BRITISH COLUMBIA ADMIRALTY DISTRICT

1951
Dec. 18
1952
Jan. 11

BETWEEN:

ALBERTA WHEAT POOL ELEVATORS LIMITED ..... } PLAINTIFF;

AND

THE SHIP *ENSENADA* ..... DEFENDANT.

Shipping—Ship striking dolphin with too much momentum—Damages—Commission evidence forms no part of record if not read by either party.

Held: That either party to an action may read into the record the evidence of witnesses examined on commission and if neither party chooses to do so such evidence does not form part of the record.

2. That defendant is liable to plaintiff for damages suffered by plaintiff through defendant ship striking a dolphin on plaintiff's wharf with too much momentum.

ACTION for damages allegedly caused by defendant ship.

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

1951

ALBERTA WHEAT POOL ELEVATORS LIMITED v. S.S. *Ensenada*

Cecil Merritt for the plaintiff.

Vernon Hill and *J. Cunningham* for the defendant.

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

SIDNEY SMITH D.J.A. now (January 11, 1952) delivered the following judgment:

In this action the plaintiff claims damages for damage done to its dolphin, situated at the northwest corner of plaintiff's wharf in Vancouver harbour, by the defendant ship while berthing along the west side of the wharf about noon on 2nd May 1951.

At the trial evidence, which I accept, was given by three of plaintiff's "tie-up crew," who were standing-by to take the ship's mooring lines. They testified as to the force with which the ship struck the dolphin; the successive cracking of its several piles and the lateral displacement of the whole. The all-important witness for the defence was the pilot in charge of the vessel (under the Master) at the time. He was not aware of any undue impact when coming alongside but admits having been told by the plaintiff's foreman of the alleged damage when he was leaving the vessel. One witness from an assisting tug and another from a line-boat were also called. They testified they saw nothing unusual, perhaps due to the position of their respective vessels at the time.

The evidence of the Master and Chief Officer of the *Ensenada* had at the instance of the defendant been taken on commission at Montreal, but defendant's counsel declined to read this into the record on the authority of *Gogstad & Co.* v. *S.S. Camosun* (1), followed by me in *Pacific Express* v. *Salvage Princess* (2). Here plaintiff submitted that defendant's counsel had no right of election and that the evidence must be tendered, the witnesses being absent from the jurisdiction. As the point was important and recurring, I reconsidered the matter. With great deference I am satisfied that my predecessor in this Court was right and that defendant's counsel may exercise the privilege he sought. In addition to *Atkinson* v. *Casserley* (3), relied on in the *Camosun* case, reference may be made

(1) (1940) 56 B.C.R. 156. (2) (1949) Ex. C.R. 230.
(3) (1910) 22 O.L.R. 527.

to the form of the long order for commission in our Supreme Court Rules, p. 219, form 35 (*b*); to Admiralty rule 111; and to *Proctor* v. *Lainson* (1). I think it quite clear from these authorities that either party may put in commission evidence, and that if neither does so, it forms no part of the record, and that is the situation here.

On the evidence before me I am of opinion that there was an error of judgment on the part of those in charge of the defendant ship, who were in control of the operation of making fast alongside the wharf in the face of no particular difficulties. I think they lost control of the vessel and allowed her to strike the dolphin with too much momentum, thus doing the damage complained of. The dolphin is for the purpose of protecting the corner of the wharf and cannot be expected to withstand blows of excessive violence. Here the dolphin was composed of 19 piles; 7 outside piles had been broken prior to this accident; 9 inside piles were broken on this occasion; only 3 remained intact.

I must therefore find for the plaintiff with costs. I think the parties will have no difficulty in reaching a settlement on the damages. To assist them I may say that in my view nothing should be allowed for the cost of replacement of the previously broken piles. Failing settlement there will be a reference to the learned Deputy Registrar.

Judgment accordingly.

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(1) (1836) 7 C. & P. 629.