13 B. 571.

1889
JULY 26.

ORIGINAL CIVIL.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

13 B. 571.

HASSANBHOY VISRAM AND OTHERS (*Plaintiffs*) *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED (*Defendants*).*

[29th June, 19th and 26th July, 1889.]

Ship and shipping—Bill of lading, exemptive clause in—Stowage—Negligence of the crew or other servants of the ship—Period of loading covered by the contract of carriage—Fitness or unfitness of the ship.

The plaintiffs shipped certain bags of sugar on the 11th and 12th November 1887 on board the defendant's ship the *Byculla* for conveyance to Bombay. There being a dispute as to the number of bags shipped, no mate's receipt was given, and no bill of lading was signed until the 28th November. The *Byculla* started on her voyage on the 15th November, and duly delivered the sugar in Bombay. The sugar, however, was found to be damaged by water which was due to [572] its having been stowed in immediate proximity to a quantity of wet timber. The plaintiffs sued the defendants in the Small Cause Court for the damage so caused. The defendants sheltered themselves under the terms of the exemptive clause in their bill of lading of the 28th November, which clause ran as follows:—"The act of God, the Queen's enemies * * * and all the perils, dangers, accidents of the sea, * * * and accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners, or other servants of the Company, or from any deviation, excepted." The plaintiffs contended that a bill of lading did not relate to, or cover, the period of loading, and that, even if it did, the exception relied upon in this bill of lading referred only to negligence subsequent to the commencement of the voyage. They also contended that the ship was not a ship "reasonably fit for the voyage" within the meaning of the rule laid down in *Steel* v. *The State Line Steamship Company* (1).

In the Small Cause Court judgment was given in the plaintiffs' favour. On appeal to the High Court on a case stated this judgment was reversed.

Held, that this was not a case to which the rule laid down in *Steel* v. *The State Line Steamship Company* (1) applied, as there was no question here of any defect inherent in the ship. It was simply a case of negligent and improper stowage.

Held, further, (following *Hongkong and Shanghai Banking Corporation* v. *Baker* (2)) that the reasonable mode of construing the contract evidenced by a bill of lading was to hold the exceptions to be co-extensive with the liability; and that there was no evidence to be found in this bill of lading of any other intention.

Held, further, that the goods were covered by the bill of lading from the time they were put on board to be loaded; consequently the defendants were protected from liability under the exemptive clause.

The Duero (3) and *Hayn* v. *Culliford* (4) commented on and followed.

[R., 19 B. 639 (646); 30 M. 79=16 M.L.J. 53=1 M.L.T. 387 (391); 32 M. 95=18 M.L.J. 497 (528)=4 M.L.T. 110.]

REFERENCE from the Court of Small Causes.

The facts fully appear from the case stated for the opinion of the High Court by W. E. Hart, Chief Judge of the Court of Small Causes, which was as follows:—

"1. The following extracts from my judgment indicate sufficiently the question of law on which the opinion of the High Court is desired, and the grounds for my decision thereon:—

* Small Cause Court Suit No. $\frac{44}{4670}$ of 1888.

(1) L.R. 3 Ap. Ca. 72.
(2) 7 B.H.C.R. O.C.J. 186.
(3) L.R. 2 A. & E. 393.
(4) L.R. 4 C.P.D. 182.

1889
JULY 26.
ORIGINAL CIVIL.
13 B. 571.

"2. The plaintiffs, abandoning the excess above Rs. 2,000, sue the British India Steam Navigation Company to recover that sum as damages occasioned to 1,046 bags out of a consignment of 1306 bags of the plaintiffs' sugar by their negligent stowage on board the defendants' steamer *Byculla*, in the same hold with a quantity of wet timber, on a voyage from Rangoon to Bombay.

[573] "3. There is no doubt that when the sugar—the subject of this suit—was landed in Bombay early in December 1887, it was all more or less damaged by wet. But the defendants deny that the damage was caused as alleged by the plaintiffs, and say that the sugar was shipped in a wet and damaged condition. They also dispute the *quantum* of damage. Finally, they plead exemption from liability under the exceptions in the bill of lading.

"4. The sugar, which had been imported by the plaintiffs into Rangoon about a year before, was shipped on the 11th and 12th November 1887 for Bombay on board the *Byculla*. No mate's receipt was given for it to the shippers at the time of shipment, owing to a dispute as to the exact number of bags put on board, the shippers declining to accept a receipt for 1,302 bags, the number tallied by the ship's officers, while the mate refused to sign one for 1 306 bags, the number tallied by the shippers.

"5. Owing to the non-production by the shippers of the mate's receipt, no bill of lading was granted for the plaintiffs' sugar before the steamer left Rangoon on the 15th November. Subsequently, however, on the 28th November 1887, a bill of lading was signed by the defendants' branch at Calcutta, and it is on the exceptions in this document that the defendants rely as relieving them from responsibility.

"6. This bill of lading purports to be for 1,306 bags of sugar bearing the plaintiffs' marks and weighing 168 lbs. each (of which, it is stated in the margin, four bags are in dispute and to be delivered if on board), 'shipped in good order and well conditioned by Visram Ebrahim & Co. in the S. S. *Byculla* now at sea, proceeding from Rangoon, and bound for Bombay and intermediate ports, to be carried and delivered subject to the conditions after mentioned, including those at the foot of this bill of lading, in the like good order and well conditioned, at the port of Bombay.'

"7. Then follows an exception of damage from various specified causes, not material to consider now in detail, which, however, speaking generally, must, I think, be taken as descriptive of the perils of the voyage after navigation has commenced.

[574] "8. Following this comes the exception relied on by the defendants, which is worded as follows :—'And accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master or mariners, or other servants of the Company, or from any deviation excepted.'

"9. At the foot of the bill of lading are the 'conditions' referred to in it. Those material to the present case, as relied on by the defendants, are as follows:—'Weight, contents, and value, when shipped, unknown. The Company is not to be responsible for damage resulting from' (a number of specified causes not material to be considered now,) 'or for the condition or contents of re-exported goods.'

1889
JULY 26.

ORIGINAL CIVIL.

13 B. 571.

"10. Just above the signature are written the words 'Bags old. Not responsible for condition or contents.'

"11. The case of *Phillips* v. *Clark* (1) decided in 1857, is authority for the proposition, which, however, has now long been settled law, that a carrier by sea can contract himself out of the consequences even of his own negligence. But it also decides that such a construction ought not to be put on a contract unless it is unambiguous in its terms. Twelve years later, in 1869, was decided the case of *The Duero* (2), which in some of its general features strongly resembles the present. In that case an exception in the bill of lading of 'barratry, negligence, or default of master, pilot, or mariners, or others performing their duties; vermin, jettison and also accidents of navigation of every kind,' was held to exempt the ship-owner from the consequences of damage to cargo occurring during the voyage, but occasioned by careless stowage.

"12. It is to be noticed, however, that there are also points of distinction between the two cases in certain significant particulars.

"13. In the first place, in the case of the goods on board the *Duero*, the bill of lading, though given after the goods had been stowed, was in substitution for a mate's receipt granted before the goods were stowed.

[575] "14. Secondly, the wording of the exception in the bill of lading of the *Duero* seems to me more expressly than do the words of the bill of lading of the *Byculla* to cover an act of negligence on the part of the ship's crew committed before the commencement of the voyage; for in the former the negligence of the master is excepted before that of the pilot, and the whole clause, excepting the negligence of those connected with the ship, precedes the separate clause excepting 'accidents of navigation of every kind.' In the latter, however, the exception of the accidents of navigation precedes the separate clause excepting the neglect of those connected whith the ship, and this last-mentioned clause, in mentioning the pilot before the master, and including deviation, points rather to the inference that the negligence to be excepted is that occurring during the voyage.

"15. Thirdly, the damage to the goods on board the *Duero*, though occasioned by careless stowage before the commencement of the voyage, seems to have wholly occurred in the course of the voyage, and after signature of the bill of lading; whereas if the damage to the plaintiffs' goods was occasioned, as alleged, by their being stowed in a wet hold, and saturated with the drippings from wet timber, a portion at any rate of the damage must have occurred before the commencement of the voyage, during the three days that the steamer was lying at Rangoon after receipt of the sugar; and nearly all, if not the whole, of the damage must have occurred before the signature of the bill of lading, seventeen days after the shipment of the sugar, and thirteen days after the commencement of the voyage, which was completed in three weeks.

"16. Lastly, in considering the case of the *Duero* with reference to the two cases next to be mentioned, it would appear, though not expressly stated, that she was reasonably fit to carry the cargo which she received. Otherwise, such a point would surely have been noticed either in the argument or the judgment; and there is nothing which can lead us to infer that she was not, in the description either of the nature of

(1) 26 L. J. C. P. 168.

(2) L. R., 2 A. & E. 393.

1889
JULY 26.

ORIGINAL CIVIL.

13 B. 571.

negligence, or of the nature of the damage, neither of which is exactly specified in the report.

[576]"17. Eight years after the *Duero*, in 1877, it was decided by the House of Lords, in the case of *Steel* v. *The State Line Steamship Company* (1), on the construction of a bill of lading containing a special clause which exonerated the shipowner from perils of the seas howsoever caused, including negligence of the crew, that the perils excepted were those subsequent to the loading of the cargo on board, and that there was an implied contract on the part of the shipowner to supply a ship reasonably fit for accomplishing the service which he engaged to perform.

"18. In applying this case yet seven years later, in 1884, the Court of Queen's Bench held, in *Tattersall* v. *The National Steamship Company* (2), that a clause in a bill of lading, that 'the shipowners or their agents or servants are, as respects these animals, (which formed the cargo the subject of the bill of lading), in no way responsible for either their escape from the steamer, or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals,' related only to the carriage of the goods on the voyage, and did not restrict or affect the primary obligation of the shipowner to have the ship reasonably fit so receive the goods.

"19. In the present case the bill of lading, which is not in substitution for any previous mate's receipt, on the face of it represents the goods not only as already shipped and stowed, but as actually on the voyage. The exception in the body of the instrument does not in unambiguous terms include negligence of the defendants' servants before the commencement of the voyage. Nor is there any term of the contract declaring the defendants exonerated from the primary obligation of shipowners to provide a ship reasonably fit to 'receive the goods which they agree to carry.

"20. Therefore, applying the principles enunciated in the cases I have cited, I must hold, on the construction of the terms of the bill of lading as qualified by the exception, in the body of it relied on by the defendants, that the exception relates only to negligence committed subsequent to the loading of the sugar [577] on board, and does not exonerate the defendants from the duty to provide a ship reasonably fit to receive the sugar they undertake to carry.

"21. Further, having regard to the collocation of this exception after those already mentioned as for the most part referring generally to perils encountered subsequent to the commencement of the navigation, and having regard also to those points already noticed in contrasting the differences between this exception and that in the bill of lading of the *Duero*, as well in their context as in their express terms, I think that the negligence intended to be excepted by the defendants, bill of lading is negligence committed after the actual commencement of the navigation.

"22. Whether in this particular case the operation of the exception is not even still further postponed to the date of making of the bill of lading seems to me to depend on the answer to the question, 'Whose fault was it that the bill of lading was not given in the usual way and at the usual time?'—*i.e.*, in substitution for the mate's receipt, after the stowing of the sugar on board, but before the steamer started on her voyage.

(1) L.R., 3 Ap. Ca. 72.

(2) L.R., 12 Q.B.D. 297 (298).

1889
JULY 26.
ORIGINAL CIVIL.
13 B. 571.

" 23. Finding on the evidence that the fault was the plaintiffs', I think the present bill of lading should be held to speak as from the date when it would have been granted in ordinary course. The exception would then relate to any act of negligence during the whole course of the voyage from the commencement of the navigation, but would not relieve the defendants from their liability to provide a ship reasonably fit to receive the plaintiffs' sugar at the time it was shipped.

" 24. But, besides the exceptions in the body of the bill of lading, there are the printed ' conditions ' following it and incorporated in it by reference, and the written remark above the signature.

" 25. The first of these conditions and the written remark, I think, amount to nothing more than such a qualification of the word ' in good order and well conditioned,' occurring at the beginning of the bill of lading, as was held in the case of [578] *Nicol and Company* v. *Castle* (1) to relieve the defendant therefrom, the consequences of an unqualified admission as to the quantity shipped, and would simply operate here in like manner to relieve the maker of the bill of lading from the consequences of an unqualified admission that the goods had been received on board in good order and well conditioned, and of an absolute undertaking to deliver them in like good order and condition.

" 26. The effect of such words would be merely to throw on the plaintiffs the burden of proving that they did ship their sugar in good condition, and to prevent their using the terms of the defendants' own bill of lading as an estoppel of the denial of that fact.

" 27. Last comes the condition that ' the company is not to be responsible for the condition or contents of re-exported goods.' It is to be noticed that these words do not go so far as those of the exception in the body of the bill of lading, and declare that the defendants are not to be responsible for loss or damage occurring to re-exported goods after shipment, and while in their charge. They merely say that the defendants do not admit any responsibility in regard to the condition or contents of goods received by them for re-exportation. There must be some meaning to be attached to such a difference in expression. I think, therefore, that the last-mentioned condition amounts to nothing more than such a qualification as that already noticed of the admission as to condition and contents, expressed in the earlier part of the bill of lading, and is intended in like manner to throw on the plaintiffs the burden of proving the condition, nature, and quality of the goods shipped for re-exportation.

" 28. But, however that may be, it is clear that that condition, no more than the others, restricts or affects the primary obligation on the defendants of providing a ship reasonably fit for the carriage of the plaintiffs' sugar.

" 29. One other case was cited in argument—that of *Jellicoe* v. *The British India Steam Navigation Company* (2)—as showing that the defendants had previously relied on the same exception [579] in their bill of lading as is pleaded in this case, and that it had received a judicial interpretation giving it the protective effect for which the defendants now contend.

" 30. I need only refer to that case now to show that it is no authority on the point with which I am at present concerned, as to the

(1) 9 B.H.C.R. 321. (2) 10 C. 489.

1889
JULY 26.

ORIGINAL CIVIL.

13 B. 571.

defendants' primary obligation to supply a ship reasonably fit for the carriage of the plaintiffs' goods, as in that case the damage was occasioned and occurred at the very end of the voyage, in the act of unloading the goods, and there was no question as to the fitness of the ship to receive them.

"31. The questions, therefore, with which I have first to deal are those formulated by Lord Blackburn in his judgment in *Steel* v. *The State Line Steamship Company* (1) :—1. Was the ship reasonably fit for the receipt of the plaintiffs' goods ? 2. If not, was the damage to them caused by her being unfit?

"32. In considering these questions I found that the floor of the hold on which the plaintiffs' sugar (which had been put on board in good condition) was stowed had been wetted, before receipt of the sugar, with water brought on board by logs of timber floated alongside in rafts and shipped before the sugar, and that such water could and did get at and damage the sugar.

"33. I also found that the bags of sugar, after shipment, had been further wetted by water brought on board by other logs of timber, shipped in the same way, after receipt of the sugar.

"34. I also found that the logs of timber were stowed in a heap only two feet from the heap of the bags of sugar, and that the wet from the former could and did get at and damage the latter.

"35. Having already found, as appears in the extracts from my judgment, that the sugar was lying in the hold under such condition for three days before the commencement of the voyage, and having held that the exceptions in the bill of lading did not appertain till after the commencement of the voyage, I answered the first of the two questions formulated in the last extract above given from my judgment in paragraph 31, in the negative, and **[580]** the second in the affirmative, and held that the defendants were not protected by the terms of their bill of lading, and passed judgment for the plaintiffs with costs.

"36. At the request of the defendants' attorneys this judgment was contingent on the opinion of the High Court on the question whether the defendants were protected from liability by the terms of their bill of lading.

"37. That question I accordingly respectfully submit for the consideration of their Lordships.

Inverarity and *Jardine*, for the defendants.

Badrudin Tyabji, for the plaintiffs.

Inverarity :—The material facts, as found by the case, are that the plaintiffs' sugar was put on board in good condition; that the hold of the ship had been wetted previously to the taking the sugar on board by water from some other cargo ; that this water got to the sugar when it was loaded, as also water from some subsequently loaded cargo ; and that the damage done occurred partly before and partly after the commencement of the voyage, though in what proportions is not stated. In any case the learned Judge was wrong in not holding that defendants were protected from liability for such damage as occurred during the voyage ; but my contention goes further than this—I claim total immunity from liability.

(1) L.R. 3 Ap. Ca. 72.

1889
JULY 26.
ORIGINAL CIVIL.
13 B. 571.

I shall contend, firstly, that the bill of lading covers the goods from the time they are put on board; secondly, that the exceptions in the bill of lading are not confined to the period of the actual voyage, but cover the whole obligation of the carrier; and thirdly, that the learned Judge of the Small Cause Court has erred in holding that this ship was a ship "not reasonably fit for the voyage" within the legal acceptation of those words. On the first point, as to the point of time from which the bill of lading speaks:—The bill of lading is merely evidence of a pre-existing contract; there is only one contract all along; not two—one before, another after, the bill of lading is signed—*The Duero* (1). The bill of lading is always signed after the goods are shipped, **[581]** and usually after the ship has sailed. But it speaks from the time the goods are placed alongside—Carver on Carriage by Sea, s. 58. Then, secondly, as to the exceptions in the bill of lading. The learned Judge holds the exceptions in question not to operate till after the commencement of the voyage. This argument is founded on their collocation with respect to the other exceptions. But the same argument, if well founded, would have applied in the case of *The Duero* (1), and even more in the case of *Hayn* v. *Culliford* (2). This latter case is strongly in my favour, for there the shipper only failed for want of the particular words "or other servants" of the shipowner, which are present in this bill of lading. In the case of *Steel* v. *The State Line Steamship Company* (3) the bill of lading was peculiar, and altogether in a different form to this. The presumption must be that exceptions are intended to be co-extensive with the liability. I submit that there is nothing in the bill of lading to override that presumption. Then, as to the third point, the learned Judge has taken an altogether wrong view of the case. There is no question here of the fitness or unfitness of the ship. There is no defect inherent in the ship itself—such as a leak making it either unfit to take the sea, or an improper receptacle for these goods. It is merely a question of want of dunnage and improper juxtaposition of cargo—that is, of negligent and improper stowage. *The Duero* is again in point here. The two cases the learned Judge has relied on—*Steel* v. *The State Line Steamship Company* (3) and *Tattersall* v. *The National Steamship Company* (4)—are not in point. In the former case the ship was actually unseaworthy: in the latter the ship was an infected ship, and, as such, an improper ship for the carriage of animals.

Badrudin Tyabji, for the plaintiffs.—Fitness or unfitness of the ship is purely a question of fact, and the Judge has found, as a fact, that the ship was not fit to receive this cargo; that finding of fact cannot be disturbed in a case stated, as this is.

[582] [SARGENT, C. J.—That is a conclusion of the learned Judge from the facts. He gives the facts on which he bases that conclusion; his conclusion, therefore, is open to examination.]

It is not enough to say that the unfitness was due to the negligence of the crew, or of some servants of the company. The same might have been said in the case of *Tattersall* v. *The National Steamship Company* (4), for in that case the ship might have been disinfected, and it was, therefore, mere negligence not to have disinfected it.

[SARGENT, C. J.—There the whole ship was affected. The ship, as a ship, was consequently unfit, at least for that cargo.]

(1) L. R. 2 A. & E. 393.
(2) L. R. 4 C. P. D. 182.
(3) L.R. 3 Ap. Ca. 72.
(4) L.R. 12 Q.B.D. 297.

1889
JULY 26.
ORIGINAL CIVIL.
13 B. 571.

And so in this case; for it is not found that there was other space in the ship in which the sugar might have been safely stowed; it must be taken, therefore, that there was not.

[SARGENT, C. J.—The hold could have been dried. The case does not find or suggest any difficulty in doing that. What Mr. Hart really went upon was his finding that this negligence was not covered by the bill of lading.]

I submit the learned Judge was right in that finding. Read the exception clause as a whole, and I submit it is clear that those exceptions were not intended to apply except to acts occurring in the course of navigation—Dennistoun Wood on the Interpretation of Mercantile Agreements, s. 243. The bill of lading only refers to acts done subsequent to the loading—*Steel* v. *The State Line Steamship Company* (1).

[BAYLEY, J.—That bill of lading was in a different form to this.]

A bill of lading can only speak from the time when it should or might have been given, which would be subsequent to the loading. A bill of lading is only concerned with carriage and delivery. The contract prior to the signing of the bill of lading is a contract of bailment, not of carriage—Maclachlan on shipping, (3rd edn.) p. 389. The bill of lading is a contract of carriage; and it is not incorrect to say there are two contracts—one before, and one after the bill of lading is signed.

[583] [SARGENT, C. J.—The question is, at what point of time the contract evidenced by the bill of lading is created? There is bailment when the goods are on the deck, if not earlier; so, even if there are two contracts, it may still be that the contract of carriage dates antecedently to the loading. It is clear from *The Duero* (2) that the bill of lading operates before the commencement of the voyage.]

[BAYLEY, J.—Do you say that the bill of lading only operates after the commencement of the voyage?]

No; it is sufficient for me to say it only begins to operate after the goods are loaded, unless the contrary is clearly expressed in the bill of lading itself. I submit on the whole case that the judgment of the learned Judge was right, and should be affirmed.

Inverarity in reply:—*The Duero* is an answer to my learned friend's argument. That case and this only differ in that the damage in that case was done wholly during the voyage; in this it occurred partly before and partly after the voyage commenced. Bills of lading are drawn with reference to decided cases. This form of bill of lading is evidently the outcome of the decision in *Hayn* v. *Culliford* (3). As to the argument that a bill of lading deals with carriage, not with loading—take the word "shipped;" that must have to do with loading, if not to things antecedent to loading. The bill of lading not only may attach to goods before they are shipped, but even to goods which never are shipped: *Pyman* v. *Burt*(4). There is no reason or authority whatever for saying that the bill of lading speaks from the completion of the loading; the only alternative to my contention is to hold that it speaks from the commencement of the voyage. Numerous cases show that that is not the case; and many of the perils generally excepted, *viz.*, fire, restraint of princes, collision, &c., &c., are dangers which may destroy the goods as well in harbour as at sea.

Cur. adv. vult.

(1) L. R. 3 Ap. Ca. 72 (84).
(2) L. R. 2 A. & E. 393.
(3) L. R. 4 C. P. D. 182.
(4) 1 Cab. & Ell. 207.

1889
JULY 26.

ORIGINAL CIVIL.

13 B. 571.

JUDGMENT.

The judgment was delivered by

[584] BAYLEY J. (after stating the reference and nature of the claim) :—The Chief Judge found that the sugar had been imported by the plaintiffs into Rangoon about a year before, was shipped on the 11th and 12th November, 1887, for Bombay on board the *Byculla*: that no mate's receipt was given for it to the shippers at the time of shipment, owing to a dispute as to the exact number of bags put on board—the shippers declining to accept a receipt for 1,302 bags, the number tallied by the ship's officers, while the mate refused to sign one for 1,306 bags, the number tallied by the shippers :—that owing to the non-production by the shippers of the mate's receipt, no bill of lading was granted for the plaintiffs' sugar before the steamer left Rangoon on the 15th November: that on the 28th November, 1887, a bill of lading was signed by the defendants' branch office at Calcutta: that the floor of the hold on which the plaintiffs' sugar (which had been put on board in good condition), was stowed had been wetted, before the receipt of the sugar, with water brought on board by logs of timber floated alongside in rafts and shipped before the sugar, and that such water could and did get at and damage the sugar: that the bags of sugar after shipment had been further wetted by water brought on board by other logs of timber shipped in the same way after receipt of the sugar: and that the logs of timber were stowed in a heap only two feet from the heap of the bags of sugar, and that the wet from the former could and did get at and damage the latter. The Chief Judge held, on the authority of *The Duero* (1), that the defendants were bound to provide a ship reasonably fit to receive the plaintiffs' goods; that under the circumstances as found by him they had failed to do so; and that on a proper construction of the exceptions in the bill of lading, which he considered only referred to what might occur after the commencement of the voyage, they were not protected from their liability for the damage sustained by the plaintiffs' sugar. The Chief Judge gave judgment for the plaintiffs, contingent on the opinion of this Court on the question whether the defendants were protected, by the exceptions in the bill of lading.

The Chief Judge has held—and, we think, correctly—that the [585] bill of lading, although given to the plaintiffs after the vessel sailed, must, under the circumstances which occasioned the delay, be taken to express the contract between the parties at the time when the goods were received on board. In the case of *The Duero* (1), a cargo, through the careless stowage of the master and crew, was damaged in the course of the voyage. The bill of lading was not signed till after the cargo was stowed. The damage came within one of the exceptions in the bill of lading, and Sir R. Phillimore says (at p 395): "It has also been urged, that this bill of lading being subsequent to the stowing, it could not relieve the shipowners from the obligations they were under, as carriers, to repair the mischief done by improper stowage of the goods. It was not exactly contended that there were two contracts in this case; but it was insisted that the bill of lading did not cover the injury arising from the stowage, which act of stowage took place before the bill of lading was granted. The conclusion at which I have arrived at is that I have only to look at the bill of lading as the expression of the true contract existing between the parties, and to

(1) L.R. 2 A. & E. 393.

1889
JULY 26.

ORIGINAL CIVIL.

13 B. 571.

consider whether the delivery of these goods in a different condition from that in which they were originally placed on board does or does not fall within the excepted perils mentioned in that bill of lading."

Considering, then, the bill of lading to be the contract of carriage between the parties, the Chief Judge held that the exceptions contained in it referred exclusively to occurrences after the commencement of the voyage, and did not protect the shipowners from the obligation of seeing that the ship was reasonably fit for accomplishing the service which the shipowner engages to perform, as laid down in *Steel* v. *The State Line Steamship Company* (1). It is plain, in the present case, that if the defendants' ship can be said to be unfit to receive and carry the plaintiffs' goods, it was entirely by reason of the negligence of the defendants' servants (see *Sandeman* v. *Scurr* (2)) in not drying the floor of the ship, or dammering it, before placing the sugar on board; and also in stowing the sugar so near to the wet timber previously shipped that the dripping water fell upon it; for it is not suggested that [586] the wet state of the floor was due to any inherent defect in the ship itself, as was the case in *Tattersall* v. *The National Steamship Company* (3). In *Hayn* v. *Culliford* (4) sugar was damaged by being stowed under oxide of zinc, and Lord Bramwell, delivering the judgment of the Court, assumed that, if the exceptions in the bill of lading had included acts of negligence of agents and servants, the defendants would have been protected; and the same principle must apply to what has been found to be the causes of damage to the sugar in the present case. The question, therefore, for decision is, whether the defendants are protected by the exceptions in the bill of lading against the consequences of acts and defaults of their servants; for, otherwise, whether by reason of the implied undertaking that the ship was fit to receive and carry the plaintiffs' goods, or the obligation of the defendants on the ordinary contract of a carrier, as put by the Court in *Hayn* v. *Culliford* (4) the defendants would be liable.

The proper rule of construction of a bill of lading was much considered by the Court in *Hongkong and Shanghai Banking Corporation* v. *Baker* (5). In that case the bills of lading exempted the master from liability from loss occasioned by "The act of God, the Queen's enemies, *fire*, and all and every *other* dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind so ever." The goods were lawfully landed on the Custom House Bandar at Bombay, where they were accidentally burned before they were delivered to the consignee. The Court of Appeal, affirming the judgment of Sir Richard Couch, held that the master was protected by the above exception in the bill of lading. Sir Michael Westropp, in delivering the judgment of the Court said: "It has been contended for the plaintiffs that the scope of that exception must be controlled by the word 'other' preceding the words, 'dangers and accidents of the seas, rivers, and navigation;' but we cannot accede to that argument. Fire, no doubt, may occur at sea, as well as on shore, but it never [587] has been regarded as a peril, danger, or accident of the sea within the meaning of those terms as known to mercantile usage or the law (6)." At p. 206 the Court of Appeal says: "The case of *De Rothschild* v. *The Royal Mail Steam Packet Company* (7) has been referred to as authority

(1) L.R. 3 Ap. Ca. 72.
(2) L.R. 2 Q.B. 86.
(3) L.R. 12 Q.B.D. 297.
(4) L.R. 4 C.P.D. 182.
(5) 6 B. H. C.R.O. C. J. 71=7 B. H. C. R. O. C. J. 186.
(6) 7 B. H. C. R. O. C. J. 186 (202).
(7) 7 Exch. 734; 21 L. J. Exch 273.

1889
JULY 26.
ORIGINAL
CIVIL.
13 B. 571.

for the proposition that exceptions in a bill of lading should be construed strictly, but in the judgment (attributed in the Exchequer Reports to Parke, B, and by the Law Journal to Pollock. C.B.) the Court lays it down that the ordinary meaning of the words used must be followed, and the circumstances under which the contract is made must be regarded; and it refused to adopt a meaning which it considered unreasonable or unlikely to be within the intention of the parties. The same doctrine has been applied to charter parties—*Barker* v. *M'Andrew* (1); *Bruce* v. *Nicolopulo* (2) *Brough* v. *Whitmore* (3). The use of the word 'other' before 'dangers and accidents of the seas,' &c. in the present bills of lading, cannot, we think, render 'fire' a peril of the sea, or limit it to the fire on board the ship. The reasonable mode of construing the contract contained in the bill of lading is to treat the exceptions as co-extensive with the liability. Were we to apply the word 'other' so as to cut down the shipowner's and master's protection against fire to fire occurring on board the ship, we should be equally bound to apply it in the same manner to limit the exception of the acts of God and the Queen's enemies, so that if the goods, even though landed after the expiration of the fifteen days contended for by the appellants, were, whilst yet undelivered, to be destroyed by lightning, or by a hostile force at war with the Queen, the shipowners and master would be unprotected. This we do not think could have been the intention of the parties." At the conclusion of their judgment, the Court say (p. 208): "The language of the five bills of lading in this case leads to the conclusion that the exception of fire is co-extensive with the contract to deliver, and does not limit the protection to the time during which the goods are in the ship. The landing of the goods appears to us to have been in conformity with the custom of the [588] port, and without default on the part of the master. For these reasons, we affirm the decree with costs."

The exceptions in the bill of lading in the present case are: "the act of God, the Queen's enemies, restraint of princes or rulers, pirates or robbers by sea or land, accidents, loss and damage from vermin, barratry, jettison, collision, fire, accidents to, or defects latent or otherwise in, hull, tackle boilers, or machinery or their appurtenances, steam, and all the perils, dangers, and accidents of the sea, rivers, land carriage and steam navigation of whatsoever nature and kind; and accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners, or other servants of the company, or from any deviation excepted." It is said that as the exception as to "acts of servants" of the company comes in the bill of lading after the exception of "perils of the sea", it must have been intended to apply only to acts after the voyage had commenced. The Chief Judge relies on the conclusion come to in *Steel* v. *The State Line Steamship Company* (4) that the acts contemplated by the bill of lading were subject to the sailing of the ship; but the language of that bill of lading was very exceptional, and pointed clearly to all the exceptions being so restricted. The exceptions in the present case are, on the contrary, of the most comprehensive kind, and clearly comprehend occurrences which might happen immediately after the sugar had been delivered over to the shipowners. There seems, therefore, to be no sufficient reason for holding that the exception, in general terms, against the negligence and default of the pilot, master, mariners, or other servants of the company, should be restricted to the voyage, simply because it is found at the close of the bill

(1) 11 Jur. N. S. 637.
(2) 11 Exch., 129; 24 L. J. Exch. 321.
(3) 4 T. R. 206.
(4) L. R. 3 Ap. Ca. 72.

1889
JULY 26.
ORIGINAL
CIVIL.
13 B. 571.

of lading. It is entirely independent of the provision against the perils of the seas, and indeed separated from it by a semicolon. And we may here observe that the exception as to acts of pilots and mariners in *Hayn* v. *Culliford* (1), which the Court said would have applied to negligent stowage had agents and servants been included in it, is found at the end of the bill of lading after "perils of the seas". If after the plaintiffs' [589] goods had been shipped at Rangoon, and during the three days that the steamer lay there before she left for Bombay, she had been run down on a dark night by another vessel, as a steamer has before now been run down and sunk when at anchor in the harbour of Bombay (on the 15th November 1887, the day the *Byculla* left Rangoon, according to the Bombay almanac there was a new moon), it would, we think, be most unreasonable to hold that the defendants were not entitled to rely on the word "collision" in the exemption clause. So if the steamer had during these three days been burnt, or been attacked and sunk by the Queen's enemies, or if the plaintiffs' goods had suffered from "pirates or robbers by sea or land," why is the company not entitled to rely on the exceptions applicable to such a state of things? The case of *Hongkong and Shanghai Banking Corporation* v. *Baker* (2) is, we think, one of high authority. It was argued in the Court of Appeal in December 1869 by the then Advocate-General, Mr. Scoble and Mr. M'Culloch for the plaintiffs, and by Mr. Green and the present Advocate-General for the respondent the arguments extending over five days. Sir M. R. Westropp, C. J., delivered the decision of the Court in October 1870, and at p. 207 of the report, towards the close of a very careful and elaborate judgment, said: "The reasonable mode of construing the contract contained in the bill of lading is *to treat the exceptions as co-extensive with the liability.*"

We adopt a similar construction in regard to the bill of lading in the present case. Any other view would, in our opinion, be unreasonable, and contrary to the intention of the parties, as evidenced by the terms of the bill of lading itself. It was, no doubt, the duty of the defendants to supply a seaworthy steamer. In the present case the *Byculla* was, according to the facts stated by the Chief Judge, reasonably fit for the carriage of the plaintiffs' 1,306 bags of sugar from Rangoon to Bombay, but the master, mariners, or other servants of the defendants negligently put them in a part of the hold which was not dry, and 1,046 of the bags, from such improper stowage, and also by the subsequent improper [590] stowage of other wet logs of timber, became wetted and damaged.

For the above reasons we reply, in answer to the question referred for the opinion of the High Court, that the defendants were protected from liability by the terms of their bill of lading, the damage complained of being, in our opinion, covered by the words "and accidents, loss, or damage from any act, neglect, or default whatsoever of the pilot, master or mariners, or other servants of the company.....excepted."

Inverarity applied for the costs of the reference.

SARGENT, C. J.—Section 620 of the Civil Procedure Code, we think, applies, and by that section the costs consequent on a reference are made "costs in the case". That being so they must be left to the Judge of the Small Cause Court for him to deal with.

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(1) L. R. 4 C. P. D. 182. (2) 7 B. H. C. R. O. C. J. 186.