

1892 ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

Mar. 2,

*The HEATHER BELLE.**The FASTNET.*

Collision—Arts. 13 and 18 of Imperial Regulations for Preventing Collisions at Sea—Interpretation of—Quantum of damages—R.S.C. c. 79 s. 12.

Two steamers were approaching each other near a public harbour in a dense fog, those in-charge having mutually learned their approximate whereabouts by an interchange of blast signals. Notwithstanding such proximity, and the fact that the courses they were steering were such as would have brought them across each other's bows, one of them maintained a speed of from three to four miles an hour, and was running with a tide, at flood force, of one and a-half knots per hour; the other was steaming at a speed of about three knots an hour, and no effort was made to alter her course. A collision occurred.

Held, that both vessels had infringed the provisions of arts. 13 and 18 of the *Imperial Regulations for Preventing Collisions at Sea*, and were, therefore, mutually to blame for the collision.

2. The word "moderate" in art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen is unlawful.

The Zadok (L.R. 9 P. D. 114) referred to.

3. The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and if a ship is totally lost the owner is entitled to recover her market value at the time of the collision.
4. Where both ships are at fault, the law apportions the loss by obliging each wrong-doer to pay one-half the loss of the other.

[The provisions of sec. 12 of R.S.C. c. 79, limiting the liability of the party at fault in a collision to a sum of \$38.92 for each ton of gross tonnage, was applied to this case.]

THESE were two actions for damages by collision. They were consolidated by order of the court upon consent of parties.

The facts are fully recited in the reasons for judgment.

The case was heard before the Honourable William W. Sullivan, C. J., Local Judge for the Admiralty District of Prince Edward Island, on January 6th, 7th, 8th, 9th, 11th, 14th, 15th, 22nd and 23rd, 1892.

McLeod for owners of *Heather Belle* ;

Peters, Q.C. (A.-G., P.E.I.) for owners of *Fastnet*.

SULLIVAN, (C.J.), L.J., now (March 2nd, 1892) delivered judgment.

This was an action brought by the owners of the steamship *Heather Belle* to recover damages, and there was a cross cause on behalf of the owners of the steamship *Fastnet*. The cases were consolidated by order of the court, tried as one action, and heard upon the same evidence. The litigation arose from a collision between the two steamers which took place on the 12th of November last in Hillsborough Bay, a short distance outside the Block House at the mouth of Charlottetown Harbour, and resulted in the total loss of the *Heather Belle*. The *Heather Belle* was making a return trip from Orwell to Charlottetown, and the *Fastnet* was proceeding from Charlottetown, on her way to Halifax. According to the statement of the captain of the *Heather Belle*, the collision took place about 6.40 o'clock in the evening, and according to the account of the captain of the *Fastnet* it happened at about 6.47 in the evening. There was a dense fog prevailing at the time. The statement of the captain of the *Heather Belle* is, that he left the Brush Wharf, Orwell, at 4.50 o'clock in the evening, having on board fifteen or sixteen passengers and some cargo. It had been foggy, but had cleared. He made the Bell

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Buoy, leaving it on the port side. The atmosphere was then thick. He commenced blowing the whistle, long blasts (fog signal), and steered for the Black Buoy, sounding with a lead for five or six minutes before he reached it, having previously slowed the speed of the steamer. He reached the Black Buoy, having it on his port side, about thirty or forty yards distant. He then steered for the harbour, N. $\frac{1}{2}$ E., and proceeded on that course for a minute or two when he heard a whistle ahead which he took to be the *Fastnet's* whistle. He thought she was a little on his port bow. He spoke to the mate who was at the wheel, and said: "That is the *Fastnet's* whistle. She is a little on our port bow. Port your helm and give him plenty of room, and blow one short blast." His order was obeyed, and the steamer went to starboard. He kept his helm ported, and his ship came to N. E. by N., steadied and proceeded on that course. The short blast was given about the time the helm was ported. It was between two and three seconds long. It took about two minutes to get the ship around to the new course. When he started on the N.E. by N. course both vessels were blowing short blasts. The short blasts were blown by him to let the *Fastnet* know he was directing his course to starboard, and he understood the *Fastnet* was doing the same. When he heard the first blast from the *Fastnet* he thought she was somewhere near the Block House. He continued on that course, after he had steadied on it, for about six minutes going at the rate of three or four miles an hour, having the tide with him. In the six minutes mentioned he would have run about three-quarters of a mile from the Black Buoy. He was then beyond the middle of the channel on the east side. The *Fastnet* could not then be seen, but her whistles indicated that she was approaching nearer to the *Heather Belle*. The first

things he saw were the masthead light and the starboard light of the *Fastnet*. He then gave orders to stop. He said to the mate: "Hard-a-port; stop her; go astern." He could see by the wheels that she did go astern. He says in his evidence that when he first saw the lights of the *Fastnet* the course of his vessel was north-east by north, and the *Fastnet* was about north of him and about four points on his port bow heading south-east. Before the collision, he gave an order to go to port, which was obeyed, and the *Heather Belle* altered her course a little to the eastward. The collision took place a few seconds after he first saw the *Fastnet's* lights. The *Fastnet* came out of the fog like a flash. He hailed her to go astern but received no reply. The port side of the *Heather Belle's* stem was struck by the "luff" of the *Fastnet's* bow and the breakage was carried to starboard, both vessels pointing to the eastward. The evidence of the captain of the *Heather Belle* is that at the time of the collision the engine of his vessel was reversed and he thinks the *Heather Belle* was about at a stand-still, and that the *Fastnet* was going pretty rapidly. A large hole was made in the *Heather Belle* through which the water was quickly entering. She was made fast to the starboard side of the *Fastnet* by lines, and they proceeded at full speed for Charlottetown Harbour. The *Heather Belle* was towed inside the harbour about 300 yards from the Block House, when the *Fastnet* separated from her, and she ultimately sunk. In his preliminary act the captain of the *Heather Belle* charges that:

The Fastnet improperly neglected to keep clear of the *Heather Belle* and improperly attempted to pass ahead of her and improperly neglected to port her helm on hearing the steam-whistle of the *Heather Belle* before the collision, and improperly starboarded her helm. The *Fastnet* improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time. Those on board the *Fastnet* while the *Heather Belle* was fastened to her with lines and

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while the two steamships were steaming towards the mouth of the harbour after the collision, improperly cut the lines and let the *Heather Belle* go, and thus permitted her to sink and be lost.

The statement of the captain of the *Fastnet* is that he started from the wharf at Charlottetown at six o'clock in the evening having been delayed on account of the fog, taking a S. $\frac{1}{2}$ W. course for the Block House, which he passed at a distance of about one hundred and twenty-five or one hundred and fifty yards. He then steered S. $\frac{1}{2}$ E., which he alleged would take him a course about thirty-five yards east of the Black Buoy. At 6.30 o'clock he was at the Block House and he then started on at full speed. At 6.40 he slowed down, and reduced to three or three and one-half knots through the water with the tide against him. He commenced to blow about seven or eight minutes after leaving the Block House. After two or three blasts, he heard the *Heather Belle's* horn ahead on his starboard bow. The blasts from both ships were long ones. The steamers appeared to be approaching nearer to one another, the *Heather Belle* still on the *Fastnet's* starboard bow. About from five to seven minutes after hearing the *Heather Belle's* first whistle, the collision took place. The first thing he saw was the *Heather Belle's* white light on her starboard bow, about thirty or forty yards off. He could not see the ship. He was then going three to three and one-half knots through the water. In a few seconds the *Heather Belle* came out of the fog, and, within six or ten feet of the *Fastnet's* bow, her paddles stopped. The *Heather Belle's* stem struck the *Fastnet's* bow five or six feet from the stem. Just before the *Heather Belle* struck, he saw her red light. The *Fastnet* had some speed on at the time of the collision, but when she struck he stopped her engines. The *Heather Belle* was then made fast to the *Fastnet*. They turned round to starboard and took a

course north for Charlottetown Harbour which they entered. The *Heather Belle* was filling with water rapidly. Her guard rested upon that of the *Fastnet*. The *Fastnet* listed over and the *Heather Belle* went off with a jerk. He gave no order to cut the lines and he endeavoured to retake the *Heather Belle*, but could not do so, and his own ship afterwards went aground on the west side of the harbour.

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The captain of the *Fastnet* alleges in his preliminary act that:

The steamer *Heather Belle* was going at too great a speed having regard to the thick fog and to the fact that she was going with the tide, and that the *Heather Belle* did not reverse her engines before the collision as she should have done, but improperly ported her helm. In addition to this, the *Heather Belle* did not, by giving the proper number of blasts of her whistle, indicate to the *Fastnet* what course she was steering or what direction she was going in, and the *Heather Belle* was on the wrong side of the channel. She should have come in on the eastern side, but she came in on the western side.

On these allegations and the evidence adduced, in support of them, the question arises, which, if either, of the ships is to blame or are they both in fault?

Before referring to the rules and principles that, in my opinion, are decisive of this case, I shall briefly dispose of one fault attributed to the *Fastnet*, namely, that of severing herself from the *Heather Belle* and thereby allowing the latter to be lost. Up to the time the vessels separated, no fault could be found with the conduct of those on board the *Fastnet* so far as regards their endeavours to save the *Heather Belle*, and although it is true that when the latter listed over and her guard slipped off the *Fastnet* one of the lines was cut possibly under the apprehension that she might take the *Fastnet* over with her, yet no order to cut the lines or separate the vessels was given by the captain or by any officer on board the *Fastnet*; and their previous action in bringing the *Heather Belle* inside the har-

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bour, as well as their subsequent endeavour to recover her, show a desire on their part to save her. The evidence does not enable me to find that the officers of the *Fastnet* were to blame in this respect.

Article 21 of the *Regulations for preventing Collisions at Sea* requires that :

In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

The entrance to Charlottetown Harbour, where these vessels were, I regard as a narrow channel requiring the observance of this rule, and under it, situated as these vessels were, it was the duty of the *Heather Belle* to enter on the eastern side, and of the *Fastnet* to depart on the western side. According to the evidence of the captain of the *Heather Belle*, after passing the Bell Buoy he took a course for the Black Buoy on the west side, and passed within thirty or forty yards of it. On this point I put this question to the gentleman who most intelligently aided in this case as nautical assessor, whether, under the circumstances, it was proper as a matter of good seamanship for the captain of the *Heather Belle* to make the Black Buoy and to pass so close to it. He advises that it was proper. That, in starting from the Belle Buoy, the captain of the *Heather Belle* was right in steering for the Black Buoy. That as there is no buoy to mark the eastern side of the channel, on that account the *Heather Belle* was not to blame for making the Black Buoy for the purpose of verifying her position. That such is the custom of ships making Charlottetown Harbour; but, that having so verified her position, it was the duty of the *Heather Belle* at once to shape a course so as to reach her proper side of the channel, and especially so on account of the fog then prevailing. Instead, however, of steering a course for the eastern side of the channel,

the *Heather Belle* was shaped N. $\frac{1}{2}$ E. for the harbour, and the captain says he proceeded on that course for a minute or two—but, according to the witness Robert McLaren, for three or four minutes—till he heard the whistle of the *Fastnet* when he steered N.E. by N. This latter course, the nautical assessor advises, was proper, but it should have been taken sooner and from the Black Buoy. In thus acting, if his conduct could possibly contribute to the collision, the captain of the *Heather Belle* would violate art. 21, and it appears to me that the minutes delayed on the N. $\frac{1}{2}$ E. course might, if employed in moving on the N.E. by N. course, have placed him clear of the *Fastnet*.

The captain of the *Heather Belle* states, that having heard a whistle ahead, a little on his port bow, which he took to be the *Fastnet's* whistle, he directed the mate, who was at the wheel, to port his helm, give him plenty of sea room, and blow one short blast; and that his orders were obeyed and the ship took a course N.E. by N.; that he continued on that course for about six minutes after he got the vessel steadied, running at the rate of three or four miles an hour, having the tide with him, and, that in the interval from seven to ten short blasts were blown by each vessel. As regards the character of the blasts there is a direct conflict between the witnesses of the *Heather Belle* and those of the *Fastnet*, the former swearing that they were short blasts and the latter that they were long ones. The captain of the *Heather Belle* says that the blast from his ship when he altered his course from N. $\frac{1}{2}$ E. to N. E. by N. was given to indicate to the *Fastnet* that the *Heather Belle* was directing her course to starboard, that they were continued by him with that object, and that he understood by what he designates short blasts from the *Fastnet* that she also was going to starboard.

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Article 12 of the regulations requires that "in fog, mist or falling snow whether by day or night" a steamship under way shall make with her steam whistle or other steam sound or signal, at intervals of not more than two minutes, a prolonged blast; and article 19 provides that, in making any course authorized or required by the regulations a steamship under way may indicate that course to any other ship, which she has in sight, by certain signals on her whistle. In these signals one short blast means, "I am directing my course to starboard." But the regulation as to the signals, in my opinion, only applies when the vessel to which the signal is given is in sight of the ship giving the signal, and as the *Heather Belle* and the *Fastnet* were not in sight of one another when the signals were given, those signals were inapplicable to the circumstances, which both captains ought to know; and the captain of the *Fastnet* was not required to govern himself by them. Moreover, the captain of the *Fastnet* says the blasts were all long ones, and that he regarded and treated them as such. As long blasts were the proper ones for the circumstances, the captain of the *Fastnet* was not misled by the blasts given, because whether they were long or short, they indicated to him what the fog signal intends, namely, that another ship was in his vicinity, and they served him as a compliance with article 12. It is charged that the *Heather Belle* infringed article 13, which requires that:

Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

The word "moderate" is regarded in this connection as a relative term, and, in law, what it should be in each case depends on the circumstances of the particular case. A general principle is, that speed such

that another vessel cannot be seen in time to avoid her is unlawful (1).

Speed which is justifiable in an unfrequented part of the ocean is unlawful in a crowded roadstead, or in a highway (2). Besides, speed which was "moderate" when no vessel was known to be near may be illegal after the whistle or horn of another is heard to be approaching (2).

The object of article 13 is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. This is the dictum of Sir James Hannen in the *Zadok* (3).

On the sea ten miles off Ushant four knots an hour have been held too fast (2), and off Cromer, with a whistle sounding ahead, three knots have been held too fast (4).

In the *Frankland* and the *Kestrel* (5), *The Kirby Hall* (6) and *The Dordogne* (2) it was held that where the fog was so dense that a steamship heard the whistle and hailing from another without being able to see, her duty was to stop at once and hail the other vessel. In a fog so dense that it is not possible for a ship to see another in time to avoid it—as undoubtedly was the case in this instance—she is not justified in being under way at all, except from necessity. In *The Lancashire* (7) and *The Otter* (8) it was held that neither article 13 nor 18 justified a ship in being under way in such circumstances.

(1) *The City of Brooklyn* L. R. 1 P. D. 276; *The Zadok* L. R. 9 P. D. 114.

(2) *The Dordogne* L.R. 10 P.D. 6.

(3) L. R. 9 P. D. 114, 115.

(4) *The Ebor* L. R. 11 P. D. 25.

(5) L. R. 4 P. C. 529.

(6) L. R. 8 P. D. 71.

(7) L. R. 4 Ad. & Ec. 198.

(8) *Ibid.* 203.

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In the latest edition of Mr. Marsden's excellent work on collisions at sea, published in 1891, at page 405, he writes :

A vessel going at too great a rate of speed on a dark night, or in thick weather, cannot be held to say that a collision was the result of inevitable accident. Under such circumstances it is her duty to go at such a rate of speed as will enable her, after discovering another vessel, to avoid her by stopping and reversing her engines. If her speed is higher than this, she will, almost certainly, be held in fault for any collision that may occur, although she does her best to avoid it when the other ship is seen.

The evidence satisfies me that from the moment the *Heather Belle* sighted the *Fastnet* nothing that either ship could do would have avoided the collision. Under the circumstances I hold that the *Heather Belle* was not going at a "moderate" speed, and that she infringed article 13 of the regulations.

In this connection it becomes necessary for me to consider whether the *Heather Belle* did not also break article 18 of the regulations, which reads as follows :

Every steamship when approaching another ship, so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary.

The requirement of this article is that a vessel when approaching another with risk of collision shall, whatever her speed may be, slacken it if possible, and at the same time, or afterwards if necessary stop, and reverse (1). In *The Ceto* (2) Lord Bramwell held that the word "necessary" does not mean that the situation is such that, without stopping and reversing, a collision would take place; but that it means rather "prudent and expedient."

In *The Dordogne* (3) a steamship in a fog so dense that a vessel could not be seen her own distance off, hearing, as in this case, the whistle of another continually approaching her was held in fault for not reversing until the other vessel was seen.

(1) *The Beryl* L. R. 9 P. D. 137-145.

(2) 14 App. Cas. 689.

(3) L. R. 10 P. D. 6.

In *The Ceto* the exigency of the rule is defined by Lord Watson (1) thus :

In broad day-light, or in the night time, so long as ships' lights are discernible at a moderate distance, I do not think that it is within the meaning of the rule "necessary" for two approaching steamers to stop and reverse until it becomes apparent to the eye that if they continue to approach they will in all likelihood either shave close or collide. When the approaching vessels are enveloped in a fog, and cannot see each other, the rule must, in my opinion, apply with greater stringency.

When two steamships invisible to each other, by reason of a thick fog, find themselves gradually drawing nearer until they are within a few ships' lengths, they are in my opinion within the second direction of Rule 18, and each of them ought at once to stop and reverse unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear without involving risk of collision.

In the same case Lord Herschell (2) said :

The necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time.

The Khedive (3) and *The Frankland* and *The Kestrel* (4) are like authorities.

In *The Love Bird* (5), a steamship in a thick fog going three knots heard a blast of a fog-horn nearly ahead. She was held in fault for not having stopped or reversed her engines until the other vessel was seen about a length off.

In the *John McIntyre* (6), Brett, M.R., said :—

It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or fog-horn in a dense fog, but when in such a fog it is heard on either bow [as in this case] and approaching [as in this case] and is in the vicinity, [as in this case also] because there must then be a risk of collision.

(1) 14 App. Cas. 686.

(2) *Ibid.* p. 694.

(3) L. R. 5 App. Cas. 876.

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(4) L. R. 4 P. C. 529.

(5) L. R. 6 P. D. 80.

(6) L. R. 9 P. D. 136.

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Lord Herschell in *The Ceto* (1) used similar language:

I think that when a steamship is approaching another vessel in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another.

In *The Ebor* (2) Lord Esher, M.R., said:—

Supposing the whistle is ahead or on either bow, then the question is whether the officer has a right to wait till he hears a second whistle. It seems to me that if it is ahead he ought not to wait at all. If it is on either bow, and apparently at a considerable distance, he may possibly, though I doubt it, wait till he hears the second whistle. If the second whistle is nearer, the position is clear: he should stop and keep his vessel in hand, so that he can do anything in a moment.

He further said:—

He was going at the time at a speed of three to three and a half knots over the ground, he was in fact going with the engines easy which was, under these circumstances, a moderate speed, before the whistle was heard. But it was not moderate afterwards, for moderate speed then was to go as slowly as he could, only keeping his vessel well under command. [And he adds that] The speed should be as slow as it can be. If it is not, article 13 is broken, and if a vessel has broken that rule, the consequence is that if a steamship, she has also broken article 18. It is possible to break article 18 without breaking article 13, because the latter only applies to a fog, but by breaking article 13, article 18 is also broken.

According to the preliminary act filed on behalf of the *Heather Belle* when the other vessel was first seen at a distance of twenty or thirty yards off, and about two points on the *Heather Belle's* port bow notwithstanding that the previous exchange of from seven to ten whistles from each ship gave the captain of the *Heather Belle* ample notice, he still proceeded at a speed of three or four miles an hour with a tide at flood force of about one and one-half knots per hour.

Under these circumstances with the facts as proved and the law as it has been laid down by the eminent authorities I have quoted, and others to the same effect,

(1) 14 App. Cas. 695.

(2) L. R. 11 P. D. 27-28.

I am forced to the conclusion that the *Heather Belle* violated article 18 as well as article 13.

Now as regards the *Fastnet* :

The master's preliminary act says that on passing about one hundred and fifty yards from the Block House shore he shaped a course S. $\frac{1}{2}$ E. and from his evidence, in which he says the sounds of the whistles of the *Heather Belle* were on his starboard bow, confirmed as that is by the evidence of those on board the *Heather Belle* that the sounds from the *Fastnet* were on the *Heather Belle's* port bow, I am inclined to believe that the *Fastnet* actually traversed a S. $\frac{1}{2}$ E. course, and that at the precise moment of the collision that ship was, if anything, rather on the east side of mid-channel in violation of article 21. The course the *Fastnet* took, steering north to re-enter the harbour, is also in confirmation of this view.

The evidence shows that the ships were pursuing courses which would lead to their crossing one another's path, and thus article 16 was brought into operation. It says :

If two ships under steam are crossing so as to involve risk of collision the ship which has the other on her starboard side shall keep out of the way of the other.

This, it seems to me, casts upon the *Fastnet* the duty of keeping out of the way of the *Heather Belle*, which she might have done effectually by going a little to starboard on her own side of the channel. This was on her part a breach of article 16. But it may be open to question, that if the *Fastnet* was bound to observe article 16, then the *Heather Belle* became bound to observe article 22, which is that :

Where by the above rules one of the two ships is to keep out of the way, the other shall keep her course.

In my view that rule was not violated by anything

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proved against the *Heather Belle*; as it appears that she did keep her course from the time she steered for the eastern side of the channel until she had ported her helm at a period when she was in the very "agony" of collision," at which time she was justified in adopting any manœuvre considered likely to save her.

But apart from this, I consider the *Fastnet* equally at fault with the *Heather Belle*. According to the captain's preliminary act, when the light of the *Heather Belle* was first seen, his vessel was making about three knots an hour through the water; she was then, he says, about forty yards from the *Heather Belle* whose bearing was from $1\frac{1}{2}$ to $2\frac{1}{2}$ points on his starboard bow. So that although he knew that the *Heather Belle* was on his starboard bow and that the vessels were rapidly approaching one another he adopted no manœuvre to get out of the way or to avoid a collision but kept on his S. $\frac{1}{2}$ E. course at a speed of three knots an hour in the midst of a dense fog. In my opinion he violated article 13 by going at an immoderate speed and article 18 by not slackening his speed or stopping and reversing at an earlier period. The authorities I have cited and the references I have made regarding the breach of articles 13 and 18 by the *Heather Belle*, apply with equal force to the *Fastnet*, and I need not again allude to them. I have, therefore, no hesitation in finding that both vessels were active agents in contributing to the collision and in declaring them both to be in fault, and pronounce accordingly,

The remaining consideration regards the damage. There was a good deal of conflicting testimony as to which vessel struck the other. The evidence leads me to the belief that when the impact between them took place, the stem of the *Heather Belle* and the bow of the *Fastnet* came in contact very nearly at right angles, that the *Fastnet* had more force and was going at a

greater speed than the *Heather Belle* and carried the breakage off to starboard. I conclude that the dent described as about five or six feet from the stem of the *Fastnet* and the projection opposite to it on the port side were caused by the collision, but that the other dent described as about fifteen feet from the stem of the *Fastnet* was not caused by the collision.

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The general rule as to damages was thus stated by Dr. Lushington in *The Clarence* (1) :

The party who has sustained damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered.

The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired; and if a ship is totally lost the owner is entitled to recover her market value at the time of the collision.

Where both ships are in fault, the law apportions the loss by obliging each wrong-doer to pay half the loss of the other.

The *Heather Belle* having been lost I have to ascertain her market value at the time of the collision. In most cases I should be disposed to adopt the practice of referring the assessment of damages to the registrar of the court assisted by merchants, but in the circumstances of this case, I see no advantage in that course, while its adoption would be attended with expense to the parties and would cause delay.

Messrs. Welsh, Owen and Hughes, three witnesses for the plaintiffs, valued the *Heather Belle* at \$16,000 at the time of the collision. Mr. Owen swore that he had been endeavouring to procure another steamer like her and found he could not purchase one for an amount so low as that sum. The evidence is that the vessel although eight years old was nearly as good as when

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 THE
 HEATHER
 BELLE.

THE
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built, that she was examined and carefully repaired every year, and was only in use about one-half of each year.

By section 12 of chapter 79 of the Revised Statutes of Canada, to which I have been referred to limit the liability of the owners of the *Fastnet* (without objection by the counsel for the owners of the *Heather Belle*) it is enacted that "the owners of any steamship in case of a collision occurring like the present one," without their actual fault or privity, "shall not be answerable in damages to an aggregate amount exceeding \$38.92 for each ton of the gross tonnage." This would amount on the *Fastnet*, whose gross tonnage is 338 tons, to \$13,154.96, at which sum, under the evidence, I value the *Heather Belle* and estimate the damages on account of her loss.

In regard to the damage done to the *Fastnet*, after a careful consideration of the evidence and all the circumstances, I estimate it at \$2,800.

Each party to contribute a moiety of the amount decreed against the other, and to bear their own costs for counsel, solicitors and witnesses, the cost of reporting the evidence and all other fees and expenses to be borne equally by the parties, and I pronounce and decree accordingly.

Judgment accordingly.

Solicitor for owners *Heather Belle*: *L. H. Davies.*

Solicitor for owners *Fastnet*: *A. Peters.*