A. Couturier & Fils Ltée (*Plaintiff*) *v.* **St. Simeon Navigation Inc.** (*Defendant*)

Walsh J. in Admiralty. Montreal, January 25, 26, 27, 28, 1971; Ottawa, May 20, 1971.

Shipping—Loss of deck cargo in heavy weather—Bill of lading relieving carrier of liability for deck cargo—No express statement in bill of lading that cargo would be stowed on deck—Shipper aware that cargo carried on deck—Whether ship seaworthy in foreseeable weather conditions—Onus of proof, whether shifting—Hague Rules, Art. I(c), III (8), IV(1), (2)(c), (2)(q) (Water Carriage of Goods Act, R.S.C. 1952, c. 291; Schedule)

Lumber stowed on a ship's deck was lost overboard in heavy weather and icing conditions on a crossing of the St. Lawrence River. In an action by the shipper against the carrier the court found that the loss resulted because lumber was stowed too high on deck for the stability of the ship in the foreseeable weather, and that the ship was not seaworthy at the time of her departure. The bill of lading stated that it was subject to the *Water Carriage of Goods Act* (the Hague Rules) and that any incompatible provision in the bill of lading was null. The bill of lading provided that cargo stowed on deck would be deemed to have been declared to be so stowed and that the carrier was not responsible for loss to goods so stowed from any cause whatsoever including negligence or unseaworthiness of the ship.

Art. I(*c*) of the Hague Rules excepts from the definition of "goods" cargo which by the contract of carriage is stated as being carried on deck and is so carried.

Held, the carrier was liable for the loss. It had not satisfied the onus of proof imposed by Art. IV(1) of the Hague Rules that it had exercised due diligence to make the ship seaworthy at the beginning of the voyage, nor (2) the onus imposed by Art. IV(2)(*q*) to prove that there was no fault or privity on its part or fault or neglect of its agents which contributed to the loss. Finally it had not proved that the loss was caused by perils of the sea (Art. IV(2)(*c*)).

While the bill of lading did not expressly state that lumber was being carried on deck, the provision in the bill of lading relieving the carrier of liability for deck cargo was not nullified under Art. III(8) of the Hague Rules since the shipper was aware that the lumber would be carried on deck. Nevertheless that relieving provision was incompatible with the Hague Rules and therefore did not have the effect of shifting from the carrier to the shipper the onus of proof under Art. IV(1) and (2)(*q*).

ACTION for damages for loss of cargo.

David Angus and *Vincent Prager* for plaintiff.

Richard Gaudreau for defendant.

WALSH J.—This claim arises from the loss of a quantity of lumber from the deck of a ship during a crossing of the St. Lawrence River from Marsoui, Quebec, on the south shore to Sept-Îles on the north shore in the winter of 1968. The proof revealed that on November 30, 1968, a cargo consisting of 461,500 board feet (full measure) of spruce lumber, 200 packages of lathes and 34 packages of shingles belonging to plaintiff was received on board the ship M.V. *Miron C* belonging to defendant, St. Simeon Navigation Inc., commanded by Captain Michel Taschereau, in good order and condition for carriage to Sept-Îles, Quebec, as appears from the bill of lading issued in connection with this shipment. The said ship left Marsoui at about 23.45 hours on November 30, 1968, and at about 01.10 hours on December 1 some 233,459 board feet of the spruce lumber fell from the deck into the sea and was lost, as well as the lathes and shingles, causing a loss to plaintiff in the amount of $20,357.09.

Plaintiff alleges that the loss was due to breach of contract by negligence of defendant and persons for whom they were responsible in that:

(*a*) The ship *Miron C* was unstable and unseaworthy at the commencement of the aforesaid voyage and defendant failed to exercise due diligence to ensure that she was in all respects stable and seaworthy and fit to carry plaintiff's cargo;

(*b*) The vessel was unstable for the proposed voyage;

(*c*) The lost cargo was improperly carried on deck;

(*d*) The entire cargo was poorly and improperly stowed and no lashings or weather-deck uprights were used;

(*e*) When the said voyage began, the ship *Miron C* was grossly overloaded, well beyond the legal and safe limitations, especially for winter navigation, the whole to the full knowledge of defendant;

(*f*) The defendants negligently failed prior to commencing the said voyage to determine that the weather conditions in the St. Lawrence River and Gulf would be safe for the intended voyage, and had they done so they would have been able to foresee the conditions actually encountered; and in any event said conditions should have been foreseen by defendant;

and that these negligent acts of defendant constitute gross negligence.

Defendant pleads that the ship was seaworthy prior to and following its loading at Marsoui, that it was not loaded below its permissible load line, that the proportion of lumber stowed on deck in relation to that stowed in the hold was not excessive, that the bundles of lumber stowed in the hold and on the deck below the bulwarks did not shift or suffer any damage, that the captain could not take the risk of staying at the dock in Marsoui since strong westerly winds had been forecast for the following

day, that when the ship left the wind was only 15 miles an hour but that soon after strong gusts of 30-40 miles an hour developed and that at 00.45 hours on December 1 heavy waves developed and the deck cargo was sprayed with water which froze on it, that at about 1.10 a.m. 5,000 feet of lumber on the port side slipped into the sea and Captain Taschereau then decided to make a half turn to take refuge in the port at Mont Louis, but before the manoeuvre was completed, the ship listed dangerously to starboard and some more of the deck cargo fell into the water, that this was due to no fault or negligence on his part but solely to strong gusts of wind and a build-up of ice on the cargo, and that despite the fact that defendant exercised reasonable diligence to maintain the seaworthiness of the ship it also invokes the non-responsibility clauses in the bill of lading, and, in particular, the clauses of non-responsibility with respect to deck cargo.

The bill of lading specified that it was subject to the *Water Carriage of Goods Act*[1]. It went on to say that any disposition in the bill of lading incompatible with the said law and Schedule would be null and of no effect. Under the conditions it provided that the goods could be carried below or on the deck at the discretion of the carrier and that when stowed on deck they would be deemed to have been declared to be so stowed without any specific mention to this effect on the face of the bill of lading, and that with respect to such goods the carrier assumes no responsibility for any loss from any cause whatsoever including negligence or unseaworthiness of the ship prior to departure or during the voyage.

Plaintiff's counsel contended that since Art. I(*c*) of the Hague Rules defines goods as

> ... goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried,

the lost lumber was not subject to this condition since it was not specifically stated in the bill of lading as being carried on deck. In support of this contention he referred to *Tetley, Marine Cargo Claims* at page 193 where, after reviewing American and British jurisprudence, the author concludes:

> ... the proper interpretation of the Rules is that deck carriage, without a statement to that effect on the face of the bill of lading, is such a breach of the contract that the contract is null or can be nullified and that the carrier cannot benefit under the contract or the Rules. (See c. 3, "Nullity of the Contract Under the Hague Rules".)

However, in the next paragraph he states:

> If, however, deck carriage was agreed on, but a clean bill of lading was issued in error, then, as between the original parties—shipper and carrier—the carrier may show that a clean or under-deck bill of lading was issued in error and that the parties had agreed to stowage on deck. (*Texas Petroleum Corp. v. S.S. Lykes* [1944] A.M.C. 1128.)

While there is no question here that there was any error in the bill of lading, it appears to me that this latter quotation would apply, as the plaintiff was

[1] R.S.C. 1952, c. 291 and the Schedule thereto (i.e. The Hague Rules).

well aware that the greater portion of the cargo was being stowed on deck, having participated in the stowage, and this moreover was the invariable practice in connection with cargoes of this sort on river boats of this type, so that it would be superfluous and unnecessary to specifically state in the bill of lading that a portion of the cargo was being stowed on deck, since this was well known, understood, and tacitly agreed to by all parties. This is not to say, however, that the condition of non-responsibility with respect to the deck cargo has the effect, as it would indicate, of excepting even negligence or unseaworthiness of the ship, to the extent that this condition is contrary to the *Water Carriage of Goods Act* and the Hague Rules contained in the Schedule thereto which were clearly made part of the bill of lading. Even if the goods were carried on deck with the knowledge of plaintiff, and despite this special condition, the carrier is still obliged to be careful of the goods and must stow them properly and not be negligent [2]. See also *Ponce* [3].

While defendant relies primarily on s. 2(*c*) of Art. IV of the Hague Rules excepting it from responsibility for damages resulting from "perils, danger and acts of the sea or other navigable waters" it also relies on s. 2(*q*) of Art. IV reading as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
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> * * *
>
> (*q*) any other cause arising without the actual fault and 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.

In this exception the burden of proof is on it. Since the definition of "goods" (*supra*) excepts cargo "which by the contract of carriage is stated as being carried on deck and is so carried" and I have found that the present cargo, while not specifically stated to be carried on deck, was so carried with the knowledge and approval of the shipper, the special condition in the bill of lading relating to the ship's cargo is therefore not null and void as being contrary to s. 8 of Art. III of the Hague Rules which reads as follows:

> 8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with *goods*

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[2] *Globe Solvents Co. v. SS California* [1946] A.M.C. 674 at p. 680: "The right to stow libellant's cargo on deck... did not relieve the respondent from the obligation to use reasonable care in reducing that risk to a minimum, which degree of care the respondent failed to exercise." (Referred to in *Tetley (supra)* at p. 192.)

[3] [1946] A.M.C. 1124: "Where goods are shipped on deck at shipper's risk, the carrier is not relieved of due care and attention toward the cargo." Cour d'Appel d'Aix (*Bagheera*, March 29, 1960), (1961) D.M.F. 525; Cour d'Appel d'Aix (*Dubreka*, March 27, 1952), (1952) D.M.F. 413: the carrier was obliged to exercise care even though the cargo was loaded on deck and a bill of lading clause put all the risks on the shipper. Cour d'Appel de Paris (*Nyombi*, December 1, 1952), (1953) D.M.F. 130. *Shaw, Sawill & Albion Co. v. Electric Reduction Sales Co. (The Mahia)* [1955] 1 Lloyd's Rep. 265; (1955) R.L. 393 (Quebec).

> arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.
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> A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability. (Italics mine)

Moreover, s. 1 of Art. IV of the Hague Rules reads, in part, as follows:

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

Here, too, the burden of proof is cast on the defendant if unseaworthiness is established.

The question arises as to what effect should be given the special condition clause in the bill of lading with respect to the deck cargo which I have found to be not invalid as being in conflict with s. 8 of Art. III of the Rules but which, nevertheless, seems to conflict with the burden of proof cast on the carrier by s. 1 of Art. IV and s. 2(*q*) of Art. IV in that it attempts to exclude responsibility of the carrier for negligence or unseaworthiness of the ship. Certainly, it could not be used to exclude gross negligence, but does it have the effect of shifting the burden of proof to the shipper to establish, with respect to this deck cargo, negligence on the part of the carrier? After careful consideration, I have come to the conclusion that the special condition relating to deck cargo does not have the effect of shifting the burden of proof. While the exclusion of such cargo from the definition of "goods" may have the effect of preventing the condition from being considered null and void by virtue of s. 8 of Art. III of the Hague Rules, the bill of lading itself explicitly states that any provision in it incompatible with the law or annex (i.e. the *Water Carriage of Goods Act* and the Hague Rules contained in the Schedule thereto) shall be null and of no effect, and I would certainly consider it contrary to s. 1 of Art. IV of the Hague Rules which places the burden of proving the exercise of due diligence on the carrier when the loss results from unseaworthiness, and s. 2(*q*) of Art. IV of the said Rules which places the burden of proof on the carrier to show that there was no fault or privity on its part nor fault or neglect of its agents when the damage results from "any other cause" to state, as the special condition does, that damage resulting even from negligence of the carrier or the unseaworthiness of the vessel shall be excluded. I will deal with the extent of this burden of proof later.

I now turn to the question of the seaworthiness of the vessel at the time of commencement of the voyage. The evidence did not disclose any defect in the vessel itself nor that it was improperly manned so the unseaworthiness, if any, must result from the manner in which it was loaded for the voyage in question, taking into due consideration the nature of the cargo, the manner in which it was stowed, the proportion stowed below deck in the hold compared with that loaded on the deck, any special characteristics of the vessel, the nature of the voyage, and the weather conditions which could reasonably be anticipated for the time of year in

this locality. With respect to the manner in which the lumber was loaded on deck (as distinct from the quantity so loaded), I can, after reviewing the somewhat conflicting evidence, find no fault with this.

[*The learned Judge reviewed the evidence on this question, and proceeded:*]

Leaving aside for the moment the question of the quantity of lumber stowed on deck as against that stowed in the hold, I cannot find, in view of this evidence, that the manner in which the lumber on deck was placed was improper or not in accordance with the usual practice, or that it should have been braced or held by uprights attached to the bulwarks of the ship, as this would have been dangerous.

There was conflicting evidence with respect to the weight of cargo which the ship *Miron C* could carry without being overloaded and the weight of the cargo of lumber loaded on her on this occasion.

[*The learned Judge reviewed the evidence on this question, and proceeded:*]

From the above evidence it appears clear that the vessel could be loaded with a weight of 500 to 510 short tons in summer and 485 to 495 in winter, and with the exception of the evidence of Captain Matheson whose weight figures of 3 to 3.4 tons per St. Petersberg measure, do not seem to be justified or borne out either by weight tables from the United States Government publication *Modern Ship Stowage* which he referred to himself in evidence or by the evidence of Mr. Bisaillon based on well known tables used by the Canadian Lumberman's Association, or by the actual weight of similar lumber shipped by train by plaintiff herein, which seems to be the most significant index, the evidence indicates that the lumber did not weigh more than 471 tons and, even adding 12 tons for water, oil and supplies and 4 tons for the lathes and shingles, the total weight would only have been slightly in excess of 485 short tons at most, so it is reasonable to conclude that the vessel was not overloaded, although undoubtedly loaded nearly to capacity. I cannot find therefore that the vessel was unseaworthy from the point of view of carrying too heavy a load or that she was loaded beyond her permissible load limit, and this despite the load line readings taken by Captain Taschereau at the time of the departure, which might so indicate. It must be remembered that this was late at night and that the sea was quite rough with substantial waves hitting the side of the vessel, so it is unlikely that any reading taken from the marks on the side of the vessel under such conditions would be accurate within the margin of several inches one way or the other.

To conclude that the ship was not overloaded, however, is not to say that she was in a condition of stability, as this is a different matter. A vessel can be overloaded without being unstable and, conversely, can be unstable without being loaded to excess. It is the distribution of the load and its effect on the centre of gravity of the loaded vessel which is the important factor. As the witness Lebas pointed out, if the vessel had been loaded with lead all in the hold the centre of gravity would be very low, and she would be very stable even if heavily loaded, while if she were

loaded with a cargo of corn flakes of the same weight, so much would have to be carried on deck because of the bulk in comparison with the weight, and the cartons would therefore have to be stacked so high that it can readily be seen that a highly unstable condition would be created, especially with respect to the cargo loaded on deck. We therefore must examine the distribution of the load, which is of vital importance.

[*The learned Judge reviewed the evidence on this question, and proceeded:*]

This evidence leads to a conclusion that on this voyage not less than 60% of the lumber was stowed on deck as against 40% in the hold and, in fact, the ratio may very well have been 65% to 35%. The lumber on deck was 12 feet high or more, and that in the hold only 8 feet high, and only about 8 feet of the vessel was immersed in the water so some of the lumber in the hold would also be above the water line. The question of whether this rendered the vessel unstable or not is difficult to determine. It is undoubtedly true that it is the practice in coastal vessels carrying lumber to load a greater quantity on deck than what can be loaded in the hold and this is not always necessarily a bad practice, but the problem arises as to what constitutes a safe ratio and, more specifically, what was a safe ratio for the *Miron C* at this time of year and in view of the weather conditions that could reasonably be foreseen in this part of the river at that time. Captain Lavoie testified that he has twice seen cargoes of lumber fall overboard from these coastal vessels and the witness Stubbs testified that it is not uncommon for such deck cargo to be lost. The witness Couturier, manager of plaintiff, testified that there were about 80,000 to 90,000 board feet of additional lumber ready for shipment which was left in the yard because no more could be loaded on this particular voyage. The amount to be loaded is the responsibility of the captain, but it is evident that both he and the shippers desire at all times that as full a load as possible be taken. In fact, Captain Lavoie, the owner of defendant St. Simeon Navigation Inc., admitted that a complaint had been laid against the *Miron C* in November 1968 for loading 609 tons of cement in August, thereby lowering the ship six inches below the load line. They were made to take off 60 tons and pleaded guilty to this charge. On previous trips the ship had taken 627 tons, 704 tons, 628 tons, 660 tons and 535 tons of cement in the hold. According to him, after the conviction the load was never permitted to exceed 500 tons and there is no evidence that Captain Taschereau ever loaded the vessel beyond the legally permissible limit. It is evident, however, that defendant was in the habit of overloading the ship weightwise until it was found guilty of so doing and the conviction caused the owners to change their practice. It seems a reasonable inference with respect to the volume of cargo that the owners would also be willing to take chances and load as much cargo as possible. In fact I am left with the impression that most of the carriers involved in this coastal trade take chances and load deck cargo up to and in excess of what may be a safe limit, and accept the risk of losing some of it from time to time which can be weighed

against the profit to be made by carrying a larger load. For this reason I cannot place too much reliance on the evidence of the various witnesses that it is the practice of the trade to carry more lumber on deck than can be stowed in the hold as, while this may be a common practice, it does not necessarily prove that it is a good practice, nor that it does not involve certain risks that the stability of the vessel may be affected.

However, the evidence of the witness Stubbs that the *Miron C* was in a stable condition when she left Marsoui cannot be set aside. Nevertheless, I believe that what may be a stable condition, calculated by a mathematical computation based on figures derived from the best evidence available as to the distribution of the lumber, and the probable weight of same, the probable weight of the vessel, and the dimensions and shape of it, while it may establish a safe degree of stability for a vessel so loaded and proceeding in still waters, may nevertheless be substantially altered if the weather conditions cause the deck cargo to be covered with ice and a heavy wind and waves cause the vessel to roll. No evidence was given as to the weight of the ice which might have gathered from the freezing spray on the deck cargo and superstructure of the vessel, but it is evident that this might have had a substantial effect on the calculations.

Leaving aside for a moment the defence of perils of the sea which I will deal with later, we have the evidence of Captain Matheson who pointed out that the freezing spray would freeze only on the deck cargo changing the weight of it, and not on the lumber stowed in the hold, the weight of which would remain unchanged. Captain Anderson, who is very familiar with the area, stated that a north-west wind causes big waves and swells on the south coast in the vicinity of Marsoui and it is his opinion that the loss was caused by the movement of the sea and the gathering of ice. Not only does the ice affect the weight above deck and hence decrease the stability, but it would also have the effect of decreasing the coefficient of friction and make the cargo more apt to slide readily on the bundles below. The witness Lebas testified that a captain needs experience to understand his ship and that he is the best judge of whether or not it is stable. Captain Taschereau became master of the *Miron C* on September 5, 1968, shortly after obtaining his captain's certificate and had made two trips for the plaintiff before the unfortunate voyage in question. He testified that the crossing normally takes 9 or 10 hours and that it is 7 or 8 hours before the ship reaches the shelter of the north shore as it approaches Sept-Îles. He stated that an hour or so after leaving Marsoui the wind had increased from 15 miles an hour to 25 or 30 miles an hour in gusts accompanied by freezing spray, but that the ship was rolling normally. When the top row of wood began to slide, he lost about fifteen bundles on the port side. This would represent about 5,000 board feet, weighing about 7 tons, and Captain Matheson, in his affidavit, stated that this should not have given a dangerous list to the vessel had she been otherwise stable. In view of this loss, however, Captain Taschereau commenced to turn to starboard

to go to the south-east and head for shelter at Mont Louis on the south shore, and as he turned the waves hit the vessel in such a way that she rolled and he lost the rest of the deck cargo above the bulwarks when it slid off to starboard all at once. It is evident that the loss of 7 tons on the port side of the vessel would have caused some list to starboard and the turn in this direction, with the wind and waves hitting the vessel from the north-west, would have accentuated this. The Captain himself admitted that the waves and swell made a difference. It would not have required much of a list for the edge of the deck to go slightly under water, and if this took place the cargo on the starboard side, being a buoyant cargo, might well have been lifted somewhat by the water, making it slide all the more readily in its ice covered condition. He testified that after the loss, the ship then rolled violently instead of sluggishly, and on re-examination he attributed the loss to the action of the waves. He conceded, however, that at that time of the year these winds and waves were not unusual.

It appears to me that in deciding how much lumber can be carried on deck in proportion to that carried in the hold, consideration must be given, when loading, to the time of year and weather conditions that are foreseeable, and the effect that icing might have on changing the centre of gravity, and that provision should be made for this by carrying less deck cargo. After losing the bundles of lumber loaded above the bulwarks, the ship resumed her voyage and arrived without incident at Sept-Îles at 10 a.m. that day having taken not much longer on the crossing than usual. I find, therefore, that had the lumber not been stacked so high on deck, it is unlikely that any of it would have been lost, and that the ship was not seaworthy in this respect at the moment of departure from Marsoui, because it was not sufficiently stable to remain unaffected by the weather conditions which might be, and were in fact, encountered. This would seem to be the only reasonable explanation for the loss of the cargo.

The burden of proof is thus transferred to defendant by virtue of s. 1 of Art. IV the second paragraph of which reads as follows:

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

The extent of this burden has been considered by the Supreme Court in the case of *Western Canada Steamship Co. v. Can. Commercial Corp.*[4] in which Ritchie J., rendering the judgment of the court, said at page 641:

> It seems to me that the distinction between the statutory burden of proof imposed by art. IV, Rule I and the burden which falls on a party to a collision who is required to rely upon "inevitable accident" by way of defence is that in the latter case the issue to be determined is confined to "the cause" of the collision whereas in the former "unseaworthiness" must have already been determined to be a "cause" of the loss before any burden is cast upon the carrier at all.
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> When, as in the present case, unseaworthiness has been shown to be the cause, the burden then arising under art. IV is limited to that of "proving the exercise of due diligence to make the ship seaworthy before and at the beginning

[4] [1960] S.C.R. 632.

> of the voyage". Notwithstanding the views expressed by Davey J.A., this language does not, in my view, serve to shift to the carrier the onus of proving either the cause of the loss or the cause of the unseaworthiness and should not be treated as going so far "as to make him prove all the circumstances which explain an obscure situation" such as the one here disclosed (see *Dominion Tankers Ltd v. Shell Petroleum Co.* ([1939] Ex. C.R. 192 at 203, 3 D.L.R. 646, 50 C.R.T.C. 191), per Maclean J.)

In view of my conclusion of fact that the piling of the lumber too high on the deck in view of the possible weather conditions that might reasonably be anticipated, made the ship unseaworthy, and since this was the responsibility of Captain Taschereau, I find that defendant has not succeeded in proving the exercise of due diligence to make the ship seaworthy before and at the beginning of the voyage.

Defendant attempted to avail itself of the exception of s. 2(*c*) under Art. IV which reads as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
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> * * *
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> (*c*) perils, danger, and accidents of the sea or other navigable waters;

Captain Taschereau made no error in judgment in putting to sea when he did after the loading of the vessel was completed, as the forecast indicated that the storm would not hit until the next day, and, in any event, his evidence to the effect that it would have been dangerous to have remained in the port at Marsoui in the wind and weather conditions forecast is fully corroborated. It was his misfortune that the wind increased in intensity from 15 miles an hour to 25 to 30 miles an hour soon after his departure, with accompanying waves striking the vessel at an angle of about 30 degrees from the direction of his course, and it is, in fact, likely that if these winds and waves had not been encountered, none of the cargo would have been lost. However, that is not to say that the loss can be attributed to perils of the sea, since he himself testified that at that time of year in that locality winds of this force are not unusual. It is true that in the Supreme Court case of *Keystone Transports Ltd. v. Dom. Steel & Coal Corp.*[5] Taschereau J., in rendering the judgment of the court, stated at page 505:

> From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, *when such damage cannot be attributed to someone's negligence.* (Italics mine)

In the Exchequer Court case of *Parrish & Heimbecker Ltd v. Burke Towing & Salvage Co.*[6] Maclean J. held at pages 177-78:

> ...The question is, was there such a peril of the sea as that against which the insured undertook to indemnify the carrier. To say there was no peril of the sea because the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about what happened here, appear to me to be not a true test;

but in that case there has been a finding that the cargo was properly loaded and stowed and that the ship was seaworthy. The distinction beteewn actions

[5] [1942] S.C.R. 495.
[6] [1942] Ex.C.R. 159.

under a marine policy and actions on a bill of lading in which the burden of proof is quite different is well set out in the case of *Donaldson Line Ltd v. Hugh Russell & Sons Ltd*[7] where Hall J. stated at page 712:

> In an action on a marine policy, the burden of proof rests upon the plaintiff, the insured, to establish the fact that the damage was due to a peril of the sea, and the proximate cause alone is considered; whereas in an action on a bill of lading, the burden of proof is on the defendants, the shipowners, to establish their right to claim the benefit of the exception "perils of the sea," in support of which they may offer evidence, not only of the proximate cause, but even of what has been called "the dominant cause."
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> Continuing his exposition, Lord Herschell quotes, with approval, the following passage from Willes, J. (*Grill v. Gen'l Iron Screw Collier Co.*) (1866), L.R. 1 C.P. 600 at pp. 611-12,
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> > "I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant."

Again, at page 714, he states:

> In the case now before us, there was nothing fortuitous or unexpected in the violent wave encountered during the course of a gale. That such incidents are of frequent occurrence in the North Atlantic is admitted by the Captain and Officers.

This judgment also refers to the case of *Canadian National Steamships v. Bayliss* [1937] 1 D.L.R. 545, S.C.R. 261, which held:

> Upon an action against a carrier for damages to goods shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea, the grounds of defence were, first that, the carrier having established at the trial a *prima facie* case of loss by a peril of the sea, the burden of proving negligence consequently rested on the respondent, and secondly, that the carrier had discharged the burden of proof resting on him under clause q, rule 2, article 3 of the schedule of the Barbados Carriage of Goods by Sea Act, 1926, which was made applicable to the contract.
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> *Held* that, the issue raised by the first ground being an issue of fact, it was incumbent upon the carrier to acquit himself of the onus of showing that the weather encountered during the voyage was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.

As I have concluded that, although it was the action of the wind and sea which caused the loss of the greater part of the deck cargo, this loss would not have taken place had this cargo not been loaded too high on deck for

[7] [1940] 3 D.L.R. 693.

the foreseeable weather conditions to be encountered, I cannot find that the loss was due primarily to the perils of the sea or that defendant can avail itself of this exception.

This leaves only the general exception under s. 2(*q*) of Art. IV which applies when the damage results "from any other cause" (i.e. not one of the possible causes enumerated in the other paragraphs of the said section), but to avail itself of this exception the burden of proof is on the carrier to establish that this took place without the fault or privity of the carrier nor the fault or neglect of its agents or servants, and since I have found that such neglect did exist in the loading of the lumber too high on the deck, defendant cannot avail itself of this exception either.

While it is not necessary to rely on the maxim *res ipsa loquitur* to decide this case in view of the findings I have made, it would appear that the facts might well have justified such an application since, if the goods were not lost as a result of perils of the sea, and should a conclusion have been reached that the vessel was seaworthy and not overloaded either weight-wise or with respect to the quantity of cargo stowed on deck, it would have been difficult to determine what caused the loss, and lead to a justifiable inference that there must have been some unspecified fault on the part of the carrier. The doctrine in Quebec law has been set out in the case of *Parent v. Lapointe*[8] where Taschereau J. said:

[TRANSLATION]

> There is not in the case before us a legal presumption against the defendant. In order that he be held responsible for the consequences of the accident of which he himself was an unfortunate victim his fault must be proved. It is not essential that this be by a direct proof; it could be by conclusions which the circumstances justify drawing and by inferences which flow from the established facts.
>
> When in the normal cause of affairs an event should not take place but, nevertheless, does so and causes damage to another and when it is evident that it would not have happened if there had not been negligence, then it is up to the initiator of this to show that there was another cause for which he could not be held responsible and which is the origin of the damage.

In this case defendant would have failed to rebut this presumption.

Judgment is therefore rendered in favour of plaintiff in the amount of $20,357.09 and costs.

[8] [1952] 1 S.C.R. 376 at 381.