ONTARIO ADMIRALTY DISTRICT

1961
Oct. 2, 3, 4, 5
Nov. 3

1962
Mar. 1

BETWEEN:

AMERICAN EXPORT LINES INC. ....PLAINTIFF;

AND

PORT WELLER DRY-DOCK LIMITED ..DEFENDANT.

Shipping—Action for damage to ship occasioned by negligence in dry-docking—Undertaking by plaintiff to be responsible for damage to ship and cargo resulting from dry-docking with cargo on board or distribution of cargo does not exempt defendant from liability for loss suffered by negligent dry-docking.

The action is for damages done to the hull of plaintiff's ship the *Extavia* in a dry-dock operated by the defendant at the northerly end of the Welland Canal. Prior to the dry-docking the ship (loaded with a cargo of well over 2,000 tons) on a voyage from Milwaukee to Montreal grounded and it was to have ascertained any damage occasioned by this accident that the ship was taken to defendant's dry-dock. Defendant did not wish to deal with a loaded ship and after some negotiations plaintiff company sent defendant a telegram reading as follows: "We confirm telephone agreement Friday to assume responsibility for damage to vessel and cargo which may result from dry-docking with cargo on board or distribution of cargo".

In docking the ship was not docked squarely with the keel mid-way on the keel blocks which had been placed there to support it and in the result there was certain buckling along the underbody of the hull from about midship forward to the stem which eventually had to be repaired and it is for the cost of these repairs that the action is brought. The defendant contends that it was released from all liability for any damage by virtue of the telegram sent it by plaintiff's officer.

Held: That the damage to the ship was not caused by the presence of the cargo on board but was caused by the faulty docking and neglect to take precaution to sight adequately and carefully what the position of the ship was before it was lowered to the blocks.

2. That the defendant is not exempted from liability for the negligence found by the Court by virtue of the telegram since to have the exemption go that far it must be shown that the negligence complained of was a direct result from the presence of the cargo on board or from its peculiar distribution.

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ACTION to recover damages sustained by plaintiff's ship.

The action was heard before the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

F. O. Gerity, Q.C. and *R. Chaloner* for plaintiff.

J. L. G. Keogh, Q.C. for defendant.

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

WELLS D.J.A. now (March 1, 1962) delivered the following judgment:

This action arises out of damage done to the hull of the ship *Extavia* in a dry-dock operated by the defendant toward the northerly end of the Welland Canal. The dock is east of the Canal and is entered at its west end. It is a large dock some 750 feet in length and is situated slightly south of Lock No. 1 on the Lake Ontario side of the Canal not far from its entry at Port Weller.

It appears that previous to this dry-docking, on its way down the Welland Canal from Milwaukee to Montreal the vessel grounded and in efforts to get it off, the propellers were observed to strike some object in the water. It was to have any damage occasioned by this accident ascertained and if necessary, any bent propeller blades replaced, that the ship was taken into the defendant's dry-dock at Port Weller. In the course of its first docking the ship was not docked squarely with the keel mid-way on the keel blocks which had been placed there to support it and in the result there was certain buckling along the underbody of the hull from about midship forward to the stem which eventually had to be repaired and it is for the cost of these repairs that this action is brought.

At the time of these events the ship was loaded with a cargo weighing approximately some 2,987 tons. The defendant company had not dealt with a ship loaded with cargo and at first requested that the cargo be removed. This the

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plaintiff company was very loathe to do and finally, after some negotiations between the parties, an agreement was reached to dock the ship without removing the cargo. The arrangement reached between the parties is outlined in a telegram which was sent by an officer of the plaintiff company, Mr. R. F. Pitcher. It reads as follows:

> We confirm telephone agreement Friday to assume responsibility for damage to vessel and cargo which may result from dry-docking with cargo on board or distribution of cargo.

At the time he sent the telegram Mr. Pitcher was the Claims Manager of the plaintiff company. It is reasonably clear on the evidence that this docking was the first time the defendant company had docked an ocean-going vessel of the size and weight of the *Extavia*. It is true that they had dealt with certain smaller and lighter vessels using the old St. Lawrence Canal system. These vessels, however, had a much lesser draught and were much lighter ships than the *Extavia*. The dead weight of the *Extavia* appears to have been approximately the gross figure of 9,000 tons. The cargo had a weight of about one-third of this or 2,981 tons. The blocks provided by the defendants for the ship to rest on when the dry-dock was drained were a series of blocks down the centre on which the keel of the ship was to rest. There were two rows of blocks on either side of this centre line which have been described to me as skow and bilge blocks and it was the opinion of the defendant that if the ship were set squarely on these blocks they were sufficient to hold it upright and properly support it in the dry-dock when the dock had been drained of the water it contained.

The ship was brought to the dry-dock on May 25, 1959 and during the docking operation it was entirely under the direction and control of men employed by the defendant. Unfortunately, while it was brought in daylight, by the time the operation was completed it had become dark. When the ship finally settled on the blocks, representatives of the plaintiff and the defendant went down to inspect the hull with the aid of flashlights. A crackling sound was heard and on investigation it was discovered that the ship had settled on the blocks off centre to port of the centre line. This, of course, led to a complete maldistribution of weight and the blocks which were of fir wood, were compressed and in some cases split. While at the stern of the ship the ship was only two inches off

centre, at the bow it was between two feet and two feet two inches off the centre line. What happened was a serious denting of the plates on the port side, the dents in some cases being as deep as two inches from the normal surface of the plate. There was apparently very little damage on the starboard side and the bulk of the damage occurred to the B strake plating on the port side. The worst damage was between the bow and a point aft about mid-way. There was some small damage on the starboard and some damage to the keel plating.

Two surveyors examined the ship on behalf of the owners. One of these represented the American underwriters and the other represented the British underwriters. A number of plates in the area of the B strake plating were found to be heavily buckled and it is interesting to note that in Mr. Warkman's report he noted that these indentations clearly bore the marks of the keel blocks. In summing up his findings he said this in the report:

> The damages were readily discernible as they bore the definite imprint of the dry-docking blocks inway the indentations. The vessel was docked off centre to port side, the forward keel plating being practically off of the keel blocks, consequently transferring the weight to the Port side where the B Strake plating was found to have sustained the most damages as it was carrying the additional weight.

After the first docking when the ship was first examined, after the dock had been substantially drained, by the two surveyors I have mentioned and Mr. Fenton who was the representative of the owners, they heard what was described as a continuous granulating or crushing sound and equipped with flashlights they went forward to try and ascertain what was the cause of this. As I have already said they found the ship docked off centre and they apparently were both of the opinion that there was a serious danger that she might roll over onto her port side. Accordingly, Mr. Fenton as representative of the owners, asked that the vessel be refloated and taken out to permit the replacing of the damaged blocks and a subsequent redocking. This was done and the second time the vessel was placed squarely on the keel blocks and despite the weight of the cargo and of the ship itself, no further damage or buckling occurred. It is, I think, a fair inference that the damage which occurred at the time of the first docking obviously occurred from the uneven support which the keel blocks offered when the ship was not centred on them properly.

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The blocks themselves were some four feet in width and apparently were quite equal to support the keel of the ship if it was placed squarely along their midline. This unfortunately, was not done and when the blocks because of the uneven distribution of weight, were crushed and gave way, in some instances the maldistribution of weight was very much aggravated.

I am not able to find in the evidence any evidence as to whether this was caused by the weight of the cargo or not. It is, I think, significant that no further damage of any sort occurred when the second docking took place and when the ship was fairly lined up along the midline. There was evidence that the machinery and boilers and motors of the ship were placed about midship and that even without cargo there was a very substantial weight. In this respect reference may be made to the evidence of the surveyor Rozycki and it may very well be that the maldistribution of support which resulted from the faulty docking, would have caused the damage even if the cargo had been removed beforehand as there was still a very considerable weight in the ship quite apart from its cargo. For some reason none of the surveyors were asked about this save Rozycki who thought the dents might be deeper because of the cargo. The defendant's surveyor was not called at all. The two surveyors who did testify, however, are perfectly clear as I have already noted, that none of the indentations which appeared, did so after the second docking.

As there is a complete denial of any liability for negligence by the defendant, it will be convenient to first discuss the facts and then to deal with the various defences in law which the defendant raises.

I have already described the situation of the dry-dock and as I have noted, it is entered on the west and is about 750 feet long. The *Extavia* at its greatest length from hull to the overhang of its stern is some 420 feet long. She was brought into the dry-dock under the control of the defendant's employees. Mr. Cleet who was substantially in charge of the operation, testified that her stern was about 50 feet from the dock gates which give on to the Welland Canal. For purposes of strength they project outwards and I am not sure whether the extra space given by this is taken into account in the figure of 750 for the length of the dock

or not. But it is quite clear, I think, that when the ship was brought in to be lowered on the blocks there was something like about 300 feet from the stem of the ship to the east wall of the dry-dock. It may be a little more or a little less than that but the figure 300 appears from the evidence to be a convenient approximation. There were erected on the east wall of the dry-dock two angle iron sights standing about four feet high to line up the centre line of a ship with the centre line of the keel blocks. Three hundred feet or even two hundred and eighty feet is a very considerable distance when one is sighting to ascertain the centre line of a ship as long as the *Extavia* and the device which was admittedly used on the second docking was that of putting up wooden battens on the centre line of the keel blocks between the angle iron sights on the east wall and the stem of the ship. This additional aid was not, in my opinion, used on the first docking. The failure to use these sights in my opinion, probably accounts for the docking off centre which I have described. The evidence is not at one on this point.

McIlravey who was the deputy foreman at Port Weller, swore that two such battens were erected on the first occasion; that one was about 50 feet east of the bow of the *Extavia* when she came to rest and the other one was about 50 feet further on. I can only say that from my observation of him in giving his evidence and considering this statement along with that of the two surveyors who were called on behalf of the plaintiff, I am not able to believe him. Both Rozycki and Warkman who were the surveyors I have mentioned, said that when they examined the ship and discovered the situation in which she was lying, they did it by flashlight. It was admittedly after nine o'clock and it had become dark. They specifically looked for sighting battens as they called them, and found none. Mr. Warkman stated that he had suggested to Mr. Cleet that such battens should be put in for the redocking and they were so placed but there were none there the first time and they apparently went up forward of the ship and looked between the dock area of the ship and the east wall to make sure. Rozycki confirms this, Fenton confirms it, and I must find as a fact that there were no battens used on the first docking.

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What caused the vessel to go to port of the centre line of the blocks? An examination of the measurements of the ship in the docking plan which was given to the defendant indicates that the *Extavia* had very fine lines and it is quite obvious from the exhibits which were filed by way of photographs, that she had a fine flaring bow. The dry-dock into which she was brought was a wide one and was capable of holding two ships abreast. Consequently when the ship was brought into the dock she was controlled by lines which ran to the north wall of the dry-dock and one large one a considerable distance over to the south wall. It was only the north wall to which the ship was at all near and the distance between the north wall and ship was controlled by two shores eight inches square fir timbers which were kept floating to the side of the vessel and which were controlled by men holding lines on the north wall and on the ship. There was one of these pieces of timber aft and one forward of the midship section but apart from this it is impossible to say just where they were. Apparently, the proper length for them had been calculated from the docking plan by checking the sections of the ship which were shown there against the distance from the centre of the keel blocks to the north wall and deducting the space which the ship actually occupied.

It is to be observed that this docking procedure was entirely in the hands of and under the control of the defendant's servants and workmen. Once the ship was in, the only lines on the ship at the forward end were lines from the bow to the north wall. Apparently the distance to the south wall was too great. It is quite obvious that while all these aids to placing the ship were there, that the real guidance must have come from the man on the sights at the east wall and without any interim sighting battens it is to me rather obvious that the possibility of error at a distance of 280 or 300 feet was considerable. If there had been interim sights, checking on the accuracy of the sights at the east wall would have greatly improved as it undoubtedly was on the occasion of the second docking. In this connection it is interesting to look at Ex. 20 which shows a sister ship of the *Extavia* in the same dock at a later time in the same year.

At 300 feet an error of two feet two inches is not a very large one but in this case it proved a very damaging error and while by reason of the arrangement between the plaintiff and the defendant the plaintiff had assumed responsibility for damage to the vessel and cargo which might result from dry-docking with cargo on board or distribution of cargo, as I will presently demonstrate, I do not think that was a complete protection for the defendant and it did not remove from the defendant some responsibility to bring the *Extavia* down on the blocks at the proper place. My impression from the defendant's witnesses was that it assumed that it was entirely protected by the telegram and in consequence did not take too many precautions for exactness. Both Cleet and McIlravey, who were between them in charge of the operation, had very little co-ordination between them. It is significant, I think, that McGrath who in the end was at the stern end of the ship and Cleet, who was generally superintending the whole operation in a somewhat detached manner at the pumphouse where the valves of the dry-dock were controlled, could not see whether any sighting battens were used or not. One would have thought that Cleet, on whom the ultimate responsibility must rest, would not have left it in the rather careless way he did to his subordinates without checking all the details himself. This in my opinion, he did not do. There was the more reason that he should take this extra care when this was the first time a vessel of its size, weight and type had been docked in the dry-dock. It is true, that before he opened the valves he shouted to McIlravey and McGrath who both assured him all was well. But he did no personal checking himself.

In my opinion the defendant was negligent in docking the ship off centre and this was caused in my view by a failure to take proper precautions to see that the ship was properly centred on the keel blocks before the water in the dock was lowered and this happened largely because there were no interim sights between the sights on the east wall and the stem of the ship and because no very great care was taken to check even with what they had. It should have been apparent to the defendant that at the distance the bow of the ship was from the sight on the east wall, there was a very real possibility of error and faulty docking. My impression of all three men employed in

supervising the docking was that they were not in the least worried by any of these matters. If my recollection is correct, Mr. Cleet or one of the men under him, expressed the opinion when it was discovered that the ship was off the blocks as it was, that they had done a pretty good job anyway.

The defendant takes the position that even if there was negligence on its part, it is effectively released by the terms of the telegram which was sent by the plaintiff to the defendant prior to the docking of the vessel. In that telegram as I have pointed out, the plaintiff "assumes responsibility for damage to vessel and cargo which may result from dry-docking with cargo on board or distribution of cargo."

Counsel are apparently in agreement on one thing and that is that the defendant in this case was a bailee of the ship for hire or reward. The duty of a bailee in such circumstances is succinctly set out in Halsbury's *Laws of England,* Third Ed., Vol. 2, p. 114, para. 225 in the article on Bailment as follows:

> 225. CARE AND DILIGENCE. A custodian for reward Amongst such custodians are included agisters of cattle, warehousemen, forwarding merchants, and wharfingers (story on Bailments (9th Edn.), s. 442). See also the following cases: *Scarborough v. Cosgrove,* (1905) 2 K.B. 805, C.A.; *Paterson v. Norris* (1914), 30 T.L.R. 393 (boarding-house keepers); *Olley v. Marlborough Court, Ltd.,* (1949) 1 K.B. 532, C.A.; (1949) 1 All E.R. 127 (proprietor of hotel which is not an inn); *Martin v. London County Council,* (1947) K.B. 628; (1947) 1 All E.R. 783 (managers of hospital). As to dock and harbour authorities, see title Shipping, is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances. HOLT, C.J., in *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, at p. 916, says that the bailee must use "the utmost care", but this probably means *"talis qualem diligentissimus paterfamilias suis rebus adhibet",* and not the care required of the borrower of a chattel loaned gratuitously. See Jones on Bailments (4th Edn.), 86, 87; *Dean v. Keate* (1811), 3 Camp. 4; and see the note to that case, *ibid.,* p. 5.

In *Brice and Sons v. Christiani and Nielsen*[1], Rowlatt J. observed at p. 336: that the ordinary rule of law was that if a person who handled the property of another and handed it back in a damaged condition was liable unless he could say that the damage had not been caused by negligence on his

[1] (1928) 44 T.L.R. 335.

part, the same principle in my estimation would apply where the article is taken in to have work done on it for which the bailee is to be paid. Relying on this principle, counsel for the defendant asks that the only responsibility on the defendant was to use reasonable care and to make sure that its equipment was reasonably safe. I quite agree with his contention that the bailee is not an insurer as is a common carrier and I also agree that the defendant's responsibility for such a dry-docking was not to be negligent in such a dry-docking. At that point it is argued that the telegram is in effect a waiver for any negligence which may result from the dry-docking with the cargo on board and I have been cited a series of cases in which, under somewhat similar circumstances, the defendants had been relieved of responsibility. One of the most helpful of these is the decision of Karminski J. in the case of *The Ballyalton. Owners of Steamship Ballyalton v. Preston Corporation*[1]. This concerned what was known as Horrocksford wharf at the Port of Preston. The ship *Ballyalton* being loaded with a cargo of stone was on April 16, 1956, berthed at Horrocksford wharf and suffered damage owing to the unevenness of the bottom of the berth. The damage was found to be due to the defendant's negligence in supervising the berths at the wharf. A notice set out the conditions for use of the dock. It was provided by this notice that there was no insurance that the berths would always be level and that rates be charged and taken by the corporation therefor, vessels going to or using the same respectively and their cargo, must be and were at the risk of the owners or charterers and the burden of satisfying themselves that it was safe to use the quays and docks was placed on the ships making use of them.

The learned trial Judge held that the words of exemption in the notice were, on their true construction wide and unambiguous enough to cover negligence. He also held that apart from the exemption the liability of the defendants rested solely in negligence. In reaching these conclusions

[1] (1961) 1 All E.R. 459.

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he relied as to method of approach on the well-known passage in the judgment of Scrutton L.J. in the case of *Rutter v. Palmer*[1], and at p. 463 he said:

> My first task is to consider the general principles of construction of an exemption clause, and these are to be found in the well-known passage of Scrutton, L.J.'s judgment in *Rutter v. Palmer* (supra)
>
> In construing an exemption clause certain general rules may be applied, the first of which is that the defendant ought not to be relieved from liability for the negligence of his servants unless clear and unambiguous words to that effect are used. In the second place the liability of the defendant has to be ascertained quite apart from the exempting words in the contract. Then, again, the particular clause in the contract has to be construed and considered, and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to discharge him: see *Reynolds v. Boston Deep Sea Fishing & Ice Co., Ltd.* (1922), 38 T.L.R. 429.

Rutter v. Palmer (1922) All E.R. Rep. 367; (1922) 2 K.B. 87 was a case where the owner of a motor car deposited the car for sale with a garage keeper on terms set out in a printed document, and the car was damaged by reason of the negligence of a driver employed by the garage keeper. The principles set out by Scrutton L.J., have been applied in cases where locks or berths have not been maintained in a safe state by their owners. Cf. *Forbes, Abbott & Lennard, Ltd. v. Great Western Ry. Co.* (1928), 138 L.T. 286; 17 Asp. M.L.C. 347, and *Jessmore (Owners) v. Manchester Ship Canal Co.* (1951) 2 Lloyds' Rep. 512.

I propose to subject the facts of the present case to the tests laid down by Scrutton L.J., bearing in mind particularly the words used by the defendants in their notice. Counsel for the plaintiffs rightly insisted that in construing exemption clauses the court should interpret them against the party putting them forward, unless satisfied as to their meaning. On the other hand, in seeking to arrive at a meaning, I have equally no doubt that I must look at the notice as a whole. It is easy to criticise the notice and to say that it could have been more clearly, and also more concisely, drafted. It might, for example, have been better in para. 3 to have said that vessels using the berths were at the sole risk of the owners or charterers. Cf. the terms of the Manchester Ship Canal Notice in *Jessmore (Owners) v. Manchester Ship Canal Co.* (1951) 2 Lloyd's Rep. at p. 525. But I have here to look also at the other terms used in this notice:

> . . . vessels going to or using the same . . . must be and are at the risk of the owners, or charterers, captains, or others interested in vessels or their cargoes and not of the corporation, who will not be responsible for and will repudiate any liability in respect of any damage either to vessel or cargo . . . the corporation will not be responsible for and will repudiate any liability in respect of any damage either to vessel or cargo resulting from using the quays or river diversion, or either of them, or taking the ground thereat or therein.

[1] (1922) All E.R. at 370.

I have considered *White v. John Warrick & Co., Ltd.* (1953) 2 All E.R. 1021, where a different exemption clause was held to exempt defendants from their liability in contract but not from negligence. But looking at this notice as a whole I have come to the conclusion that the words here used are adequate to exempt the defendants from liability for the negligence of their servants.

Adopting the mode of procedure indicated by Scrutton L.J. which has also been adopted and used by the Court of Appeal of Ontario in the case of *Porter & Sons v. Muir Bros. Dry-docking Company Limited*[1], per Grant J.A. at p. 460, I have already come to the conclusion that the defendant was negligent in not taking more precaution in docking the vessel for the first time and coming now to the words of the telegram, I may say that I have been referred to many cases. One of these was the case of *Pyman Steamship Company v. Hull and Barnsley Railway Company*[2]. There the words, in my opinion, are much wider than the telegram in the present case. They provide that the owner of a vessel using the graving dock must do so at his own risk, it hereby being expressly provided that the company are not to be responsible for any accident or damage to a vessel . . . whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising. The Court of Appeal properly held on this language that it must be read to cover failure to perform any obligation arising from the contract and as covering negligence arising from want of care in the performance of such obligation.

In the case of *Reynolds v. Boston Deep Sea Fishing and Ice Company, Limited*[3], which was a decision of Greer J., the exemption clause provided that:

> All persons using the slipway must do so at their own risk and no liability whatever shall attach to the company for any accident or damage done to or by any vessel either in taking her to the slip or when on it or when launching from it.

It was held that while this clause did not expressly mention negligence, it was wide enough to protect the defendants for liability for such negligence.

In the case of *Forbes, Abbott and Lennard, Limited v. Great Western Railway Company*[4], the clause provided that "all barges and vessels while in Chelsea Dock are at the sole

[1] 63 O.L.R. 437.
[2] (1915) 2 K.B. 729.
[3] (1921) 38 L.T.R. 22.
[4] (1927) 44 T.L.R. 97.

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risk of owners or persons bringing or causing the same to be brought into the dock." These words were held sufficient to exempt the defendants from liability for negligence.

I am urged to take the view that the words in the telegram to the effect that the plaintiff assumes responsibility for damages to vessel and cargo which may result from drydocking with cargo on board or distribution of cargo are wide enough to exempt the defendant from liability for the negligence I have found. In my opinion the exemption does not go that far. Before it operates I think it must be shown that the negligence complained of was a direct result from the presence of the cargo on board or from its peculiar distribution.

In the view I take of the matter the damage was not caused by the presence of the cargo on board. It appears to have been assumed that the additional weight would have caused the damage but I am not conscious of anything in the evidence which narrows it down to this one cause and the fact that such damage did not occur at the time of the second docking when the ship was properly placed on the blocks is a strong factor, in my opinion in supporting the view I have taken that the damage caused was not caused by the presence of the cargo on board but was caused by the faulty docking and the neglect to take precaution to sight adequately and carefully what the position of the ship was before it was lowered to the blocks. It may be that if it can be shown that the main and proximate cause was the cargo, that the defendant should be entitled to whole or partial relief but in my view of the evidence this has not been demonstrated and the direct and proximate cause of the accident was not the additional weight of the cargo but the faulty docking. It may very well be that under certain circumstances the defendant may be excused for negligence but on the facts of the case as I see them and as it has been proved before me, in my view, the exemption clause does not come into operation and is not wide enough to cover the circumstances which I think were the direct and proximate cause of the injury to the ship.

Under these circumstances there will be judgment for the plaintiff. The precise amount of the damages were not proved before me. In point of fact the *Extavia* was not repaired until nearly a year later during which time it

suffered other accidents which also damaged the hull and while the gross amount of the repairs is known, the amount of the damages suffered by the dry-docking in the defendant's dock have not been determined. To do this, on the consent of the parties and the consent of the Surrogate Judge, there will be a reference to the Surrogate Judge of the Admiralty Court in this District to ascertain the true amount of the damages. If Mr. Rozycki's opinion is correct, the depth of the dents may have been increased by the presence of the cargo. If the Surrogate Judge is satisfied with this some allowance may be made to the defendant for the increased severity of the damage. On the determination of such it may be necessary for the Surrogate Judge to have assessors. I prefer to leave that question to his discretion and it will be for him to decide whether they are necessary or not. The plaintiff should, of course, have his costs of the action to date and the costs of the subsequent reference to the Surrogate Judge I leave in the discretion of the Surrogate Judge.

Judgment accordingly.