PATERSON STEAMSHIPS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN CO-OPERATIVE WHEAT PRODUCERS LIMITED AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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* Oct. 28
* Nov. 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Carriage by water—Loss or damage to cargo—Limitation of liability of the owner of the ship—"Fault or privity" of owner—Unseaworthiness—Improper loading—Cause of loss—Merchant Shipping Act, 1894, 57-58 Vict., c. 60, ss. 502, 503, 504—Canada Shipping Act, R.S.C., 1927, c. 186, ss. 452, 457, 459, 903—Water Carriage of Goods Act, R.S.C., 1927, c. 207, ss. 6, 7.

Held, where the owner of a ship, after having been condemned in a previous action to pay damages for loss and damage to a cargo, brings another action in which he claims a limitation of his liability, either under the provisions of section 503 of the *Merchant Shipping Act* or of section 903 of the *Canada Shipping Act,* he must show affirmatively that the damage or loss happened without his actual fault or privity; he must exculpate himself (as distinguished from his servants or

* PRESENT:—Duff C.J. and Rinfret, Cannon, Davis and Kerwin JJ.

(1) [1928] A.C. 340.

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employees) from the responsibility for the loss or damage in respect of which he claims the limitation and the onus is upon him to show that there was no fault or privity of his own.

In the first action for damages against the appellant company, the trial judge, whose judgment had been affirmed by the appellate court and the Privy Council, held that its ship was unseaworthy by reason of overloading or improper loading and that such was "the real cause of the loss."

Held: That the appellant has not succeeded in bringing itself within the exception essentially required to obtain from the courts a limitation of the liability for the loss which occurred as a result of the stranding of its ship and it has failed to discharge the onus cast upon it of proving that the loss happened without its actual fault or privity. The law contemplates a clear duty on the part of the owner of a ship to enforce the observance of the obligation to take all necessary and reasonable precautions in order to prevent a grain cargo from shifting. In the present case, the appellant has failed to show it had taken any means to enforce the observance of the law in that respect. It did not attempt to exculpate itself, except in claiming that it had discharged its duty by supplying a ship properly equipped and appointing a certificated master. According to the evidence, the responsible officials of the appellant company did not apply themselves to the point of precautions at all and, before this Court, they took the stand that the question of loading the ship was one exclusively for the master and one with which they were not concerned. The trial judge found that no instructions were ever given by the company with regard to stowage of grain; and such acts of omission are included in the words "actual fault or privity."

APPEAL from a judgment of the Exchequer Court of Canada, Quebec Admiralty District, P. Demers, L. J. A., refusing the appellant, as owner of the ss. *Sarniadoc,* the right to limit its liability under the provisions of section 503 of the *Merchant Shipping Act,* 1894, and condemning the appellant to pay the costs of such action in limitation of liability. The appellant was the owner of the ss. *Sarniadoc.* At Port Colborne, Ont., on the 28th day of November, 1929, the *Sarniadoc* was loaded with two parcels of grain, the first consisting of 5,091 bushels of barley and 56,594 bushels of wheat, the property of The Canadian Co-operative Wheat Producers Limited, and the second of 37,391 bushels of wheat, the property of Jas. Richardson & Sons Limited. The latter parcel was insured by the Universal Insurance Company. After loading this cargo the *Sarniadoc* proceeded on its voyage to Montreal and on the night of the 29th November, 1929, stranded on Main Duck Island at the eastern end of Lake Ontario where it became a constructive total loss and its cargo was severely damaged. Subse-

quently two actions were instituted against Paterson Steamships Limited, as owners of the *Sarniadoc*. The first by The Canadian Co-operative Wheat Producers Limited for $83,029.03 and the second by Universal Insurance Company, as insurers of Jas. Richardson & Co. Ltd., for $60,573.42. The Canadian Co-operative Wheat Producers' action was heard in the Superior Court for the district of Montreal and judgment was rendered against Paterson Steamships Limited for an amount of $76,911.44. This judgment was appealed to the Court of King's Bench for the province of Quebec where it was confirmed and a further appeal was taken to the Privy Council where the judgments of the courts below were affirmed. The Universal Insurance Company action was stayed pending the outcome of the first action. Shortly after the judgment of the Privy Council, Paterson Steamships Ltd., the present appellant, took action in the Exchequer Court of Canada, Quebec Admiralty District, and asked for limitation of its liability under the provisions of the *Merchant Shipping Act*, 1894. This action was directed against the companies-plaintiffs in the original damage actions and all others interested in the loss of the *Sarniadoc*. The present appellant asked that its total liability in respect of loss and damage arising from the stranding of its vessel the ss. *Sarniadoc* be limited under section 503 of the *Merchant Shipping Act*, 1894, to an amount not exceeding £8 sterling for each ton of the vessel's net registered tonnage with the addition of engine room space deducted for the purpose of ascertaining that tonnage.

V. Lynch-Staunton and *F. Wilkinson* for the appellant.

C. Russell McKenzie K.C. for the respondents.

The judgment of the Court was delivered by

RINFRET, J.—This is an action in limitation of liability.

On or about the 28th day of November, 1929, a cargo of wheat and barley was loaded aboard the ss. *Sarniadoc* belonging to the appellant company, at Port Colborne, province of Ontario, for shipment to the port of Montreal.

On the 30th day of November, at or near Main Duck Island, in Lake Ontario, the vessel struck and stranded

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stern on. She became, to all intents and purposes, a total wreck, being abandoned by her crew thirty-six hours after she struck. As a result of the stranding and wreck, the cargo of wheat and barley was damaged; and the respondents, the Canadian Co-operative Wheat Producers Ltd., and Universal Insurance Company respectively, brought actions in the Superior Court, in Montreal, for the purpose of recovering the damage sustained by each of them in the amount of $83,029.03 for the Co-operative Wheat Producers and $60,573.42 for the insurance company.

The Co-operative Wheat Producers' case proceeded before Mr. Justice Demers, in the Superior Court of Montreal, while the insurance company's case was allowed to stand pending a decision in the former action.

Judgment was delivered in the Co-operative Producers' case, on the 31st day of May, 1932, condemning the appellant to pay to the latter the sum of $76,911.44, with interest since the 14th day of January, 1931, and costs. Mr. Justice Demers found that the appellant

> failed to prove that it had made due diligence to make the ship in all respects seaworthy; that the grain cargo had not been properly secured from shifting by boards or otherwise; that the master could not properly navigate his ship by fear of shifting of the cargo; and that it is the principal reason of the stranding of the ship.

Upon appeal, the judgment was confirmed by the Court of King's Bench of the province of Quebec, and subsequently by the Judicial Committee of the Privy Council.

In view of the fact that the Judicial Committee substantially approved the findings of the Superior Court, it is important carefully to consider the reasons of judgment of Mr. Justice Demers. He quoted section 6 of the *Water Carriage of Goods Act* (R.S.C. 1927, c. 207), which reads as follows:

> If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

He further quoted section 7 of the same Act, which reads as follows:

> The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice

of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.

Mr. Justice Demers then pointed out that a ship may be unseaworthy, or unsafe, not only by reason of defective condition of the hull, equipment or machinery, or by reason of undermanning; but also by reason of overloading or improper loading (*Merchant Shipping Act*, 1894, ss. 457 and 459). He referred to section 452 of the Act, which is to the effect that

(1) Where a grain cargo is laden on board any British ship all necessary and reasonable precautions (whether mentioned in this Part of this Act or not) shall be taken in order to prevent the grain cargo from shifting.

(2) If those precautions have not been taken in the case of any British ship, the master of the ship and any agent of the owner who was charged with the loading of the ship or the sending of her to sea, shall each be liable to a fine not exceeding three hundred pounds, and the owner of the ship shall also be liable to the same fine, unless he shows that he took all reasonable means to enforce the observance of this section, and was not privy to the breach thereof.

He stated expressly that the "necessary and reasonable precautions" prescribed in section 452 were not taken in this case.

He then referred to section 696 of the *Canada Shipping Act* (R.S.C. 1927, c. 186) under which ships registered in Canada and trading on the lakes are obliged to secure their grain cargo "from shifting by boards or otherwise"; and, after alluding to the practice which he held to have been proven

that since many years there are no shifting boards on the boats carrying cargoes on the lakes,

he declared that

no usage should prevail against the law. Moreover, no general negligence of a duty is a good answer.

He dismissed the plea based upon the ground of "perils of the sea"; and he wound up his reasons by concluding that the ship

—no precaution having been taken to prevent the shifting of the cargo— was not safe for the voyage and, therefore, was unseaworthy; that she was driven on the rocks on account of bad navigation; and that she was not properly navigated because of improper loading.

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In the judgment of the Privy Council, these findings were summarized as being

(1) that the ship was unseaworthy in that the grain cargo was loaded in bulk and without shifting boards or other precautions to keep it from shifting, and that the owners had not exercised due diligence to make her seaworthy, and (2) that this unseaworthiness was the cause of the loss.

Their Lordships remark that the

"necessary and reasonable precaution to be taken in order to prevent a grain cargo from shifting" can "only be determined as an issue of fact." They referred to

the practice alleged by the appellant to prevail in the Canadian Lakes grain trade to do nothing but level off the grain in the hold,

and they said that obviously the question whether such practice prevailed was also a question of fact. In their Lordships' opinion, it was

clear that the ship was, according to the findings of the courts below, not merely unseaworthy but unseaworthy in such a way as necessarily to involve some fault or failure within the final words of section 7 of the *Water Carriage of Goods Act*,

that is: a fault or neglect of the owners of the ship or of their responsible servants or agents.

Hence the appellants, Paterson SS. Ltd. could not

avail themselves of the exception of the dangers of the seas, though these dangers caused the loss, because they cannot show that in respect of the unseaworthiness which was also a cause of the loss, and indeed the real cause of the loss, that it existed under conditions entitling them to the benefit of the general words of exception at the end of the section (section 7 just referred to).

It was under those conditions and after the judgment of the Privy Council had confirmed in all material respects the judgment of the Superior Court condemning them to pay to The Canadian Co-operative Wheat Producers Limited the sum of $76,911.44, with interest and costs, that the appellant brought before the local judge in admiralty for the Quebec admiralty district the present action in limitation of its liability as owner of the steamship *Sarniadoc*. The object of the action was to obtain an order staying all proceedings in each of the actions instituted before the Superior Court for the district of Montreal, respectively by the Canadian Co-operative Wheat Producers Limited and the Universal Insurance Company, and to secure a decree that the total liability of Paterson Steamships Limited for the loss and damage resulting from the stranding of the *Sarniadoc* is limited to an amount not exceeding $69,897.84, this being the aggregate amount of

$38.92 (£8) for each ton of the registered tonnage of the ship with the addition of any engine room space deducted for the purpose of ascertaining the tonnage. The amount was tendered into court, together with interest thereon from the date of the stranding, and the further sum of $5,165.66 representing the taxable costs upon the actions hereinbefore described.

The action is based on section 503 of the *Merchant Shipping Act*, 1894, the material parts of which, as they form the main ground of the appellant's argument, may as well be quoted immediately:

503. The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say)

* * *

(*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

* * *

be liable to damages beyond the following amounts; (that is to say,)

* * *

(ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2) For the purposes of this section—

(*a*) The tonnage of a steam ship shall be her registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage.

The appellants alleged that the stranding of the *Sarniadoc* occurred "without their actual fault or privity," and, therefore, asked that their total liability to damage in respect of the loss be limited to the amount tendered in court; that all further proceedings in the actions of the respondents before the Superior Court of Montreal be stayed; that all other persons having claims arising out of the said loss or damage be restrained from instituting any proceeding against the appellants or against the ss. *Sarniadoc* and that the fund deposited in the Admiralty Court be distributed ratably among the several claimants, including the respondents.

The action thus brought by the appellants, Paterson Steamships Limited, was dismissed by the local judge in Admiralty, who happened to be the same Mr. Justice Demers who had already adjudicated, while sitting in the Superior Court, upon the action of The Canadian Co-

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operative Wheat Producers Limited, where his judgment was confirmed by the Privy Council. This is an appeal from the above judgment.

For the purpose of our decision, we are willing to assume that the local judge in admiralty had the power to issue an order staying proceedings instituted in the Superior Court, which is the court of general jurisdiction in the province of Quebec (ref. sec. 504 of the *Merchant Shipping Act,* 1894), even if the order is meant to prevent the execution of a judgment of the Privy Council condemning the owner to the payment of a fixed and liquidated sum of money—as in the present case. As no objection seemed to be forthcoming from the respondents' counsel on these points, we are content in merely mentioning that they have not escaped our attention. In view of the result to which we have come, it is not necessary to pass upon them. It is sufficient to say that we will proceed to decide the case without considering these points.

The appellant submitted that the learned trial judge erred in finding that the action was based on section 903 of the *Canada Shipping Act,* instead of section 503 of the *Merchant Shipping Act,* 1894, but we must confess our inability to find wherein, in the premises, any advantage would accrue to the appellant from the application of the section of one Act rather than of the section of the other Act. In so far as the present case is concerned, we fail to see any essential difference. Under both, the ship is the limit of liability, provided the damage or loss was caused without the actual fault or privity of the owner.

In the present case, we have not to speculate as to the cause of the loss or damage. It has been finally determined by the judgment of the Privy Council. The cause was the unseaworthiness of the ship owing to the bad stowage of the cargo of grain. And the Judicial Committee pointed out that, on its face, this must have involved the fault or neglect of the owners, or of their responsible servants or agents.

It remains to be decided—which was not necessary in the first action but is essential in the present case—whether the fault or neglect can be brought home to the owners, or if it was only that of their servants or agents; for, upon

their true construction, the words "without their actual fault or privity," in sections 503 of the *Merchant Shipping Act* or 903 of the *Canada Shipping Act* must exclude the doctrine "respondeat superior." The fault or neglect of their agents, servants, or employees, was sufficient to disentitle the appellants from the benefit of the exception at the end of section 7 of the *Water Carriage of Goods Act*, c. 207, R.S.C. 1927:

> The ship, the owner * * * shall not be liable for loss arising * * * without their fault or privity or without the fault or neglect of their agents, servants or employees.

Such fault or neglect however is not sufficient to disentitle the appellants from the benefit of the sections relating to the limitation of liability. The owners can claim the limitation provided the damage or loss was caused without their own actual fault or privity. In the case of a corporation such as the appellant, the fault or privity must be that of (in the words of Viscount Haldane L.C. in *Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited* (1)).

> somebody for whom the company is liable because his action is the very action of the company itself.

But it should not be forgotten that, in proceedings under sections 503 of the *Merchant Shipping Act* or 903 of the *Canada Shipping Act*, the owner is claiming a limitation of his liability; and it is for him to show affirmatively that the damage or loss happened without his actual fault or privity. It is for him so to speak, to exculpate himself (as distinguished from his servants or employees) from the responsibility for the loss or damage in repect of which he claims the limitation. The onus is upon him to show that there was no fault or privity of his own. He must bring himself within the exception (*Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited* (1); *Corporation of the Royal Exchange Assurance of London* v. *Kingsley Navigation Company Limited* (2)).

In the case now under consideration, the *Sarniadoc* was not equipped with shifting boards; and it is clear that if the use of these boards was the only means of preventing the cargo from shifting, the failure to supply the boards would have involved the direct responsibility of the owner.

(1) [1915] A.C. 705, at 713. (2) [1923] A.C. 235.

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Supplementary evidence made before the local judge in admiralty was directed to prove, however, that the cargo could have been loaded without any danger of shifting notwithstanding the absence of the shifting boards. This allegedly safe method of loading without the boards was not the method adopted by the master of the *Sarniadoc,* nor the practice followed by him on this or on previous occasions—a practice sufficiently established in the evidence, referred to both by the Superior Court and the Privy Council in their judgments in the first action and held to have been bad and defective, indeed to have made the ship unseaworthy and to have been "the real cause of the loss."

Now, it is the well defined duty of the owner to exercise due diligence to make his ship in all respects seaworthy (Sec. 6 of c. 207 of R.S.C. 1927). A ship is not seaworthy, we repeat, if she is improperly loaded; and, as prescribed by sec. 452 of the *Merchant Shipping Act* (N.B.—Sec. 707 of the *Canada Shipping Act* contains similar dispositions)

Where a grain cargo is laden on board any British ship, all necessary and reasonable precautions (whether mentioned in this Part of the Act or not) shall be taken in order to prevent the grain cargo from shifting;

and if these precautions have not been taken, not only the master of the ship and any agent of the owner who was charged with the loading of the ship or the sending of her to sea is liable to a fine, but the owner of the ship is also liable in the same fine

unless he shows that he took all reasonable means to enforce the observvance of this (prescription) and was not privy to the breach thereof.

The law, therefore, contemplates a clear duty on the part of the owner to enforce the observance of the obligation to take all necessary and reasonable precautions in order to prevent a grain cargo from shifting.

In the present case, the appellant, owner of the *Sarniadoc,* has utterly failed to show it had taken any means to enforce the observance of the law in that respect. It did not attempt to exculpate itself, except in claiming that it had discharged its duty by supplying a ship properly equipped and appointing a certificated master.

We are unable to agree with that view of the owners' duty under the *Shipping Acts.* The words "actual fault or privity" includes acts of omission (*Royal Exchange*

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Assurance v. *Kingsley* (1)). The fact is that the responsible officials of the appellant company did not apply themselves to the point of precautions at all. Even before this Court, they took the stand that the question of loading the ship was one exclusively for the master and one with which they were not concerned. The trial judge found that no instructions were ever given by the company with regard to stowage of grain and that, in that respect, the company had been disregarding the law for years,

their practice consisting only in levelling off the grain in the hold, a practice which was known, or should have been known and not tolerated by the company.

We think these findings were supported by the evidence. The appellant could not relieve itself of its responsibility by claiming ignorance of the practice. It had means of knowledge which it ought to have used. In this case, the most that can be said is (to paraphrase the words of Lord Parmoor) that it did not avail itself of these means of knowledge. Its omission so to do was a fault, and, if so, "it is an actual fault, and it cannot claim the protection of the section" (*Corporation of the Royal Exchange* v. *Kingsley Navigation Company* (1)).

We think the trial judge rightly held that the appellant had not succeeded in bringing itself within the exception essentially required to obtain from the courts a limitation of its liability for the loss which occurred as a result of the stranding of the *Sarniadoc* on the 30th November, 1929. In our view the appellant has utterly failed to discharge the onus cast upon it of proving that the loss happened without its actual fault or privity.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Weldon & Lynch-Staunton.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

(1) [1923] A.C. 235, at 245.