REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1913-1914.

[HIGH COURT OF AUSTRALIA].

WHYBROW & COMPANY PROPRIETARY LIMITED . . . . . Plaintiffs, } Appellants;

AND

HOWARD SMITH COMPANY LIMITED . Defendants, Respondents.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 16; *June* 2, 3, 24, 27.

Barton A.C.J., Gavan Duffy, Powers and Rich JJ.

Ship—Unseaworthiness—Commencement of voyage—Movement for purpose of proceeding on voyage—Release of mooring ropes—Sea-carriage of goods—Warranty—Sea-Carriage of Goods Act 1904 (*No.* 14 *of* 1904), *sec.* 8.

A steamship became unseaworthy by reason of an injury sustained after she had been moved from her wharf in intended prosecution of a voyage, which she continued to prosecute until an inrush of water disclosed the injury, whereupon she was beached. The cargo was damaged by the inrush. When the injury was sustained some at least of the mooring lines had been released, but it did not appear whether or not the ship had been completely unmoored.

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Held, that the appellant, a shipper, on whom the *onus* lay, had not shown that the voyage began after the injury had been sustained, so as to constitute a breach of the warranty of seaworthiness under the *Sea-Carriage of Goods Act* 1904, sec. 8.

Per Barton A.C.J.—On the facts found the voyage had commenced when the injury was sustained.

Decision of the Supreme Court of Victoria (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Whybrow & Co. Proprietary Ltd. against Howard Smith Co. Ltd. by which the plaintiffs claimed £250 damages in respect of five cases of boots belonging to the plaintiffs, which they delivered to the defendants to be carried to Sydney in the steamship *Peregrine* and which were alleged to have been damaged by reason of the unseaworthiness of the ship. The defence was a denial of unseaworthiness. When the goods were placed on the ship she was lying at a wharf in the river Yarra at Melbourne and she was moored to the wharf by ropes at the bow and stern. Between the wharf and the ship was a wooden fender with iron bands round each end, and projecting from each band was an eyelet-hole through which passed a rope holding that end of the fender. The ship was lying with her head up stream, and when she was ready to start her voyage the stern lines were released. A tug pulled her stern out into the river, while the engines of the ship moved her slowly ahead. The bow lines were then released, the engines of the ship were reversed, and the ship went stern first down the river to a swinging basin where she turned round and proceeded on her voyage. Shortly afterwards it was found that water was entering her, and she was beached at Williamstown a short distance from the mouth of the Yarra. It was discovered that the water found entrance through a port-hole on the level of the water which had been wholly covered on the inside by an iron plate bolted on to the ship's side. This plate had been forced from its fastenings by pressure from outside, and the suggestion on behalf of the plaintiffs was that this was done by the fender before the ship started on her voyage.

The action was heard by *Hodges* J., who found that the plate was forced in after the stern lines had been released, but he

could not determine whether at that time the bow lines had also been released. He held that the ship had then started on her voyage and that she was seaworthy when she started. He therefore gave judgment for the defendants.

From this decision the plaintiffs now, by special leave, appealed to the High Court.

Starke (with him *Lowe*), for the appellants. The respondents are not liable unless the appellants show that the ship was unseaworthy at the time the voyage commenced: *Sea-Carriage of Goods Act* 1904, sec. 8; *Carver on Carriage by Sea*, 3rd ed., sec. 17, p. 18; but the voyage does not commence until the ship has quitted her moorings and broken ground: *Nelson* v. *Salvador* (1); *Mersey Mutual Underwriting Association* v. *Poland* (2); *The Rona* (3); *Arnould's Marine Insurance*, 7th ed., p. 747. Here the voyage had not commenced until at any rate the last of the mooring lines had been released. She was until then merely being manœuvred in order to begin her voyage. As to the question whether the injury happened before or after the voyage was commenced, the onus was upon the appellants in the first instance. The early sinking of the ship is evidence that she was unseaworthy: *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (4); *Lindsay* v. *Klein* (5). That fact must be taken into consideration with the other evidence. The respondents took upon themselves to show how the accident happened and they have left that question in doubt, and then the balance of the evidence is with the appellants. [He also referred to *Thayer's Preliminary Treatise on Evidence*, p. 353; *Stephen's Digest of the Law of Evidence*, 5th ed., p. 111; *Pickup* v. *Thames Insurance Co.* (6); *Abrath* v. *North Eastern Railway Co.* (7).

Mann (with him *Cussen*), for the respondents. The beginning of a voyage is a question of fact; the casting off of one or more mooring ropes is only a matter of evidence relevant to that fact. The beginning of the voyage is the beginning of locomotion or when she is under way: *Abbott on Shipping*, 14th ed.,

(1) Moo. & Mal., 309.
(2) 26 T.L.R., 386.
(3) 51 L.T., 28.
(4) (1901) A.C., 362.
(5) (1911) A.C., 194.
(6) 3 Q.B.D., 594, at p. 600.
(7) 11 Q.B.D., 440, at p. 452.

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p. 917; *The Esk* (1). The critical point is when the ship ceased to be safely moored. [He referred to *Thellusson* v. *Staples* (2).]

[RICH J. referred to *Sea Insurance Co.* v. *Blogg* (3).]

The evidence supports the finding of *Hodges* J. The question being whether the injury happened to the ship before or after she began her voyage, the fact that she was beached shortly afterwards is not relevant to that question.

Lowe, in reply.

[RICH J. referred to *Cockrane* v. *Fisher* (4).]

BARTON A.C.J. I do not think that this is a case in which a lengthy disquisition on the facts or the law is necessary. If the ship was seaworthy at the commencement of the voyage, the plaintiffs fail; if she was unseaworthy, they succeed. There was a considerable volume of evidence taken to establish the facts on one side or the other. The learned Judge seems to have considered that evidence very carefully from every point of view. The question really was at what stage, that is, whether before or after the commencement of the voyage, a certain recessed port-hole in the side of the ship became in such a condition as to admit the inrush of water, the result of which was that in a comparatively short time after she had begun to steam down the river, the ship was so nearly filled with water that she had to be beached.

In dealing with that question the learned Judge said:— "When, then, did that port-hole receive the blow that did the damage? After having listened with attention to all the witnesses have said, and after having done my best by inspecting the vessel to form an opinion on the subject, I have arrived at the conclusion that that injury did not take place until after the stern lines were released and the tug was fastened on to the stern and was pulling it out. It may be important to say whether that damage was done before the last line fastened on to the shore was loosened. I am not able, on the evidence, to form a decision one way or the other about that. The utmost I am able to find with regard to that, is that the stern was being pulled out by the tug. Either somebody else will have to deter-

(1) L.R. 2 A. & E., 350.
(2) 1 Doug., 366 (*n.*).
(3) (1898) 2 Q.B., 398.
(4) 1 Cr. M. & R., 809.

mine that, or a determination will have to be arrived at on other evidence. On the evidence before me I cannot determine it. All I can say is that I am satisfied that that injury happened after the stern lines were released and after the tug began to pull on the stern of the vessel. Then I have to determine whether or not the ship had then started on her voyage—whether the voyage had commenced; because, if the voyage had commenced before that injury was done to the port-hole, the ship was seaworthy at the commencement of the voyage; if she had not started until every tie to the shore was released, she was not seaworthy when the voyage commenced. Had the voyage then commenced? I cannot say that I know of any authority (and since this case has been on I have been trying to find one) that is a clear answer to that; but I arrive at the conclusion and determine, so far as I am concerned as a matter of law, that as soon as ever the stern lines were released and the tug was fastened on, and, under directions, the tug began to work and move that vessel, the movement thus made was a movement with a view to a port of destination, and the ship's stern—if you like to call it that, although the whole ship was moving—the whole ship was then moving on her voyage. She had started, although it may be necessary for another rope to be released before she could complete her voyage —the voyage had begun."

His Honor, then, came to the conclusion that the injury to the port-hole took place, not while the ship was lying completely moored to the wharf, but after the stern lines had been released, and after the tug had been fastened on to the stern of the ship and was pulling the ship's stern out from the wharf, whether the bow was still held by its line or not. Further, we have it that this was part of a continuous movement in the course of which the ship left the wharf, went astern down the river to the basin and there turned round with her bow down the river, and proceeded on her voyage until, after going some distance down the river, she had to be beached at Williamstown. The movement of the vessel, then, from the wharf was in pursuance of an intention formed, and abandoned only in the presence of danger, to prosecute her voyage.

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In *Cockrane* v. *Fisher* (1) the head-note is as follows:—"A policy of insurance contained a warranty 'not to sail for British North America after 15th August.' The vessel, on the morning of 15th August, was cleared at the Custom-house of Dublin, and ready for sea. She was then lying in the Custom-house Dock, which opens into the river Liffey, which forms part of Dublin harbour. She was afterwards, on the same day, hauled out of dock and warped down the river Liffey about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to Quebec, in North America. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river, and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail for Quebec on 15th August, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty: *Held*, that the vessel was in prosecution of her voyage on 15th August, and that the warranty not to sail for British North America after that day, had been complied with." Lord *Denman*, in delivering the judgment of the Court, said (2):—"If, therefore, she was in fact in the prosecution of any voyage from any place, which voyage is not proved to have commenced after 15th August, the warranty is not broken; and as the facts appear to us clearly to show that she was in the prosecution of her voyage on 15th August, having made a movement, though in the river, for the purpose of proceeding to sea, and over the sea to North America, we think that the warranty has not been broken, and that the parties are entitled to recover. That makes the case of no very general application, and distinguishes it from all the cases that have been before the Courts on former occasions; for there is no particular point from which the voyage is contemplated as commencing. If that had been so, we should have been bound to consider the effect of the word 'sailing' as contradistinguished from the word 'departure,' which

(1) 1 Cr. M. & R., 809.

(2) 1 Cr. M. & R., 809, at p. 818.

we do not feel ourselves called upon to do on the present occasion. Mr. *Cresswell* has very properly abandoned the argument that the word 'sailing' can be confined to the mere technical act of hoisting the sails, or anything of that sort; the fair question is, as he has stated, whether, at the time of the loss, the voyage can be said to have commenced, and whether she was in truth proceeding on her voyage to North America." There the question was whether the ship had sailed, in the sense of beginning her voyage, after a particular date. In this case the ship had made a movement in execution of her voyage to Sydney, and under the circumstances it seems to me that, in the absence of any direct authority on the subject, the conclusion of law which his Honor drew from the facts which he found is one which is entirely consistent with common sense and which should not be reversed. As to the findings of fact, they have been come to by the tribunal which heard the actual evidence and was entitled to arrive at them, and I think we cannot say that the findings were wrong. We did not grant special leave to appeal on any pure question of fact.

In whatever aspect the appeal is considered, I am of opinion that the decision should stand.

GAVAN DUFFY J. In this case special leave to appeal was obtained on the ground that the decision of the learned Judge was wrong in law. On the findings of fact at which he arrived I do not think that his decision was wrong in law, nor am I disposed, in the circumstances of the case, to interfere with his findings of fact. I agree, therefore, that the appeal should be dismissed.

POWERS J. I agree that the appeal should be dismissed.

RICH J. I also agree. I am not prepared to disturb the conclusions of *Hodges* J.

Appeal dismissed with costs.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors, for the respondents, *W. H. Croker & Croker.*

B. L.