IN ADMIRALTY

Montreal 1969 Mar. 24 Ottawa Apr. 23

BETWEEN:

THE SHIP *MORMACSAGA* and her Owners ..... DEFENDANTS (APPELLANTS);

AND

CRELINSTEN FRUIT COMPANY, *et al* ..... PLAINTIFFS (RESPONDENTS).

Shipping—Deterioration of cargo—Ship entering strike-bound port—Shipowners' opinion that strike near end—Strike not near end—Whether shipowners negligent—Bills of lading subject to U.S. law.

The *Mormacsaga*, a U.S. line vessel, was at Buenos Aires on her regular route from Montevideo, Uruguay, to ports in Argentina, Brazil, the U.S.A. and to Montreal, when a seamen's strike began in the U.S.A. which, it was known, would tie her up if she put in to a U.S. port. The *Mormacsaga* continued to take on cargo, including 700 tons of oranges at Santos, Brazil, for shipment under refrigeration to Montreal. Most of her cargo was destined for U.S. ports and the oranges (virtually the only perishable cargo) could not as stowed be unloaded without unloading other cargo (which it was estimated would cost $9,564). On her owners' instructions the *Mormacsaga* put in to Jacksonville, Florida, and her crew forthwith joined the strike, which continued for seven weeks with resulting deterioration of the oranges. The Montreal consignee of the oranges sued for damages ($53,150) alleging breach of contract by the shipowners in not diverting the ship to Montreal instead of going into Jacksonville. The owners' defence, which was based solely on the opinions of two of their senior officials, was that at the time the ship entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay.

The ship's bills of lading were expressly subject to U.S. law and the U.S. *Carriage of Goods by Sea Act (Cogsa)* which by s. 4(2)(*j*) relieves a carrier from loss arising from strikes. The bills of lading also contained a liberty clause giving the carrier power to divert the ship in a situation of risk to ship or cargo.

Expert evidence as to U.S. law established (1) that to make out a defence under s. 4(2)(*j*) of *Cogsa* a carrier must show that no negligence of his contributed to the loss, and (2) that the liberty clause in the bills of lading did not impose a duty on the carrier to divert the ship but merely to act reasonably.

Held, affirming Smith D.J.A.'s judgment for the plaintiffs, the shipowners had not established that their decision to enter Jacksonville instead of diverting the ship to Montreal was reasonable on the basis of the information available as to the possibility of the strike soon ending, and they had therefore not established that they were not negligent in ordering the ship into Jacksonville.

CORAM: Jackett P., Noël and Cattanach JJ.

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APPEAL by defendants from judgment of A. I. Smith, D.J.A., Quebec Admiralty District, awarding damages of $53,150.24 to plaintiffs.

Charles S. Alexander for defendants (appellants).

William Tetley, Q.C. and *Claude Armand Sheppard* for plaintiffs (respondents).

JACKETT P.:—This is an appeal from a judgment delivered on July 19, 1968, by Mr. Justice A. I. Smith, as District Judge for the Quebec Admiralty District, whereby he decided that the appellants were liable to pay to the respondents $53,150.24 together with interest and costs in respect of damages sustained by a shipment of oranges as a result of their being kept on the ship *Mormacsaga* for an excessive period by reason of the ship having been strikebound.

The appeal is an appeal against the decision that the appellants are liable for the damages in question. There is no appeal against the amount of the judgment.

In March 1962, the respondents, through their broker, William H. Kopke, Jr. of New York, contracted to purchase a quantity of Brazilian oranges from Citricula Brasileira Ltda. of Sao Paulo, Brazil, to be shipped from Santos, Brazil, by "Monthly Shipments starting about end May 1965" in "Refrigerated Stowage", which sale was made subject to the broker "arranging private steamer" and subject to "shippers approval of the date of the steamers and the days the steamer will remain in port loading". Mr. Kopke "developed the programme for the shipments" with the appellant, Moore-McCormack Lines, Inc. (hereinafter referred to as "Moore-McCormack"), and the shipper (i.e., the vendor of the oranges) signed a freight contract which obligated it to deliver and load the merchandise on the ships.

Moore-McCormack operated a liner service called the American Republic Service served by a number of United States vessels, the normal route of which was

Montevideo, Uruguay	Charleston, S.C.
Buenos Aires, Argentina	Norfolk, Virginia
Paranagua, Brazil	Baltimore, Md.
Santos, Brazil	Philadelphia, Pa.
Rio de Janeiro, Brazil	New York, N.Y.
Bahia, Brazil	Boston, Mass.
Jacksonville, Florida	Montreal, Canada

The *Mormacsaga* was one of the United States vessels used to service that route. Mr. Kopke was aware of this route.

Under the arrangement with Moore-McCormack, the first monthly shipment of the oranges purchased by the respondents was to be put on board the *Mormacsaga* in June 1965.

The *Mormacsaga* began the voyage in question at Montevideo on June 7, 1965. While it was at Buenos Aires, on June 15, 1965, a strike started in the United States involving unions representing a substantial portion of the crews and officers on United States ships. As a result of the strike being called, it was known to all concerned that, if the *Mormacsaga* put into an eastern United States port while the strike was in existence, it would be tied up by the strike until the end of the strike.

Notwithstanding the calling of the strike, the *Mormacsaga* continued to take on cargo at the various South American ports on its itinerary and to stow such cargo for delivery at the North American ports on its itinerary in the order in which they are set out above—all as had been arranged and planned before the strike was called.

In particular, when the ship was at Santos, the first monthly shipment of the oranges that had been sold to the respondents was delivered to the *Mormacsaga* on June 26, 1965, bills of lading were issued for it, and the oranges were stowed for delivery in Montreal in accordance with the stowage plans that had been made before the strike started on June 15, 1965. As so stowed, they could not be unloaded without first unloading some of the cargo consigned to United States ports.

When it had finished loading in South American ports, the *Mormacsaga* had on board cargo destined as follows:

for Jacksonville	880 T.
for Charleston	358 T.
for Norfolk	302 T.
for Baltimore	464 T.
for Philadelphia	447 T.
for New York	1,874 T.
for Boston	1,019 T.
for Montreal	1,274 T.
	6,618 T.

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Of the 1,274 T. destined for Montreal, oranges purchased by the respondents constituted 700 T. Those oranges occupied the whole of the vessel's refrigerated space except for two boxes of cheese. The remainder of the cargo could not be classified as perishable.

On June 29, 1965, the *Mormacsaga* left Rio de Janeiro for Jacksonville (there being, apparently, no reason for calling at Bahia on that trip) with an estimated time of arrival of July 10. Pursuant to orders from Moore-McCormack, the Master reduced his speed below the ship's normal speed with the result that she arrived at Jacksonville on July 13, 1965, where, the strike still being on, she tied up at a place where electricity was available for the refrigeration of the oranges, and the crew, including the Master, went on strike.

The *Mormacsaga* could have been diverted when she was off Jacksonville on July 12, 1965 (and presumably at any time after she left Rio de Janeiro) as she had sufficient bunkers and fresh water on board to have enabled her to sail directly to Montreal.

The strike finally ended on August 31, 1965. The *Mormacsaga* sailed from Jacksonville on September 3, 1965 and arrived at Montreal on September 22, 1965, at which time the oranges in question were delivered to the respondents.

While, otherwise, all steps were taken by the ship properly and carefully to keep and care for the oranges, by reason of the strike the oranges were on the ship over fifty days more than the time that they would ordinarily have been there. This extra delay in delivery resulted in the oranges deteriorating and being worth, when delivered, $53,150.24 less than they would have been worth if they had been delivered after a trip of normal duration.

This action was instituted by way of a writ issued out of the District Registry at Montreal. By the statement of claim, the respondents not only set up their *prima facie* claim under the bills of lading by alleging that the oranges had been received by the ship in good order and were delivered to the respondents in a deteriorated condition, but also allege, as follows:

> 5. THAT Defendants and other ocean carriers diverted other ships from East Coast American ports to avoid the strike but Defendants did not divert the *Mormacsaga*.

6. THAT at Toronto, Defendants' local agent admitted to William D. Branson that Defendants took a calculated risk in ordering the *Mormacsaga* into Jacksonville and did so for their own benefit because they hoped the strike would terminate soon.

7. THAT the proceeding of the *Mormacsaga* to Jacksonville, Florida, by Defendants was an intentional act, breaching and nullifying the contract and Defendants have no rights under the law, the contract or otherwise and Defendants are thus in the position, place and stead of insurers of the contract to carry.

* * *

20. THAT Defendants, prior to or upon the departure of the *S.S. Mormacsaga* from Santos, did not exercise due diligence to make said vessel in all respects seaworthy and fit to carry the said oranges and the ship was at the time of her departure and at various stages of the voyage unseaworthy and as a result Defendants are entitled to none of the rights or immunities of which they might otherwise benefit under the provisions of the law, the bill of lading or any contract.

The portion of the statement of defence which indicates the position taken by the appellants reads as follows:

22. THAT the voyage in question commenced in Montevideo, Uruguay, on or about June 7th, 1965;

23. THAT from Montevideo the *Mormacsaga* proceeded to her other scheduled ports of loading in the following order, namely, Buenos Aires in Argentina and Paranagua, Santos, Angras Dos Ries and Rio de Janeiro in Brazil, the whole as advertised and in accordance with the usual and customary route taken by the vessel;

24. THAT the vessel loaded general cargo in all the said ports for discharge at the following scheduled ports in the following order, namely, Jacksonville in Florida, Charleston in South Carolina, Norfolk in Virginia, Baltimore in Maryland, Philadelphia in Pennsylvania, New York in New York, Boston in Massachusetts (all on the East Coast of the United States of America) and Montreal, P.Q., Canada, the whole in accordance with the usual and customary route taken by the vessel;

25. THAT whilst the vessel was loading cargo in Buenos Aires, which she reached on or about June 12th, 1965, and left on or about June 19th, 1965, the strike referred to in Plaintiffs' Statement of Claim broke out at midnight on June 15th, 1965, affecting all the vessel's scheduled ports of call on the East Coast of the United States of America;

26. THAT at the time the said strike broke out Defendants had no way of knowing how long it might last;

27. THAT after the vessel had completed loading at Rio de Janeiro on or about June 29th, 1965, she departed for Jacksonville with a total general cargo of approximately 6,756 tons of which approximately 1,276 tons were destined for Montreal;

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28. THAT of the tonnage destined for Montreal approximately 700 tons consisted of the cases of oranges referred to in paragraph 1 of Plaintiffs' Statement of Claim and the remaining tonnage consisted of other general cargo;

29. THAT when the vessel sailed from Rio de Janeiro the cargo was stowed in such a manner that the cargo destined for Montreal (being the last scheduled port of discharge) could not have been discharged without first removing cargo destined for the intermediate ports on the East Coast of the United States of America;

30. THAT as the vessel approached Jacksonville the Defendants cabled her Master on at least two occasions instructing him to reduce speed;

31. THAT the last such cable was sent on July 9th, 1965, and read as follows:

"FURTHER REDUCE SPEED MAKE ARRIVAL JACKSONVILLE 0600 HOURS TUESDAY 13TH. ACKNOWLEDGE."

32. THAT Defendants instructed the Master to reduce speed in the hopes that the strike would be over by the time the vessel reached Jacksonville;

33. THAT after the vessel became strikebound in Jacksonville the Defendants had no way of knowing how long the strike might last;

34. THAT all twelve bills of lading produced together as Plaintiffs' Exhibit P-1 provide that the carrier shall be exempt from liability for loss or damage arising or resulting from strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

35. THAT even if the Defendants might have been justified in ordering the *Mormacsaga* to proceed directly to Montreal, by passing the scheduled intermediate ports of call on the East Coast of the United States of America, which is not admitted but on the contrary expressly denied, they were not bound to do so;

36. THAT in arriving at the decision not to divert the *Mormacsaga* the Defendants were bound to consider and did in fact consider the adventure as a whole and the interests of and their responsibilities to all shippers and/or consignees of the cargo on board as well as the interests of and their responsibilities to the shippers and/or consignees of the cargo here in question;

37. THAT at the time the vessel reached Jacksonville the strike had been in progress for almost one month;

38. THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay;

At the trial, it was common ground that the *Mormacsaga* never departed from its original schedule and had deliberately gone to Jacksonville nowithstanding that it was known that, when it did so, it would be tied up by the

strike as long as the strike lasted.[1] It was also clear that the responsibility for no decision having been taken to avoid that situation arising was that of the senior officers of Moore-McCormack and was not a matter that had been left to the Master of the vessel. Evidence was given by the two senior officers concerned with reference to why no such decision was taken.

The first of the senior officers of Moore-McCormack who gave evidence was Harrison R. Glennon, Jr., whose title was Executive Vice-President, Operations. On direct examination, he testified that, at the time the strike began, they "felt" that they were making substantial progress in their negotiations and that the strike "would be of a very short duration". He said that negotiations were in progress on July 9, 10, 11 and 12 of 1965 and that, on July 12, they thought that "within a short period of time we would have a contract". At that time, in the back of their minds was the fact "that unless we could conclude a contract, because of the importance of our vessels, that the Federal Government would enter the picture and hopefully that ... they would force an early settlement". On July 12, in his opinion, "The prospects were reasonably good for an early settlement". In his view, "During strike negotiations it is just the feeling that you have, are you close to settlement or are you not?" On cross-examination, Mr. Glennon said that it was probably on his advice concerning the prospects of the strike that the company acted in going into Jacksonville. When referred to newspaper accounts of the strike negotiations being bogged down before the middle of July, he stuck to his statement that they were "at all times... hopeful of even that evening getting a settlement".

The second senior officer of Moore-McCormack to give evidence was Sebastien J. Mueller, Vice-President in charge of American Republic Line Service for that company. On

[1] I see no necessary inconsistency between evidence that the vessel was instructed to lay off the crew on account of the strike upon its arrival at Jacksonville and that the vessel proceeded to a berth where it could not unload and the contention that it was expected that the strike would end "without further undue delay". Clearly, when the vessel entered Jacksonville the strike was still on and she was going to be tied up by the strike. The crew would therefore go on strike and the vessel had to tie up where electricity was available for refrigeration. The appellants' position is that this was a situation which, they expected, would not last long.

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direct examination he said that, when the *Mormacsaga* left Rio de Janeiro, the officers of Moore-McCormack "thought that the settlement of the strike was imminent" and that they were receiving reports from their operations people—Mr. Glennon and those associated with him—who attended the "union meetings". He said that it was not logical for the *Mormacsaga* to have been ordered to proceed directly to Montreal by-passing the ports from Jacksonville to Boston because they thought that the end of the strike was imminent and that there would not be an undue delay and because the vessel was not stowed "that way". In addition, he said, "Had the strike been over and we had diverted the vessel we had to give consideration to other cargoes which were some 5500 tons for American ports as well". He also said that, at that time, there was no indication that they could be assured that the stevedores in Montreal would handle the discharge of American cargo "while we were on strike in the United States ports". On cross-examination Mr. Mueller, on being questioned about the way the oranges were stowed in relation to other cargo, said that, at the time the *Mormacsaga* loaded, "it was still our opinion that the strike would be of short duration", and that the strike "would be over" when the vessel arrived in a strike-bound port. He admitted that, if they had known, when they loaded the oranges on June 26, that the strike would not be over when they were due in Jacksonville, they would have stowed the oranges and other cargo so that the oranges could be unloaded first in Montreal as they did the two subsequent shipments on other vessels.

[Some of Mr. Mueller's evidence was relied on as tending to show that an agreement was made on behalf of the respondents that the strike need not be allowed to interfere with the normal trip of the *Mormacsaga*. I have not referred to such evidence, as in my view, no such agreement was established.]

Evidence was adduced by the respondent at the trial to show that the estimated extra cost of moving the cargo for United States ports in order to make the Montreal cargo "acceptable" would have been $9,564. I accept this evidence as establishing that the extra cost of unloading the oranges and other Montreal cargo before the United States cargo would have been approximately that amount.

Paragraph 16 of each of the bills of lading covering the shipment of oranges in question contains a clause reading: "This bill of lading shall be construed and the rights of the parties thereunder determined according to the law of the United States". Each bill of lading also contains a provision reading: "This bill of lading shall have effect subject to the provisions of the *Carriage of Goods by Sea Act* of the United States..." The latter Act, which has been put in evidence by the respondent, reads, in part, as follows:

CARRIER'S DUTY AND RIGHTS

RISKS—Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

DUE DILIGENCE TO MAKE SEAWORTHY BEFORE SAILING RESPONSIBILITIES AND LIABILITIES.—Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

CARRIER'S DUTY TO CARGO

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * *

IMMUNITIES—EXCEPTIONS

Sec. 4(1)...

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

While the bill of lading expressly provides that the rights of the parties thereunder are to be determined according to the law of the United States, this is a type of situation where, I should have thought, the court is to assume that the foreign law is the same as Canadian law except to the extent that some party has pleaded and proved, by the evi-

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dence of experts, the state of the foreign law.[2] In this case, neither party has pleaded what it says the law of the United States is on any relevant aspect of the matter. The parties have, however, by mutual arrangement, each put before the court below the evidence of a qualified United States lawyer on certain aspects of the matter. Where there is no such evidence, the presumption, to which I have referred, in my view applies. Where there is such evidence, the court must find as a fact (the parties having, with the acquiescence of the court below, impliedly waived pleading the foreign law that they intended to prove) the state of the foreign law on the areas covered by such evidence.

Mr. J. H. Simonson, an attorney-at-law from New York, gave evidence on behalf of the respondents. He expressed the opinion that the effect of American law is "that a carrier cannot accept goods for a non-strikebound port and take those goods into a port that is known to be strikebound... and hold them there and eventually make delivery resulting in loss to the owner of the goods bound for the non-strikebound port". He also pointed out an "important" difference between the United States *Carriage of Goods by Sea Act* (usually referred to as "Cogsa") and the Hague Rules as originally adopted, which consists of the fact that Cogsa does not make the carrier's duty to "cargo" as contained in section 3(2) subject to the "Immunities—Exceptions" contained in section 4 while the corresponding duties in the Hague Rules are expressed to be subject to the corresponding exceptions. (In support of his opinion that "carrier cannot go into a strikebound port with cargo for a non-strikebound port", Mr. Simonson referred to numerous authorities.) Mr. Simonson then quoted clause number 4 from the bills of lading in this case, which is usually referred to as the "Liberties Clause", and which reads in part as follows:

> 4. In any situation whether existing or anticipated before commencement of the voyage, which in the carrier's judgment may give rise to risk of damage, delay or disadvantage to the ship, her cargo or persons aboard, or make it imprudent to begin or continue the voyage or to enter or discharge at the port of discharge, or give rise

[2] *Canadian Fire Ins. Co. v. Robinson*, (1901) 31 S.C.R. 488 at p. 493; *C.N. Steamships Co. v. Watson* [1939] S.C.R. 11 at p. 14; and *Transocean Machine Co. v. Oranje Line* [1958] Ex. C.R. 227 at p. 229. The rule does not apply, however, to special provisions of particular statutes altering the common law. See *Gray v. Kerslake*, [1958] S.C.R. 3 at p. 10.

> to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge there, the carrier may discharge the goods into depot, lazaretto, craft, or other place; or may proceed or return, directly or indirectly, to such other port or place as the carrier may select and discharge the goods or any part thereof there; may retain the goods on board until the return trip or such time as the carrier thinks advisable; or may forward the goods by any means, but always at the risk and expense of the goods.

and expressed the opinion: "This says that the carrier can decline to export the goods. He has given himself full leeway in refusing to take it or discharge the goods if he has put them on board already, or discharge some other place, always for the purpose of avoiding delay and to damage the goods". (He also referred to authorities on this point.) In an apparent application of this principle to the facts of the present case, he said:

> The contract of carriage is to carry safely to destination and to deliver the goods in the same apparent good order as when they were received by the ship. If the vessel cannot do this, it has breached the contract of carriage. Now, to stow cargo on a vessel which is going—a vessel which is going to a strikebound port, and particularly when this cargo is perishable, and is bound for a non-strikebound port, I believe in this case there is a violation under the contract of carriage.

He also expressed the opinion that section 3(1) of Cogsa is applicable in circumstances set out in a question put to him that reads as follows:

> Mr. Simonson, in your opinion again in respect to a crew, an American crew, on an American flag ship bound for an American port which will be strikebound, and also the same crew is on a ship which has contracted to proceed to a port which will not be strikebound, do you consider that in the second contract that the crew is complete or the ship is seaworthy?

Finally, he expressed the opinion that the onus is on the carrier to show that the immediate cause of the damage is an "excepted cause" and referred to authorities to support that opinion.

Mr. Tallman Bissell, another attorney-at-law from New York, gave evidence on behalf of the appellants. He expressed the opinion that section 4(2)(*j*) of Cogsa, which relates to strikes, will give a carrier exemption from liability "provided that he can show that no negligence of his or on the sea... contributed to the loss". Referring to the Liberties Clause, he said, "... the ship must act reasonably under the circumstances. I don't believe there is a duty to divert, but merely a duty to act reasonably". Upon being

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referred to a passage in a judgment in one of the United States cases referred to by Mr. Simonson, reading as follows:

> If the vessel had proceeded to Los Angeles to wait out the strike, she would unquestionably become liable for damages to all other consignees of cargo for delays in delivery that could have been avoided.

he said, "I agree because in that case the judge had decided it was not unreasonable to divert the vessel."

The reasoning by which the learned trial judge came to the conclusion that the appellants were liable for the damage to the oranges is contained in the following portion of his reasons for judgment:

> The bills of lading provide that they will be subject to the provisions of the water carriage of goods act of the United States of America.
>
> Section 4(2)(*j*) of that statute provides that:
>
> "(2)(*j*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general: Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"
>
> It is noteworthy that this section is identical with the corresponding section of the Canadian Water Carriage of Goods Act except that the last clause thereof is not included in the Canadian Act.
>
> Included also in the said bills of lading is the usual liberty clause and it appears to be common ground that the defendants would, in virtue of this clause, have been entitled to deviate to proceed direct to Montreal instead of entering the Port of Jacksonville.
>
> Expert evidence as to the Law of the United States was presented on behalf of both parties with jurisprudence in support thereof.
>
> The following is an excerpt from the testimony of Mr. Bissell, a New York Attorney, heard on behalf of the Defendants (at page 212) and referring to the exception relating to strikes:
>
> "Well, this exception is treated by the Courts as other similar exceptions in this section of the Act. That it will give the carrier, if he can bring himself within the exception, exemption from liability; provided he can show that no negligence or fault of his contributed to the loss."
>
> The witness referred particularly to the case of BUDHWAR vs. COLORADO FUEL, 1955 A.M.C. 2139.
>
> After considering the testimony of the experts and examining the cases cited the Court is of the opinion that the test of whether the entry of the Mormacsaga into the Port of Jacksonville on the 13th day of July amounted to failure on the part of the Defendants to carry out their contract and exercise due care to protect and safely carry the Plaintiff's shipment in accordance with its obligations under the contract of carriage is whether in so doing, rather than proceeding direct to Montreal, those in charge of the said vessel acted with proper regard for the rights of the consignees as well as with reasonable care for those rights.

Having regard to the fact that, to the knowledge of the Defendants and their representatives, a strike was in progress at Jacksonville and that when the Plaintiff's shipment was loaded at Santos and at all times thereafter, right up until the vessel entered the port at Jacksonville, the Defendants or their representatives knew or ought to have known that the strike was still in effect, did they not fail to act reasonably by entering the port of Jacksonville rather than deviating to and proceeding directly to Montreal, which they were entitled to do in virtue of the liberty clause above quoted.

As noted above, the Statement of Defence contains inter alia the following paragraph:

> "38. THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay."

This is an allegation which, if proven (and the burden of proof rested upon the Defendant) might have constituted a valid defense to the Plaintiff's action.

However in the opinion of the Court it was not established by the proof. The only evidence offered in support of the allegation that the Defendants had reason to believe that the strike would be over "without further undue delay" was the testimony of Mr. Glennon who stated that it was so expected. His testimony in this respect however was not corroborated or supported by any other evidence. Moreover from the newspaper clippings produced it would appear that there was no real basis for the expectation, or even the hope, that an early settlement of the strike would ensue.

In the Court's view the Defendants failed to establish that there was any real reason to expect an early end to the strike which at the time the vessel entered Jacksonville had been in progress for almost a month and as things turned out, persisted until August 31st, 1965.

In the circumstances the Court finds that the Defendants and their representatives, by entering Jacksonville rather than proceeding directly to Montreal failed to act with reasonable care and prudence and with proper regard to the preservation of the Plaintiff's shipment of oranges.

There is moreover no evidence that had the vessel continued on to Montreal, instead of entering Jacksonville, the Plaintiff's shipment would not have been saved undamaged nor is there proof to justify the conclusion that this could not have been done with due regard to the interests of the owners of other cargo.

In the circumstances the Court considers that the Plaintiff has established his right to recover the damages sustained by it as the consequence of the failure of the Defendant and its representatives to carry out their obligations under the said contract of carriage.

The appellants attacked this judgment on two principal grounds, *viz*,

(a) that the learned trial judge erred in his finding that Moore-McCormack "failed to establish that there was any real reason to expect an early end to the strike", and

(b) that Moore-McCormack should not be held liable unless the respondents can show that the decision not

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to divert was manifestly unreasonable bearing in mind that, as a carrier, Moore-McCormack had a responsibility to all shippers and consignees and had to consider the adventure as a whole and not just the respondents' interest.

While the respondents put forward submissions concerning various aspects of the matter, their formal position is that "the real issues in this case" are "whether the carrier or the ship acted reasonably in accepting the cargo, and particularly in sailing straight into a strikebound port".

It is common ground that the shipment of oranges in question was delivered to the carrier in good order and was delivered by the carrier to the consignee in a deteriorated condition. The respondents were therefore entitled to judgment for damages unless the appellants brought themselves within one of the exceptions in section 4 of Cogsa.

The only such exception upon which the appellants relied was section 4(2)(*j*) of the United States statute. The ambit of this exception was the subject of expert evidence led by both parties. The expert for the appellants expressed the opinion, in effect, that section 4(2)(*j*) will only provide a defence to a carrier in respect of a loss arising out of a strike "provided that he"—that is, the carrier—"can show that no negligence of his . . . contributed to the loss". The respondents' expert, as I understand his evidence, took an even narrower view as to the ambit of section 4(2)(*j*). I find *as a fact*, on this evidence, that, according to the United States law, a carrier does not establish a defence under section 4(2)(*j*) unless he, at least, shows that no negligence of his contributed to the loss[3] arising from the strike situation relied on to bring him within the exception.

[3] The witnesses do not make it clear by their testimony how they reached their conclusion. The result may have been reached by referring to a failure properly and carefully to "care for" the cargo as required by section 3(2) of Cogsa as "negligence" excluded from the ambit of the exception by the proviso to section 4(2)(*j*). (It is arguable that such reasoning would not be acceptable if the Canadian statute were applicable.) Alternatively, the reasoning may be quite simply that a carrier does not establish that damage was *caused* by a strike unless he excludes the possibility that it was *caused* by his wrongfully or improperly taking the ship into a strikebound port contrary to the primary obligation in the contract of carriage. Compare *Steinman & Co. v. Angier Line*, (1891) 1 Q.B. 619.

The background against which it must be considered whether the appellants have discharged this onus of showing that the carrier's negligence has not contributed to the deterioration in the respondents' oranges caused by their being held in the strikebound port is that Moore-McCormack was operating a vessel that was held out to the public as being available to take goods from various specified ports in South America to various specified ports in the United States and to Montreal. When, therefore, by each contract of carriage evidenced by the bills of lading it issued for the various shipments it accepted in the South American ports, it undertook to deliver such goods to a specified port, that obligation must be considered in the light of the obligations similarly undertaken, in the ordinary course of its business, by all the other contracts of carriage so evidenced. In the ordinary course, therefore, the obligation to deliver the oranges in Montreal was subject to the carrier's responsibility to deliver first all the cargo consigned for United States ports. It follows that it was because it was following the normal and ordinary course of events that the vessel went to Jacksonville before it went to Montreal. Indeed, it would seem to be clear that a consignee in Jacksonville had an expectation that his cargo would be delivered on or about the time scheduled for the *Mormacsaga's* call at that port and would probably have had a legal recourse for any loss arising from an undue delay in delivery, if, for no justifiable reason, the ship had gone to Montreal before going to Jacksonville. Indeed, each of the other consignees of cargo destined for a United States port similarly had a business expectation, if not a legal right, to delivery in accordance with the established schedule, before the vessel went to Montreal.[4] Unless, therefore, the carrier had a right to change the normal route of the vessel by reason of the strike situation, there is no ground for suggesting that the carrier was negligent in allowing the vessel to go into the strikebound port.

It is, as I appreciate the situation, because the legitimate interests of the consignees of other cargo would have

[4] Compare *Leduc v Ward,* (1888) 20 Q.B.D. 475, at pp. 480 *et seq.; Margetson v. Glynn* [1892] 1 Q.B. 337; [1893] A.C. 351; *James Morrison & Co. v. Shaw, Savill and Albion Co.* [1916] 2 K.B. 783 at p. 792 *et seq.;* and *Frenkel v. MacAndrews and Co.* [1929] A.C 545.

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required that the vessel go to Jacksonville and the other United States ports before going to Montreal that both parties paid considerable attention to the so-called Liberties Clause to be found in all of Moore-McCormack's bills of lading. That clause reads, in part, as follows:

> 4. In any situation...which in the carrier's judgment may give rise to risk of damage, delay or disadvantage to the ship, her cargo or persons aboard...the carrier...may proceed...directly or indirectly, to such other port...as the carrier may select and discharge the goods...; may retain the goods on board until the return trip...or may forward the goods by any means, but always at the risk and expense of the goods.

The respondents' position is, in effect, as I understand it, that, once the strike situation arose, Moore-McCormack should have invoked the authority given to it by this clause in the bills of lading for goods consigned to United States ports so as to put it in a position, without being in breach of the contracts evidenced by those bills, to take the Montreal cargo to Montreal directly and so avoid having it tied up in a strikebound port.

With reference to the duty of the carrier to the consignee of the oranges destined for Montreal to exercise the Liberties Clause in the bills of lading for the remainder of the cargo so as to take the oranges directly to Montreal, I accept the evidence of Mr. Bissell that there was no "duty to divert" but only a "duty to act reasonably."

I have no doubt that the strike in question was a "situation" in relation to which Moore-McCormack would have been justified in considering exercising the power conferred on it by the Liberties Clause in the other bills of lading, and, indeed, as Mr. Bissell has indicated, it cast on the carrier a "duty to act reasonably", that is, as I understand it, to address itself to the question as to what special action, if any, was required by the strike situation having regard to the interests of all concerned in the adventure and to reach a reasonable decision as to whether, having due regard to the interests of all, the Liberties Clause should be invoked for the purpose of changing the order in which the ports on its schedule should be visited.

I find no support in the evidence as to the United States law for the contention by the appellants that the burden was on the consignee to show that the decision not to "divert" was manifestly unreasonable. As already indicated,

I have accepted the evidence of the appellants' expert, Mr. Bissell, that it was for the carrier to show that his negligence had not contributed to the loss.

On the other hand, I am of the view that the carrier would have discharged the obligation on it (under United States law as I have found it to be on the evidence) to show that its "negligence" did not contribute to the loss, in circumstances such as exist here, if it had shown that, at the various points of time when the circumstances required it to consider the matter, it had addressed itself to the problem and did so in a reasonable manner. The question is whether it acted reasonably in the circumstances as a carrier faced with a special situation and owing a duty to all having an interest in the adventure, and not merely whether it acted reasonably having regard to the safe-keeping of the oranges. Assuming it did so act reasonably, the Court should not substitute its judgment *ex post facto* for the decision made by the carrier in the somewhat critical situation facing it at that time.[5]

I do not find that the approach that I have expressed so laboriously differs in effect from that indicated in a much more concise manner by the learned trial judge. His reasoning, as I understand it, was as follows:

(a) he accepted Mr. Bissell's opinion that a carrier could not avail itself of section 4(2)(*j*) unless it showed that no negligence on its part contributed to the loss;

(b) he said, ". . . the test of whether the entry of the *Mormacsaga* into ... Jacksonville .. amounted to failure on the part of the Defendants to carry out their contract and exercise due care to protect and safely carry the Plaintiff's shipment in accordance with its obligations under the contract of carriage is whether in so doing, rather than proceeding direct to Montreal, those in charge of the said vessel acted with proper regard for the rights of the consignees as well as with reasonable care for those rights";

(c) having regard to all the circumstances, he re-stated the test as being, "did they not fail to act reasonably by

[5] Compare *Phelps, James & Co. v. Hill,* (1891) 1 Q.B. 605 at pp. 612-13.

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entering . . . Jacksonville rather than deviating to . . . Montreal, which they were entitled to do in virtue of the liberty clause . . .;" and

(d) from this, he concluded that the allegation in the defence that, at the time that the vessel entered Jacksonville, there appeared to be a strong possibility that the strike might end without further delay might have constituted a defence if the defendant had proved it.[6]

While I am not satisfied that, in all circumstances of a strike situation, a mere forming of a general opinion that there is a strong possibility that the strike might not last long would be a sufficient discharge of the carrier's duty to consider exercising the Liberties Clause in the interest of cargo owners, I am satisfied that, if the appellant was not able to establish that there was a "strong possibility" of the strike ending without further delay at the time that the ship entered Jacksonville, the learned trial judge was right in holding that it had failed to establish the defence under section 4(2)(*j*) in the manner in which it had undertaken to establish it.

I might try to re-state my position on this crucial point in the appeal. Accepting, as I do, the position that United States law requires a carrier to act reasonably in deciding whether or not to invoke the Liberties Clause in some bills of lading to change a vessel's route, in my view, whenever a situation arises that would make it impossible, if the situation continues, for the vessel to operate normally in a port that it is scheduled to visit—whether it be a strike, a state of war, a revolution or any other abnormal state of affairs—the carrier must consider whether the probabilities of the situation call for any change in the plans that were made when such situation was normal; and it must do so as a reasonably knowledgeable, capable and responsible

[6] My own view is that it would have been more to the point if Moore-McCormack had established the allegation in paragraph 36 of the statement of defence "That in arriving at the decision not to divert the *Mormacsaga* the Defendants...did in fact consider the adventure as a whole and the interests of and their responsibilities to all shippers and/or consignees of the cargo on board as well as the interests of and their responsibilities to the shippers and/or consignees of the cargo in question". However, I do not find evidence establishing that such consideration was given at the relevant times. The learned trial judge does not consider the matter as though it had been submitted to him that this fact had been proved and the appellant does not attack the judgment because no finding of fact was made to that effect.

business man carrying on this type of business. Applying that to the situation facing Moore-McCormack just before it accepted the oranges on board at Santos, it might have considered refusing a shipment of perishable goods by reason of the uncertainties created by the strike. (I should say that I am not satisfied on the evidence that this would not have been a breach of the freight contract that had been entered into by the vendor of the oranges with the carrier.) If it had done so and the strike had been settled the day after the vessel left Santos, it might well have then seemed that, having regard to the probabilities of an imminent settlement, its decision had paid too little regard to the business interest of the respondent in having the oranges in Montreal at the scheduled time. Another possibility is that, when it did accept the oranges at Santos, it might have considered so stowing the rest of the goods in the vessel that, in the event that the strike turned out to be prolonged, the oranges could, without undue expense, be discharged at Montreal before the United States consignments were discharged. This would have made subsequent diversion a more acceptable decision. Similarly, when the vessel was leaving Rio de Janeiro, and again when it was off Jacksonville, I should have thought that the carrier should have examined the current situation by weighing the adverse effect on the owners of the oranges and other Montreal cargo of going to Jacksonville if the strike should then become protracted against the adverse effect on the consignees of United States cargoes (and the extra costs involved if the ship were diverted to Montreal) if the strike should then come to an end as soon as the vessel were committed to the divergent course.

Obviously, in deciding whether or not to make any change in the normal operation of the vessel in any such situation, the probable duration of the emergency situation would be a very important factor. If, for example, a handful of employees have called a one-day strike at a port that a vessel does not expect to reach for a month, it might well be an irresponsibly timid interference with normal commerce to depart from an announced schedule. If, on the other hand, a strike has been announced by both sides as one that is to be fought to the end, if both sides are apparently in shape for a protracted struggle, and if the government concerned has announced that the long run

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public interests require that the parties be allowed to fight it out, a carrier serving the public might be regarded as irresponsible if it does not take steps to enable it to protect the interests of consignees against the possibility that the strike will last a long time.

In this case, the carrier has, by its evidence, rested its case on a single proposition. It has justified not changing its plans in any way by reason of the strike on the ground that "there appeared to be a strong possibility that the strike might end without further undue delay". That has been put forward as a sufficient indication of a discharge of its duty to act reasonably. If it has failed to prove that contention, it has failed to discharge the onus of showing that its negligence did not contribute to the loss because the attempt to prove that allegation in its pleading is the only attempt that it made, by its evidence, to show that it was not at fault in not changing its schedule so as not to take the Montreal bound cargo, including the oranges, into a strikebound port.[7]

I have already reviewed the evidence of the two senior officers of the appellants that were involved in making the critical decision and, after giving it the most sympathetic consideration that I can, I have come to the same conclusion as the trial judge, namely, that the appellants have not established the correctness of the allegation in paragraph 38 of the statement of defence. Taken as pleaded, that paragraph is an assertion "THAT . . . there appeared to be a strong possibility that the strike might end without further undue delay". That pleading, to me, is a pleading that such "strong possibility" appeared generally to those interested in the situation. The evidence really stops short of indicating anything except that it so "appeared" to Mr. Glennon who was able to point to no single factor that led him to that conclusion, and to his associates, who accepted his appraisal of the matter. To have any relevance for the purpose of discharging the onus of showing that their negligence did not contribute to the loss, it would have had to

[7] Even if the appellants had proven that there was a strong possibility that the strike might end without further undue delay, I am not satisfied that that would have been sufficient to discharge the onus of showing that it had acted reasonably. In view of my conclusion that it did not establish that strong possibility, I am relieved from considering whether the onus did not go to showing that it had given, at the relevant times, a more precise consideration to the various factors involved.

be shown that there was some real basis in fact that led the appellants' officers to believe that the strike would probably end without undue delay. I adopt the finding of the learned trial judge that there was no "real reason" established by the appellants to expect an early end of the strike.

I find, therefore, that the appellants have failed to bring themselves within the "strike" exception contained in the United States *Carriage of Goods by Sea Act*.

In my view, therefore, the appeal should be dismissed with costs.

NOËL J.:—The learned trial judge found that the damage to the oranges had been caused by the defendants (the carrier and its owners) in that they failed "to carry out their contract and exercise due care to protect and safely carry the plaintiffs' shipment in accordance with its obligations under the contract of carriage" when on July 13, 1965, the vessel *Mormacsaga* entered the strike-bound port of Jacksonville in the U.S.A., where it remained stranded for 49 days before completing its scheduled trip and eventually reaching Montreal where plaintiffs' oranges were unloaded and found to be in a deteriorated condition.

He indeed held that the defendants failed "to act reasonably by entering the port of Jacksonville rather than deviating to and proceeding directly to Montreal, which they were entitled to do in virtue of the liberty clause contained in the bills of lading".

The learned trial judge in this connection referred to paragraph 38 of the statement of defence which reads as follows:

> (38) THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay.

and then stated:

> This is an allegation which, if proven (and the burden of proof rested upon the Defendant) might have constituted a valid defense to the Plaintiff's action.
>
> However in the opinion of the Court it was not established by the proof. The only evidence offered in support of the allegation that the Defendants had reason to believe that the strike would be over "without further undue delay" was the testimony of Mr Glennon who stated that it was so expected. His testimony in this respect however was not corroborated or supported by any other evidence. Moreover from the newspaper clippings produced it would appear that there was no real basis for the expectation, or even the hope, that an early settlement of the strike would ensue.

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In the Court's view the Defendants failed to establish that there was any real reason to expect an early end to the strike which at the time the vessel entered Jacksonville had been in progress for almost a month and as things turned out, persisted until August 31st, 1965

The learned trial judge then concluded as follows:

> In the circumstances the Court finds that the Defendants and their representatives, by entering Jacksonville rather than proceeding directly to Montreal failed to act with reasonable care and prudence and with proper regard to the preservation of the Plaintiff's shipment of oranges.

He then finally added:

> There is moreover no evidence that had the vessel continued on to Montreal, instead of entering Jacksonville, the Plaintiff's shipment would not have been saved undamaged nor is there proof to justify the conclusion that this could not have been done with due regard to the interests of the owners of other cargo.

Before dealing with a number of facts necessary in my view to properly understand the issues involved in this appeal, it is helpful, I believe, to point out three rather important facts admitted by the parties in that:

> (1) "...the deterioration in the condition and state of the oranges, carried under twelve (12) bills of lading...was due solely to the extra passage of time during which the *Mormacsaga* (with the said oranges on board) lay strike-bound in Jacksonville from July 13th, 1965 to August 31st, 1965".

(i.e., a period of 49 days) and therefore the damage was caused only by the extended delay due to the laying up of the ship at Jacksonville because of the strike[8] which involved four United States unions, namely those of the masters, mates and pilots, the machine engineers, the radio operators and pursers.

> (2) ...the contract of carriage is subject to the Carriage of Goods by Sea Act of the United States of America (known as "Cogsa").

Two American attorneys, Mr. James H. Simonson, on behalf of the respondents and Mr. Tellman Bissell, on behalf of the appellants, were heard as experts on United States law. Both of these gentlemen in their evidence referred to a number of American and Canadian decisions to establish the law applicable to the solution in this case, but were unable to refer to any case that was directly in point. They did, however, point out a number of differences

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[8] This is confirmed by the report of the surveyer from Hayes, Stuart & Co. Ltd, acting for the respondents (Exhibit P-3) which indicates that the oranges were properly cared for from the time they were loaded in Santos to the time they were discharged in Montreal.

between the Canadian law under the *Water Carriage of Goods Act* and the American legislation, and it may be of some interest to indicate them here.

Section 4(2)(*j*) of Cogsa (the U.S.A. statute) which creates an exemption in the case of (*inter alia*) strikes reads as follows:

> Section 4
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
>
> *j*) strikes or lockouts or stoppage or restraint of labour from whatever cause whether partial or general: *provided that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts.*

The section in italics is not found in the Hague Rules or the Canadian *Water Carriage of Goods Act,* and section 3(2) of Cogsa which deals with the obligation of the carrier to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried" does not contain the opening words "Subject to the provisions of article 4" (which deals with a number of immunities of the carrier including strikes) which are found in the Hague Rules and in the Canadian *Water Carriage of Goods Act,* R.S.C. 1952, c. 291.

There is, as I see it, however, no difference between the Canadian law and the American law insofar at least as the immunity for strikes is concerned because the evidence of the expert witness was that the proviso in section 4(2)(*j*) would have no effect different than the corresponding section under the Canadian Act as it merely affirms the general principle that no man can take advantage of his own wrong[9]. With regard to the obligations and rights of the carrier, under the American Act, concerning the immunity given by strikes, I am content to accept as the law of the United States the expert evidence of T. Bissell for the defendants (p. 217 of the case) when, to the following question, he gave the following answer:

> Q And would you please tell the Court what in your opinion is the Law of the United States on the exception of strikes and in particular the proviso.
>
> A. Well, this exception is treated by the Courts as other similar exceptions in this Section of the Act that it will give the

[9] *Cf.* Ocean Bills of Lading, by Knauth, 1953 ed. at p. 223.

The maxim that "No man can take advantage of his own wrong" means that a man cannot enforce against another a right arising from his own breach of contract or breach of duty (Re *London Celluloid Co.* (1888) 39 Ch D. 190).

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carrier, if he can bring himself within the exception, exemption from liability, provided he can show that no negligence of his or on the sea was perhaps no fault of his—contributed to the loss ...

3. Captain Dale E. Haakinson, the Master of the *Mormacsaga*, admitted that if the owners of the vessel had instructed him to come to Montreal directly instead of going to an American port, he could have done so as the vessel had enough water and fuel to do so.

The respondents submitted that the real issues in the appeal are:

(*a*) whether the carrier was negligent in accepting as it did, on June 24 to 27, 1965, the cargo of perishables (oranges) in Santos, when it knew that a strike had been declared on June 15, 1965, and was in progress on the east coast of the United States and that its ship would become strike-bound as soon as it reached Jacksonville, the first American port on its scheduled voyage northward, and

(*b*) whether the carrier was negligent thereafter in not diverting the ship from Jacksonville to a port which would not be strike-bound or to Montreal as it had a right to do under clause 4 of the bills of lading (Exhibit P-1) which reads as follows:

4. In any situation whether existing or anticipated before commencement of the voyage; which in the carrier's judgment may give rise to risk of damage, delay or disadvantage to the ship, her cargo or persons aboard, or make it imprudent to begin or continue the voyage or to enter or discharge at the port of discharge, or give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge there, the carrier may discharge the goods into depot, lazaretto, craft, or other place; or may proceed or return directly or indirectly, to such other port or place as the carrier may select and discharge the goods or any part thereof there; may retain the goods on board until the return trip or such time as the carrier thinks advisable; or may forward the goods by any means, but always at the risk and expense of the goods.

In order to properly understand the situation the owners of the vessel were faced with in deciding as they did to enter a strike-bound port, it is useful to go into some of the facts covering the voyage of the *Mormacsaga* prior to entering Jacksonville.

The north-bound voyage of the *Mormacsaga* started in Montevideo on June 7th, 1965, and then proceeded to her other scheduled ports of loading in the following order: Buenos Aires, Paranagua, Santos (where plaintiffs' oranges were loaded) Angras Dos Ries and Rio de Janeiro, where

she loaded general cargo for discharge at the following ports in the following order: Jacksonville Florida, Charleston South Carolina, Norfolk Virginia, Baltimore Maryland, Philadelphia Pennsylvania, New York, Boston Massachusetts and, finally, Montreal, P.Q., in accordance with the usual and customary route taken by vessels in the owners of the *Mormacsaga's* American Republics Line Service.

The *Mormacsaga,* after completing loading at Rio de Janeiro on June 29th, 1965, sailed for Jacksonville, Florida, with a total general cargo of approximately 6,756 tons (although from the evidence of the captain at pp. 50-51, the total appears to be 6,618) of which 880 tons were to be discharged in Jacksonville, 358 tons at Charleston, 302 tons at Norfolk, 464 tons at Baltimore, 447 tons at Philadelphia, 1,874 tons at New York, 1,019 tons at Boston and, finally, 1,274 tons at Montreal of which 700 tons consisted of plaintiffs' oranges and the remaining tonnage consisted of other general cargo. The only perishables on board were plaintiffs' oranges and a small cargo of cheese.

The stowage plans, Exhibits P-14 and P-15, indicate how the cargo was stowed and the evidence of one Parfett, a witness produced by the plaintiffs, shows that the cargo for Montreal could not have been discharged without first removing some cargo destined for the other ports at a cost which was estimated at $9,564.

There is no question that the vessel could have been diverted to Montreal at some point after it left Rio de Janeiro or even later when it arrived close to Jacksonville. Had the vessel gone directly to Montreal from Rio de Janeiro, instead of proceeding to Jacksonville, as it did, it would have travelled only 637 miles further than Jacksonville since the distance to Jacksonville is 4,707 miles and to Montreal 5,354 miles. The time involved at the admitted optimum speed of 16½ knots would have been, according to C. Parfett (plaintiffs' witness) 11 days and 22 hours to Jacksonville and approximately 14 days to Montreal (*cf.* factum, p. 171, line 23). The extra time required would, therefore, have been a little more than three days.

I have gone into the facts covering the loading of the cargo, the manner in which the cargo was loaded and the possible routes the vessel could have taken to deliver plaintiffs' cargo in Montreal, because the decision to enter into a strike-bound port as defendants did, must be considered

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in the light of all the surrounding circumstances including the possibility or feasibility of diverting the cargo to Montreal, which enters into some of the considerations a carrier is faced with when a decision has to be taken as to what course its vessel should adopt having regard to the interest of all the cargo owners.

I do not consider that there is any substance in respondents' submission that the carrier was negligent in accepting the load of oranges in Santos when it knew that a strike was in progress on the east coast of the United States and that its ship would become strike-bound as soon as it reached Jacksonville, its first American port although I would have thought that some consideration would have been given at that time to loading the cargo so that the oranges could, if necessary, be unloaded first. A strike is something which may end at any time and the carrier was, in my view, entitled to continue to pick up cargo along its scheduled route in the hope and expectation that the strike would be over prior to or even when it reached the strike-bound port. I am not impressed either by S. J. Mueller's (Vice-President of the appellants) suggestion that William Kopke, the New York broker who arranged for the sale and purchase of the oranges, was aware of the possibility of the vessel becoming strike-bound but had agreed to load the cargo because of the possibility that the strike would probably be settled shortly.

Appellants' submission that Kopke, on behalf of the plaintiffs, had agreed to accept the risk of placing the cargo on board the vessel and to have the latter put into a strike-bound port, is not supported by the weight of the evidence. Mueller's evidence is at its highest a suggestion only and Kopke denies that he ever agreed to such a proposal. It also appears that this so-called agreement was not even alleged in the plea. At any rate, I cannot see how from such evidence, it can even be inferred that the plaintiffs had agreed that the carrier would safely transport and deliver its cargo only if the existing strike was settled, which is really what the respondents are saying and which is what it would have to mean to have any effect on the rights of the parties herein.

I am not particularly impressed either by the appellants' submission that they made two subsequent shipments for

the respondents in July 1965 on the ships *Mormacmail* and *Mormacgulf* where an agreement to divert was stipulated and that no such agreement was made in the case of the *Mormacsaga*. It, in my view, merely shows that when Kopke, or the plaintiffs, realized that their cargo would be stranded in Jacksonville by the entry of the carrier into that port, steps were taken to make sure that no other cargo would be tied up in this manner.

The issue here, really comes down to whether the owners of the *Mormacsaga* should have diverted her around the United States ports and ordered her to proceed directly to Montreal or was justified in bringing her into Jacksonville, as they did, on the 13th of June 1965, where she remained tied up for 49 days.

Counsel for the appellants submitted that once a carrier establishes that damages have been caused by a strike, the claimant has the burden of establishing that the exception or immunity is inapplicable because the decision of the carrier to become strike-bound was unreasonable. The evidence admittedly established that the damage to the oranges had been caused by the long delay in Jacksonville and that this delay had been caused by the strike, but it also disclosed that the carrier had knowingly gone into a strike-bound port. I do not think that in such circumstances it can be said that a *prima facie* case of loss by strike has been made or that the carrier has brought itself within the exception or immunity as it must do. In order to do so, it must, in my view, clearly establish that the cause of the damage was not its negligence in entering into a strike-bound port. Where a carrier has the option of discharging its obligations to the consignees of cargo in different ways, the propriety of the decision to enter into a strike-bound port, as defendants did, where one of the consignees' goods were damaged, becomes a question of reasonableness which the carrier must establish by satisfactory evidence and by facts which are peculiarly within its knowledge. I should think that in such a situation a defendant must establish that upon all the circumstances shown in the particular case, the loss arose otherwise than by his negligence and the question to be determined then really becomes, of course, whether the loss was due to the strike or to the

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negligence of the carrier in entering a strike-bound port. In *Lloyd v. General Iron Screw Collier Co.*[10] Pollock, C.B. states at p. 291:

> It appears to me clear, upon the authorities, that Mr. Brett's proposition is correct, and that in cases of this kind, we must look, not at the causa proxima, but the causa causans, or real cause of the loss. Therefore, if the negligence of the master or mariners was the cause of the loss, the plaintiff is entitled to recover, notwithstanding the exceptions in the bill of lading.

There are, on the other hand, to my knowledge, no authorities to the effect that a ship with cargo cannot go into a strike-bound port. Under the *Carriage of Goods by Sea Act*, a strike does not indeed have to be unforeseeable or an absolute obstacle to the execution of an obligation as required to constitute "cas fortuit" or "force majeure" in order to free a carrier from liability. Once a carrier does go into a strike-bound port, however, it must be in a position to establish and must establish that the decision to go in was a reasonable one which in the discharge of its contract with the various owners of cargo carried on the vessel is consonant with the exercise of due diligence or due care, having regard to the fact that a line carrier must only discharge its obligations by ordinary means and does not necessarily have to incur exceptional expenses in order to insure the delivery in good condition of the goods of one particular cargo owner. A carrier, of course, must attempt to remedy the effects of a strike if it can do so by ordinary means as part of its obligation to take reasonable diligence or due care of the cargo it is carrying. There is, however, no obligation to take all means at any cost. It is sufficient, in discharging its obligations under its contract of carriage, that a carrier establish that in proceeding to a strike-bound port, it has proceeded *with due care* having regard, however, to the fact that the obligations it has assumed under a contract such as we have here are towards all the owners of the cargo on its vessel who (because of the nature of the cargo for instance) may be differently affected by whatever course of action is adopted by a carrier in placing itself in a situation covered by an immunity under the Act.

The carrier, in the present case, could have used under the "liberty clause" the ordinary and apparently not too expensive or inconvenient means and right it had of divert-

[10] (1864-65) 3 H&C 284.

ing its vessel and in my view, had an obligation to divert if, in the circumstances, that was the only reasonable thing to do in order to discharge with due care its obligations under the contract. A carrier may, indeed, in some cases be in a situation where it has good reason to believe that a strike will not be of long duration and that the entry of the vessel into a strike-bound port in accordance with its scheduled line service, would be in the best interest of the cargo in general. The carrier, in such a case, could not, in my view, be faulted if after a due and proper consideration of convincing reasons for thinking that the strike will soon come to an end, it reaches a business decision that the thing to do in the interest of the joint venture is to go into a strike-bound port even if it turned out later that its expectations did not materialize. A decision arrived at in such circumstances may be considered as reasonable and consonant with the exercise of due care even if it did not succeed and I would, in such a case, be reluctant to substitute a judge's business judgment to that of a businessman in the industry.

In the present instance, however, it does not appear to me that the carrier has established, by satisfactory and convincing evidence, that the decision taken on July 13, 1965, to enter the strike-bound port of Jacksonville was the exercise of sound business judgment.

I cannot, indeed, on the basis of the evidence adduced in this case, come to the conclusion that the carrier here by merely proceeding on its scheduled stops as it did has properly and carefully cared for the plaintiffs' perishable goods under the carriage contract or that it has successfully established that it is entitled to the immunity provided by section 4(2)(*j*) of Cogsa.

I say this because the evidence as to whether the problem of determining whether the ship should be diverted to Montreal or go into Jacksonville when the ship departed from Rio de Janeiro, and even some days later prior to taking a course towards Jacksonville, was considered by the carrier (as it should have been) is non-existent. The only indication in the evidence that the effect or consequences of entering into a strike-bound port seem to have been considered was when a couple of days before the ship reached Jacksonville, wires were forwarded to the captain requiring him to reduce the speed of his vessel.

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Noël J.

The only evidence regarding the progress of the strike negotiations was given by Mr. Glennon, a vice-president of Moore-McCormack, the owners of the vessel, who was their representative at the negotiations with officials of the striking unions. He stated that the prospects for an early settlement of the strike were reasonably good on July 12th, 1965, the day prior to the entry of the vessel into Jacksonville. The strike had been in progress for approximately 30 days by then and Glennon said that this "is a little bit more than normal for strikes of this nature" although he admitted later that some previous strikes had lasted two to three months. He then added "during strike negotiations, it is just the feeling that you have, are you close to settlement or are you not. Is there any issue that remains open? If it cannot be resolved at all or are the issues so narrowed that within hours or days that you might iron them out and have a contract?"

He then later stated that he advised Mr. Moore, the president of his company, of the progress of the negotiations. "I advised him on that date that there was a possibility, or even a probability of an early solution of the contract negotiations."

I must say that it is quite impossible for me at least, to see how Mr. Glennon could, on July 12th, advise Mr. Moore that there was a probability of an early solution of the strike negotiations.

A strike, of course, may end at any time but upon a due consideration of all the facts prior to the decision to enter Jacksonville and even after, it appeared clearly on the 13th of July 1965, that no progress had been made in the negotiations which would even suggest to the most optimistic labour negotiator that a settlement was possible let alone probable.

As a matter of fact the evidence discloses that there was very little to go on to support Mr. Glennon's statement that the strike would probably be settled shortly.

The only conclusion I can reach is that the appellants have not established that the entering of their vessel into a strike-bound port was in the circumstances a reasonable decision to take and that they did not have in the diversion of their vessel to Montreal an ordinary and, under the circumstances, a not too expensive or inconvenient means

of ensuring that respondents' perishable cargo would be properly cared for and delivered to destination in good condition. It then follows that by choosing as they did not to divert their vessel to Montreal, they acted wrongly without due care and in disregard to respondents' perishable cargo and thereby breached their obligations under their contract to carry and deliver respondents' cargo to destination. I should add that there is not even any cogent evidence that in proceeding as they did, the appellants were discharging their responsibilities to all shippers and consignees of cargo on the basis that they had to consider the adventure as a whole and not just the interest of plaintiffs. I can indeed find nothing in the evidence which would indicate that they were even motivated by such a consideration. In my opinion, the appeal should be dismissed with costs.

CATTANACH J.:—The issue in this appeal from the District Judge in Admiralty of the Quebec Admiralty District dated July 19, 1968, whereby the appellants were held liable for the damage sustained by the respondent with respect to its cargo of oranges carried by the appellants, the quantum of which is not in dispute, as I see it, resolves itself into the question of whether the appellants, in deciding to put into the strike-bound United States port of Jacksonville, acted as reasonable and prudent carriers.

The obligation of the appellants, at the critical time, which I conceive to be when the ship was off Jacksonville, was to consider whether to divert the vessel to the port of Montreal, the last port of call on its itinerary and to which the respondent's perishable cargo of oranges was destined, or not to so divert the vessel.

Because of the liberty clause in the bills of lading for the respondent and other cargo owners the option to so divert the vessel was open to its owners without being in breach of its contracts of carriage. The circumstances which prompted the decision of the ship's owners to order it to put in at Jacksonville which were relied upon by the respondent as justifying that decision at that time were (1) that the cargo was so stowed so that the ship was committed to its predetermined route and ports of call so as to discharge its cargo economically and (2) that it was expected that the strike would be of short duration.

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Cattanach J.

Like the learned district Judge, I do not think that there was convincing evidence, which it was the appellants' obligation to adduce, which would justify the conclusion that the strike would be of short duration.

There was no other evidence as to the circumstances which prompted the appellants' decision to act as they did. In the absence thereof I am forced to the conclusion that the carrier has failed to discharge the onus that it was not negligent in acting as it did.

I have had the opportunity of reading the judgment of the President in which he outlines, with detailed logic, the reasons for which he arrives at a conclusion identical to the conclusion which I have reached. I am in complete concurrence with his conclusion and his reasons therefor.

Accordingly I agree with the trial Judge's conclusion that the appellants are liable for the damage so incurred and I too would dismiss the appeal.