

cient if done by his directions, express or implied. Accordingly we do not consider that the cancellation of the stamp would be invalidated if done at the time of execution by the *payee* of the *hundi* with the authority of the *drawer*. The circumstances stated by the learned Judge do not bring the case within the provisions of section 44, to which we have been referred. That section simply provides that the person to whom a bill of exchange or promissory note chargeable with one-anna duty is presented unstamped for payment, need not refuse payment on that account, but may affix a one-anna stamp thereto and cancel it and then make payment. The word "payee" in the marginal note is manifestly a clerical error for "payer." It is a curious anomaly (if it be so) that the promissor in the case of an unstamped promissory note, who is the person who ought originally to have stamped it, should be at liberty to deduct the value of the stamp from the amount which he pays in discharge of his note.

We answer the question of the learned Judge by sending him a copy of this judgment, which will enable him to dispose of the case before him.

Plaintiff's attorneys:—Messrs. *Edgelow and Gulábchand*.

Defendant's attorneys:—Messrs. *Little & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Candy.

VITHULDA'S GOBER AND OTHERS, PLAINTIFFS *v.* THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, DEFENDANTS.*

Shipping—Seaworthiness—Damage to goods by leakage while ship in dock—Bill of lading—Exception.

The plaintiffs' goods were loaded in the defendants' steamer then lying in dock to be carried from Bombay to certain ports in East Africa. At the time of loading, the ship was apparently in a sound and seaworthy condition. Two days after the goods had been put on board, and when the ship was still in dock, it sprung a leak, and the water came into the hold and damaged the plaintiffs' goods. The ship was taken to the dry dock, the cargo was shifted, and the leak repaired. It appeared that the leak had arisen from the fact that one of the plates of the ship had been worn thin in one particular spot, so that when the cargo was put on board and the

* Suit No. 540 of 1894.

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ship lay deeper in the water, the pressure became so great that a hole was made and the water rushed in. The plaintiffs sued the defendants for damages. The defendants pleaded (1) that the ship was in a seaworthy condition when the goods were put on board, (2) that they were protected by the bill of lading which contained the following exception, *viz.*, "Accident, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers, land carriage and steam navigation of whatever nature and kind and accident, 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."

Held, that the defendants were liable. While the ship was in dock it was not seaworthy, and the exception in the bill of lading did not limit the implied warranty of seaworthiness.

SUIT for damages. The plaint stated that the defendants in March, 1893, contracted with the plaintiffs to convey on board their steamship *Mobile* 632 packages of goods from Bombay to Inbambane, Quilimane and Delagoa Bay; that the plaintiffs accordingly shipped the said goods and obtained bills of lading for some and mate's receipts for others.

The plaint continued as follows:—

"3. The said goods were loaded on board the S. S. *Mobile* at the Prince's Dock, and on the 18th day of March, 1893, it was found that the said vessel was so unfit for the voyage and so unseaworthy as to have sprung a leak and to have five feet of water in her hold, and it was discovered there was a large hole in the bottom of the said steamer. She was surveyed by the surveyors to the Port Trust, and the plaintiffs will rely on the report of the surveyors, copy whereof is annexed and marked C.

"4. The plaintiffs say that the defendants did not supply a seaworthy vessel or a vessel reasonably fit for the voyage, and by reason thereof the plaintiffs' goods were landed in a very damaged condition, and the defendants committed a breach of the contract they had made with the plaintiffs in respect of the said six hundred and thirty-two packages of goods.

"5. The defendants thereafter declined to give the plaintiffs bills of lading for the goods, for which the plaintiffs held mate's receipt, without prepayment of freight, although the defendants admitted that some of the plaintiffs' goods had been destroyed and the rest had been so damaged as to necessitate their sale by public auction by or at the instance of the defendants."

The plaintiffs alleged that they had sustained damages to the amount of Rs. 2,684-1-6 and loss of interest on that amount to the extent of Rs. 1,000 which they claimed to recover from the defendants as well as the profits which they would have made if the goods had been safely carried to their destination.

The defendants denied their liability. They denied that they had broken the contract or that they had not supplied a reasonably seaworthy vessel. Their written statement contained the following paragraphs:—

“3. The defendants say that at the time the plaintiffs loaded their goods upon the said vessel she had no leak and was quite seaworthy. The defendants will rely upon the certificate of survey granted under Act VII of 1884 on the 29th October, 1892, in respect of the said vessel and upon the reports of the survey held upon the said vessel after the leak therein was discovered.

“4. The defendants say that under the conditions contained in the bills of lading, subject to which the plaintiffs' goods were received on board the said vessel, the defendants are in no way responsible for the damage caused to the goods of the plaintiffs.”

At the hearing the following issues were raised:—

1. Whether the *S. S. Mobile* was unseaworthy as in the plaint alleged?
2. Whether, having regard to the conditions on which the plaintiffs' goods were received on board the said steamship, the defendants are responsible for the damage to the said goods?
3. Whether the plaintiffs have suffered damages as in the plaint alleged, and if so to what amount?

Cleary, Q. C., and *Inverarity* for the plaintiffs:—They cited *Carvers's Carriage by Sea*, pp. 19, 22, 89; *Kay on Shipping*, p. 79; *Hassanbhoj v. The British India Steam Navigation Company*⁽¹⁾; *Steel v. State Line Steamship Company*⁽²⁾; *Gilroy, Sons, and Co. v. Price and Co.*⁽³⁾; *Christie v. Trotter*⁽⁴⁾.

Lang (Advocate General) and *Macpherson* for the defendants. They cited *The Southgate*⁽⁵⁾; *The Carron Park*⁽⁶⁾.

CANDY, J.:—The main facts are admitted. About 16th March, 1893, plaintiff shipped certain goods on board the defendant company's *S. S. Mobile* then lying in Prince's Dock. At that time the *Mobile* was apparently in a sound, seaworthy condition. On the 18th March, 1893, after plaintiff's packages had been loaded, the ship sprung a leak and a considerable amount of

(1) I. L. R., 13 Bom., 571.

(2) 3 Ap. Ca., 72.

(3) L. R. (1893) Ap. Ca., 56.

(4) 22 Law Times Rep., 101.

(5) L. R. (1893) P. 329.

(6) 15 P. D., 203.

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water came into the hold. 108 of the plaintiff's packages were damaged by the water. The ship was at once taken into the Merewether Dry Dock, the cargo was shifted, and the spot where the leak had occurred localised, and repaired. On 20th March, 1893, the ship was taken back to Prince's Dock, and the damaged cargo taken out of her. Plaintiff refused to have anything to do with his damaged packages, which, he says, the defendant company had contracted to safely convey to the ports to which they had been consigned. Eventually the saleable packages were sold by Lidbetter & Co., who paid plaintiff the sale proceeds, and now plaintiff seeks to recover the balance of the cost price of the packages, with Rs. 1,000 as loss of profits. The figures in the particulars of the claim attached to the plaint are not disputed; and if the defendant company are liable at all, then the amount claimed can fairly be awarded. The item of Rs. 1,000 would represent about 20 per cent. profit on the cost price of the goods,—not an excessive amount, all things being considered.

The defendant company deny their liability on two grounds. First, they say that the ship was in a seaworthy condition when the goods were put on board. Secondly, they say that they are protected by the conditions in the bills of lading, the mate's receipt also being subject to all conditions of company's bill of lading.

As to the cause of the accident, both sides rely on the evidence of Captain Clark, the Marine Surveyor. He examined the ship directly after she sprung the leak on 18th March, 1893, and found "a small hole, 4" x 2".....on examination. I found the leak to have been caused by the wearing away of the plate by some hard substance, probably a small metal bolt. The cause appears to be from chemical action. The wearing of the plate was quite local. After the whole of the cement had been cut out from between three floors, and the plates well tested, they were found to be perfectly sound." I express no opinion myself as to the soundness of this theory. I am not competent to do so. As it is the only theory put forward in the case, and is apparently accepted by both sides, it must be accepted by the Court. It comes to this that, when the ship was built in 1879, some bolt or other

hard substance must have been left loose between the cement and the plates of the ship, and that in the course of years, from this substance rolling and shifting backwards and forwards by every movement of the ship in a seaway, the plate of the ship had been gradually worn thin in one particular spot, so that when on 16th to 18th March, 1893, cargo was loaded, and the ship became deeper in the water, the pressure became so strong that a hole was made and the water rushed in. The defendant company point to the fact that in August, 1892, the ship was examined by the plaintiff's surveyors and the usual certificate granted to last for twelve months, and that just before the cargo was put on board the ship was overhauled by the superintending engineer of the company in the P. and O. Company's dry dock, and everything was then all right. But in reality the ship was not sound. For there was one small spot in which the plate had become so thin, that when the pressure of the water increased, a hole was made in the side of the ship and the water rushed in. Even if the defect be termed latent, none the less there was such a defect as to make the ship unseaworthy. It would be absurd to call a ship seaworthy, when, though she appears seaworthy, one of her plates is at a particular spot so worn that the mere loading of cargo on board while in dock, thus sinking the ship deeper in the water, causes the water to force a hole and rush into the hold.

It only remains then to consider whether the defendant company are protected by the conditions in their bill of lading. In my opinion they are not. The conditions are thus expressed:—

“Accident, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers, land carriage and steam navigation of whatever nature and kind and accident, 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.”

I cannot in these words find anything which excepts loss caused by an initial unseaworthiness of the ship. The words “all the perils, dangers and accidents of the sea . . . of whatever nature and kind” will not suffice for that purpose. In *Steel*

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v. *State Line Steamship Company*⁽¹⁾ the words were "peril of the seas of whatever nature or kind soever, and however caused, excepted," and it was held that there was nothing in these words qualifying the engagement in the bill of lading that the ship should be reasonably fit to perform the service for which she undertakes. Of course, as Lord Blackburn pointed out (p. 89), "the shipowners might have stipulated, if they had so pleased (I know no law that would hinder them), we will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship, that is your look out; you shall not have any remedy against us if we do. I say they might have so contracted, and perhaps in some cases they may actually so contract. I do not know." And then Lord Blackburn went on to show that by the words in the bill of lading before him the shipowners had not so contracted. As was naturally to be expected, shipowners naturally took advantage of the hint thrown out by Lord Blackburn. The case of *The Cargo ex Laertes*⁽²⁾ was a case in which special words were used in the bill of lading limiting liability on account of unseaworthiness. Butt, J., said (p. 190): "No doubt the ordinary rule is, that at the commencement of the voyage, there is an implied warranty that the ship is seaworthy, not that the owner will use his best endeavours to make her so, but that she is in fact seaworthy. The *Laertes* broke down from a latent defect, which I find as a fact could not have been discovered by the exercise of any reasonable care on the part of the owners; but the flaw in the shafting, which led to the breakdown, existed when the ship started, and, therefore, she was not seaworthy for the voyage. If the implied warranty existed, or was not limited by the contract in the bills of lading, then the owners of the '*Laertes*' would be liable." Then the learned Judge went on to show that the words in the bills of lading applied, and were intended to apply, as a limitation of the original implied warranty, and that they did in fact abrogate the warranty which would otherwise be implied. Had it not been for the express stipulation in the bills of lading, the ruling in *Steel v. State Line Steam Ship Company*⁽¹⁾ would have applied.

(1) 3 Ap. Ca., 72.

(2) 12 P. D., 187.

In the case of the *Glenfruin*⁽¹⁾ there were express conditions intended as a limitation of the original implied warranty. Evidence was given which proved that the shaft of the *Glenfruin* broke in consequence of a latent flaw, and which also explained the character of the manner of welding crank shafts, and showed that it was impossible to discover a latent flaw in a shaft, such as was the cause of the accident in this case. The Judge, Butt, J., laid down three questions for decision:—(1) Was the breakdown of the *Glenfruin's* shaft caused by unseaworthiness? (2) Does the implied warranty of seaworthiness in the bill of lading amount to a contract by the shipowner that the ship (including her machinery) shall be, in fact, reasonably fit for the voyage, or only that due care shall be taken to make her so fit? (3) Was the warranty qualified, or were the shipowners otherwise exempted from liability, for the breaking of the shaft by the exceptions in the bill of lading? (which were almost identical with the exceptions in the present case). The learned Judge found that (1) the shaft in question had been made by one of the best firms, and after its completion it was impossible for that firm, or for the owners of the ship, to discover the flaw until it was laid bare by the breaking of the shaft. As a fact when the *Glenfruin* started, the shaft was not reasonably fit for the voyage; in other words, the ship was unseaworthy. The Judge said (2) "On the second question . . . I am, I think, concluded by authority. I have always understood the result of the cases from *Lyon v. Mells*⁽²⁾ to *Kopitoff v. Wilson*⁽³⁾ to be that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel v. State Line Steamship Company*⁽⁴⁾." The learned Judge was doubtless referring more particularly to the remarks of Lord Blackburn at pages 86 and 87 of the report. (3) On the third point the learned Judge held that the exception has no application to the case of

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(1) 10 P. D., 103.

(3) 1 Q. B. D., 377.

(2) 5 East., 428.

(4) 3 Ap. Ca., 72.

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a ship which was unseaworthy at the time of sailing and the unseaworthiness of which was the efficient cause of the loss or damage.

In the face of the above rulings, which clearly indicate the law on the subject, it is unnecessary to quote other cases. The learned Advocate General for the defendant company referred to *The Carron Park*⁽¹⁾ as showing that the term "voyage" (which, by the way, does not occur in the bill of lading in the present case) included the period of time during which the vessel was being loaded; and he quoted *The Southgate*⁽²⁾ as showing that damages resulting from the incursion of water into the ship whilst she had cargo in her, though she was still at her moorings and not in motion, was an "accident of navigation." The equitableness of those decisions may well be admitted; and if the goods are covered by the bill of lading from the time they are put on board, and the reasonable mode of construing the contract evidenced by a bill of lading is to hold the exceptions to be co-extensive with the liability (*Hassanbhoy Visram v. The British India Steam Navigation Company*⁽³⁾ following *Hongkong and Shanghai Banking Corporation v. T. Baker*⁽⁴⁾), then it is clear that in the present case the defendant company by inviting plaintiff to ship his goods on board their ship, and by giving him bills of lading, on the exceptions in which they rely, cannot plead that the implied warranty of seaworthiness which they gave does not extend to the period during which the ship was being loaded in the Prince's Dock after the plaintiff's goods had been put on board. But I find as a fact that while the ship was in the Prince's Dock it was not seaworthy, and that the exceptions in the bills of lading do not limit the implied warranty of seaworthiness. Therefore, the findings on the issue must be in the affirmative for the plaintiff. A judgment will be entered for the plaintiff for the amount claimed, with all costs.

Judgment for the plaintiff.

Attorneys for plaintiff:—Messrs. *Chalk, Walker and Smetham.*

Attorneys for defendant:—Messrs. *Crawford, Burder & Co.,*

(1) 15 P. D., 203.

(2) L. R. (1893) P. 329.

(3) I. L. R. 13 Bom., 571.

(4) 7 Bom. H. C. R., 186.