Judgment
13, 1959

No.13 of 1958.

55510

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

B E T W E E N :

MAXINE FOOTWEAR COMPANY LIMITED
and J. ERIC MORIN — Appellants

— and —

CANADIAN GOVERNMENT MERCHANT
MARINE LIMITED — Respondents

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CASE FOR THE RESPONDENTS

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1. This is an appeal from a Judgment of the Supreme Court of Canada (Kerwin C.J. Taschereau, Fauteux and Abbott J.J. Cartwright J dissenting) dated 1st October 1957, dismissing with costs an appeal by the Appellants from a judgment of the Exchequer Court of Canada (Cameron J.) dated 14th February 1956 which in turn had dismissed with costs an appeal by the Appellants from a judgment of the Admiralty Court for the District of Quebec (Arthur I.Smith) dated 3rd June 1952 whereby the Appellants' action against the Respondents was dismissed with costs.

Vol.II pp 1-11

Vol.I 247-265

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2. The first-named Appellants were the shippers of certain cargo which was loaded on board the M.V."MAURIENNE" (hereinafter called "the vessel") at Halifax, N.S. in the month of February 1942 and which was destroyed by

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or in consequence of fire before the vessel sailed. The registered owner of the vessel was His Late Majesty King George VI represented by The Honourable The Minister of Transport of the Dominion of Canada. The Respondents were the Managers of the vessel. The second Appellant was the consignee of the said cargo but, having assigned to the first-named Appellants all his rights against the Respondents and his interest in the cargo, took no part in the proceedings in the Courts below.

3. There are two broad issues of fact and law between the parties, viz:-

(A) Assuming that the contract of carriage was with the Respondents, are the Respondents liable to the Appellants for the loss of the Appellants' cargo in view of the admitted fact that the contract of carriage was subject to the terms of the Canadian Water Carriage of Goods Act, 1936?

(B) The vessel not being owned by or chartered by demise to the Respondents, was the contract of carriage with the Respondents or with the Crown as owners of the vessel?

In the Courts below the Respondents have succeeded upon issue (A) above but not upon issue (B) which it has not been necessary to press. It may be convenient therefore if the Respondents in this Case deal first with issue (A) to the exclusion of all matters which are relevant only to issue (B). Issue

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(B) is considered in Paragraph 21 and the succeeding paragraphs.

4. On or about 26th January 1942 the Appellants delivered 3 wooden crates and one drum said to contain shoe leather and shoe findings (hereinafter called "the Appellants' goods") to Canadian National Railways in Montreal for carriage to Halifax, N.S. and thence, by sea, to Kingston, Jamaica, British West Indies. Upon receipt of the Appellants' goods Canadian National Railways issued a Through Export Bill of Lading which provided inter alia as follows :- Vol.I 219

> "Clause Paramount. This Bill of Lading shall have effect subject to the provisions of the Water Carriage of Goods Act, 1936, enacted by the Parliament of the Dominion of Canada, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights immunities or an increase of any of its responsibilities or liabilities under the said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

Canadian National Railways duly carried the Appellants' goods to Halifax for loading on to the vessel for the voyage to Kingston.

5. The vessel arrived at Halifax on Saturday 31st January 1942. On Tuesday 3rd

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February 1942 the loading of cargo into No.3 hold, in which the Appellants' goods were later stowed, was begun. There was a conflict of evidence as to the time when the process of loading cargo into this hold was concluded, the Master stating that this stage was reached on Thursday 5th February and one Sim, a Stowage Clerk, that it was not until 8.15 p.m. on Friday 6th February 1942. The evidence of both the Master and of Sim consisted of the minutes of an investigation held by a legal adviser of Canadian National Railways shortly after the fire. These minutes were admitted as evidence by the consent of the parties. There was no evidence showing exactly when the Appellants' goods were loaded.

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6. On the morning of Friday 6th February 1942 it was found that three scupper pipes passing through No.3 hold and discharging respectively from the bath, toilet and the galley sink were blocked by ice at the point at which these pipes met the vessel's side. The Master accordingly instructed one of the vessel's officers to have these pipes thawed out. This work was done between 3 and 4 p.m. on the same day by an employee of a Halifax firm, Purdy Bros., who used an acetylene torch to melt the ice.

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7. At about 11.30 p.m. the smell of smoke was detected and it was found that there was fire in or close to No.3 hold near the place where the acetylene torch had been used in the afternoon. In spite of efforts to extinguish the fire, it spread and at about 5.30 a.m. on 7th February 1942 the

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Master was forced to order the scuttling of the vessel which resulted in an almost total loss of her cargo.

8. By their pleadings, the parties advanced the following contentions:-

(i) The Appellants.

(a) that the Appellants' goods were not delivered and that they were entitled to a declaration of the Respondents' liability in damages in the sum of Can.$ 2801.33 together with interest and costs. Vol.I pp 1-3

(b) that the Appellants' goods were lost by fire caused by the negligence of the Respondents' servants in their use of the acetylene torch.

(c) that the negligent use and application of the acetylene torch constituted a breach by the Respondents of their obligations under Article III rule 1 of the Schedule of Rules relating to Bills of Lading forming part of the Water Carriage of Goods Act, 1936.

(ii) The Respondents. Vol.I pp 3-9

(a) That the vessel was in every respect seaworthy.

(b) That they fulfilled their obligations under Article III rule 1 of the said Rules.

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(c) That they were excused from liability by the provisions of Article IV rule 2(a) and (b) of the said Rules.

9. The material provisions of the Water Carriage of Goods Act, 1936, are as follows:

Section 3 of the Act

"3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship."

Schedule to the Act - Rules relating to Bills of Lading.

"Article III - Responsibilities and Liabilities.

1. The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to -

(a) Make the ship seaworthy;
(b) .....
(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV the carrier shall properly and carefully load, stow, carry, keep, care for and discharge the goods carried.

"Article IV - Rights and Immunities

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and.....to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or person claiming exemption under this section.

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."

10. In dismissing the Appellants' action with costs A.I.Smith J., District Judge in Admiralty for the District of Quebec, held that :-

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(a) if it was established that unseaworthiness was the direct cause of the loss, the Respondents would not be entitled to invoke the protection of Article IV rule 2 of the Rules unless they proved that they had exercised due diligence to make the vessel seaworthy;

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(b) the burden of proving unseaworthiness rested upon the Appellants and, after reviewing the evidence, that (i) the Appellants had failed to discharge that burden and that (ii) the Respondents had established that they had exercised due diligence to make the vessel seaworthy;

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(c) those undertaking the task of melting the ice may have been negligent and their negligence may have been the cause of the fire, but that, if so, it was this negligence and not the unseaworthiness of the vessel which brought about the loss.

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(d) there was no actual fault or privity on the part of the Respondents in respect of any negligence on the part of those ordering the thawing of the scupper pipes or executing that order and that the Respondents were therefore entitled to the benefit of the provisions of Article IV rule 2(b) of the Rules.

(e) if there was any neglect or default upon the part of the master or servants of the Respondents, such neglect or default occurred in the courseof acts

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related to the "navigation or management of the ship" within the meaning of that phrase in Article IV rule 2(a) of the Rules and the Respondents were entitled to the benefit of the provisions therein contained. Vol.I pp244-245

11. The Appellants appealed to the Exchequer Court of Canada which dismissed the appeal with costs, Cameron J. holding that:-

(a) the fire was caused by the negligence of employees of the Respondent, namely the welder from Purdy Bros. who operated the acetylene torch to thaw the ice and the fourth officer of the vessel who supervised the operation: Vol.I p.250

(b) the mere presence of ice in the scupper pipes did not make the vessel unseaworthy or uncargoworthy; Vol.I p.252

(c) the negligence which occasioned the fire did not occur in the carrying out by the Respondents of their obligations under Article III Rule 1; Vol.I p.253

(d) the negligence which occasioned the fire was that of the crew or employees of the Respondents in the management of the ship and the Respondents were entitled to the benefit of Article IV rule 2(a). Vol.I p.254

(e) the Respondents had established that the fire was caused without their actual fault or privity and that they were entitled to the benefit of Article IV Rule 2(b). Vol.I p.254

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12. The Respondents appealed to the Supreme Court of Canada which by a majority decision dismissed the appeal with costs. Kerwin C.J. (Tascherau, Fauteux, and Abbott J. concurring) held that:-

Vol.II p.4 (a) the Appellants' goods were not stowed until after the commencement of the fire;

Vol.II p.5 (b) "In view of Section 3 of the Act, para.1 of Article III of the Rules must be construed that if before and at the beginning of the voyage the ship is unfit for the cargo before the commencement of the loading of the goods, for the loss of which a claim is made, the carrier may absolve itself by showing that it exercised due diligence in that regard. In my view, that onus has been met by the Respondents."

Vol.II pp 5,6, (c) "whoever hired the contractors was negligent in not telling them of the cork insulation; that the contractors' employee was negligent in the manner in which he applied the flame, but Mr.Campbell" (the Respondents' Assistant Superintendent Engineer), "although inspecting the ship every day, had nothing to do with these acts of negligence nor was he derelict in his duty. Scuppers blocked by ice are common in the harbour of Halifax in the winter time. I agree with Mr.Justice Cameron that 'neither the fact that the pipes were frozen nor that an acetylene torch was to be used to clear them was communicated to anyone

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who represented the carrier.'"

(d) the negligence or default causing the fire was that of the servants of the Respondents in the management of the ship within the meaning of Article IV Section 2(a). Vol.II p.6

The decision of the Supreme Court was therefore that if (which the Court did not decide) the vessel was at any material time unseaworthy, the Respondents had discharged the onus of showing that they had exercised due diligence to make it seaworthy and that the Respondents were entitled to the benefit of the immunities contained in Article IV rule 2 (a) and (b).

13. Cartwright J. in a dissenting judgment in the Supreme Court of Canada held that:-

(a) the Appellants' goods were stowed after the beginning of the fire (in this agreeing with the majority decision); Vol.II p.7

(b) the duties of a carrier under Article III rule 1(a) and (c) are continuing and persist until the beginning of the voyage; Vol.II p.9

(c) the Respondents stowed the Appellants' goods on an unseaworthy ship when the exercise of due diligence would have resulted in the discovery of the fact that the ship was on fire; Vol.II p.9

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Vol.II p.10

(d) "while it may well be said that the negligent acts done in the course of thawing out the scupper pipes were acts of the servants of the carrier in the management of the ship and that the resulting fire was not caused by 'the actual fault or privity of the carrier' and while the fire was the agency which brought about the scuttling of the ship and loss of the cargo, in my opinion, the direct cause of the loss of the Appellants' goods was the action of the carrier's employees in bringing those goods to and loading them on, a burning and unseaworthy ship, the holds of which were not fit and safe for their reception and carriage. Had the due diligence required by Article III, R.1 been exercised this unseaworthiness would have been prevented, or, if not prevented, would have been discovered and the Appellants' loss would have been avoided. The effective cause of the loss was the failure to exercise the due diligence required by Article III, r.1"

14. Whether or not the judgment of Cartwright J. is correct in law, it is to be observed that the whole conclusion rests upon the foundation of a finding that the Appellants' goods were loaded on to a ship which was already on fire. The majority of the Supreme Court agree with this premise, but reach a different conclusion. The Courts below made no such finding and it is respectfully submitted, this finding is unsupported by any evidence whatsoever or by any reasonable inference from the evidence.

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15. The only relevant evidence is that of the Master and of Sim, the stowage clerk and that provided by the stowage plan. The Master, whose evidence was quoted by the Chief Justice in his judgment, said that Nos.1 and 3 holds were completely loaded on the night of Thursday 5th February 1942, that is to say at least 15 hours before the earliest time at which the fire could have started. Sim gave evidence before the Canadian National Railways investigator as follows:- Vol.I p.222 Vol.I p.29 Vol.I pp 51-54

"Q. Could you tell me exactly what there was in the 'tween deck of No.3 hold - and how it was placed? A. In the forward end of No.3 'tween deck we put bags of rock salt .....

Q. How deep were they? A. The height of two bundles of shooks it took to fill it.

Q. Was it about half the distance? A. Kingston came out to 12 feet of the coamings.
.....

Q. You filled the salt to about how many feet? A. I started forward and came aft about 12 ft. and then filled to the deck with shooks. We then loaded concentrates in each wing.

Q. What are concentrates? A. Concentrates is what we call Syrup - Raspberry etc. for sodas.

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Q. That "[? what]" went on top of them?
A. The shooks were right across.

Q. When you get the concentrates in, then you had the shooks right across. That would still be about 7 feet from the hatch opening.

Q. What are shooks? A. Hardwood orange crate ends of boxes.
.....

Q. Well just go on from there? A. Right in front of the shooks we put fifty bales of hay in there and on top of the hay we put 200 bags of Nassau potatoes.

Q. How far back would that take you?
A. We started our Bermuda and put bags of potatoes right to the back.
.....

Q. Then what - what about the three feet on top? A. Bags of potatoes on top with Bermuda Hay.....We put 206 bags of scratch feed on top of the hay....
.....

Q. How much did you take up in the space with hay? A. Just enough to allow 138 crates of cabbage. The cabbages filled clean up the whole of the space.

Q. When was this work started? A. On Tuesday.

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Q. I see you have 78 packages of sundries - what are they? A. We call them concentrates - that was given special stowage.

Q. What time did you start loading No.3 hold? A. At 10 a.m. and finished 8.15 Friday evening.

Q. Were you there when the work was completed? A. Yes Sir.

.....

Q. Was the weather fine? A. Yes, fine and clear. The hay went in Friday."

16. Taking the view of the evidence most favourable to the Appellants and rejecting the evidence of the Master in so far as it conflicts with that of Sim, it is submitted that it is clear that No. 3 hold was loaded in the order (a) Lower hold (b) forward part of 'tween deck - cargo for Kingston, (c) middle part of the 'tween deck - cargo for Nassau, (d) after part of 'tween deck - cargo for Bermuda. The Appellants' goods which were to be carried from Halifax to Kingston, Jamaica must have been loaded in stage (b). All that is known of the timing is that stage (a) began at 10 a.m. on Tuesday 3rd February 1942, that the Bermuda hay in stage (d) (the only hay referred to by Sim) was loaded on Friday 6th February 1942 and that stage (d) was completed at 8.15 p.m. on that day. Further, although it may be immaterial, the evidence of Sim contradicts the suggestion contained in the

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judgment of the Chief Justice that "Sundries" included the Appellants' goods. Sim stated that "Sundries" referred to concentrates. It is submitted that the inference is irresistible that the Appellants' goods were loaded before 3 p.m. on Friday 6th February and probably on the previous day.

17. The three Courts below have all held, in the Respondents' submission rightly, that the loss of the Appellants' goods was caused by a peril excepted under the terms of Article IV rule 2 of the Rules and that the Respondents exercised due diligence in accordance with their obligations under Article III rule 1. It may be of assistance if the Respondents in this Case amplify the reasons why, in their submission there was no breach of Article III rule 1.

18. The Respondents' obligation was, in the words of Article III, rule 1, to exercise due diligence (a) to make the ship seaworthy and (c) to make the holds and all other parts of the ship in which goods are carried fit and safe for their reception, preservation and carriage. When does that obligation arise? It is well settled that the so-called "warranty of seaworthiness" which, but for section 3 of the Water Carriage of Goods Act 1936, would be implied by law is not one warranty, but a series of warranties each applying at a different stage of the adventure and none of them constituting continuing warranties (see Wade v.Cockerline (1905) 10 Com. Cas. 115, McFadden v. Blue Star Line (1905) 1 K.B.697 and A.E.Reed & Co. v Page Son and East Ltd.

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(1927) I K.B. 743). So far as fitness to receive the cargo is concerned, i.e."Cargo-worthiness", the warranty is that the vessel is fit and safe for the reception preservation and carriage of the goods and this warranty operates at or with respect to the moment of time when cargo is commenced to be loaded. So far as concerns the fitness of the vessel for the voyage, i.e. "seaworthiness" properly so described, the warranty operates at or with reference to the moment of sailing. Article III rule 1 has, it is submitted, analysed and separated these different duties and the words "before and at the beginning of the voyage" recognise that while the exercise of due diligence to make the vessel seaworthy falls to be judged as at the moment of sailing, which was never reached in the present case, the exercise of due diligence to make the vessel "cargoworthy" falls to be considered in relation to a time before the beginning of the voyage, viz: at the beginning of the loading stage. In this case the loading stage began on Tuesday 2nd February 1942 and there is, as A.I. Smith J. pointed out in his judgment, the uncontradicted evidence of Mr.Campbell that the vessel was seaworthy at this stage.

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Article III rule 1 by omitting the definite article between the words "which" and "goods" underlines that the duty, and the time with reference to which its performance falls to be judged, relates to the cargo as a whole and not to particular cargo carried under a particular bill of lading. Furthermore if the material time

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were that at which the loading of the Appellants' goods began, it has not been established when that occurred and, in particular, whether it occurred before or after the beginning of the fire.

19. On the evidence and the findings of the Courts below, the presence of ice in the scupper pipes never rendered the vessel unseaworthy and no question of the exercise of due diligence in that regard can arise. In relation to the fire, the exercise of due diligence can only become relevant if (contrary to the Respondents' contentions) the material time is the beginning of the loading of the Appellants' goods and if (which is unsupported by any evidence) the Appellants' goods were loaded after the fire had begun. For the purposes of the following paragraphs relating to the exercise of due diligence, the Respondents will make these two assumptions.

20. The duty cast upon the carrier under the provisions of Article III rule 1 is to make the vessel seaworthy and to make the holds cargoworthy. It is not to maintain the vessel in a state of seaworthiness or the holds in a state of cargoworthiness. It follows that a negligent act or omission which makes a vessel unseaworthy or uncargoworthy is not per se a breach of the duty. Such an act brings the duty into operation and the carrier thereupon becomes under an obligation to exercise due diligence to restore the vessel to seaworthiness or cargoworthiness. Such an obligation does not

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cast upon the carrier the duty of taking any action until he knows or ought to have known of the defect. In the present case no one knew of the fire or had information which ought to have led him to suspect the presence of fire, until after the conclusion of the process of loading. Accordingly, it is submitted that, as all three Courts below have held, there was no want of due diligence upon the part of the Respondents

21. It is now necessary to consider whether, the vessel not being owned or chartered by demise to the Respondents, the contract of carriage was with them or whether it was with the Crown as Owner of the vessel. The material facts are as follows:-

(a) The through bill of lading issued by Canadian National Railways in Montreal on 26th January 1942 provided on its face that the Appellants' goods were to be carried to the port of Halifax N.S. and thence by Canadian National Steamships (the Respondents' trade-name) to Kingston. It further provided that:- Vol.I p.219

"In accepting this Bill of Lading, the Shipper, Owner and Consignee of the goods, and the holder of the Bill of Lading, agrees to be bound by all its stipulations exceptions and conditions, whether written or printed hereon, or on the back hereof, as fully as if they were signed by such Shipper, Owner, Consignee or Holder."

On the back of the Bill of Lading it was provided that:-

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"the property covered by this Bill of Lading is subject to all the conditions expressed in local Bills of Lading used by the Steamship or Steamship Companies carrying this property at the time of shipment."

(b) Mr.T.W.Waugh, Manager of the Respondents' insurance and payment department gave evidence for the Appellants on discovery as follows:-

Vol.I pp 132-133

"Q. Would you look at defendant's Exhibit D-2 and tell me if this was the form of Bill of Lading used by the Canadian Government Merchant Marine Ltd. at the time of this loss? A. For shipments originating locally or where we ourselves issued the negotiable Bill of Lading.

Q. I notice the Bill of Lading is signed "Canadian Government Merchant Marine, Agent for shipowners"? A. Right.

Q. And it is stamped with the following wording:-

"If the ship is not owned by or chartered by demise to Canadian Government Merchant Marine Ltd. this Bill of Lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal,

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made through the agency of Canadian Government Merchant Marine Ltd. who act as agents only and who shall be under no personal liability whatsoever in respect thereof."

Could you tell me whether these words were stamped on each Bill of Lading for the cargo carried on the ship "Maurienne"? A. Yes, on all Bills of Lading issued by us."

The stamped clause referred to above is hereinafter called the "demise clause".

(c) The registered owner of the vessel was "His Majesty the King, represented by the Honourable the Minister of Transport, of the Dominion of Canada, for the time being, Ottawa, Ontario" and the designated Managers were the Respondents. Vol.I p.226

(d) The Respondents as managers operated the vessel on behalf of the registered owner. Vol.I p.111

(e) The vessel was not chartered to the Respondents by demise or at all. Vol.I p.112

(f) By their Defence, the Respondents pleaded that:- Vol.I p.6

"12. That...any recourse that the Plaintiffs may have or have had as a result of the loss or non-delivery of the cargo covered by...." [the through Bill of Lading] "should have been directed against His Majesty the King

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represented by the Honourable the Minister of Transport of the Dominion of Canada as Owner of the said m.v. Maurienne;

13. That, therefore, Defendant, Canadian Government Merchant Marine Ltd. can not be held responsible in fact or law towards Plaintiffs for the loss and/or non-delivery of the said cargo and that there is no lien de droit between Plaintiffs and Defendant."

22. A.I.Smith J. found against the Respondents on this issue on the following grounds:-

Vol.I p.236 (a) The Respondents operated the vessel as agent for the Owner, but this fact was not known to the Appellants.

Vol.I p.236 (b) The Respondents operated the vessel exactly as an owner would have done.

(c) The Respondents contracted to carry the Appellants' goods and accepted

Vol.I p.236 them at Halifax on board the vessel and had them under their control and in their possession.

(d) No seaboard or local bill of lading was issued, but had one been issued it would, in normal course but not invari-

Vol.I p.238 ably, have had the demise clause stamped on it.

(e) There is no proof that the demise clause was ever brought to the attention

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of the Appellants or that they ever had knowledge of it. Vol.I p.239

(f) It would be unreasonable to hold that the Plaintiff is bound by the conditions of the demise clause and that in any event the clause would not be a bar to the Plaintiff's action in so far as it is an action in tort. Vol.I p.239

23. It is respectfully submitted that finding (d) in Paragraph 22 above is contrary to the relevant evidence which is set out at (b) in Paragraph 21 above and that the learned Judge was confused by evidence given by Mr.Waugh on discovery in re-examination by the Appellants that some bills of lading had stamps on and some did not. Vol.I p.137 It is submitted that, in its context, it is clear that in this evidence the witness was referring to the rubber stamp used to delete the printed name "Canadian National (West Indies) Steamships, Limited" at the foot of the bill of lading and to substitute "Canadian Government Merchant Marine Ltd."

It is further respectfully submitted that in the face of the Appellants' acceptance of the Through Bill of Lading which expressly referred and was subject to "all the conditions expressed in local bills of lading used by the Steamship or Steamship Companies carrying this property" it is wholly irrelevant that the Appellants had no knowledge of the conditions of such bills of lading and of the fact that they included the demise clause.

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Lastly it is submitted that, if reasonableness be relevant, it is not unreasonable that the Appellants should be bound by the terms of the demise clause and that if the Appellants are bound by the demise clause, it would exclude liability in tort as well as in contract.

24. On the appeal to the Exchequer Court of Canada, this issue was again debated, but Cameron J., after setting out the Respondents' plea in this respect, said:-

Vol.I p.248

"By the judgment under appeal, that plea was stated to be unfounded and that finding is now accepted. It is expressly provided in the Bill of Lading (Exhibit P - 1") [the through bill of lading] "that it should have effect subject to the provisions of the Water Carriage of Goods Act, 1936...."

It is respectfully submitted that the Respondents by their Counsel did not accept the finding of A.I.Smith J. on this issue, although it is true that unless Cameron J. had reversed the District Court on the main issue, this issue was irrelevant. It is further respectfully submitted that the learned Judge's reference to the Water Carriage of Goods Act, 1936, which is wholly irrelevant to this issue, shows that he did not fully appreciate the significance of the Respondents' plea.

25. On the Appellants' appeal to the Supreme Court, the Respondents in their Factum submitted that this issue might at that

stage be resolved by the Court under Rule 50 and that the Respondents, while not abandoning the point, should perhaps do no more than to state the issue again and reiterate their plea upon it.

26. The Supreme Court did not decide this issue.

27. The Respondents therefore submit that this Appeal should be dismissed with costs and the judgment of the Supreme Court affirmed for the following amongst other

R E A S O N S

(1) BECAUSE the Appellants have not proved that the vessel was unseaworthy at any material time and that their goods were lost thereby.

(2) BECAUSE the Respondents performed their obligations under Article III rule 1 of the Rules contained in the Schedule to the Water Carriage of Goods Act, 1936.

(3) BECAUSE the Respondents are exonerated from liability by the provisions of Article IV rules 1 and 2(a) and (b) of the said Rules.

(4) BECAUSE the Respondents are exonerated from liability by the provisions of the "demise clause".

(5) BECAUSE the Judgment of the Supreme Court is right.

JOHN F. DONALDSON

No.13 of 1958.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

MAXINE FOOTWEAR CO.LIMITED
and J.ERIC MORIN

v

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED

# CASE FOR THE RESPONDENTS

RICHARDS, BUTLER & CO.,
88 Leadenhall Street,
London E.C.3.