

mittee of the Privy Council on the appeal from the Court of Appeal of New Zealand in the case of the Union Steamship Company of New Zealand (Limited) v. the Wellington Harbour Board.

I have, &c.,

L. HARCOURT.

Governor His Excellency the Right Hon. the Earl of Liverpool,
G.C.M.G., M.V.O., &c.

Enclosure.

Privy Council Appeal No. 69 of 1914.

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND (LIMITED), Appellants, v. THE WELLINGTON HARBOUR BOARD, Respondents.

From the Court of Appeal of New Zealand.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Delivered the 9th March, 1915.

Present at the hearing: Lord Dunedin; Lord Shaw; Sir George Farwell; Sir Arthur Channel.

[Delivered by Sir George Farwell.]

THIS is an appeal from the judgment dated 28th October, 1913, of the Court of Appeal of New Zealand, affirming a declaratory order dated 3rd April, 1913, of the Supreme Court.

The question depends on the true construction of section 116, subsection (1), of the Harbours Act, 1908, and of sections 17 and 32 of a contract dated 11th November, 1910, and made between the Postmaster-General of New Zealand on behalf of His Majesty of the one part and the defendant company of the other part. Section 116, subsection (1), of the Harbours Act provides as follows: "Nothing in this Act shall charge with any dues any steamship carrying mails under any contract made with the Postmaster-General in cases where it is provided by the terms of such contract that such steamships shall be exempt therefrom."

It is clear that no agreement *inter partes* can extend or enlarge the privilege given by this Act. The first and main question therefore is, What is the meaning of a "steamship carrying mails"? and it is best appreciated by taking the facts as arising under the above-mentioned contract. Under section 17 thereof no charge for harbour dues, dock dues, or other rates was to be made or levied under the Act of 1908 "at the Ports of Wellington or Auckland for any of the steamships employed in the services under this contract." The services under the contract bound the company to carry the mails whenever required from and to New Zealand and San Francisco; and under section 6 of the agreement such mails were to be conveyed thirteen times in the year (once every four weeks) from Wellington to San Francisco by way of Auckland, Rarotonga, and Papeete, and from San Francisco to Wellington by way of Papeete and Rarotonga. The steamships "carrying mails" under the contract are properly described as "employed in the services under this contract." But the company, under section 32, obtained liberty to extend the service thereby provided for by continuing the voyage of the vessels employed thereunder, and the conveyance of mails from San Francisco to Wellington to the Port of Sydney, and thence back to Wellington or Auckland, but without any payment from the Postmaster-General for the extended service, and with the duty of providing and maintaining a third vessel, "and such extended service shall be maintained by the company under and subject to all the provisions hereinbefore contained." Under this liberty the company has frequently carried mails from Australia to the United Kingdom, and from Australia to New Zealand. But these mails are not carried under the contract. Even if the appellants could bring these mails within the 32nd section this would not assist the appellants, for the exemption under the Harbours Act is confined to a steamship carrying mails "where it is provided by the terms of such contract that such steamships shall be exempt therefrom," and there is no such provision here: the company is bound to maintain the extended service "under and subject to all the provisions" thereinbefore contained, but there are no words giving it any of the benefits thereinbefore contained. A clause imposing obligations in general terms is a restrictive, not a donative clause. As is familiar in conveyancing, when a lease is assigned subject to the covenants and conditions by the lessee, the words "with the full benefit of the lessor's covenants" are added if such benefit is intended to pass.

Then, it was argued that whenever any of the company's vessels put into (say) Wellington from Sydney with a cargo, and either with or without mails, with the object and intention of discharging her cargo and then proceeding to San Francisco, she became entitled to exemption from the dues from the moment that she entered the harbour, because she then became "a steamship carrying mails under the contract." But the question is not one of phrases but of substance and facts. It is impossible to predicate of a vessel coming from Sydney with freight and mails for discharge there that she is on entry "a vessel carrying mails under the contract." She is then in truth a vessel about to discharge so as to qualify herself to carry mails under the contract. When she is in harbour for the purpose of receiving and ready to receive the mails, then from the time when her former venture was completed she entered upon her new venture of carrying mails under the contract. This new venture is not postponed until the mails are on board, but commences from the time when she is ready and willing to commence and carry out the terms of her contract; and she cannot be so while she remains with cargo wholly or in part undischarged,