DOMINION GLASS COMPANY LIMITED (PLAINTIFF) ..... APPELLANT; *Feb. 24, 25, 28, 29. *Oct. 3. 1944

AND

THE SHIP *ANGLO INDIAN* AND HER OWNERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Fire on board ship—Damage to cargo—Metal concentrates—Whether dangerous cargo—Bill of lading—Construction—Whether Water Carriage of Goods Act, 1936, incorporated in the contract of carriage—Warranty as to seaworthiness—Exemption from liability—Due diligence to make ship seaworthy—Actual fault or privity—The Water Carriage of Goods Act, 1936, (Dom.) 1 Edw. VII, c. 49—Imperial Shipping Act, 1894, 57-58 Vict., c. 60, s. 502.

The owners of the *Anglo Indian* having agreed by a time charter to let the ship to a transport company, the latter entered into a charter party, on May 11th, 1938, with the owners of about 1,700 tons of mineral concentrates for their transport in bags under deck from the city of Quebec to Tacoma, in the state of Washington. On the 18th of the same month, at Montreal, the transport company accepted a consignment from the appellant company of 2,402 packages of glassware, owned by it, for carriage and delivery to itself at Vancouver, via the Panama canal. After the ship had passed through the canal, certain concentrates commenced to heat, the ship caught fire and she put in to a harbour on the coast of California where the fire was extinguished. It is admitted that the appellant's goods became a total loss, amounting to $4,235.13. The appellant company then brought an action against the ship and her owners to recover these damages. The bill of lading contained a number of conditions,

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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all of which were agreed to by the appellant. Clause 24 of those conditions stated that the bill when issued from a port in Canada was subject to all the terms and conditions of, and all the exemptions from liability contained in, *The Water Carriage of Goods Act of Canada,* clause 25 referred to bills of lading from a port in the United States of America and clause 26 stipulated that, subject to clauses 24 and 25, the bill of lading, no matter where issued, shall be construed and governed by English law. Also, at the foot of the face of the bill, appeared in heavy black type the following: "This bill of lading is subject to provisions of *The Canadian Water Carriage of Goods Act, 1936.* The trial judge held that this Act was not in force in May, 1938, but that, in view of the foot clause, the provisions of the Act and of the Rules scheduled thereto were incorporated into and formed part of the bill of lading; he also held that the concentrates were a dangerous cargo which rendered the ship unseaworthy and that the loss was directly attributable to such unseaworthiness. But the trial judge, holding that the owners of the ship and the charterer, the transport company, had exercised due diligence to make her seaworthy, dismissed the appellant's action. The appellant company contended that, the loss being attributable to the unseaworthiness of the ship, the respondents were responsible in damages to it, and it also challenged the finding of due diligence; while the respondents contended that, even if this Court should find that due diligence had not been exercised, the appellant company must fail.

Held that the finding of the trial judge, that the concentrates were a dangerous cargo which rendered the ship unseaworthy and that the loss of the appellant's goods was directly attributable to such unseaworthiness, should be upheld; but

Held, affirming the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Taschereau and Rand JJ. dissenting, that the respondents have shown that before and at the beginning of the voyage they exercised due diligence to make the ship seaworthy; and that, therefore, notwithstanding the unseaworthiness of the ship, the respondents were not liable for loss of the cargo.

Held that the Canadian *Water Carriage of Goods Act,* 1936 was in force at the time of shipment, i.e., in May, 1938.

Per the Chief Justice and Hudson and Kerwin JJ.:—Therefore, it is unnecessary to express any opinion as to whether, in view of the foot clause of the bill of lading, the provisions of that Act should be considered as having been incorporated into and forming part of the bill.

Per Taschereau and Rand JJ:—Whether the foot clause is looked upon as a conformity with the requirement of section 4 or a contractual reference, the effect of it is to incorporate the rules as part of the Act and to carry the intention of overriding any contrary provision of the bill of lading.

As to the contention of the respondents that, even if the finding that due diligence has been used by them to make the ship seaworthy was wrong, they were still entitled to succeed, such contention being based on clause 2 (*b*) of article IV of the Rules which provides that

"neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * (*b*) fire, unless caused by the actual fault or privity of the carrier", and the respondents relying on the decision of the House of Lords in *Louis Dreyfus and Company* v. *Tempus Shipping Company* ([1931] A.C. 726), where effect was given to the provisions of section 502 of this Imperial *Merchant Shipping Act, 1894*.

Held, per The Chief Justice and Kerwin and Hudson JJ., that the respondents' contention is not well founded.—The law of Canada must be applied in this case, notwithstanding clause 26 of the bill of lading. Considering the purpose of the *Water Carriage of Goods Act,* if the direct cause of a loss is the unseaworthiness of the ship, even though fire was the proximate cause, the loss is not one arising or resulting from fire within the meaning of clause 2 (*b*) of article IV, even though it is proven that the unseaworthiness was caused without the actual fault or privity of the carrier; that still leaves the clause free to operate where a loss is the direct result of fire only.—*Dreyfus* case (*supra*) not applicable.

Per Taschereau and Rand JJ.:—Section 502 of the Imperial *Merchant Shipping Act, 1894,* does not apply, as such provision, so far as it was in force in Canada, was repealed by the 13th schedule of the *Canada Shipping Act, 1934*.—Notwithstanding the express stipulation in the bill of lading that the contract was to be governed by English law, whatever effect might be given to it in a court outside of Canada, the Canadian courts are bound by the provisions of the *Water Carriage of Goods Act,* 1936, and section 502, if relied on as having been incorporated in the contract under that stipulation, clashes with section 8 of article III of the Rules and must in this court be deemed to be excluded from the bill of lading.—Moreover, the respondents have not brought themselves within the exception of section 2 (*b*) of article IV of the Rules.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Cannon J., dismissing the appellant's action with costs.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

C. Russell McKenzie K.C. for the appellant.

R. C. Holden K.C. and *Lucien Beauregard K.C.* for the respondents.

The judgment of the Chief Justice and of Kerwin and Hudson J. J. was delivered by

KERWIN J.—This is an appeal by Dominion Glass Company Limited from a decision of Cannon J., District Judge in Admiralty for Quebec, whereby the appellant's action

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was dismissed. That action was brought in the Exchequer Court of Canada against the ship *Anglo Indian* and her owners, The Nitrate Producers Steamship Company, Limited, a corporation duly incorporated under the law of England and having its head office and chief place of business in the city of London in England.

The appellant is a manufacturer of glass-ware, carrying on business at Montreal and throughout Canada. Its claim is to recover damages for the destruction of a consignment of 2,402 packages of glass-ware, owned by it and shipped on the *Anglo Indian* for carriage and delivery to itself at Vancouver, British Columbia, via the Panama canal. The goods were shipped from Montreal and, after the *Anglo Indian* had passed through the Panama canal and was off the coast of California, certain concentrates, which were also in the ship, commenced to heat, the ship caught fire, and on June 14th, 1938, she put into San Pedro (Los Angeles) where the fire was extinguished. It is admitted that the appellant's goods were destroyed and became a total loss by reason of the fire and that such loss amounted to $4,235.13.

The *Anglo Indian* was a new ship, built to the order of The Nitrate Producers Steamship Company, Limited, and delivered to them in January, 1938. Previously, by a time charter, the owners had agreed to let the ship from the time of delivery for about twelve to fourteen months to Canadian Transport Company Limited. Under this charter, the owners were to provide and pay for all the provisions and wages of the captain, officers and crew and no question has been raised as to the authority of the master of the *Anglo Indian* to sign bills of lading on behalf of the owners or to permit others to sign for him. The appellant's goods were shipped under two bills of lading dated May 18th, 1938. Except for the number of packages, the two bills are the same and it will be convenient hereafter to proceed as if only one had been issued covering the total shipment. The bill of lading was signed by A. Rees for and on behalf of the master and Rees had authority from the master so to sign.

Canadian Transport Company Limited entered into a charter party with Derby and Company, Limited, for the

transport by the *Anglo Indian* from the city of Quebec to Tacoma, in the state of Washington, of about seventeen hundred tons

of lead and/or zinc and/or copper concentrates and/or other ore concentrates of similar physical characteristics and stowage, in bags, under deck.

Because of what will be stated later, it should be noted that the clause of the charter party describing the cargo continued:

it is understood that concentrates shipped are safe, non-injurious and lawful merchandise.

On or about May 11th, 1938, 23,072 bags of concentrates were received at Quebec on board the ship, which then proceeded to Montreal where she loaded general cargo, including the appellant's glass-ware.

By the written admission of the parties, it was agreed that the glass-ware was "destroyed and became a total loss by reason of fire on board the said ship *Anglo Indian.*" The trial judge gave effect to this admission but found that the fire was caused by the spontaneous combustion of the concentrates; that these concentrates were a dangerous cargo which rendered the ship unseaworthy; and that the loss was naturally and directly attributable to such unseaworthiness. That finding was attacked by the respondents but I am satisfied that on that point the trial judge came to the right conclusion. However, he also held that the respondents and their agents, servants and employees, and the charterers, Canadian Transport Company Limited, exercised due diligence to make the ship seaworthy and to secure that she was properly manned, equipped and supplied and to make the holds fit and safe for the reception, carriage and preservation of the appellant's goods. It was on this ground that he dismissed the action although he held further that there was no actual fault or privity on the part of the charterers, agents or master of the ship and no fault or neglect of the owners or of their agents, servants or employees.

The appellant contends that, the loss being attributable to the unseaworthiness of the ship, the respondents are responsible in damages to it. The appellant also challenges the finding of due diligence; while the respondents

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contend that, even if the Court should find that due diligence was not exercised, the appellant must fail. It therefore becomes necessary to determine the rights and obligations of the parties.

The bill of lading contained a number of conditions, all of which were agreed to by the appellant. Clause 24 of those conditions states:

> This bill of lading when issued covering goods from a port in Canada is subject to all the terms and conditions of and all the exemptions from liability contained in The Water Carriage of Goods Act of Canada, section 4 of which is as follows:

and then follows what, except for a minor error, was section 4 of chapter 207 of the Revised Statutes of Canada, 1927,—since repealed. Clause 25 refers to bills of lading from a port in the United States, and then comes clause 26:

> Subject to clauses 24 and 25 this bill of lading no matter where issued shall be construed and governed by English law.

These clauses commence on the face of the bill of lading and are continued on the back. At the foot of the face appears in heavy black type the following:

> This bill of lading is subject to provisions of The Canadian Water Carriage of Goods Act, 1936.

The trial judge decided that *The Water Carriage of Goods Act, 1936,* which is chapter 49 of the Dominion statutes of that year, was not in force in May, 1938, but he held, in view of the clause at the foot of the face of the bill of lading, that the provisions of the Act and of the Rules scheduled thereto were incorporated into and formed part of the bill. It is unnecessary to express any opinion as to the last point because, with deference, I have concluded that the 1936 Act was in force.

That Act was assented to on June 23rd, 1936, and it consists of nine sections and a schedule containing the nine articles of the Hague Rules relating to bills of lading. Section 1 of the Act contains the short title. Section 2 provides that subject to the provisions of the Act, the Rules in the schedule shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port, whether in or outside Canada.

By section 3, there is not to 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. Section 4 provides:

> Every bill of lading, or similar document of title issued in Canada which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

Section 5 states:

> Article VI of the Rules shall, in relation to the carriage of goods by water in ships carrying goods from any port or place in Canada to any other port or place in Canada, have effect as though the said article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said article were omitted.

Section 6 contains certain provisions dealing with the weight of bulk cargo. Subsection 1 of section 7 provides that nothing in the Act shall affect the operation of certain sections of the *Canada Shipping Act,* 1934, as amended, or the operation of any other enactment for the time being in force limiting the liability of owners of vessels. Subsection 2 of section 7 is the one that causes the difficulty on the point under consideration and is as follows:

> The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

By section 8, *The Water Carriage of Goods Act,* chapter 207, R.S.C. 1927, is repealed, and by section 9,

> This Act shall come into force on a date to be fixed by proclamation of the Governor in Council published in the *Canada Gazette.*

On July 2nd, 1936, an Order in Council was passed in the following terms:

> The Committee of the Privy Council, on the recommendation of the Minister of Marine, advise that the Water Carriage of Goods Act, Chapter 49 of the Statutes of 1936, be proclaimed effective the 1st August, 1936, and that a proclamation do forthwith issue accordingly.

A proclamation was issued on the same day, proclaiming and directing that the Act should come into force and have effect upon, from and after August 1st, 1936. This proclamation was published in the *Canada Gazette* on July 18th,

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1936. Apparently this was not considered sufficient in view of the terms of subsection 2 of section 7, and on February 14th, 1939, an Order in Council was passed in the following terms:

Whereas, under the provisions of Order in Council P.C. 1623 of July 2nd, 1936, authority was given for the proclamation of *The Water Carriage of Goods Act, 1936,* effective as of August 1st, 1936;

And whereas section 7, subsection (2), of the said Act, reads as follows:

"7. (2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid."

And whereas it is deemed expedient to determine pursuant to section 7, subsection (2) of the said Act, that the Rules contained in the Schedule to the said Act shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued in pursuance of any such contract;

Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, is pleased to direct and doth hereby order and direct that the Rules contained in the Schedule to *The Water Carriage of Goods Act, 1936,* shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued, whether before or after February 15th, 1939, in pursuance of any such contract.

Nor can it be said that it was the intention of Parliament to have two different dates fixed by Order in Council. I do not think so. The schedule which contains the Rules is part of the Act and in my view it was never intended that sections 1 to 9 should be brought into force at one time and the Rules at a different time. Furthermore, section 8 repealed the previous *Water Carriage of Goods Act* and it could not have been intended that there should be an *inter regnum* during which resort might have to be had to the common law. While no doubt it would have been better had the first Order in Council referred in terms to subsection 2 of section 7, it would defeat the object of Parliament to hold that that was necessary.

The Act (including therein the Rules) being in force in May, 1938, those Rules relating to bills of lading in accordance with section 2, had effect in relation to and in connection with the carriage of glassware in the *Anglo Indian* from the port of Montreal in Canada. It was held by the

Judicial Committee of the Privy Council in *Vita Food Products* v. *Unus Shipping Co. Ltd.* (1), that a similar section of the Newfoundland Act was the dominant section, and that the words therein "Subject to the provisions of this Act" mean merely that the Rules were to apply but subject to the modifications contained in the other sections in the Act. It was also held that section 4 was merely directory. The objection, therefore, that the wording at the foot of the face of the bill of lading in this action,

> This bill of lading is subject to the provisions of the Canadian Water Carriage of Goods Act, 1936.

did not comply with section 4, even if it were valid, cannot affect the matter, as the Act, by virtue of section 2, applies.

This being an action in Canada with reference to a bill of lading issued in Canada, the law of Canada must be applied notwithstanding the inclusion in the bill of lading of clause 26. The question dealt with by Lord Wright in the *Vita Food* case (1) as to the effect of a somewhat similar clause in a bill of lading issued in Newfoundland but action upon which was brought in Nova Scotia, does not arise. For the same reason the respondents can find no comfort in subsection 1 of section 7 of the Act:

> Nothing in this Act shall affect * * * the operation of any other enactment for the time being in force limiting the liability of the owners of vessels.

There is no such enactment in force in Canada.

Under the Canadian Act there was no absolute undertaking in this case to provide a seaworthy ship but by clause 1 of Article III of the Rules, the respondents were bound to exercise due diligence to make the ship seaworthy. It has already been stated that the appellant contends that the trial judge was in error in finding that such due diligence had been exercised but that the respondents argue, even if that finding is wrong, they are still entitled to succeed. It seems advisable, therefore, to examine that argument immediately.

It is based on clause 2, paragraph (*b*) of Article IV of the Rules, which provides:

(1) [1939] A.C. 277.

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Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

* * *

(*b*) fire, unless caused by the actual fault or privity of the carrier;

The respondents rely on the decision in the House of Lords in *Louis Dreyfus and Company* v. *Tempus Shipping Company* (1), that under section 502 of the British *Merchant Shipping Act, 1894,* the owner of a British sea-going ship is freed from liability for any damage caused by fire on board his ship even though that fire resulted from actual unseaworthiness, if he could prove that the fire occurred without his actual fault or privity. That section provides:

502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

In the *Dreyfus* case (1), the House of Lords approved of two decisions of the Court of Appeal, *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (2), and *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport* (3). At page 732, Viscount Dunedin stated that where there was an exception in the bill of lading of fire on board, it had been held that that did not protect the ship when the fire was due to unseaworthiness but what the Court of Appeal decided was that the statutory exception against fire was not elided by proving that the fire was due to unseaworthiness. The point, he continues, was arguable but what had turned the scale in the earlier Court of Appeal case was that to come to the result opposite to that of the decision would be, as Vaughan Williams L.J., put it

to change the words of a section from "a British sea-going ship" into "a British sea-going seaworthy ship".

That is, what the courts in those cases were construing were the words of an enactment creating an exception against fire.

Here we have to deal with a statute wherein appears not only the obligation on the part of the ship and carrier

(1) [1931] A.C. 726. (2) [1912] 1 K.B. 229.
(3) [1914] 1 K.B. 541.

to exercise due diligence to make the ship seaworthy but also the immunity from loss or damage arising or resulting from fire unless caused by the actual fault or privity of the carrier. How is that accomplished? Under Article II of the Rules the carrier is subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth in the Rules, subject only to the provisions of Article VI, with which we are not concerned. Clause 1 of Article III then imposes the duty of exercising due diligence before and at the beginning of the voyage to make the ship seaworthy, and it is to be noted that this obligation is not stated to be subject to any of the rights or immunities granted by Article IV. Compare with this the provisions of clause 2 of Article III:

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

There, Parliament, while imposing upon the carrier the obligation to load, handle, stow, etc., provides that it is subject to the provisions of Article IV, but no such proviso appears in clause 1 of Article III.

What is the effect of these Rules and how are they to be construed? In the House of Lords in *Stag Line, Limited* v. *Foscolo, Mango and Company, Limited* (1), appear two statements on the matter. Lord Atkin at page 342 says:

> In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded.

He then refers to the well-known words of Lord Herschell in the *Bank of England* v. *Vagliano Brothers* (2), and continues:

> But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from parts of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, impor-

(1) [1932] A.C. 328.
(2) [1891] A.C. 107.

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tant that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

At page 350, Lord Macmillan states:

> It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

I adopt, if I may, these statements as my own as expressing the proper method to be followed in construing the Rules.

The actual decision and the remarks of Lord Wright in *Patterson Steamships, Limited* v. *Canadian Co-operative Wheat Producers, Limited* (1), are not in conflict therewith. First of all, what was there in question was *The Water Carriage of Goods Act,* R.S.C. 1927, chapter 207, which is entirely different from the Act with which we are concerned. At page 549 Lord Wright refers to the meaning of the words "actual fault or privity" in section 7 of that Act and states that they seemed to have been taken from section 502 of the *Merchant Shipping Act, 1894.* He points out that the meaning of the words had been explained by Hamilton L.J., as he then was, in *Asiatic Petroleum Co. Ltd.* v. *Lennard's Carrying Co. Ltd.* (2), as follows: "Actual fault negatives that liability which arises solely under the rule of 'respondeat superior'." That is, at that point Lord Wright was referring to the meaning of the words "actual fault or privity" and was stating in different language what Lord Atkin had expressed in his reservation,

> always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

Lord Wright was not dealing with the question whether something that would fall within the meaning of the words

(1) [1934] A.C. 538. (2) [1914] 1 K.B. 419, at 436.

"actual fault or privity" would relieve a carrier from liability for loss caused by unseaworthiness. In my opinion the *Dreyfus* case (1) is not applicable.

In the view of the editors of the 14th edition of Scrutton on Charter Parties and Bills of Lading, at page 497, and of the editors of the 7th edition of MacLachlan on Merchant Shipping, page 378, the exception as to fire in clause 2, paragraph (*b*) of Article IV of the Rules, does not operate if the fire has been caused by failure to use due diligence to make the ship seaworthy. The view of the authors of Williamson and Payne's Carriage of Goods by Sea Act, page 42, is to the contrary but it seems to be based upon the *Dreyfus* case (1). For the reasons already given, I am of opinion that that decision does not apply. My conclusion is that considering the purpose of the Act, if the direct cause of a loss is the unseaworthiness of the ship, even though fire was the proximate cause, the loss is not one arising or resulting from fire within the meaning of Article IV, clause 2 (*b*) even though it is proven that the unseaworthiness was caused without the actual fault or privity of the carrier. That still leaves the clause free to operate where a loss is the direct result of fire only.

It has been proved that an English Company, Lawther Latta and Co. Limited, were the managers of the ship's owners, The Nitrate Producers Steamship Co., Limited, and of their ships, and that Sir John Latta, the managing director and chairman of the board of both companies, was registered owner of the *Anglo Indian*. There was no actual fault or privity on the part of the "directing mind and will of the corporation", *Lennard's Carrying Co. Limited* v. *Asiatic Petroleum Co. Limited* (2). This, of course, is not sufficient so far as the obligation on the carrier to use due diligence to make the ship seaworthy is concerned as that diligence must be not only by the ship owner itself but by all its servants and agents. For the purposes of the Act, the owners were the carriers under the bill of lading but Canadian Transport Company Limited and their officers and servants were the owner's agents. Is the finding of the trial judge that due diligence was exercised by them sustainable?

(1) [1931] A.C. 726.

(2) [1915] A.C. 705, at 713.

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All arrangements were made for the shipment of the concentrates by the shippers, Derby and Company, with Canadian Transport Company Limited through the latter's eastern manager, A. L. Palmer. This latter company, with its head office at Vancouver, British Columbia, carried on a large shipping business, having on charter from forty to eighty ships at one time, carrying about three-quarters of a million tons of cargo a year. Mr. Palmer, who had had twelve years' previous experience, joined the company in 1932 and from that time down to and including the year 1937, the company shipped, from Quebec to Tacoma, Washington, about 100,000 tons of concentrates. With one exception, these came from the Beatty Gold Mine and an analysis had been made of them before any were shipped. They were shipped, below deck, in about thirty-three different ships similar to the *Anglo Indian* and no heating occurred. The exception was a small shipment of about 150 tons, stowed on deck because there was a suspicion that the concentrates were warm and they were stowed where they were accessible. It was in that shipment that the only difficulty occurred when the concentrates smoldered.

When Derby and Company, through its agent, J. B. Saxe, first approached Mr. Palmer, in 1937, to arrange for the shipment of concentrates, the latter, upon being told that they were coming from a different gold mine, Thomson-Cadillac, asked for and received a sample. According to Mr. Saxe, concentrates from that mine had previously been shipped on various occasions through his company from Quebec to Antwerp and no trouble had occurred. The sample was sent for testing to a well-known and reputable firm of industrial chemists and engineers, G. S. Eldridge & Co., of Vancouver, and there was received from them by Canadian Transport Company the following report, dated May 20th, 1937:

We have tested the sample of concentrates submitted by you and report as follows:

Marks	None;
Iron (Fe)	31·20%;
Sulphur (S)	23·32%;
Insoluble Matter (SiO_2, etc)	23·30%;
Alumina (A1203)	5·31%;
Calcium Oxide (CaO)	3·62%;
Copper (Cu)	None.

As this concentrate consists mainly of iron pyrites and insoluble matter and does not show any appreciable amount of pyrrhotite, we are of the opinion that if this material is shipped wet as it comes from the filters there will be no danger of the concentrate taking fire within at least six months as long as these damp conditions are maintained.

The only reason for securing this report, according to Mr. Palmer, was because the concentrates were coming from a different gold mine.

It has already been noted that the charter party between Canadian Transport Company Limited and Derby and Company was dated April 7th, 1938, and that the clause in the charter party, describing the cargo, contained the statement: "It is understood that concentrates shipped are safe, non-injurious and lawful merchandise." The concentrates actually shipped on the *Anglo Indian* were sent from the mine to Quebec in bags and accumulated in an unheated shed and lay there during the winter of 1937-1938. S. Barrow was the Quebec agent for Robert Reford Company, who in turn were the Quebec agents for Canadian Transport Company. Again, only because the concentrates were from a different gold mine, Mr. Palmer instructed Mr. Barrow to secure a sample from the pile of bags in the shed, and in April, 1938, Mr. Barrow had his wharfinger take a sample of eight to ten pounds from the centre of one of the piles. Still on Mr. Palmer's instructions, this sample was sent to well-known chemists and analysts in Montreal, Milton Hersey Company Limited, and on May 5th, 1938, that company made the following report to Canadian Transport Company Limited:

On examination of the sample of concentrates received from you, we find that the material consists of finely divided and compact mineral matter, 99 per cent passing a No. 100 standard sieve. About 11 per cent moisture is present.

We understand that the concentrates are packed in 100-lb. burlap bags, lined with paper.

In our opinion this material should be safe for shipment and not liable to heat if kept in compact form and at ordinary temperature.

When the bags are transferred from the warehouse, careful attention should be given to be certain that no heating has developed in storage, and if the temperature of any bags should be found above normal, such bags should not be shipped but should be held for further investigation.

In May, 1938, both Mr. Palmer and Mr. Barrow examined the piles of bags and were satisfied that in accordance with the last paragraph of the above report there was

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no heating. The bags on top of the piles were wet and the ones in and towards the centre of the piles were frozen. Mr. Barrow oversaw the stowing of the bags and he and the captain and the mate of the *Anglo Indian* were satisfied that the bags were stowed in compact form in the ship. At Montreal, Furness Withy were the agents for Canadian Transport Company and J. D. McCloskey was superintendent of Furness Withy. He also testified that the bags were stowed in compact form. Two port wardens at Montreal were satisfied with the stowage and approved the placing of general cargo on dunnage boards erected over the concentrates.

As against this, the appellant relies upon the evidence of Mr. Freeman, who has made a special study of concentrates and who, before 1938, had perfected a system of sealing shipments of them by spraying them with a preparation. Mr. Freeman stated that the term "concentrates" by itself means nothing but that the important thing was to discover the amount of iron and sulphur therein. He described the concentrates shipped on the *Anglo Indian* as iron sulphide concentrates and stated that where the iron exceeds the copper content by weight, as shown in the Eldridge report,

> there is certainty of the material being able to absorb oxygen and therefore heat up spontaneously. That is to say that the material should be regarded as definitely dangerous.

He also spoke of a fire that had occurred in a shipment of concentrates from Quebec to Three Rivers in 1937 as a result of which some publicity occurred, including a report in a newspaper published in the latter city and having a circulation "in the St. Maurice Valley and waterfront companies". Another witness on behalf of the appellant, Dr. Snell, objected to the smallness of the sample out of such a large shipment and also expressed the opinion that heating and fire were bound to occur. None of this was known to the Canadian Transport Company Limited or anybody connected therewith, nor do I think that it can be held that they should have known. They were bound only to act with reasonable care and exercise due diligence in view of the circumstances existing in May, 1938. I agree with the trial judge that the two reports obtained

by Canadian Transport Company Limited were inaccurate and misleading but that the company was entitled to rely on them as coming from experts who were rightly considered as reliable and competent.

It was objected that the statement in the Eldridge report:

> We are of the opinion that if this material is shipped wet as it comes from the filters there will be no danger of the concentrate taking fire within at least six months as long as these damp conditions are maintained.

could not be taken to refer to concentrates that were left for some months in a shed in Quebec after leaving the mine. However, the Transport Company was justified in thinking that when, in May, 1938, an examination disclosed that the bags of concentrates were wet or frozen, there would be no danger as the voyage of the *Anglo Indian* was to be considerably less than six months. As to the concentrates being packed in bags, it appears from the second paragraph in the report of Milton Hersey Company Limited that they knew the concentrates were packed in 100-lb. burlap bags lined with paper.

The appellant suggested that the result of some of the evidence was that the system of ventilation on the *Anglo Indian* should have been operated in a different manner and that the concentrates could have been dampened while on board the ship but this evidence is not material to the question of due diligence. I agree with the trial judge that the respondents have shown that before and at the beginning of the voyage they exercised due diligence to make the ship seaworthy.

The appeal should be dismissed with costs.

The judgment of Taschereau and Rand JJ. (dissenting) was delivered by

RAND J.—This action arises out of fire damage in the course of a water shipment of glass bottles from Montreal to Vancouver. The cause of the fire was the heating of gold concentrates taken on board the vessel at Quebec on the 10th and 11th of May, 1938, and destined to Tacoma, Washington. The goods of the appellant were loaded on May 18th at Montreal, the day on which the vessel sailed.

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About June 3rd, after the ship had passed through the Panama canal, fumes and heat were noticed arising from the concentrates. This condition steadily deteriorated until on June 9th their temperature had risen to 110 degrees Fahrenheit and on the 13th the vessel made the port of San Pedro, California, where the fire was extinguished.

Several points are raised. At the outset there is the question whether the rules under the *Water Carriage of Goods Act, 1936,* were in force at the time of the shipment and, if not, were they sufficiently incorporated in the contract of carriage by the language of the bill of lading; then there is the question whether the ship, at the time of sailing, was unseaworthy and, if so, had due diligence been used to make her seaworthy. If the rules did not apply, we are remitted to a consideration of the clauses of the bill of lading. In either case, does section 502 of the Imperial *Merchant Shipping Act, 1894,* or item (*b*) of article IV, section 2, of the Rules furnish an answer to the claim.

The doubt as to the applicability of the rules under the *Water Carriage of Goods Act* of 1936 arises from the peculiar language of section 7 (2) which is as follows:

> The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

Section 9 provides for the coming into force of the Act on a date to be fixed by proclamation of the Governor-in-Council, published in the *Canada Gazette.* On July 2nd, 1936, the proclamation was made. In the preamble it is recited:

> And whereas it is expedient and our Privy Council has advised that a proclamation be issued bringing the said Act into force on the day hereinafter mentioned.

And then follows the declaration:

> Now know ye that by and with the advice of our Privy Council for Canada we do hereby proclaim and direct that the said Act shall come into force and have effect upon, from and after the first day of August in the year of our Lord one thousand nine hundred and thirty-six.

By section 23 of the *Interpretation Act,* such a proclamation is to be taken as having been issued under an order of the Governor-in-Council. Later, on February 14th, 1939, order in council P.C. 343 was made, the declaratory language of which is as follows:

> Now therefore His Excellency the Governor General-in-Council on the recommendation of the Minister of Transport is pleased to direct and doth hereby order and direct that the rules contained in the schedule to the Water Carriage of Goods Act 1936 shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued whether before or after February 15th, 1939, in pursuance of any such contract.

The Act clearly includes the schedule containing the rules. The enacting part is in fact confined in its operation to the rules except as to the repeal by section 8 of the *Water Carriage of Goods Act,* 1910. It is argued that the statute contemplates both a proclamation of the Act and a separate order in council dealing with the rules. The inconvenience, not to say absurdity, of that procedure is obvious. With any lapse of time between the proclamation and the order in council, the effect would be to repeal the Act of 1910 and leave no statutory rules in force during that period. When section 7 (2) is carefully examined, it is seen to have only this intent, that the rules as part of the Act and so the Act itself, should not come into force before August 1st, 1936; and with an order in council supporting the proclamation, the section is, in my opinion, amply satisfied. In that view, order P.C. no. 343, made, no doubt, *ex majore cautela,* was simply inoperative.

The bill of lading contained the following reference to the Act of 1936:

> This bill of lading is subject to provisions of the Canadian *Water Carriage of Goods Act,* 1936.

Whether this is looked upon as a conformity with the requirement of section 4 or a contractual reference, I take it to incorporate the rules as part of the Act and to carry the intention of overriding any contrary provision of the bill of lading.

I come, then, to the question whether the vessel was, at the time of sailing from Montreal, in an unseaworthy condition. The facts are not in dispute. The concentrates were of such a composition that sooner or later they must

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have developed the combustion that took place. They consisted mainly of iron sulphides. Now, iron sulphides can be either safe or dangerous. If they consist strictly of the proportions of weight represented by the formula FeS_2, which makes approximately $48\frac{1}{2}$ per cent iron and $51\frac{1}{2}$ per cent sulphur, they are known as pyrites and can be carried with safety. If, however, there is a predominance of iron which brings to the mixture any appreciable quantity of what is known as pyrrhotite, in which the percentage of iron is 7 per cent. or more greater than that of the sulphur, then we have an unstable condition in which the iron, being unsatisfied by the sulphur present, reaches out for oxygen and, depending on the conditions in which the oxidation takes place, can bring about a combustion of any degree of danger.

Now, the ship was under a time charter, not amounting to a demise, to the Canadian Transport Company Limited. The representative of that company, A. L. Palmer of Montreal, had had an experience in 1933 with heating concentrates and when he was approached by the shippers he raised the question of the characteristics of the goods to be shipped. Concentrates, it may be explained, are simply the ore from which, as in this case, gold was to be obtained, ground to a very fine degree with the foreign matter or gang removed by what is known as a flotation process. What remains is the concentrated mineral substance. In April or May, 1937, Palmer asked for and apparently obtained a small sample of concentrate from the mine from which the shipment was to come and had it sent to responsible chemists in Vancouver. Under date of May 20th, 1937, they reported back the analysis which showed iron 31·02 per cent. by weight and sulphur 23·32 per cent. and the following advice:

> As this concentrate consists mainly of iron pyrites and insoluble matter and does not show any appreciable amount of pyrrhotite, we are of the opinion that if this material is shipped wet as it comes from the filters there will be no danger of the concentrate taking fire within at least six months as long as these damp conditions are maintained.

Acting on this opinion Palmer intimated that he was prepared to carry the goods as proposed. The operations of the mining company were not on such a scale as to produce sufficient material for an early shipment and from, evi-

dently, the summer of 1937 until late in the fall the necessary quantity amounting to 1,668 tons was accumulated in the storage sheds on the dock at Quebec. It is not clear what the monthly output was though there is some intimation that it might have run between two and three hundred tons, but the evidence is that the entire quantity lay in storage during the whole of the winter and up until the time of shipment on May 10th.

It is conceded that the interpretation given to the analysis by the Vancouver chemists was not strictly accurate. The marked excess of weight of iron over sulphur made the category of pyrites questionable and indicated to one thoroughly familiar with sulphides that there was a dangerous quantity of pyrrhotite and that shipment without special precautions would be hazardous.

Palmer evidently took it that the danger indicated by the report could be controlled by the use of water and he so informed the captain; and the latter accepted the goods as safe cargo for the reason that "it made no difference because I could pour water upon the concentrates if necessary". Palmer also informed him that a report of a chemist had been received and that he was acting on the strength of it.

A week or so before the vessel sailed from Quebec another sample of between eight and ten pounds, taken apparently from one or more of the bags in the shed at Quebec, was sent to reputable chemical engineers in Montreal and a report on May 5th was given as follows:

> On examination of the sample of concentrates received from you, we find that the material consists of finely divided and compact mineral matter, 99 per cent passing a No. 100 standard sieve. About 11 per cent moisture is present.
>
> We understand that the concentrates are packed in 100-lb. burlap bags, lined with paper.
>
> In our opinion this material should be safe for shipment and not liable to heat if kept in compact form and at ordinary temperature.
>
> When the bags are transferred from the warehouse, careful attention should be given to be certain that no heating has developed in storage, and if the temperature of any bags should be found above normal, such bags should not be shipped but should be held for further investigation.

The bags, 28,000 odd in number, were stowed in the bottoms of three adjoining holds. They were leveled off and on the top was laid a rough flooring of 6-inch by 1-inch

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dunnage. On this was placed general cargo, including the shipment of the appellant. Direct access to the concentrates was thus made inconvenient, if not impossible, and any application of water could have been made, if at all without the removal of cargo, only under difficulties and at the cost of damage to other cargo.

During the voyage and up until June 9th, the three holds were given full ventilation. When the fumes appeared about June 3rd, extra ventilation was provided by means of wind-sails. The temperature in approaching and leaving the canal was between 80 and 85 degrees and through the ventilation the warm air played around the concentrates. The effect of this was to dry them out, raise their temperature and promote oxidation; but in the conditions of the stowage the heat so generated could not be adequately dissipated and the process became steadily intensified. What was vital was to prevent oxidation but it seems to be a fair conclusion that the method adopted could scarcely have been more calculated to bring about the opposite result. Between June 9th and June 13th a number of communications passed between the captain and the Transport Company at Vancouver as well as the owners in London. The purport of the captain's messages was for instructions, among other things, as to the use of water. This, in the light of his conversation with Palmer before the shipment, is difficult to understand but it seems to make clear that no method of treating the concentrates with water had been planned or foreseen. The fact is, however, that the fire, after the removal of other cargo, was put out by water in about four hours, that the concentrates "which had been effectually flooded" did not have to be removed from the holds and that the ship continued the voyage to discharge them at Tacoma.

On the facts I agree with Cannon J., that when the vessel left Montreal she was not in a seaworthy condition. There were within her the conditions of a process that must, before the termination of the voyage, result in fire injurious to other cargo as well as to the ship herself and she was properly equipped in neither stowage arrangement, means, measures nor methods by which that process could be adequately controlled.

Did the master exercise due diligence in relation to this condition? It is on the basis of compliance with the two reports of May, 1937, from Vancouver, and May, 1938, from Montreal that the respondents claim to have done so. Although these reports were obtained by Palmer for the charterer, the master in effect adopted the action taken and accepted Palmer's assurance that the shipment was not dangerous; and the argument assumed that on what he did, in the light of the advice given, he must be judged. The salient point of that advice is a warning that fire from the concentrates is to be anticipated and it stresses maintenance of temperature and moisture, restriction of exposure to the air, and a time limit of safety. But the material was not shipped "wet as it comes from the filters"; nor so as to maintain "those damp conditions"; nor (at least doubtfully) so as to be "kept at ordinary temperature"; neither was the safety period of six months given consideration. In fact, although most of it had been in storage for more than six months, no more precaution seems to have been taken—with the possible exception of ventilation—than if the bags had contained sand. Either there was a failure to sense the danger against which the letter of May, 1937, so precisely warned and to appreciate the necessity of the safety conditions which it defined, or Palmer was willing to rely on his own judgment that the state of the concentrates, even though different from, was sufficiently close to those conditions to justify taking the risk.

Up to this point it has been assumed that in the circumstances mere reliance on the advice received was sufficient, but in my opinion it was not. There is nothing in the evidence to indicate that the Vancouver consultants were informed of the destination of the goods or were asked to consider ventilation, and the circumstances of the material at the time of shipment were essentially different from those on which the advice was based. It is a reasonable inference from the letter of May, 1937, that if those engineers had been aware that the material would be accumulated over a period of eight or nine months in ordinary storage, would then be shipped in bags and stowed as mentioned, carried through the canal to Tacoma

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and be subjected to a continuous ventilation, the accentuated danger would have taken on a much more serious aspect and the advice might very probably have been either that the concentrates be brought to the equivalent of the conditions mentioned in the letter of May, 1937—"wet as it comes from the filters"—or that measures be taken for the application of water during the voyage, or that the shipment be refused. The evidence, too, makes it clear that the sample taken in May, 1938, was not a fair one; the letter from the Montreal engineers is dated the 5th of that month and the sample of eight pounds was intended to represent a lot of 28,000 bags of over 100 lbs. each and as the loading started on May 10th it must have been taken while the original pile stood. It seems a bit strange that the later sample should have been sent to Montreal and without any intimation of the analysis or the opinion already received from Vancouver: and again nothing was asked as to ventilation. Neither of the engineers who reported was called as a witness; but the onus lay with the respondents to show that these undisclosed facts would not have changed the advice and would not reasonably have called for any material change of conduct on their part in precaution or lack of it. In either case, therefore, the respondents have fallen short of the duty required under the statute.

In this I disregard the fact that there was in the field and literature of chemistry not only the common knowledge that iron sulphides were liable to spontaneous combustion, but also the limited knowledge of the means for controlling them. Before 1935 Swedish chemists had discovered that spraying the concentrates with a sulphite liquor coated the particles and effectively prevented oxidation; and the practical question became one of low-cost liquids with the required properties. An article setting forth the results of the research was in 1935 published in a chemical trade journal which circulated in Canada.

It is argued that section 502 of the Imperial *Merchant Shipping Act, 1894,* applies; but this provision, so far as it was in force in Canada, was repealed by the 13th schedule of the Canada *Shipping Act,* 1934, c. 44. It is

then urged that by an express stipulation in the bill of lading the contract is to be governed by English law which must be taken to be what is called the "proper law" of the contract. Whatever effect might be given to such a stipulation in a court outside of Canada, within this country we are bound by the provisions of the *Water Carriage of Goods Act* of 1936. By section 8 of article III of the Rules any clause in a contract of carriage purporting to relieve a carrier for loss or damage arising from negligence in respect of the duties provided in that article (except as allowed by the Rules), is void. As the English law would have effect only by way of factual incorporation in the contract, and as the immunity of section 502 extends to all negligence imputable to the carrier by the rule of respondeat superior, on the assumption that item (*b*) next dealt with does not give exemption, it clashes with section 8 and must in this court be deemed to be excluded from the bill of lading.

There remains the defence that the respondents have brought themselves within the exception of item (*b*) of article IV, section 2, of the Rules:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> * * *
>
> (*b*) fire unless caused by the actual fault or privity of the carrier.

It will be convenient to set against this language that of section 502:

> The owner of a British sea-going ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:
>
> (i) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

This latter provision is in a general shipping Act which does not deal specifically with stipulations of bills of lading, and is contained in a part which provides a number of limitations on the liability of owners of vessels. It is now settled that the exemption so given extends to a loss by fire resulting from unseaworthiness and we must consider whether the same interpretation is to be given to item (*b*).

The *Water Carriage of Goods Act* of 1936 and its rules were intended to make uniform over a wide range of inter-

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national commerce the rules under which goods are carried by sea and to limit the extent to which water carriers might restrict their liability for loss or damage. At the same time it qualified the important obligation of seaworthiness to which they were subject.

At common law the obligation of a water carrier was the same as that of a common carrier: he must deliver what he received unless excused by an act of God, the King's enemies or inherent defect. Implicit in this obligation was the duty at all times to exercise reasonable care and skill in the undertaking, and an absolute warranty that the vessel was reasonably fit for the purpose to which it was to be put or, in other words, was seaworthy. But these two inherent obligations of care and skill and seaworthiness were significant only in relation to exceptions from the absolute liability of the carrier and in the development of shipping law they became the background against which all exceptions, including the act of God or the King's enemies, came to be interpreted.

The Rules assume, and are intended to be terms and conditions of, a common law undertaking to carry and deliver. That is made clear by article II. In article III the responsibilities and liabilities of the carrier are set forth. Section 1 prescribes the obligation in respect of seaworthiness, i.e., the duty of due diligence in the furnishing of a complete vessel: section 2 deals likewise with the care and skill to be exercised in the receipt, carriage and delivery of the goods.

Section 2, however, by its introductory language, "subject to the provisions of article IV", declares in effect that the responsibility so created, in relation to liability, is not absolute; that, for example, the exceptions may, on their proper construction, trench upon the duty so prescribed. On the other hand, there is no such subjection of section 1 of article III to article IV; and, in a manner complementary to section 1 of article III, section 1 of article IV expressly and exclusively deals with liability for loss or damage arising from unseaworthiness. The effect of that special treatment is, I think, to render the exercise of diligence absolute and to place it quite outside the scope of any of the itemized exemptions.

It may be that the language of item (*b*), virtually identical with that of section 502, would, in the absence of the particular provisions of the Rules to which I have referred, call for a similar construction as to seaworthiness; but as item (*b*) clearly gives exemption in the case of fire caused by negligence, other than that of the carrier himself, arising in the course of the duties of section 2, article III, the exception is fully satisfied consistently with what appears to be perfectly plain and straightforward language, and I feel bound to assume that the legislature did not intend to ascribe to the item a more extended scope.

It may be suggested that item (*p*), "latent defects not discoverable by due diligence", embraces a defect rendering the vessel unseaworthy and no doubt it does; but the obligation within which these exceptions are to be construed is that of the undertaking to carry and deliver. So considered, it is seen that they are intended to exclude the liability of the carrier as insurer and to confine it to negligence not excepted.

I would, therefore, allow this appeal and direct judgment to be entered for the plaintiff for the sum of $4,235.12, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common & Howard.*

Solicitors for the respondents: *Meredith, Holden, Heward & Holden.*