

54. 1937

In the Privy Council.

No. 112 of 1936.

ON APPEAL FROM THE EXCHEQUER
COURT OF CANADA

BETWEEN

ROBIN HOOD MILLS LIMITED ... (Defendant) Appellant.

AND

PATERSON STEAMSHIPS LIMITED ... (Plaintiff) Respondent.

s.s. "THORDOC."

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 112 of 1936.

**ON APPEAL FROM THE EXCHEQUER
COURT OF CANADA**

BETWEEN

ROBIN HOOD MILLS LIMITED... .. (Defendant) *Appellant*

AND

PATERSON STEAMSHIPS LIMITED (Plaintiff) *Respondent.*

S.S. "THORDOC."

RECORD OF PROCEEDINGS.

No. 1.

Writ of Summons.

IN THE EXCHEQUER COURT OF CANADA.
THE QUEBEC ADMIRALTY DISTRICT.

In the
Exchequer
Court
(Quebec
Admiralty
District).

PATERSON STEAMSHIPS LIMITED, a body politic and corporate
having its head office and principal place of business in the
City of Fort William, Province of Ontario, and having a place
of business in the City and District of Montreal... .. *Plaintiff*
against

No. 1.
Writ of
Summons,
26th Janu-
ary, 1934.

10 ROBIN HOOD MILLS LIMITED, a body politic and corporate having
a place of business in the City and District of Montreal, and to
every person or persons whomsoever claiming or being entitled
to claim in respect of the damage or loss alleged to have been
occasioned in any way by the stranding of the steamship
"Thordoc" on or about the 9th day of November, 1929 *Defendant.*

ACTION FOR LIMITATION OF LIABILITY, S.S. "THORDOC."

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great
Britain and Ireland and of the British Dominions beyond the Seas, King,
Defender of the Faith, Emperor of India.

In the
Exchequer
Court
(Quebec
Admiralty
District)

To the Defendants above named.

GREETING :

No. 1.
Writ of
Summons,
26th Janu-
ary, 1934—
continued.

We command you that, within one week after the service of this Writ exclusive of the day of such service, you do cause an appearance to be entered for you in Our Exchequer Court of Canada, in the above-named action ; and take notice that in default of your so doing, the said action may proceed, and judgment may be given, in your absence.

Given at the City of Montreal, in Our said Court, under the Seal thereof, this twenty-sixth day of January, 1934.

OSCAR BELANGER, 10
Deputy District Registrar.

THE PLAINTIFF CLAIMS :—

(1) An order forthwith staying all further proceedings in the action between the Plaintiff and the Defendant, Robin Hood Mills, Limited, and bearing No. F.83113 of the records of the Superior Court for the District of Montreal.

(2) That it be declared that the Plaintiff as owner of s.s. "Thordoc" is not answerable in respect of the damage to the vessel's cargo at the time of the said stranding on or about the 9th day of November, 1929, to an aggregate amount exceeding £8 sterling or \$38.92 for each ton of the said vessel's registered tonnage with the addition of any engine room space deducted for the purpose 20 of ascertaining that tonnage, the said tonnage being 2,065.35 tons.

(3) That it be declared that the amount for which the Plaintiff is liable in respect of the damage aforesaid is £16,522. 16s. sterling or \$80,363.42 and no more.

(4) That upon payment into Court of the said sum of £16,522. 16s. sterling or \$80,363.42 together with interest thereon from the date of the said loss until payment, all further proceedings in the action bearing No. F.83113 of the Superior Court for the District of Montreal may be stayed.

(5) That if need be upon such payment aforesaid directions may be given for ascertaining whether there are any other persons having claims upon the said fund in respect of the loss or damage and for distributing the said fund 30 rateably among the several persons who may make out their claims and that advertisements may be ordered to be issued for this purpose and a time fixed within which all claimants must bring in their claims.

(6) Such order as to costs in this action as this Honourable Court may deem fit.

(7) Such further and other relief as the nature of the case may require.

This writ was issued by Casgrain, Weldon, Demers & Lynch-Staunton of the City of Montreal, Solicitors for the Plaintiff.

All documents required to be served upon the said Plaintiff in the action, may be left for them at the office of the said Casgrain, Weldon, Demers & Lynch-Staunton, 132 St. James Street, West, Montreal, P.Q.

Montreal, 26th January, 1934.

(Sd.) CASGRAIN, WELDON, DEMERS & LYNCH-STAUNTON,
Solicitors for Plaintiff.

Received copy waiving service only.

BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Defendant, ROBIN HOOD MILLS LIMITED.

10 Jan. 27/34.

In the
Exchequer
Court
(Quebec
Admiralty
District)

No. 1.
Writ of
Summons,
26th Janu-
ary, 1934-
continued.

No. 2.

Statement of Claim.

PLAINTIFF'S STATEMENT OF CLAIM.

No. 2.
Statement
of Claim,
31st Janu-
ary, 1934.

1. Before and at the time of the disaster hereinafter mentioned the Plaintiff, Paterson Steamships Limited, was the owner of the steamship "Thordoc," a British vessel registered at Fort William, in the Province of Ontario.
2. On or about the 9th day of November, 1929, the s.s. "Thordoc," when proceeding from Port Arthur to Montreal with a cargo of flour, wheat, shorts and oats, grounded on Point Porphyry in Lake Superior and became a constructive total loss and the said cargo was severely damaged.
3. That the Defendant, Robin Hood Mills Limited, on the 13th day of January, 1931, commenced an action in the Superior Court for the District of Montreal, such action bearing No. F.83113 of the records of such Court whereby the said Defendant claimed the sum of \$146,326.29 as damages occasioned to its cargo and resulting from the said stranding.
4. Judgment was rendered on the said action on the 13th day of April, 1932, condemning the Plaintiff, Paterson Steamships Limited, to pay to the Defendant, Robin Hood Mills Limited, the amount claimed, with interest and costs.
5. The said Judgment was appealed to the Court of King's Bench, Appeal Side, on the 13th day of May, 1932, the record of such Appeal bearing No. 379 of the records of the Court of King's Bench, and Judgment was rendered on such Appeal on the 30th day of November, 1933, confirming as to its conclusions the Judgment of the Superior Court hereinabove mentioned, the whole as appears by a copy of the said Judgment filed herewith as Plaintiff's Exhibit No. P.1.
6. The said stranding of the s.s. "Thordoc" occurred without the actual fault or privity of her owner, the Plaintiff herein.
7. The said stranding of the s.s. "Thordoc" occurred by reason of the improper navigation or management of the ship.

In the
Exchequer
Court
(Quebec
Admiralty
District).

No. 2.

Statement
of Claim,
31st Janu-
ary, 1934—
continued.

8. There is no claim for loss of life or personal injuries and the Plaintiff does not know of any claim other than that of the Defendant.

9. The registered tonnage of the s.s. "Thordoc" with the addition of any engine room space deducted for the purpose of ascertaining that tonnage is 2,065.35 tons, as appears from a copy of the said vessel's register filed herewith as Plaintiff's Exhibit No. P.2.

10. The Plaintiff has a right to a decree of this Honourable Court pronouncing that the Plaintiff is not liable in damages beyond the aggregate amount of £8 sterling or \$38.92 for each ton of the registered tonnage of the said s.s. "Thordoc" with the addition of any engine room space deducted for the 10 purpose of ascertaining that tonnage.

11. The Plaintiff is entitled to ask this Honourable Court for an order that the proceedings in any action instituted or pending and arising out of the loss hereinbefore mentioned be stayed and that all persons be restrained from instituting or continuing any proceedings against the present Plaintiff or against the s.s. "Thordoc" and that all such persons having claims appear and file their said claims in this action within such time and subject to such conditions as this Honourable Court may fix.

12. The sum of £8 sterling per ton on the above tonnage is £16,522. 16s. sterling and the sum of \$38.92 per ton on the above tonnage is \$80,363.42 20 which the Plaintiff is willing and herewith tenders into Court together with interest thereon from the date of the said stranding to the time of such payment and the Plaintiff is further willing and herewith tenders into Court the sum of \$1,659.29, or such larger amount as may be proper under the circumstances, being the taxed costs upon the action in appeal hereinabove described in paragraphs 3, 4, and 5, with interest thereon until payment.

THE PLAINTIFF CLAIMS:—

(1) An order forthwith staying all further proceedings in the action between the Plaintiff and Defendant and bearing No. F.83113 of the records of the Superior Court for the District of Montreal. 30

(2) That it be declared that the owner of the s.s. "Thordoc" is not answerable in respect of the damage to its cargo at the time of the said stranding on or about the 9th day of November, 1929, to an aggregate amount exceeding £8 sterling or \$38.92 for each ton of the said vessel's registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage.

(3) That it be declared that the amount for which the Plaintiff is liable in respect of the damage aforesaid is £16,522. 16s. sterling or \$80,363.42 and no more.

(4) That upon payment into Court of the said sum of £16,522. 16s. sterling 40 or \$80,363.42, together with interest thereon from the date of the said loss until payment, all further proceedings in the action bearing No. F.83113 of the Superior Court for the District of Motreal may be stayed.

(5) That if need be upon such payment aforesaid directions may be given for ascertaining whether there are any other persons having claims upon the said fund in respect of the loss or damage and for distributing the said fund ratably among the several persons who may make out their claims and that advertisements may be ordered to be issued for this purpose and a time fixed within which all claimants must bring in their claims.

(6) Such order as to costs in this action as this Honourable Court may deem fit.

(7) Such further and other relief as the nature of the case may require.

10 Montreal, January 31st, 1934.

(Sgd.) CASGRAIN WELDON
DEMERS & LYNCH-STAUTON,
Solicitors for Plaintiff.

Received Copy.

(Sgd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Defendant.

In the
Exchequer
Court
(Quebec
Admiralty
District).

No. 2.
Statement
of Claim,
31st Janu-
ary, 1934—
continued.

No. 3.

Statement of Defence.

No. 3.
Statement
of Defence,
26th April,
1934.

DEFENCE OF THE DEFENDANT, ROBIN HOOD MILLS LIMITED.

1. As to paragraphs 1, 2, 3, 4 and 5 of the Plaintiff's Statement of Claim
20 the Defendant, Robin Hood Mills Limited, admits the same.

2. As to paragraph 6 the said Defendant denies the same.

3. As to paragraphs 7 and 8 the said Defendant admits the same.

4. As to paragraph 9 the said Defendant is ignorant of the allegations therein
contained.

5. As to paragraphs 10, 11 and 12 the said Defendant denies the same.

FOR FURTHER DEFENCE TO THE SAID STATEMENT OF CLAIM THE SAID
DEFENDANT PLEADS AS FOLLOWS:—

6. That the Plaintiff's vessel "Thordoc," while proceeding on her voyage
to Montreal, referred to in paragraph 2 of the Plaintiff's Statement of Claim,
30 deviated from her course and voyage and proceeded to the Port of Fort William,
in the Province of Ontario, thereby constituting a deviation in law and in fact,
and further deviated by not proceeding on the usual and direct course to the
Port of Montreal, in the Province of Quebec.

In the
Exchequer
Court
(Quebec
Admiralty
District).

No. 3.
Statement
of Defence,
26th April,
1934--
continued.

7. That in addition and furthermore the stranding of the "Thordoc" and the resultant damage was due to her unseaworthiness in that her compass was not properly adjusted.

8. The Plaintiff is not entitled to any decree in limitation of its liability.

Montreal, April 26, 1934.

(Sgd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Defendant, ROBIN HOOD MILLS LIMITED.

Received copy in lieu of service.

(Sgd.) WELDON, DEMERS & LYNCH-STANTON,
Solicitors for Plaintiff.

10

No. 4.

Reply to Statement of Defence.

No. 4.
Reply to
Statement
of Defence,
25th May,
1934.

**PLAINTIFF'S ANSWER TO THE PLEA OF THE DEFENDANT, ROBIN
HOOD MILLS LIMITED.**

In answer to the Plea of the Defendant, Robin Hood Mills Limited, the Plaintiff says that it denies each and every allegation of such Plea as are not in accord with the Plaintiff's Statement of Claim.

Montreal, 25th May, 1934.

(Sgd.) WELDON, DEMERS & LYNCH-STANTON,
Solicitors for Plaintiff.

20

Received copy in lieu of service only.

(Sgd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Defendant, ROBIN HOOD MILLS LIMITED.

Montreal.

May 26/34.

No. 5.

Amended Reply to Statement of Defence.

No. 5.
Amended
Reply to
Statement
of Defence,
25th May,
1934.

**PLAINTIFF'S AMENDED ANSWER TO PLEA OF THE DEFENDANT,
ROBIN HOOD MILLS LIMITED**

In answer to the Plea of the Defendant, Robin Hood Mills Limited, the Plaintiff says that it denies each and every allegation of such Plea as are not in accord with the Plaintiff's Statement of Claim. 30

And the Plaintiff further says in answer to paragraph 6 of the said Plea that the question of deviation is not at issue in the present case being *res judicata* as between the parties in virtue of the judgment of the Court of King's Bench of the Province of Quebec already produced as Plaintiff's Exhibit P.1.

WHEREFORE the Plaintiff reiterating the allegations of its Statement of Claim prays for the dismissal of the Plea of the Defendant Robin Hood Mills Limited and the maintenance of its action.

Montreal, 25th May, 1934.

(Sgd.) WELDON, DEMERS & LYNCH-STANTON,
Solicitors for Plaintiff.

Received copy with consent to amendment.

(Sgd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Defendant, ROBIN HOOD MILLS LIMITED.

In the
Exchequer
Court
(Quebec
Admiralty
District).

—
No. 5.
Amended
Reply to
Statement
of Defence,
25th May,
1934—
continued.

10

No. 5a.

No. 5A.

Proces-Verbal, 29th May, 1934.

(Not printed.)

No. 6.

Replication.

No. 6
Replication,
12th Nov-
ember,
1934.

In reply to the Plaintiff's Amended Answer to the Defendant's Plea the Defendant Robin Hood Mills Limited, denies the allegations therein contained.

WHEREFORE the said Defendant prays for the dismissal of the Plaintiff's action with costs.

Montreal, November 12, 1934.

20

(Sgd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for the Defendant, ROBIN HOOD MILLS LIMITED.

Received copy.

WELDON, DEMERS & LYNCH-STANTON,
Attorneys for Plaintiff.

No. 7.

Plaintiff's Evidence.

In the
Exchequer
Court
(Quebec
Admiralty
District).

CANADA,
PROVINCE OF QUEBEC,
DISTRICT OF MONTREAL.

IN THE EXCHEQUER COURT OF CANADA,
(Quebec Admiralty District).

No. 7.
Plaintiff's
Evidence.
(a) Charles
D. Mills.
Examina-
tion.

PRESENT : HON. Mr. JUSTICE PHILIPPE DEMERS.

PATERSON STEAMSHIPS LIMITED	...	...	...	...	...	<i>Plaintiff</i>	
			vs.				
ROBIN HOOD MILLS LIMITED, <i>et al.</i>	...	...	...	...	...	<i>Defendants.</i>	10

APPEARANCES.

Mr. JOSEPH W. WELDON, K.C.	...	...	...	} Counsel for Plaintiff.
Mr. VICTOR LYNCH-STANTON...	...	...	...
Mr. ERROL LANGUEDOC, K.C.	...	...	...
Mr. C. RUSSELL MCKENZIE, K.C.	...	...	...	For Defendants.

DEPOSITION OF CHARLES D. MILLS, A WITNESS PRODUCED ON
BEHALF OF PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand 20
nine hundred and thirty-four, personally came and appeared CHARLES D.
MILLS, of the City of Buffalo, in the State of New York, one of the United States
of America, Marine Surveyor, aged 58 years, a witness produced on behalf of
the Plaintiff, who being duly sworn doth depose and say as follows :

EXAMINED BY Mr. V. LYNCH-STANTON, OF COUNSEL FOR
PLAINTIFF.

Q. I understand, Mr. Mills, you are a surveyor for the American Bureau ?—
A. Yes. 30
Q. Did you in the season of 1929 have the opportunity to survey the
s.s. "Thordoc" ?—A. Yes.
Q. What was the result of this survey ?—A. We recommended a grain
class.
Q. What do you mean by recommended a grain class ?—A. We recom-
mended the carriage of dry and perishable cargoes. That refers to storage also.
Then, all boats on the Lakes are examined again.
Q. That was for the season of 1929 ?—A. Yes.
Q. What did you do when you made this examination ?—A. We went
through the cargo holds, looked at the collision bulkheads, looked at the forepeak, 40
looked at the frames, the shell plating.
Mr. MCKENZIE : I wish, my Lord, to enter formal objection to the
introduction of any evidence other than evidence on the question of the fault
or privity of the Plaintiff Company, on the ground that the matter is *chose jugee*.

Mr. LANGUEDOC : There is a very simple reply to that, and it is, that while the Court of Appeals might, or might not, decide to hold this ship liable in respect of unseaworthiness, because the compass had not been properly adjusted, there is no decision whatever that the rest of the ship was unseaworthy, which has to be established. The judgment does not say the ship was unseaworthy in other respects except as to compass.

In the Exchequer Court (Quebec Admiralty District).

THE COURT RESERVES THE OBJECTION.

10 A. On the collision bulkhead and the after cargo bulkhead we put a hose test on the peak for water tightness, examined the tarpaulins, went through the engine room, examined the boilers of the engines externally. That, I believe, completed the examination.

No. 7. Plaintiff's Evidence. (a) Charles D. Mills. Examination—continued.

BY Mr. LYNCH-STANTON : Q. What recommendation did you make to your principals, the American Bureau ? --A. We recommended a grain class.

Q. Will you produce as Plaintiff's exhibit P.3 a certificate issued by the American Bureau for that year ?--A. Yes.

Q. What class was this ship given ?--A. Class 100.

Q. Is that the best, or worst, or medium class ?--A. That is the usual class for a seaworthy vessel.

20 CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR DEFENDANT, UNDER RESERVE OF OBJECTION.

Cross-Examination.

Q. You made no examination of the compass at all ?--A. Oh, no.

AND FURTHER DEPONENT SAITH NOT.

DEPOSITION OF WILLIAM J. VIGARS, A WITNESS PRODUCED ON BEHALF OF THE PLAINTIFF.

(b) William J. Vigers. Examination.

On this twenty-ninth day of May, in the year of Our Lord one thousand nine hundred and thirty-four, personally came and appeared :

WILLIAM J. VIGARS,

of Port Arthur, Ontario, Steamship Inspector, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows :

30 EXAMINED BY Mr. LYNCH-STANTON, OF COUNSEL FOR PLAINTIFF.

Q. I understand, Mr. Vigers, you are a steamship inspector for the Department of Marine of Canada ?--A. Yes.

Q. And you were in the year 1929 ? --A. Yes.

Q. As such, did you have occasion to inspect the s.s. " Thordoc " during that year ?--A. On the 15th April, 1929.

Q. What was the result of your inspection ? What did you do ?

40 --A. I went through the vessel, went over the boilers and went over the machinery, and the boat being off the dock on the 28th November, from Ogdensburg, the hull was in good condition, outside of a few boiler sets put in.

Q. On the 28th November, 1929, she was off the dock ?--A. On the 28th. She had only made the one trip with cargo up the Lakes after she had been on the dock.

In the
Exchequer
Court
(Quebec
Admiralty
District).

No. 7.
Plaintiff's
Evidence.
(b) William
J. Vigers.
Examina-
tion -
continued.

Q. Did you find the ship in good condition?—A. I found her in good condition.

Q. Did you issue a certificate?—A. I did.

Q. Will you identify this as your certificate, which I file as P.4?—A. Yes, endorsed by Mr. Fontaine, "For Coasting." He put it on.

Q. What was your survey for?—A. Inland waters.

Q. Who is Mr. Fontaine?—A. He is a Steamship Inspector here in Montreal.

Q. What is the reason for that endorsement?—A. The vessel to have a certificate for coasting would require copper tanks in the lifeboats. In those 10 lifeboats they were galvanized tanks in Montreal. They took galvanized tanks out of the boats and put in copper ones.

Q. And apart from that the vessel was fit for the coasting trade?—A. Yes.

Q. And Mr. Fontaine was the Government Inspector here?—A. Yes.

Cross-Ex-
amination.

CROSS-EXAMINED BY Mr. MCKENZIE, K.C., OF COUNSEL FOR DEFENDANTS, UNDER RESERVE OF OBJECTION.

Q. Under reserve of my objection: you made no inspection whatever of the compass?—A. No.

AND FURTHER DEPONENT SAITH NOT.

(c) Norman
M. Pater-
son.
Examina-
tion.

DEPOSITION OF NORMAN M. PATERSON, A WITNESS PRODUCED 20
ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four, personally came and appeared

NORMAN M. PATERSON,

of Fort William, Ontario, Grain Dealer, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:

EXAMINED BY Mr. ERROL LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF.

Q. Mr. Paterson, you say you live at Fort William?—A. Yes. 30

Q. What is your position?—A. I am president of Paterson Steamships Limited; president of the N. M. Paterson & Company Grain Company.

Q. Of the Grain Company?—A. Yes.

Q. Were you president of these two companies in 1929, at the date of the last voyage of the "Thordoc"?—A. I was.

Q. The "Thordoc" was owned by Paterson Steamships Limited, was it not?—A. Yes.

Q. What was the working organization of that Company?—A. W. M. Hall was the general manager.

Q. You had a general manager called W. M. Hall?—A. Yes. 40

Q. And what were his duties?—A. Everything in connection with the ordering of the boats, chartering cargoes, hiring crews and the general operation of the Company.

Q. Were you, yourself, at that time a practical shipping man?—A. I was not.

Q. As president of the Company, what were your duties, or activities, restricted to?—A. Mostly executive.

Q. Had you anything to do with the ordering of the ships around?—A. I left that to Mr. Hall.

Q. Did you know anything about the fact that the "Thordoc" on the voyage in question had been ordered from Port Arthur to Fort William?—A. No.

Q. Apart from Mr. Hall, what other officers were in the service of the Company? By the way, was Mr. Hall vice-president as well as general manager?—I have forgotten?—A. I think so.

Q. It does not really matter.

BY Mr. MCKENZIE: Q. And a director?—A. Yes, vice-president and a director.

BY Mr. LANGUEDOC: Q. What has become of Mr. Hall?—A. He is dead.

Q. When did he die?—A. In 1930.

Q. I was asking you whether there were other officials or officers, and who they were?—A. We had a marine superintendent.

Q. Who was that?—A. Captain Montgomery.

Q. Where was he located?—A. At Port Colborne, but he worked around a good deal.

Q. Did you have anybody else? Did you have a secretary and secretary-treasurer?—A. Yes, we had a secretary.

Q. Who was that?—A. E. B. Sutherland.

Q. What were his duties?—A. Mostly in connection with the grain business, but his duties in connection with the boat business were keeping the records of the meetings, secretarial.

Q. Was Mr. Sutherland also the secretary of N. M. Paterson & Company?—A. He was.

Q. Where was he located?—A. At Fort William.

Q. Who were the directors of Paterson's Steamships at that time?—A. D. E. McKay, W. M. Hall, E. B. Sutherland, P. C. Polton and B. E. O'Donnell.

Q. How was the stock interest divided amongst yourself and these other gentlemen?—A. Qualifying shares.

Q. Who had qualifying shares?—A. The directors.

Q. Including yourself?—A. Yes.

Q. Did you have more than qualifying shares?—A. No.

Q. How many shares were issued?—A. 2,220 shares.

Q. Where was the balance of the shares?—A. In N. M. Paterson & Company Limited.

Q. They were owned by N. M. Paterson & Company Limited?—A. Yes.

Q. Had these qualifying shares, of which I understand Mr. Sutherland appeared as owner of one, been paid for?—A. No.

Q. Or were they simply entered in the books as paid for?—A. They were entered in the books as paid for.

Q. Had Mr. Sutherland paid for his?—A. No.

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District).
—
No. 7.
Plaintiff's
Evidence.
(c) Norman
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Examina-
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—
continued.

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Examina-
tion--
continued.

Q. He appeared as the owner of one share?—*A.* Yes.

Q. In the stock register?—*A.* In the stock register.

Q. Where was the certificate for that share?—*A.* It is still in the stock register.

Q. I am not asking where it is. Where was it in November, 1929?—
A. In the stock register.

Q. Is it there still?—*A.* Yes.

Q. Was it endorsed by Mr. Sutherland?—*A.* Yes.

Q. In blank?—*A.* Yes.

Q. Therefore, what was Mr. Sutherland's actual ownership of stock in 10
the Company?—*A.* He had none.

Q. And although I do not want to lead you (and I am sure my learned
friend will not object to this, it is purely a formal statement), the share allotted
to him was for the purpose of qualification only?—*A.* Yes.

Q. That is correct?—*A.* Yes.

Q. You have through general knowledge become aware of the disaster to
the "Thordoc"?—*A.* Yes.

Q. On the 9th November, 1929?—*A.* Yes.

Q. Did you know anything of the arrival of the ship at Port Arthur?—
A. No. 20

Q. Did you know anything of her loading at Port Arthur?—*A.* No.

Q. Did you know anything of the charter that had been entered into with
regard to her?—*A.* Not to my knowledge.

Q. Did you know anything of her proceedings after loading, from Port
Arthur to Fort William?—*A.* No. I would like to add for his Lordship, that
my time has been taken up mostly with the grain business, and the shipping
business was looked after by Mr. Hall. I do not want his Lordship to think
that I turned my back entirely on the shipping business, but the grain business
was more important to me.

Q. You had the shipping line as a useful adjunct to the grain business?— 30
A. Exactly.

Q. The grain business being more active in those days?—*A.* Yes.

Q. And the shipping business too, as a matter of fact?—*A.* Yes.

Q. Did you at any time give instructions to anybody to order this ship
from Port Arthur to Fort William during the month of November, 1929?—

A. I did not.

Q. Now Mr. Paterson, did you know anything about the installation of
the new navigating compass on the "Thordoc"?—*A.* No. That is a detail
I have no knowledge of.

Q. In view of the organization of the Company as you have described it, 40
within what sphere would that come?—*A.* Mr. Hall's and Captain Montgomery's.

Q. Before we leave the question of the trip to Fort William; can you tell
us who would be the person qualified under your organization at that time to
order the ship from Port Arthur to Fort William?—*A.* Mr. Hall was engaged
because he knew the shipping business, and he was the one who would be the
one authorised to do that.

Q. Was there anybody else?—*A.* No.

Q. In Fort William?—*A.* No, there was no one else authorised to do that.

Q. Let us get back to the compass. Do you happen to know personally anything about the installation and the correction and the inspection of this new compass in December, 1929, on the "Thordoc"?—*A.* No.

Q. What you do know is all hearsay?—*A.* Yes.

Q. And you have told us who would have the authority to deal with that?
—*A.* Yes, Captain Montgomery.

Q. Do you happen to know personally the reputation as a compass inspector and adjuster of Captain W. W. Inkster of Collingwood?—*A.* Yes, Sir.

10 *Q.* I understand since this accident, and since the death of Mr. Hall you, yourself, have assumed the duties of president and general manager of the Paterson Steamships Limited?—*A.* Yes.

Mr. McKENZIE: I object to this evidence as regards seaworthiness.

THE COURT RESERVES THE OBJECTION.

BY Mr. LANGUEDOC: *Q.* Have you had occasion since then to familiarise yourself with matters nautical, matters dealing with ships?—*A.* Yes.

Q. Have you attained or acquired either before or since the accident, a knowledge of the reputation of Captain W. W. Inkster in his line of business as a compass adjuster and corrector?

20

SAME OBJECTION.

Q. Do you know what his reputation was before the accident?—*A.* He was the only man on the Upper Lakes I ever heard of of adjusting a compass. His was the only name ever put to me.

HIS LORDSHIP: It was never suggested he was not competent.

BY Mr. LANGUEDOC: *Q.* We will go back for a moment to the directorate of Paterson Steamships Limited at the time of the accident. Who was Mr. Polton?—*A.* Elevator superintendent.

Q. Had he anything to do with the shipping?—*A.* No.

Q. Who was Mr. O'Donnell?—*A.* Bookkeeper.

30 *Q.* And who was Mr. D. E. McKay?—*A.* In the formation of the Company Mr. D. E. McKay was a partner with me.

Q. Was he still a partner or director, or had he an interest at the time of the accident?—*A.* I would just have to refer to the time he left.

BY Mr. McKENZIE: *Q.* Are you referring to the minutes, Mr. Paterson?—*A.* They are taken from the minute book.

Q. I presume you have your minute book here?—*A.* Yes. D. E. McKay was not with me at the time of the accident.

CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR DEFENDANT, UNDER RESERVE OF OBJECTION.

Cross-examination.

40 *Q.* I think you have explained to his Lordship, Mr. Paterson, that you are primarily interested in the grain trade rather than shipping?—*A.* Yes.

Q. So necessarily you had to get other people to carry on for you insofar as shipping was concerned?—*A.* I did.

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No. 7.

Plaintiff's
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Plaintiff's
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Cross-exam-
ination—
continued.

Q. Therefore, Mr. Hall that you speak of, was general manager, vice-president, and also a director, I understand?—A. He was.

Q. Where was he on the 8th November, 1929?—A. I am not sure. He was either in Winnipeg or Fort William, but that is not a satisfactory answer, so I cannot tell you positively.

Q. You do not know?—A. No. He was not in Fort William.

Q. Do you know that positively?—A. I know positively he was not in Fort William.

Q. Was he in Port Arthur?—A. No, he was not. He was *en route*, I think. I would have to look up the records. 10

Q. So you cannot tell where he was?—A. No.

Q. So therefore, you would have to have a substitute to carry on the business at Port Arthur and Fort William, would you not?—A. No, not necessarily. I might do it myself.

Q. Insofar as the actual movements of the ships were concerned, you were not interested in that, were you. I understand you have already told us that?—A. Except when Mr. Hall was absent, and I had to do certain things, but not very often.

Q. But insofar as the movement of the ship was concerned you left that to Mr. Hall, and when Mr. Hall was away you had to have somebody else; you would not be looking after the detail yourself, would you, with regard to the movements of the ships?—A. A good deal of it at times . . . 20

BY THE COURT: Q. Had Mr. Hall any assistants?—A. A marine superintendent, and his Winnipeg office. He had a staff in Winnipeg. Mr. Hall did not have a proper assistant.

BY Mr. McKENZIE: Q. What do you mean by a proper assistant?—A. Well, Mr. Hall did not have a definite appointed assistant.

Q. But he had practically, had he not?—A. Well, he made use of the staff to a certain extent.

Q. When your company ordered this ship to Fort William—what was Mr. Sutherland's position?—A. Secretary and chief clerk. 30

Q. And a director?—A. And a director.

Q. He is the E. B. Sutherland to whom you referred as one of the directors, is he not?—A. He is.

Q. And what is he now? Your general manager?—A. No. I am the general manager.

Q. Assistant general manager?—Q. He is assistant.

Q. How long has he been assistant general manager?—A. After the death of Mr. Hall in 1930 I think it was. The books would show.

Q. How long has Mr. Sutherland been with your Company?—A. About 40 nineteen years.

Q. I was going to say twenty years. In February, two years ago, he said he was with you eighteen years, so I think we can safely say twenty years?—A. Yes.

Q. So Sutherland has, during all that period of twenty years, been associated with you?—A. Yes.

Q. He has really been described as your right-hand man, is that not so?—

Mr. LANGUEDOC : Who described him as the right-hand man ?

Mr. McKENZIE : I am asking the witness.

Mr. LANGUEDOC : Who described him ?

BY Mr. McKENZIE : *Q.* You would accept that as a fair description of Mr. Sutherland?—*A.* What does that imply? What is a right-hand man?

Q. Anything you care to make it, if it means anything in the west. Is he called your right-hand man?

BY THE COURT : *Q.* It is a very simple question?—*A.* Yes, he is.

10 BY Mr. LANGUEDOC : *Q.* A useful employee?—*A.* A useful employee, yes.

BY Mr. McKENZIE : *Q.* And, as a matter of fact, he is really your right-hand man, is that not so?—*A.* Well, I would want that implication to be made more clear than that.

BY THE COURT : *Q.* What did you say yourself he was doing for you?—*A.* Assisting me.

BY Mr. McKENZIE : *Q.* And he is your chief assistant?

BY Mr. LANGUEDOC : *Q.* If you say he is your assistant, let us talk about today.

20 HIS LORDSHIP : He admits it.

Mr. LANGUEDOC : He admits he is not.

BY Mr. McKENZIE : *Q.* And he was in 1929?—*A.* No, he did not go before Mr. Hall. Mr. Hall was chief of the vessel business.

Q. I am speaking as far as being your chief was concerned; there is no doubt about that?—*A.* We will admit that.

Q. I understand your head office (and when I am speaking of your head office I mean the head office of the Paterson Steamships Company) is at Fort William?—*A.* Yes.

30 *Q.* Anybody looking for instructions with regard to the movement of your ships would, of course, communicate with head office?—*A.* Doubtless.

Q. That is right?—*A.* Yes.

Q. And you know in this instance here, in this particular case, that instructions were asked for at your head office?—*A.* We have a private wire from our Fort William office to our Winnipeg office and have had it for twenty years. At our head office, when Mr. Hall was there, he was consulted on everything pertaining to the boats. If the office had been asked for any instructions, they would be passed on to Mr. Hall.

Q. Or to you?—*A.* I would not take the responsibility of ordering a cargo for the boats when Mr. Hall was managing.

40 *Q.* But when Mr. Hall was away?—*A.* Mr. Hall arranged his affairs before he went away, when he was on the train, that the loading was attended to. His instructions were given before he left.

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No. 7.
Plaintiff's
Evidence.
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Cross-exam-
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Plaintiff's
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Cross-exam-
ination—
continued.

BY THE COURT : Q. Instructions given to whom at that time ?—A. To the proper clerks and captains.

BY THE COURT : Q. But name them ? He has somebody when he goes away, that is what we want to know ?—A. Likely.

BY THE COURT : Q. It is a very simple question, " When Mr. Hall was " away who would answer the people " ?—A. Some head in his Winnipeg office.

BY Mr. McKENZIE : Q. At Fort William ?—A. Mr. Sutherland or Mr. O'Donnell in the office, or Mr. McEwen.

Q. It would probably be Mr. Sutherland ?—A. More likely, being chief clerk.

Q. And he was secretary and a director of the Company ?—A. Yes. 10

Q. Insofar as compass adjustment (and this is under reserve of my original objection) you knew nothing about compasses one way or the other ?—A. No.

Q. And it was merely a matter of passing instructions along to somebody else ?—A. Yes.

Q. So I just want to make it clear to his Lordship that insofar as you were personally concerned, you had to have assistants, and these people were Mr. Hall, Mr. Sutherland and Mr. Montgomery ; those were the people you had to do that work, because, as I understand it, you were more closely associated with the actual grain rather than with shipping, that is true, is it not ?—A. Mr. Hall had assistants. It was Mr. Hall who appointed these men. 20

Q. But your secretary clearly would be appointed by the board of directors ?—A. Oh, yes.

Q. And your shareholders would appoint the directors, there is no question about that ? When you said these people had qualifying shares, do you mean they all had an equal number of shares ?—A. One share each.

Q. I understand there were 2,220 shares issued ?—A. Yes.

Q. Who held the balance ?—A. N. M. Paterson & Company Limited.

Q. That is, your Company ?—A. Yes.

Q. So you control this Company indirectly through the ownership of all the stock less qualifying shares of N. M. Paterson Limited, is that right ?—A. Quite so. 30

Q. Have you your minute book with you ?—A. I think it is here.

Q. I refer to the minute book of the Plaintiff Company ?—A. Yes.

Q. Of N. M. Paterson Limited ?—A. Do you wish to have it ?

Q. I would like to have an opportunity of examining the minute book. Will you show me your annual meeting in 1929 prior to November, and where the various directors were appointed ?—A. Can I show you ?

Q. Yes. I see those are loose leaf sheets ?—A. The secretary will find it.

Q. Mr. Sutherland could give me that information ?—A. May be I can find it. 40

Re-exam-
ination.

RE-EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR DEFENDANTS.

Q. It has been suggested to you, and you have been made to say, or, I understand you have been made to admit, that Mr. Sutherland was your so-called right-hand man ; with respect to what and when ?—A. With respect to my grain business.

Q. Mr. Hall was the Company's general manager of the shipping company in 1929?—A. He was.

Q. Was Mr. Hall, or Mr. Sutherland, therefore, your right-hand man with respect to shipping?

Mr. McKENZIE: I object to this question as you are impeaching your own witness.

BY Mr. LANGUEDOC: Q. You were asked, Mr. Paterson, what Mr. Sutherland was to-day. I am asking you what he was in November, 1929. Did you say he was your right-hand man with regard to shipping in 1929?—
10 A. I did not. I made it clear it was in regard to the grain business.

AND FURTHER DEPONENT SAITH NOT.

(This Witness was recalled—see p. 48 .)

DEPOSITION OF ERMIN B. SUTHERLAND, A WITNESS PRODUCED
ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four, personally came and appeared

ERMIN B. SUTHERLAND,

of the City of Fort William, in the Province of Ontario, assistant general manager and secretary of N. M. Paterson & Company Limited, and vice-
20 president and general assistant of the Paterson Steamships Limited, a witness produced and examined on behalf of the Plaintiff, who, being duly sworn, doth depose and say as follows:

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR
PLAINTIFF.

Q. Mr. Sutherland, what is your position today?—A. I am secretary of the N. M. Paterson Company, Limited, vice-president and assistant general manager of the Paterson Steamships.

Q. Of the Plaintiff Company?—A. Yes, of the Paterson Steamships.

Q. What were you in October and November, 1929?—A. Secretary of
30 N. M. Paterson Company Limited.

Q. What positions did you occupy in October and November, 1929?—
A. I was secretary of the N.M. Paterson Company, and a director in the Paterson Steamships, and clerk in the office—chief clerk in the office.

BY Mr. McKENZIE: Q. Secretary and director, and chief clerk in the offices of Paterson Steamships?—A. Secretary in N. M. Paterson Company Limited, and director and chief clerk in the Paterson Steamships.

Q. And secretary?—A. And secretary.

BY Mr. LANGUEDOC: Q. Secretary treasurer?—A. Secretary treasurer.

Q. Do you remember instructions being given to the "Thordoc" to take
40 her lifeboats from Port Arthur to Fort William and leave them at the latter place, and do you know who gave those instructions on the 8th November, 1929?
—A. Yes. I gave the instructions.

In the
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No. 7.
Plaintiff's
Evidence.
(c) Norman
M. Paterson.
Re-exam-
ination—
continued.

(d) Ermin
B. Suther-
land.
Examina-
tion.

In the
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No. 7.
Plaintiff's
Evidence.
(d) Ermin B.
Sutherland.
Examina-
tion—
continued.

Q. You gave the instructions?—A. Yes.

Q. Who was general manager at that time?—A. The late Mr. Hall.

Q. Who had charge of moving the ships around?—A. Mr. Hall.

Q. Had Mr. Hall given you any instructions with regard to moving the
"Thordoc"?—A. No.

Q. Under whose authority did you give those instructions to the Captain
of the "Thordoc"?—A. On my own.

Q. Did you have the right to move ships around?

Mr. McKENZIE: I object to this as being a matter of law as to whether
he had the right to do something. 10

BY Mr. LANGUEDOC: Q. What was your position?—A. Clerk in the
office.

Q. Did you move the ships around?

HIS LORDSHIP: He was secretary.

Mr. McKENZIE: And a director.

Mr. LANGUEDOC: He was a clerk in the office. That is what the witness
said, he was chief clerk, secretary, treasurer and a director of Paterson
Steamships.

Mr. McKENZIE: And the right-hand man.

Mr. LANGUEDOC: Please keep your insinuations to yourself, 20
Mr. McKenzie.

BY Mr. LANGUEDOC: Q. What have you to say about that? Was it
within your province to move ships around?—A. Not unless instructed.

Q. By whom?—A. By Mr. Hall or Mr. Paterson.

BY THE COURT: Q. By Mr. Hall or by Mr. Paterson?—A. Yes.

BY Mr. LANGUEDOC: Q. Why, in this instance, did you tell the Captain,
when he telephoned you, to finish his loading and leave the lifeboats at Fort
William?—A. On account of the cargo; the vessel was light, and the cargo
at Port Arthur was under heavy demurrage.

Q. Demurrage, where?—A. At Port Arthur. 30

Q. In what?—A. In box cars—in railway cars.

Q. Was the Railway charging the consignee for the use of those cars?—
A. Daily.

SAME OBJECTION.

OBJECTION RESERVED.

Q. How much money had accumulated, how much in charges?—A. \$326.

BY Mr. McKENZIE: Q. Were you paying that?—A. No.

Q. That was no concern of yours?—A. No.

BY Mr. LANGUEDOC: Q. But it was the concern of the consignees?— 40
A. Yes.

Q. Who were asking you all the time to get the cars unloaded and loaded
into the ship?—A. Naturally.

BY Mr. McKENZIE : Q. You do not know what the arrangement was, do you ?—A. I do not just understand you.

BY Mr. LANGUEDOC : Q. Had Mr. Bailey ever spoken to you ?—A. Surely.

Q. Tell Mr. McKenzie. He wants to know.—A. They always press us to get our boats to their dock as soon as possible, to avoid demurrage. That is natural.

BY Mr. McKENZIE : Q. And to sail as quickly as possible ?—A. Yes.

Q. To complete the voyage ?—A. Yes.

10 BY Mr. LANGUEDOC : Q. At the time when you told the Captain of the "Thordoc" to take the ship to Fort William, do you know where Mr. Hall was ?—A. Yes.

Q. Where was he ?—A. He was in Winnipeg.

Q. Was there any difficulty about communicating with him in Winnipeg ?—

A. No, none whatever.

Q. Had you a private wire to Winnipeg between your two offices ?—A. Yes.

Q. Did you use it constantly ?—A. All the time.

Q. Could you easily have got in touch with him ?—A. I could have.

Q. You did not do so ?—A. I did not.

20 Mr. LANGUEDOC : We tender the certificate of register of the "Thordoc," previously, the "J. A. McKee." I do not suppose there will be any objection to putting in a photostat.

Mr. McKENZIE : No.

BY Mr. LANGUEDOC : Q. Will you produce as Exhibit P.5 a certificate of registry of the "Thordoc" ?—A. Yes.

Q. Is that correct ?—A. Yes.

Q. Will you also produce as exhibit P.6 a statutory declaration of ownership of the "Thordoc" from the Custom House at Fort William, Collector of Customs and Excise ?—A. I do.

30 Q. Will you also produce as exhibit P.7 a certificate from the Collector of National Revenue and Excise at Fort William, showing there was no managing owner or ship's husband registered on behalf of the "Thordoc," that the registration is in the name of the Paterson Steamships Limited ?

Mr. McKENZIE : Q. You do not suggest for a moment that there is any other procedure that you followed than the procedure you followed in this instance ? I notice this is dated Fort William, May 23rd, 1934, just the other day ?—A. Yes.

Q. You never at any time have written in the ship's husband ?—A. No.

40 Mr. LANGUEDOC : Have you any objection to the production of this document, Mr. McKenzie ?

Mr. McKENZIE : Yes, I have.

Mr. LANGUEDOC : I tender it. It is a certificate from the Collector of Customs to the effect that there is no registration or declaration of the ship's husband, or managing owner, in respect of the "Thordoc" at her Port of entry.

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No. 7.
Plaintiff's
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(d) Ermin B.
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Sutherland.
Examina-
tion—
continued.

BY Mr. McKENZIE : Q. It is dated May 23rd, 1934.

HIS LORDSHIP : I will reserve the objection.

A. Yes.

BY Mr. LANGUEDOC : Q. Would any complaints about the movements of the ships, or anything of that kind, come to your knowledge, or come to you at the office ?—A. Yes, sometimes.

Q. Did you ever have any complaints about the adjustment of the compass of the "Thordoc" subsequent to September, 1929 ?—

SAME OBJECTION.

SAME RESERVE.

10

A. No, nothing whatever—no, I had not.

Q. Or did the office, to your knowledge ?—A. No, not to my knowledge.

CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR DEFENDANT.

Cross-examination.

CROSS-EXAMINED, UNDER RESERVE OF OBJECTIONS.

Q. There is no doubt, Mr. Sutherland, that your shipping Company is run from the head office at Fort William ?—A. No.

Q. And so then, that was the head office ?—A. The head office of the Company, yes.

Q. In 1929 ?—A. In 1929.

20

Q. There is no question about that ?—A. I answered that that was the head office.

Q. You knew for some considerable time before the "Thordoc" arrived at Port Arthur that she had these lifeboats on to go to Fort William, did you not ?—A. I did.

Q. You knew that ?—A. Yes.

Q. And it was your intention to send her over there, to Fort William ?—A. Yes.

BY Mr. LANGUEDOC : Q. Your intention, or the Company's intention ?—A. The Company's intention.

30

Q. You are being misled as far as possible.

HIS LORDSHIP : Let the witness answer. He is an officer.

BY Mr. McKENZIE : Q. So Mr. Sutherland, as I understand it, you had picked some lifeboats up at the Sault, had you not on the upbound voyage ; the "Thordoc" picked them up at the Sault, and the "Thordoc" on your upbound voyage at that time was destined for Port Arthur ?—A. Yes.

Q. You had a full cargo at Port Arthur, had you not ?—A. Yes.

Q. And that as far as the cargo owners were concerned, there was no occasion to go to Fort William ?—A. No.

Q. There was no occasion for the ship to go to Fort William ?—A. As far as cargo was concerned.

BY Mr. LANGUEDOC : Q. What about demurrage ?

Mr. McKENZIE : I object.

BY Mr. McKENZIE : Q. You knew it was a full cargo ? That is what I understood you to say ?—A. A full cargo for the “ Thordoc.”

Q. Destined from Port Arthur to Montreal ?—A. Yes.

Q. And, as a matter of fact, the ship went up the Kaministiquia River up as far as your elevator at Fort William ?—A. Yes.

Q. That is true ?—A. Yes.

Q. And after it had made that diversion, came down the river and ultimately proceeded on the voyage to Montreal ?—A. Yes.

Q. I understand you to describe yourself as the vice-president of the
10 Company Plaintiff ?—A. Now.

Q. And you are a director ?—A. Yes.

Q. And you have been associated with the Plaintiff Company for some twenty years ?—A. With the Grain Company, not with the Steamboat Company.

Q. Associated with Mr. Paterson ?—A. With Mr. Paterson, yes, for approximately twenty years.

BY THE COURT : Q. Since how long have you been with the Paterson Steamships ?—A. 1926.

BY Mr. McKENZIE : Q. When was the Company organized ?—A. On
20 March 3rd I think, 1926, was the first annual meeting, or the first meeting.

Q. So you have been with the Company since its inception ?—A. Yes.

Q. Since it was organized you have been with the Company ?—A. Yes.

Q. And since it was organized you were a director and secretary-treasurer ?
—A. Yes.

Q. That is true ?—A. Yes.

Q. Have you held any other offices in the Plaintiff Company since then ?

- A. I was appointed vice-president and assistant general manager in 1931.

Q. But ever since the Company has been organized you were a director ?
—A. Yes.

30 Q. And secretary ? —A. Yes.

Q. And since then you have been elected to the position of vice-president ?
—A. Yes, since 1931.

Q. These other people in the office you referred to, other than Hall, were not officers of the Company ?—A. Mr. O'Donnell and Mr. Polton were directors, and I believe are directors now.

Q. But not officers ?—A. Mr. O'Donnell is now secretary.

Q. But he was not in 1929 ?—A. No.

Q. So that as far as the officers of the Company are concerned, other than
Mr. Paterson and Mr. Hall, you were the only other officer ?—A. Yes.

40 Q. That is true ?—A. Yes.

Q. How long had you known that these lifeboats were going to Fort William ?
You picked them up at the Sault, Michigan ?—A. I don't just get your question.

Q. Approximately when was it the “ Thordoc ” picked up the lifeboats at the Sault, Michigan, destined not for Port Arthur, but Fort William, insofar as the lifeboats were concerned when the ship “ Thordoc ” was on a voyage to Port Arthur, how long had you known that ?—A. They were picked up on November 5th I think. I am not sure as to the date.

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No. 7.
Plaintiff's
Evidence.
(d) Erin B.
Sutherland.
Cross-exam-
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continued.

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—
No. 7.
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Cross-exam-
ination—
continued.

Q. On November 5th, 1929?—*A.* I am not positive of the date.

Q. About that date?—*A.* Yes.

Q. You must have given instructions to pick those up, did you not?

—*A.* Instructions were given the boat on the way to pick them up.

Q. Your Company would give the instructions to the master to pick those boats up?—*A.* He would be instructed.

Q. He would be instructed from the head office at Fort William?—*A.* Not necessarily from Fort William.

Q. Port Arthur, rather?—*A.* No. It may be from Mr. Hall in Winnipeg.

Q. Any way, he received instructions from the proper authority to pick up those boats, otherwise he would not have done it, is that the answer?—*A.* No, he would not have done it if he had not been told. 10

BY THE COURT : *Q.* Do you know by whom he was told to take those lifeboats? Was it not you who gave the order?—*A.* I was the one who ordered the boat to Fort William.

BY THE COURT : *Q.* But from the Sault. I suppose somebody wired. Who did it? I suppose there are books in your Company. Would it not be entered in your books if you sent a telegram?—*A.* Yes.

BY THE COURT : *Q.* Have you a copy of your telegram?—*A.* I don't know whether we have it back that far or not. 20

BY THE COURT : *Q.* You cannot say that you sent the order to the Master at the Sault to take those lifeboats?—*A.* To bring the lifeboats to Fort William?

BY THE COURT : *Q.* Yes, you do not know who gave the order?—*A.* He would be instructed by Mr. Hall. He would give the orders to the Captain. Mr. Hall would most likely give the orders to the Captain to bring the boat to Fort William.

BY THE COURT : *Q.* Very likely, but do you know who did it? That is the point. It is a very simple question, do you know or do you not know?—*A.* I would say that Mr. Hall did it. 30

BY THE COURT : *Q.* Do you know it?—*A.* No.

BY THE COURT : *Q.* Mr. Hall must have done it, is that your answer? Have you any record in your Company showing who ordered the Master to take those lifeboats on board at the Sault? Have you any record?—*A.* No.

BY THE COURT : *Q.* You have none?—*A.* No.

BY Mr. McKENZIE : *Q.* But you do know other than by record that the ship was ordered to pick up the lifeboats at the Sault?—*A.* Yes.

Q. About the 5th November, 1929?—*A.* Yes.

Q. As a matter of fact, three days before she actually did take the lifeboats from Port Arthur to Fort William?—*A.* Yes. 40

Q. That would be a matter which would properly come within the jurisdiction of Mr. Hall, I suppose?—*A.* Yes.

Q. You would expect that that was the instruction he would give?—*A.* That was his duty.

Q. You would expect that, would you not?—A. Yes.

Q. Insofar as you were concerned, after ordering the ship over from Port Arthur to Fort William you were merely doing something which had already been decided upon?—A. No. The boat was to go to Fort William first.

Q. No, it had to go to Port Arthur.

Mr. LANGUEDOC : Do not contradict the witness because that is not fair to begin with. There was nothing whatever to prevent the "Thordoc" from going to Fort William, dropping the boats, then going back to Port Arthur to load. It was only a difference of three hours. It does not make any difference from point of time. She had the right to do that, and if she did not do it, it was simply by way of a convenience to the consignee as we have already explained. Now my learned friend says she had to go to Port Arthur. She had not to go to Port Arthur.

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Mr. McKENZIE : Her charter was for Port Arthur.

Mr. LANGUEDOC : I beg your pardon, that is in total contradiction of the fact, and I submit it is only fair that I should put this on the record ; the charter was from Lakehead.

BY Mr. McKENZIE : Q. Who gave the instructions to go to Port Arthur ?
—A. I did.

20 Q. You gave the instructions to go to Port Arthur?—A. I gave the instructions to go to Port Arthur.

Q. So you knew then for some considerable time that the "Thordoc" was coming from the Sault and going up there?—A. Going to Fort William, yes. That was the instruction.

Q. Let us understand each other, because you have just told me you had given her instructions to go to Port Arthur?—A. I ordered a diversion at the Sault.

BY Mr. LANGUEDOC : Q. When?—A. Before the vessel arrived at the Sault.

30 BY Mr. McKENZIE : Q. I understand you say you diverted her when she was at the Sault?—A. Prior to her arrival at the Sault.

Q. Going up?—A. Yes.

BY THE COURT : Q. Yes, but who diverted her?—A. I diverted her. I did not order it the first time. The first time Mr. Hall ordered that vessel to bring the boats to Fort William, and I took it upon myself when the boat was delayed to have the vessel go into Port Arthur first.

BY THE COURT : Q. Where was Hall at the time?—A. In Winnipeg.

BY Mr. McKENZIE : Q. He was away all that time?—A. He was in Winnipeg.

40 Q. But you could have got in touch with him immediately?—A. I could have, yes.

Q. So I am right then, that you were doing something which he would have done?—A. He would have issued instructions no doubt to that effect.

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ination—
continued.

Q. Would you let me see your minute books, and show me that you are a duly qualified officer of this Company? Just tell me where you were appointed, and where the other officers of the Company were appointed in 1929? You are reading from March 26th; the officers were appointed in 1929. I just want to see if you were duly appointed a director of the Company?—A. That was the annual meeting in 1929.

Q. That was March, 1929. Where does it say you were elected a director?
—A. It does not mention any election of directors.

Q. "Such present officers were re-elected for the coming year"?—A. Yes.

Q. At the annual meeting of shareholders you elected your directors; the directors elected the officers. Tell me where that was done here? Is it not that you just covered it by saying, "The present officers were re-elected for the coming year"?—A. Yes.

Q. The office which you held was the same office you held since the inception of the Company?—A. Secretary treasurer.

Q. As a matter of fact, you were one of the incorporators, were you not?—A. Yes, I was a director.

Q. One of the incorporators of the Company?—A. Yes.

Q. So without the issue of any stock you become qualified—"And whereas Norman McLeod Paterson and this to include Ermin Burton Sutherland all of the City of Fort William in the Province of Ontario have made application for a charter, etc."?—A. Yes.

Q. So in addition to being an officer of the Company, you were one of the original incorporators?—A. Yes.

Q. And this charter is dated the 10th day of February, 1926?—A. Yes.

HIS LORDSHIP: Is it filed?

Mr. McKENZIE: Are you filing it?

Mr. LYNCH-STAUTON: No.

BY Mr. McKENZIE: Q. And it is a Dominion Charter?—A. A Dominion Charter.

Q. And incorporated as a private Company?—A. Yes.

Q. With a capital of how much?—A. Two million dollars.

Q. Two million dollars divided into twenty thousand shares?—A. Yes.

Q. Under reserve of my objection so far as privity is concerned, you spoke of the compass. You do not know anything about the compass?—A. No.

AND FURTHER DEPONENT SAITH NOT.

(This witness was recalled, see p. 43.)

DEPOSITION OF JAMES D. MONTGOMERY, A WITNESS PRODUCED
ON BEHALF OF PLAINTIFF.

No. 7.
Plaintiff's
Evidence.
(e) James
D. Mont-
gomery.
Examina-
tion.

On this twenty-ninth day of May, in the year of Our Lord, one thousand four hundred and thirty-four personally came and appeared

JAMES D. MONTGOMERY,

of the City of Montreal, Master Mariner, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR
PLAINTIFF.

Q. What do you know about the installation of the new compass on the "Thordoc" in September, 1929?

Mr. McKENZIE: I renew my objection.

SAME RESERVE.

BY Mr. LANGUEDOC: Q. To begin with, what was your position then?—

A. Marine superintendent.

Q. Of what?—A. Of Paterson Steamships.

10 Q. What positions had you occupied previous to that?—A. I was a Master Mariner.

Q. For how long?—A. Since 1912.

Q. Duly certificated?—A. Yes.

Q. What class of certificate?—A. Master inland waters.

Q. How many commands did you have?—A. Four.

Q. You were Marine Superintendent then at that time for the Paterson Steamship Company, were you not?—A. Yes.

Q. Were you thoroughly familiar with shipping on the Great Lakes?—

A. I had been at it all my life. I had never done anything else.

20 Q. You considered yourself a properly qualified man to occupy that position?—A. Yes.

Q. Were you familiar with the persons, or at least, did you know what persons were best qualified to adjust and correct ships' compasses for use in the navigation of those waters?—A. Yes, Sir.

Q. Did you at one time during the month of September, 1929, or thereabouts, make up your mind as Marine Superintendent of the Company Plaintiff, that the "Thordoc" required a new navigating compass?—A. Yes, Sir.

Q. Did you accordingly procure one?—A. Yes, Sir.

Q. And did you have it installed on board the "Thordoc"?—A. Yes.

30 Q. What make of compass was it?—A. Ritchie.

Q. What make was the previous one?—A. A Ritchie.

Q. What was the difference between the two?—A. One had been in use, I guess, for possibly fifteen or twenty years before that on the boat.

Q. And the other?—A. The other was brand new.

Q. Was that the only difference between them? They were the same make, the same machinery, same style?—A. Yes.

Q. What did you then do, having purchased or procured this new Ritchie compass for the "Thordoc"? What did you proceed to do next?—A. I engaged Captain Inkster to install it and put it on the boat.

40 Q. Why did you engage Captain Inkster?—A. He was engaged by our Company for the season.

Q. Did you know what his reputation was?—A. For twenty years before that I did.

Q. For twenty years before that you did, and what was it?—A. The very best.

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tion—
continued.

Q. As a matter of fact, what part of the general business of compass adjusting did he have on the inland waters above, let us say, Port Colborne?

—A. I would say he had over 50 per cent. of the tonnage.

Q. How many well-known adjusters were there at that time in practice on the Great Lakes?—A. Two on the Upper Lakes.

Q. Who were they?—A. Captain Frewer of Toronto, and Captain Inkster.

Q. What proportion would you say those two men divided of the total business of compass adjusting?—A. Well, Captain Frewer was C.S.L.

Q. That is the Canadian Steamship Lines?—A. Canadian Steamship Lines, 10
and Captain Inkster did the C.P.R., Algoma Central, Patersons and Playfairs
and part of Mathewson.

Q. What proportion would that account for? You have told us 50 per cent.
—50 per cent. to Inkster himself?—A. Yes.

Q. How long had he been compass adjusting for the Paterson Steamship
Company?—A. Since 1927, since I went there.

Q. That would be since the organisation of the Company?—A. Yes.

Q. Had you any reason to complain of his work?—A. No.

Q. Had you any complaints from the Company?—A. No. Possibly some
one would ask to have him sent back again if they had a load of rails, something 20
like that, they would ask for Captain Inkster to be sent back to them again.

Q. Had you availed yourself of Captain Inkster's services when you yourself
were afloat?—A. Yes.

Q. And you found him satisfactory?—A. Yes.

Q. Therefore, you had a personal knowledge of him?—A. Yes.

Q. Accordingly, you instructed Captain Inkster to install and adjust the
compass on the "Thordoc," is that it?—A. Yes.

Q. Do you know whether your instructions were carried out?—A. Well,
I saw him go aboard with the compass.

Q. Did you ever have any complaint subsequent to that, between that and 30
the casualty involved in this case about the condition of the compass?—A. No.

Q. So far as you knew then, the compass was all right?—A. Yes, Sir.

Q. You were aware that the "Thordoc" was in inland service?—A. Yes,
Sir.

Q. And remained so from the date on which the compass was installed until
the accident took place in this case?—A. Yes, Sir.

Q. In other respects what do you know about the seaworthiness of the
"Thordoc" at that time?—

SAME OBJECTION.

SAME RESERVE.

40

A. I would say she was in first-class shape.

Q. Did you yourself inspect the "Thordoc" in October, 1929?—A. Yes.

Q. Will you take communication of the inspection report already produced
in the previous case, and now filed as exhibit P.8, and state whether that is your
inspection report to the Company?—A. Yes.

Q. As Marine Superintendent?—A. Yes.

Q. What does that show briefly?—A. It is a report of the general condition of the boat.

Q. What was the vessel's condition at that time?—A. In first-class shape.

Q. Would you say she was seaworthy?—A. Yes, Sir.

Q. Had you inspected her from end to end?—A. Yes.

Q. Is the report which is filed as exhibit P.8 a truthful report?—A. Yes.

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gomery.
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ination.

CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR
DEFENDANT, UNDER RESERVE OF OBJECTIONS.

10 Q. Under reserve of my objection : speaking of this report which you have filed, Captain, are you sure this date is correct?—A. Absolutely.

Q. And did you write, "October 25th 1929"?—A. Whatever date is on there I wrote it. That is my report.

Q. There is nothing else on this to identify it except "1929"?—A. Well, that is all. I could not tell you. The date is on there. That is all I know about it.

Q. How do you know this document is 1929? Is it because 1929 is on there?—A. Yes, absolutely.

Q. Show me where you see 1929 on there?—A. There is no 1929 on it. There is October.

20 Q. It might have been in October?—A. That was my first year there 1929.

Q. You say that Inkster the compass adjuster was employed by the Company on an annual basis?—A. No, he was employed by the Company to adjust the compass at so much per boat.

Q. For the entire fleet?—A. For the entire fleet.

Q. He was on your pay roll?—A. No, he got paid by the number of vessels he adjusted.

Q. But for the entire fleet?—A. Yes, Sir.

Q. And that is on an annual basis, is it not?—A. Yes.

30 Q. As a matter of fact, you got instructions, did you not, from head office to purchase the compass in question?—A. No, I did not.

Q. You did not?—A. I did not.

Q. Well, I am reading from Mr. Sutherland's evidence in the original case. He said, "We instructed Captain Montgomery to purchase the compass for "the 'Thordoc.'"

Mr. LANGUEDOC : I object to this question.

BY Mr. McKENZIE : Q. Did you get any instructions from head office ?

A. In what way ?

Q. With reference to the purchase of this compass?—A. No, not to my knowledge I did not.

40 Q. Well now, let us presume that Mr. Sutherland said that he instructed you to purchase the compass. Would you deny that? That would be the usual thing, would it not?—A. Not necessarily.

Q. Head office would instruct?—A. Not necessarily. I was under Mr. Hall.

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gomery.
Cross-exam-
ination.—
continued.

Q. But Mr. Hall was head office?—A. I was in Port Colborne. I was not in Fort William. I got my instructions from Mr. Hall.

Q. That is head office, is it not?—A. Possibly.

Q. That is exactly what I mean. You personally did not know whether this compass had been adjusted or not, did you?—A. When?

Q. In 1929?—A. Mr. Inkster was around all the time.

Q. Did you see Mr. Inkster adjust the compass?—A. No.

Q. So you do not know whether it was adjusted or not?—A. I know he went aboard with the compass to adjust it and install it.

Q. Insofar as adjusting was concerned you did not know?—A. I did not know. 10

Q. This was the first time you actually got a report the compass was adjusted?—A. I do not think I got one yet.

Q. Don't you get a certificate from Mr. Inkster that the compass has been adjusted?—A. Not necessarily.

Q. Would you be surprised to know that he said it was necessary to give a certificate?

Mr. LANGUEDOC: Who said it was necessary? Inkster never said anything of the kind, and I challenge my learned friend to find anywhere that he said it was necessary to give a certificate. It is not the certificate that made the adjustment? 20

Mr. McKENZIE: Your Lordship made a note of it. As a matter of fact, in your Lordship's note, your Lordship said, "Inkster admits that it is customary to give a certificate to the owners, of the adjustment of a compass, that the owners have to have authority from him."

At page 74 of Inkster's testimony, the question was put to him:

"Q. When you have adjusted a compass is it usual for you to give a certificate?—A. I always do, when I get home. I keep a copy of those things, and I always write the office in connection with each ship I have been aboard of, when I get home and get through. 30

"Q. Is that certificate some authority from you, or some record from you, that you have completed the job?—A. Yes. They have to have authority from me.

"Q. In this instance they were operating the vessel up and down the Lake from September 25th to December 1st—which was after the casualty—without any certificate from you?—A. I take it there would be a lot more certificates possibly written on that date.

"Q. From whom?—A. From me. Boats I had been aboard of and inspected."

BY Mr. McKENZIE: Q. The date of this certificate was December 1st, 1929, so I ask you whether or not you had any record of this compass having been adjusted?—A. As far as that goes, what is the certificate? 40

Q. The certificate of inspection, that the compass had been inspected?—A. There is no such thing as a certificate. The only thing he sends to head office is his bill.

BY THE COURT: Q. You are not at the head office?—A. No. I was at Port Colborne.

BY Mr. McKENZIE : Q. So that so far as you personally are concerned, you did not know then whether the compass had been adjusted or not?—A. No. I was not on board.

AND FURTHER DEPONENT SAITH NOT.

DEPOSITION OF JAMES DEMILL, A WITNESS PRODUCED ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four, personally came and appeared

JAMES DEMILL

10 of the City of Picton, in the Province of Ontario, Sailor, aged 32 years, a witness produced and examined on behalf of the Plaintiff, who being duly sworn doth depose and say as follows :

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF.

Q. I believe you were aboard the " Thordoc " when she stranded on Point Porphyry on November 9th, 1929, were you not?—A. Yes.

Q. The ship had come down the Kaministiquia River having left Fort William, and had passed out to the Welcome Island, had she not?—A. Yes.

Q. By Port Arthur?—A. Yes.

20 Q. And from there laid a course down to Thunder Cape, is that right?—A. Yes, Sir.

Q. Will you produce as Exhibit P.9, Chart No. 102 of the Canadian Government, and show the course approximately laid from A to B, as laid, and A to C as apparently followed from opposite to, and south of Trowbridge Island to the place of the disaster?—A. Yes.

Q. Where were you when the ship got to Trowbridge Island, and what were you doing?—A. I was wheeling.

Q. What time did you take the wheel?—A. About twenty-minutes after twelve.

30 Q. What time had the ship got to Trowbridge Island?—A. I could not say the exact time.

Q. Well then, you must have taken the wheel very much earlier than that, long before she got to Trowbridge Island?—A. Yes.

Q. Where did you take it?—A. Just outside the piers.

Q. Those are further in, are they?—A. Yes.

Q. What happened when you got abreast of Trowbridge and south of Trowbridge : did the Captain lay down the course there?—A. Yes, Sir.

Q. And do you remember what the course was?—A. Either 81 to 91. I would not be sure which.

40 Q. East?—A. East.

Q. And what instructions were you given by the Captain?—A. To keep her at 81.

Q. Who was in the wheelhouse at the time?—A. The Captain and the Second Mate.

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Q. What was the second mate's name?—A. Arthur Fowlow.

Q. Was there anybody else there?—A. Not just then.

Q. Was there anybody else in and out?—A. Yes, the watchman.

Q. What was his name?—A. Joseph Prowsey.

Q. What happened after the course was laid down and given to you?

What became of the Captain?—A. The Captain lay down on the settee.

Q. What happened to him?—A. He went to sleep, I guess. He laid down there.

Q. Do you know whether he went to sleep or not?—A. No, I could not say.

Q. You were looking straight ahead?—A. Yes.

Q. Standing at the wheel?—A. Yes.

Q. And the wheel is in the centre of the wheelhouse, is it?—A. Yes.

Q. And you could see the light on Point Porphyry ahead of you?—
A. Well, yes, I could see it over on the port side.

Q. How was it bearing?—A. About a point or a couple of points over the port bow.

Q. Where was the second mate standing?—A. He was standing in the port window.

Q. And how long did he remain there?—A. Till she struck.

Q. Did he have occasion to leave the wheelhouse?—A. No, he never went
out of the wheelhouse. He just walked back to the chart desk and then back
to the window again.

Q. The chart desk is in the wheelhouse?—A. Yes.

Q. It was in the chart desk the course was laid out by the Captain?—
A. Yes.

Q. Did he lay it out with the second mate or by himself?—A. I don't
know whether he did.

Q. How long did you remain at the wheel that way with the Point Porphyry
light bearing a point or two over your port bow? An hour or an hour and a
half or what?—A. How long could I see the light do you mean?

Q. How long did you keep wheeling there until you were given a warning
or something?—A. Until the watchman in the window said there was white
water.

Q. How long would that be?—A. From the time I took the wheel?

Q. Yes.—A. That was a couple of hours.

Q. Had there been any remark made, or any conversation between yourself
and the second mate, or the watchman or anybody else in the wheelhouse,
about the Porphyry Light?—A. Not that I can recollect.

Q. And the first thing you knew the watchman called out and said there
was white water?—A. Yes.

Q. And could you then see white water ahead?—A. No.

Q. What happened then?—A. The second mate said "port," and I put
her hard over port.

Q. And what effect did that have on the ship's head?—A. She started
to swing.

Q. Was any movement made by the ship's engines at the same time?—
A. I think she was put full astern.

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40

Q. And did you accordingly use the Chadburn to swing over full astern ?—
A. Yes.

Q. As quickly as you could, I have no doubt ?—A. Yes.

Q. When you said the ship's head started to swing, did it start to go to port or to starboard ?—A. We have it changed now.

Q. I am speaking of those days.—A. Yes.

Q. She swung to port ?—A. Yes.

Q. What was the next thing that happened ? Did the Captain come to life then ? Was there a certain amount of noise ?—A. Yes, she hit.

10 Q. She struck ? How long after you had put the helm hard over and called for full astern ?—A. A minute, I guess ; maybe not that.

Q. To the best of your recollection about a minute ?—A. Yes.

Q. Would it be more than a minute or less ?—A. Well, I could not say.

Q. Did she strike hard ?—A. Yes, she hit pretty hard.

Q. What happened to the Captain ?—A. He got up. It woke him up. He got up anyway.

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AND IT NOW BEING TWELVE-THIRTY P.M. THE FURTHER EXAMINATION OF THIS WITNESS WAS ADJOURNED UNTIL TWO P.M.

AND AT TWO P.M. PERSONALLY CAME AND REAPPEARED THE
20 SAID WITNESS,

JAMES DEMILL,

AND HIS EXAMINATION IN CHIEF WAS CONTINUED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF AS FOLLOWS :

BY Mr. LANGUEDOC : Q. Do you know what happened after the ship struck ?—A. The Captain put the engines ahead.

Q. What was the result ?— Did she remain fast ashore ?—A. Yes.

Q. And ultimately the crew left within an hour or so afterwards ?—A. Yes.

Q. The officers and crew left and went ashore ?—A. Yes.

Q. And she became a total wreck ?—A. Yes.

30 CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL
FOR DEFENDANT.

Cross-exam-
ination.

Q. I suppose so far as you were concerned, you just followed instructions ?
—A. Yes, Sir.

Q. And when you were given a course of north or east you attempted to follow that ?—A. Yes, Sir.

Q. And that is the course you followed ?—A. Yes, Sir.

Q. Right through ?—A. Yes.

Q. You saw this light right ahead of you. As a matter of fact, the collision was practically a collision with the lighthouse, was it not almost ? You almost
40 hit the lighthouse, did you not ?—A. Well, it was on our port side.

Q. But it is fair to say it was pretty nearly a collision with the lighthouse ?
—A. Yes, pretty close.

Q. I suppose you do not know Mr. Paterson ? You have never had anything to do with him ?—A. No.

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(f) James
Demill.
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ination—
continued.

Q. Or any of the other officers of the Company?—A. No, Sir.
Q. You would not have anything to do with them at all?—A. No.
Q. This was the first time you had ever been on that course?—A. Yes, Sir.
Q. You had not had very much experience as a wheelsman?—A. No. That was my first season.

Q. That is the first time you ever went on that particular route?—A. Yes.

Q. On that course?—A. Yes.

Q. And that was the first year you had been with the Paterson Steamships?

—A. Yes.

Q. You had never had any communication with the officers of the Company at all?—A. No.

AND FURTHER DEPONENT SAITH NOT.

(g) Angus
H. Peterson
Examina-
tion.

DEPOSITION OF ANGUS H. PETERSON, A WITNESS PRODUCED ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, One thousand nine hundred and thirty-four, personally came and appeared:

ANGUS H. PETERSON,

of the City of Toronto, in the Province of Ontario, Master Mariner, aged 40 years, a witness produced on behalf of the Plaintiff who being duly sworn doth depose and say as follows:—

20

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF.

Q. Captain Peterson, you were in command of the "Thordoc" when the casualty we are dealing with occurred?—A. Yes.

Q. On the 9th November, 1929, in the morning?—A. Yes, sir.

Q. Your compass had previously been adjusted by adjuster Inkster?—A. Yes.

Q. On the 25th September previously?—A. Yes.

Q. It was a new compass which was being installed?—A. Yes.

Q. You have heard the evidence of Demill the wheelsman?—A. Yes, Sir.

Q. As I understand it, to bring the voyage down to the point that really becomes interesting, you laid a course to abreast of Trowbridge?—A. Yes.

Q. And would you tell the Court what course you laid?—A. The corrected course as I remember was north 81 east.

Q. Which would have brought you, according to that course, off east of Point Porphyry?—A. Yes.

Q. By about what distance?—A. I figure a mile.

Q. Did you give instructions to anybody before you laid down?—A. I told the officer on watch that when we got pretty nearly to the Light to give me a call.

Q. Who was the officer on watch?—A. The second mate Fowlow.

Q. Were you familiar with the currents or local attraction between Porphyry and Trowbridge?—A. No, only by hearsay, that was all.

Q. In the end, as we know, the ship piled up on Porphyry just at the lighthouse?—A. Yes.

40

Q. That light was visible for a good distance?—A. Yes.

Q. It was not a cloudy or foggy night?—A. No.

Q. You know nothing, I presume, at all, from the moment you fell asleep shortly after passing Trowbridge until you were awakened by the shock of the stranding?—A. No.

Q. If there was local attraction or currents setting towards the west, at or near the point where the "Thordoc" stranded, I take it it would not be a matter of compass but a matter of direction that would set the ship to shore?—A. Yes, Sir.

10 Q. Or current as the case might be?—A. Yes, Sir.

Mr. McKENZIE: I renew my objection as to the cause of the casualty as being *chose jugee*.

BY Mr. LANGUEDOC: Q. From the date of the inspection of your compass, September 25th by the compass inspector, or adjuster, Inkster, had you sent in any complaint to head office or to any of your superiors about that?—A. No.

Q. When you awoke, the ship was ashore, I believe?—A. She had not stopped, but she was on the bottom.

Q. Pounding?—A. She was going over.

20 Q. Had she still way on her, was she going forward?—A. She was going forward some.

Q. And what instructions did you give then?—A. At that time the engines were full astern, and she was still swinging against the wheel, that is, the engine, and I put her full ahead in hopes she would keep on swinging and swing off the shoal.

Q. Was she swinging to port or to starboard when you awoke?—A. She was swinging to port.

Q. And her helm was hard aport?—A. With the orders that were in force then with port and starboard.

30 Q. I am talking of that?—A. In those days the wheel was hard aport, yes.

Q. I believe you gave the contrary order when you woke up, did you?—A. I did.

Q. To put the helm hard astarboard?—A. To put the helm hard astarboard and full ahead.

Q. And full ahead where the engine had been full astern?—A. Full ahead where the engine had been full astern.

Q. And she never got off the strand?—A. She went on harder.

Q. And some time later you abandoned the ship?—A. Yes, Sir.

40 CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR DEFENDANT, UNDER RESERVE OF OBJECTIONS. Cross-examination.

Q. I suppose you know, Captain, there has been a Judgment to the effect that you had a faulty compass?—A. I heard that, yes.

Q. And it was a faulty compass so far as the cause of the casualty is concerned?—A. I understand that was the Judgment that was given.

Q. And that is the reason you would have given as the only thing that would account for the casualty?—A. Well now, at the time, but since then I have

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Cross-exam-
ination—
continued.

talked with different men who have had good experience on that shore, and I don't know whether I have changed my opinion or not.

Q. But at the time that was the reason you gave, it was a faulty compass ?

—A. At the other investigation that was the reason I gave.

BY THE COURT : Q. You gave the reason that you were not satisfied with the compass ?—A. Yes, I gave that reason.

BY THE COURT : Q. That you were not satisfied with the compass. If I remember right you said that, or were you satisfied with the compass ? Have you changed your mind about that ? My memory is that you said you were not satisfied with the compass ? Do you remember that ?—A. I do not remember of saying that, no. 10

BY Mr. McKENZIE : Q. You remember you expected Inkster to come back, do you not ?—A. I am not clear on that point, but we have talked about it since.

Q. You knew Fowlow was there ?

HIS LORDSHIP : Will you read to the witness part of his deposition. We must have him state now if what he stated there is correct or not. He cannot escape that way.

BY Mr. McKENZIE : Q. At page 56 with reference to deviation the question was put to you :

“ Q. That would be an explanation ?—A. Yes. 20

“ Q. Do you subscribe to that ? In this distance as being an “ explanation of what happened ?—A. It is about the only thing that “ would reasonably explain the accident.”

You remember that, do you not ?

HIS LORDSHIP : He said that. He states he changed his mind by explanations he got from other parties.

Mr. WELDON : By discussing it with other parties.

BY Mr. LANGUEDOC : Q. Have you anything to say ?—A. It was just through discussions with men who have had a lifetime of experience along that shore. They explained to me about currents that set into this base. 30

Q. It is not by your experience you have changed your mind ?—A. No.

Mr. LANGUEDOC : The witness said the same thing in the first case.

Mr. McKENZIE : He was not satisfied with his compass.

Mr. LANGUEDOC : No captain is when it is first installed. He has to take it. He has to take his observations.

HIS LORDSHIP : If my memory serves me right, he was complaining—well, of course, it is a long time since I heard his previous evidence.

BY Mr. McKENZIE : Q. Well, as a matter of fact, at page 54 of your evidence with reference to the swinging of the ship, it was your understanding the ship had to be swung over to adjust the compass ?—A. Well, that is the usual procedure. 40

Q. And you knew at that time that was not done ?—

BY THE COURT : Q. Only on one side you know that ?—A. Yes.

BY Mr. McKENZIE : Q. And you did not have a deviation card ?—

A. I had the ranges I had checked up myself in the back of the log book.

Q. As far as Inkster was concerned, he gave you no deviation ?—A. No. We were supposed to use a deviation card.

Q. That is another question, but in this instance, on this compass, you had no deviation card which would give you the deviation, so you could not have been satisfied with your compass ? That is so, Captain, is it not ?—

A. Well, I don't know as I would say that.

10 Q. What would you say ?—A. Well, I would say I have checked the compass in the rivers on the ranges . . . if you would allow me to explain ; when we get an adjustment on the compass and a deviation card, the man who is out using that card is not sure the compass adjuster had done . . . I mean, I am not going to hang my ticket on what the compass adjuster has done. I want to check it myself, and in this case I had been checking them on the ranges and in the rivers, wherever I could and I thought my deviation on that heading was right.

Q. But it was not, was it ?—A. Well, that has been the judgment.

Q. There is no question about that ?—

20 Mr. LANGUEDOC : Just a minute, let the witness speak.

WITNESS : That was the way the judgment read.

BY Mr. McKENZIE : Q. I want you to be perfectly frank with us on this one point. You had laid a course of 72 degrees . . . north 72 east.—

A. Yes.

Q. You did not have any deviation did you, on that heading ?—A. I think there was something pretty close to that.

Q. But you never had it on that heading. Now, that is your testimony here, you never had it on that heading ?—A. Right now I cannot tell you. It is five years.

30 Q. If I were to refresh your mind as to what you said before, I would tell you, you never had it on that heading . . .—A. You have it there in black and white.

Q. So that is the answer, you had had 90 degrees westerly deviation ?—A. Yes.

Q. And you got north 81 east ; that is what you got. Well now, you knew as far as that was concerned you had nothing to go by, you had no deviation card ?—A. I had the deviation that I had found myself.

Q. But on that heading . . .

Mr. LANGUEDOC : Let the witness answer.

40 WITNESS : The way a compass is adjusted, you do not get it for every degree ; we get it for the points, of the quarter points and the eighth points. We do not get it for every single degree, for the whole 360 degrees on the compass. We get it approximately and interlope it between.

BY Mr. McKENZIE : Q. Is that a deviation card (*indicating*) ?—A. Yes.

Q. Read some of that out, how many you got ?—A. Which ?

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ination—
continued.

Q. Read out the deviation? Where does it start from? Does it not go right around the compass?—*A.* Yes, but it takes it in quarter points. It does not take it in degrees.

Q. Right around?—*A.* Right around.

BY Mr. LANGUEDOC: *Q.* In quarter points?—*A.* In quarter points.

BY Mr. McKENZIE: *Q.* And how many do you get altogether?—*A.* We get the eight.

Q. Will you file this deviation card as D.1?—*A.* Yes.

Q. So that, as a matter of fact, the proper deviation on that compass, on that heading, should have been an addition of some fourteen or fifteen degrees instead of the nine which you allow?—*A.* If the current and the local attraction did not have anything to do with it it certainly should have been more deviation. 10

Q. You do not know anything about currents or anything else . . .

HIS LORDSHIP: He said before what he was told.

BY Mr. McKENZIE: *Q.* You had orders to go from Port Arthur to Fort William?—*A.* Yes, Sir.

Q. There has been a chart filed already. You will recall, Captain, you drew for us an outline of just how you left Port Arthur, and how you got over to Fort William and you filed that as an exhibit originally in the original case as exhibit D.1? Will you take communication of that, and file it as D.2, showing the route which was drawn, starting from A as Port Arthur, down to C, up the Kaministiquia River as far as point B, which is the Paterson Elevator, and then back again coming down towards C again, and then towards Montreal?—*A.* Which is B? 20

Q. The Paterson Elevator.—*A.* No, this passes the Paterson Elevator.

Q. Well, it is just at the Paterson Elevator, at the swing bridge.—*A.* The Paterson Elevator is on that side, and B is on the other side.

Q. That is only a matter of a few feet one way or the other?—*A.* Yes.

Q. Have you got your log book with you?—*A.* Yes.

Q. Would you take communication of that log book, and tell me whether that is the log book you had on the "Thordoc" at the time of the casualty?—*A.* Yes. 30

Q. That is a true record of everything up to the time of the casualty?—*A.* Yes, Sir.

Q. You are quite sure of that?—*A.* Yes.

Q. And insofar as the trip coming up, the trip before, and this trip down, that is a correct statement?—*A.* Yes, Sir.

Q. Will you file that log book as exhibit D.3?—*A.* Yes.

Q. Those life boats you took over to Fort William, I understand, belonged to the Paterson Steamship Lines, the Plaintiff in this case?—*A.* Yes, that is as far as I know. 40

Q. That is true, they were their boats?—*A.* That is the understanding I had.

Q. They were not part of the equipment of your boat?—*A.* No.

Q. None whatever?—*A.* No.

Q. And you had a full cargo from Port Arthur to Montreal?—A. Yes.
 Q. You remember Captain Inkster was going back to complete the adjustment of the compass?—A. I cannot say that I do, no.
 Q. You cannot remember that?—A. No, I cannot remember it. You asked me about that point before.

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RE-EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR
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Q. In any event, Captain Peterson, (and this was a question that I wanted to put to you in examination in chief) you navigated that ship safely from the
 10 25th of September to the 9th of November, did you not?—A. Yes.

(g) Angus
 H. Paterson
 Re-examination.

Q. And she was constantly in command?—A. Yes, Sir.

Q. Up and down the lakes on a complete trip from Montreal to Fort William and back?—A. Yes. I think it was a complete trip to Montreal.

Q. Referring to the log which my learned friend has asked you to produce, I find a large number of ranges taken and entered subsequent to the examination of the compass by Inkster, is that correct?—A. Yes.

Q. And there were 130, for instance?—A. Yes, Sir.

Q. I also find a range taken at Brush Point. How close was that to the deviation which you laid down on your course to pass Point Porphyry?—
 20 A. It is practically 6 degrees from the magnetic course.

Q. Is that sufficiently close to enable you to lay a course from Trowbridge?—
 —A. Porphyry, if you have not anything nearer, that is what we use.

Q. That is within . . .—A. Five and three-quarter points.

Q. Five and three-quarter degrees, that is about half a degree on the compass?—A. Yes.

Q. Is that sufficient?—A. Well, yes.

BY Mr. McKENZIE: Q. You do not suggest for a moment that you are competent to judge?—A. No.

AND FURTHER DEPONENT SAITH NOT.

30 DEPOSITION OF WILLIAM H. DUTHIE, A WITNESS PRODUCED ON
 BEHALF OF THE PLAINTIFF.

(h) William
 H. Duthie.
 Examination.

On this twenty-ninth day of May in the year of Our Lord, one thousand nine hundred and thirty-four, personally came and appeared:

WILLIAM H. DUTHIE,

of the City of Montreal, Clerk in the Operating Department of the Canada Steamships Lines, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:—

EXAMINED BY Mr. LYNCH-STAUNTON, OF COUNSEL FOR
 PLAINTIFF.

40 Q. I understand you are in the employ of the Canada Steamship Lines?—

A. Yes.

Q. In the Operating Department?—A. Yes.

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Q. Can you tell me if the Canada Steamship Lines on having their compasses of their vessels adjusted receive from the compass adjuster a certificate ?

Mr. McKENZIE : I make the same formal objection, my Lord, as far as any attempt to prove some other practice in regard to this particular compass is concerned.

THE COURT RESERVES THE OBJECTION.

No. 7.
Plaintiff's
Evidence.
(h) William
H. Duthie.

BY Mr. LYNCH-STAUTON : *Q.* Or report of adjustment in each case ?—
A. I can answer that question. The answer is no.

Cross-exam-
ination.

CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR DEFENDANT. 10

Q. Mr. Duthie, I have been informed that Captain Inkster has said that he always did give a certificate ?—*A.* Mr. Inkster is not our adjuster, only when Captain Frewer goes abroad, or he cannot possibly be reached. Our adjuster for twenty-five years has been Captain Frewer.

Q. So how do you know ?—*A.* Captain Inkster has adjusted our compasses, and Captain Inkster has never given us a certificate.

Q. How do you know that your compass is adjusted ? Did you ever find out about it ?—*A.* We know our compasses are adjusted. Captain Frewer has been working for us twenty-five years. We have absolute faith in Captain Frewer. 20

Q. He must report to the department somewhere ?—*A.* He gives the Captain the usual card—the error card.

Q. That is, the deviation card ?—*A.* Yes.

Q. He always gives one of those cards ?—*A.* Always.

Q. Then, you have some record of it, that that card had been delivered ?—
A. On the ship.

Q. And that means the compass adjustment has been made ?—*A.* The record is on the ship. It never reaches the office.

Q. You must know some way or another that the compass has been completely adjusted ?—*A.* We get an account. 30

Q. Then you know at that time the compass has been completely adjusted ?—
A. Yes, because it shows the date and the place.

AND FURTHER DEPONENT SAITH NOT.

(i) Captain
Inkster.
Examina-
tion.

DEPOSITION OF WALTER W. INKSTER, A WITNESS PRODUCED ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four, personally came and appeared :

CAPTAIN INKSTER,

of the City of Collingwood, in the Province of Ontario, Compass Adjuster, 40
aged 65 years, a witness produced and examined on behalf of the PLAINTIFF,
who being duly sworn doth depose and say as follows :

EXAMINED BY Mr. LYNCH-STAUNTON, OF COUNSEL
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Q. I understand, Captain Inkster, you are a compass adjuster?—A. Yes.
Q. How long have you been practising this occupation?—A. Twenty-eight years I guess—from twenty-five to twenty-eight years; I am not just positive, but it is between those two dates.

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(i) Captain
Inkster.
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tion—
continued.

Q. Who have you acted for, and whom do you act for?—A. Well, I have done that work for the C.P.R. I think I started with them in 1908, and I am still doing their work; and I used to do pretty nearly all James Playfair's work, and in fact, the last years when he had a big fleet I was engaged by the season for him, and I have been adjusting for the Matthews Steamship Company, the Paterson Steamship Company, the Sarnia Steamship Company, and I think more or less, some years ago, I used to do some of these boats down here in Montreal for the Montreal Light Heat and Power Company, and the George Hall boats; I have been working on them. I think practically every company owning boats on the Great Lakes, I have been on board their vessels from time to time.

Q. I understand you installed a new compass on the "Thordoc" and adjusted it in September, 1929, is that right?—

20

SAME OBJECTION.

SAME RESERVE.

A. Yes, I installed a new compass and inspected it.

Q. Who instructed you to put this compass in?—A. Now, I think that instruction possibly in the first place came from me.

Q. Came from you?—A. I think so, in the first place. I would imagine that. That I went aboard the "Thordoc" to examine the compasses, oh, possibly a month before the new compass was put on board, and I found that the second compass, not the navigating compass, but the second compass, was not in a very good condition. I was not satisfied with it as a compass for directing the vessel, and I think that when I went on to Port Colborne, I talked it over with the Marine Superintendent, Captain Montgomery, and we came to the conclusion that it might be better for us to get a new compass and put it in the wheel house, or that is where the Captain navigates his vessel from, and recondition the compass that was there, and put it on the outside and condemn the outside compass altogether. That, I think, is as near as I can remember the situation.

Q. So you put in a new compass?—A. Yes.

Q. You adjusted it?—A. Yes.

Q. Did you complete the adjustment?—A. No. I simply inspected the compass and found the deviations were down to a manageable quantity, and I was perfectly satisfied of that when I left the vessel, and I considered to rearrange the magnets under the compass could only be a detriment . . .

Q. I do not want you to misunderstand me. I asked, did you put the compass in working order?—A. Absolutely.

Q. I do not want to draw a fine distinction between test and inspection?—A. There is quite a difference.

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(i) Captain
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tion—
continued.

Q. I want to know what the practical thing to do is. You put it in working order?—*A.* Yes. If you would allow me; the rules and regulations distinctly state that the deviations in all new ships shall be brought down to a manageable quantity before they will be allowed to operate.

Q. And that is what you did with this?—*A.* And the compasses in all ships shall be inspected at least once every twelve months. It does not say, adjusted, because if the deviation of the compass is down to a manageable quantity, there would be no need to rearrange the magnets on the compass.

BY THE COURT: *Q.* So that is all you did?—*A.* Yes, that is why.

BY Mr. LYNCH-STANTON: *Q.* Did you give certificates of adjustment 10
to the Paterson Steamship Lines?—*A.* No. I never had occasion to.

Q. Did you give certificates of inspection to the Paterson Steamship
Lines?—*A.* No, I had no occasion to. I never had occasion to.

Q. Why did you give a certificate of your inspection of the "Thordoc"?—
A. I think that after the vessel was stranded that I got instructions from the
Paterson Steamship Company in some way asking if I could send them some
kind of a form which would show that I had inspected the compass on board
the vessel. I think that that is as near the truth as I can possibly get.

Cross-exam-
ination.

CROSS-EXAMINED BY Mr. MCKENZIE, K.C., OF COUNSEL FOR
DEFENDANT.

20

Q. You remember being examined at the trial with regard to the "Thordoc"
before?—*A.* Yes.

Q. At page 74 of your testimony you were asked the question:

"*Q.* Your certificate bears date December 1st, 1929?—*A.* Yes.

"*Q.* When you have adjusted a compass is it usual for you to
"give a certificate."

A. Well, that is to the Captain of the ship . . .

Q. Just a moment: "I always do"?—*A.* Yes.

Q. You change that, do you?—*A.* No, I do not change it because, if I do
not get a requisition from the Captain, when I leave the vessel, then I have to 30
send something to the office to let them see that I have been on board a vessel
and done the work.

BY Mr. LANGUEDOC: *Q.* And earned a fee?—*A.* Yes, and my bill.

BY Mr. MCKENZIE: *Q.* You are employed by the year with the Paterson
Steamships?—*A.* Yes, per boat. Of course, I am not on the pay roll of the
Paterson Steamships.

Q. You do the whole fleet?—*A.* Well, yes. There are sometimes you see
that it may be necessary for the Paterson Steamships to have somebody, and
they cannot get me, and rather than let the vessel go, on several occasions they
have employed an outside man to do that work. 40

Q. But there was no outside man in this instance. We are only dealing
with what you did?—*A.* Yes.

Q. In this instance you made an inspection and adjustment of the compass
in September some time?—*A.* Yes, in September.

Q. And you gave a certificate on December 1st, 1929?—A. Yes. In that particular case I was really asked for it.

Q. You were?—A. Yes, I think so.

Q. At page 74 you were asked :

“ Q. When you have adjusted a compass is it usual for you to give a certificate?—A. I always do, when I get home. I keep a copy of those things, and I always write the office in connection with each ship I have been aboard of when I got home and get through.

10 “ Q. Is that certificate some authority from you, or some record from you, that you have completed the job?—A. Yes. They have to have authority from me.”

A. No. “ Authority ” is the wrong word.

Q. That is the language you used?—A. It might be.

Q. You do not deny that this is what you said?—A. I won't deny that that is what I said.

BY Mr. LANGUEDOC : Q. But you applied the wrong word?—A. Yes, I applied the wrong word.

20 Q. Explain it to the Court?—A. Well, because a letter of that kind that I would send to the office would simply be to let the office know that I had been on board a vessel, and that is all.

BY Mr. McKENZIE : Q. Do you remember telling the mate you would be back on the downward trip?—A. No, I really do not.

Q. You remember he said that. You heard him say that?—A. Yes, but I really do not remember that, I will tell you this, sir, that I always make a practice, the last thing I say before I go off the ship is, that if there is anything wrong I will come back on board and rectify it without charge other than travelling expenses, and I make a practice of that.

BY THE COURT : Do not speak so much—A. All right.

30 BY THE COURT : Q. You were asked if you remember, and you have stated that. Just say yes or no?—A. I could not say.

BY THE COURT : Q. Instead of that, you are stating something else?—A. It is so long ago, your Honor.

BY Mr. McKENZIE : Q. And you left no deviation card?—A. No, I did not, because I did not consider it was necessary. The deviation of the new compass, so far as I could possibly see was the same as the old one, and therefore, I did not consider it necessary to do so.

RE-EXAMINED BY Mr. LYNCH-STAUTON, OF COUNSEL FOR PLAINTIFF.

40 Q. What are these requisitions to which you referred in your cross-examination?—A. In some Steamship Companies they have forms made out, in the form of requisition, three of them, and when they go into a store or into some place that they are getting supplies from of any kind, the Captain makes out one to give to the person who supplies him with the goods, the same as I would be supplying them with my services. The other one goes to the head office and the other one stays on board.

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(i) Captain
Inkster.
Cross-exam-
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continued.

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—
No. 7.
Plaintiff's
Evidence.
(i) Captain
Inkster.
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ination—
continued.

Q. It is a receipt for your services?—A. A receipt, that is it. Then, when the captain's receipt goes into the office, of course, they know that my services have been required on board the vessel.

Q. To you is that the same as a certificate?—A. Just the same thing.

Q. Exactly the same thing?—A. Exactly the same thing.

Q. And it is for the same purpose?—A. For the same purpose anyway.

Q. You were talking about payment, and you said you were employed by the year? How are you paid?—A. I am paid by the boat.

Q. When you say, by the boat, do you mean so much per adjustment, or so much per year?—A. So much per boat, so much per every boat I go on board of. 10

BY THE COURT: Q. How did you test this compass?—A. I tested the compass by checking it up under different courses. We started between Port Colborne, Cleveland and Alexandria.

By Mr. McKENZIE: Q. But you never swung a ship?—A. No.

Q. And, as a matter of fact, you never had an opportunity of taking observations with the sun?—A. No, not with the sun.

BY THE COURT: A. Is not that the reason why you were to come back. The Captain said you were to come back?

Mr. LANGUEDOC: No, the Captain did not say that. The Captain denied it. 20

Mr. McKENZIE: The Captain said that.

BY Mr. McKENZIE: Q. You do not remember?—A. No, I cannot remember, but I was perfectly satisfied the deviation of the compass was down to the manageable point.

BY THE COURT: Q. But you did not make a competent test?—A. I did not swing the vessel around.

BY Mr. LANGUEDOC: Q. Would you say it was necessary to swing the ship?—A. No.

Q. So taking her on eight quadrantal points was sufficient?—A. Absolutely sufficient. 30

BY THE COURT: Q. Is it the practice to swing the ship?—A. Oh, yes, it is the practice.

BY Mr. McKENZIE: Q. And that you did not do?—A. No.

BY Mr. LYNCH-STANTON: Q. Is there any difference between this compass and the one that was already in the binnacle?—A. No, they were so close I considered it unnecessary to rearrange the magnets.

Mr. McKENZIE: I renew my objection to this evidence.

HIS LORDSHIP: This evidence is already in the record. Objection reserved.

BY Mr. LYNCH-STANTON: Q. In your opinion as a compass adjuster, 40 was it necessary to swing that ship to put that compass into working order?—A. No, it was not.

AND FURTHER DEPONENT SAITH NOT.

DEPOSITION OF ERMIN SUTHERLAND, A WITNESS RECALLED ON
BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four, personally came and reappeared :

ERMIN SUTHERLAND,

a witness already examined and now recalled on behalf of the Plaintiff, who being duly sworn doth depose and say as follows :

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF.

10 Q. You would have knowledge of any certificates of compass adjustment coming into head office, would you not ?—A. Yes.

Q. Have you ever seen any come in ?—A. None whatever.

Q. Would they go through your hands if there were any ?—A. Yes, they would go through my hands.

20 Q. What is the requisition system that Captain Inkster has deposed to ? Just very shortly explain how it arises for his Lordship's information—A. We have a system of requisitions, blank books. We supply the Captain with the blue copy which is the original, a yellow copy which is a duplicate, and a white copy. The original copy is given to any person who performs services, such as the purchase of goods, or adjusting a compass, or anything like that. The yellow copy is signed by the Captain and given to the party as well, and forwarded to the office, so that when the bill comes in from the purchaser or the person performing the services, there is a requisition in the office to correspond with the account.

BY THE COURT : Q. On what date did you pay for the services of the adjustment in this case ? Have you the date ? On what date did you get the bill for the adjustment of the compass in this case ?—A. September 29th I think it was.

BY THE COURT : Q. Have you the bill ?—A. The bill is no doubt in our office. I have not got it here your Lordship.

30 BY Mr. McKENZIE : Q. You are just speaking from memory now ?—A. Yes.

Q. But you know the certificate you got was dated December 1st, 1929 ?—A. I do.

Q. Would you pay the bill before you got the certificate ?—A. We would.

BY Mr. LANGUEDOC : Q. At the time you paid the bill, did you expect to get a certificate ?—A. No, none whatever.

Q. How did that certificate come to be written by Inkster ?—A. We requested it, having been asked to get it from Mr. Inkster by the Solicitors of the Underwriters, I believe, Messrs. Casgrain & McDougall.

40 CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL FOR
DEFENDANT.

Q. Mr. Sutherland, Captain Inkster in his former testimony said he always gave you a certificate ?—A. No. We never have had certificates.

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Plaintiff's
Evidence.
(j) Ermin B.
Sutherland,
recalled.
Examina-
tion.

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ination

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Plaintiff's
Evidence.
(j) Ermin B.
Sutherland,
recalled.
Cross-exam-
ination—
continued.

Q. He said he always gave certificates as soon as he came home because that was a record to pay the bill?—A. No. He always sent his bill, I think, when he got home.

Q. You say you never had any record of any certificate going to your office? I read Exhibit D.5, which was filed at the original trial in the Superior Court, which is addressed, or dated, December 1st, 1929, and addressed to the manager of Patersons Steamships Limited, Fort William, Ontario?—A. Yes.

Q. Do you mean to say you never got that?—A. That was the only certificate, and we got that by reason of asking for it.

Q. But you got it? 10

Mr. LYNCH-STANTON: Of course, he said he got it.

BY Mr. McKENZIE: I understood you to say you never got any certificate. Well now, have you any record of the bill being paid?—A. Yes, the bill has been paid. I have not any record with me here. The books would show the bill has been paid.

Q. Insofar as the actual bill is concerned, you would not require a certificate, would you? That is a matter of record?—A. This particular certificate was gotten on request. We have never had certificates from Captain Inkster.

Q. You never had certificates?—A. No.

Q. Can you get for me the receipted account, in your books, showing the 20
date on which that account was paid?—A. Yes, I can.

Q. I want to see that?—A. I can get it.

Q. And that will be the original account which was paid, and you can show me the cheque. You paid by cheque?—A. By cheque.

Q. And you will show me that cheque as having been paid?—A. Yes.

Q. How would you identify that particular ship?—A. There will be attached to the cheque which was sent, Captain Inkster's requisition or statement; showing what purchase the cheque covered; if it covered four or five purchases the name of the particular purchase will be attached to this particular 30
requisition.

Q. As a matter of fact, it was you who instructed Captain Montgomery to purchase the compass?—A. No, I do not think so.

Q. You remember being examined here before, do you not?—A. I do.

Q. In the original action?—A. Yes.

Q. At page 83 you were asked:

“Q. Under whose instructions was it installed?—A. We instructed
“Captain Montgomery to purchase the compass for the ‘Thordoc’.”

—A. No, I do not think I did.

Q. Well, who did? It was head office, was it not?—A. Captain 40
Montgomery had authority to purchase compasses where they were necessary.

BY THE COURT: Q. But, did you swear that when you were before me? Did you make that statement?—A. If it is in my evidence, no doubt I did.

BY Mr. McKENZIE: Q. Then you are wrong in your latter statement.

BY THE COURT: Q. Are you wrong?

Mr. LYNCH-STAUTON : He did not say " I " in the first statement. He said, " We."

BY THE COURT : Q. If you gave the order to Montgomery you should know.

Mr. LANGUEDOC : He does not say he did. He says, " We did."

AND AT THIS POINT THE WITNESS'S EXAMINATION WAS SUSPENDED TO ALLOW THE EXAMINATION OF HONORABLE Mr. JUSTICE McDUGALL.

AND ON THE WITNESS'S RETURN TO THE BOX HE WAS FURTHER
10 CROSS-EXAMINED BY Mr. McKENZIE, OF COUNSEL FOR THE DEFEN-
DANT AS FOLLOWS :

BY Mr. McKENZIE : Q. You meant the Company, did you not ?—A. The Company.

Q. Where your answer was " We instructed Captain Montgomery to " purchase the compass for the ' Thordoc,' " the Captain had nothing to do with it—you instructed Captain Montgomery ?—A. I did not.

Q. Well, I mean your Company ?—

BY THE COURT : Q. Mr. Hall, perhaps ?—A. Probably.

BY Mr. McKENZIE : Q. It was the Company who did that. The Captain
20 had nothing to do with it ?—A. No, he would not buy it.

Q. So the Captain would not make any requisition. It would be your instructions ?—A. Captain Montgomery would make the requisition to put the compass on the boat.

Q. But you instructed Captain Montgomery to purchase a compass for the " Thordoc " ?—

BY THE COURT : Q. Did you swear to that the first time you were examined ? Do you remember if you said that ?—A. Apparently I did, your Lordship, yes.

BY THE COURT : Q. Are you mistaken ?—A. Yes, I am mistaken.

30 BY Mr. McKENZIE : Q. So your evidence now is much more accurate two years after you gave the original statement which I have read : is that so ?—Do you insist upon that ?—A. Yes.

Q. So there would be no requisition from the Captain, would there ?—A. No, not for the compass.

Q. So you would anticipate looking forward to getting some information from Captain Inkster that the compass had been inspected ?—A. Surely.

Q. And the only actual record which we have before us is the certificate of December 1st, 1929 ?—A. No. We would have a requisition in the office.

40 Q. But there is nothing in this record to show ?—A. No. That would be in the office. It will be attached to Captain Inkster's account.

Q. You cannot tell us definitely whether it is there or not ?—A. No, but I can find out.

Q. And the purpose for which this particular certificate was filed was to prove the adjustment ?—A. That was at the request of Casgrain and McDougall.

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Plaintiff's
Evidence.
(j) Ermin
B. Suther-
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recalled.
Cross-exam-
ination—
continued.

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No. 7.
Plaintiff's
Evidence.

RE-EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR
PLAINTIFF.

Q. Have you got the requisition with regard to the adjustment of the compass in September, 1929?—A. Yes

Q. Will you produce it?—A. I will produce it.

BY Mr. McKENZIE: Q. Where is it?—A. At the office in Fort William.

BY Mr. LANGUEDOC: Q. Will you produce it as exhibit P.12?—A. Yes.

BY Mr. McKENZIE: Q. With the evidence of payment, the actual cheque?
—A. Yes.

AND FURTHER DEPONENT SAITH NOT.

10

(k) Hon.
Mr. Justice
Erroll M.
McDougall.
Examina-
tion.

DEPOSITION OF HONORABLE Mr. JUSTICE ERROLL M. McDougall,
A WITNESS PRODUCED ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four personally came and appeared:

HONORABLE ERROLL M. McDougall,

of the City of Montreal, one of the Justices of his Majesty's Superior Court, for the District of Montreal and Province of Quebec, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF.

Q. Mr. Justice McDougall, we have to clear up a question of a certificate 20
in this case in the form of a letter. I do not know whether it is a certificate or
not. I suppose one might call it a certificate of some sort, or a report, written
by Captain W. W. Inkster, of Collingwood, to the manager of the Paterson
Steamships under date December 1st, 1929, reporting, or informing the Paterson
Steamship Company that he had during the month of September, 1929, installed
on board their ship, the "Thordoc," a navigating compass, the rest of the letter
being according to its tenor, which is produced. Would you be good enough to
take communication of a copy of a letter apparently written by you, on
December 2nd, and a reply from Paterson Steamships, under date December 4th,
1929, and would you be good enough to tell us whether it was at your request 30
that Exhibit D.5, the letter from Inkster, was procured from him, as you were
then acting as one of the Solicitors for the Paterson Steamships, or their
underwriters in connection with the loss of the "Thordoc"?—A. I have seen
this letter before. That letter was written by me acting for the Paterson
Steamship Lines and followed an interview which I had with them at Fort
William at or about the date stated. The letter refreshes my memory. I did ask
Mr. Sutherland with whom I had the conference, to procure for us a certificate
from the ship's surveyors, and I see by letter addressed to us shortly afterwards,
on December 4th, that in accordance with my request such certificate was
procured. 40

Q. That was after the casualty had occurred?—A. Oh, yes. I was there
to investigate the casualty.

Q. May I inquire with what object the report of Inkster was procured?
For what purpose?—A. It was my practice to ask for every certificate, the
Government certificates, the American Bureau certificates and any other

certificate relating to the seaworthiness of the ship. There is apparently a typographical error in that letter, but I corrected it.

Q. Would you kindly produce these carbon copies, letter of December 2nd, and the letter of December 4th, 1929, referred to in my previous question, as Exhibits P.10 and P.11?—A. P.10 was written by me. P.11 was received, apparently, in reply to that letter.

Q. Was P.10 the first request that you had made?—A. I think from its tenor it confirms a verbal demand made to Mr. Sutherland in Fort William. That is my recollection of the matter.

10 CROSS-EXAMINED BY Mr. McKENZIE, K.C., OF COUNSEL
FOR DEFENDANT.

Q. That was the only evidence you could obtain with reference to the adjustment of the compass?—A. Well, it was the evidence I asked for. I don't know whether it was the only evidence I could obtain. It was what I asked for.

AND FURTHER DEPONENT SAITH NOT.

DEPOSITION OF ARTHUR E. HUDSON, A WITNESS PRODUCED
ON BEHALF OF THE PLAINTIFF.

On this twenty-ninth day of May, in the year of Our Lord one thousand nine hundred and thirty-four, personally came and appeared:

20 ARTHUR E. HUDSON,

of the City of Toronto, in the Province of Ontario, Master Mariner, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:

EXAMINED BY Mr. LANGUEDOC, K.C., OF COUNSEL FOR PLAINTIFF.

Q. You are a Master Mariner?—A. Yes.

Q. What are your qualifications? What ticket have you?—A. Master of Passenger Vessels for inland waters.

Q. How long have you been a Master Mariner?—A. Since 1912.

30 Q. Have you had much experience on Lake Superior?—A. I have been Master of boats continuously since that time, trading on Lake Superior.

Q. Do you know a course from coming out of Port Arthur which passes close to Point Porphyry on the way down to Whitefish?—A. Yes, I have used the course quite often.

Q. I see some marks on this chart, which is already produced; there is a mark, a letter A and a letter B . . .

Mr. McKENZIE: I renew my objection, my Lord.

SAME RESERVE.

BY Mr. LANGUEDOC (*continuing*): Q. Do those letters correctly designate the course to follow, or approximately?—A. Approximately the general course.

40 Q. When is that course taken?—A. Well, it is used possibly for an odd time in the spring of the year, but more generally used for, say, the middle of October till the close of navigation.

Q. Am I correct in saying that it is a safe, customary, and proper course

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Plaintiff's
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(k) Hon.
Mr. Justice
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Cross-exam-
ination.

(l) Arthur
E. Hudson.
Examina-
tion.

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No. 7.
Plaintiff's
Evidence.
(l) Arthur
E. Hudson.
Examina-
tion—
continued.

to follow from the head of the lakes down, and particularly in the fall of the year?—*A.* In certain weather.

Q. What sort of weather is that?—*A.* That is up to the Captain's judgment if he considers the weather is going to come from the north-east—even north he will probably take that course with certain classes of vessels.

Q. What class of vessel?—*A.* It is more generally used at times by smaller sized vessels, and sometimes even the passenger boats use it, the best vessels we have up there.

Q. Have you used that course often yourself?—*A.* Yes, quite often.

Q. Do you know anything about currents, or attraction on that course?—*A.* Well, it is all a matter of experience along there. I have never noticed it twice the same way. It is a question of your distance off the shore. There are no two men would have the same experience possibly coming down that course. I have never had any trouble coming down there.

Q. Captain, if you took a heading of your compass, such as is shown in the Captain's log book, at page 130, in order to obtain your deviation, and you found the variation information that is contained on that page, would you consider, as a Master Mariner, that you had sufficient information on your compass to enable you to navigate along the course which the Master took?—

Mr. McKENZIE: I object to this question because we have it in the record already that the Captain said he did not have sufficient information on that particular compass, so why examine this witness . . .

HIS LORDSHIP: This evidence is useless. You are only duplicating that evidence. However, I will allow it under reserve.

BY Mr. LANGUEDOC: *Q.* Can you answer that?—*A.* I would say Brush Point range is generally used for a check on that course.

Q. And that is shown on what page of the Captain's log?

BY THE COURT: *Q.* It is a good course?—*A.* It is a check on the course. It is close enough to the course to give you an idea what to steer.

BY Mr. LYNCH-STANTON: *Q.* And that is found at page 130 of the Captain's log, and is dated 2nd October, 1929, is that right?—*A.* Yes.

Q. Given that knowledge, do you think you would be able to navigate along that course?—*A.* Yes. I have done so for years.

Q. If the ship went ashore at that place, would it necessarily show the compass was wrong?—*A.* Well, there might be other conditions that would cause it, of course. I do not think that that is the only cause.

NO CROSS-EXAMINATION.

AND FURTHER DEPONENT SAITH NOT.

(m) Norman
M. Pater-
son.
Further
cross-exam-
ination.

DEPOSITION OF NORMAN M. PATERSON, A WITNESS RECALLED
FOR FURTHER CROSS-EXAMINATION.

On this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and thirty-four personally came and appeared:

NORMAN M. PATERSON

a witness already examined, now recalled for further cross-examination, who being duly sworn doth depose and say as follows:

FURTHER CROSS-EXAMINATION BY Mr. MCKENZIE, K.C., OF
COUNSEL FOR DEFENDANT, UNDER RESERVE OF OBJECTIONS.

Q. Mr. Paterson, we have had Mr. Demill here, who was the man who had actually been at the wheel at the time of the collision. Can you tell me what you do with reference to the appointment of your crew and personnel: do you do that yourself?—A. No. Mr. Hall did that.

Q. And Mr. Demill, for instance, the man who collided with the lighthouse did not know any of the officials of the Company?—A. No, he did not come in contact. In fact, I think the way the crews are appointed is, the Captain
10 chooses his own first mate and second mate.

Q. You do not pay any attention to that yourself at all?—A. I do not make those contracts. May I say, for his Lordship's benefit, that I knew nothing about shipping. Mr. Sutherland knew nothing about shipping, and we engaged Mr. Hall, and we have a copy of the contract made with Mr. Hall, because he was a shipping man brought up in that business from a young fellow.

Q. I suppose Mr. Languedoc is your personal attorney in this case, and was from the first?—A. Yes.

Q. He states in his factum: "In the meantime the entire adventure, the
20 "ship, her cargo and the lives of her officers and crew were left to the tender
"care of an ignorant wheelsman . . ."

Mr. LANGUEDOC: I object to this as entirely improper. My learned friend is reading from my factum in the Court of Appeals. I submit, my Lord, this is entirely improper and I protest.

Mr. MCKENZIE: I have already asked the witness if Mr. Languedoc was his personal attorney. This is what Mr. Languedoc has said after receiving instructions from Mr. Paterson.

Mr. LANGUEDOC: I may say that this is the first time in my life I have heard of a lawyer's work in connection with a factum being brought before a trial Court. The factum is nothing but a written argument.

30 HIS LORDSHIP: That may be, but the question for me is this—I think your learned friend wants to receive some admission; if that is his purpose he is perfectly right, because it is mentioned in the plea or in the factum, and it is your confrere's right to prove an admission. It is only fair. You are not responsible. It is the clients who are responsible for these writings, and I will allow the question.

BY Mr. MCKENZIE: Q. Mr. Paterson, at page 22 of your factum in the Court of Appeals, it states: "In the meantime the entire adventure, the ship
40 "her cargo, and the lives of her officers and crew, were left to the tender care
"of an ignorant wheelsman, a novice, who purported blindly to follow 81 degrees
"on the compass, it was the first season this man had ever acted as a wheelsman
"in his life, apparently had never been closer to Point Porphyry than Fort
"William, and had never been in that particular course before."

HIS LORDSHIP: That is what he said to-day under oath. He spoke the truth. He said it was his first season. What Mr. Languedoc states in his factum is perfectly right.

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Plaintiff's
Evidence.
(m) Norman
M. Pater-
son.
Further
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(m) Norman
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Mr. MCKENZIE : But what I want to know is, if the putting of a novice in charge of the lives of a crew and property was the right thing to do ?

HIS LORDSHIP : The Captain did that.

Mr. MCKENZIE : That is what I am asking Mr. Paterson.

BY Mr. MCKENZIE : Q. You do not know ?—A. No, I never saw him before.

BY THE COURT : Q. You are relying on the Captain ?—A. I am relying on Mr. Hall to put the right Captain.

AND FURTHER DEPONENT SAITH NOT.

10

No. 8.

Reasons for Judgment—Demers, J.

No. 8.
Reasons
for Judgment.
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15th Dec-
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1934.

This is an action in limitation of liability.

Before and at the time of the disaster hereinafter mentioned, the Plaintiff, Paterson Steamships Limited, was the owner of the steamship "Thordoc," a British vessel registered at Fort William, in the Province of Ontario.

On or about the 9th day of November, 1929, the s.s. "Thordoc," when proceeding from Port Arthur to Montreal with a cargo of flour, wheat, shorts and oats, grounded on Point Porphyry in Lake Superior and became a constructive total loss and the said cargo was severely damaged. 20

The Defendant, Robin Hood Mills Limited, on the 13th day of January, 1931, commenced an action in the Superior Court for the District of Montreal, such action bearing No. F.83113 of the records of such Court, whereby the said Defendant claimed the sum of \$146,326.29 as damages occasioned to its cargo and resulting from the said stranding.

Judgment was rendered on the said action on the 13th day of April, 1932, condemning the Plaintiff, Paterson Steamships Limited, to pay to the Defendant Robin Hood Mills Limited, the amount claimed, with interest and costs.

The said Judgment was appealed to the Court of King's Bench, Appeal 30 Side, on the 13th day of May, 1932, the record of such appeal bearing No. 379 of the records of the Court of King's Bench, and Judgment was rendered on such appeal on the 30th day of November, 1933, confirming as to its conclusions the Judgment of the Superior Court hereinabove mentioned.

The said stranding of the s.s. "Thordoc" occurred by reason of the improper navigation or management of the ship.

By its special defence, the Defendant alleges two faults :

(a) That the Plaintiff's vessel "Thordoc" while proceeding on her voyage to Montreal, deviated from her course and voyage and 40 proceeded to the Port of Fort William, in the Province of Ontario,

thereby constituting a deviation in law and in fact, and further deviated by not proceeding on the usual and direct course to the Port of Montreal, in the Province of Quebec.

(b) That in addition and furthermore the stranding of the "Thordoc," and the resultant damage was due to her unseaworthiness in that her compass was not properly adjusted.

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It appears also by Exhibit D.4, page 4, filed by Defendant, that the case in the Superior Court has turned also on those two questions, and that there
10 was no debate as to the actual fault or privity of the owners.

By the Judgment of the Superior Court (same exhibit), it appears that the action was maintained for the two reasons alleged in the defence in this case :

"CONSIDERING," said the Court, "that Defendant has not proved
"that the compass of its ship was properly adjusted when she left
"Port Arthur ;
"CONSIDERING also that the ship deviated from the voyage to
"Montreal."

This Judgment was confirmed in Appeal and this is the decision of the
20 Court of Appeal :

"RENVOIE le dit appel, CONFIRME le dit Jugement, mais par
"l'unique motif que sans que l'Appelante ait établi avoir à ce sujet
"fait la diligence voulue, son navire était impropre à la mer
"(unseaworthy), qu'ainsi elle ne peut prétendre à l'immunité qu'elle
"invoque et qu'il lui faut en conséquence et selon la loi, répondre
"de la cargaison qui lui avait été confiée ; l'autre motif du Jugement
"a quo, celui d'un déroutement, étant écarté."

Both parties have filed memoranda on both questions, in its factum the
30 Plaintiff contending that there was *chose jugée* by the Judgment of the Court of Appeal as to deviation, and its Answer was amended accordingly.

The Defendant, seeing that Amendment, filed a supplementary factum by which for the first time it asked that if *res judicata* is pleaded, the present Plaintiff must be bound by the whole Judgment, with the result that having been condemned to pay damages, it is not entitled to maintain the present action in limitation, and that the protection of Section 504 of the Merchants Shipping Act is not available to the Plaintiff as it is not qualified under the term of such section.

It seemed that up to that time this question had not been raised, and
40 Defendant took for granted that the action for limitation existed.

I will take up this new issue immediately. Article 503 gives the right without any condition ; 504 provides for the cases where there are many claimants.

Temperley's Merchants Shipping Act, 4th Edition, page 328, states that this right may be claimed by direct action, by Defence, or by Counterclaim.

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Usually, he says, in the High Court it is invoked by the Defence or Counter-claim.

Counterclaim is an action, and by our practice, when you have the right to Counterclaim, you have the right to a direct action.

In the United States, where they have a similar statute with sections similar to 503 and 504 of the Merchants Shipping Act,* the question today is not disputed. (233 U.S. 346 ; *Corpus Juris*, p. 661, No. 1149.)

In France, where they have the right to abandon the ship, this right exists also after contestation as to the responsibility. (*Pardessus*, tome 3, No. 633.)

This demand presumes generally that the claim is admitted. The fact is 10 that the Counterclaim is made in case the principal demand is maintained.

If the parties had agreed that the damage was by bad navigation, and that the damage was for the amount now claimed, that would not preclude an action in limitation, even if there was only one claim.

The right to limit responsibility exists, in my opinion, even after Judgment granting damages, provided the question of limitation was not raised. Such is the jurisprudence in the United States. (*Monogahela v. Harst*, 20 Fed. 711.)

I am, therefore, of opinion that there is no *chose jugée* in favour of Defendant, the point of the actual fault of the owner having never been raised 20 in the previous action.

As to deviation, the Court of Appeal has in my opinion, pronounced on this point and has discarded this ground of responsibility admitted by the first Judgment.

I am inclined to think that though the matter in controversy is not the same, there is *res judicata*, the matter in issue being the same. (*American & English Encyclopædia of Law*, Vol. 24, pages 711, 780 and 781.)

The notes of Honorable Mr. Justice Letourneau are no part of the Judgment of the Court. The practice in Appeal is for one Judge only to sign the Judgment of the Court. Even if the notes of the Judges were consulted, you would see in the notes that three Judges, to wit, the majority of the Court, 30 declare formally that if there is no damage resulting from deviation, this ground cannot be alleged against the parties.

Moreover, the claim I am asked to reduce is founded on the final Judgment as modified by the Court of Appeal and it is now the title of Defendant.

I do not feel that in this case I am free to reconsider the question. I do not mean to say that, in another case, seeing the judgment of the Privy Council in the case of the *Paterson Steamships Limited v. The Canadian Co-operative Wheat Producers*, where the Privy Council states that our Water Carriage of Goods Act cannot be understood or construed except in the light of the ship-owner's common law liability, I would not reconsider the question. 40

Neither is it to be understood that if I had to pronounce on the actual fault of the owner as to deviation, my opinion would be adverse to the owners, on the contrary.

In a word, as this case stands, I am of opinion that the Judgment of the Court of Appeals should be followed.

* *Parsons*, p. 121.

The question remains then—has the Plaintiff in this case made proof that there was no actual fault of the proprietor as to the compass?

It has been decided that the compass was not properly adjusted, though the adjuster was competent.

The whole litigation on this point comes to this—were the proprietors negligent in using the compass without a certificate from the adjuster?

If I had only the first testimony of the adjuster, I would say “yes,” but in this case, the adjuster swears that his practice was not to send a certificate to the Company but to the Captain of the ship.

10 I accept without hesitation the evidence of the officers of the Company who swear that this was not the practice; that what they always received was the bill for work done. Receiving this bill from a competent man, they had, in my opinion, every reason to believe that the work was done and properly done.

For these reasons, I consider that they are entitled to the demand of limitation they pray for, and that Judgment should be entered accordingly.

As to costs, seeing the declaration of the adjuster in the first case, I consider the contestation was reasonable, and that the defence are, according to the practice, entitled to the costs of this action.

20

(Sgd.) PHILIPPE DEMERS,
Local Judge in Admiralty.

No. 9.

Decree in Limitation of Liability.

On the 15th day of December, 1934, before His Lordship Mr. Justice Philippe Demers, the Local Judge in Admiralty for the Quebec Admiralty District, the Judge having heard Counsel for the parties pronounced and decreed:—

30 1. That the Plaintiff, Paterson Steamships Limited, owner of the steamship “Thordoc” is entitled to limited liability according to the provisions of the Merchant Shipping Act, 1894, and the Merchant Shipping Act (Liability of Shipowners and Others Act) 1900; and that in respect of any loss and damage caused to property and rights of any kind whether on land or on water and whether fixed or moveable by reason of the stranding of the s.s. “Thordoc” at Point Porphyry on the 9th day of November, 1929, the said owner of the said s.s. “Thordoc” is answerable in damages to an amount not exceeding £16,522 16s. sterling, or its equivalent, viz. \$80,363·42, such sum being at the rate of £8 for each ton of the registered tonnage of the said s.s. “Thordoc” with the addition of the engine room space deducted for the purpose of ascertaining that registered tonnage;

40 2. That payment by the Plaintiff to the Deputy District Registrar of this Court of the said sum of \$80,363·42, with interest thereon at the rate of 5%

In the
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Decree in
Limitation
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continued--

per annum from the date of the said stranding to the date of such payment, and the payment of taxable costs on the action referred to in the Plaintiff's Statement of Claim shall entitle the Plaintiff to complete and final discharge of its liability to any person, firm or corporation whatsoever for damages of any nature arising out of the said stranding of the s.s. "Thordoc";

3. That the said action referred to in the said Statement of Claim, namely that bearing No. F.83113 of the records of the Superior Court for the District of Montreal shall be and is hereby stayed;

4.—His Lordship also ordered that as there appeared to be but one claimant against the limitation of liability fund, namely Robin Hood Mills Limited, no Reference before the Deputy District Registrar was necessary and that the said Deputy District Registrar was entitled to pay out to the said Robin Hood Mills Limited or their solicitors, the full amount of the said fund and that the Plaintiff in the present action should pay to the Defendant, Robin Hood Mills Limited, its costs of this action.

(Signed) OSCAR BELANGER,
Deputy District Registrar.

In the
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Court.

No. 10.
Notice of
Motion, 3rd
January,
1935.

No. 10.

Notice of Motion.

TAKE NOTICE that this Honorable Court will be moved on the 20 4th day of January, 1935, or as soon thereafter as Counsel may be heard on behalf of the Defendant, Robin Hood Mills Limited, that the Judgment of the Local Judge in Admiralty for the Admiralty District of Quebec, made herein and dated the 15th day of December, 1934, may be reversed; the whole with costs.

Montreal, January 3, 1935.

(Signed) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Defendant, ROBIN HOOD MILLS LIMITED.

To PATERSON STEAMSHIPS LIMITED,
Montreal.

and WELDON, DEMERS & LYNCH-STAUNTON,
Solicitors for PATERSON STEAMSHIPS LIMITED.

30

No. 11.
Reasons for
Judgment,
Maclean, J.,
17th July,
1935.

No. 11.

Reasons for Judgment—Maclean, J.

Judgment rendered July 17th, 1935.

This is an appeal from a decision of Demers, L.J.A., Quebec Admiralty District, wherein, in an action brought by the Respondent in limitation of liability under Section 503 of the Merchants Shipping Act (Imperial) 1894, he

found the Respondent entitled to succeed. That section is in these words :
 “ The owners of a ship, British or foreign, shall not, where all or any of the
 “ following occurrences take place without their actual fault or privity ; (this
 “ is to say)—(b) Where any damage or loss is caused to any goods, merchandise
 “ or other things, whatsoever on board the ship . . . be liable to damages
 “ beyond the following amounts ; (that is to say) . . . ” This was an
 enactment for the peculiar protection of shipowners. Limitation of liability,
 as has been frequently stated, is founded upon considerations of public policy
 and not of justice, and the statute is to be construed according to the fair and
 10 natural meaning of their words, as in the case of other Acts of Parliament.
 The intention of the legislature in all the Acts which have dealt with this subject
 has been to relieve shipowners, to some extent, from the consequences of the
 negligent acts of persons employed by them, and for which they had not been
 in any way to blame, that is to say, they must be innocent of the occurrence
 causing the loss. It is not the purpose of the Statute to relieve the shipowner
 of liability for damage or loss caused by the negligence of persons employed
 by him ; its purpose is to limit the amount of that liability, unless the same
 occurred by reason of his actual fault or privity.

20 In November, 1929, the British steamship “ Thordoc,” a cargo ship of
 some 2,000 tons, owned by the Respondent and registered at Fort William in
 the Province of Ontario while proceeding under charter on a voyage from Port
 Arthur to Montreal, with a cargo of wheat, flour, etc., owned by the Appellant,
 grounded at Point Porphyry on the north shore of Lake Superior and became,
 with her cargo, practically a total loss. The contract of carriage was for “ loading
 “ at the lakehead on or about October 30th (1929) for Montreal.”

30 The Appellant subsequently commenced an action against the Respondent
 in the Superior Court for the District of Montreal, in the Province of Quebec,
 claiming \$146,326.29 as damages occasioned to its cargo by the stranding of
 the “ Thordoc.” In April, 1932, judgment was rendered in that action
 condemning the Respondent to pay to the Appellant the amount claimed.
 An appeal being taken to the Court of King’s Bench (Appeal Side) the Judgment
 of the Superior Court was affirmed as to the Respondent’s liability for damages,
 and the amount. Later, the Respondent launched this action in limitation of
 liability, and the learned trial Judge—who also heard and determined the action
 for damages in the Superior Court of Quebec—held that the Respondent was
 entitled to a decree limiting its liability in respect of the damages mentioned
 to the statutory amount of \$38·92 for each ton of the registered tonnage of
 the “ Thordoc.”

40 In the action for damages the learned trial Judge found for the Plaintiff,
 the Appellant here, on the ground that the ship was not in a seaworthy condition
 to perform the contract of carriage in that a new compass recently installed on
 the ship had not been properly or fully adjusted, and that, prior to the material
 time, no certificate of such compass adjustment had issued to the owners in
 conformity with their usual practice, before she left Port Arthur, and also on the
 ground that the ship had deviated from the contractual voyage from Port
 Arthur to Montreal. From this Judgment there was an appeal, as already
 mentioned, and on the first ground the Appellate Court concurred in the Judgment

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continued.

of the learned trial Judge ; as to the question of deviation, while the majority of the Court of Appeal appear to have expressed the opinion that the deviation was not responsible for the stranding of the " Thordoc," and that therefore there was no liability on this account, yet the formal Judgment appears to discard this point.

In the present action the learned trial Judge held, further evidence having been given upon the point, that the compass having been adjusted by a competent person, the issuance of a certificate therefor was unnecessary and that the owners were relieved of any fault or privity as to the seaworthiness of the ship in so far as the efficiency or reliability of the compass was concerned ; and he appears to have felt himself bound by the expressed majority opinion of the Court of Appeal on the question of deviation, and I would infer from the reasons for the Judgment of the learned trial Judge that, if he was then pronouncing upon the actual fault or privity of the owners as to the deviation he would not be against the contention of the owners, namely, that notwithstanding the deviation the owners were entitled to a decree in limitation of liability ; at least that is my understanding of it though no reasons are given for that conclusion. The learned trial Judge expressed no opinion as to whether or not the deviation, in point of fact, was with the fault or privity of the owners, a point strongly urged by Mr. McKenzie for the Appellant on the hearing of this appeal. The decision of the learned trial Judge granting a decree in limitation of liability would seem therefore to proceed upon the ground that the stranding of the " Thordoc " occurred by reason of the " improper navigation or management " of the ship," and by that I assume it is meant that the stranding occurred by reason of the " fault or error " of the servants or employees of the owners, and without the actual fault or privity of the owners in fact or in law. 10

The principal grounds put forward in support of this appeal are two in number and apparently they were the main grounds advanced by the Appellant in its action for damages before the Superior Court of Quebec. The first to be mentioned is whether or not the owners of the " Thordoc " exercised due diligence to make the ship in all respects seaworthy for the contractual voyage, and this point arises on account of some question regarding the reliability of one of the ship's compasses. It appears that a new compass had been installed on the ship about six weeks prior to the stranding, pursuant to the instructions of the general manager of the Respondent Company. One Inkster regularly adjusted all the compasses of the Respondent's ships plying on the Great Lakes, and also those of Canada Steamship Company, a large shipowning concern also operating on the Great Lakes and on the River St. Lawrence. Inkster was on board the " Thordoc " when this new compass was installed and he then adjusted the same, and he testified in this action that he thought the adjustment sufficient for the ship's use. In the action for damages Inkster seems to have testified—or at least he was so understood—that it was customary for him to give a certificate of any compass adjustment to the owners of the ship, but he had not done so in this instance until long after the stranding, when, at the suggestion of a Solicitor of the Respondent, he did so. In that action the learned trial Judge seems to have thought that the failure to issue such a certificate was a matter of substance, and because of this he found that 30 40

the compass had not been properly adjusted when she left Port Arthur, and therefore, I assume, that the ship was, in this respect, unseaworthy and not properly equipped for the contractual voyage. In the action here on appeal, Inkster testified that it was not his custom to give such a certificate to the owners, and that the only evidence of any adjustment of a compass of any particular ship was his rendering an account to the owners for his services in that connection, which he did in this case, and the learned trial Judge accepted this evidence. In his reasons for Judgment from which there is this appeal he stated : “ The whole litigation on this point comes to this—were the proprietors

10 “ negligent in using the compass without a certificate from the adjustor ? If “ I had only the first testimony of the adjustor I would say “ yes,” but in this “ case, the adjustor swears that his practice was not to send a certificate to the “ Company but to the Captain of the ship. I accept without hesitation the “ evidence of the officers of the Company who swear that this was not the “ practice ; that what they always received was the bill for work done. Receiving “ this bill from a competent man, they had, in my opinion, every reason to “ believe that the work was done and properly done. For these reasons “ I consider that they are entitled to the demand of limitation that they pray “ for and that Judgment should be given accordingly.”

20 With this conclusion I agree. The issuance of a certificate from the compass adjustor to the shipowners was not the practice, and I am unable to perceive any reason for holding that the owners should be prejudiced by the failure to give such a certificate ; I see no substance whatever in the contention that the issuance of a formal certificate of adjustment of a ship’s compass to the owners was at all necessary. I therefore agree with the view of the learned trial Judge on this point and it will not be necessary to return to it again ; it is not, in my opinion, a ground for refusing a decree in limitation of liability.

An important issue arising in this case is the effect of the deviation upon the contract of carriage, and whether or not it was with the fault or privity of

30 the owners. The Appellant contends : That Port Arthur, when designated by the Appellant as the port of loading, became the port of departure at the “ lakehead ” under the charter party ; that there was an obligation on the part of the shipowners to proceed directly, or with reasonable deviation only, from Port Arthur to Montreal ; that the deviation—in the interests of the ship alone the Appellant contends—to Fort William was an unreasonable one, and changed the character of the contemplated voyage so essentially that the shipowners cannot be considered as having performed their part of the charter party or bill of lading contract, but something quite different, and therefore cannot set up the exemptions expressly or impliedly to be found in the charter

40 party, or the bill of lading, and which were only applicable to the voyage contracted for by the parties, unless they can prove that if there had been no deviation the same loss would have happened—something, I might say, quite impossible. Such cases as *Thorley v. Orchis Steamship Company* ⁽¹⁾ and *Tate & Lyle Ltd. v. Hain Steamship Co.* ⁽²⁾ were cited. The objection to a deviation is, it appears, not that the risk is increased, but simply that one of the parties to the contract has voluntarily substituted another voyage for that which has

(1) 1907 1 K.B. 660.

(2) 49 Ll. L.L.R. p. 48.

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been insured. The Appellant contends that there is no distinction between large deviations and small deviations, only between deviations not excused by law and such as are so excused. But in this action, one in limitation of liability, the question also arises, assuming the deviation to be an unreasonable one, whether the deviation was with the actual fault and privity of the owners. If not they must succeed and that question may first be considered. The evidence in any way relevant to this point should therefore be carefully reviewed.

The Respondent is a subsidiary company of, and owned by, the N. M. Paterson Grain Company Ltd., Mr. N. M. Paterson is president of both companies, the head office of each being at Fort William. A Mr. Hall, who was deceased at the time of the trial of the damage action, was vice president and general manager of the steamship company at the times material here. Patterson testified that Hall had to do with "everything in connection with the ordering of the boats, chartering cargoes, hiring crews and the general operation of the company." There was no assistant manager to Hall. On the upward voyage of the "Thordoc" to the head of the lakes, Hall directed the master to take on board at Sault St. Marie, four life boats to be delivered at Fort William for storage during the winter, Fort William being the port to which the "Thordoc" was then bound. While *en route* to Fort William the "Thordoc" was subsequently directed by one Sutherland first to load at Port Arthur, chiefly because the Appellant's grain, etc., was then in railway cars at Port Arthur and subject to demurrage, which demurrage before loading had accumulated to \$326.00, and the Appellant's representative there was apparently pressing for an immediate loading of the cargo to avoid further demurrage. I think the "Thordoc" had also been delayed in some way on her upward voyage. In these circumstances, Sutherland, so he states, took it upon himself to direct the "Thordoc" first to Port Arthur for loading, instead of to Fort William to deliver the life boats. Sutherland was the chief clerk of the grain company, and was closely associated with Paterson in the grain company's business for twenty years, but he was also the secretary and treasurer of the steamship company, and he was a director as well and had been since its organisation. Sutherland's duties in respect of the steamship company were, according to Paterson, largely secretarial, such as keeping the records of the Company's meetings. So far as I can gather both companies occupied the same office facilities, and Hall seems to have made some use of the clerical staff of the grain company. I suspect the truth is that certain of the clerical and secretarial staff was common to both companies, and that Sutherland was chief clerk in the office common to both organisations. Sutherland stated that he never directed the movements of ships unless directed by Hall, but the occasion in question would be apparently an exception.

In response to an enquiry by the master of the "Thordoc" when her loading was completed, Sutherland directed that he proceed to Fort William and there discharge the life boats before proceeding on the voyage to Montreal with his cargo, and this the master did. Both Paterson and Hall at the time were in Winnipeg, where both the grain company and the steamship company had branch offices, and where Hall had a staff. A private wire connected the Winnipeg and the Fort William offices, and it was stated in evidence that when

Hall was in Winnipeg it was usual for the head office to consult him in respect of all steamship matters. Although Hall was readily accessible to Sutherland by means of this private wire, it appears he did not communicate with Hall before directing the "Thordoc" to proceed to Fort William.

I should perhaps add that all the shares of the steamship company were owned by the grain company with the exception of about five qualifying shares held by directors of the steamship company. Sutherland at the organisation of the steamship company was allotted one qualifying share, for which he never paid anything; the certificate of this share was never delivered to Sutherland
 10 and presently remains in the stock register endorsed by Sutherland in blank, which is of course quite a usual proceeding. Sutherland was, I assume, a paid servant of the grain company, but it does not appear from the evidence whether he was in receipt of any salary or wage from the steamship company; it is improbable that he was, having in mind the relationship between the two companies, and their occupancy of the same office. It is probable that whatever services Sutherland performed for the steamship company were at least intermittent, and generally of an unimportant nature; he seems to have been, next to Paterson, the active individual in the grain company's business at Fort William, and such duties would, I assume, ordinarily consume his full working time.

20 In conformity with the instructions mentioned the "Thordoc" proceeded to Fort William and there unloaded the life boats at the Respondent's premises. This would not be a deviation intermediate between Port Arthur and Montreal, but it involved proceeding a short distance west of Port Arthur, thence up the River Kaminstiquia to Fort William, a distance of somewhere between twenty and thirty miles, inclusive of the return voyage to a point immediately off Port Arthur. The cities of Port Arthur and Fort William are, however, contiguous. The "Thordoc" departed from Port Arthur at nine o'clock in the evening for Fort William and between three and four hours thereafter had returned to
 30 one of the normal or permissible sea routes pursued by cargo steamers *en route* from Port Arthur to Montreal; some three hours after that the "Thordoc" stranded at Port Porphyry, owing, it is said by the trial Judge, to "improper navigation or management of the ship," that is, by the ship's officer in charge at the time and the wheelsman, which finding, in my opinion, would seem fully warranted. From the time of the ship's departure from Port Arthur to the moment of the stranding, there had been no appreciable change in the weather, which apparently was quite favourable in every respect. Such are the relevant facts in regard to the deviation, and to the occurrence of the stranding, and I hope I have fully and accurately narrated them.

40 The question as to whether the action of Sutherland in directing the deviation of the "Thordoc" to Fort William is to be construed as the action of the shipowners falls for decision. In order that a shipowner may be entitled to limit his liability it is necessary in all cases that he should establish that the loss or damage in question arose without his actual fault or privity, and difficult questions frequently arise where vessels are owned by corporations. An important case on this point, and referred to by Counsel, is that of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Company Ltd.*⁽¹⁾. A cargo of benzine

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⁽¹⁾ 1915 A.C. p. 705.

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on board ship was lost by a fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited company and the managing owners were another limited company. The managing director of the latter company was the registered managing owner and took the active part in the management of the ship on behalf of the owners. The owners relied on Section 502 of the Merchants Shipping Act, 1894⁽¹⁾, as relieving them from liability, and they denied the allegation of unseaworthiness. The Judgment of the Judicial Committee was delivered by Haldane, L.C., and it will be convenient to quote from the same at some length, because of his statement of the facts, and of the law there laid down. The Lord Chancellor said :— 10

“ My Lords, in that state of things the loss of the cargo took place, and the case came before Bray J., who tried it, and Bray J. found a number of facts. He found these facts after hearing the evidence on both sides and I think that his findings of fact were justified. They were these : The first was that the ship when she left Novorossisk was unseaworthy by reason of defects in her boilers. The second finding of fact was that the stranding on the Botkill Bank, just off the mouth of the Scheldt, was caused by the want of steam, which in its turn was caused by the unseaworthy condition of the boilers ; and he found the same causes as regards the subsequent stranding in the Scheldt itself. Then in the third place he found that the loss was not 20
caused by any negligence or want of precautions on the part of the engineers, because he does not find it proved that anything they could have done could have altered the consequences. He found that the loss of the cargo was caused by the unseaworthiness of the ship due to the condition of the boilers. Then there are other findings which are findings of mixed fact and law. One of these is that the duty of supervision remained with the managing owners, and that the fault of the managing owners was a fault that affected the company itself.

“ My Lords, that last question gives rise to the real question of law which occurs in this case. Taking the facts to be as the learned Judge has found 30
them, what is the consequence as regards the liability of the Appellants ? The Appellants are a limited company and the ship was managed by another limited company, Messrs. John M. Lennard & Sons, and Mr. J. M. Lennard, who seems to be the active director in J. M. Lennard & Sons, was also a director of the Appellant Company, Lennard’s Carrying Company, Limited. My Lords, in that state of things what is the question of law which arises ? I think that it is impossible in the face of the findings of the learned Judge, and of the evidence, to contend successfully that Mr. J. M. Lennard has shown 40
that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr. Lennard is the person who is registered in the ship’s register and is designated as the person to whom the management of the vessel was entrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the Appellants ; and under the circumstances the question is whether the Company can invoke the protection of s. 502 of the Merchant Shipping Act to relieve it from the liability which

(¹) 1915 A.C. p. 705.

“ the Respondents seek to impose on it. That section is in these words ‘ The
 “ ‘ owner of a British sea-going ship, or any share therein, shall not be liable to
 “ ‘ make good to any extent whatever any loss or damage happening without
 “ ‘ his actual fault or privity in the following cases ; namely,—(1) Where any
 “ ‘ goods, merchandise, or other things whatsoever taken in or put on board
 “ ‘ his ship are lost or damaged by reason of fire on board the ship.’

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“ Now, my Lords, did what happened take place without the actual fault
 “ or privity of the owners of the ship who were the Appellants ? My Lords,
 “ a corporation is an abstraction. It has no mind of its own any more than it
 10 “ has a body of its own ; its active and directing will must consequently be
 “ sought in the person of somebody who for some purposes may be called an
 “ agent, but who is really the directing mind and will of the corporation,
 “ the very ego and centre of the personality of the corporation. That
 “ person may be under the direction of the shareholders in general meeting ;
 “ that person may be the board of directors itself, or it may be, and
 “ in some companies it is so, that that person has an authority co-ordinate with
 “ the board of directors given to him under the Articles of Association,
 “ and is appointed by the general meeting of the Company, and can only be
 “ removed by the general meeting of the Company. My Lords, whatever
 20 “ is not known about Mr. Lennard’s position, this is known for
 “ certain, Mr. Lennard took the active part in the management of this ship on
 “ behalf of the owners and Mr. Lennard, as I have said, was registered as the
 “ person designated for this purpose in the ship’s register. Mr. Lennard therefore
 “ was the natural person to come on behalf of the owners and give full evidence
 “ not only about the events of which I have spoken, and which related to the
 “ seaworthiness of the ship, but about his own position and as to whether or not
 “ he was the life and soul of the Company. For if Mr. Lennard was the directing
 “ mind of the company, then his action must, unless a corporation is not to be
 “ liable at all, have been an action which was the action of the Company itself
 30 “ within the meaning of s. 502. It has not been contended at the Bar, and it
 “ could not have been successfully contended, that s. 502 is so worded as to
 “ exempt a corporation altogether which happens to be the owner of a ship,
 “ merely because it happens to be a corporation. It must be upon the true
 “ construction of that section in such a case as the present one that the fault or
 “ privity is the fault or privity of somebody who is not merely a servant or agent
 “ for whom the Company is liable upon the footing respondeat superior, but
 “ somebody for whom the Company is liable because his action is the very action
 “ of the Company itself. It is not enough that the fault should be the fault of a
 “ servant in order to exonerate the owner, the fault must also be one which is not the
 40 “ fault of the owner, or a fault to which the owner is privy ; and I take the view
 “ that when anybody sets up that section to excuse himself from the normal
 “ consequences of the maxim respondeat superior the burden lies upon him to
 “ do so.

“ Well, my Lords, in that state of the law it is obvious to me that
 “ Mr. Lennard ought to have gone into the box and relieved the Company of the
 “ presumption which arises against it that his action was the Company’s action.
 “ But Mr. Lennard did not go into the box to rebut the presumption of liability

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1935—
continued

“ and we have no satisfactory evidence as to what the constitution of the Company was or as to what Mr. Lennard’s position was. The Memorandum and Articles of Association were not put in. The only evidence was that of the secretary, Mr. Simpson, who told the Court that he was secretary not only to the Company but also to the managing company, and the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business. Under the circumstances, I think that the Company and Mr. Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossisk, was an unseaworthiness which did not exist without the actual fault or privity of the owning company. My Lords, if that is so the the Judgment of the majority of the Court of Appeal and of Bray J. was right.” 10

This means that the question for consideration in each case is one of fact ; where the loss or damage occurs with the actual fault or privity of a person for whom the Company is liable because his action is the very action of the Company itself, the Company will not be entitled to limit its liability ; in each case it will be for the Company which seeks to limit its liability to establish that the individual who had the effective direction and control of the Company’s affairs was not at fault or privy to the particular loss or damage. I would refer to McLachlan on *Merchant Shipping*, 7th Ed., p. 96 ; *The Charlotte*, 9 Ll. L.L.R., p. 341 ; *The Warkworth*, 9 P.D., p. 20. 20

In the facts here I hardly think it can be said that Sutherland was the person who had the effective direction and control of the business affairs of the Respondent, nor was he the person to whom was entrusted the management of the “Thordoc” or any other ship belonging to the steamship company. He was technically a holder of one share in the grain company and therefore in the same sense a part owner of the “Thordoc” ; ordinarily the actual fault or privity of a part-owner will not deprive his co-owners of the right to limit their liability. Sutherland was only nominally a director of the steamship company ; but he was also secretary of that company and apparently a clerk of some sort as well, all of which positions involved little or no responsibility and had no relation to the real management and operation of the company’s affairs which were entirely under the direction and control of Hall. The position of a director, or that of secretary of the company, did not clothe Sutherland with any authority in respect of the management of the ships belonging to the Respondent. In the case of *George Whitechurch Limited v. Cavangh*⁽¹⁾ Lord McNaughton said : 30

“ Then comes the question, Is the Company bound by the representations of their secretary ? That must depend upon what authority the secretary had or was held out as having. Now, the duties of a company’s secretary are well understood. They are of a limited and of a somewhat humble character. ‘ A secretary,’ said Lord Esher, ‘ is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all.’ ” 40

(1) 1902 A.C. 117, at p. 124.

At most it seems to me, that insofar as the steamship company is concerned, and in the true business sense, Sutherland acted merely as a casual servant of that company, and then performing only minor duties. The grain company was not the manager of the steamship company though it was the sole owner. There was a close association between the two companies, and perhaps the grain company may be regarded as the dominating influence, but it still remains they were separate corporations, under separate management, and engaged in different classes of business. The intervention of Sutherland in the important affairs of the shipping company, outside the occasion in question, would appear
 10 only to be rare, and then at the instance and direction of Hall. Hall was the individual clothed with authority by the steamship company to direct and manage its important and serious business affairs and bind the owners. I do not think it can be held that the direction to land first at Port Arthur instead of proceeding to Fort William as directed by Hall, and then to proceed from Port Arthur to Fort William after the loading, was in fact with the actual fault or privity of the owners. It would follow therefore that the Respondent is entitled to maintain its decree in limitation of liability.

That would seem to dispose of the Appeal. Mr. Lynch-Staunton, however, further contended that, in view of the fact that after the "Thordoc" had
 20 completed the deviation to Fort William she had resumed the contract line of route, and there being no connection between the deviation and the particular negligence which occasioned the loss, the ship owners are entitled to the decree in limitation of liability sought even if Sutherland's action in respect of the deviation was to be construed as that of the shipowners; and he also contended that in any event the deviation was a reasonable one for which the owner was exempted under the Water-Carriage of Goods Act. There is much to be said, I have no doubt, in support of both contentions. However, in my view of the case, as so far expressed, it is not necessary to pronounce any opinion upon either of these two very controversial points.

30 The Appeal is therefore dismissed with costs.

I concur,

EUGENE R. ANGERS.

No. 12.

Formal Judgment.

The Appeal of the above-named Appellant from the Judgment of the Honorable Mr. Justice Demers, District Judge in Admiralty for the Quebec Admiralty District, pronounced in the above cause on the 15th day of December A.D. 1934, having come on to be heard before this Court at the City of Ottawa, on the 1st day of May A.D. 1935, in the presence of Counsel as well
 40 for the Appellant as for the Respondent, upon hearing read the notice of Appeal and the Decree appealed from, and upon reading the evidence and exhibits of record, and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that this Appeal should stand over for Judgment and the same coming on this day for Judgment,

In the
 Exchequer
 Court,

No. 11.
 Reasons for
 Judgment.
 Maclean, J.,
 17th July,
 1935—
continued.

No. 12.
 Formal
 Judgment,
 17th July,
 1935.

In the
Exchequer
Court.

No. 12.
Formal
Judgment,
17th July,
1935—
continued.

THIS COURT DOTH ORDER AND ADJUDGE that the said Judgment of the Honorable Mr. Justice Demers, dated the 15th day of December A.D. 1934, should be and the same is hereby affirmed, and that the present appeal should be and the same is hereby dismissed.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Appellant herein do pay to the Respondent herein its costs of the appeal, after taxation thereof.

By the Court,
(Sgd.) ARNOLD W. DUCLOS,
Registrar.

No. 13.

10

Notice of Appeal to His Majesty in Council.

PRIVY COUNCIL.

No. 13.
Notice of
Appeal to
His Majesty
in Council.
2nd Decem-
ber,
1935.

Messrs. Weldon & Lynch-Staunton,
Solicitors for Respondent,
Montreal.
Sirs,

Take notice that the Defendant, Robin Hood Mills Limited, in the above-mentioned case, appeals from the Judgment of the Exchequer Court made herein on the 17th of July, 1935, to the Judicial Committee of the Privy Council, so that same may be reversed, altered, or varied.

Montreal, December 2nd, 1935.

(Sgd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Appellant.

Received copy in lieu of service.

(Sgd.) WELDON & LYNCH-STAUNTON,
Solicitors for Respondent.

No. 14.
Order
staying
proceedings
and fixing
security for
costs of
Appeal to
His Majesty
in Council,
5th Decem-
ber, 1935.

No. 14.

Order staying proceedings and fixing security for costs of Appeal to His Majesty in Council.

UPON APPLICATION this day by Counsel for the Appellant in the presence of Counsel for the Respondent and upon hearing what was alleged 30
by Counsel :

IT IS ORDERED that the proceedings in this action be stayed pending an appeal to the Privy Council ;

AND IT IS FURTHER ORDERED that the security for the costs of the Respondent on the said Appeal be and the same are hereby fixed at the sum of Fifteen Hundred Dollars (\$1,500) to be furnished in the form of a bond ;

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs to the successful party in the said appeal.

(Sgd.) ARNOLD W. DUCLOS,
Registrar. 40

No. 15.

Consent that Record be composed of certain documents.

The parties by the undersigned, their Solicitors, hereby request the Registrar of the Exchequer Court to transmit to the Registrar of His Majesty in His Privy Council in London, the original Court record, and consent that the following documents shall form the printed case on Appeal to His Majesty in His Privy Council :—

In the
Exchequer
Court.

No. 15.
Consent
that Record
be com-
posed of
certain
documents,
20th March,
1936.

PART ONE—PROCEEDINGS.

1. Writ of Summons.
- 10 2. Plaintiff's Statement of Claim.
3. Defendant's Statement of Defence.
4. Plaintiff's Answer to Defendant's Statement of Defence.
5. Plaintiff's Amended Answer to Defendant's Statement of Defence.
6. Defendant's Replication.
7. Plaintiff's List of Exhibits with Statement of Claim.
8. Plaintiff's List of Exhibits at Enquete.
9. Defendant's List of Exhibits at Enquete.
10. Proces-verbal of Proceedings at Enquete on the 29th day of May, 1934.

PART TWO—EVIDENCE.

- 20 11. Plaintiff's Evidence :
 - Evidence of C. B. Mills.
 - " " W. J. Vigars.
 - " " N. M. Paterson.
 - " " E. B. Sutherland.
 - " " J. D. Montgomery.
 - " " J. Demill.
 - " " A. H. Peterson.
 - " " W. H. Duthie.
 - " " W. K. Inkster.
 - 30 " " Hon. Judge McDougall.
 - " " A. E. Hudson.

PART THREE—PLAINTIFF'S EXHIBITS.

12. Plaintiff's Exhibits :
 - P.1, Certified copy of Judgment, dated 30th November, 1933, Court of King's Bench Appeal Side, bearing Number 379.
 - P.2, Certificate of Registry of s.s. "Thordoc," dated Fort William, Ontario, 27th May, 1926.
 - P.3, American Bureau of Shipping Certificate.
 - P.4, Department of Marine Certificate of seaworthiness.
 - 40 P.6, Certificate of Declaration of Ownership of s.s. "Thordoc."
 - P.7, Certificate of Collector of National Revenue.

In the
Exchequer
Court.

No. 15.
Consent
that Record
be com-
posed of
certain
documents,
20th March,
1936—
continued.

P.8, Superintendent's Inspection Certificate.

P.9, Canadian Government Chart No. 102, Lake Superior.

P.10, Copy of letter from Casgrain and McDougall to Paterson Steamships Limited, dated 2nd December, 1929.

P.11, Letter from Paterson Steamships Limited, to Casgrain and McDougall, dated 4th December, 1929. Letter from Captain Inkster of Paterson Steamships Limited.

P.12A, Requisition for adjustment of compass signed by Captain Peterson.

P.12B, Bill of Captain Inkster, dated 2nd June, 1929, voucher and 10 cheque.

P.12C, Requisition for installation and adjustment of new compass.

P.12D, Original account of Captain Inkster for \$15.00, dated 28th September, 1929.

P.13, Affidavit of E. Sutherland, dated 18th June, 1934, regarding Exhibits P.12A, P.12B, P.12C and P.12D.

PART FOUR—DEFENDANT'S EXHIBITS.

13. Defendant's Exhibits :

D.1, Deviation Card.

D.2, Canadian Government Chart, No. 114, Lake Superior—Fort 20 William and Port Arthur.

D.3, Log Book, pages 83, 84, 85, 151 and 152.

D.4, Judgment and Notes of Judgment of the Hon. Mr. Justice Philippe Demers re No. F.83113, Superior Court, *Robin Hood Mills Limited vs. Paterson Steamships Limited.*

PART FIVE—JUDGMENTS.

14. Decree of Local Judge in Admiralty, Quebec Admiralty District.

15. Reasons for Judgment of Local Judge in Admiralty, dated December 15th, 1934.

16. Reasons for Judgment of Mr. Justice McLean, President of the Exchequer 30 Court of Canada, dated July 17th, 1935.

PART SIX—APPEAL.

17. Notice of Appeal, dated December 5th, 1935.

18. Judgment fixing security for costs on Appeal in Privy Council.

Montreal, March 20th, 1936.

(Sd.) BROWN, MONTGOMERY & McMICHAEL,
Solicitors for Appellant.

(Sd.) WELDON & LYNCH-STANTON,
Solicitors for Respondent.

EXHIBITS.

Exhibits.

P.1.—Certified Copy of Judgment, Court of King's Bench, Appeal side, bearing Number 379.

P.1.
Certified
Copy of
Judgment,
Court of
King's
Bench,
Appeal
side, bear-
ing Number
379, 30th
November,
1933.

LA COUR, après avoir entendu les parties par leurs avocats, sur le mérite du présent appel, examiné le dossier de la procédure en Cour de première instance, et sur le tout, délibéré :—

10 CONSIDERANT qu'il n'y a pas erreur dans le dispositif du jugement rendu par la cour supérieure, siégeant à Montréal, dans le district de Montréal le treizième jour d'avril mil neuf cent trente-deux et dont est appel, RENVOIE le dit appel, CONFIRME le dit jugement, mais par l'unique motif que sans que l'Appelante ait établi avoir à ce sujet fait la diligence voulue, son navire était impropre à la mer (unseaworthy), qu'ainsi elle ne peut prétendre à l'immunité qu'elle invoque et qu'il lui faut en conséquence et selon la loi, répondre de la cargaison qui lui avait été confiée ; l'autre motif du jugement *a quo*, celui d'un déroutement, étant écarté. Dépens contre l'Appelante en faveur de l'Intimée.

(signé) SEVERIN LETOURNEAU.
J.C.B.R.

20 Pour copie conforme
Louis Marchand.
Dép-Greffier des Appels.

P.7.—Certificate of Collector of National Revenue.

P.7.
Certificate
of Collector
of National
Revenue,
dated 23rd
May, 1934.

NATIONAL REVENUE, CANADA.

(Customs and Excise Divisions.)

May 23, 1934.

Port of.....Collector's Office,
Fort William, Ont.

Paterson Steamships Limited.
Fort William, Ontario.

30 Sirs,

Attention Mr. E. B. Sutherland.

As per your verbal request to-day I enclose herewith, copies of Declaration of Ownership on behalf of a Body Corporate (Form No. 8) for the Steamer "J. A. McKee" Official No. 125442, the name of this Steamer being changed later to "Thordoc."

I also beg to advise you that there was no Ship's Husband registered in connection with the Steamer "J. A. McKee" or as it was later named "Thordoc."

Trusting the enclosed documents and the information are what is required

I have the honour to be, Sir,

Your obedient servant,

(Sgd.) W. E. COOMBER,

Collector of National Revenue,
Customs and Excise Divisions.

40

Exhibits. **P.10.—Copy of Letter from Casgrain and McDougall to Paterson Steamships Limited.**

P.10.
Copy of
Letter from
Casgrain and
McDougall
to Paterson
Steamships
Limited,
dated 2nd
December,
1929.

Paterson Steamships Limited,
Fort William, Ont.

2/G

December 2, 1929.

Attention Mr. Sutherland.
Re "THORDOC."

Dear Sirs,

We acknowledge your letter of November 29th which was awaiting the writer here upon his return to the office. We have the enclosed Certificate, 10 being the grain classification Certificate of the American Bureau of Shipping under date of May 25, 1929 and two Certificates relating to the stranding of the vessel on August 10th, 1929. We are retaining these in our record for the time being, but will return them to you in due course as requested.

In confirmation of the writer's conversation with Mr. Sutherland, we would also be glad to have the Certificates of inspection by the Government inspectors both as to hull and engines. We understand also that you are obtaining for us report of Captain Inkester in regard to the inspection of the compasses and also a full report from Captain Montgomery, your Marine Superintendent, in regard to the inspection and care of the vessel by Owners. We would also be 20 glad to have the invoices covering the monies expended to carry out repairs upon the vessel following the casualty of August 10th above referred to.

The writer proceeded to Chicago after his interview with you and reported to the Insurance Company of North America. It was decided that a surveyor should be sent out to examine the vessel, if possible, in order to strengthen our stand should proceedings be taken by cargo interests against the vessel. Mr. K. M. Walker of Chicago is the surveyor who is going to Port Arthur and we believe that you will have been advised of his visit through Messrs. Johnston and Higgins, to whom the Insurance Company of North America wrote while the 30 writer was in Chicago.

We would be glad to have from you further particulars when obtainable as to the salvage of the ship and cargo.

Yours faithfully,

P.11.
Letter from
Paterson
Steamships
Limited to
Casgrain
and
McDougall,
dated 4th
December,
1929.

P.11.—Letter from Paterson Steamships Limited to Casgrain and McDougall, and Letter from Captain Inkster to Paterson Steamships Limited.

PATERSON STEAMSHIPS LIMITED.

Fort William, Canada.

December 4, 1929.

Messrs. Casgrain & McDougall,
Transportation Building,
Montreal Que.

Attention: Mr. McDougall.
s.s. "THORDOC."

Dear Sir,

We enclose herewith Certificate issued by the Dominion Government Inspector, also a report by Captain Inkster, covering the last inspection of

40

compasses, as well as a report from our Captain Montgomery of Port Colborne covering his last inspection of the vessel. We also enclose an invoice of the St. Lawrence Marine Repair Dock showing the cost of work which we had done on this vessel a year ago this December, before the vessel loaded winter storage cargo. No repairs were necessary to the vessel after the casualty of August 10th, as you will note from the Certificate that the vessel carried a Certificate of Seaworthiness until the close of navigation, but in the event of loading winter storage cargo it would have been necessary to place the vessel on drydock for sight and survey. However, this was not done, as you will understand, owing to
10 the disaster occurring prior to that date.

Mr. Walker representing the P. & I. interests only paid us a very short visit, as we understand he secured the opportunity of going to the wreck. He made no further report to us on his return, and on making inquiries, we find he has left for Chicago. If there are any further particulars you require, if you will get in touch with us, we will endeavour to give them to you.—Yours truly,

PATERSON STEAMSHIPS LIMITED,
per E. B. Sutherland.

Exhibits.

P.11.
Letter from
Paterson
Steamships
Limited to
Casgrain
and
McDougall,
dated 4th
December,
1929—
continued.

CAPT. W. W. INKSTER.

Compass Adjuster.

20 (P.O. Box-728).

The Manager, "Peterson Steamships Limited,"
Fort William, Ontario.

Collingwood, Ont.

December 1st, 1929.

Letter from
Captain
Inkster to
Paterson
Steamships
Limited.

Dear Sirs :—

This will inform you, A New nine-inch Ritchie Compass was installed on board your Steamer "Thordoc" as a Navigating Compass during the month of September, 1929, the Binnical Inspected and Compass Adjusted, the same found to be in first class condition for the safe Navigation of the above mentioned Vessel.

Hoping this will be satisfactory to you.—I remain, Yours respectfully,

(Sd.) W. INKSTER,

Compass Adjuster.

30

**P.13.—Affidavit of Ermin Sutherland, regarding Exhibits P.12a, P.12b, P.12c
and P.12d.**

IN THE EXCHEQUER COURT OF CANADA,
(Quebec Admiralty District).

No. 82.

PATERSON STEAMSHIPS LIMITED... .. *Plaintiff*

vs.

ROBIN HOOD MILLS LIMITED, *et al.* *Defendants*

s.s. "THORDOC"

40

ACTION IN LIMITATION OF LIABILITY.

I, ERMIN SUTHERLAND, of the City of Fort William, in the Province of Ontario, being duly sworn do depose and say :—

P.13.
Affidavit of
Ermin
Sutherland
regarding
Exhibits
P.12A,
P.12B,
P.12c and
P.12d,
sworn
18th June,
1934.

Exhibits.
 —
 P.13.
 Affidavit of
 Ermin
 Sutherland
 regarding
 Exhibits
 P.12A,
 P.12B,
 P.12c and
 P.12D,
 sworn
 18th June,
 1934—
continued.

1. I am the Secretary-Treasurer of the Plaintiff Company, Paterson Steamships Limited.

2. At the trial of the present action I gave evidence concerning certain facts regarding the notification received by Paterson Steamships Limited of the adjustment of the compass of the s.s. "Thordoc."

3. At such time I stated that an account was received from Captain Inkster for his services in adjusting the compass of the s.s. "Thordoc" on the 26th day of September, 1929 and that this account was paid by Messrs. Paterson Steamships Limited.

4. Such statement was made by me under a misapprehension of fact and 10
 after having searched through the records of the Company I now find that, although this account was received as stated by me in my evidence, it was never paid by Paterson Steamships Limited for the reasons hereinafter set forth.

5.—At the commencement of the season 1929 arrangements were made with Captain Inkster to adjust, when called upon to do so, the compasses of the vessels belonging to Paterson Steamships Limited.

6. According to this arrangement Captain Inkster was to receive \$45·00 per year for the adjustment and inspection of compasses on any given vessel regardless of the number of times he was required to attend to such inspection or adjustment. 20

7. Pursuant to this arrangement, Captain Inkster attended upon the s.s. "Thordoc" and adjusted its compass on or about the 25th day of May, 1929, the whole as appears from a requisition signed by Captain Peterson, the Master of the said vessel and herewith produced and marked as Plaintiff's Exhibit No. 12A.

8. Captain Inkster billed the Company for \$45·00 for this adjustment on the 2nd of June, 1929, and was paid therefor by a cheque for \$450·00 which included other services rendered by Captain Inkster as are set forth in the voucher attached to the said cheque, the said bill of Captain Inkster and the said voucher and cheque being produced together as Plaintiff's Exhibit No. 12B. 30

9. That on or about the 26th day of September, 1929 a new compass was installed upon the s.s. "Thordoc" and adjusted by Captain Inkster, and Paterson Steamships Ltd. received notification of such installation and adjustment upon receiving a requisition therefor signed by the Master and produced herewith as Plaintiff's Exhibit No. 12c.

10. That on the 28th day of September, 1929 Captain Inkster billed the Company in the sum of \$15·00 for expenses incurred in attending upon the said vessel for fitting and adjusting such new compass pursuant to the requisition of the Captain produced as Exhibit No. 12c, the whole as appears from the original account of Captain Inkster produced herewith as Plaintiff's Exhibit No. 12D. 40

11. That this account, Plaintiff's Exhibit 12D, was not paid by Paterson Steamships Limited for the reason that it had already paid Captain Inkster the sum of \$45·00 for all and any adjustment that the compasses of the "Thordoc"

might during the navigation season of 1929 require and that the said charge of \$15.00 for expenses was not due the said Inkster or exigible by him from Paterson Steamships Limited under his contract as hereinabove described.

And I have signed :

(Sgd.) ERMIN SUTHERLAND.

Sworn to before me at the City of
Fort William, in the Province of
Ontario on this 18th day of June,
1934.

10

F. R. MORRIS.

A Notary Public in and for the Province of Ontario.

D.4.—Judgment and Notes of Judgment of the Hon. Mr. Justice Philippe Demers re No. F.83113, Superior Court, Robin Hood Mills Limited vs. Paterson Steamships Limited.

THE COURT, having heard the parties by their Counsel upon the merits of the present case, examined the proceedings, the evidence and proof of record, and upon the whole deliberated ;

WHEREAS Plaintiff, by its Declaration, declares : see Plaintiff's Declaration, page 3.

20

WHEREAS the Defendant pleads, in substance, that there was no Charter-party entered into between the Plaintiff and the Defendant ; that this contract was subject to the provisions of the Water Carriage of Goods Act (R.S.C. ch. 207) ; that the Defendant, owners of the "Thordoc" at the commencement of the voyage and prior thereto and during the course thereof, exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied ; that its vessel went aground as a result of an error in navigation ;

ADJUDICATING UPON THE MERITS OF THE PRESENT CASE :

30 CONSIDERING that Defendant has not proved that the compass of its ship was properly adjusted when she left Port Arthur ;

CONSIDERING also that the ship deviated from the voyage to Montreal ;

CONSIDERING that the damages are proved ;

FOR THESE REASONS, the action is MAINTAINED for the sum of \$146,326.29, with interest and costs.

PHILIPPE DEMERS,
J.S.C.

Notes of Judgment of the Hon. Mr. Justice Philippe Demers re No. F.83113, Superior Court, Robin Hood Mills Limited vs. Paterson Steamships Limited.

40 This action was brought to recover damages for the loss of the Plaintiff's cargo of flour, wheat shorts and oats shipped on Defendant's Steamer "Thordoc" under a charter entered into between the Plaintiff and the Defendant at

Exhibits.

P.13.
Affidavit of
Ermin
Sutherland
regarding
Exhibits
P.12A,
P.12B,
P.12C and
P.12D,
sworn
18th June,
1934—
continued.

D.4.
Judgment
of the Hon.
Mr. Justice
Philippe
Demers, re
No. F.
83113,
Superior
Court,
Robin Hood
Mills
Limited vs.
Paterson
Steamships
Limited,
dated
13th April,
1932.

Exhibits. —
 D.4.
 Notes of
 Judgment
 of the Hon.
 Mr. Justice
 Philippe
 Demers, re
 No. F.
 83113,
 Superior
 Court,
 Robin Hood
 Mills
 Limited vs.
 Paterson
 Steamships
 Limited,
 dated
 13th April,
 1932.

Montreal, on October 4th, 1929, confirmed by the Plaintiff's letter dated October 5th, 1929. Pursuant to the charter, the "Thordoc" arrived at Port Arthur, Ontario, on November 7th, 1929, and there took on a full and complete cargo.

The "Thordoc" cleared from Port Arthur for Montreal at about 8 p.m. on November 8th, 1929, but instead of proceeding on the direct course to Montreal, deviated therefrom and proceeded to Defendant's elevator up the Kaministiquia River to the Port of Fort William, pursuant to Defendant's instructions, for the sole purpose of discharging certain life boats belonging to the Defendant Company. 10

The "Thordoc" having discharged the said life boats, departed from Fort William and proceeded down the Kaministiquia River and out towards Lake Superior. The following day, November 9th, 1929, at about 3.10 a.m., the "Thordoc" stranded on Point Porphyry on the north shore of Lake Superior, and with her cargo became practically a total loss.

The Defendant pleads, in substance, that there was no charter-party entered into between the Plaintiff and the Defendant; that this contract was subject to the provisions of the Water Carriage of Goods Act (R.S.C. Ch. 207); that the Defendant, owners of the "Thordoc," at the commencement of the said voyage and prior thereto and during the course thereof, exercised due diligence 20 to make the said vessel in all respects seaworthy and properly manned, equipped and supplied; that its vessel went aground as a result of an error in navigation.

To this Plea, the Plaintiff answered reaffirming its Allegation 9 to the effect that the said steamer was not proceeding in due course, alleging specially that she had deviated from her course and voyage and proceeded to the Port of Fort William in the Province of Ontario.

Defendant replied to said Answer alleging that proceeding to Fort William, as alleged, had nothing to do with the stranding of the said vessel and does not constitute a deviation. 30

I am of opinion that this contract is a contract of Charter-party. The charterer was obliged to furnish a full cargo. The fact that a bill of lading was given does not change the nature of the contract between the parties. (Carver's *Carriage by Sea*, 7th Edition, No. 151).

In such a contract, there is an implied warranty that the ship is seaworthy. Our law on this point differs from the Carriage of Goods by Sea Act, 1924, Article 2. I don't mention this to indicate that the provisions of our Ch. 207 do not apply to this case. Our law is almost identical to the *Harter Act*, and under this Act, when the Charter-party is not amounting to a demise, the Harter Act does apply (Carver p. 163, note 's'); but these are considerations which may 40 perhaps be taken into account more particularly when we appreciate the question of deviation.

Two questions have been submitted to me by the parties in their well-made factums—

- 1st. Did the Defendant use all diligence according to Ch. 207; and
- 2nd. Was there a reasonable deviation?

FIRST QUESTION—Did the Defendant use all diligence, according to Ch. 207 ?

By Common Law, the carrier is responsible if he does not prove that a fortuitous event prevented him from executing his contract.

The Carriage Goods Act, Ch. 207, is an exception, and it was incumbent on the Defendant to prove that it exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied.

The case, on this point, turns only on the question of the compass and the absence of the deviation card.

- 10 Due diligence must be not only by the shipowner himself, but by all his servants or agents whom he employs (Scrutton, 13th Ed. p. 509 ; note ' c ' ; Carver, p. 166 ; McLaghlan, p. 371). It is different where it is a question of limitation of responsibility ; there must be personal fault of the owner (1932 Am. Mar. C. p. 123 & s.). In the case of *Angliss vs. Pinsular*, 1927 K.B. p. 456, quoted by Defendant, it is admitted that there must be diligence by those who supervise the works for the owner.

It appears that a new compass had been installed in the vessel on September 24th, about six weeks prior to the stranding. It was installed pursuant to instructions of the General Manager of the Defendant.

- 20 Inkster, compass adjuster, was aboard the vessel when the compass was installed at Fort Colborne, and remained aboard the vessel until the following day when he got off at Sandwich, Ontario. During this time, it was raining and no observation of the sun could be taken. It appears, from the evidence, that observation of the sun is necessary for a proper adjustment of a compass, and it is also necessary to swing the ship on all points of the compass on each particular heading of the ship, and that was not done.

- 30 The compass adjuster left the vessel at Sandwich, Ontario, and said that he would be back on the down bound trip. He did not leave a deviation card with the Master, and if we look at a deviation card (Exhibit P.7), we see that, not having made a complete turn with the ship, he could not leave such a card as Exhibit P.7.

The Master of the ship says that he needed such a card, that he was not sure of the compass at all.

Inkster admits that it is customary to give a certificate to the owners, of the adjustment of a compass, that the owners have to have authority from him.

Captain Peterson also admits that the lack of information as to the deviation is the only thing that could reasonably explain the accident.

The Second Mate of the ship, Fowlow, testifies that the compass was not reliable.

- 40 The Defendant says, in reply to all this evidence, that the compass could be adjusted by the Master. It may be, but in this case it was not so adjusted. It seems also to contend that the adjustment of a compass was not necessary, that it is a pure question of navigation, but it is quite evident that no Master has the right to sail without an adjusted compass. The compass is the eye of the ship and a non-reliable compass is not better than no compass at all.

As to the deviation card, Inkster says that he did not give any because it would have been about the same as the old card, but I think it is not the

Exhibits.

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reason. The reason seems to me that he did not give any because he could not give any, the ship not having made a complete turn. That is why also, in my opinion, he had not sent the certificate before the wreck.

It goes without saying that a deviation card is a very useful thing on a ship. Some men may not need one on account of an exceptional memory, but some may.

It is true that in the case of *Oritani*, the Judge said that he did not think that its absence substantially effects the issue of sea-worthiness, but it does not seem to have been the opinion of the Court in the case of *Yongay*, 1932, American Maritime Cases, p. 127. 10

However, this question of the necessity of a deviation card on board of a ship, I am not bound to decide, since I come to the conclusion that the compass of that ship had not been properly adjusted, and when the ship sailed from Port Arthur, the Captain and the Mate did not consider that compass reliable.

It is alleged also by the defence that they had already made one voyage without any accident, but this is no good answer. It shows purely and simply that they were lucky that time.

SECOND QUESTION—Was there a reasonable deviation ?

Of course, I could dispense from giving my opinion on the second question submitted, but knowing that this case is to go before other Courts, I feel I should 20 give my views on the second point.

It is contended at the outset that there was no deviation. The Charter-party says the Defendant provided for a trip from the head of the lakes, and Fort William is as much the head of the lakes as Port Arthur.

Of course, the ship, by the contract, could be loaded at either port, but having been loaded at Port Arthur, and a Bill of Lading having been issued from Port Arthur to Montreal, the choice had been made by the parties of the starting point, and the voyage began when the ship left the harbour of Port Arthur.

Fort William was not on the direct route to Montreal. The ship, to go to Fort William, had to retrograde. 30

The length of the deviation is of no importance.

It has been decided, in a case of *Gamble v. The Ocean Marine*, there may be a deviation in the same port (45 *Law Reports, Exchequer*, p. 115). It is true that this Judgment was reversed (p. 366), but not on the question of deviation, but on the principle that it was not altogether a voyage policy, but a time policy.

Fort William is a different port. For improvements by the Government, it may be the same port, but, in fact, it is a different port. The ship had to deviate many miles and through a river.

This deviation is to be treated more strictly on account of the Charter-party.

It is also proved but not pleaded that it is customary for vessels to go to and 40 fro between the two towns for loading, bunkering or other purposes, that is to say, for the voyage. This is not what occurred in this case. This little additional trip was not connected with the voyage.

The whole ship, in this case, had been chartered by the Plaintiff, and even if there had been liberty to call at other ports, it could not extend to purposes not connected with the voyage (*Carver's*, p. 423 ; see 48 and Ald. 72).

The deviation was not authorised by the Bill of Lading. Fort William is not an intermediate port, and even if it had been, it results, from the authority cited, that the deviation not being connected with the voyage, was not permitted.

I am of opinion also that the deviation was not reasonable. Of course, it results from the authorities that all the circumstances must be examined in order to decide if a deviation is reasonable or not, but when a deviation is not in favour of the ship nor of the cargo, or when it is not brought up by the contingencies of the sea or by some other unforeseen event, it cannot be
10 considered as reasonable, as a rule.

In this instance, this entire ship was chartered from Port Arthur to Montreal, and the proprietors were wrong in deciding to make a little unnecessary voyage to Fort William for their own sake. By their conduct, the cargo was running a risk. The insurers of the cargo were discharged, in my opinion, and it is only fair that the owners should be liable to the cargo owners.

This principle is not denied by the Defendant in this factum, p. 8, where he says :

20 “ Let us assume, however, for the purposes of the present argument, that technically the trip to Fort William did constitute a deviation. The general law, of course, is that the effect of unauthorised deviation is to displace the special conditions of the Charter-party or Bill of Lading, together with the exceptions therein (Scrutton, *Charterparties and Bill of Lading*, 12th Ed., p. 295). The theory upon which the law rests is that the contract has been departed from and the risk increased.”

It is true that in the 13th Edition and with reference to the Carriage of Goods Act of 1924, the same authors (p. 517, note ‘ a ’) express a doubt on this question, though they maintain that probably the English law as to deviation is so well established that it may still be held to be applicable. (See
30 Carver, p. 427.)

As I have already said, our law is practically similar to the American law, and I am of the opinion that in the United States this point is not disputed. (74 *Fed. Reports*, 881 ; 278 *Fed.* 459 ; 282 *Fed.* 235 ; 277 *Fed.* 99 ; 1930 *American Maritime Cases*, p. 1810.)

It seems to me it would require a very formal disposition to the contrary. By deviating, the insurance on the goods is lost. Would it be reasonable to say that the ship is not responsible to the cargo owners ?

For these reasons, the Plaintiff’s action is MAINTAINED, with costs.

(Sgd.) PHILIPPE DEMERS,
J.S.C.

In the Privy Council.

No. 112 of 1936.

ON APPEAL FROM THE EXCHEQUER COURT OF
CANADA.

BETWEEN

ROBIN HOOD MILLS LIMITED
(Defendant) Appellant

AND

PATERSON STEAMSHIPS LIMITED
(Plaintiff) Respondent.

s.s. "THORDOC."

RECORD OF PROCEEDINGS.

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