MAXINE FOOTWEAR COMPANY LTD. ET AL. (*Plaintiffs*) ..... } APPELLANTS;

1957

*May 15, 16
Oct. 1

AND

CANADIAN GOVERNMENT MERCHANT MARINE LTD. (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Carriers—Liabilities—Fire on vessel—Destruction of cargo—Whether carrier liable—The Water Carriage of Goods Act, 1936 (Can.), c. 49 (R.S.C. 1952, c. 291), s. 3 and sched., art. III(1), (2), art. IV(1), (2).

While a ship belonging to the defendant company was loading in Halifax harbour, it was found that her scupper pipes were frozen and a contractor was engaged to thaw them The contractor's employees used an acetylene torch, which set fire to cork insulation, of the existence of which the contractor had not been informed. Part of the cargo, belonging to the plaintiffs, was destroyed by the fire and the plaintiffs claimed its value. It was found as a fact that the cargo was stowed after the fire broke out but before it was discovered.

Held (Cartwright J. dissenting): The plaintiffs could not succeed.

In view of s. 3 of the *Water Carriage of Goods Act,* which expressly excluded any implied absolute warranty of seaworthiness, art. III(1) of the Rules under the Act must be construed as meaning that if the ship was unfit for the cargo before the loading of goods that were later lost, the carrier might escape liability by showing that it exercised due diligence in that regard. This onus had been discharged by the defendant in this case.

Further, the negligence or default, within the meaning of art. IV(2)(*a*), was that of the defendant's servants in the management of the ship rather than a want of care of the cargo. *Kalamazoo Paper Company et al. v. Canadian Pacific Railway Company,* [1950] S.C.R. 356, applied.

Decisions of American Courts under the *Harter Act* of that country must be read with care, in view of the absolute obligation under that Act to provide a seaworthy ship.

Per Cartwright J., *dissenting*: Under art. III(2)(*a*) and (*c*), the defendant was bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy and to make the parts of the ship in which goods were carried fit and safe for them. It was clear on the findings of fact that the defendant stowed the plaintiffs' goods on an unseaworthy ship when the exercise of due diligence would have disclosed the fact that the ship was on fire. The carrier was responsible in law for the failure of his employees to exercise the due diligence required by the Rule. Carver, Carriage of Goods by Sea, 9th ed., p. 182, quoted with approval. The direct cause of the loss of the plaintiffs' goods was the action of the carrier's employees in stowing them in a ship which, because of the fire, was not fit and safe for their reception and carriage. The loss was not the direct result of a fire,

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

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within the meaning of art. IV(2)(*b*), or of the negligence of the defendant's servants in the navigation or management of the ship within art. IV(2)(*a*).

APPEAL from a judgment of Cameron J. (1) in the Exchequer Court of Canada, affirming a judgment of A. I. Smith D.J.A. (2). Appeal dismissed.

C. Russell McKenzie, Q.C., for the plaintiffs, appellants.

Léon Lalande, Q.C., for the defendant, respondent.

The judgment of Kerwin C. J. and Taschereau, Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—On January 26, 1942, Canadian National Railways issued a through export bill of lading to the appellant Maxine Footwear Company Ltd., covering "Three (3) Wooden Crates and One (1) Drum said to contain Shoe Leather and Shoe Findings", addressed to Electric Shoe Repairing Co., the name under which the appellant J. Eric Morin carried on business at Kingston, Jamaica. The goods were carried by rail to Halifax and there loaded on the M.V. "Maurienne" for transportation to Jamaica. Morin assigned his interest in the bill of lading and in the goods to his co-appellant and the matter may therefore be dealt with, as it was by Mr. Justice Cameron, as if Maxine Footwear Company Ltd. were the only appellant. Mr. Justice Cameron also stated that the plea of the respondent that there was no *lien de droit* between the parties was held by the judge of first instance, Mr. Justice Arthur I. Smith, District Judge in Admiralty, to be unfounded and that that finding was accepted by the respondent. Certainly the point was not pressed before us and I therefore disregard it.

The M.V. "Maurienne" arrived at Halifax on Saturday, January 31, 1942. On Tuesday, February 3, loading of the vessel's no. 3 hold was commenced and the loading of the vessel was completed about 8 p.m. on Friday, February 6, it being the intention that the ship should sail early the following morning. Mr. McKenzie argued that it was not shown that the appellant's goods were put on board before the commencement of the fire to be mentioned later. Mr. Lalande put it that there was no evidence that the goods were not on board at that time, although he submitted that, even if the evidence were clear on the

(1) [1956] Ex. C.R. 234. (2) [1952] Ex. C.R. 569.

point, then, unless the fact that there was a fire was evident, the respondent was free of liability on other grounds.

The appellant's goods were placed in no. 3 hold. Mr. Justice Smith stated that the loading of no. 3 hold was commenced on Tuesday, February 3, and completed on the evening of Friday, February 6. Mr. Justice Cameron found (1) that the loading of no. 3 hold commenced on Tuesday "and the loading of the vessel was completed at about 8.00 p.m. on the evening of Friday the 6th". It should be here explained that this action was commenced on May 11, 1943. Examinations for discovery were held in 1946. The trial commenced May 3, 1947, before Mr. Justice Cannon, who was then District Judge in Admiralty, but after the argument he became ill and died and by consent the evidence already taken was used before Mr. Justice Smith. Accordingly, the latter heard only the evidence of Isaac Joseph Tait to have the transcript of his previous evidence amended and some further testimony by that witness and, of course, none was heard by Mr. Justice Cameron. By consent the minutes of an investigation held by a legal adviser of the Canadian National Railways, shortly after the fire, became part of the evidence of the respondent. At that investigation the captain of the "Maurienne", Y. Salaun, was asked the following questions, to which he made the answers indicated:

Q. You say you finished the loading of the cargo on Thursday in No. 3? A. At 8.00 Thursday night they had finished No. 3.

Q. And everything was battened down? A. Yes.

Q. It was all covered? A. Yes.

Q. What did you have in the tween deck? A. I got shooks in the tween deck.

Q. You had charge of the stowage of the vessel? A. The First Mate.

Q. On Thursday what loading did you still have to do? No. 3 was finished; were any of the others finished? What about No. 1? A. It was finished a long time before. They went back to No. 4 and No. 2 the next day.

Q. Then Thursday night No. 1 and No. 3 were completely loaded? A. Yes.

Francis Sim, the stowage clerk, was also examined. Under his direction the work of stowing the cargo in no. 3 hold was started on Tuesday, February 3, at 10 a.m. and finished 8.15 p.m. Friday, February 6. The stowage plan

(1) [1956] Ex. C.R. at p. 236.

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identified by Sim shows that the cargo for Kingston in no. 3 hold was put in the top, consisting of 78 sundries, 1,020 bags of salt and 250 shooks, with the bottom part containing 1,406 bundles of shooks and 3,100 bags of flour. The statements of this witness are not in conformity with that of the captain but he would know more about the stowage. Mr. McKenzie points particularly to that part of his evidence at p. 53 of the record when he stated that he was there when the work was completed and that he made sure that no. 3 was closed. "Sundries" would presumably include the appellant's goods.

Upon this record it should be held that the appellant's goods were not stowed until after the commencement of the fire, but even on that basis the appellant is not entitled to succeed. It is agreed that the *Water Carriage of Goods Act, 1936* (Can.), c. 49 (now R.S.C. 1952, c. 291) applies. By s. 3 there is not to be implied in any contract for the carriage of goods by water "any absolute undertaking by the carrier of the goods to provide a seaworthy ship". By paras. 1 and 2 of art. III of the Rules:

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. 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.

By para. 1 of art. IV:

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworhty, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

Paragraph 2 of art. IV provides in part:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(*b*) fire, unless caused by the actual fault or privity of the carrier.

In view of s. 3 of the Act, para. 1 of art. III of the Rules must be construed as meaning that if before and at the beginning of the voyage the ship is unfit for the cargo before the commencement of the loading of the goods, for the loss of which a claim is made, the carrier may absolve itself by showing that it exercised due diligence in that regard. In my view, that onus has been met by the respondent. It appears that the scuppers connected with the galley, the toilet and the shower had become clogged with ice and at someone's direction (not Mr. Campbell, the one who was in charge at Halifax) a local firm was engaged to thaw out the scuppers. The ship was cork-insulated and that fact was not made known to the contractors. Each of the scuppers emptied on the starboard side of the ship and, after going straight in for 6 inches, turned at right angles. The contractor's employee applied the flame from an acetylene torch for about 5 minutes to each of the scuppers and I think there is no question that the fire originated by the flame from the torch igniting the cork insulation. The fire was not discovered for some time. There is also no doubt that whoever hired the contractors was negligent in not telling them of the cork insulation; that the contractor's employee was negligent in the manner in which he applied the flame; but Mr. Campbell, although inspecting the ship every day, had nothing to do with these acts of negligence nor was he derelict in his duty. Scuppers blocked by ice are common in the harbour of Halifax in the winter time. I agree with Mr. Justice Cameron (1) that "neither the fact that the pipes were frozen nor that an acetylene torch was to be used to clear them was communicated to anyone who represented the carrier".

Moreover, within the meaning of para. 2(*a*) of art. IV, the negligence or default was that of the servants of the respondent in the management of the ship. The earlier cases are referred to in the judgments of this Court in *Kalamazoo Paper Company et al. v. Canadian Pacific*

(1) [1956] Ex. C.R. at p. 248.

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Railway Company; British Columbia Pulp & Paper Company v. The Same; Quatsino Navigation Company Limited v. The Same (1), and it is settled that the distinction to be drawn is one between want of care of cargo and want of care of vessel indirectly affecting the cargo. Here the frozen scuppers had nothing to do with the cargo, except incidentally and indirectly. For the reasons stated by Cameron J. the present case is distinguishable from *Spencer Kellogg & Sons, Inc. v. Great Lakes Transit Corporation* (2); and, in addition, decisions in the United States under the *Harter Act* must be read with care, in view of the absolute obligation under that Act to provide a seaworthy ship.

The appeal should be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The relevant facts are set out in the reasons of the Chief Justice and in those of the learned judges in the Courts below. I agree with the conclusion of the Chief Justice that the proper inference to be drawn from the evidence is that the appellant's goods were not stowed until after the commencement of the fire.

A brief summary of the facts will be sufficient to indicate the question of law calling for decision.

At 3 p.m. on Friday, February 6, 1942, the "Maurienne" was loading general cargo at Halifax. Three of her scupper pipes were frozen but Cameron J. has found that this circumstance did not render the ship unseaworthy, that at the time mentioned she was in fact seaworthy, and that the holds and other parts of the ship in which goods were carried were fit and safe for their reception and carriage. These findings are supported by the evidence and should not be disturbed. Between 3 p.m. and 4 p.m. the cork insulation of the ship was ignited. As to the cause of this Cameron J. says (3):

> Before me, counsel for the respondent specifically admitted that the fire "was due to the fault of an employee who had been there to thaw out the ice which was blocking the openings of a discharge line or pipe". It might be stated here that there is no evidence that Hemeon—the welder from Purdy Brothers who actually operated the acetylene torch—was told anything about the cork insulation. His work was under the direct super-

(1) [1950] S.C.R. 356, [1950] 2 D.L.R. 369.

(2) (1940), 32 F. Supp. 520.

(3) [1956] Ex. C.R. at p. 238.

vision of the Fourth Officer who—as well as the other ship's officers—had knowledge of the cork insulation near which the thawing-out operation was conducted. I think that in view of the special risk involved, it was negligence on the part of the Fourth Officer not to adequately supervise the operation and also in his failure to make an inspection to ascertain whether the cork insulation had, in fact, been ignited. Both the Fourth Officer and Hemeon were *employees* of the carrier and it was the negligence of one of these—or of both—that caused the fire. The Captain and Chief Engineer also had knowledge of the operation being carried out and of the proximity of the cork insulation thereto; it may also have been their duty to see that the operation was carried out in safety, but again, both are *employees* of the carrier.

For the purposes of this case it is sufficient to state that the evidence fully warrants the presumption that the fire was caused by the negligence of the *employees* of the carrier.

These findings also are supported by the evidence.

The fire started not later than 4 p.m. Following its commencement the appellant's goods were stowed and at about 8.15 p.m. all hatches were closed and battened down. The fire was not discovered until about 11 p.m. Efforts to control it were unsuccesful and on the following morning the ship was scuttled as the only means of extinguishing the fire.

Cameron J. found (i) that the thawing out of the scupper pipes with an acetylene torch was an act of the servants of the carrier, the respondent, in the management of the ship, (ii) that the fire was not caused by the actual fault or privity of the respondent, (iii) that the loss of the appellant's goods was "the direct result of fire only", and, (iv) that consequently the respondent was relieved from liability by art. IV, Rule 2, cls. (*a*) and (*b*) of the *Water Carriage of Goods Act, 1936* (Can.), c. 49.

In my opinion, assuming the correctness of findings (i) and (ii), findings (iii) and (iv) do not necessarily follow.

Under art. III, Rule 1, cls. (*a*) and (*c*) the respondent was bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy and to make the parts of the ship in which goods were carried fit and safe for their reception, carriage and preservation. No doubt up to 3 p.m. on Friday the requisite due diligence had been exercised but the duties of the carrier under the clauses mentioned are continuing and persist until the beginning of the voyage. It is clear that from some time not earlier than 3 p.m. and not later than 4 p.m., when the cork insulation had commenced to

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smoulder, the ship had ceased to be seaworthy and the holds had ceased to be fit and safe for the reception and carriage of goods. It is equally clear, on the findings of fact summarized above, that the respondent stowed the appellant's goods on an unseaworthy ship when the exercise of due diligence would have resulted in the discovery of the fact that the ship was on fire.

The carrier is responsible in law for the failure of his employees to exercise the due diligence required by art. III, Rule 1. In my opinion the effect of the authorities is correctly stated in the following passage in Carver's Carriage of Goods by Sea, 9th ed. 1952, p. 182:

> "Due diligence" seems to be equivalent to reasonable diligence, having regard to the circumstances known, or fairly to be expected, and to the nature of the voyage, and the cargo to be carried. It will suffice to satisfy the condition if such diligence has been exercised down to the sailing from the loading port. But the fitness of the ship at that time must be considered with reference to the cargo, and to the intended course of the voyage; and the burden is upon the shipowner to establish that there has been diligence to make her fit.
>
> It is not enough to satisfy the condition that the shipowner has been personally diligent, as by employing competent men to do the work. The condition requires that diligence to make her fit shall, in fact, have been exercised, by the shipowner himself, or by those whom he employs for the purpose. The shipowner "is responsible for any shortcomings of his agents or subordinates in making the steamer seaworthy at commencement of the voyage for the transportation of the particular cargo." [*Per* Brown Dist. J. in *The Frey* (1899), 92 F. 667.]
>
> "The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents." [*Per* Lord Wright in *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited,* [1939] A.C. 397 at 403, [1939] 2 All E.R. 648.] If such experts, servants or agents fail to exercise due diligence to make her seaworthy the owners are liable under Art. III, r. 1 of the Rules.

It is argued for the respondent, however, that, even if it is accepted that the general rule is that the carrier is responsible for loss caused by the failure of its employees to exercise the due diligence required by art. III, Rule 1, cls. (*a*) and (*c*), still, in the case at bar, the respondent escapes liability on two grounds. First it is said that the failure was an act, neglect or default of the servants of the carrier in the management of the ship and that the carrier escapes liability under art. IV, Rule 2 (*a*). Secondly, it is

said that the result of that failure was a fire caused without the actual fault or privity of the carrier and that the carrier escapes liability under art. IV, Rule 2(*b*).

I incline to the view that the duties imposed on the carrier under art. III, Rule 1, cls. (*a*) and (*c*) are paramount and that the carrier is liable for a loss caused by failure to exercise the due diligence required by that Rule even although that failure or its result could also be regarded as falling within the wording of cls. (*a*) and (*b*) of art. IV, Rule 2, but I do not find it necessary to reach a final conclusion on this question. While it may well be said that the negligent acts done in the course of thawing out the scupper pipes were acts of the servants of the carrier in the management of the ship and that the resulting fire was not caused by "the actual fault or privity of the carrier", and while the fire was the agency which brought about the scuttling of the ship and loss of the cargo, in my opinion, the direct cause of the loss of the appellant's goods was the action of the carrier's employees in bringing those goods to, and loading them on, a burning and unseaworthy ship the holds of which were not fit and safe for their reception and carriage. Had the due diligence required by art. III, Rule 1, been exercised this unseaworthiness would have been prevented, or, if not prevented, would have been discovered and the appellant's loss would have been avoided. The effective cause of the loss was the failure to exercise the due diligence required by art. III, Rule 1.

For these reasons I have reached the conclusion that the appeal succeeds. In view of my concurrence in the finding that the appellant's goods were not stowed until after the commencement of the fire I say nothing as to the position of the owners of that part of the cargo which was stowed before its commencement.

In its statement of defence the respondent asks a declaration that, in the event of the action succeeding, it is entitled to limit its liability, but in my view the question of its right to do so should be left to be determined in other proceedings in which all parties interested would be represented.

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I would allow the appeal, set aside the judgments below and direct that judgment be entered for the appellant for $2,801.33 with costs throughout.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitor for the plaintiffs, appellants: C. Russell McKenzie, Montreal.

Solicitors for the defendant, respondent: Beauregard, Brisset, Reycraft & Lalande, Montreal.