BETWEEN:

A/S *MOTOR TRAMP* .....APPELLANT (*Defendant*);

1959
Jan. 19
Feb. 22

AND

IRONCO PRODUCTS LIMITED RESPONDENT (*Plaintiff*).

Shipping—Practice—Appeal from order of District Judge in Admiralty—Appeal Court will not interfere with discretion of trial judge unless exercised on wrong principle or there had been a wrongful exercise of the discretionary power—Appeal from District Judge in Admiralty dismissed.

Held: That an Appeal Court should not interfere with the discretion of a Judge acting within his jurisdiction unless the Appeal Court is clearly satisfied that he was wrong and the wider the discretion of the Court below, the less disposed should be the Court of Appeal to reverse the trial judge's order.

2. That the Appeal Court in order to reverse the trial judge's order must say that he applied a wrong principle or there had been a wrongful exercise of his discretionary power even though the Appeal Court might have exercised his discretion differently if he had been the judge of first instance.

APPEAL from order of District Judge in Admiralty for the British Columbia Admiralty District.

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The appeal was heard before the Honourable Mr. Justice Kearney at Ottawa.

Francis Gerity for appellant.

D. McKenzie Brown for respondent.

KEARNEY J. now (April 22, 1959) delivered the following judgment:

This appeal concerns a matter of procedure and practice and involves the application of the General Rules and Orders in Admiralty of this Court. The Honourable Mr. Justice Sidney A. Smith, District Judge in Admiralty, British Columbia Admiralty District, by an *ex parte* order dated August 11, 1958, granted to the respondent an extension of time, within which to effect service on the appellant of a writ of summons which had been issued on August 31, 1956. The appellant moved to have the order set aside. By judgment rendered at Vancouver on October 23, 1958, the learned District Judge held, *inter alia,* that the long delay which occurred was due to a *bona fide* misunderstanding between counsel, and he confirmed his previous order. The appellant contends that the existing circumstances did not warrant the foregoing extension. Hence the present appeal.

The respondent's claim is for damages caused to goods in transit. It is based on a bill of lading in virtue of which Clay Cross (Iron & Foundries) Ltd. shipped from Hull, England, to the respondent as consignee, a quantity of pipe on the SS *Vedby,* which was delivered allegedly in a damaged state at Vancouver, on or about June 26, 1955. The terms and conditions of shipment are contained in three bills of lading but reference need be made to only one of them, copy of which was filed as respondent's exhibit "G". By clause 1 of the conditions of this bill of lading, it was agreed by the parties thereto that the rules of the United Kingdom statute entitled *The Carriage of Goods by Sea Act,* 1924, 14 and 15 Geo. V, c. 22, should apply, and the material portion of article III, rule 6, states:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Apart from the shipper Clay Cross (Iron & Foundries) Ltd. and the respondent as consignee, the other parties to the bill of lading were Canadian Transport Co. Ltd. as charterer, hereafter sometimes referred to as "the transport company" or "the charterer", and the appellant as carrier, sometimes referred to later as "the owner-appellant" or "the owner"; and the bill of lading was signed on the latter's behalf (name on photostat illegible) per W. F. Knowles, as agents.

The bill of lading contained also what is known as a demise clause which has the effect of exonerating the charterer of the ship who is a time charterer and not a charterer by demise, from personal responsibility for any damage in transit to the goods of the respondent.

The charterparty (Ex. "I") is described as a uniform time-charter, and by clause 9 the charterer is required to indemnify the owner for losses such as contemplated in the present instance.

The relevant General Rules and Orders in Admiralty approved by His Excellency the Governor General in Council, P.C. 1495, dated June 22, 1939, effective June 29, 1939, which require consideration are:

Rule 5—Every action shall be commenced by a writ of summons which, before being issued shall be indorsed with a statement of the nature of the claim and of the relief or remedy required, and of the amount claimed, if any. Forms of writ of summons and of the indorsements thereon will be found in the Appendix hereto, Nos. 5, 6, 7, 9 and 10;

Rule 9—The Judge may allow the plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the Judge shall seem fit;

Rule 17—The writ of summons, whether *in rem* or *in personam,* may be served by the plaintiff or his agent within *twelve months* from the date thereof, and shall, after service, be filed with an affidavit of such service;

Rule 200—The judge may enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed;

and Form No. 6, pp. 44 and 45, which prescribes the form and content of a writ of summons *in personam,* the material portion thereof being as follows:

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

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On August 31, 1956, the respondent issued three concurrent writs: one against the SS *Vedby,* another against the transport company, and the third against the owner-appellant in the present case. The writ against the ship was never served, but under circumstances later described, on July 18, 1957, service of the writ against the transport company was accepted by its counsel, and the writ giving rise to the present action was served on the appellant on September 15, 1958.

Prior to the intervention of counsel in the case, the respondent shortly after the arrival of the goods in question wrote directly to the charterer under date of June 30, 1955, to notify it that it was being held responsible for damage sustained by the shipment in question and that a detailed claim would be prepared as soon as the extent of the loss, which it felt would be considerable, had been ascertained. Nothing further occurred until June 4, 1956, when counsel for the respondent, owing to the delay of the respondent's insurance underwriters in determining the amount of the damage, wrote to the charterer requesting an extension of three months within which to issue writs of summons against the SS *Vedby* and/or her owners and charterers. The charterers referred this request to their attorneys whose reply of June 5 is couched in these terms:

re: SS *VEDBY*—Ironco Products Ltd. claim

Your letter to Canadian Transport Company Limited has been handed to us for attention.

We are instructed to allow Ironco Products Ltd. an extension of time for filing suit for three months from today. The extension therefore will expire on September 4, 1956.

The next exchange of correspondence occurred in July of the following year, when counsel for the respondent requested the same counsel who apparently, on behalf of the SS *Vedby,* her owner and charterer, had granted the three months' extension to accept service of these writs. The reply received was the following:

Re: Ironco Products Ltd. v. The Steamship *Vedby*
Ironco Products Ltd. v. Canadian Transport Company Ltd.
Ironco Products Ltd. v. A/S *Motor Tramp*

We have your letter of July 15, 1957.

We are obtaining instructions regarding accepting service of the Writ on behalf of Canadian Transport Company Limited and will advise you in due course.

We have no instructions from the SS. *Vedby* or her owners A/S *Motor Tramp* and consequently, cannot accept service of either of these Writs. We return them herewith.

This evidence was before the learned District Judge, together with copies of further correspondence between the solicitors and of their conflicting affidavits, dealing with the nature and purpose of discussions which occurred between them. It shows that, while conceding that its action against the charterer is untenable in law, the solicitors for the respondent contended that the writs of summons issued against the SS *Vedby* and the appellant were not served upon the ship or its owner within the delay prescribed by Form 6 because of the negotiations carried on between them and the solicitors for the charterer, from April 1957 to August 1, 1958. These negotiations had led the solicitors for the respondent to believe that the charterer and its counsel had authority to negotiate and effect a settlement on behalf of the ship and its owner, and that an offer of settlement was to be made.

The proof likewise discloses that counsel for the charterer denied the respondent's contentions and alleged that they were concerned with the defence of the claim against the charterer and nobody else; that this should have been obvious to counsel for the respondent at the time when acceptance of service of the writs issued against the ship and her owner was refused and the writs returned to them; that meetings were held only to ascertain the *quantum* of damages the respondent could prove, and that at these meetings nothing was said that would have justified a belief that an offer of settlement was to be made, or that the charterer would assume liability, as that question had not been discussed. Further, that the solicitors representing the charterer stated also that they were well aware of the demise clause but that the solicitors for the respondent apparently were not, and their failure to serve the writs on the owner or the vessel was due either to a misconception on the part of the solicitors for the respondent of the latter's rights, or the failure to ascertain that the charterer had no responsibility with respect to the carriage of the goods.

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In the judgment appealed from the learned District Judge observed that the main ground upon which the appellant had relied to set aside his previous *ex parte* order granting the extension was that, under his own ruling in *Donald H. Bain Ltd. v. The Ship Martin Bakke*[1], he had held that he had no power to make such an order. The learned District Judge went on to say that, on the strength of rule 200 which had not been cited in the *Bakke* motion, he had come to the conclusion that he did have such power of extension. He then added:

> It is not suggested here that any statute of limitations has run, but affidavits have been filed to show that I should have exercised my discretion against extension because the Plaintiff's solicitors had not shown due diligence in serving the writ, and it was said the delay was not adequately explained. I think possibly greater diligence could have been shown, but that there was a *bona fide* misunderstanding between the solicitors as to the authority of those negotiating for the "ship" interests, and that there was reasonable excuse for the delay in service. I am decidedly of opinion that the Court, where it has power should lean against technical objections tending to prevent the litigation of reasonable claims.
>
> I therefore hold that my former order should stand. However as my language in the Martin Bakke case gave grounds for the motion, its dismissal will be without costs.

Counsel for the appellant in his submission that the learned District Judge should not have exercised his discretion in the manner he did, placed great reliance on a leading case in England of *Battersby v. Anglo-American Oil Co. Ltd.*[2] and its applicability to the facts of this case. The High Court reversing a previous order refused to grant the renewal of a writ which, although issued within the governing statutory limitation of one year as provided in the *Fatal Accidents Act,* 1846, was not served during its currency of twelve months, and an application to renew it instead of being made before the writ had expired was made considerably later.

The Court considered R.S.C., Or. 8, r. 1 and Or. 64, r. 7, which read as follows:

> Or. 8, r. 1: No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or a judge if satisfied that reasonable efforts have been made

[1] [1955] Ex. C.R. 241. [2] [1945] K.B. 23.

to serve such defendant, or for other good reason, may order that the original . . . writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

Or. 64, r. 7: The court or a judge shall have power to enlarge or abridge the time appointed by these rules . . . for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed . . .

The issue was highly controversial, as appears from the notes of Lord Justice Goddard who read the Judgment for the Court and stated at p. 28:

So when Stable J. renewed the writ, not only had the time for renewal expired, but more than twelve months had elapsed since the death of the deceased. The plaintiffs, however, contend, and in this have the support of the decision in *Holman v. George Elliot & Co., Ltd.*, [1944] K.B. 591. that the court has a discretion under Or. 64, r. 7, to enlarge the time for renewing the writ, and that it was, accordingly, open to Stable J. to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. That the widest discretion is given to the court under that rule none will deny, but there is a line of authority, unbroken till the recent decision in *Holman's* case (*supra*), that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued.

Counsel for the respondent, while pointing out that although under English rules the Court has a wide discretion, agreed that, if these rules were made to apply in this case, it would be difficult for him to succeed. He added with justification, I think, that, since special and markedly different provisions regarding extension of time with respect to service of a writ are contained in the *Canadian Admiralty Rules and Forms,* s. 35 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, cited hereunder, has no application:

The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in Her Majesty's High Court of Justice in England on the 1st day of January, 1928. 1928, c. 23, s. 4.

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The most important difference between the two sets of rules is the fact that no equivalent to Or. 8, r. 1, is to be found in *Canadian Admiralty Rules,* and it was on this rule that Lord Justice Goddard based his conclusion that a writ unserved during its currency is a nullity. He stated at p. 29:

> If the writ has ceased to be in force the position is the same as if it had never been issued. Otherwise we see no reason for the concluding words of r. 1 of the order which provides for a renewed writ preventing the operation of statutes of limitations.

The words, "This writ may be served within twelve months from the date thereof, exclusive of the day of such date, but not afterwards," as contained in Form 6, and which appear on the writ as a *nota bene* below the signature of the registrar who issued it, though less mandatory, bears, it is true, some resemblance to the first three lines of Or. 8, r. 1, but there all similarity ends. Our Admiralty Rules do not appear to attach special significance to the delay within which an application for extension is to be made, as is the case in England. Counsel for the respondent referred to a judgment of McRuer C.J.H.C. in *Robinson et al v. City of Cornwall*[1] with respect to another aspect of the present case, which I will deal with later, but it is worth noting here that, although his observations appear to be *obiter,* the learned Chief Justice made a comparison of Or. 8, r. 1, with rule 8 of the Supreme Court of Ontario, which reads as follows:

> The writ shall be in force for twelve months from the date thereof, including the day of such date; but if for any sufficient reason any defendant has not been served, the writ may at any time before its expiration, by order, be renewed for twelve months, and so from time to time during the currency of the renewed writ. The writ shall be marked by the proper officer, "renewed", with the date of the order.

The learned Chief Justice came to the conclusion that the terms of the above rule are more flexible than those of Or. 8, r. 1, and do not imply that a writ which is allowed to expire is null for all purposes, but that, if it is not served within the period of twelve months of its date, it is no longer in force for service, and speaking of discretion, he said at p. 599:

> In no case either in our Courts or in England has the question been dealt with on a basis that there is no discretion vested in the Court, but

[1] [1951] O.R. 587, 598.

rather on the basis of whether the discretion should be exercised to extend the time for renewal of the writ and service after the period fixed by the Statute of Limitations has run.

The memorandum referred to in Form 6 is what may be termed an endorsement on the writ with which we are concerned, and under Rule 9 the plaintiff may be allowed to amend the writ or an endorsement "on such terms as to the judge shall seem fit." The concluding words of Rule 200 are in similar terms and permit the judge to extend the time prescribed by the rules and forms "upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed."

I think that the discretionary power under Form 6 combined with Rule 200 is considerably wider than that afforded by the corresponding rules 8 and 176 of the Supreme Court of Ontario and, *a fortiori,* exceeds the discretionary power referred to in the *Battersby* case, and indeed a wider power of discretion would be difficult to envisage.

The learned Chief Justice of the High Court, in the *Robinson* case (*supra*), allowed the extension of the writ on an application made after its expiry date on the grounds that the plaintiff was induced to withhold service of it in the mistaken belief that the action would be settled. Counsel for the respondent submitted that a similar circumstance existed in the present case, inasmuch as the same counsel who had admittedly granted the extension of three months, which would have postponed the last day for service of the writ to September 5, 1957, requested counsel for the respondent, in a letter dated August 26, 1957 (Ex. E), to suspend further negotiations "until the second week in September because one of our members is away at a convention." The foregoing postponement meant that the extended period for the service of the writ, in the meantime, would have expired. It was also pointed out by counsel for the respondent that, at the time the postponement was suggested, counsel who made the suggestion was aware that no direct action lay against the charterer because of the demise clause. I have no doubt that counsel for the respondent mistakenly believed that a settlement would be forthcoming without the necessity of further proceedings, but I do not think counsel for the

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charterer was under any obligation to draw his attention to the existence of the demise clause which is to be found in the fine print but which is not an unusual one in modern bills of lading. See *Scrutton on Charterparties,* 16 ed., p. 62.

Although it may be urged that counsel for the respondent should not have allowed himself to be lulled into a false sense of security by the attitude adopted by counsel for the appellant, the fact remains, I think, that such was the case, and the important point is does such an occurrence under the circumstances serve to build up a reasonable excuse for the delay in service, and this depends on an appreciation of the facts.

The main purpose of placing a limitation on the time within which writs may be served is to prevent the prejudice caused by claims being brought against a defendant without prior notice, when due to lapse of time the memory of events has faded and evidence thereof is impossible or more difficult to procure. The learned District Judge was not dealing with a case where the respondent suffered such a prejudice because, apart from having had prior notice, the *quantum* of damages had been thoroughly and exhaustively investigated by counsel for the charterer.

As prescription was interrupted when a three months' delay for the commencement of the action was granted, which was binding on the appellant, I think it was in this sense that the learned District Judge used the expression "It is not suggested here that any statute of limitations had run." It is admitted that the charterer was in the position of having to indemnify the appellant against loss by reason of damage to the cargo.

The foregoing are some of the peculiar circumstances of this case which likely prompted the learned District Judge to exercise his discretion in the manner in which he did.

The appellant claims, however, and I must say that I think it has considerable merit, that even granting that for a time counsel for the respondent had good reason to think that the same counsel was acting on behalf of the owner, ship and charterer, he was no longer justified in doing so when on July 16, 1957, counsel for the charterer refused to accept service of the writs against the ship and its owner and returned them to counsel for the respondent.

In my opinion, the respondent and its advisers failed to attach to the letter of July 16 the importance it deserved and, although the wording of the letter could have been clearer, thereafter they had little justification for assuming that counsel for the charterer had authority to act in any capacity for the appellant. On receipt of that letter, the prescribed period for service of the writ still had about six weeks to run, during which the respondent should have either caused it to be served on the appellant or applied for an extension period within which to do so.

Apart from revealing the existence of a demise clause which required investigation, a careful perusal of the bill of lading would have also shown that, although the name of the charterer, Canadian Transport Company Limited, was printed in large bold type, the said bill of lading was not signed by the latter or by an agent on its behalf, but by an agent on behalf of the owner under the authority of the Master, which would be an indication that the owner, and not the charterer, was the carrier.

What I think appears to have occurred was that counsel for the respondent, notwithstanding the return of the two writs, continued in good faith to misjudge the intent of his discussions with opposing counsel which, if they had led to a settlement, might well have obviated further unnecessary costs. Such an understanding or misunderstanding of the situation, in my opinion, is attributable at least in part to failure to adhere sufficiently closely to prescribed rules of procedure. Where in lieu of observing the delays prescribed in the rules, counsel, believing that the only point at issue is the *quantum* of damages, chooses to rely on discussions with counsel for an adverse party, it is the part of prudence and sound practice to procure an admission of liability and a waiver of the prescriptive period provided in any relevant statute of limitations. It may be that in some quarters Admiralty Rules are taken less at the foot of the letter than are those governing other types of actions in the Exchequer Court, but such a course is fraught with danger and fails to take into account that opposing counsel in the interest of his client may be required to insist on a strict observance of the rules.

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Wetmore J., many years ago, in the case of *Moore v. May*[1], said:

> It may be very convenient to carry on a suit under a loose system of practice and in many cases such a style of practice may work out all right, but when a dispute arises, trouble is sure to come, and counter affidavits, inconveniences and unpleasant contradictions are sure to arise; whenever understandings are come to, they certainly ought to be carried out strictly and honourably, but practitioners so often have different impressions of the terms of an understanding that with the most correct intentions they differ most materially in their conclusions. In the present case, I shall decide the points before me upon my view of the correct practice of the Court . . . As to loose understandings, I say nothing about them except attorneys, if they think proper to practice upon them, of course, can do as they please; if they come out all right well and good, if not they must put up with the inconveniences so likely to arise, and not expect aid from the Court . . . in carrying them out when difficulties arise.

It is interesting to note that the above case and a similar one, *Knox v. Gregory*[2], were quoted with approval but not followed in *Ferguson v. Swedish-Canadian Lumber Company Limited*[3], a case in which, owing to a misunderstanding between counsel or someone's mistake, a judgment had gone by default. In annulling the default judgment and ordering a new trial, Barry J., speaking for the Court, said:

> We have, however, notwithstanding these adverse cases, unanimously come to the conclusion that under the peculiar circumstances of this case, and taking into account the several affidavits in which the merits of the defence have been sworn to, and the fact that through some one's mistake or misapprehension, or it may be through some one's neglect, the case was tried as an undefended one, there ought in the interests of justice, to be a new trial. That the Court has power to order a new trial where something has been done inadvertently or by mistake, or where there has been a slip in the proceedings, see *Germ Milling Co. v. Robinson* (1886) 3 T.L.R. 71.; but it is said in that case that it is a discretion which will be exercised with the greatest caution, and the application will only be granted where the justice of the case manifestly requires it.

With respect I do not think on balance that I would have granted the application if I had been the judge of first instance under the circumstances then existing. I do not think, however, that it necessarily follows that, even were I disposed to do so, I should substitute my views in this case for those of the learned District Judge. It is well settled that a Court of Appeal should not interfere

[1] (1880) 19 N.B.R. 506. [2] (1881) 21 N.B.R. 196.
[3] (1912) 41 N.B.R. 217, 220.

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with the discretion of a trial judge acting within his jurisdiction, merely because it would have exercised the discretion in a different way.

Viscount Simon, in the case of *Charles Ossenton & Co. v. Johnston*[1] stated:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

In *Evans v. Bartlam*[2] Lord Wright is reported as saying:

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle.

In my opinion, the wider the discretion of the Court below, the less disposed should be the Court of Appeal to reverse the trial judge's order.

Taking into account the peculiar circumstances of the present case and the very wide discretion afforded to the learned District Judge under our Admiralty Rules, I cannot say that he applied a wrong principle, or that there has been a wrongful exercise of his discretionary power. Albeit I might have exercised my discretion differently, if I had been the judge of first instance, I am unable to come to the clear conclusion that the learned District Judge gave too much credence and importance to some phases of the evidence and failed to take into account or give sufficient weight to others.

I am therefore of the opinion that the appeal should be dismissed and taxed costs allowed.

Judgment accordingly.

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[1] [1942] A.C. 130, 138.

[2] [1937] A.C. 473, 486.