

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Master and Owners of the Steamship "City of Lincoln" v. Charles George Smith, from the Supreme Court of the Colony of Natal; delivered the 3rd February 1904.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Lord Macnaghten.*]

This is an Appeal in the name of the Master and Owners of the S.S. *City of Lincoln* from an Order of the Appeal Court in Natal. The Order appealed from upholds a verdict and, subject to a variation in the assessment of damages which were ultimately fixed at 7,450*l.* 2*s.*, affirms a Judgment obtained in the Durban Circuit Court by the Respondent Charles George Smith. The action was brought to enforce a claim for damages for non-delivery of cargo by the *City of Lincoln* in breach of a charter-party dated 1st December 1899, and expressed to be made in Buenos Ayres between W. Samson & Co., "on behalf of the Owners," and "T. S. Boadle & Co., Charterers." The *City of Lincoln* belonged to W. Samson himself, and this Appeal is brought on his behalf. The Respondent was represented by T. S. Boadle & Co. The charter provided that the vessel, being tight, staunch and strong, and every way

fitted for the intended voyage, should with all convenient speed, being discharged, proceed as ordered by the charterers or their agents to the undermentioned places, and receive from them, in the Port of Rosario, a quantity of hay in export bales; thereafter, in La Plata, a quantity of live stock on deck, which cargo the charterers bound themselves to ship not exceeding what the vessel could reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded should therewith proceed to Port Natal, South Africa, and deliver the cargo on being paid a lump-sum freight of 6,500*l*. The owners were to appoint the stevedore. The charterers were to have the full reach and burthen of the steamer with the exception of space for 1,200 tons of coals for ship's use which were to be carried in steamer's holds and bunkers. The charter and bills of lading contained a series of exceptions and provisions in favour of the owner. Average, if any, was to be payable according to the York-Antwerp Rules of 1890, which negative any claim in respect of cargo carried on deck.

In pursuance of this charter-party the *City of Lincoln* commenced loading on the 7th of December 1899, at Rosario. There she took on board some 20,000 bales of hay. She then proceeded down the river and entered La Plata on the 16th, where she took in more hay and fodder and received her cargo of live stock—270 bullocks, 100 horses, and 400 sheep. She started on her voyage on the 21st of December 1899, leaving Ensenada on the afternoon of that day. She arrived at Port Natal on the 15th of January 1900 short of her cargo of hay by 578 bales, and without a single one of the bullocks, horses and sheep shipped by the Respondent.

The Respondent's case was that the *City of Lincoln*, though in herself and as a ship

tight, staunch and strong and fitted for the voyage, was not properly ballasted, and was therefore unseaworthy when notice was given that she was prepared to receive her cargo and when she started on her voyage; that this unseaworthiness was attributable to negligence or want of reasonable care on the part of the owner himself, and was the direct cause of the loss complained of. On the other hand the owner maintained that the vessel was properly ballasted and perfectly seaworthy at starting, and, moreover, he contended that, even assuming she was unseaworthy, he was protected from liability by the exceptions and provisions of the charter-party.

The action came on to be tried in April 1901 before Mr. Acting Justice Beaumont and a special jury of five. The trial lasted several days. There was a good deal of evidence on both sides, oral and documentary, including the depositions of witnesses taken on commission, the captain's diary, the rough log, and the chief officer's log-book. The learned Judge seems to have been under a misapprehension as to the position of the charterer. He appears to have thought that the vessel was "handed over" to the charterer on the date of the charter-party, the 1st of December, and that from that date she was under his orders, and that the charterer "arranged to his own liking as to the loading of the vessel." He was prepared to hold, as a matter of law, that in any event the owner was excused by the exceptions in the charter-party. But although that was his opinion he summed up the case to the jury in a manner to which no objection can be taken, and he proposed to the jury a series of questions in framing which he invited the assistance of the learned Counsel on both sides.

The material questions put to the Jury, with the answers given by them, are as follows:—

- (1.) *Question.* Was the S.S. *City of Lincoln* as a ship tight, staunch and strong, and every way fitted for the intended voyage at the time she was chartered before she was loaded?—*Answer.* Yes. Jury unanimous.
- (2.) *Question.* Was she seaworthy after loading and before leaving dock at Ensenada?—*Answer.* No. Majority of Jury, 4 to 1.
- (3.) *Question.* If not, in what respects did she become unseaworthy and from what cause?—*Answer.* She was unseaworthy being top heavy, having insufficient dead weight in her bottom to counteract the weight above the water line. Majority, 4 to 1.
- (4.) *Question.* Was the ship owner in any way responsible for such causes, if any, by want of reasonable care on his part?—*Answer.* Owner is responsible, as he should have seen that more dead weight was put in the bottom of the steamer. Majority, 4 to 1.
- (7.) *Question.* What were the causes of the loss of cargo?—*Answer.* The vessel being in an unseaworthy condition as per answer No. 2 was not able to stand the ordinary rough weather experienced. Majority, 4 to 1.
- (8.) *Question.* Were such causes due to unseaworthiness at starting or to perils of the sea?—*Answer.* To unseaworthiness at starting. Majority, 4 to 1.

On these findings the learned Judge gave judgment for the charterer, observing that but for the condition in the charter to which perhaps (he said) he attached too much weight, there could be no doubt the verdict of the Jury would be perfectly right.

The opinion of the Supreme Court on Appeal was delivered by Mr. Acting Justice Broome in

a written judgment which has their Lordships' entire approval. The conclusion at which the Court arrived was that, on the questions of fact, there was ample evidence to support the findings of the Jury, and that there was nothing in the charter-party to relieve the owner from consequences resulting from want of reasonable care on his part.

Anglo-Argentine Live Stock and Produce Agency, Limited, v. Westall (unreported).

In the argument before their Lordships very little was said about the exceptions in the charter-party. Indeed that point was hardly open then. It had been practically concluded by what occurred in Westall's case. There a ship was chartered to carry cattle from La Plata to England. The charter was identical in its terms with the charter of the *City of Lincoln*. The ship was overburdened and rolled so heavily that the cattle were lost. Mathew J. held the owner liable. He thought the owner had been personally negligent, and that there was nothing in the charter to excuse him from the consequences of personal negligence. On Appeal, both in the Court of Appeal and the House of Lords, it was held that the owner was protected, not because personal negligence was covered and excused by the conditions of the contract, but because there was no case of personal negligence at all. It appeared that at the time when the charter was made and at the time when the vessel was being loaded the owner was in this country. He had left the management of the vessel in the hands of duly qualified and competent persons. Against the consequences of negligence on the part of servants and agents the conditions of the charter party were a protection. In the present case no one but the owner had anything to do with the loading of the vessel. The charterer had no right to interfere. It was not his province to load or to stow the vessel. His business was to provide a cargo in accordance with the conditions

of the charter-party. To do the owner justice, he did not attempt to excuse himself by throwing the blame on the steredore or the Captain or anybody else. He did not for a moment dispute his responsibility in regard to loading or ballasting. His case was that the ship was properly loaded and ballasted. She was loaded (he said) and ballasted "as proposed." Indeed he went so far as to declare that he would have no hesitation, in the event of a similar cargo being offered, to load the *City of Lincoln* in the same way and ballast her in the same manner.

The findings of the Jury on the questions of fact were impeached in a very able argument on behalf of the Appellant, but their Lordships see no reason to differ from the conclusion at which the Supreme Court arrived. Their Lordships have not to decide whether the Jury were right or wrong in their view of the facts. They have merely to determine whether there was evidence on which reasonable men properly instructed by the Judge could have come to the conclusion at which the Jury arrived. It seems to their Lordships that there cannot be any doubt upon that point.

The learned Judges of the Supreme Court have given a very accurate history of the voyage and an interesting account of the behaviour of the vessel. As soon as she got into salt water she proved to be strangely and, so to speak, perversely unstable, with a strong list—described as "abnormal"—first to one side and then to the other. The Captain was evidently alarmed. In calm weather he took down the topmasts, which is said to be a very unusual proceeding. He shifted the cargo. He did all that a good seaman could do, but his efforts were of no avail. The deck cargo was lost, partly jettisoned and partly swept overboard, in a gale which the *City of Lincoln* could have weathered with perfect safety if she had not

been so crank and unstable. That she was unstable is not open to doubt. The question is:—To what was the instability due? Various suggestions were made, all more or less plausible. The main tank leaked, it was said. But that was proved to be a mistake. The tank was tested at Natal and found to be perfectly sound. There was an overflow of water when the tanks were run up. But this water was pumped out afterwards and things were no better. There was some shifting of the coal, and that may have started the crankness. It would be difficult to counteract the mischief once started, especially considering that the tank from which the animals were supplied extended amidships without a division from side to side. A scientific witness, a Mr. James Marjoribanks, called by the owner, proved mathematically that the vessel was perfectly stable. He said that “something must have happened.” But what that something was he could not tell. Now it is to be observed that the learned Judge was not even asked to put to the Jury as a definite subject for their consideration any one of these suggestions which this Board was invited to consider. It may be that some accident did occur to which, if it could have been ascertained, the disaster might have been traced. But it cannot be said that the Jury were wrong in accepting the opinion of practical seamen and in declining to speculate on hidden causes and conjectural mishaps.

There were three witnesses whose evidence seems to be conclusive on the question which their Lordships have to determine. Captain Storm and Captain Reeves were witnesses for the charterers. Captain Cowie was called by the owner. All three were practical seamen and all independent witnesses. They were at one as to the cause of the disaster. Captains Storm and Reeve were asked to report on the loss of the

cargo immediately upon the arrival of the *City of Lincoln* at Port Natal. They did so, and afterwards confirmed their report as witnesses for the Plaintiff. Their report concluded as follows: "our opinion . . . is that the ship at the time the cattle, sheep, horses, forage, &c., were taken on deck was not sufficiently ballasted so as to counteract the heavy weight of the cargo, cattle, &c. carried on the upper decks. This was proved when the vessel got into salt water thus raising the centre of gravity, when for the above reason she listed over and showed her crankness and unseaworthiness. The direct result of this crankness of the ship was the total loss of the deck cargo and live stock, as the ship being well adapted for the carriage of livestock, she would, with sufficient ballast, have carried her cargo in safety to Natal, as she had done on previous voyages."

That passage was read to Captain Cowie in cross-examination. He was asked "Is that correct?" His answer was "I think so, the ship is all right if she is properly loaded." Captain Cowie had already expressed a very decided opinion that the *City of Lincoln* was not properly loaded for this voyage. With the cargo she carried she ought, he thought, to have had 1,300 tons dead weight in her bottom. The weight she carried on top was excessive, he said, for the weight she had underneath. There was no doubt that the behaviour of this ship showed the want of weight in her bottom; he would have taken her anywhere, he said, if he loaded her, but "not as she was."

Now Captain Cowie was an exceptionally valuable witness. Not only was he a witness called by the defence, but he actually made the same voyage with a similar cargo at the very same time as the *City of Lincoln*. He commanded the *Julia Park*, carrying cattle from



La Plata to Natal. He left La Plata on the same day as the *City of Lincoln*, and arrived at Natal before her without loss. He experienced the same weather. He probably had rather a severer gale to encounter. His course was more southerly, and it seems to be the case that in such a gale as that to which the *City of Lincoln* was exposed, the more south you go the stronger you find the wind. It is not surprising that the Jury should have preferred Captain Cowie's experience to the theories and mathematical calculations of Mr. Marjoribanks.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be dismissed. The Appellants will pay the costs of the Appeal.

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