

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ohrloff and others v. Briscall and others (Ship "Helene") from the High Court of Admiralty; delivered 4th August, 1866.*

---

Present :

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JOHN TAYLOR COLERIDGE.

SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal from a Judgment of the High Court of Admiralty in an action brought by the Respondents, under the provisions of the Admiralty Act, 1861, as owners and assignees of the bill of lading of forty-seven casks of oil against the "Helene," of which the Appellants were owners, and in which the oil had been carried from Leghorn to Liverpool. When the ship arrived there, many of the casks were partially empty, and this action was brought to recover damages for this leakage of the oil, as having been occasioned by negligence and breach of contract, and breach of duty on the part of the Appellants.

The great question in the action was one of fact, viz., what was the cause of the leakage which was the subject of complaint? The learned Judge of the Court of Admiralty decided this question, after a most complete and able examination of the evidence, and we see no reason to find fault with his decision. The evidence, in his opinion, established that the leakage was caused, not by the perils of the sea, not by the defective quality of the casks, but by their being stowed in the same hold with some rags and wool which formed part of the cargo that was taken on board at the desire of the charterers.

Assuming that this was the cause of the leakage, the Appellants, the shipowners, deny that they are responsible for it, because by the Memorandum in the margin of the bill of lading, the shipowners are not to be accountable for "leakage."

On the argument different views were suggested by Counsel as to the meaning of this word "leakage." For the Respondents it was contended that the word means only ordinary leakage (which, according to the evidence, amounts to 1 per cent.), and does not extend to extraordinary leakage, such as that in question, amounting to an alleged deficiency of 2,000 gallons.

On the part of the Appellants, it was denied that, according to the natural and ordinary meaning of the words employed, the amount of leakage was at all limited in quantity; but it was conceded that, in accordance with the case of *Phillips v. Clark* (2 C. B. N. S., 156), the words in the margin did not protect the shipowners from responsibility for leakage occasioned by their own negligence.

It was, however, contended, on behalf of the Appellants, that the Plaintiffs must, in order to entitle themselves to the action, give satisfactory proof of such negligence, and that they had failed to do so; and after a careful consideration of the case, we have come to the conclusion that this contention on behalf the Appellants is well founded.

Notwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collocation of oil in casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in this case were aware of them. If the shippers knew of them, they also knew that the wool and rags which they made a part of the cargo must necessarily be stowed, and were in fact stowed, in the single hold of the ship, and with this knowledge we think it impossible that they should have abstained from mentioning the inevitable leakage in the then condition of the ship, and from requesting some means to be applied to prevent it, such as dividing the hold by bulkheads. Nor do we think the shipowners were in a better state of knowledge on the subject. Had they been so, it is inconceivable, as it seems to us, that they should have received a cargo so composed, without

some remonstrance with the shipper for selecting such mischievous companions to form part of the cargo with the oil.

If the shipowners were ignorant of the consequences of taking such a cargo, we do not think it amounted to culpable negligence on their part to stow, in the only place they could be stowed, the goods which, under the charter-party, the charterers had a right to insist, and did insist, should form a part of the cargo.

On this question, it is, in our opinion, very material to consider not only that the charterers so insisted, but also that the cargo was according to the terms of the charter-party received on board, and stowed as it was presented for shipment by them, and that they were shown to be very frequently on board as the stowage progressed, and were well acquainted with the mode of stowage (which was effected in a masterly way), and never made any complaint of or objection to it.

Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignorant of latent mischief of this nature, when Lloyd and Co., who are proved to have had very great experience as oil merchants, were in the same state of ignorance.

But even if the Appellants knew, or ought to have known, what the consequences of such stowage must be, we are not prepared to say that they were guilty of negligence in not putting up bulk-heads. Assuming that they could have been so constructed as to protect the part of the hold where the oil was stowed from the influence of the heat generated by the wool and rags, still this could not have been done without much trouble and considerable expense, which we cannot concede that the shippers had a right to throw on the shipowners, because the shippers chose to load the ship they had chartered with a cargo of such a nature. And to this we may add that, even supposing the shipowners to have been aware of the usual consequences of stowing such a cargo in the same hold, they might have well come to the conclusion that the shippers were also aware of them, and would not have put such a cargo on board unless they had been assured that the casks were of such extraordinary strength and goodness

as to be capable of resisting the usual influence of a heated temperature.

For these reasons, we think the Respondents failed to prove that the leakage was caused by the Appellants' negligence.

It may be observed that the learned Judge of the Admiralty Court appears to have adopted the construction of the word "leakage," contended for by the Respondents, viz., that it means "ordinary leakage" only, and consequently, the Judgment adverts but little, if at all, to the question whether negligence on the part of the shipowners had been proved.

But we do not think such a construction allowable. The condition that the shipowners are not to be accountable for leakage does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms. Nor are we aware of any authority for doing so. It follows that, in our judgment, the Memorandum protects the shipowner as to all leakage except that caused by negligence, and therefore, if no negligence is shown, there is no cause of action.

Another point was raised and argued before us, viz., that the conduct of the shippers as to the stowage was such that it would support a plea of leave and licence by the shippers, if the action had been brought by them. But it was contended on behalf of the Respondents that, by reason of the Bills of Lading Act, 18 & 19 Vict., cap. 3, such a plea was not allowable in an action by the indorsees of the bill of lading. It is unnecessary, however, to decide this point, as our opinion is against the Respondents on the question of negligence.

On these grounds their Lordships will humbly advise Her Majesty that the Judgment of the Court of Admiralty should be reversed, with costs, both in the Court below and on this Appeal.

---