BRITISH COLUMBIA ADMIRALTY DISTRICT

Victoria 1965

Nov. 9, 10

Nov. 17

BETWEEN:

BOMFORD TIMBER LTD. ....PLAINTIFF;

AND

V. JACKSON ....DEFENDANT;

AND

ARNIE LEIGH ....THIRD PARTY.

Shipping—Charter party—Terms of—Towboat operator chartering barge from non-owner—Whether implied warranty of seaworthiness—Loss of cargo—Liability of towboat operator and barge charterer—Salvage—Liability for—Third party issue—Jurisdiction of Exchequer Court—Admiralty Act, R.S.C. 1952, c. 1, s. 18(3)(a)(i).

In July 1960 plaintiff company orally contracted with defendant, a towboat operator, to move a tractor and logging equipment from Thurlow Island to Topaz Harbour, British Columbia. Defendant, who was in the business of offering to carry goods for anyone who chose to employ him subject to an express agreement as to each employment, orally chartered from one Leigh a war surplus landing barge which to defendant's knowledge belonged to one Taylor but had been placed in Leigh's custody. Leigh was informed of the job to be done but said nothing as to the seaworthiness of the barge. Defendant loaded the tractor and logging equipment aboard the barge after partially inspecting its water compartments and proceeded to sea. The barge took on a list and the tractor and logging equipment slid into the sea. Salvage operations were conducted by plaintiff's underwriters with defendant's assistance and the tractor and some equipment were recovered. Plaintiff sued defendant who claimed indemnification from Leigh.

Held, defendant was liable for the damages sustained by plaintiff but had no claim to indemnification or contribution from Leigh.

1. Defendant was a public carrier by water (*Paterson Steamships Ltd. v. Can. Co-op. Wheat Producers Ltd.* [1934] A.C. 538; *Consolidated Tea and Lands Co. v. Oliver's Wharf* [1910] 2 K. B. 395, referred to), and he had not established that his contract with plaintiff contained any limitation on the absolute liability to which a common carrier is otherwise subject.
2. Defendant was not entitled to compensation for his assistance in the salvage operations in the absence of a contract with plaintiff for such work.
3. Under sec. 18(3)(*a*)(i) of the *Admiralty Act*, R.S.C. 1952, c. 1, the Exchequer Court had jurisdiction to entertain a third party issue against Leigh for indemnification.
4. Defendant was not entitled to indemnification or contribution from Leigh notwithstanding the unseaworthiness of the barge. As Leigh was not owner of the barge the charter did not in law contain a warranty of seaworthiness by him, and there was no misrepresentation by him, either fraudulent or innocent, as to the seaworthiness of the barge at the time the charter was made. *Wells v. Mitchell et al.* [1939] O.R. 372; *Smith v. Land and House Property Corpn.*, 28 Ch.D. 7, followed; *Brown v. Raphael* [1958] 1 Ch. 636, applied.

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ACTION for damages.

W. Esson for plaintiff.

Timothy P. Cameron for defendant.

Vernon Hill for third party.

GIBSON J.:—The plaintiff claims in this action against the defendant for damages to its D-8 caterpillar tractor and miscellaneous logging equipment and for loss of some of such equipment while the same were being carried on the 12th July, 1960, upon the barge *Shoal Harbour* being towed by the tug *Iron Mac* from a location called Camp O on the south end of Thurlow Island (25 miles north of Campbell River) to Topaz Harbour in Johnstone Straits, which are waters northeast of Vancouver Island, British Columbia. The damage and loss occurred shortly after the carriage commenced, at a point in Johnstone Straits called Ripple Point which is about 4 miles north of Camp O, when the said tractor and equipment slid into the water from the barge. *Shoal Harbour* and sank in about 60 feet of water.

The defendant also claims against the third party indemnification for the plaintiff's claim for damages and costs or alternatively contribution with respect to the plaintiff's claim and costs in whatever proportion to this Court may seem just, in the event this Court should hold the defendant liable to the plaintiff in the main action. The third party issue was the subject of an adjudication in the preliminary proceedings concerning the same: see *Bomford Timber Ltd. v. Jackson and Leigh* (*Third Party*)[1], Tysoe, Dpty. Dist. J.

The plaintiff is a company incorporated under the laws of British Columbia. At the material time it was carrying on a logging business and was engaged in the same on the islands in the Johnstone Straits area.

The defendant at the material time was a logger and towboat operator and resided at Campbell River, British Columbia.

The third party at the material time also resided at Campbell River and was a tug boat operator and also did charter out certain barges.

[1] (1963) 44 W.W.R. 706.

The plaintiff early in July, 1960, had occasion to move one of its D-8 caterpillar tractors and miscellaneous logging equipment from the said Camp O to Topaz Harbour for the purpose of carrying on some logging operation at this latter place. To accomplish this move he required the services of a carrier such as the defendant because the method that was employed in moving its equipment was using a tug with a barge in tow upon which barge this equipment was carried.

It is common ground that Mr. E. A. Bomford of the plaintiff company had a preliminary discussion with the defendant, V. Jackson, in a Vancouver hotel a few weeks before the 12th July, 1960, at which time Mr. Bomford let it be known that he wished this move to be made and at which time also Mr. Jackson solicited this business. It was, however, at Campbell River on or about the 8th July, 1960, that a final deal was made between these parties contracting for this move of equipment. The arrangement was verbal. There is a dispute as to whether or not insurance was mentioned on either or both of the said occasions. Mr. Bomford says he asked Mr. Jackson on both occasions whether he had insurance coverage for property damage on his equipment during the course of such prospective carriage and that Mr. Jackson assured him that he did. Mr. Jackson denies that any mention was made of insurance at all on either occasion.

The defendant at this time owned the tug called *Iron Mac* but did not own a barge. He obtained the barge *Shoal Harbour* for the purpose of this carriage from the possession of the third party, Arnie Leigh. The defendant says he chartered this from Mr. Leigh, but among other things Mr. Leigh denies that it was a charter. The barge *Shoal Harbour* was a war surplus landing barge originally called an "L.C.M." and was of plywood construction about 55 feet in length and 26 to 28 feet wide with sides of about 3 to 4 feet and having an open hold. The defendant picked up the barge *Shoal Harbour* from the premises of the third party, Mr. Leigh, on the 11th July, 1960, which premises were located opposite Campbell River and the defendant towed this barge by the tug *Iron Mac* to Camp O late that evening. The next day, the 12th July, 1960, commencing about 7.30 a.m. under the direction of the defendant and in the presence of Mr. Bomford of the

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plaintiff company, the D-8 caterpillar tractor and miscellaneous logging equipment was loaded aboard the barge *Shoal Harbour* which had been beached for the purpose of loading the caterpillar tractor and subsequently pulled out to a stiff-legged float for loading the other equipment.

The defendant said he adjusted the load on the barge *Shoal Harbour* so that the barge was properly trimmed. He caused some of the water compartments to be checked for water and found none in the ones that were checked, but that probably only about half of the water compartments were checked at all. The defendant was not familiar with the barge *Shoal Harbour* except that he had observed it at the premises of the third party prior to that time, but he had made no other inspection prior to employing it on the 12th July, 1960. The only other thing he did regarding inspection of it was again a partial checking of the water compartments on the 11th July, 1960, when he picked it up. But he never was in a position to know the condition of all the water compartments except by observing the trim of the barge as it floated and was under way.

The defendant proceeded in the tug with the barge in tow with one deckhand aboard and two of the employees of the plaintiff, namely, Albert Mayeo and a man by the name of Roberts. Mr. Mayeo was the caterpillar driver and had driven the caterpillar onto the barge.

During the course of the short carriage the defendant and the other personnel, except Mr. Mayeo, remained in the wheelhouse of the tug *Iron Mac,* While Mr. Mayeo sat outside looking astern and observing the barge during the voyage.

About half an hour to one hour later, when the tug and barge had proceeded about four miles, Mr. Mayeo observed that the barge had taken a list to starboard. He informed the defendant who subsequently brought the tug alongside the barge and substituted for the tow line, which had been a steel line about 250 feet in length, a hemp line, and attached the latter to the port forequarter of the barge, and commenced to tow the barge to the nearest beach area on Vancouver Island to the south-west. Mr. Mayeo said they substituted the hemp rope for the steel rope because he was apprehensive, and the defendant concurred, that if the barge sank with the steel cable attached to the tug that it

might cause the tug also to sink, whereas with the hemp rope only attached it was possible to cut such hemp rope and disengage the barge from the tug if the barge did sink.

The tug and barge were then about 400 to 500 feet from the beach area on Vancouver Island and the location is what is referred to and shown on the chart of Johnstone Straits, Exhibit 3, as Ripple Point. The tug towing the barge got to within about 100 feet of Ripple Point, which took about fifteen minutes, before the barge, whose starboard list had been progressive and apparently irreversible since Mr. Mayeo first observed it, listed so badly that the D-8 caterpillar tractor slid off and also all the equipment which was aboard the barge and sank in water which was about 60 feet in depth. In doing so it ripped the starboard side of the barge completely off down to below the water line but the barge did not sink. The caterpillar tractor was tied by a cable to the barge and the crew of the tug were able subsequently to attach a can marker to this cable to identify the spot where the caterpillar sank which was of assistance in the subsequent salvage operation.

The defendant then proceeded back with the tug to Camp O. Mr. Mayeo said that he immediately asked the defendant whether he had insurance covering this loss and said that the defendant told him he had, but the defendant says that what he told Mr. Mayeo was that he believed there was insurance on the barge, but that he did not intend to convey to him the impression that there was insurance on the cargo of the barge.

After arriving at Camp O the defendant spoke to Mr. Bomford of the plaintiff company. Mr. Bomford said that the defendant had told him that he had insurance on the cargo. The defendant said that Mr. Bomford on the contrary told him that he, Bomford, had insurance on his equipment to cover this loss.

In any event, Mr. Bomford of the plaintiff company got in touch with his underwriters who subsequently carried out salvage operations, recovering the D-8 caterpillar tractor and certain of the equipment, which salvage operations were carried out for the underwriters by a Captain John C. Smith, whose report of survey is filed as Exhibit 1. In carrying out this salvage operation the defendant and one deckhand and his tug *Iron Mac* assisted. The survey

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report of Captain Smith reports concerning this that "The services of Tug 'IRON MAC'—Operator Mr. Vernon Jackson and one deckhand offered and used throughout salvage operation free of charge".

The defendant had no cargo insurance and the plaintiff instituted this action against him on the 8th November, 1961. The defendant in turn obtained leave to commence the third party proceedings on the 30th August, 1963, and the third party entered an appearance on the 10th September, 1963.

The defendant takes the position that he chartered the barge *Shoal Harbour* from the third party, Arnie Leigh, and that the arrangements were made some time between the 8th and 10th July, 1960. This barge was owned by one Taylor who had left it in the custody of the third party. The defendant, in the presence of the third party some weeks before the 8th July, 1960, had discussed this barge with Taylor, at which time Taylor had agreed that the defendant, the third party, and any other responsible person could charter it. The defendant says that Taylor told them he had used this barge for carrying heavy loads such as loads of the weight involved in the carriage which is the subject of this action, namely, a tractor of this size which weighed about 20 to 25 tons, and other equipment of some few tons. Nothing else was said concerning the seaworthiness of this barge according to the evidence, except that the third party said that all persons in this trade know that it is ex-Army equipment and that the water compartments of this barge, while once water-tight, are now only as he put it "water resistent". At the time the defendant spoke to the third party, somewhere between the 8th and 10th July, 1960, the defendant asked the third party if the barge was available and he indicated that it was. He told the third party that he had this job to do for the plaintiff and the defendant stated to him that he thought this barge would be preferable to another barge which the third party had for charter, because of the convenience in loading this equipment of the plaintiff, not its seaworthiness, and the third party concurred in this view of the defendant. Other than that no representation and certainly no guarantees were given by the third party to the defendant and no mention was made otherwise of its seaworthiness.

The plaintiff claims that the contract between it and the defendant was a simple contract of carriage and that the defendant was a public carrier within the meaning of the cases and for breach of that contract he is absolutely liable as an insurer. In the alternative the plaintiff claims that the defendant is liable for these damages in negligence, particulars of which are set out in paragraph 9 of the statement of claim, namely:

(*a*) In providing for the carriage of the plaintiff's goods as aforesaid an unseaworthy barge;

(*b*) In failing so to secure the goods when loaded on the barge as to prevent them being lost overboard;

(*c*) In navigating the said barge in such a manner as to cause it to list and allow the said goods to be cast into the sea.

The defendant says that this contract was subject to a bill of lading by reason of which the *Water Carriage of Goods Act* R.S.C. Chap. 291, Article III, Rule 6, is applicable; that the contract of carriage in any event was subject to the verbal condition alleged to have been expressed by the defendant at the material time and accepted by the plaintiff that the goods carried were "at owner's risk"; that the contract with the plaintiff was not with the defendant but with the company of which the defendant was the president, namely Jackson Enterprises Ltd.; and that there is no basis in law for the alternate claim in negligence on the evidence. The defendant also counterclaims against the plaintiff for services rendered in salvaging the D-8 caterpillar tractor and sunken equipment, for which purpose he employed the tug *Iron Mac,* his deckhand and was employed himself. This is referred to above when mention was made of the survey report, Exhibit 1, made by Captain Smith for the underwriters of the plaintiff.

On the evidence it is clear and I am of opinion that the carriage contract was between the plaintiff and the defendant and not with the company referred to as "Jackson Enterprises Ltd.".

The defendant conceded that he never took any positive means to draw to the attention of Mr. Bomford of the plaintiff company that he was acting as agent for Jackson Enterprises Ltd. The defendant could point to no way that Mr. Bomford might have positively had his attention drawn to this alleged fact.

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In any event, it follows as a matter of law that if the defendant in this case made a contract in his own name verbally without disclosing the name or the existence of his purported principal he is personally liable on the contract to the plaintiff even though he may in fact (which I do not hold) be acting on a principal's behalf.

I am also of the opinion that the defendant, for the purpose of this contract, was a public carrier within the meaning of the cases: *Paterson Steamships, Limited v. Canadian Co-operative Wheat Producers, Limited*[1]; *Consolidated Tea and Lands Company v. Oliver's Wharf*[2]; and see Carver's "Carriage of Goods by Sea" 9th Ed., p. 9.

This class of public carriers by water carry subject to the liabilities of common carriers but they are distinguishable from them because they are not liable to indictment or action for refusing to accept goods for carriage as common carriers.

The defendant in this case said in evidence that at all material times he was in the business of offering to carry goods for any one who chose to employ him; subject to an express agreement as to each voyage or employment of his equipment. Such method of doing business as a carrier characterizes in one way public carriers by water according to the jurisprudence.

As a public carrier by water, in the absence of something to limit his liability, the defendant incurred the liability of a common carrier with respect to the equipment he carried in this matter. Like a common carrier, the defendant, therefore, is absolutely responsible for delivering in like order and condition at the destination this equipment bailed to him at Camp O for carriage to Topaz Harbour, unless he can show either (i) that the loss was due to the act of God or the Queen's enemies or inevitable accident, or (ii) unless that liability is cut down by special contract.

The defendant asserts his liability was cut down by special contract, as is referred to above in these Reasons, saying firstly, the carriage was subject to a bill of lading, as per the type filed as Exhibit 4 on this trial, and secondly, this carriage contract was at "owner's risk".

[1] [1934] A.C. 538. [2] [1910] 2 K.B. 395.

The conclusion I reach in the main action is that there was a breach of this contract between the plaintiff and the defendant, and the defendant, therefore, is absolutely liable for the damage caused to the plaintiff unless one of the defences he has raised is well founded.

Regarding the first defence concerning the matter of whether this contract of carriage was subject to a bill of lading, Mr. Bomford of the plaintiff company denies that there was any reference made to a bill of lading at any time. The defendant says that he had obtained a pad of blank bills of lading from the third party, who had some spare pads of the same, two or three months prior to the 12th July, 1960, and that he obtained them originally at that time for the purpose of assisting in collecting his fees, because it was better to have the person with whom he was contracting sign something rather than nothing at all, as the defendant put it; but he says that he never went into details as to what purpose a bill of lading served otherwise. He alleges he commenced at that time a system of always using this type of bill of lading in all his carriage contracts from then to the present time. He said he read one copy of these bills of lading from the pad when he had originally obtained the pad of them from the third party, but he did not understand it, and on cross-examination it was obvious he did not know how to fill out this bill of lading. He said that after he loaded the equipment of the plaintiff on the 12th that he went ashore and saw Mr. Bomford and told him he would have to get this paper signed. There was no evidence that, in this alleged conversation with Mr. Bomford, he referred to the paper on the pad he said he had in his hand at the time as a bill of lading. The defendant then delates that Mr. Bomford said they could fill it in at the end of the journey. Certainly from the evidence it is plain that the defendant was not at that juncture able to fill the form in without returning to the barge which was then afloat, because the defendant did not know what equipment was aboard other than that there was a D-8 caterpillar tractor and certain miscellaneous logging equipment. It is not alleged by the defendant that there was any mention made of any bill of lading being employed when the original deal was made on the 8th July, 1960, between the defendant and Mr. Bomford at Campbell River. And, of course, no bill of

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lading was ever filled in or even tendered to the plaintiff by the defendant after this casualty.

On this evidence I am of opinion that this contract of carriage was not subject to this bill of lading, a copy of which was filed on this trial as Exhibit 4. I do not accept the evidence of the defendant that he had established a system of always making any carriage contract which he undertook subject to this bill of lading. He did not bring into Court any copies of such bills of lading which he had employed on other prior or subsequent carriage contracts he completed. He brought in his log book from the tug *Iron Mac* and was able to give evidence of various contracts he had done, but in my opinion the absence of such proof is significant, among other things, in enabling the Court to find that no system of using this bill of lading was employed by the defendant in his business as a public carrier.

Regarding the second defence that the defendant verbally told Mr. Bomford of the plaintiff company that this contract of carriage was at "the owner's risk", he says he told Mr. Bomford this on the 8th July, 1960, at Campbell River when the contract was first entered into. He says he again told them after he had loaded the plaintiff's equipment on the 12th July, 1960. The plaintiff denies that any reference was made to this limitation in the contract at any time. I accept the evidence of Mr. Bomford of the plaintiff company in this regard and hold that no mention was made of such a limitation at any time in any of the conversations between the defendant and Mr. Bomford prior to this casualty.

As to the counterclaim, the defendant is firstly inconsistent. He claims in his personal capacity against the plaintiff for services rendered with the tug, and by himself and his deckhand in salvaging the sunken caterpillar tractor and equipment of the plaintiff four or five days after the sinking, yet says prior thereto in his defence that Jackson Enterprises Ltd. was the contracting party at all material times. But, notwithstanding this inconsistency, it is perfectly clear from all the evidence at the trial and in particular from the evidence adduced by way of the survey report, Exhibit 1, of Captain Smith, that there was no contract by the defendant with the plaintiff to be paid for

this salvage work, and in fact no contract at all for salvage work. The only contract possible for salvage work was with Captain Smith acting for the underwriters of the plaintiff and it is clear from the excerpt from this survey report, Exhibit 1, quoted earlier in this judgment, that it was agreed between the defendant and Captain Smith for the underwriters that no charge would be made. This is understandable because the defendant probably knew at the time he volunteered to help and did help in salvaging that he was liable for the damages caused in this matter. In any event, the defendant used this survey report, Exhibit 1, in cross-examining Mr. Bomford of the plaintiff company for the purpose of attacking his credibility. Having put it in in evidence for this purpose, it is now evidence against the defendant of the truth of the facts therein contained, of which the above-quoted excerpt from it is part; and even though this excerpt would be inadmissible as hearsay if the plaintiff had sought to introduce it in evidence: see *Dundas v. Eagle Star Insurance Company Ltd. et al.*[1]

In view of the findings on the contract of carriage and the counterclaim with respect thereto, it is not necessary to consider the plaintiff's alternative claim in negligence against the defendant or the defence to it.

Turning now to the conclusion I reach in the third party issue, firstly there is considered the question of the jurisdiction of this Court. The third party in his pleadings raises the objection that the claim made by the defendant against the third party in this particular third party issue is not a claim with respect to which this Court has jurisdiction to adjudicate upon.

I am of the opinion that section 18(3)(*a*)(i) of the *Admiralty Act,* R.S.C., Chap. 1, is unequivocal as applied to the facts of this case that this Court has such jurisdiction. This subsection reads as follows:

> (3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine
>
> (*a*) any claim
>
> (i) arising out of an agreement relating to the use or hire of a ship.

In my opinion, the claim made in this third party issue is a claim within the meaning of this said subsection.

[1] (1965) 52 W.W.R. 48, B.C. Court of Appeal.

On the merits, in this third party issue, the defendant claims against the third party indemnification or, alternatively, contribution if the defendant is found liable to the plaintiff in the main action, alleging that the damage caused the plaintiff was a direct result of the third party supplying the defendant with the barge *Shoal Harbour* which "was not in a seaworthy condition as represented by the third party to the defendant."

First of all I think it clear beyond doubt, and I so find on the facts, that the defendant did charter the barge *Shoal Harbour* from the third party on or about the 8th to 10th July, 1960, which charter was a verbal charter and made in the informal way recited in the facts above. It is clear also that all parties knew at all material times that the owner of the barge *Shoal Harbour* was one Taylor. And it is also not necessary in these reasons, otherwise, to characterize the status of the third party in reference to this barge *Shoal Harbour.*

Secondly, the other main issue in this third party action is whether or not this barge *Shoal Harbour* at the material times was seaworthy or not; and if it was not seaworthy whether the third party is liable to the defendant for such unseaworthiness.

The burden of proving unseaworthiness as a fact rests upon the party who asserts it. But the facts in this case afford *prima facie* evidence of unseaworthiness, namely, the facts that this barge shortly after leaving Camp O took in water and partially capsized causing damage, without any reasonable explanation adduced as to why it leaked so soon. And, in the absence of any other explanation, I find that the defendant has discharged the burden of proving unseaworthiness as a fact, because I make the inference from the circumstance of these facts in this case that the barge *Shoal Harbour* was unseaworthy at all material times.

It follows, therefore, that the third party in this case is liable to the defendant if, as a term of the charter of this barge *Shoal Harbour,* there was in law a warranty of seaworthiness by the third party.

As a matter of law, the third party not being an owner of this barge and being a charterer of it only in the peculiar circumstances of this case as recited above, there is no implied warranty of seaworthiness.

The third party is only liable therefore in this case if, as a term of this charter, he made to the defendant representations or statements which in law were (A) either (i) conditions or (ii) warranties, which were (B) false, being either (i) fraudulent statements or representations or (ii) innocent misrepresentations: *Wells v. Mitchell et al.*[1]; *Smith v. Land and House Property Corporation*[2], followed in *Brown v. Raphael*[3].

Patently in the evidence in this case there is no suggestion that there was any fraud on the part of the third party, and so only the matter of innocent misrepresentation is left to be considered.

And on the facts above stated it is equally clear that there was no innocent misrepresentation made by the third party to the defendant as to the seaworthiness of the barge *Shoal Harbour* in any representation or statement made when this charter was entered into. The words of Bowen L.J. in *Smith v. Land and House Property Corporation, supra,* at p. 15 are apt in categorizing accurately these said statements or representations of the third party to the defendant, from which this conclusion is irresistible:

> In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

What was said in any of the said representations or statements by the third party to the defendant in this case may very well have been an opinion, but in my view such did not involve a statement of any material fact or facts. That is the critical matter. No statement of any material fact as to the seaworthiness of *Shoal Harbour* at any material time was or could have been made by the third party to the defendant, in that, and I so find on the evidence, the third party did not know any more material

[1] [1939] O.R. 372.
[2] 28 Ch. D. 7.
[3] [1958] 1 Ch 636.

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facts regarding the seaworthiness of this barge *Shoal Harbour* at any material time than did the defendant.

In the result, therefore, the plaintiff is entitled to judgment against the defendant with costs and there shall be a reference to the Registrar to ascertain its damages.

The counterclaim is dismissed without costs.

The third party issue is dismissed with costs to the third party against the defendant.