

1914
 March 24.

TORONTO ADMIRALTY DISTRICT.

THOMAS LANNON,.....PLAINTIFF.

AGAINST

THE SHIP *LLOYD S. PORTER*.

Shipping—Negligence—Loss of Goods in transit—The Water Carriage of Goods Act, 1910—Application—Right of Action.

The Water Carriage of Goods Act, 1910 (Dom.) does not apply in Admiralty cases, except when the vessel sails from a Canadian port.

Quære: Has a party who has not at the time of the happening of the event upon which action is based, paid for the goods lost or taken delivery of them, the right to maintain an action in respect of their loss ?

THIS was an action brought to recover the value of a cargo of coal laden in a barge attached to the defendant ship, and which cargo it is alleged was lost through the negligent navigation of the defendant ship.

The case was tried at Toronto before the Honourable Mr. Justice Hodgins, Deputy Local Judge of the Toronto Admiralty District, on the 16th and 19th days of February, A.D. 1914.

The facts are fully set out in the reasons for judgment

W. M. German, K.C., for plaintiff.

McGregor Young, K.C., for defendant.

HODGINS, D. Lo. J., now (March 24th, 1914) delivered judgment.

The *Porter*, a steam barge of 488 gross tons and 379 registered tons, left Erie, Pa., for Port Colborne with the dumb barge *Marengo*, laden with plaintiff's coal, in tow on the 11th day of October, 1912.

The *Marengo* went ashore that evening just off Morgan's Point, about six miles west of Port Colborne, and it and the cargo were lost. The present action is by the owners of the cargo to recover its value; \$2427.85, and the charge is negligent navigation of the *Porter* causing the stranding of the tow.

The log of the *Porter* reads as follows:

" Left Erie at 12.20 p.m. with *Marengo* in tow wind
 " south light and thick at 10 p.m. eased *Porter* down
 " and at 10.30 *Porter* struck bottom very easy and
 " *Marengo* brought up backed *Porter* off got alongside
 " *Marengo* whistled and brought tug out of Port
 " Colborne *Porter* and tug tried to pull her off but
 " could not dropped *Porter* out into deep water and
 " stopped there until 3 a.m. wind freshed up from the
 " south and *Porter* had to go into Port Colborne left
 " Port Colborne 4 a.m. wind south-west blowing a
 " gale."

The above is just as it is written. There is no attempt at punctuation or division into sentences.

The vessels crossed Lake Erie. At 8 p.m. the speed of the *Porter* was checked and at 10 p.m. was slowed "right down" so that she was then going at about two miles per hour. Savage, the sailing master, says it got very thick at 9 p.m. having gradually got denser from about 3 p.m., the wind drawing from the north east. Dove and Misener, who say it was clear in the afternoon, are corroborated by McGrath and my conclusion is that Savage is mistaken as to the fog or mist having set in as early as 3 o'clock. He is, however, corroborated as to fog at 9 p.m. by Dove, in charge of the tow, and by McGrath the tug captain, who was then lying in Port Colborne. At 10.30 the *Porter* touched the bottom and the *Marengo* astern went on ground thought to be a rocky shoal.

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The place where they struck was on the south-west of Morgan's Point, about three miles westerly in a straight line from and at right angles to the course shown on the chart and about six miles from Port Colborne.

Palmattier, who held a captain's certificate, for some reason, was not in command of the *Porter* but Savage who held only a mate's certificate, was in charge. The former is said to have been engaged in taking soundings after the *Porter* was slowed down at 10 p.m. and thereafter till she touched. Savage had the usual chart, a copy of which is filed as an exhibit.

The situation, then, at 9 p.m. appears to be that it was foggy or thick; that the *Porter* was checked and that no doubt Savage knew or ought to have known from his log, if he used one, or from the speed at which he had been going and the time, his general situation. The distance from Erie is only sixty-three miles.

From 9 p.m. until a little after 10 p.m. he heard the Port Colborne fog horn continuously and at 10 p.m. he slowed the *Porter* right down, going on then slowly and sounding and getting 4 to 6 fathoms. At 10.30 p.m. she and the tow grounded. Dove, who was in charge of the *Marengo*, and whose marine protest was filed as an exhibit, gave evidence, and says that he heard the *Porter* blow to check at 10 p.m., and proceeded under check, grounding at about 11 p.m. He says he heard the Port Colborne fog-horn for more than an hour before they grounded, the last half hour very distinctly and that the sound from the fog-horn appeared to be on his starboard bow. In this, while agreeing in the main with the evidence of Savage, there is an important difference. The latter says that from a little after 10 p.m. (later he put it more definitely at 15 minutes before they struck) till just after they

grounded he could not hear the fog horn. McGrath, captain of the Port Colborne tug, says that at intervals the fog-horn would not blow but generally did so every five or ten minutes. Stinson, master of the *McKinstry*, says the Port Colborne fog-horn is not to be relied on absolutely.

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For an hour, until 10 p.m., Savage had the aid of the fog-horn in determining his position. He then went dead slow and must have done so either because, knowing his general position, he thought he could with caution make Port Colborne safely, or because, not knowing it, he was afraid to go faster. The *Porter* grounded at 10.30 p.m. and must at the specified rate have travelled a mile in the half hour. The depth of five fathoms is found one-eighth of a mile out from Morgan's Point according to Mann, so that for the greater part of the half-hour the *Porter* was in safe water. When the grounding took place there was less than two fathoms at the bow of the *Porter*—she drew twelve feet—and just over two fathoms at the bow of the *Marengo*. In the result it turned out that the course being followed before and after 10 p.m. led the vessels to a point five or six miles to the west of their intended destination. The question to be decided is not so much how the navigation had brought the *Porter* so far west but rather whether, under the circumstances in which Savage thought he was, he was guilty of negligence in moving at all after he lost touch with the fog-horn.

As to how he came to be where he was at 10 p.m. there is no definite evidence. Experts differ and in this case there is singular difference on the point of the true course to be steered.

The compass course from Erie to Port Colborne shown on the chart is N.E. $\frac{3}{8}$ N. The course steered

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by Savage, which he said had always led him to safety, was N.E. $\frac{1}{4}$ N. Johnson, one of the plaintiff's witnesses, gave this as the proper course allowing for variation. That of Cavanagh is N.E. $\frac{5}{8}$, E., he making allowance for his own compass, and of Johnson N.E. $\frac{1}{4}$ E.

Savage thinks there was something wrong with the compass, and two captains speak of a strong local attraction which may have resulted in a variation sufficient to account for the deflection, if the steering on the stated course was carefully maintained.

But the fact is that, whatever course was actually followed, the fog-horn had been heard for an hour, 9 to 10 p.m. or 10.15 and according to Dove, on the starboard bow. It then ceased, so Savage said, for half an hour although he says he heard it fifteen minutes before they grounded. Here seems to me to be the crucial point. It is known now that Savage was several miles to the west of where he ought to have been. There was safe water to within $\frac{1}{8}$ of a mile, i.e., 220 yards, from shore, and he had slowed down to dead after hearing the fog-horn continuously for an hour. I think it must be taken that during nearly thirty minutes before the vessels grounded no fog signal had been heard. That is the time given by Savage, although he puts the last blast as fifteen minutes before the *Porter* touched. If he got off his course by accident, and there is nothing in the evidence warranting me in finding differently, then he must be judged by the situation as he viewed it and not as it really was. His position, as he understood it at 10 p.m., was off Port Colborne with soundings of from four to six fathoms and with whatever the fog-horn had told him as to his position by its blasts continuously from 9 p.m. Should he have stopped dead till he picked it up

again? His not doing so is clearly responsible for the accident. A doubt is suggested by the proved irregularity of the blasts and by his statement that it sounded fifteen minutes before he struck. But if for one hour, shortly before he touched the ground, it had been heard, it seems to me that his calculation of his position was faulty. When the *Porter* grounded she was six miles from Port Colborne, going at say, four miles an hour, from 9 to 10 p.m. She was, while making that distance, in truth keeping at least as far away as when she began on a course almost parallel to the true chart course. If Savage assumed that he was on his proper course, I cannot help thinking that he should have in that hour realized that the sound was not coming any closer, as it would have been had he been heading straight for the harbour. Besides this, if he thought he was close in, and then lost touch with the fog-horn, that should have indicated to him the necessity for extreme caution in view of his assumed position close to the port. Mann, one of the defendant's witnesses, says that the compass course does not bring a vessel right into Port Colborne harbour, and that the course must be changed to get in.

There is another consideration. Having lost the fog-horn after hearing it for an hour, it might well have suggested, as the fact was, that he might be out of his course, and that the absence of the sound was due to the fact that he was not actually where he thought he was. The expert evidence, so far as it is useful, aids in this conclusion.

Anderson and Stinson, defendant's witnesses, say he should have known by fog-horn his position; while Johnson and Cavanagh for the plaintiff think he should have stopped, under the prevailing conditions the latter qualifying this by saying that he

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would have been justified in proceeding if he got his bearing from the fog-horn.

I do not give any weight to the evidence of Pal-mattier and Corby. If true, it betrays a singular disregard of their duty to their employers and to Savage. Nor am I able to understand why they maintained a resolute silence with Savage on the matter during all the rest of the season, while sailing together. Besides, if credited, their evidence throws the *Porter* one mile and a half further off her course, to the westward, at the speed shown during the time they mention.

I am unable to find that the *Porter* after the stranding was guilty of any negligence or want of seamanship in leaving the tow when she did, or that she could have given the latter any effective assistance. I am satisfied that to remain in face of the rising wind and sea, attached to a stranded barge by a line and endeavoring to get a strain upon it, was a task impossible to perform usefully, and was likely to end in disaster to the *Porter*.

Counsel for the defendant raised several objections to the plaintiff's recovery. The right of the plaintiff, who had not at the time of the accident paid for the goods nor taken delivery of them, to maintain the action is disputed and *Graham v. Laird* (1) was cited. It appears that the plaintiff took delivery of part (he sold the salvage) although the bulk was lost in transit, and that he has since paid for the whole. It may be that in such a case he has a right of action as owner. (2)

(1) 20 O.L.R. 11.

Towing Co. (1884) 9 S.C.R. at p. 547.

(2) *Irving v. Hagerman* (1863) 22 U. C.Q.B. 545. *The W. H. No. 1* and *The Knight Errant* (1910) Prob. 199, (1911) A.C. 30. *The Millwall* (1905) Prob. 155. *Sewell v. British Columbia* *v. The Ship Notre Dame D'Arvor* 13 Ex. C.R.456. But as it may be doubtful, see *The Charlotte* (1908) Prob. 206.

I give leave to the plaintiff to add the vendors of the coal as party plaintiffs.

The *Water-Carriage of Goods Act* (1910) cap. 61 (Dom.) does not apply except in cases where the vessel leaves from a Canadian port. Assuming that there is a statute of the United States in corresponding terms, as was stated at the bar, it would be equally inapplicable, and if otherwise relevant there is nothing before me to indicate that the parties had agreed that they were to be governed by it or had made it part of their contract, as in *The Rodney* (1), *Rowson v. The Atlantic Transport Co.* (2). The statute would, I think, be construed, in the circumstances here existing, as was the enactment relied on in *Morewood v. Pollok* (3).

The judgment will declare the plaintiff entitled to a maritime lien upon the authority of the following cases, and the decisions referred to therein. *The Tasmania* (4); *The Mersey Docks and Harbour Board v. Turner* (5); *The Utopia* (6); *The Ripon City* (7); *The Devonshire and The St. Winifred* (8).

On the vendors of the coal being added there will be judgment for the plaintiffs, for \$2,427.85 with costs of action. If the vendors decline to be added the question of the right of the present plaintiff to succeed may be reargued.

Judgment accordingly.

(1) (1900) Prob. 112.

(2) (1903) 2 K.B. 666.

(3) (1853) 22 L.J.Q.B. 250.

(4) (1888) 13 P.D. 110.

(5) (1893) A.C. 468.

(6) (1893) A.C. 492.

(7) (1897) Prob. 226.

(8) (1912) Prob. 68.

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