THE INSURANCE COMPANY OF NORTH AMERICA (PLAINTIFF) ... APPELLANT;

AND

COLONIAL STEAMSHIPS LIMITED (DEFENDANT) ..... RESPONDENT.

1941
* Nov. 26, 27, 28.
1942
* June 26.

ON APPEAL FROM THE ONTARIO ADMIRALTY DISTRICT OF THE EXCHEQUER COURT OF CANADA

*Shipping—Insurance—Insurance of cargo of wheat—Wheat, while in winter storage on berthed vessel, damaged by vessel sinking—Insurer paying insurance, taking over the damaged wheat, partially salvaging it, and, as endorsee of bills of lading, suing carrier for damages—Whether right of action—Bills of Lading Act, R.S.C., 1927, c. 17, s. 2—Counterclaim by carrier for contribution in general average.*

There was insured with appellant certain wheat shipped on respondent's upper lakes steamer *Mathewston* for carriage to Montreal via Port Colborne. The bills of lading were deposited with a bank, through which the shipper's purchase of the wheat had been financed, and which was named in the bills of lading as consignee. When wheat from the upper lakes is destined for Montreal, the practice is to discharge it from the upper lakes vessel into the government elevator at Port Colborne and then load it into canal sized vessels. The wheat was discharged into the elevator at Port Colborne and kept there for a time; then the shipper paid the freight to Port Colborne and the elevator charges, and arranged for the wheat to be loaded at Port Colborne for winter storage there on two vessels, one of which was respondent's vessel *Northton*. Appellant by endorsement provided that part of the insurance covered the wheat then on the

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Taschereau JJ.

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*Northton* "at and from Fort William and/or Port Arthur to Port Colborne, including winter storage while there on board the S/S *Northton* and thence to Montreal". Later the *Northton,* with its wheat on board, sank at its winter berth. Appellant paid in full the insurance on, and took over, the wheat on the *Northton,* receiving original bills of lading (duly endorsed, appellant alleged, to it) to cover the quantity, had the wheat partially salvaged, and, as endorsee of the bills of lading under which it was shipped on the *Mathewston* (and not basing its claim on right of subrogation), sued respondent for damages. Respondent counterclaimed for contribution in general average.

*Held:* It must be found upon the evidence that the bank's endorsement (assuming it to have been sufficiently proved) on the bills of lading was merely for the purpose of permitting the shipper of the wheat to present its claim for insurance, and that appellant took over the damaged wheat by reason of its insurance obligations. It is not every endorsee, who, by reason of s. 2 of the *Bills of Lading Act* (R.S.C., 1927, c. 17), is vested with the rights of action in respect of goods mentioned in the bill of lading, as if the contract therein contained had been made with himself; it is only an endorsee to whom *the* property in the goods passed *upon or by reason of the endorsement* (*Sewell* v. *Burdick,* 10 App. Cas. 74). As appellant did not come within this requirement, it could not succeed in the action.

*Held* also (Davis J. dissenting): Respondent should succeed on its counterclaim, as appellant had become the owner of the wheat before the general average expenses were incurred.

*Per* Davis J. (in dissenting as to the counterclaim): Appellant dealt with the damaged goods as an insurance company in the ordinary course of the adjustment and settlement of the insurance; it was not the consignee or the owner of the goods; there was no contract by it, express or implied, to pay; and it was not liable for contribution to general average loss. Respondent may have had a possessory lien upon the damaged grain for a general average contribution but it did not attempt to exercise any such lien or to withhold delivery until any general average contribution due to it had been paid. (*Scaife* v. *Tobin,* 3 B. & Ad. 523, referred to). Moreover, a contract of carriage of goods by water (assumed in what has been said above) did not, on the evidence, exist at the time of the loss; the original contract of carriage through to Montreal having been terminated and a new arrangement made for winter storage—a mere bailment of goods to which the rule of general average might not apply at all.

APPEAL by the plaintiff from the judgment of the District Judge in Admiralty of The Ontario Admiralty District of the Exchequer Court of Canada (1) in an action brought to recover from the Defendant the sum of $48,370.28 by reason of damage to grain. The grain was part of a cargo of wheat shipped at Port Arthur and/or Fort William, Ontario, on the

(1) Barlow D.J.A. 8 Ins. L.R. 121.

defendant's steamer *Mathewston,* for carriage to Montreal via Port Colborne. While the wheat so shipped was being held in winter storage at Port Colborne on two vessels, one of which was the defendant's steamer *Northton,* the *Northton,* with its wheat on board, sank. The plaintiff had insured the wheat and it paid in full the insurance on, and took over, the wheat on the *Northton,* receiving original bills of lading (duly endorsed, plaintiff alleged, to it) to cover the quantity, had the wheat partially salvaged, and, as endorsee of the bills of lading under which it was shipped on the *Mathewston,* sued the defendant for damages. The District Judge in Admiralty dismissed the plaintiff's claim with costs, and also gave judgment to defendant for $4,059.67 with costs on a counterclaim for contribution in general average.

The material facts of the case, so far as relevant to the grounds of decision in this Court, are sufficiently stated in the reasons for judgment in this Court now reported. The appeal was dismissed with costs, Davis J. dissenting as to the counterclaim.

*F. King K.C.* and *C. R. McKenzie K.C.* for the appellant.

*F. Wilkinson K.C.* and *R. J. Dunn* for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The Insurance Company of North America instituted an action in the Exchequer Court of Canada against Colonial Steamships Limited, claiming $48,370.28 damages caused by injury to 115,600 bushels of wheat while on the latter's steamship *Northton.* The damages were caused when the *Northton* sank while berthed for the winter at Port Colborne, Ontario. The wheat was insured by Reliance Grain Company, Limited, with the Insurance Company, which, however, does not advance any claim in these proceedings under the doctrine of subrogation but contends it is entitled to damages as endorsee of certain bills of lading. The Steamship Company counterclaimed for $4,059.67 general average. The action came on for trial before the District Judge in Admiralty for the Ontario Admiralty Division, who dismissed the claim and allowed the counter-claim. There is no dispute as to the correctness of the respective amounts, but the Insurance Company appeals on both questions of liability.

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In the autumn of 1938, Reliance Grain Company, Limited (hereafter called Reliance), purchased 225,005-30 bushels of wheat on instructions from, and for and on account of, Consolidated Shippers Limited (hereafter called Consolidated). Consolidated also instructed Reliance to ship the wheat by the respondent's steamer *Mathewston* at the head of the lakes, for carriage to Montreal, Quebec, via Port Colborne, and this was done. The transaction was financed by Reliance through the Bank of Nova Scotia but, the former requiring a margin on its purchase, Consolidated agreed to pay the respondent the freight of five cents per bushel. The respondent issued bills of lading covering the shipment, showing the shipper to be Reliance and the consignee to be the Bank. These bills of lading were deposited with the Bank. They appear to be in the usual form and in accordance with the provisions of *The Water Carriage of Goods Act, 1936* (Dominion), each bears the following endorsement in the margin:—

> Notwithstanding anything contained herein to the contrary, this bill of lading shall have effect, subject to the provisions of the rules scheduled to The Water Carriage of Goods Act, 1936, as applied by that Act.

The appellant had previously issued an open or blanket marine insurance policy covering Reliance and, by a certificate dated October 14th, 1938, it certified that the wheat shipped by Reliance on the *Mathewston* was insured for $168,754 under the policy. While the ship was proceeding down the lakes, Consolidated, thinking that there might be a better market at Port Colborne, decided to hold the wheat there and not have it taken, at least immediately, to Montreal. It accordingly arranged with the respondent to terminate the shipping contract at Port Colborne and to pay the freight charges to that point, which were settled at two cents per bushel. The *Mathewston* is an upper lakes vessel and when a cargo of wheat from the upper lakes is destined for Montreal, the practice is to discharge the wheat from such a ship into the Government elevator at Port Colborne and then load the cargo into canal sized vessels for the remainder of the voyage. The *Mathewston* arrived at Port Colborne on October 19th and discharged the wheat into the elevator. A free time of fifteen days is allowed by the elevator but, on instructions from Consolidated, the wheat was kept there until the 24th and 25th of November, 1938. Consolidated paid the respondent

the agreed freight charges to Port Colborne and the elevator storage charges. It also arranged with the respondent to load the wheat for winter storage on two vessels, the *Northton,* owned by the respondent, and the *Gilchrist,* owned by Sarnia Steamships, Limited. One of these companies is a subsidiary of the other and both are operated under one management and from one office.

On November 24th, part of the wheat was loaded on the *Gilchrist,* and on November 25th, 115,600 bushels were loaded on the *Northton.* By a certificate similar to the one already mentioned, the appellant certified that on October 11th, 1938, it insured, under its policy, $86,700 on 115,600 bushels of grain valued at seventy-five cents per bushel

shipped on board of the *Mathewston* at and from Fort William and/or Port Arthur, Ont., to Port Colborne, including Winter Storage while there on board the SS. *Northton* to Montreal, Que.

This certificate is dated October 14th and while it is clear that it was antedated, the reason for so doing is not apparent. In any event, on November 25th the appellant issued an endorsement to be attached to its first certificate and amending the latter so as to cover $86,798 on 115,730–30 bushels of wheat

at and from FORT WILLIAM and/or PORT ARTHUR to MONTREAL via PORT COLBORNE

and $81,956 on 109,275 bushels of wheat

at and from FORT WILLIAM AND/OR PORT ARTHUR, ONTARIO, TO PORT COLBORNE, INCLUDING WINTER STORAGE WHILE THERE ON BOARD THE S/S *RALPH GILCHRIST* AND THENCE TO MONTREAL.

Finally, on November 28th, when the exact quantity loaded on the *Northton* was known, the appellant issued a second endorsement to be attached to the first certificate cancelling and replacing the endorsement of November 25th. So far as material it was there provided that the certificate should cover $86,700 on 115,600 bushels of wheat

at and from FORT WILLIAM AND/OR PORT ARTHUR TO PORT COLBORNE, INCLUDING WINTER STORAGE WHILE THERE ON BOARD THE S/S *NORTHTON* AND THENCE TO MONTREAL.

In the meantime, upon the delivery of the wheat to the *Northton* and the *Gilchrist,* and in accordance with the practice of the elevator, receipts signed by the respondent

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were given by it to the elevator in the form of two documents each of which is headed "Memorandum Bill of Lading From Trans-Shipping Port". The one with reference to the *Northton* reads as follows:—

Memorandum Bill of Lading From Trans-shipping Port.

GOVERNMENT ELEVATOR

PORT COLBORNE, ONTARIO, November 25th, 1938.

SHIPPED in apparent good order and condition at and from the port of PORT COLBORNE, ONTARIO, by Reliance Grain Company Ltd., as agents and forwarders for account and at the risk of whom it may concern, on board the vessel *Northton* whereof . . . . . is Master, now in the port of PORT COLBORNE, ONTARIO, and bound for Montreal, Que., the property herein described, to be delivered in like order and condition (the dangers of navigation, fire and collision excepted) to the order of The Bank of Nova Scotia at Montreal, Que., as specified in original Bill of Lading.

The several portions of this shipment are subject to all the terms and provisions of the respective Bills of Lading therefor issued at original port of loading of upper lake vessel.

This instrument is a memorandum only and is NOT NEGOTIABLE. Original bill of lading of lake steamer named hereon, and for like quantity, which is now outstanding, will be required before delivery of this cargo.

CARGO consisting of One Hundred & Fifteen Thousand Six Hundred (115,600) bushels No. Two (2) Northern Manitoba Wheat loaded in All Over.

CONSIGNED in original bill of lading of lake steamer to the order of Bank of Nova Scotia to be delivered as specified therein.

Notify Reliance Grain Company Ltd., care of Winnipeg, Manitoba, ex lake steamer *Mathewston,* Oct. 17/38, holds 2-4-6, from Ft. Wm. & Pt. Arthur. Oct. 11/38. Elevator

R. H. Marshall,
Agent for Vessel.

It will be noted that this memorandum bill of lading states that all the terms and provisions of the original bills of lading should apply and that the latter would be required before delivery of the cargo; and that the wheat was shipped on the *Northton* "bound for Montreal, Que.", and was to be delivered to the order of the Bank of Nova Scotia at Montreal "as specified in original Bill of Lading".

The *Northton* was laid up for the winter at Port Colborne with the 115,600 bushels of wheat on board. On November 25th the respondent wrote the following letter to Consolidated:—

> This is to advise that our Steamer *Ralph Gilchrist* loaded grain yesterday, November 24, for winter storage, ex our Steamer *Mathewston*, B/L October 11, 1938, and that our Steamer *Northton* is loading the balance of this grain for storage to-day.
>
> Please arrange to forward us storage contracts to cover these two cargoes.

On November 26th, Sarnia Steamships, Limited, wrote Consolidated as follows:—

> We are herewith enclosing copies of bills of lading covering cargoes of grain loaded at Port Colborne, Ont., for storage by our Strs. *Gilchrist* and *Northton*.

The enclosures were the two memoranda bills of lading and four other documents, one of which is the original and the others copies of a form of "Canadian Lake Grain Bill of Lading" similar to the forms of the original bills of lading. On the back of each of these forms is a form of "Special Contract for Private Storage of Grain and/or Seed". Both on the face and the back of each document is a stamp similar to the endorsement in the margin of the original bills of lading, making applicable the rules scheduled to *The Water Carriage of Goods Act, 1936*. These documents are merely unsigned forms and even the spaces left blank for use in particular instances are not filled in.

The respondent contends that because of what had occurred, including the sending of these documents to Consolidated (Reliance's principal), its liability as a carrier under the original bills of lading and under the provisions of *The Water Carriage of Goods Act, 1936,* was altered to that of a mere warehouseman. We are not concerned with what the position might be as between Reliance and the respondent. Nor, even though the original consignee was never consulted about any new arrangements and had no knowledge of them or of the blank forms, need we consider the situation that might have developed with respect to the Bank. The validity of the claim of the present appellant need not be determined upon the basis of the legal relationships that might conceivably have existed between the respondent, on the one hand, and, on the other, the shipper or consignee named in the original bills of lading, or both.

It was on February 1st or 2nd, 1939, that the *Northton* sank and its cargo of wheat was damaged. The appellant was notified, the ship was raised, and the appellant decided

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to pay Reliance as for a total loss and take over the damaged wheat. It requested Reliance to submit as part of the proofs of loss a sufficient number of the original bills of lading, endorsed to the appellant, to cover the quantity of wheat on board the *Northton*. On February 4th, Reliance gave the Bank, in whose possession the bills of lading had remained, a bailee receipt wherein it acknowledged having received the bills "endorsed to our order for purpose of presenting claim to Insurance Company." The trial judge stated that, if it were necessary for the determination of the action, he would be forced to find that it was not proved that the Bank had endorsed the bills. I do not find it necessary to come to any conclusion on the point, as I assume in the appellant's favour that the evidence is sufficient. I am satisfied, however, that it is shown that Reliance endorsed and delivered the bills to the appellant. On February 9th, the appellant issued its cheque for the total amount of the insurance and telegraphed its representative in Winnipeg, Manitoba, that it was "taking over the salved grain". It did take over the damaged wheat, sold it, credited the proceeds against the value, and sued the respondent for the difference.

As stated at the outset, the appellant does not base its claim on its right of subrogation but as endorsee of those original bills of lading issued with reference to the *Mathewston* that covered the quantity of wheat subsequently loaded on the *Northton*. The question therefore is whether, within the meaning of section 2 of the *Bills of Lading Act*, R.S.C., 1927, c. 17, the appellant is an "endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such * * * endorsement". It is not every endorsee who by reason of this section is vested with the rights of action in respect of goods mentioned as if the contract contained in the bill of lading had been made with himself. It is only an endorsee to whom *the* property in the goods passed *upon or by reason of the endorsement*. *Sewell* v. *Burdick* (1). Here the appellant took over the damaged wheat by reason of its obligations under its policy, certificate and attached endorsement. It is quite evident from the bailee receipt given by Reliance to the

(1) (1884) 10 App. Cas. 74.

Bank that the bills of lading, even if endorsed by the Bank, were so endorsed merely for the purpose of permitting Reliance to present its claim for insurance under the documents issued by appellant. For this reason the appellant cannot succeed, and without expressing any opinion as to the other questions referred to in the judgment appealed from or in the arguments presented before the Court, the appellant's action must stand dismissed.

As the appellant had become the owner of the wheat before the general average expenses were incurred, the respondent is entitled to judgment on its counterclaim.

The appeal should be dismissed with costs.

DAVIS J. (dissenting in part)—I agree that the appeal in so far as the appellant's claim in the action is concerned must be dismissed, but I should allow the appeal in so far as the judgment on the respondent's counterclaim is concerned.

The appellant put its claim solely as the holder by endorsement of the bill of lading that was issued in favour of the Bank of Nova Scotia, Montreal, as the named consignee, and calls upon the respondent as carrier to pay for failure to deliver. But though challenged at the trial to do so, the appellant failed to make proof of the due execution of an endorsement of the bill of lading by the Bank of Nova Scotia or that the delivery of the alleged endorsement of the bill of lading was intended by the Bank "to pass the property in the goods therein mentioned by reason of such endorsement" within the meaning of sec. 2 of the *Bills of Lading Act*, R.S.C., 1927, ch. 17. It would appear that the Bank held the bill of lading as security for moneys advanced to the shipper to purchase the grain and that if the Bank did endorse and deliver the bill of lading to the shipper who was the real owner of the cargo, it was merely to enable the latter to make out its proofs of loss against the appellant, its insurer. The appellant's action failed and was dismissed with costs.

The respondent sought by counterclaim to recover from the appellant contribution to the general average loss and recovered judgment at the trial on the counterclaim in the amount claimed, $4.059.67, with costs. But the appellant dealt with the damaged goods in question as an insurance company in the ordinary course of the adjust-

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ment and settlement of the insurance; it was not the consignee or the owner of the goods; nor was there any contract by it, express or implied, to pay; and, in my opinion, it is not liable for contribution to general average loss. The respondent may have had a possessory lien upon the damaged grain for a general average contribution but it did not attempt to exercise any such lien or to withhold delivery until any general average contribution due to it had been paid. See *Scaife* v. *Tobin* (1). What I have said is on the assumption that there was a contract of carriage of goods by water at the time of the loss. But I think the evidence discloses that the original contract of carriage for a through journey to Montreal had been terminated by the parties at Port Colborne and a new arrangement made there for the storage of the grain during the winter months—a mere bailment of goods to which the rule of general average might not apply at all.

I should allow the appeal to the extent only of setting aside the judgment on the counterclaim and direct judgment dismissing the counterclaim with costs. The respondent's costs of the appeal in the action should be paid by the appellant and the appellant's costs of the appeal in the counterclaim should be paid by the respondent.

*Appeal dismissed with costs.*

Solicitors for the appellant: *King & Reynolds.*

Solicitors for the respondent: *Wright & McMillan.*