TORONTO ADMIRALTY DISTRICT. 1893

Feb. 2.

JOHN CHARLTON AND THOMAS CHARLTON..... } PLAINTIFFS;

AGAINST

THE *COLORADO* AND THE *BYRON TRERICE*.

Maritime law—Collision—Damages—Admission in pleading—Evidence—Obligation to begin—Cost of survey—Notice—Demurrage.

During the early hours of the morning of August 12th, 1891, a collision occurred between the plaintiffs' vessel lying moored to a dock in Windsor, Ont., and a barge in tow of a tug. The defendants in their pleadings admitted the collision, but claimed that the plaintiffs' vessel was in fault, since there was no light on board and no stern-line out, in consequence of which latter neglect she swung out into the stream as the tug and its tow were passing at a reasonable distance away from her, and that the collision was occasioned thereby.

1. Upon the question as to whom should begin,—

Held, that the defendants having admitted that their vessels were moving and the plaintiffs' vessel was at rest, and that a collision had occurred, they must begin on the question of liability for the accident, with a right to reply on the question of the amount of damage, if it were necessary to go into that question.

Held, also, that it was necessary for the defendants to establish such negligence against the plaintiffs as would contribute to the accident, and that as it was about daylight at the time of its occurrence and the plaintiffs' vessel was admittedly seen by the tug when more than one hundred feet distant, the tow being at that time three hundred feet behind the tug, and further, since the evidence showed that the plaintiffs' vessel was properly and securely moored to the dock, the absence of light did not constitute such negligence on the part of the plaintiffs as contributed to the accident. They were, therefore, entitled to recover for the damage arising from the negligent navigation of the tug and her tow, to the amount of the actual cost of the repairs and also the cost of towage to the ship-yard.

2. A survey of the damage done to their vessel was made at the plaintiffs' instance. Notice of intention to have a survey made was only given to one of the defendants, and that by mailing a letter

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to his address on the day before the survey was made. Notice of the result of the survey was given to the defendants.

Held, that the cost of the survey was not chargeable to the defendants, because reasonable notice was not given to enable them to be present or to be represented thereat.

Held, also, that demurrage should not be allowed, inasmuch as the vessel was lying idle at the time of the collision, and that as soon as the plaintiffs obtained a commission for her the vessel went to work, although repairs were not then completed,—no loss of earnings occurring by reason of the accident.

ACTION for damages arising out of a collision.

The collision occurred in the early morning of the 12th August, 1891, between the plaintiffs' vessel, the *Starling*, while moored to a dock at Windsor, Ont., and the barge *Colorado*, in tow of the tug *Byron Trerice*. The defendants admitted in their pleadings that a collision did occur with the plaintiffs' vessel, the *Starling*, which was moored to the dock, at day-break on a clear morning in August; but claimed that the plaintiffs' vessel was in fault because there was no light on board of the latter, and they also alleged that there was no stern-line out, in consequence of which last mentioned neglect her stern swung out into the stream as the tug and tow were passing at a reasonable distance away from the *Starling*, and that the collision was occasioned by such swinging out of the *Starling* into the stream.

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The case was tried before His Honour Judge McDougall, local judge for the Toronto Admiralty District.

Cox, for the plaintiffs, asked that the defendants be directed to begin, because, having regard to their admissions in the pleadings, the *onus* of proof was on them. They must either prove that the collision was the result of unavoidable accident, or was occasioned by the fault of the plaintiffs' vessel. (He cited M.C.O. Rules, sec. 139, and the following cases: *The Annot*

Lyle (1); the *Indus* (2); and the *Merchant Prince* (3). In all these cases it is laid down very clearly and distinctly that the moment the plaintiff shows that his vessel is at anchor, or is moored and is visible, and that the defendant's vessel is moving, the *onus* is upon the defendant to prove either an unavoidable accident, or exculpate himself by some such defence as that he was employing a compulsory pilot. (He cites *Marsden on Collisions* (4); *Myer's Federal Decisions* (5); *The Hornet* (6). The plaintiffs' vessel was properly moored; she was seen, as admitted, and the accident occurred solely from the negligent and careless manner in which the tug and its tow were handled on that morning. The tug made very little, if any, effort to prevent the accident, simply leaving the line slack and letting the tow get out of the difficulty the best way it could.

Fraser, for the defendants, in reply submits that the cases cited by Mr. Cox do not decide the question of fact, but the question of law; the question is whether the defendants were guilty of negligence? He submits that the *onus* is on the person claiming damages, and asserting that the other party was guilty of negligence, to show that the defendants were in fault, and submits that until the plaintiffs establish the defendants were in fault that they must fail.

McDOUGALL, L.J.—The defendants having admitted that their vessels were moving and plaintiffs' vessel was at rest, and that a collision occurred, the defendants must begin on the question of liability for the accident, with the right to reply on the question of damage if it should become necessary to go into that question.

(1) 11 Pr. Div. 114.
(2) 12 Pr. Div. 46.
(3) L. R. [1892] Pr. 9.
(4) P. 227.
(5) Vol. 23 p. 995.
(6) L. R. [1892] Pr. 361.

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Evidence was then taken upon the question of damages, and after counsel had addressed the court final judgment was pronounced.

McDOUGALL, L.J.—I propose to make the allowance $378.81. I throw out the charge of $10 for survey, on the principle that I think the owners of the colliding vessel should have had an opportunity to join in the survey had they so desired; and I do not think they were given a reasonable opportunity of so doing. I allow interest on the sum of $378.81 from the 1st November, 1891, to the 1st February, 1893, a year and a-quarter, $30. I allow for the yawl boat $30; on reflection I am of the opinion that the defendants are not bound to give the plaintiffs a brand-new yawl; they are bound to give the outside value for all that was destroyed. I allow for towing, $7. I throw out the claim for the amount paid the wharfinger for damage to the dock, on the ground that the plaintiffs were not legally bound to pay it; that it was a matter between Hurley, the owner of the dock, and the defendants in this suit, and should have been left between them to have the liability determined.

Then comes the question as to whether there should be any demurrage allowed. I am very reluctant to allow any in this case, because it appears the vessel lost no time, she having gone away in a partially repaired state and undertaken work the moment a commission was secured; and because she was not on any regular service, but was simply lying at her dock with the intention of doing any work that presented itself; and that when something did present itself during the time she was laid up for these repairs, and before she was fully repaired, she was able to undertake the work. It might have cost a few dollars more expense to go out with the repairs only partially fin-

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ished (no doubt this is included in the shipwright's bill) to patch her up till she returned. Therefore, I have disallowed the claim for demurrage. I hold, as to the question of lights on the moored vessel, that as it was about daylight at the time and the vessel was admittedly seen by the tug over one hundred feet away, and that the tow was three hundred feet behind the tug; and, further, as the *Starling* was properly and securely moored to the dock, the absence of lights did not constitute such negligence on the part of the plaintiffs as contributed to the accident, and that, therefore, they are entitled to recover for the damages arising from negligent navigation on the part of the tug and her tow.

I give judgment for the plaintiffs for the sum of $445.81, with their full costs of the action and with interest on the amount from judgment until paid.

Judgment accordingly.

Solicitors for plaintiffs: *Cox & Yale.*

Solicitor for defendants: *J. S. Fraser.*