

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Peninsular and Oriental Steam Navigation Company v. the Honourable Farquhar Shand, from the Supreme Court of Mauritius ; delivered 20th July, 1865.*

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Present :

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JOHN TAYLOR COLERIDGE.

THIS is an Appeal against a Judgment of the Supreme Court of Mauritius in favour of the Respondent, who sued the Appellants for damages occasioned by their non-delivery at Mauritius of certain articles of baggage.

The facts of the case appear to be that the Respondent, the Chief Justice of the Court below, intending to proceed to the Mauritius with his family, took and paid for a ticket for the passage from Southampton to Alexandria, and from Suez to Mauritius, for which he paid one entire sum of 315*l.* ; in the body of the ticket the engagement of the Appellants was stated to be subject to the conditions and regulations endorsed, and on its face, at the foot of it, the Respondent signed his acceptance in the following form—"I hereby accept this ticket, subject to the conditions and regulations endorsed thereon."

Numerous regulations both as to the passengers and as to their baggage were endorsed, and at the close of all was a notice commencing thus, "All parties are requested to take notice," and containing among other things the following clause, "that the Company do not hold themselves liable for damage to or loss or detention of passenger's baggage."

By the ticket it appeared that the voyage from Southampton to Alexandria was to be on board the "Ceylon," and from Suez to Mauritius on board the "Norna;" nothing, however, turns on this nor on the land carriage between Alexandria and Suez, although in the argument for the Respondent some reliance was placed on the fact that the Appellants during this last transit took exclusive possession and charge of the passengers' baggage, with some trifling exceptions of articles required for immediate personal use. At Suez the "Norna" lying a little distance out at sea, in consequence of the shallowness of the water, the passengers were conveyed to her in a small steam-boat, the baggage in another vessel. It was on board this small steamer that, according to the evidence, the parcel in question was last seen. It consisted of cloaks, an over-coat, and plaids—articles which probably had been retained for personal use. When last seen, however, it was in the possession and custody of one of the servants of the Appellants. The Respondent's female servant would have herself taken it on board the "Norna," but the servant of the Appellants told her not to do so, for that he would take charge of it. Whether it reached the "Norna" is uncertain. It was missed by the Respondent when on board that vessel, and on the arrival at Mauritius it was not forthcoming.

Upon these facts the Court below held that the law by which the case was to be tried was the French law, which prevails generally at Mauritius, and that by that law the Appellants were liable. In the argument before their Lordships the latter proposition was not seriously disputed, but it was contended that the Court below should have tried the case by the rules of English law, and that according to those rules the Appellants were protected under the circumstances of the case by the terms of their contract with the Respondent. On his part, however, it was argued that even if the Court below were wrong as to the rule it had governed itself by, yet the Judgment was right even upon the principles of English law. The case was ably and learnedly argued, and a very large number of authorities were cited for the Respondent; the conclusion, however, at which their Lordships have arrived is that the Appellants are right in both of their propositions,

and consequently that the Judgment below cannot be supported.

In stating the grounds upon which their Lordships have arrived at this conclusion, it will not be necessary to review or distinguish between all the authorities cited in the argument; every one who is but moderately familiar with the text books and decisions must know how easy it is to produce authorities on either side, when the question is by what law to interpret a contract made in one country, and to be performed, wholly or partly, in another; but if these be carefully examined, it will be found, after all, that the same general principles have, for the most part, prevailed throughout, and that where the conclusions vary, they do so from distinctions more or less minute in the facts. The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the Power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign Court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations. Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties.

This is a contract made between British subjects in England, substantially for safe carriage from Southampton to Mauritius. The performance is to commence in an English vessel, in an English port; to be continued in vessels which for this purpose carry their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the Appellants frame and issue, they have introduced for their own protection a stipulation, professing in its terms to

limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the Respondent, and required his signature to it, what must it be presumed that he understood to be their intention as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and for damage to it; or to stipulate for something to which, however clearly expressed, the law would allow no validity? This question leaves untouched, it will be observed, the extent of the contemplated protection; it asks, in effect, Was it intended that the stipulation in case of an alleged breach of contract should be construed by the rules of the English law, which would give some effect to it? or by those of the French or any other law, according to which it would have none, but be treated as a merely fruitless attempt to evade a responsibility inseparably fixed upon the Appellants as carriers? The question appears to their Lordships to admit of one answer only; but if they take the Respondent so to have understood the intention of the Appellants, they must take him to have adopted the same intention; it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different in so important an article; he could not have done this if the intention had been expressed, and there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood.

The actual intention of the parties therefore must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law; and as there is no rule of general law or policy setting up a contrary presumption, their Lordships will hold that the Court below was wrong in not governing itself according to those rules.

It is a satisfaction to their Lordships to find that in the year 1864 the Cour de Cassation in France pronounced a Judgment to the same effect in a case under precisely the same circumstances, which arose between the Appellants and a French officer who was returning with his baggage from Hong Kong in

one of their ships, the "Alma," and who lost his baggage in the wreck of that vessel in the Red Sea. The same question arose as here on the effect to be given to the stipulation in the ticket; two inferior Courts, those of Marseilles and Aix, decided it in favour of the Plaintiff on the provisions of the French law; the Supreme Court reversed these decisions, and held that the contract having been made at Hong Kong, an English possession, and with an English Company, was to receive its interpretation and effect according to English law.

Still, as has been already intimated, there remains the question what, according to English law, is the extent of the limitation imposed by the stipulation in the ticket on the responsibility of the Appellants. This is next to be considered: the case depends on the Common Law; it is not within either the Carriers' Act of 11 Geo. IV, 1 Wm. IV, cap. 68, or the Railway and Canal Traffic Act, 17 & 18 Vict., cap. 31.

It seems now incontestable that at Common Law it is open to carriers to limit their Common Law liability by special agreement with the consignors of goods; and this, according to some decisions, even to the extent of relieving themselves from the consequences of their own negligence. The contract here is that the Appellants shall not be responsible "for damage to, or loss, or detention of passengers' luggage," and the question is, what is the meaning to be given to the word "loss." Nothing can be more general than the words used by the parties. They do not enter into any distinctions as to how the damage, loss, or detention may have been occasioned, whether by pure accident, or through the negligence, or even misconduct, of the Appellants. But the facts of this case make it unnecessary to consider whether, reasonably understood, they express an intention to protect the Appellants against answering for gross negligence or positive misconduct. Upon this their Lordships express no opinion whatever. The missing baggage is last seen in its transit from the shore at Suez to the "Norna," in which it should have been conveyed to Mauritius; it was then in the keeping of the Appellants by one of their servants. Their Lordships consider the circumstance that this servant insisted on having the keeping, and refused it to the Respondent's

servant, raises no inference against the Appellants. Ordinarily speaking it is a regulation prudent and convenient, that the Company's servants, and not the several passengers, should have throughout the custody of the baggage on board. It does not appear that anything was done but in obedience to such a regulation; at all events no inference of want of due care or honesty is raised by this circumstance. How, after this, or when or where, the baggage in question was lost, there is no evidence to show. It is difficult to say what loss would be protected if this were not, or what meaning could be reasonably given to the word "loss," which would exclude such a non-arrival of the baggage as this. This is a contract to be construed on the general principles on which the construction of contracts is ordinarily determined. It would be a strange construction, and against common sense, when the parties have used the simple word "loss," to hold that they intended to limit its meaning to such cases as those in which the carriers should be able to prove all the circumstances, and that those circumstances cleared them from all blame whatever. Every one must see that this at least is not the contract into which the parties have entered; yet this in effect was the contention for the Respondent. Their Lordships have no doubt on the whole that the loss in this case falls within the true meaning of the stipulation, and that the Appellants are thereby protected from being answerable for it. They will, therefore, humbly recommend to Her Majesty that the Judgment below be reversed, with the costs in the Court below and of this Appeal.

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