BETWEEN:

PARRISH & HEIMBECKER LIMITED AND INSURANCE COMPANY OF NORTH AMERICA ..... } PLAINTIFFS;

AND

BURKE TOWING & SALVAGE COMPANY LIMITED ..... } DEFENDANT.

1941
April 7, 8 & 9
1942
March 16.

Shipping—Marine insurance—Cargo of wheat—Loss of ship and cargo in Lake Superior—Loss due to peril of the sea—Water Carriage of Goods Act, 1 Edw. VIII, c. 49, and Rules thereto—Bills of Lading—Exceptions—"Perils of the sea".

The plaintiffs seek to recover from defendant the value of a cargo of wheat delivered to and received by the defendant on its *SS Arlington* at Port Arthur, Ontario, on April 30, 1940, for carriage to and delivery at Owen Sound, Ontario, subject to the terms of bills of lading issued and delivered to the plaintiff, Parrish & Heimbecker Limited, the shipper and owner of the cargo. The *Arlington* foundered in Lake Superior on May 1, 1940, and with her cargo, became a total loss.

The plaintiff, Insurance Company of North America, was the insurer of the cargo and paid the amount of the insured value of the grain to the plaintiff Parrish & Heimbecker Limited, which plaintiff acknowledges that the Insurance Company of North America is entitled to any recovery herein from the defendant.

The defendant pleads that the shipment of grain in question was subject to all the terms, conditions and exemptions from liability contained in the defendant's bills of lading and in particular was subject to all the terms, conditions and exemptions from liability contained in the Water Carriage of Goods Act, 1936 (1 Edward VIII, c. 49) and the Rules scheduled thereto; that the *Arlington* was at the commencement of the voyage and prior thereto, seaworthy and properly manned, equipped and supplied, and that the defendant exercised due diligence to make the vessel seaworthy; that the loss resulted from perils of

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the sea which would create an exemption under the Water Carriage of Goods Act and its Rules; or in the alternative that the vessel was lost by reason of the negligence or default of the master or the servants of the owners of the vessel in the management or navigation of the ship, and that the defendant was not liable by reason of the Water Carriage of Goods Act and its Rules.

The plaintiffs contend that the exemptions provided by the Water Carriage of Goods Act and its Rules should not apply because of (1) improper loading and storage of cargo, (2) unseaworthiness of the ship in that the tarpaulins covering the hatches were deficient in quality and that the equipment used to maintain the same in place was inadequate, (3) commencing the voyage with a partly filled water tank in the after part of the ship.

The Court found that the cargo was properly loaded and stored; that the tarpaulins were in good condition and that the equipment used to maintain the same in place was proper and adequate and generally the vessel and her equipment were in good condition at the commencement of the voyage; that the ship was seaworthy; and that the presence of the water in the tank did not contribute to the disaster.

Held: That the loss of the *Arlington* was caused by a peril of the sea.

2. That the question of the degree of a storm at sea is not of importance and to say that there was no peril of the sea because the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about such an event as the foundering of the *Arlington,* is not the true test.

3. That the question is whether there was such a peril of the sea as that against which the insured undertook to indemnify the carrier.

ACTION by the plaintiffs to recover from the defendant the value of a cargo of wheat lost in Lake Superior after delivery to the defendant for carriage from Port Arthur, Ontario, to Owen Sound, Ontario.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Toronto.

C. Russell McKenzie, K.C. for plaintiffs.

F. Wilkinson, K.C. and *Ross Dunn* for defendant.

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

THE PRESIDENT, now (March 16th, 1942) delivered the following judgment:

The plaintiffs in this action seek to recover from the defendant the value of a cargo of wheat, 97,778 bushels,

delivered to and received by the defendant on board its ship *Arlington*, at Port Arthur, Ontario, on April 30, 1940, all in good order and condition for carriage to and delivery at Owen Sound, Ontario, in like good order and condition, subject to the terms of the defendant's executed Bills of Lading issued and delivered to the plaintiff Parrish & Heimbecker Ld., the shipper and owner of the cargo. The *Arlington* foundered in Lake Superior on May 1, 1940, and with her the said cargo, valued at $86,865.05, became a total loss.

The plaintiff, Insurance Company of North America, was the underwriter or insurer of the said cargo, and in accordance with its policy covering the same, and on proof of the loss thereof, paid the amount of the insured value of the cargo to its assured, the plaintiff Parrish & Heimbecker Ld., which plaintiff acknowledges that the Insurance Company of North America, as insurer of the said cargo, is entitled to any recovery herein from the defendant as may be declared by final judgment in this action. The amount claimed as damages is the sum of $86,865.05 together with interest.

The defendant pleads that the shipment of grain in question was subject to all the terms, conditions and exemptions from liability contained in the defendant's bills of lading covering such cargo, and in particular was subject to all the terms, conditions and exemptions from liability contained in the Water Carriage of Goods Act, 1936, and the rules scheduled thereto; that the *Arlington* at the commencement of its voyage and prior thereto was in all respects seaworthy and properly manned, equipped and supplied, and that the defendant exercised due diligence to make the said ship in all respects seaworthy and to make the holds and all other parts of the ship fit and safe for the reception, carriage and preservation of the cargo; that the loss resulted from perils of the sea, or by reason of the neglect or default of the master or servants of the defendant in the management of the said ship during the height of a storm which she encountered while on her voyage and shortly after leaving Port Arthur, or in not altering the course of the said ship as circumstances may have required; and that the loss of the said cargo was not due to any cause for which the defendant was liable, and

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that, therefore, under the contract of carriage and by law the defendant was exempt from liability for the loss of the said cargo. The case for the plaintiffs may be said to have been particularly directed to three points: (1) Improper loading and storage of the cargo, (2) unseaworthiness of the ship in that the tarpaulins covering the hatches were deficient in quality and that the equipment used to maintain the same in place was inadequate, and (3) in commencing the voyage with a partially filled water-tank in the after part of the ship.

The *Arlington,* built in 1913 and acquired by the defendant in 1936, was a ship of 1,118 tons, 244 feet in length, and with a beam of 43 feet. Her hatches, six in number, numbered 1 to 6 forward to aft, were protected by wooden hatch covers, which in turn would be covered from the weather by tarpaulins. The ship was known as a two-hold ship, a large hold forward and another just aft of that, virtually one open space divided by one bulkhead running transversely in the centre, thus making two cargo holds but with no longitudinal partitions. There was a collision bulkhead separating the fore part of the ship from the cargo space, and another bulkhead at the after end of the hold No. 2, called the engine room bulkhead. The latter bulkhead extended above the weather deck about 4 feet 6 inches, and aft of that was the boiler-room which was separated from the engine room by a screen bulkhead. The wheel-house was in the forward part of the ship. The *Arlington* was a double bottom ship. There were four tanks in the double bottoms in the fore and after deck. No. 1 tank extended about one-third of the length of No. 1 hold, and from side to side of the ship with a longitudinal division, and tanks Nos. 2 and 3 were similarly constructed and divided. No. 4 tank, underneath the engines in the boiler room, was not divided. The tank tops would be the bottom of the two cargo holds. I may here state, as I have already mentioned, that on the commencement of the voyage in question there was some slack water, about 18 inches, in No. 3 tank, the depth of which tank was about 3 feet, and some water was put in or left in this tank on the loading of the ship, at the instance of the master of the *Arlington,* in order that a little more grain could be put in the forward cargo hold, otherwise the ship

would be down at the head. This, the first mate of the *Arlington* stated, was not an unusual practice. It was contended that to have slack water in No. 3 tank was inviting the risk or danger of causing the ship to roll by reason of the water moving from side to side, and this, it was alleged by the plaintiffs, caused or contributed to a shifting of the cargo, and to a list in the ship which ultimately caused her to founder.

I may now turn to a review of portions of the evidence which was directed to the duty of the carrier in this case to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship, and to make all parts of the ship fit and safe for the carriage and preservation of cargo. Mr. MacMillan, the surveyor for the British Corporation Register of Shipping, Canada, duly delegated by the Canadian Government to allot or assign freeboard and freeboard measurements and markings, assigned freeboard to the *Arlington;* freeboard means the distance from the water up to the deck of a ship. The freeboard assigned the *Arlington* by Mr. MacMillan, applicable at the beginning of the voyage in question, called "intermediate freeboard", was 3 feet 5½ inches, which corresponds to a draft of about 17 feet 8½ inches, and under this allotment the *Arlington* would not be considered overloaded if she had a draft of less than 17 feet 8½ inches. The draft of the *Arlington* on the commencement of her voyage was 17 feet 2 inches in the fore end and 17 feet 5 inches in the after end and this was not put in question. On April 20, 1940, the *Arlington* was inspected by Mr. MacKenzie, the Steamship Inspector for the Canadian Department of Transport. He examined the holds, the shell of the ship, the bilges, the bulkheads, the hatch covers, the boilers, the navigating machinery, and also the life saving, steering and fire extinguishing equipment, and all were found in good condition, sufficient, and up to all requirements, and a certificate issued enabling the ship to operate for a full year. Mr. Morris of the American Bureau of Shipping, a Classification Society, surveyed the *Arlington* on April 15 and 16, 1940. This survey included an examination of the cargo holds, engines and machinery, boilers, bulkheads, tanks, hatches, hatch coamings, hatch covers,

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tarpaulins, decks, and generally the ship and her equipment were found in very good condition and the appropriate certificate issued in due course.

I may refer more specifically to the tarpaulins and the equipment for maintaining them in place, and the hatch covers. The hatch covers, which were found in good condition by Mr. Morris, were supported by what is called "strong backs" on the underside, which, as I understand it, are beams which run across the hatches transversely, and also fore and aft. In all there were twelve tarpaulins, two for each of the six hatches, or "double tarpaulins" as they were called, and it was customary to employ "double tarpaulins" in the spring and fall when the weather might be unfavourable, for the protection of the cargo. The tarpaulins were kept in place by battens and wedges, and by two angle irons or wind-bars on each hatch, three inches in width, which ran across the top of the hatches from side to side, and they were in some way strapped down to the deck and secured in place with bolts at each end. The first mate stated that before leaving port he made sure that "the tarpaulins and the battens and the angle bars were all on." The general manager of the defendant company testified that the tarpaulins were new when the ship was purchased by the owners in 1936, and the odd tarpaulin was renewed or repaired at different times. At certain times the *Arlington* had been employed in carrying pulp wood, but on such occasion the tarpaulins used in grain carrying voyages were put aside and other tarpaulins were used. Mr. Morris, of the American Bureau of Shipping, whom I earlier mentioned, stated that in his annual survey of the *Arlington* in April, 1940, he spread all the tarpaulins on the deck and examined every one of them and he found them in "good condition, or else they would have had them renewed. I would see to that." The first mate described the tarpaulins as being "passable" and by that I think he meant "serviceable", and some others of the crew expressed the opinion that the tarpaulins were in good condition at the commencement of the voyage.

I may next turn to the loading of the ship which was the subject of considerable complaint by the plaintiffs.

The entire loading of the cargo was under the supervision of the first mate, one Macksey, who testified that the *Arlington* was completely filled except for about 300 bushels in No. 1 hatch, which he regarded as of no consequence. The *Arlington* was loaded in the usual way, by spouts and chutes, in order to shoot the grain under the wings of the ship underneath the hatches, or, as expressed by one witness, to fill up the wings and pack the grain in there good. The first mate stated that the whole six hatches were filled up into the coamings, and level with the strong backs. The hatches rise about 11 or 12 inches above the deck, and these raised portions are called the "coamings". In respect of hatch No. 1 the first mate stated that one corner might have held 300 bushels more, but otherwise this hatch he said was filled up into the coamings, and that at any rate the grain could not shift under the coamings; and he said that the reason the additional 300 bushels were not loaded was that the ship was then on an even keel, and had this additional quantity been put in it would, or might have, given her a slight list. Paradis, the wheelsman, who was on watch while the ship was being loaded, and who assisted in securing the hatches after the loading was completed, confirmed the testimony of the first mate on this point, and he stated that any slackness in hatch No. 1 did not extend below the hatch coaming. Another witness, Mr. German, for the plaintiffs, was shown what was said to be the capacity plan of the *Arlington* when built in 1913, and from this he calculated that the *Arlington* was short 5,694 bushels of her capacity, and not 300 bushels, which if correct would leave a void space of 9,875 cubic feet in the holds of the ship. From this he inferred that on account of there being no longitudinal bulkheads in the holds, the cargo of grain shifted, causing a list to port, and this, he said, was responsible for the foundering of the ship in the state of weather that prevailed. I should perhaps mention that just a few days before the fatal voyage in question, the *Arlington* carried a cargo of grain from Port Arthur to Owen Sound, Ont., approximately the same quantity as on the occasion in question, and when the hatch covers were taken off at Owen Sound the cargo was found just as it was when loaded; the grain on that

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occasion was loaded level with the strong backs which run across the ship's hatches, and that was the first voyage of the *Arlington* in the season of 1940.

Another aspect of the question of the loading of the ship must be mentioned. It was urged that the ship was unseaworthy in that she was not provided with either longitudinal bulkheads in the cargo holds, or with shifting boards. Chap. 186, s. 696, of the Revised Statutes of Canada, 1927, provided that no grain cargo should be carried on board any ship registered in Canada, unless such grain cargo were contained in boxes, sacks, or barrels, or properly secured from shifting by boards or otherwise, and ss. 2 of the same section empowered the Governor in Council to make regulations prescribing the manner in which grain cargoes should be loaded at ports in Canada on ships bound to ports outside of Canada not within the limits of inland navigation. These provisions were repealed by chap. 52 of the Statutes of Canada for 1932-33 and substituted therefor was a section which empowered the Governor in Council to make regulations prescribing the manner in which grain cargoes and deck cargoes might be carried on any British ship registered in Canada, and this provision was carried into the Canada Shipping Act of 1934, which came into effect in 1936, but apparently no regulation was ever enacted, under the statutory authority mentioned, respecting the loading or carriage of grain on the Great Lakes, and I was informed there was no such regulation in the United States applicable to the Great Lakes. I understand there is some regulation regarding the loading and carriage of flax in Canada. The voyage of the *Arlington* in question was to have been completed on the Great Lakes, and apparently she operated only in the Upper Great Lakes. The classification societies have no regulation requiring shifting boards or anything of that sort, so far as the Great Lakes are concerned. Mr. Smith, a shipbuilder, called by the plaintiffs, stated that he knew of no ship engaged in the Great Lakes trade, that was equipped with shifting boards, since 1910, so that whatever the practice was prior to 1910 there was no requirement as to shifting boards since that year. Several masters of

ships usually operating in the Great Lakes, and in the grain trade, testified that shifting boards were not used in the case of such cargoes, apparently for many years.

The next, and, I think, the most vital point for consideration in this case, is whether or not the loss of cargo resulted from perils, danger, and accidents of the sea or other navigable waters, and it becomes necessary to review at some length the evidence relative to this phase of the case. The *Arlington* left Port Arthur about noon on April 30, 1940, with a full crew on board, laden with a cargo of grain, the weather being described by the first mate as "pretty good" with a northeast wind blowing which was described as "between a fresh and a strong wind". The draft of the ship on her departure was 17 feet 2 inches in the fore end and 17 feet 5 inches in the after end, and this was not in any way put in question. On her first course the ship reached a point outside Passage Island, where she would first reach the lake proper, late in the afternoon of that day, or near dark, when she headed for White Fish Point on the usual course. During all this time and until 6:15 p.m. the first mate was on watch in the wheelhouse, and he stated that after getting outside Passage Island there was a strong northeast wind, accompanied by heavy seas catching the ship pretty well on her port side. At midnight the first mate again came on watch and he stated that the wind was then still blowing from the northeast, of gale force and increasing in velocity, and that the seas had also increased and some waves were going over the ship, and others as high as the landing booms which were 18 feet above the main deck. The first mate was unable to get aft for his usual midnight meal, or to take the log reading, just before or shortly after midnight, because of the heavy seas, and because he thought it was unsafe to make his way aft along the deck, although it might have been done. When he came on duty at midnight he found that boxing about 8 feet square, like a heavy crate, placed around two of the cargo winches to protect the same from breakage, and which boxing was formed of two-inch planks passing through angle irons with bolts, had been washed away, and a punt which had been fastened to the boxing around one of the aft winches had

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broken away and was lying loose on the deck near No. 6 hatch. This boxing completely enclosed the winches except that a sufficient space was provided through which a man could enter in order to run the winches.

At this time, about or shortly after midnight, the first mate stated that the hatch covers were in order, each covered with two tarpaulins and secured in the manner I have already described. With the aid of two lights on the forward house, and two on the after house, and the running lights, and by turning the ship before the sea, the first mate was able to see from the wheel-house that the deck-hatch covers were in order, but he along with the watchman intended making an actual inspection of the hatches and were about to do so when the master of the ship appeared in the wheel-house and put the ship back on her former course, and accordingly no inspection was made, any more than could be done by observation from the wheel-house, in the way I have just described. Sometime after 2 o'clock in the morning, a time not clearly fixed, the watchman got back aft a certain distance and returning reported to the first mate that the tarpaulins on No. 3 hatch were torn or ripped, that the tarpaulins on No. 5 hatch were not only in the same way but worse, and that the angle bars on this hatch were about one foot off the hatch in the centre and were bent up like a bow. Later, the first mate called the master so that he could go down himself with others of the crew to see if they could fix the tarpaulins, and they reached as far as hatch No. 2 or hatch No. 3, when they were forced to return on account of the seas. The first mate testified that up to this time the ship had not commenced to list. Shortly after this unsuccessful effort to fix the hatches and tarpaulins, the first mate and the forward deck crew proceeded to get their life preservers which were in their rooms forward, where they stayed for a short time. The seas were going over the hatches at this time and it was observed, according to the first mate, that the ship had in the meanwhile developed a list, but he was unable to fix definitely the time he first observed this, though he thought it was less than an hour before the ship sank. The listing of the ship was at first gradual but towards the end it became very fast, but the first mate seemed to be quite clear that the list

commenced about a half or three-quarters of an hour before the ship sank, or shortly after he and the forward crew decided to put on their life preservers, and who later worked their way aft to a life boat on the boat deck which the engineer was trying to launch, and this they did along the starboard side of the deck, and eventually the whole ship's crew, except the master who went down with his ship, got into the life boat at the stern of the ship. Soon after the *Arlington* sank, about half past five o'clock in the morning of May 1st. Those in the life boat rowed about half a mile to starboard where they were taken on board the steamship *Collingwood*. The first mate stated that while on his way to the life boat, along the starboard side, he could not see the port side of the hatches, only the starboard side, and when launching the life boat some of the hatch covers were seen floating about.

The facts narrated above derive largely from the evidence of the first mate, and in the main they are supported by others of the ship's crew. The fireman, Hall, was on duty from 6 p.m. until midnight, as I understand it, of April 30th, and everything seemed to be in order when he went off duty; he came on duty again at 3:15 a.m. on the morning of May 1st and he stated that he then observed no sign of a list on the ship. After being on duty some time the bulkhead at the forward end of the stoke-hold, which would be after the end of the cargo space, began to snap and crack apparently high up on the port side. The ship then had a slight list, and water began to come in from the top of the bulkhead and the list gradually increased. The watchman, Braithwaite, came on duty at midnight on April 30th, and he stated that the ship was then in good condition, showing no list. It was this witness who examined the tarpaulins on hatch No. 3 and hatch No. 5, and in my view of the first mate's evidence I have already stated the result of his examination, but I might add that on that occasion this watchman found it was too rough to get back to No. 6 hatch, and at that time the water was going over the ship about 4 feet, and he found, as already stated, that one wind-bar on No. 5 hatch was bent up a foot in the centre. Callam, a wheelsman, went on watch at noon of the day of sailing and he stated the ship was then on an even keel; he went on watch again

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at midnight on April 30th, but he had been unable to get aft for dinner, which I assume to be a midnight meal, on account of the seas going over the deck. After midnight, this witness stated, it was blowing "very fresh" and "it seemed to be getting worse all the time", with a lot of water going over the ship. He stated that the ship acquired a list some time after midnight, the time he could not fix exactly, but he thought it was in the neighbourhood of half past three in the morning of May 1st. Another witness, Wood, the second engineer, came on duty at about 12:15 a.m. on May 1st, and he stated that everything seemed to be in good order on the ship at that time, the engines were running at full speed and continued so until 4:17 a.m. when they were checked to "half speed", and it was just a few minutes before that time he first noticed that the ship had a list. What transpired afterwards in the engine room is not of importance.

Evidence was introduced by the defendant regarding the experience of other ships in adjacent areas of Lake Superior, on April 30th and May 1st. Capt. Poidevin, master of the *Kenora,* a ship corresponding in size to the *Arlington,* stated that he was on Lake Superior on April 30th and May 1st, downbound from Port Arthur, having left Port Arthur on April 29th at about six o'clock in the afternoon. At 6 o'clock in the afternoon of April 30th the *Kenora* was running towards Slate Island, towards the north shore and off the regular course, and her master stated that he left the regular course for the reason that when he came out to Passage Island the wind was northeast, there being what he "considered a gale of wind", a big sea was running and there was every indication of it continuing, and being unable to make speed, he decided to head for the north shore; he made White Fish Point, which is out of Lake Superior, at 7 o'clock the next afternoon, on May 1st, and he stated that during most of this time the wind continued northeasterly and this he described as a northeasterly gale in his log, the seas were running quite high, and he was shipping water. About the time the *Arlington* sank, 12 miles southeast of Superior Shoal, the *Kenora* would be about 25 miles away from that point, and the master of the *Kenora* states that it then "was blowing strong northeast, with occasional snow" which his log described as a

northeast gale, and the freezing spray had got up so high that it broke his aerial down, which was about 50 feet above the deck of the ship. On April 30th, the master of the *Kenora* received a message of the weather forecast for May 1st from Port Arthur, and his recollection was that it said: " continued northeasterly wind strong to gales with snow". Capt. Poidevin stated that he would note in his log as a gale anything above 35 miles an hour, and also that the storm he encountered on this occasion was more violent than any he had experienced in the spring of other years in Lake Superior. Captain Anderson, master of the *Edmonton,* stated that on April 30th he was bound from Toronto to Fort William, loaded, and on April 30th at 5:20 p.m. he passed White Fish Point. Explaining why he did not follow the regular course as he proceeded west he said: " I started up the middle for the regular course to Passage Island and when I got two hours above Cariboo Island the wind freshened up from the northeast and got quite strong, and I pulled for the north shore. We had a big deck load, and we were rolling and labouring heavily and I went to the north shore "; when he hauled off for the north shore he stated there was a " big sea ", and his deck load began to shift by reason of the seas and the shipping of spray over the side. This brought the *Edmonton* to Point Porphyry on the north shore at 7:52 a.m. on May 1st. At the time the *Arlington* sank, the *Edmonton* was abreast of Lamb Island by log, and the wind was then still northeast, but the *Edmonton* herself was at that time under the lea of the north shore and would not be getting so much wind. Capt. Burke, master of the *Gleneagle,* a ship just below 600 feet in length, and of modern construction, was on Lake Superior April 30th, without cargo, bound for Port Arthur from Saulte Ste. Marie, having arrived at Port Arthur on May 1st at 1:50 a.m. On April 30th, at 10:40 a.m. when the *Gleneagle* was about 32 miles outside of Passage Island, the master stated that his ship rolled so badly in the trough of the seas that she rolled her steel patent hatch covers off. Capt. Meisner, master of the *Laketon,* an Upper Lake type of ship, about 416 feet in length, was on Lake Superior on April 30th and May 1st, 1940, bound for Fort William, without cargo. He passed White Fish Point at 6:30 p.m. on April 30th, the wind at that time being light but shortly after that it

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went "northeast strong", and he was forced to haul to the northeast "on account of the sea rolling the ship". He did not continue the regular course from White Fish Point to Passage Island but altered his course to the eastward of Michipicoten Island in expectation of getting more favourable weather, but the wind continued northeast, and "increased until it assumed gale force". He estimated the velocity of the wind to be not less than 35 miles per hour at any time and up to 60 miles per hour at other times, and the seas "were very big when I worked up under the land". It was, Capt. Meisner stated, the strongest storm he had ever seen on Lake Superior, or any lake, in the spring.

Evidence of the same character was presented on behalf of the plaintiffs, and to that I must also refer. The master of the *Harry K. Ewig,* an American registered ship, testified that at approximately 11:30 p.m. on the night of April 30th, he was at a point abreast of Eagle Harbour light, where he "experienced a typical northeaster, a combination of northeast wind with snow", and that at 5:24 a.m. on the morning of May 1st he was at some undefined point about northeast of Superior Shoal; and he stated that between these two points the wind had diminished, although there were times when the velocity was greater than at other times. He further stated that the weather on this occasion was characteristic of the usual spring weather on Lake Superior, that while there was a northeast storm there was nothing abnormal about it and that he had experienced worse weather in the corresponding period of other years. The *Collingwood,* the ship which rescued the crew of the *Arlington,* laden with about 145,000 or 185,000 bushels of grain, departed from Port Arthur about the same time as the *Arlington.* The second mate of the *Collingwood,* who was on duty from 6:20 p.m. to midnight of April 30th, stated that there was a "pretty strong wind" from the northeast, with "a bit of a sea running", and "the weather increased a little towards midnight and got a little bit stronger". At a quarter to five o'clock in the morning of May 1st he was called, and then the weather "did not seem to be as strong as it was at midnight". The *Arlington,* he said, was then in sight, on the port side and a little way ahead, and she then had a very bad list. He also

stated that the weather on this occasion was usual for that time of year, and that he had experienced the same weather in the corresponding period of other years, on Lake Superior. A wheelsman of the *Collingwood,* who came on duty at 12:20 a.m. on the morning of May 1st, also gave evidence, and he stated that a half hour or so after coming on duty he noticed a bad list on the port side of the *Arlington,* then about half a mile away, and this he called to the attention of the mate in the wheelhouse; that when he came on duty there was a strong northeast wind and that the *Arlington* was "kind of rolling"; and that the weather on this occasion was normal for that time of year on Lake Superior.

It was because a determination of this case depended so much upon the facts, if not entirely so, that I have reviewed the evidence at such length. Upon the evidence I have no hesitancy in holding, in fact I do not think it was contested, that the hull, decks, bilges, engines, machinery, tanks, cargo holds, bulkheads, hatch covers, and generally the ship and her equipment, excepting the tarpaulins, the equipment for securing the same in place, and the tank with the slack water, were seaworthy at the commencement of the voyage, and that the carrier used due diligence to make them so. And I may be understood as using the same language in respect of the tarpaulins. The plaintiffs seemed to contend that because the tarpaulins, or some of them, were found loosened or torn before the *Arlington* sank that therefore they were unseaworthy or insufficient at the commencement of the voyage, but there is nothing whatever in the evidence which would sustain this contention. I am not aware that the carrier was required to provide new tarpaulins at the beginning of each season. There was criticism of the type of equipment used to maintain the tarpaulins in position on the hatch covers and that more suitable means than the angle-bars or wind-bars employed by the defendant were available or were in use by other ships, which again may be true, but the equipment used was approved of, and found up to requirements, by competent persons, and upon the evidence I have no doubt as to their sufficiency. Nor have I any reason to doubt but that the hatch covers and tarpaulins were properly secured when the loading of the ship was completed,

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and in fact I do not think that was seriously put in question. Then, as to the slack water in one of the tanks, which was apparently placed there upon the direction of the master of the ship in order to permit of more cargo in the forward hatch, I do not think it can be inferred from the evidence that any list appeared in the ship until it was found that the tarpaulins were loosened or torn, which was well on in the morning of May 1st, when water was obviously getting into the cargo hold through some of the hatches, so the slack water up to that time could not have contributed to a listing of the ship or shifting of the cargo, and therefore its presence would not seem to have any real bearing upon the case. I have already described the construction of the tank in question, and the quantity of water therein, one-half of which would be on the starboard side of the ship. I am not satisfied upon any evidence before me that this slack water would impair the stability of the ship to any such degree as would cause a list in the ship, or any movement in the cargo. Another point might be mentioned at this stage, lest I forget it altogether, and that is one which the defendant raised in its defence. It was that if it appeared that the ship had been put head to wind until the storm abated, or had been headed for the north shore, and that this would have avoided the disaster, then, that was a default in the navigation or management of the ship for which the carrier would not be responsible, and with which I agree. This point was not developed at the trial, and I had no assistance whatever from any of the witnesses which I regret, because I think the point was one of importance and of probable weight. In the circumstances I do not feel obliged to make any pronouncement upon the point.

As already mentioned, it was claimed that the *Arlington* was unseaworthy in that she was not provided with shifting boards, and that the stowage of bulk grain in this ship without being provided with shifting boards caused a movement of the cargo which led to the disaster, and consequently the carrier was precluded from invoking the benefit of the exemption conferred by the Act. I have already referred to the absence of any enactment or regulation in Canada requiring shifting boards, or some equivalent, in grain carrying ships on the Great Lakes, and also to

the fact that for the past thirty years shifting boards have not been used in grain carrying boats on the Great Lakes, which would make it appear that in the opinion of those best able to judge their use was not a necessary precaution, and that is true of the United States as well. I have no doubt that many ships loading grain at the head of the Great Lakes, particularly those required to pass through the St. Lawrence canals, are not loaded to full capacity. This would be well known to all engaged or interested in the grain carrying trade on the Great Lakes, including marine underwriters. Now, in the state of facts here it does not appear to me that it can be urged that the *Arlington* was unseaworthy by reason of the lack of shifting boards, although I can imagine that in certain circumstances such a contention might be advanced with force. I do not think that in the present case any shifting of the cargo occurred by reason of the lack of shifting boards. The evidence is to the effect that no listing had developed until around 3:30 a.m. or 4 a.m., on the morning of May 1st. It is true the wheelsman Brais, of the *Collingwood,* stated that he observed a list on the *Arlington* somewhere around one o'clock in the morning of that day, but I prefer to accept the evidence of the first mate and others of the crew of the *Arlington* upon this point. I formed the impression that the witness Brais was speaking without having any clear or reliable idea as to the time he observed the listing of the *Arlington.* Considering the state of the weather for some considerable time before midnight of April 30th, it does seem to me that if there could have been any movement of the cargo due to the lack of shifting boards, it would have made itself manifest long before 3:30 a.m. or 4 a.m. on the morning of May 1st. Moreover, the list that developed was to port, and if that had been due only to the shifting of the cargo, one would expect that with the force of the wind and sea striking the ship on her port side, the list would have appeared on the starboard side and not on the port side. I see no reason for holding that any movement of the cargo occurred, or that any list developed on the ship, due to the lack of shifting boards.

Now as to the loading and stowage of the cargo in the ship at Port Arthur. First, it may be said safely that she was loaded according to the practice of the port of loading,

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a large and important grain loading port, and one might fairly assume that the stowage of any cargo laden on a ship there would be carried out in a proper manner. As the evidence shows, the grain was forced or shot underneath the hatches by spouts and chutes, and then "trimmers", by the appropriate means, would trim the cargo in the holds of the ship, if that is the proper way of expressing it. The evidence would indicate that she was fully loaded except that some 300 bushels more of grain could have been loaded on the port side of No. 1 hatch in hold No. 1, but that hatch would appear to have been loaded up to the coaming at least, and it was stated by the first mate that he regarded the 300 bushels, or the deficiency in a completely full cargo, as "neither here nor there, because that little bit would not have given her a list . . . It was not enough to bother with, so we did not bother taking it", and he stated that there could be no shifting of the cargo below the coaming of that hatch; all other hatches had been filled as full as reasonably possible, according to the evidence. Mr. German, a naval architect, in testifying, was shown by Mr. Mackenzie certain capacity plans of a ship which were tentatively received in evidence, subject to proof later that the *Arlington* was constructed according to such plans, or that they were the capacity plans of the *Arlington,* which was not shown. The owners of the *Arlington* did not have the capacity plans of their ship, and as the ship had frequently changed ownership one can understand why it was possible that such plans were not in the possession of the defendant. Mr. Mackenzie was informed that he could have authority to take commission evidence in the United States, where the *Arlington* was built, to show that the plans in his possession were the capacity plans of the *Arlington,* or duplicates thereof, and there the matter was left. There is nothing on these plans to indicate that they were the capacity plans of the *Arlington,* although her name appears thereon in red pencil, by whom it was not stated. These plans, it is plain, were standard plans prepared by a builder for the construction of a certain size and type of ship when and if ordered from the builder, which possibly would be modified in some particulars to suit the purposes of any particular purchaser, and while the *Arlington* may have been constructed substantially from those

plans, yet they may have been modified at the instance of the original purchaser, or since by other of the subsequent owners before she was acquired by the defendant. However, Mr. German computed the cargo capacity of the *Arlington* from those plans, and, as earlier pointed out, he estimated that she was short of her full cargo by about 5,700 bushels, which would leave an actual void space of 7,118 cubic feet in the cargo space, whether in both holds or in only one was not stated. I am not disposed to accept evidence of the cargo capacity of this ship, based upon a measurement of the cargo space appearing on the plans to which I have referred, and I cannot accept as a fact that there was such a void space in the cargo holds, in face of the evidence before me. I accept the evidence of the first mate as to the loading and stowage of the cargo, and as to the fact that she was a ship practically fully loaded. The difference between the fully loaded draft of the *Arlington*, 17 feet 8 inches, and her actual mean draft which was 17 feet 3½ inches, I should think would indicate a substantially complete loading of the actual cargo space of the ship, after taking into consideration the fuel, water ballast, and so forth, on board.

It was agreed, I think, that water must have entered into the cargo holds through the tarpaulins and hatch covers, of at least two of the hatches, and this undoubtedly would in time cause the ship to list, and ultimately result in the foundering of the ship. I accept the evidence of the defendant's witnesses as to the character and extent of the storm, and a review of all the evidence discloses little real difference as to the fact that there was a storm of wind and sea of substantial proportions, otherwise what happened could hardly have happened. The evidence coming from several other ships on Lake Superior at the time material is corroborative of that fact and is not to be minimized or destroyed by reason of the fact that none of these ships suffered in the same way as did the *Arlington*. It is irrelevant, I think, that the *Collingwood*, which was nearby, did not suffer any injury. The question of the degree of a storm at sea is not of importance, nor does it afford ground for the inferences which the plaintiffs ask me to draw. The question is, was there such a peril of the sea as that against which the insured undertook to indemnify

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the carrier. To say there was no peril of the sea because the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about what happened here, appear to me to be not a true test. In *Canada Rice Mills Ld.* v. *Union Marine and General Insurance Co.* (1), Lord Wright refers to certain remarks of Lord Herschell in the case of the *Xantho,* which he quoted with approval, and he said:

> In the House of Lords in *Wilson Sons & Co.* v. *Owners of Cargo per the Xantho* (2), which was a bill of lading case, but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* Lord Bramwell in *Hamilton, Fraser & Co.* v. *Pandor & Co.* (3)), Lord Herschell said: "The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding."

I do not think it can be said that the storm which the *Arlington* encountered was not a peril of the sea, or one impossible of causing the result which happened. I think it did, and on a consideration of all the facts before me that is the conclusion which I have reached.

I might add that I was referred to the case of *Paterson Steamship Ld.* v. *Canadian Co-operative Wheat Producers Ld.* (4), but the facts of that case are in such contrast to the facts of the present case that I do not think that any useful purpose can be served by discussing it.

In the result the action of the plaintiffs is dismissed and with costs.

Judgment accordingly.

(1) (1941) A.C. 55 at 67.
(2) (1887) 12 A.C. 503 at 509.
(3) (1887) 12 A.C. 518 at 527.
(4) (1934) A.C. 538.