THE DOMINION FISH COMPANY (DEFENDANTS) .................... APPELLANTS;

1910

*Oct. 21, 22.
*Nov. 2.

AND

HELEN ISBESTER (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Appeal—Concurrent findings of fact—Negligence—Shipping—Action for damages—Personal injury—Evidence—Res ipsa loquitur—Limitation of liability—"Canada Shipping Act," R.S.C., 1906, c. 113, s. 921.*

Concurrent findings on questions of fact in the courts below ought not to be disturbed on appeal unless a mistake is clearly shewn,

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers in time to permit them to escape in safety and, in an action to recover damages for injuries sustained in consequence by a passenger, the owners adduced no evidence to explain the origin of the fire.

*Held,* affirming the judgment appealed from (19 Man. R. 430), that, in the circumstances, the only inference to be drawn was that the owners were grossly negligent.

In such an action the owners of the ship cannot invoke the limitation provided by section 921 of the "Canada Shipping Act," R.S.C., 1906, chapter 113. *The "Orwell"* (13 P.D. 80), and *Roche* v. *London and South-Western Rway Co.* ([1899] 2 Q.B. 502), referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Metcalfe J., at the trial, by which the plaintiff's action was maintained with costs.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Anglin JJ.

(1) 19 Man. R. 430.

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The circumstances of the case sufficiently appear from the head-note and judgment now reported.

*R. G. Affleck* for the appellants.

*Henry F. Blackwood* for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—I think I may say that it is the well settled rule of this tribunal that, in a case like the present, when the question is whether or not the concurrent judgments of two courts should be set aside on a question of fact the appellant must put his finger on the mistake made by the trial judge, and this the appellants have failed to do in the present instance. I agree with Mr. Justice Perdue; the evidence leads us irresistibly to this alternative. Either there was no watchman in charge on the night of the fire, as there should have been; or, if there was, he failed to perform his duty. The conduct of those responsible for the safety of the ship is, in my opinion, inexplicable. No attempt was made to explain the origin of the fire or the failure to arouse the passengers in time to allow their escape and the only inference to be drawn from the silence of the defendant company is that they were grossly negligent.

A question is raised on the pleadings which is not disposed of nor referred to in the courts below as to the effect of section 921 of chapter 113 of the Revised Statutes of Canada, the burned vessel being a ship within the meaning of that section. That section, in my opinion, has no application to the main issue which involves the liability of the defendants for damages resulting from the fire. That issue the courts

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below had undoubtedly jurisdiction to dispose of and with the judgments on that issue we are now exclusively concerned. Whether the defendants may limit their liability in a proper proceeding instituted in another court to create a fund out of which the claims resulting from the fire are to be paid does not come before us for consideration now. *The "Orwell"* (1) in 1888; *Roche* v. *London and South-Western Railway Company* (2).

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Richards, Affleck & Co.*

Solicitors for the respondent: *Bernier, Blackwood, Bernier & Beaupré.*

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(1) 13 P.D. 80.

(2) (1899), 2 Q.B. 502.