 of the bill of lading it was mutually agreed that the value of each package or parcel receipted for did not exceed the sum of £5 (unless otherwise stated) on which basis the rate of freight was adjusted. And the clause also provided that the appellant was not accountable for any package or parcel beyond the mutually agreed value unless the same had been booked with a declaration of the true character and value thereof and the bill of lading signed in accordance therewith and extra freight paid prior to the receipt for shipment and then not beyond the declared value and subject to all other terms and conditions of the contract. The true value of the goods shipped was about £57, but the value was not stated in the bill of lading nor booked and declared.

(1) (1914) 18 C.L.R. 646.

H. C. OF A. 1945. WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD. Starke J.

The *Sea-Carriage of Goods Act* 1924 provides that the rules contained in the schedule to the Act shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port whether in or outside the Commonwealth.

Article III. of the rules provides that subject to the provisions of article IV. the carrier shall properly and carefully keep, care for and discharge the goods carried and that any clause, covenant or agreement lessening liability for loss or damage to or in connection with the goods carried (otherwise than as provided by the rules) should be null and void and of no effect (See article III., rules 2 and 8). Article IV. provides that neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 (gold value) per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, but by agreement between the carrier and the shipper another maximum amount than that mentioned may be fixed provided that such maximum shall not be less than the figure above named (article IV., rule 5 and article IX.).

The purpose of the Act and the Hague Rules and the proper approach to their construction have been examined and stated in *Stag Line, Ltd.* v. *Foscolo, Mango & Co. Ltd.* (1); *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (2). But there is nothing in the Act or the rules which precludes the parties to a contract of carriage of goods by sea covered by a bill of lading agreeing upon the value of the goods carried. That is not an exemption from liability and is not obnoxious to the provisions of article III., rule 8 of the Hague Rules (*Anthony Hordern & Sons Limited* v. *Commonwealth & Dominion Line Limited* (3); *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (4)). But it is contended that clause 14 is obnoxious to article IV., rule 5 of the Hague Rules. Now that clause protects the carrier and the ship; it is the measure of the carrier's and the ship's liability unless the nature and value of the goods shipped be declared. But by agreement another maximum may be fixed provided that the maximum shall not be less than the figure already named, namely, £100 (gold value). The effect of clause 14 of the bill of lading, though a valuation clause, alters the measure of that liability because it operates to reduce the maximum liability to £5 for each package or unit unless otherwise stated in the bill of lading or another value

(1) (1932) A.C. 328, at pp. 342-350.
(2) (1939) A.C. 277.
(3) (1917) 2 K.B. 420.
(4) (1914) 18 C.L.R. 646, at pp. 659, 660, 678.

has been booked and declared in accordance with the provisions of the clause. That clause is therefore obnoxious to the provisions of article IV., rule 5 and therefore ineffective.

The appeal should be dismissed.

DIXON J. It is admitted that the carton of drapery in respect of the loss of which the action is brought was received for shipment by the s.s. *Lanena* upon the terms of the " received for shipment " bill of lading, that it was shipped thereunder, and that it was not delivered to the consignees at the port of discharge. It does not appear at what point in the handling of the goods at the port of destination, namely, Hobart, delivery would have been made. But the bill of lading expressly provides that the shipowner shall cease to be liable as soon as the goods are free from the ship's tackles and, as this provision is not relied upon, it may be taken that the failure to deliver cannot be attributed to loss of the goods after the sea carriage had ended. We should, therefore, treat the matter as governed by the rules relating to bills of lading scheduled to the *Sea-Carriage of Goods Act*. These rules are to have effect in relation to and in connection with the sea carriage of the goods and the bill of lading contains a provision, as it must, that it is to have effect subject to the rules. The provision goes on to say, as it need not, that the bill of lading is " to be read and construed so that every clause, covenant, and agreement herein or on the face hereof contained and every part thereof shall be deemed not to include anything whereby the liability of the Company or ship arising from negligence, fault or failure in the duties and obligations provided in article III. of the said Rules is (otherwise than as provided in the said Rules) relieved from or lessened, but shall otherwise be of full force and effect."

The clauses of the bill of lading should, accordingly, be read, as far as may be, in a sense which will reconcile them with the rules.

The case law, English, Australian and American, dealing with other legislation thought to be *in pari materia* cannot be applied to the Hague Rules, except with great care and discrimination. An example is provided by *Hisken's Case* (1) in so far as it turned on what amounted to proper delivery, as will be seen upon a comparison with article II. of the rules. But I agree that we should adopt the view that clause 14 (*a*) of the bill of lading does not involve any conflict with rule 8 of article III. on the ground that the establishment by agreement of a maximum value is not regarded as relieving the carrier or ship from liability for loss or damage to or in connection with the

(1) (1914) 18 C.L.R. 646.

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

DIXON J.

goods or as lessening such liability. There is, therefore, no need for reconciliation. But the question whether the clause 14 (*a*) of the bill of lading, literally applied, exhibits any repugnancy to rule 5 of article IV., appears to be quite open and its determination to be in no way controlled by authority.

An analysis of rule 5 shows that its primary purpose is to restrict the liability of the carrier and ship for loss or damage in point of amount. The amount to which the liability is restricted is calculated with reference to the package or unit and is fixed at £100 in gold sterling per packet or unit. The restriction is expressed as a general proposition, that is to say, not in reference to the particular goods made subject to a given bill of lading. There is no definite article before the word "goods," and the qualification which follows contemplates as an exceptional case the specific declaration of the nature and value of the goods. That qualification expresses the secondary purpose and that is to allow the shipper to escape from the restriction by pursuing a course which will unmistakably fix the carrier with knowledge of the nature and value of the specific goods and acceptance of prima-facie responsibility for them on that footing. Before shipment the nature and value of the goods must be declared by the shipper and he must have them inserted in the bill of lading.

Finally, by agreement another maximum amount than that mentioned in the rule may be fixed. But it may not be less than the figure above named, viz. £100 sterling. It is evident that it must be a figure per unit or package and means no more than substituting a higher amount in the same general proposition. The agreement is to be made between the carrier or the master or the carrier's agent and the shipper.

Unlike rule 5, clause 14 (*a*) of the bill of lading is not expressed as a restriction in point of amount upon liability. It does not, in terms, deal with liability. What it does is to agree the value of each package or parcel receipted for at a maximum sum of £5 and state that it is on that basis freight has been adjusted. The fixing of a maximum value is subject to its being otherwise stated in the bill of lading. It is thus a clause of general application but its operation is excluded by the introduction of an express statement of value into the document.

There is, I think, no inconsistency between this limb of the provision and the restriction of the shipowner's liability in point of amount per package or unit which it is the primary purpose of rule 5 to impose. That restriction is provided for the protection of the shipowner. But when the rule proceeds to allow the substitution of

another maximum as the limitation and, at the same time, to stipulate that it must be a higher maximum, a fresh element is introduced. For it may be said that the stipulation is expressive of an intention that the carrier's liability may not be limited in point of amount below £100. I agree that an intention of this sort does appear. What, I think, is implied is that, so far as concerns restrictions upon liability by reference to amount, there shall be no general proposition restricting liability below £100.

Then, is the fixing by clause 14 (*a*) of a maximum value, £5 per packet or parcel, in the absence of some other statement, obnoxious to the intention so implied ?

It is said that it is not, because it deals with value, not liability. That, I think, is only a matter of expression. It deals with value for the purpose of liability. Then, it is said that no incompatibility with the rule can be involved in valuing the goods in case of loss. The answer is that the goods are not valued. A general provision that they do not exceed a value is not a valuation but a limit upon the value that can be assessed, if and when valuation becomes necessary and that means when the amount of liability is in question. This answer is not displaced by the fact that the clause operates only when not " otherwise stated " in the bill of lading. If otherwise stated, the clause is no part of the contract of carriage. If there is no such other statement, it stands unqualified as part of the expression of the contract of carriage. It is then repugnant to rule 5. Nor is it displaced by the authorities which hold that it does not relieve from or lessen liability because it is an agreement as to value. For that purpose an agreement fixing a maximum may be allowable, but it is not a fixing of the value by agreement and it is not, in my opinion, consistent with article IV., rule 5.

For the foregoing reasons, I think that clause 14 (*b*) cannot operate to restrict the damages assessable for the failure to deliver the goods.

The appeal should be dismissed.

McTiernan J. In my opinion the appeal should be dismissed.

The question to be decided is whether clause 14 (*a*) of the bill of lading is a good defence to so much of this claim for damages as exceeds £5. The decision of the question is governed by the *Sea-Carriage of Goods Act* 1924, particularly s. 4 (1), s. 6, and the schedule to the Act, particularly article III., rule 8 and article IV., rule 5.

In regard to any carriage of goods by sea which is within the operation of the Act, s. 4 (1) says that the rules in the schedule shall have effect in relation to and in connection with it. Section 6 says that every bill of lading which contains or is evidence of a contract

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

McTiernan J.

of carriage to which the rules apply shall contain an express statement that the bill of lading is to have effect subject to the provisions of the rules as applied by this Act. In this respect the bill of lading in question conforms with the Act.

Article III. imposes responsibilities and liabilities upon the carrier and article IV. confers upon the carrier rights and immunities. The basis of the attack upon clause 14 (*a*) is that it purports to relieve the carrier from or lessen his statutory liability and responsibilities and also to enlarge the carrier's rights and immunities beyond the limits fixed by the Act and the rules. Article III., rule 8 makes null and void and of no effect any clause in a contract of carriage relieving the carrier from the liability therein mentioned or lessening such liability, otherwise than in the manner provided in the rules. Article IV., rule 5, says that the carrier shall not be liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit unless the nature and value of such goods have been declared before shipment and inserted in the bill of lading. This clause further provides, among other things, that by agreement another maximum amount than that mentioned in the rule may be fixed provided that such maximum shall not be less than the figure above named.

By clause 14 (*a*) the present parties agreed for the purpose of the bill of lading that the value of the package with which the case is concerned was not more than £5, the value not having been otherwise stated in the bill of lading. If the agreement is binding, it would limit the liability of the appellant for the loss of the package to an amount not exceeding £5, although the true value of the package was £57 12s. 7d.

It is necessary to compare clause 14 (*a*) with the provisions of article IV., rule 5. This rule limits liability to £100 unless the nature and value of the package are declared and inserted in the bill of lading, whereas clause 14 (*a*) limits liability to £5 unless the value of the package is otherwise stated in the bill of lading. Further, article IV., rule 5, provides that the parties may by agreement fix another maximum than £100, but not less than £100. Upon this comparison it seems to me that clause 14 (*a*) is repugnant to article IV., rule 5 ; and as clause 14 (*a*) only has effect subject to the provisions of the Rules, the clause is not sufficient in law to limit the appellant's liability to £5 for the loss of the package.

The case of *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1) provides authority for holding that clause 14 (*a*) is an agreement as to value. It was held in this case that clause 14 of the

(1) (1914) 18 C.L.R. 646.

bill of lading which was in question was not a clause whereby the carrier was relieved from liability, and was therefore not obnoxious to s. 5 (*a*) or (*c*) of the *Sea-Carriage of Goods Act* 1904.

There were no words in s. 5 (*a*) or (*c*) of the *Sea-Carriage of Goods Act* 1904 corresponding with the words " otherwise than as provided " which occur in article III., rule 8 ; and the *Sea-Carriage of Goods Act* 1904 did not contain anything corresponding to the provisions of article IV., rule 5. As clause 14 (*a*) of the present bill of lading is repugnant to these latter provisions, nothing that was decided in *Hisken's Case* (1) can save it.

WILLIAMS J. This appeal raises the important question whether it is a contravention of the *Sea-Carriage of Goods Act* 1924 for a carrier and shipper of goods to agree by a clause in a bill of lading that the value of the goods shipped, unless otherwise stated in the bill of lading, does not exceed a certain sum, where the sum stated is less than £100. The facts are briefly that the appellant company (the defendant in the action), which is a shipowner, shipped certain goods, the property of the respondent company (the plaintiff in the action), on one of its ships for carriage from Melbourne to Hobart under a bill of lading dated 24th September 1943. The appellant failed to deliver the goods at Hobart, whereupon the respondent sued the appellant for negligence, and the learned trial Judge gave judgment for the plaintiff for £57 2s. 7d., that being the real value of the goods. The appellant contends that he should have given judgment of £5, the sum stated in the bill of lading. The bill of lading contains a provision that it is to have effect, subject to the provisions of the rules in the schedule to the *Sea-Carriage of Goods Act* 1924, and to be read and construed so that every clause, covenant, and agreement therein shall be deemed not to include anything whereby the liability of the company or ship arising from negligence, fault, or failure in the duties and obligations provided in article III. of the rules is (otherwise than as provided in the rules) relieved from or lessened, but shall otherwise be of full force and effect. The bill of lading contains the following clauses : 1. Marks, weight, measure, contents, quality, value and conditions unknown. 2. The company may charge freight by weight, measurement or value, and may at any time re-weigh, re-measure, or re-value, or require the goods to be re-weighed, re-measured, or re-valued, and charge proportional additional freight accordingly. 14. (*a*) It is mutually agreed that the value of each package or parcel receipted for as above does not exceed the sum of £5 (unless otherwise stated herein) on which basis

(1) (1914) 18 C.L.R. 646.

H. C. OF A. 1945. WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD. Williams J.

the rate of freight is adjusted; (*b*) the company is not accountable . . . beyond such mutually agreed value for any parcel or package of any kind whatsoever unless the same shall have been booked with a declaration of the true . . . character and value thereof and the bill of lading signed in accordance therewith and extra freight paid prior to receipt thereof for shipment and then not beyond such declared value and subject to all other terms and conditions of the contract. If any declaration of character and/or value shall be incorrect or untrue or misleading in any particular the company shall not be accountable beyond the sum for which it would have been accountable had no declaration been made. If the nature or value of the goods be knowingly misstated by the shipper in this bill of lading then neither the company nor the ship shall in any event be responsible for loss or damage to or in connection with the goods.

The rules in the schedule to the *Sea-Carriage of Goods Act* 1924, referred to in the bill of lading, are in the same terms as the rules in the schedule to the English *Carriage of Goods by Sea Act* 1924, both Acts being passed to give effect to the International Conference on Maritime Law which met in Brussels in 1922. The Acts make important alterations in the common law rights and liabilities of shipowners, but the rules of the common law remain applicable except in so far as they are expressly modified by the Act: *Halsbury's Laws of England*, 2nd ed., vol. 30, p. 607. Section 4 of the *Sea-Carriage of Goods Act* 1924 provides that the rules contained in the schedule to the Act shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port, whether in or outside the Commonwealth, other than the carriage of goods by sea from a port in any State to any other port in the same State. Section 6 provides that every bill of lading issued in the Commonwealth which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the rules as applied by this Act.

Before referring to the relevant provisions of the rules it will be convenient to refer to two previous Acts which, like the rules, contain provisions limiting the extent to which a carrier of goods by sea can contract out of liabilities to which he would otherwise be subject. The first Act is the Act of Congress of the United States known as the *Harter Act* passed in 1893 intituled an Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property. Section 1 of this Act provides that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise

or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. The second Act is the *Sea-Carriage of Goods Act* 1904 which applied to ships carrying goods to any place outside Australia, or from one State to another State, and was repealed by the *Sea-Carriage of Goods Act* 1924. Section 5 of the Act of 1904 provided, so far as material, that where any bill of lading contained any clause, whereby any obligations of the owner of any ship to exercise due diligence, were in any way lessened, weakened, or avoided, that clause, covenant, or agreement should be illegal, null and void, and of no effect. In cases decided in the Supreme Court of the United States and in the English Courts relating to bills of lading subject to or incorporating the provisions of the *Harter Act*, and in a case in this Court relating to a bill of lading subject to the *Sea-Carriage of Goods Act* 1904, it has been held that a clause whereby the shipper of goods and the shipowner agree that the value of the goods does not exceed a certain sum, and that the freight is adjusted on this basis, does not contravene the provisions of either Act. In *Calderon* v. *Atlas Steamship Co. Ltd.* (1) the Supreme Court of the United States said, after citing a number of cases, that " in these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations " (2). In *Anthony Hordern and Sons Ltd.* v. *Commonwealth & Dominion Line Ltd.* (3) English cases are cited by *Horridge* J. where clauses in bills of lading incorporating the *Harter Act* providing that the value of each package should be taken to be a stated sum were also upheld. In *Studebaker Distributors Ltd.* v. *Charlton Steam*

(1) (1898) 170 U.S. 272 [42 Law. Ed. 1033].

(2) (1898) 170 U.S., at pp. 278, 279 [42 Law. Ed., at p. 1035].

(3) (1917) 2 K.B. 420, at pp. 424-426.

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

Williams J.

Shipping Co. (1) *Goddard* J., as he then was, held that a clause in a bill of lading that " it is agreed and understood that the value of each package shipped hereunder does not exceed the sum of two hundred and fifty dollars, . . . on which basis the rate of freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be especially declared and stated herein, and such extra freight as may be agreed on paid," did not offend against the *Harter Act* (2). His Lordship later said " the Act does not prevent the parties agreeing the value of the goods shipped, and if the shipowner accepts liability up to the agreed value, he is not limiting his liability. It is clear here that it was open to the shippers to declare their goods at a value higher than 250 dollars, in which case they would have had to pay a higher freight. It is not as if the shipowner would accept goods only on the terms that he was not to be liable beyond 250 dollars " (3). In *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (4) it was held by *Griffith* C.J., *Isaacs* J. and *Powers* J. that a clause in a bill of lading subject to the *Sea-Carriage of Goods Act* 1904 that the shipowner was not liable beyond a sum of £10 for each package of goods unless such package had been previously booked with a declaration of the nature and value thereof and extra freight paid thereon, and was then liable only for the declared value, was not within the terms of s. 5 of the Act and was therefore valid. *Griffith* C.J. said that if the shipper " obtains the advantage of paying lower freight, he will be taken to have agreed that the parcel is for the purposes of the contract to be taken to be not worth more than £10 . . . I do not think that such a stipulation is obnoxious to s. 5 of the Act, or comes in any way within its terms " (5). *Isaacs* J. said " as I read it," the clause " only requires the owner of the goods to state whether their value is over £10, and, if it is, to pay accordingly. If he does not state their value above that sum, it is an admission that they are not worth more. He has a fair option, so long of course as the extra freight is not unreasonable. It is not an exemption from liability : it is an agreement as to value made between the owner who knows and the carrier who does not ; and the freight is proportionate to the value " (6).

It is clear from these citations that clause 14 of the present bill of lading would not have been an agreement relieving the appellant from liability for loss or damage arising from negligence within the meaning of the *Harter Act*, or whereby its obligation to exercise due

(1) (1938) 1 K.B. 459.
(2) (1938) 1 K.B., at p. 466.
(3) (1938) 1 K.B., at p. 468.
(4) (1914) 18 C.L.R. 646.
(5) (1914) 18 C.L.R., at p. 660.
(6) (1914) 18 C.L.R., at p. 678.

diligence in the carriage of goods would have been lessened within the meaning of s. 5 of the *Sea-Carriage of Goods Act* 1904.

The material rules in the schedule to the *Sea-Carriage of Goods Act* 1924 are rule 8 in article III. and rule 5 in article IV. Rule 8, so far as material, is in the following terms: any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect. This rule is, in all material respects, *in pari materia* with the *Harter Act*, and s. 5 of the *Sea-Carriage of Goods Act* 1904, and therefore contains nothing which would avoid clause 14. If, therefore, the clause is void, it must be because it contravenes the provisions of rule 5. This rule is in the following terms: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding One hundred pounds per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima-facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connexion with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading."

The purpose of the rule is to fix a maximum liability of £100, or by agreement between the parties some higher amount, in respect of loss or damage to any particular package or unit where the nature and value of the goods have not been declared by the shipper before shipment and inserted in the bill of lading. But the rule does not restrict such a declaration and insertion to goods of a value of more than £100. It contemplates that the nature and value of goods of any value may be so declared and inserted, and provides generally, with respect to goods of any value, that the declaration, if embodied in the bill of lading, shall be prima-facie evidence of their nature and value, and that neither the carrier nor the ship shall be responsible in any event for loss or damage to the goods if the nature or value

H. C. OF A. 1945.

WILLIAM HOLYMAN & SONS PTY. LTD. v. FOY & GIBSON PTY. LTD.

Williams J.

thereof has been knowingly misstated in the bill of lading. The rule contemplates three events: (1) a right in the carrier to limit his liability to £100, unless the shipper declares the nature and value of the goods and the declaration is inserted in the bill of lading; (2) a right in the shipper upon such a declaration and insertion, in the absence of agreement to the contrary, to recover the true value of the goods; (3) a right in the parties to agree that, whatever the nature and true value of particular goods, and whether or not this nature and value are declared and inserted in the bill of lading, the goods shall be agreed, for the purpose of liability, not to exceed a certain value, provided that this value is not less than £100. The present bill of lading provides that the company is not accountable for loss or damage to goods beyond £5 unless the goods shall have been booked with a declaration of the true nature and value thereof and the bill of lading signed in accordance therewith. This provision, which limits the liability of the carrier to £5 instead of to £100, is a direct contravention of the provision in the rule that, where a maximum amount is fixed by agreement, the amount shall not be less than £100. This provision does, it seems to me, restrict to this extent the validity of agreements as to the value of the goods to be carried which would not have been held to infringe the *Harter Act* or the *Sea-Carriage of Goods Act* 1904.

For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Malleson, Stewart & Co.*

Solicitors for the respondent, *Gillott, Moir & Ahern.*

E. F. H.