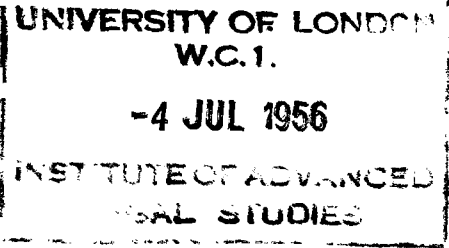


28, 1955

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In the Privy Council.

No. 41 of 1954.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA

BETWEEN

WILLIAM D. BRANSON LIMITED ... (*Plaintiffs*) APPELLANTS

AND

FURNESS (CANADA) LIMITED (in Liquidation)  
(*Defendants*) RESPONDENTS.

CASE FOR THE RESPONDENTS

RECORD

1.—This is an appeal from a judgment of the Supreme Court of Canada (the Right Honourable the Chief Justice of Canada, Taschereau, Rand, Locke and Fauteux, JJ.) dated 6th October, 1953, varying a judgment of the Exchequer Court of Canada, Quebec Admiralty District (A. I. Smith, D.J.A.) pronounced on 4th April, 1952, upon the trial of the action between the Appellants as Plaintiffs and the Respondents as Defendants. By his judgment A. I. Smith, D.J.A., awarded the sum of \$44,677.81 to the Appellants as damages for breach of contract by the Respondents, together with interest and costs. By their judgment, the Supreme Court of Canada unanimously dismissed the Respondents' appeal on liability, but (also unanimously) reduced the damages to \$5000. They further ordered the Appellants to pay the costs of the appeal to the Supreme Court, but left undisturbed the trial Judge's order that the Respondents should pay to the Appellants the Respondents' costs of the action. The Appellants now appeal to your Lordships' Board for the revision, alteration or variation of the judgment of the Supreme Court of Canada and for the restoration of the judgment of A. I. Smith, D.J.A. Bail in respect of that appeal was duly fixed by the Right Honourable the Chief Justice of Canada on 4th November, 1953, in the sum of £300 sterling and bail in that amount has been duly provided by the Appellants.

Vol. II, p. 9

Vol. I, p. 240, l. 24

Vol. I, p. 240, l. 24

Vol. II, p. 9, l. 28

Vol. II, p. 9,

ll. 30-2

Vol. II, p. 8,

ll. 24-5

Vol. II, p. 10

Vol. II, pp. 11-2

Vol. II, pp. 12-14

RECORD

2.—The question raised by this appeal is as to the amount of damages which the Appellants are entitled to recover from the Respondents for the Respondents' breach or breaches of contract in relation to the carriage of potatoes by sea from Canada to Brazil in 1947. Though the Respondents disputed liability in both Courts below, they no longer seek to deny that they are under some liability to the Appellants. The Respondents do however humbly submit that the Appellants never properly or satisfactorily proved that they were entitled to recover more than nominal damages or alternatively that they were entitled to recover damages in excess of the sum of \$5000 awarded by the Supreme Court of Canada. The Respondents humbly submit that the onus of proof lay upon the Appellants to prove the damages naturally and directly flowing from the Respondents' breach or breaches of contract and that Appellants have failed to discharge that onus. The circumstances of the case as hereinafter detailed establish that the Appellants alone could know what (if any) damages they had sustained and the Respondents therefore humbly submit that in these circumstances it was for the Appellants to establish by clear and cogent evidence what these damages (if any) were and how they were sought to be arrived at, that such evidence was not adduced at the trial by the Appellants and that therefore the Appellants' claim for more than nominal damages or alternatively for damages in excess of \$5000 should fail.

3.—The Appellants' claim arises out of the carriage of a large quantity of Canadian potatoes in bags on board the Respondents' steamship "Fort Columbia" from Halifax N.S. to Rio de Janeiro in or about November, 1947. By three bills of lading all issued in Montreal and all dated 5th November, 1947, the Respondents acknowledged the shipment at Halifax in apparent good order and condition of the undermentioned quantities of potatoes.

Vol. III, pp. 2, 3  
and 4

Vol. III, p. 2	Bill of Lading No. 1 ...	11,770	100 lb. bags	
		4,467	75 lb. bags	30
Vol. III, p. 3	Bill of Lading No. 2 ...	13,440	75 lb. bags	
Vol. III, p. 4	Bill of Lading No. 3 ...	14,056	75 lb. bags	

The total number of bags so acknowledged were 43,733. All three bills of lading were issued to the Appellants as shippers and provided that the goods were to be delivered to the order of the Appellants. The shipments were respectively made by the Appellants for the purpose of fulfilling three contracts for the sale of potatoes c.i.f. Rio de Janeiro into which the Appellants as sellers had entered on 20th October, 1947, with three different importers of potatoes in Rio de Janeiro as buyers. The names of those buyers are for brevity hereinafter referred as "Sociedade Continental," "Sociedade Brasileira Lavoura" and "Exportadora Fluminense" respectively. Those buyers were respectively named in Bills of Lading Nos. 1, 2 and 3 as the parties to be notified.

Vol. III, p. 1

4.—As appears from the general arrangement plan of the vessel, she had 5 holds. Potatoes were stowed and carried in all holds except No. 3. The stowage was as follows :

RECORD

Vol. III, p. 12

	No. 1 Lower Hold	...	3,843	100 lb. bags	
	No. 1 Tween Deck	...	1,411	100 lb. bags	
			11,500	75 lb. bags	
	No. 2 Tween Deck	...	885	100 lb. bags	
			12,381	75 lb. bags	
10	No. 4 Tween Deck	...	700	100 lb. bags	
			5,432	75 lb. bags	
	No. 5 Lower Hold	...	1,777	100 lb. bags	Vol. III, p. 14
	No. 5 Tween Deck	...	3,154	100 lb. bags	
			2,650	75 lb. bags	
	Total	...	<u>43,733</u>	<u>bags</u>	Vol. I, p. 193

The blank spaces on the stowage plan show the various cargo spaces set out above which the potatoes occupied on the voyage. None of the bags were marked or numbered.

Vol. III, p. 14

Vol. I, p. 114,

ll. 20-21

Vol. I, p. 20, l. 32 ;

p. 23, l. 37 ; p. 27,

l. 22

5.—The vessel arrived in the harbour of Rio de Janeiro on 24th November, 1947, and berthed on the afternoon of 25th November, 1947. It was then raining, and though stevedores boarded the vessel at 1900 hours that evening, no work was done owing to rain. Discharge began at 0115 hours on 26th November, 1947, and was concluded on 28th November, 1947, at 1800 hours. According to the Chief Officer, the first examination of any of the potatoes which was made on the arrival of the ship was when he personally escorted representatives of the consignees to the different hatches and himself got into the holds. This was before discharge began. According to the Master, three men, whom he understood to be the representatives of the consignees, came on board on this occasion. He asked them, after their inspection, "how the potatoes looked to them." They replied to him that they looked "fine." Some potatoes were then cut open by these men, in the presence of the Chief Officer. Those cut open were examined and the representatives of the consignees told the Chief Officer that they were satisfied with the condition of what they saw. The Chief Officer himself then saw no sign of deterioration, and the only evidence of deterioration which he observed throughout the whole of the discharge was deterioration and signs of rot in some of the bags in No. 1 lower hold, port side forward. There was no sign whatever of deterioration in the after holds of the vessel (that is to say No. 4 and No. 5 holds) as indeed a surveyor named Noguira whom the Appellants called as a witness later admitted. All of these three representatives gave evidence on commission in Rio de Janeiro ; Messrs. Merhy of Sociedade Brasileiro Lavoura, Rios of Exportadora Fluminense and Galdeano of Sociedade Continental. Their accounts of what they saw and did on this occasion differed. Merhy said

Vol. I, p. 149,

ll. 47-8 ; p. 150,

ll. 2-9

Vol. III, p. 6

Vol. I, p. 150, l. 15.

Vol. III, p. 6

Vol. I, p. 134,

ll. 9-19

Vol. I, p. 134,

ll. 32-3

Vol. I, p. 122, l. 10

Vol. I, p. 122, l. 38 ;

p. 123, ll. 10-11

Vol. I, p. 134,

ll. 19-20

Vol. I, p. 134, l. 29 ;

p. 135, l. 19

Vol. I, p. 135,

ll. 15-25 and 45-6 ;

p. 136, ll. 4-15

Vol. I, p. 135,

ll. 20-21

Vol. I, p. 22,

ll. 28-9

Vol. I, pp. 26-34

Vol. I, pp. 58-65

Vol. I, pp. 72-79

Vol. I, p. 27,  
ll. 46-7  
Vol. I, p. 29,  
ll. 9-10  
Vol. I, p. 59, l. 20  
Vol. I, p. 59, l. 40  
Vol. I, p. 74,  
ll. 25-28  
Vol. I, p. 29,  
ll. 33-40 and p. 59,  
ll. 9-10  
Vol. III, p. 7  
Vol. I, p. 20, l. 15  
Vol. I, p. 20,  
ll. 7-10  
Vol. I, p. 20,  
ll. 42-3  
Vol. I, p. 21,  
ll. 10-12  
Vol. I, p. 21,  
ll. 17-18  
Vol. I, p. 22,  
ll. 15-22  
Vol. I, p. 22,  
ll. 28-29  
Vol. I, p. 20,  
ll. 40-5; p. 21,  
ll. 16-17  
Vol. I, p. 31,  
ll. 25-6; p. 62,  
l. 12; p. 63, l. 24;  
p. 67, ll. 47-9;  
p. 79, ll. 18-19;  
p. 82, ll. 33-5;  
p. 88, ll. 22-25  
Vol. I, p. 135,  
ll. 3-4  
Vol. I, p. 36,  
ll. 45-6  
Vol. I, p. 36,  
ll. 46-7  
Vol. I, p. 36,  
ll. 18-20  
Vol. I, p. 43,  
ll. 32-33  
Vol. I, p. 44, l. 13  
Vol. I, p. 45, l. 19  
Vol. I, p. 41,  
ll. 21-46  
Vol. I, p. 41,  
ll. 38-40; p. 53,  
ll. 24-35; p. 55,  
ll. 32-33  
Vol. I, p. 41,  
ll. 46-7  
Vol. III, pp. 7, 8, 9  
Vol. I, p. 43,  
ll. 32-3

that he did not go into any holds and that he only noticed a very slight smell characteristic of deteriorating potatoes. Rios said that he did not go into any holds. He also said that he noticed no smell. Galdeano said he went into some of the holds. Rios and Galdeano observed the beginning of the discharge and as a result of what they saw applied to Lloyd's agents at Rio de Janeiro for a survey to be carried out. Lloyds agents, The Brazilian Coal Co., Ltd., appointed one of the staff, C. T. Nogueira, to carry out the survey. He received this request on 26th November, 1947. Nogueira was originally instructed to go to a warehouse to carry out the survey, but at the request of Rios went first on board the vessel instead. This he did on 27th and 28th November, 1947, but on neither visit did he go down the holds and such inspections as he made on board were rapid and apparently superficial. The whole of the potatoes discharged were removed into warehouse No. 19, by means of wagons. But Nogueira made no complete examination of the potatoes in that warehouse. Instead he suggested the appointment of an agronomist named Sodre. It is to be noted that though Nogueira apparently took the view that the allegedly damaged potatoes all came from No. 1 and No. 2 holds he stated that "the others were perfect"—he made no attempt to secure that separation between the potatoes from No. 1 and No. 2 holds and those from No. 4 and No. 5 holds should be made in the warehouse. All potatoes were taken indiscriminately into warehouse No. 19. All holds were discharged substantially concurrently.

6.—Sodre was called in on 5th December, 1947, and carried out his survey in warehouse No. 19 on 6th December, 1947, eight days after the completion of discharge and ten days after discharge had begun. He had never been on board, nor had he watched the unloading. He only spent one and one-half hours examining the potatoes in the warehouse and he only examined approximately 100 bags out of the mass of bags then in the warehouse. He never made any attempt to estimate with even approximate accuracy the number of bags present or to varify an estimate which he alleged that he had been given of the number of bags present at the time of his survey. He apparently thought that there were about 15,300 bags present and that this quantity represented the total discharged from No. 1 and No. 2 holds. Those who were alleged to have supplied this information to Sodre were not called as witnesses by the Appellants. He said that the figure of 15,300 appeared in his own notes, though these were not put in evidence and his evidence on this point is unsupported by any other single piece of evidence. This figure in fact does not correspond with the quantities of bags in fact loaded in No. 1 and No. 2 holds; nor does it even approximately tally with the figures in certain survey reports to parts of which Sodre subsequently subscribed his name.

7.—Basing his view upon an examination, which lasted about one and

one-half hours, of about 100 bags which he erroneously believed formed part of about 15,300 bags which in turn he erroneously believed represented the contents of No. 1 and No. 2 holds, Sodre expressed the opinion that the 15,300 bags were deteriorated to the extent of 70%. From this he drew the further conclusion that the total shipment of 43,733 bags were depreciated by 25%.

RECORD

Vol. I, p. 44, l. 13

8.—On 2nd January, 1948, there were issued three survey reports. These were signed by Nogueira, certified correct and approved by Lloyd's agents and each contained a schedule in identical terms signed by Sodre and  
 10 purporting to summarize his views. These survey reports on their face purport to cover 13,440 75 lb. bags, 11,770 100 lb. bags and 4,467 75 lb. bags and 14,056 75 lb. bags respectively, that is to say the whole shipment. Sodre, notwithstanding his oral evidence, affixed his signature to each of the schedules to these reports covering these quantities. The quantities respectively covered by these reports (which tally with the bills of lading quantities) are not identifiable with the quantities from any given hold or any given combination of holds. But the Respondents respectfully submit that these reports clearly show that (a) the entire shipment was indiscriminately mixed up in the warehouse (b) the entire shipment was there when  
 20 Sodre made his only examination (whether or not he realized it) (c) his examination of about 100 bags was from a bulk of over 43,000 bags and not from about 15,300 bags and (d) it was quite impossible to determine at the time of his examination which bags emanated from No. 1 and No. 2 holds and which from No. 4 and No. 5 holds.

Vol. III, pp. 7, 8, 9

Vol. III, p. 7

Vol. III, p. 8

Vol. III, p. 9

9.—No notice of any intention to hold either Nogueira's survey or Sodre's survey was ever given to the Appellants. Nor, as already stated, was any complaint made to the vessel's officers on outturn. Nogueira never gave oral evidence of any notification. The surveys were conducted "ex parte" and the first notice which the Respondents received of the  
 30 claim was a letter dated 10th February, 1948. The Appellants thus failed to comply with Article III Rule 6 of the Schedule to the Canadian Water Carriage of Goods Act, 1936, to which all the bills of lading were subject. *Prima facie* therefore the potatoes were, by reason of that Rule, delivered in the condition described in the bills of lading.

Vol. I, p. 122, l. 35 ;

p. 123, ll. 10-11

Vol. I, p. 134,

ll. 15-19

Vol. I, p. 159,

ll. 20-40

Vol. I, pp. 225-6

10.—The Appellants in their Statement of Claim, before the trial judge and indeed before the Supreme Court of Canada rested their case as to the extent of the Respondents' liability solely on Sodre's evidence. Sodre alone expressed the opinion that the whole shipment was depreciated by 25 per cent. as the Appellants pleaded and have since sought to contend.

Vol. I, p. 2,

ll. 35-40

40 11.—The Respondents humbly submit that for a number of reasons Sodre's conclusion as to the extent of the damage and of the Respondents' alleged resulting liability is unreliable and unsupported by any evidence.

## RECORD

The Respondents further humbly submit that the following are the main reasons for rejecting Sodre's evidence :

- (1) *Sodre wrongly believed he was examining about 15,300 bags when in fact he was examining the entire shipment.*

The Respondents respectfully refer to paragraphs 6, 7 and 8 of this case: it is, in the Respondents' humble submission of cardinal importance that a surveyor seeking to estimate damage on a percentage basis of a given quantity of the whole should first accurately ascertain and appreciate the quantity which he is surveying. Nogueira agreed that this is so. A surveyor named Crocker whom the Respondents called as a witness at the trial took the same view. Moreover Sodre said in evidence the bags were only 15-20 tiers in height, though the schedules to the survey reports which he signed stated that they were 30 bags high as did the other witnesses who gave evidence on this question.

- (2) *Sodre wrongly believed that he was examining potatoes from No. 1 and No. 2 holds only and that the remaining potatoes had already been removed from the warehouse before his survey.*

Though Sodre repeatedly referred to the removal from the warehouse of potatoes from No. 3 and No. 4 holds, no potatoes were in fact ever carried in No. 3 hold. All the other witnesses who gave evidence on this question agreed that no potatoes had been released from the warehouse before Sodre's survey.

- (3) *Sodre's method of sampling was completely inadequate.*

Sodre only examined "approximately 100 bags more or less" out of what he believed to be 15,300 bags but were in fact about 43,000 bags. Moreover he took this small sample notwithstanding that though his first impression was that the damage was not serious "as the bags seemed to be dry and clean" and "perfect," his further examination led him to believe that the damage was serious. Nogueira said that Sodre "opened up several bags and examined the quantity of spoilt potatoes and arrived at the result of the depreciation." Crocker said that sampling should be based on a minimum of "ten per cent. of any shipment." Merhy said that Sodre only "cut open several" potatoes.

- (4) *Sodre was unable to support his estimate of 70% damage of whatever may have been in the warehouse or to explain how he arrived at that figure.*

Sodre's answers on this issue are confused and unsatisfactory.

- (5) *The estimate of 70% appears not to have been his own calculation but the result of discussion and agreement with the consignees at the warehouse on 6th December, 1947.*

- (6) *Sodre appears to have introduced considerations of market in calculating percentages of damage.*

Crocker stated that considerations of market are irrelevant. The Respondents humbly submit that this view must be correct.

Vol. I, p. 25,  
ll. 40-47 and p. 26,  
ll. 4-5 and ll. 20-23  
Vol. I, p. 205,  
ll. 15-40  
Vol. I, p. 43,  
ll. 10-11

Vol. III, pp. 7, 8, 9  
Vol. I, p. 20,  
ll. 47-48; p. 71,  
ll. 11-12; p. 97,  
ll. 45-46  
Vol. I, p. 40,  
ll. 42-45; p. 41,  
ll. 28-31; p. 53,  
ll. 38-47 and p. 55,  
ll. 42-46

Vol. I, p. 31,  
ll. 23-25; p. 63,  
ll. 23-25; p. 79,  
ll. 18-19

Vol. I, p. 44, l. 14

Vol. III, pp. 7, 8, 9  
Vol. I, p. 38, l. 17  
Vol. III, pp. 7, 8, 9  
Vol. I, p. 23,  
ll. 13-17  
Vol. I, p. 204,  
ll. 16-17 and  
ll. 40-41  
Vol. I, p. 31,  
ll. 18-19

Vol. I, p. 45,  
ll. 22-44 and p. 56,  
ll. 19-29

Vol. I, p. 32,  
ll. 46-49; p. 56,  
ll. 10-30

Vol. I, p. 45,  
ll. 31-34 and  
ll. 46-49; p. 56,  
ll. 20-29  
Vol. I, p. 205,  
ll. 6-9

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- (7) *Sodre took other erroneous matters into account to support his conclusion*
- (a) he thought the vessel was a refrigerated vessel and that the refrigeration had been incorrectly applied, whereas the vessel was not a refrigerated vessel.
- (b) he thought that a stevedore had been killed by gasses given off by potatoes in No. 1 or No. 2 hold, whereas the stevedore had in fact died in No. 4 hold of a serious condition of the heart after all cargo had been removed from that hold.
- 10 (8) *Sodre's evidence, which is based upon estimate only, is inconsistent with the evidence of those who saw the potatoes on board and during discharge and who did not form the impression of any serious damage.*
- Da Silva, the "overseer" of the discharge of the vessel, said that the potatoes were not rotten but that some were wet, and that if they had been rotten, the stevedores would have required and received increased wages. Nogueira said that the damage he suspected was only in No. 1 and No. 2 holds. Mascarenhas, a checking clerk, said the cargo was perfect. Goncalves, another checking clerk, said the cargo was in good condition on discharge.
- 20 Dos Santos, yet another checking clerk, said the same thing.
- 12.—The Respondents further humbly submit that there are other and independent grounds for criticising Sodre's evidence. The whole burden of his evidence was that the damage which he claimed to have found was all due to "black heart" and that that "black heart" must have developed on board the vessel and that it could not have developed otherwise than on board. He based his view however upon his assertion that the potatoes were stored in piles 15 or 20 bags high and were therefore perfectly aerated in warehouse No. 19. He further stated in answer to a leading question (Question 57) that "one cannot on any hypothesis assume that
- 30 "bad stowage could be that in warehouse No. 19." He agreed however that "black heart" develops within three or four days if a potato is without air and that it is a disease due to aeration conditions in storage. Mr. Racicot, a plant pathologist in Ottawa called by the Appellants, agreed that this was the cause of black heart, as did Mr. Coulson, professor of plant pathology in Quebec, who was called by the Respondents. But Mr. Racicot agreed that no tuber should ever be more than three feet from a source of air, thus agreeing with Mr. Coulson on this point. Mr. Racicot however was only prepared to say that black heart developed on the voyage on the basis that (inter alia) Sodre was correct as to the manner in which
- 40 the potatoes were piled in the warehouse. He said that if the potatoes "were piled twenty-five bags high and ten or fifteen or more bags wide in "a solid pile that [i.e. black heart] would be possible and to be expected." As stated in paragraph 11 (1) of this case the schedules to the survey reports which Sodre signed stated that the potatoes were piled 30 bags high in warehouse No. 19. This was also the evidence of Nogueira, while Da Silva

Vol. I, p. 36,  
ll. 46-49; p. 49,  
l. 18 to p. 50, l. 20;  
p. 51, ll. 12-26;  
p. 54, ll. 7-19;  
p. 150, ll. 38-39  
Vol. III, pp. 7, 8, 9  
Vol. I, p. 47,  
ll. 35-45; p. 57,  
l. 42 to p. 58, l. 20  
Vol. I, p. 224.

Vol. I, p. 66,  
ll. 5-6; p. 69,  
ll. 8-30

Vol. I, p. 22,  
ll. 22-29  
Vol. I, p. 90, l. 45  
Vol. I, p. 96, l. 33  
Vol. I, p. 102, l. 26

Vol. I, p. 37,  
ll. 18-47; p. 43,  
ll. 8-18; p. 46,  
l. 46 to p. 47, l. 6  
Vol. I, p. 43,  
ll. 8-18

Vol. I, p. 43,  
ll. 12-13  
Vol. I, p. 43,  
ll. 14-17  
Vol. I, p. 50,  
ll. 25-29

Vol. I, p. 163,  
ll. 18-20  
Vol. I, p. 212,  
ll. 24-33  
Vol. I, p. 166,  
ll. 26-28  
Vol. I, p. 212,  
l. 40; p. 213, l. 4

Vol. I, p. 167,  
ll. 43-7

Vol. I, p. 167,  
ll. 21-24

Vol. III, pp. 7, 8, 9  
Vol. I, p. 20, l. 48  
Vol. I, p. 71, l. 12  
and p. 97, l. 46

## RECORD

Vol. I, p. 43, l. 10  
 Vol. I, p. 38, l. 18  
 Vol. I, p. 23, l. 22  
 Vol. III, pp. 7, 8, 9  
 Vol. I, p. 31,  
 ll. 23-26

and Goncalves put the height at between 25 to 30 bags. Moreover Sodre himself said in evidence that the piling was "close" and that he climbed on top of the piles. Nogueira said that the bags selected for examination were taken from "the centre of the pile." This last phrase is also used by Sodre in the schedules to the survey reports. Merhy refers to Sodre climbing up on top of a mass of 43,000 bags. The Respondents therefore humbly submit that the evidence as to the conditions of storage points overwhelmingly to the greater part of the damage having developed in the warehouse in the eight to ten days which elapsed between the discharge of the potatoes and Sodre's survey on 6th December, 1947. Crocker went so far as to say that eight days after discharge no conclusion could be reached as to the condition of the potatoes on discharge. The Respondents humbly submit that this contention is further supported by the fact that only the undersides of such bags as Sodre examined were found to be wet and that at first sight there did not appear to him to be substantial damage.

Vol. I, p. 204,  
 ll. 45-47

Vol. I, p. 38,  
 ll. 5-25  
 Vol. III, pp. 7, 8, 9

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13.—The Respondents therefore humbly submit that for the foregoing reasons the Appellants have wholly failed to prove their pleaded claim, and that at the most they have only established that an unspecified but small number of bags of potatoes damaged to an uncertain extent were found on a survey held eight days after the completion of discharge without notice to the Respondents, after storage for that period in conditions almost ideal for the development of the damage complained of.

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Vol. I, p. 230,  
 ll. 40-46

Vol. I, p. 230, l. 36

Vol. I, p. 232,  
 ll. 1, 16 and 18

Vol. I, p. 239,  
 ll. 44-46 and p. 240,  
 ll. 1-21

14.—In his judgment A. I. Smith, D.J.A., expressed the view that Sodre's inspection "appears to have been adequate to enable him to determine the cause of deterioration and to estimate its extent." Whilst the learned Judge refers to the fact that Counsel for the Respondents was critical of Sodre's inspection, he nowhere directed his mind to those criticisms in detail. He appears to found his view that the whole of the damage occurred on board the vessel on the assumption that in the warehouse the potatoes were stored "in single rows" (a phrase used by the learned Judge three times on one page of his judgment), whereas the evidence summarized in paragraph 12 of this case clearly shows that this was not so. So far as the extent of the alleged damage is concerned, the learned Judge, as appears from the end of his judgment, accepted without any critical examination the basis pleaded in paragraph 8 of the Statement of Claim. The learned Judge therefore gave judgment for the Appellants for the full sum claimed. While the Respondents, as already stated, now agree that some small but unproven amount of damage must be accepted as having occurred on board, they humbly submit that the learned Judge was wrong in his conclusion both as to the extent of the damage which occurred on board and as to the resulting amount of loss suffered by the Appellants.

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15.—The Respondents appealed to the Supreme Court of Canada from the judgment of A. I. Smith, D.J.A. The Supreme Court of Canada



dismissed the appeal so far as it related to liability but were unanimously of the opinion that the Appellants had failed to prove the extent of the alleged damage and the amount of their loss. They accordingly reduced the damages to \$5000 and awarded the Respondents the costs of the appeal.

RECORD

Vol. II, pp. 1-9

16.—The leading judgment was delivered by Locke, J. with whom the learned Chief Justices, Rand and Fauteux, JJ. concurred. A short separate concurring judgment was delivered by Taschereau, J. The judgment of Locke, J. subjected the evidence and in particular the evidence of Sodre to what the Respondents respectfully submit was a cogent and closely reasoned critical analysis. The Respondents respectfully adopt the criticisms of Sodre's evidence as correct. The learned Judge reached the conclusion that it was obvious "that in the length of time spent by Sodre there was not such an examination of the potatoes as would enable him to estimate the loss with any degree of accuracy whether the quantity in the warehouse was 15,300 bags or all of the potatoes that had been in holds 1 and 2 or the entire shipment of over 43,000 bags piled in the manner described." The learned Judge therefore expressed the view that the award of damages by the learned trial Judge could not be sustained.

Vol. II, pp. 1-8

Vol. II, p. 8

Vol. II, p. 8, l. 2-7

17.—The learned Judge further expressed the view that a new trial on damages should not be ordered but that the Court should "in the interests of the due administration of justice" then and there quantify the damages. The damages were accordingly fixed at \$5000. Taschereau, J. expressed the same view as to the desirability of avoiding a new trial for the assessment of damages and concurred in the figure proposed by Locke, J. He agreed that the evidence on damage was "very unsatisfactory."

Vol. II, p. 8,  
ll. 12-13Vol. II, p. 8,  
ll. 44-47

Vol. II, p. 8, l. 45

18.—The Respondents humbly submit that it was for the Appellants to prove the extent of the alleged damage to the potatoes and the amount of their loss and that they have failed to discharge the burden which lay upon them in those respects. Both were matters upon which the Appellants alone could adduce evidence, since they had never notified the Respondents of their claim at the time of discharge or before the survey of Sodre. The Respondents further humbly submit that the award of \$5000 to the Appellants which was made by the Supreme Court of Canada was, on the evidence which the Appellants had adduced, generous, since on that evidence the Appellants established a right to no more than nominal damages.

19.—The Respondents therefore humbly submit that this appeal should be dismissed with costs and the judgment of the Supreme Court of Canada affirmed for the following amongst other

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### REASONS

- (1) BECAUSE the onus of proving the extent of the alleged damage to the potatoes rested upon the Appellants.

RECORD

- (2) BECAUSE the onus of proving the extent of their loss rested upon the Appellants.
- (3) BECAUSE the Appellants have failed to discharge the onus of proving either the extent of the damage or the extent of their loss.
- (4) BECAUSE in the absence of any notification of claim to the Respondents and of due compliance with Article III Rule 6 of the Rules scheduled to the Canadian Water Carriage of Goods Act 1936 and of intention to hold any survey, it behoved the Appellants to prove their claim clearly and by cogent 10 evidence and the Appellants have failed to do so.
- (5) BECAUSE the evidence of Sodre, upon which the Appellants rested their claim, is unreliable and does not support the conclusions at which he claimed to arrive.
- (6) BECAUSE the weight of the evidence points to the greater amount of damage having been sustained after discharge of the potatoes from the Respondents' vessel and while the potatoes were in warehouse No. 19, under the control of the Appellants, their servants or agents.
- (7) BECAUSE there is no evidence that the shipment as a whole 20 was depreciated to the extent of twenty-five per cent. of its value.
- (8) BECAUSE there is no or no reliable evidence that, whatever the total quantity of bags was in warehouse No. 19 at the date of Sodre's examination, that quantity was depreciated to the extent of seventy per cent. of its value.
- (9) BECAUSE the Appellants failed to establish a right to more than nominal damages.
- (10) BECAUSE if (contrary to the Respondents' contention) the Appellants have established a right to more than nominal 30 damages, the Appellants have not established a right to damages in a sum exceeding \$5,000.
- (11) BECAUSE the judgment of A. I. Smith, D.J.A. awarding the Appellants \$44,677.81 and costs was wrong.
- (12) BECAUSE the judgment of the Supreme Court of Canada was right and ought to be affirmed.

EUSTACE ROSKILL.  
MICHAEL KERR.

In the Privy Council.

No. 41 of 1954.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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BETWEEN

WILLIAM D. BRANSON LIMITED  
(*Plaintiffs*) APPELLANTS

AND

FURNESS (CANADA) LIMITED (in  
Liquidation) (*Defendants*) RESPONDENTS..

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CASE FOR THE RESPONDENTS

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MIDDLETON LEWIS & CO.,  
53-54 Leadenhall Street,  
London, E.C.3,  
*Respondents' Solicitors.*