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April 20
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Feb. 14

BETWEEN:

MAXINE FOOTWEAR COMPANY LIMITED and J. ERIC MORIN .. APPELLANTS;

AND

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED .... RESPONDENT.

Shipping—Destruction of cargo by fire—Bill of lading subject to The Water Carriage of Goods Act, 1936, S. of C., c. 49—Negligence in management of ship in port—No proof fire caused by "actual fault or privity of carrier"—The Water Carriage of Goods Act, 1936, S. of C., c. 49, article IV, r. 2(a), (b).

The appellant's goods were shipped from Montreal to Kingston, Jamaica under a through bill of lading which provided it should have effect subject to *The Water Carriage of Goods Act, 1936* (Can.). The Act by Article IV r. 2 provides that "neither the carrier nor the ship shall

be responsible for loss or damage resulting from, (*a*) act, neglect or default of the master . . . or servant of the carrier in the navigation or management of the ship; (*b*) fire unless caused by the actual fault or privity of the carrier." The contract of carriage was delivered to the appellant at Montreal by the Canadian National Railways, the agent of the respondent, and the goods, after carriage by rail to Halifax, were loaded aboard the respondent's ship. Subsequently, and before the vessel sailed, the ship's captain gave orders that certain frozen pipe lines be thawed out and in the carrying out of the order the ship was set afire and the appellant's goods destroyed.

Held: That the respondent, the carrier, by its acceptance of the goods owed the appellant a duty to carry them to their destination or, in the event of loss due to its negligence, to answer for such loss unless relieved by some provision of the law.

2. That the ship from a cargo point of view was seaworthy and since the negligent acts which gave rise to the fire were acts done in the management of the ship the respondent was entitled to the benefit of the exemption provided by article IV, r. 2(*a*).

3. That the loss was the direct result of the fire and the respondent was also entitled to the immunity provided by article IV r. 2(*b*) unless the fire was caused by its actual fault or privity as to which the onus of disproof rested on it. The negligence which caused the fire was that of the employees of the respondent but since neither the fact that the pipes in question were frozen nor the means to be used to clear them were communicated to any one who represented the carrier or who had power to act on its behalf, it could not be said that the actions of those responsible for the fire (and to whom alone negligence was attributable), were the very actions of the respondent or of its directing mind. Moreover since the operation which caused the fire was unknown to it, it could not be found that the fire was caused by its privity and having satisfied the onus cast upon it, it was entitled to the immunity provided by r. 2(*b*).

Judgment of Smith D.J.A. [1952] Ex. C.R. 569, affirmed.

APPEAL from the judgment of Smith, Deputy Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard by the Honourable Mr. Justice Cameron at Montreal.

C. Russell McKenzie, Q.C., for the appellant.

Lucien Beauregard, Q.C., for the respondent.

CAMERON J. now (February 14, 1956) delivered the following judgment:

This is an appeal by Maxine Footwear Co., Ltd., from the judgment of Mr. Justice A. I. Smith, Deputy Judge in Admiralty for the Quebec Admiralty District, dated June 3, 1952 (1), which dismissed the appellants' claim for

(1) [1952] Ex. C.R. 569.

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damages. The trial came on before Mr. Justice Cannon, but owing to his illness and subsequent demise, the parties agreed to refer the matter for decision to Mr. Justice Smith. The other named appellant, J. Eric Morin, was joined as a co-plaintiff in the original proceedings in his capacity as consignee under the terms of the Bill of Lading later to be referred to, and stated in the pleadings that he had no interest in the Bill of Lading or in the goods and, in any event, assigned his interest therein to his co-plaintiff and asked for judgment in their favour. It appears that he has now no further interest in these proceedings. Any reference hereinafter to "the appellant" will be understood as meaning the corporate appellant.

The appellant's damages resulted from the loss of its goods entrusted to the respondent for transportation from Montreal to Kingston, Jamaica. The goods were shipped by rail from Montreal to Halifax to be there carried by water to Kingston by Canadian National Steamships, the contract of carriage consisting of a through Bill of Lading delivered to the appellant at Montreal by Canadian National Railways, the agent of the respondent. It may be noted here that in its statement of defence the respondent alleged that any recourse which the appellant might have as a result of the loss of its goods should have been directed against His late Majesty the King, represented by the Minister of Transport as owner of the vessel, and that there was no *lien de droit* between the parties hereto. By the judgment under appeal, that plea was stated to be unfounded and that finding is now accepted. It is expressly provided in the Bill of Lading (Exhibit P-1) that it should have effect subject to the provisions of *The Water Carriage of Goods Act, 1936* (hereinafter to be referred to as "the Act").

The M/V *Maurienne,* operated by the respondent, arrived at the port of Halifax on January 31, 1942. On the following Tuesday, loading of the vessel's No. 3 hold (in which the appellant's cargo was placed) was commenced and the loading of the vessel was completed at about 8 p.m. on the evening of Friday the 6th, it being the intention to sail the following morning. On Friday morning it was found that certain water tanks on deck were leaking and that some of the pipe lines on deck were frozen. Employees

of Purdy Brothers were instructed to weld the tanks and thaw out the pipes and these operations were carried out on Friday morning and Friday evening, the work being completed at about 9 p.m.

Amongst the pipes which were frozen were three scuppers discharging respectively from the bath, toilet and the galley sink, and instructions were given by the Captain to the Fourth Mate to have them thawed out. In order to free these pipes which discharged through the starboard side of the vessel adjoining No. 3 hold and some 8 or 10 feet below deck level, one or more of the employees of Purdy Brothers, working on a scaffold suspended over the side, used an acetylene torch to melt the ice accumulated near or in the openings of the said pipes. This work was carried out between 3 and 4 o'clock on Friday afternoon, and, while all had not then been cleared, all were found to be free early in the evening.

At about 11.30 p.m. the smell of smoke was detected and it was found that there was fire in or close to No. 3 hold, near the place where the acetylene torch had been used in the afternoon. In spite of efforts to extinguish the fire it spread, and by 5.30 a.m. it had reached such proportions that the Captain ordered the opening of the seacocks. The vessel soon sank with almost complete loss of its cargo.

There is clear proof that the respondent agreed to carry the appellant's cargo and that it accepted and had the same under its control. It therefore owed the appellant the duty of transporting and delivering the cargo to Kingston and if the cargo were lost or destroyed due to its negligence or by its failure to discharge its obligations under the contract of carriage, it must answer for such loss unless relieved of liability by some provision in law. Non-delivery of the goods is admitted.

The learned trial Judge found that while direct and positive proof of the cause of the fire was lacking, the facts proven gave rise to a presumption that it had its origin in the heat generated by the acetylene torch which was used in removing the ice from the scupper pipes and which in some way was communicated to the cork insulation in the ship's wall adjoining the scupper pipes. The vessel had originally been a fruit carrier and was insulated throughout with ten inches of granulated cork inside the ship's shell;

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all of the scupper pipes passed through this insulation. There is evidence that the workman operating the acetylene torch placed its flame into the scupper pipes for excessively long periods and the presumption is that in so doing, the cork smouldered and eventually burst into flame, spreading to the wooden sheathing in the cargo holds and thence to the cargo itself. The evidence strongly supports the finding of the trial Judge on this point and it is now accepted by both parties as the most reasonable and probable cause of the fire.

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 supervision 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. The question to be determined is whether such negligence engages the liability of the respondent.

The first submission of counsel for the appellant is that the trial Judge erred in not finding the ship unseaworthy. He relies on the provisions of Rule 1 of Article III of the Schedule to the Act which is as follows:

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.

It is to be observed that the burden of proving unseaworthiness lies on him who alleges it.

The submission on this point falls into three categories. First it is said that the mere presence of ice in the scupper pipes made the ship itself unseaworthy. There is no evidence to support such a finding; none of the experts called on the point were of that opinion. The positive evidence was that it would merely result in some temporary inconvenience caused by the inability to use the facilities to which the scupper pipes were connected and that in the ordinary course of things the ice would disappear shortly after the vessel had commenced its voyage.

The second submission is that the presence of ice in the scupper pipes made the vessel unseaworthy from a cargo point of view—that it lacked cargoworthiness. Seaworthiness, of course, includes cargoworthiness. The suggestion on this point is that as the scupper pipes passed through or over the holds, there was a possibility that the presence of ice therein might at some stage result in a fracture of the pipes and the flow of the water therefrom into the holds would cause damage to the cargo. Mr. Campbell, a witness for the respondent and who has had very lengthy experience in such matters, said that he had never known of a fracture in a scupper pipe caused by ice. That witness and Messrs. Carswell & Tait were all of the opinion that such a condition did not render the vessel unseaworthy from a cargo point of view. Mr. McKean, a witness for the appellant, was of the same opinion so long as the scupper pipes were not fractured. Mr. Fletcher, an expert witness called on behalf of the appellant, however, was of the opinion that the vessel was unseaworthy from a cargo point of view by reason of the ice in the scupper pipes.

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In support of this submission, counsel for the appellant cited *Spencer Kellogg & Sons, Inc.* v. *Great Lakes Transit Corporation* (1), a decision of the District Court of Michigan. In that case the vessel had a frozen *water line* in her cargo hold when the hatches were closed prior to the sailing. While on its voyage the water line broke due to freezing, permitting the contents of the water tank to drain into and damage the cargo. It was held that the vessel was unseaworthy "before and at the beginning of the voyage" for the carriage of a grain cargo because she had a frozen water line in her cargo hold when the hatches were closed and battened. The present case on the facts is readily distinguishable from the *Kellogg* case. There it was a water line leading from a tank that ran through the holds and the line was not insulated; the water line broke. In the instant case the pipes were merely scupper pipes draining a limited amount of water from the lavatory, bath and galley sink, and all were insulated and did not break.

The weight of the evidence on this point supports the finding of the learned trial Judge that the vessel from a cargo point of view was not unseaworthy and his finding should not be disturbed. It may be noted, also, that there was evidence on behalf of the respondent that even if the scupper pipes were broken by ice, only a small amount of water would be released, and, under normal precautions, it would not affect the cargo in any way.

The final submission on this point is that in the negligent use and application of the acetylene torch, the respondent failed before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy, and the holds and all other parts of the vessel in which goods were carried, fit and safe for their reception, carriage and preservation, as required by Rule 1 of Article III (*supra*), and is not, therefore, entitled to the immunity provided in Rule 1 of Article IV which is as follows:

> 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 seaworthy, 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.

(1) (1940) 32 Federal Supplement 520.

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.

It is submitted that the respondent had not proven the exercise of due diligence in making the holds safe inasmuch as the negligence in operating and supervising the thawing-out operation, it is said, negatives diligence.

In view of my conclusion that the learned trial Judge was right in holding that the ship was not unseaworthy nor the holds unfit or unsafe, it would seem to follow that the question of due diligence does not arise—*The Touraine* (1). These findings establish that the respondent had fully complied with the responsibilities put upon it by the relevant parts of Rule 1 of Article III. A finding of seaworthiness implies that due diligence has been used.

Moreover, it seems to me that the negligence which occasioned the fire did not arise in the carrying out of the obligations under Rule 1 of Article III, to make the ship seaworthy and its holds safe and fit. These obligations had been fully carried out before the thawing-out operations began. In my opinion, the fire arose because of negligence by members of the crew or employees of the carrier in the management of the ship and the respondent is therefore entitled to the benefit of Rule 2(*a*) of Article IV, which is as follows:

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;

The meaning and effect of this subsection was considered by the Supreme Court of Canada in the recent case of *Kalamazoo Paper Co. et al.* v. *C.P.R.* (2). All the leading cases in which the meaning of the phrase "management of the ship" was considered, were cited and may usefully be referred to.

In *The Glenochil* (3), the facts were that while the vessel was loading and unloading cargo at London, it was found necessary to fill some of the water-ballast tanks in order to stiffen the ship. In doing so, water escaped from the broken pipes causing damage to the cargo. The trial Judge had

(1) [1928] P. 58 at 68. (2) [1950] S.C.R. 356.
(3) [1896] P. 10.

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found that if the pipes had been examined, their broken condition would have been discovered and that the failure to make such an examination was negligence "in the management of the ship" and that, therefore, the owner was not liable. His judgment was affirmed upon appeal. Sir Francis Jeune, President, said in part at page 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 at page 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.

In the same case Gorell Barnes J. said at page 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".

Reference may also be made to *The Rodney* (1). In that case, while the vessel was at sea, 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 Article IV, Rule 2(*a*), the owners did not incur liability for the damaged cargo. Sir Francis Jeune said at page 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.*

In the same case, Gorell Barnes J. said at page 117:

> 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.

(1) [1900] P. 112.

In the *Kalamazoo* case Estey J., after referring to the above cases and to *The Ferro* (1), and the *SS. Germanic* (2), said at page 370:

> 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 a ship as distinguished from acts in relation to the cargo.

And at page 380, Locke J., speaking also for Taschereau J., said:

> 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 the instant case, the steps taken to thaw out the ice were undertaken to return to use the facilities or appliances of a portion of the ship, namely, the galley and washroom, and to keep those parts of the vessel in proper condition; they were not done primarily in connection with the cargo. In my opinion, therefore, these acts fall within the principle of *The Glenochil.*

Does that principle apply only when the vessel is at sea or does it extend to the time when she is in harbour? The question is discussed in *Carver* at page 117. As I have noted, Estey J. in the *Kalamazoo Paper* case, said that it was clear that the management of a ship is not restricted to acts done in relation to the ship while she is sailing.

Its applicability has also been considered under s. 3 of the *Harter Act* which provided that if the owner of a vessel exercised due diligence to make her seaworthy, he would not be liable "for damage or loss resulting from faults or errors in navigation or in the management" of the vessel.

In *The Glenochil* (*supra*), damage occurred in the cargo in filling the ballast tanks during the discharge of cargo at its destination. It was held to be covered by the section. Gorell Barnes J. stated at page 19: "Exemption extends from the time the cargo was taken on board to the discharge." In *McFadden* v. *Blue Star Line* (3), injury to

(1) [1893] P. 38. (2) (1905) 196 U.S. 589.
(3) [1905] 1 K.B. 697.

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goods caused by the imperfect closing of a sluice door during loading, but after the goods had been shipped, was held to be covered by s. 3. Again, in *SS. Lord* v. *Newsum* (1), it was held that the word "management" can be applied to a ship both while she is in harbour and while she is in motion. In that case Bailhache J. said at page 849:

> The word "management" may well be applied to a ship while she is in harbour and also while she is in motion and the two words taken together denote something done in the user or control of the ship while in harbour or on her voyage. Things done of that nature come within the term "navigation or management". . . .

In *Temperley's Carriage of Goods by Sea Act,* 1924, Third Edition, the author states at page 47:

> Article II provides that "the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and *entitled to the rights and immunities* hereinafter set forth."
>
> Thus, *prima facie,* the period during which the exceptions in Article IV Rule 2 operate, is the whole period from the beginning of the loading to the end of the discharge. There is no room for any argument based on the idea that the exceptions only operate during the voyage itself or while the ship is beyond the control of the carrier himself.

And at page 48 the author states:

> It is submitted, therefore, that the exception above quoted, contained in Article IV Rule 2(*a*), of acts, neglects and defaults of the master, etc., in the navigation or in the management of the ship should be read as an exemption of the shipowner from liability for any *use or failure to use or any active misuse of the ship and the tackle and machinery on board her, which the owner in pursuance of his* obligation contained in Article III, Rule 1, has *supplied,* and in the manipulation of which the peculiar skill of the seaman in its broadest sense has its scope. In other words, the scheme of the Rules seems to be that the carrier must take all proper steps to provide a proper ship, with proper appliances and a proper crew; but that for what the crew do with the ship and her appliances, and whether they use them in the manner which true seamanship in its broadest sense demands, the carrier is not to be responsible.

Applying these authorities to the present case, I have reached the conclusion that the negligent acts of the respondent's employees, which gave rise to the fire, were acts done in the management of the ship and that the respondent is entitled to the benefit of the exemption provided in Rule 2(*a*) of Article IV.

(1) [1920] 1 K.B. 846.

The trial Judge found that as the cargo was lost because of the fire—and not because of unseaworthiness—the respondent was entitled to succeed under Rule 2(*b*) of Article IV, which is as follows:

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

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

That the immunity provided by that rule is not absolute was pointed out in *Dominion Glass Co., Ltd.* v. *Ship Anglo Indian* (1). There it was held that certain concentrates were a dangerous cargo which rendered the ship unseaworthy and that the loss of the shipper's goods was directly attributable to such unseaworthiness, and not to the fire which resulted when the concentrates heated and the vessel caught fire. In that case Kerwin J. (now C.J.C.), speaking for the majority of the Court, said at page 421:

My conclusion is that considering the purpose of the Act, if the direct cause of a loss is the unseaworthiness of the ship, even though fire was the proximate cause, the loss is not one arising or resulting from fire within the meaning of Article IV, clause 2(*b*) even though it is proven that the unseaworthiness was caused without the actual fault or privity of the carrier. That still leaves the clause free to operate where a loss is the direct result of fire only.

In the present case, the appellant has failed to prove unseaworthiness. Further, it is established, I think, that the loss is the direct result of fire only. In considering whether the breach complained of is *caused* by an excepted peril, the immediate, the direct, or dominant cause, and not the remote cause is looked to—*Scrutton,* page 227. The respondent is therefore entitled to the immunity provided by Rule 2(*b*) of Article IV unless the fire was caused by its actual fault or privity. The onus of disproving "actual fault or privity" is on the shipowner—*Scrutton,* page 511, note (*r*). The words "actual fault" would seem to negative that liability which arises solely under the rule of *"respondeat superior"*. In *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (2), the House of Lords considered the meaning of the phrase "actual fault or privity" in s. 502 of the *Merchant Shipping Act, 1894.* The headnote is as follows:

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship shall not be liable to make good to any extent whatever

(1) [1944] S.C.R. 409. (2) [1915] A.C. 705.

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"any loss or damage happening without his actual fault or privity" where any goods or merchandise taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

A cargo of benzine on board ship was lost by a fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited company and the managing owners were another limited company. The managing director of the latter company was the registered managing owner and took the active part in the management of the ship on behalf of the owners. He knew or had the means of knowing of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition:—

Held, that the owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity.

In that case Viscount Haldane L.C. said at page 713:

Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also

be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.

In the instant case the carrier was the respondent corporation, its trade name being The Canadian National Steamships. It has a board of directors, the head office, I think, being in Montreal. Its representative at Halifax in 1942 was Mr. J. W. Campbell, called as a witness by the respondent. He had been assistant superintendent engineer from 1929. It was part of his duty to go on board the respondent's vessels as they arrived in Halifax to overlook and inspect the vessels and secure reports from the ships' officers and to undertake any repairs that might be necessary for the conditioning of the ships. He examined the *Maurienne* on arrival and found her in generally good condition except for a few minor repairs. He found her in good seaworthy condition and the holds and all other parts of the vessel in which goods were stored fit and safe for their reception and preservation. He was on the vessel at least once each day after her arrival in Halifax up to and including the day of the fire. He was not advised by any one that the scupper pipes were frozen and had no knowledge that such was the case or that they were being thawed out with an acetylene torch. There is no evidence as to who employed Purdy Brothers but it was not Campbell; presumably, it was one of the ship's officers who made the arrangements. In any event, it was one of the ship's officers who instructed the employees of Purdy Brothers to thaw out the scupper pipes.

I think it is clear that in order to deprive the carrier of the benefit of the exception, the fault or privity must be in respect of that which causes the loss or damage in question (*Scrutton*, page 511, note (*r*)). The fault or negligence which caused the fire was that of the workman who used the acetylene torch and of the ship's officers, all of whom, as I have said, were employees or servants of the respondent corporation. The evidence is that it is customary to thaw out scupper pipes by the use of a torch, but the fault here was in applying the torch for excessively long periods and in an area close to granulated cork. The clearing of the pipes was considered to be a purely routine matter and

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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 or who had power to act on its behalf. While *Lennard's* case (*supra*) had to do with s. 502 of the *Shipping Act, 1894*, the wording of that section is so similar to that of Rule 2(*b*) of Article IV, that the opinion of Viscount Haldane, which I have quoted, is applicable to this case. It cannot be said, I think, that the actions of those responsible for the fire and to whom alone negligence is attributed, were the very actions of the owner or of its directing mind. Moreover, since the operation which caused the fire was unknown to the respondent corporation, it cannot be found that the fire was caused by the privity of the carrier. In my opinion, the respondent has satisfied the onus cast upon it to establish that the fire was caused without its actual fault or privity and it is therefore entitled to the exception from liability provided for in Rule 2(*b*) of Article IV.

In view of these findings, it is unnecessary to consider the question raised by the respondent in its statement of defence, namely, that if liable to the appellant, it is entitled to limit its liability.

For these reasons, the appeal fails and will be dismissed with costs.

Judgment accordingly.