Toronto 1964 / Jan. 27, 28 / 1965 / Sept. 8

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

CARGILL GRAIN COMPANY LIMITED and SCREATON GRAIN LIMITED ..... PLAINTIFFS;

AND

N. M. PATERSON & SONS LIMITED ..... DEFENDANT.

AND BETWEEN

SMITH VINCENT & CO. LIMITED ..... PLAINTIFF;

AND

N. M. PATERSON & SONS LIMITED ..... DEFENDANT.

Shipping—Damage to cargo from wetting—Special winter storage contract—Damage ascertained after vessel tied up for winter—Proof of negligence—Damage prima facie proof—Onus—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Schedule, Article IV(2).

In early December 1960 the ship *Ontadoc* carried a cargo of grain from Fort William to Goderich, Ontario. The grain remained aboard the vessel in Goderich under a special winter storage contract. At the end of December it was discovered that snow on No. 7 hatch cover was melting and investigation disclosed that the grain in No. 7 hatch had suffered damage from wetting. The owners of the grain sued the shipowner for the damage to the grain. Article IV(2) of the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291 (which governed the bills of lading) relieves a shipowner of liability for loss or damage resulting, *inter alia*, from the conduct of the master in the operation of the ship and from perils of the sea. The special winter storage contract also relieved the shipowner of liability for damage resulting from perils of the sea and for damage resulting from circumstances other than negligence, and placed the burden of establishing negligence on the person asserting it. At the trial evidence was given that in the course of the voyage from Fort William to Goderich the vessel encountered heavy weather and that waves broke over the ship at approximately the position of No. 7 hatch. Defendant contended that the damage was caused by a peril of the sea and from the master's failure to alter the course of the voyage to prevent the incursion of water.

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Held, plaintiffs were entitled to succeed. The fact of the damage to the grain satisfied the onus on plaintiffs by raising a *prima facie* case of negligence against the defendant which could only be met by proving what actually occurred. This the defendant had failed to do, as it was uncertain from the evidence whether the grain was damaged during the voyage or after the ship arrived at Goderich.

Gosse Millerd v. Can. Gov't Merchant Marine Ltd. [1927] 2 K. B. 432, per Wright J. at p. 434 *et seq.; Canada Rice Mills Ltd. v. Union Marine and Gen. Ins. Co.* [1941] A.C. 55, applied.

ACTIONS for damages.

A. S. Hyndman for plaintiffs.

J. J. Mahoney and *C. Mason* for defendant.

WELLS D.J.A.:—These are two actions tried together. Both concern the damaging of grain carried by the ship *Ontadoc* from Fort William to the port of Goderich. The bills of lading in each case are dated December, 1960 and as appears from the certificates filed at the time of shipment, the goods which consisted of barley and two grades of Northern Manitoba wheat, were all in apparent good order and condition on loading.

The voyage took place and the steamship duly reached the port of Goderich on December 5, 1960. This grain, in each case, was subject to a special contract for private storage aboard the *Ontadoc* and the grain was to be kept in winter storage until April 15 in the succeeding year.

Somewhere towards the end of the month, in the vicinity of December 27, it was discovered that snow on hatch cover at No. 7 hatch was melting and on investigation it was discovered that some of the grain had been wetted and as a result it had heated. It was an area under what had been the cover of hatch No. 7, which has been variously described by the witnesses. Mr. Stoddard described the situation from the melting of the snow on the hatch cover at about an area of 4 feet. Mr. Meno, for the Salvage Association of London, who did not see it until about January 6, 10 days after the situation was first discovered, said that the section of grain affected was on the starboard side of No. 7 hatch. He described it as a distinctly localized area about 4×5 feet in diameter. All those who examined it complained of the pungent and acid odour. The condition of the grain in the other holds was perfect, except for the odour which had penetrated and affected the rating of some of the other grain.

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The grain itself was apparently wet and damp on top and the charring process which turned it black from its heating, was at the bottom of the heap, not at the top. One of the witnesses called by the defendants said that they were able to contain the damaged grain by a sort of coffer dam or metal sheet which they sank around it to the bottom of the hold.

Stoddard who was the ship keeper for the winter storage said that when he noticed it he called Mr. Robinson who looked after the ship owner's interest in Goderich. He saw the grain subsequently discharged from the ship and described how some of the grain was black, not on the top, nor in his opinion, all the way down.

Captain Robinson had been a Master Mariner for 33 years and he also testified. He was acting as Harbour Captain at Goderich that winter and he saw the damaged grain about December 27 when Stoddard called him. He said that when he took the leaf from the hold cover the grain was steaming, warm and damp and coamings were wet from condensation. The grain was not removed until nearly a week later and it was he who described making a coffer dam 3 feet deep around the grain.

He said the damaged grain had a spread of 10 feet at the bottom and in his opinion the charred grain, which looked like charcoal, had spread from near the top to the bottom. On cross examination he described seeing steam, but no flame or smoke. He also mentioned the strong odour. He did not recall saying that there was any oakum missing, he said both pads were on the hatch cover. There was no caking of the grain on top, but there could have been little chunks of it. He said that Mr. Meno and Mr. Loeser were both present at the time of the unloading. He said that at that time the pad on top of the hatch cover had been removed.

Johnston, who was the Assistant Superintendent of the Goderich Elevator and Transport Company also testified that the grain was wet and had quite an odour to it. He thought the area affected was the width of the hatch, 10 or 12 feet and he said that at a depth of about 6 or 7 feet it was burnt. There was no burning on top, but it was quite wet. The damaged grain he saw was barley. He had never seen

grain burned like this before, although he had been with the elevator company some 36 years.

As a result the Cargill Grain Company Limited and Screaton Grain Limited claim damages in the sum of $15,-037.41. Smith Vincent & Co. Limited the other plaintiff in the second action claim damages in the sum of $28,408.02.

Paragraph 6 of the bills of lading appears to be the same in all the bills and is as follows:

> 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.

On the back of each bill of lading there is endorsed a special contract for storage aboard the *S. S. Ontadoc* from December 2, 1960 until April 15, 1961.

It would appear to me that paragraphs 1 to 5 are the conditions that are applicable to the facts of this case and they are as follows:

1. It is understood and agreed that the vessel is to be considered as a vessel and not a warehouse throughout the storage period. It is further understood and agreed that the shipowner is not engaged in the business of warehousing grain or any other commodity and does not hold itself out generally as engaged in the business of storing grain for profit, and hereby assumes no obligation in respect to inspecting, ventilating, or conditioning cargo during the storage period referred to in this contract. If the shipowner receives any information indicating that the grain is, or is likely to be damaged, it shall be its obligation to report this information promptly to the shipper.
2. The shipowner does not warrant the fitness of the vessel or its appliances for the storage of grain, but does warrant to use due diligence to furnish a seaworthy vessel as a bulk carrier of grain for the storage period. The shipowner shall not be liable for loss or damage due to any defect, latent or otherwise, in the vessel or its appliances if at the time of loading the grain it shall have exercised due diligence to furnish a seaworthy vessel as a bulk carrier of grain.
3. The shipowner shall not be liable for loss or damage to the grain whensoever and howsoever occurring, not due to its negligence or the negligence of its servants and employees.
4. Notwithstanding the provisions of the foregoing paragraph, the shipowner in any event shall not be liable for any loss or damage to the grain by collisions, perils of the sea, or fault or error in navigation of the vessel; or by fire unless the fire is caused by the neglect or design of the shipowner.
5. The burden of establishing negligence will be on the person asserting it.

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The defence consists of a general denial and an assertion that the loss or damage arise from perils, danger and accidents of the sea for which the defendant was not responsible and paragraphs 9, 10 and 11 of the statement of defence in the Cargill action and in the Smith Vincent & Co. Limited action are as follows:

9. On passage across Lake Superior the said S.S. *Ontadoc* steering 120 degrees on the downbound course encountered strong winds from the South South West causing waves to break over the ship on the starboard side at approximately the position of number seven hatch.
10. At 1305 hours on the 3rd day of December 1960 with the weather continuing to deteriorate and seas continuing to break over the vessel the ship's course was altered to 130 degrees.
11. With the alteration of course no further water was shipped on deck. The vessel arrived at the Port of Goderich on December 5, 1960, without further incident.

In consequence of this alteration of course no further water was shipped on deck. The defendant's explanation is that during this period water entered the hold by way of the hatch cover supporting bar aperture at the forward end of hatch No. 7 on the starboard side and that as a result the grain in No. 3 hold, directly beneath the named hatch cover became wetted and subsequently fired. They submit that this was a peril of the sea for which they were not liable.

In addition it is also pleaded by the defendant that such loss or damage resulted from the act of those controlling the ship, in failing to alter the course of the vessel in time to prevent the incursion of water into No. 3 hold.

These defences are obviously directed to the rules under the *Water Carriage of Goods Act,* 1936, c. 419, s. 1, which is now found in c. 291, R.S.C. 1952. By that statute every bill of lading is directed to contain an express statement that it is to have effect subject to the provisions of the rules as applied by the Act. Article 4 of the rules, paragraph 2 sets out a number of circumstances under which neither the carrier nor the ship be responsible for loss or damage. It is sufficient to quote Article 4, par. 2, sub-items (*a*) to (*c*) 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;
   (*b*) fire, unless caused by the actual fault or privity of the carrier;
   (*c*) perils, danger, and accidents of the sea or other navigable waters;

The defendant in opening its case called a meteorologist with the Department of Transport stationed at the weather office at Malton Airport, by name Wyllie. He produced a copy of a letter from the Department of Transport Air Services Office at 315 Bloor Street W., Toronto. This letter was from the Director Mr. McTaggart-Cowan and from it the witness read paragraphs 2 and 3, which are as follows:

> Included are (1) copies of the Lake Forecasts issued on December 3, 1960 together with a copy of the decoding tables and (2) reports from three ships which were in the area on the date in question.
>
> An examination of the weather maps for this date indicates that southwesterly winds in the range of 10-15 m.p.h. were reported from land stations and it would be reasonable to expect that speeds of 20-25 knots would be attained over open water. No precipitation was reported in this area on December 3.

Mr. Wyllie said that these winds were not unusual, which would seem a reasonable view to take of the whole circumstances.

The Captain of the *Ontadoc* was then called and he described the loading of the ship. The wind was first a light wind from the South West and as he proceeded it freshened around 1:00 p.m. He put it somewhere between 20 and 25 miles an hour. The ship's scrap log was produced and marked as Exhibit 10. He stated the entries were made by the mate between noon and 1:00 p.m. on December 3. He then described how the ship started to take a little water over the starboard side a little abaft the beam. The wind was on the starboard side. He said there was no water coming over forward of Number 7 hatch but at times there was a foot of water coming over No. 7. It kept up for around three hours when he changed course and no further water came aboard. The ship apparently had a draft of about 19.16 aft and 18 feet 2 or 3 inches at the bow. He placed the freeboard of the ship at nearly 8 feet. He stated that it was customary to hawl off but he was not in a hurry and it was a good thing to keep closer to the land under the circumstances. He had no reason to fear for the safety of the cargo or the ship.

McDonald, the first mate, also testified that when they left the weather was good and he described the battening down of the hatches, particularly when the loading finished at 2250 hours. The hatches were battened down at night, and he said that the deck was illuminated. Later on he said that the ship left the dock at around 11:30 p.m. at which

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time the battening down process had been completed. He was on watch when the ship cleared and continued until 4:00 a.m., coming back on duty at about noon on December 3. He placed the freeboard of the ship at around 9 feet and according to his recollection the wind became stronger at around 12:30 p.m. and the ship's course was changed at 1305 hours. He said after the course was altered the water continued "a little slop". There was no rain or snow and he described their arrival at Goderich on December 5 at which time he said that he had no reason to think that the cargo was damaged. He inspected the tarpaulins on the hatch covers generally at Goderich but found no damage to them.

Looking at the scrap log, Exhibit 10, the ship was apparently steering a course of 120 degrees at 1044 on December 3. The wind was described as coming from the South South West and moderate and the weather was described as clear. The next entry is at 1305 hours when the course was altered to 130 degrees and the entry as to wind is a ditto mark under the letters S.S.W. and then the word "strong" is written in and on looking at it, it would appear to be in a different handwriting than other entries around about it. I am not able to say this with any certainty whatsoever as no one was examined in respect to these entries in regard to the handwriting. I simply mention the word "strong" as having a somewhat unusual appearance when one looks at the log book.

After the damaged grain was discovered Captain Chapman was ordered by the owners to execute an instrument of protest, which he did as Master of the *Ontadoc* and this was done on December 30 some 27 days after the events to which it related. Captain Chapman's statement of what occurred at that time is as follows:

> At One O'Clock in the afternoon of December 3rd, 1960 a strong southerly wind was encountered with heavy seas over the deck of the said ship. The ship hauled up for three hours and at Four O'Clock in the afternoon of December 3rd, 1960 the wind and sea diminished and the ship proceeded to the Port of Goderich arriving Monday, December 5th, 1960 at Five O'Clock A.M.

In connection with this evidence I have to reach conclusions on two points. Whether I can accept this evidence, which is not contradicted, and if I do accept it whether it is a peril of the seas, which would excuse the defendant from liability, pursuant to the terms of the Bills of Lading.

Quite frankly I have considerable doubt whether the weather was as heavy as the Master's protest would indicate. Looking at the log book I have some suspicion and it is only a suspicion, as to when the word "strong" was inserted, nor it does not seem to me that the evidence of Captain Chapman, the mate McDonald, the pleadings and the protest are entirely consistent.

In my opinion there is a certain element of exaggeration in describing what occurred when the wind strengthened around 1:00 o'clock p.m. on December 3. The evidence of the ship officers does not convince me of its accuracy.

A great deal of the defendants' evidence was devoted to showing the care that had been taken by the defendants in loading the ship. There is no doubt however, that the water at some stage got into the grain under hatch cover No. 7. My difficulty is that I am not certain when it got in or how it got in. I do not place very much credit in the statement that water was washing over the part of the deck where the hold in question was situated. After the loading inspection was made late at night at Fort William under somewhat uncertain light and everything was certified as being in good condition. A further inspection was made without removing any of the tarpaulins on or about December 12 at Goderich. It is quite clear that during the month of December, before the heating of the grain was discovered, there was snow on the decks. I am not even sure that the water in question got in on the voyage, it may have, in some fashion, penetrated after the ship got to Goderich.

The Judicial Committee of the Privy Council dealt with a problem of what is a peril of the sea in the case of *Canada Rice Mills Ltd. v. Union Marine and General Insurance Co.*[1] This was an action on an insurance policy, covering among other things, perils of the sea. The opinion of the Judicial Committee was delivered by Lord Wright. The cargo was rice which was damaged by wetting. A variety of occurrences were shown from which it could be inferred that the damage had been caused by a peril of the sea. The case was originally heard by a Jury who came to that conclusion. At page 67 beginning at the third paragraph Lord Wright reviewed many of the cases dealing with this problem and at page 68 he summed the matter up in the following words:

[1] [1941] A.C. 55.

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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 sea water 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. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter, and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold, and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of sea water which, but for the covering of the ventilators, would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel heavily laden with 5000 tons of rice driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. The Lordships do not think that it can properly be said that there was no evidence to justify their finding. 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.

In the case before me no circumstances have been disclosed which would explain when the water penetrated to the grain. In the case of *Gosse Millerd v. Canadian Government Merchant Marine Limited* and the case of *American Can Company v.* the same defendants[1], the two actions were tried together and Lord Wright, who was then Mr. Justice Wright, heard them. It was necessary for him to consider the *Carriage of Goods By Sea Act* 1924, they are in similar form to those attached to our *Water Carriage Goods Act,* R.S.C. 1952, c. 291, and in doing so he discussed the rules scheduled in that Act, and at page 434 there is a very illuminating discussion of the rules as follows:

[1] [1927] 2 K. B. 432.

These Rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the Rules, which cannot be varied in favour of the carrier by any bill of lading, their liabilities are precisely determined, and so also are their rights and immunities. In particular, Art. III., r.2, of the Rules is in the following terms: "Subject to the provisions of Article IV., the carrier" (which means the carrier and any person employed by him to do the work) "shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." The word "discharge" is used, I think, in place of the word "deliver", because the period of responsibility to which the Act and Rules apply (Art. I. (*e*)) ends when they are discharged from the ship. Art. III., r 3, requires the bill of lading to state (inter alia) "the apparent order and condition of the goods," that is, on shipment.

The words "properly discharge" in Art. III., r.2, mean I think, "deliver from the ship's tackle in the same apparent order and condition as on shipment," unless the carrier can excuse himself under Art. IV. Hence the carrier's failure so to deliver must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Art. IV., r.1, which deals with unseaworthiness and provides that, in a case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy. Art. IV., r.2, contains a long list of matters in respect of loss or damage arising or resulting from which the carrier is not to be liable. The excepted causes specified in paras. (*c*) to (*p*) inclusive, except (*l*), are all matters beyond the control of the carrier or his servants, such as sea perils, acts of God, restraint of princes, riots, inherent vice of the goods, etc. (*l*) relates to deviation to save life and property. (*a*) deals with neglect in the navigation or management of the ship, which falls, I think, under a category different from the care of the cargo. (*b*) relates to fire and, following previous statutory protection, gives a wide exemption. Finally (*q*) is in these terms: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." I read the second "or" in the above paragraph as meaning "and." In this I agree with the decision of MacKinnon J. in *Brown & Co. v. T. & J. Harrison*, (1927) 27 Ll.L. Rep. 415.

The words of para. (*q*) expressly refer to the carrier as claiming the benefit of the exception, and I think that, by implication, as regards each of the other exceptions, the same onus is on the carrier. He must claim the benefit of the exception, and that is because he has to relieve himself of the prima facie breach of contract in not delivering from the ship the goods in condition as received. I do not think the terms of Art. III. put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while they have been in his custody (which includes the custody of his servants or agents on his behalf) and to

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bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised. This was the language of Erle C J. in delivering the judgment of the Exchequer Chamber in *Scott v. London and St. Katherine Docks Co.* (1865) 3 H. & C. 596, adopted by the House of Lords in *Dollar v. Greenfield,* (1905) The Times, May 19. In *Joseph Travers & Sons v. Cooper* [1915] 1 K.B. 73, 88. Buckley L.J. said:

> "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus."

Buckley L.J. also quotes from *Morison Pollexfen & Blair v. Walton,* Unreported the words of Lord Halsbury:

> "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

The principle is also discussed by Atkin L. J. in The Ruapehu, (1925) 21 Ll L. Rep. 310, 315, where he points out that it is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee. I think that this principle of onus of proof is applicable to the carrier under the Act. Indeed in the general exception of Art. IV., r. 2 (*q*), it is expressly laid down. In the facts of this case, if the shipowners claim (as they do in their pleading) the benefit of that exception, in that damage was due to wet or damp, they can only succeed by negativing fault or privity.

This judgment was reversed in the Court of Appeal but restored by the House of Lords. There are two very illuminating judgments in that decision which is found in [1929] Appeal Cases, 223. There is a judgment by the then Lord Chancellor Hailsham with whom Lord Atkin agreed and a further judgment by Lord Sumner. For the purposes of this case I think the matter may be summed up by quoting part of the headnote, which is found at page 223, as follows:

> Held, that the shipowners having failed properly and carefully to carry, keep and care for the tinplates, as required by Art. III., r. 2 of the Schedule to the Carriage of Goods by Sea Act, 1924, the onus was on them to prove that they were protected from liability by Art. IV., r. 2(*a*) and that the negligence in the management of the hatches was not negligence "in the management of the ship" within the meaning of that rule.

In my view the principles enunciated in this case also apply to a claim to the benefit of Rule IV, Article 2(*c*), that is perils of the sea. The goods having been damaged by a state of affairs, which was discovered slightly over three

weeks after the conclusion of the voyage on December 5; the defendants have not in my opinion proved that the damage to the grain occurred by the incursion of water on the voyage down. The ship remained at storage for three weeks and a day after that before the real state of affairs was apparent. The water may have gotten in while the ship was in Goderich, it is in my opinion on the evidence impossible to say. It may have been from a peril of the sea, it may have been from some fault in the covering of the hatches during or after the voyage. I do not know. Water however, unquestionably did get in at some time. As I understand the principles behind the decision of Mr. Justice Wright, as he then was, the fact that the goods were damaged raises a *prima facie* case of negligence, which can only be met by showing what actually occurred. This the defendant has not shown and the *prima facie* case raised by the plaintiff by showing the damages which had occurred in the absence of any explanation which might relieve the ship or its owners answers the burden placed on the plaintiff by Paragraph 5 of the Special Contract for Private Storage of grain and/or seed on the *Ontadoc,* which provided that the burden of establishing negligence will be on the person asserting it. The *prima facie* case of negligence raised by the plaintiff in this case has not been answered. In the result therefore, there will be judgment for the plaintiff in each case. The actual loss or damage suffered was not gone into in any great detail. Unless the parties can agree these can be most conveniently determined by a reference to the Surrogate Judge. The plaintiffs should have their costs of the action in each case. The cost of the reference should be left to the discretion of the Surrogate Judge.

Judgment for plaintiffs.