ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN

ROBIN HOOD MILLS LIMITED et al (DEFENDANTS) .... APPELLANTS;

1935

*May 1
*July 17

AND

PATERSON STEAMSHIPS LIMITED (PLAINTIFF) .... RESPONDENT.

Shipping—Loss of Cargo—Limitation of Liability—Merchant Shipping Act (Imperial) 1894—Charter party—Deviation in voyage—Burden on party claiming limitation of liability to disprove fault or privity to the particular loss or damage.

Respondent's steamship *Thordoc,* under charter to appellants, on a voyage from Port Arthur, Ontario, to Montreal, Quebec, with a cargo of wheat and flour owned by appellants, grounded on the shore of Lake Superior and became, with her cargo, practically a total loss. Respondent brought action for limitation of liability under s. 503 of the *Merchant Shipping Act (Imperial) 1894.* The decrease in limitation of liability was granted and appellants appealed from such judgment. Appellants contended that the *Thordoc* was not in all respects seaworthy for the contractual voyage because no certificate of adjustment of a compass, newly installed six weeks before the commencement of the voyage, was obtained by respondent. The Court found that the compass had been properly adjusted by a competent person and that a formal certificate of adjustment was not necessary.

The contract of carriage was for "loading at the lakehead * * * for Montreal." Appellants contended that Port Arthur, when designated by the appellants as the port of loading, became the port of departure at the "lakehead" under the charter party and that a deviation to Fort William, Ontario, was an unreasonable one, and, therefore, respondent cannot set up the exceptions found in the charter party.

The respondent company is a subsidiary of the N. M. Patterson Grain Company Ltd., which owns all the stock of respondent company except that required for directors shares. One Hall was general manager of respondent company. He ordered the *Thordoc* on its voyage up the lakes to take on board lifeboats at Sault Ste. Marie to be delivered at Fort William, that being the port to which the *Thordoc* was then bound. While en route to Fort William the *Thordoc* was directed by one Sutherland to load appellants' grain

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at Port Arthur before proceeding to Fort William to deliver the lifeboats. Sutherland was chief clerk of the grain company and also secretary and treasurer and a director of the respondent company, his duties in respect to it being largely secretarial. He never directed the movements of ships unless instructed by Hall, except on this occasion, when he did so without communicating with Hall. The *Thordoc* proceeded to Fort William, and about four hours later returned to one of the permissible routes pursued by cargo steamers en route from Port Arthur to Montreal. About three hours later it stranded due to improper navigation. The Court found that the action of Sutherland in directing the deviation of the *Thordoc* to Fort William was not the action of respondent company.

Held: That the fault or privity of a shipowner which is a company, within the meaning of s. 503 of the *Merchant Shipping Act,* must be the fault or privity of somebody for whom the company is liable because his action is the very action of the company itself.

APPEAL from the decision of the Local Judge in Admiralty for the Quebec Admiralty District, allowing plaintiff's action for limitation of liability.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, and the Honourable Mr. Justice Angers, at Ottawa.

C. R. McKenzie, K.C. for appellants.

V. M. Lynch-Staunton for respondent.

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

The judgment of the Court was delivered by

THE PRESIDENT (Angers J. concurring):

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 sec. 503 of the *Merchant Shiping 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; (that 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

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not of justice, and the statute is to be construed according to the fair and 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.

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 Porphery 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."

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*.

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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 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 judgment of the learned trial Judge that, if he were 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

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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.

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 ship owning 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 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

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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 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. 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 given accordingly.

With this conclusion I agree. The issuance of a certificate from the compass adjuster 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 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

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up the exemptions expressly or impliedly to be found in the charter 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 *Joseph Thorley Ltd.* v. *Orchis Steamship Co. Ltd.* (1) and *Tate & Lyle Ltd.* v. *Hain Steamship Co. Ltd.* (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 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. Patterson Grain Company Ltd. Mr. N. M. Patterson 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 Ste. Marie four lifeboats 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 appellants' grain, etc., was then in railway cars at Port Arthur and

(1) (1907) 1 K.B. 660. (2) 49 Ll. L. Rep. 123.

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subject to demurrage, which demurrage before loading had accumulated to $326, 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 lifeboats. Sutherland was the chief clerk of the grain company, and was closely associated with Patterson 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 organization. Sutherland's duties in respect of the steamship company were, according to Patterson, 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 were common to both companies, and that Sutherland was chief clerk in the office common to both organizations. 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 lifeboats before proceeding on the voyage to Montreal with his cargo, and this the master did. Both Patterson 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 organization 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 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 Patterson, the active individual in the grain company's business at Fort William, and such duties would, I assume, ordinarily consume his full working time.

In conformity with the instructions mentioned the *Thordoc* proceeded to Fort William and there unloaded the lifeboats 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 Kaministiquia 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 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 Porphery, 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

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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.

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 Co. Ltd.* (1). A cargo of benzine 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 sec. 502 of the *Merchant 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:—

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 caused by any negligence or want of precautions on the part of the engineers, because he does not

(1) (1915) A.C. 705 at 711.

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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 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 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 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,—(*i*) 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".

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 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 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

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to be liable at all, have been an action which was the action of the company itself 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 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 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, then the judgment of the majority of the Court of Appeal and of Bray J. was right.

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 Maclachlan on Merchant Shipping, 7th Ed. p. 96: *The Charlotte* (1), *The Warkworth* (2).

In the facts here I hardly think it can be said that Sutherland was the person who had the effective direction

(1) (1921) 9 Ll. L.L.R. 341. (2) (1883) 9 P.D. 20.

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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 Ltd.* v. *Cavanagh* (1) Lord McNaughton said:

> 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."

At most it seems to me, that in so far 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 only to be rare, and then at the instance and direction of Hall. Hall was the individual clothed with authority by the steamship

(1) (1902) A.C. 117 at 124.

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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 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 shipowners 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.

The appeal is therefore dismissed with costs.

Judgment accordingly.

Reasons for judgment of Demers J.:

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 Porphery in Lake Superior and became a constructive total loss and the said cargo was severely damaged.

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 Plain-

tiff, 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 Side, on the 13th day of May, 1932, the record of such appeal being 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 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.

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 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 Court of Appeal:

"RENVOIE le dit apel, 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 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 pretension 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 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.

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Temperley's Merchant Shipping Acts, 4th Edition, page 328, states that this right may be claimed by direct action, by defence, or by counter-claim. Usually, he says, in the High Court it is invoked by the defence or counter-claim.

Counter-claim is an action, and by our practice, when you have the right to counter-claim, 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 *Merchant Shipping Act*, (Parsons on Shipping and Admiralty p. 121), the question today is not disputed. (233 U.S. 346; 58 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 that the counter-claim 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. (*Monongahela & Hurst* 200 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 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 Encyclopedia of Law, Vol. 24, page 711, 780 and 781).

The notes of Honourable 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, 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 & 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 shipowner's common law liability, I would not reconsider the question.

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 Appeal should be followed.

The question remains then — has the Plaintiff in this case made proof that there was no actual

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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.

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.