Privy Council Appeal No. 82 of 1938

Vita Food Products Inc. - - - - - *Appellant*

v.

Unus Shipping Company Limited in liquidation - - *Respondent*

FROM

THE SUPREME COURT OF NOVA SCOTIA EN BANC

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JANUARY, 1939

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
LORD WRIGHT.
LORD PORTER.

[*Delivered by* LORD WRIGHT.]

This appeal arises out of a claim made against the respondent, a body corporate incorporated under the law of Nova Scotia now in liquidation, as owner of the motor vessel "Hurry On" registered at the port of Halifax, Nova Scotia. The claim was made by the appellant, a body corporate carrying on business at New York, in the United States, for damage and loss suffered in respect of consignments of herrings which were being carried in the "Hurry On" from Middle Arm, Newfoundland, to New York, and were delivered in a damaged condition.

In January, 1935, the "Hurry On" was put up as a general ship for the carriage of cargo, including herrings, from Newfoundland ports to New York. Middle Arm was one of these ports. At that port there were loaded in the "Hurry On" three lots of herrings in barrels for carriage to New York. The appellant purchased the herrings from M. G. Basha, whose name appears on the bills of lading. It is not clear when the property passed, but so far as concerns this case the appellant may be treated as owner of the herrings at all material times. Bills of lading were issued on behalf of the ship. They were dated Middle Arm, 15th January, 1935, and acknowledged receipt on board of the goods in apparent good order and condition from M. G. Basha, and provided for delivery in the like apparent good order and condition at New York, "unto order Commercial National Bank and Trust Co., notify Vita Food Products, New York, or his or their assigns." W. A. Shaw acted for the ship as broker or agent in Newfoundland to secure the

cargo, and J. Poole acted as a sort of super cargo, and signed the bills of lading for the ship. By some error or inadvertence the bills of lading so signed by Poole were old ones used outside Newfoundland by Shaw at other ports for other vessels, and did not incorporate the Hague Rules which had been adopted by the Carriage of Goods by Sea Act enacted in Newfoundland in 1932. It is this fact or accident which has led to the questions agitated in this case.

The "Hurry On" sailed from Middle Arm on 16th January, 1935, bound for New York with the herrings on board. On the 18th January, 1935, she ran into bad weather and ice off the coast of Nova Scotia. The captain decided to make for a port of refuge but in the attempt to do so ran ashore at Grady Point in Nova Scotia in a gale of wind. The ship was eventually got off and taken to Guysboro, where the herrings were unloaded, reconditioned and forwarded by another ship to New York. At New York the appellant took delivery of the herrings in their damaged condition under the bills of lading and paid freight, and then claimed for the damage to the herrings and for salvage and other expenses. The allegation in the action that the ship was unseaworthy was rejected by the Courts in Canada and need not now be considered; it is however admitted that the loss was due to the captain's negligence in navigation. The provisions either of the bills of lading or of the Carriage of Goods by Sea Act would exempt the respondent from liability for a loss due to negligence, but it was contended on various grounds to be discussed later that, as the Act had not been complied with, the exceptions did not avail the respondent, and that it was subject to the liabilities of a common carrier. This contention was rejected by the Chief Justice of Nova Scotia, where the action was brought, and also by the Supreme Court of the Province. In addition the Supreme Court held that if the bills of lading were illegal, the parties were *in pari delicto* and on that ground also the action must fail.

The bills of lading are in identical terms except as to the description of the goods included in each parcel, and it will be convenient to begin by stating briefly the substance of them and of the Act. The bills of lading contained, as already stated, an acknowledgement that the goods had been received on board for carriage to New York, with a proviso that they should be at shipper's risk while at the dock pending loading. There was a later clause by which in accepting the bill of lading the shipper, consignee and holder of the bill of lading agreed to be bound by all its stipulations as fully as if the shipper, consignee or holder had signed it. The bill of lading set out in detail the "Terms and Conditions of this Contract Bill of Lading which are hereby mutually agreed upon as follows." These terms and conditions, so far as material, may be briefly summarised. There were the usual exceptions of sea and other perils, and the usual exemptions of specified classes of damage such as leakage, breakage and so forth. Of these latter clause 7 is specially material in this case. It contains a general exemption in respect of the goods carried from liability for all

damage capable of being covered by insurance, and from liability above a certain value per package unless a special declaration is made. There follows a wide general exemption of loss or damage due to negligence of the shipowners' servants at or after the commencement of the voyage, or to unseaworthiness provided all reasonable means had been taken to provide against it. General average was to be settled according to York Antwerp Rules, 1924, and adjusted in the country selected by the owners. The same clause also provided that "This contract shall be governed by English law." By clause 8 the liability of the goods to contribute to general average and similar charges was not to be affected though the necessity for that contribution was due to negligence or unseaworthiness, provided, however, that due diligence was exercised to make the ship seaworthy and properly manned, equipped or supplied. By clause 22 no claim was to be admitted unless made in writing within 15 days after delivery or failure to deliver the goods. Provision was also made that in the case of shipments from the United States the Harter Act of 1893 was to apply. It was also stipulated that save as so provided, the bill of lading was subject to the terms and provisions of and exemptions from liability contained in the then unrepealed Canadian Water Carriage of Goods Act, 1910, and the clause of that Act which declared illegal, null and void any clauses exempting the shipowners from liability save in accordance with the provisions of that Act was specifically incorporated. The Canadian Act only applies to shipments of goods from any port in Canada, whether to ports in Canada or ports outside Canada, and accordingly *primâ facie* would not apply to a shipment from Newfoundland. In any event the incorporation of the Canadian Act, like the incorporation of the Harter Act, would only have effect as matter of contract on the principles laid down in *Dobell* v. *Steamship Rossmore Co.*, [1895] 2 Q.B. 408.

The Newfoundland Act, passed in 1932, recited that it is expedient that the rules agreed to as a draft convention for the unification of certain rules relating to bills of lading by the delegates of a number of States, including the delegates representing His Majesty at the International Conference on Maritime Law held at Brussels in October, 1922, and afterwards amended at a further conference at Brussels in October, 1923, should, subject to the provisions of the Act, "be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading."

Of the sections of the Act, it is necessary to set out sections 1 and 3 in full. They are as follows:—

Section 1.—Subject to the provisions of this Act, the rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.

Section 3.—Every bill of lading or similar document of title issued in this Dominion which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as expressed in this Act."

Sections 4, 5 and 6 (3) contain certain provisions to which the rules are subject. Section 7 gives any Court in Newfoundland having jurisdiction to the amount claimed power to try any action for loss or damage to goods carried by sea to or from the Dominion of Newfoundland, notwithstanding any stipulation in the bill of lading or similar document.

The rules which are thus given the force of law are set out in full in the schedule to the Act. These rules, often called the Hague Rules, are identical with those scheduled to the British Sea Carriage of Goods Act, 1924, and have now been adopted with or without modifications by certain foreign States, including recently the United States, and also by the Crown Colonies, by Australia, by Canada, and by New Zealand. They confer rights and immunities and also impose liabilities upon the shipowner; liabilities which he cannot escape since article III (8) avoids any clause or agreement relieving the carrier from the liability for negligence imposed by the rules or lessening that liability. But the Act and rules only apply where a bill of lading is issued and there is no provision making it imperative for the carrier to issue a bill of lading save on demand of the shipper.

If the rules are compared with the provisions of the bills of lading in suit, they agree in substance in respect of the relevant matters, viz., liability in respect of negligence and unseaworthiness. In some respects the rules go beyond the bills of lading, as for instance where they provide that the carrier is to be released from liability if suit is not brought within one year after delivery has been or should have been made. In other respects the bills of lading contain provisions which are outside the scope of the Act and rules. The bills of lading are furthermore documents of title which define the contractual voyage and provide for general average and for the obligation to deliver the goods which are received at the dock and actually loaded. Moreover they expressly stipulate that the proper law of the contract is to be English law. It is necessary to bear such matters in mind when the central questions in the case are being considered, that is, the questions whether the failure to obey section 3 of the Act is illegal under the law of Newfoundland the place where the contract was made, and whether that failure renders the contract void in the Courts of Nova Scotia, and in either event what is the resultant legal position. The learned Chief Justice held that notwithstanding the non-inclusion of the clause paramount (by which is meant the clause specified in section 3) the bills of lading were effective documents but are subject to the exemptions, not of the bills themselves, but to those prescribed in the rules, and that in the circumstances the latter exemptions gave a good defence

to the shipowner so that the action failed. The Supreme Court also held that the action failed but reached that conclusion by a different route. The reasoning of the learned Judges did not in all respects agree, but in substance they held that disobedience to section 3 constituted an illegality in which both parties were equally concerned, and accordingly the action failed whether laid in contract or in tort. They held that the appellant's arguments involved it in a dilemma, either the bills of lading were good or they were illegal. In either event the suit failed.

Their Lordships are of opinion that the bills of lading were not illegal, and must be accepted as valid documents by the Courts of Nova Scotia. The precise meaning of this statement however and the reasoning on which it is based require elucidation.

The first question to determine is the true construction of sections 1 and 3 of the Act. Section 1 provides for the application of the rules to every bill of lading for the carriage of goods by sea in ships from any port in Newfoundland to any other port, whether in or outside that Dominion. The appellant contended that since section 1 only provided that the rules should have effect "subject to the provisions of this Act", the rules could not apply to a bill of lading unless the terms of section 3 were complied with. Their Lordships do not so construe the section. In their opinion the words "subject to the provisions of this Act" merely mean in this connection that the rules are to apply but subject to the modifications contained in sections 2, 4, 5 and 6 (3) of the Act. To read these words as meaning that the rules are only to have effect if the requirements of section 3 are complied with, would be to put an unnecessarily wide interpretation upon them instead of the narrower meaning, which is more natural and obvious. In their Lordships' judgment section 1 is the dominant section. Section 3 merely requires the bill of lading to contain an express statement of the effect of section 1. This view of the relative effect of the sections raises the question whether the mandatory provision of section 3, which cannot change the effect of section 1, is under Newfoundland law, directory or imperative, and if imperative whether a failure to comply with it renders the contract void, either in Newfoundland, or in Courts outside that Dominion.

It will be convenient at this point to determine what is the proper law of the contract. In their Lordships' opinion the express words of the bill of lading must receive effect with the result that the contract is governed by English law. It is now well settled that by English law (and the law of Nova Scotia is the same) the proper law of the contract "is the law which the parties intended to apply." That intention is objectively ascertained and if not expressed will be presumed from the terms of the contract and the relevant surrounding circumstances. But as Lord Atkin, dealing with cases where the intention of the parties is expressed, said at p. 520 in *Rex* v. *International Bondholders* [1937]

A.C. 500 (a case which contains the latest enunciation of this principle), "their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive." It is objected that this is too broadly stated and that some qualifications are necessary. It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions. But where the English rule that intention is the test applies and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy. In the present case however it might be said that the choice of English law is not valid for two reasons. It might be said that the transaction which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries contains nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of principle essential. The provision in a contract (e.g. of sale) for English arbitration imports English law as the law governing the transaction and those familiar with international business are aware how frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England. Moreover in the present case the "Hurry On" though on a Canadian register is subject to the Imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English. In any case parties may reasonably desire that the familiar principles of English commercial law should apply. The other ground urged is that the choice of English law is inconsistent with the provisions of the bill of lading, that in respect of certain goods the Harter Act or the Canadian Water Carriage of Goods Act of 1910 (now repealed, but in force at the date of the bill of lading) was to apply. It has been explained that the incorporation of these Acts may have only contractual effect, but in any case though the proper law of the contract is English, English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and apart from such incorporation other laws may have to be regarded in giving effect to the contract. The proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms. But that part of the English law, which is commonly called the conflict of laws requires where proper the application of foreign law, e.g., English law will not enforce a performance contrary to the law of the place of performance in circumstances like those existing in *Ralli Bros.* v. *Compania Naviera Sota y Aznar* [1920] 2 K.B. 287,

and the law of the place of performance, though it will not be effective to affect the construction of the contract in regard to its substance (which must be ascertained according to the rule of the proper law, as was held in *Jacobs* v. *Crédit Lyonnais* 12 Q.B.D. 589), will still regulate what were called in that case the incidents and mode of performance in that place. English law will in these and sometimes in other respects import a foreign law, but the contract is still governed by its proper law. The reference to the United States and the Canadian Acts does not on any view supersede English law which is to govern the contract, nor does Newfoundland law, though Newfoundland was the place where the contract was made, apply to oust English law from being the law of the contract, and as such from being the law which defines its nature, obligation and interpretation, though Newfoundland law might apply to the incidents of performance to be done in Newfoundland. There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with section 3 of the Act.

If however by reason of this failure to obey the Act the bills of lading were illegal in Newfoundland, it would not follow as a necessary consequence that a Nova Scotian Court, applying the proper law of the contract, would in its own forum treat them as illegal, though the position of a Court in Newfoundland might be different, if it held them illegal by Newfoundland law. A Court in Newfoundland would be bound to apply the law enacted by its own Legislature, if it applied, and thus might treat the bills as illegal, just as the Supreme Court in the United States treated as void an exemption of negligence in a bill of lading issued in the United States, though in relation to the carriage of goods to England in an English ship (*Montana,* 129 U.S. 397). Such a clause, it was held, was against public policy and void by the law of the United States, which was not only the law of the forum but was also held to be the proper law of the contract. This decision may be contrasted with *In re Missouri Steamship Co.,* 42 Ch. D. 321, where in similar circumstances the Court of Appeal, holding the proper law of the bill of lading to be English, held that English law did not apply the American rule of public policy though the shipment took place in America and the bill of lading was issued there, and that the clause being valid in English law must receive effect.

With these considerations in mind it is necessary first to consider if the bills of lading are illegal by Newfoundland law. If they are not, the question of illegality cannot arise in the Courts of another jurisdiction, e.g.:—those of Nova Scotia. Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinise the particular circumstances with precision in

order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibitions in *Liverpool Borough Bank* v. *Turner,* 2 De G.F. and J. 502:—

> "No universal rule can be laid down for the construction of statutes as to whether mandatory enactments can be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the contract to be construed."

In that case the Court by a careful examination of the object of the Act and the public importance of compliance with it, held the transfer of a vessel to be a nullity for breach of a registration law. The same result has been reached in other cases, some of which have been cited in argument where breaches of statutes were held to nullify the transactions in question, even without express words of nullification. On the other hand cases can be cited where the contract was not avoided by some particular illegality, e.g., *Kearney* v. *Whitehaven Colliery Co.* [1893] 1 Q.B. 700, where an illegality in a certain respect in an agreement of employment was held not to vitiate the whole contract. Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void, are in proper cases nullified for disobedience to a statute is a rule of public policy only and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

Are there such grounds for holding that the Newfoundland law does in Newfoundland nullify bills of lading such as those in question? In their Lordships' opinion there are not. The matter can be tested by asking what would be the position if a bill of lading set out *in extenso* the exact provisions of the rules, but failed to contain an express statement in compliance with section 3, that the provisions of the rules applied to it. Surely such a bill of lading could not be regarded as illegal. Or again, what is the position where not only is a shipment made in a Newfoundland port but the port of delivery also is in Newfoundland? In such a case section 1, by its own force, imports the rules and section 3 is merely an intimation of what, if the parties concerned are all residents or natives of Newfoundland and bound by that law, they must be taken to be aware. At least this is the position if Newfoundland law governs the contract. It seems impossible to hold that in such cases the bills of lading would be illegal and void. If that is so of a transaction beginning and ending in Newfoundland, and if such a transaction is not illegal, their Lordships do not think that such a transaction is to be treated as illegal because the place of delivery is outside Newfoundland and the parties or some of them are outside that Dominion and are not bound by its laws. It is said that the rules are not made part of the contract save when there is an express clause in the contract stating that they are to apply as provided in section 3 and that to hold the bills of lading legal and effective documents

without such a clause would frustrate the purpose of the Hague Rules and of the International Conference, which aims at an obligatory unification of bills of lading all over the world, at least so far as particular nations adopt them. The Act, however, does not in terms provide that the bill of lading is to be deemed illegal and void merely because it contravenes section 3, nor does it impose penalties for failure to comply with section 3, nor does it in terms expressly prohibit the failure. Indeed there is nothing to prevent a contract of sea carriage in respect of which there is no bill of lading at all, see *Harland and Wolff* v. *Burns*, 31 S.C. 722. The inconveniences that would follow from holding bills of lading illegal in such cases as that in question are very serious. A foreign merchant or banker could not be assumed to know or to enquire what the Newfoundland law is, at any rate when the bill of lading is not expressed to be governed by Newfoundland law and still less when it provides that it is governed by English law, and it would seriously impair business dealings with bills of lading if they could not be taken at their face value, and as expressing all the relevant conditions of the contract. It was partly for that reason that in *Dobell* v. *Steamship Rossmore Co.* [1895] 2 Q.B. 408, the Court of Appeal refused to treat the Harter Act as having any effect as a foreign law affecting the validity of the contract but treated it only as part of the English contractual document which expressly embodied it. A bill of lading fulfils other functions than merely that of setting out the conditions of carriage. It is a document of title which if endorsed passes the property, and which if money is advanced upon it, as is done in ordinary course of business, passes a special property by way of pledge to the banker or other lender. It would be a grave matter if business men when dealing with a bill of lading had in a case like the present to enquire into the foreign law ruling at the port of shipment.

All these reasons seem to justify the conclusion that the omission of what is called the clause paramount does not make the bills of lading illegal documents, in whole or in part either within Newfoundland or outside it. Section 3 is in their Lordships' judgment directory. It is not obligatory nor does failure to comply with its terms nullify the contract contained in the bill of lading. This, in their Lordships' judgment, is the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion. If that is so the bills of lading are binding according to their terms and consequently the respondent is entitled to succeed in its defence.

But on the basis that the bills of lading were illegal in Newfoundland in that their issue without the clause paramount was prohibited by the law of that country it was argued that no Court in any country would enforce their terms and exemptions and the carriage would therefore be upon the terms implied where goods are taken for carriage

by a common carrier, i.e., subject only to the exception of the Act of God and the King's Enemies. No further terms it was said, could be implied nor could any reliance be put upon the provisions of the Hague Rules since they had not been incorporated in the bills of lading by the insertion of the clause paramount. The appellant contended that unless the clause was inserted, no contract between carrier and shipper which included the provisions of the Hague Rules was entered into. Nor could the Act be said to have incorporated them even in Newfoundland itself since section 1 only provided that the rules should have effect "subject to the provisions of this Act," a phrase which the appellants maintained meant *inter alia* that the rules were not incorporated unless the provisions of section 3 were complied with. For reasons already explained their Lordships do not so construe the section.

But whatever view a Newfoundland Court might take, whether they would hold that the contracts contained in the bills of lading must be taken to have incorporated the Hague Rules or whether they would hold them to have been illegal, the result would be the same in the present case where the action was brought not in a Newfoundland, but in a Nova Scotian Court. It may be that if suit were brought on these bills of lading in a Newfoundland Court and the Court held they were illegal, they would refuse to give effect to them, on the basis that a Court is bound to obey the laws of its own legislature or its own common law, as indeed the United States Supreme Court did in *The Montana* (*supra*). But it does not follow that any other Court could properly act in the same way. If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law. This was done in the *Missouri* case (*supra*), both by Chitty J. and by the Court of Appeal. Lord Halsbury having stated that the contrary view would mean that no country would enforce a contract made in another country unless their laws were the same, said (p. 336),

> "that there may be stipulations which one country may enforce and which another country may not enforce, and that to determine whether they are enforceable or not, you must have regard to the law of the contract, by which I mean the law which the contract itself imports to be the law governing the contract."

Having held that the law of the contract was English, he went on to hold that the exception of negligence even if of no validity in the place where made, must receive effect in English law, although the exception of negligence was invalid in the United States as being against the public policy of that country and although to do an act contrary to public policy is one type of illegal action. The same attitude is illustrated in *Dobell* v. *Rossmore* (*supra*), where the Harter Act, which declares certain stipulations to be unlawful and imposes penalties on shipowners inserting them in bills of lading, was not considered as affecting the English contract as a part of the contract where its provisions were infringed, save so far as it was expressly incorporated.

Foreign law was also disregarded in *Trinidad Shipping Co.* v. *G. R. Alston & Co.*, [1920] A.C. 888, where the contract was an English contract and payment of certain rebates on freight were rendered illegal by the law of the United States where the freight was payable. From the rule which he states Lord Halsbury in the *Missouri* case puts aside:—

> "questions in which the positive law of the country [*sc.* the foreign country] forbids contracts to be made. Where a contract is void on the ground of immorality or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world and no civilised country would be called on to enforce it."

In this passage Lord Halsbury would seem to be referring to matters of foreign law of such a character that it would be against the comity of nations for an English Court to give effect to the transaction just as an English Court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of Lord Halsbury's proviso has not been defined. There may also be questions in some cases as to the effect of non-performance of conditions which by the foreign law of the place where a contract was entered into, are essential to its formation, though even in that case the validity of the contract may depend on its proper law. But whatever the precise ambit of that saving expression, it is clear that it does not apply to such a statutory enactment as section 3, even if disobedience to it were regarded as rendering the bill of lading in some sense illegal.

It is, however, necessary before parting with this aspect of the case to consider whether *The Torni* [1932] P. 78, (in which the Court of Appeal affirmed the judgment of Langton J.) should be applied, as the respondent's counsel contend it should, in the respondent's favour. The bills of lading in that case had been issued in Palestine, a territory over which His Majesty held a mandate. Two bills of lading, the only bills material in the case, had been endorsed to Hull merchants. The shipment was to Hull. The question was whether these bills of lading were to be construed according to their actual terms or whether those terms were supplemented or supplanted by the Hague Rules, there being a Sea Carriage of Goods Ordinance in Palestine corresponding to the Newfoundland Act. There were certain differences between that case and the present. One was that the bills of lading had a clause providing that they were "to be construed in accordance with English law" not as in the present case "shall be governed by English law." In their Lordships' judgment that distinction is merely verbal and is too narrow to make a substantial difference. The construction of a contract by English law involves the applications to its terms of the relevant English statutes, whatever they may be and the rules and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense the construing of the contract has the effect that the contract

is to be governed by English law. In addition even apart from that term (and *a fortiori* with it) the form of the bill of lading would point to it being an English contract (*The Industrie,* [1894] P. 58). The law of the flag was Esthonian, which was not likely to be taken as the proper law of the contract. The other distinction was in section 4 of the Palestine Ordinance which corresponded to section 3 of the Newfoundland Act. The former section which was otherwise identical with section 3 contained the additional words " and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." In view of the effect of section 1 as construed by their Lordships the additional words seem to them to add nothing in substance. The indorsees were claiming in the action for damage and short delivery and the question was set down for trial as a preliminary issue whether the bills of lading were subject to the provisions of the Ordinance. The Court of Appeal held that they were. The grounds of this decision were that the bills would have been illegal because they did not contain the stipulated express clause had it not been for the fact that its omission was immaterial because by the law of Palestine the clause was incorporated whether expressly inserted or not and the bills of lading were therefore legal. It was also held that the stipulation that the contract should be construed by English law did not mean that English law should be the proper law of the contract but merely that English rules of construction as contrasted with English substantive law, should apply. The law of Palestine was the substantive law to be applied and governed the contract.

As already indicated their Lordships do not agree with this view. With the greatest respect to the Court of Appeal their Lordships are of opinion that the decision is contrary to the principles on which they have proceeded in the previous part of this judgment and that it cannot be supported. The Palestine Ordinance, so far as appears, did not any more than the Newfoundland Act make the contract illegal so as to nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract, that is the law by which it was to be enforced and governed, should be English law. To do so is to contravene the fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply. The effect of the judgment seems to be to read the bill of lading as if it expressly provided that it was to be governed by the law of Palestine. Nor does the Court of Appeal seem to have had its attention directed to the *prima facie* rule that an English Court dealing with a contract made in a foreign jurisdiction, as Palestine was, must first ascertain what was the bargain of the parties and give effect to that bargain unless debarred by some provision of the foreign law which binds the Court. In general, for reasons already explained, legislative provisions such as those in question do not have extra-territorial effect and do not debar the Court from giving effect to the bargain of the

parties. The exceptions to this general rule do not apply here. It may be that a Court in Palestine, bound to give effect to the laws under which it exercises jurisdiction might arrive at a different conclusion. No opinion can here be expressed on that matter nor would it be material in considering the effect which a Court outside Palestine should give to the contract. Nor is it necessary to consider what the position would have been if the bills of lading had expressed that they were governed by the law of Palestine. Their Lordships do not think that they should follow or apply the reasoning in *The Torni*.

A further question strenuously argued on the assumption that the bills of lading were illegal and void was that the appellant was entitled to recover in tort against the respondent as a bailee, which had no contractual protection but was simply liable for its admitted negligence whether as common carrier or bare bailee. As the assumption, in their Lordships' judgment, fails, the question does not arise. It may, however, be pointed out that if there were illegality in respect of the bills of lading, both parties would be *in pari delicto*. In a case like this, the bills of lading contain the contract. On that footing they are issued by the shipowner and accepted by the shipper, as indeed the bills expressly state. The question of illegality would not depend on pleading or procedure or who first might or should produce the documents. It would be a question of substance, of which if necessary the Court would of its own motion take cognisance and to which the Court would give effect. Furthermore though there may be cases in which an action may be brought indifferently either in contract or in tort this is not such a case. The actual transaction between the parties cannot be ignored even in an action in tort. The transaction includes as an essential part the bills of lading whether regarded from the point of view of the contractual exceptions or of illegality. To apply the language of Lord Sumner in the *Elder Dempster* case [1924] A.C. 522 at p. 564, there is not here a bald bailment with unrestricted liability, or tortious handling independent of contract. Such a view would be a travesty of fact. Hence even on that footing the respondent would fail, either because it was party to an illegality avoiding the contract or alternatively because the contractual exemptions could not be ignored.

Their Lordships are of opinion that the appeal should be dismissed with costs and will humbly so advise His Majesty.

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In the Privy Council.

VITA FOOD PRODUCTS INC.

v.

UNUS SHIPPING COMPANY LIMITED
IN LIQUIDATION

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