
EXCHEQUER COURT OF CANADA

BRITISH COLUMBIA ADMIRALTY DISTRICT

1947

Jan. 7, 8, 9, 10, 11 & 13

Jan. 18

BETWEEN:

CANADIAN TRANSPORT COMPANY LIMITED, OWNERS OF THE SCHOONER *City of Alberni* ..... } PLAINTIFF;

AND

HUNT, LEUCHARS, HEPBURN, LIMITED ..... } DEFENDANT.

The City of Alberni

Shipping—Action for general average contribution—Abandonment of ship—Counter claim for loss of cargo—Unseaworthiness—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49—Extent of owner's responsibility—Canada Shipping Act, 1934, 24-25 Geo. V c. 44, s. 649—Limited liability of shipowner—"Actual fault or privity" of owners—Action dismissed—Counterclaim allowed.

The schooner *City of Alberni*, owned by the plaintiff and carrying a cargo of lumber, owned by the defendant, from Vancouver, B.C., to Durban, S.A., was forced to put into San Francisco, California, and later into Valparaiso, Chile, for repairs. At the latter port she was abandoned by her owner and the ship and cargo were sold, causing heavy losses to both owners.

The action is brought by the ship owners to recover a general average contribution from the owners of the cargo who defend on the ground that the ship was unseaworthy at the commencement of the voyage and that the owners failed to use due diligence to make her seaworthy. The cargo owners counterclaim for the loss they sustained.

The Court found that the ship was not seaworthy when she sailed from Vancouver nor when she left San Francisco.

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Held: That the carrier's obligation under The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49 to exercise due diligence to see that his vessel is seaworthy is not limited to his personal diligence, his responsibility extends to the acts or defaults of his agents or servants.

2. That the action must be dismissed since the ship was unseaworthy and judgment be given in favour of the defendant on its counterclaim for the amount of limited liability under the Canada Shipping Act, 1939, 24-25 Geo. V, c. 44, s. 649.

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ACTION by plaintiff to recover a general average contribution from defendant.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver, B.C.

J. V. Clyne and *J. I. Bird* for plaintiff.

C. K. Guild, K.C. and *F. A. Sheppard* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

SIDNEY SMITH D.J.A. now (January 18, 1947) delivered the following judgment:

The plaintiffs in this case were the owners of the schooner *City of Alberni* and the defendant the owner of a cargo of lumber laden therein at Vancouver, British Columbia, for carriage to Durban in South Africa. I shall call the former the "shipowners" and the latter the "cargo interests".

The *City of Alberni* is a five-masted schooner, built in 1920 of fir at Hoquiam, Washington, U.S.A., length 242 feet; beam 44 feet; loaded draft 23 feet; gross tonnage 1,590 tons; registered (at all material times) at Vancouver, B.C.; official number 172,324; registered owner, Canadian Transport Company Limited. In 1940 she was purchased by the shipowners and in that year made a voyage to Australia with lumber and returned to Vancouver with sugar from the Fiji Islands. In 1941 she made a similar voyage to Australia, arriving back in Vancouver in November, 1941, with hardwood and copra from Sydney, New South Wales, and Samoa, respectively. She was then laid up until the following October, when she was again laden with lumber to the extent of one million feet below decks

and a half million feet on deck, and on 10th November, 1942, with a crew of 18 men all told, sailed upon the voyage with which we are concerned in this action. When four days out of Vancouver the vessel was found to be leaking so badly that the Master decided two days later to put into San Francisco for repairs and did so, arriving in that Port on the 24th November, 1942. There certain repairs were made around the stem, and on 12th December, 1942, she continued upon her voyage. From the 20th to the 24th February, 1943, she encountered heavy weather and again leaked so badly that on the 25th the Master decided to put into Valparaiso for further repairs. The ship arrived there on the 12th March, 1943. After various inspections it was decided by the owners to abandon the voyage and thereupon the ship and cargo parted company. The shipowners sold the ship and the cargo interests sold the cargo for what they respectively would bring. Heavy losses were incurred by both. Hence this action.

This action is brought by the shipowners to recover a general average contribution from the cargo interests of some $55,000. The equity of the underlying principle of general average has been recognized throughout the centuries, and every maritime state has adopted the rule that a loss caused by a sacrifice in time of peril at sea shall not be borne by one but by all interests involved in the adventure. A general average act is defined in the Marine Insurance Act, R.S.B.C. 1936, Ch. 134, sec. 68 (2) (and in Section 66 (2) of the English Marine Insurance Act, 1906) as follows:

> There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

Here the loss was not by way of sacrifice but by way of expenditures made by the owners at San Francisco and at Valparaiso and, assuming such expenditures were properly and reasonably made, the shipowners would be entitled to contribution from the cargo interests. But the cargo interests resist the claim upon the footing that the ship was initially unseaworthy, and that the owners failed to use due diligence to make her seaworthy. They say that the legal consequence is that the shipowners cannot

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recover; but that on the other hand they must pay to the cargo interests the amount of their losses, which they (the cargo interests) now make the subject of a counter-claim in this action.

The Bills of Lading contained a clause which is known as the "New Jason Clause", under which it was argued that the onus of proving seaworthiness fell upon the ship-owners if they were to succeed in their claim for a general average contribution. This may or may not be true, but in the view I take of the matter the question of onus is not material.

The Bills of Lading also contained an overriding clause making them subject to all the terms and provisions of and all the exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1936. The relevant parts of this Act are as follows:

> Sec. 3. There shall not be implied in any contract for the carriage of goods by sea, to which the rules apply, any absolute undertaking by the carrier of goods to provide a seaworthy ship.
>
> Art. 3 (1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to,
>
> (*a*) Make the ship seaworthy.
>
> Art. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy . . . .
>
> Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (*p*) Latent defects not discoverable by due diligence.

Finally, under the Bills of Lading general average was made payable according to York Antwerp Rules, 1924 or 1890 at the option of Canadian Transport Co. Ltd.

In *Paterson Steamships Ltd.* v. *Canadian Co-Operative Wheat Producers Ltd.* (1), Lord Wright deals with the shipowner's absolute warranty of seaworthiness which formerly prevailed at common law, and shows how the British Carriage of Goods by Sea Act, 1924, (which is the same as the aforesaid Canadian Act of 1936) and kindred acts, imposed restrictions upon the shipowner's freedom to contract out of his liability as carrier at common law, and at the same time gave him the benefit of certain statutory

(1) (1934) A.C. 538 at 544.

provisions in his favour. One such provision was the statutory removal of his absolute warranty of seaworthiness and its replacement by a provision requiring only due diligence on his part to make his ship seaworthy.

In the present case the legal position envisaged in the Bills of Lading is this: The shipowners are entitled to recover provided their vessel was seaworthy; or even if she were not seaworthy, provided they used due diligence to make her so. But if both provisoes are found against them, they fail, the cargo interests succeed on their counterclaim, and the only remaining question is whether the shipowners are entitled to limitation of their liability under sec. 649 of the Canada Shipping Act, 1934.

The issue of seaworthiness and the issue of due (which means "reasonable") diligence are here both questions of fact, depending on the evidence adduced and the proper inferences to be drawn from such evidence. The well known definition of seaworthiness given by Lord Cairns and approved by Lord Herschell, L.C., in *Gilroy Sons & Co.* v. *Price & Co.* (1) is as follows:

> That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic, or in performing whatever is the voyage to be performed.

Measured by this standard, I am of opinion that the *City of Alberni* was not seaworthy when she sailed from Vancouver. These are my reasons for thinking so.

First, the weather: The vessel sailed from Vancouver on November 10, 1942. Her log entries show that she was "making considerable water throughout night" of the 13th and 14th November and at 9.30 a.m. on the 14th a "leak was discovered at stem in vicinity of water-line". This leak was of such gravity that at noon on the 16th the Master, quite rightly, decided to "run for San Francisco for repairs". The weather, up until the morning of the 14th, was not abnormal for a November day in the North Pacific. The Beaufort Scale affords a useful method for recording the velocity of the wind, running as it does from 0, signifying a dead calm, to 12, signifying winds of hurricane force. On this scale, until then, as depicted in the log, there was no wind over force 5, except for two hours from

(1) (1893) A.C. 56 at 63.

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6 to 8 a.m. on the 14th, when it was logged as being at South-West, force 6. But at 8 a.m. it backed to the South-South-East and moderated to force 2. This was by no means unusual weather for the time and place, and certainly not weather such as *per se* should cause a seaworthy vessel to take water. I adopt as appropriate to the case a passage from the judgment of Lord Loreburn, L.C. in *Lindsay* v. *Klein, et al (The Tatjana)* (1):

> If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner's business to account for it if he can in some way which shall displace the natural inference.

and the further passage at p. 205 from the judgment of Lord Shaw:

> In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may of course be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character.

The Master says that the log-book does not show the true nature of the weather—that it was much more severe than the log entries indicate. I am satisfied that the Master is a brave and capable officer, but on this point I think he is mistaken, and that the memory of the Second Mate is also at fault. I have not overlooked the evidence from the United States Weather Bureau as to the winds prevailing at that time along the coast of the State of Washington. But, it does not follow that winds of a similar velocity were also prevailing at a point two hundred miles to the Westward. The Captain himself signed each page of the log-book in the calm of San Francisco harbour, when he had ample time for reflection. In my opinion the log-book correctly reflects the weather experienced at this and other times on the voyage.

Next, the condition of the vessel at San Francisco:

It may first be useful to notice that the stem or stem post is the foremost perpendicular timber of a vessel, and that it is united to the keel inside by the deadwood, and outside by the stem band. while at its head the breast-hook binds the upper strakes (the planking) of the vessel

(1) (1911) A.C. 194 at 197.

firmly to it. Behind or abaft the stem another timber is secured called the apron, which gives to it additional support, and which also secures the forward end of the strakes, thus rendering the bow, as it needs to be, a powerful construction. The fore ends of the horizontal outside planking of the vessel (known as the hood ends) are fitted into a groove or channel incised along the after outer edge of the stem post. This groove is known as the rabbet of the stem and is expressly made to receive the edge (ends) of the side planking.

The Master said there was a leak on each side of the stem between the hood ends of the planking and the rabbet of the stem; that there was a wide seam there but that he could not recall its width. It needed caulking. John Tarabochia, the shipwright foreman, who carried out the repairs, gave evidence before me. He is an Austrian and was at times a little difficult to follow. But I think he spoke the truth, as he saw it, and I accept his evidence. He said the hood ends of the planks had pulled away from the stem, that the spikes had drawn from the stem and apron, and that this was due to dry-rot in both stem and apron. The evidence of Robert Martinolich was taken on commission at San Francisco. He is the Supervisor of Repairs for the Martinolich Shipbuilding Company who executed the repairs. His testimony was substantially the same as that of Tarabochia, and I see no reason to doubt it. These two witnesses were called by the cargo interests. For the shipowners (apart from the Master) evidence was given on commission by Captain Jory at San Francisco. He is a surveyor with the Board of Marine Underwriters of San Francisco and was called in to survey the stowage of the cargo. He said he knew nothing about the conditions of the stem and apron when the vessel arrived, but knew "she was leaking water forward because you could hear the water running in". He gave no opinion in his survey report that the vessel was seaworthy. His report states that the vessel was making about twenty-four inches of water per day while at anchor and that the leaking appeared to be caused by started and opened seams in way of plank ends at stem and apron; that the vessel was raised approximately twenty-six inches at the bow when temporary

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repairs were made by re-fastening the plank ends and caulking the open seams; that shaped steel plates were then fitted to each side of the stem in way of the bow plank ends and secured in place by through bolting; that a diver was employed to caulk the seam below the water-line; that upon completion of repairs the leaking had apparently been reduced to normal.

The only other evidence on this point was a certificate from Edward Hough, surveyor to the Bureau Veritas at San Francisco, and therefore the opposite number of Mr. Louden at Vancouver. It may be well to set out his certificate in full.

THIS IS TO CERTIFY that at the request of the British Ministry of Shipping, Agents for the Wooden Schooner, *City of Alberni*, the undersigned Marine Surveyor to Bureau Veritas, did on November 24, 1942, and subsequent dates, hold survey on the above vessel as she lay afloat in San Francisco Bay for the purpose of determining the extent and nature of a leak reported to have been sustained while the vessel was en route from Vancouver, B C., to South Africa.

As the vessel was diverted from her voyage she entered San Francisco Bay where repairs were effected and the vessel is now on this date, in my opinion, in fit and seaworthy condition to carry lumber cargos on trans-ocean voyages.

HOUGH & EGBERT COMPANY
By *"Edward Hough"*

Mr. Hough, although a resident of San Francisco, was not called, and so gave no evidence in support of his certificate. It appeared that the matter was in charge of another surveyor, a Mr. Dixon, now deceased. But it also appeared that Hough had been down at the vessel during repairs and his certificate so states. I did not have the benefit of his opinion on the "extent and nature of a leak" for which he says, he held survey; nor upon what facts he based his opinion that the vessel was "in fit and seaworthy condition"; nor what he means by "trans-ocean voyages"; nor whether that expression includes a voyage around Cape Horn. This was not very satisfactory. But I must take the evidence as I find it and considering it as a whole, with respect to the state of affairs at San Francisco, I find that there was dry-rot in the stem and apron of such a nature and to such an extent as to afford no sufficient fastening for the hood ends of the planking which consequently started and opened in the first moderate weather encountered.

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Next, the position at Vancouver: There was much evidence given as to the vessel's condition and as to the surveys she underwent and the repairs that were made. The shipowners were generous with regard to surveys, and as to the general upkeep of the vessel. A survey was held on purchase and another at the end of each voyage. After her return in November, 1941, the vessel was dry-docked and repairs continued afloat, off and on, until February, 1942. She was then laid up till October, 1942, when she loaded the aforesaid cargo. Prior to loading she was dry-docked again for hull painting and examination. But the Master and surveyors all agree that this was merely a superficial examination. They, however, all knew that the pending voyage was one round the Horn, and I think they also knew that it was her first voyage round the Horn. While in her previous ownership she had been employed in the carriage of lumber cargoes to the Hawaiian Islands. The surveyors were Mr. Louden (who succeeded Mr. Lockhart, present at the first survey) of the Bureau Veritas and Captain Clarke of the Board of Marine Underwriters of San Francisco, both of whom are men of experience. After the ship returned from the second voyage she was as already stated dry-docked in November, 1941, and repairs and survey continued afloat. Amongst other matters attended to then were the planks in the way of the hawse-pipes on each bow. These were found decayed. They were removed and replaced. The evidence of Captain Clarke on this repair is as follows:

Mr. CLYNE: Q. Several planks in way of hawse pipes on both port and starboard sides more or less decayed?

A. That is a different matter.

Q. What is the occasion of that decay?

A. Dry, plain rot.

Q. What was the occasion of the decay?

A. Moisture getting in there through damaged portions of the planking, through the anchor. The bows were sheathed around the hawse pipes with metal and we do find with the anchor—that metal had been punctured. Water had got through the punctured places, and was possibly running through the seams above and down behind; and in the packing around there we found some deterioration with the result we decided to take those off and give it a thorough examination. On pulling this off we found deteriorated planks, just plain rot in pockets and places and I think Mr. Lowden was the chief man who took the matter into his hands

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there—I was in attendance with him and the shipyards cut those planks off. I don't recall how many, but it extended from a position above the flanges of the hawse pipe to a position below the flanges.

Q. How many planks were removed, could you tell, Captain?

A. No, I cannot recall but it was almost to my own depth as I stood on the planking there near the whole aperture on the starboard side. It was pretty near as tall as myself.

Q. What members of the ship were exposed when you removed the planking?

A. The knightheads, a small portion of the apron, the aft part of the stem, about three or four frames and all the filling troughs.

Q. Did you have occasion to observe the work?

A. Yes.

Q. What was the condition of the wood in those members?

A. In the filling troughs they were quite seriously affected by rot, just plain rot. Some of the frames were affected with pockets, with rot adjacent to the filling troughs. It would appear the filling troughs were not of the same wood as the frames had been and they became deteriorated and were cut off, all out. The troughs are not very long. We were able to pull them out in their entirety. The defective portions of the frames were cut off and replaced with new sections.

Q. What was your opinion of that work after it had been completed?

A I considered it a very satisfactory repair.

I am of opinion that the dry-rot referred to by Captain Clarke had spread, undetected, to the apron and stem; and I find as a fact that the extent of dry-rot existing in that area, when she broke ground at Vancouver on 10th November, 1942, was such as to render insecure the hood end fastenings; and that as a consequence the ship was plainly unseaworthy for the intended voyage. In my view the evidence is quite sufficient for the purpose of this finding, let the onus lie where it may.

I also think that the vessel was unseaworthy when she left San Francisco in that no proper repairs had been effected to the underwater portion of the stem and hood ends of the hull planking; that the caulking of these seams below water by a diver could at best be only considered an improvised repair and totally inadequate for a vessel making a long voyage around Cape Horn; that this caused further leaking whenever the ship met with anything but fine weather, and that in the sequel the initial unseaworthiness was a co-operating cause, if not the main cause, of the vessel having to put into Valparaiso in distress. There can be no doubt that the ship went through a very heavy gale from 20th to 24th February, 1943, when in Lat. 51 S.,

in a position South-East of Pitcairn Island and about 1,000 miles from Cape Horn. But she was then in the region of the Westerlies (as the Captain stated) and such weather is to be expected there. After the gale she was leaking at such an alarming rate that the Master had no recourse but to again seek shelter. He observed on the way, amongst other damage, that the seams in the bows between stem and hood ends worked badly. Captain Pewsey surveyed the vessel at Valparaiso and in his report dated 9th April, 1943, he details the damage as follows:

It was found that, the butts of hull planking at stem rabbet having moved, plank sheer seams on each side of bow opened out, waterway seam on both sides of weather deck opened out and beam across fore part of poop moved, diagonal tie rods, one through each side of hull, leading up to after part of forecastle head, slackened up. The cause of this is severe racking strain suffered during very bad weather.

In these circumstances I am, on the authorities, unable to find that the shipowner exercised due diligence to make the ship seaworthy at Vancouver, B.C. The Carrier's obligation under The Water Carriage of Goods Act, 1936, to exercise due diligence to see that his vessel is seaworthy, is not limited to his personal diligence and so does not confer upon him as great a benefit as would at first appear; for his responsibility extends to the acts or defaults of his agents or servants.

It is thus expressed in Scrutton on Charter-parties and Bills of Lading (14th Ed.) at page 494:

In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For the dilemma indicated on page 110 *ante* must constantly arise, and the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover.

The dilemma mentioned is concisely stated at page 111, as being this:

In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.

What is meant by due diligence was discussed by Wright, J., (as he then was) in *W. Angliss and Company (Austra-*

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lia) Proprietary, Limited v. *Peninsular and Oriental Steam Navigation Company* (1). I quote two short passages from page 462.

> In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her.
>
> Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.

Lord Wright, (as he became) returns to the subject in the House of Lords in *Smith, Hogg & Company, Limited* v. *Black Sea and Baltic General Insurance Company Limited* (2). Dealing with the facts of that case he says,

> The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The over-loading was the result of overt acts.

The case made here was not one of latent defects. It was one of a seaworthy ship damaged by a peril of the sea. The defect here was in truth not a latent one. Dry-rot was known to have existed (and remedied) in different parts of the ship, notably in the area of the hawse-pipes. The only factor that was latent was the extent and nature of its development. But with the details of the vessel before them, her age, her history, her record, that was for the surveyors.

The remaining question is whether the shipowners are entitled to limit their liability under the provisions of Section 649 of the Canada Shipping Act. The limited liability is stated in the pleadings as amounting to $32,307.52. They are so entitled provided they prove that the loss was occasioned without their actual fault or privity. Mr. H. A. Stevenson was the directing will and mind, the *alter ego* of the plaintiff company. He is a man of very considerable experience and ability. It must be shown that he personally was without fault and privity, for parties who plead the section must bring themselves within its terms. I think that this has been done. Indeed, the defendant did not press the point very strongly. The main

(1) (1927) 2 K.B. 456. (2) (1940) A C. 997 at 1001.

contention advanced was as to a peculiar mix-up in the vessel's classification. She was originally classified with the Bureau Veritas, "a well known agency which issues certificates and keeps a list for the purpose of showing the condition of ships" per Lord Haldane in *Lennards Carrying Company Ltd.* v. *Asiatic Petroleum Company Ltd.* (1). The previous owners dropped the entry but she was restored to classification by Mr. Stevenson when purchased. She was then (as appears from her classification certificate) put under class "A", which in this Agency means that her navigation limits are restricted. Mr. Louden first said that under "A" she was prohibited from going around Cape Horn, but later he was not so sure of this. In any event, "A" means a restriction. The letter "L" is the appropriate one for unrestricted navigation and the vessel appeared under "L" in the official register of the Agency, though the certificate gave "A" only. I think it was suggested that the letter "A" on the certificate, which was always in the keeping of the ship and so of the shipowner, should have put Mr. Stevenson upon inquiry to make sure that she was not thereby prohibited from a round-the-Horn voyage: that there being no evidence of any such inquiry upon his part he was not without "actual fault" as stated in the section and so not protected by its terms. I do not agree. This is only one circumstance among the many comprising his activities regarding this vessel, and viewing the matter as a whole, I think he was entitled to look upon Mr. Louden, the Society's representative at Vancouver, for guidance in this respect. I hold, therefore, that the shipowner has discharged this onus.

It should perhaps be mentioned that the matter of the classification certificate also entered into the issue of "due diligence". But there, too, it was only a circumstance for consideration. A vessel may be seaworthy regardless of whether classified or not; and, if classified, regardless of whether she may be entered in the wrong division. It is seaworthiness that is the paramount consideration, not classification. The important point, as I see it, is that Mr. Louden in his survey report of 24th February, 1942, recommended a lower class because, as he says, "the wood-work generally throughout the hull does not warrant the vessel

(1) (1915) A.C. 705 at 710.

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to retain her original class". This goes to the general question of seaworthiness, as to which I have found adversely to the ship.

I accordingly dismiss the plaintiff's claim and give judgment in favour of the defendant on its counterclaim for the amount of limited liability under Section 649 of the Canada Shipping Act. I understand the defendant's losses amount to very much more than this and that a reference will not therefore be necessary. But if I am wrong on this point the matter may be spoken to.

The defendant will have its costs.

Judgment accordingly.