BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
August 23.

HARBOUR NAVIGATION COMPANY LIMITED ..... } PLAINTIFF;

AGAINST

THE SHIP *DINTELDYK*

Shipping—Harbour—Collision—Improper displaying of lights—Negligence —Lookout

The *E.*, a small motor ship, was lying at a temporary landing stage, in a crowded harbour of Vancouver, having only moored to take on provisions. She had been displaying navigating lights, which by Art. 2 must be carried "when under way," and neglected to extinguish them when moored, and there was no lookout on her. The *D.*, while proceeding with all due caution and at lowest speed consistent with safety to her allotted berth collided with the *E.* Proper berthing signals were given by the *D.*

Held, that by her conduct in wrongly displaying navigating lights the *E.* was liable to mislead and entrap other vessels, who might properly assume that she was in a position of instant control and able to immediately extricate herself from danger due to an approaching vessel, and that she was victim of her own negligence.

2. That the degree of watchfulness must correspond to the necessity of each case.

ACTION to recover damages due to collision between the ship *Enilada* and the *Dinteldyk.*

Trial before the Honourable Mr. Justice Martin at Vancouver.

E. C. Mayers for the plaintiff;

D. N. Hossie for the *Dinteldyk.*

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

MARTIN L.J.A. now this 23rd August, 1924, delivered judgment (1).

(1) *Note.*—Upon an appeal to the Exchequer Court of Canada from this judgment, Maclean J. dismissed the appeal and affirmed the judgment of the trial judge for the same reasons as given by such judge.

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This is an action brought by the owner of the small motor ship *Enilada*, of 57·39 tons, length 64 feet, against the motor ship *Dinteldyk* of 5,814 tons, net register, length 501 feet, breadth 60 feet, for damages, estimated at $7,000, done by a collision at the C.P.R. wharf in Vancouver harbour on the 23rd of November, 1923, about 5.27 p.m. At the time of impact the *Enilada* was lying at a temporary landing stage formed by a scow (87·4 x 28·5 feet) in front of shed No. 4 at said wharf, with a gangway down to it, her bow being to the east and her stern projecting westward beyond the scow for about fifteen feet, thus being about 560 feet from the intersection of pier D with said wharf at an acute angle, the pier projecting into the harbour 930 feet in a northeasterly direction, as shown in Ex. 3, and the large steamship the *Empress of Asia* (about 500 feet long) was lying at the east side thereof, about 200 feet from the intersection, and other vessels were lying near the landing as roughly shown in Ex. 2.

The *Enilada* had left Gore Avenue slip, a short distance to the east, en route for the said landing, at about 5.15 and on the way in had passed to the starboard a large ship which later proved to be the *Dinteldyk* with her head inside pier D, but which the *Enilada* thought had stern way on and was putting out to sea, so without paying further attention to said big ship the *Enilada* moored herself to the landing scow by a single line with her stern projecting as aforesaid, though there was more than ample room for her to lie wholly alongside of it, the scow being about 30 feet longer than she was. This temporary landing had been placed in front of the wharf to afford facilities to maintain and support certain men employed during a longshoremen's strike then in progress and the *Enilada* went to said landing to get supplies for that purpose and expecting that they would be awaiting her did not take the precaution to extinguish her navigating lights (which she had been properly showing at that dark time of the evening) nor did she take the obviously very necessary precaution of keeping *a good look-out* as she alleges she did in her statement of claim (par. 4) especially when that locality was a *crowded* one as alleged in par. 6. The only explanation offered for these two serious breaches of good seamanship is that she ex-

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pected to get the supplies immediately, but there was some delay about getting them owing to a mistake in delivery thereof, and I have no doubt that she was at the scow for about ten minutes at least before the collision; the master admits seven; her engine, he says, was kept running all the time. Her complement consisted of the master, mate and engineer, and she could be moved by one man; both the master and the mate went off the boat on to the scow and the engineer was below; there is no pretence that a lookout was kept, properly so called. At the time when they became aware of the presence of the *Dinteldyk* she was almost upon them, 50-60 feet away, and, as the master says, with her bow "already beyond us" moving westward towards pier D, her allotted berth along the wharf and touching the inner corner of pier D. Both master and mate say that it was then too late to avert the collision, though the mate tried to haul her ahead with the said bow line, and the master was afraid, he says, to go ahead suddenly with his engine because of two other launches which were in front of him and would have been endangered by that manoeuvre; the master further says that he paid no attention to where he moored his vessel because he only expected to be there a minute. The engineer seems to have been more alert than the other two men, for when he looked out of the cabin and saw the *Dinteldyk* getting close he became apprehensive and at once went back to his engine thinking the captain would need his services but he was not called upon to act. It is impossible, in my opinion, to acquit the *Enilada* from clearly established negligence in displaying improper and misleading lights and in failing to keep a lookout in circumstances created by herself which called for special watchfulness, in regard to which it was long ago laid down in *The Mellona* (1), that the degree of watchfulness must correspond to the necessity of the case, Dr. Lushington saying at p. 13:—

> In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed; and I cannot but think that, under all the circumstances of the case, if the master of *The Mellona* found it necessary to go below for the purpose of consulting his chart, he was bound to have called up another of the crew to supply his place on deck.

(1) [1847] 3 Wm. Rob. 7.

The special circumstanes here were in particular, that by wrongly displaying navigating lights, which by Art. 2 are only to be carried "when under way" [cf. *The Wega* (1)], the *Enilada* in effect laid a trap for other vessels which could only properly assume from correctly observing her lights that she was in a position of instant control and therefore able to immediately extricate herself from any danger created by an approaching ship. It is very unfortunate for her that she should have formed an entirely erroneous impression of the incoming berthing manoeuvre of the *Dinteldyk,* but the responsibility for that grave initial error which lulled her into false security, is hers alone. The two cases her counsel chiefly relied upon do not assist her upon the particular facts—in the first, *The Hornet* (2), the court found that the absence of a lookout on the barge "had nothing to do with the collision," whereas here it had everything; and in the second, *Bailey* v. *Crates* (3), wherein the judgment of the Full Court of which I was a member was affirmed, the Supreme Court said:

> Whether any or how many or what class of men should have been kept on board, whether there should have been a watch whether steam should have been kept up or other precautions taken, depended wholly upon the circumstances. The cases which have been cited to show that the absence of certain precautions was regarded as constituting negligence depended upon the particular facts and the respective situations of the vessels.

No one would question these observations, but the facts before me are essentially distinct from those in *Bailey* v. *Cates, supra,* and also from *Bank Shipping Co.* v. *City of Seattle* (4), and I have to decide what was good seamanship upon them alone. Nor is it, in the circumstances, any legal excuse for the *Enilada* to set up that when self-invited danger came upon her she found herself in peril from which she could not save herself because other vessels had later taken a position in front of her at the same landing place, for just so long as she continued to display navigating lights in the manner aforesaid she continued to mislead and entrap other vessels and so should have taken proper precautions to escape from the danger that she should have anticipated as the result of her negligent actions.

(1) [1895] P. 156 at p. 159.
(2) [1892] P. 361 at p. 365.
(3) [1904] 11 B.C.R. 62.
(4) [1903] 10 B.C.R. 513.

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But it is urged on her behalf that however negligent she may "have been, yet the *Dinteldyk* was also negligent" (par. 6) in attempting to dock at a short berth at a crowded wharf without the "assistance of a tug and in attempting to do so at an excessive rate of speed."

As to the first charge, the evidence is overwhelming that in the case of so well equipped and modern a twin screw vessel as the *Dinteldyk*, to enlist the services of a tug in that confined space (only 850 feet between the N.E. end of pier D and Union S.S. Company's Wharf to the eastward) would be quite unnecessary, if not actually detrimental to her making the very good berthing she unquestionably did make.

As to the second, the evidence is equally convincing that she proceeded to her allotted berth with all due caution and at the lowest possible speed consistent with safety, having regard to the proximity of the other vessels already mentioned, to the said confined space; to the fact that the Telephone Company's barge *Twelana* and tug were coming out, to make way for her, from her allotted berth, passing the *Empress of Asia* by about 50-75 feet; to the fact that she was light and that there was a steady breeze about 16-1 knots from the E.N.E. upon her quarter, and to other circumstances not necessary to detail. There can be no reasonable doubt that she twice gave in ample time the proper berthing signals, the latter of which particularly should have been heard by the *Enilada* had she not lulled herself into a state of false security, and later, when the danger became apparent, endeavoured to arouse the *Enilada* by megaphone and shouting, but, as it turned out, it was too late then when she finally awoke to her self-created peril, to avoid it, though if she had been moved only a few feet she would have saved herself.

After carefully considering all the evidence and circumstances I am unable to find any act of negligence against the *Dinteldyk*, and I think she was justified in continuing to believe up to the last moment that the *Enilada* had the power as well, of course, as the intention of moving out of that danger which she should have anticipated she was bringing upon herself by the misleading display of wrong lights, and I do not doubt that when that unfortunate

moment was reached it was then impossible for the *Dinteldyk* to extricate herself with due regard to her own safety, from the position into which she had been in effect entrapped. It follows that the action should be dismissed with costs.

Judgment accordingly.

Solicitor for appellant: *J. H. MacGill, Esq.*
Solicitor for respondent: *Ghent Davis, Esq.*