

1924  
April 30.

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NEW BRUNSWICK ADMIRALTY DISTRICT

FRANK K. WARREN ..... PLAINTIFF;

AND

R. P. & W. F. STARR, LTD..... PLAINTIFF;

AGAINST

SS. *PERENE*

*Shipping—Collision—“ Lookout ”—Preliminary Act—Amendment—Presumption of fault—Burden of proof.*

On February 1, 1924, about 4 a.m., a collision occurred near the entrance of St. John Harbour, between the steamer *P.* outbound and the

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schooner *M.* of *S.* inbound, sailing with a light breeze off land. The night was clear and the visibility good. The *M.* of *S.* was painted white and carried main, fore-stay sail and jib, and even without lights, could have been seen a quarter mile off. All required lights were burning and visible at the regulation distance. Between 20 and 30 minutes before the collision the *M.* of *S.* first saw the *P.*'s lights, about one mile away. She was then on her port tack steering E.N.E., intending to make harbour on that tack. About 20 minutes before collision, then finding water too deep, she wore ship and decided to beat up to the harbour. At this time the green light of the *P.* was noticed. When 70 feet away, seeing the *P.* coming down on her, the captain of the *M.* of *S.* waved a burning torch, but the *P.* did not change her course, none of these lights being seen by her officers. Just before collision, the *M.* of *S.* ported her wheel to escape from the *P.* but she was struck on the starboard side at the mizzen rigging. The man acting as "lookout" on the *P.* had also been assigned the duties of clearing the anchor. The *P.* claimed at trial that by wearing ship, which was an unnecessary manoeuvre, the lights of the schooner had been hidden, which was the cause of the accident.

*Held*, on the facts, that the manoeuvring of the schooner in no way contributed to the collision, but that the collision was entirely due to want of care and negligence of the steamer, particularly in not having a proper lookout.

2. That the burden of proof that she had a proper lookout was upon the *P.*, and that a lookout, to whom is also assigned the duty of tidying up on the forecaste head and clearing the anchor, is not a sufficient or efficient lookout.
3. That, as by article 20 a steamer is obliged to keep out of the way of a sailing vessel, there is a presumption of responsibility on the part of the steamer in case of collision with such vessel, only to be rebutted by proof of some fault on the part of such vessel (1).
4. That whilst amendments to the Preliminary Act cannot be allowed, at the instance of the party who filed it, error or misstatement therein is not fatal, but may be rectified in the pleadings. If, however, parties go to trial without pleadings, they will be held strongly to the allegations contained in their Act. This particularly, as in this case, where the Act was prepared and filed after inquiry by the Wreck Commissioner. (*The Westmount*, 40 S.C.R. 160 at p. 176 followed).

*Semble*, that even where a schooner has been negligent in not showing proper lights, the fact that the steamer itself had not sufficient "lookout" would be conclusive to hold it responsible for a collision.

ACTIONS *in rem* by the owners of the schooner and freight respectively for damages arising out of a collision between the steamer *Perene* and the schooner *Maid of Scotland*, which resulted in the sinking of the schooner and loss of almost all its crew. March 12 and April 4, 1924. Both

(1) *Note*: Compare decisions in *Fraser v. Aztec*, 19 Ex. C.R. 454; *Geo. Hall Coal Co. v. Parke Foster*, (1923) Ex. C.R. 56, and *Geo. Hall Coal Co. v. Maplehurst*, (1923) Ex. C.R. 167; (1923) S.C.R. 507.

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actions were tried together, before the Honourable Mr. Justice Sir Douglas Hazen at St. John.

*F. R. Taylor K.C.* and *Hugh H. McLean, Jr.* for plaintiffs.

*J. B. M. Baxter K.C.*, *A. N. Carter* and *J. B. Hunter* of the New York Bar for defendant.

*F. R. Taylor K.C.*: The steamer was at fault in not keeping out of the way, in not having adequate lookout, not slackening speed or reversing and in backing out of the hole made in the schooner. *The Bold Buccleugh* (1); 26 Hals. 703; *The Diana* (2); *The Batavier* (3); *The Glannibanta* (4); *The Morning Light* (5); *The Belgen Land* (6); *The Shakkeborg* (7), and article 29.

The only fault alleged upon the schooner was lights not displayed or of sufficient visibility. The parties are confined to their Preliminary Act and bound by it and no other fault than there alleged can be claimed against it at the hearing. *The Franklin* (8); *The Mirenda* (9); *The Vortigern* (10); *The Godiva* (11); *Montreal Transportation Co. v. New Ontario Steamship Co. (The Westmount)* (12).

The steamer was obliged to keep out of the way of the sailing vessel, Article 20, and when a collision happens the steamer is *primâ facie* liable, Marsden, 6th ed. pp. 34, 405 and 406. *The Alepo* (13); *The J. D. Peters* (14); *Higgins v. The Gypsum Packet Co.* (15); *The Pennland* (16); and *The City of Truro* (17).

The lights were all burning on schooner and should have been noticed by steamer. *McLaren v. Cie Française de Navigation à Vapeur (The Thames)* (18). There was confusion on the steamer and improper navigation and manoeuvres. The captain's story was not confirmed by wheelsman's or engineer's log. He also cites the following cases: *The John Harley v. William Tell* (19); *The Val-*

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| (1) [1853] Pritchard's Adm. Digest, 3rd ed. p. 221. | (10) [1859] 1 Swaby 518.      |
| (2) 1 W Rob. 131.                                   | (11) [1886] 11 P. 20.         |
| (3) [1854] 9 Moore P.C. 286.                        | (12) [1908] 40 S.C.R. 160.    |
| (4) [1875] 1 P. 283.                                | (13) [1865] 35 L.J. Adm. 9.   |
| (5) [1864] 69 U.S. (2 Wall.) 550.                   | (14) [1890] 42 Fed. Rep. 269. |
| (6) [1885] 114 U.S. 355.                            | (15) [1895] 67 Fed. Rep. 612. |
| (7) [1911] P. 245, n.                               | (16) [1885] 23 Fed. Rep. 551. |
| (8) [1872] L.R. 3 A. & E. 511.                      | (17) [1888] 35 Fed. Rep. 317. |
| (9) [1881] 7 P. 185.                                | (18) [1884] 9 A.C. 640.       |
|   | (19) [1865] 2 Asp. 290.       |

*des* (1); *The Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Navigation Co.* (2); *The Julia David* (3). Even if schooner negligent she did not contribute to the accident. *Cork Steamship Co. v. Kiddle*, 1920, unreported, cited in *The Volute* (4).

*J. B. Hunter*: The schooner observing a green light on her port bow should have obeyed Article 21, binding on a sailing vessel. *The Highgate* (5). A schooner must not go about ahead of the steamer so as to embarrass her. *The Palatine* (6). Her wearing ship instead of going about to windward was improper and greatly contributed to the cause of the collision by concealing her lights. *The Falkland* (7). Showing flare when steamer only 50 feet away is too late and gross negligence.

*A. N. Carter*: The schooner was not sailing in westerly direction when collision took place but was wearing around to starboard. When schooner first sighted the courses were crossing courses, and in such directions as to cause "risk of collision" and she should have kept her course and speed. She was an overtaken vessel and should have shown the required stern lights. He cited: *The Beryl* (8); *The Stanmore* (9); *The Orduna v. Shipping Controller* (10); *The Haugland v. SS. Karamea* (11); 28 Hals. p. 451; *The Highgate* (12); *The Kirkwall* (13); Marsden p. 335; *The Main* (14); *The Essequibo* (15); *The Fenham* (16); *The Basset Hound* (17); *H.M.S. Hydra* (18); *The Breadalbane* (19); *The Patroclus* (20); *The Saragossa* (21); *The Cumberland Queen* (22); *Kennedy v. Sarnation* (23).

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

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| (1) [1914] 31 T.L.R. 144.      | (13) [1909] 100 L.T. 284.    |
| (2) [1880] 5 A.C. 876.         | (14) [1886] 11 P. 132.       |
| (3) [1877] 46 L.J. Ad. 54.     | (15) [1888] 13 P. 51.        |
| (4) [1922] 91 L.J. Ad. 38.     | (16) [1880] L.R. 3 P.C. 212. |
| (5) [1890] 6 Asp. 512.         | (17) [1894] 7 Asp. 467.      |
| (6) [1872] 1 Asp. N.S. 468.    | (18) [1918] P. 78.           |
| (7) [1863] Brown and Lush 204. | (19) [1881] 7 P. 186.        |
| (8) [1884] 9 P. 137.           | (20) [1888] 13 P. 54.        |
| (9) [1885] 10 P. 123.          | (21) [1892] 7 Asp. 289.      |
| (10) [1921] 1 A.C. 250.        | (22) [1922] 126 L.T. 679.    |
| (11) [1922] 1 A.C. 68.         | (23) [1880] 2 Fed. Rep. 911. |
| (12) [1890] 6 Asp. 512.        |                              |

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HAZEN L.J.A., this 30th day of April, 1924, delivered judgment.

These two actions were tried together, and the case arises out of a collision between the steamer *Perene* and the schooner *Maid of Scotland* in the early morning of the first of February last, a short distance from Partridge Island near the entrance to St. John harbour.

The *Perene* is a steamer of about 1,800 tons gross, 284 feet long, while the schooner was 148 feet long and 341 tons gross. The *Perene* carried a crew of 42 men, including three certified officers and three engineers. The schooner's crew consisted of six all told.

The steamer *Perene* left its dock at St. John bound for sea between two and three o'clock on the morning of February 1, with a pilot (McKelvey) on board. He was discharged near the bell-buoy off the northeast corner of Partridge Island at about three o'clock in the morning, and the collision occurred, while there is some dispute as to the hour, at some time as nearly as I can figure between 3.30 and 4 o'clock in the morning.

It was a fine night, the weather being clear and the visibility good, and according to Pilot McKelvey the loom of a vessel even without lights could have been seen at a distance of a quarter of a mile. He says that the weather was clear and starlight, and a light breeze was blowing, but the sea was smooth, the wind being off the land, and that when he was leaving the steamer at the bell-buoy he saw three vessels at anchor. The lights were showing all right, and there was no fog, nothing to interfere with the visibility but just a low vapor in spots that would not interfere with the seeing of the side lights and there was not sufficient wind or sea to cause spray to be thrown on the lights of the schooner, and there was nothing in the weather conditions that would prevent side lights being visible at the regulation distance of two miles. The schooner was painted white and was carrying main sail, fore stay sail and jib, and it was with regard to these conditions that McKelvey said a vessel should be seen a quarter of a mile even without lights. The pilot left the ship at what is known as the bell-buoy, and it then proceeded on its course and came into collision with the schooner about half an hour afterwards, near what is called the fairway buoy, the flash of which the

master of the *Perene* said he was able to see after leaving the bell-buoy.

As a result of the collision only two of those on board the schooner were saved, viz., two seamen named respectively Missick and Todd, who jumped into the rigging and succeeded in making the deck of the steamer. A boat was lowered from the steamer and manned by two men from it, but it was lost and never returned, and those on board presumably lost their lives, as they have not been heard of since.

The case was tried without pleadings. In the preliminary act filed by the steamer the fault attributed to the *Maid of Scotland* is lights not displayed or not displayed so as to be visible more than 200 feet away; while in the preliminary act filed by the schooner the fault attributed to the *Perene* is that it failed to keep out of the way of the *Maid of Scotland* as required by the regulations; that it did not keep an adequate or any lookout; that it failed on approaching the *Maid of Scotland* to slacken speed, stop or reverse; that it failed to reverse when danger of collision was obvious; that it was in default in backing out of the hole made in the *Maid of Scotland* before the crew of the schooner were saved.

It is well known that the object of the preliminary act is to obtain from the parties statements of fact at the time when they are fresh in their recollection and before either party knows how his opponent's case is shaped, and it is evident that at the time the preliminary act in this case was made up and filed on behalf of the steamer, the only fault alleged on behalf of the schooner was not displaying its lights so as to be visible more than 200 feet away. The rule is established that the amendment of a preliminary act will not be allowed at the instance of the party who has filed it, but an error or misstatement is not absolutely fatal or binding on the party making it, but may be rectified in the pleadings afterwards, and if so rectified will be a subject for comment on the hearing. But if the parties go to trial without pleadings the parties will be held most strongly to their preliminary acts. (See the *Westmount, Montreal Transportation Co. v. New Ontario SS. Co.* (1).

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(1) [1908] 40 S.C.R. 160 at p. 176.

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It is important to remember that in this case before the preliminary act was filed an inquiry had been held in the Wreck Commissioner's Court and evidence taken, and the facts gone into and a report had been made by that court consisting of the Dominion Wreck Commissioner and two assessors, so that there could be no fault or neglect it appears to me on the part of the schooner which could not be presumed and was not known to the steamer at the time of the filing of the preliminary act. The collision took place a fortnight before the preliminary act was filed.

The plaintiff went to trial relying on the preliminary act as filed by the steamer, and while it was quite open to the defendant to have had an order made for pleadings, they did not do so but went to trial with the preliminary act as their record. In my opinion in this matter the case must be tried on the allegations contained in the preliminary act. As admitted by the learned counsel for the steamer, it was its duty to keep out of the way of any sailing ship. No fault on behalf of the schooner can be shown unless it is specified in the preliminary act. The important question, it seems to me, therefore is as to whether or not lights were properly displayed on the schooner at the time the accident occurred, for unless some fault can be shown on the part of the schooner the authorities are clear that there is a presumption of responsibility on the part of the steamer.

The evidence on behalf of the plaintiff with regard to the lights was given by the seamen Missick and Todd, who alone escaped from the schooner. I was favourably impressed with the manner in which they gave their evidence, and as both were disinterested witnesses I am prepared to accept it. There were six people on board the schooner. Missick was on the watch from 12 to 4 in the morning, and was at the wheel at the time the accident happened. He says the steamer struck the schooner about ten minutes to four. They had a bell and the custom on the ship was when the bell struck every hour for the man who was on watch to report to the Captain as to whether the lights were burning bright, and this was done on the night of the collision. The man on watch with him was a Porto Rican named Brown, and he reported to the Captain every hour that the lights were burning.

Coming towards St. John harbour he saw the lights, of what afterwards turned out to be the *Perene*, before the collision, and he judged her to be a mile away, though he believed more, and he first saw the light on the *Perene* about half an hour or 20 minutes before the collision took place. The schooner was then on the port tack, steering East North East. After that they wore ship, all hands being on deck except the cook, and when they wore ship they came on full and by the wind, and after wearing ship he noticed the green light on the *Perene* once. After wearing ship it was about twenty minutes before the collision occurred. He states that they wore ship a good while before the collision about twenty minutes, and that was after they had seen the lights of the steamer, the steamer being away up in the harbour at that time. All hands were on deck except the cook, as they were expecting to make harbour on that tack, but the Captain sounded the lead and found 16½ fathoms of water and it being too deep to anchor he wore ship and said he would beat it up for the harbour.

When the captain of the schooner saw the steamer coming down upon him he ran below and got a torch which he lit and held the flare out to the ship and by the time the torch burned the ship was about 50 feet away. After the captain of the schooner burned the flare there was no change in the course of the steamer. The captain of the schooner shouted out to the man on deck to see if the lights were burning bright, and Todd, the man in question, shouted to the captain that the lights were burning bright. The schooner at this time was carrying main sail, fore sail, stay sail and jib. He says there was no fog or mist, and after the captain burned the flare he shouted to those on board the steamer, and just before the collision he ordered Missick to port his wheel and see if he could run away from her. There was no time, however, for this to take effect, and the steamer struck the schooner on the mizzen rigging, the bow going into the schooner, striking the schooner on the starboard side. At the same time, and before the collision occurred, one of the crew of the schooner was working on the deck with a lantern removing ice from some of the ropes.

Missick swears that before the collision the schooner continued on the starboard course after wearing ship for about

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twenty minutes, and during the time on that tack there was nothing that would obstruct the view of the lights—no sail or anything over the lights. As a matter of fact the sail was on the port side and there was nothing to block a clear view of the starboard light from the steamer.

Missick's evidence is confirmed by that of Todd, who was the man who was on the deck with a lantern beating the ice off the main halyards. He says that he came out on deck about forty minutes before and noticed the light on the steamer the minute he did so. This would be about twenty minutes past three, and from the time he came on deck he saw the steamer's lights. He was the one who was told by the captain to look at the side lights and see if they were burning bright, and he says they were all burning bright, and he so reported. The lights were of the kind ordinarily used on schooners. He confirms Missick's statement as to the Captain burning the torch, and he saw him standing on the house swinging it in his hand. At this time he says the steamer was about 65 or 70 feet away approaching the schooner's starboard side.

If these witnesses are to be believed, and as I have already said I was impressed with the manner in which they gave their testimony, the schooner lights were properly displayed, and according to the evidence displayed so as to be visible more than 200 feet away and should have been seen by those on board the *Perene* in ample time for the steamer to take steps to avoid the collision.

The Captain and other witnesses on board the *Perene* say that they did not see the lights of the schooner or the schooner itself until they were within 200 feet of it. Even if the schooner carried no lights at all it is hard to understand why those on board the steamer if a proper watch was kept failed to see the schooner until they were so close to it, and further it is remarkable that they failed to see the flare that was burned by the Captain on board the schooner.

The pilot McKelvey, to whose evidence I have already referred, said there was nothing that night that would prevent side lights being visible at the regulation distance, and that without any lights at all under the weather conditions of that night the vessel should be seen at a distance of a

quarter of a mile. I cannot ignore the evidence of an experienced man like this, supported as it so strongly is by the evidence of the two sailors who were saved from the wreck, and I am forced to the conclusion that the lights were properly burning, and that the failure to see them was caused by a want of a proper lookout on board the steamer. They had been put up at six o'clock the night before and inspected every hour.

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The burden of proof that the defendant had an efficient lookout is undoubtedly on the defendant, and it is want of due caution for the lookout forward to be engaged in other duties, such as clearing the anchor. See the *Bold Buccleugh* (1).

The evidence of Ewart White, master of the *Perene*, stated that a man called Albarrican was the lookout, and he states that he was on the forecastle head at the time of the collision, and that he had orders to fix everything after leaving the side of the wharf in St. John harbour. These were his instructions, not to act as lookout, but to fix everything, and the pilot McKelvey says there was not to his knowledge any lookout detailed on the steamer, but that men were working on the forecastle at the time and he does not believe they had finished when he left the ship about half-past three o'clock.

Now it is apparent from this that Albarrican, even if he was assigned to act as a lookout had had other duties assigned to him as well, and the only evidence is that he was on watch and clearing up things on the forecastle head. It would take some time for him to tidy things up after the vessel left the wharf and while it could easily have been ascertained, there is no evidence that he ever stopped doing so, and this I think accounts for his not having reported any lights which could be seen at long distance or of not having seen the loom of the sails and hull until within a very short distance of the schooner. He was engaged in other duties than those of lookout which is contrary to the laws laid down by the authorities, and I am disposed to agree with the contention of the learned counsel for the schooner that even if it was negligent in not showing proper lights, which I think the steamer has failed to prove, the

(1) [1853] Pritchard's Admiralty Digest 3rd ed. 221.

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fact that the steamer itself had not sufficient lookout is conclusive to hold it responsible.

I am of opinion that the schooner had proper lights, properly shown and that the collision did not occur in consequence of its not displaying those lights so as to be visible more than 200 feet away, but on the contrary I am of opinion that if there had been a proper lookout on board the *Perene*, they might have been seen at a much greater distance, and if there had been a proper lookout and due caution exercised the schooner would have been seen at a much greater distance than 200 feet, even though no lights were visible at all. In addition to the port and starboard lights, the lantern referred to was on the deck, and a flare was burned by the captain, and yet none of these lights were seen, and it is impossible to reconcile this fact with careful attention to duty on the part of those on board the steamer.

It is claimed, however, that those on board the steamer were unable to see the lights of the schooner in consequence of the manoeuvre of wearing ship that was made by the schooner before the accident occurred, and that the schooner was guilty of a fault in making this manoeuvre, and that there was no necessity for its so doing. The schooner had expected to get into the harbour on the tack on which it was proceeding, but found the water too deep to anchor and so wore ship and came on the starboard tack, and the contention is that in wearing ship there was a period of time during which the lights could not be seen from the steamer as it was approaching, the contention being that the schooner's side lights showed from dead ahead to a point abaft the beam on both sides, leaving a dark sector around the stern of the ship of 12 points, the lights ahead showing through 20 points so that if a vessel is approaching another vessel from anywhere more than two points abaft the beam, the approaching vessel would always be in a dark sector unless there was a white light on the stern. It is claimed that she changed her course by bearing away which was an unusual manoeuvre, and that she turned the black sector of 12 points in the direction of the steamer and showed no light.

This contention is not set out in the defendant's preliminary act, and no fault or default in that respect is in that document attributed to the schooner, and while I do not think it can be raised now, in view of the fact that a full inquiry took place in the wreck commissioner's court before the preliminary act was filed, and all the facts were known to the steamer, yet I think it better that I should deal with the matter briefly in event of my conclusion regarding the matter being confined to the preliminary act being considered on appeal.

Now the contention is that this accident was caused by the *Maid of Scotland* wearing ship at the time it did. I once more refer to the evidence that the Captain expected to make the port on the preceding tack and that all hands were on deck preparatory to anchoring, and it was only when the Captain sounded and found there was too much water for him to anchor that he decided he would wear ship and beat up for the harbour. The evidence of Missick shows that the lights of the *Perene* were seen from the schooner up in the harbour. They saw the lights on the steamer before they wore ship and having worn ship they came about and proceeded for a considerable time after they wore ship before the collision. One of the witnesses says that the time occupied in running on the course on which they were when the collision occurred after they wore ship was about twenty minutes, so that it is clear that if there was a period of time during which the schooner was wearing ship when the lights could not be seen it would only be for a very few minutes, and would not justify the action of the steamer in colliding with the schooner, and if a proper lookout had been kept the *Perene* almost from the time it left the harbour would have known that the schooner was ahead and would have taken care to keep a proper lookout so as to prevent a collision taking place. The steamer should have seen one or more of the lights of the *Maid of Scotland* for a very considerable time, with the exception of a short portion of the time during which the *Maid of Scotland* was wearing ship.

Edward C. Williams, who had had much experience as a schooner captain and was called by the defence as an expert, although he disclaimed the right to be considered such,

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estimated that the schooner in wearing ship would travel 900 feet and for about  $\frac{5}{12}$  of this distance her lights would not be visible. Accepting this evidence as correct there would be 375 of this 900 feet when the lights could not be seen, and travelling at a speed of 5 miles an hour, which is the rate fixed by Cambridge, a marine engineer on the *Perene*, it would take about three-quarters of a minute to traverse that distance, and if this was the case it could not have affected the collision. It appears to me that there was a great deal of excitement on the *Perene*, and that the Captain made a mistake in leaving the bridge from which place he could have commanded a full view of everything that took place, and making his way down to a lower deck, and it is also extraordinary that it took the length of time it did to lower a boat in order to go in search of the men who were on board the schooner at the time of the disaster. This all has a bearing on the discipline on board the steamer, and leads to the conclusion in view of the other evidence, that an efficient and effective lookout was not maintained, and that failure to see the lights and the flare and the lantern, or even the schooner, must have been the result of very great negligence.

I am compelled to the conclusion that the collision was due to negligence on the part of the steamer.

*Judgment accordingly.*