[HIGH COURT OF AUSTRALIA.]

F. KANEMATSU AND COMPANY LIMITED . PLAINTIFF;

AND

THE SHIP "SHAHZADA" . . . . DEFENDANT.

H. C. OF A. 1956.

SYDNEY, *Sept.* 13, 14, 17, 18; *Oct.* 5.

Taylor J.

High Court—Admiralty jurisdiction—Foreign ship—Collision—Goods—Hides—Damage—Claim—Action—Bill of lading—Contract of carriage—"Goods carried into any port"—Goods carried out of port—Territorial limits of port—Deviation from contract—Loss or damage—Cause—Proof—Waiver of breach—Admiralty Court Act 1861 (*Imp.*), *s.* 6—*Colonial Courts of Admiralty Act* 1890 (*Imp.*), *s.* 2—*Sea Carriage of Goods Act* 1924 (*Cth.*)—*Rules, Art. IV, r.* 2.

The admiralty jurisdiction of the High Court, exercisable by virtue of the provisions of the *Colonial Courts of Admiralty Act* 1890, is no more extensive than that which was exercisable in the admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed, and unless claims made are of such a character as to have been within the cognisance of the admiralty jurisdiction of the High Court in England in 1890, the High Court of Australia has no jurisdiction to entertain them.

The High Court is not by virtue of s. 6 of the *Admiralty Court Act* 1861 invested with jurisdiction in admiralty to entertain claims generally in respect of cargo damaged in foreign ships, which jurisdiction is limited to cargo "carried into any port" in such ships. The expression "goods carried into any port" does not include goods carried out of that port or goods in the course of being carried out of that port.

Where, unknown at the time to a cargo owner, there has been a wrongful deviation, the shipowner is not entitled to rely upon the exceptions prescribed by the rules under the *Sea Carriage of Goods Act* 1924. In such a case he will not escape liability for loss of or damage to cargo, unless he can show that the loss or damage was occasioned either by an Act of God, or by the Queen's enemies, or as the result of inherent vice in the goods and, in addition, that such loss and damage would have occurred even if there had been no deviation.

Hain Steamship Co. Ltd. v. *Tate & Lyle Ltd.* (1936) 52 T.L.R. 617, distinguished.

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The *Shahzada* completed her loading at Sydney on 12th September 1952 of 1,000 wet-salted cattle hides for carriage to Kobe and, having left her berth, proceeded on her way to the sea. But on the evening of that day, whilst still in harbour, and a considerable distance from the entrance to the port, she came into collision with another vessel and sustained serious damage and the master beached the vessel in Double Bay where it remained until the morning of 14th September, when having been refloated the *Shahzada* returned to a berth at Glebe Island, Sydney, where a considerable portion of her cargo was removed to enable her to enter dry dock for repairs. The owner of the hides, a company incorporated in accordance with the laws of Japan, claimed damages.

Held that the *Shahzada* not having proceeded beyond the territorial limits of the port did not, in returning to a berth at Glebe Island, carry goods into the Port of Sydney within s. 6 of the *Admiralty Court Act* 1861, and, accordingly, the High Court had no jurisdiction to entertain the action.

Held, further, that in all the circumstances the plaintiff had failed to make out a case on the merits, and that even if the Court had jurisdiction to entertain the action, it should be dismissed.

ACTION.

This was an action brought by way of statement of claim in the High Court of Australia to recover compensation for damage alleged to have been caused to 1,000 wet-salted cattle hides as the result of a collision in Sydney harbour between the ship *Shahzada* and a British ship of 5,460 gross and 3,210 net tonnage owned by the Asiatic Steam Navigation Co. Ltd. of London. The hides, the property of the plaintiff, were part of the cargo of the *Shahzada* at the time of the collision.

Further facts and the relevant statutory provisions appear in the judgment hereunder.

R. L. Taylor Q.C. and *B. Burdekin*, for the plaintiff.

N. H. Bowen Q.C. and *L. W. Street*, for the defendant.

Cur. adv. vult.

Oct. 3.

The following written judgment was delivered by :—

TAYLOR J. The above-mentioned plaintiff, a company incorporated in accordance with the laws of Japan, was the owner of one thousand wet-salted cattle hides which were shipped in three hundred and thirty-two bags on board the above-mentioned vessel at Sydney on 12th September 1952 for carriage to Kobe. The hides had been purchased on the plaintiff's behalf by its agent in Sydney, J. Gunton (Aust.) Pty. Ltd., and they were consigned by that

company, pursuant to two bills of lading issued on the last mentioned date, to Kobe for delivery to its order. The bills of lading, each of which related to one hundred and sixty-six bags of hides, were issued by MacDonald, Hamilton & Co. on behalf of the owner of the vessel. As will appear the hides did not reach Kobe but there is no dispute that the plaintiff company was at all material times entitled to the benefit of the contracts evidenced by the bills of lading in the same manner as if those contracts had been made between it and the shipowner and the case has proceeded on this basis.

The *Shahzada* completed her loading on 12th September 1952 and, having left her berth, proceeded on her way to sea. But whilst still in harbour, and a considerable distance from the entrance to the port, she came into collision with another vessel and sustained serious damage as a result of which the master thought it prudent to beach the vessel in Double Bay. The collision occurred during the evening of 12th September and the vessel remained in Double Bay until the morning of 14th September. After she had been re-floated on the morning of the 14th she returned to a berth at Glebe Island where a considerable portion of her cargo, including the hides in question, was removed to enable her to enter dry dock for repairs. It should be said at once that it is not suggested that the collision was caused either wholly or in part by any default on the part of those in charge of the *Shahzada*.

After their removal the plaintiff's hides, together with other hides which had been shipped in the vessel, were stored for a time at Glebe Island. They are said to have been stored there under cover of the wide eaves of a building and, otherwise, to have been protected by suitable dunnage and by tarpaulins which substantially covered the various stacks. At a later stage, about the middle of October 1952, the hides so stored, with the exception of a quantity representing approximately thirty-three bags to which reference will be made later, were removed to a wharf at Pyrmont where they were stored in much the same manner except that they were not protected overhead by overhanging eaves. The removal of the hides to Pyrmont was undertaken preparatory to their transhipment to the *Nellore* which was due to sail for Japan on 25th October 1952. They were not, however, transhipped for, about 20th October, the view was expressed by an expert who then inspected them that the condition of the hides might have deteriorated to such an extent as to render it unlikely that they would arrive in Japan, after a delayed voyage including a passage through the tropics, in merchantable condition.

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Wet-salted hides are a perishable commodity and their commercial life, when stored under favourable conditions, was variously estimated by competent witnesses at periods ranging from six months to two years. The expression "wet" is used to denote a hide from which the moisture has not been evaporated and one which has been treated in its original condition as a hide by the application of brine and solid salt. In the prudent storage of wet-salted hides, it appears, two conditions should be observed: they must be protected from rain or other water damage and adequate ventilation must be provided. Water damage, it is said, will operate to reduce the concentration of solid salt whilst warmth will encourage the development of salt burn or "red heat". Under adverse conditions of storage marked signs of deterioration may appear within a short space of time—possibly, within a few weeks—and it is readily apparent that some consideration must be given to the condition of any hides which are intended to be consigned by ship on a voyage which involves a passage through the tropics.

The plaintiff's hides, and the other hides which had been removed from the *Shahzada*, were seen at Glebe Island by Captain Langley, a marine surveyor who apparently became interested in them on behalf of underwriters, on 15th September 1952. They were then in a number of stacks on wooden pallets acting as dunnage and they were confined under tarpaulins which covered one hundred per cent of the tops of the stacks and seventy-five per cent to eighty per cent of the sides. From then until 12th or 13th October he saw the various stacks on a number of occasions, but he did not make any close inspection of them or notice any signs of damage. Nor, apparently, did he make any complaint concerning the manner in which the goods had been stored though he says that, at a later stage, at Pyrmont he noticed signs of heat in the stacks. On 12th or 13th October, however, he observed, at Glebe Island, a number of hides, representing some thirty-three bags, which were in a very badly damaged state. They had been saturated with water, they were "wet and flabby" and "odorous" and, in places, were turning black. None of these hides, it appeared later, was the property of the plaintiff, but the suggestion upon Captain Langley's evidence is that these saturated hides were, or may have been, stored at Glebe Island in the same stack or stacks as those which contained the plaintiff's hides with the result that the moisture which they contained adversely affected the latter. There is, however, no direct evidence that the saturated hides were so stored and, though the inference may be open on Captain Langley's evidence, there is every reason for doubting whether such a state of affairs

existed. The damaged hides had become saturated on the deck of the *Shahzada*, their condition was obvious upon their removal from that vessel and I think it highly unlikely that they were placed in the same stack as other hides which, at that time, had not been affected. The evidence given on behalf of the shipowner is to the contrary and in my view it is probable that the hides were kept segregated upon their removal from the *Shahzada*. Moreover, if they had been stored with unaffected hides, there may be reason for thinking that when, about 20th October 1952, the hides which had been removed to Pyrmont were subjected to an inspection, evident signs of resultant water damage might well have been found.

The inspection which took place about 20th October was made in the presence of Mr. Jarvis, the claims officer of MacDonald, Hamilton & Co., Mr. Wood and Mr. Morton, representing the consignees, and a Mr. Tulloch. The last named was an expert whose attendance at the inspection had been arranged by the consignees' representatives. There is, however, but little evidence of what occurred on this inspection. Mr. Wood died before the trial, Mr. Morton was said to be abroad, Mr. Tulloch was not called to give evidence and, although Mr. Jarvis gave evidence, he has no expert knowledge concerning wet salted hides. In his evidence he said that bags of hides were taken at random from the stacks and opened up. According to him no comment was made by Mr. Tulloch concerning most of the hides inspected but some of them, he said, bore patches of salt burn. At the conclusion of the inspection Mr. Tulloch said that he thought it would be inadvisable to send them to Japan and those present appear to have been disposed to accept that advice. The same view seems to have been accepted subsequently by Captain Carter, on behalf of the shipowner, and Captain Langley, upon their joint survey of the plaintiff's hides. In their joint report, dated 29th October 1952, they observed that "depreciation of hides is probable" and they recommended the sale at auction of the plaintiff's hides. In these circumstances the plaintiff's agent wrote to MacDonald, Hamilton & Co. on 23rd October in the following terms:

"re s.s. 'Shahzada' at Sydney.
re Wet-salted Hides.

We refer to our discussions with your Mr. Jarvis and on behalf of consignees are agreeable to the Wet-salted Hides shipped by us being sold here for the benefit of all parties concerned without prejudice to any rights or claims of the parties."

Thereafter, about 4th October, the plaintiff's hides and the other hides at Pyrmont were removed to the warehouse of the Farmers &

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Graziers' Co.-op. Grain Insurance & Agency Co. Ltd. and they were sold by auction on 4th December 1952. Subsequently the proceeds of this sale were paid to MacDonald, Hamilton & Co. who, in turn, accounted to the plaintiff therefor with the exception of a sum of £445 12s. 3d. which, it was claimed the shipowner was entitled to retain on account of the plaintiff's liability to make a general average contribution.

In the course of the inspection at Pyrmont, at which Mr. Wood and Mr. Morton represented the consignees, it was discovered that when the plaintiff's hides were received on board the *Shahzada* they were not stowed below deck; in common with other hides received for shipment they were stowed on deck. Some of the hides were stowed on the well-deck in the vicinity of No. 2 hatch and others were stowed on the after-deck. The latter were separated from the former by a distance of approximately one hundred feet and the intervening space was occupied by a citadel deck and the ship's navigation bridge. During the course of the trial it became apparent that the plaintiff's hides were among those stowed on the after-deck and, in view of subsequent events, this is of some importance. When the *Shahzada* came into collision she was holed on the port side in the vicinity of No. 2 hold and, after she had been beached, steps were taken to pump out of that hold the water which had entered. A number of pumps were used but the use of one of these resulted in the discharge of a considerable amount of water on the deck in the vicinity of No. 2 hatch. It was this circumstance, I have no doubt, which resulted in the saturation of the quantity of hides estimated as thirty-three bags and when these hides were removed at Glebe Island both they and the bags which contained them, or had contained them, were extensively damaged. It seems to have been thought originally that the plaintiff's hides suffered water damage when water had been pumped out of No. 2 hold but there is no reason at this stage to think that they suffered any water or other damage whilst they were on the *Shahzada*.

Enough has now been said to indicate the nature of the claims which the plaintiff makes in this action. In the first place it is alleged that damage to the plaintiff's goods resulted from a failure on the part of the shipowner's representatives to exercise proper care in storing them whilst they were at Glebe Island and Pyrmont and an appropriate claim is made. Alternatively to this claim it is contended that the plaintiff is entitled to recover damages for the deterioration of the hides during the period of delay consequent upon the collision. The alternative claim is said to arise because the stowage of the plaintiff's hides on the deck of the vessel was a

breach of the contracts of carriage. That breach, according to the argument advanced for the plaintiff, entitled it to rescind the contracts of carriage *as from the time of the breach* (see per Lord *Maugham* in *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.* (1), but cf. the discussion on this latter point in *Salmond and Williams* on *Contracts*, 2nd ed. (1945), p. 565) and, thereupon, left the rights and liabilities of the parties to be determined as if the plaintiff's goods had been in the hands of the shipowner as a common carrier (cf. *Scrutton* on *Charter Parties and Bills of Lading*, 16th ed. (1955), p. 298). The plaintiff's agents did, on 29th October 1952, purport to rescind the contracts of carriage when it wrote to MacDonald, Hamilton & Co. in the following terms:

"re s.s. 'Shahzada' at Sydney—re Wet-salted Hides.

We refer to our letter of 23rd instant and have duly passed on to our buyers the information supplied by your Mr. Jarvis on 20th instant, that the Wet-salted Hides consigned by us from Sydney had been shipped on deck without our or consignees' knowledge or consent. We have now been instructed to repudiate the contract with you for shipment of same. As a matter of convenience, and to minimise loss we confirm the arrangement for you to dispose of the Hides on behalf of all concerned, as per our letter of 23rd instant.

We have also been instructed to inform you that the 'Shahzada' will be held responsible for any loss or damage."

Thereupon, it is said, the shipowner became answerable, even in the absence of negligence, for the consequences of the deterioration of the plaintiff's goods during the delay consequent upon the collision. Further it is said that, quite apart from rescission, the fact that the goods were improperly carried as deck cargo precludes the shipowner from relying upon any of the immunities which, otherwise, would be available to it by virtue of the provisions of art. IV. of the rules under the *Sea Carriage of Goods Act* 1924.

Additionally to these claims the plaintiff claimed a declaration that it is not, in the circumstances, liable to make a general average contribution and seeks to recover the sum of £445 12s. 3d. retained by the defendant.

The first question which, in these circumstances, presents itself for consideration is whether this Court has any jurisdiction to entertain the action. The admiralty jurisdiction of the High Court, exercisable by virtue of the provisions of the *Colonial Courts of Admiralty Act* 1890, is no more extensive than that which was exercisable in the admiralty jurisdiction of the High Court in England

(1) (1936) 52 T.L.R. 617, at p. 625.

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"as it existed at the time when the Act was passed" (*The Yuri Maru* (1)). This Court has no other jurisdiction to entertain the claims made by the plaintiff in this action and, accordingly, unless they are seen to be of such a character as to have been within the cognisance of the admiralty jurisdiction of the High Court in England in 1890, this Court has no jurisdiction to entertain them.

It is clear that the plaintiff's claims to recover damages could not properly have been pursued in the admiralty jurisdiction in England prior to 1861 and the narrow point which arises for decision on this aspect of the case is whether s. 6 of the *Admiralty Court Act* of that year sufficiently extended the jurisdiction to embrace claims of this character. It was, it should be said, conceded that there is no basis for contending that any other appropriate extension of the jurisdiction took place at any material time. The language of s. 6 of the Act of 1861 is of significance and the material provisions should be set out in full: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales." By virtue of the first proviso to s. 2 of the *Colonial Courts of Admiralty Act* 1890 the reference to England and Wales in the quoted provision should be read as a reference to the Commonwealth of Australia (*John Sharp & Sons Ltd.* v. *The Katherine Mackall* (2)). The provisions of s. 6 have been the subject of discussion in several cases and earlier cases were the subject of comment in the *Pieve Superiore* (3) and *The Cap Blanco* (4). The result of the decisions is that goods are carried into a port within the meaning of that section whether they are so carried for delivery at the port in accordance with a contract of carriage, or, whether the vessel on which they are carried enters the port as an intermediate port or, merely, to take refuge or for the purpose of receiving orders or for any other purpose. Dr. *Lushington* apprehended that "the phrase 'carried into' was used advisedly instead of the word 'import'" and thought that great latitude should be given "to the construction of the Act" (*The Bahia* (5)) whilst the Judicial Committee of the Privy Council declined "in construing the Act so to interpret words,

(1) (1927) A.C. 906, at p. 915.
(2) (1924) 34 C.L.R. 420.
(3) (1874) L.R. 5 P.C. 482.
(4) (1913) P. 130.
(5) (1863) Br. & Lush. 61 [167 E.R. 298].

large enough in their ordinary meaning to embrace such cases, as to exclude them from its operation, and thus leave foreign masters who have broken their contracts free to take away their ships from this country in the sight of English consignees, who would be powerless, as they were before the Act, to stop them" (*Pieve Superiore* (1)). In the *St. Cloud* (2) Dr. *Lushington* spoke of the general intention of the legislature in enacting s. 6: "The statute is remedial. The short delivery of goods brought to this country in foreign ships or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for, the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal. To send the merchant who had sustained a loss to commence a suit in a foreign tribunal and probably in a distant country, could not be deemed a practical or effectual remedy. With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign parts, the common law tribunals could (not) afford effectual redress" (3).

But whatever views may be entertained concerning the desirability of giving a liberal construction to s. 6 it is only too clear that it is impossible to hold that the section confers admiralty jurisdiction to entertain claims generally in respect of cargo damaged in foreign ships. No justification can exist for holding that the expression "goods carried into any port" includes goods carried out of that port or goods in the course of being carried out of that port. It may be desirable that, where goods are lost or damaged whilst in the course of being carried out of a port on a foreign ship, and they proceed no further, a local jurisdiction to enforce a resultant claim against the ship should exist but this consideration forms no justification for saying that s. 6 produces any such result. No doubt a like consideration may account for the enactment of s. 6 but that section, it should be observed, extends to confer jurisdiction to entertain claims not otherwise within the jurisdiction of any English Court.

In the present case it is said that at the time of the collision on 12th September 1952 the *Shahzada* was a "sailed" ship and that when she returned from Double Bay to a berth at Glebe Island she carried the plaintiff's goods into the port within the meaning of s. 6. This

(1) (1874) L.R. 5 P.C., at p. 490.
(2) (1863) Br. & Lush. 4 [167 E.R. 269].
(3) (1863) Br. & Lush, at p. 14 [167 E.R., at p. 275].

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view, it is contended, does not involve violence to the language of that section. But in my opinion the operation of s. 6 in no way depends upon whether a vessel is a "sailed" or an "arrived" ship for the purposes of a contract made between interested parties; the expression "carried into any port" is used to describe a condition upon fulfilment of which a local court may exercise jurisdiction and the condition is fulfilled as soon as a vessel carrying goods in respect of which an appropriate claim exists comes within the territorial limits of the port. Beyond these limits the *Shahzada* did not proceed and accordingly she did not, in my view, carry goods into the Port of Sydney. The circumstances of the case are unusual and it may, perhaps, safely be said that such a case did not enter into the contemplation of those who framed the provisions of s. 6. But although some of the considerations which operated to bring about the enactment of that section apply with equal force to cases such as the present this does not justify the contrary conclusion. The words are clear enough and, though it may be proper to give them a liberal construction it would require an excess of liberality to hold that the plaintiff's claims for damages falls within s. 6.

The remaining claim of the plaintiff is for a declaration that it is not liable to make a general average contribution to the shipowner and for the recovery of the sum of £445 12s. 3d. at present held by the latter. In effect it is a claim by the plaintiff to recover moneys received by the latter to the use of the plaintiff and it is not a claim, itself, within the cognisance of the admiralty jurisdiction. Nor is it made so by the preliminary claim for a declaration in the terms already mentioned. Further, I doubt whether the circumstances in which such moneys were withheld can be said to give rise to a claim against the ship.

For the reasons which have been given I am of opinion that this Court has no jurisdiction to entertain this action. But since the merits of the case have been litigated before me and my view on this point may be held to be erroneous I propose, briefly, to express the conclusions which I have reached on the other issues in the case.

In so far as the claim for damages is based upon the allegation that due diligence was not exercised in caring for the goods whilst they were at Glebe Island and Pyrmont no substantial question of law arises; there is no doubt that the plaintiff would be entitled to recover upon proof of this allegation in any competent court. But it is not so clear that the plaintiff would be held entitled to damages, merely, in respect of deterioration in the goods occurring during the period of delay consequent upon the collision. No doubt the plaintiff considered that it was entitled to recover damages in respect

of any loss resulting from this delay but the statement of claim as originally drawn did not, in my view, make such a claim and it was not until the evidence had been concluded that such a claim was expressly added. As already indicated the plaintiff maintained that the question of the shipowner's liability should, in the circumstances of the case, be determined on the basis that he was a common carrier of the goods in question. This result was said to flow from the rescission by the plaintiff of the contracts of carriage after it had been discovered, on 20th October 1952, that the goods had been improperly stowed on deck. In support of this contention reliance was placed on the decision in *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.* (1) and on the passage already referred to in *Scrutton* on *Charter Parties and Bills of Lading*, 16th ed. (1955), p. 298. In the case referred to the House of Lords was concerned with the position of a cargo owner who, with full knowledge that the ship upon which his goods were being carried had, in breach of the contract of carriage, deviated from the contract voyage, had expressly waived the breach. The result of the waiver, according to their Lordships, was that the contract of carriage remained in full force and effect notwithstanding the deviation. In the action the cargo owner had sought the return of moneys deposited on account of a liability to make a general average contribution and, in the result it was held that it was not entitled to recover such moneys. In the present case it seems to have been assumed that the case is an authority for the proposition that where there has been a deviation, or other fundamental breach of a contract of carriage, the cargo owner will remain bound by all the terms of the contract and the shipowner will be entitled to rely upon any relevant term of the contract for his protection unless the contract is rescinded. But the decision in that case in no way detracts from the rule that where, unknown at the time to a cargo owner, there has been a wrongful deviation, the shipowner is not entitled to rely upon the exceptions prescribed by the rules under the *Sea Carriage of Goods Act*. In such a case he will not escape liability for loss of or damage to cargo, unless he can show that the loss or damage was occasioned either by an act of God or by the Queen's enemies or as the result of inherent vice in the goods and, in addition, that such loss and damage would have occurred even if there had been no deviation (see *Joseph Thorley Ltd.* v. *Orchis Steamship Co. Ltd.* (2); *James Morrison & Co. Ltd.* v. *Shaw, Savill & Albion Co. Ltd.* (3); *A/S Rendal* v. *Arcos Ltd.* (4); *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.* (5)).

(1) (1936) 52 T.L.R., at p. 625.
(2) (1907) 1 K.B. 660.
(3) (1916) 2 K.B. 783.
(4) (1937) 53 T.L.R. 953.
(5) (1931) 2 K.B. 48; (1932) A.C. 328.

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"Practically", as the learned authors of *Scrutton* on *Charter Parties and Bills of Lading*, 16th ed. (1955), p. 298, observes, "proof of the second proposition is hardly possible as regards any cause of loss except inherent vice of the goods."

Upon what I conceive to be a mistaken view of the decision in the *Hain Steamship Co. Ltd. Case* (1), counsel for the plaintiff sought to establish that the contracts of carriage had been rescinded. This, in my opinion, the plaintiff failed to establish for at the time it purported to rescind them the contracts had already been rescinded by mutual agreement. On 23rd October 1952, the parties agreed that the goods should be sold in Sydney and this was sufficient to put an end to the contract of carriage. It was of no consequence, on this aspect of the case, that the agreement between the parties was that the goods should be sold *without prejudice to any rights or claims of the parties* for an agreement was made which had the effect of bringing the contracts of carriage to an end. The only matters which were left outstanding, and which were not affected by that agreement, were the outstanding claims, if any, which the plaintiff, in fact, then had against the shipowner. It was however unnecessary for the plaintiff to establish that the contracts had been rescinded for no situation had previously arisen which required him to elect, either, to affirm the contracts or to treat them as at an end.

It was contended at the hearing that, although the principles applicable in cases of deviation apply generally to cases where goods have, in breach of the contract of carriage, been carried on deck a shipowner will escape liability in the latter circumstances if he is able to show that the loss or damage complained of would have occurred even if the goods had been properly stowed. Whether or not the same consequences follow in each case may, perhaps, be open to doubt but it is clear that a breach of the latter character constitutes sufficient ground upon which a cargo owner may, in the language of Lord *Atkin* in the *Hain Steamship Co. Ltd. Case* (1), elect to treat the contract as at an end and, further, the decision in *Royal Exchange Shipping Co. Ltd.* v. *W. J. Dixon & Co.* (2) is sufficient authority for saying that, where no case for election on the part of the cargo owner has arisen, the shipowner is precluded from relying upon any excepted cause of damage. There is, it may be observed, every reason why this should be so for improper stowage on deck must operate to give an entirely different significance, in the performance of the contract, to the exceptions—or at least many

(1) (1936) 52 T.L.R. 617.

(2) (1886) 12 App. Cas. 11.

of those—specified in art. IV, r. 2 of the *Rules of the Sea Carriage of Goods Act*. It was however pressed upon me by counsel for the defendant that in cases where it can be established that the loss or damage resulting from an excepted cause would have occurred even if the goods had been stowed below deck the shipowner is entitled to rely upon the exception. This, it is said, is such a case but I confess that I can find no warrant for the suggested qualification upon the liability of a shipowner in such circumstances. It is, however, unnecessary to pursue the matter for, in my view, no damage to the goods resulted from the delay consequent upon the collision.

I have already indicated that the evidence satisfied me that no damage was caused to the plaintiff's goods by the manner of their stowage on the deck of the *Shahzada* and that when re-landed at Glebe Island they had not suffered damage from water or any other cause. To this should be added—though it seems scarcely necessary—that the delay which supervened upon the collision in which the vessel was involved, was in no way a consequence of or connected with the improper stowage of the plaintiff's goods on her deck. Nevertheless, it was a consequence of the collision and if damage was thereby caused the plaintiff would be entitled to recover. So far as the subsequent storage at Glebe Island and Pyrmont is concerned I should, except for one significant fact to which no reference has yet been made, have been disposed to think that there was some undue deterioration in the condition of the goods at the time when it was decided that they should be sold at auction. But I do not mean by this statement that they had suffered water damage or that the form of storage adopted did not constitute a sufficient external protection to them ; if damage did result during this period it was because the manner of their storage was unsuitable for perishable goods of this character and not because of any lack of diligence in sufficiently maintaining the form of protection which, in fact, had been provided. If damage did ensue it was because they were perishable goods and their deterioration was accelerated by a lack of ventilation and consequent excessive warmth. But when the plaintiff's hides were sold on 4th December 1952 they realised prices commensurate with those then current for prime quality hides sold for export and the hides were, in fact, thereafter exported. A hide and skin merchant, who was the successful bidder for nearly three hundred of the plaintiff's hides, gave evidence in the case and he says that on the day before the sale he inspected the total offering. According to his evidence the hides showed no signs of deterioration

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which affected their value and that the prices realised for the plaintiff's hides on the following day were "just about the top mark that day". There were, it should be noticed, large quantities of hides other than those which had been removed from the *Shahzada* submitted for auction on that occasion. The same witness also said that the hides purchased by him were subsequently exported to Europe. The evidence of a representative of the Farmers & Graziers' Co-op. Grain Insurance & Agency Co. Ltd., however, seems to suggest that the prices obtained were slightly below those prevailing for hides of prime quality sold for export. He said that the prices may have varied by one and one half-penny per pound though evidence given by him earlier tends to show that there was no such disparity at all. But the purport of his evidence is not that the condition of the hides was responsible for any diminution in their value; on the contrary it is said that the fact that the hides were being offered for sale for export a second time might well have produced this result. It seems clear enough that it was known to the trade that the plaintiff's hides had been removed from the *Shahzada* after the collision in September and then stored pending transhipment and these circumstances were not calculated to enhance the prices obtained for them at auction. All in all, the prices obtained seem to indicate that they had suffered no material damage and the fact that they were then fit for export is demonstrated by the fact, which sufficiently appears, that all of the hides sold on the plaintiff's account that day were subsequently exported.

In answer to these considerations the plaintiff points to the fact that, in October 1952, it was agreed that the hides should not be transhipped but should be sold in Sydney. The fact that the parties so agreed, it is contended, is the strongest possible evidence that the hides were not then in a fit condition to be exported. Indeed the plaintiff goes further and asserts that the parties then agreed that this was so. But the evidence does not establish that either party formed any such judgment or that they so agreed; at the most the evidence shows that they were prepared to adopt the course suggested by Mr. Tulloch whose view, it may be said, appears to have been influenced substantially by factors other than the apparent condition of the hides. As already appears the only evidence of what occurred when the inspection was made on 20th October 1952 is that given by Mr. Jarvis. The inspection, itself, appears to have been a spot or random check and, though according to the evidence, some of the hides exhibited small patches of salt burn—which were not necessarily due to improper methods of storage—no comment was made

by Mr. Tulloch concerning the others which were examined. His final observation appears to have been that he "could not recommend the hides being forwarded on to Japan having regard to the length of time they had been in the bags and the further fact that at least another month would elapse before they would be available for delivery there." "By that time" he felt "serious depreciation could take place." Thereupon Mr. Jarvis said that the shipowner was prepared to accept that advice and added that if the owners agreed and wished the hides to be disposed of in Sydney they should let him have instructions in writing and he would make the necessary arrangements. The letter of 23rd October followed and arrangements were thereafter made for the sale of the goods. This oral evidence is in no way disputed and, though it may show that the parties were prepared to act upon the advice tendered to them, it does not establish that they agreed that the hides were then unfit for export, or, that they had been damaged as the result of some default on the part of the shipowner. Primarily, it was for the plaintiff to say if its hides should be retained for sale in Sydney though, in view of the fact that the shipowner was asserting a general average claim, it was necessary that both parties should agree. But the fact of their agreement that this course should be adopted in the circumstances did not involve the conclusion that there had been any default on the part of the shipowner or conclusively establish that the hides were then in such a condition as to be unfit for export.

In my view these matters were left open by the agreement of the parties. Nevertheless, as I have already said, if the facts relating to the inspection on 20th October stood alone they might well constitute evidence upon which a finding might be made for the plaintiff. But what weight can this evidence carry when the conclusion which it suggests is completely opposed to testimony that a subsequent thorough examination of the hides disclosed no damage? I refer of course to the evidence of Mr. Davis who, on the day after the examination, was prepared to back his judgment by bidding for the hides and by purchasing a large quantity of them at top prices. These, with the balance of the plaintiff's hides, which also realised approximately current prices for prime quality hides, were subsequently exported. These circumstances, at the very least, strongly suggest that Mr. Tulloch was mistaken and the fact that he was not called to give evidence in the case can lend no assistance to the plaintiff in attempting to establish that he was not. In all the circumstances I am of opinion that the plaintiff

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failed to make out a case and that, even if this Court has jurisdiction, the action should be dismissed.

Action dismissed.

Solicitors for the plaintiff, *John Wight & Co.*
Solicitors for the defendant, *Ebsworth & Ebsworth.*

J. B.