BETWEEN: 1949

TORONTO ELEVATORS LIMITED.....APPELLANT; Apr. 25, 26 and 27

AND 1950

COLONIAL STEAMSHIPS LIMITED....RESPONDENT. May 26

Shipping—Damage to cargo—Bill of lading—Contractual voyage—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49, s. 3, articles III and IV—Peril of the sea—Ship damaged in process of docking—Appeal from District Judge in Admiralty dismissed.

Appellant's claim is for damage to a cargo of grain consigned by appellant from Fort William, Ontario, to the Sarnia Elevators at Sarnia, Ontario, for carriage on the S.S. *Laketon* owned and operated by respondent. Appellant contends that respondent did not use due diligence to make the *Laketon* seaworthy prior to and at the time when the voyage was commenced and that there was a deviation from the contractual voyage in that the *Laketon* passed the dock of the consignee and proceeded down stream for two miles. Upon her return upstream she stopped at the Imperial Oil dock to refuel and when docking struck the dock with considerable force. Later it was discovered that a quantity of the grain was wet and that the *Laketon* had a jagged hole on the starboard side which was responsible for the wet grain. The hole was below the water line as long as the ship was loaded.

The District Judge in Admiralty for the Ontario Admiralty District dismissed an action brought by appellant against respondent company.

On appeal the Court found that the *Laketon* was in a seaworthy condition when she left Fort William and that the hole made in one of her plates was caused by her striking the Imperial Oil dock and that this occurrence was due to a peril of the sea.

(1) (1876) 93 U.S. 486.

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Held: That the *Laketon* in fueling at the Imperial Oil dock did not depart from her contractual voyage and that in any event it was fair and reasonable for her to take on fuel as she did and no liability was created.

APPEAL from the judgment of the District Judge in Admiralty for the Ontario Admiralty District.

The appeal was heard before the Honourable Mr. Justice Angers at Ottawa.

C. Russell McKenzie, K.C., for appellant.

F. M. Wilkinson, K.C., for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (May 26, 1950) delivered the following judgment:—

This is an appeal by the plaintiff from the judgment rendered by the Honourable Mr. Justice Fred H. Barlow, District Judge in Admiralty for the Ontario Admiralty District, on February 17, 1949, dismissing the plaintiff's action with costs.

The plaintiff claims the sum of $16,994.57 from the defendant for damages allegedly arising from the breach of an agreement relating to the carriage of plaintiff's goods on the S.S. *Laketon* and in tort in respect of the said goods received by the defendant on board the said S.S. *Laketon* in good condition at the ports of Fort William and Port Arthur, Ontario, on or about December 3, 1946, for carriage and delivery by the defendant at Sarnia, Ontario, with interest.

(The learned Judge here refers to the pleadings and continues):—

The claim is for damage to a cargo of grain (wheat and barley), consigned by plaintiff from Fort William, Ontario, to the Sarnia Elevators at Sarnia for carriage on the S.S. *Laketon,* owned and operated by defendant.

The bill of lading filed as exhibit 1, dated at Fort William, Ont., December 3, 1946, starts with the following preamble:—

Shipped in apparent good order and condition at and from the port of Fort William, Ont., by Reliance Grain Company Limited as agents

and forwarders for account and at the risk of whom it may concern, on board the vessel S.S. *Laketon* whereof Hawman is Master, now in the port of Fort William, Ont., and bound for Sarnia, Ont., the property herein described, to be delivered as agreed herein in like order and condition, to the order of The Bank of Nova Scotia, or his or their assigns at Sarnia, Ont., upon payment of freight and charges as noted below.

The bill of lading contains, among others, these clauses, which seem to me material and relevant:—

4. The vessel shall have liberty to tow and to be towed and to assist vessels under all conditions; to deviate for the purpose of making necessary repairs, taking on fuel, ship's supplies or equipment, loading or discharging cargo, crew, passengers or other persons having business with the vessel and any such deviation shall conclusively be deemed reasonable and within the contemplation of the parties hereto and a part of the contract voyage; save that in connection with a deviation for the purpose of loading or discharging cargo, there shall be no unreasonable delay.

. . . . . .

6. All the terms, provisions and conditions of The Canadian Water Carriage of Goods Act, 1936, and of the rules comprising the Schedule thereto are, so far as applicable, to govern the contract contained in this Bill of Lading, and this Bill of Lading is to have effect subject to the provisions of the Rules as applied by the said Act. If anything herein contained be inconsistent with the said provisions, it shall to the extent of such inconsistency and no further be null and void.

The bill of lading describes the goods and rate of freight thus:—

Nineteen Thousand Three Hundred Sixty 20/48 (16,360-20) bushels Sample Barley.

Hold 1.

Rate of Freight from Fort William, Ont., to Sarnia, Ont. — As per agreement.

(The learned Judge here considers the evidence and continues):—

The rights of the parties are governed, apart from the evidence verbal and written, particularly the bill of lading, by The Water Carriage of Goods Act, 1936 (1 Edward VIII, chapter 49), and the schedule thereto containing the rules relating to bills of lading.

Section 3 of the Act contains the following provision:—

There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

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Paragraph 1 of article 3 of the rules enacts:—

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;

Paragraph 6 reads in part thus:—

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the persons entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

The notice in writing in the present case was unnecessary since the state of the goods, at the time of their receipt at the point of destination, was the subject of joint inspection.

I believe that the *Laketon* was seaworthy from the time she left Fort William until she hit the Imperial Oil dock at Sarnia. This is purely a question of fact.

Counsel for plaintiff-appellant relied on *Parkyn & Peters et al.* v. *Coppack Bros. & Company* (1). This case was decided on its particular circumstances and it was found that the ship was unseaworthy, that there had been earlier leakage and that no proper inspections had been made. This decision is irrelevant.

The collision is attributable, in my opinion, to a peril of the sea and not to neglect or default of the master or pilot of the defendant-respondent in the navigation of the vessel.

Section 3 of the Act and paragraphs 1 and 2 and subparagraphs (*a*) and (*c*) of the latter of article IV of the rules are rather favourable to the carrier.

Paragraph 1 of article IV enacts (*inter alia*):—

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 . . .

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.

(1) (1934) 50 Ll. L. Rep. 17.

The material part of paragraph 2 of article IV contains, among others, the following provisions:—

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;

. . . . . .

(c) perils, danger, and accidents of the sea or other navigable waters;

I think that it may be inferred from the evidence that the accident occurred as the result of a peril of the sea or navigable waters.

The obligation of the carrier has been defined in *Northern Fruit Brokers, Limited* v. *Aberdeen & Commonwealth Line, Limited* (1), where Wrottesley, J. expressed the following opinion (p. 192):—

Now, the law on this matter is laid down in terms by Lord Justice Scrutton in the case of Silver v. Ocean Steam Ship Company, (1930) 1 K.B. 416, at p. 424; 35 Ll. L. Rep. 49, at p. 51, and as applied to this case it is as follows. The defendants here, after examination, signed for the apples as in apparent good order and condition. That must mean that so far as inspection and handling and cutting open of a reasonable number of apples which should have disclosed defects, these apples were not suffering from such defects; and it is not therefore open to the defendants, in the absence of fraud—and here no fraud is suggested—to allege that these apples suffered from such defects, or that the damage which admittedly happened in this case was the result of any such defects.

Now, pausing there for a moment, if therefore the plaintiffs were to prove merely the delivery of these apples to the defendants on this bill of lading and that when the apples arrived at Hull they were in bad order, the defendants must either consent to judgment or prove, firstly, that they had exercised the due diligence laid down in Art. III, to which I have already referred, in the matter of the ship, and, secondly, one of the exceptions contained in Art. IV, r. 2.

The primary obligation placed upon the carrier before he can take advantage of one of the exceptions provided by article IV, rule 2, is the exercise of due diligence. In *Smith, Hogg & Co. Ltd.* v. *Black Sea & Baltic General Insurance Co. Ltd.* (2), Lord Wright made the following observations (p. 260):—

I think this was also the view of Lord Atkinson in the curious case of Standard Oil Company of New York v. Clan Line Steamers, (1924) A C. 100; 17 Ll. L. Rep. 120, where the vessel was held to be unseaworthy because the master had not been furnished with instructions as to special dangers which her design involved. The ship was lost because

(1) (1940) 66 Ll. L. Rep. 184. (2) (1940) 67 Ll. L. Rep. 253.

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the master, being uninstructed, made a manœuvre which caused her to capsize. He would not have done so if he had been instructed as he ought to have been.

. . . . . .

The loss resulted from the unseaworthiness. In that as in other cases, including the present case, the right to rely on the exception of negligence was conditional on due diligence on the part of the owners to make the ship seaworthy, which the owners had failed to exercise.

What constitutes "due diligence" was set forth in *Grain Growers Export Co.* v. *Canada Steamship Lines Limited* (1). This was an action by the owners of a cargo of grain against the owners of a barge carrying the grain to recover damages for injury to it during carriage. The *Moravia* was a barge having no motive power of her own, which was towed from port to port by tugs. She was taken to the Government elevator at Port Colborne and there loaded with the view of being towed through the Welland canal to Montreal. The report shows that, after leaving the elevator dock, she was found to be leaking and was taken back to the elevator, where the dry grain was removed, and was then directed to another dock, where the wet grain was taken out of her hold. The decision of the Appellate Division of the Supreme Court of Ontario reversed the judgment of Middleton, J., who had dismissed the action with costs. In the reasons of Hodgins, J.A., who delivered the judgment of the Appellate Division, we find the following remarks (p. 344):—

> Upon the result of all this evidence, I cannot find due diligence in regard to seaworthiness, nor seaworthiness itself. To my idea, the words "exercises due diligence" must be taken in a reasonable sense, and mean something substantial. The ship-owner warrants the seaworthiness, and the seaworthiness is a necessary condition of the carriage. Its absence, as has already been pointed out, increases the danger from the perils mentioned in sec. 6, and I read "exercises due diligence to make the ship in all respects seaworthy" as meaning not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it.

The decision of the Appellate Division was unanimously confirmed by the Supreme Court of Canada.

In view of the defendant-respondent's reliance on the perils of the sea or other navigable waters, it becomes necessary to define what constitutes such perils. In the

(1) (1918) 43 O.L.R. 330; (1919) 59 S.C.R. 643.

case of *Canadian National Steamships* v. *William Bayliss* (1) Duff, C.J., expressed the following opinion (p. 263):—

Counsel for the appellant accepted the definition of "perils of the sea" given in the last edition of Scrutton on Charter Parties (p. 261) as follows:—

"Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure."

His main contention was that the appellants having established at the trial a *prima facie* case of loss by a peril of the sea within this definition, the burden of proving negligence consequently rested on the respondent on the authority of *The Glendarroch,* (1894) Prob. 226. At the trial the defence raised under this head was that the heavy seas that were encountered after leaving Hamilton and before the discovery of the loss and damage on the following morning were of such a character as to bring the damage within the words quoted above.

In the case of *Grain Growers Export Co.* v. *Canada Steamship Lines Limited* (*ubi supra*) Hodgins, J.A., said (p. 347):—

There is no doubt that, if the hole was made by striking the dock, owing to bad steering, then it was not caused by a peril of the sea. Striking a rock or being struck by another vessel without fault is a peril of the sea. See *Cluxton* v. *Dickson,* (1876) 27 U C C P. 170. But there is in such a case always the proviso that the vessel itself must not have been at fault: *Wilson Sons & Co.* v. *Owners of Cargo per The "Xantho",* (1887) 12 App. Cas. 503; *British and Burmese Steam Navigation Co.* v. *Liverpool and London War Risks Insurance Association,* (1917) 34 Times L.R. 140.

It was submitted on behalf of plaintiff-appellant that the burden rests upon the carrier to bring itself within some exception from liability. In support of this contention counsel for plaintiff-appellant cited the decision of Mr. Justice Morris of the King's Bench Division *in re Herald & Weekly Times, Ltd.* v. *New Zealand Shipping Company, Ltd.* (2). In this case the Court dealt with the exception under the Canadian Water Carriage of Goods Act, 1936, and specifically with rule 2 (*a*) of article IV, which is the same exception put forward by the defendant-respondent herein. At page 606 we find the following statements by the Court:—

. . . I do not think on this evidence that I ought to come to the conclusion that it is reasonably shown that there was some act or default on the part of the servant of the ship so as to bring the carriers within the exemption of Art. IV, Rule 2 (*a*). Unless it can be shown to

(1) (1937) S.C.R. 261.
(2) (1947) 80 Ll. L. Rep. 596.

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me with reasonable clearness what was the act or default, I think it is very difficult to say whether that act or default was done in the navigation or management of the ship.

Further on (p. 607) the learned Judge added:—

Apart from the other difficulties to which I have referred, I am not in a position to know whether the alleged act or default was an act or default while doing something in reference to the cargo or not, nor am I in a position to say whether any act or default was of a nature necessary in the proper handling of the ship.

For these reasons it seems to me that it would be quite impossible for me on the evidence before the Court to say that there was an act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship. Equally it follows that the defendants have not shown that they bring themselves within Rule 2 (*q*). It follows from what I have said that the plaintiffs are entitled to succeed in this action and it is not really necessary that I should deal with the question of unseaworthiness.

Regarding the question of failure to exercise diligence to make the *Laketon* seaworthy counsel for plaintiff-appellant also relied on the case of *Parkyn and Peters et al* v. *Coppack Bros. & Company* (*ubi supra*). He argued that this case is very similar to the one at bar and referred particularly to the statement by the Court (p. 18) in dealing with the facts and the application of the rules under the English Carriage of Goods by Sea Act, which reads in part as follows:—

Therefore, the question for me is whether the defendants, the shipowners, have proved that they had exercised all due diligence to make the steamer seaworthy. They say that they had at all times kept this ship up to the requirements of Lloyd's Register classification surveyors; that so far as human care can go, they had kept her in a seaworthy condition; that she was well kept up; and that this disaster was due to some unforeseen accident.

The Court then relates in detail the story of the ship, which I do not consider useful to reproduce, and continues:—

As I have said, it is asserted by the defendants that they did by this means satisfy Lloyd's Register's requirements in everything to keep this vessel in perfect and good condition; that she was in good condition; and that this disaster must have been due to the fact that she sat on some hard substance in taking the ground in Par Harbour which fractured the bottom in some way, which otherwise was sound and seaworthy, and hence this disaster.

There is no evidence whatever that there was any such obstruction.

I must say that I fail to see a thorough similarity between the two cases which counsel for plaintiff-appellant sets forth.

It was urged on behalf of defendant-respondent that the accident was caused by a peril of the sea and in no way by the act, neglect or default of the master, pilot or servants of the *Laketon* in the navigation or management of the vessel. Counsel submitted that the definition of the expression "peril of the sea" is the same whether it be used in a marine insurance policy or in a bill of lading. In support of his pretension counsel referred to various text-books and precedents, the most relevant thereof I think apposite to summarize briefly.

In the case of *Wilson, Sons & Co.* v. *Owners of Cargo per The Xantho* (1), Lord Herschell made the following comments (p. 509):—

> But it is said that the words "perils of the sea" occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded; whilst, in the former, you may go behind the *causa proxima*, and look at what was the real or efficient cause.
>
> It is on this view that the Court of Appeal acted in *Woodley* v. *Mitchell*, 11 Q.B.D. 47.
>
> Now, I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think this difference arises from the words "perils of the sea" having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments.

In the matter of *The Stranna* (2), Scott, L.J., expressed the following opinion (p. 82)—

> In my view what happened was a loss by a peril of the sea, and none the less so because it was the negligence of those who were concerned with the work of loading the ship that brought the peril into operation. It was argued by Sir Robert Aske that if the listing of the ship was caused by bad loading, that very fact excluded the idea of a peril of the sea, his contention being that the meaning of that phrase in the English language, or at any rate as judicially defined, restricts it to cases where the damage to ship or cargo by the sea, or sea water, arises through external causes such as wind and weather, or striking a rock, or where sea water actually gets into the ship. I do not agree.

(1) (1887) 12 A.C. 503. (2) (1938) P.D. 69.

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Even apart from the wider expressions in the clause which come after "perils of the sea", it is, in my opinion, an appropriate use of the English language to say that on the facts of the present case the timber was lost by a peril of the sea. The fortuitous aspect of the meaning of the word "peril" in a contract either of carriage or of insurance is plainly satisfied by the evidence. As the learned judge points out, so far as the defendants' servants were concerned, the event was wholly unexpected, it was just an unfortunate accident. But it was also a peril of the sea and not merely a peril on the sea.

. . . . . .

The liability of a ship floating in the sea, and free to respond to the changing interaction of the forces of gravity and buoyancy as the cargo is loaded, and thereunder to list sideways and so to cause a sudden loss of deck cargo is in my opinion essentially one of the sea risks to which maritime commerce is exposed. It falls within the passage in Lord Herschell's speech in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 12 App. Cas. 484, 498, which the learned judge cites—it is "damage of a character to which a marine adventure is subject"; and therefore a loss by such an event is a loss by a peril of the sea.

Another decision which offers some interest is that rendered by The Judicial Committee of the Privy Council in *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* (1). Lord Wright, who delivered the judgment of the Court, set forth these remarks (p. 68):—

Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which is the peril of the sea in such cases.

Further on Lord Wright added (p. 69):—

On any voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but if in consequence of the storm cargo is damaged by the incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position.

Reference may also be had with advantage to *The Thames and Mersey Marine Insurance Company, Limited and Hamilton, Fraser & Co.* (2); *Hamilton, Fraser & Co. and Pandorf & Co.* (3); *Davidson* v. *Burnand* (4).

(1) (1941) A.C. 55.
(2) (1887) 12 A.C. 484, 492, 498
(3) (1887) 12 A.C. 518, 527, 529.
(4) (1868) L.R. 4 C.P. 117.

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The question of deviation must now be considered.

Paragraph 4 of article IV of the rules is thus worded:—

> Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

As already noted, the bill of lading contains a clause concerning deviation, which is hereinabove reproduced; this clause is clear and unequivocal.

The evidence discloses, as I think, that the deviation in the present case, which consisted in the berthing at the Imperial Oil dock to take on fuel, was reasonable. It shows that the master of the *Laketon* took her down the river, past the Imperial Oil dock, with a view to turning and making his way into the elevator, and that, upon the return up-stream, the Imperial Oil dock being along the trip of the vessel, the latter stopped there for fuelling. I do not believe that the plaintiff-appellant's claim that the *Laketon* had sufficient fuel to dock at the elevator is founded. The learned trial judge rightly said, to my mind, that, if there were delay in unloading, the fuel supply might be insufficient.

The decision in the case of *Glynn et al.* v. *Margetson & Co. et al.* (1) cited by counsel for plaintiff-appellant is not pertinent; it cannot be contended that the deviation therein was reasonable.

The case of *Stag Line Limited* v. *Foscolo, Mango & Co. Ltd. et al.* (2) is not, on the whole, applicable, because the vessel therein involved departed from her contractual route for a purpose entirely outside of her contract. Nevertheless, the remarks by Lord Atkin, dealing with rule 4 of article IV of the schedule to The Carriage of Goods by Sea Act, which, by the way, is literally the same as paragraph 4 of article IV of The Water Carriage of Goods Act, 1936, are material and relevant (p. 341 in fine et seq.).

The decision in *Reardon Smith Line Ltd. and Black Sea and Baltic General Insurance Co. Ltd.* (3) is fairly in point, particularly the reasons of Lord Wright on page 577.

(1) (1893) A.C. 351.
(2) (1932) A.C. 328.
(3) (1939) A.C. 562.

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In *Phelps, James & Co.* v. *Hill* (1) the notes of Lopes, L.J., at p. 613, are apposite and informative.

See also *Leduc & Company* v. *Ward et al.* (2); *Frenkel* v. *MacAndrews & Co. Ltd.* (3); *Tate and Lyle Ltd.* v. *Hain Steamship Company* (4); *Rendell* v. *Black Diamond Steamship Company* (5).

In Scrutton, on Charterparties and Bills of Lading, 15th edition, on pp. 469 and 470 there are relevant and clear commentaries relating to deviation.

Maclachlan, on Merchant Shipping, 7th edition, and Carver's Carriage by Sea, 8th edition, may also be consulted beneficially on this subject.

About the weight to be attached to the testimony of Loeser, rejected by the learned trial judge, as I have not seen nor heard him, I am not in as good a position as Mr. Justice Barlow to determine the credibility of this witness; in the circumstances I am disposed to adopt his view.

In *Dominion Tankers Ltd. and Shell Petroleum Company of Canada Ltd.* (6) the late President of the Court, Mr. Justice Maclean, had to deal with the evidence of a witness who testified in a capacity rather similar to that of Loeser. The learned judge declined to accept this evidence; his decision on this particular point will be found at p. 202 of the report.

After carefully perusing the evidence and the able and exhaustive argument of counsel I have reached the conclusion that the *Laketon,* when she left Fort William, was in a seaworthy condition and that a hole made in one of her plates on the straight of the vessel aft the bluff of the bow, on the starboard side, was caused by her violently striking the Imperial Oil dock and that the accident must be attributed to a peril of the sea.

I am satisfied that the deviation to take fuel at the Imperial Oil dock was reasonable and a part of the contractual voyage.

For the reasons aforesaid the appeal is dismissed, with costs against plaintiff-appellant.

Judgment accordingly.

(1) (1891) 1 Q.B. 605.
(2) (1888) 20 Q.B.D. 475.
(3) (1929) A.C. 545.
(4) (1936) 55 Ll. L.R. 159, 173.
(5) (1895) 8 S.C. 442; (1896) 10 S.C. 257.
(6) (1939) Ex. C.R. 192.

Reasons for judgment of Barlow, D.J.A.:—

The plaintiff's claim is for damage to a cargo of grain consigned by the plaintiff from Fort William to the Sarnia Elevators at Sarnia, for carriage on the S S. *Laketon,* owned by the defendant company.

It is admitted that certain of the grain cargo was damaged by water on the said voyage, and it is agreed by counsel that the damages will be the subject of a reference if it is found that the plaintiff is entitled to recover.

The rights of the parties fall to be decided, apart from the evidence. upon the bill of lading, Exhibit 1, and The Water Carriage of Goods Act, 1936, Statutes of Canada, 1 Edward VIII, Cap. 49.

The plaintiff contends that the defendant did not use due diligence to make the S S. *Laketon* seaworthy prior to and at the time when the voyage was commenced, and that there was a deviation from the contractual voyage, which fixes the defendant with liability. The defendant contends that the *Laketon* was seaworthy, and in any event that it used due diligence to make her seaworthy. The defendant further contends that there was no departure from the contractual voyage and that if there was, it was a reasonable departure and does not create liability.

Pursuant to the bill of lading, Exhibit 1, the plaintiff shipped from Fort William a cargo of grain on the S S. *Laketon* owned by the defendant, consigned to the Sarnia Elevators Limited The *Laketon* duly arrived at Sarnia, and I am satisfied on the evidence quite properly by reason of the strength of the current, passed the elevator and proceeded downstream for about two miles, in order to make the turn and proceed to the elevator. Upon her return up-stream, she would pass the Imperial Oil dock, being the only dock on the Canadian side where she could replenish her fuel oil, she being a fuel oil burner. The evidence which I accept shows that she had in her tanks before refueling at the Imperial Oil dock, at least twenty tons of fuel oil, which was sufficient to enable her to complete her voyage to the elevator. The evidence further shows, that her then supply of fuel oil might not have been sufficient to enable her to move about the elevator harbour in the event of not being able to unload at once by reason of other vessels being ahead of her. Her Master and the Chief Engineer decided to take on a further supply of fuel oil at the Imperial Oil dock. When docking, the starboard side of the Laketon struck the dock with "considerable force".

After having taken on fuel, she then proceeded to the elevator where she docked, for the purpose of unloading, with her port side to the elevator. During the unloading a considerable quantity of wet grain was found. After she was unloaded it was then discovered that she had a jagged hole three inches by three-eighths of an inch on the starboard side, which undoubtedly was responsible for the wet grain. So long as the ship was loaded this hole was below the water line.

The evidence shows no water was made on the down voyage, and that the ship had no damp grain on other voyages.

Upon this evidence and other evidence which I accept, I find as a fact that the hole was made by the force with which the ship struck the Imperial Oil dock.

Article III, section 1 of The Water Carriage of Goods Act is as follows:—

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

(*a*) make the ship seaworthy;

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(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.

and Article IV, sub-section 1 is as follows:—

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

The above articles place the onus upon the defendant of proving that due diligence was exercised to make the *Laketon* seaworthy prior to and at the commencement of the voyage.

The evidence shows that the vessel was properly inspected, certified and classified.

I accept the evidence that the hole was on the straight of the ship, just aft the buff of the bow on the starboard side. The witness Loeser would place it slightly forward of this His demeanour in the witness box and the fact that he was willing to swear that the plate in which the hole was, was paper thin which I cannot accept, makes me suspicious of his evidence. The manner in which he made his examination, the fact that no rivets were disturbed or loose which he admits, the further fact that it was only by reason of the edges of the hole being sharp and jagged which leads him to the conclusion that the plate was paper thin, is not in the least convincing. I cannot accept his evidence.

The evidence which I do accept satisfies me that the hole was the result of a fracture of the plate caused when the ship sharply struck the Imperial Oil dock. The evidence shows that there is always danger in docking. Undoubtedly, she was not as carefully docked as she should have been

After a careful consideration of all of the evidence, including the evidence of Captain Misener on discovery read into the record by the plaintiff's counsel, I am satisfied that the defendant has satisfied the onus placed upon it, and that all due diligence was taken by it to make the vessel seaworthy. *Dominion Glass Company Limited* v. *The Ship Anglo Indian and her owner* (1).

It would appear to me that what happened at the Imperial Oil dock might very well be termed a peril of the sea. There is always danger in docking, and it requires very skilful handling If what happened was not a peril of the sea then it was caused by the act, neglect or default of the master or the servants of the defendant in the navigation or in the management of the ship, for which the defendant cannot be held liable. See Article IV, ss 2 of The Water Carriage of Goods Act, as follows:—

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;

. . . . . .

(c) perils, danger, and accidents of the sea or other navigable waters;

I must therefore find that there is no liability on the part of the defendant unless it can be found

(1) (1944) S.C.R. 409.

that it arose by reason of a deviation from the contractual voyage.

The question now to be determined is: Was the deviation to take on fuel oil at the Imperial Oil dock a departure from the contractual voyage, or if it was a departure, was it an unreasonable departure?

The bill of lading, exhibit 1, contracted for a voyage from Fort William to the Sarnia Elevators at Sarnia. Paragraph 4 of Exhibit 1 is as follows:—

4. The vessel shall have liberty to tow and to be towed and to assist vessels under all conditions, to deviate for the purpose of making necessary repairs, taking on fuel, ship's supplies or equipment, loading or discharging cargo, crew, passengers or other persons having business with the vessel and any such deviation shall conclusively be deemed reasonable and within the contemplation of the parties hereto and a part of the contract voyage; save that in connection with a deviation for the purpose of loading or discharging cargo, there shall be no unreasonable delay.

This provides for a deviation for the purpose of taking on fuel and that "any such deviation shall conclusively be deemed reasonable and within the contemplation of the parties hereto and a part of the contract voyage." The alleged deviation is the docking to take on fuel oil at the Imperial Oil dock. This is the only Canadian dock at which fuel oil can be taken. The evidence satisfies me that the Master quite properly took his vessel down the river past the Imperial Oil dock in order to turn and make his way into the elevator. Upon the return upstream, the Imperial Oil dock was along the way of the voyage, and the vessel stopped for fueling in terms of Exhibit 1 quoted above.

It is contended that this was an unnecessary part of the voyage in view of the fact that the vessel had sufficient fuel to dock at the elevator. It is further shown, however, that if there were delay in unloading necessitating the moving of the vessel around the elevator harbour, the fuel supply would be insufficient. This is not the case of a vessel travelling for a considerable distance outside of her line of voyage, and by reason thereof encountering perilous seas and other difficulties. It would appear to me that this was a usual and reasonable deviation and that it comes quite properly within the terms of the contract.

The case of *Glynn and Others* v. *Margetson & Co. and Others* (1), cited by the plaintiff's counsel, is not applicable. In that case it clearly could not be said that the deviation was either usual or reasonable.

In the case at bar, the vessel in the necessary course of her voyage was passing very near the Imperial Oil dock.

Counsel for the plaintiff also cites *Stag Line, Limited* v. *Foscolo, Mango and Company Limited and Others* (2). This case also is not applicable in my opinion because the vessel departed from her contractual voyage for a purpose entirely outside of her contract.

The case of *Reardon Smith Line, Limited* v. *Black Sea and Baltic General Insurance Company, Limited* (3), would appear to be in point, and more particularly at page 577, where Lord Wright after having found that a deviation must be usual and reasonable, says:—

The test of what is usual and reasonable in a commercial sense may arise in very different circumstances and must be decided whenever it arises by the application of sound business considerations and by determining what is fair and reasonable in the interests of all concerned.

(1) (1893) A.C. 351.
(2) (1932) A.C. 328 at 340.
(3) (1939) A.C. 562 at 575.

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It appears to me that in the light of all the evidence, it was fair and reasonable for the *Laketon* to take on fuel oil at the Imperial Oil dock.

The Master must act reasonable under all the circumstances, *Phelps, James & Co.* v. *Hill* (1). See also Article IV, s. 4 of The Water Carriage of Goods Act, which is as follows:—

> 4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

For further reference as to deviation see: *Frankel* v. *MacAndrews and Company, Limited* (2); Tate *and Lyle Limited* v. *Hain S.S. Co.* (3), and Scrutton Charter Parties, 15th Ed. 469 and 470.

I find that the S S. *Laketon* in fueling at the Imperial Oil dock did not depart from her contractual voyage. Furthermore, that in any event it was fair and reasonable for her to take fuel as she did and that no liability was created.

The action will be dismissed with costs.

(1) (1891) 1 Q.B. 605 at 611.
(2) (1929) A.C. 545 at 564.
(3) (1936) 55 Ll. L. Rep. 159 at 173.