

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moore and another v. Harris, from Canada; delivered 7th April, 1876.*

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Present :

SIR JAMES W. COLVILE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE SMITH.  
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the Court of Queen's Bench for Lower Canada, affirming a Decree of the Superior Court, which dismissed the Plaintiffs' action.

The Appellants, who are merchants in Toronto, brought the action against the Respondent, the owner of the steamship "Medway," one of a line of steamers between London and Montreal, for the value of the damage alleged to have been done to 306 packages of tea on the voyage from London to Montreal.

By the Bill of Lading, signed in London by the Master's Agent on the 12th April, 1870, the 306 packages were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal," . . . . . "unto the Grand Trunk Railway company, and by them to be forwarded thence per railway to the station nearest to Toronto, and at the aforesaid station delivered to Messrs. Charles Moore & Co., or to their assigns." The exception contains a long list of special risks, besides general perils of the sea, whether arising from negligence or otherwise. The instrument also contains the following condition, upon the last clause of which a material question arises :—

"No damage that can be insured against will be

paid for, *nor will any claim whatever be admitted unless made before the goods are removed.*"

The case of the Plaintiffs, as stated in their Declaration, was that during the voyage the tea "had become impregnated and affected with the odour and taste of chloride of lime and other injurious substances," and that the damage so occasioned was not within any of the exceptions of the Bill of Lading. The defence, stating it generally, was (1), that the tea was not damaged on board the ship; and if it was, that in one way of accounting for it, the injury was within the excepted risks; and (2), that the claim was barred by the delay which occurred in making it.

The evidence for the Plaintiffs was to the effect that, during the voyage, scarlet fever broke out among the steerage passengers, and, under the advice of the surgeon, chloride of lime and carbolic acid were employed as disinfectants. That the chloride was thrown in large quantities about the fore cabin and other parts of the ship occupied by the passengers, and carbolic acid sometimes used in the same places, appears to have been satisfactorily proved. The Plaintiffs' packages—how many of them did not appear—and packages of tea belonging to other consignees were stowed in the hold under this cabin, and the passengers trunks were in a place near them. The passengers, it is said, suffered greatly during the voyage from the smell of the disinfectants, and when their trunks were opened on shore the clothes contained in them were found to be strongly impregnated with the same odour. The ship arrived at Montreal on the 2nd or 3rd May, having sailed from London on the 14th April.

There were, in all, 4,000 or 5,000 packages of tea on board dispersed in various parts of the ship. The Plaintiffs' were landed with the others, and all were placed in shipping sheds, where they were sorted, and then taken to the freight sheds of the Grand Trunk Railway Company. From thence they were carried by railway to Toronto, and deposited in the Railway Company's bonded warehouses there. After lying a day or two in these warehouses the packages were carried in the Railway Company's waggons to the Plaintiffs' own warehouse.

The unloading of the ship occupied several days, and the Plaintiffs' packages were forwarded in three lots. These lots were removed from the shipping sheds to the railway freight sheds in Montreal on the 6th, 9th and 12th May, and were respectively delivered at the Plaintiffs' warehouse in Toronto on the 13th, 16th and 17th May.

Much evidence was given as to the storing and transport of the packages after they left the ship, to exclude the supposition that they were damaged in their transit from the ship to the Plaintiffs' warehouse.

It appears that upon the arrival of some of the packages at the Plaintiffs' warehouse, their shipping clerk and foreman, Macfarlane, perceived a peculiar smell in them, and called the attention of the carmen to it.

On the 18th May the Plaintiffs called in four persons, viz., two grocers, a merchant, and a tea broker, to examine the tea, and obtained from them the following Report, which was sustained by their evidence given in the cause:—"We find the entire lot damaged and unmerchantable. The damage appears to have been caused by chloride of lime, or some other chemical. We find the packages impregnated with the odour, as also the contents."

On the 27th May another survey of the tea was held for the purpose of obtaining a return of duty, and the surveyors then called in reported damage to the extent of 99 per cent.

No notice whatever of the damage or of these surveys was given to the captain or agent of the ship until the 30th May, when the solicitors of the Plaintiffs wrote to Mr. Shaw, the agent for the ship at Montreal, informing him that "the tea upon its arrival was found to have been spoiled and rendered almost worthless by reason of its having been improperly carried," and inviting him to be present at a survey of the tea proposed to be held on the 9th June. To this letter, which was received by Mr. Shaw on the 3rd June, no answer was returned. The survey, however, took place, and a Report in substance the same as that of the 18th May was made.

Other evidence was given by the Plaintiffs, but none as to the condition of the tea when shipped.

The Defendant called witnesses to rebut the presumption that the damage was done in the ship, and

among them stevedores and others who were present when the cargo was discharged, and say that as far as they observed, the floors over the hold were tight, and the packages undamaged; but it is remarkable that none of the officers or crew of the ship were examined.

Mr. Justice Mackay, the Judge of the Superior Court, who tried the cause, does not seem to have grappled with the question, whether the tea was damaged in the ship. The "considerants" of his Judgment are principally directed to the conduct of the Plaintiffs in delaying to make their claim, and in exaggerating the extent of the damage; and it can only, if at all, be inferred that this question was decided by him in the negative from the general "considerant," "that some of the material allegations of the Declaration are unproved, and some of them disproved."

Their Lordships, however, have had the advantage of seeing the reasons given by the Judges of the Court of Queen's Bench, and the majority certainly find the question of fact against the Plaintiffs. But the learned Judges, in dismissing the action, rest their decision principally upon other grounds, and their opinion on the question of fact is evidently not a firm one. It is based on what they consider the insufficiency of the evidence, and especially on the absence of proof of the condition of the tea when it was shipped.

Their Lordships cannot but think that the Plaintiffs' evidence, although on some points open to unfavourable comment, does on the whole make out a strong *prima facie* case that the damage was done in the ship, and that the presumption arising from it is greatly strengthened by the conduct of the Defendant in declining to call any of the officers or crew of the ship to explain in what manner and under what conditions the chloride of lime and carbolic acid were used, and the state of the ship during the voyage.

They also think that the Judges gave undue weight to the consideration that the Plaintiff offered no proof of the condition of the tea when it was shipped. There is not, and, in the nature of things, cannot be, any general rule of law or evidence on the subject. It must depend on the circumstances of each case, how far such proof is necessary, and

the case is to be regarded as inconclusively proved without it. Where, for instance, a cargo of grain is found to be heated—a damage which may arise either from its bad condition when shipped, or from some cause existing in the ship—it may be essential to prove the state of the cargo before its shipment. But where, as in this case (supposing, of course, the evidence to be believed), noxious substances, calculated to produce the peculiar damage actually present, are found to have been used in close proximity to the tea, cause and effect are so nearly brought together that a conclusion can be reached without proof of its condition at the time of shipment.

Their Lordships would have thought it right to discuss the evidence with greater minuteness, if overruling the finding of the Judges on the question of fact would have led to the reversal of the judgment under Appeal. But their opinion being adverse to the Appellants on another part of the case, it is enough to say that they are not so satisfied of the correctness of the conclusions of the Judges below on that question as to be able to advise Her Majesty to rest Her affirmance of the judgment appealed from upon them.

It is also unnecessary, after what they have just intimated, for them to consider the point raised by Mr. Watkin Williams, that in one way of accounting for the damage, the injury, if done in the ship, would fall within the excepted perils mentioned in the bill of lading.

Their Lordships will now proceed to the defence founded on the condition in the bill of lading, that no claim whatever for damage will be admitted unless made before the goods are removed.

It was not, and could not be denied, that this condition, stringent as it is, was binding on the consignees; but its application to the claim in question was disputed. It was contended that, "before the goods are removed" meant removal from the ship at Montreal, and not from the railway station at Toronto; and that the condition applied only to apparent damage, and the injury sustained by the tea was not such damage.

There is undoubtedly difficulty, owing to the ambiguous language and inconsistent provisions of the bill of lading, in determining whether the removal referred to was that from the ship or the

railway station. The construction most consistent with the rest of the instrument seems to point to the latter place. It was at the railway station that in express terms the goods were to be delivered to the Plaintiffs, "freight being payable by the consignees as per margin;" this freight being, as it was admitted, a through freight from London to Toronto. By another clause it is provided that "goods must be taken away within twenty-four hours after arrival at the railway-station to which they are destined." Again, freight is made due, if payable by consignees, "on arrival at the place of destination." On the other hand it was pointed out that it is provided that the goods are to be delivered from the ship's deck, where the ship's responsibility shall cease, and this delivery is to be to the Railway Company; but although the liability of the ship for the subsequent damage then ceases, it would be the duty of the ship to contract with the Railway Company to carry on the goods to Toronto, and, as already observed, the railway station is spoken of as the place of destination, and it is there the goods are to be delivered to the Plaintiffs.

The clause: "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the expense of the consignee, and at his risk"—is no doubt opposed to the above construction, but this clause is inconsistent with the engagement of the shipowner to send on by railway at a through freight to Toronto. It is evidently one of the printed clauses, and cannot control the specific undertaking to forward the goods to Toronto.

Mr. Cohen, in insisting that the condition referred to the removal from the ship, desired to assist his main contention that the condition should be confined to claims for apparent damage, since there being, as he said, little opportunity for examination on a delivery from the ship's side, it would be unreasonable to suppose the parties intended it to apply to claims other than for such damage. Supposing, however, removal from the ship was meant, that construction would not, in their Lordships' view, materially assist his contention; for in that case the Railway Company would be the agents of the Plaintiffs to receive the goods from the ship, and if the Plaintiffs, who had

come under this stringent condition, were not content to leave the examination of the packages to the officers of the company, they should have taken care to employ a competent agent for that purpose. There were shipping sheds on the wharf alongside the ship in which the packages on being landed were placed, and where the goods remained in charge of the agents of the ship, who sorted and afterwards delivered them to the Railway Company's servants. There is no reason for supposing that opportunity would not have been afforded in these sheds for inspecting and examining the packages.

But the principal contention on behalf of the plaintiffs was that, whichever was the place of removal referred to, the condition should be confined to apparent damage. Now, its language is plain, and without any ambiguity. The first branch of it, "no damage that can be insured against will be paid for," although limited to insurable damage, clearly applies to such damage, whether apparent or latent. The words of the last branch are unlimited and universal, "any claim whatever." It was not, indeed, denied that these words would, in their natural sense, include all damage, but it was said they should be construed as the usual acknowledgment found in bills of lading, "shipped in good condition," has been, and confined to external and patent damage. It is to be observed, however, that although the general understanding may have been so to limit the words of this acknowledgment, it is not an uncommon practice to qualify them by such expressions as "weight, value, and contents unknown."

But in truth the supposed analogy does not exist. This is a condition for the shipowners' benefit, and it may well be, that stale claims for latent damage were those against which he most desired to guard. Tea is an article peculiarly liable to such damage. It may be injured not only by contact with, but by the vapours or odours arising from, other substances, as in this case from chloride of lime. In the long voyage from China, even if sound when shipped, and in the removal and storage of it in England, it may have been subjected to noxious influences, which would spoil or deteriorate its condition without any external appearance of damage. Its susceptibility to similar injury would, of course, also

exist after it was taken from the ship, and stored or otherwise dealt with by the merchant. A shipowner may choose to say I will not be liable for any damage to an article of this kind, unless a claim is made so that it may be looked into and checked by my agents before the goods are removed from their control. And when a condition to this effect is found in a Bill of Lading, expressed in language, which, in its ordinary and natural sense, includes all damage, whether latent or not, can the Courts undertake to say it is so unreasonable that the parties could not have meant what they have said? No doubt this condition may bear hardly on consignees, but so also may the very large exceptions to the responsibility of the shipowner inserted in the body of this Bill of Lading. Certainly, no reasons for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout with a view to exempt the shipowner (as far as could be foreseen) from liability for damage. It may be that this has been done to an unreasonable extent, but the Plaintiffs are merchants and men of business, and cannot be relieved from an improvident contract, if it really be improvident. Possibly, in shipping under Bills of Lading; thus framed, the merchant gets a corresponding advantage in a lower rate of freight.

None of the cases cited at the bar bear a close analogy to the present. The decisions relating to conditions common in the sales of horses, providing that the liability on the warranty shall cease at a certain date, were referred to, in which it has been held that latent defects are within them (see *Smart v. Hyde*, 8 M. and W., 723; *Chapman v Gwyther*, L. R., 1 Q. B., 463).

Reference was also made to a well-known class of decisions on policies of Fire Insurance, in which conditions, requiring claims to be sent in within specified periods, have been strictly construed. In a recent Appeal before this tribunal from the Court of Queen's Bench in Canada (*Whyte v. the Western Assurance Company*), in which a question arose, whether the period of thirty days for sending in proofs of the claim was a material part of the condition, Lord Justice Mellish, in delivering the opinion of the Committee, observed: "It was



said that, although it was a condition precedent that the proofs should be sent in, yet the period of thirty days was not material; but if that were so, then there would be no time at all appointed within which the proofs were to be sent in, and the assured might wait one or more years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition." Exactly the same consequences, if the Plaintiff's construction of the condition were to prevail, might happen in this case, and would be equally opposed to its meaning.

But if any limitation of the condition could be implied, it could not reasonably go further than to exclude such damage only as could not on an examination of the packages, conducted with proper care and skill at the place of removal, have been discovered, and their Lordships think it appears upon the evidence that if such an examination had taken place, either at the shipping sheds at Montreal or the railway station at Toronto, the damage complained of might have been discovered. The odour of chloride of lime, even from the packages themselves, was very strong. A peculiar smell was perceived by MacFarlane, the plaintiffs' foreman, as soon as they were delivered, and he not only called the attention of the railway carmen to it, but made a memorandum on some of the receipts that the packages were damaged.

Again, Mr. Mills, a witness, whose tea formed part of the "Medway's" cargo, upon examining his packages on the wharf at Montreal on the day they were landed, discovered that they were damaged by chloride of lime and carbolic acid. He says the smell was quite perceptible.

The surveyors also, who examined the plaintiffs' tea on the 18th May, report that they found "the packages," as well as the contents, impregnated with the odour of chloride of lime. It is true the stevedores, employed in unloading the ship, say they did not observe any smell about the packages; but they do not appear to have examined or even handled them.

Their Lordships cannot doubt that if a competent agent of the plaintiffs, like MacFarlane, had been ready to receive the packages, either at the shipping

sheds or the railway station, the smell would have been at once detected by him, and, having detected it, he might, without difficulty, have further examined the tea by taking and testing samples from the packages in the simple and usual manner described by the surveyors. The damage would then have been fully disclosed, and a claim in respect of it might have been made before the packages were removed.

The opinion of their Lordships, whilst it sustains the second "considerant" of the judgment under appeal, rests entirely on the express condition in the Bill of Lading. Some of the learned judges below gave the same effect to it; but all of them found their decision, in part at least, upon the maritime law of France, and Article 1,680 of the Canadian Civil Code, applying the principles derived from these sources to what, upon the evidence, they deem to be unreasonable and unfair delay on the part of the plaintiffs. It is often useful, especially in mercantile cases, to refer for illustration to the laws and usages of countries other than that whose law governs the particular case. But the Judges seem to have gone further, and to have thought that a substantive defence arising from the delay might be founded upon their own law. Their Lordships, therefore, think it right to observe that, in their opinion, the Bill of Lading, having been made in England by the master of an English ship, is a contract to be governed and interpreted by English law, and that, whilst the presumptions arising from the conduct of the plaintiffs may properly be regarded in determining the question whether the damage was in fact done, as they assert, in the ship, neither their conduct, nor the delay in making the claim, would constitute, by English law, an answer to the action, apart from the express condition in the Bill of Lading. (See the *Peninsular and Oriental Company v. Shand*, 3 Moore P. L. N. S. 272; *Lloyd v. Guibert*, 4 Best and Smith, 100.)

In the result their Lordships will humbly advise Her Majesty to affirm the Judgment appealed from, and to dismiss this Appeal with costs.