

COLONIAL STEAMSHIPS LIMITED }
 (Defendant) } APPELLANT;

1954

*Feb. 15,
 16, 17
 *May 19

AND

THE KURTH MALTING COMPANY }
 and McCABE GRAIN COMPANY } RESPONDENTS.
 LIMITED (Plaintiffs) }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA,
 ONTARIO ADMIRALTY DISTRICT

*Shipping—Damage to cargo—Seaworthiness of vessel—Perils of the sea—
 Onus—Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49.*

In an action for damage caused to a cargo of barley shipped in good order by the respondent on the appellant's vessel under bills of lading subject to the *Water Carriage of Goods Act, 1936*, the appellant pleaded that the vessel had been seaworthy and that the loss had been caused by perils of the sea. The District Judge in Admiralty found that the damage had been caused by a break in a steam pipe which had occurred some time before the accident relied upon by the appellant as a peril of the sea, that the appellant had not discharged the onus of showing that the damage resulted from perils, dangers and accidents of the sea, and that the unseaworthiness of the vessel had not been shown.

Held: The appeal should be dismissed since the appellant had not satisfied the onus which rested upon it to show that the damage resulted from perils, dangers and accidents of the sea.

Per Taschereau, Locke and Cartwright JJ.: Since the District Judge had found that the defence of perils of the sea had not been made out, it was, in the state of the pleadings, unnecessary for him to deal with the seaworthiness of the vessel at the time the cargo was shipped. (*Bradley v. Federal Steam Navigation Co. Ltd.* (1927) 27 Ll.L.R. 395; *Gosse Millard v. Canadian Government Merchant Marine* [1927] 2 K.B. 432 and *Paterson Steamships Ltd. v. Canada Co-operative Wheat Producers* [1934] A.C. 538 referred to).

APPEAL from the judgment of the Exchequer Court of Canada, Ontario Admiralty District, Barlow J., District Judge in Admiralty (1), in an action for damage to a cargo shipped on the appellant's vessel.

F. Gerity and *P. B. C. Pepper* for the appellant.

R. C. Holden Q.C. for the respondents.

KERWIN J.:—I agree with the trial judge as I am of opinion that the appellants have not satisfied the onus which rested upon them. The appeal must be dismissed with costs.

*PRESENT: Kerwin, Taschereau, Rand, Locke and Cartwright JJ.

(1) [1953] Ex. C.R. 194.

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The judgment of Taschereau, Locke and Cartwright JJ. was delivered by:—

LOCKE J.:—The claim of the respondents as pleaded is in damages for breach of the contracts evidenced by the bills of lading issued by the appellant for the barley shipped on the steamship "Laketon" at Port Arthur on November 19, 1951, for transport to Milwaukee. While the manner in which the steam escaped from the return pipe was ascertained on November 22 when the hatches were opened at the latter place, the Statement of Claim contained no allegation of unseaworthiness.

The bills of lading were issued subject to the provisions of the *Water Carriage of Goods Act, 1936*, and the Rules in the Schedule to that Act. By way of Defence the appellants pleaded, inter alia, that they had exercised due diligence before and at the beginning of the voyage to make the ship seaworthy and the holds fit and safe for the reception, carriage and preservation of the barley and that the loss was caused by perils, dangers and accidents of the sea.

By way of Reply the respondents pleaded that the damage to the pipe had occurred before or soon after the commencement of the voyage and that the damage had resulted from the unseaworthiness of the ship. The allegation that the loss resulted from perils of the sea was put in issue.

Subsection 2 of Article IV of the *Water Carriage of Goods Act, 1936*, provides that the ship shall not be responsible for loss or damage arising or resulting from perils, dangers and accidents of the sea. The burden of proof on this issue was upon the appellant and the learned trial Judge (1) has found that this onus was not discharged. My consideration of the evidence leads me to the same conclusion and upon this issue the appeal should fail.

Whether by reason of the fact that the appellant considered that to succeed upon the defence of perils of the sea it was necessary to prove that the ship was seaworthy at the port, and at the time, of shipment, or by reason of the allegation of unseaworthiness contained in the Reply, the appellant gave evidence directed to that issue.

(1) [1953] Ex. C.R. 194.

In *Bradley v. Federal Steam Navigation Co. Ltd.* (1), Viscount Sumner, in delivering the judgment of the Judicial Committee, said in part (p. 396):—

The bill of lading described the goods as 'shipped in apparent good order and condition' and proceeded 'and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London.' Though the usual words 'in the like good order and condition' do not appear after the word 'delivered,' it was common ground that the ship had to deliver what she received as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.

That was an action in which the exceptions were contained in the *Sea Carriage of Goods Act, 1904*, of Australia.

In *Gosse Millard v. Canadian Government Merchant Marine* (2), Wright J. adopted this statement as applicable to an action to which the *Carriage of Goods by Sea Act 1924 (Imp.)* applied, and in *Paterson Steamships Ltd. v. Canadian Co-Operative Wheat Producers* (3), the language of Lord Sumner was adopted in the judgment of the Judicial Committee as applying to the *Water Carriage of Goods Act* (R.S.C. 1927, c. 107).

In this view of the law, since the learned trial Judge found that the defence that the loss had been occasioned by perils or accidents of the sea had not been made out, it was, at least in the state of these pleadings, in my opinion, unnecessary to deal with the question as to whether the ship was seaworthy, within the meaning of the Article, at the time the cargo was shipped at Port Arthur.

I would dismiss this appeal with costs.

RAND J.:—This action was brought for damages to a cargo of barley carried from Port Arthur to Milwaukee. The steamship company pleaded perils of the sea and it was sought to show that longitudinal as well as transverse cracks and fissures and the separation of a union in a return steam pipe the parallel line of which heated the forward

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(1) (1927) 27 Ll. L.R. 395.

(2) [1927] 2 K.B. 423 at 437.

(3) [1934] A.C. 538 at 54a.

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living quarters were caused by a sudden and unforeseeable bending, torsion or racking strain to the vessel's structure while in the trough of the sea during heavy weather which had communicated similar stresses to the pipe. Both pipes were supported by steel loops attached to longitudinal or other steel beams. The longitudinal cracks in the only piece of pipe recovered were in large part along the seam of a butt weld. The parallel supply pipe, about 18 inches inboard and of the same size and quality of metal, suffered no similar or other damage. The particular occurrence lasted ten minutes or so and there was evidence that within eighteen hours the grain under the effect of the steam heat was showing germination and sprouting. The preponderance of the expert evidence was that internal stresses played a part in the collapse of the pipe but as the steam pressure in it could not have exceeded two or three pounds their only suggested source was ice which had formed in the pipe immediately prior to and during the loading at Port Arthur.

The trial judge, Barlow J., came to the conclusion that the appellants had not made out a case in support of their plea, and after a careful reading of the record, in the light of the argument addressed to us, I am in agreement with him. I find it quite impossible to say, on any balance of probabilities, that there could have been any such torsion to the pipe as was claimed.

The appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, McMaster, Meighen & Hebert.*
