BETWEEN:

1963
Apr. 23
Jun. 18

SEPT ILES EXPRESS INC. (*Plaintiff*) ..APPELLANT;

AND

CLEMENT TREMBLAY (*Defendant*) ..RESPONDENT.

Shipping—Water carriage of goods Act, R.S.C. 1952, c. 191, Art. IV(5)—"Package or unit"—Responsibility of shipper—Truck transported by respondent's vessel lost overboard—Limitation of liability of carrier—Failure to comply with requirement of Act to declare value of shipment—Appeal from District Judge in Admiralty dismissed.

Appellant sued respondent on a bill of lading to recover the sum of $19,788, the price it paid for a new truck which was lost, while being transported as deck cargo on respondent's vessel, due to high winds and heavy seas causing the truck to break away from its cable fastenings and was washed overboard and never recovered. The bill of lading did not contain a declaration by the appellant of the value of the lost vehicle. The trial judge held that inasmuch as there was a non-valued bill of lading, the damages recoverable from the carrier could not exceed $500 as the defendant was entitled to invoke the immunity or limitation referred to in the *Water Carriage of Goods Act* R.S.C. 1952, c. 291, Art. IV(5).

On appeal to this Court the appellant contended that the word *"unit"* as used in the Act meant a unit of weight or customary freight unit and not the unit actually shipped as contended by respondent.

The appeal was heard on the question of damages only.

Held: That the appeal must be dismissed.

2. That the definition of the word *unit* as contended by respondent is more in keeping with its natural and usual meaning especially as the word formed part of the phrase *Package or Unit.*

3. That the responsibility of seeing that the value of the thing shipped is declared and inserted on the bill of lading is on the shipper.

4. That any consequential hardships due to failure to comply with the requirement of the Act are to be charged against the shipper's own failure to do so.

5. That there was nothing in the evidence to absolve the appellant from the consequence of its omission to cause evaluation of the truck to be inserted in the bill of lading.

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

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

Peter Walsh for appellant.

T. H. Bishop for respondent.

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The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (June 18, 1963) delivered the following judgment:

By judgment rendered by the Honourable Mr. Justice Smith of the Admiralty District of Quebec on November 6, 1962, the (Defendant) Respondent was condemned to pay damages to the (Plaintiff) Appellant to the extent of $500, together with interest and costs. The (Plaintiff) Appellant being dissatisfied with the amount of damages thus awarded instituted the present appeal.

At the opening of the case counsel for the parties stated that they had already exchanged written submissions on the matter in issue and made a request, which was granted, to file them in lieu of oral argument.

The (Plaintiff) Appellant (sometimes referred to as "the shipper") sued on a bill of lading (Ex. P[1]) to recover the sum of $19,788, being the price which it paid for a new White Motor Company truck which was lost, on or about January 14, 1959, while being transported from Quebec City to Sept Iles by the (Defendant) Respondent (sometimes referred to as "the carrier"), as deck cargo, aboard carrier's M/V *Savoy*. The evidence shows that when at a point in the St. Lawrence River, about midway between Trinity Bay and Cariboo Islands, the vessel ran into high winds and heavy seas, and the vehicle, which weighed 14,000 lb., broke away from its cable fastenings, was washed overboard and never recovered.

It is not disputed that the respective rights of the parties are governed by the bill of lading the original of which was issued to the shipper or its agent by the vessel and that it did not contain a declaration by the shipper of the value of the lost motor vehicle.

The learned trial judge, after dismissing as unfounded certain defences of non-responsibility which can be ignored since no counter-appeal has been filed, maintained an alternative defence, namely, that since the case concerns a non-valued bill of lading, the damages recoverable from the carrier cannot exceed five hundred dollars as he was entitled to invoke the immunity or limitation referred to in Art. IV(5) of the *Water Carriage of Goods Act* which reads as follows:

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount

exceeding five hundred dollars per package or *unit*, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading (emphasis added).

This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.

The judgment made no comment in respect of a further alternative defence whereby the carrier sought to limit its liability to $38.92 per ton under s. 657(1) of the *Canada Shipping Act*, 1952 R.S.C., c. 29.

The issue in the case is a narrow one and concerns the meaning to be attributed to the word "unit" *supra*. It is submitted on behalf of the appellant that it means a unit of weight, or customary freight unit, and not the unit actually shipped as alleged by the respondent and as found by the learned trial judge.

The reasons given by the learned trial judge for reaching the above-mentioned finding appear at pages 10 and 11 of the said judgment and read as follows:

> In the present instance, although the nature of the said cargo was apparent, no declaration of the value of the car was inserted in the Bill of Lading which document does not indicate, and *there is no evidence to show what freight was charged or whether freight was charged at a flat rate or was based on the tonnage of said vehicle.* All that is shown is a description of the cargo and an indication that its weight was 14,000 lbs. (Emphasis added.)
>
> This being the case the question of whether or not the Defendant is entitled to limit his liability in accordance with the provisions above-quoted appears to be settled by the judgment of the Supreme Court of Canada in the case of *Anticosti Shipping Co. v. St-Amand*, [1959] S C R. 372 That case concerned the loss of a truck which was being transported under a contract of carriage by water evidenced by a Bill of Lading which contained no statement of the value of the vehicle. It was held that the said vehicle was a "unit" within the meaning of Art. IV, Par. 5, of the Water Carriage of Goods Act and therefore the carrier's liability for the loss was limited to $500.

Counsel for the appellant submits that the findings underlined in paragraph 1 *supra* were reached because the learned trial judge inadvertently omitted to take into account the evidence of witness Jean-Pierre Simard (pp. 78, 79 and 80 of the transcript) and Exhibits P^4 and P^5 which furnished specific proof that the freight charge amounted to $396.72 and was based in the manner described in the

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plaintiff's statement of claim and referred to at page 4 of the judgment in the following terms:

> . . . It is alleged moreover that freight for carriage of the auto-car was based on a rate of $2.82 per unit of 100 lbs and that the said auto-car weighed 14,000 lbs, so that the limitation of Section 5 of Article IV of the rules contained in the Water Carriage of Goods Act would be $500 as multiplied by 14,000, a total of $70,000.

It is also claimed for the appellant that the *Anticosti* case[1] is not directly in point and, moreover, it is as favourable to the appellant's claim as to that of the respondent.

Counsel for the respondent stressed the fact that the bill of lading itself contained no reference to freight charges, and while conceding that the learned trial judge overlooked the other evidence above-referred to concerning these charges, such oversight in no way affected the validity of his judgment and he was, nonetheless, justified in following the findings in the *Anticosti* case.

I think the definition given by the respondent to the word "unit" is more in keeping with its natural and usual meaning than the one advocated by the appellant, especially since the word forms part of the phrase "package" or "unit". Although it is etymologically possible to give a different generic meaning to the two words, I think there is insufficient law or fact in the circumstances to warrant doing so.

It cannot be disputed that s. 5 of Art. IV was designed for the protection of carriers, and, if the appellant's interpretation of "unit" were accepted, it would, in my opinion, for reasons hereinafter mentioned, serve to defeat the purpose of the legislation and render the immunity or limitation meaningless.

Furthermore, to allow the appellant's omission to make a declaration of value to prevail would not be unlike allowing the shipper to invoke his own omission to penalize the carrier by substituting $70,000 instead of $500 as the latter's limit of liability. Perhaps this word "omission" is not the appropriate term because there is no evidence that the failure of the shipper or its agent to cause a valuation to be inserted in the bill of lading was due to inadvertency. Indeed, if the appellant anticipated that the meaning it now seeks to attribute to the word "unit" would prevail, doubtless it would have been careful to refrain from making any declaration of value.

[1] [1959] S.C.R. 372.

It is well recognized that in fixing freight rates, whether on land or sea, there are more than a dozen factors which are taken into consideration: see Freight Traffic Red Book, 1955, published in the United States. In my opinion, the most important of these are the value, bulk, weight and risk of handling the article. I place value first since it is an ever-present factor which accounts for the rate differential applicable to the carriage of two articles of the same size and weight but where the value of one greatly exceeds the value of the other. But this is not the only reason why great importance is attached by the carrier to the shipper's valuation of the object to be shipped. True, such declared valuation, insofar as the carrier is concerned, is only *prima facie* evidence of the actual value of the article shipped, and is not binding on him, but as I read the Act it is not open to the shipper to claim any damages in excess of the amount of his declared valuation.

Counsel for the shipper pointed out that acceptance of the definition given by the respondent leads to an anomaly in as much as it permits a carrier who, as in the present case, has been found negligent for failure to properly stow a new motor vehicle, which could be readily seen to be worth far more than $500 and for which, as subsequent evidence shows, the shipper had paid approximately $20,000, to argue that his liability be restricted to $500.

In the *Anticosti* case, in the court of first instance the learned trial judge relied on such an anomaly, particularly since the truck in question was not boxed and the carrier could easily see that its value far exceeded $500, and condemned the defendant to pay $4,222. On appeal that reasoning in the Court of Queen's Bench was not accepted by Owen J., but he affirmed the said judgment on other grounds, namely, that no bill of lading (or similar document) existed and that in consequence Art. IV(5) was inapplicable.

It is interesting to note that Owen J., who delivered the said judgment, observed that, in his opinion, the reasons given by the trial judge were untenable. Rand J. in rendering the judgment of the Supreme Court agreed with Owen J. in this latter respect, but found, contrary to the judgment of the Court of Appeal, that a bill of lading had been filled out but mislaid, that Art. IV(5) was applicable

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and that the amount of damages must be limited to $500, and he maintained accordingly the appeal.

It is important to note that the so-called anomaly referred to by counsel for the appellant could have been eliminated and would never have arisen if the shipper had inserted the valuation which he attached to the motor vehicle in question; and if he had inserted its valuation at approximately $20,000, which is a large sum, this would have permitted the carrier to charge more freight or take special precautions in protecting the unit from loss or damage.

Counsel for the shipper pointed out that in the United States the word "unit", as contained in our Act and the corresponding British Act, was replaced with the phrase "customary freight unit". (See Carver—Carriage of Goods by Sea, 9th ed., at pp. 1102 and 1108.) Although it is said that this alteration "would appear to have been made to clarify the meaning of unit rather than change it", I am not satisfied that such is the case.

Mr. Justice Goddard, in the case of *Studebaker Distributors Ltd. v. Charlton Steam Shipping Co. Ltd.*[1] wherein a bill of lading contained a clause by which it was agreed that the value of each "package" did not exceed $250, expressed the opinion that both the terms "package" or "unit", as found in The Hague Rules, referred to an individual piece of cargo, as appears from the following extract found at page 467 of his judgment:

> . . . The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer "Package" must indicate something packed It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk *If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit", to use the language of The Hague Rules*

The preceding case concerned damage to uncrated automobiles shipped under a bill of lading not subject to Rule IV(5) of the British *Carriage of Goods by Sea Act*, which is similar to the same rule in the Canadian Act and both of which are in conformity with The Hague Rules.

[1] [1938] 1 K B. 459

In the case of *Pendle and Rivet, Ltd. v. Ellerman Lines, Ltd.*[1], the plaintiff sent shipping instructions to the defendant by a document addressed to the Western Laurence Line, Ltd. in regard to a case of wool and silk the contents of which was stolen in transit. The document stated, *inter alia,* that the value of the goods was £256 8s. 1d. However, when the bill of lading was issued it did not include anything about the value of the goods. Mackinnon J. held that Rule 5 of Art. IV of the British *Carriage of Goods by Sea Act,* and which conforms to The Hague Rules and from which the Canadian Art. IV, Rule 5, was taken, applied and that the amount of damages recoverable was limited to £100.

I made mention earlier of the carrier's other alternative plea of immunity based on s. 657 of the *Canada Shipping Act*. The evidence discloses that during the storm on the voyage in question another vehicle was lost and other automobiles were somewhat damaged. These factors together with the tonnage of the ship would require consideration insofar as the application of s. 657 is concerned, but because I am of the opinion that Art. IV(5) is applicable I do not think it necessary to deal with the aforesaid supplementary defence.

The following is an extract from the judgment in the *Anticosti* case, at page 337:

> The responsibility of seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardships must be charged against his own failure to respect that requirement.

In my opinion, notwithstanding that the factors in the present case differ from those in the *Anticosti* case to the extent previously indicated, I think the above-mentioned finding is applicable and I propose to follow it.

Regrettable as it may appear for the shipper, I do not consider that there is anything in the evidence before me which absolves it from the consequence of its omission (if omission it was) to cause a valuation of its motor vehicle to be inserted in the bill of lading. On the other hand, notwithstanding the inadvertent mis-statement of fact contained in the judgment *a quo* and the evidence contained in Exhibit P[4], I think the respondent is entitled to the

[1] [1927] 33 Comm Cas 70 at 78.

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immunity as found in the judgment of the learned trial judge and, for the above reasons, I would affirm the said judgment and dismiss the appeal with costs.

Judgment accordingly.

Reasons for judgment of A. I. Smith, D.J.A.:—

The plaintiff sues to recover the value of a White Motor Company Auto-car which was lost at sea while being transported on board M/V *Savoy* from Quebec City to Sept Iles on or about January 14, 1959.

It is alleged that the said motorcar was delivered by The White Motor Company of Canada Limited, acting on behalf of plaintiff, to the defendant in good order and condition and was placed on board said vessel for carriage and delivery to Sept Iles in accordance with the terms and conditions of a bill of lading issued by the defendant of January 14, 1959. (Exhibit P.1.)

The plaintiff alleges that it was the owner of the said motorcar in virtue of a Conditional Sale Contract between The White Motor Company and the plaintiff, dated January 12, 1959, and moreover is responsible for the said motorcar in virtue of the said contract and is the consignee of the aforesaid shipment and vested with all right, title and interest in and under the said bill of lading.

It is alleged that in breach of its undertaking and in dereliction of its duty, the defendant failed to deliver the said motorcar, the whole to the prejudice of plaintiff who, as a consequence, has sustained loss and damage representing the value of the said motorcar, amounting to $19,788.00.

By way of defence to plaintiff's action, the defendant admits having received the said motorcar from The White Motor Company, at Quebec City, for carriage to Sept Iles in accordance with the said bill of lading; alleges that it was a condition of said bill of lading that in accepting same the shipper, owner and consignee of the goods and the holder of the bill of lading agreed to be bound by all the stipulations and conditions thereof which were to be read with the provisions of the *Water Carriage of Goods Act*, 1957 R.S.C. ch. 291, which bill of lading with its conditions were accepted by plaintiff.

The defendant alleges that in view of the provisions of the *Water Carriage of Goods Act* and particularly the definition of the term "goods" contained therein, the defendant was free to impose whatever conditions he chose with regard to his liability for loss or damage to cargo carried on deck and that plaintiff's said auto-car was to the knowledge of plaintiff carried on deck and by reason of its size and the size of the vessel could not have been carried otherwise.

The defendant invokes all the provisions of the bill of lading and particularly the so-called condition of non-responsibility for deck cargo which appears therein, in virtue of which it is alleged that the defendant is not liable for the loss of said car.

Under reserve of the foregoing, the defendant invokes the exceptions from liability afforded by the *Water Carriage of Goods Act*.

It is alleged that the M/V *Savoy* was tight, staunch and strong and well and sufficiently manned, provisioned, equipped and furnished with all things needful and necessary and in every way fit and proper to perform the voyage safely and the said cargo was properly ar-

ranged and in every respect properly stowed on deck . . . the defendant alleges that during the voyage and especially on January 16, 1960, at 1600 hours when the vessel was abeam Trinity Bay, suddenly an easterly wind of hurricane force started blowing, accompanied by extremely rough seas, snow and rain; that the engines of the vessel were put at half speed ahead and course set for Egg Island for shelter. The very rough and heavy weather encountered caused the loss of some deck cargo, including the said auto-car, which was washed overboard, its loss being due to perils of the sea and or force majeure or cas fortuit.

The defendant alleges moreover that in any event and without prejudice to or waiver of the foregoing he is not responsible for the loss of said auto-car by reason of the clause of non-responsibility contained in the bill of lading and again without prejudice to or waiver of the foregoing, the defendant alleges that he is entitled to limit his liability in accordance with the clauses contained in the bill of lading and *Water Carriage of Goods Act* and subsidiarily and without prejudice, the defendant pleads his right to limit his liability in accordance with the provisions of the *Canada Shipping Act*.

By way of reply to defendant's statement of defence, plaintiff prays acte of the defendant's admission that it received the said auto-car at Quebec for carriage to Sept Iles, as well as his admission that said auto-car was lost en route; alleges that the said bill of lading, as well as the *Water Carriage of Goods Act* and *Canada Shipping Act* speak for themselves and otherwise denies the defendant's statement of defence.

Plaintiff alleges moreover that the bill of lading does not contain any statement that the motorcar was to be carried on deck; alleges that the defendant had carried an identical motorcar on the same vessel in January 1959; plaintiff alleges that there is no express statement in the bill of lading that the motorcar was to be carried on deck as is required by Article 1 of the rules relating to bills of lading contained in the schedule of the *Water Carriage of Goods Act* and to the extent that it purports to limit or exclude the liability of the defendant, is contrary to Article (2) of the said rules and is of no force or effect.

The plaintiff alleges also that the defendant is not entitled in any event to raise the defence of "perils of the sea" by reason of its failure to discharge its obligation to properly load, stow and secure cargo in a safe place having regard to the conditions which should have been anticipated. It is alleged moreover that freight for carriage of the auto-car was based on a rate of $282 per unit of 100 lbs. and that the said auto-car weighed 14,000 lbs., so that the limitation of Section 5 of Article IV of the rules contained in the *Water Carriage of Goods Act* would be 500 as multiplied by 14,000, a total of 70,000.

The proof shows that the M/V *Savoy* sailed from Quebec City on or about the 14th of January, 1959 for Sept Iles and that when at a point approximately abeam of Trinity bay, at 1600 hours, on the 16th day of January, she encountered wind and gales of force 4 and heavy seas accompanied by rain and snow. It appears to have been reported to the captain that plaintiff's auto-car, which had been stowed crosswise on the ship's deck over No. 1 hold, was moving backwards and forwards indicating slackness in the cables with which it was secured to the deck and the First Mate and a sailor attempted to tighten these cables. The prevailing conditions however made it difficult and dangerous for them to accomplish this and they were warned by the Master of this danger. Approximately ½ hour later, the plaintiff's auto-car and another truck, which had been stowed alongside of it,

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broke from their moorings and were seen to disappear into the sea.

The first ground of defence raised is that by reason of the so-called non-responsibility clause which is contained in the bill of lading, the defendant cannot be held liable for the loss of the said auto-car This clause reads as follows:—

Les marchandises couvertes par connaissement peuvent être arrimées sur ou sous le pont à la discrétion du voiturier; et lorsqu'elles sont chargées en pontée elles sont, en vertu de cette disposition, censées être déclarées comme étant ainsi chargées en pontée et cela même si aucune mention spécifique à cet effet n'appert à la face de ce connaissement Relativement aux marchandises chargées en pontée ou déclarées comme étant ainsi chargées à la face de ce connaissement, le voiturier n'assume aucune responsabilité quant aux pertes, avaries ou au retard se produisant en n'importe quel moment et résultant de toutes causes que ce soit, y compris la négligence ou le mauvais état de navigabilité du navire au départ ou à n'importe quel moment du voyage.

Notwithstanding the fact that the bill of lading expressly stipulated that the contract of carriage which it evidences is subject to all of the terms and conditions of the *Water Carriage of Goods Act,* it is submitted on behalf of the defendant that the *Water Carriage of Goods Act,* does not apply in the circumstances of the present case, because the plaintiff's auto-car was not "goods" within the meaning of that term as it is defined in paragraph (*c*) of Article 1 of the *Water Carriage of Goods Act* 1952 R S C c. 291 to wit:

"goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

The defendant takes the position that the said auto-car was not within the meaning of the said definition because it was in fact "cargo which by the said contract of carriage is stated as being carried on deck and is so carried".

In point of fact the contract of carriage, that is the bill of lading which was delivered to the shipper at the time of shipment, does not contain statement that the said cargo was to be carried on deck and there is no proof that the plaintiff was aware that it was to be so carried It is true that what otherwise purports to be a copy of this bill of lading (Exhibit D-2) bears on its face the following inscription in small print apparently imprinted by means of a rubber stamp "chargée en pontée sans aucune responsabilité, perte ou dommage quelle qu'en soit la cause."

Counsel for defendant attempted to get around the difficulty arising from the fact that the bill of lading which was signed by and given to the shipper (Exhibit P.1) bears no such inscription by invoking the statement contained in the non-responsibility clause above-quoted to the effect that if cargo is in fact stowed on deck, it is deemed to be declared to be so stated even though no statement appears on the bill of lading.

This however is a proposition which this court is unable to accept. As above noted, the bill of lading is expressly stated to be subject to the terms, conditions and dispositions of the *Water Carriage of Goods Act* and therefore subject to Article 1, para. C of the rules relating to bills of lading

In the opinion of the undersigned, the bill of lading does not contain a statement that the said auto-car was to be carried on deck and therefore the so-called clause of non-responsibility contained in the bill of lading and above-quoted, insofar as it purports to limit the liability of the defendant, is contrary to Articles 1 and 2 of the said rules and is of no force and effect.

Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd.[1]

Under reserve of the abovementioned defence, it is pleaded that even if the *Water Carriage of Goods Act* is held to apply and the non-responsibility clause in the bill of lading is without effect insofar as it purports to exclude or limit liability on the part of the defendant, the latter nevertheless is not liable for the damages claimed since he is entitled to avail himself of the immunity provided by the *Water Carriage of Goods Act*. These exceptions however can only avail as a defence, if the ship-owner either stowed said cargo on deck with the express agreement of the shipper or in doing so acted in accordance with a clearly established custom.

Scrutton, 15th Edit, p 157:

The goods are to be loaded in the usual places The shipowner or master will only be authorized to stow goods on deck (1) by a custom binding on the trade, or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper, of the particular goods to so stow them;

The effect of stowage not as authorized will be to set aside the exceptions of the charter or bill of lading and to render the shipowner liable under the contract of carriage for damages.

In the present case, although some evidence was brought with a view to establishing the existence of a custom of trade, no such custom was alleged, and, in the opinion of the undersigned, none was proved.

I am unable to find in the evidence proof of a general custom of the trade that cargo of that kind, weight and dimensions was carried on deck in the case of vessels of the size, type and tonnage of the M/V *Savoy* on voyages from Quebec to Sept Iles during the winter months It may well be that some vessels did make it a practice to stow such cargo in this manner without the knowledge or authorization of the shipper and contrary to their obligations under the contract of carriage and it may equally well be that had such cargo been lost or damaged the shipowner would have been liable to the owner of the goods. In any event, since no custom of trade has been allowed no evidence relating to one can be considered.

Therefore, were it not for the first part of the so-called non-responsibility clause above-quoted, the effect of which is to grant liberty to the shipowner to carry on deck, this Court would be obliged to find that the defendant had, by reason of his failure to establish such a custom of trade or to prove any agreement or authorization for such stowage, deprived himself of any protection the exceptions of the *Water Carriage of Goods Act* might otherwise have afforded.

However in view of the liberty to carry on deck which was granted in the bill of lading, the defendant was free to carry the said cargo on deck subject however to his obligation to comply with the requirements of Art III, rule 2 of the *Water Carriage of Goods Act* to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." (*Svenska Traktor* case (*supra*))

The burden of proving that the said auto-car had been properly and carefully loaded, handled, stowed, carried, kept and cared for rested upon the defendant

Carvers Carriage of Goods By Sea, 9th Edit, page 185:—

. if the goods owner proves that the goods shipped have not been delivered, or have been damaged after shipment, the carrier is liable unless he can prove affirmatively (I) that he has taken reasonable care of the goods while they were in his custody; and (II) that the loss or damage falls within one of

[1] [1953] 2 Q B 295

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the immunities specified in Article IV r. 2.

Scrutton, 15th Edit., p. 215;

Svenska Traktor case (*supra*) p. 303;

In the present case the auto-car, a very heavy and bulky vehicle, was stowed crosswise on the deck above hold No. 1 (slightly forward of midship) and was secured to the deck by means of four cables. On the 2nd day after leaving Quebec and while the vessel was proceeding through heavy seas with winds of gale proportion, it was observed that the cables, some at least of which had previously shown signs of slackness, were sufficiently loose to permit the said auto-car forward and backward movement and the Captain ordered the First Mate and sailor to tighten the cables. This however was exceedingly difficult and dangerous to accomplish under the circumstances and it is doubtful if in fact anything effective was done in this connection. About a half-hour later said auto-car and another truck came loose from their moorings and were lost overboard.

In the opinion of the undersigned, the evidence as to the cause of the loss is at least consistent with negligence on the part of the defendant or his servants and the presumption that there was negligence in respect of the loading, handling, stowing, carrying and keeping said cargo has not been rebutted.

Although those in charge of the M/V *Savoy* should have anticipated the possibility that the vessel at that time of the year and in those waters would encounter winds of gale proportion and rough seas, it does not appear that any special attention was given to the stowing and securing of the auto-car. Captain Dery testified that he left these matters to the First Mate although before leaving Quebec he himself inspected the lashings in a general way and found them to be "comme on fait toujours" and "normal".

There is no evidence that the elementary precaution of placing chocks before and behind the wheels of the vehicle was taken and there is evidence to at least suggest that the auto-car was not even left in gear.

From the following excerpt from the testimony of the First Mate it would appear that no particular attention was directed to the lashings with which the auto-car was secured until about half an hour prior to the accident at which time it was impossible to take any effective action owing to the boisterous seas and high winds.

Page 28:

Q. Vérifiez-vous vous-même l'arrimage du vaisseau avant de partir de Québec?

R. Aux alentours d'une demi-heure, avant l'accident, le capitaine m'a envoyé avec un matelôt aller vérifier les «wires» et nous avons fait notre possible, nous avons pris un peu de «slack», comment je disais bien ça? Vous savez, ce que je veux dire et puis là le capitaine nous a lâché un cri en disant «Faites attention à vous autres, la mer est haute, vous allez vous faire emporter» Nous avons fait tout notre possible pour exempter l'accident,

and at p. 47:

Q. Est-ce que vous n'auriez pas pu à ce moment-là renforcer l'arrimage?

R. Non, monsieur, parce que la mer était trop grosse, c'était dangereux de nous faire emporter.

The weather conditions which prevailed at the time and place of the accident were not abnormal for that season and in those waters and the circumstances were such that ordinary care and prudence required that special precautions be taken to stow and secure cargo of the weight, size and description of plaintiff's motor-vehicle, which was being carried on open deck in a manner which exposed it to the full effect of the rolling of the ship and the

force of waves breaking on the deck.

The undersigned is forced to conclude that it has not been established that all reasonable care was taken in respect of the loading, stowing and safe-guarding of said auto-car, the loss of which was brought about by the failure of defendant and his servants to comply with Art. III, para. 2 of the *Water Carriage of Goods Act* and that therefore the defendant must be held responsible for the loss of said cargo.

It remains to deal with the question of whether or not the defendant is entitled to limit his liability in virtue of Art. IV, para. 5, of the *Water Carriage of Goods Act*, which reads as follows:

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

In the present instance, although the nature of the said cargo was apparent, no declaration of the value of the car was inserted in the bill of lading which document does not indicate, and there is no evidence to show that freight was charged or whether freight was charged at a flat rate or was based on the tonnage of said vehicle. All that is shown is a description of the cargo and an indication that its weight was 14,000 lbs.

This being the case the question of whether or not the defendant is entitled to limit his liability in accordance with the provisions above-quoted appears to be settled by the judgment of the Supreme Court of Canada in the case of *Anticosti Shipping Co. v. St. Amand*[1]. That case concerned the loss of a truck which was being transported under a contract of carriage by water evidenced by a bill of lading which contained no statement of the value of the vehicle. It was held that the said vehicle was a "unit" within the meaning of Art. IV, para. 5, of the *Water Carriage of Goods Act* and therefore the carrier's liability for the loss was limited to $500.

In the opinion of the undersigned the defendant in the present case is for the same reason entitled to invoke the limitation of liability afforded by the statute.

CONSIDERING that in the circumstances disclosed by the proof the defendant must be held reponsible for the loss of plaintiff's auto-car, but he is entitled to limit his liability in respect of said loss at the sum of $500.

DOTH MAINTAIN plaintiff's action AND DOTH CONDEMN the defendant to pay to the plaintiff the said sum of $500, with interest and costs.

Judgment accordingly.

[1] [1959] S.C.R. 372.