TORONTO ADMIRALTY DISTRICT.

1898

July 14.

ARTHUR HEMINGER.....PLAINTIFF;

v.

THE SHIP "*PORTER.*"

Maritime law—Collision—Wrecking-tug at anchor—Watch and lights—Negligence.

A wrecking steamer was lying at anchor during the night over a sunken wreck in mid-channel, about a mile and a quarter north from Colchester Reef lighthouse, on Lake Erie. The existence of the wreck was well known to mariners sailing upon the lake. While the steamer was working on the wreck, there was no light exhibited at that point by the lighthouse keeper, but it was his custom to put a light there during the absence of the wrecking steamer. Upon the night in question the wrecking-steamer had a white light burning on the top of her pilot-house. The night was clear with a light breeze from the north-north-east. The *Porter*, a three-masted sailing vessel of seven hundred and fifty tons burthen, was pursuing her voyage, light, up the lake from Buffalo to Detroit. She had all her canvas set and was making between two and a half and three and a half miles an hour when she collided with the wrecking steamer so lying at anchor. It was proved that the wrecking steamer had no anchor-watch on deck at the time of the collision, and there was some contradiction upon the evidence as to whether the light on the top of her pilot-house was burning brightly at the time. It was also proved that the *Porter* was slow in answering her helm when light, and that the look-out on the *Porter* did not see the wrecking steamer until it was too late to so manœuvre the *Porter* as to avoid a collision.

Held, 1, That the wrecking steamer's light satisfied the regulations.

2. That there was no duty upon the wrecking steamer to maintain an anchor-watch under the circumstances, and that the sailing ship was solely responsible for the collision which was to be attributed to the negligence of those on board of her.

THIS was an action for damages by collision brought by the owner and master of the steam tug *Fern* against the ship *Porter*.

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The case was tried at the city of Windsor, before His Honour Judge McDougall, Local Judge of the Toronto Admiralty District, on the 25th day of March, A.D. 1898.

H Clay for the plaintiff;

The affirmative of the issue is really on the defendant. The collision is admitted. The plaintiff's ship was resting, and the defendant's ship was moving, and the main question is whether there were lights on the resting ship or not.

[His Honour having ruled that the burden of proof was on the moving ship, the defendant's evidence was gone into, and afterwards the plaintiff's.]

J. E. O'Connor for the defendant ship:

The evidence shows clearly, and in fact it is admitted, that the tug *Fern* did not comply with the requirements of the regulations as to the light to be carried by a vessel under 150 feet in length when at anchor. It is also admitted by the *Fern* that she had no anchor-watch set on deck at the time of and one half-hour previous to the collision, and consequently no effort was made by the ringing of a bell or otherwise to warn the *Porter* of the whereabouts of the *Fern*. It is also in evidence that it was, what is called in nautical language, a "dark night," inasmuch as there was no moon. The *Fern*, therefore, on the admissions of her own witnesses was at fault in both these particulars. Although it is true that the rule is, between a moving vessel and one at anchor, where a collision occurs, that the onus is upon the moving vessel to show that the collision was not caused by its negligence, yet I submit that the moment it is shown by the evidence that the light of the *Fern* was not placed where the regulations required it to be, and that the *Fern* had not a lookout on deck as required by the regulations,

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the onus was shifted from the ship *Porter* to the owner of the tug *Fern*, and that it was for him to show in what particular the negligence of those on board the *Porter* either caused or contributed to the collision. It is submitted that there is no affirmative evidence showing that the lookout on board the *Porter* was not attending to his duty. The evidence of the mate and wheelsman shows clearly that he was on the alert.

I submit that on the cases, which I will cite, the element of negligence completely fails, and the whole case against the *Porter* rests upon the fact that the watch on board the *Porter* did not see the light until close upon the *Fern*.

I submit that it being admitted that the *Fern* was in fault in two respects, namely, as to the position of her light and the absence of the lookout on deck, if the plaintiff seeks to hold the *Porter* liable for all the damage he must show that notwithstanding his negligence in both these particulars such negligence did not in part directly cause the accident, but that it was due solely to the negligence of the *Porter*. If he seeks to hold the *Porter* liable for part of the damage he must show that while his negligence partly caused the accident the negligence of the *Porter* also partly directly contributed to that result, and that the plaintiff could not, by the exercise of reasonable care, have avoided the consequence of the *Porter's* negligence. The *Vernina* (1): *The Cuba* v. *McMillan* (2); see also *Cayser* v. *Carron Company* (3).

I submit that there is not sufficient evidence before the court on behalf of the *Fern* establishing affirmatively that the negligence of the *Porter* or those on

(1) L. R. 12 P. D. p. 61.
(2) 26 Can. S. C. R. 651, & pp. 651 & 662.
(3) L. R. 9 App. Cases, pp. 881 887.

board of her was wholly or partly the cause of the collision, and even if the plaintiff had established negligence beyond a reasonable doubt, the evidence shows that the negligence, if any, of the *Porter*, was not wholly or partly responsible for the accident; but that the negligence that directly caused the collision in the last result was the omission of the *Fern* to have a lookout on deck, in other words, there were "means open to the *Fern* of preventing the collision after the *Porter's* lookout failed to discern the *Fern's* light." *Cuba* v. *McMillan* (1).

Where damage is occasioned by unavoidable accident, or there is reasonable doubt as to which party is to blame, loss must be sustained by the party on whom it falls. The *Catharine of Dover* (2); *Pritchard Admiralty Practice* (3) the *Grace Girdle* (4); The *Rockaway* (5).

The rule as to the division of damages will not be applied where the fault on one side is flagrant, and on the other so trivial as to leave it in doubt whether it at all contributed to the accident. The *M. Densman* (6); *Ralston* v. *The State Rights* (7); the *Baltic* (8).

As to the necessity of a boat at anchor having a light hoisted to mark her position, and an anchor-watch on deck, see the *Miramichi* (9).

Having disobeyed the nautical rule as to the position of the light, the *Fern* had no right to allow the watch to go below on assumption that the light must be seen. The *Mary Bannatyne* (10); the *Pacific* (11); the *Breadalbane* (12).

Where the evidence conflicts, greatest credit is to be given to the crew on the alert; the *Dahlia* (13).

(1) 26 Can. S.C.R. 662.
(2) 2 Hagg. 154.
(3) P. 156.
(4) 7 Wall. (U. S.) 196.
(5) 2 Stu. 129.
(6) 1 New. Adm. 239.
(7) Crabbe (U. S.) 22.
(8) 30 L. T. N. S. 475; 43 J. Adm. 17.
(9) Stu. V. Adm. Rep. vol. 1 at p. 240.
(10) 1 Stu. V. Adm. R. at p. 354.
(11) L. R. 9 P. D. 124.
(12) L. R. 7 P. D. 186.
(13) 1 Stewart, p. 242.

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A person in the agony of collision is not negligent because he does not do what a cool spectator would do in the circumstances. (The *Niagara-Elizabeth* (1); *Wharton on Negligence* (2); the *Bougainville* and the *James C. Stevenson*. *Beal* v. *Marchais* (3); the *Byewell Castle* (4); *Desty's Admiralty Law* (5), and the numerous cases cited in notes thereto.

As to infringement of regulations see the *James McKenzie* (6); the *Khedive* (7); the *Aurora* (8).

Old rule as to both ships to blame now qualified by the regulations:—*Germany* v. *City of Quebec* (9); the *Martha Sophia* (10); [where Black J. at p. 17 remarks "if the people on board the steamer and brigantine had not seen the *Diligence*, then the non-compliance with the regulation might have been a defence to the action."] The *Arabian* (11); the *Englishman* (12); the *Tirzah* (13); the *Magnet* (14).

The fact that the *Fern* had a light does not render the *Porter* liable because her watch did not see it in time to avoid collision, if the *Fern's* was not the light required by the regulations. The *Mary Hounsell* (15).

As to what is a dark night and as to conflicting evidence, as to how clearly objects could be seen, see the *Dahlia* (16).

H. Clay for the defendant.—The evidence clearly shows that at the time of the collision the *Fern* was carrying a regulation white light which could have been clearly seen by the *Porter* if a proper lookout had been kept on the vessel. The evidence of the lighthouse keeper shows that it could be seen on the

(1) 1 Stu. at 1, 318.
(2) 2nd Ed. p. 304.
(3) L. R. 5 P. C. 316.
(4) L. R. 4 P. D. 216.
(5) Ed. 1879, p. 381.
(6) 2 Stu. p. 87.
(7) L. R. 5 App. cases p. 876.
(8) 2 Stu. p. 52.
(9) 2 Stu. 158.
(10) 2 Stu. 14.
(11) 2 Stu. p. 72.
(12) L. R. 3 P. D. 13.
(13) L. R. 4 P. D. 33.
(14) 4 A. & E. 417.
(15) L. R. 4 P. D. 204.
(16) 1 Stu. at p. 343.

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night in question for more than a mile. It is quite evident that the lookout of the *Porter* did not properly discharge his duty and that the collision is due to his neglect of duty. If a moving ship is proved to have been negligent in not keeping a proper lookout she is answerable for all the reasonable consequences of her negligence. The *Viola* (1); the *Clarion* (2); the *George Murray* (3).

The evidence on the whole clearly shows that the *Porter* was wholly to blame for the collision and is answerable for the damages.

The facts of the case are stated in the reasons for judgment.

McDOUGALL, L. J. (July 14th, 1898), now delivered judgment.

On the 2nd of September, 1897, the steam tug *Fern*, with the plaintiff, her owner, on board as master, was lying at anchor over the wreck of a sunken schooner, *The Grand Traverse*, in mid-channel, about a mile and a quarter north from Colchester Reef lighthouse, in Lake Erie.

The plaintiff was engaged with his vessel in removing this obstruction to navigation, and had been working upon the said wreck from the previous April. The existence of the wreck was well known to mariners sailing upon Lake Erie. A light had been kept on the wreck by the lighthouse keeper at Colchester Reef, and this was always placed there at sunset. The light so maintained was on a small raft or buoy and elevated about four feet above the level of the water. When the *Fern* was working at the wreck, no independent light was shown there at night except the light on the *Fern* at anchor over the wreck, which

(1) 59 Fed. Rep. (U.S.) 732. (2) 27 Fed. Rep. 128.
(3) 22 Fed. Rep. 117.

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was placed on the top of her pilot house, at an elevation which would be about fourteen feet above the level of the water. On the night of the 2nd September, the *Fern* was thus lying at anchor over the wreck. She had the regulation white light, burning brightly placed on the top of her pilot house. This light, according the evidence of the lighthouse keeper, could be seen on a clear night at a distance of three or four miles. The lighthouse keeper saw it from his lighthouse burning brightly at 10 p.m., on the night of the 2nd September, when he was trimming his lamp at that hour. He was distant from it about 1¼ miles. The night was clear with a light four or five knot breeze from the north-north-east. The defendant's ship, the *Porter*, a three-masted sailing vessel of about 750 tons measurement, was pursuing her voyage (light) up the lake, from Buffalo to Detroit. She had all her canvas set and was making between 2½ and 3½ miles per hour.

As in all collision cases there is a considerable conflict of testimony upon the facts, and as to the incidents occurring immediately preceding the collision.

The witnesses on the defendant's ship, the onus being upon them, adduced their evidence first and swore that there was no light displayed upon the *Fern* that could be seen and they also say that there was no lookout upon the *Fern*. They say that they only became aware of the proximity of the *Fern* when within 150 to 200 feet of it. On the deck of the *Porter* at the time of the collision there were three men, the man at the wheel, the mate and a lookout in the bow.

According to the mate who was about amidships, he suddenly saw the spar of the *Fern* loom up about 100 to 150 feet away. At the same moment that he saw it, the lookout called out "there is something ahead."

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The mate called to the wheelman to put the helm hard astarboard; but before the vessel obeyed the wheel she struck the *Fern* a little abaft of amidship and carried her away from her anchor and moorings and did considerable damage to her by the impact. After the collision, when it was found that the *Fern* would float, the *Porter* took her in tow and towed her up to Detroit at the request of the plaintiff. The *Porter's* mate says there was no light that he could see on the *Fern*, except the lanterns brought out of the cabin by the crew of the *Fern* immediately after the collision. He admits, however, that the sheer of the bow and the sails of the *Porter* would interfere with his view to port and forward. The lookout of the *Porter* was not called. The defendant procured an adjournment of the hearing for several months upon the suggestion that they might be able to find the lookout, who had left their service shortly after the collision; but the case was finally closed without his testimony being given, the defendant informing the court that he was unable to discover his whereabouts. The wheelsman of the *Porter* says that the night was clear, a little haze near the water; but not enough to prevent seeing an object or vessel at a safe distance to avoid it; though he doubts if the *Fern* had been discovered when even 500 feet away, if the collision could have been avoided, as the *Porter*, he says, being light and the wind very light, did not answer her helm very promptly. He also states that from his position at the wheel, near the stern, his view to port and forward was obstructed by the sails and the sheer of the bow.

Now, the account given by the crew of the *Fern* is very different. The plaintiff and master swears that the collision took place about 10.40 p.m.; that at that time, he, the master, was in bed; but before retiring at

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about nine o'clock he had seen that the light was burning brightly on the top of the pilot house. After the collision the light was still burning; but not so brightly, as the concussion of the collision had broken the chimney and the lamp continued burning but the lense speedily became somewhat smoky. He says the lamp continued to burn till the vessels reached Bar Point next morning at daybreak; when he himself put it out. He says the night was very clear, and affirms that when he came on deck immediately after the collision and looked about he could make out quite distinctly the abutment of the lighthouse a mile and a quarter away.

The man who was detailed as lookout on the *Fern* was not on deck at the time of the collision. He was in the cabin getting something to eat. He says about half an hour after he went below he observed a schooner coming up the channel. He could only see her port light and concluded that she was going by. He swears that the lamp was burning brightly on top of the pilot house when he went below. The schooner may, he says, have been several miles off when he first observed her. He went below and had just finished eating his lunch when the collision occurred. He swears that the light was burning immediately after the collision and that one of the men on the *Porter* called out, "Where is your light," and that he pointed it out to him and the man said "Oh, I see it now." He also swears that the collision broke the chimney of the lamp, but that the lamp continued to burn though the lense speedily became somewhat smoked, and he saw the captain put it out in the morning at daybreak when they arrived at Bar Point.

The engineer of the tug says that he was below at the time of the collision and turned out at the shock. He swears that the light was burning when he turned

in between eight and nine, and was burning after the collision when he rushed on deck.

Another man, the diver employed on the tug, says that he retired about 8 p.m.; the light was then burning brightly. He says he heard some one enquire from the *Porter*, immediately after the collision, "Where is your light," and that he pointed out to him the light on the pilot house, and that it was burning brightly when he came on deck immediately after the collision; but shortly after the collision it became smoked through, the chimney being broken, and that it was kept burning until daybreak.

The lighthouse keeper swears it was a clear night and no haze, and that one could see lights three or four miles off; that he saw a light on the *Fern* at 10 p.m., and saw lights about two miles off from the wreck at about 11.30; but no light then was visible at the wreck. He states that a man could have easily seen the hull of the *Fern* 1,000 feet away or more, even if she were showing no light, and could easily have avoided her. He states also that a lookout on the *Fern* would have seen the *Porter* with her sails set more than 1,500 feet away, and that if he had been on deck and thought a collision imminent he should have made a noise.

Captain Hackett, a master mariner, called by the defendant ship, gave his opinion that the *Fern's* lookout should have been on deck and called out or given some signal if a collision appeared likely to take place. He, however, states that the order to put the wheel hard astarboard was an improper order; that the order should have been to put the wheel hard aport, as that would have brought the *Porter* up in the wind, and that the *Porter* would have come up in the wind much more rapidly than she would have paid off, and therefore if that order had been given she might have

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avoided colliding, or at most, in such a case, would have struck a glancing blow only on the *Fern's* bow which would probably have produced little or no injury. He states that a vessel sailing in a four mile breeze with all canvas set, if the helm should be put hard down either way, ought to clear within twice her own length a vessel 70 feet long, lying across her course, and which she was making for on a course which would be likely to strike her amidships. The foregoing is a brief summary of the evidence.

Now, the defendant's ship contends that the *Fern* was guilty of such negligence that there should be no recovery for any damage sustained by her and resulting from the collision, even if it be held that the *Porter* was so negligently navigated that it led to the collision.

The negligence, it is said, consisted in:

1. Breach of statutory rule in not carrying, as a vessel at anchor, the regulation light properly displayed.

2. Not having a lookout or watch on deck to give a verbal warning or display some signal to warn the *Porter*, upon her approach, of the likelihood of a collision.

Article 11 of the regulations for preventing collisions, &c., reads as follows: (11) "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 around the horizon at a distance of at least one mile."

I find as a fact that on the night in question at the time of the collision the *Fern* was carrying a regulation white light, upon the top of her pilot house, which would be about nine feet above her hull "where

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it could best be seen," and where it could clearly be seen by the *Porter* if a proper lookout had been kept on that vessel; because the *Fern* was lying directly across the course of the *Porter*, and the view of the light so displayed was, so far as the *Porter* was concerned, unobstructed. It was visible on the night in question for more than a mile. This is shown by the evidence of the lighthouse keeper, an independent witness, who saw it distinctly one and a quarter miles away.

The only conclusion to be drawn from these facts is that the lookout of the *Porter* did not properly discharge his duties and that the collision is due to his neglect of duty. If a moving ship is proved to have been negligent in not keeping a proper lookout, she will be answerable for all the reasonable consequences of her negligence.

It has been held in the American courts that, even though the other ship has no lights it is negligence not to see and avoid her on a clear night (the *Viola* (1); but if the absence of a lookout clearly had nothing to do with the collision it will not be deemed to be a fault contributing to the collision (the *Clarion* (2); the *George Murray* (3); the *Farragut* (4).

The general rule of law is that a vessel under way is bound to keep clear of another at anchor. It applies though the ship at anchor is brought in the fair way or elsewhere in an improper berth.

"It is the bounden duty of a vessel under way, whether a vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever" (the *Batavier* (5). "If one ship properly lighted (at night) is fast to the shore

(1) 59 Fed. Rep. 632.
(2) 27 Fed. Rep. 128.
(3) 22 Fed. Rep. 117.
(4) 10 Wall. 334.
(5) 2 W. Rob. 407.

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or laying at established moorings, it can scarcely happen that the other would not be held in fault for a collision." (The *Secret* (1); the *Bridgeport* (2); the *Granite State* (3).

Great stress was laid upon the absence of the look-out on the *Fern* at the time of the collision, it being urged that had he been on deck at the time attending to his duty he might have called out or given some signal to have attracted the attention of those on board the *Porter* to the danger of a collision, and that if this had been done the collision might have been avoided. Now, the question of the necessity of an anchor-watch upon a vessel at anchor seems to be a question depending upon the position of the anchored vessel. A vessel brought up in a frequented channel should keep an anchor-watch ready to sheer her clear of an approaching vessel or to give her chain.

Marsden on *Collisions*, 4th edition, p. 540, says: "But if not in a frequented channel the absence of a watch, with proper lights up, does not appear to be essential."

In the present case the *Fern* was anchored over a wreck in mid-channel between the Colchester reef and the main shore, a channel two and a half miles wide. The existence of the wreck and its position and the fact that a light was kept upon it, and also the fact that the *Fern* had been engaged most of the season in attempting to remove it, was well known to all mariners sailing in Lake Erie. The master of the *Porter* admitted this in his testimony. Yet on a clear night, when the light on the *Fern* could be seen at a distance of several miles, the *Porter* ran her down. I cannot hold upon these facts that, under article 29 of the regulations for collisions, the temporary

(1) 1 Asp. M. L. C. N. S. 318. (2) 7 Blatch. 361.
(3) 3 Wall. 310.

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absence of the lookout from the *Fern* under the special circumstances detailed in evidence was "the neglect of a precaution which would be required by the ordinary practice of seamen."

The necessity of keeping a watch on a vessel at anchor is not a statutory rule unless it be required by the ordinary practice of seamen. No doubt here if the weather had been thick or stormy the ordinary practice of seamen would demand the constant vigilance of a watchman; but, as I have said before, the *Fern* anchored over a wreck, the position of which was well known to those navigating Lake Erie, carrying on a clear night a proper light, and in an open lake channel with sea room of over a mile on each side of the wreck, could not be charged with negligence contributing to the collision by reason of the temporary absence of the lookout at the time of the collision. In the case of *The Cuba* v. *McMillan* (1), at page 662, it was held that the non-observance of one of the statutory rules by one of the vessels was not to be considered as in fact occasioning the collision if the other vessel, *The Cuba*, could, with reasonable care exerted up to the time of the collision, have avoided it. This is not a case of unavoidable accident, nor to my mind is there any reasonable doubt as to which party is to blame.

Difficult questions of that nature more commonly arise in a case of two moving vessels; but the case of a moving vessel running into an anchored vessel upon a clear night in a fair way two and a half miles wide, even if no light had been displayed by the anchored vessel, raises an almost irrebuttable presumption of negligence and responsibility upon those in charge of the moving vessel. In the case of the *Indus* (2), speaking of the relative duties and responsibility of a moving vessel and a vessel at anchor, Lord Esher says:

(1) 26 Can. S. C. R. 651. (2) 12 P. D. 46.

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"It was encumbent on the plaintiffs to make out a *primâ facie* case, one which, if unanswered, would entitle them to judgment. They, therefore, gave evidence that their vessel was at anchor and was showing a proper light. Under these circumstances, the defendant's vessel being in motion, in my opinion, as has been frequently held, the plaintiffs had established a *primâ facie* case of negligence against the defendant's vessel. It is the duty of a vessel in motion to keep clear of one at anchor, if the latter can be seen, and if she does not keep clear, then she must show good cause for not doing so."

I do not think in this case the defendant has shown good cause for not keeping clear of the *Fern*. The *Porter* is therefore answerable for the injury to the *Fern*. There is no dispute as to what sum should be allowed for damages if the *Porter* is liable. Mr. Chamberlain, one of the owners of the *Porter*, stated very frankly that he considered the amount claimed by the plaintiff not unreasonable if the *Porter* was liable. The plaintiff makes up his claim at $252, which includes a claim of $15 for towage. The receipt for this latter sum was not produced at the trial. The plaintiff is entitled to a decree against the defendant ship *Porter* for damages, and I assess these damages at the sum of $252. The said sum, however, is to be reduced by $15, unless a proper receipt for the towage is filed in the registry before issuing the decree.

I see no reason why the plaintiff should not also be allowed his costs of suit.

Judgment accordingly.