1965
*Oct. 25, 26
Dec. 14

N. M. PATERSON AND SONS LIMITED (*Defendant*) ..... APPELLANT;

AND

MANNIX LIMITED (*Plaintiff*) .....RESPONDENT.

APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Voyage charter agreement—Defendant to provide ship and crew —Contract to transport goods and equipment—Shipper's employees assisting with stowage of equipment—Heavy machinery included in cargo and lost overboard in storm—Liability—Civil Code, art. 2424.

The plaintiff entered into a voyage charter agreement with the defendant. The defendant supplied the ship and crew. The employees of the plaintiff assisted in loading and stowing heavy equipment which made up a part of the cargo. About three hours out of port a heavy mechanical shovel broke loose and was lost overboard. The action to recover the value of the mechanical shovel was maintained by the trial judge. The defendant appealed to this Court.

Held: The appeal should be dismissed.

The loss was occasioned by the failure of the lashings. The defendant argued that the mechanical shovel had been stowed on board by the plaintiff's own employees, and that the plaintiff was estopped from making a claim based on improper and negligent stowage. Under both the law of Quebec and of England, the primary duty of stowing cargo in a ship rests upon the owner of the ship and its master unless there is an express agreement to the contrary or the circumstances give rise to an implication that such an agreement has been made. This was a contract to carry the plaintiff's goods in the defendant's ship between specified ports and not a contract for " letting of the ship" which could have created the relationship of bailor and bailee between the parties. The absence of any provision in the charterparty making the plaintiff liable for stowage, and the inspection made by the ship's officers of the way in which the shovel was placed and secured on the deck and their approval thereof was evidence negating any implied agreement to

*PRESENT: Fauteux, Abbott, Judson, Ritchie and Spence JJ.

relieve the defendant of the obligation imposed upon it to receive the goods and carefully arrange and stow them in the ship.

Navigation—Contrat de charte-partie pour voyage déterminé—Le défendeur devant fournir le bâtiment et l'équipage—Contrat de transport d'effets et d'outillage—Les employés de l'affréteur aidant à l'arrimage de l'outillage—Pesante machine faisant partie de la cargaison et tombant à la mer durant une tempête—Responsabilité—Code Civil, art. 2424.

Le demandeur passa un contrat de charte-partie pour voyage déterminé avec le défendeur. Le défendeur fournissait le bâtiment et l'équipage. Les employés du demandeur ont aidé au chargement et à l'arrimage de l'outillage qui faisait partie de la cargaison. A peu près trois heures après avoir quitté le port, une pelle mécanique se détacha et tomba à la mer. Le juge au procès a maintenu l'action pour le recouvrement de la valeur de la pelle mécanique. Le défendeur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La perte a été occasionnée par un manque dans les câbles servant à attacher la pelle. Le défendeur a soutenu que la pelle mécanique avait été arrimée par les employés mêmes du demandeur, et qu'en conséquence le demandeur était empêché de faire une réclamation basée sur la négligence dans l'arrimage. En vertu de la loi du Québec et de l'Angleterre, l'obligation originelle dans l'arrimage d'une cargaison tombe sur le propriétaire du bâtiment et son maître à moins d'une entente formelle au contraire ou de circonstances donnant lieu à une implication qu'une telle entente avait été faite. Il s'agit ici d'un contrat pour le transport des effets du demandeur sur le bâtiment du défendeur entre des ports spécifiés et non pas d'un contrat pour le louage du bâtiment qui aurait pu créer une relation de déposant et de dépositaire entre les parties. L'absence de toute disposition dans le contrat de charte-partie rendant le demandeur responsable de l'arrimage, et l'inspection faite par les officiers du bâtiment de la manière dont la pelle avait été placée et attachée sur le tillac et leur approbation constituaient une preuve réfutant tout contrat tacite devant relever le défendeur de l'obligation qui lui était imposée de recevoir les effets et de les placer et arrimer avec soin dans le bâtiment.

APPEL d'un jugement du Juge Smith du district d'amirauté de Québec [1]. Appel rejeté.

APPEAL from a judgment of Smith D.J.A., for the district of Quebec [1]. Appeal dismissed.

Jean Brisset, Q.C., for the defendant, appellant.

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

The judgment of the Court was delivered by

[1] [1965] 2 Ex. C.R. 107.

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RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Arthur I. Smith sitting as District Judge of the Exchequer Court[1] in and for the Admiralty District of Quebec, whereby he condemned the appellant in the sum of $60,925 being the agreed value of a mechanical shovel the property of the respondent which was lost at sea while being carried on board the appellant's vessel S.S. *Wellandoc* when that vessel encountered heavy, but not unseasonable, weather on a voyage between Baie Comeau and Bagotville on December 9, 1954.

It is not disputed that the shovel in question which was a heavy piece of equipment weighing approximately 87 tons was being carried pursuant to an agreement between the parties evidenced by a letter addressed by the appellant to the respondent in the following terms:

> Mannix Limited, November 30th, 1954.
> 660 St. Catherine St. W.,
> Montreal, P.Q.
> *Attention Mr. G. J. Pollock*
>
> Dear Sirs:
>
> As per our agreement the SS "WELLANDOC" will be provided to carry out a voyage on your behalf from Montreal 1, P.Q. to Mont Louis, P.Q., Baie Comeau, P.Q. and Bagotville, P.Q., and return to Montreal, P.Q., or Cornwall, Ont., if possible, under the following terms and conditions.
>
> 1. Cargos to consist of steel outbound and contractors' equipment inbound with no dangerous cargo permitted unless arranged for.
>
> 2. Charterers to have full use of ship's gear as on board.
>
> 3. Charterers to pay for all extra insurances on the vessel during the term of this charter. Extra meaning everything additional to insurances normally carried on this vessel prior to November 30th, 1954.
>
> 4. Owners to provide this vessel fully manned, victualled and fueled at a daily rate of hire of $900.00 or pro rata thereof. Hire payable in advance on the estimated term of the charter and to be adjusted in full immediately upon redelivery.
>
> 5. Delivery of the vessel to date from the hour the vessel clears Elevator 2 Montreal today with redelivery on the date and time when the vessel is safely returned to Montreal, cleaned and free of cargo.
>
> 6. Charterers to be responsible for any and all damage caused through cargo handling at any or all ports and to make good said damage before the vessel is accepted at redelivery.
>
> Yours very truly,
> N. M. PATERSON & SONS LIMITED
> (sgd.) I. C. McEwen
> Traffic Manager.
>
> Accepted:
> Mannix Limited.

[1] [1965] 2 Ex. C.R. 107.

No bill of lading was issued with respect to this shipment and both parties agree that the provisions of the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, do not affect the matter.

A great deal of the evidence at trial was devoted to describing the way in which the shovel was loaded and secured on the vessel, but I do not find it necessary to examine this evidence in detail as I agree with the learned trial judge that:

> The preponderance of the proof is that the stowage and method of securing the Plaintiff's shovel were inadequate and bad, having regard to the weight and dimensions of the machine and *the weather conditions which might reasonably have been anticipated at that time of the year in that area.* That such was the case would appear moreover, from the fact that in a little over three hours after leaving Baie Comeau, the shovel began to move and the lashings, which were intended to secure it, parted and the Plaintiff's shovel went overboard.

The italics are my own.

It was contended on behalf of the appellant that the finding of the learned trial judge with respect to improper stowage was vitiated by the fact that he allowed himself to be influenced by the evidence of Mr. Eric Crocker who was called as an expert witness on behalf of the respondent and who, in the appellant's submission, could not be impartial as he represented cargo underwriters interested in the loss. The unanimous opinion of this Court, which was expressed at the hearing of the appeal, is that this circumstance can only affect the weight to be attached to Mr. Crocker's evidence which was essentially a matter to be determined by the learned trial judge.

The main argument advanced in support of the appeal was that the improper and negligent stowage of the cargo, to which the learned trial judge attributed the loss, was the work of the respondent's own servants and that the respondent was accordingly estopped from enforcing any claim based thereon.

I am satisfied on all the evidence that the respondent's employees under the direction of their foreman, Mr. Bellfontaine, did the major part of the work of lashing and securing this heavy cargo to the deck, but it is equally clear to me that the method which they employed was approved by the owner's agents aboard the vessel.

The master of the *Wellandoc,* Captain R. M. McCurdy, did not give evidence at the trial but a statement made by

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him on the 21st of December, 1954, was admitted as part of the defendant's case and the circumstances under which the loading took place are accepted in the factum filed on behalf of the respondent as having "been carefully summarized" in the following excerpt from that statement:

> All equipment required for the stowage was supplied by Mannix Limited and we had nothing to do with the securing of the cargo. The method of stowage passed the inspection of all three mates and of the Mannix people ashore. The method of stowage was thoroughly discussed by all concerned and everybody gave his own views and the method adopted was the result of these discussions as incorporating the best ideas of everyone.

Some question was raised in the Court below as to whether the law of Quebec or the law of England should be applied in the circumstances, but as the learned trial judge has pointed out, this question does not arise in the present case it having been conceded that the same rules apply under both systems of law. It follows that nothing herein contained is to be construed as deciding this question.

Under both the law of Quebec and the law of England it appears to be established that the primary duty of stowing cargo in a ship lies on the owner of that ship and on the master as his representative unless there is an express agreement to the contrary or the circumstances give rise to an implication that such an agreement has been made. This is made plain by reference to art. 2424 of the *Civil Code* of Quebec and to the English authorities, the effect of which is in my view accurately summarized in the reasons for judgment of Lord Wright in *Canadian Transport Co. v. Court Line Ld.*[1] Article 2424 of the *Civil Code* reads as follows:

> 2424. The master is obliged to receive the goods, and carefully arrange and stow them in the ship, and to sign such bills of lading as may be required by the freighter or lessee, according to article 2420, upon receiving from him the receipts given for the goods.

In the case of *Canadian Transport Co. v. Court Line Ld., supra,* there was an express agreement incorporated in the charterparty that the charterers were "to load, stow and trim the cargo at their expense under the supervision of the captain . . ." and as there was no evidence of the extent if any of the captain's supervision or approval, the charterers

[1] [1940] A.C. 934, 3 All E.R. 112.

were found liable for improper stowage, but in reviewing the law as to the respective duties of an owner and a charterer in relation to stowage of cargo, Lord Wright said at page 943:

> It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interests of the seaworthiness of the vessel, but in order to avoid damages to the goods, and also to avoid loss of space or dead freight owing to bad stowage. In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charterparty to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect.

The appellant's counsel cited a number of English cases in which the shipper was held responsible for damage resulting from faulty stowage but it will be found in each of these cases either that there was an express provision in the charterparty whereby the shipper undertook to stow the cargo or that he had participated or approved of a method of stowage, the defects in which were, or should have been, obvious to him having regard to his knowledge of the special properties of the goods which were being shipped.

The most recent case of this type that I have been able to find is *Upper Egypt Produce Exporters and others v. Santamana*[1], a decision of Hill J. in the Admiralty Division in England which was strongly relied on by the appellant's counsel. In that case the cargo was a large shipment of onions a part of which had, with the assistance and approval of the shipper, been stacked in tiers 15 or 16 feet high with the result that the lower tiers were unable to withstand the pressure from above and were squashed and spoiled. The shipper of the cargo was in a much better position to know of the likelihood of it being damaged by this method of stowage than the ship owner or the master and it appears to me to be logical that in such a case a shipper who knows or ought to know the special characteristics of his own cargo and who approves of it being stowed in a manner which is obviously likely to expose it to damage cannot later hold the ship owner responsible for the damage which ensues. In the course of his reasons for judgment, after reviewing the relevant authorities, Hill J. went on to say:

[1] (1923), 14 Ll.L. Rep. 159.

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> I have considered these cases very carefully. They seem to me to carry the law at least far enough to show that a shipper who takes an active interest in the stowage and complains of some defects but makes no complaints of others *which are patent to him* cannot be heard to complain of that to which he has made no objection.

The italics are my own.

The same considerations governed the case of *Bozzo v. Moffat et al*[1] upon which the appellant also relied. This was a case in which a shipment of wool had been stowed against the skin of the ship without sufficient dunnage to protect it from dampness with the result that it was damaged by water, and it was held that under the charter-party there in question whereby the shippers reserved the right to employ and did employ their own stevedores in loading the vessel, the owner was relieved of liability. The effect of this line of cases appears to me to be accurately and succinctly summarized in art. 51 of *Scrutton on Charterparties,* 17th ed., page 148, where he says:

> A shipper who takes an active interest in the stowage cannot afterwards be heard to complain of *patent defects* in the stowage of which he made no complaint at the time.

The italics are my own.

In the present case it was not the condition of the cargo but the stability of the ship that was affected by the faulty stowage, and the loss was occasioned by the failure of the lashings which secured the shovel to withstand the strain to which they were subjected by reason of the shovel's movement in the heavy seas which were encountered. One of Mr. Crocker's main objections to the method of loading was that it was likely to increase the rapidity of the roll of the ship and his opinion that the shovel was not properly secured to the deck was predicated on the assumption that fairly rough weather would be encountered. These do not appear to me to be circumstances which should have been obvious to the respondent's employees as they were not in the same position as the master or his crew to know the extent to which the ship would roll or the seas which it would be likely to encounter.

It therefore appears to me that in the absence of any provision in the charterparty making the shippers responsible for stowage, the inspection made by the ship's officers of the way in which the shovel was placed and secured on the

[1] (1881), 11 Que. R.L. 41.

deck and their approval of it, is evidence negating any implied agreement to relieve the carrier of the obligation imposed upon it by law "to receive the goods and carefully arrange and stow them in the ship."

It was further argued on behalf of the appellant that the second paragraph of the agreement governing this shipment carried with it the implication that the charterers were to be responsible for stowage. That paragraph merely provides for the "charterers to have full use of the ship's gear as on board" and I do not consider that these words can be treated as relieving the owner of any of its responsibility for stowing the cargo.

It was further contended on the appellant's behalf that the agreement governing this shipment was a contract for the letting of the ship as distinguished from a contract for her services, and that in so far as the crew of the vessel participated in the stowage of the cargo, they were to be regarded as servants of the charterer. This contention was based in great measure on the case of *Thomas P. Beal*[1] where Wooley, Ct. Judge had occasion to say:

> Ordinarily the owner charters only the space; the ship continues in the possession, management and control of the owner and its officers and crew. But in this case of a time charterer, the charterer, in chartering the space, chartered the whole reach of the ship; the owner in terms put at 'the charterer's disposal' her 'holds, decks and usual places of loading'.

And the same judge later said:

> The terms of the charter party make it certain there was a letting of the ship, as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of carrier and shipper.

This contention appears to me to be without merit because in my opinion the agreement here in question is a voyage charter and not a time charter and it is to be construed as a contract to carry the respondent's goods in the appellant's ship between the ports specified therein and not as a contract for the "letting of the ship" which could create the relationship of bailor and bailee between the parties.

Finally, appellants contended that the loss was occasioned by "dangers of navigation" and that the circumstances were accordingly governed by art. 2433 of the *Civil Code* which reads, in part, as follows:

[1] (1926) A.M.C. 438.

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2433. The owner of a sea-going ship is not liable for the loss or damage, occasioned to any goods, wares, merchandise and article of any kind on board any such vessel or delivered to him for conveyance therein, without his actual fault or privity or the fault or neglect of his agents, servants or employees:

1. By reason of fire or the dangers of navigation; . . . .

In this regard, I think that the phrase "dangers of navigation" is to be given the meaning attached to the words "perils of the sea" by Sir Lyman Duff in *Canadian National Steamships v. Bayliss*[1], where he said, speaking on behalf of this Court:

> The issue raised by this defence (perils of the sea) was, of course, an issue of fact and it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.

In my opinion the evidence discloses that the weather which was encountered by the *Wellandoc* on the 9th of December, although it was rough, was of a kind which an experienced master should have foreseen as a probable incident of such a voyage at that time of year. I am accordingly satisfied that the provisions of art. 2433 of the *Civil Code* could have no application to these circumstances.

It should perhaps be mentioned that although Mr. Crocker expressed the opinion that the ship was unseaworthy, there is no suggestion that the loss was occasioned by unseaworthiness and the question therefore does not arise.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Beauregard, Brisset & Reycraft, Montreal.

Solicitors for the respondent: Lalande, Brière, Reeves & Paquette, Montreal.

[1] [1937] S.C.R. 261 at 263, 1 D.L.R. 545.