1956

Mar. 29

Apr. 17

LEO PERRAULT LIMITED (*Defendant*) APPELLANT;

AND

CAPTAIN DAVID TREMBLAY *et al.* (*Plaintiffs*) ..... } RESPONDENTS.

Shipping—Damages for detention—Mitigation—Contract with 3rd party —Lien de droit created by consignee.

The respondents pursuant to a contract entered into with a third party transported two cargos of lumber to Montreal and there made delivery to the appellant. On each occasion the latter when notified of the arrival of the respondents' vessel sent trucks to take delivery but because it did not supply the trucks continuously the unloading was delayed. The respondent sued to recover damages for losses sustained by reason of the unlawful detention of their vessel beyond the normal time required to discharge cargo and were awarded judgment by the trial court.

Held: That although there was no contractual relationship between the parties the fact that the appellant on notice of the vessel's arrival undertook to send its trucks and take delivery, created a *lien de droit* between them and established the manner in which the cargo was to be delivered and the appellant became legally bound to proceed with the unloading without interruption until the vessel was discharged.

2. That the respondents were engaged in the "Coasting Trade in Canada" as defined by s. 2(12), *Canada Shipping Act, 1934,* S. of C. 1936, c. 49, and were not compelled to issue bills of lading under the provisions of articles V and VI of *The Water Carriage of Goods Act, 1936,* S. of C. 1936, c. 49: the mode of discharge was to be determined by the verbal undertaking of the appellant and the respondents could not change the manner in which the unloading was to take place. Carver's, *Carriage of Goods by Sea,* 5 Ed., p. 700; *Syeds* v. *Hay* 4 T.R. 260; *Grey* v. *Butler's Wharf* 3 Com. Ca. 67; *Smailes* v. *Hans Dessen* 12 Com. Ca. 117; 10 Asp. M.C. 319, 95 L.T. 809.

3. That there was a delay, the result of the unlawful act of the appellant in not taking delivery in a reasonable time, but the respondents could have mitigated their loss by requesting permission to unload on the wharf and the trial judge was right in deciding the responsibility for the vessel's detention should be shared and as to the amount of damages the respondents were entitled to recover.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Harry Aronovitch for appellant.

André Verge for respondents.

FOURNIER J. now (April 17, 1956) delivered the following judgment:

This is an appeal from the judgment of the District Judge in Admiralty for the Quebec Admiralty District, dated July 3, 1953, by which he allowed the respondents' claim for damages arising out of the fact that the appellant unlawfully detained their vessel the *St-Paul du Nord* for a longer period than normally required for the discharge of cargo.

Here is a summary of the facts. The respondents, owners and operators of the above vessel, entered into an oral contract with a third party, by which they undertook to carry two shipments of lumber from Mont-Louis, Gaspé, to Montreal and deliver same to the appellant. The *St-Paul du Nord* on its first voyage arrived at Montreal on September 25, 1949, at 2.45 p.m. The appellant was notified of the vessel's arrival and the next day the unloading commenced. Discharge was completed on October 4, 1949 at 3.45 p.m. On its second voyage it arrived at Montreal on October 21, 1949 at 11.40 a.m. The appellant was immediately advised of this fact and unloading started at 1.15 p.m. the same day. The unloading was completed on October 28 in the afternoon, and the vessel departed the same day at 6.50 p.m. with a cargo of 200 barrels of oil.

On both occasions, the appellant, shortly after being advised of the vessel's arrival, sent its trucks to receive the shipments. It was established that under normal conditions a cargo of this nature would and should be discharged in about two days. It took seven to eight days to unload the first shipment and five to six days to discharge the second cargo. There is no doubt that, had a sufficient number of trucks been available, the cargo could have been discharged in two or three days. It would seem that the appellant, though it undertook to send its trucks to receive the lumber, failed to do so continuously till the vessel was unloaded. The appellant's employees had received instructions to attend first to the servicing of the company's clientele and, when not busy in doing so, to use the trucks for the discharging of the shipments in question. When the trucks were so diverted to other purposes, the respondents and their employees remained idle and the unloading stopped. The respondents claim that the delay caused them damages and entitled them to recover from the appellant the loss sustained therefrom.

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The respondents' claim is based on the rule that the consignee of goods is bound to remove the goods from the ship's side and to provide the number of men and necessary equipment to fulfil the task and that the discharging operation should be a continuous one.

In support of their proposition, it was established that they had received two shipments of lumber to be delivered to the appellant. They carried the cargoes to their place of destination and notified the appellant of their arrival. The company admitted having sent its trucks to take delivery. It is in evidence that the appellant proceeded slowly with the unloading because its men and trucks were part of the time occupied elsewhere, with the result that there were delays in the operation and the respondents' vessel was detained for longer periods than was necessary.

The appellant submits that it had nothing to do with the transportation or unloading of the shipment. It had a purchase contract with one Laliberté for a certain quantity of lumber to be delivered on the wharf at Montreal. No contract existed between the appellant and the respondents. There were no bills of lading, and the shipper had the obligation of discharging the cargo onto the wharf and notifying the appellant that the lumber had been unloaded on the wharf; that being done, it would be deemed that it had received delivery and then had become responsible for the lumber.

The appellant also contended that it was not legally bound to give any instructions as to unloading because it had purchased the lumber to be delivered on the wharf at Montreal. Furthermore, there could be no claim for damages because no demand or complaint concerning the delay of unloading had been made before the last day of discharging and there was no proof that the respondents had sustained any loss as a result of the delays.

The questions to be determined are: Was there a juridical relationship between the parties? If so, does the evidence show in what manner the delivery of the lumber was to be made by the respondents to the appellant? Were there delays in the unloading? Who was responsible for such delays? Did the delays result in a loss to the respondents, and was the appellant responsible for same?

The fact that a contract existed between the appellant and one Laliberté, concerning the purchase and delivery of the lumber, could not affect or bind the respondents, who were not parties to the contract. Legally, a person cannot be injured by the acts of others to which he is a stranger. Hence the appellant's position was that there was no contractual relationship between the parties and the mode of delivery of the lumber was determined by the contract between Laliberté and the appellant.

I cannot agree with this contention. Though there was no written contract between the appellant and the respondents, the fact that, on being notified of the arrival of the vessel, the appellant undertook to send its trucks to take delivery certainly created a *lien de droit* between the parties and established the manner in which the cargo would be delivered. I am of the view that the appellant, after the notification of arrival and the statement that trucks would be on hand to take delivery, became bound legally to proceed with the unloading of the lumber without interruption till the vessel was discharged.

The fact that there were no bills of lading does not help the appellant's contentions. Nothing in the law obligated the respondents to issue bills of lading. The respondents' vessel was engaged in "Coasting Trade in Canada" as defined by para. 12 of s. 2 of the *Canada Shipping Act 1934*, c. 44 of the Statutes of Canada, and they were not compelled to issue bills of lading under the provisions of articles V and VI of the *Water Carriage of Goods Act, 1936*, 1 Edw. VIII, c. 49 of the Statutes of Canada. There is no doubt that the mode of discharge had to be and was determined by the verbal undertaking of the appellant on the day of arrival of the shipments of lumber.

As to the delays in the process of unloading the cargo, it was admitted that they were the result of the appellant's actions. The trucks were used for other purposes after the commencement of the discharging, though on many occasions the respondent Clement Tremblay complained of this situation and requested that the unloading be proceeded with.

To my mind there was nothing unusual in what took place between the parties regarding the mode of delivery of the lumber. Once the respondents were told by the

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appellant that trucks would be on hand to receive the cargo, the respondents could not very well change the manner in which the unloading was to take place.

Carver's *Carriage of Goods by Sea*, 5th Ed., p. 700, states:

> . . . But if one mode of discharge involves charges upon the consignee which another suitable and convenient mode avoids, the shipowner cannot, contrary to the consignee's demand, insist upon adopting the former. Thus, if the consignee requires, and is ready to take delivery into lighters without the goods first being landed on the wharf at which the vessel is lying, the shipowner will be answerable if he lands them on to the wharf and so makes them liable to wharfage charges.

This rule was followed in the following cases: *Syeds* v. *Hay* (1); *Grey* v. *Butler's Wharf* (2); and *Smailes* v. *Hans Dessen & Co.* (3). If this rule applies to the consignee, I see no reason why it should not apply to the shipowner.

The mode of discharge having been determined and the appellant having sent trucks to take delivery, the operation should have continued without interruption. In the absence of express stipulation to the contrary, the delivery contemplated was a continuous delivery and the consignee was bound to remove the goods and to provide for the equipment and men necessary to cope with the situation. On the other hand, I am of the view that the shipowner, under the circumstances, had a certain duty to take necessary measures to minimize the damage. The respondents not only should have complained of the slowness of the unloading but should have insisted on discharging the lumber on the wharf, because when they did insist on the last day they were instructed to do so.

True, the rules cited by the learned trial judge were based on decisions which concerned claims for demurrage, but the accepted definition found in *Scrutton on Charter Parties*, 15th Ed., p. 339, reads as follows:

> DEMURRAGE, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading.

In this case there was no charter party, but there was delay by a consignee in receiving a shipment of lumber in a reasonable time, which is alleged to have caused damages. The delay being the result of the unlawful act of the appel-

(1) (1791) 4 T.R. 260. (2) (1898) 3 Com. Cas. 67.
(3) (1906) 12 Com. Cas. 117.

lant in not taking delivery of the goods, the respondents were not bound to unload on the wharf but could have mitigated the loss sustained by requesting permission to do so. If they prove that they were detained for an unreasonable time and sustained a loss as a consequence, I believe they are entitled to succeed with their claim.

I am satisfied that the appellant did not take delivery of the lumber in a reasonable time or within the normal period necessary to unload the cargo and that it is liable for part of the damages, if any, caused to the respondents on this account.

Now, did the respondents suffer damages and sustain losses? If so, what amount should be granted?

A careful reading of the evidence has convinced me that the learned trial judge was correct in his conclusions that the responsibility of the detention of the vessel should be shouldered by both parties.

As to the damages, there is proof that the delays occurred during the last part of the navigation season on the St. Lawrence River and that the respondents were quite busy during that time. After they had delivered cargoes at Montreal, freight would be taken on there and at other ports for the return voyage. This seems to have taken place after the two trips herein mentioned. It may be readily assumed that, had they not been delayed, they could have taken freight on their way back and could have possibly made another voyage. This seems a logical deduction when one considers the evidence adduced and, to my mind, justifies the learned trial judge's conclusion. This loss, though not established by positive figures, is nevertheless a real one. He was correct in considering this loss with the cost to the respondents of the payment of the crew's salaries and board and their own loss, for which amounts were given.

In my opinion, for the reasons above stated, the learned trial judge was right in deciding that the plaintiffs-respondents were entitled to recover from the defendant-appellant

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as damages the sum of $100 per day for each day during which he found that the vessel had been unlawfully detained as a result of the defendant-appellant's failure to discharge the cargoes.

I, therefore, make mine his finding. The appeal is dismissed with costs.

Judgment accordingly.