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No. 72 of 1933.

APPELLANTS' CASE.

In the Privy Council.

ON APPEAL

FROM THE COURT OF KING'S BENCH FOR THE PROVINCE
OF QUEBEC (APPEAL SIDE).

BETWEEN

PATERSON STEAMSHIPS LIMITED (Defendants) *Appellants*

AND

10 CANADIAN CO-OPERATIVE WHEAT
PRODUCERS LIMITED (Plaintiffs) - - *Respondents.*

Case on behalf of the Appellants.

RECORD.

1. This is an Appeal from a decision of the Court of King's Bench for the Province of Quebec (Appeal side) dismissing the Defendants' Appeal from the judgment of the Superior Court of the District of Montreal, delivered on the 31st May 1932 by Mr. Justice Philippe Demers.

20 2. The Respondents' claim in the action was in respect of loss of and damage to a cargo of wheat and barley occasioned by the stranding of the Appellants' steamship "Sarniadoc" in shallow water near Main Duck Island at the Eastern end of Lake Ontario. After the stranding of the "Sarniadoc" a portion of her cargo was salvaged and the Respondents' original claim in the action amounted to the sum of \$83,029.03. The learned trial judge gave judgment in favour of the Respondents for the sum of \$76,911.44 with interest from the 14th January 1931 and costs. This judgment was affirmed (by a majority) on the 29th March 1933 by the Court of King's Bench for the Province of Quebec consisting of Tellier, C.J., and Dorion, Rivard, Letourneau and Bond, J.J. Bond, J., delivered a dissenting judgment in favour of the Appellants. No question arises on this Appeal as to the *quantum* of the damage sustained by the Respondents. p. 1-3. p. 136. p. 146. p. 156.

3. The facts of the case are shortly as follows. The "Sarniadoc" is a steel screw steamship of 1,939.94 tons gross and 1,159.74 tons net register, 252.7 feet in length, 43.2 feet in beam, fitted with engines of 900 indicated horse-power. The vessel was built in the year 1929 by Messrs. Barclay Curle & Co., and at the material time was classed "B.S." in the British Corporation Register of Shipping and Aircraft. The letters "B.S." indicate "British Standard Star" which is the highest class of certificate granted by the British Corporation. The "Sarniadoc" was a new ship and was sent out to Canada in the month of May 1929. She was being used at the material time by her owners for the transportation 10 of grain cargoes on the Great Lakes.

4. The Respondents' cargo of wheat and barley, which forms the subject-matter of this action, was originally shipped on the Appellants' steamship "Mantadoc" at Fort William under two Bills of Lading both dated the 16th October 1929 for carriage to Port Colborne on Lake Erie. On the arrival of the "Mantadoc" at Port Colborne a portion of the Respondents' cargo consisting of 5,091 bushels of barley and 56,594 bushels of wheat was transhipped on to the "Sarniadoc" for carriage to Montreal under a Bill of Lading dated 28th November 1929. The "Sarniadoc" had also on board certain other grain not belonging to the Respondents 20 and on leaving Port Colborne her draft was about 14 feet, which was the maximum draft permissible for passage through the Welland Canal. It was the intention of the parties that all the grain in question should remain in the holds of the "Sarniadoc" for winter storage. p. 20.

5. Having loaded the said cargo the "Sarniadoc" left Port Colborne in the 28th November 1929 and after proceeding through the Welland Canal entered Lake Ontario at Port Dalhousie at about 2.15 p.m. on the 29th November. At this time the weather, which had been bad during the earlier part of the day, had moderated somewhat, but the Master of the "Sarniadoc," on leaving Port Dalhousie, proceeded at 30 first on a course of North by West in the direction of Toronto in order that he might be able to take shelter at this port if the weather conditions again became bad. After proceeding on this course for some 13 miles the weather outlook appeared favourable and accordingly at about 4.10 p.m. the Master put his vessel on to an Easterly course and proceeded down Lake Ontario. All went well until between 9.0 p.m. and 10.0 p.m. on that evening when the wind increased to a gale from a Westerly to a West North Westerly direction. The "Sarniadoc" proceeded on down the Lake and at about 3.0 a.m. on the following morning Peter Point Light was observed on the port bow. Soon afterwards, however, the temperature 40 dropped to zero and it commenced to snow hard with the result that it

was difficult to fix a reliable position off Peter Point. At about 5.0 a.m. the "Sarniadoc" had Peter Point about abeam at an estimated distance of about 3 miles. At about 6.0 a.m. the Master of the "Sarniadoc," being uncertain as to his position speed was reduced and a course of N.70°E magnetic was set to make the passage between Main Duck Island and the False Ducks.

6. At this time it was the intention of the Master, owing to the bad visibility, to take shelter and come to anchor in the lee of Main Duck Island until the weather conditions improved. The vessel proceeded on her course at reduced speed until about 7.10 a.m. At this time the Master and Second Officer, who were in the Pilot House, and the Chief Officer, who was on the upper bridge, simultaneously made out through the snow directly ahead of the vessel and at an estimated distance of about three-quarters of a mile the trees on Main Duck Island. The Master at once ordered the helm of the "Sarniadoc" to be put hard-a-starboard (old command) and her engines to be worked at full speed ahead. The "Sarniadoc" answered her helm and gradually came round some 16 points to port and was brought on to a Westerly course heading into the wind and sea. The engine room telegraph had in the meantime been rung full speed ahead several times as an indication to the engineers that all available power was required. As the "Sarniadoc" got round on to her Westerly heading she lost her way owing to the strong gale and heavy seas and although her helm was kept hard-a-starboard she fell off on to a heading between North West and North North West. For some 20 minutes after executing her turn to port the "Sarniadoc" remained with engines working at full speed ahead shipping very heavy seas overall. During this time being unable to make any progress or to hold her own against the gale and high seas she was driven gradually in an Easterly direction and eventually grounded with her stern in the shoal water to the Westward of Main Duck Island. Thereafter the vessel settled down and ultimately her decks split and she filled with water.

7. The stranding of the "Sarniadoc" formed the subject-matter of an enquiry which took place at Toronto before the Dominion Wreck Commissioner and two Nautical Assessors on the 9th January 1930. By the judgment of the Court the stranding of the "Sarniadoc" was pronounced to be "due partly to very poor judgment, consequently poor seamanship, on the part of the Master."

8. When the Respondents' grain was transhipped from the "Mantadoc" to the "Sarniadoc" at Port Colborne a document entitled "Memorandum Not Negotiable," dated the 28th November 1929, was issued by the Appellants acknowledging shipment of the grain in question

on board the "Sarniadoc." This Memorandum contained the following words :—

" This instrument is a memorandum only and is not negotiable. Original Bill of Lading on Lake steamer named hereon, and for like quantity, which is now outstanding, will be required before delivery of this cargo. Lake Bill of Lading consigned as appears below."

Below this passage appear the words " Ex steamship ' Mantadoc ' November 2nd 1929," and also particulars of the grain in question.

The " Mantadoc " Bill of Lading contained the clause :— 10

p. 206.

" This shipment is subject to all the terms and conditions and all the exemptions from liability contained in the Water Carriage of Goods Act."

From these documents it is clear and it was accepted by both parties in the Courts below that the relationship of the parties to the contract of carriage on board the " Sarniadoc " was governed by the provisions of the Canadian Water Carriage of Goods Act.

9. The relevant provisions of this Act are contained in Sections 6 and 7 and are as follows :—

" Section 6. If the owner of any ship . . . exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect. 20

Section 7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from . . . dangers of the sea or other navigable waters . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees." 30

10. At the trial of the action it was contended by the Respondents that the " Sarniadoc " was unseaworthy and that the Appellants had failed to exercise due diligence to make her seaworthy in that—

- (I) her boilers and furnaces were in a defective condition, and
- (II) she was not fitted with shifting boards.

11. The first of these contentions was rejected by all the Judges in both the Courts below and the Appellants submit that the evidence clearly established that the boilers and furnaces of the " Sarniadoc " were in fact in an efficient and seaworthy condition at the material time or

alternatively that the Appellants had exercised due diligence to make them so. This question is very fully discussed in the judgment of Bond, J., in the Court of King's Bench. pp. 156 to 171.

12. With regard to the second point there was no dispute that the "Sarniadoc" was not fitted with shifting boards. The Appellants called evidence, which was accepted by the Courts below, that for the last 20 years it had been the universal custom to carry grain cargoes on the Great Lakes without shifting boards. The "Sarniadoc" was registered in England and was consequently not subject to the provisions of the Canadian Shipping Acts. The only statutory provision applicable to the "Sarniadoc" is contained in Section 452 of the Merchant Shipping Act 1894. This is a penal section and is in the following terms:—

"Sub-section (1). Where a grain cargo is laden on board any British ship all necessary and reasonable precautions (whether mentioned in this Part of this Act or not) shall be taken in order to prevent the grain cargo from shifting."

Sub-section (2) of the same section provides for the infliction of a fine upon the master or owner of any vessel where such precautions are not taken.

13. It is submitted, however, that on the question of the fitting of shifting boards the only real point for decision is whether upon all the evidence the Courts below were justified in holding that in the particular circumstances the Appellants had failed to exercise due diligence to make the "Sarniadoc" seaworthy for the carriage of the Respondents' grain cargo.

14. The Appellants contended that they had exercised all reasonable and proper care to make the "Sarniadoc" seaworthy for the carriage of this particular cargo. It was not challenged that the Respondents' grain had been properly trimmed to a level surface in the holds of the "Sarniadoc" and, as already indicated, it was proved and accepted by the Court that for some 20 years the practice of fitting shifting boards in grain-carrying vessels on the Great Lakes had been universally abandoned.

15. In this state of affairs it is submitted that the evidence in this case established that the Appellants had taken every usual and proper precaution to make the "Sarniadoc" seaworthy and fit for the carriage of the Respondents' cargo and that in the circumstances they had not been guilty of any lack of due diligence in this connection.

16. It is submitted moreover that, whether or not the Appellants were guilty of lack of due diligence in failing to fit the "Sarniadoc" with shifting boards, such failure had, on a proper view of all the evidence, no

bearing upon the stranding of the vessel and the consequent loss of and damage to the Respondents' cargo. It is submitted that such stranding, loss and damage were solely brought about by " dangers of the sea or other navigable waters " and that in the circumstances the Appellants are protected by the exception contained in Section 7 of the Canadian Water Carriage of Goods Act.

17. In this connection it is submitted that the learned trial Judge and the majority of the Judges in the Court of King's Bench have failed to appreciate the true effect of the Master's evidence and have attached undue importance to certain answers given by the Master in cross-examination, which were not really material to the point at issue. The learned trial Judge and the majority of the Judges in the Court of King's Bench base their decisions substantially upon the ground that if the " Sarniadoc " had been fitted with shifting boards her Master would or might, at some unspecified time, have put his vessel on to a course for Kingston. They were of opinion that the Master failed to take this action because it would have involved putting his vessel " in the trough of the seas," which might or might not have caused her cargo to shift owing to the fact that she was not fitted with shifting boards. 10

18. In the formal judgment of the learned trial Judge the following passage occurs :— 20

p. 136.

" Defendant has failed to prove that it had made due diligence to make the ship in all respects seaworthy ; that the grain cargo had not been properly secured from shifting by boards or otherwise ; that the Master could not properly navigate his ship by fear of the shifting of the cargo ; and that that is the principal reason of the stranding of the ship."

At the conclusion of the notes of his judgment the learned trial Judge says :—

p. 140.

" I have, therefore, reached the conclusion that the ship—no precaution having been taken to prevent the shifting of the cargo —was not safe for the voyage and, therefore, was unseaworthy ; that she was driven on the rocks on account of bad navigation ; and that she was not properly navigated because of improper loading." 30

pp. 149 to 156.

In the Court of King's Bench Tellier C.J., and Dorion J., did not deliver separate judgments and the judgment of the majority of the Court was delivered by Rivard, J., and Letourneau J.

In the course of his judgment Rivard J., says :—

p. 150.

" Car il ne semble pas douteux que l'échouement du ' Sarniadoc ' ait été le résultat d'une manœuvre erronée en soi, 40

mais que le maître dut adopter, parce que la marche normale du vaisseau l'aurait mis au creux de la lame, avec danger de désarrimage des grains. Le naufrage et une perte totale auraient pu résulter d'un désarrimage dans ces conditions, la manœuvre adoptée pour éviter ce désastre a causé l'échouement et une perte partielle. Erreur de navigation, mais justifiée, chez le maître, par la crainte d'un désarrimage possible et qui en effet devait être prévu."

At the conclusion of his judgment Rivard J., says :—

10 " Je crois, comme le premier juge, qu'il y avait eu défaut de p. 152.
de precautions dans l'arrimage ; en conséquence, les propriétaires du bâtiment sont responsables de l'erreur occasionnée par ce défaut.

" Cette erreur dans la manœuvre étant la vraie cause de l'accident, le moyen de défense tiré des perils de la mer est écarté."

In the course of his judgment Letourneau J., says :—

20 " Il faut deduire de l'ensemble du témoignage du capitaine Angus que force de s'éloigner des récifs qu'il venait d'apercevoir, et incapable pour cela de remonter contre le vent et la vague, ainsi qu'il l'a tenté, il eut pu réussir en prenant en diagonale la vague ou tout au moins le creux de la lame (the trough of the sea). C'est ce qu'il aurait fait s'il n'eut craint le shifting ; et, encore une fois, le témoignage qu'il rend sur ce point implique que cette manœuvre eut été la bonne. L'absence des cloisons a empêché qu'il y eut recours.

" L'on objecte que sans égard à cette complication pouvant provenir d'un déplacement de la cargaison, déjà le navire n'avait d'autre issue que d'atteindre l'abri de Main Ducks, qu'il était virtuellement en perdition, faute d'une visibilité suffisante . . .

30 " Il convient de reconnaître que le capitaine s'était en effet p. 154.
arrête à cette idée ; mais il serait plus difficile de conclure que ce fût là la seule issue qu'il avait. Quoiqu'il en soit de cette première idée d'aller se mettre à l'abri de Main Ducks, il faut reconnaître que cette idée a dû faire place à une autre lorsqu'a 7.10 a.m., le capitaine aperçut, en face de lui, les récifs ; et c'est bien plutôt à la situation telle qu'elle se présentait alors, à cette minute précise, qu'il faut s'arrêter, puisqu'il se présentait là un danger soudain et imminent, soit que le but ultime fût le port de Kingston ou la rade de Main Ducks."

40 In the above passage it will be seen that Letourneau J., recognises that, in considering what was the effective cause of the stranding, the critical

time was the moment when Main Duck Island was sighted ahead. None the less he concludes his judgment with the following passage :—

p. 156.

“ Dans ces circonstances, je crois bien établi que l'arrimage, ou plus exactement l'absence des cloisons qui devaient assurer la stabilité de la cargaison, a joué un rôle décisif ; la relation de cause à effet entre cet inconvénient at l'échouement même, me parait suffisamment démontrée.”

19. It is submitted that the view of the facts taken by the learned Judges in the passages set out above is not supported by the evidence and that even if the Master of the “ Sarniadoc ” would have been averse, as he said he was, to putting his vessel on to such a course that she had the wind and seas on her beam, no occasion ever arose on which he was called upon to come to a decision as to the propriety or otherwise of adopting this manœuvre. As has already been pointed out, by about 6.0 a.m. on the morning of the 30th November 1929 the Master had made up his mind to seek shelter in the lee of Main Duck Island and from and after this time he never considered the question of setting a course for Kingston or putting his vessel “ in the trough of the seas.” The evidence clearly establishes that whilst endeavouring to make the passage between Main Duck Island and the False Ducks, preparatory to carrying out his intended manœuvre of rounding to and coming to anchor in the shelter of Main Duck Island, the Master of the “ Sarniadoc ” suddenly made out the trees on Main Duck Island close to and ahead of his vessel. In this state of affairs, being uncertain as to what part of Main Duck Island he was seeing, it is submitted that the Master's only proper course was to do what he in fact did, namely, to round to under a starboard helm and head her away from the shoal water and into the wind and sea. Whilst rounding to under a starboard helm the “ Sarniadoc ” was for a substantial period beam on to the wind and sea. During this time, although she rolled very violently her cargo did not shift. 10 20

20. It is submitted that this casualty was solely due to a conjunction of causes all of which arose without any lack of due diligence on the part of the Appellants or their servants on board the “ Sarniadoc.” Owing to the bad visibility it had been impossible to obtain a reliable position off Peter Point. Thereafter the vessel encountered an unexpected Southerly set with the result that she failed to make good her intended course. It is further submitted that after sighting Main Duck Island the Master of the “ Sarniadoc ” adopted the only safe course which was open to him and that the stranding of the vessel some 20 minutes after she had rounded under a starboard helm was solely due to the strong gale and heavy seas which drove her into the shoal water and caused her to strand. 30 40

21. If, contrary to the Appellants' submission, the stranding of the “ Sarniadoc ” was not occasioned by dangers of the seas or other navigable waters it is submitted, for the reasons set out above, that the Appellants

exercised due diligence to make the "Sarniadoc" seaworthy and fit for the carriage of the Respondents' cargo and that in the circumstances the loss of and damage to such cargo was occasioned by faults or errors of the Master of the "Sarniadoc" in the navigation or management of the vessel in that he :—

- (I) Failed to keep a good look-out.
 (II) Failed to ascertain the position of the "Sarniadoc" with accuracy when off Peter Point.
 10 (III) Failed to ease [the engines of the "Sarniadoc" sufficiently after passing Peter Point.
 (IV) Failed to make sufficient or any allowance for a possible Southerly set or for local magnetic disturbance after passing Peter Point.
 (V) Failed after sighting the trees on Main Duck Island to direct the course of the "Sarniadoc" so as to pass to the Northward of the Island.

22. The Appellants submit that the judgments of the learned trial Judge and the majority of the Judges in the Court of King's Bench should be set aside and that the Respondents' claim should be dismissed with costs
 20 for the following amongst other

REASONS.

- (I) BECAUSE the stranding of the "Sarniadoc" and the consequent loss of and damage to the Respondents' grain cargo were caused by dangers of the sea or other navigable waters.
 (II) BECAUSE the absence of shifting boards on the "Sarniadoc" did not cause or contribute to the said stranding, loss and damage.
 30 (III) BECAUSE the evidence established that the "Sarniadoc" was at all material times seaworthy and/or that the Appellants had exercised due diligence to make her so and that the said stranding, loss and damage were due to faults or errors in the navigation or management of the ship and that the judgment of Bond J. is right and should be affirmed.
 (IV) BECAUSE the judgments of the learned trial Judge and of the majority of the Judges in the Court of King's Bench were wrong and should be reversed.

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G. ST. C. PILCHER.

In the Privy Council.

ON APPEAL

*From the Court of King's Bench for the
Province of Quebec (Appeal Side).*

BETWEEN

**PATERSON STEAMSHIPS
LIMITED** - - - *Appellants*

V.

**CANADIAN CO-OPERATIVE
WHEAT PRODUCERS
LIMITED** - - - *Respondents*

Case

ON BEHALF OF THE APPELLANTS.

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