

CANADA / JUDGMENT

Owen v. Outerbridge

(1896) 26 SCR 272

COURT

Supreme Court of Canada

DECIDED

18 May 1896

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Collection

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Date

1896-05-18

Report

(1896) 26 SCR 272

Judges

Henry, William Alexander; Strong, Samuel Henry; Taschereau, Henri-Elzéar; Sedgewick, Robert; King, George Edwin; Girouard, Désiré

On appeal from

Prince Edward Island

Subjects

Maritime law

Decision Content

Supreme Court of Canada

Owen v. Outerbridge, (1896) 26 S.C.R. 272

Date: 1896-05-18

Lemuel C. Owen (Defendant) Appellant;

and

Henry C. Outerbridge (Plaintiff) Respondent.

1896: February 20; 1896: March 18.

Present:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Ships and shipping—Chartered ship—Perishable goods—Ship disabled by excepted perils — Transhipment — Obligation to tranship—Repairs— Reasonable time—Carrier—Bailee.

If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight.

The option to tranship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch or otherwise the owner of the cargo becomes entitled to his goods.

Quare.—Is the ship owner obliged to tranship?

If the goods are such as would perish before repairs could be made the ship owner should either tranship, deliver them up or sell if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable. And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the ship owner the amount they would have been worth to him if he had received them at the port of shipment or at their destination at the time of the breach of duty.

APPEAL from a decision of the Supreme Court of Prince Edward Island sustaining the verdict for the plaintiff at the trial.

The facts of this case, which are fully set out in the judgment of the court, may be briefly stated as follows: The plaintiff Outerbridge chartered the "Claribel," belonging to the defendant, to carry a mixed cargo of oats, potatoes, &c., from Charlottetown to Bermuda for a lump freight. The vessel was loaded and towed out of the harbour but afterwards got on a reef and had to be towed back. The defendant refused to tranship the goods, but endeavoured to get the vessel taken to a port of repairs but was unable, owing to the advanced season, to do so. The charterer then demanded his goods, which was refused except on payment of full freight, and a portion of the cargo was sold in spite of protest by the plaintiff. In the spring the vessel was repaired and sailed to Bermuda with the balance of the cargo, which was sold there. The charterer then brought an action claiming that by the refusal of the defendant to deliver up the goods, or to tranship, he had lost the market in Bermuda. The courts below held he was entitled to recover.

Davies Q.C. for the appellant. The defendant was entitled to freight before delivering up the goods. *The Norway* ([1]); *Robinson v. Knights* ([2]); *Merchants Shipping Co. v. Armitage* ([3]).

It is only when the owner has declined to repair or to tranship that he is bound to give up the cargo without payment of freight. *The Bahia* ([4]).

The damages were excessive. The Parana ([5]); The Notting Hill ([6]).

Peters Q.C, Attorney General of Prince Edward Island, for the respondent, referred to Hunter v. Prinsep ([7]).

The judgment of the court was delivered by:

KING J.—This is an appeal by the defendant from a judgment of the Supreme Court of Prince Edward Island, refusing to set aside a verdict for plaintiff and enter a non suit or grant a new trial.

The action was brought by the owner of cargo shipped at Charlottetown for Bermuda at a lump sum freight against the ship owner for refusing to deliver up the goods at a port of distress. The cargo consisted in good part of perishable goods, including 1,100 or 1,200 barrels of potatoes.

The vessel proceeded to sea on the 2nd of December, 1890, and put back four days afterwards in a damaged and leaky condition, having been rescued from a perilous situation by a tug sent out by defendant. It is admitted upon the pleadings, and clear upon the facts, that she was compelled to put in by stress of weather, and was unable to proceed through being in a damaged condition, but it is claimed by plaintiff that in consequence of alleged unreasonable delay in repairing he became entitled to a return of the cargo upon demand.

There are two counts in the declaration. The first, after setting out the shipment, and the entering upon the voyage and the putting back in a damaged and leaky condition by stress of weather, whereby the vessel was unable to proceed, avers that the plaintiff after waiting a reasonable time in order that

defendant might repair the ship and proceed with the voyage (and defendant having neglected to repair within such time) demanded the goods so shipped, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle plaintiff to delivery, yet defendant neglected and refused, etc.

The second count was similar, with the additional averment that defendant refused to deliver without payment of freight which plaintiff refused to pay.

The pleas denied that a reasonable time had elapsed at the time of demand, or that defendant neglected to repair within a reasonable time. It was also pleaded that defendant used all diligence to repair and did repair and complete the voyage and deliver the goods. Issue was joined upon these pleas. The jury found that a reasonable time had elapsed before the plaintiff made the demand, and that the defendant had prior and up to the demand neglected to repair within a reasonable time.

When the vessel was taken in tow she could have been taken to Pictou, according to the testimony of the tug owner, if the tug had had a sufficient supply of coal, and had been otherwise prepared for the service. No blame, however, is to be imputed to defendant that the tug was not so prepared, because the vessel was in such immediate peril that it had to go to her at once.

Besides, the necessity of putting back is admitted, and indeed is manifest upon the evidence. The differences between the parties relate to what took place afterwards and the effect of it.

If a ship be disabled by excepted perils from completing the voyage the ship owner does not necessarily lose the benefit of his contract, but may forward the goods by some other means to the place of destination, and thus earn the agreed freight. It has not been decided that there is an obligation to tranship, as seems to be the case in the United States. But the option is to be exercised, if exercised at all, within a reasonable time. *The Bahia* ([8]); *The Soblomsten* ([9]). In case repairs are decided upon they are to be effected with all reasonable despatch in view of the circumstances, otherwise the cargo owner becomes entitled to his goods. *Hunter v. Prinsep* ([10]).

In this case the potatoes were being sent to Bermuda for seed with the object of raising early crops for the New York market. The profit lay in getting them there before the month of March.

In *Jackson v. Union Marine Ins. Co.* ([11]), where by a charter party a vessel was to proceed with all possible despatch to a port of loading and there take a cargo which in the contemplation of the parties was a commercial adventure which would be wholly frustrated unless the loading took place within a reasonable time, it was held that there was an implied condition precedent that the vessel should arrive at the port of lading within a reasonable time and hence that if she was detained beyond this, whether by excepted perils or howsoever, the contract was at an end.

In *Dahl v. Nelson* ([12]), Lord Blackburn, who had taken part in the above decision, referring to it, repeated what he had previously stated in the somewhat similar case of *Geipel v. Smith* ([13]):

Very different considerations arise when the cargo is already on board, or, as in *Hadley v. Clarke* ([14]), is already on the voyage.

Where cargo is shipped the ship owner has a lien upon it from that time for the freight which he is proceeding to earn. So long as he is proceeding to earn the freight and retains possession he is entitled to the possession. But if for any reason the contract comes to an end the right ceases, and if he, in terms or in effect (as, for example, by unreasonably delaying necessary repairs) declines to proceed, the other party may rescind the contract.

The case of perishable goods is in some respects exceptional.

If the repairs at the port of distress would take so long that the cargo cannot endure the delay, but would in all probability perish before it could arrive by the ship at the port of destination, then as the shipowner would in that event not earn freight in respect of the goods not arriving in specie the reason for the lien would not continue to exist, and in the adjustment of relative rights on the happening of the misfortune to the vessel the interests of the shipper should govern. It would be unreasonable that the ship owner, having (for instance) unloaded the goods for the repairs, should retain and reship them in his own vessel to perish on the way, to the almost certain and unnecessary loss of the cargo owner, when the law clothed him with a power for his own protection of saving himself, or at least mitigating his loss by transhipment. In such case his duty would be (according to circumstances) either to tranship, if practicable, or deliver up, or to sell (if the owner does not object), the decision (except in case of sale being objected to) being left to the

master or ship owner as a skilful and prudent person.

The same result is reached by regarding the shipowner's, or master's, duty as bailee of the goods. The law gives to him the power of transshipping. If he will not save the cargo when that is the only reasonable way of doing so, he ought not to allow it to perish by depriving the cargo owner of the chance of transshipping.

It seems to me that the case is the same where a portion of cargo severable from the rest is perishable.

In *Notara v. Henderson* ([15]), a portion of the cargo was damaged by sea water and could have been rendered fit to go on by being unladen and dried. It was however carried on in a wet state and further damaged. In the Queen's Bench it was considered that the drying could not have been effected during a time for which it was reasonable that the vessel should remain, but that the goods ought nevertheless to have been taken out and dried, and either sent forward by another conveyance or delivered up. In the Exchequer Chamber it was considered that the goods could have been unladen and dried without unreasonably delaying the ship and that it was therefore the duty of the ship owner to take active steps to preserve them.

Mr. MacLachlan says ([16]):

If the cargo be of a perishable nature, or so damaged as to become perishable, it cannot be retained for any length of time even at best; and he (the master) may be compelled to give it up to the charterer or his agent, or in the absence of both to sell it on the spot.

Then as to the facts.

It was the imperative duty of the ship owner to exhaust every reasonable means of getting his vessel away before she became frozen in. He knew that this was likely to happen at any time, and he certainly seems to have taken every means to proceed. The vessel was making six inches of water an hour, and the portwarden (one of the surveyors) stated upon the trial that she was unseaworthy to proceed herself, but was fit to go to sea in tow. Charlottetown did not furnish facilities for repair, the nearest port of repair being Pictou, and he could get there only by aid of a tug. There was but one tug owner in Charlottetown. Defendant first designed to go to Pictou, but found by telegraph that he could not get in there owing to ice on the cradles of the marine slip; then, following the recommendation of the surveyors, he endeavoured to induce the tug people to take him to Halifax, but they very reasonably declined to go so far at that season of the year. Then he agreed with them that they should tow him to Port Hawkesbury for \$500 and the tug owner spent the day in preparing for the work. All this took place on the day next following the night on which the vessel returned to port. But on the next day the tug owner changed his mind and refused to undertake it. On the trial he stated that his reason was that the navigation was virtually closed, and the ice rapidly forming, and he says that he would not touch her. As a matter of fact the harbour did close that night and remained so for two days when the weather became milder and vessels passed in and out. The tug owner, however, says that although he did some work afterwards it was only by seeking out some soft places in the ice. I think the clear

conclusion is that he would not afterwards have ventured to go to Port Hawkesbury.

A survey was again held on the 8th in consequence of the master having reported that he was unable to get towage to proceed to Halifax, as before recommended, and the surveyors now recommended that the vessel be towed up to a wharf. This was done, and soon the ice set and she remained till the spring. The plaintiff had an agent at Charlottetown cognizant of what was being done and active in plaintiff's interests, yet it does not appear that he, or any one else, suggested that something else might be done to get the vessel away. So far, it is difficult to say wherein the owner ought to have acted differently in the way of getting the vessel out.

What is claimed is that the cargo might have been, and ought to have been, sent forward by other means.

Soon after the vessel was laid up at the wharf and the weather moderated a vessel came in that offered to take the cargo or the perishable part of it on, and plaintiff's agent requested defendant to let him have the goods to tranship, stating that the plaintiff had sold the potatoes to arrive at a profit, but defendant refused to give up the cargo in whole or in part unless the whole freight was paid.

On 20th December plaintiff arrived from Bermuda and he also asked for the goods and received the same answer. At this time the only mode of conveyance was by rail to Souris or Georgetown, and from thence by steam or sailing vessel direct to Bermuda or via New York, or some other United States port.

On the 28th December plaintiff, finding that he could do nothing, left for home, and before doing so attempted to abandon to the underwriters. Hearing that the defendant was likely to sell the potatoes he protested against it, but left directions to his agent to buy them in and ship by Farquharson's steamer in case of a sale. The potatoes, 1,10.0 or 1,200 barrels, were sold, but plaintiff's agent did not buy them in because Farquharson's boat had not arrived. The potatoes realized \$419 net. Some of them were sent to Bermuda by the routes referred to.

The jury have found that there was no urgent necessity for the sale, and that it was made without plaintiff's knowledge or consent. For such conversion of property the defendant is liable, but it is contended that the declaration does not cover such a cause of action.

On the 16th February the plaintiff, through Mr. Peters, again claimed the cargo, but was refused except on terms of payment of entire freight.

In April navigation opened and the vessel was towed to Pictou, where she was unloaded, repaired and reloaded, and then, proceeded on her voyage, and arrived at Bermuda on the 6th of June and delivered her cargo in poor condition. The freight was demanded, and plaintiff paid the lump sum less a deduction in respect of some horses carried on deck and landed at Charlottetown, and was credited with the proceeds of the potatoes in defendant's hands.

It is contended by plaintiff that by the improper sale the defendant in effect declined to repair and so left it open to plaintiff to rescind, which he did by the request of Mr. Peters on 16th February. The effect of a partial breach of contract as warranting a rescission by the other party is considered in *The Mersey Steel & Iron Co. v. Naylor* ([17]). The conclusion is that upon the whole facts it must appear that the conduct or words of the party making the breach must evince an intention not to be bound further by the contract. Here I am inclined to think that such an interpretation cannot be placed upon defendant's words or conduct.

But however this may be, as it must be taken upon the case presented by both sides that the potatoes could not endure the delay of awaiting the repairs of the vessel, the defendant, by, in effect, saying "these goods cannot be carried forward in the original ship and I will sell them," announced as to them that he did not intend to carry them on, and as he did not within a reasonable time exercise his option of sending them forward by another reasonably practicable means of conveyance, the effect was that as to these goods at least the plaintiff was entitled to have them freight free. The defendant's conduct was contrary to his duty as a carrier and as a bailee, and I think the declaration sufficiently wide to cover such a failure of the carrier's duty as is above indicated.

As to the damages, the plaintiff would be entitled to what the potatoes were worth to him over the amount realized (for which he has been allowed) and upon the evidence the damages awarded do not exceed the proved value of the potatoes to him if he had received them either at Charlottetown (or at Bermuda) at the time of the breach of duty.

For these reasons I think that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: L. H. Davies.

Solicitor for the respondent: Arthur Peters.

[1] 3 Moo. P. C. [N. S.] 245.

[2] L. R. 8 C. P. 465.

[3] L. R. 9 Q. B. 99.

[4] B. & L. 292

[5] 2 P. D. 118.

[6] 9 P. D. 105.

[7] 10 East 378.

[8] B. & L. 61.

[9] L. R. 1 A. & E. 293.

[10] 10 East 378.

[11] L. R. 8 C. P. 572 ; 10 C. P. 125.

[12] 6 App. Cas. 38.

[13] L. R. 7 Q. B. 404.

[14] 8 T. R. 259.

[15] L. R. 5 Q.B. 346 ; 7 Q.B. 225.

[16] Maclachlan on Shipping 4 ed. P. 449.

[17] 9 App. Cas. 434.

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