Privy Council Appeal No. 43 of 1922.

Point Anne Quarries, Limited - - - - - *Appellants*

v.

The Ship "M. F. Whalen" - - - - - *Respondent.*

The Ship "M. F. Whalen" - - - - - *Appellant*

v.

Point Anne Quarries, Limited - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1922.

Present at the Hearing:

VISCOUNT CAVE.
LORD PARMOOR.
LORD PHILLIMORE.
LORD JUSTICE CLERK.

[*Delivered by* LORD PHILLIMORE.]

This is a suit *in rem* brought in the Toronto Admiralty District of the Exchequer Court of Canada, claiming damages for the loss of a scow with her cargo of stone in Lake Ontario, on the 13th November, 1920, owing to her abandonment two days before by the tug sued, the "M. F. Whalen."

The claim stated various points of negligence and failure on the part of the tug to perform her duties. The owners of the tug, who appeared and defended, denied the negligence, set up contributory negligence on the part of the plaintiff company, and further said that the contract into which they had entered with the plaintiff company was to tow barges only and not scows;

that under the contract the tug master was to take the orders of the superintendent of the plaintiff company's business, and that in breach of the contract the superintendent had directed the tug master to take the scow in tow; and, though it was not very distinctly pleaded, they relied upon these facts as absolving them from any liability for the negligence of the tug master, if such there were. They also, by an amendment made after the close of the pleadings, claimed that in any event their liability should be limited to $38·92 for each ton of their tonnage, under Section 921, of the Canada Shipping Act.

The Trial Judge decided all these points in favour of the plaintiff company. He held that the contract to tow did cover scows, and that if a particular letter or memorandum on which the defendant company relied did not cover scows, and if it were the instrument embodying the contract, it should be rectified. He found negligence on the part of the tug master, and he held that the owners of the tug had warranted her capacity, and that the loss was due first to her inferior capacity and then to the subsequent negligence of the master in dealing with the defects that her want of capacity brought on; and that, therefore, the owners could not limit their liability. This decision was confirmed with a slight variation of reasons by the judge of the Exchequer Court.

The defendants then appealed to the Supreme Court of Canada. In their factum of appeal, while not admitting that the Courts below were well founded in blaming the master of the tug, they did not insist so far as this question of fact was concerned upon their contentions as submitted to the lower courts. Their Lordships take this as an abandonment of the defence to the charge of negligent navigation, and the further charge that this negligence caused or contributed to the loss.

In the Supreme Court there was a considerable difference of opinion. Idington and Anglin, JJ., gave their opinions in favour of dismissing the appeal. The Chief Justice and Mignault, J., were for allowing the appeal and dismissing the suit, the Chief Justice further expressing the view that if the judgment for the plaintiff company could stand the damages must be reduced to the amount of the statutory liability of the defendants. Duff, J., was in favour of allowing the judgment to stand, but only for the sum fixed by the statutory liability. In the result a judgment was passed, varying the decree by limiting the liability of the defendants to this sum with certain directions as to costs. From this decision both parties have appealed.

The facts of the case as taken from the admitted documents and the oral evidence as it was accepted by the Trial Judge are as follows.

The Kirkwood Steamship Line had two tugs, the "Metax" and the "M. F. Whalen," which they were willing to dispose of. The plaintiff company, which had stone quarries at a spot in the north-eastern portion of Lake Ontario and a fleet of scows and barges to carry the stone, needed a tug to tow these vessels from

Presqu'il, where they got into the open lake, to Toronto or Hamilton. They had been using a tug of a Mr. Russell, but it had gone away to another job. Thereupon a correspondence ensued between the parties, beginning with a letter of the 11th September, 1920, from Kirkwood, junior, in which he recommended his tugs and suggested a price. As the correspondence progressed it appeared that the "Metax" would not be available, but the "M. F. Whalen," described as exactly the same, was still free for either sale or hire. In order that Kirkwood might know what the probable profits of a hire would be, the last account from Russell was sent to him. Thereupon the manager of the plaintiff company, Stewart, met Kirkwood at Toronto on the 27th October, and it was agreed that the tug should be employed. As to the scope of her employment the witnesses differed. Stewart said that it was made clear that all the company's equipment, a word which he used to cover both scows and barges, were to be towed. Kirkwood said that there was no mention of scows, and according to one statement in his evidence, that he had never heard of scows. Eventually Stewart wrote down the memorandum or letter, the terms of which formed one of the principal causes of this litigation. The letter is as follows :—

"POINT ANNE QUARRIES, LIMITED.
"Toronto, Ontario, 27th October, 1920.

"The Kirkwood Steamship Line,
14, Place Royale, Montreal, Quebec.

"Dear Sirs,

"This will confirm arrangement made with your Mr. T. R. Kirkwood this morning, whereby you agree to send the 'M. F. Whalen' to tow our barges between Point Anne, Presqu-Isle and Toronto at the following rates :—

"Front Point Anne to Toronto—
General business, 75c. per yard.
Crib filling stone, 90c. per yard.

"From Presqu-Isle to Toronto—
General business, 60c. per yard.
Crib filling stone, 75c. per yard.

"It is understood that the tug will take her towing orders from our superintendent, Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the Quarry end ; we to look after fueling arrangements and purchase of supplies.

"(Signed) J. F. M. STEWART."

It will be noted that the phrase used is "barges," and there is no doubt that scows are a different class of craft. Barges in general, and the barges of this company in particular, have a rudder and carry a man or men who can use the rudder and to some extent keep the tow behind the tug. Scows have no rudder and carry no men, and their lines are such that they have a tendency to run up into the wind. Stewart frankly admitted that he ought to have said "barges and scows," and that he could not account for the mistake, except that it was a slip.

Matters having been thus far settled on the 27th, the tug was in due course despatched to Presqu'il, where under the orders of Mr. Thompson, the superintendent, she towed one of the company's barges to Toronto, and took back without protest one of the scows light, and then waited for the scow in question, with which she started on the morning of the 11th November. In the course of the day a strong south-westerly wind came on and the tug could not properly hold the scow. When the master was off Cobourg he doubted whether he could hold on and whether he had not better make for that port, but gave it up because his tow rope was too long to go in through the channel. He proceeded on and passed Port Hope with his steam pressure steadily diminishing and the wind and sea increasing. He then made an attempt to turn to starboard towards the shore and back to Port Hope, but this could not be done. He next turned to port out into the Lake and tried to go back to Presqu'il, but the tow rope caught in a chock on the quarter and the master gave up the job, cut the scow adrift, went into shelter at Cobourg, and reported the same night to his owners. The plaintiff company, learning of this next morning, telegraphed to the Kirkwood Steamship Line that the scow had been thrown adrift with no reason except that the captain could not control his crew, that the scow was still floating, that they had sent a steamer from Toronto which would not be able to reach her before dark, that the tug was at Cobourg with a wind off-shore and yet the crew refused to go out. Thereupon the defendants sent the following telegrams, the first to the master and the second to the plaintiff company :—

> "Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it if you can save this scow without risk to your tug do so.
>
> "KIRKWOOD STEAMSHIP LINE."

> "Wire received T. R. Kirkwood leaving for Cobourg first train to investigate have wired Captain to save scow if at no risk to tug.
>
> "KIRKWOOD STEAMSHIP LINE."

The tug did not go out that day, but went out the next, when, however, it was too late, as the scow had already drifted ashore and become, with her cargo, a heavy loss.

The Trial Judge found that the power of the tug was insufficient to manage the scow in the weather, which was bad but not exceptional, and that the captain was negligent in not taking steps when he was off Cobourg, and holding on till it was too late instead of turning back when conditions were still favourable and when, if he got before sea and wind, he could probably have hauled in a part of his long tow rope so as to make it safe to go into either Cobourg or Port Hope ; and further, that it was his duty to have gone out on the next day, and the weather was not such as to excuse him and the crew for not making the attempt.

He concluded his judgment on this part of the case in the following words :—

> " The result of the foregoing is that I find that the ' Whalen ' was negligently navigated by her master and that he failed to take any reasonable steps towards endeavouring to secure the scow and its cargo on the day after its abandonment. I also find that the tug lacked capacity to accomplish the task undertaken by it in the weather conditions which ought to have been expected in November in that it could not sustain sufficient steam pressure, a condition aggravated by the inefficiency of the crew."

It was because of these findings and of his view of the contract that the Trial Judge held that the loss was occasioned partly by the negligence of the master and crew, and partly because the tug was not equal to the implied warranty, and therefore that the owners could not say that it happened without their fault or privity.

Upon these findings of negligence, even if the original contract covered only barges and not scows, their Lordships think that the judgment under appeal, condemning the defendants to the extent of the limit of their liability, could probably be supported for the reasons given by Duff, J. But their Lordships on consideration agree with the view taken by the Trial Judge and three other judges, that the original contract covered scows as well as barges. No doubt the language of the letter or memorandum creates a difficulty for the plaintiff company; but no distinction was drawn at the interview between the different classes of vessels owned by the plaintiff company. If any distinction was present to the mind of Kirkwood, it would be that a scow was the more desirable of the two vessels for his purpose. The principal subject of discussion was the price which his tug would earn if employed on the same terms as Russell's tug. Russell's bill was before him, and mentioned in terms barges and scows, each paid at the same rate, namely for the yards of stone carried, the scows carrying considerably more than the barges, so that the towage of the scows was the more profitable. Stewart's evidence was believed, and he is positive that scows were mentioned. The subsequent happenings throw a considerable light upon the original transaction. The tug master had already towed one scow without protest, and was taking the second as a matter of course. When on the 12th November the plaintiff company complained that their scow had been cast adrift and that the tug would not go out to bring her in, the defendants, without a word of comment, told their man to go and save her if he could without risk, and informed the plaintiff company that they had done so. There is no indication in the papers that until the defence in the action was put in, this point was ever made by the defendants.

The cross appeal of the defendants therefore fails, and judgment must stand against them for at least the sum found by the Supreme Court.

However, in their Lordships' opinion, they are not liable for more, and the appeal of the plaintiff company also fails. Their

Lordships cannot find that Kirkwood warranted that his tug would be fit to hold the scow in rough weather. To begin with they do not think that Kirkwood knew, or that it was sufficiently brought home to him, that a scow would be so difficult to tow as it was. Secondly, the whole thing was experimental. It was a trial trip to see whether the tug could do the business. And thirdly, it was a contract for a named vessel, which brings the case within the authority of *Robertson v. the Amazon Tug and Lighterage Company* (7 Q.B.D., p. 598), followed by Kennedy, L. J., in the *West Cock* (1911 P., p. 231) and excludes any implied warranty. Their Lordships fail to find any evidence of any express warranty which was not complied with. There were no doubt general representations as to the goodness and power of the tug, but nothing tangible in respect of which it could be said that the tug fell short. A point indeed was made that in the first letter the engines were described as "designed to indicate 200 h.p.", while the ship's register shows "I.h.p. 144." But though the register showing this was put in by the defendants for the purpose of limiting their liability, no attention was directed to the apparent discrepancy between the register and the letter; there was no cross-examination as to this; no point concerning it appears to have been made at the trial, and no evidence was led to show that the difference, if difference there were, would have had the effect of making the tug incapable when she would otherwise have been capable.

Their Lordships will, therefore, humbly advise His Majesty that the appeal and cross appeal should be dismissed and upon the whole that they should be dismissed without costs on either side, leaving the judgment of the Court below to stand as drawn up.

In the Privy Council.

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v.

THE SHIP "M. F. WHALEN."

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DELIVERED BY LORD PHILLIMORE.

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