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Dec. 14.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

THE SHIP "*PORTER*" (DEFENDANT)...APPELLANT;

AND

ARTHUR HEMINGER (PLAINTIFF).....RESPONDENT.

Collision—Ordinary care—Contributory negligence—Evidence.

Where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it although the other ship may have been guilty of some breach of the rules, but which did not contribute to the collision.

2. Where the defence of contributory negligence is set up by the defendant in an action for collision, he must show with reasonable clearness not only that the other ship was at fault, but that her fault may have contributed to the collision.

APPEAL from the judgment of Macdougall, Local Judge of the Toronto Admiralty District, reported ante (1).

The facts of the case are stated in the report of the case below.

October 3rd, 1898.

The appeal was now argued.

J. E. O'Connor for the appellant, cited the following cases: The *Benin* (2); The *Gordon* (3); The *Oriental* (4); The *McLeod* (5); The *Oliver* (6); The *Davis* (7); The *Oscar Towsend* (8); *Buzzard* v. *Scow Petrel* (9); The *Granite State* (10); *Cayzer* v. *Carron Company* (11); *Cuba* v. *Macmillan* (12); The *Miramichi* (13); The

(1) P. 154.
(2) L. R. 12 P. D. 58.
(3) 2 Stu. 198.
(4) 2 Stu. 144.
(5) 2 Stu. 140.
(6) 22 Fed. Rep. 848.
(7) 19 Fed. Rep. 836.
(8) 17 Fed. Rep. 93.
(9) 6 MacL. 491.
(10) 3 Wall. 310.
(11) 9 App. Cas. 873.
(12) 26 Can. S. C. R. 638.
(13) 1 Stu. 318.

Ella B. (1); The *Bywell Castle* (2); *Desty's Admiralty Law* (3); *Marsden on Collisions* (4).

Henry Clay for the respondent, cited the following: The *Pleiades* (5); The *Margaret* (6); The *Duke of Buccleugh* (7); The *Fire Queen* (8); *Owen* v. *Odette* (9); The *City of Antwerp* (10).

THE JUDGE OF THE EXCHEQUER COURT now (December 14th, 1898), delivered judgment.

This is an appeal on behalf of the owners of the ship *Porter* against a judgment pronounced on the 14th day of July, 1898, by the learned judge of the Toronto Admiralty District, whereby he maintained the plaintiff's action for damages to the steam tug, the *Fern*, occasioned by the *Porter*, a three masted schooner, coming into collision with the *Fern* on the night of the 2nd of September, 1897. The plaintiff was the owner and master of the *Fern*, which at the time of the collision was lying at anchor in Lake Erie about mid-channel between Colchester Reef and the main shore,—the channel at this place being about two miles and one half wide. She had been engaged for some four months in removing the cargo and wreck of a sunken schooner, and was at the time anchored over the wreck. The night was clear and fine, with a light breeze from the northeast, or as some of the witnesses say, from the north northeast. The *Porter's* course at the time of the collision was west northwest, and she was making about four miles an hour. Her lights were lit and burning brightly. The *Fern* was lying with her head to the wind and across the *Porter's* course. Whether she was at the time carrying an

(1) 19 Fed. Rep. 792.
(2) L. R. 4 P. D. 216.
(3) P. 381.
(4) 3rd Ed. 497.
(5) [1891] App. Cas. 259.
(6) 8 P. D. 128; 9 P. D. 47.
(7) L. R. 15 P. D. 85.
(8) L. R. 12 P. D. 147.
(9) Cass. Dig. p. 519.
(10) L. R. 2 P. C. 25.

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anchor light is a question in dispute. On the conflicting testimony presented by the case the learned judge has found "that on the night in question at the "time of the collision the *Fern* was carrying a regula- "tion white light upon the top of her pilot house "which would be about nine feet above her hull "where it could best be seen, and where it could "clearly be seen by the *Porter* if a proper look-out had "been kept on that vessel;" and that "it was visible "on the night in question for more than a mile." This finding I accept in the main as justified by the evidence. The light according to the regulation then in force should have been carried forward. It was as a matter of fact carried on the pilot house a few feet aft of midships; and I see no reason to believe that it would be better seen when so set or carried than it would have been had it been carried in the position prescribed by the regulation. But I agree that the *Porter* has nothing to complain of in that respect. The fact that the light was carried on the pilot house and not forward did not in any way occasion or contribute to the collision. To a vessel approaching the *Fern* on the course the *Porter* was steering the light was as distinctly visible where it was placed as though the regulation had been in terms complied with, and it is obvious that the persons in charge of the *Porter* could not have been misled as to the position of the *Fern* by a light which they failed to see. The contravention of the statutory rule will not prevent the plaintiff from succeeding in his action if otherwise he is entitled to succeed, unless it occasioned or contributed to the collision. The Act respecting the navigation of Canadian waters (R. S. C. c. 79, s. 5, re-enacting 43 Vict. c. 29, s. 6) follows in this respect the Act of the United Kingdon, 25th & 26th Victoria, c. 63, s. 29, and not the later Act, 36th and 37th Victoria, c. 85, s. 17, the

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provisions of which are now in substance to be found in *The Merchant Shipping Act*, 1894, s. 419. So that the question that arises under the Canadian statute is as the question under the earlier English Act was, whether or not the non-observance of the rule occasioned or contributed to the collision; and in the present case, as I have said, it seems to be clear that it did not.

Perhaps it is unnecessary, but I should like to add something to guard against being understood to hold the view that it is immaterial whether that part of the rule that requires a vessel of the size of the *Fern* to carry her anchor light forward is infringed or not. It may or may not be material according to the circumstances of the case, and the person who contravenes the rule takes the risk of it being found to be material. There has been a change in the rule which indicates that some importance should be attached to the position in which in this respect the light should be carried. By the 11th article of the regulations approved by His Excellency in Council on the 9th of February, 1897, and which came into force on the first day of July, 1897, it is provided that a vessel under 150 feet in length when at anchor shall carry forward where it can best be seen, but at a height not exceeding 20 feet above the hull a white light in a lantern so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least a mile; and that a vessel of 150 feet or upwards in length, when at anchor shall carry in the forward part of the vessel at a height of not less than 20 feet, and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light. The regulations in which this provision occurs are in

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conformity with the regulations for preventing collisions at sea approved by Her Majesty in Council on the 27th of November, 1896, and which also came into force on the 1st of July, 1897. By the 8th article of the regulations in force in Canada prior to that date it was provided that a ship, whether a steam-ship or a sailing ship, when at anchor, should carry, where it could best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of not less than eight inches in diameter and so constructed as to show a clear uniform and unbroken light visible all around the horizon at a distance of at least one mile (1). The later article omits the requirement about the shape and size of the lantern, but provides that a vessel under 150 feet in length shall carry her light not as provided in the earlier article where "it can best be seen," but "forward where it can best be seen," and that a larger vessel must carry two lights in the manner provided in the regulation; and it is obvious that a case might arise in which the position in which the light was carried might be very material. In the present case I think it was not material.

For the *Porter* it is also contended that the *Fern* was to blame for not having an anchor watch at the time of the collision, and that if both vessels are found to be in fault the damage should be divided according to the rule that prevails in Admiralty in such cases. There is no dispute as to what happened. Up to about half an hour before the collision the watch on board the *Fern* was on deck. He saw the *Porter* when she was two or three miles away, her port light being then visible, and he concluded that she was going clear of the *Fern*. Then he went below to get something to eat and remained there until the collision. The *Fern* being anchored in

(1) R. S. C. c. 79, s. 2, Art. 8.

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a place near which vessels were constantly passing, it was her duty to keep a competent person on watch. (1).

In the case of the *Meanatchy* it is said that their "Lordships entertain no doubt that in the case of a "vessel at anchor there is an obligation to keep a com- "petent person on watch; and that it is his duty not "only to see that the anchor light or lights are pro- "perly exhibited but also to do everything in his power "to avert or to minimize a collision. Many such things "may no doubt be done, and it is necessary also to be "prepared to summon aid for any needful purpose" (2). In the present case the person whose duty it was to keep the watch left his post and neglected his duty, and if it were reasonably clear that his absence continuing as it did up to the time of the collision may have contributed thereto, then I should think that the *Fern* as well as the *Porter* ought to be held to be in fault. That the absence of the anchor-watch did not actively contribute to the collision is of course clear, and it is not suggested that if he had remained on deck he could have done anything to avert it or to minimize its effect, by changing the position of the *Fern*. What is suggested is that when he saw that a collision was imminent he could have rung the tug's bell or shouted, and in that, or some such, way have attempted to attract the attention of those on board the *Porter* to the position of the *Fern* and to their own carelessness in not noticing her anchor light. A number of witnesses have said that he ought to have done that, and I have no doubt that it was his duty; but no witness has said or has been asked to say that in his opinion such a warning would probably have been effectual to

(1) The *Miramichi*, 1 Stuart 237; The *Masters and Raynor*, 1 Brown Ad. 342; The *Clara*, 102 U. S. 200; The *Rigaud*, 11 Q. L. R. 382; The *Guyandotte*, 39 Fed. Rep. 575; The *Meanatchy*, [1897] App. Cas. 351.

(2) [1897] A. C. 356.

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avert the collision. The wind at the time was blowing across the *Porter's* course and not in her direction, and it appears that she was slow to answer her helm. To be of any use the warning should have been given when she was at a considerable distance from the *Fern*; and whether it would likely have been effectual or not is left to conjecture. This defence of contributory negligence is set up by the owners of the *Porter*, and it is for them to make out their case, and to show with reasonable clearness not only that the *Fern* was at fault, but that her fault may have contributed to the collision. On the whole I think that they have failed to make out such a case.

The *Fern's* light was exhibited where it could have been seen by the look-out of the *Porter*, if he had been attentive. He ought to have seen it, and if he had, the collision could have easily been avoided by the *Porter* whether an anchor watch was kept on the *Fern* or not. The *Porter* was the moving vessel and it was her clear duty to keep a good look out and to avoid the anchored vessel. And though the latter was in fault in that a sufficient watch was not kept, the *Porter* could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision and ought I think to be held alone to blame (1).

The appeal will be dismissed and with costs.

Judgment accordingly.

Solicitor for appellant: *J. E. O'Connor.*

Solicitor for respondent: *H. Clay.*

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(1) The *Margaret*, 9 App. Cas. 873.