Privy Council Appeal No. 61 *of* 1914.

The British South Africa Company - - *Appellants,*

v.

Lennon, Limited - - - - *Respondents.*

FROM

THE SUPREME COURT OF SOUTH AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1915.

Present at the Hearing.

VISCOUNT HALDANE. LORD DUNEDIN.
LORD SUMNER.

Delivered by LORD SUMNER.

The single question in this case is whether *culpa* was imputable to the plaintiffs either in causing the damage sued for jointly with the defendants' *culpa*, or in failing to avert the consequences of the defendants' *culpa* by the exercise of reasonable care. It has throughout been spoken of as contributory negligence to be tested by the English decisions. Whatever difference there may be in general between the English doctrine of contributory negligence and the Roman-Dutch doctrine of *culpa*, no confusion arises here from speaking of the one in terms of the other.

By a majority the Supreme Court of South Africa held that Harrington ought to have understood from the telegrams that he had received all the drums sent, and that they contained 5½ cwts. of arsenite of soda; that

he was accordingly negligent in acting on the assumption that they only contained 93½ lbs. of arsenite of soda, the labels notwithstanding; and that his statement that he thought the 5½ cwt. had only been sent off and had not yet been delivered to him, was an afterthought and an untruth. Mr. Justice Solomon adds as an alternative view that even if Harrington's explanation were true, his conduct was nevertheless careless, and that he ought not to have mixed and used the dip till he had obtained an explanation from Messrs. Lennon, since "a "telegram to Lennons would have cleared up the "matter in a day." A further and apparently a fresh argument was advanced at their Lordships' bar in the form of a dilemma: first, that Harrington was careless as above stated; second, if he was not, it was said that the appellants' "Farms" office at Salisbury was, because the officials there ought to have understood from Harrington's telegram what had occurred and, by applying to Messrs. Lennon at once, could have cleared up the matter in time.

As to Harrington's negligence it is to be observed that the question was one exceedingly personal to himself. The reasonableness of his conduct under the circumstances was very much dependent upon what he knew, thought, and believed on September 11 when he mixed the dip, and on September 12 when he had it used. He may have been stupid, but no case was really made that, being what he was, he ought not to have been employed. His judgment may have been honestly at fault, but that alone would be no defence. If a man of ordinary care, standing in his place, would have read the telegrams as he says he did, have believed in

the explanation in which he says he believed, and would thereupon have acted as he acted, and if his account of his reading of the telegrams and of his belief in the explanation of them be true, then the conclusion of fact that he was not guilty of negligence was fully supported by the evidence and was right.

Harrington was examined and cross-examined at length. The epithet "funny" applied to the erroneous label, which seems to have impressed Mr. Justice Innes strongly, was put into his mouth by cross-examining counsel, and was afterwards harped upon for a good deal more than it was worth. If the adjective had been "odd" or "singular" there would have been little to remark in the matter. If he gave a flippant answer or two, the Trial Judge was best able to decide how far that impaired the general value of his evidence. In rejecting Harrington's explanation of his understanding of the telegrams, Mr. Justice Solomon observes that "nowhere does he state that at the time " of the occurrence he believed that this was " the true explanation." There appears to be some oversight here, for the evidence runs thus :—

" *Q.* Then you got this telegram saying that you had the " 50 lbs. plus 5 cwt. ; it amounted to that ?

" *A.* It meant that they had despatched that amount " of dip.

* * * * * * *

" *Q.* In these drums ?

" *A.* It did not say in these special eleven drums.

* * * * * * *

" *Q.* Can you say, when you got their telegram, that you " did not understand them to mean that it was contained in " these eleven drums ?

" *A.* Certainly not : if I had understood it, I should not " have dipped the cattle."

and again :

" *Q.* You were told on the 9th September that you had " over 6 cwt. of arsenite of soda ; where did you think it " was ?

" *A.* I thought that it was on the railway somewhere."

From this Harrington clearly meant to say that when he mixed the dip he believed the drums sent had not all been delivered, and so the Trial Judge took it. In a very careful and elaborate judgment he observes of Harrington and Bekker—

" Harrington is an educated man with some practical " knowledge of farming, and his evidence was well given. " Bekker is a capable intelligent man with practical " knowledge of cattle. . . . I considered them both " honest, straightforward witnesses, and I think there was " no ground for the imputation that they were trying to cover " up their own mistakes. I accept entirely their story as to " what happened."

Their Lordships are far from saying that this conclusion was binding upon the Court of Appeal. There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an appellate tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the Trial Judge's impression of the witness what it may. The present, however, is by no means such a case. The telegrams, which Harrington received, state that 5½ cwts. of arsenite of soda had been despatched in two lots. They do not say in how many drums this quantity was contained. Nicely scrutinised they might disclose that it was contained in 11 drums, the very number which Harrington had in hand, and therefore that it had all been delivered to him, but this riddle was by no means plain for a stockman to read. South

Africa is familiar with two tons, the ton avoirdupois and the metric ton, and under the names of the "long" hundredweight and the "short" it enjoys two standards of weight. Unfortunately not only is each called a hundredweight and its moiety half a hundredweight, but people write 50 lbs. when they mean 56 lbs. This was done in the Salisbury office telegram of 9th September (Exhibit G.L.H. 4), but no one has suggested that this was negligence or that it affected the cause of action. Accordingly, if Harrington was to identify the 11 drums, weighing 616 lbs., which were in his hands, with the unspecified number of drums containing the quantity of arsenite of soda mentioned in the telegram (Exhibit G.L.H. 4), he had to divine that in the expression "one 50 lbs. the other 5 cwts." the hundredweights were "long," though the half-hundredweight appeared to be, and really might be, "short," and that the half-hundredweight really was "long," though it was expressed as "short." So understood, the telegram certainly told him that 616 lbs. had been sent, and 616 lbs. was the quantity that he had received. If, however, the 5 cwts. were "short" hundredweights, as the 50 lbs. appeared to be a "short" half-hundredweight, all that had been sent was 550 lbs., and then at 8½ lbs. of arsenite of soda to the drum, which he said he believed to be the case on the faith of the label, a large quantity must have been still on the way. Probably he went through no particular mental process, but simply accepted the explanation which occurred to him. That would be neither astonishing nor careless in itself. Certainly such telegrams are not so clear and convincing as to warrant the conclusion that Harrington could not have been truthful, and that he had deceived the Trial Judge.

The alternative suggestion that an inquiry of Messrs. Lennon would have been a quick and certain way of solving the puzzle, depends on whether Harrington or the Salisbury office made it, and on Messrs. Lennon's willingness and ability to give the correct answer when applied to. Neither Harrington nor Bekker was asked at the trial why a telegram was not sent to Messrs. Lennon direct. Messrs. Lennon were not asked whether an inquiry coming from Harrington direct would have been attended to. The question put to Mr. Inskipp, whether any inquiry was made of Messrs. Lennon, was not followed up or pressed to any conclusion. When a claim was made for the loss against Messrs. Lennon, based on an allegation of negligence in labelling the drums, twenty-three days elapsed before they admitted, and then as to one drum only, " that " one of our staff inadvertently placed a label " properly belonging to an 8½ lb. tin on the " 56 lb. drum," at the same time charging Harrington with gross carelessness or incapacity. There is certainly nothing here to show much willingness on their part to admit an error on September 11th, even if they then knew of it. Even down to 16th December Messrs. Lennon confined their admission of error to one drum, disputing that any error could be proved as to the other ten. Though the defendants' servants were carefully asked if any inquiry about the label had been made of them before the cattle were dipped, they were equally carefully not asked whether, if an inquiry had been made, they could and would have cleared up the mystery then. Mr. Skerrett admits that before the accident he did not know of the mistake at all and Bickle says the same. Owen, the egregious person who committed this blunder, was never asked to say that upon inquiry from outside

he would have made a clean breast of what he had done. It is true that the Trial Judge says "an inquiry would almost immediately— "in a few minutes if they had sent a man "down to Lennons'—have elicited the fact "that these drums were wrongly labelled." This, however, rests on nothing in the evidence and is true only if it be assumed that the inquiry would have reached Owen and that Owen would have confessed what he had done. The Trial Judge makes the observation only in connection with the conduct of Mr. Mason, and does not put it to the use to which it was put on appeal, and after making it he acquits the officials at the "Farms" office at Salisbury of any negligence at all. In their Lordships' opinion this point as a ground for finding negligence against Harrington himself has no foundation, for it was never suggested that he should have disregarded the regular routine and have telegraphed to anyone but the "Farms" office, and, as regards the officials there, it is only a plausible speculation, which is not really supported by any substantial evidence.

It ought to be remembered throughout this case that, admittedly, Messrs. Lennon's reputation in their business is high, and that their clerk's blunder was as extraordinary as it was unpardonable. Persons in Harrington's position or in the position of the officials at Salisbury were warranted in putting great faith in the correctness of the labels under which Messrs. Lennon sent out their goods, and, however they might be perplexed by the discrepancy between the label and the weight of the drum, could not be reasonably expected either to hit on the true explanation of it, or to hold their hands for fear that a description proceeding from so respectable

a firm might yet be so grossly erroneous. If no such idea occurred to them, they cannot be stamped as negligent in consequence. Harrington was preoccupied, and not unreasonably, by the fear that he had not arsenite of soda enough, not that the label was false or that he had far too much. His duty was to make and use a dip with the arsenite of soda ordered by the Salisbury office and sent in by Messrs. Lennon. If the dip was too weak, it might not kill all the ticks, but at any rate it would not kill any cattle. Why should he be expected to divine that, on the contrary, thanks to the defendants' fault, his dip was too strong and his surmises were mistaken? After careful examination of the evidence their Lordships have been unable to avoid the conclusion that the decision of the Trial Judge was not reasonably open to exception, and that there was no sufficient ground for interfering with it, and they will humbly advise His Majesty that it should be restored, and the judgment appealed against should be reversed and the present appeal should be allowed, with costs here and below.

In the Privy Council.

THE BRITISH SOUTH AFRICA COMPANY

v.

LENNON, LIMITED.

DELIVERED BY LORD SUMNER.

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