ADMIRALTY DISTRICT OF BRITISH COLUMBIA. 1891

Dec. 14.

The ZAMBESI (JOHNSON.)

The FANNY DUTARD (UPTON.)

Collision—Damages—Salvage.

1. In a collision between a steamer and a sailing vessel in a fog, the steamer was going half-speed. Had she been going dead slow she might have been stopped in time to prevent the collision.

Held, that the steamer was partly in fault, although the collision was no doubt due to the want of a fog-horn on the sailing vessel.

2. The sailing vessel immediately becoming water logged and helpless, and in a position where, though safe for the moment, she might very shortly have been in great danger, it was a salvage service, towage not merely, to rescue her.

3. Where two vessels in collision are both in fault, salvage services performed by one towards the other are to be divided.

THESE were two actions arising out of a collision in the Straits of Fuca, about twenty-five or thirty miles from Victoria.

The *Zambesi* was the regular Japan steamer, of the Upton line, on her voyage to Victoria, well found and equipped and navigated in every respect. The *Fanny Dutard* was a three-masted schooner, laden with lumber, outward bound, beating out of the straits against the tide, with a light variable wind from the westward, steering by the wind. The night was foggy, occasionally very dense, with intervals of lighter fog, but always foggy. The schooner had no mechanical fog-horn at all as required by R.S.C., c. 79, s. 2, art. 12, only a horn sounded by the mouth. It was not produced at the trial and was alleged to have been lost at the time of the collision. The *Zambesi*, inward bound, with the tide, had been at half speed in an interval of lighter fog and was just reducing her speed on entering a

1891

THE ZAMBESI.

THE FANNY DUTARD.

Statement of Facts.

dense fog bank, when she heard a fog-horn faintly and perceived the bow of the *Fanny Dutard* at four hundred or five hundred feet distance right ahead and, before she could stop her way, struck her, stem on, nearly amidships, totally incapacitating her from further navigation, though being laden with lumber she was in no danger of sinking. The *Zambesi* took her in tow into the port of Victoria, for which she was herself bound. In performing this service she carried away two of her own hawsers, worth when new $175 and $150 respectively. The towage service was in the opinion of the assessors skilfully performed. The half speed of the *Zambesi* was about five miles per hour. She had been travelling for some time in the denser fog dead slow, at about two knots. The first action was brought by the owners of the *Fanny Dutard* for damages consequent on the collision. The second action was brought by the *Zambesi* for salvage.

December 12th, 14th, 1891.

The case was heard before Sir MATTHEW B. BEGBIE, C. J., Local Judge in Admiralty for the district of British Columbia, Capt. Sinclair, R. N., and Lieut. Melville, R. N., sitting with him as nautical assessors.

Pooley, Q.C., and *Helmcken*, for the *Fanny Dutard*, cited *The Franconia* (1).

Bodwell for the *Zambesi*, cited *The Franconia* (2); *The Margaret* (3); *The William Tell* (4); Marsden on Collisions (5).

Sir MATTHEW B. BEGBIE, (C. J.) L. J.—It seems clear, and we are all convinced, that the disregard by the steamer of the statutory rule as to a fog-horn

(1) L.R. 2 P.D. 12.
(2) *Ibid.*
(3) L.R. 6 P.D. 76.
(4) 13 L.T., N.S. Adm. 414.
(4) Pp. 30, 31, 36.

1891

THE ZAMBESI.

THE FANNY DUTARD.

Reasons for Judgment.

was the real cause—the *causa causans*—of the disaster; but in all cases of collision the immediate cause is to be regarded,—*causa proxima, non causa causans, spectanda est*,—and the immediate cause was the inability of the *Zambesi* to stop her way in time. Was that a fault in her? When a steamer and a sailing vessel are in danger of collision, the statute throws on the steamer alone the duty of getting out of the way. If she does not do so, *primâ facie* she is a wrong-doer and has neglected her duty. If it be said on her behalf that she could not stop in time, that only states in other words that she was going too fast to permit her to perform this duty. It is true, every vessel—steamer or not—has a right to keep herself safe; she cannot be safe unless under command; she cannot be under command unless she has steerage way; and therefore it is certain that even the statute permits, and, indeed, compels, a steamer to make some progress through the water. The rate of progress, therefore, alone is in question. Now, as the assessors point out, the *Zambesi* had for three-quarters of an hour on that very night deemed it quite safe, as far as her own navigation was concerned, to go dead slow. And if she had been going at that rate when the loom of the *Dutard* was first seen, I should have pronounced her free from blame. But she was at that time going half speed. This was an unnecessary rate for her own safety, and she must, unfortunately, stand to the consequences of having exceeded it.

Without any doubt the *causa causans* of the calamity was the almost criminal negligence of the schooner in regard to her signal outfit. There was very imperfect evidence as to the quality of her lights, and we are by no means satisfied that these were sufficient. But the lights were comparatively unimportant on this occasion;

1891

THE ZAMBESI.

THE FANNY DUTARD.

Reasons for Judgment.

the most important instrument of safety on that foggy night was undoubtedly a fog-horn,—and this was clearly quite inadequate. The assessors are well acquainted with the instrument, and inform me that with even a small horn it is quite usual to convey orders, by signal, at distances of a mile or even a mile and a half. We have no doubt but that if the *Dutard* had been furnished with such an instrument, the *Zambesi*, carefully navigated as she was, could easily have avoided her even at half speed. But the *causa proxima* of the collision was, we think, the unnecessary —we do not say improper—speed of the *Zambesi*. That speed might have been proper enough among vessels duly equipped; but it was not recollected on board the *Zambesi* that she might encounter some vessel that was not duly equipped, perhaps helpless, through no fault of her own. In fact the *Zambesi* was on the point of reducing her speed on entering the denser wreath of fog which, unfortunately for her, concealed the schooner. Both vessels being to blame there must be the usual reference to assess the damage, which will be divided. Then as to salvage. There was no immediate danger to life or ship, nor any difficulty or risk in the service performed, and not above three hours delay. But, though the *Dutard* was in no imminent danger, she was utterly unmanageable and might, within an hour, have been in most imminent danger. It was, therefore, highly important that she should be placed at once in a place of safety. I award one-tenth of the value of the schooner and cargo, not exceeding $2,000, one-half to be borne by each vessel, and there will be a reference as to that, unless the parties agree. The chief responsibility and merit of the salvage belongs to the *Zambesi* herself, and to the captain. I therefore award $\frac{5}{8}$ to the ship, $\frac{1}{4}$ to the captain, $\frac{1}{8}$

1892

THE ZAMBESI.

THE FANNY DUTARD.

Statement of Facts.

to be divided among the crew, in proportion to their wages.

As to costs. If I have jurisdiction, in a case where both vessels are in fault, I feel disposed to give the costs of the *Zambesi* in both actions against the *Dutard* if that can be shown to have been ever done.

[*Pooley*, Q.C.—Where both are to blame costs are divided.]

That is, of course, the general rule, and if I have no discretion that will be the direction in the first action for damages by the collision. In the second action costs to the *Zambesi* to be paid by the *Dutard*. But it will be better to reserve the whole question of costs, which may be mentioned again.

December 23rd, 1891.

The salvage action, *Upton* v. *Fanny Dutard*, came on again to be mentioned.

February 3rd, 1892.

Pooley, Q.C., wished to have the whole decision as to salvage reargued and reconsidered. No judgment has as yet been drawn up or signed, and the court has power to reconsider the result with a view to an appeal. [The *Monarch* (1); *Griffin* v. *Hamilton* (2).] Where both vessels are in fault, no salvage will be awarded to either, for she must necessarily be a wrong-doer and cannot be permitted to make a profit out of her own wrong. [*Glengaber* (3); *Cargo ex Capella* (4); *Griffin* v. *Hamilton* (5); The *Glamorganshire* (6); and the *Fanny Carvill* (7).] Where the neglect of statutory rules does not lead to the collision, it may be disregarded.

(1) 1 Wm. Rob. 21.
(2) 7 Ir. Rep. Eq. 141.
(3) 41 L. J. Adm. 84.
(4) 1 L.R. Adm. and Eccl. 356.
(5) 7 Ir. Rep. Eq. 141.
(6) 13 App. Cas. 455.
(7) 13 App. Cases 455, foot note.

1892

THE ZAMBESI.

THE FANNY DUTARD.

Bodwell contended that the power of reconsidering a judgment only extended to amending or explaining it, but not to a complete reversal.

Reasons for Judgment.

Sir MATTHEW B. BEGBIE, (C.J.) L.J.—I think Mr. Bodwell's contention right. The power of altering a decree after verbal utterance and before being drawn up, is undoubted. But I think this power ought not to be deemed to extend so as in fact and in substance to reverse the whole decision. Upon this application in the salvage action, both considerations arise. I shall avail myself of this opportunity of correcting a clear oversight as to the cargo. And I shall give an additional direction to the taxing-master as to the plaintiff's costs in the salvage action, viz., that the plaintiff is to get them, so far as they are distinguishable from, and additional to, his costs in the collision action. Neither of these matters received any attention on the argument at the hearing. But as to reversing my decision, which allowed salvage to the *Zambesi*, that being a matter which I had fully considered and discussed with the assessors, I much doubt whether that is within my power; that can probably be done only by a court of appeal. However, I still think the decision reasonable and not contrary to any decided case; rather carrying out the principles of the cases cited.

There does not appear to be any reported decision on the circumstances of this case, viz., a claim for salvage services rendered by one vessel to the other in collision, where both are declared to be in fault. In the *Cargo ex Capella* (1) the court expressly points out that the cargo was entirely innocent, and then lays down the principle, on which Mr. Pooley

(1) 1 L. R. Adm. & Eccl. 356.

1892

THE ZAMBESI.

THE FANNY DUTARD.

Reasons for Judgment.

strongly relies, that no man can make a profit out of his own wrongful act. That principle clearly applied in the case of the *Glengaber* (2): the collision had been occasioned by the vessel claiming for salvage, the other vessel not being, apparently, in fault. It strikes me that the principle must be applicable to both parties. The question was fully discussed before myself and the assessors; of course I am wholly responsible for the decision, but we did discuss it, and were fully agreed that this was a salvage service. The *Fanny Dutard* was drifting with the tide (which runs five or six miles an hour), quite helpless and quite unable to indicate her position either to a tug or to a passing ship,—in danger herself and a danger to navigation. Even if a tug had been summoned by the *Zambesi* on her arrival at Victoria, she would not have gone out on such an errand on the ordinary terms of towage; nor could she, probably, have discovered the disabled ship. It is none the less salvage, because a steamer to perform the service happened to be on the spot. If the service had been performed by a stranger, the remuneration, whatever it was, would have been part of the damages arising out of the collision, just as much as the repairs of the schooner, and so would have been divided between the two ships equally. If indeed the *Zambesi* had been solely to blame, the expense of a tug would have fallen on her exclusively, and she would, by performing the service merely, have exonerated herself from paying the stranger tug; she would therefore have been entitled to nothing at all. On the other hand, if the *Dutard* alone had been in fault, she would have had to pay the whole expense of the tug. Why should she, being the chief, and in our opinion, the real wrong-doer, take advantage of her own wrong, and get this salvage service *gratis*? The

(1) 41 L. J. Adm. 84

1892

THE ZAMBESI.

THE FANNY DUTARD.

Reasons for Judgment.

proper amount for salvage ought therefore, like the other expenses caused by the collision, to be divided equally. The assessors thought $2,000 would have been a proper sum if performed by a stranger. I thought that rather high. It was a very valuable service, no doubt, to the schooner—her existence, and the lives of her crew, probably, depended on it; but it was easily performed and involved no danger to life or limb or ship, of the salvors. I therefore awarded one-tenth of the value of the schooner as salved, not however to go beyond $2,000; the amount to be equally divided; one-half payable by the *Dutard*, distributed as I have directed.

Judgment accordingly.