ONTARIO ADMIRALTY DISTRICT

1941
March 20.

BETWEEN:

THE INSURANCE COMPANY OF NORTH AMERICA ..... } PLAINTIFF;

AND

COLONIAL STEAMSHIPS LIMITED... DEFENDANT.

Shipping—Bills of Lading Act, R S C., 1927, c. 17, s 2—Variation in contract of shipment of cargo of grain—Bill of lading not a fully negotiable instrument—Sinking of vessel with cargo due to peril of the

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sea and not to negligence—Endorsee of bill of lading accepting same with knowledge of variation in contract is not entitled to recover damages from owner of vessel for loss to cargo not resulting from negligence of owner.

The plaintiff, having paid a loss under a marine insurance policy, secured possession of certain bills of lading and now claims in this action, as endorsee, holder and owner of those bills and as the owner of the cargo represented thereby, damages for injury to 115,600 bushels of wheat from the sinking of the steamer *Northton* at Port Colborne, Ontario. The defendant counterclaimed for general average expenses.

The damaged grain had formed part of a cargo of 225,005·30 bushels of wheat originally shipped from Fort William on October 11, 1938, on defendant's steamer *Mathewson* The bills of lading gave the defendant the right to tranship the whole or any part of the cargo at any transfer elevator in Canada *en route* for forwarding to destination. While the grain was in transit between Fort William and Port Colborne it was agreed between the owners of the cargo and the defendant that the carriage contract would be terminated at Port Colborne Under a further agreement the entire cargo was loaded into two smaller steamers to be held in these vessels for winter storage at Port Colborne, Ontario On February 1, 1939, one of these vessels, the *Northton*, with her portion of the cargo on board, sank at her moorings with resultant damage to the grain. A claim for total loss was settled by plaintiff which acquired as part of the proof of loss the bills of lading covering the portion of the grain on board the *Northton*. The Court found as a fact that plaintiff became endorsee of the bills of lading with full knowledge of the variation made in the contract.

Held. That the plaintiff gave no consideration for the bills of lading and that the ss *Northton*, before loading, was seaworthy and sank as a result of a peril of the sea and not because of any negligence on the part of defendant

2 That a bill of lading is not a fully negotiable instrument but is merely evidence of the contract between the parties to it

ACTION by plaintiff as endorsee of certain bills of lading, to recover from defendant damages paid by plaintiff in settlement of a claim for loss of part of a cargo of grain.

The action was tried before His Honour Judge Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto, Ontario.

Francis King, K.C., and *C. Russell McKenzie, K.C.*, for plaintiff.

F. M. Wilkinson, K.C., and *R. J. Dunn* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

BARLOW D.J.A. now (March 20, 1941) delivered the following judgment:

This is an action to recover the sum of $48,370.28 on a bill of lading dated the 11th day of October, 1938, made by the defendant to the order of the Bank of Nova Scotia, Montreal, as consignee, and subsequently endorsed to the Reliance Grain Company Limited, and by the latter endorsed to the plaintiff. The defendant by counterclaim claims under general average the sum of $4,059.67. Upon the opening of the trial counsel agreed that if either or both parties were found entitled to recover, that judgment should go for the amount claimed. The facts are:

Upon instructions from Consolidated Shippers Limited of Winnipeg, Reliance Grain Co. Limited, as brokers and agents for Consolidated Shippers Limited, purchased on the Winnipeg Grain Exchange from the Grain Board 225,005·30 bushels of wheat. The Reliance Grain Co. Limited arranged for shipment of the same and the same was received on board the ss. *Mathewston,* owned by the defendant company, at Fort William and Port Arthur for carriage and delivery at Montreal. The said grain was shipped by the Reliance Grain Co. Limited to the order of the Bank of Nova Scotia, Montreal, subject to the terms and conditions of bills of lading as shown in Exhibit 2. The bills of lading provided for a voyage from Fort William to Montreal, via Port Colborne, with the right of the carrier to tranship the whole or any part of the cargo at any transfer elevator in Canada *en route.* The evidence shows that the bills of lading were pledged by the Reliance Grain Company Limited to and deposited with the Bank of Nova Scotia. See *Sewell* v. *Burdich* (1). The evidence further shows that the Reliance Grain Co. Limited was acting as agents for Consolidated Shippers Limited, that the latter became responsible to the Reliance Grain Co. Limited for the freight, insurance and a brokerage charge, all of which have been duly paid and settled by Consolidated Shippers Limited with Reliance Grain Co. Limited. On the 14th day of October, 1938, the plaintiff Insurance Company of North America issued an insurance certificate M 10453 to Reliance Grain Co. Limited covering the cargo on the voyage from Fort William to Montreal, the loss, if any, being payable to

(1) (1884) 10 A.C. 74

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Reliance Grain Co. Limited. The cargo in question arrived at Port Colborne on the 19th or 20th day of October and was unloaded into the Government Elevator. The ss. *Mathewston* is an upper lakes vessel and the practice is to unload into the Government Elevator at Port Colborne and then load the cargo into canal size vessels for the remainder of the voyage to Montreal. There is a fifteen-day free time in the elevator. Acting on instructions from Consolidated Shippers the grain was retained in the elevator until the 25th or the 28th day of November, 1938. Consolidated Shippers, believing that there might be a better market for the grain at Port Colborne than at Montreal, settled with the defendant for the carriage from Fort William to Port Colborne at 2 cents per bushel and paid the same. Consolidated Shippers further arranged with the defendant to load the grain in question on two vessels of the defendant, the ss. *Gilchrist* and the ss. *Northton* for winter storage. On the 25th day of November a certain portion of the cargo in question was loaded on the ss. *Gilchrist* and on the 28th day of November the remainder of the cargo, 115,600 bushels, were loaded on the ss. *Northton*. On the 28th day of November, 1938, the plaintiff, Insurance Company of North America, issued an endorsement to be attached and made part of certificate No. 10453 insuring the grain while in winter storage in the ss. *Northton*. On the 28th day of November the defendants by letter wrote R. S. Meisner, the president and manager of Consolidated Shippers Limited, enclosing copies of bills of lading covering cargoes of grain loaded at Port Colborne for storage on the ss. *Gilchrist* and the ss. *Northton* and also enclosed a memorandum bill of lading from the transhipping port which is affixed and is part of this Exhibit. The copies of the bills of lading were in the form used for winter storage. The evidence shows that although there were several requests by the defendant to Consolidated Shippers to have these bills completed, the same were never filled out and signed. About midnight on the 1st day of February, 1939, or early in the morning of the 2nd day of February the ss. *Northton* sank at her berth at Port Colborne. On February 2nd the Insurance Company of North America was advised of the sinking of the ss. *Northton* and on February 3rd they instructed Albert R. Lee & Co of Buffalo to make a survey of the

vessel. On the same date the Insurance Company of North America gave instructions to take over the cargo of the ss. *Northton* for disposition. On February 4th Reliance Grain Co. Limited obtained from the Bank of Nova Scotia bills of lading covering 116,300 bushels of grain, being the quantity of grain stored in the ss. *Northton,* giving the Bank of Nova Scotia a bailee receipt for the same. The bills of lading were endorsed by the Bank of Nova Scotia to Reliance Grain Co. Limited. Reliance Grain Co. Limited then endorsed the bills of lading to Insurance Company of North America and handed the same together with the other necessary papers to prove loss under the insurance policy to Johnson and Higgins, Limited, of Winnipeg, insurance brokers, who on the same date forwarded the bills of lading to the Insurance Company of North America. On the 10th day of February Reliance Grain Company received a cheque from Insurance Company of North America for $86,700 in full settlement of the insurance claim with respect to 116,300 bushels which was the quantity of grain stored in the ss. *Northton.* Reliance Grain Co. Limited then deposited this cheque in the Bank of Nova Scotia and took up the bailee receipt. Insurance Company of North America salved the cargo and now claims for the balance owing, after having given credit for the amount obtained by salvage.

Much evidence was given as to the cause of the sinking of the ss. *Northton* at her berth at Port Colborne. It must be found on the evidence that the ss. *Northton* was seaworthy, that she was properly inspected for a storage cargo and also properly inspected as to loading and berth and the proper certificates issued. It also must be found that she was well and properly laid up for the winter. The evidence shows that on the 30th day of January, 1939, the water at Port Colborne dropped to the lowest point in history. The evidence shows that ordinarily there would be about ten feet of water between the bottom of the ss. *Northton* and the floor of the harbour where she was berthed providing that such floor were clean. The water, about 11 a.m. of the 30th day of January, 1939, dropped to a point which would leave about 6·54 feet between the bottom of the vessel and the harbour floor. Within a few hours the water had risen to its normal height. The shipkeeper's evidence shows that on the 1st

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day of February at 10 p.m. the vessel was in her usual position. About 12 p.m. the shipkeeper was awakened and found that the vessel was sinking and that she had settled at this time about five feet at her stern. About 2 a.m. on the 2nd day of February, 1939, the stern settled to the bottom so that her decks were under water. The evidence shows that upon subsequent examination the plates of the vessel under the engine room hold had been stove in in a semi-circular form about 11 inches or 12 inches deep and that this was the cause of her filling with water. The best evidence is that she settled upon some obstruction at the time of the low water on the 30th day of January, that by some means the hole in question was blocked until towards midnight of the 1st day of February. The best evidence is that whatever the obstruction was it broke off and cannot now actually be located. It must be found that there was no negligence on the part of the defendant, that the explanation given as to the sinking is a reasonable one under all the circumstances and that the defendant has satisfied the onus placed upon it; *Dominion Tankers* v. *Shell Petroleum* (1). What happened, therefore, comes within a peril of the sea. See *The Xantho* (2).

The plaintiffs do not make any claim under the doctrine of subrogation.

The plaintiff's claim is as endorsee of the bills of lading. The Bills of Lading Act, R.S.C., 1927, Chapter 17, Section 2, is as follows:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Prior to the passing of the Bills of Lading Act the contract of carriage was not transferred by transfer of the bill of lading or of the property in the goods. The transferee did not acquire any right to sue for a breach of the contract in his own name. In order to overcome this situation the Bills of Lading Act was enacted. The bills of lading as issued to the Bank of Nova Scotia as consignee, were for a voyage from Fort William to Montreal with the right of transhipment at Port Colborne into canal size vessels.

(1) (1939) Ex. C.R. 192 at 203; (1940) 3 D.L.R. 115
(2) (1887) 12 A.C. 503.

The agreement made between Consolidated Shippers, the owners of the cargo, and the defendant for the holding of the grain at Port Colborne and the storing of the same in the ss. *Northton* or the ss. *Gilchrist,* was undoubtedly a deviation from the contract of carriage and would have given the Bank of Nova Scotia, as consignee, a right of action for such breach. Consolidated Shippers Limited, the owner of the cargo, subject to the pledge of the bills of lading to the Bank of Nova Scotia, gave the instructions to the defendant which brought about the deviation, which instructions were acquiesced in by Reliance Grain Co. Limited, the agents of Consolidated Shippers Limited. The bills of lading were endorsed by the Bank of Nova Scotia to the Reliance Grain Co. Limited. Immediately the bills of lading came into the hands of Reliance Grain Co. Limited, as endorsees, there attached to such bills of lading the variation made in the contract of carriage by which the grain was stored on the ss. *Northton* pursuant to agreement between the defendant and the owners, Consolidated Shippers, and acquiesced in by the latter's agent, Reliance Grain Co. Limited. In any event, Reliance Grain Co. Limited by reason of the fact that either it or its principal, Consolidated Shippers Limited, was responsible for the change from the through voyage to Montreal to an arrangement for storage at Port Colborne, would as holders of the bills of lading be estopped from setting up a claim on the bills of lading as against the defendant. Does the transfer of the bills of lading by Reliance Grain Co. Limited to the plaintiff give the plaintiff any higher rights than its transferor, the Reliance Grain Co. Limited? A bill of lading is not a fully negotiable instrument; it is merely evidence of the contract between the parties. If an endorsee receives a bill of lading without notice of any variation of the contract, such endorsee takes the bill of lading free from variation. In this case the plaintiff became endorsee of the bills of lading by transfer from Reliance Grain Co. Limited with full knowledge of the variation which had been made in the contract. The plaintiff knew of the variation of the contract on the 28th day of November, 1938, when it issued its endorsement to its insurance policy covering the grain for winter storage. It also had full knowledge at the time of the receipt of the bills of lading of the change in the contract,

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and that it was purchasing a damaged cargo. Reliance Grain Co. Limited as endorsees of the bills of lading could only have had a claim against the defendant upon the complete agreement with the defendant which would include the subsequent agreement for winter storage. As it has been found that the defendant was not negligent, such a claim could not succeed. If the Reliance Grain Co. Limited is estopped from enforcing the terms of the bills of lading without regard to any variation in the same, then the plaintiff is also estopped because, in my opinion, the plaintiff could acquire no higher rights than Reliance Grain Co. Limited possessed. The plaintiff relies upon the case of *LeDuc* v. *Ward* (1) where it is held that a deviation from the contract of carriage by reason of some arrangement between the shipper and the ship owner is not binding upon the endorsee and does not affect the endorsee's rights under the bill of lading. That, however, is not this case. In *LeDuc* v. *Ward* the endorsee of the bills of lading took the same without notice of the arrangement between the shipper and the ship owner. Furthermore, the bill of lading in question did not come into the hands of the endorsee from the shipper after the deviation had taken place but prior thereto.

Counsel for the defendant contends that the plaintiff gave no consideration for the bills of lading. The plaintiff, as shown above, was the insurer of the cargo in question. The money which it paid was in satisfaction of its insurance contract with Reliance Grain Co. Limited and was not paid as the purchase price of the bills of lading. The fact that the plaintiff did not give any consideration for the bills of lading and that they were taken by the plaintiff with full notice of the agreement between the plaintiff's transferor and the defendant is a further reason why the plaintiff cannot acquire any higher rights than its transferor, Reliance Grain Co. Limited.

Counsel for the defendant further contends that the endorsements of the Bank and of the Reliance Grain Co. Limited on the bills of lading have not been proved. The only witness who gave any evidence as to this was Gordon Smith, a Director and the export manager of Reliance Grain Co. Limited. He stated that he sent on the bills of lading to the plaintiff or its agents with the

(1) (1888) 20 Q.B.D. 475.

endorsements. Except for this there is no evidence in proof of the endorsement by the Bank or the endorsement by Reliance Grain Co. Limited; and while witnesses doubtless could have been called to prove such endorsements, there is no evidence before the Court. In order that the plaintiff may properly prove its case the endorsements should be specifically proved. If it were necessary for the determination of the action, I would be forced to find that there is not sufficient proof before me of the endorsements on the bills of lading.

The defendant counterclaims for general average. The plaintiff as transferee and endorsee of the bills of lading became responsible for any liabilities attaching to the same. Furthermore, it became the owner of the cargo and was the owner at the time the general average claim was incurred. I am of the opinion that the defendant must succeed on its counterclaim.

Judgment will therefore, go:

1. Dismissing the plaintiff's action with costs;

2. For the defendant on its counterclaim for the amount claimed with costs.

Judgment accordingly.