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# Admiralty - Carriage of Goods by Sea Act - Ship Mortgage Act

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# RECENT DECISIONS

ADMIRALTY—Carriage of Goods by Sea Act—Ship Mortgage Act—Doctrine of seaworthiness expanded to include financial responsibility of a carrier.

*Morrisey v. S.S. A. & J. Faith,* 252 F. Supp. 54 (N.D. Ohio 1965).

Libelant, the Republic of Pakistan, contracted for the shipment of certain cargo with Pacific Seafarer's, Inc., owner of the *S.S. A. & J. Faith,* and paid the freight charges in advance. It did so at a time when the vessel owner was on the brink of hopeless insolvency. The prepaid freights were distributed among the ship's creditors in an attempt to satisfy their growing impatience. Inevitably, however, the creditors filed libels against the *Faith* and she was seized and held for judicial sale.[1] Grace Lines, Ltd., who was also the holder of the preferred ship mortgage, was the purchaser at the sale[2] and is now the respondent in this action by libelant for recovery of its prepaid freights.[3] Libelant contends that its claim is entitled to priority over Grace Line's preferred ship mortgage because the solicitation and acceptance by the shipowner of the prepaid freights when imminent seizure was foreseeable was a breach of the owner's duty under the Carriage of Goods by Sea Act to use due diligence to provide a seaworthy vessel fit to perform its voyage.[4] By emphasizing the commission of a tort by the shipowner, libelant will recover a greater share of its prepaid freights than it would if it merely sued in contract.[5] Respondent, on the other hand, argues that any breach of its

1. Forty-one libels were filed against the *Faith* for unpaid wages, maritime injury, breach of contract, breach of employment obligation and failure to pay suppliers and maritime service companies. The court appointed a Master Commissioner to assist in determining the validity and priority of the respective liens. Grace Lines, Ltd. appeals from the Commissioner's decision.

2. Grace Lines, Ltd. was the highest bidder at $350,000. It assumed the obligation and cost of completing the voyage.

3. Other parties to this consolidated libel proceeding were before this court in 1964 in an action for a share in certain freight receipts paid when respondent completed the voyage. The court denied relief to libelant stevedoring companies and suppliers on the ground that their prior liens against the vessel were extinguished by the judicial sale. Morrisey v. S.S. A. & J. Faith, 238 F. Supp. 877 (N.D. Ohio 1964).

4. The Carriage of Goods by Sea Act, § 3(a), 49 Stat. 1208 (1936), 46 U.S.C. § 1303(1a) (1964).

5. This is so because the Ship Mortgage Act allows a lien for damages arising out of tort to gain priority over the preferred ship mortgage. The Ship Mortgage Act, § 30(m), 41 Stat. 1004 (1920), 46 U.S.C. § 953(a) (1964). The Ship Mortgage Act represented legislation adopted by Congress to overcome the decision in Bogart v. The John Jay, 58 U.S. (17 How.) 399 (1854), which held that a mortgage on a ship was not a maritime contract and was not within admiralty jurisdiction, thus preventing the mortgagee from suing in admiralty. Port Welcome Cruises, Inc. v. S.S. Bay Belle, 215 F.Supp. 72 (D.C. Md. 1963). It also was intended to establish sound security in favor of loans to shipowners, First

duty under the Carriage of Goods by Sea Act to provide a seaworthy vessel is excused under that section of the Act exempting the owner when delay is due to "seizure under legal process."[6] *Held*, for libelant; a vessel is unseaworthy when the vessel owner leaves the ship unprotected against foreseeable seizure by creditors, thereby giving rise to an action in tort and allowing the claim for prepaid freight to gain priority over the preferred ship mortgagee.

After deciding that the *Faith* was a common carrier with all the attendent obligations to the public,[7] the Chief Judge of the District Court disposed of the respondent's contention that it was excused from liability for seizure by legal process. The court subscribed to the view espoused by Gilmore and Black in their treatise on Admiralty that it was the better view that the exemption should not be granted when the owner is the cause of the seizure.[8] The court also supported this position by resorting to an analysis of the purpose of this exemption. "The purpose," it said, "is to excuse ships and their owners from underwriting damage sustained by unexpected delays which the owner can neither avoid, anticipate nor prevent."[9] From this analysis and from the fact that it has been held that the other exemptions of the Act are not available as a defense when the vessel owner is at fault,[10] the court's conclusion that the exemption cannot be invoked by respondent rests on sound foundations.

The court then turned its attention to libelant's argument that the acceptance of the prepaid freights by the vessel owner violated his duty to use due diligence to provide a seaworthy ship. "The connotative ambit," it said, "of the term 'seaworthy' has expanded concentrically in direct proportion to the number of occasions upon which courts have been called upon to interpret it."[11] With this trend established, Judge Connell then decided that seaworthiness "should not be limited to merely the physical facilities" of a ship but should also include its financial condition.[12] In support, the court reasoned that seaworthiness "connotes simply

Suffolk Nat'l Bank of Huntington v. The Air Brant, 125 F. Supp. 709 (E.D.N.Y. 1954), and to promote ship financing by affording substantial security to investors, Chemical Bank New York Trust Co. v. Steamship Westhampton, 358 F.2d 574 (4th Cir. 1965). For a discussion of the soundness of ship mortgages, see Gyory, *Security at Sea: A Review of the Preferred Ship Mortgage*, 31 FORDHAM L. REV. 231 (1962).

6. The Carriage of Goods by Sea Act, § 4(g), 49 Stat. 1210 (1936), 46 U.S.C. § 1304(2g) (1964).

7. 252 F. Supp. 56-57 (N.D. Ohio 1965).

8. GILMORE & BLACK, THE LAW OF ADMIRALTY 143 (1957), which lists three cases on the subject, two of which were decided by the same judge.

9. 252 F. Supp. 58 (N.D. Ohio 1965).

10. The exemption for damage from an act of God is not available if the carrier was negligent in failing to guard against the natural event claimed to be the act of God. Mamiye Bros. v. Barber Steamship Lines, Inc., 241 F. Supp. 99 (S.D.N.Y. 1965).

11. 252 F. Supp. 58 (N.D. Ohio 1965).

12 *Ibid.*

lem.[23] Congress accepted the recommendation and adopted the Carriage of Goods by Sea Act in 1936 which bound the vessel owner to his present duty to "exercise due diligence to make the ship seaworthy."[24] The two Acts differ principally in the areas to which they apply: the Carriage of Goods by Sea Act to foreign commerce[25] and the Harter Act to domestic commerce unless the parties stipulate that the Carriage of Goods by Sea Act will govern.[26] On the whole, however, it has been authoritatively suggested that both Acts contain so many similarities that their differences can be considered minor and that both "seaworthiness" and "due diligence" mean the same under both Acts.[27]

The classic definition of "seaworthiness" was laid down by the Supreme Court in *The Silvia*:[28] whether the vessel is reasonably fit to carry the goods which she has undertaken to transport. Since then, the major area for the operation of the term has been as a seaman's remedy for maritime injury.[29] It is to be noted that in the *Morrisey* case, the court dealt with "seaworthiness" as it applies to the carriage of goods, an area significantly different from the personal injury area.[30] It is not absolutely clear that the seaworthiness concept in the carriage of goods area has been expanding to the degree that it has in the personal injury area.[31]

23. For history and comment on the Hague Rules, see Geary, *Carriage of Goods by Sea*, 7 ORE. L. REV. 320 (1928); James, *Carriage of Goods by Sea—The Hague Rules*, 74 U. PA. L. REV. 672 (1926); Note, 23 VA. L. REV. 590 (1937).

24. The Carriage of Goods by Sea Act, § 3(2), 49 Stat. 1208 (1936), 46 U.S.C. § 1303(1a) (1964).

25. § 1207, 49 Stat. (1936), 46 U.S.C. § 1300 (1964).

26. The Vale Royal, 51 F. Supp. 412 (D.C. Md. 1943).

27. GILMORE & BLACK, *op. cit. supra* note 8, at 127; The Bill, 47 F. Supp. 969 (D.C. Md. 1942), *affirmed* 145 F.2d 470 (4th Cir. 1944); for a comparison of the two Acts see Note, 27 VA. L. REV. 1078 (1941).

28. 171 U.S. 462 (1898).

29. For an examination of the current state of the seaworthiness doctrine in this area, see Shields and Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137 (1963); Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954); Note, 66 COLUM. L. REV. 1180 (1966); Note, 4 HOUSTON L. REV. 153 (1966); Note, 61 MICH. L. REV. 982 (1963); Comment, 76 HARV. L. REV. 819 (1963); Comment, 9 VILL. L. REV. 422 (1964).

30. Seaworthiness in the personal injury area holds the shipowner to an absolute duty, unlimited by concepts of common-law negligence. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). Seaworthiness in the carriage of goods area holds the shipowner to a duty relaxed by statute to use due diligence. The difference is mainly due to the widely espoused belief that seamen are "thoughtless and require indulgence; . . . are credulous and complying; and are easily over reached. . . . They are emphatically wards of admiralty. . . ." Harden v. Gorden, 11 Fed. Cas. 480, 485 (No. 6047 1823). See also, Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1014 (9th Cir. 1966). On the other hand, cargo seaworthiness seems to have been made a less exacting doctrine when the shipping industry needed room to expand.

31. See Note, 66 COLUM. L. REV. *supra* note 29, reviewing the expansion and discussing conflicting decisions as to whether a failure to allocate an adequate number of crewmen to perform a particular duty comprises unseaworthiness. See also, Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1015 (9th Cir. 1966).

a vessel fit to perform as she promises,"[13] that the obligation for a seaworthy ship is imposed so that a shipowner can make a reasonable effort to furnish a vessel which can complete the voyage for which she solicits business,[14] and that the foreseeable result of a financially unprotected ship is the same as one with a physical defect: "interruption or termination of the voyage."[15] This conclusion is necessary for the ultimate determination of the priority of libelant's claim, for it supports the existence of a tort. In doing so, however, it is necessary to determine whether the court unnecessarily expanded the seaworthiness doctrine.

"Seaworthiness" as an Admiralty concept is primarily applicable to three areas—to the carriage of goods, as here, to a seaman as a remedy for maritime injury,[16] and to Marine Insurance.[17] It has its foundation in early history as part of the famous Laws of Oleron requiring the shipowner to exercise due diligence to make his vessel seaworthy for the benefit of the shipper.[18] England developed the doctrine as an implied, absolute warranty for the benefit of both the shipper and the ship underwriter.[19] Thereafter, when the shipowners began the practice of placing clauses in their bills of lading relieving them of their liability for unseaworthiness, a split developed between the English and American courts. The former approved these provisions while the latter held them invalid as against public policy.[20] In response to a demand for relief by American shippers,[21] Congress passed the Harter Act in 1893 relaxing the standard of care required to one of due diligence to make the ship seaworthy.[22] Shortly after this action, brokers, underwriters and shipowners saw the need for international uniformity in ocean bills of lading, and, in 1923, the Hague Rules were recommended to all countries as the solution to this prob-

13. *Ibid.*

14. *Ibid.*

15. *Id.* at 59.

16. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944); Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); The Osceola, 189 U.S. 158 (1903).

17. I PARSONS, MARINE INSURANCE 367-400 (1868).

18. The Laws of Oleron take their name from the Island of Oleron off the French coast and were supposed to have been compiled under the direction of Eleanor of Acquitine about 1150 A.D. They have been reprinted as an Appendix to Volume 30 of the Federal Cases. The Laws of Oleron, 30 Fed. Cas. 1171 *et seq.*

19. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703). The exceptions were only for "Acts of God and the enemies of the King."

20. The Jason, 225 U.S. 32 (1912); The Delaware, 161 U.S. 459 (1896); see also Green, *The Harter Act*, 16 HARV. L. REV. 157 (1903).

21. The American shippers demanded relief because shipowners in foreign trade inserted clauses in their bills of lading relieving them of liability for injuries due to the neglect of their agents. These clauses, while invalid in United States Federal Courts, were valid in countries to which the vessel was bound, thus placing American shippers at a disadvantage. Green, *supra* note 20.

22. The Harter Act, § 3, 27 Stat. 445 (1893), 46 U.S.C. § 192 (1964).

The decisions in the cargo carriage area have tended to concentrate on an evaluation of the physical fitness of a ship to carry, preserve and deliver her cargo.[32] Included among the ordinary situations have been: defective compasses,[33] protruding conduit pipes[34] and defective boilers.[35] Some courts, however, have held a ship unseaworthy for such situations as improper stowage,[36] overloading[37] and open hatches.[38] These decisions appear to be consonant with the broad test of seaworthiness set forth by the Supreme Court and generally recognized by courts since that time.[39] In view of this background, the *Morrisey* court seems to be correct in its conclusion that the cargo seaworthiness doctrine should include the financial responsibility of the vessel owner. Its failure to trace the actual expansion of the doctrine leaves the court open to some criticism, but, notwithstanding this lapse, the validity of the general conclusion should be accepted.

Once the court decided that the *Faith* was unseaworthy it was not difficult to give the libelant's claim priority. The court did so by reasoning that the breach of the duty to provide a seaworthy vessel gives rise to a cause of action both in tort and contract[40] and if in tort, libelant's claim becomes a preferred maritime lien within that section of the Ship Mortgage Act that gives priority to a "lien for damages arising out of tort."[41] The existence of a tort-contract action was arrived at by considering the general consensual duty imposed by law on a common carrier dealing with the public,[42] in which situation the Supreme Court had early stated that such dual remedies in tort and contract exist.[43] It has been suggested that the Supreme Court case so holding has not been followed by the lower courts, which, when faced with these "hybrid" claims, have

32. Morrisey v. S.S. A. & J. Faith, 252 F. Supp. 58 (N.D. Ohio 1965).

33. The Yungay, 58 F.2d 352 (S.D.N.Y. 1931).

34. Edmund Weil, Inc. v. American West African Line, Inc., 147 F.2d 363 (2d Cir. 1945).

35. Karobi Lumber Co. v. S.S. Norco, 249 F. Supp. 324 (S.D. Ala. 1966).

36. Pioneer Import Corp. v. The Lafcomo, 138 F.2d 907 (2d Cir. 1943), *cert. denied*, Black Diamond Lines, Inc. v. Pioneer Import Corp., 321 U.S. 766 (1944).

37. Andros Shipping Co., Ltd. v. Panama Canal Co., 184 F. Supp. 246 (D.C. Canal Zone 1960), *aff'd*, 298 F.2d 720 (5th Cir. 1962).

38. Middle East Agency, Inc. v. The John B. Waterman, 86 F. Supp. 487 (S.D.N.Y. 1949).

39. The Second Circuit has recently declared that "the basic threefold concept of a sound ship, proper gear and a competent crew has remained unchanged." Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247 (2d Cir. 1966). Even seaworthiness as a mariner's remedy has been said to be a duty, while absolute, only to furnish a vessel and appurtenances reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

40. 252 F. Supp. 59 (N.D. Ohio 1965).

41. The Ship Mortgage Act, *supra* note 5.

42. Morrisey v. S.S. A. & J. Faith, 252 F. Supp. 59 (N.D. Ohio 1965).

43. The John G. Stevens, 170 U.S. 113 (1898).

tended to treat such claims as contractual.[44] It has also been suggested that another case,[45] which the *Morrisey* court cited and which is very similar to the case at hand in that it allowed the prepaid freight claim to gain priority in the same manner, is not reputable authority, for it relied on railroad cases where the contract-tort distinction is procedurally important and where any determination of lien priorities is substantively unimportant.[46] While this distinction may be accurate, it is not absolutely certain that this fact alone makes the case unauthoritative, for decision by analogy is a commonly used device among courts. In any event, the *John G. Stevens* still remains good law and its dual cause of action theory even appears to have been approved by dictum in a later decision of the Supreme Court.[47] Overall, therefore, the *Morrisey* court's logic seems valid; however, before it can be totally approved, its effect on the preferred ship mortgagee must be examined, for his was supposedly a preferred security.

The mortgagee has every right to be dismayed at the result reached[48] and, unfortunately, the possible alternatives he might follow to avoid another decision similar to the present one do not offer much hope. He might require the shipowner to provide financial statements after every trip, but the shipowner may have already acted irresponsibly. He could require the shipowner to place a clause in every bill of lading whereby any shipper would be obligated to waive his claim for prepaid freights if delivery is not made; we have already seen, however, that American courts view these clauses with disfavor.[49] The mortgagee could possibly require the shipowner to indemnify him for any tort liens that gain priority over the mortgagee due to the shipowner's irresponsibility. This action might, however, adversely affect the shipping industry and prove impractical if the shipowner, himself, is financially unsound. Statutory reform is a possibility but as is too often the situation with these attempts, Congress may prove to be an insurmountable barrier. The most favorable course of action may only be to press for a narrow application of the holding in the *Morrisey* case for in all probability the exercise of sound management by the vessel owner would have resulted in a decision for

44. GILMORE & BLACK, *op. cit. supra* note 8 at 612.

45. The Henry W. Breyer, 17 F.2d 423 (D.C. Md. 1927). The *Morrisey* court realized that it could have merely relied on *Breyer* in reaching its decision but concluded that it would not do so because *Breyer* was decided before the passage of the Carriage of Goods by Sea Act. In view of the similarities between this Act and The Harter Act (see note 6), it is difficult to understand the court's reluctance.

46. GILMORE & BLACK, *op. cit. supra* note 8 at 612.

47. Stevens v. The White City, 285 U.S. 195 (1932) (dictum). See also, The Pacific Spruce, 1 F. Supp. 593 (W.D. Wash. 1932).

48. It has been recognized, however, that the investor in a ship mortgage has a different kind of risk with possibly a slightly greater litigation factor. Gyory, 31 FORDHAM L. REV. *supra* note 5.

49. *Supra* note 20.

the mortgagee. Sound management would, in fact, vitiate the argument that the vessel was unseaworthy and any creditor seeking to recover prepaid freights would, therefore, have to sue in contract and be forced to settle for a smaller share of the proceeds. Even if the *Morrisey* decision is simply viewed as one of a policy choice between two innocent parties,[50] the absence of the vessel owner's reckless acts would most likely be enough for a court to then favor the ship mortgagee. Therefore, it is submitted that ship mortgagees need not become unduly concerned about the *Morrisey* decision, for the fact situation in itself is unique and affords a possible basis for future distinction. If any principle is to be extracted from this case, it is not particularly a legal one, but simply that investors in the ship mortgage market primarily need to be more selective in their investments, that shipowners primarily need to exercise better financial methods, and that shippers primarily need to be more cautious before agreeing to pre-pay freight charges.

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CONSTITUTIONAL LAW—Congress, by appropriate legislation, may have the power to punish private conspiracies that interfere with fourteenth amendment rights.

*United States v. Guest*, 383 U.S. 745 (1966).

In a Federal indictment growing out of the murder of Negro Educator Lemuel Penn on a Georgia highway, the prosecution alleged a conspiracy by the six defendants to deprive Negro citizens of the free exercise and enjoyment of "the right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated, or managed by or on behalf of the State of Georgia or any subdivision thereof."[1] Such alleged deprivation was said to be in violation of the Equal Protection Clause of the fourteenth amendment;[2] and of 18 U.S.C. § 241, which provides in part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his not having exercised the

50. Admiralty can be viewed quite often in this regard. For example, the Supreme Court seems to have decided Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), on this basis. See also, Comment, 9 VILL. L. REV. *supra* note 29.

1. United States v. Guest, 383 U.S. 745, 753 (1966). Paragraph two of the indictment.

2. U.S. Const. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" [Emphasis added.]