

Present : Bertram C.J. and Ennis J.

HAMEED *v.* THE FISCAL, WESTERN PROVINCE.

65—D. C. Colombo, 1,105.

Seizure of boats by Fiscal—Boats leaky—Action for damages against Fiscal.

The Fiscal seized certain boats belonging to plaintiff under a writ. The boats were old and leaky, and could not be kept afloat, except by intermittent baling. The crew who used to do this left the boat when the boats were seized. The Fiscal informed the plaintiff that the men had left the boats.

Held, that it was not the duty of the Fiscal to engage a crew for the purpose of preserving the boats.

IN this action the plaintiff sued the Fiscal of the Western Province for the recovery of a sum of Rs. 13,337 as damages consequent on the sinking of three cargo boats belonging to him, whilst in the custody of the Fiscal, under seizure in action No. 52,701 of this Court, as a result of the gross negligence and gross want of ordinary diligence of the officers of the Fiscal in mooring the boats too close together, in failing to provide adequate crews to protect the boats in rough weather, and in failing to make provision for the baling of water out of the boats:—

The District Judge H. A. Loos, Esq., held as follows:—

The seizure took place on December 1, 1920, in the afternoon when the boats had already been moored by the plaintiff's men in the usual place in the harbour, and apparently in the usual manner.

The boats when seized were, as admitted by plaintiff, in a leaking condition, and had been in a leaking condition from July, 1920; in fact, the plaintiff stated that at the time of seizure the boats leaked to such an extent that if the water was not baled out, there would be about 10 inches depth of water in five days' time as the result of the leaking.

The plaintiff's case is that the Fiscal's officers shifted the boats from the positions in which they had been moored by his own men, and tied them up in contact with each other, with the result that they knocked against each other and were damaged, and the leakage increased; that the Fiscal failed to provide men to bale out the water from the boats, or crews to shift the boats away from each other when the weather becomes stormy and the sea rough; and that the boats, three, became full of water and sunk, and he has lost them altogether, two of the boats having sunk on the night of December 20, 1920, and the other one on the night of January 6, 1921. . . .

I am not prepared to accept the evidence of the plaintiff's witnesses as to the Fiscal's officers having changed the boats from the positions in which they had been moored by the plaintiff's men. . . .

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The chief cause of the loss of the boats, according to the plaintiff, is that they were allowed to be in contact with each other; admittedly, the boats were, for several days at all events, in the same position in which they had been moored by the plaintiff's men, and if it is the fact, as I hold it is, that they remained in that position all throughout, then they were in contact with each other owing to the act of the plaintiff's men.

The question arises then, whether it was not proper that the boats should have been moored so as to be in contact with each other—the plaintiff's own witness Lyle admitted that he has seen cargo boats sometimes tied up together and sometimes separately—he is an Engineer who has not much to do with work in the harbour, but he also stated that "Lighters and vessels are always kept apart sufficiently clear, so that they may not knock against each other and get damaged."

That is apparently a general statement which on his own showing is not strictly accurate, for he admits that he has seen cargo boats sometimes tied together.

The defendant's witness, Zarephe, however, who is a member of a firm possessing 80 cargo boats in the harbour, and whose business is connected with the harbour, and who has an experience of eighteen years in connection with cargo boats in the harbour, states that their boats are always moored in contact with each other, whether the weather be good or rough, with fenders in position, and he gives the reason for their so doing. . . .

This witness' evidence which is apparently disinterested, and which I am prepared to accept completely, disposes of the main ground on which the plaintiff rests his case.

What then was the cause of the sinking of the boats. In my opinion it was the leaking condition of the boats, inadequate baling, and the stormy weather which prevailed on the nights on which the boats were sunk.

The plaintiff was in financial straits towards the end of the year 1920, the boats in question were practically his sole assets and the only means of earning an income, he knew that his boats were in a leaking condition; that it was absolutely necessary that they should be regularly baled out in order to keep them afloat; that the Fiscal's officers were ignorant of such matters, so that it seems to me in the highest degree improbable that he would not have provided for the baling out of the boats, and I have no reason to doubt, as the defendant's witnesses stated, that the plaintiff's men did remain on the boats and continue to bale out the water till December 28, 1920.

One of the Fiscal's officers, Gabriel Perera, states that he sent word to the plaintiff on December 28, 1920, that his men had left the boats, and also informed Nagoor Meera, the execution-creditor, that they had gone, and requested him to send men to bale out the water from the boats.

Neither the plaintiff nor Nagoor Meera sent any men thereafter to do the baling till December 30, 1920, and on the night of December 29, 1920, the stormy weather, which it is established prevailed, caused two of the boats to fill with water and sink.

On December 30, 1920, the plaintiff appears to have sent some men who did the baling for about half an hour and then left, and Nagoor Meera also appears to have sent some men, who finding on arrival that there were men already baling out the water, the plaintiff's men went away. From January 2, 1921, however, some men baled out the water at the instance of Nagoor Meera, but in spite of that fact one of the two

remaining boats was sunk during the bad weather which prevailed on the night of January 6, 1921, a fact which seems to establish that the boats of the plaintiff were in such a bad and leaking condition that the probability is that, even if they had been regularly baled out, the three boats which did sink would have been sunk during the stormy weather in any event.

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The plaintiff has, in my opinion, failed to establish that the defendant has been guilty of gross negligence or gross want of ordinary diligence in respect of the boats seized, for I hold on the second and third issues that the boats were not moored too close together by defendant that they were in fact not moored by the defendant at all; that if he did fail to provide adequate crews to protect the boats in rough weather, such failure did not materially affect the matter, for the boats would probably have sunk even if there had been no such failure, owing to the bad condition of the boats, and that there was no need for him to provide for baling out the water as the plaintiff's men had been attending to the work, and when they ceased to do so, the defendant informed the plaintiff and the judgment-creditor of the fact.

As regards the fourth, fifth, and sixth issues I have already indicated how I would decide them. I hold that the plaintiff did provide crews and attend to the baling of the boats during the whole period practically that the boats were under seizure, and that in my opinion the evidence indicates that the boats would have sunk in any case owing to their bad condition during the stormy weather that prevailed on the nights of December 29, 1920, and January 6, 1921.

As regards the first issue I hold that the boats were sunk while in the custody of the officers of the defendant.

Croos-Da Brera, for the appellant.

Hayley, for respondent.

October 2, 1922. BERTRAM C.J.

This is an action by a judgment-debtor against the Fiscal alleging gross negligence and gross want of ordinary diligence on the part of the Fiscal's officers with regard to certain boats belonging to the plaintiff, which were seized and held by the Fiscal in the course of an execution. The two main grounds of negligence alleged may be summarized as follows: The first was that the officers of the Fiscal committed gross negligence in mooring the boats together in such a manner that they became peculiarly liable to damage from heavy weather. On that point the learned Judge has made an explicit and reasoned finding of fact. He does not believe that the Fiscal's officers had taken any special measures for mooring the boats in any particular way. He is of opinion that they were moored as they were left by the plaintiff's own men, and that there was no necessity, in any case, that cargo boats of this description should be moored separately. This finding of fact cannot be effectually challenged.

The second suggested ground of negligence was this: It was that, when the cargo boats in question were abandoned by the plaintiff's own men, a duty arose on the part of the Fiscal himself to engage a

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crew for the purpose of preserving the boats. The boats were in point of fact very old and leaky. They could not be kept afloat, except by intermittent baling. This intermittent baling would, in the ordinary course, have been carried out by the crew while they were employed on their work on behalf of the plaintiff in the harbour. But as soon as they ceased to so being employed and consequently ceased to be earning money, the crew were not paid any wages by the plaintiff, and therupon abandoned the boats. When this happened on December 28, 1920, one of the Fiscal's officers sent word to the plaintiff that his men had left the boats. He also informed the judgment-creditor, who himself had an interest in the boats being advantageously sold, that the crew had gone, and he requested him to send men to bale out the water from the boats. This was clearly a very reasonable step to take. The question is, is there any further obligation upon the Fiscal in the circumstances? Was it his business to make good the default of the owner? There are no definite authorities as to the degree of care which the Fiscal under such circumstances should take.

Mr. Croos-Da Erera cited to us a passage from *Beven on Negligence, Book II., Chapter II., p. 269*, which states how the law has been worked out in America. It is stated in the same authority that Story puts the liability of an officer, such as the Fiscal, on the same footing as that of a bailee for hire. Under our own legal system the liability of the Fiscal is determined by section 362 of the Civil Procedure Code, which declares that the Fiscal is exempt from civil liability except in cases, amongst others, of gross negligence or gross want of ordinary diligence.

I do not think it has been made out that there is any duty upon the Fiscal, when he seizes property of this kind, to take any positive or active measures for its preservation. If a large ship in the harbour was seized, a Fiscal's officer would be put on board, and the crew would be left to look after the ship and to preserve the machinery and to save the ship from any incidental dangers to which it might be exposed. I cannot see that the Fiscal has any larger duty in the case of these cargo boats. I cannot see how he can be justly charged with gross negligence when he did nothing more than what the plaintiff's men did. The plaintiff was given an opportunity of preserving his boats, but did not use it. I think that all that can be expected of the Fiscal was to give that notice which his officers gave, and though I have sympathy with the plaintiff, who has lost his means of livelihood while they were in the custody of the Fiscal, I cannot see that the Fiscal is under any legal liability, and I would dismiss the appeal, with costs.

ENNIS J.—I agree.

Appeal dismissed.