

<i>S.S. FANAD HEAD</i> (DEFENDANT).....	APPELLANT;	1948
AND		*Nov. 2, 3, 4,
<i>HENRY W. ADAMS</i> et al (PLAINTIFFS)....	RESPONDENTS.	5
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ON APPEAL FROM THE EXCHEQUER COURT OF CANADA,		*Mar. 18
NOVA SCOTIA ADMIRALTY DISTRICT.		—

*Shipping—Collision at sea in dense fog between fishing schooner and steamer in convoy—In situation of danger convoy orders re speed and position subject to each ship taking independent action in exercise of good seamanship. International Rules of the Road, article 16, (P.C. 259, 1897).*

The steamer *Fanad Head* and the auxiliary fishing schooner *Flora Alberta* collided in a dense fog on the Western Bank fishing grounds off the Nova Scotia coast. The schooner sank with a loss of twenty-one of her crew of twenty-eight. The *Fanad Head* was one of a convoy of eight ships in command of a commodore. The convoy was formed in three columns, the commodore's ship led the centre column, the *Fanad Head* the port column of two ships, separated from the nearest ships by three cables abreast and two astern. Under Admiralty orders, transmitted by the commodore each ship was required to keep in convoy order both as to speed and course. For some time prior to the collision the ships were running at eight knots an hour without

\*PRESENT: Taschereau, Rand, Kellock, Estey and Locke JJ.

(1) [1916] W.N. 59.

(2) [1945] 1 All E.R. 451.

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lights, except for a cluster of white lights at the stern as a guide for the following ships, and fog signals were blown every ten minutes by the leading ship of each column. On hearing a high pitched whistle ahead and to port, the *Fanad Head* sounded her column number independently and showed navigation lights, and hearing no reply, sounded again some few minutes later, but did not reduce speed. Three to four minutes later she again heard a high pitched whistle to port and a few minutes later saw lights 300 to 400 feet from the bow whereupon she put her helm hard to starboard, her engines full speed astern and blew three short blasts. The *Flora Alberta* was proceeding through the fog at nine knots an hour and blowing her fog whistle at regular intervals and her survivors said they heard no other fog signals until a steamer's whistle was heard at about the same time as her lights were sighted a ship's length away bearing down on them. Efforts of both ships to avert the collision were unsuccessful.

*International Rules of the Road*, article 16, (P.C. 259, 1897), provide that every vessel shall, in a fog go at a moderate speed, having careful regard to the existing circumstances and conditions and that a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

*Held*: Admiralty Orders to ships in convoy both as to speed and course are subject to the responsibility of the master of each ship in any situation of danger taking such independent action as good seamanship may require. *Larchbank v. British Petrol* [1943] A.C. 299 followed.

*Held*: also, Taschereau J. dissenting, that the negligence of both ships contributed to the collision and the blame should be apportioned to the extent of two thirds to the *Fanad Head* and one third to the *Flora Alberta*.

*Per* Taschereau J., dissenting, the speed of the *Fanad Head* was the determining cause of the accident. It was the duty of her Master, when he heard the fog signals of the *Flora Alberta* to reduce to moderate speed, and if the latter's position could not be ascertained, to stop the engines and navigate carefully. It seems clear he only inferred her position but this is not sufficient, he must ascertain it. *Nippon Yusen Kaisha v. China Navigation Co.* [1935] A.C. 177. The finding of the trial judge that the *Flora Alberta* some time prior to the collision had reduced to a moderate speed, was right.

APPEAL from the judgment of Carroll J., Local Judge in Admiralty for the Nova Scotia Admiralty District of the Exchequer Court of Canada (1).

*H. P. MacKeen K.C.* and *Gordon Dunnet* for the appellant.

*W. P. Potter K.C.* and *Donald McInnis K.C.* for the respondent.

TASCHEREAU J. (dissenting):—The owners of the ship *Flora Alberta*, a fishing schooner, claim \$100,000 from the British ship *Fanad Head* owned by the Ulster Steamship Company, Limited, as the result of a collision which occurred on the 21st of April, 1943, on the High Seas on the Western Bank Fishing Grounds, and at a distance of approximately 90 miles southeast of Halifax.

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The *Fanad Head* has a length of 420 feet, a breadth of 59 feet, and a net registered tonnage of 3002 tons. She is powered by triple expansion engines and her maximum speed is 11½ knots. She was mastered by Captain Thos. Heddles, and left Halifax on April 20, 1943, with a general cargo, forming part of a convoy, destined for the United Kingdom. There were eight ships in the convoy, and the *Fanad Head* was leading the port column, the Commodore's ship ss. *Telapa* with Captain Hugh Roberts, was leading the centre column and was in charge of the convoy. The third column on the starboard side, was led by the ss. *Tetela*. There were three ships in this last column, three in the centre column, and two in the port column, separated by three cables abreast and two cables in line. The convoy was steering a course of 132 degrees, with an ordered speed of 10 knots.

The *Flora Alberta* was a vessel of about 140 feet long, had a breadth of 26·4 feet, with a registered tonnage of 93 tons. She left Lunenburg, N.S. on the 17th of April, 1943, bound for the Western Bank Fishing Grounds, west of Sable Island. She reached these grounds on the 18th of April where she stayed on the 18th, 19th and 20th of April. In the course of her operations, she drifted eastward, but on the 21st of April, a course was made to return to the bank, due west magnetic. It was while returning to the Fishing Grounds that on the 21st of April, in the midst of a very dense fog, a collision occurred and the *Flora Alberta* sank within a few minutes. Of a crew of twenty-eight members, only seven were saved.

The Honourable Mr. Justice Carroll, L.J.A. with the assistance of a nautical assessor, found against the *Fanad Head*, and gave judgment for the owners of the *Flora Alberta*. The appellant now appeals from that judgment.

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The main facts as revealed by the evidence, may be summarized as follows:—

At 2 a.m. Standard Time, on April 21st, the fog was very dense and the visibility was poor. The convoy was running in a northwest-southeast direction at a speed of 8 knots. Previously, this speed had been 10 knots, but it had been reduced, not on account of the fog, but because the convoy would otherwise have arrived too early at a planned rendezvous with ships which were to join the convoy. Under orders, the eight ships were running without lights, the only exception being a white cluster at the stern as a guide for the following ships. The *Fanad Head* had starboard lights, and the Commodore's ship was equipped with starboard and port lights, while the leader of the starboard column had port lights as a guide for the leaders. Every ten minutes fog signals were blown, consisting of various blasts indicating the leaders' numbers, beginning on the Commodore's ship and then on the leader on starboard, the *Tetela*, and then by the port leader, the *Fanad Head*. These fog signals were the signals ordered for the convoy, but were not the ordinary fog signals required by the regulations.

The *Flora Alberta* was heading in a westerly direction with her starboard side towards the oncoming convoy. The suggestion that she had turned around in an easterly direction, has been rightly discarded by the learned trial judge. She had been running at a speed of about 9 knots, but some time before the collision, the Master noting the depth of the water, and realizing that he was nearing the fishing area, reduced the speed to approximately  $4\frac{1}{2}$  knots. The fog whistle was blown at regular intervals.

It is also in evidence that at 4:10 the officers on the bridge and the lookout of the *Fanad Head*, heard the sound of a high pitched whistle, and a second one at 4:17, both on the port bow. Captain Roberts of the *Telapa* says:—

I heard some time afterwards a definite sound signal a little forward of our port beam, one long blast, and close to the convoy. I formed the opinion at that time that this signal had some connection with the previous one that I thought I heard. I was suspicious and I was on the alert, and I knew *definitely* then that there was a ship in the vicinity.

After the first blast, Captain Heddles of the *Fanad Head* immediately ordered the navigation lights switched on his ship, blew his column number independently, and on hear-

ing the second whistle sounded his column number again, but did not reduce his speed. A few minutes later, he saw a white light and a green light at about 300 or 400 feet from his bow. He then ordered "Hard astarboard" and "full astern", and blew three short blasts. On the *Flora Alberta* some members of the crew heard only one blast a few seconds before the accident. At the same moment they saw the lights of the *Fanad Head*, but it was obviously too late to avoid the collision.

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I have come to the conclusion that the Master of the *Fanad Head* cannot be exonerated. His speed of 8 knots in this dense fog was clearly in violation of Article 16 of the International Rules which reads as follows:—

Art. 16: Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a *moderate speed*, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is *not ascertained*, shall, so far as the circumstances of the case admit, *stop her engines*, and then navigate with caution until danger of collision is over.

It was obviously the duty of the Master of the *Fanad Head* when he heard the fog signals of the *Flora Alberta* to reduce to a *moderate* speed, and if the position of the *Flora Alberta* could not be *ascertained*, his only alternative was to stop the engines and navigate carefully. From the blasts that he heard, it seems clear that he only *inferred* the position of the *Flora Alberta*, but this is not sufficient. He must *ascertain* it. In *Nippon Yusen Kaisha v. China Navigation Co.* (1), it was held:—

In order that the position of a vessel whose fog-signal is heard by another vessel may be "*ascertained*" within the meaning of art. 16 of the Regulations for the Prevention of Collisions at Sea, the vessel must be known by the other vessel to be in such a position that both vessels can safely proceed without risk of collision. An *inference* as to the vessel's position, based upon the direction from which the fog-signal was heard, the probable course which she is taking, and the improbability of her crossing the fairway in a fog, is not an *ascertainment* justifying a disregard of the precautions enjoined by the above article. Implicit obedience to the Regulations, upon which navigators are entitled to rely, is of great importance.

In his judgment Lord MacMillan made the following statement:—

The position of the *Toyooka Maru* was not in their Lordships' opinion *ascertained* within the meaning of the Regulations. It was *inferred*, "not ascertained, and as it turned out the inference was wrong."

(1) [1935] A.C. 177.

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In re *Aras* (1) Sir Gorell Barnes said:—

S.S. I think it is exactly the same because it is so well known—so  
 FANAD HEAD absolutely well known—that it is impossible to rely upon the direction  
 v. of whistles in a fog, that I do not think any man is justified in relying  
 ADAMS ET AL. with certainty upon what he hears when the whistle is fine on the bow,  
 Taschereau J. and is not justified in thinking that it is broadening \* \* \* unless he  
 can make sure of it.

The failure of the Master of the *Fanad Head* to go at a moderate speed and to stop his engines was, in my view, negligence in the circumstances, and the determining cause of this unfortunate accident. Moreover, the Master of the *Fanad Head* knew that in that particular region of the Atlantic, many fishing schooners were in the vicinity, and he should therefore have exercised a more vigilant look-out.

The speed of the *Flora Alberta* was moderate. She blew her whistle which was admittedly heard by the *Fanad Head*, and the moment she heard what is now proved to be the second blast of the *Fanad Head*, it was too late to avoid the accident. Her failure to hear the first blast, does not appear to be the result of any negligence, but must be attributed to the vagaries of sound signals, transmitted through the air, and which are caused by the lack of uniformity in the density of the fog or the atmosphere.

It is argued on behalf of the appellant that the *Fanad Head* forming part of the convoy, was subject to the orders of the Commodore, and that the precise orders were that the speed was to be 8 knots. It is said that the Commodore had a legal authority to give such an order as to speed, and that the *Fanad Head* was under a legal compulsion to obey the order of 8 knots while in convoy, and while subject to those orders.

On this point the law seems to be well settled.

In *Larchbank v. British Petrol*, (2), it was held that an “emergency” had arisen, not by reason of the mere fact of the fog, but because the Master of the *British Petrol* had good reason to think that the *Larchbank* might be approaching, even though he could not hear her, and that accordingly he should have sounded fog signals. The *Larchbank* was under orders to join a convoy, and although the British Admiralty had forbidden fog signals, it was

(1) [1907] P. 28.

(2) [1943] A.C. 299.

held that in such an "emergency" the ordinary rules of the sea should be followed, and that fog signals should have been given.

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In the *Scottish Musician* (1) it had been previously decided:—

A vessel enclosed in convoy has the same duty as every other vessel on the sea to take every possible means to avoid a collision. She is not to regard herself, because she is in convoy as a vessel which is excused from keeping a lookout outside the convoy \* \* \* On the contrary she has to take every possible means of avoiding a collision which she can take without danger, *that is to say without creating more imminent danger still to her consorts in the convoy*. She has a duty to the convoy to keep her station, but she must not press that duty to the point of never taking measures to keep out of the way of some other vessel which is threatening her with collision.

If any further authority is needed on that point, *vide* the *Vernon City* (2), and on Appeal (3). Nowhere will it be seen that a ship in a convoy must not take "individual action" when necessary, to avoid a collision, particularly as in the present case, where it is clear that an "emergency" arose.

Such also were the orders of the Commodore who clearly states in his evidence, that if a ship is in danger, she has to take individual action. The instructions of the Admiralty are that the Master of a ship, although in convoy, is responsible for the safety of his ship, and that if she is in any position of danger, it is for him to take whatever action he thinks fit. He says quite frankly that if, in his opinion, there is any danger, after hearing a whistle of a ship coming near him, he would naturally take some action irrespective of any ship astern or on either side of his own ship, and forming part of a convoy.

For these reasons I think that the trial judge was right, and that the appeal should be dismissed with costs.

RAND J.:—This is a case of collision. The fishing vessel *Flora Alberta*, between four and five o'clock Atlantic Daylight Time on the morning of April 21, 1943, was running on a west by north course in a dense fog approaching fishing banks lying about 90 miles to the south-east of Halifax. She had been hove to during the night and had drifted some distance to the east of the banks. The final speed is in dispute, but it is admitted that she had for some

(1) [1942] P. 128.

(3) [1942] P.61.

(2) [1942] P. 9.

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time been making at least eight knots an hour. The contention is that the speed had been reduced to  $4\frac{1}{2}$  knots, and the trial judge has found the order for this to have been given about 15 minutes before the crash. Tanner, the captain, is contradictory. At one place he says he rang for reduced speed while in the pilot house, and in another while on his way to examine the key-sounding device in his cabin; in each case just before going to breakfast. He estimated the time between the signal and the impact at two or three minutes. On board the *Fanad Head* he spoke of ten knots as his speed. After making every allowance for the circumstance that he was then nearing the fishing grounds, I can find nothing to justify the finding of a 15-minute interval or an actual speed of  $4\frac{1}{2}$  knots. I take the fact to be that some few minutes before the collision an order was given to reduce speed, but that the actual final speed was several knots greater than  $4\frac{1}{2}$ ; and on that footing, having regard to the dense fog and the surrounding circumstances, I am unable to agree that the speed was not excessive. So far, therefore, the vessel was proceeding in violation of the rules of the sea.

Was the *Fanad Head* at fault? She was one of a convoy of seven or eight vessels sailing in a generally south-easterly direction from Halifax in three columns a distance of three cables apart with the ships following each other at two cables or 1200 feet. The *Fanad Head* was the leading ship on the port side. In the center was the commodore's ship *Tilapa* and on the starboard the *Tetela*. In the port column one ship followed the *Fanad Head*. From 2 a.m. until after the accident, the convoy had been moving at eight knots an hour in the fog and from that time until about 4:06 standard time convoy signals had been given at intervals of ten minutes or thereabouts. These would be initiated by the commodore's vessel and would consist of five blasts, the first one two or three, short, to indicate the column, and they would be sounded only by the leading vessel of each line.

About 4:10 a high pitched whistle was heard on the *Fanad Head* which appeared to come from slightly to port of the vessel's bow. At that time the master, Heddles, the first officer, Rea, an apprentice of twenty years, Stark,



and the helmsman, were on the bridge and either then or shortly afterwards the second officer, Davey. The first three agree in their statements of what took place.

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Heddles describes the whistle as "one blast of a high pitched whistle ahead on the port bow;" "we waited to see what would happen to see if they would blow again. Then the Chief Officer blew." It was the convoy signal, and was given independently of the commodore. It was blown a second time, likewise without regard to the commodore. After three or four minutes, the whistle was heard again three points on the port bow. He puts the time between two whistles at seven or eight minutes.

It is beyond doubt that the apparent shift from stem to three points port indicated to him a single vessel crossing from starboard to port and that she was out of danger; but "a few minutes later" they saw the loom of a white and a green light "about  $3\frac{1}{2}$  points on the port bow" and at about two ships' length or 800 feet away. On the bearing of the first whistle the master was adamant; the second whistle made it obvious to him that the vessel was going clear; and "I assumed she was clear."

As admittedly the *Alberta* was on a westerly or north of westerly course when the two met, some explanation had to be given of the change, and the master insisted that between the time of the first whistle and the collision she had about turned. "She turned around. She could not possibly have come against me if she had not." This leaves no room for doubt of the effect upon his mind of the second whistle. Later on: "I considered the danger was over when she altered her course." Asked "And you say you sounded it again when you heard the whistle the second time?"—he answered: "We blew our column number twice between his blasts to attract his attention"; and later on, "I did not consider an emergency had arisen until I sighted the *Flora Alberta* three points on the port bow." This evidence excludes the suggestion that after hearing the second whistle, any signal was given before the fishing vessel hove in sight when three short blasts were sounded.

Rea is to the same effect. He says: "At about ten past four we heard a medium length blast of a high note on ahead. I immediately sounded my column number in reply, one short and four long": "we took independent action

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when we heard the whistle": "I waited then for about two or three minutes and then sounded the column number again. There was still no reply." Later: "A couple of minutes after I sounded my column number the second time, we heard this same note about three points to the port bow. Just after that, about a minute, I saw a white light and the starboard green light and they appeared to me to be about a couple of ships' length away." The vessel was "closing on us very rapidly." "Thereupon the master ordered hard to starboard and rang the engines full astern." "As he did that, I sounded three short blasts on our steam whistle." He agreed that he signalled "twice when you blew your column number and then you blew three short blasts when you went astern." Asked, "Did you take any steps after hearing that whistle (the second)" he answered "We had no time to take any steps, not at that time"; "Until I saw the green light, I thought it had gone from ahead to the port side going clear of me" and "We (meaning the master, Mr. Davey and the witness) all assumed it had gone clear." Questioned: "You blew your column number twice you say;" his answer was: "Yes, between the two blasts we heard we blew once and then waited two or three minutes and then blew it again."

Stark is to the same effect. After the first whistle "We immediately sounded our column number, and at the same time switched on the navigation lights, full brilliancy;" "About two minutes later we again blew our column number." Still later, "We heard the same whistle again. We heard it broad on our port bow", and "Just about a minute after that we saw the lights—a green side light and white masthead light." The vessel seemed to be coming across "our bow at about 90 or 100 degrees." Asked "What happened after the first whistle fine on the port bow", he answered, "We sounded our whistle independently of the commodore." Then: "Did you hear the commodore sound his whistle after this deep-toned whistle (the first)?" "No, I never heard the commodore sound his whistle again." He gave the times of the three column signals sounded while he was on the bridge prior to the collision as: 4:06, 4:10 and about 4:12. The first had been a regular signal

led by the commodore; and the witness means that after that sounding, the commodore's whistle was not heard again before the accident.

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Now, against this very clear and positive evidence by the persons most interested, there is, first, that of the commodore himself. Shortly after four o'clock he heard a faint whistle; it appeared to come "fine on the port side of the convoy." He says: "As a precaution, I sounded my column number" and, asked whether he heard an answer, replied, "I could definitely say that whenever I sounded my column number the leaders of the other two columns sounded theirs." Some minutes later he heard "a definite sound signal a little forward of our port beam." "About two or three points forward of our port beam and apparently close to the convoy." "We immediately blew our column numbers, but I am not sure whether it was the *Fanad Head* who blew hers first. If she did, we would wait until she had finished sounding before we sounded so as not to have a confusion of signals. But there was definitely plenty of noise at that time." "Did you do anything else on your vessel? No. This other ship being on that bearing, I knew my ship was clear, and it was too late to take any action for the convoy as a whole." Then: "Did you sound any further column signals before you heard the three short blasts of which you have spoken"; "I cannot remember that, because we blew our whistles so often; knowing that there was a ship close to, we would blow our whistle as frequently as possible until all danger was past."

This testimony is vague and general compared with what I have just considered. He is clearly confused about the initiation of the signals and I cannot accept it as going specifically to the sounding of a convoy signal after the second whistle. I draw the inference that he was satisfied, in the situation of the convoy, to leave to the *Fanad Head* the responsibility for dealing with the unknown craft ahead.

Then there is Davey. He is asked at once, "What did you hear?" "I heard a high sounding whistle on the port bow." And, "having heard that whistle signal, did you hear any other signals?"; "We all sounded our column signals." But later: "I heard it (the whistle) a couple of times. I do not know whether the chief officer heard it

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or how many times he heard it." "I do not know whether her first whistle was reported. We may or may not have heard it all together." On re-examination: "Do you remember where you were on the first occasion that you heard her first signal?"; "I am not sure about that, but I believe I was in the chart room when I heard her whistle the first time." "It may have been" in that room. This likewise cannot be taken to qualify the statements of the others. He is hazy about the circumstances of both whistles and not being on duty after four o'clock, although at times actually on the bridge, it would be but natural that the particular incidents affecting the navigation of the vessel would be more vividly impressed upon the minds of those on whom the immediate responsibility rested.

Then Ward on the lookout is asked: "After you had heard that (the second whistle) did you hear anything more from your own ship"; "Yes, she blew again." And, "In about a minute—it might have been a little more or less—I saw a white light bearing down on the port bow." Previously in speaking of the convoy signals: "I could not say exactly how many times I heard them, but I heard them a few times—twice or something like that—" Describing the signals given after the first whistle, he says: "Yes, our own ship then blew some shorts and longs." Asked "How many times had she blown that signal (the convoy signal) before you heard this other whistle signal?" "I don't know; I didn't pay any attention to our whistle blown." This evidence, too, lacks precision, and I am unable to treat it as affecting in any degree that of those on the bridge.

The vessels of the convoy, being under Admiralty orders as given to them by the commodore, were required generally to keep in convoy order both as to speed and position. This duty, however, was admittedly subject to the responsibility of each vessel to meet any situation of danger in which she might find herself. When, therefore, the second whistle was heard two or three points off the port bow at a distance which the commodore took to be not far from the convoy, did a situation of danger present itself to the *Fanad Head* which called for the independent exercise of good seamanship?

I think the case comes directly within *Larchbank v. British Petrol* (1). The word "emergency" in the Admiralty direction there is the equivalent of "danger" here. The assumption by the master and officers of the *Fanad Head* that the *Alberta* was on a starboard-to-port course and had got clear was quite unwarranted. They could not justifiably act on the view that the same vessel had given both signals or upon the apparent quarter from which the first whistle came. Both signals indicated a vessel in motion forward of the beam and the situation called imperatively for at least such action on the part of the *Fanad Head* as could be taken without danger to or serious dislocation of the ships of the convoy. Nothing of that sort would have resulted from sound signals at the moment of the second whistle. Although it is difficult to be precise, yet it is I think unquestionable that at least from two to three minutes elapsed between the second whistle and the sighting of the lights of the *Alberta*. The three blasts were clearly heard by the *Alberta* and there is the strongest probability that had a signal been sounded at 4:17 it would have been heard on the *Alberta*. The failure to hear the signals given four or five minutes before when both vessels were making eight knots is, in the conditions of fog, quite consistent with that conclusion. It is evident, too, that with that additional two or more minutes there would have been sufficient time to manoeuvre the *Alberta* out of collision.

Against this neglect, Mr. McKeen urges both the failure of the *Alberta* to hear the earlier signals sent out by the *Fanad Head* and to have seen the latter much sooner than it did. In the weather conditions then prevailing, swell, heavy fog and wind, the vagaries of sound are notorious: and counsel was driven to say that those who should have been on deck duty were either asleep or below: but their fog signals were being given and heard; and considering the circumstances and the ordinary apprehension of a fishing vessel for fog-shrouded dangers, I find it impossible to treat their evidence in this respect as deliberately false. It is a corroborating circumstance that the master of the *Tetela*, 1800 feet approximately south-westerly of the com-

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modore, did not hear the second whistle although he did hear the crash of the vessels coming together; and the distance between the *Tetela* and the *Alberta* at say 4:17 was considerably less than between the *Fanad Head* and the *Alberta* at say 4:13.

Nor can I conclude that the *Alberta* should have seen the *Fanad Head* in time to swing out of danger. The vessels were coming together at a rate of between 20 and 25 feet a second: and as the first officer, Rea, says, the final events crowded rapidly. Even if the *Fanad Head* had been seen at the moment of the emergency signal, the evidence would not justify us in saying that reasonable action by the *Alberta* would have been sufficient.

In these circumstances the question remains whether the *Alberta* by her violation of Article XVI contributed to the collision. Those on board the schooner could reasonably expect a reply from any vessel hearing their signal and the *Fanad Head* should have given it: the failure to do so misled the *Alberta* and influenced in fact both her course and speed: and that had the answer been given, the schooner, notwithstanding her speed, could have avoided the collision, is virtually conceded. Mr. McKeen's strenuous contention was that even after the three blasts there was time to have taken avoiding action; and to add two or three minutes longer is to conclude the question.

But rules of the road accumulate precautions in the general interest of safety; lookout, speed and sound signals anticipate not only accidental and unavoidable circumstances and situations, but the careless and the misjudged as well; and it is not sufficient for the respondent to say that the reply signal would have enabled him to nullify his own delinquency. What we are determining is liability and not abstract causation and it has not been shown that the collision would have taken place regardless of the speed of the *Alberta*.

Although there is no order of precedence in these measures for safety, yet their actual interrelation is to be taken into account in determining degrees of responsibility. Sound signals are clearly dominant in fog and the error on the part of the *Fanad Head* was far more serious in its

consequences than the excessive speed. I would, therefore, attribute to the fishing vessel one-third and to the *Fanad Head* two-thirds of responsibility.

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The appeal should be allowed in part with costs in this Court and the judgment below varied accordingly. The respondent will be entitled to two-thirds of its costs in the Court below.

KELLOCK J.:—It is not necessary to repeat an outline of the main facts appearing in evidence. With respect to the speed of the *Flora Alberta* when the *Fanad Head* was sighted, I think the learned trial judge was in error in his finding that it had been reduced to approximately four and one-half knots almost fifteen minutes before the collision. I find no evidence to support that finding. Nor do I think that attention should not be paid to the statement admittedly made by Captain Tanner aboard the *Fanad Head* the afternoon of the day of the collision. The learned trial judge did not hear any of the evidence of this witness and I see no reason why the statement most nearly related in time to the event here in question should not be taken as more reliable than statements made on much later occasions when the evidence of the witness, taken as a whole, appears to have been given without due care to be accurate. Tanner gives no reason why the statement should not be taken as representing the fact.

Rea, the first officer of the *Fanad Head* says that Tanner, on being asked as to the speed of the *Flora Alberta*, said that he was making ten knots. This evidence does not stand by itself. Captain Heddles, of the *Fanad Head*, said that in his opinion the speed of the *Flora Alberta*, when he observed her come out of the fog, was at least nine knots. Rea says the *Flora Alberta* was, at the same time, "cruising rapidly". In my opinion, therefore, it should be found that the speed of the *Flora Alberta* at the time of the collision and at all relevant times before that event was at least nine knots. That this was excessive in the circumstances, I have no doubt.

None of the witnesses called for the respondent would admit having heard any of the whistling of the *Fanad Head* or of any of the other convoy leaders. The reason given,

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in argument, was the existence of fog and the well known vagaries of sound in fog. If, however, one were to have regard to the evidence of Captain Tanner alone, he said, in answer to his own counsel, that under the conditions prevailing on that particular morning, the whistle of an ordinary steamer could be heard at a distance of seven or eight miles. There is also the fact that the whistling of the convoy leaders was heard in both directions, i.e., the whistling of the *Telapa* and the *Tetela* was heard by the *Fanad Head* and that of the latter by the *Telapa*. No witness was called from the *Tetela*, the leader of the starboard column.

The recklessness of speeding through the fog at nine knots in an area where, as Tanner knew, a convoy might be met with, does not add to the acceptability of the evidence on behalf of the respondents on this point. That such evidence is not to receive automatic acceptance is of course clear; *The Curran* (1), is an illustration, if one be needed. But I am, however, not prepared to find that the convoy signals were heard or should have been heard had a proper lookout been kept on the *Flora Alberta*. Negligence, however, in the matter of speed is to be charged to that vessel.

As to the visibility at the place and time immediately preceding the collision, the only witnesses for the respondents who were able to speak, were the lookout, Knickle, and the helmsman, John Reinhardt. The others, with the exception of Best, who was drowned, were below when the *Fanad Head* was sighted. Knickle says he heard the *Fanad Head's* whistle and saw her lights at the same time. He says he did not see the form of the other ship at any time. He estimates the distance between the two ships as "100 feet or so", or about a ship's length, i.e., 140 feet, but he says, what is of course obvious, that he cannot be sure. As to the time interval between sighting the lights and the collision, he says he just had "time enough to go aft and time enough to get back". This is not very helpful.

John Reinhardt also saw the steamer's lights at the same time as he heard the last whistle blown by her. He estimates the distance then separating the vessels at two shiplengths, which would be about two hundred and eighty

(1) [1910] P. 184.



feet, but he says he could not say how far she was away. It was the whistle which attracted the attention of both these witnesses.

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Captain Heddles, of the *Fanad Head*, estimates the visibility at eight to nine hundred feet. When he saw the *Flora Alberta* he says she was about that distance away. Rea, the Chief Officer of the *Fanad Head*, says the same thing. Captain Roberts, the Commadore, estimated the visibility of lights at the time at about the same distance. Davey, the second officer of the *Fanad Head*, says the white light of the *Flora Alberta* was over a ship's length away when he saw it, but he cannot be more definite than more than a ship's length and less than three cables.

Stark, the apprentice on the *Fanad Head*, estimates the distance at not more than a ship's length. The *Fanad Head* is 420 feet long. Dennis Ward, the lookout on the *Fanad Head*, says he "could just about make the bridge out and no more; just the outline of the bridge I could make out"; i.e., the bridge of his own ship. He says further, however, that when he saw the white light of the *Flora Alberta* he could not say whether it was at a greater or less distance than that between him and the bridge. He could not "estimate the distance of light in fog".

When the helmsman on the *Flora Alberta* saw the appellant ship he turned his vessel to port and when Captain Tanner heard Knickle's call he came up on deck and gave Reinhardt the order to stop. The latter then rang for the stopping of the engine. The *Fanad Head* had reversed her engines when she whistled the last time and had also starboarded her helm.

As to the *Fanad Head*, it is admitted that she was subject to binding orders which required her to keep in the convoy, on its course, and at its speed. This does not mean, however, that she had to continue blindly no matter what eventuated. She was also obligated, if occasion arose, to observe the rules of good seamanship, having regard to the fact that there was a vessel behind her, which might as well as other vessels in the convoy on her starboard be out of position. I do not find fault with the *Fanad Head* because she did not stop her engines when she heard the whistle of the *Flora Alberta* on either the first or second

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occasion, having regard to her being in convoy and to the presence of the other vessels I have mentioned. I think, however, that her officers erred in assuming that the ship whose whistle was heard on two occasions, if it were in fact the same ship, had gone out of danger. No doubt they assumed that ship would have heard the whistling of their ship and that of the other convoy leaders just as the *Fanad Head* had heard the whistle of the *Flora Alberta*, but they erred in assuming that they had ascertained either her course or position. I think the *Fanad Head* ought to have sounded on hearing the *Flora Alberta* not only as she did the first time, but the second time as well when the latter was much closer, and failure to do so constituted negligence directly contributing to the collision.

I think, however, that the excessive speed of the *Flora Alberta* was negligence of the same character. She was struck almost amidships. Therefore, as little as 100 feet would have made all the difference. Kerr, the engineer on the *Fanad Head* says that from the time he had got the engines of his ship going astern until he felt the bump of the collision was from one to one and a half minutes. There is a considerable body of evidence to the same effect. In one minute the *Flora Alberta* would travel 900 feet at nine knots and the *Fanad Head* 800 at eight knots.

In *The Campania* (1), Gorell Barnes J. said at p. 296:  
 \* \* \* as a general rule, speed, such that another vessel cannot be avoided after being seen, is excessive: see *The City of Brooklyn* (2).

The reasons for judgment of the learned trial judge were approved in the Court of Appeal.

In *The Counsellor* (3), Bargrave Deane J. said at p. 72:

I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: you ought not to go so fast in a fog that you cannot pull up within the distance that you can see.

In *The Zadok* (4), Sir James Hannen said at p. 115:

It was the duty of both vessels under Article 13, to go at a moderate speed, and it appears to me that the object with which that rule of conduct is imposed is, not merely that the vessels should go at a speed which will lessen the violence of a collision, but also that they shall go at a speed which will give as much time as possible for the making of any proper manoeuvres which may become necessary by unforeseen circumstances—for, in a fog, it cannot be told exactly from what quarter the danger may come.

(1) [1901] P. 289.

(2) (1876) 1 P.D. 276.

(3) [1913] P. 70.

(4) (1883) 9 P.D. 114.

Without laying down any hard and fast rule in the terms of either Gorell Barnes J. or Bargrave Deane J., it is nevertheless apparent that the excessive speed of the *Flora Alberta* not only placed her in the path of the *Fanad Head* but also rendered her, when those on board did observe the *Fanad Head*, unable to manœuvre out of danger which might have been possible had she been going as she ought to have been. The contrary is not to be presumed. Reinhardt, the helmsman, testified that if the *Flora Alberta* were going slowly she would answer her helm better than if she were going fast. There would have been more time for her to have answered her helm and more opportunity to have reversed her engine which apparently was not even attempted.

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I am also of opinion that the excessive speed itself may well have contributed to the failure of those on board the *Flora Alberta* to hear any of the whistling on the part of the convoy. The excessive speed in question would undoubtedly increase the noise of her passage through the water and it may well be also that the throb of her engine and the exhaust at that speed caused greater interference with the reception of sound than if she had been moving as she should have been in the circumstances.

I think therefore that the *Flora Alberta* must be held to blame to the extent of one-third and I would allow the appeal to that extent. I think the appellant should have its costs in this court and the respondent two-thirds of the costs in the court below.

ESTER J.:—This litigation arises out of a collision between the fishing schooner *Flora Alberta* and the *Fanad Head*, one of eight ships in a convoy, on the Western Bank Fishing Grounds about 90 miles out of Halifax. The learned trial Judge in Admiralty of the Exchequer Court in the district of Nova Scotia held the *Fanad Head* solely responsible.

The *Flora Alberta* was observing Atlantic Daylight Saving Time and the *Fanad Head* Atlantic Time. For convenience I have set forth all times on the basis of Atlantic Daylight Saving Time.

The collision occurred on the morning of April 21, 1942, at about 5.20 in a dense fog, a light north-west wind and

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a heavy swell. The *Flora Alberta* was proceeding west-by-north and the *Fanad Head* was proceeding 132° true at the head of the third or port side column of a convoy that had set out from Halifax the preceding afternoon. The fog had existed since 3.00 a.m. and the extent of visibility without lights was about 400 to 500 feet and with lights about 800 to 900 feet. The eight ships in the convoy were placed three in a centre column, three in a starboard column and two in a port column, in the latter were the *Fanad Head* in the lead with the *Timothy Dwight* behind her. The commodore of the convoy was on the *Tilapa* at the head of the centre column. These columns were about 1800 feet apart and in the column the ships were about 1200 feet apart.

As it left Halifax this was a sectional convoy proceeding at 10 knots per hour. At that speed this section would have arrived at the point fixed for meeting the main convoy too early and therefore the commodore, sometime after leaving Halifax, reduced the speed of this section to 8 knots per hour, which speed the *Fanad Head* maintained until the collision was inevitable. At 5.00 a.m. Captain Heddles of the *Fanad Head*, his Chief Officer Rea, Second Officer Davey and Midshipman Stark were on duty, and Lookout Ward was on the forecastle head. Because of the dense fog the ships at the head of the respective columns were sounding their column numbers about every eight to ten minutes and were proceeding without lights, except a cluster in the rear and side lights in the front.

At about 5.00 a.m. Captain Heddles "heard a blast, a short high note . . . ahead on the port bow." The Chief Officer blew his column number, the navigating lights were put on "full brilliance" and Captain Heddles "waited to see what would happen, to see if they would blow again." He did not stop the *Fanad Head*, as he explained, "because there was a ship lying astern, a ship; and on instructions in the convoy, we were to maintain our convoy speed." He did not reduce his speed. Three or four minutes later he repeated the column number. Seven or eight minutes after hearing the first blast he again heard the short high note about "three points on the port bow" which, as he states, led him "to believe that she had crossed out of

danger" and a few minutes later, he saw "the loom of a white light and one green one about three and one half points on the port bow." Captain Heddles then observed the *Flora Alberta* was crossing his bow and "immediately put the helm hard to starboard and the engines full speed astern, giving three blasts to that ship and to the next astern to indicate I was going full speed astern." These steps were of no avail and the *Fanad Head* struck the *Flora Alberta* amidships on the starboard side causing it to sink immediately when twenty-one of its crew of twenty-eight lost their lives. It appears obvious, and, indeed, it was not contested, that from the moment the *Flora Alberta* was seen the collision was inevitable. Nor is it contended that there was any negligence on the part of Captain Heddles prior to his hearing the first whistle. The entire issue so far as the *Fanad Head* is concerned is the conduct of its officers after they heard the first whistle.

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The masters before leaving Halifax received certain instructions, the legality of which are admitted and which in these proceedings were deposed to by the commodore. It is significant that these instructions, so far as disclosed, did not cover circumstances such as encountered by the *Fanad Head*. It would rather appear that the management of the vessels was left in such circumstances to the commodore and his masters to take such action as good seamanship under the circumstances would require.

The commodore, referring to the duty of the captains or masters of the respective ships, stated:

If she is in convoy she is supposed to keep the course and speed of the convoy; but the Admiralty instructions are that the Master of a ship is responsible for the safety of his ship and if there is any position of danger it is up to the Master to take what action he thinks fit.

He further deposed:

Q. Do you expect a ship under your command to go on and to continue steaming at some 7.5 knots after hearing a ship ahead of her sounding?

A. No.

Q. Do you, as Commodore, expect a ship under your command—one of the leading ships of your convoy—to steam on at a speed of 7.5 knots on hearing a fog signal forward of her beam?

A. I would not expect that; she should in those circumstances take individual action, but that individual action depends on the Master of the ship.

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He further deposed relative to the master of the ship:

His orders are that he has to endeavour to keep his station in the convoy, but at the same time under Admiralty orders a Master is considered responsible for the safe navigation of his ship.

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Captain Heddles himself when asked the question: "You say that in convoy you must carry right on until you get an order to change?" replied: "No, sir. Not in an emergency. You take steps to avert trouble."

The commodore himself heard a faint whistle shortly after 5.00 a.m. but no one else on the *Tilapa* heard it. Then later he heard a definite sound signal, one long blast forward of his port beam but "it was then too late to take any action for the convoy as a whole." This would indicate that at that time the commodore expected each ship to act upon its own initiative. When he heard the three short blasts he realized that the *Fanad Head* must have sighted the other ship.

That Captain Heddles when he heard the first whistle or "short high note \* \* \* ahead on the port bow" was in a "position of danger" or emergency must follow from the fact that he knew he was proceeding through a fishing ground in a dense fog at a speed which apart from a convoy was admittedly excessive, and even in a convoy at a speed greater than the commodore would have expected once he heard a whistle. Under such circumstances it was his duty to take individual action. That he appreciated his position is evidenced by the fact that he immediately "switched on the navigating lights full brilliance," sounded his column number (one short and four long), then "waited to see what would happen, to see if they would blow again." In taking those steps he was acting on his own initiative. He did not, however, reduce the speed of the *Fanad Head*. When nothing transpired in three or four minutes he again blew his column number. Seven or eight minutes after he heard the first whistle he again heard the short high note, this time "about three points on the port bow," which led him "to believe that she had crossed out of danger." A few minutes later he saw the light of the *Flora Alberta* about three and one half points on the port bow at a distance of about 800 feet crossing the bow of the *Fanad Head*." This meant that the *Flora Alberta* was now going

in a direction almost directly opposite to that Captain Heddles had concluded she was proceeding when he heard the first and second whistle. Indeed, he himself explained that somewhere between 5.17 a.m., or possibly earlier, and 5.20 a.m. the *Flora Alberta* "turned around. She could not possibly have come against me if she had not." The circumstances and the other evidence do not support any such change of direction on the part of the *Flora Alberta*. Then when asked: "Can you ascertain, with any degree of accuracy at all, the place from where the whistle comes?" Captain Heddles himself replied: "When it is clear, you can get the direction. On this occasion, when it was dull, it was difficult to locate it." All of the evidence emphasizes how unreliable is any conclusion as to distance or location of a whistle heard in a fog. The evidence of experienced seamen, including the commodore who said: "Sound at sea is very deceptive," as well as the expert, make it clear that it is impossible to judge with any degree of accuracy the distance or location of the source of a sound heard at sea during a fog. It is stated in 30 Hals. 2nd Ed., p. 730, para. 940:

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It is not correct, again, to say that a whistle having been heard, it can be located so as to be certain that it is a precise bearing on the bow; case after case in the Admiralty Court shows that that is not true.

As stated by Sir Gorell Barnes, on behalf of the Privy Council:

It is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog "signal when it is heard \* \* \*"  
*The Chinkiang* (1), quoted in *H.M.S. Malaya*, (1937) P. 191.

Once Captain Heddles found himself in what was a "position of danger" or emergency, it was his duty to take such action as good seamanship would require. *The F. J. Wolfe* (3). What in a particular case constitutes good seamanship is a question of fact. That the *Fanad Head* was here in a convoy is a circumstance to be considered along with the other circumstances, and when the master is thus called upon to take individual action the requirements of the "International Rules of the Road", adopted by Canada in 1897 (P.C. 259, 1897) become important.

(1) [1908] A.C. 251, 259.

(2) [1937] P. 179 at 191.

(3) [1946] P. 91.

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Even if they be not binding on a ship in convoy, they do embody the principles or requirements of good seamanship. As stated by Scott, L.J. in *The F. J. Wolfe, supra*, at p. 95: Those rules represent the considered views of almost generations of seamen of many nations.

Articles 16 and 29 of these Rules read as follows:

Article 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Article 29. Nothing in these Rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

The foregoing evidence and quotations relative to the location of the source of a whistle were illustrated in relation to art. 16 of the "International Rules of the Road" in *Nippon Yusen Kaisha v. China Navigation Co. Ltd.* (1), where two vessels were signalling each other in a dense fog. In that case the master of the *Kiangsu* concluded that from the fog whistle the position of the *Toyooka Maru* was on the south side of the channel. Their Lordships, in construing the word "ascertained" as it appears in the foregoing art. 16, stated at p. 182:

\* \* \* in the present case the only data were that the fog-signals were heard on the *Kiangsu's* port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision.

Captain Heddles never ascertained the position of the *Flora Alberta* in that sense. His experience as a seaman should have indicated that any conclusion that he might entertain as to the location of the vessel sounding the whistle could not be accepted as reliable and ought not to be acted upon, certainly not in a manner to justify his proceeding as he did.



The *Fanad Head* when it heard the second whistle was still in a position of danger or emergency. The duties of a master of a ship in such a position are described by Langton, J.:

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The handling of a vessel when and after the whistle of the *Lairdcastle* was first heard falls into a somewhat different category. There was no convoy order to the effect that she was not to stop on hearing a whistle forward of her beam, and she is also open to criticism in not having stopped her engines at the moment when she first sighted the masthead light of the *Lairdcastle*. These are matters which fall to be decided in relation to the particular circumstances of each individual case. *The Vernon City* (1) affirmed on appeal (2).

The foregoing quotation repeats that which has been so often stated, that each of these collision cases must be decided upon its own facts. Both that statement and the individual responsibility of a master for the conduct of his ship in an emergency is emphasized in the *Larchbank v. British Petrol* (3). The master of the *British Petrol*, proceeding in a convoy, did not sound his fog signal when he knew the *Larchbank* was manoeuvring in a dense fog to take a position in the same convoy and immediately behind the *British Petrol*. The master explained he did not do so because he was forbidden by Admiralty Regulations. It was held in effect that he had misconstrued the Admiralty Regulations, which required that he under the circumstances should exercise his own discretion. The House of Lords affirmed the view of the learned trial Judge that in the emergency that there existed the master of the *British Petrol* was negligent in not sounding his fog signals. Lord Wright at p. 307 stated:

The extra and abnormal risk which here, in my opinion, constituted emergency consisted in the nearness of the *Larchbank* when the fog came down, her probable and at least possible operation of continuing to join the convoy, and the impossibility in the absence of fog signals, after the weather became so thick, of knowing where she was or what she was doing, particularly as no signal was heard from her. The master was, indeed, left with a discretion whether he would or would not sound his fog signal, or, if so, how often. This is a separate issue which only arises if there is found to be emergency. I think there was emergency. The judge has found, and I agree with him, that he exercised his discretion wrongly.

In that case both of the ships were held to be negligent, and the fault apportioned three-quarters to the *Larchbank* and one-quarter to the *British Petrol*.

(1) [1942] P. 9 at 26.

(3) [1943] A.C. 299.

(2) [1942] P. 61.

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While Captain Heddles, when he heard the first whistle, sounded his column number and three or four minutes later did so again, the evidence does not disclose that after hearing the whistle a second time he caused any whistle to be sounded on the *Fanad Head*. He did not do so, as he explained, because he concluded that the ship sounding that whistle had passed out of danger. An experienced master, as already stated, was not justified in relying upon such a conclusion. If he had sounded a whistle at that time when the vessels had come much closer to each other, it would probably have been heard by the crew of the *Flora Alberta* and as two or three minutes still remained before the collision, it is possible that steps might have been taken by those on the latter vessel to avoid a collision. In fact he neither sounded the whistle nor stopped his engines. Nothing was done and the *Fanad Head* continued at 8 knots until the lights of the *Flora Alberta* were actually seen and when he sounded the three blasts. The conclusion is unavoidable that at that time the position was such that nothing could have been done on the part of either crew to avoid a collision.

Captain Heddles knew that he was passing through a fishing ground in a dense fog when he heard the first whistle. In spite of that he took only the precautions, which have been mentioned, of putting on the lights and sounding the column number. When he heard the second whistle his conduct, based upon his conclusion as to the position of the *Flora Alberta*, would not be accepted as good seamanship. It was as a consequence of that conclusion that he took no further precautions. Under the circumstances of the fog, the whistles and his position in the fishing grounds, it was negligence on his part to maintain the speed of the *Fanad Head* at 8 knots up to the time when the collision was unavoidable.

The evidence of Captain Tanner of the *Flora Alberta* and of his officers, Reinhardt and Knickle, was taken before other than the learned trial Judge, who, therefore, had not the advantage of observing the witnesses as they gave their evidence. He could but read their evidence

and was in this regard in the same position as members of an appellate court with respect to the inferences and conclusions to be drawn.

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The *Flora Alberta* had been on the fishing grounds since the 18th. On the morning of the 21st she had drifted eastward when at 4.00 a.m. her engines were started, and with foresail and mainsail set she was proceeding first due north and from 4.30 a.m. west-by-north at 9 knots per hour. Captain Tanner had altered the course at 4.30 and had gone down to breakfast three or four minutes before the collision. He heard no signal and just before he went down to breakfast he signalled for half speed, or  $4\frac{1}{2}$  knots. The learned trial judge finds that Captain Tanner "about fifteen minutes before the collision, reduced his speed to approximately  $4\frac{1}{2}$  knots." With great respect, the evidence does not support such a finding. Indeed, apart from the statement that the signal was given just before he went to breakfast there is nothing to support the evidence that a reduction in speed was effected. It is not mentioned by any other of the witnesses of the *Flora Alberta*; moreover, while every allowance must be made for the pain and exhaustion he suffered that day, it is pertinent to observe that he did not mention any reduction in speed during his discussion later that same day with the officers of the *Fanad Head*. Reinhardt, who was at the wheel of the *Flora Alberta* from 4.30 until the collision, did not know the speed of the vessel. Captain Heddles, who observed the *Flora Alberta* crossing his bow, was of the opinion that she was going "at least 9 knots" per hour, and Rea stated, "It was cruising rapidly" and later suggested 10 knots per hour. Under these circumstances, it is impossible to conclude but that the *Flora Alberta* was immediately prior to and at the time of the collision proceeding at too great a speed.

Counsel for the appellant pressed his contention that those in charge of the *Flora Alberta* were negligent in not hearing the whistles from the *Fanad Head* and taking consequent precautions. It was suggested if the officers on the one ship could hear the whistle those on the other could have heard it also. The expert was asked:

Q. Therefore, so far as sound gradients are concerned, if A could hear B, B could hear A?

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A. As far as temperature gradient is concerned, yes. That would not be true so far as wind velocity. You would hear down-bent and you wouldn't hear up-bent.

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There was not sufficient information available to enable him to express an opinion relative to the wind velocity gradient and the matter was left in that position. All the witnesses who gave evidence from the *Flora Alberta* were in agreement that they did not hear any whistle until they had seen the *Fanad Head*, and under these circumstances, having regard to the acknowledged vagaries of sound in fog, I am not disposed to find that those in charge were negligent in this regard.

This collision was caused by both vessels proceeding in a dense fog at too great a speed which they maintained up to the moment of impact. Because the officers of the *Fanad Head* had heard the whistle approximately ten minutes before the collision and took no precautions, apart from sounding their column numbers and putting on their lights, to avoid a collision, I think that they are two-thirds to blame and the *Flora Alberta* one-third. The judgment at trial should be so varied and the appellant should have its costs in this Court and the respondents two-thirds of the cost in the Court below.

LOCKE, J.:—In absolving the *Flora Alberta* from blame in this matter the learned trial judge has found that about fifteen minutes before the collision the schooner, which had been moving through a fog at a speed of about 9 knots, reduced the speed to approximately  $4\frac{1}{2}$  knots, that her fog whistle was blown at regular intervals and that those on board heard no other fog signal until about the moment of sighting the *Fanad Head*, when a whistle was heard and at the same time the lights of the approaching steamer sighted about a ship's length away on the starboard bow. A further finding is that there was nothing the *Flora Alberta* could have done after sighting the ship to avoid the collision. The witnesses Guy Tanner, Douglas Reinhardt, Walter Corkum, John Knickle, John Reinhardt and Garth Reinhardt, being all but one of the surviving members of the crew of the *Flora Alberta*, gave their evidence

before a registrar and not in the presence of the trial judge, so that we are in an equally good position to estimate the weight to be given to their evidence.

Tanner, the captain, said that at about 4 o'clock daylight saving time of the morning in question the engines were started and the *Flora Alberta* steered due west through what is described as a heavy fog at a speed of 9 knots: that at 4.30 when the witness John Reinhardt took the wheel he was given instructions to steer west by north and that he (Tanner) then went down to breakfast. On direct examination he said that this was about 3 or 4 minutes before the collision and in response to a question as to what he had then done said: "I went down and slowed her down", and that this was done before he went forward for breakfast. Why after running at 9 knots since 4 a.m. he reduced the speed at this time he did not explain. On cross-examination he said that it was nearly 5 o'clock when he went to breakfast, that he had first gone to his own cabin and then come out on deck and proceeded to the forecabin and had been seated at his breakfast for about two minutes when he heard the shout "Steamer" from the look-out John Knickle and had then gone on deck. This evidence was given on January 3, 1945. On October 31, 1947 Captain Tanner again appeared before the registrar and gave certain further evidence. According to the record, he was recalled at the request of the learned trial judge to clear up some question as to the type of horn used on the *Flora Alberta* and the evidence should have been restricted to this. However, he was asked further questions in chief: one of these related to the time which elapsed between his going down to breakfast and the collision and he then said: "That was just about—just a few minutes." In answer to a further question as to the speed to which he had slowed down the vessel he said to half speed and that this was about  $4\frac{1}{2}$  knots. Counsel for the *Fanad Head* had objected to the reception of the evidence unless it was evidence in rebuttal but proceeded to cross-examine and the witness then said that he had rung to the engineer for half speed before he had gone to breakfast. Captain Tanner had been picked up by the *Fanad Head* at some time between 5 and 6 a.m. and later on that day had a conversa-

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tion with the Chief Officer of the *Fanad Head*. This took place at about 1 p.m., Tanner having been invited to the Chief Officer's cabin to have a drink and he then, on his own admission when asked what speed the *Flora Alberta* had been going, said that it was at the rate of 9 knots an hour. When asked further as to whether he had not said they were going 10 knots he said: "I did tell him 10 knots and that we were cutting down to half speed"; then to the question "He asked you what speed you were making and you replied 10 knots?" he answered "Yes." In addition to these statements, according to Chief Officer Edward C. Rea, Tanner had told him at this interview that he was making 10 knots and that the crew of the schooner did not reduce speed unless the captain ordered it. The second officer of the *Fanad Head* who was present at this interview corroborated Rea's account of what had been said by Tanner. John Reinhardt, a member of the crew of the *Flora Alberta* who was present, merely said that he did not remember the interview. Captain Heddles, the master of the *Fanad Head* and Chief Officer Rea, both of whom had seen the *Flora Alberta* a short space of time before the collision, estimated her speed at 9 and 10 knots respectively.

Upon this evidence, I think the finding of the learned trial judge that the speed of the schooner had been reduced to  $4\frac{1}{2}$  knots 15 minutes before the collision, or indeed that it had been reduced at all, cannot be supported. No witness suggested that this had been done 15 minutes before the collision. None of the other members of the crew who gave evidence suggested that the speed had been reduced at any time. In particular one would expect that either John Knickle who was at the wheel between 4 and 4.30 and who then went to the look-out, or John Reinhardt who succeeded him at the wheel at 4.30 and was there at the time of the collision, would have noted the change in speed but both of them were silent on the point. Asked on direct examination whether he had any idea at what speed the *Flora Alberta* was going, John Reinhardt said that he had not. Being then asked whether he had noticed anything about the engine exhaust, he said that the engine might have been running slower than usual but gave no opinion as to the speed. As to the admission made by Captain

Tanner several hours after he had been picked up, the learned trial judge said that he attached little importance to the conversations, that both Tanner and Rea had denied making certain statements attributed to them and that it might be that under the circumstances "each misinterpreted what the other said." This quite ignores the admission made at the trial by Tanner as to the statements made by him to Rea, as to which there was no possible ground for misunderstanding. Upon this issue, I think it should be found that the speed of the *Flora Alberta* at the time her look-out first saw the approaching steamer was 9 knots an hour.

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By its preliminary act the appellant further contended that the *Flora Alberta* did not maintain a proper look-out. There is no finding as to this by the learned trial judge but, as he found the *Fanad Head* wholly to blame, it must be taken that he considered the claim to be unfounded. According to the witness Knickle, after he was relieved at the wheel at 4.30 he went forward to the bow where he had a clear view on all sides and he heard no whistle blown until the *Fanad Head* loomed out of the fog a little forward of the starboard bow when he says: "I thought I heard a little tinkle and a long blow. I'm not sure of that," and that he heard this and saw the lights almost at the same time. He immediately shouted "Steamer" and the collision followed almost immediately. Asked as to the distance between the vessels when he first saw the *Fanad Head* he estimated this at about 140 feet. John Reinhardt who had been on look-out on the bow between 4 and 4.30 says that he did not hear the sounds of any other ship while he was there and only heard the whistle of the steamer very shortly before the impact. He estimated that the distance separating the vessels was about two ship lengths of the *Flora Alberta* or about 290 feet when he first saw the *Fanad Head*. Walter Corkum who had been on look-out up until 4 o'clock and had gone below heard Knickle's shout but did not hear any whistle from the steamer. Captain Tanner whose movements have been described heard nothing. The respondent's preliminary act stated the distance at which the steamer was first seen as being 275 feet.

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There are a number of discrepancies in the various accounts given by the officers and the crew members of the *Fanad Head* and the commodore of the convoy, the master of the *Tilapa*, which led the centre column of the convoy. The master of the *Fanad Head*, Thomas Heddles, whose evidence was heard by the trial judge and who had had something more than fifty years at sea and had held a master's certificate since 1903, said that the visibility at the time of the collision was about 800 or 900 feet. In pursuance of orders from the commodore of the convoy, the column leaders blew their respective column numbers at intervals of about seven minutes from 2 a.m. when the fog had set in until the time of the accident. The commodore's ship sounded first, sounding two short and three long blasts, the leading ship on the starboard column followed sounding three short and two long, and this was followed by the *Fanad Head* blowing one short and four long blasts. The *Fanad Head* was steering a course 132° true and judging from the whistles on the beam the captain considered that he was in his correct position in the convoy. Following the *Fanad Head* at a distance of two cable lengths was an American vessel, also part of the convoy. According to Captain Heddles, at about 10 minutes past 4 (which would be 5.10 a.m. by the clock of the *Flora Alberta* which was set at fast time), he was on the bridge with Chief Officer Rea and a midshipman named Stark when he heard a high pitched whistle ahead fine on the port bow. On hearing this the Chief Officer, without waiting for the commodore, blew the column number. The speed of the *Fanad Head* at this time was 8 knots and, according to the captain, since there was a ship following them and they had been instructed to maintain their convoy speed this was not slackened. At the same time as the *Fanad Head* blew its column number, the navigating lights were switched on to full brilliance. Three or four minutes later the column number was again blown independently. Shortly thereafter the captain heard what he described as a high pitched whistle about three points on the port bow. He estimated the time this second whistle was heard at about 7 or 8 minutes after it had first been sounded. He said



that "a few minutes later" he saw the lights of the schooner crossing his bow at what he described "as a fairly good speed and distant approximately 800 feet."

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Chief Officer Rea who came on duty at 4 o'clock and relieved the second officer on the bridge said that the commodore blew his column number at 4 or 5 minutes past 4 and the *Fanad Head* did likewise: that at about 4.10 he heard a medium length blast of a high note on ahead and immediately again sounded the column number in reply. After putting on the navigating lights and waiting 2 or 3 minutes he sounded the column number again. It was, he says, about a couple of minutes after this that he heard the whistle again about three points on the port bow, and about a minute after that he saw the lights of the schooner. The master had immediately ordered hard to starboard and rung the engines full astern and as he did this three short blasts were sounded on the steamer whistle. According to this witness, he saw the lights of the *Flora Alberta* when they were about two ship lengths' away.

Dennis Ward, a seaman who was on look-out on the forecastle head of the steamer, had gone on duty at 4 o'clock, at which time the vessel was blowing its column signal. He says these signals were being blown from one leading ship to the other and thought the *Fanad Head* was blowing every minute or two. After he came on watch he said he heard some of the other vessels in the convoy blowing what he described as "shorts and longs" and that some 8 or 10 minutes after he had gone on watch he heard a high note whistle a little on the port bow and ahead. He says that he heard the same whistle again later and about a minute after that saw the lights of the schooner which he thought to be about three points on the port bow. Asked as to how far he could see in the fog, he said that he could just see the outline of the bridge of the *Fanad Head* from the forecastle but could not estimate the distance from the steamer where he had first seen the lights of the schooner.

Edward Davey, the second officer, said that after 2 o'clock when the fog commenced the column numbers were sounded at ten minute intervals on the average. He had been relieved by the Chief Officer at 4 o'clock and, after going into the chartroom to write up the scrap log, had

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returned to the bridge and heard what was apparently the first whistle from the schooner at about two or three points on the port bow and says that all the leaders then sounded their column numbers. Thereafter he saw a light on the port bow and heard the order "full speed astern" and "hard-astarboard" and the collision followed. Davey was unable to express an opinion as to how far he could see in the fog but said that the lights of the schooner were over a ship length's away when he saw them. On cross-examination he said that he had heard the whistle of the schooner twice and was indefinite as to the length of time between the two, saying that it was 3 or 4 or 5 minutes. Charles H. Stark, the midshipman who had been on the bridge with the captain when the whistle was first heard and who was at the time his evidence was given the second officer of the *Fanad Head*, had come on duty at 4 o'clock and said that at 4.05 or 4.06 the *Fanad Head* and the other leaders had sounded their column numbers. He heard the whistle which he described as being "right ahead or fine on our port bow" and said that immediately the steamer sounded her column number again. The navigating lights were then switched on and about two minutes later the column number blown again. A few minutes later, he says, he heard the same whistle again, this time broad on the port bow, and about a minute after that saw the green light and white mast head light of the schooner which was then about three or four points on the port bow. Stark said that the sounding of the column number of the *Fanad Head* twice after they heard the first whistle was done independently of the commodore and he had not heard the commodore sound his column number after hearing the whistle. He estimated the distance between the two vessels when he first saw the light of the schooner as being one ship's length.

Captain Hugh Roberts, the master of the *Tilapa*, said that he heard the whistle of what proved to be the schooner shortly after 4 o'clock. He described it as a faint whistle and he was the only one on his vessel who heard it and said that it appeared to be fine on the port side of the convoy. As a precaution he sounded his column number and says that the other leaders of the convoy sounded

theirs after that and that he distinctly remembers hearing that of the *Fanad Head* from its position abeam. Some time afterwards he heard what he described as a definite sound signal a little forward of the port beam and apparently close to the convoy and immediately the column numbers were blown again. Whether it was the *Fanad Head* who blew first he was not certain but said that there was "definitely plenty of noise at that time". After that he heard the three short blasts from the *Fanad Head* followed by the sound of the collision. Captain Roberts estimated the visibility at the time at about 400 or 500 feet.

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In addition to these witnesses who were either officers or members of the crew of the ships concerned, Oliver Bertram, a marine engineer who had been torpedoed and landed in Canada and was returning to England as a passenger on the *Fanad Head*, gave evidence that he was in his stateroom on the starboard side and had been awake for some time before the collision. He could hear the whistle of the *Fanad Head* and of the other ships on its starboard side, though the port-hole was closed. He said that these whistles were at fairly regular intervals of between 7 and 10 minutes and that before the accident there seemed more frequent whistles. He had heard also the three short blasts from the *Fanad Head*, the significance of which he appreciated and had then got up and gone on deck. Charles Third, a marine engineer who was travelling as a passenger on the *Fanad Head* under similar circumstances, occupied a cabin on the port side and was wakened by the frequent blowing of the whistles. He said that every few minutes there was a blast and then there were three short blasts and appreciating what these signified he got up and went on deck.

There is no finding of fact which casts any doubt upon the veracity of any of these witnesses. The evidence of Heddles and Rea was taken more than two years and that of Roberts, Davey and Stark nearly three years after the collision occurred and it would be strange if there were not some discrepancies in the recollections of these witnesses. It is, in my opinion, established from their evidence that the convoy leaders were regularly sounding their column numbers at intervals of approximately ten minutes after

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2 o'clock on the morning in question, that this was last done prior to the time when the whistle of the *Flora Alberta* was heard at about 5 minutes after 4: that both the *Fanad Head* and the *Tilapa* again sounded their column numbers promptly following the first of the two whistles and that the *Fanad Head* sounded again some two or three minutes prior to the time when the second whistle from the *Flora Alberta* was heard. It appears to me that it is not established that the *Fanad Head* blew again after hearing the second whistle until the *Flora Alberta* was sighted and the three short blasts were given. In my opinion, the evidence also establishes that the visibility was such that the lights of the schooner were visible at least 400 or 500 feet distant. It was proven that the navigating lights of the *Fanad Head* were switched on at full brilliance as soon as the first whistle was heard from the schooner and yet Knickle did not see them until they were about 140 feet distant. Much evidence was given as to the unreliability of bearings taken to sound signals in a fog and some to the effect that during a considerable fog a fog horn or whistle may not be heard a very short distance which would under normal conditions be heard several miles away. In so far as the latter point is concerned, there is a conflict in the evidence. Neither Heddles nor Rea had had any such experience with steam whistles such as those on the *Fanad Head* and it is significant that the column leaders had since 2 a.m. verified their positions in the convoy by sounding their column numbers and that, according to Captain Roberts, when the *Tilapa* had sounded the signals they were answered every time. The *Fanad Head* was equipped with a double whistle located on the funnel operated by steam. Rea considered that the range of the whistle would be about 4 miles. When the three leaders blew their column numbers at about 4.05, each signal consisted of 5 blasts and the evidence establishes that, at least the *Fanad Head* and the *Tilapa* if not the leader of the starboard column, blew these signals again promptly following the time when the first whistle was heard, and the *Fanad Head* at least blew again shortly before the second whistle of the schooner was heard. Thus, while the single blast of the whistle of the *Flora Alberta* was heard at about 4.10 by the Captain, Chief Officer,

Second Officer, Stark and Ward of the *Fanad Head* and Captain Roberts of the *Tilapa* and also the second blast sounded 7 or 8 minutes later, we are asked to believe that the great volume of sound from the steamers was inaudible to those who were supposed to be on watch on the *Flora Alberta*. The evidence does not satisfy me that this was the case. I think the only proper inference is that if the column numbers sounded were not heard on the *Flora Alberta* it was because no proper watch was being kept or that, having been heard, the Captain was mistaken as to the direction from which they proceeded and did not slacken speed.

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By Article 16 of the International Regulations the *Flora Alberta* while proceeding in a fog was required to "go at a moderate speed having careful regard to the existing circumstances and conditions". There was a clear breach of this rule on her part. By the same article she was required upon hearing, apparently forward of her beam, the fog signal of a vessel the position of which was not ascertained, so far as the circumstances of the case admitted, to stop her engines and then navigate with caution until the danger of collision was over. Assuming the signals from the vessel were heard the *Flora Alberta* should have stopped her engines and, as required by Article 19, should have kept out of the way of the steamer which was on her starboard side. If the signals were not heard it was, in my opinion, due to a failure of those who were supposed to be on watch on the schooner to attend to their duties. The schooner was proceeding at a dangerously high rate of speed under the circumstances. It appears to me to be further apparent that the look-out was negligent in failing to see the lights of the approaching steamer, which were on at full brilliance, when she was 400 or 500 feet distant. Had the schooner been proceeding at the rate suggested by her master of  $4\frac{1}{2}$  knots and had the look-out been alert and detected the position of the steamer at this distance and the engines then reversed, the collision would have been averted, even had the schooner not altered her course.

As to the *Fanad Head*, she was proceeding in the convoy and was bound to conform to the instructions of the commodore which at the time in question required her to

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maintain a speed of 8 knots an hour and her position in the convoy and not to sound her whistle independently, except in an emergency when the master would be required to exercise his own discretion for the safety of his ship. When the master heard the first whistle from what proved to be the *Flora Alberta*, she was apparently at a distance and fine on the port bow and in view of the position of the ship in the convoy, with the American vessel following her at three cable lengths, I think no fault can be found in that the master did not at that time stop the engines. The International Regulations did not apply without qualification to the *Fanad Head* at this time in view of her obligation to obey the convoy orders and I do not consider that an emergency existed when the whistle was first heard. Having heard the whistle of the *Flora Alberta* which was apparently a high whistle and not of great volume, the master would, in my view, be justified in assuming that the great volume of sound from the three vessels blowing their column numbers would be audible to those on the other ship and that they would have ample time to take measures for their own safety. I think, however, a different situation was created when the second whistle was heard. While it is not entirely clear upon the evidence, I am of the opinion that the proper inference is that the column number of the *Fanad Head* was not blown again after the second whistle was heard and that the only signal given by her was the blowing of the three short blasts when the schooner was sighted. Assuming she was kept upon the course of 132 degrees true, it is difficult to understand the apparent change in the position of the *Flora Alberta* from being fine on the port bow to three points on the port bow, unless either the schooner executed some such manoeuvre as is suggested in the evidence of the master of the *Fanad Head* or, owing to fog, the bearing of the signals could not be properly determined. In view of the evidence as to the unreliability of sound bearings taken during fog conditions and of the evidence of the Captain and the helmsman of the *Flora Alberta*, I think the latter is the explanation to be accepted. On this footing the situation was that the master of the *Fanad Head* inferred that the schooner was going to port and the inference was erroneous. When the second whistle was heard forward of the beam and

clearly much closer than the earlier signal, I think a state of emergency existed requiring the *Fanad Head* to take independent action and that the engines should then have been stopped and the whistle blown again, and that had these steps been taken the accident would have been averted.

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In my opinion both ships were at fault and the negligence of each continued up to the moment of collision and contributed to its occurrence and accordingly the damages should be apportioned. (*The Eurymedon* (1), Greer, L.J. at p. 50: *Admiralty Commissioners v. North of Scotland* (2), Viscount Simon at p. 354). I would apportion the liability one-third to the *Flora Alberta* and two-thirds to the *Fanad Head*. As to costs the appellant should have its costs of this appeal and the respondents should be allowed two-thirds of their taxable costs in the court below.

*Appeal allowed in part, the liability being apportioned one third to the Flora Alberta, two thirds to the Fanad Head. Appellant to have costs of this appeal and respondents two thirds of their taxable costs in the Court below. Taschereau J. dissenting, would dismiss the appeal with costs.*

Solicitor for the appellant: C. B. Smith.

Solicitor for the respondents: Donald McInnes.

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(1) [1938] P. 41.

(2) [1947] 2 All E.R. 350.