

1938

QUEBEC ADMIRALTY DISTRICT

June 21.

BETWEEN:

Demers  
D.J.A.SHELL PETROLEUM COMPANY  
OF CANADA LIMITED .....

PLAINTIFF;

AND

DOMINION TANKERS LIMITED.....DEFENDANT.

*Shipping—Charter party—Bill of lading—Loss of cargo—Cause of loss unexplained—Liability of ship owner—Onus of proof—Water Carriage of Goods Act, R.S.C., 1927, c. 207.*

Plaintiff, by its agent, entered into a Charter Party with defendant for the carriage and transportation of a full cargo of gasoline, the property of plaintiff, on board defendant's vessel from Montreal, P.Q., to Sydney, N.S. Plaintiff alleged that the gasoline was shipped on board defendant's vessel which failed to deliver it at Sydney, but instead returned to Montreal and there discharged part of the cargo. Plaintiff claimed for the loss of part of the cargo and for other damage suffered by it.

Defendant alleged that the vessel during the course of the voyage stranded on rocks and boulders on the shore of the St. Lawrence river, and that the loss of cargo and damage suffered by plaintiff were due to faults and errors in the navigation of the vessel, and that defendant is not liable therefor. Defendant counter claimed to recover from plaintiff a proper proportion of the General Average losses, expenses and charges assessed against the cargo.

*Held:* That plaintiff being the owner of the cargo is entitled to maintain the action.

2. That defendant must explain its default in the delivery of the cargo.
3. That the stranding resulted from the fault of the pilot of the vessel and defendant is not liable for that damage consequent upon the stranding.
4. That the cause of loss of the balance of the cargo being in doubt and the defendant not having discharged the onus on it to prove that such loss did not occur through negligence of its servants, defendant must be held liable therefor.
5. That defendant is entitled to recover on its counter claim.

ACTION by plaintiff to recover damages for loss of cargo from defendant.

The action was tried before the Honourable Mr. Justice Phillippe Demers, D.J.A., Quebec Admiralty District, at Montreal.

*C. Russell McKenzie, K.C.* for plaintiff.

*R. C. Holden, K.C.* and *F. M. Wilkinson, K.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

DEMERS, D.J.A., now (June 21, 1938) delivered the following judgment:

Plaintiff, by its Statement of Claim, alleges that: on or about the 29th of July, 1935, the Shell Oil Company of Canada Limited for and on behalf of the plaintiff entered into a Charter Party with the defendant for the carriage and transportation of a full and complete cargo of gasoline on board the defendant's vessel called the *John A. McDougald* from the Port of Montreal to the Port of Sydney, N.S.

That at the Port of Montreal on or about the 3rd August, 1935, in accordance with the said Charter Party Agreement 547,909 imperial gallons of gasoline were shipped on board the said vessel *John A. McDougald* for carriage to the Port of Sydney, N.S.

That on or about the said 3rd day of August, 1935, the said vessel cleared from the Port of Montreal but failed to arrive at the Port of Sydney, N.S., or deliver her cargo thereat in accordance with the terms of the said Charter Party Agreement or at all.

That on or about the 5th of August, 1935, the said vessel returned to the Port of Montreal and discharged a portion of her original cargo amounting to 188,438 gallons but the defendant failed to deliver the balance of 359,471 gallons of gasoline at Montreal or at all.

That defendant failed to fulfil its obligations to carry and deliver the said cargo in accordance with the said Charter Party Agreement to the damage and prejudice of the plaintiff as owner of the said cargo.

That the particulars of the plaintiff's claim in the total amount of \$47,353.99 are as follows:—

Value of 547,909 Imperial Gallons of Gasoline shipped ex Montreal East Refinery on August 3rd at 13c per gallon.....	\$71,228 17	
Value of 188,438 Imperial Gallons of Gasoline discharged after accident, at 13c per gallon .....	24,496 94	\$46,731 23
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1938	Wharfage paid to Montreal Harbour Commissioners on Gasolene discharged after accident .....		70 40
SHELL	Value of 47 Gallons of Special Heavy Pale Oil at 30c per gallon This is one of a shipment of 62 Drums of Lubricating Oil only 61 of which were recovered .....		14 10
PETROLEUM	Value of one Oil Drum .....		3 00
CO. OF	Value of 60 Sample Oil Cans purchased from American Can Co. to draw off samples of Lubricating Oil .....		5 98
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	Forward.....		46,824 71
	Value of 15½ Imperial Gallons of Lubricating Oil drawn off from drums for testing purposes .....		5 96
	Expenses incurred at Montreal East Refinery—		
	<i>Re</i> unloading <i>McDougald</i>		
	Direct labour at wharf .....	\$43 40	
	Direct material charges .....	25 44	
	Laboratory tests .....	15 00	
	Trucking .....	2 50	
	Telephone calls (to and from Toronto) .	7 50	
	Gauging—4 hrs. at 65c.....	2 60	
		96 44	
	Overhead and supervision .....	24 11	120 55
	Rental of tank car from Canadian Car & Transit Co.—		
	14 days at \$2.50 per day.....	35 00	
	Switching charge from Vickers to Sec. 63—Longue Pointe .....	4 50	
	Canadian National Railway from Turcot and return .....	15 00	
	Harbour Commission charge from Turcot and return .....	9 00	63 50
	<i>Re</i> Unloading Lubricating Oil and Grease—		
	Labour .....	26 04	
	Material .....	5 80	
	Trucking .....	23 00	
	Overhead and supervision .....	13 71	
		68 55	34 27
	50% of Analysis of 61 samples of Lubricating Oil at \$5 per sample .....		305 00
	Total claim .....		\$47,353 99

Wherefore the plaintiff prays for judgment against the defendant in the amount of \$47,353.99, with interest and costs.

By its Statement of Defence and Counter-claim, defendant avers that: it denies all the allegations of the plaintiff's Statement of Claim except in so far as they are in accordance with the present Statement of Defence.

The loss of and/or damage to cargo, if any, which was sustained by the plaintiff was not due to any cause for which the defendant is responsible.

The defendant says that under the terms and conditions of a Charter Party, dated the 29th day of July, 1935, and under and by virtue of a Bill of Lading, dated at Montreal on the 3rd day of August, 1935, a cargo of gasolene amounting to 545,646 Imperial gallons was shipped on board the ss. *John A. McDougald*, owned by the defendant, destined for the Port of Sydney, N.S.

The said contract of carriage was subject to all the terms and provisions of and all the exemptions from liability contained in The Water Carriage of Goods Act, R.S.C., 1927, chap. 207.

At the commencement of the said voyage and prior thereto and until the time of stranding hereinafter referred to, the said vessel was in all respects seaworthy and properly manned, equipped and supplied.

The defendant, owner of the said vessel *John A. McDougald*, at the commencement of the said voyage and prior thereto and during the course thereof exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied.

At about 11.19 p.m. of August 3rd, 1935, during the course of the said voyage, the said ss. *John A. McDougald* stranded on rocks and boulders on the south shore of the St. Lawrence river near Ste. Antoine, in the Province of Quebec.

As a result of the said stranding, the ss. *John A. McDougald* sustained severe bottom damage and leaks and her cargo tanks and pipe lines and equipment were seriously damaged.

Efforts were made to release the ss. *John A. McDougald* from the strand and from time to time her cargo was transferred between different tanks to lighten the vessel forward and to keep her in proper trim, and with the assistance of the wrecking tug *Lord Strathcona*, she finally came afloat on the evening of August 4th, 1935.

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Owing to her seriously damaged condition, the said ss. *John A. McDougald* was unable to proceed on her voyage and returned to Montreal.

As the result of the damage occasioned to the said vessel and to her tanks and pipe lines and equipment by the stranding, a large quantity of her gasolene cargo was lost.

The cargo remaining on board the ss. *John A. McDougald* was discharged and delivered at Montreal.

The said stranding and damage and the loss of cargo claimed by the plaintiff were due to faults or errors in the navigation of the said ship, and under the contract of carriage and by law, the defendant is exempt from liability therefor.

Without waiver of the foregoing, the defendant alleges that if there were any loss of cargo apart from what escaped owing to the damage occasioned to the ship and to her tanks and pipe lines and equipment by the stranding, such loss was due to faults or errors in the management of the said ship, and that the defendant is exempt from liability for any loss which may have resulted therefrom.

The defendant also alleges alternatively that in any event any loss of and/or damage to cargo was due to dangers of the sea or other navigable waters or to other causes from the consequences of which the defendant is likewise exempt from liability under the contract of carriage and by law.

The plaintiff has not suffered the damages claimed.

The defendant is not indebted to the plaintiff in any amount for any cause or reason whatsoever.

The defendant prays that this action be dismissed with costs.

By its counterclaim, the defendant repeats the allegations contained in the Statement of Defence and says that as a result of the stranding and the damage and danger thereby occasioned and the efforts made to save the vessel and its remaining cargo, the defendant suffered losses and incurred expenses and charges in General Average or of a General Average nature in respect of which it is entitled to recover in General Average from the plaintiff.

The defendant says that under the said contract of carriage and by law, the defendant is entitled to recover

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from the plaintiff the proper proportion of the said General Average losses, expenses and charges assessed against the said cargo.

The proportion of the General Average losses, expenses and charges chargeable to the plaintiff amounts to \$1,827.65, and although a demand has been made on the plaintiff for the payment of the said amount, the plaintiff has refused to pay and still refuses to pay the said sum.

The defendant therefore claims from the plaintiff the sum of \$1,827.65 together with interest thereon from the 3rd day of August, 1935, and costs.

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1. The first point to decide is as to the right of action of plaintiff.

Plaintiff has shown that it was the proprietor of the goods.

Carver, Carriage by Sea, 9th edition, p. 687, says:—

It may be shown that the vendor in shipping was really acting as the buyer agent, although the Bill of Lading was made to his order.

It is also admitted that the principal in such a case can sue under the contract.

Corpus Juris, vol. 2, p. 874.

It is the application of the maxim *qui agit per alium agit per se*.

Moreover, by its Cross Demand, defendant has abandoned this point.

2. The second proposition submitted does not seem to be disputable, to wit, that it is for the defendant to explain its default in the delivery of the goods.

3. The third point as to the damages to tanks nos. 1, 2 and 3 on the port side, there is no doubt that such damages were the consequence of the stranding, that the stranding resulted from the fault of the pilot of the ship, and that the defendant, by the Charter Party Agreement, is not responsible in such a case.

The Court is satisfied that the defendant had fulfilled its obligation as to the seaworthiness of the ship and, in consequence, those damages cannot be allowed against it.

It is also admitted that, for the other tanks, the stranding might explain a loss of 300 gallons, but as there is a doubt on that question and as it applies to all the other

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tanks, I will allow a loss of 2,100 gallons caused by the stranding, to the other tanks.

4. As to the rest of the cargo, defendant has not satisfied the Court that the loss of those goods did not occur without any fault on its part.

(a) It is true that the protest of the master says there was no jettison, but this protest was not sworn to.

(b) In its plea and particulars, the defendant says:—

If there was any loss of cargo apart from what escaped owing to the damage occasioned to the ship and to her tanks and pipe lines and equipment by the stranding, such loss was due to faults or errors in the management of the said ship in that during the efforts made to release the vessel the valves and pipe lines connected with cargo tanks were opened or must have been opened by mistake by members of the crew which allowed gasoline to flow from less seriously damaged tanks into tanks which were found to be badly punctured.

Not a word of evidence has been brought in support of that allegation, and this allegation shows that in the mind of the defendant there was a great doubt, and it is very natural because an examination of the ship had then and there been made in the presence of the officers of the company, by one, Drake, who was acting for the company. By his report Drake had told them that the stranding was not sufficient to explain the loss.

(c) Captain Foote at p. 21 of his testimony is asked:—

Q. So there was just a slight leaking in number 5 port and starboard?

A. Yes.

Q. And I think you will agree with me, a similar answer as far as number 4 is concerned?

A. Yes, that was a slight leak there.

On p. 42, we see that the same witness is much in doubt:—

Q. I put this to you very seriously: that the leaks you referred to, that is, those slight leaks, once you had the cargo gone on the port tanks 1, 2 and 3, those leaks you referred to, would not account for the loss of the cargo?

A. I could not answer that as I did not see the bottom of the ship when she was sitting on the boulders, but the cargo went, and most of it gone through the damage.

It shows the doubt in his mind. It is true that later on (p. 43) he makes an argument:—

There was no pumping overboard of the cargo, therefore it went through the damaged bottom of the ship.

(d) But Captain Foote was not alone on that ship. There were three mates, and the First Mate Gallawin was not examined; he might have explained the loss.

One must not forget that defendant was interested to say that there was no voluntary jettison, though Captain Foote admits that it would have been a proper thing to do on the occasion.

The conclusion the Court arrives at is that this excess of loss is not satisfactorily proven. It is doubtful, and the doubt should be against the defendant. *Gosse Millard v. Canadian Government Merchant Marine Limited* (1).

I am of the opinion that the defendant has accounted for the loss of 174,543 gallons. I value the goods at twelve cents (\$0.12) per gallon and the goods unaccounted for at \$22,191.36, and judgment will go accordingly in favour of plaintiff for that amount, with costs and interest.

Coming now to the Cross Demand, this claim is justified by the Charter Party Agreement. It has been established by an adjuster appointed by the parties, a man of great experience, knowing all the rules and usages, and the Court does not feel disposed to interfere with his decision.

The Cross Demand is, therefore, maintained and the plaintiff is condemned to pay to defendant the sum of \$1,827.65, together with interest from the 3rd of August, 1935, and costs.

*Judgment accordingly.*

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(1) (1927) L.R. 2 K.B. 432 at p. 437.