Privy Council Appeal No. 97 of 1922.

The Corporation of the Royal Exchange Assurance (of London) and another - - - - - - - - *Appellants*

v.

The Kingsley Navigation Company, Limited - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1923.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
LORD PARMOOR.
LORD WRENBURY.
LORD CARSON.

[*Delivered by* LORD PARMOOR.]

Early in the month of November, 1920, the Pacific Mills, Limited, contracted to buy from the Pacific Lime Company, Ltd., 3,000 barrels of lime, to be consigned to them at Ocean Falls, on board a barge called the "Queen City." The "Queen City" belonged to the respondents, the Kingsley Navigation Company, Limited. The barge left Blubber Bay, a port on Texada Island, on the 10th November, 1920, loaded with 3,000 barrels of lime, and some soda ash, and proceeded in tow of a tug to Beaver Cove, a port on Vancouver Island, reaching Beaver Cove on the 11th November, 1920, at six in the morning. On the same morning, at 7 o'clock, smoke was observed rising from the after hatch. The "Queen City" was towed away into deep water, where she and her cargo were completely burnt and destroyed. The Pacific Mills, Limited, had insured the cargo with the Corporation of the Royal Exchange Assurance, and that

Company paid to them the amount of the loss, taking an assignment of their claim against the Kingsley Navigation Company.

On the 26th May, 1921, the Assurance Company, and the Pacific Mills, Limited, joined in an action against the respondents to recover the value of the lost lime. The Judge of first instance in the Supreme Court of British Columbia gave judgment in favour of the appellants, but this judgment was reversed by the judgment of the Court of Appeal of British Columbia of the 6th June, 1922. This is an appeal from the judgment of the Court of Appeal, and the judgment of the Supreme Court is sought to be restored.

The appeal raises questions of considerable importance on the construction of the Water Carriage of Goods Act (9 & 10 Ed. VII, c. 61) enacted by the Parliament of Canada on the 4th May, 1910.

The barrels of lime were carried under the terms of a bill of lading, which was probably lost when the cargo and barge were burnt. Their Lordships agree in the finding that the lime was intended to be shipped on the terms of a bill of lading in accordance with the usual custom of shipments of this character then prevailing in the coasting trade. The endorsement on such a bill of lading would include the following term :—

> " Shipment covered by this bill of lading is subject to all the terms and provisions of, and to all the exemption from liability contained in, the Act of Parliament of Canada known as the Water Carriage of Goods Act. This bill of lading and all matters arising thereunder shall be subject to, and interpreted according to, the law of England in so far as the same is not repugnant to the provisions of the same Act."

This endorsement subjects the shipment of the barrels of lime to all the terms and provisions of the Water Carriage of Goods Act, and the case, as argued before their Lordships, depends upon the construction of that Act.

Apart from any limitation of liability, either by statute, or agreement, a carrier of goods by sea is liable as insurer of the safety of the goods which he undertakes to deliver, and further warrants that the vessel, in which the goods are intended to be carried, is seaworthy at the time when the goods are placed on board; in other words, that the vessel has that degree of fitness, in relation to the character of the goods to be carried, which a prudent owner of the goods would require a vessel to have at the commencement of a voyage, in view of all probable conditions and contingencies. It follows that, apart from the protection of the Water Carriage of Goods Act, the respondents would be liable. The case for the respondents is that they are within the exceptions from liability, created by that Act, in favour of the shipowner.

The first important section is Section 4. This section (*inter alia*) renders any clause, covenant or agreement illegal, null, and of no effect which purports to relieve the owner, charterer, or agent of any ship, or the ship itself, from obligations to exercise due diligence to make and keep the ship seaworthy.

There is nothing in this section which prohibits a shipowner from contracting out of his common law liability to warrant the absolute seaworthiness of the ship, but he cannot contract out of the obligation to exercise due diligence to make and keep the ship seaworthy. The relevant facts in the present case are as follows: On the 2nd November, 1920, at the request of the Pacific Lime Company, owners and operators of the "Queen City," Captain Cullington, Surveyor to the Board of Marine Underwriters of San Francisco, California, proceeded on board the "Queen City" to complete an internal survey, supplementing a survey held on the 11th September, 1920. Captain Cullington made the following report:—

> "Found upon examination a part of the ceiling rotted, also the stern-post rotted so badly that it was almost reduced to pulp, and, from conditions as existing in and around the transom, it is my opinion that the horn timber, also the rim of counter, is affected by rot, and in consequence of the conditions, as found, I cannot recommend this vessel as a risk to underwriters."

Captain Cullington stated it did not necessarily follow that because a vessel could not be recommended for insurance it was not seaworthy, but he left no doubt on the mind of the Trial Judge that, in his opinion, owing to the conditions in which he found the ship on the 2nd November, 1920, he did not consider her seaworthy. This opinion was further corroborated by the evidence of John Kenneth McKenzie, Superintendent of the British Marine and Shipbuilding and Repair Company, who stated that he had been asked by Captain Cullington to have a look on the inside of the "Queen City," and that he would not call her seaworthy, if she had rotten wood in her. It is, however, not necessary to pursue this matter further, since both Courts concurred in the finding that the ship was not in a seaworthy condition to carry a cargo of lime, on evidence which, in the opinion of their Lordships, is conclusive.

It remains to consider whether the respondents did exercise due diligence to make and keep the "Queen City" seaworthy. Mr. Mather, the first witness called at the trial on behalf of the respondents, was general manager both of the Pacific Lime Company and of the Kingsley Navigation Company, and acted throughout the whole transaction as the representative of these two Companies. He was present on the occasion of the inspection of the ship by Captain Cullington, before the issue of the report of the 2nd November, and the report must have come to his knowledge before the loading, on the "Queen City," of the cargo of lime. No doubt there is some difference in the recollection of Captain Cullington and Mr. Mather as to the conversation which took place on the occasion of the inspection of the ship before the November report, but Mr. Mather's own answers, in cross-examination, leave no doubt that he knew the condition of the ship at the time, although he was not prepared to accept the actual language, which had been used, according to the recollection of Captain Cullington. Mr. Mather says that you could pull

handfuls of wood out of the top of the sternpost, and that if Captain Cullington had said that the top was reduced to pulp it would have been quite correct, and that, although he did not think the first stage of decay had set in all along the ceiling, it had set in in places. The manager of a company, who had received the report of the survey of Captain Cullington, and then sent the ship to sea with a cargo of lime in the condition to which that report testifies, cannot be said to have exercised due diligence to make and keep the ship seaworthy. In addition, there is ample evidence that the actual conditions of rot which affected the ship, and rendered her unseaworthy, were known to Mr. Mather on his own personal inspection. The respondents are a limited Company, as were the defendants in the case of *The Asiatic Petroleum Company, Limited*, v. *Lennard's Carrying Company* (1914, 1 K.B.D., p. 419). They could only act through some individual as their *alter ego*, and they did so act through Mr. Mather. The result is that, as the owners of the "Queen City" did not exercise due diligence to make and keep the ship seaworthy, no clause, covenant, or agreement to escape liability, under this head, would have protected them from a claim for the loss of cargo, and any such clause, covenant or agreement would have been illegal, null and void, and of no effect, unless it had been in accordance with other provisions of the Act. In the present case there is no suggestion that the other provisions of the Act would have operated to render valid such a clause, covenant or agreement.

Section 6 of the Act protects the owner of a ship, who exercises due diligence to make the ship in all respects seaworthy, against responsibility for loss or damage resulting from faults or errors in navigation, or in the management of the ship, or from latent defect. In the present case the loss of the lime cargo is not attributed to any of these causes, and in any case the protection would not operate to release the respondents from liability, since, as above stated, they did not exercise due diligence to make the "Queen City" in all respects seaworthy.

The section on which the respondents in substance rely for exemption from their common law liability, is Section 7. The first question which arises under this section is whether the loss of the cargo, which followed on an outbreak of fire, is a loss "arising from fire." Captain Cullington states that the effect of the rot which he saw would be that the vessel would lose the effect of the strength of the stern-post, and also of the ceiling, and that there would be a tendency to make the planking work open at the seams, causing her to leak, and to take in water. If this leakage was of such an extent that the water rose above the level of the bottom of the barrels containing the lime, there would be a tendency to oxydation and combustion, and the creation of a heat atmosphere sufficient to ignite the wooden structure of the vessel. It is said, however, on behalf of the respondents, that the "Queen City" had only

taken in 12 inches of water in 24 hours, which would prove that there was no considerable leakage, and that the depth of the water was not sufficient to affect the lime cargo. Evidence was given by Walter Ford, the Captain of the "Queen City," that at 6 o'clock in the morning he had sounded the depth of water, and found there was not sufficient to affect the lime cargo, but under cross-examination it appeared that he did no more than drop an iron rod, on which there were no marks of inches or feet, down the sounding hole; in truth, he was not in a position to make more than a conjecture as to the depth of the water. Moreover, the soundings were taken an hour before there was any sign of the outbreak of the fire, leaving time for a marked increase in the depth of the water if the "Queen City" had sprung leaks to any considerable extent. On the hearing of the appeal, the counsel for the respondents placed the main weight of his argument on the evidence of Walter Ford as to the depth of water, but the Trial Judge does not appear to have given any weight to this evidence. Their Lordships regard it as quite insufficient to establish the proposition, that the outbreak of fire could not be due to the heat generated by the contact of water with a lime cargo. There is a further passage in Ford's evidence which corroborates this conclusion. He states that he knew that the union of lime and water produced heat, and that this was the reason why he did not turn water on the "Queen City" when he ascertained that she was burning. The unseaworthiness of the "Queen City" was, therefore, of such a character as to render probable a considerable leakage, and the influx of sufficient water to come into contact with the lime cargo, and thus to generate heat which would be sufficient to ignite the timbers of a wooden ship constructed on the lines of the "Queen City."

Mr. Mather, in his cross-examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, "well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water." Their Lordships cannot doubt that the unseaworthiness of the "Queen City" was the natural and direct cause of leakage, sufficient to bring water into contact with the lime cargo, and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire within the protection of Section 7. The train of causation, from the unseaworthiness of the "Queen City" to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*, 1918, A.C., p. 369, the proximate cause of a loss is not necessarily the cause nearest in time. The question of onus is not material in these circumstances; but, if a shipowner seeks to escape liability, on the ground that the loss arose from fire,

the onus of showing that the loss did arise from fire is affirmatively upon him.

In order, therefore, to escape liability, the respondents must be able to prove, under the later words of the section, that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants or employees. Under the terms of Section 502 of the Merchant Shipping Act, 1894, the owner is not liable to make good to any extent whatever any loss or damage happening without his actual fault or privity where (*inter alia*) goods on board his ship are lost or damaged by reason of fire on board the ship. It has been held under this section that parties who plead the section, must bring themselves within its terms, and that the whole onus lies on the shipowner to prove that the loss has happened without his actual fault or privity (*Asiatic Petroleum Company, Limited*, v. *Lennard's Carrying Company* (1914, 1 K.B., p. 419, 1915, A.C., 705), *Ingram & Royle, Limited*, v. *Services Maritimes du Tréport* (1914, 1 K.B.D., 541)). In this latter case, Kennedy, L.J., says that the party who is relying upon the provisions of Section 502 of the Merchant Shipping Act, 1894, has not merely to show that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to show affirmatively that the loss happened without his actual fault or privity.

Their Lordships are of opinion that the same principle applies in the construction of Section 7 of the Water Carriage of Goods Act, and that therefore the onus was upon the respondents to show that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants or employees. The words " actual fault or privity " include acts of omission, and if an owner has means of knowledge which he ought to have used, and does not avail himself of them, his omission so to do may be a fault, and if so, it is an actual fault, and he cannot claim the protection of the section (*Asiatic Petroleum Company, Limited*, v. *Lennard's Carrying Company* (1914, 1 K.B.D., Buckley, L.J., p. 432)).

It is not necessary to analyse further the words " actual fault or privity," since the loss must also be without the fault or neglect of the agents, servants or employees of the respondents, and, quite apart from any question of onus, it is impossible to say in the present case that the loss arose without the fault or neglect of Mr. Mather, who, having seen the report of Captain Cullington, and himself being cognisant of the rotten condition of the timbers in the " Queen City," sent her to sea with a cargo of lime.

A reference was made during the argument to the Act known as the Harter Act, which was passed by the U.S.A. Congress in February, 1893, and came into operation on the 1st July, 1893. This Act prohibits clauses which relieve shipowners from liability for the consequence of not exercising due diligence to make a vessel seaworthy, and capable of performing her intended voyage, and exempts shipowners from liability resulting from certain losses

where they have exercised "due diligence to make the vessel in all respects seaworthy." In the opinion of their Lordships, it is not necessary to express any opinion on the construction of the Harter Act, in construing the provisions of the Water Carriage of Goods Act, but so far as the provisions of the Harter Act have been brought to their notice, there appears no inconsistency between its provisions and the construction which they have placed upon the Canadian Act. The provisions of the Harter Act were considered by Channell, J., in *McFadden* v. *Blue Star Line*, 1905, 1 K.B., 697. That learned Judge held that the immunity clause did nothing more than give immunity in respect of fire arising from certain specified causes in the course of the voyage, provided the shipowners had exercised due diligence to make the ship seaworthy.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of Mr. Justice Macdonald restored, and that the respondents do pay the costs of the appellants in the Court of Appeal of British Columbia and on this appeal.

In the Privy Council.

THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON) AND ANOTHER

v.

THE KINGSLEY NAVIGATION COMPANY, LIMITED.

DELIVERED BY LORD PARMOOR.

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