GC1646

13, 1959

IN THE PRIVY COUNCIL No.13 of 1958.

ON APPEAL

FROM THE SUPREME COURT OF CANADA

MAXINE FOOTWEAR COMPANY LIMITED
and
J. ERIC MORIN
(Original Plaintiffs) Appellants

- and -

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED
(Original Defendant) Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal brought by the Appellants from the judgment of the Supreme Court of Canada, dated the 1st October 1957, dismissing an appeal by the Appellants from the judgment of the Honourable Mr. Justice Cameron in the Exchequer Court of Canada dated the 14th February 1956 affirming a judgment of the Honourable Mr. Justice Smith, local judge in Admiralty for the Quebec Admiralty District, delivered on the 3rd June 1952 in the exercise of the Courts' jurisdiction in Admiralty dismissing the Appellants action commenced on the 11th May 1943 against the Respondent for damages for the loss by fire of the Appellants goods shipped in the Respondent's Motor Vessel "MAURIENNE". Vol.2 p.1. Vol.1 p.247 Vol.1 p.232 Vol.1 p.1.

2. The main questions which arise for consideration in this appeal are :-

(1) Whether the M/V "MAURIENNE" was at any material time seaworthy.

(2) Whether the Respondent has discharged the onus of proving the exercise of due diligence at the material time to make the ship seaworthy and her holds fit for the reception, carriage and preservation of goods.

(3) Whether the Respondent is entitled to the benefit of the exceptions in Article IV of the Rules set out in the Schedule to the Water Carriage of Goods Act of Canada (Chapter 49 of the Statutes of Canada of 1936) so as to exempt the Respondent from liability for the loss of the Appellant's goods.

3. The corporate Appellant is Maxine Footwear Company Limited, a company carrying on business in Montreal.

Vol.1 p.89. 4. The Respondent at the material time carried on business under the trade name "Canadian National Steamships" as an operator and manager of ships, including the Motor Vessel "MAURIENNE", and as a carrier of goods by sea. On or about the 26th January 1942 the said Appellant despatched a consignment of goods consisting of 3 wooden crates and one drum of shoe leather and findings of the total value of $2801.33 from Montreal for carriage by rail to Halifax, Nova Scotia, and thence by sea in the Respondents ship to Kingston, Jamaica in the British West Indies under a contract of carriage evidenced by a Vol.1 p.219 Through Export Bill of Lading dated the 26th January 1942. The said Bill of Lading, acknowledging receipt of the said goods in apparent good order and condition, was issued to the said Appellant at Montreal by Canadian National Railway Company as agents for the Respondent Company.

Vol.1.p.91. 5. The said goods were duly conveyed by rail from Montreal to Halifax and there loaded into the said Motor Vessel "MAURIENNE" on the 6th February 1942 but Vol.1 p.92 were never delivered to the consignee at Kingston because, owing to a fire on board, Vol.1 p.28 the said ship had to be scuttled and sunk in the early morning of the 7th February 1942 before sailing from Halifax with the result that the Appellants said goods were lost.

6. The Respondents having refused to admit liability for the said loss the Appellant on the 11th May 1943 instituted

THE PRESENT SUIT

in the Exchequer Court (Quebec Admiralty District) to recover from the Respondent the said sum of $2801.33.

The corporate Appellant (hereinafter referred to as "the Appellant") was the first-named Plaintiff in the action and brought the claim as owner and shipper of the aforesaid goods. The second-named Plaintiff was J. Eric Morin, the consignee of the goods, who declared by the Statement of Claim that he had no interest in the goods, that he assigned any interest he may have had therein to the first-named Plaintiff and prayed for judgment for the first-named Plaintiff. Thereafter the second-named Plaintiff took no further part in the proceedings. Vol.1 p.3. Vol.1 p.247

7. By the Statement of Claim the Appellant alleged that on or about the 26th January 1942, Canadian National Railways as agents for the Respondent issued to the Appellant a Through Export Bill of Lading covering the aforesaid goods for carriage to Halifax N.S. and thence by the Respondent Steamship Company to Kingston in Jamaica; that the said goods in good order and condition were loaded on board the Motor Vessel "MAURIENNE" at Halifax and that the said vessel was at all material times owned, chartered and/or operated by the Respondent; that in breach of its undertaking as evidenced by the aforesaid Bill of Lading and in breach of its duty implied by law the Respondent Company failed to deliver the said cargo at destination or at all. The Appellant claimed damages in the sum of $2801.33 the value of the said goods. Vol.1 p.1. Vol.1 p.219

8. The Respondent by the Statement of Defence admitted that the said cargo was loaded on board the Motor Vessel "MAURIENNE" at Halifax for carriage to Kingston and that it was not delivered at Kingston. The Respondent Company denied that it was the owner charterer or the Vol.1 p.3. Vol.1 p.4.

operator of the said vessel and alleged that it was at all material times the manager and/or agent of the said vessel for His Majesty the King represented by the Minister of Transport of the Dominion of Canada, who was owner of the said vessel, and alleged that the aforesaid Bill of Lading on its true construction was issued by Canadian National Railways as agent for the said owner and not as agent for the

Vol.1 p.6 Respondent and that there was no lien de droit between the Respondent and the Appellant. In the alternative the Respondent alleged that the shipment of the cargo covered by the said Bill of Lading was subject to the provisions of the Water Carriage of Goods Act 1936 and claimed to be relieved from liability for the loss of the

Vol.1 p.6. Appellants' Goods by Article IV (2)(b) of the Rules forming part of the said Act. The Respondent Company further claimed to be entitled to limit its liability for all claims to a sum of $90,372.24 under the provisions of Sections

Vol.1 p.7 649 and 654 of the Canada Shipping Act 1934.

Vol.1 p.9 9. By the Statement of Reply the Appellant admitted that the contract of carriage was subject to the Water Carriage of Goods Act 1936 but alleged that the loss of the goods was due to the negligence of the Respondents' servants and that in the circumstances their said negligence constituted a failure by the Respondent to exercise due diligence to make the vessel seaworthy and the holds fit to receive the cargo in breach of the Respondents' obligation under Article III (1) of the aforesaid rules.

Vol.1 pp.12-14 In the subsequent pleadings the Respondent denied negligence and alleged that the Motor Vessel "MAURIENNE" was seaworthy in every respect and that even if there were negligence it was negligence in the management of the ship by servants of the carrier for which the carrier is not liable under the Water Carriage of Goods Act.

10. The material provisions of the Water Carriage of Goods Act 1936 are as follows :

ARTICLE II

RISKS

Subject to the provisions of Article VI under every contract of carriage of goods by

water the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

ARTICLE III

RESPONSIBILITIES AND LIABILITIES

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried .....

ARTICLE IV

RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on

the carrier or other person claiming exemption under this Section;

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 management of the ship;

(b) fire, unless caused by the actual fault or privity of the carrier" ....

Vol.1 p.139 11. The trial of the action began on the 3rd May 1947 before the Honourable Mr. Justice
Vol.2 p.3. Cannon who was then local Judge in Admiralty for the Quebec Admiralty District, but before the hearing was completed Mr. Justice Cannon
Vol.1 p.247 l.17. became ill and died. Subsequently, the trial was continued before Mr. Justice Smith and by consent, a transcript of the evidence
Vol.1 p.20 already taken before Mr. Justice Cannon was used before Mr. Justice Smith and the minutes of an investigation held by a legal adviser of the Canadian National Railways became part of the evidence of the Respondent.

Vol.1 p.232 On the 3rd June 1952, Mr. Justice Smith gave Judgment dismissing the action.

From this judgment the Appellant appealed to the Exchequer Court of Canada. The Appeal came on for hearing on the 20th April 1955
Vol.1 p.247. before Mr. Justice Cameron who gave judgment on the 14th day of February 1956 dismissing the appeal.

12. Both Mr. Justice Smith and Mr. Justice Cameron made detailed findings of fact which
Vol.1 p.232 are set out fully in the respective Judgments
Vol.1 p.247 but are summarised briefly in the following paragraphs:

Vol.1 p.232 The Appellant consigned his goods as aforesaid on or about the 26th January 1942 for carriage by the Respondent Company by sea in their Motor Vessel "MAURIENNE" from
Vol.1 pp.236-239 Halifax to Kingston. The Bill of Lading was signed by Canadian National Railway Company as agent for the Respondent Company which Company was in fact the carrier of the goods by sea.

The Motor Vessel "MAURIENNE" commenced loading general cargo at Halifax N.S. on Monday February 2nd 1942 and completed loading at about 8.15 on the evening of Friday February 6th 1942. Loading went on after 4 p.m. on Friday 6th to about 8.15 p.m. Vol.1 p.248 Vol.2 p.3. Vol.1 p.53.

13. While the vessel was in berth in Halifax some of her tanks and deck lines including three scupper pipes leading respectively from the bath, the toilet and the galley sink became frozen and blocked by ice. Some of the ships officers, acting on behalf of the Respondent, instructed employees of Purdy Brothers Limited, a local repair shop, to thaw out the frozen pipes and this work was carried out by the said employees under the supervision of the Fourth Officer of the Motor Vessel "MAURIENNE" between 3 p.m. and 4 p.m. on Friday February 6th. The thawing of the three blocked scupper pipes was carried out by applying from a staging suspended over-side the flame of an acetylene torch to the openings of the pipes in the starboard side of the ship by No. 3 hold. The sides of the ship, through which the scupper pipes passed were cork insulated, and the said Fourth Officer was well aware of this cork insulation. At about 11.20 p.m. on Friday the 6th February it was discovered that the ship was on fire and the fire was located in or close to No. 3 hold near the place where the acetylene torch had been used in the afternoon. Strenuous efforts were made to extinguish the fire but it spread to such proportions that at 5.30 a.m. on Saturday the 7th February on the orders of the Captain the vessel was sunk by opening the sea cocks and all the cargo including the Appellants' goods was lost.

Vol.1 p.232
Vol.1 p.248 l.20
Vol.1 p.249
Vol.1 p.250 l.10
Vol.1 p.233
Vol.1 p.249

14. Mr. Justice Smith found as a fact that the fire had its origin in the heat generated by the acetylene torch which was communicated to the insulation in the ships wall immediately adjoining the said scupper pipes. He found further that the work of unblocking the scuppers was carried out between 3 p.m. and 4 p.m. on Friday February 6th. Mr. Justice Cameron in the Exchequer Court upheld this finding

Vol.1 p.233
Vol.1 p.232 l.44
Vol.1 p.249

and said that it was now accepted by both parties as the most reasonable and probable cause of the fire. The learned Judge also found that the fire was caused by the negligence of the Respondent's employees viz:

Vol.1 p.249 l.44

"Before me Counsel for the Respondent specifically admitted that the fire 'was due to the fault of an employee who had been there to thaw out the ice which was blocking the openings of a discharge line or pipe.' It might be stated here that there is no evidence that Hemeon - the welder who operated the acetylene torch - was told anything about the cork insulation. His work was under the direct supervision of the Fourth Officer who - as well as the other ship's officers - had knowledge of the cork insulation near which the thawing out operation was conducted. I think that in view of the special risk involved it was negligence on the part of the Fourth Officer not to adequately supervise the operation and also in his failure to make an inspection to ascertain whether the cork insulation had in fact been ignited. Both the Fourth Officer and Hemeon were employees of the carrier and it was the negligence of one of these - or of both - that caused the fire ....

For the purpose of this case it is sufficient to state that the evidence fully warrants the presumption that the fire was caused by the negligence of the employees of the carrier."

Vol.2 p.5.

Vol.2 p.8.

These findings of fact were accepted and affirmed by the Supreme Court, as appears in the judgment of the Honourable the Chief Justice of Canada and in the judgment of the Honourable Mr. Justice Cartwright.

p.242 l.8

15. Mr. Justice Smith without referring to any particular testimony said that the evidence showed that the Appellant's cargo had been completely loaded prior to the attempt to thaw the ice from the ships scuppers. Mr. Justice Cameron made no specific finding of fact on this issue and dealt with the matter of loading in the following words :

"The Motor Vessel "MAURIENNE", operated by the Respondent, arrived at the port of Halifax on January 31st 1942. On the following Tuesday, loading of the vessel's No.3 hold (in which the Appellant's cargo was placed) was commenced and the loading of the vessel was completed at about 8 p.m. on the evening of Friday the 6th, it being the intention to sail the following morning". p.248 l.12.

In so far as the reference by Mr. Justice Smith to the time the Appellants goods were loaded on board represented a finding of fact by him, that finding was rejected by the Supreme Court for the reasons stated in the Judgment of the Honourable the Chief Justice and referred to in paragraph 25 hereinafter. The Supreme Court found as a fact that the Motor Vessel "MAURIENNE" was already on fire when the Appellants goods were received on board. Vol.2 p.4-7 Vol.2 p.3.

16. Mr. Justice Smith in his Judgment first dealt with and rejected the contention that there was no lien de droit between the Appellant and the Respondent. This point was not pursued by the Respondent and is not now in issue. Vol.1 p.239 Vol.1 p.248 Vol.2 p.2.

17. The Appellant had argued that the Respondent was not entitled to rely on the exceptions in Article IV 2 (a) or 2 (b) of the Rules aforesaid, because the Respondent had not exercised due diligence to provide a seaworthy ship in that the frozen condition of the scuppers made her unfit to receive cargo. Having reviewed the evidence on this issue Mr. Justice Smith came to the conclusion that the ship was not unseaworthy because the scupper pipes were blocked by ice and that in any event due diligence had been exercised in this respect. He said that the carriers warranty of seaworthiness was neither continuing nor absolute and that there was no evidence that the Vol.1 pp.240-242. Vol.1 p.243 Vol.1 pp.241-242

pipes were frozen when loading of cargo first began on Tuesday the 3rd February or when the Appellants' cargo was loaded. The Appellants' contention that the vessel being unseaworthy by reason of the frozen scuppers and the Respondent's employees having been negligent in their attempts to make her seaworthy by thawing out the pipes the Respondent had failed to exercise due diligence was rejected by the learned Judge on the ground that even if unseaworthiness had been established the damage did not flow from that unseaworthiness but from the fire

p.243 l.26 l.41 p.244 l.25 which was caused by the negligence of those who undertook to thaw out the pipes. As it was normal practice to thaw out frozen scuppers with an acetylene torch there was "No per se fault or negligence" and no fault or privity on the part of the Respondent Company. The Respondent was therefore entitled to the benefit of the exceptions in Article IV 2 (b) of the Rules and also in Article IV 2 (a) on the ground that any neglect or default on the part of

p.244 l.26. the servants of the carrier occurred in the course of acts related to the navigation or management of the ship.

p.247. 18. Mr. Justice Cameron delivering judgment in the Exchequer Court said that the Appellants' submission that the Respondent in breach of its obligations under Article III (1) of the Rules had failed to provide a

p.251 seaworthy ship fell into three categories, first the presence of ice in the scupper pipes made the ship itself unseaworthy, secondly that the presence of the ice made the vessel unfit for reception of the cargo and therefore unseaworthy, and thirdly that in the negligent use and application of the acetylene torch the Respondent had failed before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy and the holds and all other parts of the vessel fit and safe for the reception carriage and preservation of the cargo. He rejected the first submission as to

Vol.1 p.251 l.11. unseaworthiness of the ship itself on the ground that there was no evidence to support such a finding and on the second submission as to uncargoworthiness, having considered the evidence and reviewed certain authorities came to the conclusion that the learned

Vol.1 p.252 l.1. trial Judge's finding against the Appellant

should not be disturbed.

As regards the third submission the learned Judge said that, in view of his conclusion that the ship was not unseaworthy and her holds were not unfit or unsafe the question of due diligence did not arise. A finding of seaworthiness implied that due diligence had been used. Moreover he thought that the fire did not arise in carrying out the obligations under Article III (I) - those obligations had been fully carried out before the thawing-out operations began - but because of negligence by employees of the carrier in the management of the ship which entitled the Respondent to the benefit of Article IV (2) (a). Vol.1 p.252 l.38 Vol.1 p.253 l.34 Vol.1 p.254 l.2.

19. The learned Judge referred to a number of authorities on the meaning of the phrase "management of the ship" in this Rule in which a distinction is drawn between acts done in relation to the ship and those done in relation to the cargo and concluded that in the present case the steps taken to thaw out the ice were undertaken to return to use the facilities or appliances of the ship, namely the galley and washroom, and were not done primarily in connection with the cargo. As the phrase "management of the ship" in its true meaning was sufficiently wide to include acts done in harbour as well as at sea the Respondent was entitled to the benefit of the exemption provided in Article IV (2) (a). Vol.1 pp.254-259 Vol.1 p.257 l.14. Vol.1 p.259 l.24.

20. Mr. Justice Cameron dealt finally with the Appellants' plea that the Respondent had failed to establish that the fire was caused without its actual fault or privity, and referred to the authorities that establish that if the direct or dominant cause of the loss is unseaworthiness, even though the proximate cause is fire, the shipowner is not exempted from liability by Article IV (2) (b) even though it is proved that the unseaworthiness was caused without his actual fault or privity. The Appellant had failed to prove unseaworthiness and the loss was the direct result of fire only, and therefore provided the Vol.1 pp.259-265 Vol.1 p.260

Vol.1 p.264 l.21.

Respondent Company could prove that the fire was caused without its actual fault or privity, it was protected. The fault or privity had to be in respect of that which caused the loss or damage and had to be that of the "directing mind" of the owner corporation. In the present case the fault, or negligence, was that of the workmen who operated the acetylene torch and of the ships officers and not that of the "owner or its directing mind". There was no negligence on the part of Mr. J.W. Campbell the Respondent's assistant superintendent engineer and representative at Halifax, who inspected the ship daily.

Accordingly Mr. Justice Cameron dismissed the appeal.

Vol.2 p.2.

21. It is respectfully submitted that both Mr. Justice Smith and Mr. Justice Cameron in their respective Judgments failed, as did the Chief Justice in delivering the judgment of the majority of the Supreme Court as will appear hereinafter, to take into account or give any effect to the submission on behalf of the Appellant that the Respondent carrier was in breach of his obligation under Article III (2) of the Rules properly and carefully to "load, handle, stow, carry, keep, care for and discharge the goods carried ...." The Appellant relied on three matters as constituting a breach of this obligation: first the frozen condition of the scuppers involved a risk of fracture of the pipe and for that reason alone the ship was unseaworthy and unfit to receive the cargo: secondly that the use of an acetylene torch in a pipe in the side of a cork insulated cargo hold was in itself dangerous and when that operation had also been carried out negligently and when there had been a negligent failure, as Mr. Justice Cameron found there had been, subsequently to inspect the cork insulation for signs of fire, there was established a clear breach of the duty in respect of care of the cargo; thirdly the failure to discover the fire for over 7 hours was due to grave dereliction of duty on the part of the ships crew and in particular of the watchman and relieving mate on duty. The watchman Canou, said in evidence, which was uncontradicted, as follows :

Q. When did you go on duty? Vol.1 p.47 l.32.

A. Eight o'clock.

Q. Just tell me what you did from 8 o'clock until the fire

A. Just walked around on deck for awhile and as it was cold went into my cabin and the Bosn's messroom.

X X X

Q. Did you make a round of the deck? Vol.1 p.48 l.3.

A. I went aft and was supposed to make my round but only went to the gangway, went from the stern up to the starboard side a little aft of amidships and then went back to my cabin and read again.

X X X

Q. Then how many rounds did you make while on duty? Vol.1 p.48 l.23.

A. From 8 o'clock to 10.30 I made three or four rounds.

B. Where did you go on your rounds?

A. I did exactly the same thing each time. Each round I came back to my cabin which is occupied by me and a man named Roberts and we chatted".

22. The relieving mate Treweek admitted in evidence that when he made a round on deck and found the watchman absent he took no action but merely went back to his cabin and read. Mr. J.W. Campbell, the Respondent's Assistant Marine Superintendent at Halifax, who was called to give general evidence of the diligence exercised by the Respondent said that it was no part of his duty to concern himself in any Vol.1 p.39 l.13. Vol.1 p.168 l.45.

Vol.1 p.169 l.18

way with the safety of the cargo. He said that he was last aboard the ship at about 4.30 p.m. but knew nothing, so far as the ship was concerned, of the operation of the acetylene torch.

It was submitted that this negligent conduct on the part of those responsible for the safety of the ship and her cargo at the material time constituted a further breach of the Respondent's obligation under Article III (2) of the Rules and that the cumulative effect of these breaches and failures is that the Respondent has failed to discharge the onus of showing that it has exercised due diligence to make the ship seaworthy and fit to receive the cargo.

Vol.1 p.254 l.2.

23. It is respectfully submitted that Mr. Justice Cameron erred in holding that the obligations to exercise due diligence had been fully carried out before the thawing out operations began. It is submitted that the obligation is a continuing one and persists at all times until the ship sails, and that the failure of Mr. Justice Cameron so to interpret Article III (I) led him erroneously to the conclusion that the negligence of the Respondent's servants was in the management of the ship and that the fire was caused without the actual fault or privity of the carrier. It is respectfully submitted further, that the majority of the Supreme Court was wrong in upholding the findings of Mr. Justice Cameron in these respects.

Vol.1 p.266

24. The Appellants appealed from the decision of Mr. Justice Cameron in the Exchequer Court to the Supreme Court of Canada and the appeal was heard on the 15th and 16th of May before the Honourable The Chief Justice of Canada, the Honourable Mr. Justice Taschereau, the Honourable Mr. Justice Cartwright, the Honourable Mr. Justice Fauteux and the Honourable Mr. Justice Abbott P.C. The Supreme Court delivered Judgment on the 1st October 1957

Vol.2 p.1.

and by a majority dismissed the appeal.

Vol.2 p.2.

25. The Chief Justice of Canada delivering the Judgment of the majority of the Court dealt with the argument on behalf of the Appellant that it was not shown that the Appellant's goods were put on board before

the commencement of the fire, and reviewed the course the trial had taken at first instance owing to the death of Mr. Justice Cannon, as set out in paragraph 15 hereof. The Chief Justice pointed out that in consequence Mr. Justice Smith had heard no evidence on this issue from any witness appearing in person before him. The Chief Justice considered the transcript of the evidence and decided that on that record it should be held that the Appellants goods were not stowed until after the commencement of the fire.

Vol.2 p.3.
Vol.2. p.3.
Vol.2 p.4.

The Chief Justice then dealt very briefly with the Appellant's other submissions and while affirming the findings in the Courts below that the fire was caused by the negligent application of the flame of the acetylene torch and that whoever hired the contractors was negligent not to tell them of the cork insulation, nevertheless found that the Respondents had discharged the onus of showing that it had exercised due diligence, and that the negligence or default was that of the servants of the Respondent in the management of the ship within the meaning of Article IV 2 (a).

Vol.2 p.4.
Vol.2 p.5.
Vol.2 p.6.

26. Mr. Justice Cartwright delivering the dissenting Judgment of the minority of the Court said that he agreed with the conclusion of the Chief Justice that the proper inference to be drawn from the evidence was that the Appellants goods were not stowed until after the commencement of the fire.

Vol.2 p.7.

Mr. Justice Cameron had found that the frozen condition of the scupper pipes at 3 p.m. on Friday the 6th February did not render the ship unseaworthy or the holds unfit for the reception of cargo and these findings should not be disturbed. The fire started not later than 4 p.m. as a result of the negligence of the Respondent's servants and Mr.Justice Cameron had found (i) that the act of thawing out the scupper pipes was an act of the servants of the Respondent in the management of the Ship (ii) that the fire was not caused by the actual fault or privity of the Respondent (iii) that the loss of the Appellants' goods was "the direct result

Vol.2 p.7.

of fire only" and (iv) that consequently the Respondent was relieved from liability by Article IV (2) (a) and (b).

Vol.2. p.8.

27. Mr. Justice Cartwright said that assuming the correctness of findings (i) and (ii) above findings (iii) and (iv) did not necessarily follow.

No doubt up to 3 p.m. on Friday the requisite diligence required under Article III (1) (a) and (c) had been exercised but the duties of the carrier under those clauses were continuing and persisted until the beginning of the voyage. Not later than 4 p.m. when the cork insulation had begun to smoulder the ship had ceased to be seaworthy and the holds had ceased to be fit for the reception and carriage of the goods. The Respondent therefore stowed the Appellants' goods on an unseaworthy ship when the exercise of due diligence would have resulted in discovery of the fire. The Respondent was responsible in law for the failure of his servants to exercise the due diligence required by Article III (i) and had this diligence been exercised the unseaworthiness would have been prevented or if not prevented would have been discovered and the Appellants' loss avoided. While the negligent thawing out of the scuppers may have been an act done in the management of the ship and the resulting fire may not have been caused by the actual fault or privity of the carrier, the direct cause of the loss of the Appellants' goods was the action of the Respondent's employees in bringing those goods to and loading them on a burning and unseaworthy ship. Accordingly the appeal should be allowed and judgment entered for the Appellant for $2801.33 and the Respondent's claim to be entitled to limit its liability be determined in other proceedings in which all the parties interested were represented.

Vol.2 p.9

Vol.2 p.9.

Vol.2 p.11.

28. The Appellant being dissatisfied with the order of the Supreme Court dismissing the appeal presented a Petition of Appeal to Her Majesty in Council.

29. The Appellant humbly submits that its appeal should be allowed for the following among other

REASONS

(1) Because the ship was at all material times unseaworthy and her holds unfit and unsafe for the reception carriage and preservation of goods.

(2) Because the Respondent failed before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and the holds fit and safe for the reception carriage and preservation of the goods.

(3) Because the Respondent failed properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods.

(4) Because the Respondent has failed to exercise due diligence to provide a seaworthy ship and has failed properly and carefully to load handle and care for the goods and is therefore not entitled to the benefit of the exceptions in Article IV (2) of the Rules in the Schedule to the Water Carriage of Goods Act 1936.

(5) Because the loss of the Appellants' goods was due to the negligence of the Respondent's servants.

(6) Because the negligent acts of the Respondent's servants were not acts done in the management of the ship.

(7) Because the Respondent failed to establish its plea that the fire was not caused by its actual fault or privity.

(8) Because the direct cause of the loss of the Appellants' goods was the act of the Respondent's servants in bringing the goods to and loading them on a burning and unseaworthy ship the holds of which were not fit for their reception, carriage and preservation.

(9) Because in any event the reasoning and conclusions of Mr. Justice Cartwright in his dissenting judgment in the Supreme Court were right and should be affirmed.

C. RUSSELL McKENZIE
S.O. OLSON.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CANADA

B E T W E E N :

MAXINE FOOTWEAR CO. LIMITED and J. ERIC MORIN — Appellants

- and -

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED — Respondent

C A S E

- FOR THE -

A P P E L L A N T S

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