APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

THE BARQUE "BIRGITTE," HER CARGO AND FREIGHT (DEFENDANT) } APPELLANT;

1904 June 6.

AND

LAMBERT FORWARD (PLANTIFF)...RESPONDENT;

AND

THE BARQUE "BIRGITTE," HER CARGO AND FREIGHT (DEFENDANT) } APPELLANT;

AND

R. MOULTON (PLAINTIFF).............RESPONDENT,

Shipping—Collision—Breach of regulations—Minor breach not contributing to collision—Liability.

If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the Regulations for preventing Collisions at Sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation where such contravention could not by any possibility have contributed to the collision.

2. A vessel "hove-to" with her helm lashed is not obliged to carry the lights mentioned in Article 4 of such Regulations, as she is not "a vessel which from any accident is not under command."

ACTIONS for damages for collision on the high seas.

The facts of the case are stated in the reasons for judgment on appeal. For a better understanding of the relative positions of the two vessels in and about the time of collision a sketch, prepared by Captain Bloomfield Douglas, R. N. R., who acted as nautical assessor in the court below, is here given.

Mag. N

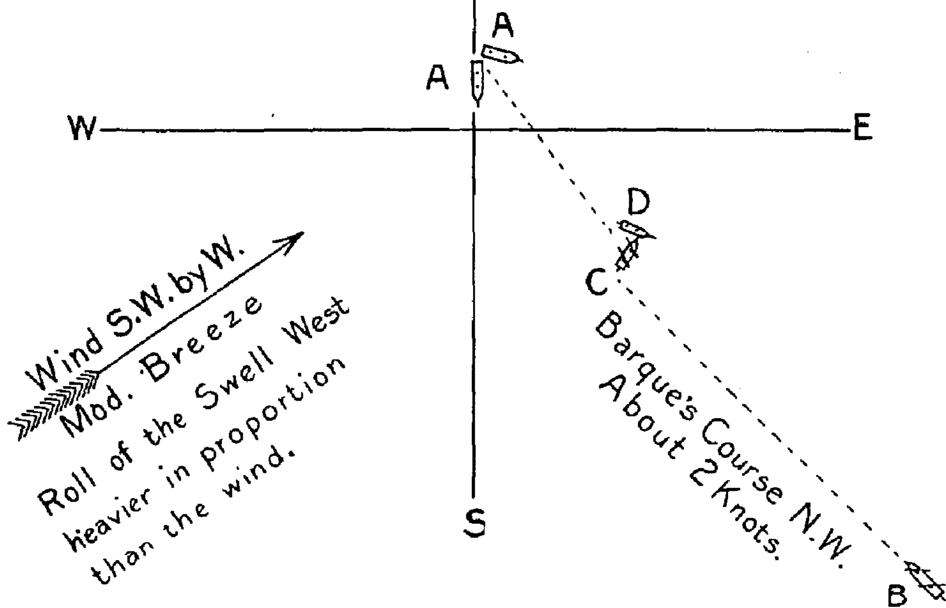
A. A:– Schooner "Hove to" on Starboard Tack. Helm lashed "hard a lee", ship forereaching, between South and E. by S., going about One Knot. Course made say S.E ½ E Speed say ¾ of a Knot.

Note–The Master of the Schooner states in evidence that when the collision took place her head was E. by S.

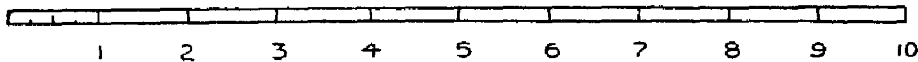
B:– Probable position of the Barque when she first sighted the Schooner, she was making a N.W. course, going about 2 Knots

C:– Approximate position of the Barque when she bore up and collided with the Schooner and sunk her.

D:– Position of Schooner when run into.



SCALE. 20 CABLE'S LENGTHS.



Bloomfield Douglas
R.N.R

Halifax 1st Octr 1903

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Judgment of Local Judge.

The reasons for judgment of the learned trial judge (MACDONALD, (C.J.) L.J., 9th Decr. 1903) follow:—

This is an action to recover damages for loss sustained by collision at sea, which the plaintiff alleges was caused by the negligence and default of the defendant ship, her master and crew.

The schooner *Georgina*, owned and commanded on on this voyage by her owner Capt. Forward, was on a voyage from Borgeo, Newfoundland, to Halifax, with a small quantity of fish. The collision took place about ten miles south of Country Harbour Ledges, on the south eastern coast of Nova Scotia, on the 31st July, 1903, and about 12.30 a.m. The wind was S.W. by W. and blowing about a six mile breeze. There was thick fog with mist. The sea was choppy and rough, and the *Georgina* in consequence lay to during the night. At the time of the collision the *Georgina* was lying-to under foresail and small jumbo to keep her steady and making little or no headway. One witness says about one mile an hour. The movements and position of the two vessels at the time of the collision are fully stated in the evidence.

The only question for determination is, which of the two vessels was to blame for the collision, or were both to blame and after giving the best consideration in my power to the evidence adduced, I have arrived at the conclusion that the defendant barque *Birgitte* was solely to blame. As this is largely, if not altogether, a question of seamanship, I was glad to have on the trial the assistance and advice of Captain Bloomfield Douglas, R.N.R., as Assessor; and he concurs in the opinion at which I have arrived. There will, therefore, be judgment for the plaintiff with costs. The damages will be referred to the registrar and merchants for assessment and the usual decree will be entered for the damages so ascertained and costs.

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Opinion of Nautical Assessor.

The opinion of the nautical assessor at the trial was as follows:

After having carefully considered the evidence given in the Vice Admiralty Court in the cases relating to the collision between the two vessels in question on the night of the 31st July last, off the coast of this Province, and having heard the addresses to the court by the counsel for the parties concerned,

I am of opinion that the master and owners of the Norwegian barque *Birgitte* are in default; that the collision with and the sinking of the British schooner *Georgina* were caused by the master of the barque *Birgitte* not continuing his course to the N. W. when the schooner *Georgina's* green light was well open on the barque's starboard bow.

(Signed) BLOOMFIELD DOUGLAS,
R. N. R.,
Nautical Assessor.

February 19th, 1904.

H. Mellish, K.C., for the appellant, contended that in the worst aspect of the case for the appellant the court must hold that both vessels were at fault, and, as a matter of law, neither is liable to the other. But the primary cause of the collision was the negligence of the respondent in keeping his vessel's helm lashed and the vessel lying-to. In this way she was constantly "coming up" in the wind, and then "falling off," so that her lights would be constantly changing. Then she carried no fog-horn to be sounded in foggy weather as required by the regulations. (*The Love Bird* (1)

The case cited goes further in excusing the appellants from liability than is necessary. In that case the ship had a proper fog-horn, and it was heard

(1) 6 P. D. 80.

before the collision. Here no such horn was heard. The respondent's ship was guilty of a breach of a statutory requirement in not having or sounding a proper horn, and the appellant is excused from responsibility for the collision. Moreover, the respondent's ship in the position of lying-to could not put upon us the duty of avoiding her as if she was lying at anchor. A vessel may not carry the lights of a sailing ship if she is not pursuing a steady course but is veering about. Our men say they first saw a white light, and then a green light and the result was confusing to them. Then the respondent vessel was in a helpless condition with her rudder-head lashed, and could not do anything to avoid the collision when it was imminent. She had no right to throw all the burden of keeping clear upon us.

J. A. McKinnon, for the respondent, contended that as to the objection in the appellant's preliminary act it could not be raised now. The finding of the learned trial judge is that the *Birgitte* was wholly to blame, and that is as good as a finding that the absence of a fog-horn did not contribute to the collision. The facts, moreover, show that even if we had used a fog-horn it would not have averted the collision. It was the duty of the *Birgitte* to keep out of our way. A ship hove-to is entitled to her rights. (*Marsden on Collisions* (1). There is no more lee-way made in lying-to than in sailing.

Again, the *Birgitte* was clear when she opened up to those on board the *Georgina*, and the latter rightfully decided to keep her course; but the barque put her helm up, and that was the first moment when collision became imminent.

As to the case of the *Love Bird*, that was the first case decided after the old rule was made as to equality

(1) 4th ed. pp. 447, 450, 453.

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of fault, and it is absurdly severe upon a minor fault not contributing to the collision. The proper interpretation of the rule is found in the *Duke of Buccleugh* (1), where it was held that if an infringement of the regulations could not possibly have caused the accident, the ship guilty of such infringement should not be held to blame. See also the same case in the House of Lords (2).

Under the rules, the *Birgitte* should have kept out of our way (the *Winstanley* (3); the *Argo* (4); *Fanny M. Carvell* (5); *Fire Queen* (6).

H. Mellish, K.C., replied, citing *Howell's Admiralty Practice* (7); *Stockton's Admiralty Digest* (8); *Marsden on Collisions* (9).

THE JUDGE OF THE EXCHEQUER COURT now (June 6th, 1904,) delivered judgment.

This is an appeal from the judgment of the learned Judge of the Nova Scotia Admiralty District whereby, in an action for damages by collision, he pronounced in favour of the respondent's claim for the loss of his schooner the *Georgina* and condemned the ship *Birgitte*, her cargo and freight and their bail in an amount to be found due, and costs.

The learned judge came to the conclusion that the officer in command of the *Birgitte* was solely to blame, in which view he was supported by the opinion of Captain Bloomfield Douglas, R.N.R., who acted as nautical assessor. The latter states that in his opinion the master and owners of the Norwegian barque *Birgitte* were in default, and that the collision with, and the sinking of, the British schooner *Georgina*

(1) 15 P. D. 86.
(2) [1891] A. C. 310.
(3) 8 Asp. M. L. C. 170.
(4) 82 L. T. N. S. 602.
(5) 13 App. Cas. 455, (note.)
(6) 12 P. D. 147.
(7) P. 249.
(8) P. 199.
(9) Pp. 472, 555.

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were caused by the master of the barque *Birgitte* not continuing his course to the north-west when the schooner *Georgina's* green light was well open on the barque's starboard bow. The sketch accompanying Captain Douglas' opinion shows the position of the two vessels immediately before the collision, and the manner in which according to his view it occurred (1).

On the appeal it was contended that the *Birgitte* was not in any way at fault; but that ground, in view of the finding of the learned judge, was not strongly pressed. But it was urged that the *Georgina* was also in fault, and that the judgment appealed from was in that respect wrong. And this contention was placed upon three grounds.

First, it was said that the *Georgina's* helm being at the time lashed she was out of command and should have carried the light provided by Article 4 of the Regulations for preventing Collisions at Sea. But that Article refers to vessels that from accident are not under command, which is not this case, and it seems to be settled that a vessel "hove to", as the *Georgina* at the time was, is under way and must carry the lights mentioned in Articles 5 and 2 of the Regulations. With these Articles the *Georgina* complied and no fault can, I think, in that respect be attributed to her (2).

Then, in the second place, it is said that the *Georgina* was in fault in that she was not provided with a mechanical fog-horn as prescribed in Article 15 of the regulations; and in the third place it was contended that the conditions under which the *Georgina* was sailing contributed to the accident. Being "hove to"

(1) *Supra*, p. 340.

(2) REPORTER'S NOTE.—Upon the point as to whether a ship "hove-to" with helm lashed is a ship "under way," see *The Pennsylvania*, 23 L. T. N. S. 55 at p. 56; and the report of a case by other parties against the same ship in the Supreme Court of the United States in 19 Wall. 125, at p. 135.

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with her helm lashed hard down she was continually "coming to" and "falling off" the wind; and while she in that way kept her general course there was within the limits of south and east by south a constant changing of course, and a corresponding change in the position of her lights, which, it was argued, contributed to, if it did not actually cause, the collision.

As it was clear that the *Georgina* was not provided with such a fog-horn as the regulations called for, and that in this respect there was on her part a contravention of such Regulations, and as the collision occurred beyond the limits of Canadian waters, it was necessary, before the judgment appealed from could be given or affirmed, to come to the conclusion that the fact that the *Georgina* was not provided with a mechanical fog-horn not only did not, but could not, by any possibility have contributed to the collision. (The *Cuba* (1); the *Westphalia* (2); *Marsden's Laws of Collisions at Sea* (3). On that question, as well as on the third contention mentioned, there was no direct finding by the learned judge whose judgment was appealed from, or expression of opinion by the nautical assessor whose assistance he had. It was, I think, to be inferred that on both points the views of the learned judge and of the assessor were favourable to the respondent; but for greater certainty, and because the questions were in the main questions of seamanship, I directed the case to be re-argued at the sittings of the court lately held at Halifax where I had the advantage of being assisted by Captain Thomas Douglas, as nautical assessor, both parties agreeing in my asking him so to assist me. He agreed with Captain Bloomfield Douglas' opinion already referred to, and on the other questions mentioned was of the opinion that the

(1) 26 S. C. R. at p. 661.
(2) 8 Ex. C. R. 263.
(3) 4th ed. 49.

fact that the *Georgina* was not provided with a mechanical fog-horn could not, under the circumstances by any possibility, have contributed to the collision; and that the fact of the *Georgina* being at the time "hove to" with helm lashed did not contribute to the accident.

With that view I fully agree. At the time when immediately before the collision the *Birgitte's* course was changed, the *Georgina's* green light was "well open" on the barque's starboard bow, and the safe and proper thing for her to have done was to keep her course. By changing her course at that time she caused the collision; and the fact that the *Georgina* had no mechanical fog-horn, or that she was "hove to" with her helm lashed, had nothing to do with the collision occurring at the time and in the manner in which it occurred.

The appeal will be dismissed with costs.

Judgment accordingly.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondent: *H. Mellish.*