

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.

CASE FOR THE APPELLANT.

RECORD

1.—This is an Appeal by Robin Hood Mills Limited, the Defendant, from the Judgment of the Exchequer Court of Canada, rendered on the 17th day of July, 1935, which dismissed its Appeal from the Judgment in favour of the Respondent granting a decree in limitation of liability under the Merchant Shipping Act, 1894, and rendered by the Local Judge in Admiralty for the Admiralty District of Quebec, the Honourable Mr. Justice Philippe Demers, on the 15th day of December, 1934. pp. 54-63
 pp. 50-53

2.—The facts which gave rise to the original litigation and the resultant liability which the Respondent has sought to limit were that in November, 1929, the British steamship "Thordoc," a cargo ship of some 2,000 tons, owned by the Respondent and registered at Fort William, in the Province of Ontario, while proceeding under charter on a voyage from Port Arthur to Montreal with a full cargo of flour and wheat shorts owned by the Appellant, stranded at Point Porphyry, on the north shore of Lake Superior and became with her cargo practically a total loss. p. 55, l. 19

3.—The Appellant, representing cargo interest, instituted an action against the Respondent as owner of the "Thordoc" in the Superior Court for the District of Montreal, in the Province of Quebec, claiming \$146,326.29 as damages occasioned to their cargo by the stranding of the "Thordoc" due to her unseaworthiness.

4.—To this action the "Thordoc" owners pleaded error in navigation as a defence provided by Section 6 of the Canadian Water Carriage of Goods Act (R.S.C. Chapter 207), which reads as follows :— p. 71, l. 27

" If the owner of any ship transporting merchandise or property
 " from any port in Canada 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

RECORD

“ held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.”

The further issue of deviation in the voyage was raised by the Appellant.

p. 71, l. 34

5.—The Superior Court in rendering Judgment in favour of the Appellant in the amount of \$146,326.29 held that the owners of the “ Thordoc ” had “ not proved that the compass on its ship was properly adjusted when she left Port Arthur ” and that “ the ship deviated from the voyage to Montreal.”

p. 67, l. 15

6.—In Appeal to the Court of King’s Bench this Judgment was affirmed on the issue that the prerequisite due diligence with regard to seaworthiness required by the Canadian Water Carriage of Goods Act had not been established by the Respondent as shipowner, and consequently the Defence of error in navigation failed. The issue of deviation was merely referred to as “ étant écarté.”

7.—The Respondent thereupon instituted the present action in limitation of liability under the provisions of Section 503 of the Merchant Shipping Act, 1894, and was successful in obtaining a decree in limitation of liability limiting its liability for the damages in the original Judgment to the statutory amount of £8 per ton of the registered tonnage of the “ Thordoc.” The Judgment of the Local Judge in Admiralty was affirmed by the Exchequer Court of Canada, and it is from this Judgment that the present Appeal has been taken.

p. 3

8.—By paragraph 7 of its Statement of Claim the Respondent alleged that the stranding of the “ Thordoc ” “ occurred by reason of the improper navigation or management of the ship,” and by paragraph 6 that “ the stranding occurred “ without the actual fault or privity of her owner,” the Respondent herein.

p. 5

9.—The Appellant by its Statement of Defence admitted that the stranding occurred by reason of the improper navigation or management of the ship, but denied that it was without the Appellant’s actual fault or privity as owners of the “ Thordoc.”

p. 5.

10.—The Appellant raised the two further and additional defences of

(a) deviation on the voyage and

p. 6, l. 2

(b) unseaworthiness of the “ Thordoc ” in that her compass was faulty because it had never been properly adjusted as found by the Learned Trial Judge in the original action in the Superior Court.

p. 31, l. 38

11.—The stranding occurred on a clear night and was such that it was nearly a collision with the lighthouse on Point Porphyry. This light has a visibility of 13 miles. (See Exhibit No. P.9.)

p. 49, l. 37

12.—In the original action in damages the Respondent stated with regard to the wheelsman of the “ Thordoc ” :

“ In the meantime the entire adventure, the ship, her cargo and the lives of her officers and crew were left to the tender care of an ignorant wheelsman, a novice who purported blindly to follow 81° on the

“ compass. It was the first season this man had ever acted as a wheelsman
 “ in his life, apparently had never been closer to Point Porphyry than
 “ Fort William and had never been in that particular course before.”

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13.—The Respondent did not introduce any evidence to establish the competency of the officers and crew of the “ Thordoc ” or that any effort had been made by the Respondent as a shipowner properly to man the “ Thordoc ” with a competent master and a sufficient number of persons of skill and ability to navigate her as required by law.

10 14.—It is submitted that the nature of the casualty and the admissions of the Respondent are such that they lead to the conclusion that the officers and crew of the “ Thordoc ” were incompetent, and that therefore there was a breach of the implied warranty of seaworthiness.

15.—On its voyage from Port Arthur to Montreal the “ Thordoc ” deviated from her course and voyage and proceeded to the Port of Fort William in the Province of Ontario which constituted a deviation in law and in fact. p. 36, l. 15

16.—The deviation of the “ Thordoc ” was ordered by the Respondent acting through a responsible officer, one Sutherland, who was Respondent’s Secretary-Treasurer, and who also had been a director of the Respondent Company since its organisation. p. 17, l. 39
p. 21, l. 23

20 17.—The Learned Trial Judge in the present action gave Judgment in favour of the Respondent on the deviation point on the ground that it was *res judicata* and a Defence which he could not consider in view of the Judgment of the Court of King’s Bench. He also found that there was no actual fault or privity on the part of the Respondent in regard to the failure properly to adjust the “ Thordoc’s ” compass. p. 52, l. 21

30 18.—The Courts below made no finding with regard to whether or not the Respondent had satisfied the requirements of the implied warranty of seaworthiness from the point of view of competency of the officers and crew nor whether there was any actual fault or privity on the part of the Respondent which gave rise to the improper navigation or management of the ship alleged by the Respondent.

19.—The only points dealt with by the President of the Exchequer Court of Canada were those of deviation and the unseaworthy compass. The finding in each instance was that there was no actual fault or privity on the part of the Respondent. p. 54

20.—It is submitted that as a matter of law the burden of proof was upon the Respondent to establish its allegation that the stranding occurred by reason of improper navigation or management of the “ Thordoc ” and that it so occurred without the Respondent’s actual fault or privity.

21.—It is submitted that, inasmuch as no evidence was introduced to establish the competency of the officers and crew of the “ Thordoc ” the Respondent has not discharged the burden of proof necessary to justify a decree in limitation of liability.

22.—It is submitted that in any event and as a matter of law the Respondent is not entitled to a decree in limitation of liability after the deviation which had been ordered by the Respondent.

23.—The Appellant submits that the Judgment of the Exchequer Court of Canada affirming the Judgment of the Local Judge in Admiralty should be set aside, and that Judgment should be entered for the Appellant with the costs of 10 this Appeal and in the Exchequer Court of Canada for the following reasons :—

REASONS

- (1) Because the Respondent has failed to discharge the burden of proof of establishing that the stranding and consequent loss of ship and cargo occurred without their actual fault or privity.
- (2) Because in fact the stranding and loss of the “ Thordoc ” and her cargo were due to her unseaworthy condition from the point of view of personnel.
- (3) Because the Respondent is not entitled to a decree in limitation of liability after a deviation in the voyage to which the Respondent 20 was a party.
- (4) Because the Judgments of the Exchequer Court of Canada and the Local Judge in Admiralty were ill founded in fact and were wrong in law.

RUSSELL McKENZIE.

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BETWEEN

ROBIN HOOD MILLS LIMITED
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AND

PATERSON STEAMSHIPS LIMITED
(*Plaintiff*) RESPONDENT.

CASE FOR THE APPELLANT

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