

ONTARIO ADMIRALTY DISTRICT

1951  
May 25  
June 8

BETWEEN:

THE GREAT LAKES PAPER } PLAINTIFF;  
COMPANY LIMITED, ..... }

AND

PATERSON STEAMSHIPS LTD., . DEFENDANT.

*Shipping—Goods on board ship damaged before bill of lading issued—  
Bill of lading contemplated before loading and before damage—  
Carrier entitled to have rights decided as though bill of lading had  
issued.*

*Held:* That since the loading of certain cargo on defendant's ship contemplated the issue of a bill of lading with respect to the same the defendant's rights in an action for damage to a certain part of the cargo loaded before the bill of lading was issued must fall to be determined as if a bill of lading had been issued and the provisions of the Water Carriage of Goods Act, 1936, are applicable.

ARGUMENT on point of law whether defendant may rely on provisions of the Water Carriage of Goods Act.

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

*Peter Wright* and *F. Gerity* for plaintiff.

*Jean Brisset* for defendant.

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

BARLOW D.J.A. now (June 8, 1951) delivered the following judgment:

An application by the defendant to determine a question of law raised by the pleadings, namely: Is the Water Carriage of Goods Act, 1936, applicable to the 189 rolls of news print damage to which forms the basis of this action?

For the purpose of this application the parties agree that the following facts shall be admitted:

1. A contract, in the nature of a charterparty, was made and entered into by the parties, Paterson Steamships Limited and the Great Lakes Paper Company Limited on the 24th day of February, 1949, a copy of which is annexed hereto as Schedule "A", and

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2. Pursuant to such contract, bills of lading were given in the usual course of business in the form annexed hereto as Schedule "B".

3. Paterson Steamships Limited were, at all relevant times, owners of the steamship *Prescodoc*.

4. Pursuant to the contract, as aforesaid, the steamship *Prescodoc*, whereof Frank Butters was Master, arrived alongside the wharf of Great Lakes Paper Company Limited at Fort William and commenced the loading of newsprint at about 5 o'clock p.m. on the 14th day of May, 1949.

5. At about 1 o'clock p.m. on the 15th day of May, 1949 the loading of newsprint, as aforesaid, was checked, it being found that water was entering into the No. 1 hold by means of a small hole situated in the shell plating.

6. Thereupon a portion of the newsprint already loaded was discharged again it being found that it had been damaged by water.

7. No bills of lading were given or received for that portion of the newsprint which was discharged in consequence of water damage, consisting of 189 rolls of a total weight of 328,160 lbs. standard white newsprint.

8. The shell plating leak was in due course repaired; a full cargo was loaded; bills of lading for such cargo similar to Schedule "B" were issued, and the steamship proceeded on its voyage.

The liability of the defendant in this action, and the evidence which the parties were required to adduce, depends very largely upon whether or not the Water Carriage of Goods Act, 1936, is applicable. Hence the reason for bringing this application at the present time.

Counsel for the defendant contends that the matter must be dealt with as if a bill of lading had been issued, or in the alternative that the charterparty made between the parties and dated the 24th February, 1949, by paragraph 12 thereof, which is as follows:

12. The Bill of Lading shall have effect subject to the rules scheduled to and as applied by the Water Carriage of Goods Act, 1936.

presumes that a bill of lading will be issued, and makes the terms of a bill of lading applicable or in any event makes the Water Carriage of Goods Act 1936, applicable.

The condition in the bill of lading which the defendant relies upon, is as follows:

This bill of lading shall have effect subject to the provisions of the Water Carriage of Goods Act, 1936 of the Dominion of Canada including the schedule thereto . . .

It is to be noted from the facts admitted, that the plaintiff is both the charterer and the shipper. It was the usual practice for the defendant to issue a bill of lading after

loading of a cargo had been completed. A bill of lading was not issued with respect to the 189 rolls of newsprint, because before the loading had been completed it was discovered that water had entered No. 1 hold of the ship and had caused damage to the said rolls of newsprint, which were immediately unloaded. This having been done, the ship then proceeded to load a cargo of newsprint with respect to which a bill of lading was issued, but which did not include the 189 rolls of newsprint in question in this action. Undoubtedly if the damage had not been discovered before the loading was completed, a bill of lading would have been issued with respect to these rolls of newsprint. Furthermore, there is no time limit within which a bill of lading may be issued, and this might even yet be done.

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A bill of lading as between the shipper (the plaintiff) and the carrier (the defendant) is merely a receipt.

Upon these facts, and under the circumstances disclosed, the defendant should not be deprived of any advantage that may accrue to it by virtue of the issue of a bill of lading. See *Scrutton on Bills of Lading*, 15th Ed. p. 10 as follows:

A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship. It is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract.

The terms of the contract may also be gathered from the charter, where there is one, provided that (1) its terms either wholly or in part are expressly incorporated in the bill of lading, or (2) the charterer is also the shipper, in which case the bill of lading as between charterer and shipowner is usually merely a receipt.

And also p. 52, as follows:—

Where the charterer is himself the shipper, and receives as such shipper a bill of lading in terms differing from the charter, the proper construction of the two documents taken together is that, *prima facie* and in the absence of any intention to the contrary, as between the shipowner and the charterer, the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods.

There is no third party interest in this action, and the matter must be determined as between the charterer and shipper and the carrier.

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In *Luckenbach Steamship Company, Inc. v. American Mills Company* (1), it was held that where a cargo is received for shipment by a carrier under a verbal contract which contemplates the issuance of a bill of lading, and the cargo is destroyed by fire on the wharf before issuance of a bill of lading, the carrier may avail itself of a bill of lading exemption against loss by fire since there was an implied understanding that the carrier would in due course issue its customary bill of lading.

This decision is directly applicable to the case at bar, by reason of the fact that paragraph 12 of the charterparty quoted above clearly contemplates the issue of a bill of lading.

The above decision was followed and affirmed in *Eastern Outfitting Company v. Pacific Mail Steamship Company* (2). In this latter case no bill of lading was actually issued before the goods were damaged, but it was held that the carrier was entitled to avail himself of the defences contained in the usual form of bill of lading. This case is directly in point. I therefore find that since the loading of the 189 rolls of newsprint on the defendant's ship contemplated the issue of a bill of lading with respect to the same, the defendant's rights must fall to be determined as if a bill of lading had been issued. It therefore follows that the provisions of the Water Carriage of Goods Act, 1936, are applicable.

Apart from the above finding, it is clear to me from the terms of section 12 of the charterparty quoted above, that the agreement between the parties gave to the defendants the protection afforded them by the Water Carriage of Goods Act, 1936.

For further reference see *Hugh Mack and Co., Ltd. v. Burns and Laird Lines, Ltd.* (3); *Harland and Wolff, Ltd. v. Burns and Laird Lines, Ltd.* (4) and Temperley and Rowlatt *Carriage of Goods by Sea Act 1924*, 3rd Ed. p. 10.

I, therefore, find that the Water Carriage of Goods Act 1936 is applicable to the 189 rolls of newsprint, the damage of which forms the basis of this action.

Costs of the application will be in the cause.

*Judgment accordingly.*

(1) (1928) A.M.C. 558.  
 (2) (1928) A.M.C. 974.

(3) (1944) 77 Ll. L. Rep. 337.  
 (4) (1931) 40 Ll. L. Rep. 286.