ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

1928
Sept. 13.
Oct. 18.

VANCOUVER ORIENT EXPORT CO., LTD. (PLAINTIFF) .... APPELLANT;

AND

THE SHIP "ANGLO-PERUVIAN" AND OWNERS (DEFENDANTS) .... RESPONDENTS.

Shipping—Collision—Conflicting evidence—Weighing of evidence—Duty of Appeal Court to vary on facts

Action by plaintiff to recover damages suffered by it by reason of defendant's ship coming into collision with one of its booms of logs in Burrard Inlet, North Vancouver, while the said ship was backing out of Empire Wharf.

Held (reversing the Judgment appealed from) that in cases of collision where the evidence is conflicting and nicely balanced, the Court should be guided by the possibilities of the respective cases which are set up, in weighing the evidence.

2. That it is next to impossible for one on a moving vessel, unless he is in a position to see her from stem to stern and at the same time maintain a complete and commanding view of the shore, to follow the course, speed or evolutions in the manoeuvres of a vessel; and that the plaintiff's witnesses being some on the boom and some on land overlooking the locus of the accident were in a better position to follow the course of the vessel than were those on board the same.

3. That though a Court always loathes to reverse the findings of another Court on questions of fact, this does not mean or imply that it should abdicate its right and duty to examine all the evidence, and, when there appears manifest error, to rectify the mistake.

APPEAL from the decision of the Local Judge in Admiralty for the British Columbia Admiralty District, dismissing plaintiff's action.

1928
VANCOUVER ORIENT EXPORT CO. LTD. v. THE SHIP *Anglo Peruvian* AND OWNERS.

The appeal was heard before the Honourable Mr. Justice Audette, at Vancouver, B.C.

J. W. de B. Ferris, K.C., for appellant.

R. H. Tupper, Esq., for respondents.

The facts and questions of law discussed are stated in the reasons for judgment.

AUDETTE J., now (October 18, 1928), delivered the following judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 16th day of February, 1928, in a collision case, dismissing the action with costs.

The plaintiff claims, as per the endorsement on the writ, the sum of $635.80 as representing the amount of damages suffered by him, as arising out of a collision between the defendants' ship *Anglo Peruvian* and the booming ground of the plaintiff situate at North Vancouver, Burrard Inlet, British Columbia, on the 27th December, 1927.

The *Anglo Peruvian* is a steamer of 430 feet in length, 58 feet beam, gross tonnage 5,435, registered tonnage 3,331, and painted gray and red.

The witnesses on behalf of the plaintiff, with great unanimity, testify seeing the *Peruvian* in actual contact with the plaintiff's boom and logs. The salient points of their evidence, using their own language as much as possible, are as follows:—

[The learned judge here analyses and discusses the evidence adduced by plaintiff, and concludes that the plaintiff has discharged the onus upon it to prove its claim, and then proceeds as follows:—]

* * * *

This closes the plaintiff's evidence which in my estimation, conclusively discharges the onus placed upon him of proving his case beyond any uncertainty. Were the case closed at this juncture, it would be quite impossible to do otherwise than to give judgment in favour of the plaintiff.

I shall now review the defendant's evidence, which absolutely denies any of the charges made by the plaintiffs and the testimony of all his witnesses. While doing so, I shall comment upon it as it develops, with the en-

deavour to reconcile it, if possible, with the plaintiff's evidence and fill the great gap between their respective contention.

The salient points of the defendant's evidence are as follows:

[The learned judge here discusses the defendant's evidence, and then proceeds.]

* * * *

The evidence of these last four witnesses,—two of them standing at the forecastle and two at the poop—should be carefully scrutinized to be understood. First, the vessel we know is of 58 feet beam,—half of that would be 29 feet—therefore if these four witnesses standing in the centre of the vessel, and the vessel was in a slanting position across A., if the centre of the poop and the forecastle were then at 20 feet from the logs, the midship must have been nine feet inside of the apex of the boom at A. That evidence indeed must also be read conjointly with the evidence of the plaintiff's witness Moore who said the *Peruvian* was lying right up against the point of the boom, and witness Penny said that both the stern and the bow of the vessel were clear of the logs. (See also witness Penny and the Pilot on that point.) All of that evidence read together confirms itself. Under that evidence to find that the two ends of the ship were clear of the logs would not be at all inconsistent with the plaintiff's evidence, which would therefore remain uncontroverted. All of this would materially fill the gap in the evidence and reconcile it.

It would also take away any reliability that could be placed upon the Pilot's evidence when he says the vessel went only 20 feet from the logs. By a mental effort, through mental reservation, he would be right, as to the bow and the stern. But is he thus telling the whole truth? Telling only part of the truth is worse than telling a whole falsehood.

The defendant's evidence thus scrutinized and analysed does not present that character of reliability that could in any manner shake the positive testimony of the plaintiff's witnesses who were in a better position for observation and who gave their evidence in a manner free from any suggestion of bias or bad faith.

1928
VANCOUVER ORIENT EXPORT CO. LTD.
v.
THE SHIP *Anglo Peruvian* AND OWNERS.
Audette J.

The judgment appealed from seems to have given preponderance to the witnesses for the defence for the alleged reason that being on board they had a better opportunity for exact observation of what actually occurred, than those of the plaintiff, standing on the shore. With that view I am unable to concur, for among reasons, those already mentioned and also and more especially because the witnesses on the shore were in a better position to follow the course and the manoeuvres of the vessel and their unanimity is also very convincing. I would further say that it seems that a deal of the evidence given by the crew was not from actual observation, but by deduction from casual observation at a given moment, relatively to their special position on the vessel.

One must not overlook the personal equation which necessarily arises where a person on a moving body attempts to estimate the distance between that body and a fixed point under observation. It is next to impossible for one on a moving vessel, unless he is in a position which allows him to see her from stem to stern, and at the same time maintain a complete and commanding view of the shore, to follow the course, or speed, or evolution in the manoeuvres of a vessel. *The Purdy* (1).

Moreover, in cases of collision "where the evidence on both sides is conflicting and nicely balanced (as it so often happens in Admiralty cases) the Court will be guided by the possibilities of the respective cases which are set up." *The Mary Stewart* (2); *The Ailsa* (3).

The physical facts of the case are that unless the vessel were prevented by skilful manoeuvring, she would, when leaving the dock, be taken down by the tide, right to the boom in question. These physical facts favour the plaintiff's view.

There can be no doubt that the four members of the crew who were, two at the extreme aft, at the poop, and two at the forecastle, could not see if the ship came in contact amidship on the port side: they had no vision of the port side at midship.

(1) (1919) 19 Ex. C.R. 212 at 229. Confirmed by Supreme Court of Canada.
(2) (1844) 2 Rob. 244.
(3) (1860) 2 Stuart's Adm. 38.

A question suggesting itself to me is why the Pilot, being in such danger on account of the vicinity of the boom which was a menace to his safety, did not back out further in the stream where he had clear and good water, remains unexplained and suggest to my mind that it was bad seamanship, backing out as he did and allowing himself to be drifted by the tide when he was quite aware the tide was absolutely drifting him towards the boom.

The trial judge, in dealing with this question of facts in the manner he did, did not have the advantage of seeing the demeanour of the four last witnesses in the witness box and in that respect I am in the same position as he was.

Moreover, I may cite here a well known rule of law, which, however, has recently been criticized by Professor Wigmore, in his Treaties on Evidence, with whom I am not entirely in accord, and that is: (as expounded in *Lefeunteum* v. *Beaudoin* (1), that it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negatibus,* because he who testifies to a negative may have forgotten the thing that did really happen, but on the other hand where memory affirms the happening of the fact, positive testimony of the fact ought to be accepted rather than negative testimony, and this rule seems to be more applicable to the case because, repeating myself, those affirming were in a much better position to judge than those who are denying. This rule is not a mere *cliché,* but it has its obvious *raison d'être.*

The Court, it is true, always loathes to reverse the findings of another court on questions of fact; but it does not mean or imply that the Court in a proper case should abdicate its right and duty to examine all the evidence and, when there appears manifest error, to rectify the mistake. *Benner* v. *Benner* (2) and cases therein cited; *The Navarino* (3).

I find that the plaintiff has abundantly proved its case and that has not been controverted by the defendant's evi-

(1) (1897) 28 S.C.R. 89 at 93.
(2) (1928) 3 D.L.R. 495, at p. 497.
(3) (1920) 2 Lloyd's L.L. 390.

1928

VANCOUVER ORIENT EXPORT CO. LTD. *v.* THE SHIP *Anglo Peruvian* AND OWNERS.

Audette J.

dence. The Pilot is the most interested witness in the case and I find his testimony unconvincing. The crew's evidence would seem to support the suggestion of mental reservation, linked in all circumstances to their relative position on the ship on the occasion and the question of the logs mentioned by them seems to be one suggested, without substantial evidence, to becloud the issue.

The testimony of the superintendent proving the amount claimed remains uncontroverted.

There will be judgment allowing the appeal with costs, and declaring that the plaintiff do recover from the defendant the sum of $635.80, also with costs in first instance.

Judgment accordingly.