BETWEEN:

1959
May 27

NEW ENGLAND FISH COMPANY OF OREGON and LEO A. WOODS } PLAINTIFFS;

AND

BRITAMERICAN LIMITED, Owner of the Ship *BRITAMERICAN* and THE BRITISH AMERICAN OIL COMPANY LIMITED ..... } DEFENDANTS.

Shipping—Collision between two ships—Both ships equally to blame—Form of judgment—Disposition of costs—Appeal from Registrar's form of judgment dismissed.

In an action arising out of a collision between a fishing vessel, of which the plaintiff New England Fish Company is the owner and the plaintiff Leo A. Woods is the charterer, and an oil tanker, of which the defendants are the owner and charterer, the court held the two vessels equally to blame. The plaintiffs had before trial discontinued the action against the owner of the tanker leaving the charterer as the sole defendant. Defendant did not claim for any damage to the tanker, but did claim limited liability under the *Canada Shipping Act*. The fishing vessel being entirely under the control of its charterer, the owner was "innocent". Defendant conceded that the owner is not affected by the charterer's negligence but can recover all its loss, subject to the statutory limitation on defendant's liability. The matter now comes before this Court by way of motion brought by the plaintiffs to vary the minutes of judgment as settled by the Registrar, the issue being the liabilities between Woods, the charterer

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of the fishing vessel and the defendant, the charterer of the tanker. The judgment as settled by the Registrar orders the defendant to pay Woods half of his damage and requires the defendant to pay the New England Fish Company all its damage, subject to the statutory limitation, and the defendant to recover from Woods half of what it pays the New England Fish Company. Woods objects to this part of the judgment. He contends that his liability to indemnify the defendant "only exists with respect to the excess paid by the defendant . . . to the plaintiff owner . . . over and above one-half of the defendant's libability to the said plaintiff (owner) . . . before the application of limitation of liability, up to the amount actually paid by reason of the limitation of liability".

Held: That the Registrar's form of judgment should be confirmed.

2. That the defendant is not entitled to be indemnified by Woods against the costs paid to the New England Fish Company.

3. That the New England Fish Company is entitled to one-half of the trial costs and all the general costs except so far as increased by joinder of Woods who is entitled to tax all other costs taxable by the plaintiffs and recover half of them against the defendant.

MOTION to vary minutes of judgment.

The motion was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

J. A. Cunningham for the motion.

J. I. Bird, contra.

SIDNEY SMITH, D.J.A. now (May 27, 1959) delivered the following judgment:

This is a motion by the plaintiffs to vary the minutes of my judgment as settled by the learned Registrar. The judgment was given in an action *in personam* that arose out of the collision between a fishing vessel and an oil tanker. The plaintiffs are the owner and the charterer of the fishing vessel, and the original defendants the owner and the charterer of the oil tanker. At the trial I held the two vessels equally to blame.

The plaintiffs early discontinued their action as against the owner of the tanker, so the charterer may be considered the only defendant. The tanker apparently suffered no material damage; at all events the defendant claimed for none, though it set up a counterclaim asserting that the plaintiff-charterer was to blame. It also claimed that the defendant's liability should be limited under Section 657

of the *Canada Shipping Act*. The plaintiff-charterer did not make any corresponding claim for limitation of his liability, if any.

The fishing vessel was entirely under the control of its charterer, so that the owner was "innocent". Defendant's counsel concedes that this means that the owner is not affected by the charterer's negligence but can recover all its loss, subject to the statutory limitation on the defendant's liability, which I have held has been established at $30,614.08. The dispute on the form of the judgment therefore is as to the liabilities between Woods, the charterer of the fishing vessel; and the defendant, the charterer of the tanker.

There has been considerable argument on the application of the Provincial *Contributory Negligence Act*. I think this can be disregarded. The provision in the Act as to costs is I think inconsistent with those in the *Admiralty Rules;* these Rules are authorized by Dominion statute, and so cannot be varied by Provincial legislation. The substantive provisions of the Provincial Act do not seem to me to differ in any way material to this case from the *Canada Shipping Act,* so it is unnecessary to decide whether they could otherwise govern the rights of parties in this Court.

Even before Section 648 of the *Canada Shipping Act* (following the *Maritime Conventions Act* 1911) made those jointly liable for a collision share liability for the total damage, according to their degrees of fault, the admiralty rule had held them equally liable to pay the whole. Lord Sumner pointed out in *The Cairnbahn*[1] that such had been the admiralty rule even before *Merryweather v. Nixan*[2], had established the common law rule against contribution by tort-feasors. Here the two ships were held equally to blame, so both Section 648 and the earlier law would produce the same result (apart from costs) as the *Contributory Negligence Act*.

[1] [1914] P. 25. [2] (1798) 8 T.R. 186.

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The paragraph in the formal judgment, as settled by the Registrar, on which the argument has centred, reads:

> AND HE PRONOUNCED in favour of the Counter-claim of the Defendant, The British American Oil Company Limited, against the Plaintiff Leo A. Woods and CONDEMNED the said Plaintiff in one-half of any amount, including costs, which the said Defendant may be required to pay to the Plaintiff, New England Fish Company of Oregon;

The judgment orders the defendant to pay Woods half of his damage, and the defendant does not object to this. Presumably it will be satisfied by set-off. The judgment also requires the defendant to pay the New England Coy. all of its damage though this will be restricted by the limitation of liability to $30,614.08, assuming that the damage found exceeds that figure. The paragraph quoted would enable the defendant to recover back from Woods half of what it pays the New England Coy., including half the costs. For Woods it is said that this goes too far, and he submits an alternative direction fixing quite a different measure for the indemnity payable by him.

The language of his suggested substitute direction I find obscure; however in his notice of motion Woods clarifies what he wants. He there says that his liability to indemnify the defendant

> only exists with respect to the excess paid by the Defendant . . . to the plaintiff (owner) . . . over and above one-half of the Defendant's liability to the said Plaintiff . . . (owner) before the application of limitation of liability, up to the amount actually paid by reason of the limitation of liability.

Right at the outset, I find it almost impossible to reconcile such a contention with Section 648 (1), as interpreted by the decision in *The Cairnbahn,* (*supra.*) That section says:

> (1) Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

The above language, considered as Section 1 of the *Maritime Conventions Act* 1911, was held in *The Cairnbahn,* (*supra,*) to mean that if A and B by combined negligence have caused injury to C, then if A is compelled to pay C, the amount he must pay is "damage or loss" to A caused partly by C's fault. If A and B have been held equally at fault then A can recover from B half of what

he pays C. Here the defendant and Woods have been held to have injured the New England Coy. by their equal negligence and the effect of Section 648 is that the defendant can recover from Woods half the "damage or loss" the defendant suffers, which is half of what he pays the New England Coy. But Woods seeks to restrict the defendant's indemnity to half, not of what he pays the New England Coy., but a sum arrived at by applying a more elaborate formula. In explanation of this formula Woods asks me to consider several legal principles, which indeed have some relation to the issue but which, to my mind, do not lead to anything like justification of the suggested formula.

At the outset he emphasizes that when two opposed parties are held equally liable for a collision between their respective ships, the proper procedure is not to take the two resultant liabilities, reduce these by the limitations applicable to the respective ships, and then strike a balance; but rather to set off the two initial amounts of damage, which will leave a balance payable in favour of one only; and this balance alone is to be reduced by the limitation section. The decisions in *The Stoomvaart v. P. and O. Navigation Coy*,[1], *The Hector*[2] and *The London S.S. Owners v. The Grampian S.S. Coy.*[3] amply support this proposition. But what follows from this?

The principle laid down is one applying to cross-claims by two tort-feasors. I was at first inclined to think it was entirely excluded here by the fact that we are dealing with the claim of a third party, whose claim is not subject to set-off. But I see now that that is over-simplifying the problem, because our primary concern is with cross-claims between Woods and the defendant, even though one claim is defined by reference to the third party. There is still a set-off between Woods and the defendant. But how far does that fact advance matters?

Woods indeed makes the point that to apply the sections as the Registrar has done produces anomaly. He points out that if the crew of the fishing vessel had been employed by the owner, and the damage had been $50,000.00 (as is

[1] (1882) 7 A.C. 795. [2] (1883) 8 P.D. 218.
[3] (1890) 24 Q.B.D. 663.

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estimated), then the defendant would have been liable to pay $25,000.00 without getting anything back; whereas the judgment as now drawn would result in the defendant's paying $30,614.08 (as limited by Section 657) but with a right to recover back half of this from Woods, so that in the result he is some $10,000.00 better off.

I do not think this result proves much. It was pointed out by Lord Selborne in the *Stoomvaart* case, and I myself have respectfully pointed out (see e.g. *Robertson v. The Maple Prince*[1]) that the limitation section often works arbitrarily. Nevertheless we still have to apply it according to its language. Moreover Woods himself is hardly in a position to complain of this, since he himself benefits largely from the defendant's ability to invoke the limitation.

Without having argument on the point, at one stage I felt a doubt whether Woods could not prove against the fund of $30,614.08 *pari passu* with the New England Coy. Further thought has convinced me that that doubt was unfounded. The *Stoomvaart* case expressly decided that where one of two parties jointly at fault pays in a fund under the limitations section, the other party at fault can only prove against that fund to the extent that his damage exceeds that of the party who paid in. Here Woods can only get compensation by set-off against the defendant's claim upon him. The *Stoomvaart* case deprecates the use of the term "set-off"—these are really cross-claims—but I think the term is apt enough after the claims are made definite by decree and assessment.

The whole of the $30,614.08 therefore goes to the New England Coy., assuming its loss is found to equal or exceed that figure. According to *The Cairnbahn*[2] the result would be that the defendant is entitled to an order for repayment by Woods of half what he pays to the New England Coy. As I have said Woods contends that I should not follow this case, but that to find his liability I should take half of what the defendant would pay the New England Coy. apart from Section 657, then deduct from this figure half of what the defendant actually pays the New England Coy.,

[1] [1955] Ex. C.R. 225. [2] (1914) 30 T.L.R. 309.

the balance left representing all that Woods would owe the defendant—and even that subject to set-off of half of Woods' own damage.

I see nothing in the factors relied on by Woods that justify any such course, or that even give a plausible reason why I should follow it. To me the balance so arrived at has no significance. So far as I can see it is a purely arbitrary figure. Once the defendant's liability is limited, the figure that it would otherwise have paid the New England Coy. has no relevance, and deduction from that of the figure actually paid has no meaning.

There has been considerable discussion of the case of *The Morgengry and The Blackcock*[1] and the defendant distinguished the case on several grounds. I find it unnecessary to examine these, because that case was so different in its facts that I cannot see that it has any bearing.

Apart from costs then I confirm the Registrar's form of judgment.

The plaintiff Woods' second main objection to the Registrar's settlement is that this provided for the defendant's recovering from the plaintiff Woods all costs paid by it to the New England Coy. The plaintiff says this is contrary to the principles laid down in *The Cairnbahn* (*supra*). There in a judgment for an innocent ship against two negligent ships, Evans P., who tried the case, in ordering one negligent ship to pay the other one-half of what the latter had paid to the innocent ship, refused to include the costs paid because he said the ship seeking indemnity should not have defended a well-founded claim and he laid down a general rule that indemnity for costs in such cases should be refused. The Court of Appeal approved the order as to costs in that case, but refused to commit themselves as to whether a general rule should be laid down. At least it seems to me proper to follow the ruling made unless there are reasons for not doing so. However, there are material differences between *The Cairnbahn case* (*supra*) and this; we are not dealing with an action brought by an innocent plaintiff alone, but with one brought jointly by an innocent and by a negligent plaintiff.

[1] [1900] P. 1.

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That does not exclude all application of the principle mentioned. However I think the question whether Woods should indemnify the defendant against costs paid by the latter to the New England Coy. is tied up with the general apportionment of costs which I prefer to deal with first.

Though I have held that the costs provision in the *Contributory Negligence Act* does not govern here, I am in general prepared to follow its principle so far as it is practicable to do so. As against each other plaintiff Woods and the defendant are each entitled to recover against the other half of their taxable costs. But as to the plaintiff Woods' costs, there are some complexities. The two plaintiffs having sued through one solicitor are entitled to only one set of costs between them. The most authoritative English decision *Gort v. Rowney*[1] held that where one of two plaintiffs succeeds and the other fails, the successful plaintiff can tax all of his costs except so far as they have been increased by joinder of the co-plaintiff. In *Keen v. Towler*[2], Lord Darling sitting as a trial Judge criticized this ruling as irrational, refused to follow it, and held instead that *prima facie* the successful plaintiff should recover only half of his taxable costs. The Annual Practice gives some prominence to this view. However in *Duchman v. Oakland Dairy Co. Limited*[3], two Ontario Courts after considering both cases followed *Gort v. Rowney*. Here, even if I do so also, there can be no doubt that the general costs were much increased by Woods being joined as a plaintiff. The New England Coy. was interested in establishing the defendant's negligence, but not the plaintiff Woods' negligence, and much of the trial was devoted to the latter. I think on the whole I shall award the New England Coy. one-half of the trial costs and all the general costs except so far as increased by joinder of Woods. He will tax all other costs taxable by the plaintiffs and recover half of them against the defendant. I will follow *The Cairnbahn case* and hold that the defendant is not entitled to be indemnified by Woods against the costs paid to the New

[1] (1886) 17 Q.B.D. 625. [2] (1924) 41 T.L.R. 86.
[3] (1930) 65 O.L.R. 553; 66 O.L.R. 236.

England Coy. (such as discovery), since the general costs would have been incurred in any event, and the defendant will recover half of these costs against Woods.

The costs of this motion will be divided, two-thirds to the defendant and one-third to the plaintiffs.

Judgment accordingly.