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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Tuesday, Oct. 14, 1919.

SHIPBUILDING CONTRACT DISPUTE.

NITRATE PRODUCERS STEAM SHIP COMPANY, LTD. v. SHORT BROS., LTD.

Before Lord Justice BANKES, Lord Justice SCRUTTON and Lord Justice DUKE.

In this case the plaintiffs, the Nitrate Producers Steam Ship Company, Ltd., of Billiter Street, London, E.C., appealed from a judgment given by Mr. Justice Bailhache against them upon their claim to damages from the defendants, Messrs. Short Brothers, Ltd., shipbuilders, of Sunderland, in respect of delay in the delivery of the steamship *Anglo-Chilean*, built by the defendants for the plaintiffs under a contract dated Nov. 21, 1914. The claim was for £87,000, and Mr. Justice Bailhache, in case his decision in favour of the defendants should be reversed, assessed the damages at £50,000.

The judgment under appeal was reported in *Lloyd's List* on April 8, 1919.

Sir John Simon, K.C., Mr. F. D. Mackinnon, K.C., and Mr. C. R. Dunlop, K.C. (instructed by Messrs. Holman, Fenwick & Willan) appeared for the appellants; and Mr. R. A. Wright, K.C., Mr. H. A. Colefax, K.C., Mr. R. I. Simey and Mr. E. A. Digby (instructed by Messrs. Bolam, Middleton & Co., of Sunderland, Messrs. Maude & Tunnicliffe, agents) represented the respondents.

Sir JOHN SIMON, in opening the appellants' case, said that the contract for building the ship provided that she should be delivered by a particular date, and there was a clause which would excuse delay if the delay were due to certain named causes beyond the defendants' control. There was no doubt that these causes contributed to the delay down to a certain date, and that date was admitted to be Nov. 30, 1916. The dispute between the parties was this. The plaintiffs contended that the delay which occurred from Nov. 30, 1916, down to March 28, 1917—approximately four months—in delivering the steamer in accordance with the contract, was delay for which the defendants failed to show any justification. Under the contract the vessel, apart from her engines, had to be built in accordance with one specification, while the engines had to be in accordance with another specification and provided by Messrs. G. Clark, Ltd., engine builders, of Sunderland, but through the defendants. It was a term of the contract that before the vessel was handed over to the plaintiffs she should undergo an eight hours' steam trial. On Nov. 30, 1916, she had run her trial trip and was returning to the Tyne when a loud knocking was heard in the low-pressure cylinder. It was found that that cylinder was very seriously cracked, and the result was that another four months elapsed before the vessel was handed over to the plaintiffs.

The case for the plaintiffs was that the cylinder cracked because certain connections with the low-pressure cylinder were not only not in accordance with their instructions, but were quite contrary to the instructions they had given, in that they led into the hot-well. Therefore, plaintiffs said, there was no valid excuse for the delay that occurred, and consequently the defendants were answerable in damages for the delay. The reply of the defendants was that the delay arose from causes not within their control. They said it was quite true that the cylinder cracked by reason of the particular connections, but the connections were made as they were on the express instructions of Mr. Quelch, the plaintiffs' engineer, and therefore the fact that the cylinder cracked was not the defendants' fault, but rather that of the plaintiffs. Mr. Justice Bailhache entirely negatived the suggestion that the connections, made as they were, were made on Mr. Quelch's instructions.

Lord Justice BANKES: Why did Mr. Justice Bailhache decide for the defendants?

Sir JOHN SIMON explained that there were two connections with the cylinder, and the plaintiffs in their pleaded case set up that the water which passed from the hot-well into the cylinder and caused it to crack passed up one particular connection of these two connections. Mr. Justice Bailhache found as a fact that the water passed up by the other connection, and he declined to give the plaintiffs leave to amend on the ground that no engineer of reasonable skill and experience either would have or ought to have anticipated this damage from that particular breach of contract.

Both connections, continued Sir JOHN SIMON, were made in defiance of the plaintiffs' instructions, and his submission was that the defendants were liable,

no matter by which connection the water reached the cylinder. The plaintiffs' claim was for damages for delay in delivery of the vessel. They succeeded in that action unless the defendants brought themselves within the exceptions, and justified what was an admitted postponement of delivery. They sought to justify that by saying that the dangerous arrangement in question was put in on Mr. Quelch's instructions. The learned Judge had found that Mr. Quelch gave no such instructions. Therefore the defendants had wholly failed in the defence they set up in answer to the plaintiffs' complaint of delay. That being so, he submitted that the plaintiffs were entitled to succeed.

The hearing was adjourned.

Wednesday, Oct. 15, 1919.

The hearing of this case was continued to-day.

Sir JOHN SIMON, continuing his argument in support of the appeal, said that there was admittedly delay in the delivery of the vessel, and the defendants had failed altogether to show that which they alleged, namely, that the delay was due to instructions given by the plaintiffs' own engineer to carry the drain pipe from the steam chest, connected to the low-pressure cylinder, down to the hot-well. That defence, therefore, had entirely broken down and the plaintiffs were entitled to succeed. As to whether the pleadings showed that the cause of action was delay in delivery of the vessel, he submitted that they undoubtedly did, and that no amendment was required. He was, however, anxious to protect himself, and if the Court should think an amendment necessary, he should ask them to allow an amendment to the effect that in breach of the contract the defendants failed to deliver the vessel on Nov. 30, 1916, and such delivery was delayed until March 28, 1917, by reason of the cracking of the low-pressure cylinder, due to water being forced up the pipe connections and not getting away again.

Mr. COLEFAX, for the respondents, contended that no such amendment should be allowed because it would give rise to considerations which were never gone into in the Court below. The case was never opened as an action for damages for delay, but was opened as one for damages for breach of contract in the construction of the engines. Upon that question Mr. Justice Bailhache had found in favour of the defendants. The plaintiffs' case had entirely failed as they pleaded it and sought to support it by evidence.

Lord Justice SCRUTTON: Supposing the case is put against you properly that you ought to have delivered by a certain date and did not deliver till four months afterwards, and assuming there was a fixed date for delivery, and also supposing the Judge has found against you that the plaintiffs did not give the instructions as to the connections you allege, what is your answer to that case?

Mr. COLEFAX said his answer would be that the mishap to the cylinder arose from a cause beyond the defendants' control, because to fix the pipes as they were fixed was not an unreasonable or unlikely thing to do, and the defendants misunderstood the instructions.

Lord Justice SCRUTTON: A cause beyond the defendants' control because of ambiguous instructions?

Mr. COLEFAX agreed. Further, when the cylinder cracked the engines were under the control of engineers appointed by the engine makers.

The hearing was adjourned.

Thursday, Oct. 16, 1919.

The hearing of this case was continued to-day.

Mr. WRIGHT, following Mr. Colefax, on behalf of the respondents, said that the plaintiffs, in order to succeed, must prove a breach of contract and damages flowing from the breach. An amendment of the statement of claim which the plaintiffs were now asking the Court to give them leave to make, and which was not sought before Mr. Justice Bailhache, was an allegation that the damages flowed, not from a breach of contract, but from delay in delivery of the vessel. A claim for damages for delay in such a case as this was meaningless. The plaintiffs could only claim in respect of delay if there was something express or implied in the contract to show that the delay complained of was a breach of that contract.

They could only found an action based on delay by showing that there was a breach of covenant in the contract. That was to say, they must prove that whereas delivery had to be made upon a certain date under the contract delivery was, in fact, made at a later date. He agreed that if the action had been brought on the contract as originally drawn, and the ship had not been delivered by September, 1915, then there would have been a breach of covenant subject to the exceptions, and the defendants would have had to excuse their breach of covenant by causes within the exceptions.

But the case here was not that case at all. This contract, though entered into in November, 1914, was entered into rather in view of pre-war conditions than in view of the conditions that developed at the beginning of 1915, and, therefore, having regard to later events, the original date for delivery was departed from and there was entered into what amounted to a new agreement as regarded the date of delivery.

He did not mean that any new specific time for delivery was mentioned. But the original date of September, 1915, having admittedly gone, whatever the reason, no definite contract period was fixed. Therefore, as their first step in the case to be raised by the proposed amendment, the plaintiffs must show affirmatively that there was a date at which delivery under the contract ought to have been made, and that date could only be arrived at by consideration of what was a reasonable time, and that must involve going into various matters which so far had not been touched upon.

Lord Justice BANKES intimated that the Court, as at present advised, would not trouble Counsel to deal further with the proposed amendment with reference to the new claim for delay, as it must give rise to questions which were not before Mr. Justice Bailhache.

Mr. WRIGHT, with regard to the amendment which Mr. Justice Bailhache was asked to allow and refused, submitted that the learned Judge had rightly exercised his discretion.

Lord Justice SCRUTTON said that the learned Judge had refused to permit the amendment because in

his view it would not have made any difference in the judgment. The effect of that was really to shut out an appeal.

Mr. WRIGHT contended that, having regard to the findings of the learned Judge as to the cause of the cracking of the low-pressure cylinder, which led to the delay, the amendment ought not to be allowed.

The hearing was adjourned.

Friday, Oct. 17, 1919.

The hearing of this case was concluded to-day.

Mr. WRIGHT concluded his address on behalf of the respondents, contending that Mr. Justice Bailhache's decision ought not to be disturbed.

Mr. MACKINNON, in reply, urged that the defence which the defendants put forward to the action had completely failed, and that judgment ought to be entered for the plaintiffs.

Their Lordships reserved judgment.

COURT OF APPEAL.

Friday, Oct. 17, 1919.

EXPLOSION IN A FACTORY: FIRE INSURANCE.

HOOLEY HILL RUBBER AND CHEMICAL COMPANY, LTD. v. ROYAL INSURANCE COMPANY, LTD., AND OTHERS.

Before Lord Justice BANKES, Lord Justice SCRUTTON, and Lord Justice DUKE.

In this case the Hooley Hill Rubber and Chemical Company, Ltd., appealed from a decision of Mr. Justice Bailhache, upon a special case stated by Mr. A. M. Langdon, K.C., as sole Arbitrator in a dispute which had arisen between the appellants and the Royal Insurance Company, Ltd., the Atlas Assurance Company, Ltd., the London and Lancashire Fire Insurance Company, Ltd., and Motor Union Insurance Company, Ltd., in regard to the liability of the insurance companies under policies of fire insurance upon premises belonging to the appellants. The arbitrator's award in favour of the insurance companies was affirmed by Mr. Justice Bailhache, whose judgment was reported in *Lloyd's List* on May 12, 1919.

Mr. D. McGarel Hogg, K.C., and Mr. R. M'Cleary (instructed by Messrs. Hockin, Beckton & Hockin, of Manchester, Messrs. Vizard, Oldham, Crowder & Cash, agents) appeared for the appellants, the assured; and Sir John Simon, K.C., Mr. R. A. Wright, K.C., and Mr. G. D. Keogh (instructed by Messrs. Weightman, Pedder & Co., of Liverpool, Messrs. Paines, Blyth & Huxtable, agents) represented the respondent insurance companies.

Mr. MCGAREL HOGG said that the appeal gave rise to two questions in connection with a fire which occurred at the premises of the appellants. They were: (1) Whether a clause in the fire policies which excepted damage caused by explosion applied so as to exempt the insurance companies from liability where the explosion was only incidental to and in the course of the fire; and (2) assuming that the first point was decided against the appellants, whether the Royal Insurance Company was estopped from putting that construction upon their policy when it had induced the appellants to refrain from insuring against explosion loss, by making a representation in writing that the exception did not exclude such a risk.

The award of the Arbitrator stated that the Hooley Hill Rubber and Chemical Company, which manufactured the explosive known as T.N.T., carried on business at Ashton-under-Lyne on premises which they had built for that purpose. They were assured under policies issued by the Royal Insurance Company, Ltd., and three other companies. Condition 3 of the policy of the Royal Insurance Company, Ltd., provided:—

"This policy does not cover . . . loss or damage occasioned by or in consequence of invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, or any military or usurped power whatsoever, earthquake, volcano or subterranean fire, loss or damage by explosion, except loss or damage caused by explosion of illuminating gas elsewhere than on premises in which gas is manufactured or stored."

The other companies' policies contained a similar condition. There was also the following typewritten memorandum on the margin of the Royal Insurance Company's policy:—

"This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused, directly or indirectly, thereby or was not the result thereof."

On June 13, 1917, a fire broke out in the works, which burned fiercely, doing great damage, for some 20 minutes, when an explosion took place which shattered the premises. The explosion occurred by reason that a quantity of T.N.T. contained in closed receptacles was exposed to the intense heat of the conflagration. It was common knowledge among chemists and persons conversant with the manufacture or handling of T.N.T. that under such conditions T.N.T. was bound to explode. The loss sustained by the assured up to the time of the explosion he assessed at £12,740. The loss sustained by assured in consequence of the fire and explosion together amounted to a sum far in excess of the aggregate amount of the sums insured by the policies.

It was admitted on behalf of the insurance companies that they were liable to indemnify the assured in respect of the loss sustained in consequence of the fire, but the insurance companies contended that they were not liable under the policies for the loss consequent upon the explosion on the ground that the conditions of the policies excepted them from such liability.

On behalf of the assured, it was contended that under the policies they were entitled to be indemnified not only in respect of the loss caused by the fire, but also in respect of the loss caused by the explosion, on the ground that the explosion was an incident in the course of the fire and that the proximate cause of the whole loss was the fire. The arbitrator directed himself, on the authority of the case of Stanley v. Western Insurance Company (Law Reports, 3 Exchequer, 71), that he was bound to

hold that the contention of the insurance companies was well founded, and that the contention of the assured could not prevail.

A further contention was advanced by the assured, namely, that the insurance companies were estopped from denying that they were liable under the policies to indemnify the assured against loss which arose from the explosion. No evidence was given to establish that the insurance companies, other than the Royal Insurance Company, were in any way affected by the suggested estoppel, but evidence was laid before him in support of this contention as against the Royal Insurance Company, and, on consideration, he arrived at the following conclusions of fact and law :—

In 1915 the assured were organising their factory for the manufacture of T.N.T., and negotiating with the Royal Insurance Company as to the insurance to be effected, and, in particular, as to the sum to be insured and the kind of risks to be covered. The negotiations were conducted with the Manchester agent of the Royal Insurance Company, with whom all communications passed. No evidence was given of any interviews on the subject. On Sept. 27, 1915, by letter, the assured inquired whether the ordinary fire policies to be issued by the Royal Insurance Company covered them against fire arising from enemy bombs, and the agent, replying on Sept. 28, referred the assured to the conditions of the policy. Upon receiving such letter the assured were desirous of determining their position in the case of an explosion following a fire, and contributing to the damage done by the fire. Accordingly, on Oct. 12 they addressed an inquiry on this matter to the Royal Insurance Company. The agent replied on Oct. 13 :—

"We have pleasure in advising that damage caused by an explosion resulting from fire would be duly covered by an ordinary fire policy, with the qualification, of course, that the loss or damage as specified in the third condition of our policy would still be excepted."

By such letter the agent intended to inform the assured as to the legal effect of the policy to be issued by the Royal Insurance Company. The assured understood the letter as a notification that they were in fact covered against loss caused by an explosion following a fire other than an explosion due to enemy action, and, whatever be the true construction of the letter, the assured was in fact induced by it to limit his insurance against loss caused by an explosion following a fire to the policies about to be issued by the Royal Insurance Company. Consequently the assured did not cover themselves by taking out further policies against such loss. The agent's statements were repeated in a letter of Dec. 23. The assured were well aware that an outbreak of fire in a T.N.T. factory was almost certain to cause an explosion if the fire attacked the receptacles in which the T.N.T. was enclosed.

The Arbitrator directed himself in law that the letters of Oct. 13 and Dec. 23 were observations of an officer of the Royal Insurance Company during the negotiation of the policies as to the legal effect of the policies about to be issued, and that, as such, no estoppel arose against the Company to prevent them relying on the true meaning of the policies legally considered.

Subject to the opinion of the Court, he awarded that the insurance companies should pay the assured as follow :—

Royal Insurance Company, £5096; London & Lancashire Fire Insurance Company, £2548; Atlas Assurance Company, £2548; and the Motor Union Insurance Company, £2548.

If in the opinion of the Court his construction of the policies was wrong, and that the policies did in law cover loss caused by an explosion following a fire, he awarded the following sums should be paid :—

The Royal Insurance Company £10,400, and the other companies £5200 each.

If in the opinion of the Court his construction of the policies was right, but that he had wrongly directed himself on the question of estoppel, and if the Court was of opinion that the Royal Insurance Company was estopped from denying that the assured was covered against loss covered by explosion following fire, and from relying on the due legal effect of the policy, he awarded that the Royal Insurance Company should pay the assured £10,400, and the other companies £2548 each.

Mr. Justice Bailhache agreed with the Arbitrator in holding that on the first point the case was covered by Stanley v. Weston Insurance Company (Law Reports, 3 Exchequer, 71), his Lordship adding that that case was a binding authority and the Insurance Companies were right in saying that their policies did not cover an explosion in the circumstances of the present case.

On the second question of whether by reason of the representation made by the agent of the Royal Insurance Company there was an estoppel against that company, the learned Judge took the view that the agent was expressing his opinion of the legal effect of condition 3, and was not stating a positive existing fact. Upon this ground his Lordship thought that the Arbitrator was right, and that there was no estoppel against the Royal Insurance Company.

Mr. McGarel Hogg, on the first question, now submitted that the exception in the policies did not exclude liability for damage caused by explosion in the course of the fire. His contention was that if the proximate cause of the loss was fire, then the fire policy, apart from any question of exception, covered it. It was only in the event of the proximate cause of disaster being explosion and not fire, that the first policy would not cover it.

The hearing was adjourned.

HIGH COURT OF JUSTICE.

ADMIRALTY DIVISION.

DIVISIONAL COURT.

Monday, Oct. 13, 1919.

SALVAGE AWARD REDUCED.

WILLIAM WATKINS, LTD. AND OTHERS v. OWNERS OF SCHOONER "DEVONIA."

Before the President (the Right Hon. Lord STERNDALE) and Mr. Justice HILL, sitting with Captain A. W. CLARKE and Captain P. N. LAYTON, R.D., R.N.R., Elder Brethren of Trinity House.

In this case, the owners of the schooner *Devonia*, of Grimsby, appealed against a salvage award of £150 made by Sir John Paget, K.C., Deputy Judge of the City of London Court, in favour of Messrs. William Watkins, Ltd. (owners) and the Master and crew of the steam tug *Simla*.

Mr. L. Batten, K.C., and Mr. A. E. Nelson (instructed by Messrs. W. & W. Stocken) appeared for the appellants; and Mr. H. C. S. Dumas (instructed by Messrs. Clarkson & Co.) represented the respondents.

Mr. BATTEN said that the owners of the *Devonia* appealed upon the ground that the award of £150, made by the learned Deputy Judge, was so unreasonable as to call for the intervention of the Court. The *Devonia* was worth only £1500, so that the award was a tenth of her value. A two-masted topsail schooner, the *Devonia* was 137 tons net and 260 tons deadweight. While on a voyage from Tréport, France, to Hull, in ballast, the schooner in March last came to anchor in the vicinity of the Nore. While lying there she lost one of her anchors, and, in order to get under way, she slipped the other. Off Southend she was taken in tow by the *Simla*, which took her up to Gravesend, where she was moored to buoys.

The services lasted for two hours, and the distance towed was about 14 miles. The wind was a favourable fresh breeze from the E.N.E., falling light. There was, Counsel submitted, no difficulty or danger in the task. No bargain was made before the towage, but afterwards the Master of the tug asked for £125. Subsequently, the owners of the *Devonia* tendered £30. Sir John Paget, led astray, suggested Mr. Batten, by the advice given him by his Nautical Assessors, awarded £150. The learned Judge, in his judgment, said:—

> I have considered this case with the Nautical Assessors, and my conclusion is that this was a service admittedly of the nature of salvage, and the vessel salved was in a position of considerable difficulty and danger.

The PRESIDENT: Do you say that there was no salvage?

Mr. BATTEN: No; it is admitted to be a salvage service, because the vessel was crippled by the loss of her anchors, but her difficulties, I submit, were only potential, and not of such a nature as to justify the conclusion that she was in danger.

Mr. DUMAS, for the respondents, argued that the award was not outrageous, nor such as to shock the conscience of the Court. In other cases the award had exceeded the amount of the bail demanded, showing that the Court sometimes took a more generous view of services than did the salvors themselves. Therefore the fact that in this case only £125 was asked by the plaintiffs ought not to influence the Court. The value of money was not what it was, and the *Simla* was a most expensive salvage instrument. Her value was £17,000. The evidence was that the ordinary towage rate for this particular passage was £60 to £70, and, as this was a salvage service, he submitted that £150 was not an excessive award.

As to the danger, the wind might have become too strong for the *Devonia* or it might have dropped to a force too weak for her. In either case, she being without anchors, her position would have been a very awkward one.

JUDGMENT.

The PRESIDENT, in giving judgment, said:—This is an appeal from Sir John Paget, Deputy Judge of the City of London Court, in an action for salvage in which he awarded £150 as due to the plaintiffs for their services. The value of the salved vessel was £1500. The value of the tug was no doubt large. She is a valuable tug and a powerful tug. But the value of the tug really only comes into the matter in a very remote way, if at all, because it is not suggested that there was any danger or risk to the tug. Therefore it is only a small matter hardly to be considered.

The salvage here was very difficult to distinguish from towage. It was only distinguishable from towage in this way. The *Devonia* had lost one of her anchors and slipped the other. Therefore she was a crippled ship and any services rendered to her would be salvage services.

The wind had been stronger than it was at the time of the service. It was blowing from the E.N.E. Its force had been six to seven, but during the towage it was force five to six, and afterwards it fell to force five. Therefore, although it had been a moderate gale, the wind was falling light.

The *Devonia*, the salved ship, wished to go to Gravesend, and when off Southend she signalled for a tug. No evidence was given by the Master or Mate of the *Devonia*, and, therefore, we have no evidence as to what the signal was, except that the Master of the tug says he did not take any particular notice of what it was, but evidently he is unable to say, and he did not pretend to say, that it was a signal of distress. He admits that with the wind from the E.N.E. as it was, and blowing in the direction in which the *Devonia* meant to go, she could have sailed up to Gravesend perfectly well. The distance was about 14 miles. The tide was with the vessel for half the way, and against her for the other half of the way, and she was towed up in two hours. That is the nature of the service.

After the tug went to the *Devonia* in answer to the signal, there was some bargaining with regard to remuneration. The tug Master—and he is a tug Master not unfamiliar with salvage services—put his demand at that time at only £125. That is what he asked for the service. He knew what the weather was, and I presume that he was able to judge, so far as any one can judge, what were the weather prospects for the next few hours. He says that the rate for such a towage of a vessel not disabled would have been between £60 and £70. He added on to

that a certain amount for the vessel being crippled, and put his demand, at the highest, at £125.

I quite agree with what has been said by Counsel for the respondents that it is by no means unknown for the Court to take a higher view of salvage services than was taken at the time by those who rendered them. At the same time, it is not a matter to be neglected, and I have no hesitation in saying that, if the case had come before me as a Judge of first instance, I should have given a much less sum than the learned Judge below did.

But the Court will not interfere unless there is some misapprehension of facts and principles, or, without that, something so excessive in the award as, as it has been expressed, to shock the conscience of the Court. I do not know that the conscience of the Court is always the same, and I do not think it is necessary in this case to consider whether the conscience is shocked or not. If there has been a misapprehension of the facts, that is sufficient ground for the Court varying the award.

The learned Judge has based his judgment upon this: He says that this was a service admittedly in the nature of salvage. With that I entirely agree. Then he says: "The vessel salved was in a position of considerable difficulty and danger." That was the advice given to him by the Nautical Assessors sitting with him. If that were the case, probably this Court, although it might think the award too high, would not interfere.

But we have thought it right to ask the Elder Brethren whether it is correct to say that this vessel was in a position of considerable danger. They advise us that she was not. She was in a position of difficulty, no doubt. If certain things had happened she might have been in danger, but to say that she was in considerable danger is not right.

Therefore I think that this judgment proceeds under a wrong apprehension of the facts from a nautical point of view, the learned Judge having acted on the advice of his Assessors. We are advised that the advice given to him was not right, and, so far as I am in a position to express an opinion, I think the vessel was in no danger at all. Therefore I think we ought to reduce the award. In my opinion, £100 is ample for the service, although I do not think I should have given as much as that myself if I had had the case before me as a Judge of first instance.

The result is that the appeal must be allowed and the award reduced to £100, and the appellants must have the costs of the appeal.

Mr. Justice HILL: I agree.

ADMIRALTY DIVISION.

DIVISIONAL COURT.

Tuesday, Oct. 14, 1919.

APPLICATION FOR LEAVE TO APPEAL REFUSED.

WILLIAM WATKINS, LTD. AND OTHERS v. OWNERS OF SCHOONER "DEVONIA."

Before the President (the Right Hon. Lord STERNDALE) and Mr. Justice HILL.

An application was made in this case, in which their Lordships on Oct. 13 reduced from £150 to £100 an award made by Sir John Paget, K.C., Deputy-Judge of the City of London Court, in favour of Messrs. William Watkins, Ltd. (owners), and the Master and crew of the steam tug *Simla*, for salvage services rendered to the schooner *Devonia*, of Grimsby, in the Thames in March last.

Mr. H. C. S. DUMAS (instructed by Messrs. Clarkson & Co.), for the salvors, now applied *ex parte* for leave to appeal to the Court of Appeal.

The PRESIDENT: So far as I am concerned you will not get it. The Court of Appeal may give it you.

Mr. DUMAS: I was instructed to apply.

Leave to appeal was accordingly refused.

ADMIRALTY DIVISION.

Wednesday, Oct. 15, 1919.

COLLISION IN THE BRISTOL CHANNEL.

OWNERS OF STEAMSHIP "BOSCAWEN" v. OWNERS OF STEAMSHIP "HIGHCLIFFE."

Before Mr. Justice HILL, sitting with Captain A. E. BELL and Captain T. GOLDING, Elder Brethren of Trinity House.

The hearing was concluded of this case which was originally before the Court on March 5, and reported in *Lloyd's List* on March 7, 1919.

The suit involved a claim and counterclaim for damages arising out of a collision between the Cardiff steamship *Boscawen* and the South Shields steamship *Highcliffe*, in the Bristol Channel in the early morning of April 20, 1918.

Mr. A. D. Bateson, K.C., and Mr. Lewis Noad (instructed by Messrs. Downing & Handcock, of Cardiff, Messrs. Downing, Handcock, Middleton & Lewis, agents) appeared for the plaintiffs; and Mr. F. N. R. Laing, K.C., and Mr. R. H. Balloch (instructed by Messrs. Botterell, Roche & Temperley, of Newcastle, Messrs. Botterell & Roche, agents) represented the defendants.

According to the plaintiffs' case, shortly before 4 a.m. on April 20, 1918, the *Boscawen*, a steel screw steamship of 1936 tons gross and 279 ft. in length, while on a voyage from Cardiff to sea, under sealed orders, laden with a cargo of coal, was in the Bristol Channel, near the Nash. The wind was north-easterly, a moderate breeze, the weather fine but slightly hazy, and the tide ebb, of about three knots force. The *Boscawen*, on a course of N.W. by W. ½ W. magnetic, was making about six knots. The regulation lights were duly exhibited and burning brightly, and a good look-out was being kept.

In these circumstances, the green light of the *Highcliffe* came into sight about a point and a half on the port bow, about a mile to a mile and a half distant. The light was carefully watched as it drew across the bows of the *Boscawen*, and when the *Highcliffe*, being about half a point on the starboard bow, opened her red light and sounded a short blast, the helm of the *Boscawen* was put hard-a-port and a short blast sounded. Almost immediately afterwards the engines were put full-speed astern and three short blasts sounded; but the *Highcliffe* came on at high speed, and, with her port side forward, came into collision with the port bow of the *Boscawen*, doing damage.

Plaintiffs alleged that those on board the *Highcliffe* negligently and improperly failed to keep a good look-out; failed to keep clear; failed to port in due time; ported at an improper time; failed to ease, stop, or reverse; and failed to comply with Articles 1, 2, 19, 22, 23, 27, 28 and 29 of the Regulations for Preventing Collisions at Sea.

The case for the defendants was that shortly before 5 26 a.m. the *Highcliffe*, a screw steamship of 3238 tons gross and 335 ft. long, was, while on a voyage from St. Nazaire to Barry Roads for orders, in water ballast, in the Bristol Channel to the southward and westward of Nash Point, and between two and three miles from it. The wind was easterly, light, the weather was fine and clear, and the tide was ebb, of a force of one and a half to two knots. The *Highcliffe* was on a course of E. ¾ N. magnetic, and was making from 10 to 10½ knots. In accordance with instructions, she exhibited side lights and stern light only, which were burning brightly, and a good look-out was being kept.

In these circumstances those on board observed the masthead light and red light of a steamer, which proved to be the *Boscawen*, distant about one and a quarter miles and bearing about one point on the starboard bow. The helm of the *Highcliffe* was immediately ported, and the lights of the *Boscawen* were brought on to the port bow. Shortly afterwards the *Boscawen* was observed to be altering her course as if under starboard helm, bringing her green light into view. The helm of the *Highcliffe* was immediately put hard-a-port, and one short blast was sounded on her whistle, but the *Boscawen* shut in her red light. The helm of the *Highcliffe* was kept hard-a-port, and her engines were kept working full-speed ahead as the best means of avoiding a collision, and the one short blast was repeated. The *Boscawen* continued to close in on the port bow, gradually broadening, with her green light remaining open and her red shut in, and three short blasts were heard from her steam whistle. The steam whistle of the *Highcliffe* was sounded one short blast in reply, and the engines were put full-speed astern; but the *Boscawen*, bringing her red light again into view, with her stem and port bow struck the port side of the *Highcliffe* in the way of No. 2 hatch, doing her considerable damage, and afterwards struck her further aft on two occasions.

Defendants pleaded that a good look-out was not being kept on board the *Boscawen*; that that vessel improperly failed to keep to her course and speed; that her helm was improperly starboarded; that she, having altered under starboard helm, improperly failed to keep her starboard helm and improperly ported her helm or altered her heading to starboard; that she improperly failed to indicate by the appropriate or any signals the course she was taking; and that she improperly failed to comply with Articles 21, 28 and 29 of the Regulations for Preventing Collisions at Sea.

JUDGMENT.

Mr. Justice HILL, in giving judgment, said: This case has had the misfortune of being tried in bits, but this morning my attention has been properly called by Counsel to all the material parts of the evidence, and having talked the matter over with the Elder Brethren, I have no doubt at all what my judgment ought to be. The collision happened on the early morning of April 20, 1918, in the Bristol Channel off the Nash Light, between the *Boscawen*, a steamship of 1936 tons gross, 279 ft. long, which was laden, and the *Highcliffe*, a steamship of 3238 tons gross, 335 ft. long, in ballast. The weather was fine and clear; there was a light wind. The *Boscawen* was carrying her regulation masthead and side lights. The *Highcliffe* was carrying side lights only. She had a stern light, but that is immaterial. The courses and speeds were as follow:—The *Boscawen* was on a course of N.W. by W. ½ W., making six knots. The *Highcliffe* was on a course of E. ¾ N., and making 10 knots or a little more. They came into collision, the port bow of the *Boscawen* and the port side forward of the *Highcliffe* in the way, I think it was, of No. 2 hold, and then there was a subsequent contact further down her port side. It is common ground that when the two ships were first seen the red light of the *Boscawen* was to the green light of the *Highcliffe*. They were on slightly crossing courses, and it was the duty of the *Highcliffe* to give way, and of the *Boscawen* to keep her course and speed.

The real question in the case is this: Did the *Highcliffe* port timeously, thereby taking proper steps to give way, and were those steps defeated by the *Boscawen* starboarding, or did the *Highcliffe* take action much too late and so late that she could not avoid the *Boscawen*, the *Boscawen* herself taking no wrong action but only helping at the last by hard-a-porting? That really comes back to the question: Did the *Boscawen* starboard, because if she did not it is quite certain that the *Highcliffe* ported much too late.

The case pleaded by the *Boscawen* is that, she being on her course, she saw at a mile or a mile and a half and about one and a half points on the port bow the green light of the *Highcliffe*; that she kept her course and speed; that the *Highcliffe* drew across the bows of the *Boscawen* until she got somewhat on the starboard bow; that when she was a little on the starboard bow she opened her red light, and a short blast was heard from her; that then the *Boscawen* hard-a-ported and gave a short blast, and went full speed astern and gave three short blasts, but it was too late to avoid the collision.

That is the pleaded case and it is the case which is made in the evidence by her witnesses, subject to this, as Mr. Laing has pointed out, that there are matters in the cross-examination of the Chief Officer which Mr. Laing says show that it is not the

fact that the *Boscawen* never starboarded, and it is not the fact that the *Highcliffe* ported much too late. I will deal with that in a minute.

The case made for the *Highcliffe* as pleaded is that the masthead and red lights of the *Boscawen* were seen about a mile and a quarter away and about a point on the starboard bow; that the helm was ported and the ships were brought red to red; that shortly afterwards the *Boscawen* opened her green light, whereupon the helm was hard-a-ported and a short blast was sounded; that the *Boscawen's* red light was shut in and the short blast was repeated, and the helm of the *Highcliffe* hard-a-ported, full speed being maintained as the best means to avoid collision; that they heard three blasts, and gave for a third time a short-blast signal, and then went full astern, and at the last the red light of the *Boscawen* opened and the collision happened. The distances and times in the evidence of the Chief Officer of the *Highcliffe* are somewhat lengthened beyond the distances and times pleaded.

Now the case made by the *Highcliffe* is consistent with the *Boscawen* starboarding and then porting, but it is also consistent with the *Highcliffe* standing on much too long and porting when nearly across the bows of the *Boscawen* and close to. It is common ground that at the last the *Boscawen* was porting. The question is whether before that she starboarded. First of all, I will consider this: What conclusion ought I to draw as to the time at which the *Highcliffe* ported? I find that it was very late. The Chief Officer said that he did port, without giving any whistle, at a very substantial distance. I do not think that that is supported by any of the other evidence. As he was acting for the *Boscawen*, if he ported at that time, he ought to have signified it by whistle signal. Admittedly there was no whistling. The helmsman of the *Highcliffe* speaks to a porting and a short blast and a hard-a-porting and a short blast. The Master of the *Highcliffe* was roused by a short blast, stepped up upon the top of the chart room, and, as he states in his letter, saw the *Boscawen* then at a distance of two lengths.

I conclude that the whistling was a very short time before the collision, and I conclude also that the porting, which was accompanied by the whistling, was a very short time before the collision. I do not believe in the earlier porting which is stated by the Chief Officer of the *Highcliffe* to have taken place without whistling. I think that has been invented to try to excuse what, as a fact, was very late action. Why was that action taken so very late? The look-out man from the *Highcliffe* was not called, but it was not necessary, because there was no report from him at all. It seems to me to be pretty clear that the *Highcliffe* became aware of the *Boscawen* very late, and took action very late, with the result that she swung across the bows of the *Boscawen* and could not avoid her. Now, the other question in the case is: Did the *Boscawen* starboard? The evidence from the *Boscawen* is to my mind very clear upon this matter, except for the cross-examination of the Chief Officer of the *Boscawen*. On the other hand, the evidence from the *Highcliffe* in support of a starboarding by the *Boscawen* is exceedingly weak.

The conclusion I have come to is that the truth is that the *Boscawen* never did starboard, and it seems to me—and it is pointed out to me—that that is borne out by the evidence as to the angle of the blow, even if it be taken as pictured by the evidence from the *Highcliffe*, and the admitted fact is considered that the *Boscawen* at the last was porting. The case that the *Boscawen* starboarded involves this, that she starboarded away from her original course and then ported back in order to get back to her original course, and did get considerably to the northward of her original course. How that happened in the time it is very difficult to understand. I am advised that it could not have happened in the time—she could not have done it. Though I recognise that there is some confusion in the evidence of the Chief Officer of the *Boscawen* in his cross-examination, yet I think his evidence is quite reconcilable with the evidence of the Master of the *Boscawen* (which I thought at the time was very well given) when it is remembered that this was a swing collision brought about by the give-way ship standing on until she is very near the stand-on ship, and that it is very difficult for witnesses to be exactly accurate as to the bearing of the other ship at the moment, for it was only a moment that both lights were open to them. These were the matters which Mr. Laing called attention to, but while worthy of consideration, they do not weigh with me sufficiently to make me doubt that the *Boscawen* did not starboard.

If I find that the *Boscawen* did not starboard, it must show that the *Highcliffe* must have ported very late. I find in addition that the *Highcliffe* did port very late. That settles the whole case, for it is not suggested that the *Boscawen* did anything else wrong but to starboard. I find she did not. She was the stand-on ship. The *Highcliffe* was the give-way ship and she did not avoid the *Boscawen*.

I pronounce the *Highcliffe* alone to blame.

ADMIRALTY DIVISION.

Thursday, Oct. 16, 1919.

COLLISION IN A HULL DOCK.

OWNERS OF SAILING VESSEL "FRANCES & JANE" v. OWNERS OF SAILING VESSEL "LUNA" AND OWNERS OF STEAM TUG "KINGSTON."

Before Mr. Justice HILL, sitting with Captain A. S. THOMSON, C.B., and Rear-Admiral G. R. MANSELL, R.N., M.V.O., Elder Brethren of Trinity House.

In this case the owners of the Harwich sailing vessel *Frances & Jane* sued the owners of the Dutch lugger *Luna* and the owners of the London steam tug *Kingston* to recover damages arising out of a collision which occurred in the Prince's Dock, Hull, on Jan. 26, 1919, between the *Frances & Jane* and the *Luna*, when the latter vessel was in tow of the *Kingston*. Plaintiffs alleged that the collision arose by reason of the negligent navigation of one or both of the defendants' vessels. The owners of the *Luna* denied that the collision was caused by the negligent navigation of the *Luna*, and put the blame upon those in charge of the *Kingston*.

The owners of the *Kingston*, in their turn, denied negligence, and said that the collision could not have been avoided by the exercise of ordinary and

reasonable care, caution and maritime skill on the part of those in charge of the tug. Further, in third party proceedings, they claimed to be entitled, under the terms of their towage contract, to be indemnified by the owners of the *Luna* against any sum the plaintiffs might recover against them, the tug owners.

In their defence, under the third party notice, the owners of the *Luna* denied that they were liable to indemnify the other defendants.

Mr. J. R. Ellis Cunliffe (instructed by Messrs. J. A. & H. E. Farnfield) appeared for the plaintiffs, the owners of the *Frances & Jane*; Mr. D. Stephens, K.C., and Mr. A. E. Nelson (instructed by Messrs. A. M. Jackson & Co., of Hull, Messrs. Pritchard & Sons, agents) were for the defendants, the owners of the *Luna*; and Mr. C. R. Dunlop, K.C., and Mr. H. C. S. Dumas (instructed by Messrs. Locking, Holdich & Locking, and Arthur Mills & Co., of Hull, Messrs. C. J. Smith & Hudson, agents) represented the defendants, the owners of the *Kingston*.

According to the plaintiffs' case, about midday on Jan. 26, 1919, the *Frances & Jane*, a wooden barquentine of 193 tons net register, 103 ft. in length, and about 24 ft. in beam, was in the Prince's Dock, Hull. The weather was fine and clear, there was no wind, and there was no tide in the dock. The *Frances & Jane* was securely moored fore and aft respectively to the dolphin and the southern buoy, and was heading northerly. She had been so moored some days earlier on the instructions of the Dockmaster. A good look-out was being kept.

In these circumstances, the sailing vessel *Luna*, in tow of the steam tug *Kingston*, while navigating the dock, was so negligently managed by those on board of her and/or by those in charge of the *Kingston* that the *Luna* with her stem was allowed to strike the starboard quarter of the *Frances & Jane*, doing damage.

Plaintiffs alleged that those on board the *Luna* negligently and improperly failed to keep a good look-out; to keep clear of the *Frances & Jane*; to use the appropriate or any helm action to avoid collision; to slip her tow-rope in due time or at all to avoid collision; and to comply with Art. 29 of the Regulations for Preventing Collisions at Sea.

Further, they alleged that those on board the *Kingston* negligently and improperly failed to keep a good look-out; to keep the *Luna* clear of the *Frances & Jane*; and to comply with Art. 29 of the Regulations for Preventing Collisions at Sea.

The defence of the owners of the *Luna* was that at 12 45 p.m. that vessel, a wooden lugger of 86 tons net register and 172 ft. long, while on a voyage from Vlaardingen to Hull, in ballast, to load coals for France, was in the Prince's Dock lock, bound into the Prince's Dock. The *Luna* was in tow of the tug *Kingston*, made fast with a scope of about five fathoms of 6½-in. manilla rope. The lugger *Alida* was made fast astern of the *Luna* with a scope of about three fathoms of rope. The weather was fine and clear, the wind calm, and there was no tide. The *Kingston*, with the two luggers, was stopped in the lock for the bridge to be opened. A dock pilot was in charge of the luggers, and the Master of the *Luna* was at his wheel. The *Frances & Jane*, moored as stated by the plaintiffs, was nearly right ahead of the vessels in the lock and about 80 or 90 yards from the *Luna*, on which a good look-out was being kept.

In these circumstances, the Master of the *Kingston* (who had received orders from the Dockmaster or his assistant at the Humber Lock to take the luggers straight down the dock to the St. John's Church berth, at the top of the Prince's Lock), without getting any orders from the dock pilot, proceeded fast ahead with his tug, and as soon as she was clear of the lock pit she began to alter her course to port, as if under a starboard helm, and the helm of the *Luna* was starboarded and she followed the *Kingston*. At this time there was no room to pass up the Prince's Dock to the westward of the *Frances & Jane*, and the *Kingston*, which had got off the port quarter of the *Frances & Jane* and near to it, was hailed by the dock pilot to keep the vessels clear of the buoy to which the *Frances & Jane* was fast. The *Kingston* then ported her helm to go to the eastward of the *Frances & Jane*, crossing her stern. The helm of the *Luna* was put and kept hard-a-port to follow the tug and try and clear the *Frances & Jane*, and, although a rope was thrown from the *Alida* to the lockmen to try and check the way on the vessels, the *Kingston* kept on at full speed and just cleared the *Frances & Jane*, but caused the stem of the *Luna* to strike the starboard quarter of the *Frances & Jane*, breaking the tow-rope, and the *Alida* with her stem struck the stern of the *Luna*. In both collisions the *Luna* received damage.

The owners of the *Luna* alleged that those in the *Kingston* negligently and improperly failed to keep a good look-out; failed to tow the *Luna* at a slow and proper speed, or to keep a proper and safe course to the eastward of the *Frances & Jane*, and as directed by the Dockmaster or his assistant; began to tow the *Luna* to the westward of the *Frances & Jane*, and when too near to her tried to tow the *Luna* to the eastward of her; failed to tow the *Luna* so as to keep her clear of the *Frances & Jane*, and towed her into collision with that vessel; failed to ease, stop and reverse their vessel's engines in due time or at all; and failed to comply with Art. 29 of the Regulations for Preventing Collisions at Sea.

In their defence the owners of the *Kingston* stated that shortly before 11 30 a.m. the *Kingston*, a steam tug of 36.64 tons register, fitted with engines of 35 h.p. nominal, and of the length of 52 ft. 8 in., was in Prince's Dock, Hull, with the Dutch sailing vessel *Luna* and the Dutch barque *Alida* in tow. The weather was fine and clear and the wind about south-west, a light breeze. The *Luna* was the tow next astern of the *Kingston*, and was made fast with about six fathoms of rope out, and the *Alida*, with a similar scope of tow-rope, was astern of the *Luna*. The *Kingston* was heading to the northward, and making about two knots, with engines working at dead slow ahead. A good look-out was being kept on board her.

In these circumstances, and shortly after the *Kingston*, with her craft in tow, had entered the dock through the Mytongate Bridge, the *Kingston* was hailed from that bridge by the foreman bridge master to moor her craft in the north-west corner of the dock. The helm of the *Kingston* was at once ported, but the *Luna*, instead of following the *Kingston*, as she could and ought to have done, took a sheer to port and towards a sailing vessel, which proved to be the *Frances & Jane*, and which was lying moored with her head fast to the dolphin and her stern fast to a buoy. The engines of the *Kingston* (which tug had passed the *Frances & Jane* in safety) were immediately put to half-speed, in order, if possible, to pull the *Luna* clear of the *Frances & Jane*, but the tow rope parted on the *Luna* fairleads or bulwarks. Directly afterwards the *Luna* with her bowsprit struck the *Frances & Jane*

on the starboard quarter. Nothing further could be done by the *Kingston* to avoid the collision.

These defendants further said that the *Luna* was being towed under a contract containing (*inter alia*) the following provisions:—

> The steam tug owners are not responsible for the acts neglect or default of the Master Pilots or crew of the steam tugs or other persons in their employment . . . or for any damage or loss that may arise to such vessel or craft being towed or about to be towed . . . or any other ship or cargo or any pier wharf or other property through collision or otherwise whether such damage arise from or be occasioned by any accident or by any omission breach of duty mismanagement negligence or default of the steam tug owners or employees . . . and the owners or persons interested in the vessels or craft so being towed . . . shall and do undertake to bear satisfy and indemnify the steam tug owners against all liability whatsoever . . . in relation to any such loss or damage.

Mr. CUNLIFFE, at the outset, explained that the only one member of the *Frances & Jane's* company who was on board at the time of the collision was the Mate. The solicitors representing the owners of the vessel, when the day of trial was fixed, endeavoured to find the man, but it was ascertained that he had gone on a long voyage. Sooner than have the trial postponed, the solicitors wrote to the defendants asking them to agree that the *Frances & Jane* was properly moored at the time of the collision. They did so agree. No charge was made against the *Frances & Jane* in the pleadings, and Counsel, therefore, asked his Lordship to allow him to conduct the plaintiffs' case without calling evidence.

His LORDSHIP: It is admitted that the *Frances & Jane* was properly moored, that she was damaged by the *Luna* coming into collision with her, and that there was no negligence on the part of the *Frances & Jane?*

Mr. CUNLIFFE: That is so.

Mr. STEPHENS: I agree that there is no question about that.

His LORDSHIP acceded to Mr. Cunliffe's application.

Mr. STEPHENS said that there were third-party proceedings in which the owners of the *Kingston* (even though their vessel were found to blame) claimed to be entitled to be indemnified by the owners of the *Luna*, and in which the owners of the *Luna* denied the allegation. That was a separate issue, and he asked that the collision action should be disposed of first. The only question in the third-party proceedings was whether the owners of the *Luna* had entered into a particular form of towage contract.

Mr. Justice HILL agreed to the course suggested.

Evidence was then called on behalf of the two defendants on the question of navigation, and the hearing was adjourned.

Friday, Oct. 17, 1919.

The hearing of this case was continued to-day.

Mr. DUNLOP, for the *Kingston*, argued that if there were found to be personal negligence on the part of the Master of the tug, then the owners of the tow, the *Luna*, were liable, too, on the ground that the Master and crew of the tug were, for the time being, the servants of the owners of the tow.

Mr. Justice HILL: That means they are the servants of both the tug-owners and the owners of the tow.

Mr. DUNLOP: Yes, because they owed a duty to both. There were, continued Counsel, only two reported cases in which the Master and crew of the tug were held not to be the servants of the owners of the tow. Those cases were the *Quickstep* (15 Probate Division, 196), and the *W.H. No. 1* (1910, Probate, 199, and 1911, Appeal Cases, 30). In both those cases it was clearly proved, and the Court found as a fact, that the whole control of the navigation and the power of controlling the navigation lay in the tug alone. The *Quickstep* was a dumb barge without a rudder, and the *W.H. No. 1* was a Liverpool hopper which had a rudder but no motive power. In the absence of proof of that kind, the rule was that the Master and crew of the tug were the servants of the owners of the tow, because those on board the tow had the control, or the power of exercising control.

Mr. STEPHENS, for the owners of the *Luna*, on the question of law, submitted that no general rule could be laid down. The point of whether the Master and crew of a tug could be regarded as the servants of the tow must depend upon the particular facts of each case. Here was the case of a tug which took in two luggers, and which from start to finish never received an order from the luggers; a tug, which, in the language of the tug Master, after he started "carried on"; who said it was his practice in dealing with craft to control the navigation, and who said he received no order from anybody except that which he described as the disastrous order from the dock-foreman to go to the eastward. The dock Pilot on board the *Luna* was not there to navigate; that work was given to the tug.

Mr. Justice HILL: I shall have to look into this matter and I therefore reserve my judgment. But I may as well say at once that I shall find fault in the tug. I shall have to consider whether that, in law, makes the owners of the tow liable. As to that I can give no expression of opinion at present.

Evidence was then given in the third-party proceedings, in which the owners of the *Kingston* set up an alleged towage contract under which the owners of the tow were liable to indemnify them against any sum the plaintiffs might recover from them.

The owners of the *Luna* denied that their vessel was being towed under any such agreement, and pleaded that the towage was being performed under the ordinary common law liability of the tug-owners.

Judgment was reserved.