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*Oct. 19, 20.
*Dec. 1.

THE STEAMSHIP "ROSALIND" (DEFENDANT) ..... APPELLANT;

AND

THE STEAMSHIP SENLAC COMPANY AND OTHERS (PLAINTIFFS) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Maritime law — Collision — Negligence—Failure to hear signal — Evidence.

The S.S. "Senlac" was coming out of Halifax harbour taking the eastern side of the channel. There was a dense fog at the time and the fog signals were sounded at regular intervals. She was making about six knots and having passed George's Island heard the whistle of an incoming steamer. Fog signals were given in reply and when the incoming vessel the "Rosalind" was estimated to be about half a mile off the "Senlac" gave a single short blast and directed her course to starboard. The "Rosalind" replied to this signal and stopped her engines. Within a few seconds the "Senlac" was seen about a ship's length away on the port bow and almost at the same moment the latter gave two short blasts on her whistle and swung to port threatening to cross the "Rosalind's" bow. The "Rosalind's" engines were immediately put "full speed astern" but too late to avoid a collision in which the "Senlac" was seriously damaged. At the trial of an action by the latter reliance was placed on the failure of the "Rosalind" to respond to her signals but the first signal admitted to have been heard on the "Rosalind" was the one short blast when the "Senlac" went to starboard. The result of the trial was that both vessels were found in fault and on appeal by the "Rosalind":

Held, that the "Senlac" was in fault in continuing on her course when the vessels were quite near together instead of stopping and reversing and was alone to blame for the collision, and that the failure to hear her signals was not negligence on the part of the "Rosalind" and did not contribute in any material degree to the accident.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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APPEAL from a decision of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada dividing the damages resulting from a collision equally between the parties.

The material facts are stated in the above headnote.

Mellish K.C., for the appellant. The only negligence charged against the appellant is that of failure to keep a proper look-out which would have enabled her to hear the earlier signals from the "Senlac." But there is no finding that they were heard and no rule of law making failure to hear them negligence. Marsden on Collisions, p. 34; *The Campania*(1), at p. 292; *The Koning Willem I.*(2); *The Lepanto*(3).

The "Senlac" by going to starboard instead of stopping and reversing brought the ships into danger of collision, and is alone to blame, the "Rosalind" having done all that was possible to avert the disaster. See Marsden on Collisions, p. 416.

W. B. A. Ritchie K.C., for the respondents. From the findings and evidence it is clear that signals were given on the "Senlac" which should have been heard on board the "Rosalind," and whether heard or not the latter was guilty of negligence. Moore on Facts, vol. 1, p. 287; *The Saginaw*(4), at p. 711; *The Rondane*(5).

Even if the "Rosalind" had a right to cross the channel her speed was excessive. See *The Magna Charta*(6); *The Ebor*(7).

(1) [1901] P. 289.
(2) [1903] P. 114.
(3) 21 Fed. R. 651.
(4) 84 Fed. R. 705.
(5) 9 Asp. N.S. 106.
(6) 1 Asp. N.S. 153.
(7) 11 P.D. 25.

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As to the necessity for the "Senlac" to stop after hearing the "Rosalind's" whistle see *The Chinkiang* (1).

THE CHIEF JUSTICE.—I am inclined to think that there was some negligence in that the rate of speed at which the "Rosalind" passed Chiboucto Head (6 knots), and Meagher's Beach Lighthouse, and the Middle Ground buoy (about four knots), was, under the circumstances, excessive and I am also of opinion that the proper sound signals were not given by those on board the "Rosalind." But to succeed in this case it was necessary to go further and shew that this negligence materially contributed to the collision, and, in this respect, the evidence fails. On the contrary, I think, the evidence shews that, with ordinary care, the "Senlac" would have avoided the collision. I agree with the nautical assessor that, while the lack of care in the frequency and duration of the signals may have given rise to confusion or misunderstanding, they cannot be said to have contributed in a material degree to the collision. The captain of the "Senlac" (McKinnon) interpreted these signals as ordinary fog-blasts, so that he was not deceived by them.

As to the rate of speed, it is, in my opinion, proved that when the vessels came in sight of one another, at about 300 feet distant, the engines of the "Rosalind" had been stopped and were then immediately put full speed astern, whereas the speed of the "Senlac" was then about six knots and, instead of stopping and reversing and thus probably avoiding a collision, she kept on her course across the bows of the "Rosalind"

(1) [1908] A.C. 251, at p. 259.

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and made the collision inevitable. If, instead of thus proceeding recklessly on her way, the "Senlac" had stopped, reversed and gone full speed astern when the "Rosalind" was first sighted, there is every probability, as found by the nautical assessor, that the collison would have been avoided or, at most, if the vessels had come into contact, no material damage would have been caused to either.

In view of the very carefully prepared judgments of my brothers Davies and Duff, I do not think it necessary to discuss the facts at greater length.

DAVIES J.—This is a case of collision which occurred near the Middle Ground buoy in Halifax Harbour, on the afternoon of 1st July, 1907, between the screw steamer "Senlac," of 1,010 tons, outward bound on a coasting voyage, and the screw steamer "Rosalind," of 2,517 tons, bound inward from New York. It is admitted that the weather, during the day and at the time of the collision, was very foggy, with a light south-west wind.

The learned judge of the Nova Scotia Admiralty District had no difficulty in finding that the "Senlac's" breaches of the regulations for preventing collisions in Canadian waters had occasioned the collision, but he also found that the earlier fog-blasts given by the "Senlac," on her way out, and which the "Rosalind" contended had not been heard by her, should have been heard, and

that, if they were not heard, it was due to the negligence of the "Rosalind" and that the negligence contributed to the disaster.

He, therefore, found both vessels at fault and decreed accordingly.

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It was from this finding and the decree against her that the "Rosalind" appealed.

The "Senlac" did not appeal or question the finding as against her.

The question for us, therefore, is whether or not the decree can, under the evidence, as against the "Rosalind" be sustained.

It does not appear to me that it can.

The "Senlac" was, beyond any doubt, in fault, not only in proceeding in a fog at such an excessive speed down the narrow channel as six miles an hour, but in failing to stop her engines and reverse when she sighted the "Rosalind" and the danger of collision was imminent.

The nautical assessor says, in his report,

> in view of the fact that she sighted the "Rosalind" at a distance not too great to have stopped her way by going full speed astern she was at fault in continuing her course across the "Rosalind's" bow.

She was also on her wrong side of the narrow channel forming the entrance to the harbour. It would almost appear as if she had done everything possible to occasion the collision.

The immediate and direct cause of the collision, however, was the manœuvre adopted by the "Senlac" immediately she saw the "Rosalind," and, as her captain says, "in consequence of seeing her," of starboarding her helm and attempting to cross the "Rosalind's" bows.

Had he ported her helm instead of starboarding, or stopped and reversed her engines instead of continuing on at his six mile speed, the probabilities are strong that the collision would have been avoided.

The trial judge finds that the "Rosalind" was not proceeding up the harbour as cautiously as she might

have been, "and that negligence" was the cause of her not hearing the earlier fog-blasts of the "Senlac."

A close perusal of the evidence, part of which was taken by commission and was not given before the learned judge, has failed to satisfy me that the finding of negligence in not hearing the earlier fog-blasts of the "Senlac" could be sustained. The decided cases referred to before us, alike in England and the United States, collected in Marsden on Collisions at Sea (ed. 1904), at page 34, shew that the courts are unwilling to infer negligence from the mere fact that a fog-signal which is proved to have been sounded in the vicinity was not heard. It has been held by Sir James Hannen, in *"The Zadok"* (1), at p. 118, that

> proof that a fog-horn was blown yet was not heard at the distance it might be expected to be heard cannot be accepted as proof that there was negligence on the part of those who did not hear it.

In the case of *The "Campania"* (2), at p. 292, Gorrell Barnes J. says:

> But the fact that the sound of the fog-horn does not appear to have reached the ears of those on board the "Campania" is not sufficient to override the positive evidence of the witnesses from the barque that it was being properly sounded. The Elder Brethren advise me that, as a matter of experience, sound signals in a fog are not always to be heard as they might be expected to be, and especially by persons on steamers approaching at considerable speed and sounding their own fog-whistles, and that this makes it all the more necessary that the speed of vessels in a fog should be moderate.

In the Channel Pilot (9 ed.), art. 18, cited by Bucknell J. in *The "Koning Willem I."* (3), at p. 121, it is stated that:

> Apart from the wind, large areas of silence have been found in different directions and at different distances from the origin of sound, even in clear weather.

(1) 9 P.D. 114. (2) (1901) P. 289.
(3) [1903] P. 114.

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I am assuming, of course, cases where there is credible evidence on both sides. It may well be that the evidence from both ships may be true. Now, in the case before us, there is credible evidence on both sides. The fog-horn of the "Senlac" was, undoubtedly, blown several times as she was proceeding down the harbour and was heard by others than those aboard of her. On the other hand, the evidence of many witnesses on the "Rosalind," including the captain, the third officer, the man at the wheel, the "Hell Gate" pilot from New York, who was on the bridge, and the first mate, who was at the bow on the look-out, all concur that they were keeping a vigilant look-out and they did not hear any of these earlier fog blasts of the "Senlac."

The finding of the learned judge of negligence because they did not hear is very general. He does not say how far the ships were apart when the fog-signals should have been heard, or whether all those sounded or only some of them should have been heard, or what their apparent bearing from the "Rosalind" would have been had they been heard, nor does it appear that, if heard, the danger apparent of a possible collision would have been such as to call for other manœuvres being adopted by the "Rosalind" than those which were adopted. Perhaps, however, any more specific finding could not, under the circumstances, have been made. I will not, however, press the point further, because I am of opinion that, under our statute, R.S.C. ch. 113, sec. 916, copied from the Imperial Statute 17 & 18 Vict. ch. 104, sec. 298, which governs this case, where the collision took place in Canadian waters, in order to hold the "Rosalind" liable, the collision must appear

to the court to have been *occasioned by the non-observance on her part of some regulation she was bound to observe. The Cuba* v. *McMillan*(1). It was incumbent on the "Senlac" to prove that the negligence complained of and found, which I assume to have been not keeping a proper look-out so as to have heard the "Senlac's" earlier fog-signals, in part contributed to the collision. Nowhere is there any evidence from which we could draw such a conclusion. The collision was directly caused by the "Senlac" wrongfully starboarding her helm, without attempting to stop or reverse, when the "Rosalind" was first seen by her in the fog, and so throwing herself right across the latter's bows. This manœuvre was taken "in consequence of seeing her," as the "Senlac's" captain states. It was quite inexcusable and everything was done by the "Rosalind" to avoid its consequences that reasonably could be done.

Such being the case, I am quite unable to see how the "Rosalind" can be held in fault under our Canadian statute as in part contributing to the collision, even if she, at any earlier time, negligently failed to hear the fog signals.

As to the contention of Mr. Ritchie, that the "Rosalind" was in fault in crossing from Meagher's Beach to pick up the light on the Middle Ground of the channel, it is sufficient to say that I quite agree with the finding of the assessor that

> the "Rosalind," having passed Meagher's Beach, was navigated with due caution and was justified in her endeavour to make the Middle Ground buoy.

In doing so she did not break the rule requiring her to keep the eastern side of the channel. She did

(1) 26 Can. S.C.R. 651.

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keep to such eastern side of the channel in the sense that the Middle Ground light was about the centre of the channel and her course was to the eastward of that light. She was not obliged, in such a fog, to hug the eastern shore line.

I think the appeal should be allowed with costs and the judgment holding the "Rosalind" liable reversed.

IDINGTON J.—I concur in the opinion stated by Duff J.

MACLENNAN J.—I concur in the opinion stated by my brother Davies.

DUFF J.—The action out of which this appeal arises is the result of a collision which took place in Halifax Harbour near the Middle Ground buoy, on the 1st of July, 1907, between the "Senlac," a wooden ship of 1,010 tons, going out of the harbour, and the "Rosalind," a steel ship of 2,517 tons, going in. The collision occurred in daylight, in a thick fog. The "Senlac" was seriously damaged and beached in a sinking condition, the "Rosalind" being uninjured.

The action was tried by the local judge in admiralty, in Nova Scotia (assisted by an assessor), who found both ships to blame. The "Rosalind" appeals.

The account given by the captain and pilot of the "Senlac" shews that, after leaving the wharf in Halifax, the "Senlac" proceeded down the harbour under full steam, making, however (for reasons which need not be discussed), only about six knots an hour. For some time before the collision occurred they heard distinctly the fog-blasts of the "Rosalind" and

recognized them as the signals of an incoming steamer; but, notwithstanding this, the "Senlac" did not moderate her speed. As the vessels approached one another there seems to have been no misapprehension on board the "Senlac" respecting the direction in which the "Rosalind" was moving. The captain says:

Q.—After you made that observation, did you hear his fog-blasts again? A.—Yes.

Q.—How far away did you judge they were from you? A.—It was, I judged, about a mile and a quarter away. Over a mile.

Q.—What did you do when you heard them close to the course of your vessel? A.—I did not do anything just then.

Q.—Did you hear another one soon after? A.—Yes; soon after. About a minute or two after.

Q.—How far did you judge that was away? A.—I judged it was a little nearer. I did not do anything then. Then I heard a third one. I judged that it was from half to three-quarters of a mile away. I then gave one short blast of the whistle and directed my course to starboard.

And the pilot:

We blew the regulation blasts until we got pretty well towards their ship. The captain said he appeared to be getting closer, then he blew one short blast indicating a course to starboard.

There is no dispute that this blast was given by the "Senlac" and heard by the "Rosalind;" and it is admitted that a blast from the "Rosalind" followed it. What occurred immediately afterwards is the subject of direct contradiction. Those on board the "Senlac" say that, within a very short time—estimated at about a minute—the "Rosalind" came in sight and, almost simultaneously, blew two short blasts, which they took to be a helm signal indicating a course to port; and that the "Senlac" (answering with the same signal), accordingly starboarded her helm. The captain and crew of the "Rosalind," on the other hand, deny that this signal was given by her, and state that she

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gave no further signals except a short blast as the vessels came together. There is also a dispute respecting the relative positions of the two vessels when they came in sight. The "Rosalind" people say that the "Senlac," when first seen, was coming head on, masts in line bearing about a point on the port bow and distant between 200 and 300 feet. The captain of the "Senlac," on the other hand, says the vessels were on parallel courses, the "Rosalind" on his starboard bow. The assessor, in a report furnished by him to the learned trial judge, accepts, substantially, the account given by the "Rosalind" of the relative positions of the ships, and on this point (which, however, in the view I take of the case, is not of much importance), I agree with him. The other question—whether the "Senlac" was misled into taking a course to port by the blasts of the "Rosalind"—is a more difficult question; and, in this case, we have not the assistance of any definite finding. The evidence of those aboard the "Senlac" is supported by that of some persons on shore at a place of about half a mile from the place of collision; there is a great deal of force in Mr. Mellish's contention that these witnesses would not be expected to distinguish with accuracy between a double blast from one of the steamers and two single blasts delivered successively from the "Senlac" and the "Rosalind" with only a momentary interval between them. Two such blasts were delivered, and they were admittedly very shortly followed by two short blasts from the "Senlac." In these circumstances I do not attach much corroborative weight to this evidence.

Whether the signal indicating a course to port was or was not heard on board the "Senlac" I do not think the evidence justifies the conclusion that this manœu-

vre of the "Senlac," which in the view of the assessor was the immediate cause of the collision, was the result of that signal. The captain of the "Senlac" does not say that it was, and the absence of a distinct affirmation by him to that effect is rather strikingly significant. His account, indeed, of the relative position of the ships when the "Rosalind" hove in sight—that the "Rosalind" was on his starboard bow—would indicate that the manœuvre was the result of his own observation of her position, and this accords entirely with his statement, made more than once at the trial, that he starboarded in consequence of "seeing the 'Rosalind.'" Balancing the probabilities as best one can, I think the "Senlac" fails to make out that the "Rosalind" was responsible for this manœuvre.

Apart from the contention I have just been considering the principal fault charged against the "Rosalind" is that she failed to observe article 16 of the regulations, which is in these words:

> Every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The particular disobedience charged is that she did not take the course prescribed by the regulations on hearing the fog signals of the "Senlac." The evidence of those on board the "Rosalind" is that (with the exception of the signal given by the "Senlac" shortly before the collision, with the object, as her captain says, of indicating a course to starboard, and subsequent signals), these signals were not heard by them. The learned trial judge does not distinctly

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find whether they were or were not heard. The view expressed by him is that if they were not heard it must have been because the attention of those on board the "Rosalind" was not sufficiently on the alert for such signals; and, on that view, he found the "Rosalind" in fault. The facts in evidence upon which this opinion is based are simply these: the whistle of the "Senlac"—a powerful whistle, which in ordinary circumstances could be heard at a distance of two miles or more—was unquestionably sounded (at intervals not greater than three minutes), for the twenty minutes preceding the collision; these signals were distinctly heard in Halifax up to the time of the collision, a distance of nearly two miles from the place where the collision occurred; the whistles of both steamers were heard, as already mentioned, at a place about half a mile away, immediately before the collision; the signals of the "Rosalind" were (except during a short interval), heard on board the "Senlac" for a considerable time previous to the collision, and as to that interval the evidence does not enable us to judge with any confidence whether it was due to an omission on the part of the "Rosalind" to sound her whistle or to the noises on the "Senlac" (such, for example, as the sound of her own whistle), or, as suggested by Mr. Mellish, to exceptional atmospheric conditions. The captain of the "Rosalind," the look-out, and several other witnesses, two of whom were examined on commission, positively state that the "Senlac's" signals were not heard. The learned trial judge has, as I have said, not expressly refused to accept the statements of these witnesses; and, in the absence of such a finding, there really does not appear to be any good ground upon which this court can refuse to hold

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that these signals were not heard. Then there is really no direct evidence of lack of proper attention on the part of the officers and crew of the "Rosalind;" and I am not by any means free from doubt upon the question whether the facts I have mentioned are sufficient, in themselves, to support the inference the learned trial judge has drawn from them. Eminent and experienced judges have frequently, on the advice of experienced assessors, in the trial of admiralty actions, refused to accept credible testimony that a signal was not heard as sufficient evidence to shew that it was not given in the face of positive evidence that it was given; and it may be accepted that the vagaries and uncertainties of sounds in certain atmospheric conditions make it, as a rule, unsafe to infer that a signal was not given on one ship at sea because it was not heard upon another. On the other hand, it is, I think, impossible to lay down as a rule that in no circumstances would the fact that a signal proved to have been given on one ship was not heard by another be evidence of culpable inattention on the latter; and, in the circumstances here, I am unable to say that I am satisfied that the learned trial judge was wrong in finding, with the concurrence of the nautical assessor, that the signals given by the "Senlac" would have been heard by those on board the "Rosalind" if they had been on the alert for such signals.

A failure in the attending to the possibility of fog signals would, in the circumstances, clearly amount to a neglect of the direction contained in article 16, to act with "careful regard to existing circumstances and conditions;" but it does not follow that the "Rosalind" was in fault within the meaning of the statutory enactment applicable to this case. The language of

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the statute (which is that of the earlier English Act, 17 & 18 Vict. ch. 104) is as follows:

> If in any case of collision it appears to the court * * * that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel * * * shall be deemed to be in fault unless it can be shewn, to the satisfaction of the court, that the circumstances of the case rendered a departure from the said rules necessary (R.S.C. ch. 113, sec. 916).

In *The Ship "Cuba"* v. *McMillan*(1), this court held, following the decisions upon the English Act referred to, that where non-observance of the regulations *per se* is relied upon as constituting fault within this enactment, it is necessary to consider whether the non-observance did or did not in fact contribute to the collision. King J., who delivered the judgment of the court, uses these words, at page 661:

> Apart from statutory definitions of blame or negligence, there seems no difference between the rules of law and of admiralty as to what amounts to negligence causing collision. *Per* Lord Blackburn, in *Cayzer* v. *Carron Co.*(2); *The Khedive*(3). As applied to the case before us, the principle is that a non-observance of a statutory rule by the "Elliott" is not to be considered as in fact occasioning the collision, provided that the "Cuba" could, with reasonable care exerted up to the time of the collision, have avoided it. *The Bernina*(4).

The rule was also applied by the court of appeal in *H.M.S. "Sans Pareil"*(5).

We need not, I think, concern ourselves with the question whether, if the "Rosalind" had heard the "Senlac's" signals and committed no breach of article 16, the ships would or would not have been brought into danger of collision. Assuming they would not, the "Rosalind" is, I think, still entitled to succeed on

(1) 26 Can. S.C.R. 651.
(2) 9 App. Cas. 873.
(3) 5 App. Cas. 876.
(4) 12 P.D. 36.
(5) [1900] P. 267.

the principle stated in the passage I have quoted; because I think the evidence shews that she being where she was when the "Senlac" gave the first signal, admittedly heard on board the "Rosalind," the "Senlac" could, by the exercise of reasonable care have avoided the collision. The evidence is conclusive that the "Rosalind," on hearing the signal mentioned, stopped her engines and, when the "Senlac" came in sight, reversed them; and there can be no doubt that had the "Senlac" done the like, the collision could not have happened. Apart from any rule, knowing that she was in the vicinity of the "Rosalind"—an incoming ship—the slightest regard for the safety of the two ships demanded that the "Senlac" should at least take the precaution of stopping her engines until the position of the "Rosalind" should be accurately known. It is the opinion of the assessor that, when the "Rosalind" came in sight, the "Senlac" (though still under full steam ahead), had time by reversing her engines (as the "Rosalind" did), if not to avert the collision, at least so to lessen the force of the impact as to escape substantial injury.

But it is not, I think, necessary that the "Rosalind" should rely upon this view. The most ordinary attention to the obvious risks of the situation would have led the "Senlac," at the time she gave the starboard signal, to take such measures as might be necessary to avoid a collision; and this could easily have been done by simply stopping her engines. The truth seems to be that, at the moment the ships were in a position involving risk of collision, but no actual peril if both ships should be navigated with the caution which such a situation required; but that, while the "Rosalind" was navigated with care, the "Senlac"

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was navigated with a reckless disregard of the safety of both ships. It was this recklessness that was the proximate cause of the collision.

The appeal should be allowed.

Appeal allowed with costs.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondents: *H. C. Borden.*