17, 1952

In the Privy Council.

No. 8 of 1951.

ON APPEAL FROM THE COURT OF APPEAL FOR THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE

BETWEEN

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... ... (*Plaintiffs*) *Appellants*

AND

SINGAPORE HARBOUR BOARD... ... (*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

EXHIBITS.

DOCUMENTS NOT TRANSMITTED OR PRINTED.

DOCUMENTS TRANSMITTED BUT NOT PRINTED.

Description of Document.	Date.
Notice of Entry of Appearance	22nd June 1948
Plaintiffs' Affidavit as to Documents	23rd August 1948
Plaintiffs' Summons to take evidence of M. C. Dack (Plaintiffs' Witness) *de bene esse*	14th October 1948
Affidavit of J. L. P. Harris in support	14th October 1948
Notice of Appeal to Court of Appeal	13th December 1949
Affidavit of C. H. Smith to fix date of Hearing of Appeal	15th December 1949
Defendants' Summons to fix date of Hearing of Appeal	15th December 1949
Order in Chambers fixing date of Hearing of Appeal	16th December 1949
Petition for Leave to Appeal to Privy Council	4th September 1950
Plaintiffs' Motion for Leave to Appeal	4th September 1950
The like	4th September 1950
Part of Agreed Correspondence	Various
Police Reports	Various
Exhibit "C"—Tally Sheets of Peninsular & Oriental Steam Navigation Company	Various
Exhibit 1—Police Duty Roster	10th May 1948
Exhibit 2—Tally Sheets of Singapore Harbour Board	Various.

In the Privy Council.

No. 8 of 1951.

ON APPEAL FROM THE COURT OF APPEAL FOR THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE

BETWEEN

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... ... (*Plaintiffs*) *Appellants*

AND

SINGAPORE HARBOUR BOARD... ... (*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS.

No. 1.

Writ of Summons.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 1. Writ of Summons, 19th June, 1948.

Suit No. 347 of 1948.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (SS) LIMITED *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.*

(L.S.)

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, to Singapore Harbour Board.

WE COMMAND YOU, that within Eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in a Cause at the Suit of The Firestone Tire & Rubber Company (SS) Limited whose place of business is at No. 22 Geylang Road, Singapore.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 1. Writ of Summons, 19th June, 1948— *continued.*

And take notice that in default of your so doing, the Plaintiff may proceed therein to judgment and execution.

Witness, The Honourable Mr. Charles Murray Murray-Aynsley Chief Justice of the Colony of Singapore, the 19th day of June 1948.

(Sgd.) DREW & NAPIER,
Solicitors for the Plaintiffs.

The Plaintiff's Claim is for damages for breach of contract of bailment in respect of 3,960 loose new rubber tyres and 33 cases of rubber tubes and flaps.

This Writ was issued by Drew and Napier, of Nos. 33/35 Chartered Bank Chambers, Battery Road, Singapore, Solicitors to the said Plaintiffs.

This Writ was served by

on

on the day of 194 .

Indorsed the day of 194 .

(Signed) .....

(Address) .....

.....

N.B.—This Writ is to be served within twelve months from the date thereof, or, if renewed, within six months from the date of such renewal, including the day of such date, and not afterwards.

The Defendant (or Defendants) may appear hereto by entering an appearance (or appearances) either personally or by solicitor at the Registry of the Supreme Court of Singapore.

A Defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for $2.50 with an addressed envelope to the Registrar of the Supreme Court at Singapore.

0.46, r.4.—Take notice that this Writ is served on you as a partner and/or the person having the control or management of the Defendant firm.

No. 2. Notice of Service of Writ on person as having control of business, 19th June, 1948.

No. 2.

Notice of Service of Writ on Person as having control of business.

Take notice that the Writ of Summons served herewith is served upon you as the person having the management or control of the Defendant Singapore Harbour Board.

Dated this 19th day of June, 1948.

(Sgd.) DREW & NAPIER,
Solicitors for the Plaintiffs.

No. 3.

Statement of Claim.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 3. Statement of Claim, 5th July, 1948.

Suit No. 347 of 1948.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.*

10 STATEMENT OF CLAIM.

1.—The Plaintiff Company was the consignee of a cargo of 3,960 loose new rubber tyres and 33 cases of new rubber tubes consigned to the Plaintiff Company from Bombay India on the S.S. " Samokla " which arrived at Singapore on the 4th day of July 1946.

2.—The said cargo was discharged from the S.S. " Samokla " into the Defendants' Godown No. 1 on the dates at the times and in the quantities particulars whereof are hereinafter mentioned.

Time.	*Date*	*Total tallied into Godown No.* 1.
20 1 p.m. to 4 p.m.	11.7.46	33
8.30 p.m. to 11 p.m. ...	,,	138
7 a.m. to 11 p.m. ...	12.7.46	230
1 p.m. to 5 p.m.	,,	312
9 p.m. to 11 p.m. ...	,,	403
7 a.m. to 11 a.m.	13.7.46	348
1 p.m. to 5 p.m.	,,	545
7 p.m. to 11 p.m. ...	,,	630
7 a.m. to 11 p.m. ...	14.7.46	602
1 p.m. to 5 p.m.	,,	712
30 7 p.m. to 11 p.m. ...	,,	40
		3,993

3.—The Defendants received the said cargo into the said Godown No. 1 and took charge of the same upon the implied terms that the said cargo and each and every part thereof should be taken care of by the Defendants and delivered to the Plaintiff Company on request. The Plaintiff Company paid to the Defendants the usual rent for storage space in respect of the said cargo in the said Godown in consideration of the Defendants undertaking the custody of the said cargo.

4.—The Defendants did not take care of part of the said cargo more 40 particularly described in the particulars of claim hereinafter contained.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 3. Statement of Claim, 5th July, 1948— *continued.*

5.—The Defendants delivered to the Plaintiff Company part only of the said cargo and although requested many times so to do have failed and neglected to deliver the said cargo more particularly described in the particulars of claim hereinafter contained by reason whereof that other part of the cargo was lost to the Plaintiff Company.

6.—By a letter of subrogation dated the 25th March 1947 the Plaintiff Company assigned unto the New Zealand Insurance Company Limited all rights and remedies in respect of the loss hereinbefore pleaded, and by an assignment dated the 11th June 1948 the said New Zealand Insurance Company Limited assigned all the said rights and remedies in respect of the said loss to the Plaintiff Company, notice of such assignments being duly given to the Defendants.

PARTICULARS.

5	5.50—16 Champion Tyres	$ 243.50
3	30 x 5 Heavy Duty Tyres	282.00
8	32 x 6 „ „ „	1,328.00
1	34 x 7 „ „ „	199.60
1	5.50—16 Heavy Duty Tube	7.20
		$2,060.30

And the Plaintiff Company claims $2,060.30 and interest thereon at such rate as this Honourable Court may allow.

Delivered this 5th day of July, 1948.

(Sgd.) DREW & NAPIER,
Solicitors for the Plaintiff Company.

No. 4. Defence, 7th August, 1948.

No. 4.

Defence.

Suit No. 347 of 1948.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (SS) LIMITED *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.*

DEFENCE.

1.—The Defendants deny the allegations contained in paragraph 2 of the Statement of Claim in so far as such allegations relate to the goods particularised in paragraph 6 of the Statement of Claim and put the Plaintiffs to strict proof thereof.

2.—Alternatively, if the Defendants received the goods particularised in paragraph 6 of the Statement of Claim (which is denied) then the said goods were lost as a result of theft from Godown No. 1 despite reasonable precautions taken against theft by the Defendants.

3.—At the trial of this action the Defendants will submit that the right or remedy claimed against them by the Plaintiffs herein is for an act alleged to have been done in pursuance or execution or intended execution of the Ports Ordinance, or of an alleged neglect or default in the execution of the Ports Ordinance and/or the By-Laws made thereunder. The Defendants will further submit that this action is not maintainable against them by reason of the fact that it was not commenced within six months after the alleged act, default or neglect complained of as required by Section 2 (2) of the Public Authorities Protection Ordinance.

4.—The Defendants deny that such cargo as was received into their Godown No. 1 and taken charge of by the Defendants was on the implied terms that such cargo and each and every part of it should be taken care of by the Defendants. The Defendants say that the only implied terms on which any of the said cargo was received was that such cargo would be received and held by the Defendants subject to the Defendants' By-Laws made pursuant to the Ports Ordinance. The Defendants say that they complied strictly with such implied terms in respect of such of the said cargo as was received and held by it.

5.—The Defendants deny that they did not take care of such of the said cargo as was received by them. The Defendants deny that they have ever had any contractual relationship with the Plaintiffs in connection with the said cargo.

6.—The Defendants admit that on being requested by the Plaintiffs to deliver the goods particularised in paragraph 6 of the Statement of Claim they failed to do so but say that the reason of such failure to deliver was because the said goods were never in the custody of the Defendants. Alternatively, if the said goods were received by the Defendants (which is denied) then the said goods have been lost by theft despite reasonable precautions and vigilance by the Defendants and the Defendants have no legal responsibility for such loss.

7.—Save as is herein expressly admitted or denied the Defendants deny each and every of the allegations contained in the Statement of Claim as though the same had been set out in detail and specifically denied.

Dated and delivered this 7th day of August 1948.

(Sgd.) DONALDSON & BURKINSHAW,
Solicitors for the Defendants.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence.

No. 5.

Judge's Notes of Evidence.

Suit No. 347 of 1948.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.*

Coram: BROWN, J.

NOTES OF EVIDENCE.

WITHERS PAYNE & HARRIS for Plaintiffs.

C. H. SMITH & L. A. J. SMITH for Defendants.

WITHERS PAYNE.

Defts. were bailees of goods in return for remuneration paid.

Defence is—

(1) never received.

(2) if received, lost by theft despite reasonable precautions.

(3) Public Authorities Protection Ordinance.

Refers to Agreed Bundle. (Ex. A.)

On 29 July 1947, one year after the landing, defts. change their ground. (33)

S. H. B. insist on having their own stevedores. They will not allow independent stevedores. Their stevedores take over at the sling.

Duties of bailee.

Hails. Vol. 1 p. 748. To use due care and diligence.

But not liable except for negligence.

1. *Phipps* v. *New Claridge Hotel* (1905 22 T.L.R. 49).
(Onus negativing negligence is on bailee.)

2. *Joseph Travers & Son* v. *Cooper* (1915 1 K.B. 73) p. 87. p. 90.
(Held that bailee had failed to discharge the onus because he neglected to keep his man on the spot who alone could have proved what happened.) p. 97 (Phillimore, L.J.)

3. *Coldman* v. *Hill* (1919 1 K.B. 443).
(If goods lost by theft bailee must prove that by diligence he could not have recovered them.) p. 452 (Warrington, L.J.) pp. 454–455.

4. *Brook's Wharf* v. *Goodman* (1937 1 K.B. 534).
(Duty of bailee is to do what is reasonable.)

5. *Aitchinson* v. *Page Motors* (135 T.L.R. 137).
(Negligence of servants improves liability on bailee.)

No. 5.
Judge's Notes of Evidence —*continued.*

6. *In re Davies & Co.* (1945 1 Ch. 402) p. 407.
(Onus on bailee to prove that damages *not* due to negligence.)
7. *Martin* v. *London County Council* (1947 1 K.B. 628). (Facts shewing example of liability of a bailee for reward.)
8. *Gutter* v. *Tait* (1947 177 L.T. 1.) (Further example of liability of bailee on the *facts*.)

Public Authorities Protection Ordinance.

Compare Public Authorities Protection Act 1893.
Hals. Vol. 26 p. 294 para. 612 p. 297 para. 619.
Ports. Ordce. s. 73 (c). The Board " may " . . . .
Bradford Corporation v. *Myers* (1916 1 A.C. 242).
They were exercising a power with an individual member of the public and not performing a duty which they owed to the public in general, and their liability arose from their private contract. P. 264.
Milford Docks v. *Milford Haven* (1901 65 J.P. 483).
Clarks v. *Lewisham* (1902 19 T.L.R. 62).
McManus v. *Bowers* (1938 1 K.B. 98) pp. 116, 118, 125.
Attorney-General v. *Margate Pier & Harbour* (1900 1 K.B. 749).
(Company formerly a private company.)

s.o. till 2.30 p.m.

2.30 p.m.

Calls—

Plaintiffs' Evidence.

MERDITH COLE DACK : 22 Geylang Road, Singapore,
Director of Plaintiffs.

M. C. Dack, Examination.

Prior to June 1946 my Company ordered from Firestone Bombay as much tyres and tubes as they could let us have. These were to be shipped to Singapore as soon as available.

I was then the only European in our tyres sales department. I personally dealt with distribution to dealers of all tyres.

25th July 1946 I received from Bombay a letter dated 25th June 1946 (A L), enclosing invoice no. 0083 and packing list dated 18 June 1946 for (inter alia) 1,200 passenger tyres and 2760 truck tyres coming to Singapore on S.S. " Samokla," and also sending me B/L No. 319. (Ex. B.) According to the letter a Delivery Telegram had been sent to the Shipping Agents here.

I had received A 2 from the Shipping Agents.

I received A 3 from Messrs. Islay Kerr, the Shipping Agents. It is a Delivery Order addressed to S. H. B. dated 28th June stating that ship arrived on 22nd June. It referred (inter alia) to 3960 loose new rubber tyres.

I went to S.H.B. and took delivery of the tyres, returning the Delivery Order to S.H.B. after endorsing it in name of my company.

Discharge of this consignment began to take place on 11 July. It continued on 12th, 13th and 14th.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence —*continued.*

Plaintiffs' Evidence —*continued.*

M. C. Dack, Examination— *continued.*

Goods were in Hold No. 2 of ship.

Taken from there to Godown No. 1 S.H.B.

I was present when discharge first began and remained all the time.

They were put immediately into the godown and we removed them from there. I checked them as they came out of the godown and they were placed on the lorries.

The tyres belonged to 3 of our local contractors to whom they had been sold for re-sale.

All the contractors were there at times during the four days.

The tyres were not wrapped but they had a tag tied round them bearing the shipping mark of " Firestone Singapore."

I saw military tyres being unloaded at the same time from the same hatch. They had a white painted stencil mark.

So far as possible as soon as the tyres came into godown I checked them out again and delivered them to the dealers.

Upon taking delivery and before a lorry could leave I had to sign a standard receipt form for contents of each lorry.

Army removed their tyres on the third shift—from 7 p.m. to 11 p.m. I visited the godown on some evenings and saw their procedure.

When unloading of my tyres had finished from the ship I looked round the godown and checked.

I found I had not received full consignment. 17 tyres short. I searched but could not find them. I reported this to the clerk on duty. S.H.B. employees also helped me search.

We had a lot of trouble keeping ours separate from the Army's and when it was over I suggested that as we were short the Army might have got some of ours.

After we had removed all our tyres, other tyres were still in godown. They had the white Army stencil on them. I suggested to the clerks that the Army had left them there in place of some of ours. I was not allowed to take them.

I saw no looting going on, or petty thieving. There were S.H.B. tally clerks checking the slings as they reached the wharf.

The unloading was quite normal.

Having found the balance undelivered I made claims both against S.H.B. and the ship.

Value of tyres is shewn in A 12—$2053.10 (excluding Tube). That is the invoice price to me from consignors. It does not include profit.

Cross-examination

XXD. I have not read through B/L (Ex. B.)

I see the name of the consignee has been struck out and " or order " put in.

I cannot point to any endorsement over to my company.

I see an instruction by the shipper that delivery is to be made to Firestone, Singapore.

I also see " owing to existing conditions at port of discharge ship not " responsible for short deliveries or shortage of contents."

I also see that the carrier is permitted to warehouse the goods at the risk of consignee or ship.

I have paid S.H.B. their charges for the tyres received but not for the tyres not received. They never attempted to charge me for them.

I know of *no contract* made by my company.

It is possible that they were stolen and sold to a sampan man by someone on the ship, or stolen by someone on the ship and sold in Bombay. It is possible that they may have been left at the back of the hold. I know that cargoes are sometimes overcarried. Some of my tyres were unloaded at night. I did not know about any Bye-laws relating to cargoes unloaded at night.

We had told our dealers that when they came in we would sell them.

I know that conditions in July 1946 were very unsatisfactory. Some godowns had been destroyed by enemy bombing. Less facilities for storing than pre-war.

I would stay till 5 or 6 p.m. Then I would come back several times during the evening say at 9.30 ; then at 7 a.m. next morning.

RE-EXN. We are not allowed to arrange our own stevedoring from ship to godown. I assume the charge for that is in the final bill. I cannot say what is included in the charges. I pay one charge for everything.

I do not know if Shipping Agents make an application to unload to S.H.B.

I used to go back every evening.

I saw no looting or thieving.

Adjourned till 10.30 a.m.

(Sgd.) T. A. BROWN, J.
28.11.49.

29*th* November, 1949.

SEAH QUEE BAK (Ah Kwee) 15A Patini Street, Singapore,

Stevedore Foreman of S.H.B.

July 1946 I was employed as such by Tanjoing Pagar Labour Co. Daily job. In spare time I took temporary work with other shipping agents as tally clerk.

July 1946 I took such temporary employment with Islay Kerr & Co., agents of P. & O., as far as I can remember.

As far as I remember I helped to unload the " Samokla." She was berthed at Godowns 1 & 2.

I was given tally book to write down what cargo was discharged. The goods were discharged into the godown.

From the time they were removed from the ship they were put on the wharf for the wharf labourers to wheel into the godown.

I was standing near to where the cargo landed on the wharf.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence—*continued.*

Plaintiffs' Evidence—*continued.*

Seah Quee Bak, Examination—*continued.*

I recognise these documents which are now handed to me. They are tally sheets torn from the tally book supplied to me. (Ex. C.)

I entered them. At the foot of each page is my signature. I entered them during the work. They refer to goods coming from hatch No. 2. Amongst other things, tyres.

Tyres were loose. Not all to same consignee.

The entries in the tally sheets are correct.

As I was checking the goods the godown was 60 feet away.

Ship was discharged from 11th—14th July 1946.

I tallied all that cargo *personally* on those dates.

I saw them go into the godown.

Cargo from hatch No. 2 went into Godown No. 1.

A rope sling was put through the tyres—between 20/30 at one time.

The stevedores unhooked and wharf labourers took to godown on truck (hand truck).

I tally them when they were putting them on the truck.

I look through the cargo and check the marks.

If one tyre had no mark on I would report to Chief Tally Clerk. If mark is clear I make a stroke in the tally slip.

I examined each individual tyre for its mark.

I worked 7—11 a.m. and 1—5 p.m. 7 p.m.—11 p.m.

I signed tally sheet and handed it to Chief Tally Clerk.

He checked it with the ship's Manifest to ascertain the balance still to be unloaded.

In July 1946 there were looters on the wharf.

In general they looted cigarettes and piece goods mainly.

As far as I remember no such goods were in hatch No. 2.

I saw no looting or thieving when I was working this cargo.

I saw military police on duty on the wharf.

They came on rounds occasionally.

If I had seen looting or thieving I should have reported to Chief Tally Clerk.

I myself never saw the ship's Manifest.

Cross-examination.

XXD. I agree that there were a number of labourers removing tyres on hand trucks to the godown. 8 or 9 handcarts. Each in charge of one man. Two men lift them on.

My attention is not necessarily concentrated on the tyres which are on the truck. I cannot say that I follow the truck with my eyes after it has left for the godown.

Chief Tally Clerk must have a copy of the Manifest. Manifest shews number of tyres of each mark which should be unloaded.

After each period of checking the Tally Clerk checks my tally sheets in the godown office.

I saw the S.H.B. Tally Clerk at the door of the godown.

I know the type of tally sheet they use.

I do not know they are made out in duplicate with a carbon in between.

I do not know that they have to be handed in each evening. My own have to be handed in at the end of each period. I agree that on my tally sheets there is a space for the signature of the Chief Officer. I do not know if the Chief Tally Clerk attempted to get his signature.

It is no concern of mine that the S.H.B. Tally Sheets are dated 15 and 16 July.

This was my first job. I say that my tallies are right because I wrote what I see and I see what I wrote.

I worked the " Samokla " till the cargo from hatch No. 2 was finished.

10 I was not concerned with cargo from other hatches.

RE-EXD. I am now employed by defendants as stevedore-foreman.

I would not make the entry until I saw the shipping mark.

In my opinion the unloading of this hatch was slow.

In July 1946 the dock labour was slow.

As far as I remember I saw every hand truck go into the godown. But I was not responsible for that. My responsibility ended when I had tallied.

I did three jobs of tallying for ships and then went back to Tanjong Pagar Labour Co. as stevedore.

20 *Case for Plaintiff Closed.*

C. H. SMITH.

No contract between plaintiff and defendant.

B/L is a document of title.

s. 1 Bills of Lading Act 1853. (p. 495 of Scrutton).

The relationship between ship-owner and warehouseman is—statutory relationship and never any question of contract.

Plaintiff is not consignee or endorsee. The back of the B/L shews that. And p. 2 of " A " asks for a guarantee.

Glyn v. *East & West Indian Dock* (L.R. 6 Q.B.D. 475).

30 Brett L.J. pp. 483–485.

Appeal to H. of L. (7 A.C. 591) p. 597, p. 601, p. 608.

Bye-laws provide that receipt shall be subject to conditions of B/L.

Para. 1 of Conditions of B/L.

Bye-law No. 30.

McLachlan on Merchant Shipping 7th Edition p. 420, p. 719. S. 317 seq. Merchant Shipping Ordinance. c.f. S. 493 Merchant Shipping Act.

Ports Ordce. S. 46. Rates are fixed, not the subject of contract.

S. 62 gives the Board a lien until rates are paid. *Imperial Bank* v. *London and St. Katherine Docks* (5 Ch.D. 195) p. 203.

40 1947 Edition. Chitty on Contracts p. 861.

Paget's Law of Banking (5th Edition) p. 88.

Goods shipped under B/L are still in transit even when they are lying in warehouse at port of destination. Transit does not end until consignee or endorsee has received the goods. Carver's Carriage of Goods by Sea. 8th Edition para. 515). That is why the conditions in B/L apply.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence—*continued.*

Defendants' Evidence.

I. W. Freathy, Examination.

Public Authorities Protection Ordinance.

S. 28. All employees are public servants.

" The Udun " (1899 P. 236).

Page 3 of " A " 3. " Subject to conditions of B/L."

s.o. 2.30 p.m.

Resumed 2.30 p.m.

S. 73 Ports Ordce. " May."

Queen v. *Tithe Commissioners* 117 E.R. 179 at p. 185.

Calls—

IVOR WEBB FREATHY. Deputy Traffic Manager S.H.B.

Joined the Board Sept. 1945.

I have personal knowledge of conditions in S.H.B. in 1946.

Chief features were looting; looters intermingled with the labour working the ships; staff who attempted to control were intimidated; Asian staff were actually intimidated by looters; personnel (including myself) were sometimes attacked.

July 1946 there were many thefts.

Military were importing heavily at that time. Consequently godowns were somewhat congested. Also owing to war damage S.H.B. had not its full number of godowns. We had two watchmen in each godown, and they were on duty all the time the godown was open.

Police were on duty throughout the 24 hours.

Keys of godown were lodged in Police Station.

Military Police also operated in the wharf area.

Despite these precautions thefts frequently occurred.

I have seen the Police records of the policemen who were on duty at Godowns 1 & 2 at this time and they shew that men were on duty throughout the 24 hours.

I produce a roster showing the numbers of the policemen on duty (Ex. 1.)

I remember the " Samokla."

From our records she ceased discharging cargo on 23rd July. The clerk will produce the tally sheets and prove this.

I say that the Board did not receive the 17 tyres which are the subject of this claim.

I say that, because the Board has no record of receiving the tyres. Further that thefts from ships before they were discharged were not unknown at that time. I have also known of cargoes stolen after landing on wharf and before reaching godown.

The tally sheets of the Board shew less than the number of tyres delivered.

Some of the tallying was done at night time, when it was not always easy to distinguish marks on goods. Labourers sometimes took the goods to other doors of the godown.

After the tally has been made the tally clerks hand their tally sheets into the godown office after each working period.

No charge has been made against the plaintiffs for the 17 missing tyres.

The Board does not enter into contracts with ship-owners for the storage of goods.

The routine is that the agent of the ship sends in an application form for a berth. He then receives a reply on a scheduled form. The ship is then allocated a berth, and comes alongside. Shipping agent should produce to the Board a Manifest of the cargo to be discharged which should be presented before the ship starts unloading, but in practice seldom is.

The receipt of the Manifest is required by Bye-law 27.

Shipping Company orders what labour it wants from the Board.

Ship is asked if she is going to discharge by marks or all together. Then the goods are unloaded. Having received a copy of the Manifest from the Agent it does not necessarily follow that the Board receives all the goods shewn.

Sometimes the goods are delivered to the consignee direct from a lighter or on to a lorry, but in that case the Order from the Shipping Agent is to the Ship and not to the Board. And the Board receives no payment from the consignee. And the Shipping Co. pays the stevedores who put the cargo on to the lighters.

But when the cargo is landed on to the wharf and taken into the Board's godown the consignee or owner does not come into the picture until he presents the delivery order on the S.H.B. which he has received from the Shipping Agent.

Cross-examination.

XXD. I know of no report of any theft from Godown No. 1 in July, 1946

I personally did not make a search when I was informed that the 17 tyres were missing. When I wrote that they were shortlanded I was relying on the records.

I agree that a year later I said that they may have been stolen.

Goods received by S.H.B. should be those shewn as received in their tally sheets. which shew 3,923 tyres marked Firestone. But S.H.B. delivered to plaintiffs 3,943 tyres marked Firestone. Therefore I agree that our tally sheets were not accurately kept in respect of Firestone tyres. I know that in the same hatch there was a consignment of tyres destined for the Army. I am not in a position to know that some of these tyres remained in the Godown after delivery had been taken by Army.

It is possible that our clerks negligently gave delivery of 17 Firestone tyres to the Army. I have known one or two similar cases. I made no enquiries from B.O.D. whether they had any Firestone tyres.

Q. Why ?

A. Because the Army had not got more than the quantity they should have had.

It is possible that that quantity might have been made up by including 17 Firestone tyres.

I am the person in charge of this. No one else would make enquiries.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence— *continued.*

Defendants' Evidence— *continued.*

Poh Hoe Ghee, Examination.

We have had requests from consignees to keep their goods for a month or 6 weeks or 2 months, etc. And we write to the consignee (who had the delivery order) agreeing to this. It is to him that we look for the payment of our charges.

The Delivery Order (page 3 of " A ") to deliver.

3,960 tyres dated 28 June 1946 was received on 4 July.

It was received on the Board's premises, at the godown office, but not by me. We would not deliver the tyres to anybody but Firestone. I understood that Firestone were the consignees. I had the goods for the plaintiffs, who were to pay the charges.

I agree that the Agents must have applied to a responsible officer of the Board in order to get the labour ready and present.

I agree that Messrs. Islay Kerr & Co. are in daily contact with us, and cannot unload any vessel on the wharf without our assistance.

POH HOE GHEE. Employed S.H.B. 39 years.

July 1946 I was in charge of Section 10 i.e. Godowns 1—5.

I remember the consignment of tyres unloaded from " Samokla."

A lot of labourers were working at godown 2. Other people too. but I do not know who they were. Some Army people were about. Lorries, military and civilian, were about.

I saw the tallying being done—sometimes, but sometimes I was too busy.

I saw where my tally clerks were standing—at the doorway of the godown. They were having difficulty. Some of the labourers refused to go to the right door. There were 4 doors. This made it difficult to check. 15 hand trucks were in use. 5 gangs.

I saw Police on duty—sometimes one, sometimes two.

Plaintiffs were taking delivery.

I see these tally sheets, which I checked (Ex. 2).

When the work was done I check them to see that there are no erasures or alterations.

s.o. till 10.30 a.m.

(Sgd.) T. A. BROWN, J.
29.11.49.

30th November 1949.

Smith announces that Withers Payne accepts the facts—

(a) that there was adequate Police Protection on the wharves ;

(b) despite that protection there was pilferage.

He therefore will not call evidence to establish these points.

POH HOE GHEE. Xn. in chief (continued).

The tally sheets are made in triplicate, and numbered.

Ex. 2 is the duplicate.

All these copies are taken to my office to see if any alteration or erasure has been made.

The third copy is sent to Wharf Accountant, and I never see that copy again.

The second copy is kept in the godown.

The first copy is exchanged with ship's tally. It is given to the Agent's clerk.

I did this in connection with the cargo from the " Samokla " in July, 1946.

I recollect that while the " Samokla " was being discharged there were thefts from the godown. I personally found the galvanized sheets unscrewed when I arrived one morning and cargo missing. But I did not see the theft perpetrated.

I look at the tally sheets for 15th and 16th July, 1946, in Ex. 2. The number of the one for the 15th is No. 416. That was a night shift, and I received the sheet the next morning. It is impossible for the Firestone tyres shown in the sheet to have been tallied in on any day except the 15th July.

I look at tally sheet 412, showing 12 Firestone tyres tallied in on 16th July. They could not have been tallied in on any day but the 16th.

I see that according to Ship's Tallies (Ex. C) no Firestone tyres were tallied after 14 July.

The military tyres and the Firestone tyres were unloaded at the same time.

XXD. At one time S.H.B. did not do its own stevedoring, which was done by independent contractors.

The lorries were on the road side of the godown.

The unloading of the " Samokla " was slow because the stevedores were going slow, but there was adequate labour on the wharf side.

There would be not less than 2 S.H.B. tally clerks at the door of the godown through which the tyres were taken.

The labourers should all have gone through one door, but they did not.

There are 4 doors opening on to wharf in godown 1. All those doors were open. The 3 not being used were not guarded to prevent the tyres being taken through them. The labourers should have brought all tyres in at one door and gone out of the godown by the other.

Q. Why was it necessary to open all 4 doors ?

A. Because the godown was congested with cargo.

I did not myself see cargo from hatch No. 2 going through any unauthorised door.

In July 1946 it was quite common to have one part of the cargo in one section of the godown and another part in another.

If a tally clerk found a part of a consignment, which he had tallied on the previous day, in another part of the godown he would not tally it then when he discovered it.

He would report it to me verbally. And I would report it to my manager. Then the Manager reports to the Agent.

In July 1946 I made a physical check of the stock in this godown. First I checked by my tally sheets what should be in the godown. Then I

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence—*continued.*

Defendants' Evidence—*continued.*

Poh Hoe Ghee, Cross examination—*continued.*

go to the godown and check the stock-book. I do not go round the godown and physically check the goods.

The Stock book contains quantity of goods and marks. It is the duty of the Storekeeper to check the actual goods in the godown physically.

I cannot say on which day I found the galvanised iron sheet unscrewed in July 1946.

I reported in writing to Mr. Freathy. I kept no copy. I said that cargo had been stolen.

Cannot remember if a check was at once made with the stock-book. I, made no report to the Police. I left that to Mr. Freathy.

The tally sheets in Ex. 2 are bound in a book in triplicate. They are entered in order according to the shift.

The explanation of sheet 412 being dated the 16th and 416 being dated the 15th is that a tally clerk who was given 412 on a previous occasion did not use it then and returned it to the book-keeper who re-issued it on the 16th.

I was not informed that there were more Firestone tyres in the godown than had been tallied.

I was not informed that Army tyres had been left in the godown. The Store-keeper did not report it. But he should have done.

Re-examination.

RE-EXD. When goods are taken into godown on trucks they go through one door. If godown is empty any door may be used to go out.

As the godown was full up we were forced to place some goods near the door so that you could not go out of this door.

Part of the time when the "Samokla" was being discharged all 4 doors were open.

In the rush period 3 doors are needed to go out; and two doors are used for going in with 2 lots of tally clerks on each door.

The 4 doors are in fact 2 double doors.

The tally clerk is not concerned with what goes on in the godown.

During the time the "Samokla" was discharging I was never told by a tally clerk that he had found part of the consignment in another part of the godown.

There is no fixed number of tally sheets issued to each tally clerk. It depends on the cargo which they are checking. Four sheets may be issued, and only 3 found to be required.

Case for Defendant Closed.

SMITH addresses—

Position of goods between time when they come down in the sling and time when they go into godown is that ship is responsible.

Carriage of Goods by Sea Ordee. Art VII (p. 601 Vol. IV).

Shipper has made a "stipulation" or "condition" in the B/L.

Mere fact of giving Delivery Order does not create a contract.

All cases on bailment cited by plaintiffs are cases of contract of bailment.

Having told the plaintiffs about the loss the defts'. duty to contact the military was at an end.

Worthington v. *Hulton* (1 Q.B. Cases 63). "May."
The Johannesburg (1907 P. 65) p. 78. (Public Authority).

s.o. till 2.30 p.m.

WITHERS PAYNE addresses—

1. Was there a contract ?

Defts. are not concerned with contract between shipper and consignee. They never see the B/L.

They received Delivery Order on 4 July.

Freathy said they would only deliver to the plaintiffs and that Delivery Order was the only document they required. From the moment the goods are taken from the sling by their labourers the defendants hold them for the consignee. Ship is no longer responsible—not by virtue of Carriage of Goods by Sea Ordce. but by virtue of B/L. "All liability . . . . leaves the ship's deck."

Defts. have treated pltffs. as consignees by delivering cargo to them. B/L is endorsed, though not in usual form. (Scrutton p. 183). Holder of the B/L was same as person named as consignee in Delivery Order.

S. 173 of Merchant Shipping Ordinance is irrelevant because statutory right of ship-owner could not be exercised in this case. That applies only where owner is not ascertainable. That section can only be invoked in the conditions set out in the section.

Temperly (4th Edn.) p. 310. It is a permissive power only.

Marzetti v. *Smith* (1883 49 L.T. 580) p. 583.

Miedbrodt v. *Fitzsimon* (1875 L.R. 6 P.C. 306) p. 315.

Glyn Mills v. *E. & W. India Dock Co.* at p. 607. There the facts made the provision of the Merchant Shipping Ordinance relevant. In this case it is not relevant because the owner was ready waiting to take the goods.

Public Authorities Protection Ordinance.

"May" cannot be "must." See item (p) of s. 73. There is no duty which can be enforced. It is only a power.

Bye-laws 32, 32A 39.

Bye-law 30 refers to the receipt given to the ship-owner.

"Subject to conditions of B/L" in Delivery Order continues the protection which the ship-owner has under the B/L after the goods have left his hands.

26 Hails. 294 para. 612.

Clayton v. *Pontypridd Urban District Council* (1918 1 K.B. 219) Only case where there was a *contract* and the public authority has had the protection of the Act.

S. 73 is equivalent to the objects contained in a Company's Memorandum.

Sharpington v. *Fulham Guardians* (1904 2 Ch. 449) p. 455. This is a private wrong to the plaintiffs by not carrying out the private contract which defts. had with pltffs.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 5. Judge's Notes of Evidence —*continued.*

Wee Hong Heng v. *Municipality* (1937 M.L.J. 207).
Palmer v. *Grand Junction Railway* (1839 4 M. & W. 749) p. 766.
Carpue v. *London and Brighton Railway* (Case 790).
38 E. & E. Digest 180 111.

Defendants have not discharged the onus which is upon them. They have left us entirely in the air.

It is clear that they did nothing to find the tyres when they were informed of the loss.

Judgment reserved.

Sgd. T. A. BROWN, J., 10
30.11.49.

No. 6. Judgment of Brown, J., 9th December, 1949.

No. 6.

Judgment of Brown, J.

Suit No. 347 of 1948.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.* 20

Coram : BROWN, J.

JUDGMENT OF BROWN, J.

The plaintiffs' claim is for damages for breach of contract of bailment. They say that they were the consignees of a cargo of 3,960 loose rubber tyres which arrived in Singapore on the S.S. " Samokla " on the 4th of July, 1946 from Bombay. They allege that the defendants received the full number of tyres into their godown No. 1, but delivered to the plaintiffs 17 tyres short. The defendants deny that they received the 17 missing tyres ; and they say, alternatively, that if they did receive them they were lost as a result of theft from the godown despite reasonable precautions being taken against theft. 30

The defendants' Deputy Traffic Manager in his evidence gave three reasons for saying that the defendants did not receive the 17 missing tyres. His first reason was that they are not shown in the defendants' records as having been received. His second reason was that thefts of cargo from ships before discharge were not unknown at that time. His third reason was that he knew of cases where cargo was stolen after landing on the wharf and before reaching the godown. With regard to his third reason,

the defendants' pleading does not suggest that if the tyres were stolen they were stolen from any place other than the godown. And, according to the evidence, no witness saw any pilfering or looting of the cargo while it was being taken from the wharf to the godown. Seah Quee Bak was the tally clerk employed by the shipping agents. Standing on the wharf and tallying the cargo as it came from the sling, he was only 60 feet away from the godown or about the length of this Court. And the plaintiffs' representative, Mr. Dack, was present all the time. With regard to the suggestion that the tyres were stolen on the ship, the tally sheets (Ex. C) entered by Seah Quee Bak show that there was no short-landing from the ship. And as for the point that the defendants' records do not show that the 17 missing tyres were received, I do not think that much reliance can be placed on this because their tally sheets show only 3923 tyres as having been received, although 3943 were in fact delivered to the plaintiffs. The fact is that the defendants' tally clerks were working under conditions of considerable difficulty at that time. Not all the godowns were in use, some having been damaged by enemy bombing. Those that were in use were congested. Labour was undisciplined, and it was not uncommon for the labourers to enter the godown through the wrong door and dump cargo in the wrong place, despite all the instructions, entreaties and efforts of the defendants' tally clerks. Compared with the difficulties under which the defendants' tally clerks were working at the door of the godown, the task of Seah Quee Bak on the wharf was simple. All he had to do was to count the tyres as they were taken from the sling and put on the hand-trucks, identifying the plaintiffs' mark in the case of each tyre. And when he says that his tally sheets (Ex. C) are correct, I believe him, especially as Mr. Dack, the plaintiffs' representative, was also present. I find as a fact that the 17 tyres, which are the subject of this claim, were received by the defendants in their godown. But before leaving this part of the case a fact must be mentioned which will be of importance when I return to the evidence later in order to consider the question of negligence. In the cargo which was being discharged from the " Samokla," there was a large consignment of tyres for the military which was being discharged at the same time as the plaintiffs' consignment, and from the same hatch.

The first question of law which must be considered is whether there was a contract between the plaintiffs and the defendants. On behalf of the defendants a point was taken that owing to the form of endorsement on the back of the Bill of Lading (Ex. B) the plaintiffs had not proved that they were the consignees of the cargo. But I do not think it was disputed that the evidence shows that the defendants throughout treated the plaintiffs as the consignees, and that if there was an implied contract the plaintiffs as the owners of the goods were the contracting party. Therefore I propose to confine myself upon this question to the defendants' contention that the parties' relationship was statutory and not contractual.

I received the impression that in support of this contention the defendants mainly relied upon Section 317 of the Merchant Shipping Ordinance. Whether that was a correct impression or not, I can only say that I cannot see what bearing Section 317 has upon this case.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 6. Judgment of Brown, J., 9th December, 1949— *continued.*

That section makes provision for a case where the owner of the goods is not ready to take delivery, in consequence of which the ship-owner, if it were not for this provision, would be left with the goods on his hands. It provides that in such a case he may unship the goods and place them on a wharf or in a warehouse. And the succeeding sections make provision for the wharfinger's or warehouseman's lien and power of sale. But that is not this case. Here the plaintiffs were awaiting to receive the goods. The Delivery Order (Ex. A 3) had been in the possession of the plaintiffs' representative for a fortnight. He was waiting for the goods on the wharf and was present throughout the time when they were being discharged. For the same reason I cannot see that the case of *Glyn* v. *East and West India Dock Co.* (6 Q. B. D. 475) has any bearing on this case. As Brett, L.J., said at p. 484 :—

> " The statute does not deal with the case of a delivery of goods
> " to a person ready to take delivery after paying freight. It deals
> " with the case of no such person being ready to take delivery."

Reference was also made to sections 46 and 62 of the Ports Ordinance. The former gives power to the defendants to fix and levy rates for their services, and the latter gives them a lien on the goods if the rates are not paid. But that does not impose upon the defendants a statutory liability apart from contract. By section 73 (c) the defendants have authority to carry on the business of warehousemen. And my view of the position is that when the defendants' servants take the goods from the wharf to the godown the defendants are impliedly contracting to act as bailees of the goods for a reward which they are statutorily empowered to fix. I have no doubt that the relationship is contractual, and if the defendants are liable in this case they are liable as bailees for reward for a breach of their contract of bailment.

But the defendants then say that if there was an implied contract it was subject to the exceptions contained in the Bill of Lading (Ex.B), which protect the shipper (*inter alia*) from " any loss by thefts or robberies by land or sea . . . . and any neglect or default whatsoever, or error in judgment of . . . . stevedores and others." And they refer to the Delivery Order (Ex. A3) which states that it is " subject to the conditions of the Bill of Lading." But the Delivery Order is a document which is issued by the shipper's agent. It is an order addressed to the Singapore Harbour Board by the shipper's agent, instructing them to deliver the goods to the consignee, and setting out three conditions for the protection of his principal : (1) the steamer is not responsible for incorrect delivery according to mark ; (2) no claims for short delivery or damage to goods will be entertained unless made within one month after the arrival of the vessel ; and (3) the goods are subject to the conditions of the Bill of Lading. These are conditions for the protection of the shipper, and they are made by his agent. The defendants then referred to their bye-law No. 30, which provides that " the receipts given by the Board for cargo . . . . shall bear the following endorsement " Received in apparent good order and condition (or as otherwise stated),

not accountable for weight, measurement, contents, or value and subject to all the clauses governing the relative Bill of Lading." But that does not mean that in the place of the name of the shipper in the Bill of Lading we are to read the name of the Board, or that the Board in making their contract of bailment is taking over all the protective provisions which the shipper made for his protection when he made his contract of carriage. Bye-law No. 30 then proceeds specifically to set out the case when the Board will not be responsible for safe custody, and that is a case where packages have arrived in a damaged condition and have been surveyed at the Board's wharf. In all other cases the Board has the ordinary liability of a bailee for reward, subject to the partial limitations which are made in succeeding bye-laws.

I now pass to the important question of whether this action is barred by the Public Authorities Protection Ordinance. There can, in my view, be no doubt that the defendants are a public authority. The Chairman and every member of the Board is appointed by the Governor. All its officers are deemed to be public servants. There are no shareholders, and the undertaking is not run for personal profit. The Public Authorities Protection Ordinance has effect—

> " Where any action . . . . is commenced against any person
> " in respect of . . . . any alleged neglect or default in the execu-
> " tion of any Ordinance . . . . or of any public duty or authority."

The defendants say that in storing the plaintiffs' tyres they were acting in the execution of a public duty. They say that section 73 of the Ports Ordinance sets out their statutory duties, and that although the section opens with the words " The Board *may*——," the word " may " must be construed as " must " Section 73 is the only section contained in Part XII of the Ordinance which has the heading " Works and Duties," and it sets out seventeen items of business which it says the Board may undertake under that heading. No doubt in certain statutes which authorise persons to do acts for the public good the word " may " has been held to have a compulsory force. But if one studies the language used in the seventeen items which section 73 sets out it is difficult to see how the section lends itself to such a construction. The items do not refer to specific acts which the Board is required to do. They enumerate in general terms various works and other kinds of business which the Board may undertake. By item (a) the Board may construct docks. How can the principle of compulsion be applied to that ? What docks can the Board be compelled to construct ? By item (p) they may be the insurers of goods in their custody. But it cannot be suggested that they are compelled to insure all goods which pass through their godowns. By item (c) they may " carry on the business of warehousemen." That is all. I can see nothing in those words which go so far as to create a duty whereby the defendants were bound to store the plaintiff's tyres ; and on behalf of the plaintiffs reference was made to the defendants' own bye-law 39 as showing that they were not so bound. I doubt if that bye-law can be said to have the full effect for which the plaintiffs contend, because I think it might equally well be said that its object was merely to protect

In the High Court of the Colony of Singapore, Island of Singapore.

No. 6. Judgment of Brown, J., 9th December, 1949— *continued.*

the defendants in a case where they were physically unable to find storage space. But although I do not think that the tyres were stored in pursuance of any duty which could be enforced, they were stored in pursuance of an implied contract for which item (c) of section 73 furnishes the authority; and section 1 (1) of the Public Authorities Protection Ordinance includes an act or default done in the execution of any public authority as well as in execution of any public duty. It seems to me that the short statement of the law as it appears in 612 of Hailsham Vol. 26 must be treated with reserve, because it appears to ignore the word "authority" in the section. But the important word is the word "public." Did the defendants store the tyres in the execution of a public authority? Or did they store them in pursuance of a private contract, which item (c) gave them power to make or not as they pleased. As Lord Buckmaster said in the case of *Bradford Corporation* v. *Myers* (1916 A.C. 242)—

> " It is not because the act out of which the action arises is within " their power that a public authority enjoys the benefit of the " statute. It is because the act is one which is either in direct " execution of a statute, or in the discharge of a public duty or in " the exercise of a public authority."

In that case the defendant corporation was under a statutory duty to supply gas. They were also empowered to sell the coke produced in the manufacture of gas. The plaintiffs' premises were damaged through the negligence of the defendants' workmen when delivering a ton of coke in pursuance of that power. Lord Haldane said (at page 252)—

> " the language of section 1 (of the Public Authorities Protection " Act) does not extend to an act which is done merely incidentally " and in the sense that it is the direct result, not of the public " duty or authority as such, but of some contract which it may be " that such duty or authority put it into the power of a public " body to make, but which it need not have made at all."

And Lord Shaw of Dunfermline (at page 264) contrasts the case of a person who boards a municipal tramway which the municipality is running in the execution of a public duty. Although by paying his fare he undoubtedly becomes a party to a contract, nevertheless " the boarding of the car, the payment of " the fare, and the charging the corporation with the responsibility for safe " carriage are all matters of a public right of carriage which he shares with " all his fellow citizens." But where the foundation of the relations of the parties does not lie in anything but a private bargain, which it is open to either of them to enter into or decline, the matter is not one of public right or public duty but of a private and individual bargain.

Now it seems to me that if the authorities which have been cited in this case are read in the light of the contrasting illustrations of the man who boards a municipal tramcar and the person who contracted to buy the Bradford Corporation's coke, the principle is clear. In the case of *The Ydun* (1899 P. 236) the vessel was exercising a public right of passage, and the Preston corporation was performing a public duty. If the vessel

with regard to the very matter which caused the damage, had refused to obey the orders of the harbour authorities her owners might have been summoned and fined. Equally if the corporation gave preference to one vessel over another in the performance of their public duty of allowing vessels to go up the river, the corporation would be to blame. Conversely, in *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901, 65 J.P. 483) the action was brought upon the contract to repair the highway and to recover the sum which the plaintiffs had expended, at the Council's request, on doing the work. It was a private contract between the plaintiff and the Council. The action was not founded on the public duty of the Council as a public authority to repair the highway. In *Sharpington* v. *Fulham Guardians* (1904, 2 Ch. 449) the public authority had a public duty to provide a receiving house for poor children. In order to carry out their duty they employed a builder to erect the necessary building. Their contract with the builder was held to be a private contract and not one which they made in execution of their public duty to provide the receiving house for poor children. But I think that the two authorities which afford the best illustration of the principle are *Palmer* v. *The Grand Junction Railway Co.* (4 M. & W. 749) and *Carpue* v. *London and Brighton Railway* (5 Q.B. 747). In those cases the relevant statutes empowered the railway companies to make the railways and also empowered them to become carriers themselves. In each case it was held, in an action for damages for injuries sustained in a railway accident, that the Company was sued in their capacity as common carriers and not in execution of the powers and authorities given by the statute. It seems to me that in the present case item (c) of section 73 of the Ports Ordinance gives the defendants power to carry on the business of warehousemen, just as in the two cases cited the railway companies were given power to carry on the business of common carriers ; and that the alleged neglect or default was done in carrying on that business and not in the execution of a power given by the statute.

In the light of these authorities the test is to my mind clear : were the defendants dealing with the plaintiffs as members of the public in the course of an implied contract which was truly founded on their statutory powers or their public position ? Or were they dealing with the plaintiffs as individuals in the course of an implied contract which was an incident in carrying on their business as warehousemen ? In other words, was the plaintiffs' position analogous to the member of the public who boards a municipal tramcar, or was it analogous to that of the individual who bought the Bradford Corporation's coke ? In my opinion the latter was the case. Leaving bye-law 39 out of account, I can find nothing in the ports Ordinance which compelled the defendants to store the plaintiffs' tyres, and the authority which enabled them to do so is a general authority to " carry on the business of warehousemen." Equally, the plaintiffs were not bound to store the tyres in the defendants' godown. It is in evidence that sometimes goods are delivered to a consignee direct from the ship on to a lorry. There was no reason, except one of convenience, why the plaintiffs' representative should not have disregarded the Delivery

In the High Court of the Colony of Singapore, Island of Singapore.

No. 6. Judgment of Brown, J., 9th December, 1949— *continued.*

Order (Ex. A3), and asked the shipping agents to give him an order directed to the ship instead of the defendants, and transported his tyres direct from the ship to his own premises or to the godown of some warehouseman in the town. I have come to the conclusion that this action is not barred by the Public Authorities Protection Ordinance.

I now come to the final question in this case of whether, upon the facts, the defendants are liable for breach of their contract of bailment. Their duty as bailees was to use due care and diligence. They are not liable unless they were negligent. But the onus of proving that they were not negligent lies upon them. *Phipps* v. *New Claridge's Hotel Ltd.* (1905 T.L.R. 49). I have already referred to the fact that a large consignment of tyres for the military authorities were being unloaded at the same time as the plaintiffs' tyres, from the same ship, and from the same hatch. When the plaintiffs' representative discovered the loss of the 17 tyres he reported it to the defendants' clerk and suggested that they might have been taken in error by the military. This suggestion was strengthened by the fact that some of the military tyres, with the white Army stencil mark on them, were still left in the godown. Surely the reasonable thing would have been to contact the B.O.D. and enquire if any of the plaintiffs' tyres had been taken by the military in error ? Mr. Smith, on behalf of the defendants contended that having told the plaintiffs about the loss the defendants' duty to contact the B.O.D. was at an end. But I cannot accept that. Their duty was to take every reasonable step in using due care and diligence to keep the tyres in safe custody. It seems to me that, in all the circumstances that was a reasonable step which they could and should have taken, and which if it had been taken might well have resulted in the recovery of the missing tyres. I think this point is covered by the case of *Goldman* v. *Hill* (1919, 1 K.B. 443). The head-note to that case reads :—

> " An agister of cattle does not discharge himself of his duty
> " as a bailee for reward by proving that they were stolen without
> " his default, if by using reasonable diligence he could have
> " recovered them.
>
> " If, having failed to use such diligence, he is sued for loss of
> " the cattle, he must prove, in order to discharge himself, that such
> " diligence would have been unavailing ; it is not for the bailor
> " to prove that it would have retrieved the loss."

That case was an appeal from a Divisional Court, which had taken the view that " the burden of proof that the negligence caused the loss is " on the plaintiff, and that as it is pure guesswork whether inquiries or " search would have recovered the beasts or not, he fails to sustain the " burden of proof he is under." This view was held to be erroneous by the Court of Appeal, and Bankes, L.J. (at page 450) said the case was covered by the rule that the bailee must shew that the loss of the goods was not due to any fault of his own. In my view the defendants in this case have not done so. When their Deputy Traffic Manager was asked why he made no enquiries from the B.O.D. he replied that it was " because they had

" no more tyres than they should have had." But he agreed that their correct quantity might have been made up by the 17 missing Firestone tyres. And it is in evidence that after all the Firestone tyres had been removed some military tyres still remained in the defendants' godown. Allowance must be made for the difficulties under which the defendants were working at this time. But the fact is that a step was not taken which could have been taken without difficulty, and I am satisfied that upon the evidence the defendants have not discharged their burden of proving that the loss of the tyres was not due to any fault of theirs.

There must be judgment for the plaintiffs for $2,053.10 with costs on Higher Scale.

Stay of execution for 14 days and if notice of hearing lodged stay to continue until the hearing of the appeal.

(Sgd.) T. A. BROWN,
Judge.

Singapore, 9th December, 1949.

In the High Court of the Colony of Singapore, Island of Singapore.

No. 6. Judgment of Brown, J., 9th December, 1949— *continued*

No. 7.

Formal Judgment.

No. 7. Formal Judgment, 9th December, 1949.

Suit No. 347 of 1948.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (SS) LIMITED *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.*

The Seal of the Supreme Court
Colony of Singapore.

9th December, 1949.

This action coming on for trial on the 28th, 29th and 30th days of November 1949 before the Honourable Mr. Justice Thomas Algernon Brown in the presence of Counsel for the Plaintiffs and for the Defendants and upon reading the pleadings and upon hearing the evidence adduced and what was alleged by Counsel on both sides this Court did order that this action should stand for judgment and this action standing for judgment this day in the presence of Counsel aforesaid It Is Adjudged that the

In the High Court of the Colony of Singapore, Island of Singapore.

No. 7. Formal Judgment, 9th December, 1949—*continued*

Plaintiffs recover from the Defendants the sum of $2,053.10 with costs to be taxed on the higher scale and paid by the Defendants to the Plaintiffs And It Is Ordered that execution be stayed for 14 days from the date of this judgment and if Notice of Appeal be filed execution be stayed until the hearing of the appeal.

Entered in Volume LIII page 10 at 3.00 p.m. this 19th day of December, 1949.

Sd. TAN THOON LIP,
Deputy Registrar.

In the Court of Appeal.

No. 8. Judgment of Murray-Aynsley, C.J., 28th March, 1950.

No. 8.

Judgment of Murray-Aynsley, C.J.

Civil Appeal No. 28 of 1949.
Suit No. 347 of 1948.

IN THE SUPREME COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.
IN THE COURT OF APPEAL.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED *Plaintiffs-Respondents*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants-Appellants.*

Coram : MURRAY-AYNSLEY, C. J.
EVANS, J.
GORDON SMITH, J.

JUDGMENT OF MURRAY-AYNSLEY, C.J.

In this case the facts are simple and the legal issues are clearly defined. The appellants are a statutory body in whom are vested the docks of Singapore. They also are responsible for the management of the undertaking and undertake various operations in connection with the loading and unloading of ships.

In the present case certain goods belonging to the respondents were unloaded from a ship known as the " Samokla." They were removed from

the ship in the docks by servants of the appellants into a godown belonging to the appellants and from thence they were moved, again by servants of the appellants to lorries, at which point the responsibility of the appellants ceased. At some time during this operation certain of the goods of the respondents were lost. It is not known what happened to them. In these circumstances the respondents claimed damages for the loss. The learned Judge found in their favour and the Harbour Board appealed.

The first question to be decided is whether the respondents in fact and law have established the right to damages. The second question is whether having established this right, they are barred by the Public Authorities Protection Ordinance.

On the first point, the appellants were bailees for reward. The respondents have not established any positive negligent act or omission. The appellants have not, on the other hand, shown the cause of the loss. The position of a bailee for reward is defined briefly in Hailsham, Vol. 1, para. 1234 : " When a chattel intrusted to a custodian is lost . . . . the " onus of proof is on the custodian to show that the injury did not happen " in consequence of his neglect to use such care and diligence as a prudent " or careful man would exercise in relation to his own property." The article continued " If he succeeds in showing this, he is not bound to show how or " when the loss or damage occurred." This passage refers to *Bullen* v. *Swan Electric Engraving Co.* (1907, 23 T.L.R. 258). That decision appears to be based on certain views as to the responsibility of masters for the acts of their servants which were superseded by *Lloyd* v. *Grace, Smith & Co.* (1912, A.C. 716). I do not think that a bailee could now be considered to have discharged the onus put upon him unless the possibility of misconduct or negligence of his servants is excluded.

In my opinion the whole matter would be clear if it proceeded on the lines of the old action of *detinue*. The bailor set out the fact of the bailment and the failure to redeliver. To this the bailee had to plead. In the present case the appellants say, in effect, that the goods in question may have been stolen without negligence on their part or they may have been delivered in error to the wrong consignee. They contend that the decision in the " *Aralia* " (1949, 82 Lloyd's List Rep. 886) is in their favour. That case was complicated by the fact that two causes of action of different kinds were under consideration at the same time—a claim by a bailor against a bailee, and claim for damages caused by collision. The basis of the collision claim was really *res ipse loquitur*. The defendant showed that there were two possible causes one of which imported negligence and the other did not. That, according to the learned Judge, disposed of the *res ipse loquitur*. He also disposed of the claim by the bailor on the same ground. If the learned Judge was satisfied that of the various hypothesis, one, which did not import negligence, was the more probable, then I think that his decision was correct. If, on the other hand, he considered that either hypothesis was equally probable, I think that it was wrong. The judgment is not clear on the point. We have to consider if an alternative plea of this sort would be a good answer to a claim in *detinue*. In my

In the Court of Appeal.

No. 8. Judgment of Murray-Aynsley, C.J., 28th March, 1950—*continued.*

opinion, it would not. The matter has become somewhat confused by the fact, that, as, for a long time, it was open to a defendant in *detinue* to wager his law plaintiffs were driven to bring an action on the case for negligence. There the burden of proof would be reversed. In my opinion the appellants have not answered the claim in *detinue*. The learned Judge who tried the case found a specific act of negligence, in the omission of the appellants to take certain steps after the loss. For this he relied on *Coldman* v. *Hill*, (1919 1 K.B. 751). I do not agree with him on this point, as I do not consider that in the circumstances that authority is applicable ; it is not, in view of what I have decided necessary to go into the question in detail.

A more troublesome point is whether the appellants are entitled to rely on the Public Authorities Protection Ordinance (Cap. 14).

It is conceded that the appellants are a public authority within the meaning of the Ordinance in question, which for the present purpose may be treated as being the same as the English Act of 1893.

The appellants are a statutory body incorporated by the Ports Ordinance (Cap. 149). Section 4 (4) provides—" The duty of carrying " out this Ordinance shall . . . . be vested in bodies of Commissioners " to be called ' The Singapore Harbour Board '." Part XII of the Ordinance is headed " Rights and Duties." It contains only one section, 73, which is in terms permissive. " The Board may etc." It is admitted that it was this section which gave the appellants authority to undertake the operations in the course of which the loss now being considered occurred. To this may be contrasted section 75. This latter section is the only one, apart from matters of accounting and internal organization, casts any positive duty on the appellants.

From a fairly early time privileges in litigation have been given to persons, natural or juristic, functioning under statutory powers. The kind of privilege has varied as have the types of persons entitled to the privilege. The privileged activities have, however, been for practical purposes the same in a great many acts, both public and private. There is, therefore, a formidable body of case law, much of it earlier than 1893. The Act of 1893 has been interpreted in the light of decisions on earlier acts. The wording of the 1893 Act is perfectly general. There is nothing in the Act itself to exclude the protection thereby afforded from any *intra vires* acts of the protected authorities.

From an early date the Courts have decided that certain activities are excluded. The great difficulty has been to decide which.

It is interesting to note that in the case of *The Ydun* (1899, P. 236) Jeune P. and the Court of Appeal treated the exemption as general to *intra vires* acts. An attempt had been made to distinguish between economic or commercial functions of a local authority and those strictly governmental. " If Parliament decides that a public authority should be so authorized, " if it confers on a municipality the right and duty to assume the functions " of a trader, it clothes those functions with a public character, and makes " them just as much public duties of a public authority as those for the

" performance of which that authority was created. If a municipality is " authorized to supply water or gas, I can see no distinction in character " between its acts, its contracts, and its defaults, in supplying those " articles, and its acts, contracts, and defaults in repairing roads or main- " taining street lamps." (at p. 240). As the privilege given by the Act is arbitrary, so in construing it the Courts have invented exceptions equally arbitrary. One of the first of these breaches was made in the case of *Sharpington* v. *Fulham Guardians* (1904, 2 Ch. 449). That was a case of pure contract, that is, apart from contract, there would be no cause of action at all. The decision was, I think, influenced by pre-1893 authorities. Counsel for the plaintiff cited *Midland Railway Co.* v. *Withington Local Board ; Davies* v. *Swansea Corporation ; Wallace* v. *Smith* ; (1883 11 Q.B.D. 788 ; (1853) 8 Ex. 808 ; (1804) 5 East 115, respectively.

The case of *Wallace* v. *Smith* is instructive. That was an act which gave a privilege of a different kind, the right to notice of action to privileged acts, the same as under the 1893 Act.

Lord Ellenborough said at p. 122 " The notice certainly applies to all " actions of trespass and tort. Whether it extend to assumpsit I should " doubt." In the earlier case of *Irving* v. *Wilson* (4 Term Rep. 485) it was assumed that such protection did not apply to an action of assumpsit. The basis of the doctrine seems to have been that notice was required in order to enable the defendant to tender amends and that this could not apply to assumpsit.

The plaintiff had tried to waive a tort and bring an action in assumpsit for money had and received. This he was not permitted to do.

In *Davies* v. *Mayor of Swansea* it was admitted that (under 11 and 12 Vict. c. 83, the Public Health Act, 1848) notice of action was not required in an action on contract arising out of a contract to construct a sewer.

Midland Railway Co. v. *Withington Local Board* was an action for money had and received and the plaintiffs tried to bring the matter within the exception, apparently well established by that time, of actions on contract. It was decided that the exception did not extend to what the confused terminology of the time described as implied contracts. They would now be called quasi-contracts. Brett, M.R., at p. 794, puts forward the doctrine in its modern form : " I incline to think that the draftsman " of this section (The Public Health Act, 1874, s. 264) had his mind directed " to actions of tort ; it rather applies to actions sounding in damages ; but " the question is what is the meaning of the whole section ? I am prepared " to say that it applies to everything intended to be done or omitted to be " done under the powers of the Act . . . . It has been contended that this " is an action in contract, and that whenever an action is brought upon " a contract, the section does not apply. I think that where an action has " been brought for something done or omitted to be done under an express " contract, the section does not apply ; according to the cases cited an " enactment of this kind does not apply to specific contracts. Again, " when goods have been sold, and the price is to be paid upon a *quantum* " *meruit*, the section will not apply to an action for the price, because the

In the Court of Appeal.

No. 8. Judgment of Murray-Aynsley, C.J., 28th March, 1950—*continued.*

" refusal or omission to pay would be a failure to comply with the terms of " the contract and not with the provisions of the statute."

This is interesting. Before this the exception in actions in contract had always been connected with the question of tender of amends. The arguments of counsel were mainly based on the question of tender, but Brett, M.R., for the first time tried to justify the exception on grounds more rational and less technical and even obsolete.

In *Sharpington's* case the question tender of amends disappears but the argument is substantially " The plaintiff is not suing in respect of " anything done or omitted under the defendant's statutory powers or " public duties, but for breach of their private duty to him under the " contract." This re-echoes the judgment of Brett, M.R., in the *Withington* case. Counsel for the local authority admitted that the rule would not apply to a purely incidental contract, " but it applies to every contract " entered into for the direct object of carrying out their powers."

Farwell, J., in his judgment made no reference to the pre-1893 cases. He does not seem to have intended that all contracts should be outside the Act, but he seems to have assumed that the Act could not apply to all contracts and, in the attempt to draw a line somewhere, to have made a distinction between direct and incidental in reference to acts done under statutory powers. He quotes Romer, L.J. in *Ambler* v. *Bradford Corporation* (1902, 2 Ch. 585). That was a tort case and the suggestion that Farwell, J. found in the remark of Romer, L.J. is obiter, even if it was intended. The word " direct " thus introduced has a considerable part to play in the subsequent history of the Act.

Another line of attack was based on the distinction of duties and powers vested in the protected authority. In *Parker* v. *London County Council* (1904, 2 K.B. 501), an attempt was made to get round the Act with the assistance of what may be called the railway cases. *Carpue* v. *London, Brighton and South Coast Railway* (1844, 5 Q.B. 747) and *Palmer* v. *Grand Junction Railway* (1839, 4 M. & W. 749). In *Palmer's* case a railway company had in its private act obtained privilege for its acts in terms similar to those in the 1893 Act and by its negligence had caused damage to certain horses which were being carried on the railway. Parke, B., giving the judgment of the court of Exchequer said, at p. 766, " The second " objection is, that the Lord Chief Justice was wrong in ruling that no " notice of action was required. That terms on the question, whether " this is a case in which notice was requisite by the 214th section of the act. " If the action was brought against the Railway Company for the omission " of some duties imposed upon them by the act, this notice would be required. " If, for instance, it was founded on a neglect in not duly fencing the " railway, on account of which the travelling on it was dangerous to those " passing along it, assuming that such an obligation resulted from the " 180th section, or from the general provisions of the Act, that case would " have fallen within the 214th section. But, when the matter is looked at " and explained, it appears that the action is not of that nature, but the " defendants are sued as common carriers, who have received nine horses

" for the purpose of being taken to their journey's end, which they have not " so delivered, etc. : the action is brought against them, therefore, in their " character of common carriers : and it appears to me that a breach of their " duty in that character is not a thing omitted to be done in pursuance of " the act, or in the execution of the powers or authorities given by it. The " act does not compel them to be common carriers ; it only enables them " to be so, so far as they shall think fit ; and when they have elected to " become so, they are liable in that character, in the same way that other " common carriers are." The arguments in the case were highly technical and it would seem that counsel sought to treat the matter on the same lines as the assumpsit cases. I am not sure that the Court intended to decide otherwise. This case was followed in *Carpue's* case which did not carry the matter further.

In *Parker's* case counsel based his argument on the distinction between the character of the defendants as owners of the tramway and as carriers. Channel, J., declined to apply the railway cases, which had not been followed in *Kent* v. *Great Western Railway* (1846, 3 C.B. 714).

In *Lyles* v. *Southend Corporation* (1905, 2 K.B. 1) the plaintiff, who was a passenger on the defendants' tramway, tried to get round the Act by suing in contract. The Court decided against his contention on the ground (*inter alia*) that the defendants were not only permitted but obliged by the terms of their order to carry passengers. The Court intimated that if the plaintiff had been carried by a special contract the result would have been different.

In the year 1907 the matter was considered by the House of Lords for the first time in *Pearson* v. *Dublin Corporation* (1907, A.C. 351). The matter was not considered in detail but the decision of the House implied that a fraud committed by the servant of a public authority in order to induce another person to enter into a contract with the public authority was not within the protection of the statute. Lord Atkinson referred to *Sharpington's* case with apparent approval.

The next case of importance was *Bradford Corporation* v. *Myers* (1916, A.C. 242). This case arose out of a tort committed in the course of the performance of a contract made by the appellants in the course of their duties as gas undertakers. The Corporation was obliged to supply gas and authorised to sell coke. This distinction was stressed in the judgments of the House and this stress caused the actual decision to be misunderstood. In view of later cases it must be taken to be limited to cases in which there is a contract and either a breach of contract or a tort arising out of the performance of that contract. When there is no contract there is no distinction between activities which are obligatory and those which are merely permissive : (*Griffiths* v. *Smith* (1941) A.C. 170).

The case of *Myers* v. *Bradford Corporation* is interesting for several reasons. One of them is the fact that the original basis of the exclusions of actions on contract was forgotten or at least overlaid. Originally the matter had rested on technical questions of procedure. Now it appears to rest on the ground suggested by Brett, M.R., that the performance of a

In the Court of Appeal.

No. 8 Judgment of Murray-Aynsley, C.J., 28th March, 1950— *continued.*

duty under a contract is not or rather may not be the performance of a duty under a statute. This was not entirely made clear by the judgments, as is shown by the fact that the effect was misunderstood. In the *Torquay Corporation* case (1938, 4 A.E.R. 18), which was a case in tort of invitor and invitee, the decision was based on the distinction of permissive powers and statutory duties. The *Bethnal Green* case (1939 55 T.L.R. 519) cannot be distinguished but it was decided in the opposite sense. In *Myers'* case I think that confusion was caused by the words of Lord Shaw (at p. 263), " And I will venture to add, my Lords, that it will be found that the position " not of the one party, but of both parties, must rest on the same foundation. " If there be a duty arising from statute or the exercise of a public function, " there is a correlative right similarly arising." This gave rise to the impression that there must be a right that could be enforced in the Courts. The consequence of such an assumption is shown in the case of *Western India Watch Co.* v. *Lock* (1946, 1 K.B. 601). There the public authority was an officer of the Crown and the Crown cannot in any event be compelled to carry out any duty.

In *Griffiths* v. *Smith* the defendants were a public authority but they could not be compelled to perform any duty as they were permitted by statute to cease to function as a public authority at any time. In that case Lord Maugham said (at p. 185): " It is sufficient to establish that the act " was in substance done in the course of exercising for the benefit of the " public an authority or a power conferred on the public authority not being " a mere incidental power, such as a power to carry on a trade. The words " in the section are ' public duty or authority,' and the latter word must " be taken to have its ordinary meaning of legal power or right, and does " not imply a positive obligation."

In the popular interpretation of *Myers'* case all the emphasis was on the word " duty." The distinction between duty and authority was overlooked.

A great deal of argument was devoted in the present case to the question of whether there was a contract between the parties. I think that it was quite probable that there was, but I regard the question as immaterial. In the first instance there was certainly a contract between the appellants and the shipowners and what was done was done in performance of that contract. If the existence of a contract were sufficient to displace the protection of the Ordinance there is certainly a contract. In *Myers'* case the result would have been the same if the coke had been thrown through the window of a stranger to the contract; it was done in performance of the contract.

I think that *Myers'* case should not now be considered as depending entirely on the existence of a contract. I think that too much attention has been paid to the consideration of whether there was or was not a contract. I do not think that that was the criterion.

I think that Lord Porter put the matter correctly when he said in *Griffiths'* case (at p. 208) " I think it is true to say that a private contract " even if entered into in pursuance of an Act of Parliament is not thereby " protected but an act which is done in performance of a public duty is

" still done in the execution of a public duty though it is performed through the medium of a " contract." There are many public authorities which can only exercise their functions through contracts. A housing authority performs the duty of housing by entering into contracts with tenants. No member of the public has a right to a house. The right, such as it is, is of imperfect obligation and belongs to the public at large. It is open to the housing authority to decide to whom they shall let houses.

In the *Western India Watch* case the public generally had no right to ship goods; the duty of the public authority was to limit shipments to those helpful to the prosecution of the war. Such goods as were shipped were shipped no doubt in pursuance of contracts of affreightment. But the shipping of the goods was no doubt the exercise of a public authority.

There is no doubt that an exception has been grafted on to the act. I have tried to explain how the trouble started and how the nature of the exception has changed and how it has ceased to be purely procedural. There is nothing in the Ordinance to justify the exception and if it were a question of construction of a modern act the trouble would not have arisen. I think that care should be taken to ensure that the exception is not enlarged.

In the present case the appellants are a public authority incorporated to carry on a trade. To do that they are given certain powers. As long as they use those powers to carry on that trade in my opinion, they continue to exercise authority under that Ordinance although they can only carry on that trade by entering into contracts with shipowners and others, though no particular ship has a right to use the docks. In the words of Lord Shaw in *Myers'* case (at p. 262) " when the act or neglect had reference " to the execution of their duty or authority—something founded truly on " their statutory powers or their public position—to that, and that only, ' will the limitation apply." I think that the distinction is between performing the public duty or authority and doing things to enable the authority to perform those duties or authority, e.g. making a contract for the erection of a building. I am afraid that one cannot decide these cases without the use of some such expression as indirect, incidental, etc.

In my opinion, in the present case, the appellants were directly performing their duties under the Ordinance, their duties as dock owners, even though the particular operation was not an essential part of the work of a dock authority, and it may be that in most cases dock authorities leave persons interested to make their own arrangements. The appellants were entitled to use their discretion in the use of the powers conferred by the Ordinance. The exception might come into play if they had entered into a contract for the building of a house for an employee, a thing permitted but not the duty or the function of a dock authority as such.

In my opinion the appellants are entitled to the protection of the Ordinance and the appeal must be allowed with costs.

(Sgd.) C. M. MURRAY-AYNSLEY,
Chief Justice, Singapore.

Singapore, 28th March, 1950.

In the Court of Appeal.

No. 9

Judgment of Evans, J.

No. 9. Judgment of Evans, J., 28th March, 1950.

IN THE SUPREME COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.
IN THE COURT OF APPEAL.

Appeal No. 28 of 1949.

Suit No. 347 of 1948.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED (*Plaintiffs*) *Respondents*

and

SINGAPORE HARBOUR BOARD ... ... (*Defendants*) *Appellants.*

Coram : Murray Aynsley, C.J.S.
Evans, J.
Gordon Smith J.

JUDGMENT OF EVANS J.

The appellants are a body incorporated under the Ports Ordinance with certain powers to manage the Singapore Harbour, and they appeal from a judgment given against them for $2,053.10 and costs. The action in the High Court was brought by Respondents in respect of certain tyres shipped to them by their associated company in Bombay in S.S. " Samokla " which discharged here between 11-14 July, 1946. The respondents claimed that the appellants failed to deliver to them 17 tyres received by them from the ship.

The appeal was brought on three grounds, that the learned Judge was wrong in finding that there was an implied contract between the parties; tnat the appellants were negligent in not inquiring of some B.O.D. whether tyres had been misdelivered to them ; and that the appellants were not entitled in this case to the protection of the Public Authorities Protection Ordinance.

The ship discharged alongside and the tyres were checked ashore by the ships agents and passed at once into the hands of the appellants' employees, who removed them to the appellants' warehouse where they were checked in by appellants' clerks. The consignee was anxious to obtain early delivery and removed the goods from the warehouse as they arrived so far as he was able with the transport supplied and without working at nights. When all were removed seventeen, which should have been in the warehouse, were found missing. The appellants at that time denied receipt.

The respondents on notification of shipment communicated with the ship's agents in Singapore and on a guarantee received from them a Delivery Order on the appellants. This order was endorsed "Please collect all

" charges and store rent from consignees." This Delivery Order the respondents passed to the appellants on 4th July before the ship came alongside and appellants retained it. The goods were shipped under a Bill of Lading which provided *inter alia* that " The Company shall have the " option of making delivery of goods either over the ship's side or from lighter, or store ship, or hulk, or Customs House or warehouse or dock or wharf or quay at consignees' risk."

A contract should only be implied where the circumstances necessitate it, and the relations presumed should be the simplest consistent therewith. A right to delivery is not a contract. A holder of a Delivery Order is in a position to demand the goods referred to therein. If he does not wish to take delivery at once from a bailee, and leaves the goods with the bailee after the latter has notice of the order it may be necessary to presume a contract, and there will be a transfer of the right to possession. Cases regarding goods continuing in the hands of a bailee after issue of a Delivery Order have no bearing on this case. Bailment is a transfer of possession, and the bailment here was clearly direct from the ship to appellants. The shippers could nominate the mode of delivery, and in my opinion the Delivery Order was an intimation of the mode chosen. The respondents' consent or agreement was immaterial. In such circumstances it is difficult to understand how a contract can arise. The point is not essential, as, even were the Delivery Note taken as an offer to deliver in the manner indicated, it was accepted by the respondents, but delivery was by the ship's agents chosen and instructed by them. The respondents had only a right to delivery. The parties relations seem clear, and to require no implied contract.

The basis of the claim, however, and the link of the parties relation is the appellants dealings with respondents' property. Mr. Smith carefully confined himself to implied contract as found by the learned Judge and respondents' Counsel did not seek to take the claim farther. It seemed to be thought that were the claim in tort, the statutory plea would be good, but no case founded on tort has been held barred on that ground only. The Statement of Claim, however, clearly alleges in paragraph 3 the respondent's right to delivery and in paragraph 5 the demand for the goods and the failure to deliver. The case is in my opinion one of detinue. It is true that detinue by bailment has been said to partake of contract, but the original action in detinue is far older than assumpsit. Moreover, the averment of bailment in such case was not traversable. The only element of contract was not in issue, so that, as I understand it, the point here could not have been raised. It may be that the learned Judge refers to this as an implied contract, the passage in his judgment which Mr. Smith cites and attacks at page 131 is not quite clear. I do not think that a bailee of goods for safe keeping ceases to be liable in detinue by reason of a Delivery Order having been issued, because the bailor can no longer demand delivery, and there is no bailment by the person who can now do so. To such a claim loss is no answer, and I can find little more in the defendants' various excuses and the state of the

In the Court of Appeal.

No. 9. Judgment of Evans, J., 28th March, 1950— *continued.*

facts. The case of *Reeve* v. *Palmer*(1) applies. That case concerns deeds in the custody of a solicitor, but Cockburn, C.J., speaks only of a duty to take ordinary care of the articles. On the pleadings and as the case has been fought it might be said there is a plea of theft, but that plea has wholly failed. The plaintiff need not allege negligence, nor anything more than demand and refusal of his own goods ; of course, negligence is no defence. It can only arise after there is, at least, *prima facie* evidence of a theft, when there might be a question of whether the loss on the theft was attributable to appellants' negligence as in *Coldman* v. *Hill*(2). The cases cited appear to me remote. Animals have wills of their own. Barges are subject to natural forces, and perils, against which special steps may have to be taken, but in each case the cause of loss, rising tide, or founding under another ship were known, and, in the latter case, the reason the barge could not be redelivered. In the cases involving theft, the theft was proved or admitted. In these circumstances I do not think the appeal can succeed on either of the first two grounds.

That leaves what the parties describe as the principal point of whether the respondents action is barred by the Public Authorities Protection Ordinance (Cap. 14). This Ordinance corresponds to the former English statute. The leading case under that statute seems still to be *Bradford Corporation* v. *Myers*(3), but we are told that the later cases have blurred the lines traced therein. In that case, however, Lord Haldane gave clear warning of the vanity of seeking exact and comprehensive principles in these cases. *Ex hypothesi* the duty which the alleged public authority is exercising is, usually, the creation of statute, and statutes appear drawn on no certain principles. We were offered fresh guides in whether the act complained of was done for profit, or whether it was one tending to the public benefit. These are but will of the wisps. Dicta referring to these considerations may be found, but they are indicative of the variety of the duties. Lord Simon seems clearly to be speaking in this sense in *Griffiths* v. *Smith*(4). Had the House of Lords in that case insisted that the duty must be legally exigible, it would have amounted to saying that voluntary and altruistic acts, whatever their other qualities, could never be regarded as performed as a public duty. On the other hand a public duty does not cease to be one because the doer is paid for doing it nor is there distinction between one paid in wages and one whose reward bears a more direct relation to its usefulness. Again the actors freedom in disposing of the fruits of his works may be some indication of the width of discretion or freedom in which he acts.

The difficulties arise from the endless variety of the duties. In some cases the authority may be a governing body, as indeed was the Bradford Corporation, but it was also empowered to carry on a gas undertaking from which it was required to provide gas to consumers within its area, and was permitted to engage in a coke trade. For the supply of gas it became

(1) 5 C.B. (N.S.) 84.
(2) 1919 1 K.B. 443.
(3) 1916 A.C. 242.
(4) 1941 A.C. 170 at 176/7

a public utility body, and the case turns entirely on the variation in the wording of the sections of their own Improvement Act and that of the defunct gas company. In the *Western Indian Match Co.* v. *Lock*(1) the public authority was a wartime " Competent Authority " with very drastic powers indeed, but for a limited time and purpose. The exact position of the authority, and the sanction of his duty is not made clear. The Lord Chief Justice says it " might be one of imperfect obligation " and then that it " was not a duty the courts would enforce "—but I do not think there is a definite finding, for the point was thought of secondary importance as the quotation from Lord Maugham shows. It seems clear the Competent Authority was himself a man under authority, and the Attorney General compares him to a servant of the Crown carrying out a lawful order, so that wide as his powers appear and wider though his powers might be, he was strictly controlled. He was strictly accountable and exercised his powers in the King's service. The case was decided, as I understand it, on the ground that not only had he a power to requisition the ship but was under a duty both so to do, and to use it in the public service for the prosecution of the war. That duty was exigible by his superiors if not by the courts in all cases. The loss obviously occurred in the performance of that duty, which is a public duty.

This case does not in fact seem to go so far as *Griffiths* v. *Smith*. There the defendants were managers of a voluntary school, that is one of a kind which in origin were charitable institutions carried on by the owner, providers or managers. They had become a statutory body by virtue of the statutes, but these seem largely to be for control and regulation. The work may have been undertaken voluntarily and performed gratuitously. The Law Lords seem to have had difficulty in defining their duty. Lord Simons said " It was strenuously contended for the appellants that this " action was ' voluntary ' . . . . The real question is, whether the " managers, in authorizing the issue of invitations to the display on the " school premises after school hours, should be regarded as exercising their " function of managing the school." Lord Porter says much the same adopting the words of the Master of the Rolls and assuming, with him, that " carrying on a public elementary school in execution of the act " is a public duty. Lord Wright says clearly " what was being done was, in " my opinion, clearly done as an item in the management of the school " which was a public duty obligatory on the managers so long as they " continued it." It seems easy to see that persons devoting their time, or property to such a purpose are performing a public duty, even if it be not so simple to define its obligation, or its extent, but that case is very different from this. So different, in my opinion, as to have little bearing on it.

That the Singapore Harbour Board is a public Authority is in this case admitted. We have only to consider whether the loss occurred in the execution, or intended execution of its public duty or authority. I agree with the learned Judge who tried the case that *Palmer* v. *The Grand*

(1) 1946 1 K.B. 601.

In the Court of Appeal.

No. 9. Judgment of Evans, J., 28th March, 1950— *continued.*

Junction Railway Co.(1) and *Carpue* v. *London & Brighton Railway*(2) afford the best illustration of the principle, the authorities being public utilities and monopolies empowered to do certain acts and to carry on certain trades, but the cases are not as such conclusive. For the reasons set out the case must turn on the existence of a public duty, and this whole case turns on the Ports Ordinance which creates the authority and clothes it, if at all, with powers and duties.

This Ordinance begins by severing the Board's predecessors' connexion with the Crown, and by setting up this and another statutory Corporation (Sections 2 and 4). It goes on to transfer to it a large quantity of Crown land without specifying the tenure, but of the nature of ownership, and subject to a floating first charge in favour of the Crown; but otherwise without limitation on the ownership or use of the land (section 30). By Section 29 the Board has full powers to lease its land, subject, in the case of a lease for more than three years, to written sanction of the Governor. It can let from year to year and long leases in Singapore seem uncommon. The Boards powers to contract (section 41) throw no light on their public duties, and are related only to their " current business " a term not suggestive of duty. The Board under Section 46—50 is free to fix its own rates, and consequent profits, without reference to any tribunal. Such rates are subject to approval by the Governor in Council but, apparently, on the advice and after hearing the Board alone, for there is no provision for publishing proposed rates nor for objection thereto. Section 73 is headed " Works and Duties " but the marginal note reads " Board empowered to do certain works etc." and seems a more accurate description. The draftsman would appear sedulously to have avoided imposing any duty on this official or semi-official body, and the only section which admittedly does so, is section 75, requiring it to provide public landing places. There is nothing to correspond to section 1 of the Coal Industry Nationalisation Act 1946(3) which sets in the forefront the duties of the Coal Board, nor, to take a case nearer in time and subject matter, to section 2 of the Port of London Act 1908(4). Section 4 speaks of the duty of carrying out this Ordinance being vested in the Board. This only throws us back on the ordinance to discover the duties and powers while the word " vested " suggests that the word " duty " is used in the same peculiar sense as in the Heading. The section is principally concerned with defining the Boards sphere of activity.

Section 73 is the only section to which parties made much reference. The relevant provision reads " The Board may . . . . (c) carry on the " business of Wharfingers and warehousemen . . . ." The appellants emphasised the word " Duties " in the heading and argued that " may " might often be read as " shall." It might also be said that some of the matters specified would generally be supposed to be among the duties of a Harbour Board such as the maintenance and repair of wharves and docks.

(1) 4 M. & W. 749.
(2) 5 Q. B. 747.
(3) 9 & 10 Geo. 6 .c. 59.
(4) 8 Edw. VII c. 68.

The argument however goes much too far. As the section is drafted all the matters therein are in the same category. There is but one " may." These matters are very varied including (c) building ships, (e) generating electricity, and (p) insuring goods in their custody. The heading is so vague as to be almost meaningless. It cannot be read as indicating a power to construct and a duty to use, for the Board can quite properly build warehouses and let them to persons carrying on that trade, while there could be no obligation to use the ships they build. I can see no reason to read the section otherwise than as an enabling section as it appears at first sight, and in accordance with the marginal note.

The argument on this point was confused to some extent with another like it, that the Singapore Harbour Board is under a duty to manage the port and that its dealings in this case were essential to that duty and not merely incidental. On this argument as it stands I should have been inclined to say the work here is incidental only, and that the essential functions of such a board are the maintenance and repair of wharves and docks, and the land and sea approaches thereto. Even if, as here, it is a considerable neighbouring land owner it can quite properly lease warehouses should it find it necessary to build them. Could they not be let it might be necessary to manage, but there is no evidence of all this. The whole argument, however, appears to me impermissible. It asks the court to read into the Ordinance just such a section as the legislator has deliberately omitted for some reason or another. It cannot be said, but in the loosest sense, that the Harbour Board is under a vague, implied duty to manage, even as the defendants in *Griffiths* v. *Smith* were under a duty to manage the school. The Board is entirely the creature of this Ordinance in a way the managers were not of the Education Acts. It is brought into separate existence in contradistinction to its predecessor, and then only vested with property. It has never been suggested that its status or duties are in any way affected by its predecessors. Doubtless the members of the Board should do their duties in that state of life to which it may please God to call them, and that duty may be deemed a public one, but it is one they share with all mankind. I can find no more definite duty laid upon them in this regard. In fact the Board has many powers ; it carries on a business, as section 41 of its ordinance says on its own land, with a wide choice of extension, and at a profit fixed by itself with very little check. If its business is in part to the benefit of the community it shares this character with many others.

The Board is seized of a large area of public land in the neighbourhood of the docks amounting according to the Schedule to the Ordinance to over 1 square mile. It may be under a duty to develop this to the best advantage. Were the appellants sued in respect of their general use and occupation of the premises, or the maintenance of any necessary works thereon, I think they could plead the Ordinance. If the act arose in building warehouses to develop the site, it might be in the same position ; but I can see no public duty to run a warehousing business. The public have not, so far as we know been consulted, and the Board is not elective. The public may well prefer dealing with competing private traders to dealing with a monopoly and one

In the Court of Appeal.

No. 9. Judgment of Evans, J., 28th March, 1950—*continued.*

which will plead the Ordinance to escape its liabilities. Nor can it be said in the words of Lord Porter in *Griffiths* v. *Smith*(1) that the Board " have " adopted a course of action which imposes upon them the performance of a public duty at the material time " and the default is in carrying it out. The words of Lord Maugham are more applicable " the act was in substance " done in the course of exercising for the benefit of the public an authority " or power conferred on the public authority not being a mere incidental " power, such as a power to carry on a trade." There is no evidence the Board is acting for the public benefit, and it is carrying on a trade. By its own Regulations Sections 32A and 39 the Board is under no duty to receive all goods, nor all goods discharged. Its liability here arises directly out of a contract express or implied it chose to make with the shipping company in the course of conducting a warehousing business. The case is to me indistinguishable from that of *Bradford Corporation* v. *Myers*(2).

In my opinion therefore the appeal should be dismissed.

(Sgd.) L. E. C. EVANS,
Puisne Judge, Singapore.

Singapore, 28th March, 1950.

No. 10. Judgment of Gordon-Smith, J., 28th March 1950.

No. 10.

Judgment of Gordon-Smith, J.

IN THE SUPREME COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.
IN THE COURT OF APPEAL.

Appeal No. 28 of 1949.
Suit No. 347 of 1948.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... ... (*Plaintiffs*) *Respondents*

and

SINGAPORE HARBOUR BOARD ... ... (*Defendants*) *Appellants.*

Coram : Murray Aynsley, C.J.S.
Evans, J.
Gordon-Smith, J.

JUDGMENT OF GORDON-SMITH, J.

I have had the advantage of reading and considering the Judgments of my learned colleagues which have just been delivered. Both such Judgments have dealt at length with the points raised in argument on the

(1) 1941 A.C. 207 & 185.
(2) 1916 A.C. 242.

Appeal before us. The first main point was as to the legal relationship between the parties and on which, on the findings of the learned Trial Judge, a further point of negligence arose. The other point was entirely separate and distinct and on which the question of applicability of the Public Authorities Protection Ordinance, Cap. 14, arose. If the learned Trial Judge had found in favour of the Appellants on this later point, then the other point or points did not arise for decision and discussion thereon would have been merely academic. A lot of time would therefore have been saved and argument avoided had this latter point been taken as a preliminary issue.

Both my learned colleagues have dealt at some length with this first point and are in agreement that the matters arising thereon could have been more simply pleaded and argued as one of plain and straight-forward detinue and not of one of implied contract arising out of bailment, and both my learned colleagues having examined the matter, have come to the conclusion that, even so, the Answers by the Appellants on the findings of fact by the learned Trial Judge, would not have been successful in either event. I agree, generally, with their conclusions and have no more to add.

On the remaining point and after detailed reasoning, Evans, J., finds that to him the present case is indistinguishable from that of *Bradford Corporation* v. *Myers* (the Coke case), and that therefore the Appellants are not entitled to the protection of the Ordinance and he would dismiss the Appeal. On the other hand, the learned Chief Justice, after examining this and other cases in detail, comes to a contrary conclusion. There is therefore a conflict of opinion between my colleagues and it is necessary for me to express my opinion in some detail.

There is no conflict of opinion at all as to the Appellants being a Public Authority, as found by the learned Trial Judge. After examining the Authorities and in particular the Bradford Corporation case, he makes a distinction between a dealing by the Respondents as members of the public in the course of an implied contract which was truly founded on the Appellants' statutory powers or public position, and a dealing with the Appellants as individuals in the course of an implied contract which was merely an incident in the carrying on of a business by the Appellants as Warehousemen. He found that the transaction was analogous to that of the individual who contracted to buy the coke from the Bradford Corporation, and accordingly that the action was not barred by the Public Authorities Protection Ordinance. On reference to this Ordinance, I think, some light is thrown on the matter by the long title " To provide for the protection of " persons acting in the execution of statutory and other public duties," and which makes a distinction between statutory and public duties. In effect, the long title of the Act of 1893 is in the same terms. The Appellants are a statutory Board created and established by the Ports Ordinance (Cap. 149) and by Section 4, a statutory duty is imposed on them to carry out the provisions of the Ordinance. The only mandatory statutory provision imposed on the Appellants vis-à-vis the public, is that contained in Section 75 which enacts that the Board shall provide free landing places.

In the Court of Appeal.

No. 10. Judgment of Gordon-Smith, J., 28th March, 1950— *continued.*

Section 73 prescribes what they may do in carrying out their duties and it is obvious that such duties must necessarily be permissive and not mandatory. In effect, the Board is the Port Authority for the Colony authorised, but not compelled, to construct and develop progressively all the necessary wharves, docks, warehouses, facilities and conveniences as set out in Paragraph XII, Section 73, headed " Works and Duties." Because such rights and duties are merely permissive and not mandatory, are they excluded from being " other public duties " ? I do not think so. Both the learned Trial Judge and Evans, J., base their decision on the Bradford Corporation case in which there was not only a specific trade contract entered into but a proved and obvious tort committed by the Corporation agents in carrying out such contract. The facts, at least, can clearly be distinguished. The learned Chief Justice has examined this case at some length and also the later case of *Griffiths* v. *Smith*, and these two cases are much more relevant than many others quoted to us and both of them were Appeals to the House of Lords and in the latter of which the learned Law Lords examined and, I think, to a great extent clarified their earlier decision.

In *Griffiths* v. *Smith*, the Lord Chancellor in his speech drew particular attention to the warning given by Lord Haldane in the Bradford Corporation case that it might be difficult to extract from the words of the Act a comprehensive principle which would serve as a complete guide for the future and quoted Lord Haldane as follows : " In such a case, the Court " can only take the particular facts in the case before it, and decide as best " it can whether they come within the words, or they fall altogether outside them."

As I have said earlier, the provision of docks, wharves, warehouses and all the other items enumerated in Section 73 of the Ports Ordinance is permissive and not mandatory but having elected so to provide such conveniences and facilities progressively in carrying out their multifarious duties of a Port Authority, the question, so it appears to me, is whether by so doing, the Appellants have done something which is incidental to, part of, the process of carrying on their statutory duties, as a Port Authority. In effect, the protection afforded by the Act and Cap. 14 is limited to Public Authorities and it is not disputed that the Appellants are such a public authority and as Lord Maugham said in his speech in reference to the Bradford Corporation case (at p. 185) " It is not essential that a Public " Authority seeking to rely on the Act of 1893 must show that the particular " act or default in question was done or committed in discharge or attempted " discharge of a positive duty imposed on the Public Authority. It is " sufficient to establish that the act was in substance done in the course " of exercising for the benefit of the public an authority or power conferred " on the Public Authority or a power conferred on the Public Authority " not being a mere incidental power, such as a power to carry on a trade."

It seems to me clear that the appellants were carrying out a public duty in transferring goods discharged from a ship alongside the wharf by the ship's crew on to the wharf, to their own godowns or warehouses, pending future delivery to the consignees.

The fact that the consignees had previously handed to the appellants a formal delivery order instructing delivery of such goods to themselves does not, in my opinion, affect the matter one way or the other, nor does such delivery order constitute a contract between themselves and the appellants. It may be that in the course of such transference or during the period of temporarily warehousing the goods the consignee suffers some private injury or wrong in relation to such goods, due to the default or negligence of the appellants, but the question is whether it was committed by the appellants in the execution or intended execution of a public duty or authority. In my opinion this was so, and the appellants are entitled to the protection of the Ordinance. I therefore agree with the learned Chief Justice in thinking that on this ground the action fails and the Appeal should be allowed.

(Sgd.) F. GORDON-SMITH,
Judge.

Singapore,
28th March, 1950.

No. 11.

Formal Judgment

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.

IN THE COURT OF APPEAL.

Appeal No. 28 of 1949.

Suit No. 347 of 1948.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... ... (*Plaintiffs*) *Respondents*

and

SINGAPORE HARBOUR BOARD ... (*Defendants*) *Appellants.*

March 28th, 1950.

The Appeal of the Singapore Harbour Board, the abovenamed appellants against the Judgment of the Honourable Mr. Justice Thomas Algernon Brown herein dated the 9th December 1949 coming on for hearing on the 23rd, 24th and 28th days of March 1950 before the Honourable Mr. Charles Murray Murray-Aynsley, Chief Justice of the Colony of Singapore, the Honourable Mr. Frederick Gordon Smith, Judge, and the Honourable Mr. Lamen Evan Cox Evans, Judge in the presence of counsel for the appellants and for the respondents and upon reading the record of Appeal filed herein and hearing Counsel for both parties THIS COURT DID ORDER that this Appeal should stand for Judgment and upon the same standing for Judgment this day in the presence of Counsel on both sides THIS COURT DOTH ADJUDGE that the said judgment dated the 9th December 1949 be

In the Court of Appeal.

No. 11. Formal Judgment, 28th March, 1950—*continued.*

reversed AND IT IS ORDERED that the moneys paid into Court by the appellants as security for costs be paid out to the appellants or their solicitors, Messrs. Donaldson & Burkinshaw and IT IS FURTHER ORDERED that the appellants' costs of this action in the Court of first instance be taxed as between Solicitor and Client on the Higher Scale and be paid by the respondents to the appellants and IT IS LASTLY ORDERED that the appellants' costs of this Appeal be taxed on the Higher Scale as between Party and Party and be paid by the respondents to the appellants.

Entered in Volume LIII, pages 160 and 161 this 3rd day of April, 1950.

By the Court,
(Sgd.) TAN THOON LIP,
Registrar.

No. 12. Order granting Leave to Appeal to Privy Council, 18th September, 1950.

No. 12.

Order granting Leave to Appeal to Privy Council.

IN THE HIGH COURT OF THE COLONY OF SINGAPORE,
ISLAND OF SINGAPORE.
IN THE COURT OF APPEAL.

Civil Appeal No. 28 of 1949.
Suit No. 347 of 1948.

The Seal of the Supreme Court.
Colony of Singapore.

Between

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... ... *Plaintiffs*

and

SINGAPORE HARBOUR BOARD ... ... *Defendants.*

Before the Honourable the CHIEF JUSTICE, The Honourable Mr. Justice BROWN and the Honourable Mr. Justice STORR in Open Court.

Upon Motion made unto the Court on the 16th day of September 1950 by Counsel for the Plaintiffs and upon hearing Counsel for the Defendants the Honourable the Chief Justice ordered the said Motion to be adjourned to be heard in the Court of Appeal and upon this Motion coming on for hearing this day in the presence of Counsel for the Plaintiffs and for the Defendants and upon reading the Petition and upon hearing what was alleged by Counsel THIS COURT DOTH CERTIFY that this case as regards the nature of the legal issues and questions involved is a fit one for appeal to His Majesty in Council AND THIS COURT DOTH GRANT to the Plaintiffs leave to appeal herein to His Majesty in Council.

Dated this 18th day of September, 1950.

TAN THOON LIP,
Registrar.

EXHIBITS.

Exhibit " A."—Agreed Correspondence.

Copy.

25th June, 1946.

Firestone Tyre & Rubber Co., of India, Ltd.

Seamail.

Messrs. Firestone Tyre & Rubber Co. (S.S.) Ltd.,
22 Geylang Road, Singapore.

Dear Sirs,

3960 Tyres, 1500 Tubes and 1180 Flaps per S.S. " Samokla."

We send you herewith Invoice No. 0083 and packing list in duplicate covering shipment of 1200 passenger tyres, 2760 truck tyres, 900 passenger tubes, 600 truck tubes and 1180 flaps to Singapore per the above steamer. Copy of B/L No. 3/9 in respect of above is also attached.

A delivery telegram has been sent through the agents of the above vessel to enable you to clear the shipment in time.

Yours very truly,

FIRESTONE TYRE & RUBBER CO. OF INDIA LTD.,
(Sgd.) Illegible,
Auditor.

Enc. :
KVR.

Copy

Peninsular and Oriental Steam Navigation Company,
Peninsular, Singapore.

JWS/CGS :

Singapore, 27th June, 1946.

Messrs. Firestone Tyre & Rubber Co. (S.S.) Ltd.,
Singapore.

Dear Sirs,

S.S. " Samokla " from Bombay.

We have today received a telegram from our Bombay Agents instructing us to deliver to you :—

3,960 loose Tyres.
20 cases new rubber tubes.
13 cases new rubber flaps.

ex the above vessel from Bombay.

Exhibits.

Exhibit "A," Agreed Correspondence—*continued.*

We enclose herewith our Letter of Guarantee which please sign and return to us with the relative Import declaration against which we shall be glad to let you have the necessary delivery order.

Yours faithfully,

for ISLAY KERR & Co., LTD.,

(Sgd.) JOHN STOGDON,
Agents, P. & O.S.N. Co.

Enc.

Copy.

No. 387.

P. & O. S. N. Company.

Singapore, 28th June, 1946.

To the Singapore Harbour Board.

Please deliver to Messrs. Firestone Tire & Rubber Co. (S.S.) Ltd. the following cargo Ex. S.S. "Samokla" voy.....arrived 22/6/46 from Bombay on.....

Marks and Nos.	No. of Packages.	Contents.
Firestone Singapore ,, 1/20 21/33	3960 20 c/s 13 ,,	Loose New Rubber Tyre ,, ,, tubes ,, ,, flaps
	3993	(Three Thousand Nine Hundred and ninety-three packages only).
Please collect all charges and store rent from Consignees.		

Subject to the conditions of the Bill of Lading.

Per Islay Kerr Co., Ltd.

No claims for short delivery or damage to goods will be entertained unless made within one month after the arrival of the vessel.

Steamer not responsible for incorrect delivery according to mark.

As Agents P. & O.S.N. Co.

Copy.

Invoice No. 78.

Firestone Tire & Rubber Co. (S.S.) Ltd.

T.N. Singapore S.S.

August 1st, 1946.

Sold to the Singapore Harbour Board,
Singapore.

5 pcs.	5.50/16 Champion Tyres	$ 48.70	...	$243.50
2 „	6.50/16 „	65.60	...	131.20
3 „	30 x 5 H.D. Tyres	94.00	...	282.00
8 „	32 x 6 „ „	166.00	...	1328.00
1 „	34 x 7 „ „	199.60	...	199.60
1 „	5.50/16 Tube	7.20	...	7.20
				2191.50

Above short received by us from S.H.B. ex S.S. "Samokla" from Bombay arrived in Singapore at July 4th 1946.

THE FIRESTONE TIRE & RUBBER CO. (S.S.) LTD.
(Sgd.) M. C. DACK.

Copy

Ref. DTM/EG/45.

Traffic Office,
The Singapore Harbour Board,
Singapore.

17th August, 1946.

Messrs. The Firestone Tire & Rubber Co. (S.S.) Ltd.,
22, Geyland Road,
Singapore.

Dear Sirs,

"Samokla" arrived 4.7.46.

I have to acknowledge receipt of your communication of 1st August, and, in reply, would inform you that a search is being made for your cargo ex the above mentioned vessel.

A further communication will be sent to you as soon as possible.

Yours faithfully,

(Sgd.) IVOR FREATHY
Deputy Traffic Manager (Shipping),
The Singapore Harbour Board.

IF/SB.

Exhibits.

Exhibit "A," Agreed Correspondence—*continued.*

Copy.

THE SINGAPORE HARBOUR BOARD

Mr. Emmerson — W. Wharf

Ex Ship "Samokla" — Date of Arrival 4/7/1946. — Cargo Tracer

Godowns 1/2

Marks and Numbers	No. of Pkgs.	Contents	Account
Firestone	17 Pieces Tyres (NOT 19 Pieces Tyres and 1 piece Tube)		Firestone Tire & Rubber Co. S.S., Ltd.

As per Manifest	As per Dly. Order	Inward Tally: Clean receipt can be given	Inward Tally: Clean receipt cannot be given 0	Inward Tally: Clean receipt cannot be given 1	No. of Pkgs delivered	Was clean receipt obtained	No. of Pkgs. lying	Where lying
3960 Pieces Tyres 33 Cases Tubes 3993	3960 Pieces Tyres 33 Cases Tubes 3993	3923 Pieces 33 Cases 3956			12 7/46 692 Pcs. tyres 10 cases tubes 13 7/46 782 Pcs. tyres 20 cases tubes 14 7/46 1278 Pcs. tyres 15 /46 844 ,, ,, 16 /46 147 ,, ,, 17 7/46 74 ,, ,, 2 cases tubes 18 7/46 138 pieces tyres 20 7/46 8 ,, ,, 1 case tubes 3976	Nil		

Remarks

The above 17 Pieces Tyres were shortlanded

Sgd.) OW HONG KEE — *Store-keeper* / *Supt. Clerk*

(Sgd.) HOE GHEE — *Assistant Traffic Supervisor*

Date 23/8/46

Exhibits.

Exhibit "A," Agreed Correspondence—*continued.*

(*Copy*)

Peninsular and Oriental Steam Navigation Company,
(Incorporated in England).

Ref: GR/- 2610
WEG/CGS

Singapore, 7th October, 1946.

Messrs. Firestone Tire & Rubber Co. (S.S.) Ltd.,
Singapore.

Dear Sirs,

S/S " Samokla " Arrd : 4.7.46.

With reference to your letter of the 1st instant (MCD/KENG) addressed in error to Messrs. Hadden & Co. (Singapore) Ltd., regarding 17 pieces tyres and 1 piece tube shortlanded ex the above vessel, we have to advise that according to our discharge records the full amount of the manifested quantity viz., 3,960 loose new rubber tyres and 33 cases new rubber tubes & flaps were tallied ex ship's sling for discharge into S. H. B. Godown No. 1.

It will be appreciated that the Shipping Company is unable to accept responsibility for short deliver after the cargo has left their care. We would therefore refer you to the Harbour Board for trace of your missing cargo or to your underwriters for compensation of the loss sustained.

Your Invoice No. 217 for $2060.30 is returned herewith.

Yours faithfully,

for Islay Kerr & Co. Ltd.
(Sgd.) Illegible.
Agents, P. & O. S. N. CO.

Enc :

(*Copy*)

23rd December, 1946.
Marine Claim No. O. B. 179.

The Deputy Traffic Manager (Shipping),
Singapore Harbour Board,
Singapore.

Dear Sir,

S.S. " Samokla " arrived 4.7.46.

I refer to your letter of 28th September, 1946, to Messrs. Firestone Tyres & Rubber Co. (S.S.) Ltd., wherein you state that 17 pieces of tyres were, according to your records, short-landed. I refer also to my letters of the 11th October, 22nd October and your reply of the 25th November

Exhibits.

Exhibit "A," Agreed Correspondence—*continued.*

attaching copy of letter of the 28th September to Messrs. "Firestone." In this you state that 17 pieces of tyres were short-landed. By my letter of the 29th November, I pointed out that the Ship's Agents have provided us with copy of their tally to the effect that 3,993 tyres were landed. Your letter of the 6th December stated that your records showed that only 3,976 packages were landed, leaving a quantity of 17 short-landed.

2.—Will you kindly advise me exactly what records you have to show that only 3,976 packages (or tyres) were landed. Did you give a discharge or a receipt to the Carrier, in respect of the number of tyres received by you ?

3.—Your early reply will be appreciated, as it is now found necessary to pursue this matter further, and it would probably assist us both if you would let me know the exact position, so that I may ascertain with some certainty, whether my action lies against you or the Carrier.

Yours faithfully,

Intld. N. M. LEVIEN,
Manager.

NML/CDW.

(*Copy*)

Traffic Office,
The Singapore Harbour Board,
Singapore.

Received Singapore
24 Jan. 1947
Ans'd No Reply.

20th January, 1947.

Ref. DTM/EG/261–47.

The Manager,
The New Zealand Insurance Co., Ltd.,
Singapore.

Dear Sir,

"Samokla" arrived 4.7.46.

I have for reply your two letters of 23rd December and 9th instant, ref: Marine Claim No. O. B. 179.

A complete re-check of our records relating to the above vessel has been made, the result confirming that there is no trace in our tally sheets of the 17 undelivered tyres having been received into our godowns. A receipt for 3,976 tyres/cases will, in due course, be given to the above vessel's agents.

Yours faithfully.

(Sgd.) Illegible
Deputy Traffic Manager (Shipping)
The Singapore Harbour Board.

IDP/CWK
Intld. Illegible.

(Copy)

Donaldson & Burkinshaw,
Mercantile Bank Chambers,
Singapore.

CHS/TBY

29th September 1947.

Messrs. Drew & Napier,
Singapore.

Dear Sirs,

Suit No. 221 of 1947

Firestone Tire & Rubber Co.

v.

Singapore Harbour Board.

Please supply us with the following particulars of the Statement of Claim :—

What part of the cargo is it alleged that the 2nd Deft. failed to take care of ?

In what manner is it alleged that the 2nd Deft. failed to take care of such part of the cargo ?

Yours faithfully,

(Sgd.) DONALDSON & BURKINSHAW.

LH/PM/936
CHS/TBY/

4th October, 1947.

Dear Sirs,

Suit No. 221 of 1947

Firestone Tire & Rubber Co.

v.

Singapore Harbour Board.

We have your letter of the 29th ultimo, and the following are the particulars of the Statement of Claim you ask for :—

1. That part of the cargo which the 2nd Defendant failed to deliver to the Plaintiff particulars whereof are as set out in the Statement of Claim.
2. We do not think the Plaintiff should be asked for particulars of this allegation which is wholly negative and in respect of which the onus of proof lies on the 2nd Defendant.

Yours faithfully,

(Sgd.) DREW & NAPIER.

Exhibits.

Exhibit " B."—Bill of Lading.

Exhibit " B," Bill of Lading, 18th June, 1946.

PARAMOUNT CLAUSE :—All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925 and the Schedule thereto are to apply to the contract contained in this Bill of Lading, and the Company is to be entitled to the benefit of all privileges, rights and immunities contained in such Act, and the Schedule thereto, as if same were herein specifically set out. If anything herein contained be inconsistent with the said provisions it shall, to the extent of such inconsistency and no further, be null and void. It is hereby expressly further agreed in pursuance of the provisions of Article 7 of the Schedule to the said Act, that the carriers' liability prior to the loading on, and subsequent to the discharge from the ship shall be governed by the conditions and exceptions of this Bill of Lading.

No. 319

SHIPPED in apparent good order and condition by FIRESTONE TYRE & RUBBER Co. of India Ltd. Bombay Sewri, in the PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY'S Steamship " SAMOKLA " now lying in or off the Port of BOMBAY with liberty before or after proceeding towards or arriving at the Port of Discharge to proceed to and stay at any ports or places whatsoever although in a contrary direction to or out of or beyond the ordinary route to Port of Discharge once or oftener in any order, backwards or forwards, for loading or discharging cargo, mails or bullion, or embarking or disembarking passengers or bunkering or drydocking with or without the cargo on board or adjusting compasses, or repairing, or for any purpose whatsoever whether connected with the present voyage or any intended subsequent voyage, and all such ports, places, sailings, and dry dockings shall be deemed included within the present voyage ; such liberty not to be considered as restricted by any words in this Bill of Lading whether written or printed and whether descriptive of the voyage or otherwise, or by any implication which otherwise might be drawn from this Bill of Lading. Also with liberty to sail with or without Pilots, and to tow or be towed, and to assist any vessels in all situations and also to deviate from the voyage for any purpose whatsoever the following goods :—3993 (Three thousand nine hundred and ninety-three only) Notify Firestone Tyre & Rubber Co. (S.S.) Ltd. No. 22 Geylang Road Singapore, PACKAGES MERCHANDISE being marked and numbered as in the margin and to be delivered (subject to the exceptions and conditions and provisions herein contained in the like good order and condition from the Ship, at her anchorage (where the Shipowners' responsibility shall cease) at the Port of Singapore (or as near thereto as she may safely get) unto or to his or their assigns ~~FIRESTONE TYRE & RUBBER Co. (S.S.) LTD., 22 Greylands Road, Singapore, or to his or their assigns,~~ which persons are herein included in the term the Consignees. Freight for the said goods, with primage (if any) as per margin, to become due on shipment and to be paid by the shipper in

The liability of the members is limited.

exchange for the Bill of Lading in cash without discount, or at destination by the consignees as may be agreed upon, and declared in the margin hereof. Freight and primage (if any) to be considered as earned whether the Ship or goods be lost or not lost at any stage of the entire transit.

IN WITNESS whereof the Commander of the Ship hath affirmed to two bills of Lading all this tenor and date one of which being accomplished the others to stand void.

Dated in Bombay 18th June 1946.

The following are the Exceptions and Conditions above referred to :—

Contents, quality and value unknown and not responsible for weight, measurement and gauge, nor for specification, brand or countermark.

The Act of God, the King's Enemies, Pirate, Robbers or Thieves by Land or Sea, arrests or restraints of Princes, Rulers or People, restrictions and consequences of Quarantine, riots, strikes, lockouts or other labour disturbacnes, combinations of workmen or others whether ashore or afloat or civil commotion or loss, damage or delay caused directly or indirectly thereby and any circumstances beyond the Shipowners' control ; accident, loss or damage of any description resulting from any of the following causes or perils, viz :—insufficiency of packing or packages wear and tear of packages through handling, inaccuracies, obliteration or absence of marks numbers address or description of goods shipped, boilers, machinery, rust vermin, breakage, leakage, ullage, hook-holes, chafage, sweating, evaporation or decay, injurious effects of other goods, effects of climate or heat of holds, chemical action, fumigation, rain, spray, snow, frost, steam, coal or coal dust, risk of craft, of transhipment, of storage, afloat or on shore, fire or water on board, in hulk, in craft or on shore, explosion, accidents to or defects latent or otherwise in hull, tackle, boilers or machinery or their appurtenances unseaworthiness or unfitness to receive and carry cargo provided the owners have exercised due diligence to make the vessel seaworthy and fit ; barratry, jettison, loss by thefts or robberies by sea or land, and whether by persons directly or indirectly in the employment or service of the Company or otherwise, accidents loss or damage or any consequences arising from overcarriage or loss of Market ; any act neglect or default whatsoever, or error in judgment of the Master Pilot, Officers, Engineers, Mariners, Stevedores or others ; collision, stranding or wreck however caused ; and all perils dangers and accidents of the seas, rivers, land carriage and navigation of whatsoever nature or kind and howsoever caused ; any accident, loss, damage delay or detention from any act or default of the Egyptian Government or the administration of the Suez Canal or arising out of or consequent upon the employment of the Company's vessels in or assistance rendered by them in the performance of His Majesty's Mail Service.

The Company reserve the right of charging freight on the goods by weight, measurement or value and of re-measuring or re-weighing the same and charging freight accordingly before delivery and will not be responsible

Exhibits.

Exhibit "B," Bill of Lading, 18th June, 1946— *continued.*

for correct delivery unless each package is distinctly, correctly and permanently marked by the Merchant before shipment with a mark and number, or address, and also with the name of the Port of Delivery, which last must be in letters not less than two inches long. In no circumstances will the Company accept responsibility for delivery to other than leading marks.

The goods may be discharged as soon as the ship is ready to unload and as fast as she is able, continuously day and night, Sundays and holidays included, and if the consignee fails to take delivery of his goods immediately the ship is ready to discharge them the Company shall be at liberty to land the said goods on to wharf or quay or into warehouse, or discharge into hulk, lazarretto or craft or any other suitable place without notice and the goods may be stored by them at the risk and expense of the shippers or consignees any custom of the port to the contrary notwithstanding. Consignees to pay charges for sorting and stacking the goods on wharf or in shed. The Company shall have the option of making delivery of goods either over the ship's side or from lighter or store ship or hulk or Custom House or warehouse or dock or wharf or quay at consignees' risk. In all cases the Company's liability is to cease as soon as the goods are lifted from and leave the ship's deck.

The Company have liberty to carry the goods by the above or other steamships or vessels belonging to themselves or others by any route direct or indirect and at the ship's option and expense but at consignees' risk to tranship at any place or places to any other vessels, or to land or store or put into hulk, craft or lighter, to reship in the same or other vessel proceeding by any route or forward by lighter-rail or any other conveyance whether such other vessel, store, hulk, craft lighter or other conveyance belong to the Shipowners or not. With liberty also to overcarry the goods beyond or away from their port of destination notwithstanding the arrival of the carrying steamer at such port. Goods so overcarried or carried away from destination and goods in course of transhipment may be placed or stored in craft or ashore and reshipped or forwarded or returned by land or sea at the Company's option and expense but at consignees' risk. The Company to be free of liability for any loss depreciation or damage arising from over-carriage or return carriage or for loss of Market. In the event of the goods being consigned to any port or place to which the steamer cannot enter the next tide after having arrived as near as she can safely get thereto without discharging and lie always afloat, the master shall be at liberty to discharge the whole or any part of the cargo into lighters at the consignees' risk.

The Company will not in any event be accountable for gold, silver, bullion, specie, jewellery, watches, clocks, precious stones, or metals, bank notes or securities for money, paintings, pictures, sculptures or other works of art, nor for goods of which the value is more than £10 per cubic ft. for measurement or per cwt. for weight cargo, nor for goods of which the value exceeds £100 for any one package, unless the value thereof shall have been declared in writing prior to shipment and entered on the shipping

note which must be presented to the Commander at time of shipment and the Bill of Lading signed with the nature and value of goods appearing thereon and extra freight in respect of same agreed upon and paid ; nor for loss injury or detention to packages intended for different consignees but enclosed in one package unless the contents and value of each separate package be given before shipment and freight paid accordingly ; nor for breakage or damage to castings, cast iron pipes, showcases, unprotected goods, marble, slate, glass, glassware, china, earthenware, or any goods of a brittle or fragile nature, from whatsoever cause arising, all such cargo being conveyed at the risk of the shippers and consignees. Fish, fruit, vegetables and all perishable goods and all cargo carried on deck are conveyed solely at the risk of the shipper.

In cases where the ultimate destination at which the Company may have engaged to deliver goods is other than the steamer's port of discharge the Company reserve the right to forward such goods by rail. Goods forwarded by rail are deliverable at any railway station within or nearest to the destination named and must be taken away by the consignees immediately after arrival otherwise the consignees will be liable for any expenses incurred. Whenever through Bills of Lading are granted by the Company and shipment transhipment carriage or delivery of the goods is to be subject to the conditions and exceptions of the forwarding conveyance performed by the Vessels or Agents or Servants of other Shipowners such shipment transhipment carriage or delivery of the goods is to be performed or partly supplemented by those expressed herein and at consignees' risk. Transhipment of cargo for ports where this ship does not call, or for the Company's purposes, to be at the Company's expense, but at consignees' risk from the time the goods are lifted from and leave the ship's deck, where the Company's responsibility shall cease. Goods to be forwarded as soon as practicable, but the Company do not guarantee that steamers shall have room at Ports of transhipment and accept no liability for detention, any expenses for storing or warehousing to be borne by the consignees. For dutiable cargo transhipped, Shipowners may give such undertaking as Customs require at port of transhipment respecting dealing with cargo at port where duty is payable, and all charges and risks incurred shall be on account of the consignees. Consular fees on cargo if any are to be borne by the consignees. The Company act as forwarding agents only from their steamer's port of discharge and in all cases their liability is to cease as above provided. Specie deliverable in London will be landed at a port in England and conveyed to the Bank of England at the Company's expense but at consignees' risk. All liability of the Company is to cease as soon as the Specie is lifted from and leave the ship's deck.

If chemicals, liquids or other goods of an explosive dangerous or damaging nature or liable to spontaneous combustion be shipped without previous declaration and arrangement or any goods contraband, or prohibited by the law of ports of shipment discharge or call such goods upon discovery may be thrown overboard or may be discharged at any port or may be otherwise dealt with according to the Master's discretion

Exhibits.

Exhibit "B," Bill of Lading, 18th June, 1946—*continued.*

and the Company shall not be responsible for their loss and the shippers and consignees and each of them shall be liable for any consequent damage, loss, expenses penalty or responsibility to the ship or cargo.

Should a port be inaccessible on account of ice, blockade or interdict or should entry and discharge at a port be deemed by the Master unsafe or inadvisable or liable to subject the steamer to any risk whatsoever whether in consequence of war, disturbance, epidemic or of any other cause or to be likely to subject the steamer or the goods to quarantine or delay there or at any subsequent port the Master shall have liberty to discharge goods intended for such port on the ice or at some other port or place at the risk and expense of the shippers and consignees and upon such discharge the ship's responsibility shall cease.

In the event of quarantine or sanitary or other similar regulations or restrictions whatsoever or wheresoever arising the goods may be discharged into any depot, lazaretto, hulk or other vessel or craft as required for the ship's despatch, or should the Master consider this impracticable he may discharge the goods at a safe port of call, in his option, at the risk and expense of the consignees ; and the ship's responsibility shall cease when the goods are so discharged. The shippers and consignees and each of them shall be liable for all quarantine expenses of whatever nature or kind.

Optional delivery is only granted when arranged prior to the shipment of the goods and is expressed in the Bill of Lading. Consignees desiring to avail of the option so expressed must give notice to the Company's Agent at the first port of steamer's call named in the option at least 24 hours prior to the arrival of steamer there, otherwise the goods will be landed and the Company's responsibility will cease.

The freight payable as above has been calculated and based on a description of the goods declared by the shippers to the Shipowners. The shippers warrant the correctness of such description. An incorrect description of the nature of the goods or an untrue declaration of their value shall entitle the shipowners to charge as and by way of liquidated and ascertained damages and not as a penalty, a sum equal to double the freight which would have been charged if the goods had been correctly described ; and in the event of the goods being subject to loss, seizure, or detention through being wrongly described the Shipowners shall be released from all responsibility. Any lift weighing over two tons gross must be declared in writing before shipment and the weight be stencilled clearly on the package, and if the actual weight be in excess of that declared the shippers and consignees and each of them in addition to paying the above-mentioned double freight, shall make good and bear any loss damage or delay caused in handling to any property or persons whatsoever and shall also pay all additional charges of handling.

Any claim that may arise in respect of goods shipped in the Company's steamer for which the steamer is responsible must be preferred in writing to the Company's Agent at the place of delivery within seven days after discharge and before the goods are removed from the quay or ship's side

or place of discharge otherwise the Company shall be free from liability. The Company's liability in case of loss or injury to goods for which they may be responsible within the limits of this Bill of Lading to be calculated on and in no case to exceed the net invoice cost and disbursements.

In the event of any vessel belonging to the Company rendering service to the vessel carrying the goods enumerated in this Bill of Lading entitling the assisting vessel to salvage reward or remuneration for such service, such reward or remuneration shall be treated in the same manner as if the assisting vessel belonged to another company or person.

The contract evidenced by this Bill of Lading shall be governed by the Law of England and in accepting this Bill of Lading the shippers and consignees expressly accept and agree to all its stipulations, exceptions and conditions whether written stamped or printed as fully as if signed by him or them. Average payable according to York/Antwerp Rules 1924 supplemented by the practice of English Average Adjusters on all points on which such Rules contain no provision and the average statement to be drawn up in the United Kingdom or at any port of discharge or other place at the option of the shipowners.

The Company shall have a lien upon the goods for unpaid freight and also for dead freight upon any portion of the goods covered by the Shipping Order granted in respect hereof which may not have been shipped and for all charges stipulated herein to be borne by the shippers and/or consignees.

This Bill of Lading must be surrendered duly endorsed at port of destination in exchange for delivery order.

For Commander.

Four anna stamp.

Shippers may by paying a higher rate of Freight ship their goods under Bill of Lading (known as the Red Bill of Lading) under which the Company take responsibilities not imposed by this Form.

Shippers are cautioned against shipping goods of a dangerous or damaging nature as by so doing they become responsible for all consequential damage and also render themselves liable to penalties imposed by Statute.

In addition to all other liberties reserved by the Shipowners, they shall have liberty to change the route before the commencement of or at any time or stage of the voyage, to delay the sailing from the port of loading, or to put into and remain at any port should circumstances in their opinion or in the opinion of the Master render this advisable.

WAR RISKS.

When and so long as a state of war exists and/or so long as any control over the use or movements of the vessel is exercised by any Government or other Authorities, and/or the insulated or other space on this vessel is requisitioned or controlled the Carrier and/or his Agents and/or the Master

Exhibits.

Exhibit "B," Bill of Lading, 18th June, 1946—*continued.*

may (if in his or their uncontrolled discretion he or they think it advisable) at any time before or after the commencement of the voyage alter or vary or depart from the proposed or advertised or agreed or customary route, and/or delay or detain the vessel at or off any port or place and/or tranship the cargo at any port or ports, place or places without being liable for any loss or damage whatsoever directly or indirectly sustained by the Owner of the goods. The ship in addition to any liberties expressed or implied herein, shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages transhipment, discharge or destination, or otherwise howsoever given by any Government or any department thereof, or any person acting or purporting to act with the authority of any Government of or any Department thereof, or by any committee or person having, under the terms of the War Risks' Insurance on the ship the right to give such orders or directions and if by any reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation. The vessel is free to carry contraband, explosives, munitions or warlike stores, and may sail armed or unarmed.

AVERAGE ACCORDING TO YORK-ANTWERP RULES, 1924.

If within goods do not satisfy all requirements of any British and/or other authorities for importation into the country of destination the shippers are to indemnify shipowners against any expenses or detention of ship arising in consequence thereof. In the event of goods not being permitted to be landed at destination shipowners may land them at any other port or return them to port of loading, charging in either case freight and/or forwarding expenses thereon. The steamer shall have a lien on the goods for all before-mentioned freight expenses and detention and goods shall be at shipper's risk.

Nothing in the above clauses shall in any way restrict or prejudice any other liberties or exceptions in this Bill of Lading.

FIRESTONE SINGAPORE	3960	Loose New Rubber Tyres
do. $^{1}/_{20}$	20	cases New Rubber Tubes
do. $^{21}/_{33}$	13	cases New Rubber Flaps
	3993	

Freight to be paid by
396.5145 940 cubic feet
Rs. 60/- per ton.
Rs. 23790

The carrier in addition to any liberties expressed or implied herein shall in the event of the imminence or existence of War hostilities or warlike operations between any Nations cessation or prohibition of intercourse

commercial or otherwise between any Nations sanctions imposed or measures taken by any Government under the Covenant of the League of Nations and measures taken by any Government in consequence of or connected with any of the above matters have the rights and liberties as set out in the War Risks Clause incorporated in this Bill of Lading. Anything done or not done by reason of or in compliance with these clauses is within the Contract voyage and the Owners of the goods and/or consignees thereof shall pay the full freight stipulated herein if not prepaid and if prepaid the shipowner shall be entitled to retain the same.

Please arrange to send a delivery telegram to Messrs. Firestone Tyre & Rubber Co. (S.S.) Ltd., Singapore.

FIRESTONE TYRE & RUBBER CO. OF INDIA, LTD.

Owing to existing conditions at port of discharge ship not responsible for short deliveries or shortage of contents.

(Rubber stamp).

NEW JASON CLAUSE.

In the event of accident, danger damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not for which, or for the consequence of which the carrier is not responsible by statute contract or otherwise the goods shippers consignees and owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required be made by the goods, shippers, consignees and owners of the goods to the carrier before delivery.

In the Privy Council.

No. 8 of 1951.

ON APPEAL FROM THE COURT OF APPEAL FOR THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE.

BETWEEN

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... (*Plaintiffs*) *Appellants*

AND

SINGAPORE HARBOUR BOARD ... (*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS

SMITH & HUDSON,
Crown Buildings,
3/9, Southampton Row, W.C.1,
Solicitors for the Appellants.

PARKER GARRETT & CO.,
St. Michael's Rectory,
Cornhill, E.C.3,
Solicitors for the Respondents.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A56088)