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Oct. 27.

THE ACTIESELSKABET (THE COMPANY OF THE OWNERS OF THE) "*PRINCE ARTHUR*," (PLAINTIFFS) ..... APPELLANTS;

AND

HENRY JEWELL AND OTHERS, OWNERS OF THE TUG "*FLORENCE*," (DEFENDANTS)..... RESPONDENTS.

Maritime law—Tow and tug—Negligence of both pilots—Liability.

A sailing vessel in tow of a steam-tug was passing up the St. Lawrence River. The pilot of the tow and the pilot of the tug were both at fault in not having the course changed after passing a certain point in the river. The pilot of the tow discovered the mistake and gave notice to the tug, by executing the proper manœuvre in that behalf, but not until it was too late to avoid an accident which befell the tow.

Held, that the owners of the tow could not recover in such a case from the owners of the tug.

APPEAL from a judgment of the Local Judge of the Quebec Admiralty District (1).

The appeal was argued at Quebec on Friday, the 29th May, 1896.

A. H. Cook, for the appellants:

The real cause of the accident was the gross negligence of those in charge of the tug in not keeping a look-out. It is true the engineer and stoker came up occasionally for air, but their duties were not those of a look-out and the pilot's duty was at the wheel. The pilot of the tow instructed the pilot of the tug to steer by compass, watch the lights, passing ships, and also the tow. These instructions were not carried out. The finding of the court below, and of the assessor, is that the tug was at fault in not maintaining a proper look-out.

(1) Reported *ante*, p. 151.

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Argument of Counsel.

The *consensus* of authority establishes this doctrine: That the tow and tug are to be held as one ship only for the purpose of having one chief person in control of the whole. In other words, the pilot of the tow is charged with the supreme command of the vessels, and his orders must be obeyed; so that *quoad* the rights of third persons the tow must be held solely responsible if an accident, such as a collision, occurs. But that is not this case. In such a case as this there is no artificial rule making the tow liable in any event. If the tug asks for no directions, and none are given, the tug takes the responsibility of the course. *Inter se*, the tug is then responsible when an accident happens. (*Smith* v. *St. Lawrence Nav. Co.* (1); *Spaight* v. *Tedcastle* (2); The *Robert Dixon* (3); *Sewell* v. *B. C. Towing Co.* (4).)

We were not guilty of contributory negligence in not having done something earlier that might have avoided the effect of the defendants' negligence.

Radley v. *L. & N. W. Ry. Co.* (5); *Dowell* v. *Steam Nav. Co.* (6); *Tough* v. *Warman* (7).

Appellants should have the costs of this appeal.

C. A. Pentland, Q.C.:

As to costs, in such a case as this, costs should properly be borne by each party.

This court will not disturb the finding of the judge below as to what was the primary cause of the accident, nor his application of the law determining who is responsible for it. The learned judge has not erred either in fact or in law. The tug is clearly exempt from blame and responsibility. (The *Emma* (8); The *Electric* (9).)

(1) L. R. 5 P. C. 313.
(2) 6 App. Cas. 217.
(3) L. R. 5. Prob. D. 54.
(4) 9 Can. S. C. R. 527.
(5) 1 App. Cas. 758.
(6) 5 E. & Bl. 195.
(7) 5 C. B. N.S. 573.
(8) 2 Wm. Rob. 315.
(9) 1 Stu. Ad. R. 333; Pritchard's Adm. Dig. 165.

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Argument of Counsel.

It is contended that the pilot gave general directions as to the course to be steered by the tug. That did not relieve him from the necessity of giving special directions at any particular time. His business was to personally control the course of the two vessels. Nothing he might say or do would relieve him from that responsibility. His omission in this respect was the proximate cause of the accident. (The *Niobe* (1); *McKeown* v. *Bain* (2); The *Englishman and Australian* (3).) The tug and tow are one ship under the control of the pilot who is on the tow. (*Spaight* v. *Tedcastle* (4); *The Thrasher Case* (5).)

The proper method of controlling the course of the tug is by changing the course of the tow—"girting" the tug, as it is called. (*Abbott on Shipping* (6); *Marsden on Collisions at Sea* (7); The *Energy* (8); *Marsden on Shipping* (9); *Maclachlan on Shipping* (10).)

Mr. *Cook* replied:—The authorities cited by counsel for the defendants do not apply to this case. They are cases arising out of salvage and collision claims, while this one subsists in a breach of contract for safe towage.

It cannot be too strongly insisted on that in the absence of directions by the pilot of the tow, the tug was responsible for the course steered. (*Newson on Shipping* (11); *Pollock on Torts* (12).)

THE JUDGE OF THE EXCHEQUER COURT now (October 27th, 1896) delivered judgment.

This is an appeal by the plaintiffs from the judgment of the Judge in Admiralty of the Quebec Admi-

(1) L. R. 13 Prob. D. 55.
(2) [1891] App. Cas. 401.
(3) [1894] Prob. D. 239.
(4) 6 App. Cas. 217.
(5) 1 B. C. L. R. 189; 9 Can. S. C. R. 527.
(6) Ed. pp. 194 to 198.
(7) P. 199.
(8) L. R. 3 Ad. & E. 49.
(9) Pp. 137-181.
(10) Pp. 274 to 277.
(11) Pp. 21, 22.
(12) P. 279.

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ralty District, dismissing an action brought by them against the defendants to recover damages for the loss of the barque *Prince Arthur*, which, on the 27th of June, 1893, while being towed by the defendants' tug, the *Florence*, was run on shore on Red Island Reef, in the St. Lawrence River, and became a total loss.

The accident happened because the course of the tow and the tug was not altered as it should have been after passing Red Island light-ship. As to that, the pilot of the tug was at fault from that time until the accident was inevitable. There is no question about that. The pilot of the tow was also at fault for a time after passing the light-ship. That too, is, I think, beyond question. But he discovered the mistake that had been made before the accident actually happened and hailed the tug, directing it to change its course. Failing to make himself heard or understood he had the helm of the barque put hard-a-starboard, the effect of which was to bring the vessel upon her proper course, and at the same time to indicate to the pilot of the tug that he too should change his course. That was, it is clear, the proper thing to do under the circumstances, and the only question is, was it done in time to avoid the accident? The learned Judge of the Quebec Admiralty District has found that it was not. Referring to the pilot of the barque, he says:

> I am of opinion that the evidence shows that the pilot was negligent and grossly in fault throughout. His statement that twenty minutes before the accident, or even fifteen, he commenced to starboard his helm with a view of keeping the tug on the starboard bow of the ship and continuing in that condition up to a period shortly before the accident, when he put the helm hard-a-starboard, is entirely incredible. It is impossible that any such movement on the part of the ship would not have been at once felt by the man at the wheel of the steamer, and it is incredible to suppose that after feeling the effect which such a motion on the part of the tow would have had on the tug that he should have continued his course without putting his own helm to starboard, and the only result that I can deduce from the fact

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is that the pilot did not perceive his danger until he gave the order to the man at the wheel to hard-a-starboard, when it was evidently too late to save the vessel from going on the reef.

I have examined the evidence carefully. It is no doubt conflicting and contradictory, but as a whole it justifies, it seems to me, the finding on the question of fact to which I have referred.

The tug was also in fault in not having a proper look-out. But that was not the cause of the disaster, and it could not have contributed to it if the directions which the tow gave to change the course were given too late to avoid it. That incident would have been a material fact in the case if the pilot of the tow had discovered the mistake in time to avoid the consequences of such mistake, and for want of the look-out the tug had not observed and followed the directions given to it as quickly as it otherwise would have done. But if the fact is, as it has been found to be, that the mistake was not discovered and the directions to change the course were not given until it was too late to avoid the accident, the absence of a proper look-out was not in any sense the cause of the accident and did not contribute thereto.

The case is an extremely hard one for the plaintiffs, and I should be glad, in dismissing the appeal, to dismiss it without costs, if it were proper for me to do so. I think, however, that there are no sufficient reasons for me to depart from the ordinary and usual rule as to costs.

The appeal is dismissed, and with costs.

Judgment accordingly.

Solicitors for appellant: *W. & A. H. Cook.*

Solicitors for respondents: *Caron, Pentland & Stuart.*