1969
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ORPHANIDES & MURAT v. JOHN S. LATSIS LINE ETC. & ANOTHER

[HADJIANASTASSIOU, J.]

ORPHANIDES & MURAT,

Plaintiffs,

v.

JOHN S.LATSIS LINE AS OWNERS AND/OR OPERATORS AND/OR CHARTERERS OF M.S. EUROPE AND ANOTHER,

Defendants.

(*Admiralty Action No.* 7/67).

Shipping—Carriage of goods by sea—Bill of lading—Claim by shippers against shipowners for loss of goods undelivered—No evidence that goods actually discharged and delivered—Liability of shipowner—Onus of proof—Shipowner failed to discharge the onus cast upon him—To prove delivery of the goods—Or that he has exercised reasonable care—Or to bring himself within any of the immunities specified in the schedule to the Carriage of Goods by Sea (English) Act, 1924, *Article IV, r.2—See also Articles I, II, III, IV and VI of the aforesaid schedule.*

Carriage of goods by sea—Loss of goods—Onus of proof—Liability of shipowner—Immunities and exceptions—See above.

Statutes—Construction of "Discharge"—"Properly discharge"—The Carriage of Goods by Sea Act, 1924 (*English*), *Schedule thereto, Article III, r.2.*

Words and Phrases—"Discharge" and "Properly discharge" in Article III, r.2 of the Schedule to the Carriage of Goods by Sea Act, 1924.

Contract—Contract of bailment—Breach of—Carriage of goods by sea—Liability of the shipowner (bailee)—Loss of goods—Onus of proof—See above.

Bailment—Carriage of goods by sea—See above.

In this action the plaintiffs claimed £784.500 damages for the loss of five bales of cotton piece goods on a voyage from Port Said to Famagusta on the ship "Europe" belonging to the first defendants. The second defendant was the agent in Cyprus of the first defendants. The defendants denied liability.

On April 3, 1966 the goods were shipped on board the "Europe" in apparent good order and condition in Port Said for carriage to Famagusta. The goods were consigned to the order of the plaintiffs, on the terms of the ship-owner's bill of lading dated April 3, 1966, and signed on behalf of the ship-owners. This bill incorporated the provisions of the Rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924. The goods in question were to be delivered to the plaintiffs in the like good order and condition from the ship's tackles (where the ship's responsibility would cease) at the aforesaid port. This bill of lading was forwarded to the plaintiffs, who then became and thereafter remained the owners or the consignees of those goods.

On the morning of April 8, 1966, the ship "Europe" arrived at Famagusta Port, and their agent, the second defendant, engaged stevedores in order to discharge the goods from the ship and to deliver them to the owners or the consignees of such goods. Be that as it may, the five bales in question were never delivered to the plaintiffs, the defendants alleging that the said goods were duly discharged on April 8, 1966, at Famagusta Port and were transferred to the stores of the Customs but later on were stolen when the goods were no longer in their custody.

It was common ground that the aforesaid bill of lading shall have effect subject to the provisions of the Rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924, as applied by that Act, and shall be construed accordingly. Article III, r.2, of the said Rules provides:

> "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for discharge the goods carried."

On the other hand Article IV, r.1 provides that in a case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy; and Article IV, r.2, contains a long list of matters in respect of loss or damage for which the carrier is not liable. Particularly, Article IV, r. 2(9) reads:—

> "Any other cause arising without the actual fault or privity of the carrier, or without the fault or negligence of the agents or servants of the carrier the burden of proof shall be on the person claiming the benefit of this excep-

tion to show that neither the actual fault or privity of the carrier not the fault or negligence of the agents or servants of the carrier contributed to the loss or damage."

Awarding to the plaintiffs the damages claimed with costs against only the first defendants, the Court:—

Held, (1). The word "discharge" in Article III, r.2 of the Rules (*supra*) is used, I think, in place of the word "deliver", because the period of responsibility to which the Act and Rules (*supra*) apply (see Article I(e) ends when the goods are discharged from the ship. I would further observe that the words "properly..... discharge" in Article III, r.2 (*supra*) mean, I believe, "deliver" from the ship's tackle in the same apparent order and condition as on shipment, unless the carrier can excuse himself under Article IV (*supra*). See also in this respect the bill of lading (Exhibit 1).

(2) In my view, therefore, the failure of the carrier to deliver the goods to the plaintiffs must constitute a *prima facie* breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Article IV, r.1 and 2(9) (*supra*). It would be observed that the words of the said paragraph (9) expressly refer to the carrier as claiming the benefit of the exception thereunder, and I think that, by implication as regards each one of the other exceptions, the same onus is on the carrier; he must claim the benefit of the exception, and that is because he has to relieve himself of the *prima facie* breach of contract in not delivering from the ship the goods in the condition as received. I do not think that the terms of Article III (*supra*) put the preliminary onus on the owner or consignee of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves that the goods have not been delivered. And in this case the plaintiffs did so.

(3) In my view, the defendants failed to discharge the burden cast upon them. They failed to prove that the loss of the goods occurred without the fault or negligence of themselves, their servants or agents. They failed to prove that the goods in question were discharged from the ship and delivered into the appropriate customs store. Furthermore, I have no difficulty to reach the conclusion that the said goods were not actually delivered into the room allocated by the customs to the agent of the ship for the purposes of storing them.

(4) For the foregoing reasons, I have reached the conclusion that the first defendants are liable having failed to discharge the onus upon them to prove that they have exercised reasonable care, and, furthermore, having failed to bring themselves within the immunities specified in Article IV, r.2 of the Schedule to the Carriage of Goods by Sea Act, 1924.

In the result, I would give judgment for the plaintiffs for the sum of £784.500 mils with costs against the first defendants only. Since it has been conceded that the second defendant has been acting all along as the agent of the first defendants, I would dismiss the action against him with no order as to costs.

Judgment for plaintiffs against the first defendants as aforesaid with costs; action against second defendant dismissed; no order as as to costs.

Cases referred to:

Gosse Millard v. *Canadian Government Merchant Marine American Can Co.* v. *Same* [1927] 2 K.B. 432; [1929] A.C. 223, at p. 234;

Bradley and Sons v. *Federal Steam Navigation Co. Ltd.* (1927) 27 Ll. L. Rep. 395;

Herald and Weekly Times Ltd. v. *New Zealand Shipping Co. Ltd.* 80 Ll. L. Rep. 596;

Stag Line Ltd. v. *Foscolo Mango and Co. Ltd.* [1932] A.C. 328;

Anglo-Saxon Petroleum Co. v. *Adamastos Shipping Co. Ltd.* [1957] 2 Q.B. 233, at p. 253; [1959] A.C. 133, at p. 157;

Heyn v. *Ocean SS. Co.* (1927) 137 L.T. 158.

Admiralty Action.

Admiralty action for £784.500 damages for the loss of five bales of cotton piece goods on a voyage from Port Said to Famagusta on a ship belonging to the first defendants.

A. Hadjiloannou, for the plaintiffs.

R. Constantinides, for the defendants.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by:

HADJIANASTASSIOU, J.: In this action, the plaintiffs claimed from both defendants the amount of £784.500 damages for the loss of five bales of cotton piece goods on a voyage from Port Said to Famagusta on a ship belonging to the first defendants and known as the "Europe". The defendants denied liability.

The plaintiffs, Orphanides & Murat, are shipping agents in Famagusta. The first defendants are the owners of the vessel "Europe" and their agent in Cyprus at all material times was the second defendant.

On April 3, 1966, Messrs. Damanhour Shipping Agency shipped five bales of cotton piece goods with identification mark TW.0.240 FT.0.250 on board the vessel "Europe" in apparent good order and condition in Port Said for carriage to Famagusta. The goods were consigned to the order of the plaintiffs, on the terms of the ship-owner's bill of lading dated April 3, 1966, signed on behalf of the ship-owners. This bill of lading, exhibit 1, incorporated the provisions of the Rules set out in the Schedule of the Carriage of Goods by Sea Act, 1924. The goods in question were to be delivered to the plaintiffs in the like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port. This bill of lading was forwarded to the plaintiffs, who then became at all material times and thereafter remained the owners or the consignees of those goods.

On the morning of April 8, 1966, the ship "Europe" arrived at Famagusta Port, and their agent, the second defendant, engaged stevedores in order to discharge the goods from the ship and to deliver them to the owners or the consignees of the goods.

The plaintiffs alleged in para. 5 of their Statement of Claim that the first defendants, in breach of the said terms and/or conditions and/or rules of the said Act, failed to carry the said goods to Famagusta and discharge same from the said vessel and/or deliver them to plaintiffs. In para. 6 they alternatively alleged that defendants and/or defendant 2 as agents of defendants 1 failed in their duty towards the plaintiffs i.e. failed to show proper care when the goods had been discharged from the said vessel and trace same, where it was stored or transferred and/or in any case failed to inform the plaintiffs in time for the arrival of the said vessel for collecting the said bales.

The defendants alleged that the said goods were discharged at Famagusta Port from the ship "Europe" on April 8, 1966, and were transferred to the stores of the Customs, but later on were stolen when the goods were no longer in their custody.

The plaintiffs, in support of their allegation that the goods in question were never delivered to them, called their Managing Director, Mr. Stavros Pissarides, who said:—

"We instructed our agents at Port Said to transship to us the goods which are referred to in the bill of lading, exhibit 1. In accordance with the terms and conditions referred to in the bill of lading, defendants 1 have undertaken to deliver those goods to Famagusta. We have no notice of the arrival of the ship because it was not chartered by us, and usually no notice is sent to us of the date of arrival. However, we were aware from the bill of lading in our hands that the ship would arrive in Famagusta, and it is a practice between all the shipping agents to inform each other about the arrival of the boats when we have goods consigned thereon. As a matter of fact we were never informed of the actual date of the unloading of the goods, but we were informed by the agent of defendants 1, sometime about 3–4 days after the arrival of the ship.

We received a delivery note from the defendants in order to present it to the Customs Authorities to collect our goods or whilst there to assign them to our ultimate consignees who would be entitled in their turn to collect them themselves. When we presented the bill of lading to the customs authorities, I think to Mr. Spyros Stephou, he informed us that the good were not in his custody. From there we presented our delivery order to the agent of the ship, defendant 2, who in his turn inserted on that delivery order that the goods were "short" and this delivery order remained with the Customs as an exhibit. The customs authorities, in their turn, issued to us a certificate to the effect that the goods were short-landed.

I would like to add that the unloading of a cargo is carried out by the agent who employs stevedores for that purpose. Those men, the stevedores, once they unload the goods from the ship, they are bound to deliver them to the stores of the customs or to any particular place approved by the customs. Once the goods are delivered into the hands of the customs, then the next

thing is that the representative of the agent of the ship-owner and an officer from the customs authorities check the goods from the manifest in order to see whether they are short-landed or not or correct or damaged, and they make on the manifest their own observations and remarks".

On June 15, 1966, the plaintiffs wrote to the agent Mr. Takis Solomonides, in these terms:—

"We refer to the above consignment and beg to advise you that we hold you, as agents of the carriers, responsible for the non-delivery of same to us and reserve the right to submit our claim in due course."

On October 24, 1966, the agent in reply had this to say:—

"In reply to your letter dated 15th June, 1966 we confirm that the above goods were definitely discharged at Famagusta on 8.4.66 and were stolen ex Customs, as per Famagusta Court Case No. 5935/66.

On behalf of the owners of the vessel and/or the operators and ourselves as agents, we repudiate liability for the alleged shortage, in accordance with the terms and conditions of the relevant bill of lading."

The defendants, in support of their allegation that the goods of the plaintiffs were discharged from the ship "Europe" at Famagusta Port, called Mr. Michaelides, the manager of the office of the second defendant, who said:—

"On 8th April, 1966, the ship "Europe" arrived in the Port of Famagusta for discharging a cargo. I visited the captain of the ship and I asked him to hand me the manifest in which were all the goods which were due to be unloaded in Famagusta and had destination Cyprus. He handed me the manifest as well as envelopes containing documents addressed directly to the consignees of various goods. One of those envelopes, I distinctly remember, was addressed to the plaintiffs in this action, that is to say, Orphanides & Murat of Famagusta. From the documents I was handed by the captain, I was satisfied that the goods, including the goods of the plaintiffs, were shipped from Port Said via Cyprus. The Plaintiffs were informed of the arrival of the goods and the envelope was handed over to them. The bales in which the goods complained of were, had no

specific marks on them, they simply had 'Larnaca via Famagusta'.

When the unloading started, I instructed my own men for the purpose of unloading all the goods from the ship. I was not present during the unloading, but before the ship left the harbour, I made enquiries with the supervisor and the tally-clerks that all the goods were unloaded, in order to sign to the captain a clearance certificate that the goods were actually landed in Famagusta. I was referring to the witnesses who have actually given evidence in Court.

By looking at the general tally-sheet, I was satisfied that all the goods were unloaded from the ship."

In cross-examination he said:—

"As it has been already said, our office informed what I call a colleague, because the office of Orphanides & Murat is in the same business as we are, that the ship had arrived and to come and collect this envelope, but at that time I was not in a position to know where the goods were on the ship.

I want to make it clear, once again, I was not present during the unloading of the cargo, and information which I have related to the Court I have collected from my men; that is to say the tally-men, and from the general paper which I have read."

The evidence of Frixos Eliades, who was one of the supervisors for the unloading of goods had this to say:—

"On the particular day, 8th April, 1966, I was supervising the unloading of the ship 'Europe' and I was satisfied that all the goods destined for Cyprus were unloaded from that ship. As I said I was satisfied because we have tally-men who make notes of the goods unloaded and it being part of my official duty to make sure I have asked them and they gave me an affirmative answer. As a result, I also reported my assurance to the agent of defendant No. 1.

On the 8th of the same month I went to the Customs officials for the purpose of checking the goods which were put in the store of the Customs."

In cross-examination he said:—

"I want to qualify my statement, actually I am one of the chief tally-men, supervisors.

The duties of a tally-man during the unloading of a ship is to enter into a tally-book the actual goods which are unloaded. When I said actual goods, actually what the tally-man does is to put in the tally-book the marks which are either on the bags or on the cases. I agree that sometimes the checking is very difficult to carry out. Even if the goods are coming out of the crane and do not come out the normal way, then again the tally-men have to do the checking. The exception I had in mind, that it was difficult to check, is where there are small carton boxes and because if they are small and many it is difficult to check them. In this particular case, no such goods were unloaded.

During the unloading of the ship, there were three tally-men checking the unloading of the ship. As a matter of fact I did not follow the removal of the cargo into the stores of the Customs; it was not part of my job to do so."

Pausing there for a moment, it would be observed that there is no direct evidence at all that the goods were actually discharged from the ship "Europe" and that they were stored temporarily in any particular place approved by the Customs Authorities.

I think it is convenient to begin by considering the effect of the Rules, as both counsel have agreed that this bill of lading shall have effect subject to the provisions of the Rules set out in the schedule of the Carriage of Goods by Sea Act, 1924, as applied by that Act, and shall be construed accordingly.

These rules, which now have statutory force in England have radically changed the legal status of sea carriers under bills of lading, imposing upon ship-owners a precise liability, and giving them precisely defined rights and remedies in place of the previous freedom to contract in any terms they please. Article II provides that in every contract of carriage of goods as defined in Article I, with the exception of certain special shipments, dealt with in Article VI (extended by s.4 of the Act to the Coasting Trade as therein defined), the carrier shall be

subject to the responsibilities and liabilities contained in Article III, and entitled to the rights and immunities contained in Article IV. In particular, Article III r. 2, of the rules is in the following terms:—

> "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

It would be observed that the carrier, in my view, means the carrier and any person employed by him to do the work. Furthermore, the word "discharge" is used, I think, in place of the word "deliver" because the period of responsibility to which the Act and Rules apply (Article I (e)) ends when they are discharged from the ship. I would further observe that the words "properly discharge" in Article III r. 2, mean, I believe, deliver from the ship's tackle in the same apparent order and condition as on shipment, unless the carrier can excuse himself under Article IV. See also the bill of lading.

In my view, therefore, the failure of the carrier to deliver the goods to the plaintiffs must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Article IV, r. 1, which deals with unseaworthiness and provides that, in a case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy. Article IV, r. 2, contains a long list of matters in respect of loss or damage arising or resulting for which the carrier is not to be liable. Particularly, Article IV, r. 2(q) is in these terms:—

> "Any other cause arising without the actual fault or privity of the carrier, or without the fault or negligence of the agents or servants of the carrier, the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or negligence of the agents or servants of the carrier contributed to the loss or damage."

It would be observed that the words of paragraph (q) expressly refer to the carrier as claiming the benefit of the exception, and I think that, by implication as regards each of the other exceptions, the same onus is on the carrier. He must claim the benefit of the exception, and that is because he has to relieve himself of the prima facie breach of contract in not delivering

from the ship the goods in the condition as received. I do not think that the terms of Article III put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves that the goods have not been delivered.

Indeed, counsel for the defendants, quite properly in my view, stated that the onus was on the defendants to satisfy the Court that their failure to deliver the goods was not due to their negligence. Counsel further contended that the defendants, in the light of the evidence before the Court, have succeeded in discharging the burden cast upon them that the goods were delivered, and that the loss was not due to their own negligence.

With respect to counsel's argument, going through the evidence carefully, I find that the defendants have failed entirely to prove by affirmative evidence that the goods in question were delivered to the plaintiffs. It is clear from the evidence of Mr. Spyros Stephou, a Customs & Excise Officer, first grade, that the authorities have allocated store-room No. 20(b) for the purposes of storing all the cargo unloaded from the ship "Europe"; and that although the goods complained of were included in the cargo in accordance with the manifest of the ship, *exhibit* 6, and that the rest of the goods (which appear as ticked on the manifest) were stored there, the goods of the plaintiffs were not traced in that store-room.

Furthermore, although all along, counsel for the defendants has alleged that the goods were stolen, no direct evidence at all has been adduced to show, either that the goods were discharged from the ship by the servants of the shipowners or by the persons employed by the agent for and on behalf of the first defendants; or that the said goods were stored temporarily in any place approved by the customs authorities. As for the weight one may attach to the tally-sheets, even counsel for the defendants has admitted that the name of the plaintiffs was never inserted in those tally-sheets. Of course, in fairness to counsel, he tried to explain to the Court that perhaps one could reach the conclusion that the said goods were discharged from the ship by adding the number of bales or of the cases already discharged.

Although I am aware of the difficulties which counsel for the defendants is meeting with in this case, nevertheless, I ought to make it quite clear that from the evidence adduced,

one cannot but reach the conclusion that it is of a most unsatisfactory nature, and that in no way it does help the case of the defendants to discharge the burden cast upon them, to prove that the goods were discharged from the ship and that they were stored in the room allocated by the customs.

In *Gosse Millard* v. *Canadian Government Merchant Marine*, *American Can Co.* v. *Same* [1927] 2 K.B. p. 432 relied upon by counsel for the plaintiffs, Mr. Justice Wright, in giving judgment for the plaintiffs, had this, *inter alia*, to say:—

> "I do not think that the terms of Art. III put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while they have been in his custody (which includes the custody of his servants or agents on his behalf) and to bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised. This was the language of Erle C.J. in delivering the judgment of the Exchequer Chamber in *Scott* v. *London and St. Katherine Docks Co.* (1865) 3 H. & C. 596, adopted by the House of Lords in *Dollar* v. *Greenfield* (1905) The Times, May 19. In *Joseph Travers & Sons* v. *Cooper* [1915] 1 K.B. 73, 88 Buckley L.J. said: 'The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus.' Buckley L.J. also quotes from *Morison, Pollexfen & Blair* v. *Walton* (unreported) the words of Lord Halsbury: 'It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested

upon him.' The principle is also discussed by Atkin L.J. in *The Ruapehu* (1925) 21 Ll. L. Rep. 310, 315, where he points out that it is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee. I think that this principle of onus of proof is applicable to the carrier under the Act. Indeed, in the general exception of Art. IV., r. 2(q), it is expressly laid down. In the facts of this case, if the shipowners claim (as they do in their pleading) the benefit of that exception, in that the damage was due to wet or damp, they can only succeed by negativing fault or privity."

Later on he says:

"On the above grounds, if the true conclusion be that the cause of the damage to the tinplates has not been ascertained but is left in doubt, I think that the defendants, have not discharged the onus which is on them to negative negligence on the part of their servants and to prove some excepted peril, and hence they must be held liable."

On appeal to the Court of Appeal, the judgment of the learned trial Judge was set aside by majority, and it was held that the negligence complained of was "negligence in the management of the ship" within the meaning of the exception in Article IV., r. 2(a); and on appeal to the House of Lords it was held that the judgment of the majority of the Court of Appeal was wrong, and that the appeal must be allowed. ([1929] A.C. p. 223).

Viscount Sumner, in his speech, had this to say at p. 234.

"My Lords, I agree. As the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventible and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under Art. III., r. 2, of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within Art. IV., r. 2, so as to obtain the relief for which it provides."

In *Bradley & Sons* v. *Federal Steam Navigation Co. Ltd.* (1927) 27 *Ll. L. Rep.* 395, Lord Sumner had this to say:—

"The bill of lading described the goods as 'shipped in apparent good order and condition' and proceeded 'and

to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London.' Though the usual words 'in the like good order and condition' do not appear after the word 'delivered', it was common ground that the ship had to deliver what she received as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

See also *Herald & Weekly Times, Ltd.* v. *New Zealand Shipping Co., Ltd.*, 80 *Ll. L. Rep.* 596. *In Stag Line, Limited* v. *Foscolo, Mango & Co. Ltd.* [1932] *A.C.* p. 328 Lord Atkin, dealing with the question as to what principles of construction should be applied to the Carriage of Goods by Sea Act 1924 and the rules, had this to say:—

"In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded. I will repeat the well-known words of Lord Herschell in the *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107, 144. Dealing with the Bills of Exchange Act as a Code he says: 'I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view..... The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained

by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was.' He then proceeds to say that of course it would be legitimate to refer to the previous law where the provision of the code was of doubtful import, or where words had previously acquired a technical meaning or been used in a sense other than their ordinary one. But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from ports of the United Kingdom: and the rules will often have to be interpreted in the Courts of the foreign consignees. For the purpose of uniformity it is, therefore, important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them."

Lord MacMillan in the same case, had this to say:

"The Bills of Lading, as required by s. 3 of the Act of 1924, contain an express statement that the shipowners are to be entitled to the privileges, rights and immunities contained in (*inter alia*) Art. IV. of the Schedule to the Act..... It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."

See also the passage from the judgment of Devlin J. *in Anglo-Saxon Petroleum Co.* v. *Adamastos Shipping Ltd.* [1957] 2 *Q.B.* 233, 253, with regard to the meaning attached to the words

"loss or damage". This passage was approved in the same case in the House of Lords ([1959] A.C. 133, 157).

Finally, with regard to the allegation of theft, whilst the goods were in the custody of the customs, no evidence at all has been adduced to show affirmatively that the said goods were discharged from the ship "Europe" and that they were taken to the store-room allocated by the authorities. As I have said earlier, if the defendants wanted to escape from liability, they had to show that the loss was not due to the negligence of their servants or agents. In the present case the ship-owners, in my view, did not succeed in discharging the burden of proof resting upon them, because the loss of the goods remains unexplained. Certainly there is evidence that goods similar to those of the plaintiffs were stolen, but nevertheless, the defendants are not exonerated from blame unless they can show that the theft took place whilst the goods were no longer in their custody. It is in evidence that the work of discharge of the goods was carried out by stevedores employed by the agent defendant 2, by and on behalf of the ship-owners, but I would like to reinstate that in the absence of evidence showing whether the goods were actually stolen from the ship or whether the loss was due to other thieves who were confederates of the stevedores, and as it had not been established that they were not, consequently, in my opinion, the defendants have failed to prove that the loss occurred without the fault or negligence of their servants or agents. See on this point *Heyn* v. *Ocean SS. Co.* (1927) 137 *L.T.* 158.

Furthermore, from the evidence before me, I have no difficulty to reach the conclusion that the goods in question were not actually delivered into the room allocated to the agent of the ship for the purposes of storing the goods there.

For the reasons I have endeavoured to advance, I have reached the conclusion that the first defendants are liable, and that they have failed to discharge the onus upon them that they have exercised reasonable care, and furthermore to bring themselves within the immunities specified in Article IV r. 2. I would, therefore, dismiss the contention of counsel.

In the result, I would, therefore, give judgment in favour of the plaintiffs for the sum of £784.500 mils with costs against the first defendants only. Since it has been conceded by both

counsel that the second defendant has been acting all along as the agent of the first defendants, I would dismiss the action against him with no order as to costs.

Judgment for plaintiffs against the first defendants in the sum of £784.500 *mils with costs. Action against the second defendant dismissed; no order as to costs.*