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*June 16, 17.

*Dec. 13.

C. J. McCUAIG AND E. B. SMITH.....APPELLANTS;

AND

DAVID SMITH KEITH .....RESPONDENT.

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Appeal involving questions of fact—Discretion of Judge, on appeal not in general interfered with—40 *Vic.*, ch. 21, *Constitutionality of.*

Held,—Where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of *Ontario*, as in the case of a collision, the Supreme Court will not reverse the decree of the Judge of the court below, merely upon a balance of testimony.

2. That 40 *Vic.*, ch. 21, establishing a court of maritime jurisdiction for the Province of *Ontario*, is *intra vires* of the Dominion Parliament.

APPEAL from a decree of the Maritime Court of *Ontario*, in a case of damage, instituted by the owners of the steamer *Southern Belle* against the steamer *Picton*, the owners intervening.

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, and Gwynne, J. J.

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The case on behalf of the plaintiffs in the Maritime Court was, that the *Southern Belle* was, on the 12th day of August, 1878, in the Port *Dalhousie*, lying at the wharf, waiting for a full cargo of passengers, on an excursion trip to *Toronto*; that the *Picton* was lying at the same wharf, with her bows in under the port quarters of the *Southern Belle;* that the *Belle*, having received her cargo, was heavily laden, and employed the tug *H. Neelon* to hitch on her prow and draw her head away from the wharf, so as to bring her into her course, heading towards Lake *Ontario;* and when the *Southern Belle* was about broadside on to the *Picton*, the *Picton* cast off her ropes and, putting on steam, ran stem on into the starboard side of the *Southern Belle*, amidships, and broke in her wheel-house, beside doing her other damage.

The contention of the defendant was, that the *Southern Belle* was negligently and improperly towed upon the bow of the *Picton*, thus hemming the latter boat in and hindering her freedom of motion; that when a collision was imminent the *Southern Belle* was being towed towards the prow of the *Picton*, and in fact ran into the *Picton;* that the *Picton* had not completed her "winding," and though she had been moving in the course of her "winding," and though at the moment of the collision the stern line was not actually fastened to the dock, the *Picton* had then no appreciable forward motion and was not further from the dock than she properly might be in the process of "winding;" that it was the duty of the *Southern Belle* to have waited till the *Picton* (as the boat nearest the lake) had gone out of the basin, or to have seen and considered the position of the *Picton*; and to have kept out of her way by moving nearer to the western pier in crossing the *Picton's* bow; and that the *Southern Belle*, by using her own engines, might have moved ahead and avoided a collision, while

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the *Picton* was helpless, being unable to move ahead without running into the *Southern Belle*, and unable to move astern without endangering her steering gear by backing against the dock.

The defendants also claimed the benefit of the Merchants' Shipping Act, and the statutes in force in the Province of *Ontario*, respecting the navigation of Canadian waters.

The case came on for hearing on the 5th and 6th of February, 1879, before his Honor the Judge of the Maritime Court and two assessors.

At the close of the plaintiff's case, the defendants submitted that the plaintiff had not proved—

1. That the *Picton* was to blame. 2. That the *Belle* was not to blame.

That the case came within Article fourteen of 31 *Vic.*, ch. 58, and the *Belle*, not having got out of the way of the *Picton*, must be deemed to be in default, unless she showed circumstances justifying a departure from the rules, which the evidence did not disclose, and therefore that the plaintiff could not recover.

These objections were overruled.

At the close of the whole case, the assessors reported:

1. That the stern of the *Belle*, being lapped over the bow of the *Picton*, it was proper that the *Belle* should leave first.

2. That the *Belle* left the dock in the tow of the tug to wind her, and prudence required the *Picton* to remain until the *Belle* was in a position to proceed down the piers.

3. That the apparent mismanagement on the part of the *Belle* in parting her towline on the stern, did not appear to them to be a direct cause of the disaster, and the *Belle* was not to blame.

4. That they considered the direct cause of the disaster was the *Picton* hauling aboard her stern line, while

proceeding in the direction of the *Belle*, and not taking due precaution to reverse her engine before the vessels came into collision, seeing that there was a space of from thirty to fifty feet between the stern of the *Picton* and the east pier. 1879 THE PICTON.

The learned judge's views coincided with those of the assessors, and he gave judgment in favor of the plaintiffs, referring it to the Registrar to take an account of the damage and reserving further directions and costs.

From this judgment the defendants appealed to the Supreme Court of *Canada*.

Mr. *Maclennan*, Q.C., for appellant:

The first point I will raise is, whether the constitution of the Maritime Court was illegal and *ultra vires* of the Parliament of the Dominion of *Canada*. This is a Dominion Court established to execute Dominion laws in the Province of *Ontario*. If the power exists under sub-section 2 of section 91, which gives the Dominion Parliament power to legislate about *trade and commerce*, then it would be competent for the Dominion to create a court which would have exclusive jurisdiction over subject matters, which are now tried by our provincial courts. If it is a Dominion Court, its jurisdiction should not be limited to one province.

[THE CHIEF JUSTICE:—If there is one subject-matter over which the Dominion parliament has legislative authority, it is this. There is nothing to prevent the parliament from limiting the territorial jurisdiction of a Dominion Court. You might as well contend that the Exchequer Court Act is *ultra vires*, because some parts are only applicable to one province. I do not think this is an arguable point.]

The learned counsel then argued on the facts, that the Maritime Court should have found that the *Southern*

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Belle was not free from blame, and that, at most, the damages should be divided.

The *Southern Belle* having violated Art. 14 of the Rules of Navigation, and the plaintiff having failed to show circumstances justifying a deviation from Art. 14, the plaintiff is not entitled to recover any damages, even though the *Picton* should be also considered to blame in respect to the collision. See 31 *V.*, c. 58, s. 6; The *Palestine* (1); The *Arabian* and the *Alma* (2); The *Ada* (3).

Mr. *John E. Rose* for respondent:

The issues are two: Was the *Picton* to blame? the burthen of proof on that issue being on the *Southern Belle*. Was the *Southern Belle* to blame? the burthen of proof on that issue being on the *Picton*. The *Oceano* (4).

The appellants are wrong in their contention that the plaintiff must prove that the *Belle* was not to blame.

It appeared at the trial that the assessors, in addition to their nautical knowledge, had the advantage of a personal practical knowledge of the port, and a decree founded on their opinion on credibility of witnesses will not be reversed by a court of appeal unassisted by nautical asssessors. The *Sisters* (5).

RITCHIE, C. J.:—

I think the evidence fully justifies the conclusion at which the assessors and the learned judge of the court below arrived, and that there is no ground whatever for disturbing the decision of the court. I think the evidence satisfactorily establishes, in view of the relative positions of the *Southern Belle* and the *Picton*, and of the *Southern Belle* having been the first to leave the

(1) 13 W. R. 111.
(2) Stuart, 72.
(3) 28 L. T. N. S. 825.
(4) L. R. 3 P. Div. 62.
(5) 3 Asp. R. N. S. 124.

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wharf, as the assessors found it was proper she should do, placed as she was with her stern overlapping the bow of the *Picton*, that the *Picton* should not have started so soon as she did, but should have waited a few minutes, the very trifling length of time necessary to have enabled the *Southern Belle* to get clear off, and also that the stern line of the *Picton* should not have been let go as it was by orders from the *Picton*, and that the engines should have been reversed before the collision took place, as the evidence shows might have been done in the space between the stern of the *Picton* and the piers.

The *Picton*, being to blame in these particulars, in my opinion, caused the collision, and I cannot discover from the evidence that the *Southern Belle* in any way, by any misconduct or negligence on her part, contributed to the accident, and consequently the *Picton* cannot escape the consequences of her misconduct.

Had the evidence, in our opinion, raised doubt on all or any of these points, it would not have been proper under the authorities for this court to have interfered with the finding of the court.

As this is the first case of the kind that has been before us, it may be as well to cite some authorities as to the duty of an appellate court in dealing with cases of this description.

In *Moore* v. *Clucas* (1), on the counsel remarking: "The case of *Baboo Ulruck Sing* v. *Beny Persad* (2), relied upon by the appellant, is a strong authority in our favor, as it shows this court will not reverse a finding of the court below upon a pure question of fact," Mr. Baron *Parke* says:

> The appellant must show that the judgment is wrong. We never reverse unless we are satisfied that the judgment is clearly wrong. *Khoorshedjee Manikjee* v. *Mehrwanjee Khoorshedjee* (3).

(1) 7 Moo. P. C. 352. (2) 2 Knapp's P. C. C. 265.
(3) 1 Moo. Ind. Ap. Cas. 442.

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In *Bland* v. *Ross* (the "*Julia*") (1), the Privy Council held that where a disputed fact, involving nautical questions, is raised by an appeal from the Admiralty Court, as in the case of a collision, the Privy Council would not reverse the decree appealed from, unless conclusively satisfied that the decree is wrong, though the Court may entertain doubts as to the finding of the Admiralty Court; and at pages 235, 236 and 237 the reasons for this rule are given at length, in order, as the court say,

> That the vexation and expense of hopeless appeals may, as far as possible, be avoided, by parties being made aware of the difficulties which the appellants must have to encounter when the merits depend upon the differing opinions of nautical men.

And in the case of the "*Araxes*" and the "*Black Prince*" (2), the principles laid down in the case of the "*Julia*" were confirmed in these words:

> In order to reverse the judgment we must be satisfied it is founded on some mistake either on the law or the facts of the case. It is useless to repeat the observations which we made in the case of the "*Julia.*"

In *Dean* v. *Mark*, the "*Constitution*" (3), the Court says:

> We laid down in the case of the "*Julia*" (4), in the year 1861, the rules by which we must be guided.

And again in the case of the "*Alice*" (5), the law laid down in the case of the "*Julia*" is followed in these words:

> But, in the opinion of their Lordships, the principal point upon which we should rest our decision is this, that following the doctrine laid down in the case of the "*Julia,*" we should be most unwilling to come to a conclusion different from that of the Judge of the Court below merely upon a balance of testimony.

See also *Gray* v. *Turnbull* (6) in which Lord *Chelmsford* says:

(1) 14 Moo. P. C. 210.
(2) 15 Moo. P. C. 122.
(3) 2 Moo. P. C. N. S. 461.
(4) 14 Moo. P. C. Cas. 235.
(5) L. R. 2 P. C. 252.
(6) L. R. 2. Sc. App. Cases 53.

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If there is to be an appeal on questions of fact (and I regret that there should be such) I think that this principle should be firmly adhered to, namely, that we must call upon the party appealing to show us irresistibly that the opinion of the Judges on the question of fact was not only wrong, but entirely erroneous.

If this principle is so uniformly acted on in the Privy Council, where they have the benefit of the assistance which they receive from the able marine officers who are ordered to attend the Privy Council in cases of this description, how much more is it the duty of this court to be in like manner governed where we have no such assistance.

As to the constitutional question which has been suggested in reference to the court: the 40 *Vic.*, ch. 21, which establishes a Court of Maritime Jurisdiction in the Province of *Ontario*, and gives to all persons the like rights and remedies in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade or commerce on any river &c., of which the whole or part is in the Province of *Ontario*, as such persons would have in any existing British Vice-Admiralty Court, if the process of such court extended to the said Province, the *British North America* Act, sec. 91, gives to the Dominion parliament the exclusive legislative authority over these several subjects, and also power to establish courts for the better administration of the laws of *Canada*. I have not heard a word that in my opinion casts the slightest doubt on the validity of this act.

STRONG and FOURNIER, J. J., concurred.

HENRY, J.:—

The appeal in this case is from a decree of the Maritime Court of *Ontario*, in a case brought by the respondent to recover damages, alleged to have been caused by a collision of the steamer *Southern Belle*, of which he

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was owner, with the steamer *Picton*, by proceedings *in rem* against the last mentioned steamer, but in which the appellants intervened as owners.

By the decree the fact of the collision is found, and the damage to the *Southern Belle* ascertained. It is founded on the report of two assessors, according to which the *Picton* was found in fault and the *Southern Belle* not in fault, and that to the improper management of the *Picton* the collision and consequent damage to the *Southern Belle* was due. The learned judge confirmed the report and the court decreed "that the appellants were liable to the respondent for all damages which he sustained by reason of the collision," with an order for reference to the registrar to inquire and state the amount of the damages. On the part of the appellants it is contended that "the judge did not exercise his own judgment upon the law and the facts ; but decided the case wholly upon the opinion of the assessors." I cannot agree with that contention. The evidence was before him, and we are, I think, bound to conclude that he fully considered it. When the report of the assessors was made it had to be disposed of—in one of two ways—either by adopting or rejecting it. To decide, he had to consider the evidence, and the decree is evidence that he concurred in the views of the assessors. It cannot, I think, be fairly contended that he did not exercise his own judgment. The objection, therefore, in that form cannot be successfully taken.

The real question is : does the evidence sufficiently sustain the report and decree ? The former was made by two gentlemen who, from the fact of their selection alone, in the absence of anything to the contrary, we may conclude to have been competent to consider and decide upon the nautical questions involved, and to occupy such a position as to efficiency as would entitle their report to respect and consideration. I

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think that to reject their report, confirmed, as I view it, by the court, we must be fully convinced the weight of evidence was largely the other way, or that the proved facts laid no foundation in law for a claim to recover damages.

I have read and considered the evidence and so far from being of the opinion that the report and decree are against the weight of evidence I think the opposite, and that it fully justifies both. That the *Picton* had any right to cast off, and, instead of following the course taken in turning by the *Southern Belle*, run straight for her when only a few yards distant, was justified in doing so, is a conclusion that, I think, few disinterested persons would arrive at. The principle of law in such cases is, that even when one party has got into a wrong position, and that another using ordinary care can avoid a collision, but does not use that ordinary care, he is answerable for damages consequent on his negligent conduct. I do not consider, however, that the *Southern Belle* was negligently or illegally in the position she occupied at the time of the collision. She had started on her voyage in a manner she had the legal right to do, and it was the duty of the *Picton* to have waited till she could do the same thing without the necessity (which is set up here as a defence) of running into the steamer ahead of her, or to have followed her course when turning.

I have considered the objection to the jurisdiction, but have been unable to discover any reason to doubt that the act establishing the court was *intra vires*.

I think the appeal should be dismissed and a judgment entered to sustain the decree with costs.

GWYNNE, J.:—

The asssesors who sat in this case with the learned

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Judge of the Maritime Court have, in their finding, expressed their opinion upon the facts involved in this enquiry to be: That the *Southern Belle* having left her dock in tow of a tug to wind her out, the *Picton* should have remained at the dock where she was until the *Belle* was in a position to proceed down the piers, and that the direct cause of the disaster was, the *Picton* hauling aboard her stern line while proceeding in the direction of the *Southern Belle*, and not taking due precaution to reverse the engine before the vessels came into collision, seeing there was a space of from 30 to 50 feet from the stern of the *Picton* and the east pier.

In this finding the learned Judge of the Maritime Court has entirely concurred. Sitting as a Court of Appeal, we should be satisfied beyond all doubt of the incorrectness of this finding before we should reverse it. But, in view of the circumstances of the case, I can not say that I see anything in the evidence to justify a rational doubt as to the correctness of the finding. It can scarcely, I think, have been seriously expected that reasonable men should have adopted the view urged by the defendants, namely, that it was not the *Picton* which ran stem on to the midships of the *Belle*, but the *Belle* which had come down broadside on to the stem of the *Picton*; neither do the circumstances of the case warrant (as was contended for by the defendants) the application of the 14th article of sec. 2 of 31st *Vic.*, c. 58. No one can, I think, read the evidence without perceiving that the object of the captain of the *Picton* was to get out of the harbor ahead of the *Belle*, although the latter had started first, and that to attain this object he swung round on the stern of the *Picton* at the dock where she was, instead of following, as he could without any danger, the course taken by the *Belle*; and the evidence leads, I think, fairly to the conclusion, that, failing to effect his object as he had

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designed, whether from the breaking of his swing rope, or for some other cause, he most recklessly and negligently gave the order to advance instead of to back, to which cause, I think, most justly the collision is to be attributed. It was contended also that if the *Belle* had gone ahead with her engines when she saw the *Picton* coming on to her she might have avoided the collision, and that by not doing so she was herself partly to blame; but the evidence fails to satisfy my mind that by going ahead at that critical moment she could have avoided the collision. Some of the evidence upon that point is to the effect, that if she had gone ahead (if she could have done so, being then in tow), the consequence would have been that the collision would have occurred in a manner which would have occasioned greater damage to her. However, the giving a wrong order, or the omission to give one by the execution of which the collision might have been avoided, by a person in the excitement of impending and imminent peril, cannot be imputed by the person who brings the other into such peril for the purpose of shifting a portion of the blame of the ensuing collision from the party who had brought the other into the peril and of attributing to the party so injured a portion of the blame attending the injury, and this has recently been decided in *England* in two cases—the "*Bywell Castle*" (1) and the "*Khedive*" (2).

I think, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Mowat, Maclennan & Downey.*

Solicitors for respondent: *Rose, McDonald, Merritt & Blackstock.*

(1) L. R. 4 Pro. Div. 219. (2) Weekly Notes, Aug. 2d, 1879, p. 150.