1920
*May 20.
*June 21.

THE MONTREAL COTTON AND WOOL WASTE COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE CANADA STEAMSHIP LINES (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Carriers—Liability—Damages—Bill of lading—Cost price—Market value—Arts. 1073, 1074, 1675 *C.C.*

Where a bill of lading contains the following clause: "The amount of loss or damage for which any carrier is liable shall be computed on the basis of the value of the goods at the time and place of shipment," the damages occasioned by the loss of a shipment of goods must be calculated at the market value of these goods at the time and place of shipment, and not at the cost price of the goods to the owner at the place where he bought them plus the charges for freight.

Judgment of the Court of King's Bench (Q.R. 29 K.B. 186) reversed.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), modifying the judgment of the Superior Court and maintaining the appellant's action in part.

PRESENT.—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. L. Perron K.C., for the appellant.

A. Wainwright K.C., for the respondent.

THE CHIEF JUSTICE.—At the close of the argument the court was unanimously of the opinion that the appeal should be allowed and the judgment of the trial judge restored on the ground that the contract or bill of lading for the carriage of the goods fixed and determined the damages for which the defendant might become liable, namely, on the basis of the value of the goods at the time and place of shipment.

The defendant company did not dispute their liability for damages, the goods having been destroyed by their negligence during their transit. The sole question was as to the proper test by which their liability for damages should be determined. The defendant's contention was that their liability should be determined from the cost to the plaintiffs of these goods under their contract with the Dominion Textile Co., Ltd., by which they agreed to purchase the entire output of the mills for four cents per pound for one year. That price so agreed to be paid was the value, they contended, of the goods in Quebec on which their liability should be based and determined.

The trial judge held that the true value of the goods to the plaintiff under the contract of carriage was not the cost or price at which they purchased them from the mills but what they would fetch in the open market at the time and place of shipment and assessed the damages on that basis at eight cents per pound, or $2,010.24.

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The Court of King's Bench (1) reversed this finding, holding that the purchase price at which the plaintiffs bought from the mills was the test of value of the goods under the contract of carriage to them for the loss of which only they could recover, and accordingly reduced the damages by half or to $1,005.12.

I am of opinion that the Court of King's Bench erred in the test they accepted as to the value of the goods at the time and place of shipment. That value, I think, was not the price which under a yearly contract for the entire output of the textile company's mills they had bought the goods for, but the market value of those goods to them at the time and place of shipment of the goods. Their contract for the purchase of the entire output of the mills may or may not have been a good one; it may or may not have been improvident. It is not evidence of the market value of the goods at the time and place of shipment which was proved independently as very nearly double the cost to them from the mills. The carrier had nothing to do with that price. If they had paid double the market value, they certainly could not recover such value from the carrier, nor can the fact of their having purchased at less than the market price at the time of shipment avail against the market value. An ordinary purchase in open market would be very different.

The evidence uncontradicted at the trial shewed that the goods had been purchased by plaintiffs for resale in Montreal where their market value at the time of shipment was between 8 and 8 5-8 cents per pound and that the only difference between the market value in Quebec and Montreal was the cost of

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carriage from Quebec to Montreal. This cost, $71.25, was no doubt inadvertently not deducted from the damages awarded in the Superior Court and must be, of course, deducted now.

In some way or another which has not been explained this vital and necessary evidence of the market value of the goods in Quebec at the time and place of shipment was overlooked by the Court of King's Bench. There, however, we find it in the record clear and distinct and uncontradicted, and so finding it must render our judgment accordingly.

A question was raised during the argument as to whether the bill of lading or contract of carriage was not illegal as contravening the 4th section of the statute 9 & 10 Ed. VII, ch. 61, but as the defendants, respondents, so far from relying on that section distinctly rest their case upon the validity of the contract I do not deem it necessary to discuss the question.

In my judgment the appeal must be allowed with costs and the judgment of the Superior Court restored with a reduction of the amount by the sum of $71.25, the cost of the carriage between Quebec and Montreal.

The case of *Wertheim* v. *Chicoutimi Pulp Co.* (1), is, I think, much in point in some of the material points involved in this appeal. The head-note of that case in the Law Journal report states the decision of their Lordships to have been, *inter alia*, as follows:

> Where a contract provided for the delivery of goods at a place where there was no market for them, damages for non-delivery should be calculated with reference to the market at which the purchaser, as the vendor knew, intended to sell them, with allowance for the cost of carriage.

(1) 80 L.J. P.C. 91; [1911] A.C. 301.

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IDINGTON J.—The only evidence we have for our guide as to the value of the goods in question when destroyed, explicitly puts them at market prices in Montreal supplemented by clear and express evidence of their value in Montreal at the time in question and further, in accordance with common sense that their value in Quebec, the point of shipment in question, was the same less the expense of transportation from Quebec to Montreal.

Thus, even under the contract insisted upon by the respondent—of the legality of which there may be a doubt upon which I do not pass because the point was not taken below—the value is amply demonstrated.

What right has the respondent to reduce the value to the cost price, at another point than Quebec, of the goods which may have been got at a bargain, due to business foresight on the part of appellant, long before the time in question?

The appeal should be allowed with costs and the damages assessed on the basis of the market value sworn to.

ANGLIN J.—The defendants come into court admitting liability. The sole question at issue is the measure of damages to which the plaintiffs are entitled. The defendants assert that that measure is fixed by the terms of the special clause in the bill of lading under which the goods were shipped for the loss of which the plaintiffs sue. The plaintiffs contest the validity of this special clause on the ground that it contravenes s. 4 of c. 61 of 9 & 10 Ed. VII. (D.). But it is probably unnecessary to determine that question and I express no opinion upon it.

Assuming the validity of the special clause of the bill of lading relied upon, I find myself, with great respect, unable to agree with the view, which seems to have prevailed in the Court of King's Bench (1), that by "the value of the goods at the place and time of shipment" (in this case Quebec) the parties meant the cost price of the goods to the owner at the place where he bought them (in this case Montmorency) plus the charges for freight. I find no justification for such a departure from the ordinary meaning of plain language. "Cost price plus freight" and "value" are by no means the same thing. The utmost that can be said is that the former may afford some evidence of the latter.

The only evidence in the record is that the value of the goods in question was the same in Quebec as in Montreal, due allowance being made for the cost of transportation; and the uncontradicted testimony is that the goods could not have been replaced at the time they were destroyed.

The only evidence of value was given by the plaintiff's manager who tells of actual sales in Montreal on September 4th at 9½ cents, on September 6th, at 8 7-8 cents and on September 26th at 8 cents. The learned trial judge found the value at the date of the breach (Sept. 12th) to have been between 8 and 8 5-8 cents a pound. He fixed the value "within the terms of the bill of lading" at 8 cents a pound and allowed the plaintiffs as damages on that basis, $2,010.24.

Counsel for the appellant conceded at bar that there should be a deduction from this amount of $71.25 to cover cost of transportation. I rather think it should be $^{44}/_{50}$ ths of that amount ($62.70)

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since six bags out of the fifty were duly delivered, only 44 having been destroyed. The learned trial judge appears to have fully intended to make this deduction as two *considerants* in his judgment shew. He apparently omitted to do so when finally computing the amount of the damages.

I would allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the Superior Court modified however to the extent indicated.

BRODEUR J.—L'intimée est une compagnie de navigation qui, en septembre 1918, a reçu à Québec de la Dominion Textile Co. quarante-quatre balles de déchets de coton et s'est chargée de les transporter à Montréal sur l'un de ses bateaux.

Elle avait stipulé dans le connaissement que le montant des dommages qu'elle pourrait encourir devrait être basé sur la valeur de ces marchandises au port d'expédition, c'est-à-dire à Québec.

Je serais porté à croire que cette clause du connaissement fût illégale si elle eut pour effet de restreindre ou de diminuer la responsabilité du propriétaire du navire, car je crois qu'elle violerait la "Loi du transport des marchandises par eau" (9 & 10 Ed. VII, ch. 61). Mais il n'est pas nécessaire de décider cette question dans la présente cause, car le litige ne porte que sur la signification des mots suivants du connaissement, "value of the goods at the place and time of shipment."

L'appellant prétend que la compagnie de navigation, ayant perdu ces quarante-quatre balles de déchets, doit lui rembourser la valeur marchande de ces balles, soit environ huit cents la livre. L'intimée

prétend qu'elle n'est tenue de rembourser que le prix d'achat, soit quatre cents la livre. La cour supérieure a décidé en faveur de la demanderesse-appelante; mais en cour d'appel l'intimée a eu gain de cause (1).

Les articles 1073, 1074 et 1075 du code civil nous indiquent comment les dommages-intérêts doivent être calculés. Si un contrat est inexécuté, les dommages-intérêts dus par celui qui y contrevient doivent remplacer tout l'avantage sur lequel le créancier pouvait raisonnablement compter, et le débiteur n'est tenu responsable que des dommages qui ont été prévus et qui sont la suite immédiate et directe de cette inexécution, à moins qu'il y ait dol de sa part; et personne ne suggère que l'intimée s'est rendue coupable de dol.

Dans le contrat de transport, si le voiturier perd la chose, il doit en rembourser la valeur intégrale. (Baudry-Lacantinerie, 3ème édition, vol.22, n.° 2574).

Il est admis par les deux parties que la responsabilité de la compagnie de navigation doit être déterminée dans le cas actuel par la valeur des effets au port d'expédition. Or, quelle est cette valeur?

L'intimée dit que c'est le prix payé par la demanderesse à la Dominion Textile Co. La demanderesse prétend que le prix qu'elle a payé était très bas et ne représentait pas la valeur actuelle du marché. Et elle prouve par un témoin dont la déposition n'est pas contredite que la valeur actuelle de ces effets était d'environ huit cents la livre. Il nous dit qu'à Québec il était impossible de se procurer sur le marché des marchandises de cette nature et que l'endroit le plus rapproché où l'on pouvait les avoir était à Montréal où elles valaient environ huit cents, plus les frais de transport.

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Il n'y a pas de doute, ainsi qu'il a été décidé dans la cause de *Wertheim* v. *Chicoutimi Pulp Co.* (1), que l'on pouvait, dans un cas comme celui-là, avoir recours au prix du marché de Montréal pour établir la valeur des marchandises à Québec.

La preuve constate que les marchandises avaient été vendues en vertu d'un contrat à long terme à l'appelante par la Dominion Textile Co. C'était un contrat qui pouvait avoir ses avantages mais qui avait aussi ses mauvais cotés.

Dans ce cas-là quelle est la somme que doit rembourser le transporteur ? Est-ce la valeur des marchandises, ou bien si c'est le prix ? Baudry-Lacantinerie (loc. cit. no 3585) pose cette question et la résout comme suit:

> Lorsque les marchandises avaient été vendues par l'expéditeur au destinataire, est-ce leur valeur ou le prix de vente qui doit être remboursé par le voiturier?
>
> Il nous semble que la première solution ne fait aucun doute dans le cas où le prix était *inférieur* à la valeur, et cela que les marchandises aient voyagé aux risques de l'expéditeur ou aux risques du destinataire . . . . En tout cas, quelle que soit la partie aux risques de qui la marchandise voyage, c'est, suivant le droit commun, la *valeur* de la chose qui doit être remboursée.

Dans notre cas, le prix d'achat était inférieur à la valeur de la marchandise. Alors, adoptant l'opinion de cet auteur, je suis obligé de dire que la cour d'appel a fait erreur en basant son jugement sur le prix payé par la compagnie appelante.

L'appel doit être maintenu avec dépens de cette cour et de la cour d'appel. Le jugement de la cour supérieure devrait être rétabli. On devra déduire de ce dernier jugement une somme de $62.70 qui y a été portée par erreur.

(1) [1911] A.C. 301.

MIGNAULT J.—This action arose out of a shipment, in September, 1918, of fifty bales of cotton waste consigned to the appellant at Montreal by the Dominion Textile Company, Limited, from which company they had been bought by the appellant at the Dominion Textile Company's Mills at Montmorency, Quebec, the shipment being made from Quebec to Montreal. The bill of lading contained the following condition:

> The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under this bill of lading (including the freight and other charges if paid and the duty if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the amount to govern such computation, whether or not such loss or damage occurs from negligence.

The appellant alleged that when the said bales reached Montreal, employees of the respondent, through carelessness and neglect, instead of placing them in the respondent's sheds, left them on the dock exposed to the rain, where 44 of the said bales were spoiled, and the appellant claimed as damages $2,387.16.

By its plea the respondent, setting up the above condition, admitted its liability for the said loss

> computed on the basis of the value of the said goods at the place and time of shipment as provided in the bill of lading,

so that the only question is as to the amount to which the appellant is entitled.

The learned trial judge (Maclennan J.) found that the goods had been purchased by the appellant from the Dominion Textile Company at four cents per pound, that there were no users of said goods in Quebec, but there were users and a market for them in Montreal where they were being brought for resale

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by the appellant, and where their market value, at the time of shipment, was between eight and eight and five-eighths cents per pound; that the true value of said goods to the appellant at the time and place of shipment was not the invoice price or cost at which the appellant had bought them under a yearly contract, but what they would fetch in the open market at such time and place; that the only difference between the market value of said goods in Quebec and Montreal was the cost of their carriage from Quebec to Montreal, and that their value at Quebec might be taken to be the market value thereof in the ordinary course of business in the open market at Montreal, less the cost of carriage from Quebec to Montreal; and fixing their value at eight cents per pound for forty-four bales, weighing 25,128 pounds, the learned trial judge gave judgment to the appellant for $2,010.24.

On appeal to the Court of King's Bench (1), the latter court reduced the judgment to $1,076.12 for the following reasons:

Considérant que les 44 balles de déchets de coton dont il s'agit ont été endommagées et gâtées, comme l'intimée le prétend et comme la cour supérieure l'a décidé;

Considérant cependant que la base du quantum adopté par la cour supérieure est erronée et que ledit jugement de la cour supérieure—vu que le prix d'achat était de 4 cts la livre—se trouvait à accorder à l'appelante un profit de 100% sur les marchandises en question, sans les avoir revendues, sans y avoir touché et sans avoir fait aucune dépense ni encouru aucun risque à ce sujet;

Considérant que le montant de l'indemnité, dans un cas comme celui qui nous occupe, est, toutes choses égales d'ailleurs, celui de la perte subie ou du prix auquel l'acheteur pourrait se procurer d'autres marchandises semblables, mais que, dans la présente action, il y a, entre les parties, un contrat contenu dans la lettre de voiture et qui règle cette question dans l'espèce;

Considérant que cette lettre de voiture déclare que le montant de la perte ou du dommage pour lequel l'appelant est responsable sera calculé sur la base de la valeur des marchandises au temps et au lieu de l'expédition:

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Considérant que les marchandises en question ont été achetées à Montmorency, près de Québec, de la Montreal Textile Co. au prix de 4 centins la livre:

Considérant que ce chiffre établit la valeur des marchandises en question au point d'expédition, tel que le veut la lettre de voiture;

Considérant qu'en accordant 8 centins pour le prix d'une livre, la cour supérieure a accordé la valeur, non pas au point d'expédition, tel que le veut le contrat, qui est la loi des parties, mais à Montréal, au point de débarquement, et que la lettre de voiture a spécialement pourvu à ce que la responsabilité de l'appelante soit celle de la valeur au point de l'expédition.

The appellant now appeals to this court from the latter judgment.

With all possible respect, I think the judgment appealed from is clearly wrong. The measure of damages was fixed by the bill of lading, and it was "the value of the goods at the place and time of shipment." The determination of this value involves a pure question of fact and we have only to look at the evidence, which was properly directed to show the value of the goods to the appellant, to decide what amount should be awarded.

Mr. Lichtenheim, managing director of the appellant, was called by the latter. He said, in answer to questions put by the appellant's counsel:

Q. I want to know what they were selling for at the market price?

A. Your Lordship, the goods were purchased on a contract many months before they were ready for sale and you cannot sell those goods in that way until you obtain possession of them, never knowing whether you are going to get them or not.

Q. Those goods were shipped from Quebec?

A. Montmorency Falls.

Q. The boat company took them from Quebec?

A. Yes.

Q. You have stated in your examination "on discovery" what the value of those goods was in Montreal? A. Yes.

Q. Was there any difference between the value of those goods in Quebec and in Montreal? A. Freight and cartage only. And they could not have been replaced by the company at the price for which we wanted to sell.

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Q. All I am concerned with is whether there was any difference in the value between Quebec and Montreal, and if so what it was? A. The freight and cartage. That was the market price of the material at that time.

This evidence, which was not contradicted or tested by cross-examination, establishes that the only difference between the market value of the goods as between Quebec and Montreal, was the freight and cartage. In his examination on discovery, Lichtenheim swore that he could have sold the goods at $9\frac{1}{2}$ cents per pound if he had them. As the witness testified to sales at 8, $8\frac{7}{8}$ and 9 cents, the learned trial judge accepted the value as being 8 cents per pound, finding that the only difference between the price at Montreal and Quebec was the cost of carriage.

I take it that we are bound by this evidence which, as I have said, was not contradicted, and it establishes the value of the goods at Quebec, the place of shipment, by merely deducting from their value in Montreal the cost of shipment to the latter city. It also seems to me that in the case of two cities relatively near to each other, even though there be no buyers in the one, if there be buyers in the other, the value of the goods in the former can be fairly considered as being that at which they could be sold in the latter, less the cost of carriage. I am also of opinion that the value to be considered is the value to the purchaser; *Wertheim* v. *Chicoutimi Pulp Co.* (1). This is in agreement with art. 1073 of the Civil Code, which allows to the creditor the profit of which he has been deprived, and the appellant would not be compensated according to this rule if he were given only the price he paid for the goods, excluding any profit on the same.

(1) [1911] A.C. 301, at pp. 307-8.

I have duly considered the reasons of the learned judges of the Court of King's Bench, but, with deference, it seems to me that under this contract, and there is involved here merely a matter of contract, it cannot be said that the value of the goods is the purchase price of the same, or the price at which similar goods could be bought by the appellant. It is noteworthy that Lichtenheim swears he could not have purchased identical goods in the open market, but it suffices to say that the measure of damages was fixed by the contract, and was not the price at which the goods were purchased but their value at the place and time of shipment. This raises merely a question of fact and unfortunately for the respondent the evidence of this value, uncontradicted as it was, is conclusive against it.

Mr. Perron for the appellant conceded at the argument that the cost of the carriage of the goods from Quebec to Montreal, which the bill of lading stated to have been $71.39, for 50 bales, making $62.82 for the 44 bales in question, should be deducted from the value found by the learned trial judge. This deduction however should be without effect on the costs.

I would therefore allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the learned trial judge, reducing however the amount allowed to $1,947.42.

Appeal allowed with costs.

Solicitors for the appellant: *Perron, Taschereau, Rinfret, Vallée & Genest.*

Solicitors for the respondent: *Davidson, Wainwright, Alexander & Elder.*