THE SCHOONER "RELIANCE" (DEFENDANT) ..... APPELLANT; 1901

*Nov. 20, 21.
*Nov. 26.

AND

WALTER N. CONWELL AND R. E. CONWELL, OWNERS OF THE SCHOONER "CARRIE E. SAYWARD" AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation—Negligent lookout.

In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance" the decision mainly depended on whether or not the lights of the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance."

Held, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. *Santanderino* v. *Vanvert* (23 Can. S. C. R. 145), and *The Village of Granby* v. *Ménard* (31 Can. S. C. R. 14), followed.

APPEAL for a decision of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada (1), in favour of the plaintiffs, owners of the "Carrie E. Sayward."

The facts are fully stated in the judgment of the court.

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*PRESENT: — Taschereau, Gwynne, Sedgewick, Girouard and Davies JJ.

(1) 7 Ex. C. R. 181.

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Harris K.C. for the appellant. The burden of proving negligence is upon the plaintiff; *Morgan* v. *Sim* (1), per Lord Wensleydale at page 312. See also *Harris* v. *Anderson* (2); *Wakelin* v. *London & South Western Railway Co.* (3); *The Catherine of Dover* (4); *The Ligo* (5). Marsden on Collisions at Sea (4 ed.) p. 2. The plaintiff, in order to recover entire damages, must prove both care on his part, and want of it on the part of defendant; *The Clara* (6); his light was burning and could be seen; *The Florence P. Hall* (7). Where the evidence is conflicting, and there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen. *The Agda* (8). See Stockton's Admiralty, p. 565.

There is no obligation upon the master to be on deck if it is in charge of competent men; *The Obey* (9). We refer also to Marsden on Collisions at Sea (4 ed.) p. 49, 64, 71, 72, 331, 332, 333, 423, and Canadian cases there cited; *Emery* v. *Cichero; The Arklow* (10); *Ocean SS. Co.* v. *Apcar & Co.; The Arratoon Apcar* (11); *The Milan* (12); *Eastern SS. Co* v. *Smith*; *The Duke of Buccleuch* (13); *The Fanny M. Carvill* (14). At the worst both vessels were in fault and it is submitted that if the evidence shews any fault whatever on the part of the defendant, it also shews an equally serious one on the part of the plaintiffs' ship, and in that case the damages will be divided; *The Lapwing* (15); and there should be no costs to either side in such a case. *The Lake St. Clair* (16); Stockton's Admiralty, p. 567; *The Heather*

(1) 11 Moo. P. C. 307.
(2) 14 C. B. N. S. 499.
(3) 12 App. Cas. 41.
(4) 2 Hag. Adm. 145.
(5) 2 Hag. Adm. 356.
(6) 12 Otto. 200.
(7) 14 Fed. Rep. 408.
(8) Cook Vice Ad. Cas. 1.
(9) L. R. 1 A. & E. 102.
(10) 9 App. Cas. 136.
(11) 15 App. Cas. 37.
(12) Lush. 398.
(13) [1891] A. C. 310.
(14) 13 App. Cas. 455n.
(15) 7 App. Cas. 512.
(16) Cook Vice Ad. Cas. 43.

Belle (1); *The Julia* (2); *The Picton* (3) at p 265; *The Sisters* (4); *The Santanderino* v. *Vanvert* (5); *The Maid of Auckland* (6).

Borden K.C. for the respondents. Article 11 was not only reasonably, but abundantly complied with; *The Fire Queen* (7); *The General Birch* (8).

In the Preliminary Act of the "Reliance," although mention is made, in stating the course of the vessel, that the helm of the "Reliance" was starboarded in compliance with a call from the "Sayward," this is not alleged to be a fault on the part of the "Sayward" contributing to the accident, the fault or default alleged being solely in regard to the light. The practice in Admiralty forbids the amendment of a contradiction of the Preliminary Act at the trial. *The Vortigern* (9); *The Frankland* (10).

The findings of the trial court are much better supported in this case than in *The Santanderino* v. *Vanvert* (5). See as to the weight of findings, *The Julia* (2); *The Araxes and The Black Prince* (11); *The Alice and The Princess Alice* (12); *Gray* v. *Turnbull* (13); *The Sisters* (4); *The Picton* (3); *Lefeuntéum* v. *Beaudoin* (14); *The Village of Granby* v. *Ménard* (15).

The judgment of the court was delivered by:

DAVIES J.—This is an appeal from the judgment of the local judge of the Nova Scotia Admiralty District, the Chief Justice of Nova Scotia (16), holding the schooner Reliance responsible for a collision which

(1) 3 Ex. C. R. 40.
(2) 14 Moo. P. C. 210.
(3) 4 Can. S. C. R. 648.
(4) 1 P. D. 117, 281; 2 Asp. Mar. Cas. 589; 3 Asp. Mar. Cas. 122.
(5) 23 Can. S. C. R 145.
(6) 6 Notes of Cases 240.
(7) 12 P. D. 147.
(8) 6 Q. L. R. 300.
(9) Swabey 518.
(10) L. R. 3 A. & E. 511.
(11) 15 Moo. P. C. 122.
(12) L. R. 2 P. C. 245.
(13) L. R. 2 Sc. App. 53.
(14) 28 Can. S. C. R. 89.
(15) 31 Can. S. C. R. 14.
(16) 7 Ex. C. R 181.

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took place between her and the schooner Carrie E. Sayward on the night of September 6th, 1900, on Quero Bank in the North Atlantic. The learned judge held that the Sayward was not in any respect to blame, and that the collision was caused by the negligent and careless navigation of the Reliance. The facts of the case are stated by him as follows:—

The Carrie E. Sayward, a fishing schooner of the Port of Provincetown, United States of America, while in pursuit of her fishing voyage was at anchor on Bank Quero, about one hundred miles east of Sable Island on the morning of the 6th September, 1900. The schooner had a crew of twelve men all told and had nearly completed her cargo of fish, when about three o'clock on the morning of the day mentioned she was run into by a schooner afterwards ascertained to be the Reliance of Nova Scotia, also fishing on the Bank Quero. The result of the collision was that the Carrie E. Sayward sank at her anchors, and the vessel and cargo were totally lost. The wind was blowing about a three or four knot breeze from the W. S. W. or S. W. The Carrie E. Sayward had occupied the berth at which she was anchored when the collision took place for about a fortnight, and three other fishing vessels, the Lottie Burns, A. K. Damon, and the Hattie Western were anchored southerly from her at distances varying from half a mile to a mile and a-half. The Reliance had also been fishing in the neighbourhood for some weeks at a distance of three or four miles from the Carrie E. Sayward, and having resolved to change her berth her master was, when the collision occurred, sailing through and among the vessels anchored in the immediate neighbourhood of the Carrie E. Sayward. Some hours before the collision the Reliance had passed and spoken the Lottie Burns while sailing N. N. W. or N. W. on the port tack, and having tacked was sailing a course near south and on the port tack when the collision occurred. At the time of collision the Reliance had all her sails set and was making between two and one half and three miles an hour speed. It is generally admitted on both sides that during the early part of the night of the 5th September the weather was fine, the sea smooth with a slight ground swell, a bright moonlight and clear starlight. The moon sank about 2 a.m. on the 6th September, and there is much discrepancy as to the state of the atmosphere after the moon had disappeared, one party alleging that the night became dark and cloudy, while the others declare that it continued fine and clear till the collision took place. There is no question that the Reliance struck the Carrie E. Sayward a square blow about midships, and that from the effects of that blow the

latter vessel with her cargo sank about two hours after the collision, after every effort had been made to save her by pumping. The only question for discussion therefore, is that raised by the defendant vessel in her preliminary act, namely:

The fault or default attributed to the Carrie E. Sayward is as follows:

(*a*) She was carrying no light at all.

(*b*) The light, if any, carried by her was very dim and indistinct, and not in accordance with the regulations for preventing collisions at sea.

(*c*) The light was not so constructed as to show a clear or uniform unbroken light, nor was the same visible at a distance of at least one mile, but was a very dim and indistinct light, and was only visible a few feet from the said ship.

The appellant contends, first, that the burden of proving negligence lay upon the plaintiff, the Sayward, and that if in the end the case is left in "even scales" and does not satisfy the court that the loss was occasioned by the neglect or default of the Reliance, the plaintiff cannot succeed. He further contends that the fault was solely that of the Sayward, and that at the worst both vessels were in fault and the damages should be divided.

This court has time and again laid down the rule that the decision of the trial judge on disputed questions of fact will not be reversed unless it is clearly shown that the evidence is against the finding. *Santandarino* v. *Vanvert* (1); *Village of Granby* v. *Ménard* (2).

Such a rule is peculiarly applicable to cases of collision at sea, where there is almost invariably a great conflict of testimony and the judge must necessarily be largely influenced by the demeanor and conduct of the witnesses when examined. The contention of the appellant as to the onus of proof is admitted. The court before condemning the defendant must be first satisfied that the loss was occasioned by his neglect

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and further that the plaintiff was not guilty of any breach of the regulations which by possibility could have contributed to the collision. As to these legal propositions, there is no dispute.

The sole and only questions in this case are of fact and they turn mainly, if not altogether, upon the single question whether, on the night and at the time in question, the Carrie E. Sayward exhibited such a light as the statute requires of a vessel lying at anchor. If she had and displayed such a light, then it cannot be argued that the navigation of the Reliance was not unskillful or careless, and did not cause the accident. On this crucial question the finding of the trial judge is clear and explicit. He says:

> The evidence of the master and crew of the "Carrie E. Sayward" is very clear and positive as to the sufficiency of the light during the whole voyage up to the time of the collision,

and after giving a few of the more important parts of that evidence he goes on to say:

> This evidence of those on board the vessel, who have best opportunity of learning and knowing the facts as to which they testify, has not in my opinion been seriously, if at all, shaken or impugned by testimony on the part of the defendant vessel, while it is corroborated very strongly indeed by the evidence of those on board the schooners in the immediate neighbourhood of the Carrie E. Sayward, on the night of the collision, and as to the general character of the light on board the Carrie E. Sayward not only on the night and morning of the collision, but during the whole period of her voyage on the banks. These witnesses are Brier, master of the Lottie Burns; Silver, master of the Ada K. Damon; Marshall, master of the Hattie Western; and Gasper, a fisherman on the Ada K. Damon.

The contention of Mr. Harris, for the appellant, that the evidence does not justify this finding, he based upon two distinct grounds, one, that the lantern itself was defective, having been carelessly or badly repaired during the fishing voyage and after the vessel had left her port of departure, and the other, that even if the lantern was a good and efficient one, the light was

insufficient and not up to the regulations on the particular night in question, and especially at and for some time previous to the moment of the collision.

On the first point it seems sufficient to say that the learned Chief Justice had the lantern in court at the trial before him and therefore had the best possible opportunity of deciding whether it was as alleged leaky and otherwise defective. But in addition to that the evidence shows that the crew of the Reliance took possession of the lantern, which belonged to the Sayward, at the time of the collision, produced it in court for a time, and then took it away and have since retained it. If it was leaky or otherwise inherently defective, they surely would have given positive evidence on the point either from experiment or by ocular demonstration. The presumption against them from their not having done so, is to my mind conclusive. Then on the question whether the light was insufficient on the night in question and not up to that prescribed by the regulations, I think the findings of the learned Chief Justice fully justified by the evidence. It is true there is conflicting evidence. There generally is under the like circumstances. But while the three men who were on the deck of the Reliance testified that the light was not seen by them until just before the collision, it must be borne in mind that this is purely negative testimony and that it comes from witnesses who may fairly be classed as interested. On the other hand, not less than seven or eight witnesses testified positively that at the time or immediately before the collision took place they saw the light of the Sayward and that it was burning clearly and distinctly. While several of these witnesses belonged to the crew of the Sayward and might also be classed as interested, at least three of them were wholly disinterested and belonged to the vessels Lottie Burns, Ada K.

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Damon and Hattie Western, which were riding at anchor some distance from each other and at a distance of about a quarter of a mile, a mile and a mile and a half respectively from the Sayward. The overwhelming weight of testimony therefore establishes the fact that on the night in question and at the time of the collision the Sayward had her light burning and that it complied fully with the regulation. That fact being once established, the negligence and carelessness of the Reliance in running into the Sayward follows as of course. The conclusion is then irresistible that the latter vessel was so negligently navigated as to have caused the collision.

It was however contended that just before the Reliance ran into the Sayward, the look-out, or some one of the latter vessel, shouted out "keep her off," and that the look-out man of the Reliance repeated the order, which the steersman of the Reliance immediately acted upon by starboarding the helm, whereas if the order or shout had been to luff the two vessels would or might have cleared or at most met side to side. Whether the predicted result would have followed the suggested order to "luff" is little more than conjecture, it might perhaps be correctly called a pious hope. As a matter of fact the Reliance does not appear to have answered much, if any, to the starboarding of her helm, and there is no good reason to believe she would have answered more readily to it had it been ported. But leaving all such speculations aside, we find that the vessels were at that moment in immediate peril of collision, only in fact a few yards apart. The exclamation, shout, or order, whatever it may be termed, was one given in presence of an immediate and pressing danger, a natural cry coming from the lips of some one unknown at the moment, when it was evident the vessel he was aboard

of was in immediate peril of being run down. To ask this court to hold that such a cry was under the circumstances an order for which the owners of the Sayward should be held responsible as they would be for an improper order given by a person in authority, when navigating his own ship, is to ask something in support of which I venture to say no principle or authority could be cited. As a matter of fact the immediate order in which the helmsman of the Reliance acted when he starboarded his helm came from the look-out man of the Reliance. He says he took it up and repeated it from the cry he heard from the Sayward. But he was surely in as good a position to judge of the proper order to be given as was the unknown man aboard the Sayward, and if the order was a wrong one and contributed to the collision, those navigating the Reliance have themselves to blame.

On all the material disputed facts the learned Chief Justice has found in favour of the Sayward, and in my opinion his findings are fully justified by the evidence.

The appeal therefore should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Borden, Ritchie & Chisholm.*