

Appeal Suit No. 92 of 1867.

PENINSULAR AND ORIENTAL STEAM NAVI-

1867
April 8.

GATION COMPANY *Appellants.*

MA'NIKJI NASARVA'NJI PA'DSHA' *Respondent.*

*Bill of Lading—Insufficiency of Package—Mercantile Usage—Custom—
Evidence of Custom.*

The defendants, carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damage to goods arising from insufficiency of package.

The plaintiff shipped certain goods in the defendants' steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay.

On their being landed in Bombay it was found that packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages.

In an action brought to recover damages in respect of such injury, it was held—

That evidence of mercantile usage or of custom would be admissible to show that the words *insufficiency of package* should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade.

Held, also that evidence of these packages being ordinary China packages, and of such packages having been always carried by the defendants without objection, was not sufficient, in the absence of proof of negligence, to fix the defendants with liability for damage done to them, there being no proof that it had been the practice either of the defendants, or any other shipowners protected by a similar clause in their bill of lading, to make compensation for injury to goods contained in such packages.

THIS was an appeal from the decision of Arnould, J., delivered in the First Division Court on the 7th of January 1867, in Suit No. 802 of 1866.

The plaintiff in his plaint claimed Rs. 5,120 as damages for breach of contract, for that the defendants, on the 27th of February 1866, in consideration of freight in that behalf paid to them, promised to carry safely certain goods of the plaintiff, consisting of seven boxes of glass bangles, twenty boxes of yellow stone, and thirty boxes of brass leaf, shipped at Hongkong, in good order and well conditioned, in and upon a certain ship of the defendant named the "Behar," from Hongkong to Bombay, and to deliver the same, in like good order and well-conditioned, to the plaintiff or his assigns at Bombay.

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Breach—that the defendants dealt so carelessly and negligently in and about the carrying of the same, that when they arrived in Bombay they were damaged and in an unmerchantable condition; whereupon the plaintiff, as he lawfully might, refused to receive the same when tendered to him by the defendants.

The defendants in their written statement relied upon a condition in their bill of lading, which was as follows:—
“The Company are not to be responsible for leakage or breakage or other consequences arising from the insufficiency of package.”

By the bill of lading it was also stipulated that the company were to be at liberty, at any time during the voyage, to tranship the goods into any other steamer of the defendants, and for that purpose to land and store the same at the company's expense, but at the merchant's risk. It was admitted by the defendants that the goods were shipped in good order and condition. And, from the evidence given at the trial, it appeared that they arrived in Bombay in such a state that a wholesale merchant would be justified in refusing to receive them, all of the packages being more or less broken. The contents also were in some instances injured, and, in others, had partially but not extensively escaped, and lay on the floor of the warehouse belonging to the Customs Department, in which the goods were stored on arrival in Bombay. The boxes of bangles contained each about three thousand glass bangles, sewed on cards, four pairs of bangles being on each card. Those boxes were composed of woodwork three-eighths of an inch in thickness. They were about two feet in length, eighteen inches in width, and eighteen inches to two feet in depth, weighed about 170 lbs. each, and were made of China pine fastened together with wooden pegs; they were also fastened with cross pieces of the same wood, and the whole was covered with China matting, tied round with pieces of split rattan. Each box of yellow stone weighed about 130 lbs. The yellow stone and brass leaf were in boxes, about fifteen inches long, eight to ten inches in width, and of like depth, the woodwork being

half an inch thick. They were wrapped in matting in the same manner as the boxes of bangles. The packages of the three kinds of goods mentioned were proved to be such as are in ordinary use for conveying such goods respectively from China to Bombay—in fact the only species of packages in which the trade is carried on. In ordinary voyages the evidence for the defence showed that of such boxes from twenty-five to thirty per cent. usually arrived in a broken and damaged state, and that they were altogether unfit to bear any extra hardship, such as would be occasioned by transshipment. One witness, the Chief Assistant in the Landing and Shipping Company, deposed that the woodwork was so slight, and the contents of the boxes so heavy, the woodwork frequently gave way in the slings.

Transshipment was not an ordinary incident of the voyage, and had not, it was stated by one of the defendants' employés, occurred more than three times altogether in the three preceding years; but in this case the goods had been transhipped at Galle. Evidence was tendered by the defendants to show that they had never paid for or compromised any such claim as the present. This evidence, being objected to by the plaintiff's counsel, was rejected. No express negligence on the part of the defendants was proved.

The issues framed were—

I. Whether the defendants dealt carelessly and negligently in and about carrying the said goods, as in the plaint alleged.

II. Whether the said goods arrived in Bombay in an unmerchantable condition, as in the plaint alleged.

III. Whether the damage, if any, to the said goods arose from the bad and insufficient package thereof, and not from the fault of the defendants, as in the written statement alleged.

McCulloch and Hayllar, for the plaintiff.

Howard and Branson for the defendants.

Curr adv. vult.

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ARNOULD, J. (after stating the pleadings and issues), continued :—It was admitted by the defendants that the goods, described in the bill of lading as “seven boxes of glass bangles, twenty boxes of yellow stone, and thirty boxes of brass leaf,” were “shipped in good order and well-conditioned” at Hongkong; and the evidence, in my judgment, clearly shows that the said boxes with their contents did not arrive in Bombay “in like good order and well-conditioned.”

Under these circumstances it is clear that the defendants, as carriers, would be liable to *some* extent in damages to the plaintiff, unless they could show that there was anything in the bill of lading, which in this case constituted the contract between the plaintiff, as merchant, and the company, as ship-owners, to exempt them from liability.

The general rule of law on this point is too clear, and has been too long established, to admit of any doubt, and is thus laid down in *Abbott on Shipping*, Part IV., Chap. VI., p. 286 (Ed. of 1856):—“In considering whether shipowners or other carriers are chargeable with any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, the provisions of statutes, or the particular contract of the parties, afford an excuse for the non-performance of the contract.” The defendants contended that the bill of lading, which in this case constitutes the particular contract between themselves as carriers and the plaintiff as shipper, *did* afford an excuse for the non-performance of their contract, to whatever extent such non-performance might be proved.

They relied on the following stipulation, forming one of the printed conditions to which the bill of lading on the face of it was declared to be subject :—“The Company are not to be responsible for leakage, or breakage, or other consequences arising from insufficiency of package;” and they contended that their failure, if any, to deliver the plaintiff's boxes of bangles, yellow stone, and brass leaf in Bombay “in

the like good order and as well-conditioned" as when they were shipped at Hongkong, arose from the "insufficiency of the package," and not from any default of the company as carriers.

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The proof as to this part of the case was that the boxes of glass bangles contained each about three thousand glass bangles: and that the thickness of the woodwork of these boxes was three-eighths of an inch; the wood was of China pine, fastened together with wooden pegs, not with iron nails, and further secured with cross-pieces of the same wood, and with an outer wrappage of China matting tied round with pieces of split rattan. The boxes of "yellow stone" and "brass leaf" were packed in the same way, the only difference being that the woodwork of these boxes was somewhat thicker, being half an inch instead of three-eighths of an inch.

Now the result of the whole evidence as to the sufficiency of these packages, in my judgment, amounts to this—that they were sufficient, according to the course and usage of the China trade (that is, of the known and established course of the import navigation between China and Bombay), to withstand the ordinary wear and tear of the voyage from China to Bombay, apart from accident. They were the ordinary China packages for goods of the nature and weight of those forming the consignment out of which this suit has arisen. In the great majority of instances, goods of the same weight and quality as those of the plaintiff's in the present case, packed in cases of precisely the same strength and description, arrive in Bombay in the like good order and condition as they were shipped in China. Even Mr. Parker, the Acting Chief Assistant to the Agent of the P. and O. Company in Bombay, admitted that, though European packages were much stronger than China packages, the percentage of claims preferred against the company for damage on voyages from Europe to Bombay was considerably higher than on voyages from China to Bombay; the reason probably being that transhipment is a necessary incident of the voyage from Europe to Bombay (in the

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company's steamers), whereas it is only an occasional, and, in fact, a very infrequent incident of the voyage from China to Bombay, not having occurred, said Mr. Parker, above three times in the course of the last three years.

On the present voyage transhipment and storage *did* take place at Galle, and it may very reasonably be conjectured that the damage done to the plaintiff's packages was mainly caused in that process; but of this no positive proof was given, and in the absence of such positive proof the company cannot, of course, rely on the clause of their bill of lading which gives liberty to the company to tranship and store, such transhipment and storage being "at the merchant's risk." Indeed the defendants' counsel very properly did not attempt to contend that the company could avail themselves, as a defence to the present suit, of this transhipment and storage clause, and they rested their defence, as to the general question of the company's liability (irrespective of all questions as to amount of damages,) upon the clause as to "sufficiency of package."

I am of opinion, upon the evidence, that these packages are not shown to have been insufficient within the true meaning of the condition annexed to this bill of lading. The evidence, as already intimated, shows, in my judgment, as a matter of fact, that these packages were sufficient according to the usage and known course of the import navigation trade from China to Bombay; they were up to the average strength of China packages for goods of such weight and description as those shipped by the plaintiff for this voyage.

This being my conclusion from the evidence as to the matter of fact, I am of opinion, in point of law, that as against the company, under this bill of lading, they must be taken as having been sufficient packages. The company, which has been for some years engaged in this import carrying trade, from China to Bombay, and has latterly had by far the largest share of it, must be taken to have been fully cognisant of the general nature of China packages, and cannot, in reason and good sense, be taken to mean, by the con

dition on which they now rely, that they would not be answerable for any loss arising from damage done, in the course of a voyage from China to Bombay, to China packages which are up to the average standard of sufficiency usual in the import trade from China to Bombay. If they wish to protect themselves against the consequences of such damages to China packages as has taken place in the present instance, they should make their conditions of exemption more precise and specific. They should distinctly stipulate, for instance, either in their bills of lading, or in shipping orders to be issued by them at the China ports, that they will not be responsible for consequences arising from damage to China packages, except in cases where the woodwork of such packages is of a certain specified thickness for a certain specified weight of contents; where the woodwork is fastened together with iron nails, not with wooden pegs; where the packages are iron-clamped or iron-hooped, &c., &c. That the company know perfectly well how to limit their liability, by specific conditions as to the strength and description of packages for damage to which alone they mean to be responsible, is clearly shown by exhibit H—a printed form of shipping order issued by the company to those who ship goods by their steamers from Bombay both to Europe and to China.

Mr. Howard contended that the words "insufficiency of the package" were too clear to be construed with reference to any usage or course of trade, and must be taken in an absolute sense. But how is the Court to form a judgment as to what constitutes "insufficiency of package" in the absolute sense. In one point of view, every package which has not come safely through the wear and tear of the voyage on and for which it was shipped, which arrives damaged at its port of destination, without express proof of negligence on the part of the shipowners, may be said to be insufficient. But it can hardly be seriously contended that the words "insufficiency of package" are to be taken in this sense; for, if so, then the P. and O. Company, under this form of bill of lading, could never be held responsible for loss arising

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from damage to China packages, except on express proof of negligence: a proposition which, if established, would probably soon have the result of preventing all prudent merchants engaged in the Bombay and China trade from shipping by the company's steamers.

The fact is there can be no *absolute* standard of sufficiency and insufficiency of the kind contended for. The good sense of the mercantile world, which in this respect has been first followed and then sanctioned by the rules of mercantile law, shows that in all mercantile, and especially maritime, contracts, reference must be had to the established course and usages of the trade, that is, of the line of export and import navigation in respect of which the contract has been entered into.

And this is so not only in cases where the terms of the contract are technical, obscure, and ambiguous; it is so also where the words, in their ordinary, or dictionary, sense, are unambiguous and plain. Whenever, without reference to trade usage, the mere terms employed would not be a complete expression of the mind and intention of *both* the contracting parties, evidence of usage or course of trade, if not repugnant to the express terms of the instrument, is always admitted to show what the true nature of the contract, as mutually understood by the parties, really was,—evidence of usage, or course of trade, in such cases not being adduced to vary or contradict the plain words of the instrument, but merely to introduce matter which, though it must be taken to have been in the mind of both the contracting parties, is not expressed in terms on the face of the instrument (see the cases and authorities collected in Arnould on Insurance, 2nd Ed., Vol. 1, pp. 69, 70, and 71).

To apply these principles to the present case. Here the ordinary sense, the *dictionary* sense, of the words "insufficiency of package" is clear enough; but the question is, what do those words mean in a bill of lading forming the contract between a merchant and shipowner on the import carrying trade from China to Bombay? Would the merchant, from the language of this stipulation, have fair and reasonable

notice that packages up to the ordinary average of strength and sufficiency in the import trade from China to Bombay, could in any event be treated by the shipowner, by virtue of this stipulation, as "insufficient packages," within the meaning of the clause?

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It appears to me that the merchant shipper under this bill of lading could not have such notice, but that he would, on the contrary, have a clear right to consider under this stipulation that if his packages were up to the usual standard of strength and sufficiency in the trade between China and Bombay, for the transport on that voyage of goods of the weight and description actually packed in them (which the evidence adduced at the hearing proves to my satisfaction that in the present case they were), then they were not "insufficient" packages according to the true meaning of this condition. As to the shipowners (the company), it is clear that the condition having been inserted by them in limitation of their common law liability as carriers, its words must, according to the usual rules of legal construction, be taken *contra proferentes*. It was in the power of the company to have made the meaning of this clause clear and explicit beyond all chance of mistake; as they have not done so, but left its meaning to some extent equivocal, that interpretation must be adopted which, while strictly consistent with, and merely explanatory of the language of the clause, is the most favorable for the merchant shipper.

The parties to this contract cannot, in my view, according to the rules that govern the construction of mercantile instruments, be taken as meaning that packages sufficient, according to the usual course of trade, for the ordinary wear and tear of a voyage from China to Bombay, were "insufficient packages" within the meaning of this stipulation.

The conclusion I come to, therefore, on this part of the case is, that the plaintiff has a cause of action, in respect of loss sustained by reason of the damage done to his packages in the course of their transit in the defendants' steamers from Hongkong to Bombay. * * * * *

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The decree, therefore, will be for the plaintiff for Rs. 5,120 damages with costs; and interest at six per cent. on the amount of the judgment till payment.

From this decree the defendants appealed.

The appeal was heard before COUCH, C.J., and WESTROPP, J., on March 14 and 15.

Howard and *Branson* for the appellants.

McCulloch and *Hajllar* for the respondent.

Cur. adv. vult.

April 8. COUCH, C.J.:—There are two questions to be determined in this case. The first is, whether the packages were insufficient within the meaning of the contract between the parties; and the second, whether the damage which they sustained was occasioned by that insufficiency.

After the admission made by the defendants, that the goods were shipped in good order and condition, it is necessary for them to show that the packages were insufficient, and that the damage was occasioned thereby.

I may observe that it appeared in the course of the evidence that there had been a transshipment of the goods, in accordance with the liberty given to the defendants. It also appeared that transshipments on the voyage from Hong-kong to Bombay are not an ordinary occurrence—in fact they seldom occur.

Now were the packages sufficient? The judgment of the learned Judge in the plaintiff's favour proceeds upon the ground that there was in this case evidence of usage, which showed that the packages were sufficient within the meaning of the bill of lading.

With the law laid down by the learned Judge, that evidence is admissible to explain the meaning of the contract, and to show what the parties meant by insufficiency of package, I entirely concur. It is not necessary to refer to authorities, which are numerous, on this question; but, by way of illustration of the principle, and of the mode in which it is applied in cases of this kind, I may mention the cases of *Lucas v.*

Bristow (a) and *Cuthbert v. Cumming (b)*. These illustrate the application of this rule of evidence; and, as I have said, I entirely agree in the law laid down by the learned Judge as to its admissibility.

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But I think that in this case the evidence does not prove such a usage as justified the conclusion arrived at by the learned Judge. The question was whether the parties entering into this contract understood and meant that packages such as these were to be considered sufficient within the meaning of the contract; and I think that the usage which it was necessary for the plaintiff to show that these packages were to be considered sufficient was a usage of this kind: that, in a case where the goods had been put on board and received by the shipowners under a contract like this the packages were treated as sufficient, and, when damage arose from the state of the packages, the shipowners paid for the damage. It was not enough for the shipowners to receive the package, if they did not, when damage occurred, pay for such damage. Now, it is important to observe that there was no evidence in the case showing a usage of this kind. One witness was questioned with regard to similar claims having formerly been made upon the defendants, and he mentioned that a claim had been made, but he proceeded to say that in that case there had been other damage besides the more damage which might be attributed to the insufficiency of the packages; and in answer to a question put to him by the counsel for the defendants he said: "In the case I spoke of, beyond the damage done to the packages, some of the goods were missing;" and when he was asked—"Have the P. and O. Company ever paid damages in respect of injuries to packages alone," the question was objected to by the counsel for the plaintiff, on the ground that it was not a matter of custom but of law; and the question was not allowed to be put. That, in my opinion, is the very question in the case. The point to be determined was whether there was a custom, where a contract contained this stipulation, and the packages were such as were used in the China

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trade, to treat these packages as sufficient, and to pay for damage to them. Not only was that question not allowed to be put, but there is no evidence in the case to show that this has ever been done, and on the other hand there is evidence which shows that from twenty-five to thirty per cent. of these goods usually arrive damaged.

The learned Judge appears by his judgment to have considered that these packages must be regarded as sufficient packages, and that the parties intended to treat them as sufficient within the meaning of the contract, because otherwise the trade would not have been carried on, and the goods would not, for so many years as is shown to have been the case, have been carried in such packages. I do not think that is a necessary conclusion. It is quite possible that the persons sending these goods may from various reasons, such as saving expense or time, have been quite willing to take upon themselves the risk of sending the goods so packed, and, at the same time, the shipowners may have been quite content to take the goods in such packages, protecting themselves, as these defendants have done, by inserting in the bill of lading that they were not to be liable for damages arising from insufficiency of package. The owner of the goods is content to run the risk of the packages not proving sufficient for the voyage (especially if they should have to be transhipped), and the shipowners have no objection to take them, as they are protected by the stipulation in the bill of lading. That, it appears to me, is the probable origin of the insertion and continuance of this clause in the bill of lading. I do not think that the defendants were bound to insert, or indeed that they could very well have inserted, in their bills of lading, precise stipulations as to the size, strength, or materials of the packages for every particular class of goods.

For these reasons, while I entirely agree in the view of the law which the learned Judge took at the trial, it appears to me that the case is not supported by the evidence, and that there is no evidence of such a usage as would control the meaning of the words used in the bill of lading.

Then there is a second question which has to be considered. It is not sufficient that the defendants should make out that these packages were insufficient within the meaning of the contract; they must also satisfy the Court by reasonable evidence that the damage arose from the insufficiency of the packages. Now, with regard to this question, I think that the evidence which was given of the state, in which they were, leads to the conclusion that that was the cause. The evidence of the way in which these packages generally arrived certainly goes to show that they frequently did prove insufficient; and probably in this case the fact, that the damage was greater than in an ordinary voyage, is accounted for by the transshipment which occurred; this being, as I have said, a risk which the shippers took upon themselves, and for which the defendants are not answerable. The shippers were bound by the terms of the bill of lading to send these goods in packages which would be sufficient for transshipment, if such transshipment should occur, because they give the company liberty to tranship. It is probable that, as transshipment very rarely occurs, the packages are not intended to bear the risk of transshipment; and that the parties who send the goods are content to run the risk of it, rather than in every case make the packages much stronger than they need be for the ordinary voyage. It appears to me a fair conclusion from the evidence that the damage arose from the insufficiency of the packages; and I am therefore of opinion that the case on the part of the defendants was made out.

I do not understand that the learned Judge entertained any doubt on that question, or that he was of any other opinion, than that the damage was occasioned by the insufficiency of the packages; but he appears to have thought that the insufficiency was of such a nature as, looking to what he conceived to be evidence of usage in regard to the packages employed in the China trade, the plaintiff ought not to take the consequences of. The substantial question, therefore, upon which the judgment of the learned Judge mainly turned, was whether the packages were shown to be sufficient

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within the meaning of the parties who made the contract. I think that they were not shown to be so. They were in fact insufficient, and there was no such evidence of usage as to show that the parties intended the term "insufficient" to be used in the contract in such a way that these packages, which were frequently employed in the China trade, must be considered as sufficient, and that if damage was caused the shipowner was to pay for it. I think the evidence failed to show that; and therefore I am of opinion that the decree of the court below must be reversed, and a decree made in favour of the defendants with costs.

WESTROPP, J. :—I concur in the remarks of the Lord Chief Justice. It was, no doubt, quite correctly laid down in the Division Court, by my brother Arnould, that the burden lies on the defendants to excuse themselves as to the damage which accrued to the goods.

To do so, the defendants point to their bill of lading, which guards them against insufficiency of package, and provides for the contingency of transshipment. The packages, therefore, in order to satisfy the terms of the contract, should have been sufficient not only for an ordinary direct voyage from Hongkong to Bombay, but also for the less frequent event, of a voyage interrupted by transshipment. That the packing, though possibly of the usual strength and scantling for goods of the nature shipped, was "insufficient," in the popular sense of that word, for even an unbroken voyage, is, I think, unquestionable. There is satisfactory evidence that such packages were too weak for the duty which they had to perform, would bear but little handling, and were, even in ordinary voyages, usually damaged to the extent of from twenty-five to thirty per cent. Many witnesses state that cargoes from China were generally more or less damaged. Two independent witnesses, one a respectable officer of the customs, and the other the Chief Assistant in the Landing and Shipping Company, deposed to the percentage of damage which I have mentioned. Still greater then must have been the insufficiency of the packages (using that term in the same sense,) to withstand the double hardship of a voyage broken by transshipment. This being so, the

burden devolved upon the plaintiff to show that, although within the ordinary meaning of the term insufficient, yet the packages were, within the mercantile meaning of the term, and according to mercantile usage, sufficient. I have been unable to perceive any evidence of such mercantile usage. It is true that like goods, so packed, were frequently carried by the defendants; but as they carried, so they protested. They, by their bills of lading, protested, on each occasion that they carried those goods, against being held liable for insufficiency of package. The mere fact of their constantly carrying the goods, so packed, could neither obliterate nor alter an express stipulation contained in the bills of lading under which they were carried. The onus being upon the plaintiff to show that, albeit insufficiently packed in the popular sense of the term, the goods were sufficiently packed according to the glossary of merchants and shipowners, the only way I can suggest in which the plaintiff could have established that proposition was by showing that compensation has heretofore been made in similar cases, it being in evidence that this was an ordinary mode of packing, and that injury to such packages frequently occurred. There is not, however, an iota of evidence to show that *such* injury had ever been paid for. The defendants' counsel have not shrunk from that issue. They put the very question, but, on the objection of the learned counsel for the plaintiff, it was disallowed. It seems to me to have been the vital question in the case. Two, indeed, of the plaintiff's witnesses stated that the company had paid damages on previous occasions, but it turned out that the payment was made because a considerable portion of the goods had been carried off by plunderers at Galle during transshipment. In order to prove that the packages were sufficient in a mercantile sense, it should have been shown that the company, and traders to China, agreed to treat as sufficient such packages as these, and that, if not this particular company, at all events other companies and shipowners, had made compensatory payments for such injury as is the subject of this action. But there was no evidence to that effect. Mihirváñji

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Hormasji, a witness examined *for the plaintiff*, and who is an Inspector at the Custom House, said that "English packages generally arrive safe in Bombay. China packages are not nearly so strong as English packages. China packages arrive broken more frequently than English." Mr. Dixon, Lloyds' Surveyor, examined on behalf of the defendants, said, "there is so much China cargo arriving broken in Bombay that, as a general rule, if the contents arrive sound, though the packages may be more or less broken, they (the consignees) accept;" and again: "as a general rule, consignees of produce from China do not object to more or less breakage of the outer case, as broken cases from China are very common." My brother Arnould, in his judgment, refers to Mr. Parker's evidence as to a greater percentage of *claims* being preferred against the company for damage on goods brought from Europe, than on those brought from China. A greater number of *claims* does not necessarily show a greater proportion of *damage*. The evidence of Mihirvánji Hormasji, to which I have referred, to the effect that a greater proportion of packages imported from China are broken than of those arriving from England, proves that such an inference would be erroneous. The fact, therefore, that more claims are made against the company in respect of packages conveyed from Europe, than of packages conveyed from China, is far from being an assistance to the plaintiff. The evidence of Mr. Dixon, to which I have referred, proves that China packages are customarily accepted in a more or less broken state by consignees, without objection. The comparative paucity of claims, in the case of China boxes, is, I think, attributable to the generally recognised insufficiency of the packing. The same forbearance is not shown by merchants in the case of English packages, which, being much stronger, are expected to be conveyed in safety. Shippers have been, for reasons best known to themselves, satisfied to transmit goods, similar to those the subject of this suit, from China, packed in an inferior manner, inadequate to sustain the wear and tear of the voyage to Bombay.

The company have wisely guarded themselves against responsibility for that insufficiency, and cannot be now compelled to forego the benefit of the stipulation.

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Decree reversed with costs.

Acland, Prentis, and Bishop, Attorneys for the plaintiff.

Crawford and Hurrell, Attorneys for the defendants.

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JEHA'NGIR RASTAMJI MODI *Plaintiff.*

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Joint Stock Company—Directors—Shares—Purchase ultra vires—Trustee Shareholder—Acquiescence.

The purchase by the Directors of a joint stock company, on behalf of the company, of shares in other joint stock companies, unless expressly authorised by the Memorandum of Association, is *ultra vires*.

A joint stock company, even though it be empowered by its Memorandum of Association to deal in the shares of other companies, is not thereby empowered to deal in its own shares, and a purchase by the directors of the company of its own shares on behalf of the company is, therefore, under such circumstances, *ultra vires*.

A shareholder in a joint stock company can maintain an action against the directors of such company to compel them to restore to the company funds of the company that have by them been employed in transactions that the directors have no authority to enter into, without making the company a party to the suit.

Where a shareholder purchased shares in a joint stock company knowing at the time that similar companies were in the habit of dealing in their own shares and those of other companies, and believing that the company in question adopted the same practice, but made no inquiry to ascertain whether or not such was the case, nor made any objection to such dealings of the company until it was discovered they had resulted in loss, it was held that he had by his own conduct lost his right to hold the directors personally liable in respect of such dealing, and the result was held to be the same whether the said shareholder was beneficially entitled to his shares, or merely a trustee of them for others.

THE plaintiff stated that (L.) the plaintiff was the registered shareholder of 601 shares in the Financial Association of Europe and India (Limited) registered under Act XIX. of 1857.