QUEBEC ADMIRALTY DISTRICT

1952
June 3

BETWEEN:

MAXIME FOOTWEAR COMPANY LIMITED ..... PLAINTIFF;

AND

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED ... DEFENDANT.

*Shipping—Water Carriage of Goods Act, 1936, I Ed. VIII, c. 49, Art. IV—Action to recover damages for loss of cargo destroyed by fire on board ship in Halifax harbour—Bill of lading—Action against defendant properly brought—Defendant entitled to benefit of exemptions from liability provided by statute—Failure to prove unseaworthiness of vessel or negligence on part of crew—Action dismissed.*

Plaintiff shipped goods from Montreal to Halifax by rail and from Halifax to Kingston, Jamaica, by Canadian National Steamships. A through export bill of lading for the shipment was delivered to plaintiff at Montreal by the Canadian National Railways. At Halifax the goods were placed on board a vessel operated by the defendant. Before sailing from Halifax the ship's crew, pursuant to orders of the Captain, used an acetylene torch to thaw out some pipes that had frozen and in the course of such thawing a fire broke out on board ship and plaintiff's goods were destroyed. Plaintiff seeks to recover from defendant the damages resulting from the loss of the goods.

*Held:* That the action is properly brought against the company defendant instead of against His Majesty the King represented by The Honourable Minister of Transport.

2. That defendant company having contracted to carry plaintiff's cargo and having accepted and had the same under its control and possession owed to the plaintiff the duty of transporting and delivering the cargo to Kingston, Jamaica and if the cargo was lost due to defendant's negligence or its failure to discharge its obligations under the contract of carriage the defendant must answer for the loss unless relieved of liability by some provision of law.

3. That the plaintiff failed to prove that the presence of ice in the scupper pipes had the effect of making the vessel unseaworthy or even if that were so that the defendant had not exercised due diligence to make the vessel seaworthy.

4. That it is only when unseaworthiness is the direct cause of the loss or damage that the carrier is deprived of the benefit of the exceptions afforded by Article IV of the Water Carriage of Goods Act, 1936, I Edward VIII, c. 49.

5. That defendant is entitled to the benefit of the exemptions provided by the Water Carriage of Goods Act, 1936, and is not liable for the damage claimed.

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ACTION to recover damages for loss of cargo on board a vessel operated by defendant.

The action was tried before The Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

*C. Russell McKenzie,* Q.C. for plaintiff.

*Lucien Beauregard,* Q.C. for defendant.

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

SMITH D.J.A. now (June 3, 1952) delivered the following judgment:

The plaintiff claims damages alleged to have resulted from the loss of certain of plaintiff's goods entrusted to the defendant for transportation from Montreal to Kingston, Jamaica. The said goods were shipped from Montreal to Halifax by rail to be there carried by water to Kingston by Canadian National Steamships. The contract of carriage consisted of a through export bill of lading delivered to the plaintiff at Montreal by the Canadian National Railways, who, it is alleged, acted as the agent for the defendant.

The said cargo was duly transported to Halifax, at which port the *M/V Maurienne,* operated by the defendant, arrived on January 31, 1942. On the following Tuesday, February 3, loading of the vessel's No. 3 hold, in which plaintiff's cargo was placed, was commenced and the loading of this hold was completed on the evening of Friday, the 6th, it being the intention to sail on the following morning, February the 7th.

During Friday orders were given by the Captain to the Fourth Mate to have certain pipes, which were found to be frozen, thawed out. Amongst these pipes were three scuppers discharging respectively from the bath, the toilet and the galley sink.

In order to free these pipes which discharged through the starboard side of the vessel, adjoining No. 3 hold and some 8 to 10 feet below deck level, a man or men working on a scaffold suspended over the ship's side, used an acetylene torch to melt the ice accumulated at or near the

openings of the said pipes. This work was carried out between three and four o'clock in the afternoon of Friday, February the 6th, and early in the evening all three pipes were found to be free.

About 11.30 Friday evening 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. Although strenuous efforts were made to extinguish the fire it spread and by 5.30 a.m. had reach such proportions that the Captain ordered the opening of the sea-cocks and this being done the vessel soon sank with complete loss of the cargo.

While direct and positive proof of the cause of the fire is lacking, the facts proven give rise to a presumption that it had its origin in the heat generated by the acetylene torch which, in some way or other was communicated to the insulation in the ship's wall immediately adjoining the said scuppers pipes.

The plaintiff's action is based both upon alleged breach of contract and negligence.

The endorsement on the Writ of Summons reads as follows:

> The plaintiffs claim from the defendant the sum of $2,800 as and for damages arising from an agreement relating to the carriage of goods on the Motor Vessel *Maurienne* and in tort in respect of the said goods received by the defendant on board the said *Maurienne* in good order and condition at Halifax, N.S. on or about the 3rd day of February 1942, for carriage and delivery by the defendant in like good order and condition at Kingston, Jamaica, B.W.I.; the whole with interest and costs.

Plaintiff's Statement of Claim contains the following paragraph 3:

> 3. In breach of the defendant's undertaking as evidenced by Bill of Lading filed herewith and by reference incorporated herein as plaintiffs' Exhibit No. 1, and in dereliction of its duty in the premises implied by law, the defendant failed and has refused to deliver the said cargo.

By the Statement of Defence the defendant alleges that the said Bill of Lading speaks for itself, that the said cargo was loaded on the *M/V Maurienne* at Halifax for carriage to Kingston, Jamaica, admits that the said cargo was not delivered at Kingston, but denies that the plaintiff is entitled to claim any damages from the defendant. It is further alleged that the *M/V Maurienne* is the sole property

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of His Majesty the King and that the defendant was never the owner, charterer or operator of the said vessel but that at all times acted solely as manager or agent thereof for and on behalf of His Majesty the King. It is moreover alleged that no seaboard Bill of Lading was issued by the Master of the said vessel, or by the defendant as agent for the owner of the said vessel, covering plaintiff's cargo, which was shipped under through export Bill of Lading (Plaintiff's Exhibit No. 1), but that it is provided in Clause 16 of Condition II of the said Bill of Lading that the plaintiff's shipment was to be subject to all the provisions and conditions mentioned in the form of local Bill of Lading used by the defendant, one of which purports to provide that the defendant Company is acting only as an agent and shall be under no personal liability.

The defendant alleges, therefore, that any recourse which plaintiff may have, as a result of the loss of the said cargo, should have been directed against His Majesty the King represented by the Minister of Transport, as owner of the said vessel, and that there is no *lien de droit* between the plaintiff and the defendant.

Without prejudice to the foregoing defence, the defendant alleges that the said shipment was subject to the provisions of the Water Carriage of Goods Act (1936), which statute the defendant invokes. The defendant alleges that if said cargo was lost and not delivered, it was due to and resulted from a fire which occurred on board the said vessel on February 6, 1942, in Halifax harbour, which fire was not caused by the actual fault or privity of the defendant and that the defendant is, therefore, not responsible for the said loss. The defendant, moreover, without admission of liability and under reserve of the other grounds of defence raised, sets out allegations from which it concludes that in the event of the defendant being held liable, it should be declared entitled to limit its liability to $38.92 for each ton of the said vessel's tonnage, or a total amount of $90,372.24.

The plaintiff, by its reply to said statement of defence, after praying *acte* of the admissions therein contained and denying or joining issue as to the other allegations thereof, alleges that the said fire was caused or brought about by the fault and negligence of the defendant and its agents by their improper use of an acetylene torch used in an effort

to thaw out the scuppers on the starboard side of the said vessel. It is alleged that the Chief Engineer of the said vessel negligently failed in carrying out this operation, to take into account that the said vessel was insulated in the way of the said pipes and scuppers and that heat and fire would result from the use of the said torch, and that this is what actually occurred and resulted in the loss and destruction of the said cargo. It is further alleged that the defendant failed, before and at the beginning of the voyage, to exercise due diligence to make the *M/V Maurienne* seaworthy, and the holds and all other parts of the vessel fit and safe for the reception of the said cargo.

The proof establishes that the *M/V Maurienne* was registered in the Port of Montreal in March 1941 in the name of His Majesty the King, represented by the Honourable Minister of Transport of the Dominion of Canada. Although it appears that the said vessel was, at all times pertinent to this case, being operated by the defendant company as agent for His Majesty the King, this is a fact of which there is no reason to believe that the plaintiff had knowledge, either at the time the said Bill of Lading was issued or at the time of the loss of its said cargo. In fact, the evidence is that the defendant company operated the said vessel exactly as the owner would have done. The master, officers and crew were engaged by the defendant company and from the point of view of the shipper of the cargo there would be no distinction as between the manner in which the said vessel was operated by the defendant company and the manner in which it would have been operated by the owner of the said vessel.

The Bill of Lading states specifically that the plaintiff's goods are to be carried to the Port of Halifax, N.S., and thence by Canadian National Steamships to the Port of Kingston, Jamaica, B.W.I. The proof establishes that the Canadian National Steamships was merely a trade-name for Canadian National (West Indies) Steamships Limited and Canadian Government Merchant Marine Limited.

The said Bill of Lading is signed by Canadian National Steamships and expressly states that it is so signed on behalf of Canadian National (West Indies) Steamships Limited and Canadian Government Merchant Marine Limited severally.

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The effect is therefore exactly as if the said Bill of Lading had been signed by the defendant company itself. It was the defendant company therefore who contracted to carry the plaintiff's said cargo and it was the defendant and its servants who accepted the said cargo at Halifax on the *M/V Maurienne*, which it had under its control and in its possession.

Under such circumstances the defendant company having contracted to carry the plaintiff's said cargo, and having accepted and had the same under its control and possession, owed to plaintiff the duty of transporting and delivering the said cargo to Kingston, Jamaica, and if said cargo was lost due to the negligence of the defendant, or by its failure to discharge its obligations under the contract of carriage, the defendant must answer for such loss unless relieved of liability by some provision of law.

58 Corpus Juris, page 469, Paragraph 794:

One who operates a vessel as agent for the owners thereof is not liable to a shipper for breach of a contract of carriage made by the shipper *with the owner*, but he is liable in tort for losses and damages negligently caused to such cargo. (Citing *Fioretta* v. *Cunard S.S. Company*, 10 Fed. (2d) 244).

Scrutton on Charter Parties 15 Ed. page 69:

Semble that the companies other than the company which signs and delivers the Bill of Lading are not liable and cannot sue on the contract of carriage contained in such bill of lading, unless the signing company had authority to act in their behalf, or its action was afterwards ratified by them. But they will be liable as carriers for goods shipped on board their ships, or to an action of tort for negligent dealings with the said goods.

Also Scrutton at page 451, Paragraph (*a*):

Carrier includes the owner or the charterer who enters into a contract of carriage with the shipper.

NOTE—"includes"—The use of the words suggests:

that the definition is not exhaustive and, if so, the term "carrier" might include a freight agent, a forwarding agent or carriage contractor in cases where by issuing a bill of lading, he enters into a contract of carriage with the shipper.

The defendant, however, invokes the following paragraph from the said Bill of Lading:

The property covered by this Bill of Lading is subject to all the conditions expressed in local bills of ladings used in the steamship or steamship companies carrying this property at the time of shipment.

As above indicated, the plaintiff's shipment was made on a through export bill of lading issued at Montreal. No seaboard or local bill of lading was issued. Had one been issued, the evidence is that it would, in the normal course, though not invariably, have had the following clause stamped upon it.

> If the ship is not owned by or chartered by demise to Canadian Government Merchant Marine Limited this bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of the Canadian Government Merchant Marine Limited who act as agents only and who shall be under no personal liability whatsoever in respect thereof.

As above stated, no seaboard or local bill of lading was issued in respect of plaintiff's said shipment and there is no proof that this clause was ever brought to the attention of the plaintiff, or that it ever had knowledge of it. In the circumstances, it would be unreasonable to hold that the plaintiff is bound by the conditions of the said clause. In any event this clause would not be a bar to plaintiff's action insofar as it is in an action in tort.

I, therefore, conclude that the defendant's plea, insofar as it attacks plaintiff's action solely on the ground that it is directed against the company defendant, and not against His Majesty the King, represented by the Honourable Minister of Transport as owner of the said vessel, is unfounded.

It is provided in the Bill of Lading issued to the plaintiff that the Contract of Carriage shall be governed by the provisions of the Water Carriage of Goods Act (1936). Section 2, subsection (*a*) of Article IV of the said statute reads 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 maintenance of the ship;
>
> (*b*) Fire unless caused by the actual fault or privity of the carrier.

There is no doubt that if it is established that the direct cause of the said loss was the unseaworthiness of the vessel the defendant will not be entitled to invoke the exceptions provided by the Article of the Water Carriage of Goods Act above quoted, unless the defendant has proven that it exercised due diligence to make the ship seaworthy.

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The burden of proof, however, rested upon the plaintiff to prove the unseaworthiness alleged. Carver's "Carriage by Sea", 8th Edition, Section 78, page 121:

> The burden of proving that a loss which has occurred has been due to an expected cause has been held to be upon the shipowner who seeks to excuse himself . . . But in the case of loss apparently falling within an exception, the burden of showing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, has been held to be upon the person so contending . . . . Similarly if a prima facie case of peril of the seas is made out and the plaintiffs allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests.

Five witnesses were heard in regard to the matter of seaworthiness. Mr. Campbell, the assistant superintending Engineer of the defendant company at Halifax, testified that he examined the vessel on her arrival at Halifax and subsequent thereto and that she was seaworthy.

Mr. Carswell, marine engineer and marine consultant of great experience, stated that, in his opinion, the fact that ice had formed in the said scuppers did not render the said vessel unseaworthy, and Mr. Tait, also a consulting engineer of experience, expressed the same view.

On the other hand Mr. Crichton, heard on behalf of the plaintiff, stated that, in his opinion, the fact of the said pipes being frozen made the ship unseaworthy insofar as the cargo was concerned. On cross-examination, however, he modified this statement by alleging that "as long as they are not fractured or broken, the ship is not unseaworthy".

Finally, Mr. Fletcher, a marine consultant also of great experience, expressed the view that the fact of scuppers being frozen had the effect of making the ship unseaworthy from a cargo point of view.

Insofar as the testimony of the witnesses goes, therefore, the evidence of Messrs. Campbell, Carswell and Tait is that the ship was seaworthy while Crichton shares the same view so long as the pipes are not fractured. On the other hand, there is the evidence of Mr. Fletcher, that the vessel was, in his opinion, unseaworthy from a cargo point of view.

It is important, however, to note that the evidence offered by Fletcher and Crichton relates to the condition of the vessel after the said scupper pipes had become frozen,

that is, during the afternoon or evening of February 6th. There is no evidence whatever that the said pipes were frozen at the time the loading of cargo into hold No. 3 commenced, which appears to have been on the preceding Tuesday. On the contrary, there is the uncontradicted testimony of Mr. Campbell who examined the ship on her arrival, and each day subsequent thereto, that she was entirely seaworthy.

It must be remembered that the carrier's warranty of seaworthiness, insofar as the cargo is concerned, is not a continuing warranty. It is rather a warranty that "at the commencement of loading, the ship must be fit to receive her cargo and fit as a ship for the ordinary perils of lying afloat in harbour while receiving her cargo, but need not be fit for sailing". (Scrutton page 93). "There is no continuing warranty that the ship shall be at the time of sailing fit to receive her cargo". (Scrutton page 94).

In the present case the evidence is that the plaintiff's cargo had been completely loaded prior to the attempt to thaw the ice from the ship's said scuppers. There is no proof that any ice existed either prior to or during the loading of the cargo. The plaintiff has, therefore, failed to establish that the vessel was unseaworthy for the reception and storage of the said cargo while she lay at the dock.

Moreover, it must be borne in mind that the carrier's warranty of seaworthiness is not absolute. To discharge his obligations in this matter, he is obliged only to "exercise due diligence to make the ship seaworthy". Having done so he is entitled to invoke the exceptions provided by Article IV of the statute, even although it is found that the vessel was in fact unseaworthy.

The plaintiff takes the position that the *M/V Maurienne* was unseaworthy by reason of the said frozen scuppers and that its officers or crew having been negligent in thawing out the said scuppers in order to make the vessel seaworthy, the defendant has failed to exercise due diligence.

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In the first place, as above stated, the proof does not support the contention that the fact that the said scuppers were frozen rendered the ship unseaworthy either for the reception of cargo or for the voyage. In the opinion of the Court, the weight of the evidence is to the contrary. In any case, as above noted, there is no proof that the said scuppers were frozen when loading of cargo was commenced.

Furthermore, the evidence is that frozen scuppers are common in the harbour of Halifax in wintertime, and that it is the usual practice to thaw them out by the use of a torch. There is proof also, which is uncontradicted, that while it is usually advisable to thaw out the said scuppers, the ice which is formed around the openings while the vessel is in port rapidly melts and disappears of its own accord when the vessel gets to sea and rarely, if ever, has ice formed to such an extent that the pipes have broken or burst.

The Court finds therefore that the plaintiff has failed to prove that the presence of ice in the said scupper pipes had the effect of making the vessel unseaworthy and that, even if this were so, the defendant has established that it exercised due diligence to make the vessel seaworthy.

It should be noted that the seaworthiness of the vessel for the voyage is not in question since she never sailed and moreover the proof is that the said scuppers were in fact freed of ice early in the evening on February 6th, it being the intention to sail the following morning.

In their endeavour to melt the ice and thus restore the scuppers to their normal function those undertaking the task may have been negligent and their negligence may have been the cause of the fire. But if so, it was this negligence and not the unseaworthiness of the vessel which brought about the loss.

It is only when unseaworthiness is the direct cause of the loss or damage that the carrier is deprived of the benefit of the exceptions afforded by Art. IV of the Statute (Scrutton page 96 citing *The Europa* (1) and *Kish* v. *Taylor* (2)). Compare *S.S. Anglo Indian* v. *Dominion Glass Company* (3).

(1) (1908) P. 84. (2) (1912) A.C. 604.
(3) (1944) S.C.R. 409.

Even if it had been established that the presence of ice in the scupper pipes rendered the ship unseaworthy in respect of plaintiff's cargo, and it does not, it was not this unseaworthiness which caused the fire.

The case would have been very different if as the result of the ice the said pipes had burst with resultant damage to the cargo. In that case, assuming that the frozen condition of the pipes rendered the vessel unseaworthy, the damages resulting from the bursting of the pipes would have been caused by the unseaworthiness of the ship and to escape liability the defendant would have been obliged to prove that it had exercised due diligence to make the vessel seaworthy. (Compare *Dominion Glass Co. Limited* v. *Anglo Indian* (1); *Spencer Kellogg* v. *Great Lakes Transit* (2)).

That the loss of plaintiff's cargo was caused by the fault or negligence of those who undertook to thaw out the pipes may be true, but it is in respect of said fault or negligence that the carrier is relieved of liability provided that there is no fault or privity on its part.

As to this the proof shows that it is usual to thaw out scupper pipes with an acetylene torch and that it is quite safe to do so provided the operation is properly executed. The order to thaw out the said pipes by using an acetylene torch was therefore not *per se* fault or negligence. In any case, the defendant is a limited company and consequently there was no fault or privity on its part in respect of whatever negligence there may have been on the part of those actually ordering or doing the work.

(*The Desmond* (3); Scrutton Bills of Lading, 15th Edit. page 259).

The defendant is therefore entitled to the benefit of the exceptions provided by subsection (*b*) of Section 2 of Art. IV of the Statute and cannot be held responsible for the loss of plaintiff's cargo.

It would appear, moreover, that the defendant is also entitled to the benefit of the exceptions provided by subsection (*a*) of Section 2 of Art. IV of the Statute since, if there was any neglect or default on the part of the master

(1) (1944) 4 D.L.R. 721. (2) (1940) 32 Fed. Supp. 520.
(3) (1906) P. 282.

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or servants of the defendant, such neglect or default occurred in the course of acts related to the "navigation or management of the ship".

The facts here are not dissimilar to those involved in *The Rodney* (1). In that case a boatswain while trying to clear a blocked pipe in order to drain water from a flooded forecastle and thereby make it habitable, drove a poker through the pipe allowing water to reach the cargo. The Court held that the act having been done with the purpose of making the forecastle habitable, it was one which related to the management of the vessel and the shipowner was therefore exempt from liability under subsection (*a*) of section 2 of Art. IV of the Statute. (See also *Kalamazoo Paper Company* v. *C.P.R.* (2); Scrutton pp. 267-8. Compare holding in *Goose Millard Limited* v. *Canadian Government Montreal Merchant Marine* (3), where negligence in handling of tarpaulin covering the cargo was held to relate rather to the care of the cargo than to the navigation or management of the ship).

The Court therefore concludes that the defendant has brought itself within the exemptions provided by the statute and is not liable in respect of the damages claimed.

Since the foregoing was drafted the Court has been referred to the decision in the case of *MaGhee* v. *Camden & Amboy R.R. Company* (4). It is apparently suggested that since the plaintiff's contract required that its cargo would "be carried to the port of Halifax, N.S. and thence by Canadian National Steamships Limited to the port of Kingston, Jamaica", the defendant deviated from said contract in loading the said cargo onto *M/V Maurienne,* a vessel owned by His Majesty and operated on his behalf by the defendant company.

The proof, however, as above stated, is that the Canadian National (West Indies) Steamships Limited and the Canadian Government Merchant Marine are one and the same and that the name "Canadian National Steamships" is the trade-name for Canadian National (West Indies) Steamships Limited and Canadian Government Merchant Marine. The stipulation therefore that the said cargo was

(1) (1900) P. 112.
(2) (1950) S.C.R. 356.
(3) (1929) A.C. 223.
(4) (1871) 45 N.Y. 514.

to be transported from Halifax to Jamaica by Canadian National Steamships Limited was equivalent to a stipulation that the said cargo would be transported by Canadian Government Merchant Marine Limited or Canadian National (West Indies) Steamships Limited and there was therefore no deviation from the contract.

Plaintiff's action is accordingly dismissed with costs.

*Judgment accordingly.*