Privy Council Appeal No. 50 of 1926.

The Makins Produce Company, Incorporated - - - *Appellants*

v.

The Union Steamship Company of New Zealand, Limited - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER, 1926.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD ATKINSON.
LORD CARSON.
LORD DARLING.

[*Delivered by* LORD CARSON.]

This action was brought by the appellants against the respondents (defendants) to recover damages alleged to have been sustained to a shipment of eggs, consisting of 950 cases in all, which were shipped on board the respondents' steamship "Makura" at Sydney for carriage to Vancouver and delivery to the appellants or their order.

The allegation of the appellants, as appears from the particulars delivered in the action, was that the respondents were guilty of negligence

> "in the improper loading of the said eggs, such improper loading consisting in the permitting of the said cases to drop into the hold of the ship, and consisting further in the improper stowage of the said goods, in that in receiving the eggs in the ship and stowing them, they were roughly handled, and consisting further in the rough handling of the said eggs in unloading the same."

The eggs in question were shipped under the terms of a bill of lading dated November 14th, 1919, acknowledging receipt of the 950 cases of eggs in apparent good order and condition, weight and contents unknown. Upon arrival at Vancouver in due course the eggs were unloaded, and it was ascertained that of the 950 cases, 60 cases arrived externally stained, the remaining 890 cases being, as is conceded, in apparent good order. The whole cargo of eggs was piled in the wharf warehouse, the 60 cases being separated from the balance.

As regards the 60 cases, the respondents, without prejudice to any question of liability, allowed a certain sum to the appellants, and the remaining cases were taken possession of by the plaintiffs without any complaint and forwarded by them by boat and railway to Boston and various cities, and on being opened at their respective destinations were found, as regards the lower tiers in each case, to contain broken and cracked eggs.

It was admitted that on one occasion, in the course of lowering the cases into the hold at Sydney by hydraulic lift, an accident occurred, and that one sling load of about 50 cases fell some distance, causing damage to the eggs in those cases, but apart from that one accident no evidence was offered by the appellants of any acts of negligence complained of in the particulars supplied by the plaintiffs and already referred to.

The appellants, however, contended (1) that the onus lay upon the respondents to show that the damage complained of to the 890 cases of eggs was not caused by any negligence upon their part during the transit of the eggs from Sydney to Vancouver: (2) that it ought to be inferred from the uniform nature of the damage to the whole consignment that the eggs were damaged whilst under the control of the respondents, and (3) that the fact that the hydraulic lift was, for a time at all events, out of order was some evidence of negligent handling and loading by the respondents. Both the learned Trial Judge and the Court of Appeal were of opinion that the onus of proving negligence on the part of the respondents was on the appellants.

The learned Trial Judge. however, held "with a good deal of hesitation" that the appellants had discharged that onus. He does not, their Lordships observe, make any definite finding as to negligence, stating merely "that it was more probable than not on all the evidence submitted that the eggs were damaged whilst under the control of the defendants (respondents) and by their negligence," relying also on the facts "that the loading apparatus was not working well; admittedly one accident occurred whereby a sling load fell; admittedly 60 cases arrived in Vancouver egg stained, being at least ten cases more than could have been damaged in the accident at Sydney. Further, there was uniform damage to the whole shipment."

Accordingly, the learned Judge gave judgment in favour of the appellants, and directed an inquiry as to damages. The Court of Appeal of British Columbia, consisting of the Chief Justice, and Martin, McPhillips, Galliher and Macdonald JJ.

(Martin J. dissenting), reversed the judgment of the Trial Judge, holding that the plaintiffs had not discharged the onus which was upon them of proving negligence as alleged.

Their Lordships agree with the conclusions arrived at by the majority of the Court of Appeal. As decided by both Courts, the onus lay upon the appellants of showing that the damage could be traced to some default of the respondents. It is impossible, in the absence of specific evidence, to attribute negligence to the respondents, from the fact that after the eggs had been forwarded—subsequently to delivery at Vancouver—by boat and rail to different points in the United States some thousands of miles further away, they were found in the condition already referred to. Nor can their Lordships see that any deduction as to the cause of the damage can be drawn from the fact that for a time the hydraulic lift was out of order, in the absence of any evidence that any accident occurred except in the one case which has been already referred to, and which is not shown to have affected any but the cases of eggs for which the appellants have already been compensated.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE MAKINS PRODUCE COMPANY, INCORPORATED

v.

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED.

DELIVERED BY LORD CARSON.

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