1949
*Oct. 13, 14, 17, 18.
1950
*Feb. 21.

KALAMAZOO PAPER COMPANY and ACER, McLERNON LIMITED (PLAINTIFFS) ..... } APPELLANTS

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT

AND

BRITISH COLUMBIA PULP & PAPER COMPANY (PLAINTIFF) ... } APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT

AND

QUATSINO NAVIGATION COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Shipping—Ship damaged on rock and later beached—Allegation that ship's officers were negligent after beaching resulting in damage to cargo—Failure to use all pumping facilities—Whether such neglect was in "the management of the ship"—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49, Art. IV, s. 2(a).

The insurers of the cargo of a ship damaged by striking a rock and later beached to prevent sinking brought action to recover damages alleged to have been suffered by the cargo after the beaching, owing to the failure on the part of the captain to direct the use of all available pumping facilities to prevent the entry of further water into the hold and away from the cargo. The trial judge held that there had been such negligence after the beaching but that as it was in a matter affecting the management of the ship the defendant was not liable under the terms of the contract of carriage which incorporated Art. IV, s. 2(*a*) of the *Water Carriage of Goods Act*.

Held, affirming the judgment at the trial that, assuming there was such a failure on the part of the ship to utilize the available pumping facilities and that damage to the cargo resulted, this was neglect of the master in "the management of the ship" within the meaning of s. 2(*a*) of the statute and the defendant was not liable.

PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

Per Taschereau and Locke JJ.: The failure to exercise reasonable diligence to prevent the entry of further water into the forehold was neglect in the navigation as well as in the management of the ship within the meaning of the subsection.

Per the Chief Justice, Rand and Estey JJ.: The evidence did not establish that any damage was occasioned to the cargo by the entry of water after the beaching.

The Glenochil [1896] p. 10; *The Rodney* [1900] p. 112; *The Ferro* [1893] p. 38; *Good* v. *London SS. Owners' Association* L.R. 6 C.P. 563; *Carmichael* v. *Liverpool Sailing Ship Owners' Association* 19 Q.B.D. 242; *Gosse Millerd Ltd.* v. *Can. Govt. Merchant Marine* [1929] A.C. 223; *Rowson* v. *Atlantic Transport Co.* [1903] 2 K.B. 666; *Hourani* v. *Harrison* (1927) 32 Com. Cas. 305; *The Sylvia* 171 U.S. 462 and *The Sanfield* 92 Fed. Rep. 663 refered to.

APPEAL and CROSS APPEAL from the judgment of the Exchequer Court of Canada, British Columbia Admiralty District (1), dismissing the action of the insurers of the cargo of a ship for damages suffered by the cargo when the ship hit a rock and was later beached.

Alfred Bull, K.C. for the appellants.

J. W. de B. Farris, K.C. and *J. A. Wright, K.C.* for the respondent.

The judgment of the Chief Justice and of Rand J. was delivered by

RAND J.: In this appeal two determinative questions are raised, one of fact and the other of law, and notwithstanding the conclusion to which I have come on the former, I think it advisable to deal with both.

A claim is made by cargo insurers against a vessel on the ground that, beyond a certain point, damage done to the cargo consisting of wood pulp was caused by the negligence of captain and crew. At 12.30 a.m. on July 29, 1947 the vessel had sailed from Port Alice on the coast of Vancouver Island bound for Vancouver. At about 2 o'clock, in heavy fog, the ship stranded on a ledge of Cross Island in Quatsino Sound. After being held there for approximately one hour and a half, she slid off and proceeded on the voyage. It soon became evident that water was entering in volume, and the captain decided to make for Quatsino where, if necessary, he could beach the vessel in mud. He arrived at that point in about an

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hour's time, where he found the dock occupied by a tug. After a short wait, until sinking appeared imminent, he aroused the tug, which withdrew, and the bow was set in a mud bank, northwesterly from the corner of the dock, at approximately 5.40 o'clock. Later, around noon, with the tide rising, he moved the vessel further on to the bank. Next afternoon, a salvage tug, with heavy pumps and a diver, arrived and by late evening the vessel had been brought to condition and trim to return to Port Alice: and following a stay of a few hours there, to continue the voyage to Vancouver. Arriving on August 2nd, the entire cargo was removed and the vessel placed in dry dock.

It is admitted that up to and including the beaching at Quatsino, the measures taken by the captain were unexceptionable. The case for the insurers is that from that time on there was negligence in failing to keep the water down and out of the cargo. It assumes that at the moment of beaching, the water in the forward hold, numbered 1 and 2, was not more than $1\frac{1}{2}''$ above the oil tank tops; and alleges that the available pumping capacity, if properly employed, could have held the water to that level, with the result that the greater part of the loss would have been avoided. It thus becomes necessary to examine these matters in some detail.

The factual assumption rests upon conclusions drawn from a visual examination of the hull made on the morning after the vessel was placed in dry dock by a surveyor representing the cargo insurers as well as the general average adjusters. This surveyor, Clarke, at about 9 o'clock on the morning of August 12th, entered the dock and inspected the damage. No one else was around except two laborers. By that time the water had long since drained out of the hull. He found, first, that half a dozen or so rivets had been disturbed, but whether sheared or not he could not say; several were described as "hanging" but he denies that any were quite out, that is, through both plates entirely; there was a fracture of one of the forward keel plates about 14" in length, $\frac{3}{8}''$ at its greatest width aft and tapering to a light hair crack forward: and the keel plate and strakes Nos. 1, 2 and 3 on the port side were buckled for upwards of 20 feet. From these facts he

calculated the area of the opening through which the water could have entered, and at this point it will be better to use his own language: "I first took my calculations, this ruptured plate, without going into many difficult calculations for a mere 2 or 3 per cent, the roughness of the hole and the shape, but taking it as a plain orifice which is 2″ square, $\frac{3}{8}$″ by 14 is equal to 2″ square, a plain orifice. Then I allowed for the seven rivets, the allowance for those seven rivets was 1·54 square inches . . . I estimated those rivets at $\frac{3}{4}$″. I didn't measure them but thought they were $\frac{3}{4}$″. If they are smaller it would be less, if larger slightly more. It made a total of 4 square inches that water could enter that ship. Now by a simple method I found with 4″ we get 70 tons per hour that can leak into that ship at a 25 foot draft." Later on he was questioned in relation to the buckled plates:

Q. Do you mean to say there wouldn't be any water go in between those buckled parts?

A. No.

Q. No?

A. I have allowed for $\frac{1}{2}$" to go in there.

Q. That's where you have allowed it to go in? You haven't allowed anything. What have you allowed for rivets other than these seven?

A. I have given in my opinion decimal five of the total area estimated. Instead of ·5, ·3 would have been more accurate. I allowed ·3 to cover any other rivets.

Q. Where the rivets are out—

A. There were none out entirely.

There is some error in this evidence; 2″ square is 4 sq. inches: 14″ by $\frac{3}{8}$″ is 5·25 sq. inches and half of it, 2·6. But disregarding that, on the basis of an orifice of 4 sq. inches, estimating the varying head of water and the discharge by the bilge pump, started when the vessel grounded and kept up throughout, he computed the net intake of water up to beaching. This was then extended for the 14 hours from that time until 8 o'clock in the evening when he arrived on the scene, making 16 hours in all. He concluded that in that period 880 tons had entered the forepeak and the forward hold, an average of 55 tons an hour, and that the quantity held when he arrived was 412 tons, leaving 468 tons to have been discharged by the pump, at an average of 29 tons an hour. In the course of half an hour, he noticed a rise at the aft end of the forward hatch combing on the port side of 2″; the water

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was then within one foot of the 'tween deck and he assumed it to have been rising continuously from the morning; but admittedly a shifting of cargo then going on could explain in part at least the apparent rise of 2″. Nor is his conclusion that there had been a constant rise unchallengeable; considering the position of the vessel and the likelihood of the damaged portion, at low water, being imbedded in the bank, the probabilities are that the level had lowered and risen. When put ahead at noon on a high tide, the vessel was afloat and the damaged parts would then be exposed and the admission of water most likely freer. During the first two hours, from the sliding off the ledge to the beaching, 137 tons, on his basis, would have entered: deducting from this 58 tons pumped out, 79 tons would remain: 44 tons were required to fill /1 tank, and 5 would be in the forepeak: of the remaining 30 tons, half would be absorbed in the pulp and the rest would present the level stated, $1\frac{1}{2}$″ above the tank tops. From this it is seen how the result follows mathematically from the assumed area of entrance and the quantity on his arrival. The latter may for our purposes be accepted and the former becomes the determining factor.

Clarke also estimated that the vessel would go down one foot in the head for each 100 tons of water in the hold. When leaving Port Alice, the draught was 16 feet fore and 17′ 11″ aft. As the net quantity admitted up to the beaching was 79 tons, it would follow that between Cross Island and Quatsino the bow would not be more than one foot below trim. On Clarke's arrival at Quatsino he judged the draught to be 24′-25′. The captain at the time of beaching, with the tide low, looking for the marks by the aid of a torch, had seen that the last one, 21′, was below water. Discounting somewhat Clarke's estimate by reason of the fact that it represents an excessive distance of 9 feet submergence of the bow from trim, and having regard to tide and beaching, these opinions are not greatly in conflict and indicate approximately the same weight of water. To the captain this meant "imminent danger"; the vessel was "going perceptibly by the head": in the words of the first officer, "she was settling fast." On the run back to Port Alice, Clarke thought the head had been down about 9 feet which he says did not seriously affect

the steering; and in his opinion there could have been no or very little difficulty from such a cause in bringing the vessel into Quatsino.

Now the datum so gathered and its conclusions, apart from a confidential communication made to his principals and to counsel, were disclosed to no one until presented in evidence at the trial. By every other person interested, from captain to adjuster, it was assumed that the water at the time of the beaching had reached a level that accounted substantially for all of the damage. In his report of survey, Clarke stated that "all damaged cargo . . . was as a consequence of striking the rock at Cross Island, . . ." He claimed to have passed on his discovery to the surveyor for the hull insurers, Warkman, although apparently his calculations had not then been made. Here is what he said:

Q. But beaching didn't cause any damage, not a word about all the things that did cause it?

A. I don't think they are called for.

Q. We have gone over that question. The underwriters needed to know—

A. The principle involved in these remarks was reported to, was discussed with Mr. Harry Warkman, who represented the underwriters on the other side. I was not doing it entirely without the knowledge of the representatives of the ship knowing my thoughts in the matter.

Q. It's awfully nice, though, afterwards to have it down in black and white what your thoughts were, especially when you start to put them down and then stop?

A. I spoke on the ship to Mr. Harry Warkman.

Q. You never put anything in black and white?

A. It was more or less agreed with Harry Warkman, but the full extent was not estimated until recently.

* * *

"Q. Who was the surveyor?

A. Harry Warkman, I discussed it with him. *We came to the conclusion it was impossible just by observing.* I don't suppose Mr. Warkman has ever gone and taken any figures on the matter. It was just a specimen.

Q. What was it you decided was impossible?

A. *For that amount of water to pass into the ship immediately it slid off the rocks.*

Q. Immediately.

A. *Within the trip across,* impossible for 400 tons of water to pass through that damage on the trip across.

Q. Do you know how long the trip across took?

A. *Yes, just about an hour, approximately.*

Q. Did you figure out with Mr. Warkman how much would go in?

A. No, I did not.

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Warkman denied having been informed of this matter. The trial judge accepted generally the evidence of Clarke but this particular feature is not mentioned. There can be little, if any, doubt that in the secrecy in which Clarke made his inspection and thereafter concealed the information, it would be against all probability that he would communicate matters to Warkman as would make clear the significance of what he now exhibits; there is no suggestion of confidence, and it would have been to run too great a risk of making them common knowledge, which Clarke had no intention of doing. Conceivably some reference might have been made to apparent smallness of openings through which the water entered, but not being clearly associated with the alleged failure in pumping, it would not be significant; and after two years, it is not surprising that Warkman, who had been called hurriedly as a witness, should not recall it; but if its full implication had been revealed, not only Warkman but others through him, would have heard of it. In view of the unusual secrecy, I cannot conclude that an effective disclosure was made to Warkman. Clarke, in cross-examination, suggested the manager of the shipyards should be able to confirm the facts as he gave them, but, as would have been expected, the manager recalled nothing of what at the time carried no importance; but he did say that "no one, I think, could tell approximately what the leak was."

There are other facts to be weighed with the estimates of Clarke. The diver who likewise was called hurriedly gave a clear statement of what he found. His account of the rivet holes was definite that in some cases the rivets had been forced out completely, and that the suction had drawn his thumb into the holes. There was one significant item of damage related by him; he found two or three open seams, two or three feet in length, formed by the separation of hull plates where they overlapped each other. These he plugged with wedges which were seen by Warkman at the shipyard: "Two rows of wooden wedges had been driven in leaking seams." These plates had all been badly buckled for as much as 15 feet, as the specification for repairs of Warkman and the evidence of Smith make abundantly clear; in fact the surfaces were described as corrugated; and the bow had been twisted to almost

a right angle toward the starboard. Clarke had not mentioned seams at all on his direct examination and his later reference to them already quoted was mixed up with the rivet holes. There is this further statement by him:

Q. Did you make a close examination of all the buckled plates?
A. I walked along and closely observed all the landing. (s?)
Q. Yes?
A. For possible leaks. I could find nothing there.
Q. Is it correct to say you found nothing else that would cause—
A. Any serious leaks, with the exception of the rivets and the fracture of these plates.

He was not recalled. Rebuttal evidence explained that the plates could be opened at the outer edge of the overlap and the rivet broken or bent without affecting the inner contact of the plates and in that way the mere existence of the seams did not mean an entrance for water. Against this there are two considerations: the rebuttal dealt with plates in their normal condition and did not take into account the wavy buckling present here; and the diver's evidence was that the wedges were put in because he felt the suction of the water into the hull. The captain says "the plate laps were open . . . I didn't measure the exact distance these plates were open but I saw a large outflow of water which was still taking place from damage to the hull: there was a large outflow of water from these holes." The latter was not seen by Clarke, and the trial judge implies no questioning of the truthfulness of the captain.

As is not wholly unknown in pretentions to completeness and infallibility, it is quite evident that in this seeming mathematical demonstration one important factor at least in the estimate of the area of the openings has been omitted. Apart from the evidence already quoted, it is obvious that any estimate based upon such an examination would be of dubious dependability, except in a gross sense, for the purposes intended. The proper test would have been to put water into the forehold under pressure or a known head and to ascertain its rate of outflow. By that means the state of things Clarke was seeking to confirm might have been established; but this would have eliminated surprises and he would have run the risk of having his basic datum falsified.

There is another circumstance to be considered. On the way to Quatsino the steering had become difficult, the head,

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in the opinion of the captain and first officer, being down 4'-6', on arrival, and, as already stated, beaching was made in what the officers considered a state of sinking. On the return trip to Port Alice, there could not have been more than 250 tons of water in the hold, but Clarke says the head was down 9 feet. According to the scale of the plan of the vessel, this depth would bring the draught above the water line. On Clarke's mathematics, 9 feet would represent 900 tons of water, about double the capacity of the forehold. The forward 'tween deck cargo had been unloaded at Quatsino and the tank in /4 hold had been filled with water. When the vessel arrived at Port Alice, she was "fairly dry", as agreed to by Smith with appellant's counsel. At that point about 250 bales of pulp screenings, deck cargo, had been shifted from forward to aft; and on setting out for Vancouver the fore draft was 20' 5" and aft, 19'. These facts seem to be quite inconsistent with the conclusions formed by Clarke as to the conditions on the run from Cross Island: and I see every reason to accept the statement of the captain that the vessel was down several feet, sufficient to interfere with the steering and to justify his serious apprehension; and that it was considerably less than 9 feet on the return to Port Alice is undubitable.

In the light of all of these matters, including the convinced judgment of the ship's officers that the hold was virtually filled before beaching, it would be entirely too dangerous to ground this substantial liability upon the too plausible deductions of Clarke; there was no danger, once he had found what he thought to be the facts, of losing the evidence of them before they could be verified, if that had been desired: the insurers at that time were in fact in complete command of the vessel; they could have taken any step thought desirable to ascertain any condition or obtain or preserve or confirm evidence of negligence; and the failure to do so, although entirely within the right of Clarke, supports an inference from undisputed or unquestionable facts against his conclusions which his method risked.

I do not think the evidence makes out failure of the officers after beaching. Mr. Bull contends that the onus is on the ship owner to free himself from what is charged.

The statement of claim alleges negligence and gives particulars of it, and on the issues so raised the parties went to trial. Proof was assumed by the plaintiff; but even if we take the initial burden to be on the defendant, a prima facie case for perils of the sea was made out and the onus of showing negligence to displace that thereupon shifted to the plaintiff: *The Glendarroch* (1).

The question of law is this: assuming neglect to use the available pumping capacity and its responsibility for part of the damage done, was it an omission in relation to the care owed to the cargo or in the management of the ship? The bill of lading incorporates the Articles of the *Water Carriage of Goods Act*, 1936: by Article III (ii):—

> 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.

and Article IV (ii) provides that:—

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
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> (*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;

These uniform provisions have been considered in a number of cases in the English courts, culminating in that of *Gosse Millerd Limited* v. *Canadian Government Merchant Marine* (2). In that case it was laid down by the House of Lords that whether the act resulting in the damage to the cargo is one in the management of the ship depends upon the circumstances in which it operates. There the cargo was damaged by the entrance of rain through an uncovered hatch. As the particular use of the tarpaulin was in relation to the protection of cargo only, the omission to keep it over the hatch was neglect in maintaining that protection and not in the management of the vessel.

In the circumstances here there is likewise an omission, but the omission of an act which, as alleged to be necessary for the proper care of the goods, is at the same time claimed to be required in the management of the ship. Mr. Farris' contention is that there was a duty on the captain to utilize the full pumping capacity not only for the general safety of the ship but also specifically to prevent a collapse of the bulkhead between the forehold

(1) [1894] p. 226. (2) [1929] A.C. 223.

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and the engine room; if the pressure of the cargo and the water had broken through that barrier, the vessel would have been in the gravest danger; and measures of anticipation would be acts of management. That view of the situation was accepted by Smith, J. and I respectfully concur in his conclusion. The further question is whether an act or omission in management is within the exception when at the same time and in the same mode it is an act or omission in relation to care of cargo. It may be that duty to the ship as a whole takes precedence over duty to a portion of cargo; but, without examining that question, the necessary effect of the language of Article III(ii) "subject to the provisions of Article IV" seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may be also an omission in relation to cargo. To construe it otherwise would be to add to the language of paragraph (*a*) the words "and not being a neglect in the care of the goods."

On both grounds, therefore, the respondent succeeds, and the appeal must be dismissed with costs.

ESTEY, J.:—The appellant, owner of a cargo of wood pulp sulphide on the ss. *"Nootka"* from Port Alice, B.C. to Vancouver, B.C., claims against the respondent as owner of the *"Nootka"* for damage to the cargo en route.

The *"Nootka"* left Port Alice at 12.40 a.m. D.S.T. on July 29, 1947; fog was soon encountered and at 2.01 a.m. the vessel grounded on Cross Island. A rising tide enabled the ship to slide off at 3.40 a.m. It was immediately realized that water was coming into the head of the *"Nootka"* and the captain determined to proceed to Quatsino Wharf where he arrived at 4.43 a.m. At the Quatsino dock the ship was sinking so fast that the captain grounded her in the mud. A diver was sent to Quatsino and after an examination of the ship and temporary repairs the *"Nootka"* left July 30th at 5.09 p.m. and arrived back at Port Alice at 7.39 p.m.

It has been conceded throughout this litigation that there was no negligence on the part of the master and the crew aboard the *"Nootka"* up to its arrival at Quatsino. The learned trial Judge (1), however, found that at Quatsino

(1) [1949] Ex. C.R. 287.

the failure to pump efficiently with the available facilities had allowed the water to rise in the ship and to further damage the cargo. He held that 68 per cent of the damage to the cargo was caused by this negligence but as this negligence was in relation to the management of the ship he hel dthe respondent not liable by virtue of the *Water Carriage of Goods Act,* S. of C. 1936, c. 49, Schedule Art. IV, sec. 2(*a*).

The appellant in this appeal contends that the negligence at Quatsino was not in relation to "the management of the ship" and therefore the respondent does not come within the above mentioned Art. IV, sec. 2(*a*). The respondent cross-appeals and contends that all of the damage was caused prior to the ship reaching Quatsino and therefore consequent upon acts in relation to "the management of the ship."

The first issue is, therefore, whether upon the facts as found by the learned trial Judge the respondent is liable under Art. III, sec. 2, or not liable because of the provisions of Art. IV, sec. 2(*a*), or more precisely stated, was the pumping of the water out of the *"Nootka"* conduct in "the management of the ship" within the meaning of that phrase as used in Art. IV, sec. 2(*a*).

Art. III, sec. 2, of the said Schedule reads as follows:

> 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.

Art. IV reads in part as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
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> * * *
>
> (*a*) act, neglect, or defeault of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

The origin and history of the foregoing provisions are discussed in Scrutton on Charter parties, 15th Ed., p. 439. Similar provisions were enacted in the United States in 1893 and in Canada in 1910. The immediate provisions are the result of recommendations for the adoption of the "Hague Rules" with slight modifications as a basis of legislation at the diplomatic conference on Maritime law at Brussels in October, 1922. The Imperial Economic Conference in 1923 recommended the adoption of the rules

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throughout the British Empire with the consequence that the Schedule to the Canadian Act is identical with that of the *Carriage of Goods by Sea Act in Great Britain*, 1924.

Lord Sumner states the purpose and object of the foregoing legislation to be as follows:

> The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption.

Gosse Millerd Ltd. v. *Canadian Government Merchant Marine* (1).

In the *Gosse Millerd* Case the House of Lords considered a claim against the ss. *"Canadian Highlander"* for damage to a shipment of tinplates from Swansea to Vancouver. The ship went from Swansea to Liverpool where cargo was both loaded and unloaded. When undocking at Liverpool the *"Canadian Highlander"* suffered injuries and was placed in dry dock for repairs. The damage to the tinplates was caused by negligence in moving and replacing tarpaulins while the vessel was in dry dock which permitted rain water to reach and damage the tinplates. It was held that this negligence in handling the tarpaulins was not negligence in the management of the ship and therefore the case was not brought within the proviso of Art. IV, sec. 2(*a*) and therefore the owners of the *"Canadian Highlander"* were liable under Art. III, sec. 2. Lord Sumner at p. 240:

> I think it quite plain that the particular use of the tarpaulin, which was neglected, was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or scraping the 'tween decks.

In the *Gosse Millerd* Case Lord Hailsham, L.C. approved of the principle laid down in *The Glenochil* (2). *"The Glenochil"* in the course of a voyage from New Orleans to London encountered exceptionally heavy weather. While unloading and loading cargo at London it was necessary to fill some of the water-ballast tanks in order to stiffen the ship. The learned trial Judge there found that if before admitting the water into the ballast tanks an

(1) [1929] A.C. 223 at 236. (2) [1896] p. 10.

examination had been made the broken pipes through which the water passed into and damaged the cotton-seed oil-cake would have been discovered. He held failure to make such an examination constituted negligence causing the damage, but that it was negligence in "the management of the ship", and the owners, therefore, were not liable by virtue of Art. IV, sec. 2(*a*). His judgment was affirmed upon appeal. Sir F. H. Jeune, President, stated at p. 15:

. . . the Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo.

Gorell Barnes, J. at p. 19:

. . . where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words "management of the said vessel."

In *The Rodney* (1), a pipe to carry off water became clogged and was cleared in such a negligent manner as to make a hole in it and permit water to damage the cargo. This was held to be negligent conduct in the management of the ship and therefore under Art. IV, sec. 2(*a*) the owners did not incur liability for the damaged cargo. Sir F. H. Jeune at p. 117:

The acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel, and falls within the principle of *The Glenochil.*

And Gorell Barnes, J. at the same page:

I think that the words "faults or errors in the management of the vessel" include improper handling of the ship, as a ship, which affects the safety of the cargo.

See also *The Touraine* (2).

In *The Ferro* (3), a quantity of oranges, because they were so placed in the vessel were damaged. The owners were held liable due to the provisions under a bill of lading containing language similar to the above quoted passages from the Schedule. Gorell Barnes, J. at p. 46:

It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of cargo.

(1) [1900] p. 112.
(2) (1927) 97 L.J.P. 60.
(3) [1893] p. 38.

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The ss. *Germanic* (1) arrived at New York with a heavy coat of ice estimated at 213 tons. This weight was increased by a heavy fall of snow after her arrival. In the course of unloading cargo and loading coal the vessel listed first to starboard, later to port, and then after a short time again to starboard, and finally about four hours later listed to port carrying the lower part of the open coal port below the water line where the pumps could not control the inflow of water, as a consequence of which the ship sank before relief could be had. At the trial, and this was affirmed in the Circuit Court of Appeals, the loss was found to be due to hurried and imprudent unloading. This finding was accepted in the Supreme Court of the United States where it was held that the negligence was not due to the management of the ship. Mr. Justice Holmes stated at p. 597:

> If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.

The foregoing authorities make it clear that the management of a ship is not restricted to acts done in relation to the ship while she is sailing. They rather indicate that the line is drawn where the conduct is, in the language of both Gorell Barnes, J. and Mr. Justice Holmes, primarily in relation to the management of the ship as distinguished from acts in relation to the cargo. The conduct of the master and crew prior to beaching at Quatsina was in relation to the management of the ship. The placing of the vessel in the mud in order to prevent her sinking was an act for the preservation of and therefore in relation to the management of the ship. The pumps were started at Cross Island and were kept going all the time the vessel was at Quatsino. The appellant stresses the fact that the master said once the *"Nootka"* was beached at Quatsino she was safe. He, however, explained she was safe unless some unfortunate accident occurred. He had in mind and mentioned the possibility of the bulkheads giving away

(1) (1905) 196 U.S. 589.

which would be a major accident. In order to avoid this it was necessary that the pumps be kept working. The fact that there was negligence in the operation of these pumps does not affect the matter if, as I think, they were operated for the preservation of and therefore were acts in relation to the management of the ship.

The master was, as his duty required, concerned about the cargo. When scows were available at 4.00 p.m. they began unloading the pulp from hold /1. However, the master was obviously of the opinion that whatever damage had been suffered by the cargo had been suffered prior to the landing at Quatsino.

The primary concern of the master in keeping the pumps going was to get as much water out as he could so that the bulkheads would not give way and that possibly the ship might continue her course. That being the primary concern, the fact that the pumping did tend to preserve or affect "the safety of the cargo", as stated by Gorell Barnes, J. in *The Rodney, supra,* does not take the case out of the exception of Art. IV, sec. 2(*a*). This was damage resulting from an act relating to the ship, and as stated by Bankes, L.J., in *Hourani* v. *T. & J. Harrison* (1), "only incidentally damaging the cargo." It was conduct such as Gorell Barnes, J. in *The Glenochil, supra,* refers to as "not primarily done at all in connection with the cargo." The conclusion must follow that the pumping of the water out of the *"Nootka"* was conduct in the management of the ship and therefore the facts bring this case within Art. IV, sec. 2(*a*).

The respondent cross-appealed and contended that the water which caused the damage was in the hold before the ship was beached at Quatsino and that all the damage was done before beaching. I agree that the evidence justifies this conclusion and concur in the analysis of the facts as made by my brother Rand.

The cross-appeal as such was unnecessary within the meaning of Rule 100 of this Court. The respondent in supporting the judgment at trial had a right to raise all the points which he did without a cross-appeal. In the result the appeal should be dismissed with costs including all of the costs of preparing the factum. The cross-appeal should be dismissed without costs.

(1) (1927) 32 Com. Cas. 305 at 313.

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The judgment of Taschereau and Locke JJ. was delivered by

LOCKE, J.:—The appellants as plaintiffs in these consolidated actions brought in the Exchequer Court, British Columbia Admiralty District (1), claim to recover from the defendant railway company as the owner and operator of the ss. *Nootka,* for damage to cargo carried in that vessel occasioned under the following circumstances. On July 29, 1947, shortly before 1 o'clock in the morning the *Nootka* sailed from Port Alice for Vancouver and at about 2 a.m. of the same day ran aground in a dense fog on Cross Island in Quatsino Sound. The vessel carried some 8,000 bales of wood pulp sulphite, the property of the plaintiffs in various proportions and, of this, part was carried in two forward holds known as Nos. 1 and 2 which formed together one common hold with two hatches leading into it. This combination hold, referred to in the reasons for judgment at the trial as the fore hold, consisted of the lower hold and 'tween decks, and cargo was stored in each. The space forward of the hold was occupied by the fore peak which, except for some ship's gear, was empty. The damage claimed is in respect of injury caused by sea water which gained access to the fore hold at some time following the stranding.

The *Nootka* remained aground on Cross Island for approximately one hour and forty minutes and then slipped off on the following tide. The first officer had ascertained by an examination that in the fore peak she was beginning to make water, though no significant amount obtained entry into her until she slid off the rock but, according to both the master and the first officer, within a very short time after this there was difficulty in handling the vessel and they discovered she was going down perceptibly by the head, indicating that she was making water rapidly. The master then decided to proceed to Quatsino Wharf and to run her aground on a mud bank immediately ahead of the wharf and this was done. According to him, they commenced to operate the bilge pumps promptly after the vessel slid off the rock but this was insufficient to keep down the water gaining entrance to the vessel, so that by the time she was tied up at Quatsino Wharf

(1) [1949] Ex. C.R. 287.

at 4.43 a.m. she was considerably below her draft marks forward. The plaintiffs do not complain of any neglect on the part of the defendant up to the time the *Nootka* arrived at Quatsino Wharf. They do, however, dispute the accuracy of the evidence of both the master and the first officer as to the amount of water which had gained entrance into the ship by the time she arrived there. According to the ship's officers, such a large quantity had gained entrance into the fore hold by that time that all of the damage sustained by the cargo had been suffered. The evidence for the plaintiffs, which has been accepted by the learned trial judge, indicated, however, that a comparatively small amount of water had entered the vessel up to that time and it is the plaintiffs' case that it was the negligence of the crew thereafter which caused almost all of the damage to the cargo which ensued. The learned trial judge, however, while deciding this issue in favour of the plaintiffs held them disentitled to recover by reason of the provisions of sec. 2 of Art. IV of the *Water Carriage of Goods Act,* 1936, and dismissed the action. The plaintiffs appeal from this decision and the defendant has cross-appealed on the ground that it was error on the part of the trial judge to find as a fact that the damages claimed by the plaintiffs were caused after the arrival of the vessel at Quatsino Wharf. If the statute is an answer to the claims of the plaintiffs, the question of fact raised by the cross-appeal need not, in my opinion, be considered.

The case of the plaintiffs is that when the *Nootka* arrived at Quatsino Wharf and was beached in the mud there was only some 1½ inches of water in the hold above the top of the fuel oil tanks, it having been kept at this level by the use of the bilge pump only and that had the ship's officers promptly put to work other pumps then readily available the water could have been kept either at or below this level and much the greater part of the damage which was occasioned to the cargo in the forehold prevented. It is said that the master failed in his duty to protect the cargo by neglecting to use the available pumps, so that when the surveyor for the cargo underwriters arrived at the vessel at 8 o'clock in the evening there was some 13 or 14 feet of water in the hold, it being above the 'tween deck level. As a result of arrangements made after

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the arrival of Captain Clarke, the surveyor, the hold was pumped out with the available pumps but the damage had, of course, then been done.

The carriage by sea of the cargo in question was from Port Alice, B.C. to Vancouver and the rules prescribed by the *Water Carriage of Goods Act* (cap. 49, Statutes of Canada, 1936) applied. By sec. 2 of Art. III it is provided that:—

> 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.

It is said, however, for the defendant that if there was failure on the part of the ship's officers to care for the cargo no action lies by reason of the provisions of Art. IV, sec. 2(*a*) which provides that:—

> 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.

These statutory provisions are taken verbatim from the rules relating to bills of lading contained in the schedule of the *Carriage of Goods at Sea Act 1924 (Imp.)* 14 & 15, Geo. V, c. 22. That statute which was enacted as a result of the recommendations made at the International Conference on Maritime Law held at Brussels in 1922 follows closely in this respect the language of the Harter Act, which had been enacted by the Congress of the United States in 1893. As pointed out in Scrutton on Charter Parties, 15th Ed. p. 263, the Imperial Statute, imitating the Harter Act, draws an implied distinction between negligence in the navigation or in the management of the ship and negligence otherwise than in such navigation or management. From the consequences of the former it allows the ship owner to be relieved, while from those of the latter it does not.

Neither the Canadian or the Imperial Statute or the Harter Act attempt to define the meaning or effect of the words "navigation" or "management". In *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine Ltd.* (1), Lord Hailsham, L. C. pointed out that the expression "management of the ship" while first appearing in an

(1) [1929] A.C. 223 at 230.

English Statute in the *Carriage of Goods at Sea Act 1924*, had a long judicial history in that country and expressed the opinion that the words should be given the meaning which had been judicially assigned to them when used in contracts for the carriage of goods by sea prior to its enactment. In the present matter the learned trial judge, after stating that he accepted fully the evidence of Captain Clarke, including his conclusions as to the quantity of water in the vessel at the time it arrived at Quatsino Wharf, said that if the measures taken by Captain Clarke after his arrival at 8 p.m. to clear the fore hold of water had been taken by her own officers when she was first beached, the rise of water in the hold would have been checked and 68 per cent of the damaged cargo saved and said in part:—

> What I think tends to obscure the real issue here is the circumstance that the rising water had such an immediate damaging effect on the cargo, and only that might be relatively regarded as a remote effect on any ship operation. But that cannot matter. Had soundings been taken on arrival at Quatsino Bay (or before) and the ship's actual condition ascertained and appreciated, and the water then in the ship pumped out or reduced in volume (as I have found it could and should have been with the vessel's facilities then available) the ship would again have come to life; she would once more have become a going concern, might even perhaps have found it possible to get under way and move under her own power to Port Alice, 12 miles distant, for survey and temporary repairs. The failure to pump efficiently with all facilities at hand most certainly damaged further cargo, but it was essentially a failure in a matter that vitally affected the management of the ship, viewed in the light of the authorities. It was a "want of care of vessel indirectly affecting the cargo"; or so it seems to me.

For the defendant it is said that if the findings of fact of the learned trial judge be correct, then the neglect or default of the master or other servants of the carrier was in "the navigation or in the management" of the ship, within the meaning of Art. IV, sec. 2(*a*).

The meaning to be assigned to the words "improper navigation" in an agreement was considered in *Good* v. *London Steamship Owners' Association* (1). By the agreement the members of the Association undertook to indemnify each other in respect of "loss or damage which by reason of the improper navigation of any such steamship as aforesaid may be caused to any goods, etc. on board such steamship." The ss. *Severn*, while on a voyage from Memel to Hull, encountered heavy weather and being short of coal put back to Frederickshaven to coal and to

(1) (1871) L.R. 6 C.P. 563.

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trim her cargo which had shifted. Going into the harbour she grounded but got off within an hour and the pumps were put on to try whether she had made any water and, for this purpose, the bilge-cock was opened but through the negligence of the crew was not closed when the attempt to pump ceased. While the vessel was moored at the quay, orders were given to fill the boilers and for this purpose the sea-cock was opened—this communicated with the box or tank in which was the bilge-cock—and when the boilers were filled, the sea-cock being through a like negligence left open, the water entered in large quantities by means of the open bilge-cock and damaged the cargo. This was held to be damage from improper navigation, Willes, J. saying in part (p. 569):—

> Improper navigation within the meaning of this deed is something improperly done with the ship or part of the ship in the course of the voyage. The omission to close the bilge-cock was clearly improper navigation within the meaning of this deed. It was improper navigation in the course of the voyage.

In *Carmichael* v. *Liverpool Sailing Ship Owners' Association* (1), similar language in the articles of a mutual insurance association was considered. While loading a cargo of wheat, an opening or port in the side of the vessel was negligently left insufficiently secure so that water gained access to the cargo and caused damage. The matter came before A. L. Smith and Wills, JJ. by way of a stated case and the neglect was held to fall within the expression "improper navigation." On appeal, Lord Esher, M.R. and Fry, L.J. agreed with A. L. Smith and Wills, JJ. that the decision in *Good* v. *London Steamship Owners' Association,* above referred to, concluded the matter. Lopes, L.J. said in part (p. 251):—

> In my opinion improper navigation means the improper management of a ship in respect of the cargo during the voyage.

In *The Ferro* (2), damage caused to cargo by negligent stowage was held by Sir Francis Jeune and Gorell Barnes, J. to be not within the expression "neglect or default in the navigation or management of the ship" in a bill of lading. In *The Glenochil* (3), goods were shipped under a bill of lading incorporating the provisions of the *Harter Act.* After arrival at her port of destination and during

(1) (1887) 19 Q.B.D. 242.
(2) [1893] p. 38.
(3) [1896] p. 10.

the discharge of the cargo it became necessary to stiffen the ship. For this purpose, the engineer ran water into a ballast tank but negligently omitted first to ascertain the condition of the sounding-pipe and casing which had, owing to heavy weather during the voyage, become broken. Damage to the cargo ensued. The action failed, the loss being held to fall within the exception from liability for "faults or errors in the management" of the vessel. Sir Francis Jeune said in part:—(p. 14)

> It is sufficient for us to say that it is negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her. In that operation of stiffening there was a mismanagement of a pipe and the result was that water was let in and damaged the cargo.

and expressed the opinion that the Act permitted the exemption in respect of a fault primarily connected with the navigation or management of the vessel, and not the cargo. The learned President did not consider that it was necessary to deal with the matter as a question of navigation, saying that (p. 16)

> the word "management" goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself.

and said that in *The Ferro* the distinction he intended to draw was one between "want of care of cargo and want of care of vessel indirectly affecting the cargo." Gorell Barnes, J. said in part (p. 19):—

> I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words "management of the said vessel".

In *The Rodney* (1), the exemption contained in the *Harter Act* was again considered. There the vessel meeting with heavy weather and the forecastle becoming flooded the boatswain, while endeavouring with the aid of a poker to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold and damaging a portion of the cargo. Following the decision in *The Glenochil* the action failed. The

(1) [1900] p. 112.

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President in delivering judgment reversing the decision of a county court judge, referring to the reasons given by the latter in finding for the plaintiff that the word "management" should be confined to the performance (though improper) or non-performance of such acts as are or ought to be done for the safety of the vessel and her maintenance in a seaworthy condition, said that this was too narrow a view and that the acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition, but extended to keeping the vessel in her proper condition. Gorell Barnes, J. agreeing, said that nothing that was said in *The Glenochil* was intended to limit the meaning of the words "management of the ship" to acts done for the safety of the ship but included improper handling of the ship as a ship, which affects the safety of the cargo. In *Rowson* v. *Atlantic Transport Co.* (1), Stirling, L.J. adopted the views expressed in *The Glenochil* and *The Rodney,* and in *Hourani* v. *Harrison* (2), Atkin L.J. noting this fact adopted the statement of Gorell Barnes, J. in *The Rodney* that "faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo." In the *Gosse Millerd* case, above referred to, Lord Hailsham, L.C. expressly approved the principle laid down in *The Glenochil,* saying that the principles enunciated in that case had repeatedly been cited with approval in England and noting that they had been applied in *The Rodney* and accepted by the Court of Appeal in *Rowson's* case and adopted as correct by the Supreme Court of the United States in cases arising under the *Harter Act.*

The relevant language of the *Harter Act* has been considered in a large number of American cases. The statute was enacted in 1893 and in *The Sylvia* (3), Gray, J. delivering the judgment of the Supreme Court said in part:—

> This case does not require a comprehensive definition of the words "navigation" and "management" of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the

(1) [1903] 2 K.B. 666 at 680. (2) (1927) 32 Com. Cas. 305.
(3) (1898) 171 U.S. 462 at 466.

inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship.

and noted that this view was in accordance with the English decisions, referring, inter alia, to *Good* v. *London Steamship Owners' Association, Carmichael* v. *Liverpool Sailing Ship Owners' Association, The Ferro* and *The Glenochil.* In *The Sanfield* (1), Wallace J. delivering the judgment of the Circuit Court of Appeals held that the failure to open a sluice gate designed to empty the bilges which was neglected for twenty days during heavy weather was a fault pertaining to the management of the ship, within sec. 3 of the *Harter Act,* adopting the above quoted language from the judgment in *The Sylvia.*

Here, upon the facts found at the trial, the master having brought his ship safely to the wharf with only a small quantity of wtaer in the forehold and having by causing her to be grounded on the mud bank obviated the danger of her sinking, did nothing to prevent the rise of water in the forehold other than to continue to use the bilge pump which was, as the result showed, quite inadequate. Thus, the ship lay from early in the morning of July 29, 1947, until after 8 o'clock that evening, when Captain Clarke arrived, and having ascertained that there were some 13 or 14 feet of water in the forehold was instrumental in initiating measures which pumped the hold dry and, with the assistance of some temporary work on the hull done by a diver, enabled her to return to Port Alice and thence to Vancouver. There were, as was demonstrated after Captain Clarke's arrival, sufficient pumps immediately available to have kept the hull dry or practically so had they been put promptly to work when the vessel arrived at the wharf. Admittedly, the Captain knew that the vessel was taking water rapidly as she lay at the wharf. He apparently, however, erroneously considered that having consulted the engineer regarding the use of pumps he had discharged his duty.

Accepting the findings of fact made by the learned trial judge, that there was negligence on the part of the master appears to me to be undoubted. That this negligence resulted in damage to the cargo is equally beyond question. Any negligence in failing to take prompt steps to avoid

(1) (1898) 92 Fed. Rep. 663.

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the inroad of seawater into the holds of a vessel carrying perishable cargo must, in my view, be also negligence either in the navigation or the management of the ship. It is said for the appellant that when the *Nootka* was run aground at Quatsino Wharf she was safe from sinking, so that the failure to operate the available pumps did not jeopardize the safety of the vessel and that the presence of the large accumulation of water in the forehold did not constitute a danger to the bulkhead, but I think it must be accepted upon the authority of *The Rodney* that this is not decisive of the matter. Navigation, as indicated by the decisions in *Good* v. *London Steamship Owners' Association* and *Carmichael* v. *Liverpool Sailing Ship Owners' Association,* does not refer merely to the time when the vessel is at sea. The decision in *The Accomac* (1), is clearly distinguishable on the facts, for there the voyage had ended at the time the events occurred giving rise to the claim. I think the failure to exercise reasonable diligence to prevent further water entering the forehold falls within the same category as the failure of the crew to close the bilge-cock in Good's case, and the port in Carmichael's case, and was "neglect in the navigation of the ship" within the terms of the exception. The learned trial judge considered the matter as one of negligence in the management of the ship and, having come to a conclusion on this aspect of the matter, no doubt considered it unnecessary to decide further whether there was not also negligence in the navigation of the ship. The same neglect may, in my opinion, be both in navigation and in management. Adopting the language of Gorell Barnes, J. in *The Rodney,* there was here improper handling of the ship as a ship which affected the safety of the cargo and this was fault or error in management. The learned trial judge has said that the neglect was essentially a failure in a matter that vitally affected the management of the ship, a conclusion with which I respectfully agree.

In view of my conclusion upon this aspect of the matter, I express no opinion upon the issue raised by the cross-appeal. It was unnecessary for the respondent to cross-appeal. Rule 100 provides that a notice of cross-appeal may be given by the respondent if it is intended upon the

(1) (1890) 15 P.D. 208.

hearing of the appeal to contend that the decision of the court below should be varied. Here the action was dismissed by the learned trial judge upon the ground that the fault established was negligence in the management of the ship, for which the respondent was not liable. The respondent did not seek to have the decision varied. The respondent was entitled to support the judgment upon any tenable ground and all of the arguments advanced upon the cross-appeal in support of the contention that the respondent had not been negligent might have been advanced on its behalf.

The appeal should be dismissed with costs which should include all taxable costs in connection with the preparation of the factum, including that portion thereof directed to the question as to whether the respondent had been guilty of negligence. Under the circumstances, I think the dismissal of the cross-appeal should be without costs.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the appellants: *Bull, Housser, Tupper, Ray, Carroll and Guy.*

Solicitor for the respondent: *J. A. Wright.*