

In the Privy Council.

ON APPEAL
FROM THE EXCHEQUER COURT OF CANADA.

BETWEEN—ROBIN HOOD MILLS LIMITED ... (*Defendant*) APPELLANT
 AND
 PATERSON STEAMSHIPS LIMITED (*Plaintiff*) RESPONDENT.

“ s.s. THORDOC.”

CASE FOR THE RESPONDENT.

1.—This is an Appeal from the Judgment of the Exchequer Court of Canada dated the 17th July, 1935, dismissing the Appellant's Appeal from the Judgment of the Honourable Mr. Justice Demers, Local Judge in Admiralty for the Quebec Admiralty District, dated the 15th December, 1934, whereby the learned Judge decreed that the Respondent (Plaintiff) was entitled to limit its liability under the Merchant Shipping Acts, 1894 and 1900, in respect of any loss or damage caused to property and rights of any kind by reason of the stranding of its vessel the s.s. “Thordoc” on the 9th November 1929.

RECORD

p. 63, l. 33

p. 53, l. 22

2.—The main question in the Appeal is whether the damage or loss caused to the Appellant's goods carried on the Respondent's s.s. “Thordoc” when she stranded at Point Porphyry, Lake Superior, on the 9th November, 1929, occurred without the actual fault or privity of the Respondent, within the meaning of those words in the Merchant Shipping Acts of 1894 and 1900.

57 & 58 Vict.

c. 60

63 & 64 Vict.

c. 32

3.—The Appellant alleges, firstly, that the stranding of the s.s. “Thordoc” and the resultant damage were due to her unseaworthiness in that her compass was not properly adjusted, and secondly, that prior to the said stranding, the s.s. “Thordoc” deviated from her course and voyage by proceeding to Fort William after leaving Port Arthur instead of following the direct course to Montreal. The Appellant contends that the said unseaworthiness and deviation did not occur without the actual fault or privity of the Respondent and that therefore the Respondent is unable to limit its liability under the said Acts. The Respondent contends that both the alleged unseaworthiness and deviation occurred without its actual fault or privity, and submits, in addition, that the said deviation had

RECORD no bearing on the stranding or loss and is irrelevant in considering the Respondent's claim under the said Acts, and, moreover, that the deviation was reasonable in the circumstances.

4.—The Respondent's s.s. "Thordoc" left Port Arthur, Lake Superior, at about 8 p.m. on the 8th November, 1929, with a cargo of flour, wheat, shorts and oats, the property of the Appellant, bound for Montreal. On the vessel's arrival south and abreast of Trowbridge Island, the Master laid a compass course, which should have brought the vessel about a mile off Point Porphyry. Such a course is a usual one to follow at that period of the year and it is marked on Exhibit P.9 by the line A-B. At about 3.10 a.m. on the 9th November the vessel stranded at Point Porphyry and became a total loss and her cargo was damaged. On the 13th January, 1931, the Appellant began an action against the Respondent in the Superior Court for the District of Montreal, No. F.83113, claiming the sum of \$146,326.29 as damages occasioned to its cargo and resulting from the said stranding. The action was tried before the Honourable Mr. Justice Demers, who, on the 13th April, 1932, gave Judgment for the Appellant.

5.—The learned Judge found that the Respondent did not exercise due diligence to make the vessel seaworthy according to the Canadian Water Carriage of Goods Act (R.S.C., 1927, Ch. 207) in that the new compass, which had been installed in the vessel on the 24th September, had not been properly adjusted by one Captain Inkster, compass adjuster.

6.—The learned Judge further dealt with the question of deviation. The vessel after leaving Port Arthur had proceeded to the contiguous port of Fort William, where she had discharged certain lifeboats belonging to the Respondent. She had then at once rejoined the route from Port Arthur to Montreal. Fort William was not on the direct route to Montreal, and the learned Judge held that the deviation was not authorised by the bill of lading and was not reasonable. For these reasons the learned Judge gave Judgment for the Appellant.

7.—The Respondent appealed against this decision to the Court of King's Bench of the Province of Quebec, Appeal Side, which, by a Judgment dated the 30th November, 1933, dismissed the Appeal and confirmed the Judgment of Mr. Justice Demers, but solely on the ground that the Respondent, having failed to establish that it had exercised due diligence to make the vessel seaworthy, and the vessel being in fact unseaworthy, the Respondent was not entitled to the protection of the Water Carriage of Goods Act relied upon. The other ground of the Judgment appealed from, namely, deviation, was rejected. From the report of the Judgments of the Court of King's Bench in 57 Quebec Law Reports, King's Bench, page 322, *et seq.*, it appears that the Court considered that the alleged deviation had no effect whatever on the casualty.

8.—The present action was brought by the Respondent by writ dated the 26th January, 1934, in the Exchequer Court of Canada, Quebec Admiralty District, and in its Statement of Claim the Respondent alleged that the stranding of the s.s. "Thordoc" occurred without the actual fault or privity of the Respondent and that it was due to the improper navigation or management of the ship. The

Respondent claimed a declaration that the Respondent, as owner of the s.s. "Thordoc," was not answerable in respect of damage to her cargo at the time of the stranding to an amount exceeding £8 or \$38·92 for each ton of the vessel's registered tonnage, amounting in all to £16,522. 16s. sterling or \$80,363·42, and an order that upon payment of that amount and interest into Court, all further proceedings in the above-mentioned action No. F.83113 should be stayed.

RECORD

p. 4, l. 28
p. 4, ll. 30-40

9.—The Appellant, by its Statement of Defence, denied that the stranding had occurred without the actual fault or privity of the Respondent, and further pleaded that the vessel had deviated by proceeding to the port of Fort William and that the stranding and resultant damage were due to unseaworthiness in that the vessel's compass was not properly adjusted.

p. 5, ll. 20-33

p. 6, l. 1-5

10.—The relevant sections of the Merchant Shipping Acts are as follows :—

Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60), Section 503. " (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity ; (that is to say)

" (b) Where any damage or loss is caused to any goods merchandise, or other things whatsoever on board the ship ;

" be liable to damages beyond the following amounts ; (that is to say)

20 " (ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

" (2) For the purpose of this section

" (a) The tonnage of a steamship shall be her registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage . . ." (as amended by the Merchant Shipping Act, 1906 (6 Edw. 7. c. 48 Section 69). Section 509—" This part of this Act shall, unless the context otherwise requires, extend to the whole of Her Majesty's dominions."

30 Merchant Shipping (liability of Shipowners and Others) Act, 1900 (63 and 64 Vict., c. 32), Section 1.

" The limitation of the liability of the owners of any ship set by section five hundred and three of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship."

40 11.—The action came on for trial before the Honourable Mr. Justice Demers. Oral evidence was given on behalf of the Respondent, which is to be found at pp. 8 to 50 of the Record, and various documents were put in by each party. The learned Judge gave Judgment for the Respondent and made a decree limiting its liability as claimed and staying the action No. F.83113 between the parties on payment of the limited amount into Court. On the question of deviation, he regarded himself as bound by the Order of the Court of King's Bench of the

pp. 8-50
p. 53, l. 23

p. 67, ll. 1-20

RECORD
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 p. 52, l. 25
 p. 52, l. 41
 p. 53,
 ll. 10-18

Province of Quebec, Appeal Side, above mentioned, which decision he considered rendered the question of deviation *res judicata*. He made no finding as to whether the deviation occurred without the actual fault and privity of the Respondent but said: "Neither is it to be understood that, if I had to pronounce on the actual "fault of the owners to deviation, my opinion would be adverse to the owners; "on the contrary." On the question of the failure properly to adjust the vessel's compass, the learned Judge found that the compass had been adjusted by a competent adjuster, and that the Respondent had proved that the loss or damage occurred without the actual fault or privity of the Respondent Company. He stated that he accepted without hesitation the evidence given to the effect that it was not the practice for the Respondent Company to receive a certificate that a compass had been adjusted, but merely to receive a bill for work done. As the Respondent had received such a bill from a competent man, it had every reason to believe that the work of adjustment was done and properly done. 10

p. 63, l. 33
 p. 54, l. 33
 p. 63, l. 31

12.—From this decision the Appellant appealed to the Exchequer Court of Canada, which gave Judgment dismissing the Appeal on the 17th July, 1935. The Judgment of the Court was delivered by the Honourable Mr. Justice Maclean, with whose reasons the Honourable Mr. Justice Angers concurred.

p. 57, l. 20
 p. 53
 p. 57

13.—On the circumstances as to the adjustment of the compass, the Court was in agreement with the conclusion arrived at by the learned trial Judge. On the question of fact as to whether the unseaworthiness of the vessel, due to the improper adjustment of her compass, occurred without the actual fault or privity of the Respondent Company, there are therefore two concurrent findings of the learned trial Judge and of the Exchequer Court of Canada in favour of the Respondent. On this point, therefore, it is submitted that this Appeal comes within the principle laid down in *Robins v. National Trust Company Ltd.*, 1927, A.C. 515, and that such concurrent findings of fact will not be disturbed by the Privy Council. 20

p. 58, l. 5
 p. 63, l. 23
 p. 63, l. 26
 p. 63, l. 26

14.—The Honourable Mr. Justice Maclean in dealing with the question of deviation confined his decision to determining whether the deviation was made with the actual fault and privity of the Respondent. The learned Judge expressly refrained from giving any opinion on the question whether, as the vessel had resumed the contract line of route before her stranding, and as there was no connection between the deviation and the stranding, the deviation, even if with the fault and privity of the Respondent, was any bar to its obtaining the decree in limitation of liability claimed. He further refrained from deciding whether the deviation was a reasonable one for which the Respondent was exempted under the Water Carriage of Goods Act. He said, however, "There is much to be said, "I have no doubt, in support of both contentions." 30

p. 58-63
 p. 63, l. 9

15.—The learned Judge considered in detail the evidence which had been given as to the part played by the officers of the Respondent Company in regard to the deviation, and came to the conclusion that the order given for the ship to proceed from Port Arthur to Fort William after loading was not in fact with the actual fault or privity of the Respondent. 40

16.—It is respectfully submitted that the reasons given by the learned Judge and the decision based thereon are correct. The general manager and vice-president

- of the Respondent Company was one W. M. Hall whose duties were "everything in connection with the ordering of the boats, chartering cargoes, hiring crews and the general operation of the Company," and who was also a director of the Respondent Company. The president of the Respondent Company and the secretary, Sutherland, knew nothing about shipping, and Hall was engaged because of his shipping knowledge. He was the only person who was authorised to order the s.s. "Thordoc" from Port Arthur to Fort William. On the 8th November, 1929, Hall was at Winnipeg where the Respondent has an office, which was in communication with the Respondent's head office at Fort William by private wire. Hall had no one appointed as his assistant at Fort William, and it was easy and usual for the head office to communicate with him. In these circumstances Sutherland, who was secretary and treasurer and a director of the Respondent Company, but whose duties were chiefly secretarial and mostly in connection with the N. M. Paterson and Company Grain Company, took it upon himself to give the master orders to go to Fort William after leaving Port Arthur. Sutherland had had no instructions from Hall to do this; he gave the order on his own authority; and it was not within his province to move ships around unless so instructed. Applying the reasoning of the opinions in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, 1915, A.C. 705, it is respectfully submitted that in these circumstances Sutherland was not, as far as the ordering of ships was concerned, the *alter ego* of the Respondent Company so that his actions were the very actions of the Respondent Company itself; but that on the other hand, Hall alone occupied this position, and that the deviation therefore occurred without the actual fault or privity of the Respondent.

- 17.—It is further respectfully submitted that should the Exchequer Court of Canada be wrong in holding that the deviation was without the actual fault or privity of the Respondent Company, such deviation is no bar to the Respondent's claim to limit its liability. The deviation consisted in proceeding from Port Arthur to the adjacent port of Fort William up the Kaministikwia River to just past the Paterson elevator, back down the river and on until the original route to Montreal was reached. The route taken is shown in blue on Exhibit D.2, the distance covered during the deviation was only between twenty and thirty miles, and the time taken between three and four hours. The stranding was due to the fact that the master laid an incorrect course owing to the failure to adjust the new compass, and the helmsman followed this course until the vessel struck. Had the compass been properly adjusted the course laid by the master south of Trowbridge Island would have brought the vessel about a mile to the east of Point Porphyry. The majority of the learned Judges in the Court of King's Bench, of the Province of Quebec, Appeal Side, came to the conclusion that the deviation had no effect on the casualty (see the report in 57 Quebec Law Reports, King's Bench 322), and it is respectfully submitted that the deviation to Fort William is of no relevance to the Respondent's claim to limit its liability under the Merchant Shipping Acts since it did not occasion the damage or loss to the Appellant's cargo.

18.—The Water—Carriage of Goods Act (R.S.C. 1927 Ch. 207) by Section 3 thereof applied to the contract of carriage by which the Respondent was carrying the Appellant's cargo from Port Arthur to Montreal. By Section 7 of that Act it is provided that "the ship, the owner . . . shall not be held liable for loss

RECORD

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p. 10,
ll. 39-43p. 49,
ll. 11-12

p. 12, l. 45

p. 49, l. 15

p. 12, l. 46

p. 19, l. 13

p. 15, l. 33

p. 14, l. 26

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ll. 30-40

p. 23, l. 40

p. 21, l. 23

p. 11, l. 24

p. 17, l. 10

p. 22, l. 14

p. 23, l. 36

p. 18, l. 5

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p. 18, l. 23

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ll. 15-28

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ll. 20-30

p. 33,

ll. 40-46

p. 34, l. 4

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ll. 20-35

p. 31,

ll. 34-6

Exhibit P. 9

p. 32,

ll. 30-35

Exhibit P. 5

p. 47,

ll. 30-43

RECORD — “ arising from . . . saving or attempting to save life or property at sea, or
 “ from any deviation in rendering such service, or other reasonable
 “ deviation . . . ”

p. 20,
 ll. 33-39
 p. 23, l. 4.
 l. 35
 p. 58,
 ll. 15-20
 p. 18,
 ll. 28-30
 p. 18, l. 40
 p. 19, l. 6
 p. 23,
 ll. 33-37

19.—The s.s. “ Thordoc ” on her voyage to the head of Lake Superior to load the Appellant’s cargo was carrying four lifeboats, the property of the Respondent, but not belonging to the vessel, which she had taken on board at the Sault and which she was to discharge at Fort William for storage during the winter before proceeding to Port Arthur to load the Appellant’s cargo. Owing to the fact that the Appellant’s cargo was incurring demurrage of cars at Port Arthur, the Appellant was anxious to load the vessel as soon as possible, and the s.s. “ Thordoc ” was therefore diverted by Sutherland to Port Arthur before she had discharged her lifeboats, thereby necessitating the subsequent move to Fort William for the purpose. It is respectfully submitted that in all the circumstances it was reasonable for the ship to proceed to Fort William and that so proceeding was a reasonable deviation within Section 7 of the Water—Carriage of Goods Act. 10

20.—The Respondent humbly submits that the Judgments of the trial Judge and of the Exchequer Chamber were right, and that this Appeal ought to be dismissed for the following amongst other

REASONS.

- (1) Because the damage or loss to the Appellant’s cargo occurred without the actual fault or privity of the Respondent Company. 20
- (2) Because the unseaworthiness of the s.s. “ Thordoc ” in that her compass was not properly adjusted was without the actual fault or privity of the Respondent Company.
- (3) Because of the concurrent findings of the Courts below on the fact that the improper adjustment of the vessel’s compass was without the actual fault or privity of the Respondent Company.
- (4) Because the deviation to Fort William occurred without the actual fault or privity of the Respondent Company.
- (5) Because the said damage or loss was not due to or caused by the said deviation which had no effect on or connection with the stranding of the vessel. 30
- (6) Because the Court of the King’s Bench of the Province of Quebec, Appeal Side, in their Judgment No. 379 of the 30th November, 1933, were of the opinion that the said deviation was of no effect.
- (7) Because the said deviation was reasonable.
- (8) Because the Judgments in the Courts below were right and ought to be confirmed.

ROBERT ASKE.

A. A. MOCATTA. 40

In the Privy Council.

ON APPEAL
FROM THE EXCHEQUER COURT OF
CANADA.

BETWEEN
ROBIN HOOD MILLS LIMITED
(Defendant) APPELLANT
AND
PATERSON STEAMSHIPS LIMITED
(Plaintiff) RESPONDENT.

“S.S. THORDOC.”

CASE FOR THE RESPONDENT.

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