QUEBEC ADMIRALTY DISTRICT.

1906

April 26.

THE HARBOUR COMMISSIONERS OF MONTREAL ..... } PLAINTIFFS;

AND

THE S.S. "*UNIVERSE*", THE S.S. "*BAY STATE*", THE BARGE "*BERKSHIRE*", THE BARGE "*BATH.*" ..... } DEFENDANTS.

THE BOUTELL STEEL BARGE COMPANY ..... } PLAINTIFF;

v.

THE OWNERS OF THE S.S. "*UNIVERSE.*" ..... } DEFENDANTS.

THE UNIVERSE JOINT STOCK COMPANY ..... } PLAINTIFF;

v.

THE OWNERS OF THE S.S. "*BAY STATE*", THE BARGE "*BERKSHIRE*", THE BARGE "*BATH.*" } DEFENDANTS.

Admiralty law—Nautical assessors—Expert testimony as to the management of ships—Practice.

Where the court at the trial of a collision action has the assistance of a Nautical Assessor to advise on all matters requiring nautical or other professional knowledge, the evidence of experts as to the management of the ships shortly previous to the collision is inadmissible.

ACTIONS for collision in the Harbour of Montreal.

During the examination of a witness before Mr. Justice Dunlop, Deputy Local Judge for the Quebec Admiralty District, objection was taken to the admissibility of his evidence in so far as it related to matters coming within

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the competence of the Nautical Assessor to advise upon at the trial.

A. Geoffrion, K.C., for the Harbour Commissioners.

F. E. Meredith, K.C., for the *Universe*.

C. Pentland, K.C., and *M. Goldstein, K.C.*, for the *Bay State*, the *Berkshire* and the *Bath*.

DUNLOP, D.L.J., now (April 26th, 1906) delivered judgment.

The question involved in these cases is to fix the responsibility for heavy damages caused by the collision between the S.S. *Universe* and the barge *Bath*, which took place in the Harbour of Montreal on the 29th September, 1905. As a result of this collision, the S.S. *Universe* and the barge *Bath* were seriously damaged, and two dredges, the property of the Harbour Commissioners of Montreal, were much damaged, one having been sunk and the other injured to a large extent. Damages to a considerable amount resulting from said collision are claimed, first, by the owners of the S.S. *Universe;* second, by the owners of the S.S. *Bay State*, the barge *Berkshire* and the barge *Bath*. It may be stated that the barge *Bath* was in tow of the S.S. *Bay State* when the collision took place.

The owners of each of the said steamers claimed that the other was in fault and responsible for the collision.

Four actions are also taken by the Harbour Commissioners, to wit:

Case 157 against the S.S. *Universe*;

Case 158 against the S.S. *Bay State*;

Case 159 against the barge *Berkshire*;

Case 160 against the barge *Bath*.

Captain Louis Robert Demers, master mariner, and branch pilot, master of the S.S. *Campana*, was being examined as a witness. In the course of his examination the following question was put to him:

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"Q. Supposing you were coming up in charge of an ocean steamer bound for the harbour of Montreal, and you had arrived at a point about opposite to the lower end of those dredges, between two and three hundred feet to the south of them, and you perceived a steam-vessel coming down the river somewhere between the Victoria Pier and the dredges, having astern of her two barges in tow, what steps would you take to avoid a collision with those vessels?"

As appears by the deposition, Mr. Meredith, K.C. stated:

"I object to this evidence on the ground that the case is one in Admiralty, where the learned judge is to be assisted by an assessor or assessors, and that such evidence should not be allowed, as it is a question for an assessor to determine, being one of seamanship; and I further object to the question as being illegal inasmuch as it is, in effect, asking the witness to decide as to one of the main points in the case, which is a question for the court and assessors to determine."

This objection was taken *en deliberé*; and the further question was put to the witness:

"Q. What steps if any should be taken by those in charge of a steamship bound into the harbour of Montreal (when opposite to the lower end of the two harbour dredges which were anchored opposite sections 25 and 26) to avoid a collision with a steamship and her tow of two barges coming down the river, the said steamship and tow being, when first seen by the upward boat, some little distance below the Victoria pier?"

The same objection was made to this question, and the objection was taken *en deliberé*.

The question to be decided now is, as to whether the above-quoted questions were admissible under the circumstances of these cases?

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In these cases it has been submitted by the solicitors of the S.S. *Universe* and the Universe Joint Stock Company, Limited, that evidence is not competent upon any matters requiring nautical knowledge, as it is the province of the assessor or assessors to advise the court thereon. Taking into consideration this pretension, I might refer to Article 112 of the General Rules and Orders regulating the Admiralty practice in the Exchequer Court of Canada which reads as follows:

"The Judge on the application of any party, or without any such application, if he considers that the nature of the case requires it, may appoint one or more assessors to advise the court upon any matters requiring nautical or other professional knowledge."

It is submitted that this provision alone renders expert evidence unnecessary and illegal, as the court will take the advice of the assessor and assessors upon all matters requiring nautical or other professional knowledge.

If it be contended, however, that the provisions of Article 112 of the Rules are not sufficient, reference should be made to Article 228, which reads as follows:

"In all cases not provided for by these Rules the practice for the time being in force in respect of Admiralty proceedings in the High Court of Justice in England shall be followed."

A consideration of the practice in respect of proceedings in the High Court of Justice in England will make abundantly clear the fact that expert evidence cannot be admitted.

In *Roscoe on Admiralty Jurisdiction and Practice of the High Court of Justice* (3rd edition, 1903), the best authority upon this subject, we find at page 352:

"The assessors of the judge are two of the Elder Brethern of the Trinity House. Trinity Masters are summoned as a matter of course in collision and salvage

actions. The function of the Elder Brethren is to advise the court upon matters of nautical skill; the responsibility of the decision and the weight to be attached to evidence rests on the Judge. When Trinity Masters are present, evidence as to matters of nautical skill and practice and as to the deductions to be drawn from nautical facts is inadmissible, and will not be allowed to be given."

There is very little jurisprudence on this point in the reported cases in the Admiralty Courts of Canada, but there is none in any sense contrary to our rules and the English practice as above explained.

The only reported Canadian cases bearing upon the point are apparently the following:

The *Attila* and *Pomona* (1). G. Okill Stuart, J. at p. 198, said:

"No less than nine persons, masters of vessels have been examined to prove that six or seven knots an hour for sailing before the wind in the locality where the collision occurred was right and proper in fog and was customary. These persons have no personal knowledge of the collision, and an hypothetical case is put to them so as to cover this. The objections to this evidence now come before me for the first time, and I cannot do better than apply to it the language used by the Judge of the High Court of Admiralty in a case wherein an attempt was made to introduce similar testimony:—

"The inevitable consequence would be, if received, that the Court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other to the great expense of suitors, and a great delay in the hearing of the cause and with no benefit whatever. Therefore I disclaim paying any attention whatever to the opinions which have been referred to and maintain the objections to them."

In that case Commander Ashe, R.N., and Mr. Gourdeau sat as assessors.

(1) [1879] Cook, 196.

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The *Cumberland* (1). Hon. Henry Black, at p. 78 said :—

"If there was no want of proper nautical skill and discretion in so anchoring this vessel, the collision must be considered as having arisen from a *vis major* for which the *Cumberland* is not answerable. To enable the court to come to a decision upon the case it is necessary that a correct opinion should be formed upon the following questions which are of nautical character :

" 1. Whether previous to and at the time of the occurrence of the accident the *Cumberland* was properly moored and anchored, relation being had to the situation of the *Cornwallis* and the state of the wind and tide at the time when the *Cumberland* was so moored and anchored :

" 2. Whether the accident arose from unavoidable circumstances without fault being attributable to either of the ships or their masters, or whether it proceeded from the fault of either of the said ships or their masters, and if so from which of them :

" Availing myself of the power which this court has, to refer to some gentleman conversant in nautical affairs, I have obtained the assistance of a captain in the Royal Navy, now engaged in important public service here, upon whose judgment and opinion I shall feel it my duty to rely."

The English authorities and jurisprudence are of course directly applicable to our practice, as is clear not only from the *Colonial Courts of Admiralty Act* 1890 (Imperial Statutes 53–54 Vict. chap. 27) and the Canadian Admiralty Act 1891, passed there under (54–55 Vic. Cap. 29) but also by the definite provisions of the Admiralty Rules as above quoted.

In *Marsden on Collisions*, it is said (2) :—

(1) [1836] 1 Stuart, 75.

(2) 4th edn. 1897, p. 338, also in 5th edn. 1904, p. 291.

"In the Queen's Bench Division, matters of seamanship may be proved by experts. In Admiralty and it seems in any court where assessors are present to advise the court, such evidence is not admissible. In a recent case evidence directed to shew what the usual mode of navigating ships in the entrance to the Mersey was held to be inadmissible in the Admiralty Division. (The *Kirby Hall*: 8 P. D. 71). The function of the assessors is not to decide questions of fact arising in the case, but to advise the court upon nautical matters. The decision of the case rests entirely with the Judge."

In the *Assyrian* (1): "Sir Walter Phillimore, for appellants asked leave to call evidence to shew that this particular screw alley did not emit any smell. The mind of the judge was influenced by this advice of the Elder Brethren.

[Esher, M. R.—This is a matter depending on a nautical knowledge of ships and when the court has skilled advice you cannot give such evidence.]

"The assessors have never seen this particular ship and however valuable their advice they cannot speak with certainty as to the ship.

"[Esher, M. R. It seems to us that this advice which was given by the Masters to Butt, J. was founded upon a nautical knowledge of ships. That is a matter about which evidence cannot be admitted at all, and therefore we cannot admit any evidence on this appeal"].

In the *Kirby Hall* (2) the Plaintiffs proposed to examine witnesses as to what was usually done as a custom of navigation by pilots and masters in charge of large steamships. They submitted that though where Brethern of the Trinity House were present to assist the court the evidence of expert witnesses on questions of general seamanship was inadmissible, yet that evidence of the customary mode of navigating vessels in a particular

(1) [1890] 63 L. T., N.S. 91. (2) [1883] 8 P. D. 71.

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locality might by the practice of the court be proved by witnesses examined in court. Sir Robert Phillimore (p. 75), said :

" I think on the whole I ought not to admit the evidence in question. I think it is evidence on a point on which it is the province of the Trinity Masters to advise the court and I do not think I ought to do anything which will go any way towards allowing the examination of expert witnesses on questions of nautical skill and seamanship in cases where the court is assisted by the Trinity Masters."

In the *Sir Robert Peel*, James, L.J. (p. 365). said (1) :

" As to the alleged improper rejection of evidence, the evidence tendered was that of alleged experts on a matter of nautical skill. It is very important to adhere to the rule laid down by Dr. Lushington in the case of the *Anna and Mary*. (2 W. Rob. 189)." At the hearing in the court below the defendants tendered evidence of experts in the river navigation to shew that there was a certain draught or suction between a large or small vessel, but the court ruled the evidence to be inadmissible on the ground that it was an invasion of the province of the Trinity Masters assisting the court. See p. 364.

Brett, L. J. (p. 365) said :

" The practice of the Court of Admiralty with respect to evidence on points of nautical science is different from that of other courts. In other courts, questions of nautical skill and science as to the management and movement of ships may be proved by the evidence of experts. But that is not the way in which the Court of Admiralty is instructed in these matters. It has other means of instruction through the presence of nautical assessors.

" If the judge of that court were sitting by himself without the assistance of assessors the case might be

(1) (1880) 43 L. T., N.S., 364.

different; but when he is assisted by assessors he is instructed by them on such matters. The assessors are not part of the tribunal it is true, but the judge acts on their opinion and advice with regard to technical questions of nautical skill. The evidence therefore tendered in this case was properly rejected. I wish however to limit my observations as to the evidence of experts to questions concerning the manœuvres of ships. The Court of Admiralty would of course rightly receive evidence of experts on other subjects, such for example as the loading of ships, a matter not strictly within the prevision of the nautical assessors."

Cotton L. J. (p. 365) said:

"I concur. The presence of nautical assessors is intended to dispense with nautical evidence as to the management of ships."

In the *Ann and Mary* (1) counsel proposed to read affidavits of two Trinity Masters who were not those sitting as assessors. Dr. Lushington (p. 196) ruled as follows:

"The opinions of nautical men on a question of seamanship, indeed of men of science on points of science generally when a clear statement of the whole of the facts has been laid before them, is admissible evidence in this as well as other courts; but in this case I am assisted by gentlemen of great skill and experience in nautical matters, and it would be most inconvenient and injurious to the ends of justice if in cases where the court always has the benefit of and derives the greatest assistance from the opinions on nautical points of the Trinity Masters the proceedings were allowed to be encumbered by any evidence by way of opinion on such points. These affidavits must be rejected."

In the *Gazelle* (2) Dr. Lushington, addressing the Trinity Masters, (p. 474) said:

(1) (1843) 2 W. Rob. 195. (2) (1842) 1 W. Rob. 471.

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"Gentleman, in directing your attention to those facts of the case which are material to the question which you will have to determine I must in so doing notice an observation which has been much pressed in the argument by the counsel for the *Gazelle*, viz.: That the decision in this case must be strictly founded upon the evidence in the cause, and that you are not at liberty to travel out of that evidence in forming your opinion upon the points which will be submitted to your consideration in the present instance.

"Now I entirely concur in the propriety of this observation so far as it is confined to the evidence upon the facts of the case; at the same time I utterly deny the applicability of the argument if it is intended to control your judgment by the affidavits of witnesses in the cause with respect to matters of mere nautical practice and experience. Upon these points it is my duty to inform you that you must be guided solely and entirely by your own science and knowledge and not by the opinion of other nautical persons, however respectable or numerous such witnesses may be, swearing to a belief that this or that particular course was the proper course to have been adopted. If this were not so your attendance in this court would be almost nugatory and in the majority of cases that might occur it would be impossible for the court to arrive at any certain or satisfactory determination."

The counsel for the S.S. *Bay State*, the barge *Berkshire* and the barge *Bath*, and for the Boutelle Steel Barge Company contend that the evidence of experts is admissible in the present case, and cite the case of the *Polynesian* and *Cynthia* heard before the late Mr. Justice Irvine, assisted by Commander Hire as Nautical Assessor (1), and also the case of the *Loyal* and *Challenger* (2) where the judge was assisted by the late Captain

(1) 15 Q. L. R. 341; sub nom. Allan *v.* Reford.

(2) 14 Q. L. R. p. 135.

Smith, R. N. R., as Nautical Assessor, as cases where expert testimony was allowed. It will be seen by the report of the first case referred to that whatever witnesses were examined by the parties, the court relied upon the opinion of the Nautical Assessor as to all points necessitating expert evidence. The questions submitted to the Nautical Assessor by the court are found at pages 351, 352 and 353, and are in effect as follows:

1. Did the *Polynesian* manœuvre properly in starboarding?

2. Was it prudent for the *Polynesian's* pilot to put his wheel hard to starboard, then reverse his engines and immediately afterwards steady his ship?

3. Were the ships under the operation of the rule as to ships meeting end on so as to involve risk of collision?

4. Did the *Cynthia's* pilot act prudently and properly in porting?

5. Should the *Cynthia* have ported earlier?

6. After the *Polynesian* starboarded and the *Cynthia* ported, was it possible to avoid the accident?

I have no means at present of ascertaining exactly the nature of the evidence given by the witnesses referred to by the learned counsel in his memorandum; but judging by the report of the judgment there was no objection taken to any of such evidence by either of the parties, so that the court was not called upon to decide the question formally.

The other case referred to is that of the *Loyal* and the *Challenger* (1), and precisely the same remarks might be made with regard to the judgment in this case. It will be seen (pages 137 and 138) that Mr. Justice Irvine asked the Assessor precisely those questions which would have been covered by expert evidence if any such had been relied upon by the court.

As to the last statement made by the learned counsel in his memorandum, it is of too general a nature to admit

(1) 14 Q. L. R. 135.

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of a specific answer, but it is submitted that there is nothing to show its correctness and the only cases quoted show that whatever evidence had got into some of the records either through want of formal objection or on account of the court having sat without assessors or for any other reason, the court has always relied upon the expert opinion of its assessors or assessor when it has availed itself of their services.

I have been informed that the practice of this court has been not to allow the opinions of experts to be given in cases where nautical assessors sit. It seems to me the sole object of the questions objected to is to elicit the opinion of the witness as to the management of the ships. The presence of a nautical assessor is, as has been well said by Cotton, L. J. (1), to dispense with nautical evidence as to the management of ships. If such evidence were admitted, the inevitable consequence would be, as has been well stated in one of the cases cited, that the court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other, to the great expense of suitors and a great delay in the hearing of the cause and with no benefit whatever.

The evidence tendered is as to the management of ships; and the objections in my opinion made to such evidence should be and are maintained; and I declare all such evidence inadmissible in the present cases.

I have also been referred to the case of the *Cape Breton* and the *Canada* (2) and certain rulings as to the admissibility of evidence have been pointed out to me as there made, which simply confirm the correctness of the conclusions I have arrived at as to the inadmissibility of expert evidence in these particular cases.

Order accordingly.

(1) The *Sir Robert Peel*, 43 L. T. N. S. at p. 365.

(2) 36 S. C. R 564.