Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Ship "Kitty D" v. His Majesty the King, from the Supreme Court of Canada; delivered the 21st December 1905.

Present at the Hearing:

THE LORD CHANCELLOR (the Earl of Halsbury).
LORD MACNAGHTEN.
LORD DAVEY.
LORD JAMES OF HEREFORD.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by the Earl of Halsbury.*]

In this case, to quote the language of Mr. Justice Davies, the question for determination is "solely one of fact." A vessel called the *Kitty D*, seized by the Canadian Government cruiser *Petrel* on the 3rd of July 1903 for fishing in Canadian waters, appeals against the Judgment of the Supreme Court of Canada which reversed the Judgment of Mr. Justice Hodgins who had tried the case and had found in favour of the *Kitty D* that she was in United States waters when she was fishing. The fishing was being conducted with nets of a very considerable size, and their site was marked by a buoy. If the exact situation of the nets could be ascertained, all difficulty as to where the *Kitty D* was engaged in the operation of fishing would disappear. On the 27th of July Captain Hewison, of the United States Navy, proceeded to investigate the circumstances of the seizure. He found the nets and the buoy.

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He took off two corks with the initials R. and D. marked upon them. He logged the distance from Dunkirk and found it to be nine and a half statute miles. If this distance is accurately stated, and the nets were the same nets and had not been moved from their position on the 3rd of July, there can be no doubt that the *Kitty D* was fishing in United States waters, and that the Judgment of the learned Judge who tried the cause ought to be affirmed. It has not been suggested that Captain Howison has made any error in his measurements, but two points were raised, not at the trial, but for the first time in the Appellate Court, first, that the nets are not sufficiently identified, and, secondly, also for the first time in the Appellate Court, that if they are the same nets, they had been removed from the original place of the fishing to the place where Captain Howison found them. It is obvious that if either of these two suggestions is well founded, the witnesses who established the identity of the nets and negatived their having been removed must have been guilty of wilful falsehood. No mistake is possible under the circumstances. The witnesses were either telling the truth or they were parties to a scheme of falsehood and fraud. No wonder that the learned Chief Justice of the Supreme Court protested that it was impossible to reverse the finding of fact of the Court below without disbelieving the evidence of witnesses whom the learned Judge had heard and believed. It is difficult to understand what Mr. Justice Davies means when he says that the learned Judge who tried the cause did not base his conclusions "upon "any questions arising out of the demeanour or "credibility of witnesses, matters which would "be peculiarly within his province and with a "decision upon which an Appeal Court would "not interfere." To act upon either of the

suggestions above referred to would be in truth to decide the case without hearing it. No such question appears to have been entertained at the trial, and their Lordships entirely concur in the view of the Chief Justice that it would be impossible to enter Judgment, as the Supreme Court appears to have done, upon an hypothesis of fact never suggested at the trial. Independently of this consideration their Lordships think that sufficient weight has not been given to the cogent and careful reasoning of the learned Judge who tried the cause.

The problem of marking the exact spot where the seizure has taken place, when there were no landmarks and no points from which the observations could be taken, was in itself a difficult one. No mark or boundary distinguishes Canadian from United States waters. The distance from one shore to the other is proved to be 22½ miles, and the mode by which it is sought to establish that the *Kitty D* was fishing in Canadian waters is by calculating by time and distance from the point of the *Petrel's* departure, that is to say, from about 32 miles along the Lake, to the point of seizure, the calculation being derived from the ship's log and the course marked in it. There could be no more cogent enumeration of the sources of error than that given by Mr. Justice Davies himself, although he somewhat overstates the precautions taken against the errors incident to such a problem. He says:—

"The direct distance across the lake at the point of seizure "is 22½ miles, and the boundary line running through the "middle of the lake would be 11¼ miles from the Canadian "shore. At the time and place of seizure there was no land "in sight, and it was therefore necessary to establish the "position of the cruiser by reference to the courses and "distances which she had sailed from the land.

"The *Petrel* had sailed from Port Dover on the morning of "the 3rd July and had taken her usual course towards the

"boundary S.E. by S. ¼ S., passing Long Point light at a "distance of about half a mile, and with the light bearing "directly abeam had set her patent Negus log to indicate the "distance run from that point. It is not disputed that the "Negus log is one of the most approved logs known to "mariners for the purpose of registering distances sailed. All "these patent logs have to be corrected from experience. The "*Petrel's* log had been carefully tested and corrected, and "found by actual experience and measurement to over-register "2¼ knots in every forty knots. Likewise her compass had "been carefully tested and corrected for deviation, and the "variation in the locality of course was known.

"In fact, the *Petrel's* compass carried a quarter of a point "westerly deviation and the variation was 3·30 degrees.

"The *Petrel* then, according to her officers, having set her "log with Long Point light abeam on her compass course "S.E. by S. ¼ S. continued that course until her log registered "5 knots, which brought her 1¾ miles to the north of the "boundary line.

"At this point she turned to run down eastwardly parallel "with the line within Canadian waters, and her compass "course was as usual from there E. by N. ½ N., which course "she continued until her log registered 27 knots from the "turn, making in all 32 knots from Long Point light."

It may be conceded that, if every part of these considerations could be accepted as precisely accurate, the conclusion arrived at would justly follow. But the learned Judge who tried the cause justly pointed out that no one of the assumptions referred to could be relied on for accuracy. It is admitted that the log of the *Petrel* is inaccurate. What the learned Judge points out is that "the change of a quarter of a "point in a compass would make a difference of "a mile and a half right or left in a vessel's "course over a distance of some thirty miles." The variation and deviation of the compass and the fact that the wheel was in the hands of two inexperienced persons, are circumstances which render it impossible to treat the conclusion arrived at as one arrived at with complete certainty.

The learned Judges in the Supreme Court appear to have supposed from an observation in the Judgment of Mr. Justice Hodgins, that he was under the impression that the sailor

steering on board the *Petrel* was himself expected to make allowance for errors in the compass and the log. Their Lordships think that this suggestion does scanty justice to the intelligence or knowledge of Mr. Justice Hodgins. Mr. Justice Davies suggests that the eyes of one of the captain's officers were perpetually on the steerer's conduct. But the condition of the log, or of the notes which form materials from which the log should be composed, certainly do not lead to a conviction of that precise accuracy. It comes out incidentally that in looking over the log-book the letter W was added to describe the course of the vessel some days after the transaction to which that portion of the log referred—probably with perfect honesty, but it certainly does not suggest that scientific precision upon which Mr. Justice Nesbitt seems to rely for his Judgment. All that the learned Judge at the trial meant was that the steering was not as accurate as if the vessel had been steered by experienced seamen, and it is to be observed that Captain Howison seems to share the learned Judge's view of the error that might arise from loose steering. It appears to be assumed by the Supreme Court that Mr. Justice Hodgins made a grave mistake as to the alleged course of the *Petrel*. Even if that mistake had been made, it does not seem to interfere with the learned Judge's reasoning as to the sources of error which would prevent the calculations on board the *Petrel* from being a sufficiently certain guide. But it is obvious to remark that it would have been easy to apply to the learned Judge to know whether he had in fact made the mistake attributed to him rather than to leave it to the hazardous conjecture that he was misled by a printer's or shorthand writer's blunder. In the uncertain and unsatisfactory state of the

evidence it is impossible not to observe that if, upon the seizure, the *Petrel* had carefully logged the distance to the shore, no doubt could have remained as to whether the place of seizure was within Canadian waters. It may be that the excuses given for not doing so are valid ones, but an excuse for not having evidence will not supply the place of the evidence itself.

Their Lordships will, therefore, humbly advise His Majesty that the Judgment of the Supreme Court should be reversed with costs, and the Judgment of Mr. Justice Hodgins restored. The Respondent will pay the costs of the Appeal.