THE

# Eastern Law Reporter.

VOL. VII. TORONTO, DECEMBER 15, 1909. No. 9

## DOMINION OF CANADA.

EXCHEQUER CUORT.

QUEBEC ADMIRALTY DISTRICT. MAY 12TH, 1909.

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, AND ALEXANDER D. THOMPSON v. THE SHIP "NORWALK."

*Shipping—Collision—Breach of Regulations—Liability.*

Holden, K.C., and Howard, for plaintiff.

Clarke, K.C., and Angers, K.C., for ship.

DUNLOP, D.L.J.:—The plaintiffs by their statement of claim in substance alleged as follows: (1) At about 4 o'clock p.m. on the 23rd October, 1907, the steam tug "Glide," of which plaintiffs are owners, left the lower end of the Soulanges Canal with the barges "Jet" and "Winnipeg," of both of which plaintiffs are owners, in tow, and proceeded down through Lake St. Louis on a voyage to Montreal by way of the Lachine Canal; the barges "Jet" and "Winnipeg" being towed abreast, the "Jet" being on the left or port side of the "Winnipeg." (2) That shortly before 7 o'clock p.m. on the same day, the weather being dark but clear, and the wind from between north and north-west, those on board the tug and her tow saw the white lights of a ship apparently about 2½ miles or 3 miles away and bearing about two points on their starboard bow; that the tug and her tow were then about abreast of lightship No. 3 in Lake St. Louis; that the tug then gave 3 blasts of her whistle as a signal to the other ship to slow down in order to enable the tug with her tow to pass through the narrow and difficult navigation of the channel that lay

between them before they met, in order to enable the tug and her tow to extricate themselves from a place where the vessels could not safely meet; that the tug and her tow were at this time on a course a little east of north-east, and the tug was was proceeding at about half speed, that is, about 5 miles an hour over the ground, the current there running at a great speed, and for a considerable distance almost at right angles to the direction of the ship channel, making navigation particularly difficult for a tug or tow. (3) That from 3 to 5 minutes after her first signal, the tug "Glide" again gave 3 blasts on her whistle for the same purpose, but the approaching ship, which was the "Norwalk," did not answer either of these signals or give any intimation that she was going to act in accordance therewith. (4) That as the "Norwalk" still came on, the tug "Glide" gave a single blast on her whistle as a warning to the "Norwalk" to keep her starboard side of the channel in any event; and the tug and the barges in tow put their wheels hard over to port and the "Norwalk" answered by one blast on her whistle. (5) That the ship channel below No. 3 lightship becomes very narrow and at No. 2 lightship the channel suddenly turns about due east; that after the tug "Glide" had rounded No. 2 lightship the "Norwalk" met her and passed by at some distance off on her port side; that the barges "Jet" and "Winnipeg" followed their tug, but the "Norwalk" swung to port and the bluff of the "Norwalk's" port bow came into collision with the port bow of the barge "Jet." (6) That the "Norwalk," when she collided with the "Jet," stove in the latter's port bow and shattered her planking and otherwise seriously injured her and her contents and equipment, and as a result of the collision the hawsers attaching the barges to the tug "Glide," and the lashings between the barges were broken; and the "Jet" began rapidly to fill with water, but managed to keep afloat until she settled on the shoals about a mile below lightship No. 2. (7) That the "Norwalk," had no proper lookout on duty, and (8) did not respect the right-of-way to which the other ship was entitled on account of the current, and (9) did not respect the right-of-way that the other ship was entitled to on account of being a tug with a tow. (10) That the "Norwalk" did not stop and wait a sufficient distance below the lightship to enable the tug and tow to round the bend in the channel without danger of a collision, and (11) did not keep her own starboard side of the

channel; but (12) starboarded her helm while the tug and tow were passing on her port side; (13) did not keep sufficient steerage-way under the circumstances, and (14) was permitted to become uncontrollable and drift towards the tug and tow while they were passing, and (15) did not comply with the signals given by the tug, and tow; (16) That the "Norwalk" did not make for the north side of the lightship early enough, and did not go far enough in that direction; (17) and did not comply with the rules for navigating the waters in question as enacted by order in council of the Governor-General of the 20th April, 1905, and in particular with articles 2, 19, 27, 28, and 29. (18) That the master or other person in charge of the "Norwalk" did not, after the collision, render or offer to render said tug and tow, their masters and crews, any assistance whatever, nor give them or either of them the name of his vessel, her port of registry, and the ports from and to which she was bound; but on the contrary, proceeded directly on her course up Lake St. Louis without making any attempt to communicate with said tug or tow. (19) That the collision and the damages and losses consequent thereon were occasioned by the negligent and improper navigation of those on board the "Norwalk";

That plaintiffs claimed (1) a declaration that they are entitled to the damage proceeded for; (2) the condemnation of the defendant and its bail in such damage and in costs; (3) that an account be taken of such damage with the assistance of merchants; (4) such further and other relief as the nature of the case may require.

The defendants by their statement in defence in effect alleged as follows: (1) That the defendants are the owners of the screw steamship "Norwalk" of about 881 tons register of the port of Mt. Clemens being in the United States of America, and having a crew of fifteen. (2) That the "Norwalk" was proceeding on its voyage up stream from Quebec to Detroit on the evening of the 23rd October, 1907, having passed out of the Lachine Canal at about ten minutes to six o'clock in the evening; that the night was dark but clear, and the regulation lights on the "Norwalk" were duly exhibited and burning brightly and a good lookout was being kept on board her. (3) That she arrived at a point in the cut in Lake St. Louis a little below No. 2 lightship when a tug, subsequently proved to be the "Glide," appeared in sight, and from her lights, appeared to have a tow, although the lights

of the tow barge did not appear. (4) That when the "Norwalk" and the tug "Glide" were about half a mile apart the "Glide" sounded one blast of its whistle, which was responded to by the "Norwalk." (5) The "Norwalk" kept well over to the channel bank which it had on its starboard side, and reduced its speed to about bare steerage-way. (6) The "Norwalk" continued to keep well over to this side of the channel and was safely passed by the tug "Glide," but the barges which the "Glide" had in tow did not keep clear of her, and one of them, which proved to be the "Jet," came in collision with the "Norwalk" at a point in the stream a little below No. 2 lightship, the bluff of the "Norwalk's" port side receiving a glancing blow from the barge "Jet." (7) That save as hereinbefore appears, the several statements contained in the statement of claim are denied. (8) A good lookout was not kept on board the "Glide" nor on board the "Jet" or the "Winnipeg," and (9) they, or some one of them, did not have a proper lookout. (10) Those on board the "Glide" neglected or omitted to keep her course over to the other side of the channel and away from the "Norwalk." (11) No steps were taken on either the "Jet" or the "Winnipeg" to keep these barges over to the other side of the channel and away from the "Norwalk." (12) The helm of the "Winnipeg" was not ported, nor (13) the helm of the "Jet." (14) It was dangerous for the tug "Glide" to proceed down the channel having two barges abreast of one another in tow. (15) The regulation lights were not burning on the tug and barges. (16) The collision was occasioned by some or all of the matters alleged in the paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 hereof, or otherwise by the default of the "Glide" or of the barge "Jet" or of the barge "Winnipeg," or those on board one or the other of said ships or on all of them. (17) No blame in respect of the collision is attributable to the "Norwalk" or to any of those on board her.

The plaintiffs by their reply to defendants' statement of defence in effect alleges (1) that they are ignorant as to the truth of the allegations contained in paragraph 1 of said statement of defence; (2) deny paragraphs 2 and 6 thereof except in so far as the allegations therein contained are in accordance with plaintiffs' statement of claim herein; (3) plaintiffs pray acte of defendant's allegation in paragraph 3 of said statement of defence to the effect that the lights exhibited by the tug "Glide" shewed that she had a tow;

but deny the balance of said paragraph except in so far as the same is in accordance with plaintiffs' statement of claim herein; (4) admit paragraph 4 of the statement of defence; (5) deny paragraphs 5, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 and (6) join issue as to the allegations of paragraph 7 thereof.

The intervening plaintiff by his attorneys, Messrs. Geoffrion, Geoffrion & Cusson, intervened in said action as appears by notice and affidavit filed in this matter of date the 9th October, 1908, whereby they notified Messrs. McLennan, Howard & Aylmer, attorneys for plaintiffs, and Messrs. Clarke, Bartlett & Bartlett, attorneys for defendant, that on the 12th October, 1908, they would move on behalf of Alexander D. Thomson, of the city of Duluth, in the State of Minnesota, one of the United States of America, grain merchant, for an order allowing him to intervene and making him a plaintiff in this case for the purpose of urging his claim for the sum of $8,208.50, the whole, as explained in his affidavit attached to said notice, with interest and costs, and of making evidence and being heard in support thereof, and for the purpose of availing himself of any condemnation that might be pronounced in said case; and for such other purposes as he might be entitled to.

The hearing of said motion was continued to October 21st, 1908, when it was granted, costs being reserved.

At the trial the plaintiffs moved to amend their statement of claim alleging that in said statement of claim endorsed upon the writ of summons in rem plaintiffs are described as being the owners of "a certain barge, her cargo and freight"; alleging further that this statement is in error in as much as plaintiffs were not owners of the cargo, and should be described in said statement as bailees of the cargo, and asking that they be permitted to amend the said statement of claim, changing the description reading "The plaintiffs as owners of a certain barge, her cargo and freight," to the following, "The plaintiffs as owners of a certain barge, and her freight and as bailees of her cargo;" so that the whole endorsement would read "The plaintiffs as owners of a certain barge, and her freight and as bailees of her cargo claim the sum of twenty-six thousand five hundred dollars for damages occasioned by a collision which took place in Lake St. Louis on the 23rd day of October, 1907, between the said ship 'Norwalk' and the said barge and for costs."

It has been admitted by the parties to this cause that the intervenant was the owner of the cargo of the barge "Jet" in question in this cause; and the foregoing motion is consequently granted, but without costs.

Inasmuch as the said intervention has not been answered or contested, and as it has been admitted by the parties to this cause that the intervenant was the owner of the cargo of the said barge "Jet"; the said intervention is now maintained and plaintiffs are ordered to account to the said intervenant for any damage to the fund due to the cargo of the barge "Jet" resulting from the collision in question, and to pay over any amount that may be awarded to them or that they may receive as damages to said cargo; and further, the defendant is adjudged and ordered to pay to the intervenant the costs of the said intervention up to the time of its allowance, inasmuch as the defendant opposed the allowance of said intervention.

The evidence in this case is more than usually contradictory, even for a collision case. But a great many things are no longer in dispute which were apparently in dispute under the pleadings. For example, the dimensions and cargoes of the vessels, their ownership, the course followed by the tug and tow and the course followed by the steamer "Norwalk" up to the moment just before the collision, the channel, its direction, width and depth, more particularly in the neighborhood of the St. Louis lightship No. 2 near where the collision occurred—all are no longer in dispute.

The tug "Glide" belonging to plaintiffs left the Soulanges Canal on a voyage to Montreal on the afternoon on the 23rd October, 1907, having in tow two barges belonging to plaintiffs, the "Winnipeg," a large barge about 180 feet long with a load of from about 1,200 to 1,300 tons, and the barge "Jet," about 145 or 150 feet long, with a load of flax seed, of a gross tonnage of about 600 or 700 tons. The barges were lashed abreast to the "Glide" by a seven inch hawser, and the barges were lashed very firmly together by at least four lines from their respective timber heads. In fact they were lashed as close as they possibly could be, as several witnesses have testified, and they formed as it were one ship.

It has been established and conclusively proved that this was the correct mode of towing two barges down Lake St. Louis; although one barge might be, as was the case in the present instance, considerably smaller than the other. Now

it was one of the principal charges made against plaintiffs in defendant's preliminary act and plea, that this was an improper mode of towing; but no proof has been adduced to contradict the evidence of plaintiffs' witnesses that this was the ordinary way of bringing those barges down the lake; because, as the experts said, the tug had a very much better control over the barges when lashed together in this way.

It has been also established that as you descend Lake St. Louis, coming near the Chateauguay light, termed "lightship No. 3, the channel narrows, and it continues narrowing till immediately past the St. Louis lightship, termed lightship No. 2." Just below this lightship it widens out again. The channel there is proved to be in a north-easterly direction as far as a little below lightship No. 2, where it turns eastward. The channel itself does not bend until opposite the black buoy, the lower of the two black buoys which are placed below the lightship and indicated on the chart, plaintiffs' exhibit No. 2, and the descending vessel taking the southern part of the channel would continue on its course without any alteration if it kept in the centre of the south part of the channel until 500 or 600 feet below lightship No. 2, where it would take the bend east for Lachine.

The charts shew, and practically all the witnesses state, that at lightship No. 2 the channel for boats of fourteen feet draft is at least 400 feet wide, with the lightship practically in the centre of the channel. It is important to observe that this measurement is taken in the narrowest part of the channel, not north and south, but slightly north-west and south-east, in order to get it as narrow as that.

Mr. Fusey, the engineer, a witness examined on the part of the plaintiffs, who was cognizant of the whole matter and took the soundings and prepared the departmental plan, plaintiffs' exhibit No. 2, states in his evidence, and the plans confirm what he says, that in taking a line between the two black buoys east of lightship No. 2, the width of the channel north and south is 850 feet, of which about 200 feet lies to the south of the east and west lines, through the lightship and 650 feet lies to the north of the east and west lines through the lightship.

It is proved that at lightship No. 2 there is a strong current coming down from the channel of the Ottawa River, which is shewn in the chart to be in a north-westerly direction and sets across the channel towards the south.

The witnesses state that the current runs from two to three miles or more an hour, setting in a southerly direction across the channel, that is to say, that at lightship No. 2 it would strike vessels a little on the quarter, almost abeam; then after they took the bend below the lightship would strike them more and more astern; a little further down it would strike them exactly astern. It will be seen afterwards that this current has an important bearing on the case,

As to the weather on the evening of the accident, which occurred about 7 p.m. All agree that it was clear though dark, and there was a light wind blowing from the north or north-west. The lights on all the vessels are well proved. Both the "Glide" and "Norwalk" carried regular lights. The tow carried the regulation lights, to wit, a red light was carried on the "Jet" on the port side, and a green light on the "Winnipeg" on the starboard side. All went well with the "Glide" and tow from the time they left the Soulanges Canal until near the lightship No. 3, when a steamer, the "Norwalk," was seen, which afterwards came in collision with the barge "Jet" and evidently struck with great force her port bow, shortly after the "Glide" and her tow had rounded the lightship No. 2. The steamer "Norwalk" evidently struck the barge "Jet" with great force, as the 7-inch hawsers, by which the barges were towed, were broken, causing the barges to break away from the tug and each other, thereby causing great damage to the "Jet," and practically destroying her cargo of flax seed.

Now, taking into consideration the nature of the channel and its width and dimensions at and near where the collision occurred, in order to determine whether the "Norwalk" and the tug and its tow were properly managed at and previous to the time of the accident, which question is after all the crucial point in the case, it is necessary to determine, if possible, the exact place where the collision occurred. It may be remarked that it is admitted on behalf of the "Norwalk" that they knew and recognized that a tug with a tow was descending the lake when about 3,500 feet away from it, as testified by Captain Goodrow, the master of the "Norwalk." In view of this fact, if there had been proper management of the vessels, the collision should have been avoided.

It will be necessary, in order to discover who was responsible for the damage, to examine the very voluminous evidence taken in this case with care.

I find it proved (1) that the tow had come straight down the channel from lightship No. 1 to lightship No. 2, and that at the time of the collision the barge was heading a little to the south and swinging to port, that is to say, to the south, with wheel aport, and the tug was pulling also in the same direction: (See evidence of Cholette, pp. 188, 201, 209; Moreau, pp. 281, 285, 292, 293; Malette, pp. 231, 234, 236, 261; Dennemy, p. 267 et seq., and O'Connor, pp. 38, 78, 79),

I find it also proved (2) that the collision occurred when the cabin of the "Jet" was opposite lightship No. 2, and (3) that the "Jet" was from 20 to 30 feet to the south: (See evidence of Moreau, pp. 282, 290, 291; Cholette, pp. 191, 203, 204, 207; Malette, pp. 234, 260, and O'Connor, p. 43).

In my opinion it has also been established, although on this point the evidence is contradictory, (4) that the "Norwalk" as well as the barges were at the moment of the collision in the waters south or south-east of lightship No. 2: (Malette, pp. 240, 261; Moreau, p. 285; Kennedy, pp. 154, 156, 161, 168).

Kennedy, on the "Glide," swears that he saw the light of lightship No. 2 over the bow of the "Norwalk" immediately after the collision (pp. 170-173 of the Transcript of Evidence).

See also O'Connor, p. 43, and Mahoney, pp. 137-138, who saw it about a minute after the collision.

It is established (5) that the "Jet" is about 138 feet between perpendiculars, and therefore about 145 feet over all (Henderson, pp. 176, 177), and that the cabin of the "Jet" is from 15 to 20 feet from her stern (Moreau, pp. 281-291).

Having carefully examined all the evidence in this case, I am of opinion that the collision occurred about 125 feet below, that is, east or south-east, of lightship No. 2. This is virtually confirmed by what the witnesses state. Moreau, at p. 292 of the Transcript of Evidence, says, 130 feet; Malette, p. 260, 140 feet, and Cholette, p. 207, 125 feet.

The witnesses for the "Norwalk" say that the collision took place from 50 to 75 feet below the lightship. (See evidence of Goodrow, Chestnut, Comins, Johnston and Ellis.) In my opinion, the witnesses on the tow were far better placed to judge the position of the "Jet" with regard to the lightship than those on the "Norwalk"; and it is reasonable to say that they were in a position to be certain that at the time

of the collision the cabin of the "Jet" was opposite lightship No. 2. But the witnesses on the "Norwalk" had to depend on their estimate of the distance of a light across a stretch of water on a dark night, and nothing could be more deceptive.

The channel is that portion which is either naturally of a depth of 14 feet, or has been dredged to a depth of 14 feet, and can be easily traced on the chart by noting the soundings, and the scale of the blue print chart produced shewing the soundings is 400 feet to the inch. From the chart it will be seen that the narrowest part of the channel is a line through the first black buoy and the lightship, where it is about 440 feet wide. But it is important to note that the width through the point of collision, whether the collision occurred 50, 75 or 125 feet east of the lightship, is, as shewn on the chart and as stated by the witness Fusey, p. 110, about 850 feet wide, and it is the same width for 400 or 500 feet below, where it narrows slightly, but continues of ample width for nearly a mile below lightship No. 2. It will be seen that the channel a few feet below lightship No. 2, widens quickly to an extent of 850 feet, and there is at least 850 feet to the north of the line between the two black buoys, as is established by the chart and the evidence of the witness Fusey.

All defendant's witnesses contend that the tug and tow went north of the fairway of the channel, while plaintiff's witnesses swear exactly the opposite.

I think it was wrong to say that the lightship lies east and west, and that the channel was only 440 feet wide where the collision occurred. It was 440 feet wide at the shoals, which are westward and north-westward of the lightship, but the channel is much wider where the collision occurred.

The fairway swings up very much further north than the east and west line between the lightship. The principal part of the bend in the channel is considerably below the lightship, as the witnesses shew and the chart establishes. All the expert witnesses say that the "Norwalk" should have stayed below when she saw a tug and tow coming down and recognised it as such, except Chestnut, the pilot of the "Norwalk," upon whom the responsibility must fall if plaintiffs succeed in their action.

It has been proved, as I stated before, that the "Norwalk" recognised that a tug and tow was coming, when it

was distant from the "Norwalk" about 3,500 feet. Captain Goodrow says that when he got to the turning buoy, which is about 3,500 feet east of the lightship, he saw the lights of a tow and recognised it as such. Though the experts say it would have been prudent for the "Norwalk" to have stayed below, it was not contended by plaintiffs' counsel that there was any statutory regulation to that effect; but it seems to me it was one of the duties which rested upon the "Norwalk" so to do, in order to avoid the danger of a collision by meeting a tug and tow in a portion of the channel proved to be dangerous owing to the fact of its being comparatively narrow, and the very material fact that there was a strong cross-current. It seems to me that the current accounts, to a great extent, for the manner and place in which the collision happened; as it was shewn that the "Norwalk" did not take this sufficiently into consideration. The pilot, Chestnut, seems entirely to have ignored the current, and Captain Goodrow frankly says he did not know of the existence of the current at the time of the collision, but he knows it now. At pp. 488 and 489 of the Transcript of Evidence he was interrogated and answered as follows:—

"Q. I presume you know the channel changes its direction shortly above that? A. A trifle, yes.

"Q. So that you get the current in a different position with regard to your boat shortly above that? A. I did not know then, but I do now.

"Q. You were relying on Chestnut for that kind of thing? A. Yes, sir.

"Q. How soon after did you learn this? A. I don't know."

When the "Norwalk" decided not to stay below, as she could easily have done, as has been established in this case, notwithstanding what the pilot, Chestnut, says, she took the risk of coming on, and if in default must be responsible for the consequences of taking that risk. All the other witnesses say it was perfectly safe for upcoming vessels to slow up and stop, so far as the current is concerned, anywhere in the reach below lightship No. 2; and experts say that is what they would have done if they had been in the position of the "Norwalk" and saw a tow coming down, particularly at night, in order to avoid meeting it in a narrow channel near lightship No. 2, and more particularly in view of the cross-current; the "Norwalk" had plenty of time to have taken

that precaution, but having taken the risk coming on, should have kept as far to the northward of the channel as possible. This she did not do, and did not allow for the current. Captain Goodrow does not seem to have known this, and they were coming along holding their course, just to clear lightship No. 2 by 10 feet. There was a powerful cross-current which began to bear on the vessel and make it edge or sag off, and the result was that they found themselves in the southern part of the channel, as the current had been drifting the "Norwalk" continually towards the south, and I find the collision occurred in the southern part of the channel at the place above mentioned.

The material question in this case is as to the management of the "Norwalk" and the tug and tow immediately before and at the time of the collision; because no one seems to have imagined there was any danger of a collision until it actually happened. I am of opinion it was imprudent in the "Norwalk" not stopping; I find she took the risk of coming on. I find further that there was nothing to prevent the "Norwalk" keeping further north than she did, as it is shewn she just cleared lightship No. 2 by 10 feet, and that the collision might have been avoided if reasonable care and skill had been employed in the navigation and management of the "Norwalk" by its master and officers and crew. The "Norwalk" did not respect the right-of-way that the tug and tow were entitled to.

With respect to the sketch made by Captain Goodrow, when examined, and fyled as exhibit D 3, purporting to shew the position of the boats at the time of the collision, I do not think that it shews the true position of the vessels at the time of the collision. This sketch is simply a rough copy of the plan or sketch, defendant's exhibit No. 2, which was produced subject to plaintiffs' objections, and has not been proved; and which plan I refused to allow Captain Goodrow to refer to owing to the objections made by counsel of plaintiff. This exhibit was produced under reserve of the objections made to its production by counsel for plaintiff.

These objections are now maintained, and inasmuch as this plan has not been proved, I order it to be rejected from the record.

It seems to me strange that on the night of the accident, which is proved to have been fine, though dark, with little wind, that those on board the "Norwalk" should not have

heard the 3 blasts twice repeated by the tug "Glide," and which has been conclusively proved to have been the customary signal in those waters, notifying up-coming vessels to check down, and also that they should not have seen the lights on the tow, while it is proved that they heard the one blast given by the "Glide" indicating that she was keeping to starboard. It has been proved that the whistle of the "Glide" was a loud and hoarse whistle, and could be heard a considerable distance off.

Another fact worthy of remark is that all the witnesses examined by defendant say that when the collision occurred, the shock was but a slight one, and a glancing blow. Now it is proved, beyond all question, that the blow was a severe one, that the bow of the barge "Jet" was stove in, and she immediately filled with water; that the seven inch hawsers, comparatively new, which fastened the barges "Winnipeg" and "Jet" to the tug "Glide," were broken, and the barges at once separated, and the ropes fastening the barges together were broken, that two of the crew of the barge "Jet" at once jumped into the barge "Winnipeg" to save themselves. It was also shewn by the evidence of two of defendant's witnesses that they in any event considered the collision a serious one in view of what they did. I refer to the evidence of Johnston and Ellis.

The pilot Chestnut of the "Norwalk" seems to have been very uncertain as to the course he should take. His evidence shews (and more particularly the statement he made at the enquiry held before the Wreck Commissioner, and which in his evidence he has admitted to be correct), that he first intended to pass to the south of the lightship, but was reluctantly compelled, as he states, to go to the north. What he stated before the Wreck Commissioner, and what he admitted to be correct, will be found at p. 565 of the evidence:—

"Q. Where did you first get the impression that the quarters were going to be narrow? A. When I passed the upper gas buoy.

"Q. That was the place where you realized that the quarters were going to be close? A. Yes, that he was coming. I saw I would have to take the north side, and said to myself that I did not want to go there. I was kind of hanging off to let him get past, and then go in behind him. He came over between 'C' and 'F' (This refers to marks on a plan

produced before the Wreck Commissioner.) In fact I thought he was past us when he struck us, because the tug was past us and I supposed he would follow right after her."

Now, with respect to the contradictory evidence as to the part of the channel where the accident occurred, all plaintiffs' witnesses swear positively that when it occurred, the tow and barges were in the channel south of the lightship, while defendant's witnesses swear as positively it was in the channel north of the lightship. Pilot Chestnut says the barges were north of the lightship, and, at p. 544 of the evidence, says: "I did not think of going into the south channel. I gave her (the tow) the whole channel, and got to the north side myself. That is why I went up past the gas buoy as far as I did." It will be seen that this is contradicted by what he said before the Wreck Commissioner, where he states, "I would sooner have gone to the southward but could not."

As to the contention of the defendant that the "Norwalk" could not have been in the position where she was seen after the accident. It seems to me that the blow and the force she received when the collision occurred would have turned her round so that she could have cleared the lightship at least by 10 feet. Now, what did this blow do to the "Jet"? It stove in her bows, it stopped her—she was going 5 miles an hour; it broke 2 seven-inch hawsers and also broke the ropes fastening the barges together, and turned the "Jet" athwart the channel. Yet it is contended by defendant's witnesses that it had no effect whatever on the "Norwalk" except to scrape a little paint off her bows. Here was a tow, consisting of two barges lashed together, making one complete whole, both heavily laden. The "Winnipeg" was almost as big as the "Norwalk." Her gross tonnage was over 1,200 tons. The tonnage of the "Jet" was about 700 tons; and in addition to this there was the tug with 2 new seven-inch hawsers pulling on its tow. So that we have practically a single vessel coming down with the momentum of the tug and those two barges together. They are coming down at 5 miles an hour, and collide with the "Norwalk" which is coming up more or less against the current, at a speed of at most three miles an hour. All this shews that the collision was a violent one, and I cannot conceive that it had no effect whatever on the "Norwalk."

The "Norwalk" was a large steamer of about 881 tons register, heavily laden and proceeding on a voyage to Detroit. It has been proved that after she left Lachine on the evening in question, about 6.30 p.m., she twice touched bottom. Plaintiffs contend that this indicated she steered badly, while defendant says that this was owing to the unusual lowness of the water at that time. However, the fact remains, she did twice touch bottom shortly before the collision in question occurred.

It must be remembered in deciding this case that a tow of two heavy barges with a hawser of 125 feet in length would make it impossible for the tug and tow to stop or slow up more than would be safe in accordance with the necessity of controlling the tow, while there was nothing to have prevented the "Norwalk" stopping in the reaches below lightship No. 2.

I am of opinion that the defendant made a mistake in assuming that the lightship No. 2 lies east and west, and in assuming that the channel was only 440 feet wide at the place where the collision occurred. All the witnesses say that a tug with a tow descending Lake St. Louis, always hugs closely lightship No. 2, so as to straighten out the tow when going down the channel, and that very often the tow sheers off.

Now, in the present case, if the tow did sheer off a little so as to encroach in the northern half of the channel to the extent of 10 feet, as contended by some of defendant's witnesses, this would not, in my opinion, relieve the "Norwalk" from fault, for there was no occasion for her to pass the lightship so close as she did, as no matter whether the collision occurred 50, 75 or 125 feet east of or below the lightship No. 2, there was plenty of water in the north channel for the "Norwalk" to have kept out of the way; and if she had done what she alleges she did in her preliminary act and defence, there would have been, in my opinion, no collision, and it has been established that the channel was much wider at the place where the collision occurred as I have stated above.

The authorities are clear that even if there had been some initial fault on the part of the tug and tow, which I do not find proved in the present case, yet the tug and tow would not be responsible for the collision, if by the exercise of reasonable skill on the part of the master, officers and crew of

the "Norwalk," the collision could have been avoided, and, in my opinion, such reasonable skill on the part of the master, officer and crew was not exercised at and before the collision. There was no occasion to have kept the "Norwalk" so close to lightship No. 2, and there was nothing to have prevented her keeping farther to the north, where there was plenty of water.

Defendant contends strongly that the "Norwalk" was properly navigated, according to the evidence of the expert, Macdonald, a witness examined on behalf of the plaintiff, but it must be remarked that this witness did not say that the "Norwalk," under the conditions existing at and previous to the collision, was properly navigated. On the contrary, he states he should have remained below until the tug and tow had passed down, or kept well to the north side of lightship No. 2. See what he says at pp. 375 and 376 of the Transcript of Evidence, where he was interrogated and answered as follows:—

"Q. If you were coming up the lake with one of the steamers, such as you have described—that is a canal size steamer—and you met a tow coming down, under such conditions, when you could come abreast of her about the light. What would your duty be under those circumstances? That is if you had no signals from her whatever? A. Well, if I met a tow anywhere near the light coming down there, I would take the other side.

"Q. The north side of the lightship? A. The north side of the light.

"Q. Did you ever do that? A. Yes, sir.

"Q. More than once? A. Yes, sir, more than once.

"Q. And, if you were not going to take the north side of the lightship, would you have any other course open to you? A. Well, if I saw him coming into me in time, I would check down, and wait below altogether. In order to give him time to get out. I could go to the other side if I wished."

And further on he says:

"Q. If you did not know the north channel as well as the south one? A. I would not go.

"Q. What would you do then? A. I would wait below, outside. There is lots of room there."

The lookouts, both on the "Norwalk" and on the tug and tow, may not have been as efficient as they should have

been, but I do not think that this contributed at all to the collision.

Plaintiffs contended that the "Norwalk" should have stopped after the collision, and offered to render assistance, which certainly was required as regards the barge "Jet," which drifted down and stranded some distance above the Lachine Rapids, and part of her crew was afterwards rescued by a boat being sent after the tug had returned from towing the "Winnipeg" to a place of safety. But as the crew of the "Norwalk" say they did not hear any cries for assistance, though it is proved that assistance was called for, as the tug was there, and the barges were near shore, I think, under the circumstances as disclosed by the evidence, they were not in fault in going on as they did. I am of opinion that there would have been no collision if the "Norwalk" had stopped shortly after she recognized that the "Glide" and her tow were coming down, and this she did when it was about 3,500 feet away, as testified by Captain Goodrow

I am further of opinion there would have been no collision if the "Norwalk" had kept further to the north, where she would have had ample water to have passed the tug and tow in safety.

The channel was that part of the lake which either naturally or dredged had a depth of 14 feet, as shewn on the chart produced.

Now, even if, in the first instance, the tug and tow were in fault, which I do not find, yet if the collision could have been avoided by reasonable care on the part of the master, officers and crew of the "Norwalk," the tug and tow would not be responsible for the accident.

Now, on this point I might refer to a recent Admiralty case of the "Etna" reported in the Times Law Reports, vol. 24, p. 270, and following, where Mr. Justice Bucknill, referring to the management of the torpedo boat "Wear," which had been in collision with the steamer "Etna," said: "He failed to act (referring to the officer in charge of the torpedo boat), until too late, and just failed to clear the 'Etna' by 40 feet. It was agreed that on the authority of H. M. S. "Sans-Pareil" (1900), P. 267, the rules of common law as to negligence applied, and that if the "Etna" was initially negligent, yet she might escape if by reasonable care and skill the "Wear" could have avoided her.

This, however, had not been made out to his satisfaction, as the "Etna" was not only negligent in getting in between the two lines of the flotilla, but there had evidently been a bad lookout on board, for she did not see the starboard division of the flotilla at all." And the Judge, having regard to the negligent navigation of the "Wear" also, held both vessels to blame.

The decision in the torpedo case above cited shews that the "Sans-Pareil" case is a binding authority on the Admiralty Court in England; and there, notwithstanding that the Nautical Assessors in the first Court held that there was no negligence in the "East Lothian" in passing across the bows of the "Sans-Pareil," the Court held as the "Sans-Pareil" might, with ordinary care, have avoided the collision, she was alone to blame for the collision. This case was taken to appeal on the ground that there was improper navigation on the part of the "East Lothian," and the damage sustained should have been, in any event, divided. Different assessors assisted the Court of Appeal, which confirmed the judgment of the Court below, and which asked the assessors the following question as mentioned at p. 282 of the Probate Reports, 1900:—

"Q. Was the 'East Lothian' under the circumstances of this case guilty of negligence in passing across the bows of the 'Sans-Pareil'?" The answer is: "It was improper navigation," which the Court of Appeal took to mean that the assessors did not advise them in the same way as the elder brethren in the Court below, and accepted their advice so given.

Lord Justice Smith, in giving judgment, at p. 283 of the reports, said: "The well known rule of contributory negligence laid down by Lord Penzance in the House of Lords, in Radley v. The London and North Western Railway Co., L. R. 1 A. C. 754 is, 'that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident'; but there is this qualification equally well established, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not ex-

cuse him. The case of the "Margaret" (Cayser v. Carron Co., 9 App. Cas. 873), shews that the common law doctrine is applicable to such a case as that now before us."

Reference might also be made to the remarks of Lord Justice Williams, who, at p. 287, said: —

"The only remaining question is whether, applying the common law rules to this matter, there is evidence of such a state of circumstances that the plaintiff is disentitled to recover. That there was negligence by the plaintiff there can, to my mind, be no doubt. If the evidence of our assessors is right, there obviously was, and, speaking for myself, I entirely agree with the view they take. But, according to the rule laid down in Radley v. London and North Western Railway Co. that is not sufficient; you must shew that the negligence was of such a character that the defendant could not, with ordinary skill and care, have avoided the accident. That rule applies equally in the Court of Admiralty where the practice is that if both ships are to blame, the damage is to be divided: (See the "Margaret:" Cayzer v. The Carron Co., 9 App. Cas. 873). In that case Lord Blackburn and Lord Watson made it clear that the common law principle governs the Admiralty Rules, and that if the consequences of the neglect of plaintiff could have been avoided by ordinary care and prudence on the part of defendants, the negligence of plaintiffs would be no answer to the action."

In the case of the Hamburgh Packet Co. v. Desrochers, 8 Ex. C. R. 304, BURBIDGE, J., in rendering judgment, said:—

"The effect of the statute (referring to the English statute) is to impose on a vessel that had infringed a regulation which is prima facie applicable to a case, the burden of proving, not only that such infringement did not, but that it could not by possibility, have contributed to the accident. That is the rule for which the appellants contend, and it is no doubt the rule to be followed in Canadian Courts in cases of collisions on the high seas, but it is not applicable where the collision occurs in Canadian waters."

This must always be borne in mind when considering the English authorities, and such authorities prior to 1873 are only applicable, the English law having been then changed. Previous to that time the law was the same as the present Canadian law.

The case of the "Khedive" is referred to at pp. 303-4 of 8 Exchequer Court Reports, as follows:—

"The alteration of the law in 1873 was an important one. The occasion of it, and its effect, will be seen by reference to the following cases: In Tuff v. Warman the defendant was charged with having so negligently navigated a steam vessel in the river Thames as to run against and damage the plaintiff's barge. The case came before the Exchequer Chamber in 1858. The effect of the decision cannot, I think, be better stated than it was by Lord Blackburn in the case of the 'Khedive,' decided by the House of Lords in 1880: 'On the construction of this and similarly worded enactments, it has been held, in Tuff v. Warman, that though the plaintiff had infringed the rules, and by his neglect of duty put the vessel into danger, yet if defendant could by reasonable care have avoided the consequences of plaintiff's neglect, but did not, and so caused the injury, the plaintiff could recover, as under such circumstances the collision was not occasioned by the non-observance of the rule.' This, he adds, 'prevented the statute from producing the effect that those who framed it wished; but nothing was done until attention being apparently called to the subject by the case of the "Fenham," Section 17 of the Merchant Shipping Act, 1873, was enacted.'"

This was evidently one of the earlier cases referred to in the judgment of the Exchequer Court, where the presiding Judge said:—

"When that happens," (referring to the collisions in Canadian waters), "the rule to be followed is that established by the earlier cases; it is necessary then in considering the English authorities to distinguish between cases decided before and those decided after 1873, when the Act was passed."

With reference to the jurisprudence bearing particularly on this case, it is well known that from the Victoria Bridge down we are practically under the International Rules of the Road, that is to say, the Canadian Government has made the Imperial Rules applicable in their entirety from the Victoria Bridge down stream. But from the Victoria Bridge up stream we are under the regulations as passed by Order in Council on the 20th April, 1905. These Rules are printed in the first part of the volume of the Dominion Statutes, 4 & 5 Edw. VII., p. 60. Art. 25b of these regulations is important and reads:—

"In all narrow channels where there is a current and in the rivers St. Mary, St. Clair, Detroit, Niagara and St.

Lawrence, when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of half a mile of each other, give the signal necessary to indicate which side she elects to take." This was done by the "Glide" by giving the one blast of her whistle, indicating that she was keeping to starboard.

I would also refer to the case of the "Independence" decided by the Privy Council in 1861, see reported at 14 Moore P. C., p. 103. In that case the ship that met the tug and tow was in a much more favourable position than the "Norwalk" is in this case, because she was a sailing ship. This is what the Privy Council said when they held the sailing ship in fault: at p. 115, Lord Kingsdown, in giving the judgment of the Court, said:—

"A steamer unencumbered is nearly independent of the wind. She can turn out of her course and turn into it again with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. But a steamer with a ship in tow is in a very different situation. She is not in anything like the same degree mistress of her own motions, she is under the control of and has to consider the ship to which she is attached. She cannot, by stopping or reversing her engines, at once stop or back the ship which is following her. By slipping aside out of the way of an approaching vessel, she cannot, at once and with the same rapidity, draw out of the way of the ship to which she is attached, it may be by a hawser of considerable length, and the very movement which sends the tug out of danger may bring the ship to which she is attached into it."

I would also refer to the case of the "American" and the "Syria," reported in Law Reports, 6, Privy Council Cases, p. 127. This is a judgment of the Privy Council in 1874. In that case the "American" was found to blame; she was towing the "Syria," and both struck a sailing ship. Sir Robert Collier, in delivering the judgment of the Court, commented upon the decision and the passage above quoted in the "Independent," and the effect upon that decision of the promulgation of the new regulations for preventing collisions at sea. His words at p. 130, are as follows:—

"It is true that this case (referring to the "Independence") was decided before the promulgation of the present regula-

tions for preventing collisions at sea, which in terms direct that where the courses of two vessels involve risk of collision, the steamship shall keep out of the way of the sailing ship, and the sailing ship shall keep her course, subject to due regard to dangers of navigation and to special circumstances rendering a departure from the rule necessary in order to avoid immediate danger." He goes on to say:—

"But the rule of navigation, though formulated, can scarcely be said to have been altered by the regulations, and the distinction taken between the relations of an encumbered and unencumbered steamer is manifestly a just one and still applicable."

Marsden on Collisions at Sea, 5th ed., published in 1904, summarises the English Jurisprudence at page 166 and following. At page 166 he writes:—

"It is obvious that a tug with a ship in tow has not the same facility of movement as if she were unencumbered. She is not, in anything like the same degree, mistress of her own movements. She cannot, by stopping, or reversing her engines, at once stop or back the ship in tow." . . . He continues:—

"In taking measures to avoid a third vessel she has to continue her tow, and a step that would be right and take her clear, if she were unencumbered, may bring about a collision between her tow and the ship she herself has avoided. Although, therefore, it is the duty of a tug with a ship in tow to comply, so far as is possible, with the regulations for preventing collisions, it is also the duty of a third ship to make allowances for the encumbered and comparatively disabled state of the tug, and to take additional care in approaching her."

And at page 344 this author, referring to the requirements for lights, states:—

"The distinguishing lights of the tug are 'for the purpose of warning all approaching vessels that she is not in all respects mistress of her movements,' and to shew that she is encumbered."

And at page 487, states:—

"The Supreme Court in America has held that a vessel undertaking to pass another in a narrow channel, or navigating such a channel in weather that makes it dangerous, does so at her own risk."

And at page 444:—

"In determining, therefore, what are the proper steps for a ship to take in order to avoid another approaching her in a winding river, the sinuosities of the river, and also the usual course of vessels in the river must be taken into consideration."

And at page 445:—

"It has recently been held in the Admiralty Division that it is prudent rule in a winding tidal river, in the absence of special regulations for a steamship about to round a point against the tide to wait until a vessel coming in the opposite direction has passed clear, and a steamship was held in fault for disregarding this precaution."

And at page 331:—

"A vessel is not justified in delaying to take precautions until the last moment, or in trusting to be able to 'shave' clear of the other. If by doing so she frightens the other into taking a wrong step and a collision occurs, she will be responsible for the entire loss."

Here again it may be said that if it were true, which I do not admit, that the tug and tow were ten feet north of the line of the lightship, and if being there, considering the direction of the current and other attending circumstances, constituted a fault, I am of opinion that, under the principles laid down in the above cited authorities, the tug and tow could not be held responsible for the collision brought about by the "Norwalk."

I would refer also to the case of the "Hibernian," 2 Stuart Admiralty Reports, p. 148. The judgment was rendered in 1870, and the Privy Council judgment will be found in L. R. 4 P. C., p. 511; also to the case of the "Earl of Lonsdale," Cook's Admiralty Reports 153, a judgment of the late Mr. Justice Stuart, where it was held:—

"Where a steamship ascending a river, before entering a narrow and difficult channel, observed a tug approaching with a train of vessels behind her, and did not stop or slacken speed, and where she subsequently collided with the tug and her tow, held the steamer was to blame for not stopping when entering the channel."

This judgment was confirmed in the Privy Council; and the judgment of the Privy Council is reported in the same volume of Cook, page 163.

The American jurisprudence is in the same sense, and it is unnecessary to quote the cases at length, as a great many of the more important decisions are cited in plaintiff's written argument.

I might also state that Malette's evidence has been referred to, pages 253 and 254 of the Transcript of Evidence, in which he stated it would not be proper navigation to go north of the line of lightship No. 2; and this has been strongly urged against the plaintiffs on the assumption that the line of lightship No. 2 runs east and west; but the line does not run east and west as shewn by the charts and explained by Mr. Leger at page 124 of the evidence, but in a north-easterly and south-westerly direction; so that when the line of the lightship is properly laid, Captain Malette's evidence is perfectly explainable and seems to support plaintiff's pretensions; and this has been satisfactorily explained by Mr. Howard, one of plaintiffs' counsel in his argument.

Having carefully examined the able arguments of the counsel, the authorities cited on both sides, and carefully examined the jurisprudence bearing on this question, and the evidence of record, I am of opinion that the defendant is solely to blame for the collision in question, and is responsible for the result in damages.

I am further of opinion that the collision in question could have been avoided if reasonable care and skill had been exercised by the master, officer and crew of the steamship "Norwalk."

I am, consequently, of opinion that the said steamship "Norwalk" is solely responsible for all damages caused by the said collision; and I consequently find in favour of plaintiffs, and maintain the plaintiffs' action, and do condemn the defendant, the ship "Norwalk," her owners and bail in the amount to be found due on plaintiffs' claim, together with costs of the principal action; and do further adjudge and order that an account be taken, and refer the same to the deputy registrar, assisted by merchants, to report the amount due; and order that all accounts and vouchers with reports in support thereof be filed within six months after the date of the present judgment; and do further order that any amount to be found due by the defendant for damage to the cargo of the barge "Jet," said barge being owned by the plaintiffs, be paid over in due course by plaintiffs to the said intervenant who has been proved to have been the owner of

the cargo of the said barge "Jet" when the collision in question occurred; and do order that defendant pay to the intervenant the costs of his said intervention up to the date of its allowance.

Judgment accordingly.*

---

## DOMINION OF CANADA.

EXCHEQUER COURT. NOVEMBER 23RD, 1909.

THE SHIP "NORWALK" v. THE MONTREAL TRANSPORTATION COMPANY AND ALEXANDER D. THOMSON.

*Shipping—Collision—Negligence—Evidence—Costs.*

An appeal from Deputy Local Judge in Admiralty for Quebec.

Clarke, K.C., for appellant.
Howard, for respondents.

CASSELS, J.:—The appeal in this case is on behalf of the ship "Norwalk" from a judgment of Mr. Justice Dunlop, Deputy Local Judge in Admiralty for the Admiralty District of Quebec, delivered on the 12th May, 1909. (Reported above).

The appeal was argued before me on the 14th of September last.

Counsel for both the appellant and respondents, after shortly stating their points, requested that I should read the arguments of counsel before the local Judge and consider them as addressed to me.

These arguments had been taken by the stenographer and extended. Mr. Holden, K.C., and Mr. Howard argued the case for the plaintiffs, and Messrs. Clarke, K.C., and Angers, K.C., for the defendant.

Since the argument I have read and re-read these arguments.

Each of the counsel presented the case for his respective client in a very able way, sifting the conflicting testimony and urging the respective views, and also dealing with the legal questions.

If the local Judge has erred in his conclusion it is not because of want of assistance of counsel.

*EDITOR'S NOTE.—Confirmed on appeal to the Judge of the Exchequer Court, see below.

I have carefully read the evidence given at the trial, and I am of opinion that the learned Judge has arrived at a correct conclusion.

The question at issue in the main turns upon disputed questions of fact, and I would be loath to overrule the trial Judge who had the benefit of seeing and hearing the witnesses, and was in a much better position to judge of their credibility than I can be, sitting in appeal.

I wish to state, however, that after a minute perusal of the evidence with the contentions of counsel before me, I am of opinion that the learned Judge arrived at a proper conclusion, and I agree with him in all his findings.

The learned trial Judge has dealt with the evidence and law in a very exhaustive opinion, and it would be mere repetition on my part to add anything to his opinion.

It was proved conclusively at the trial that the tug "Glide" on two occasions blew three short blasts, the customary signal in those waters, to notify up-coming vessels to check down. It is said that these blasts were not heard by those on board the "Norwalk." Mr. Angers, K.C., during his argument, cstated that it was fortunate they were not heard, as since 1905 three short blasts mean: "My engines are going full speed astern." This, however, is only east of the Victoria Bridge, and is not a rule applicable to the waters in question.

The "Norwalk" was aware that the tug "Glide" had a tow. It is proved that the beam of the "Winnipeg" is 37½ feet and the beam of the "Jet" 30 feet. The beam of the tug "Glide" is 16 feet.

The "Winnipeg" was on the starboard side and carried the regulation green light. The "Jet" was on the port side carrying the regulation red light. It is said that those on board the "Norwalk" did not see these lights, giving as a reason that they were apparently obscured by the lightship No. 2. This lightship is about 35 feet long and 10 to 12 feet beam.

Had the "Norwalk" been in that part of the channel northerly of the lightship with the lightship on her port bow, and the tow in the channel northerly of the lightship it is difficult to understand how the lights, or one of them, would be obscured. It is quite evident to my mind that the pilot of the "Norwalk" deliberately intended to pass the light ship on the southerly side.

I think, as the learned Judge finds, the "Norwalk" is solely to blame.

A minor point was raised by Mr. Clarke as to that part of the judgment ordering the defendants to pay the costs of the intervenant up to the time of the allowance of the intervention. It was stated that no opposition was made to the intervention, and that in the previous part of the learned Judge's reasons it was stated that it has been admitted by the parties that the intervenant was the owner of the cargo and "the foregoing motion is consequently granted, but without costs." The learned Judge, however, when using this language, was dealing with an application on behalf of the plaintiffs for leave to amend the statement of claim. The motion on behalf of the intervenant had been previously dealt with, and an order made October 21st, 1908, and the costs were reserved. No doubt the learned Judge would amend the judgment if it was not intended to order the defendant to pay these costs.

The appeal is dismissed with costs. I think there should be no costs of the appeal to or against the intervenant.

Appeal dismissed.

---

## NOVA SCOTIA.

SUPREME COURT. JULY 28TH, 1909.

### LOVITT v. SWEENEY ET AL.

*Land — Fraudulent Conveyance — Insolvency of Grantor— Possession at Time of Conveyance — Title — Pleading— Amendment.*

G. Bingay, K.C., for plaintiff.

J. A. Grierson, for defendants.

RUSSELL, J.:—The plaintiff accommodated the defendant Jacob Sweeney by endorsing his promissory note or notes, having as security some shares in a joint stock company. The said defendant desiring further accommodation, plaintiff agreed to endorse, provided security could be given, and defendant offered him as such security a deed of a property at Weymouth. Plaintiff accordingly endorsed to the extent of $3,000 on the security of the conveyance which was made on July 1st, 1904, the note being endorsed in October, 1904. The note so endorsed was not paid at maturity, and was renewed for $1,850. About a year later, Jacob Sweeney having

in the meantime assigned, notice was given to the plaintiff by the assignee asking him to realize on his security so that a dividend could be computed on the unpaid portion of his claim. This led to the assertion of a claim by Frederick Sweeney, the other defendant, a son of Jacob Sweeney, that the property belonged to him and not to his father, and it is in evidence that the property had been conveyed by the son to the father in 1896 in trust—the deed not to be recorded unless nor until directions to record it should be given by the son. No explanation was given of the reasons for this transaction, and the plaintiff asserts that he had no notice of any trust under which the property was held when he endorsed the note for Jacob Sweeney, nor until more than a year afterwards. Frederick Sweeney alleges a conversation with the plaintiff before the making of the endorsement, in the course of which he notified him that the property was held in trust by his father. He fixes definitely the date of this alleged conversation, and the place, which was Yarmouth, but the plaintiff has proved to my satisfaction that he was not in Yarmouth at this date, but for some time before and after the alleged date of the conversation was in the United States. Plaintiff distinctly denies that any such conversation took place at any time, and I do not think it at all likely that the plaintiff would have accepted the property as security for the accommodation, with notice that it was the property of the son, and not of the father, who held the deed and made the conveyance. I conclude that the plaintiff had no notice of any trust. It is contended, however, that he took nothing by virtue of the conveyance, because at the time it was made Jacob Sweeney was not in possession, the property being in the possession of Frederick Sweeney or his tenant. I do not think that this contention can prevail. The defendant Frederick Sweeney for some purpose of his own, unexplained, and which on its face suggests a fraudulent design of some kind, enabled the other defendant to deal with the property as his own, and on the strength of that title the latter has conveyed to the plaintiff for value. I cannot think that the party so dealing with the property can be heard to say that his grantee had no power to so convey it. The objection that Jacob Sweeney was out of possession at the time he conveyed to the plaintiff is of a technical nature, and as I read the opinion of Graham, E.J., in Brown v. Dooley, 36 N. S. R., at p. 72, the equitable title to the property passes to the grantee from a grantor out

of possession who has the legal estate. The only reason why the legal title does not pass is that it would be against the common law principle that a lawsuit cannot be sold. If the plaintiff has the equitable title, and there is a competition between his equities and those of the defendant Frederick Sweeney, I think those of the plaintiff must prevail. It was the action of the latter with reference to the property that made it possible for the defendant Jacob Sweeney to procure the accommodation from the plaintiff on the strength of the apparent legal and equitable title, and he must suffer the consequences. An amendment of the particulars of notice was asked for at the trial, which I granted, although considering it unnecessary, and as every possible ground of recovery and defence was fully raised at the trial, any other amendment in the pleadings necessary to cover the facts brought out and secure a decision on the real merits of the case should be made.

---

## NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 7. OCTOBER 20TH, 1909.

### REX v. MICHAEL McISAAC.

*N. S. Liquor License Act—Infringement—Social Club—Sale of Liquor by Secretary without License—Liability.*

This is an appeal from the Stipendiary Magistrate's Court for the city of Sydney.

R. M. Langille, for appellant.

Finlay McDonald, for informant.

FINLAYSON, Co.C.J.:—The defendant was convicted for seling liquor without a license contrary to the provisions of the Nova Scotia Liquor License Act.

The defendant is secretary of "The Highland Club," a body corporate, incorporated for the promotion of social intercourse among its members, to provide them with reading rooms and with such amusements as the managing committee may determine.

The membership of the club at this time was about one hundred; each shareholder is a member of the club and has a number corresponding to the number of his stock certificate. There does not appear to be any entrance fee or yearly subscription. The purchase of one share of stock entitles a per-

son to all the privileges of the club, including the purchase of liquor, which is claimed to be the property of the club, and kept solely for the use of the members.

There is no evidence that the liquor kept was the property of the club.

The custom of the club is, that a member orders liquor from the steward. He gets the supply and then sells to the members (evidence of defendant).

The club used rooms in the building occupied by John McIsaac, the steward of the club, brother of the defendant. The liquor was kept in a room in the same building, but whether in one of the rooms used, owned and occupied by the members of the club is not shown by the evidence. The defendant admits acting as steward for or in place of his brother on two or three occasions, and says he was so acting at the time he made this sale in which the information in the proceedings was laid.

There was no further evidence taken at the hearing of this appeal, and I have before me the evidence taken by the magistrate at the trial, from whose decision this appeal is asserted.

I think the magistrate was truly justified in coming to the conclusion, that the defendant was guilty of a violation of the License Act, and properly committed him therefor.

I do not see that the case of Graff v. Evans, 8 Q. B. D. 37, relied on by the defendant, has any application in this case. The club in that case was an unincorporated association. The sale was by the manager to one of the members of liquor, the property of the club. I think, in the study of the decision in that case the true ground for the decision will appear to be the fact that the Licensing Acts of 1828 never considered or intended clubs to come within their scope: See Huddlestone, B.'s decision.

These Acts specified the persons to be licensed. The Nova Scotia Act forbids all persons (including firms and corporations) to sell without a license.

This case is in some respects analogous to the Queen v. Hughes, 2 Can. C. C. 5. In that case the charter of the club (an inland corporation) forbade the selling of intoxicating liquors by the club.

The liquor was kept by the steward in a room in the building leased by the club, but under the control of the

steward, for the use of the members of the club. The steward was convicted for keeping liquor for sale, and the appeal Court confirmed the conviction.

In this case the liquor was kept in the house occupied by John McIsaacs, nor can there be any as to that of the defend- the evidence discloses, probably had the property in the liquor as well. There can be no question as to the liability of John McIsaac, nor can there be any as to that of the defendant. He says that he acted as steward on two or three occasions in place of his brother, and was so acting on the occasion in question. I do not say that in this case, if the liquor was clearly proven the property of the club, the defendant was not properly committed convicted. The decision of Mr. Russell, now Mr. Justice Russell, in Rex v. Walsh, 29 N. S. R. 521, has not, so far as I am aware of, been questioned. He convicted the steward of an incorporated club for selling liquor, the property of the club, to one of its members. It would seem from the evidence that the sole purpose of the "Highland Club" was to supply liquor to its members. It has all the earmarks of an illegal club, as stated by Daly in his Club Law, p. 98. However, it is unnecessary to discuss this phase of the question.

The conviction will be confirmed and the appeal dismissed with costs.

---

## NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 7. NOVEMBER 17TH, 1909.

### REX v. MARGARET RYAN.

*N. S. Liquor License Act—Infringement—Selling Liquor without License—Non-intoxicating Beverage—"Pilsener Beer"—Knowledge of Intoxicating Nature—Liability.*

This was an appeal from the Stipendiary Magistrate, City of Sydney.

A. D. Gunn, for appellant.

Finlay McDonald, for informant.

FINLAYSON, Co.C.J.:—This is an appeal from a conviction against the defendant for keeping liquor for sale without a license contrary to the provisions of the Nova Scotia Liquor

License Act. The defendant was conducting a fruit and candy store as well as a restaurant at Whitney Pier, Sydney. She sold soft drinks in her store. The drinks were all exposed without attempt to concealment. She swears that she never, to her knowledge, sold intoxicating drinks, and would never knowingly sell or keep any intoxicating liquor for sale. The liquor which the inspector found on her premises was purchased by her in good faith as non-intoxicating and non-alcoholic liquor. She also swears that she had no knowledge or suspicion that it was otherwise than as represented. The inspector visited her premises, found two or three cases of liquor marked "Pilsener Beer," and took a bottle away which, on analysis, was found to contain 7.40 per cent. of alcohol in volume and 5.94 per cent. of weight. The defendant's solicitor contended that there is a difference between selling and keeping for sale. That when a sale is effected the offence is committed, and knowledge of the nature of the liquor sold is not essential, but that in keeping for sale knowledge is essential. That if the party shews that he only intended to sell non-intoxicating liquor, and if he happens by mistake or ignorance to have intoxicating liquor in his possession that he cannot be said to keep them for sale for the reason that he never intended to sell intoxicating liquor. That knowledge of the quality of the liquor must be brought home to him, otherwise he does not commit the offence. I regret that I cannot accept this view, and must hold the conviction good. The License Act is an absolute prohibition of selling or keeping for sale without a license, and there does not seem to be any differenc in these two offences so far as knowledge of the quality is concerned. In nearly all sumptuary statutes mens rea is not essential to the commission of an offence, and the only intent required is the intent to sell, and if the articles sold or intended for sale are without the prohibition of the Act the offence is complete whether the accused knew of the character or quality of the thing sold or not. The Courts of Massachusetts, as well as those of England, hold this view. Hoar, J., in Comm. v. Boynton, 2 Allen 160, case of selling, said: "If the defendant sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article sold. Where the act is expressly prohibited without reference to the intent or purpose, and the party committing it was under no obligation to

act in the premises, unless he could do so lawfully, if he violates the law he incurs the penalty. The rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases, and the hardship is no greater when the law imposes the duty to ascertain a fact."

In Comm. v. Goodman, 97 Mass. 117, case of keeping for sale, Bigelow, J., said: "The offence with which the defendant is charged might have been committed irrespective of any knowledge on his part that the liquor kept by him was intoxicating. The statute prohibits absolutely the keeping of such liquors with an intent to sell. The intent applies solely to the purpose for which they are kept and not at all to the nature or quality of the article. This a person is bound to know or ascertain, at his peril. Whether he knows or not he commits the offence by keeping an article which is in fact intoxicating with an intent to sell it." This principle is affirmed in Comm. v. Savery, 145 Mass. 212; Comm. v. O'Kean, 152 Mass. 584; Brook v. Mason, 72 L. J. K. B. 19, and Emary v. Nollath, 72 L. J. K. B. 620.

There is no question that the liquor in question found on the defendant's premises was intended for sale. I believe the defendant had no knowledge of the quality of the liquor, but that is no defence. To hold otherwise would be to review the Act in operation. I have no doubt this is a hardship on the present defendant, but all laws may work individual cases of hardship, still they must be given effect. The conviction will be affirmed, but in this case without costs.

---

## NOVA SCOTIA.

COUNTY COURT FOR DISTRICT No. 7. NOVEMBER 17TH, 1909.

### REX v. LOUIS SIDOWSKI.

*N. S. Liquor License Act — Infringement — Knowledge — Liability.*

This was an appeal from the Stipendiary Magistrate, City of Sydney.

A. D. Gunn, for appellant.

Finlay McDonald, for informant.

FINLAYSON, Co.C.J.:—An appeal from a conviction against the defendant for keeping intoxicating liquor for sale

without a license contrary to the provisions of the Nova Scotia Liquor License Act. In all these cases, as I understand it, there has been an agreement that a bottle of the liquor taken should be sent to a chemist at Halifax for analysis, and that the certificate of the chemist would be sufficient evidence of the percentum of alcohol in the liquor. In this case Mr. Gunn, for defendant, objected that there was not sufficient identification of the bottle received from the chemist as the bottle sent for analysis. This is a question entirely for the discretion of the magistrate who tried the case, and his being satisfied, I am not going to question his finding. In this case the defendant contends that he was ignorant of the fact that the liquor he was selling, and which he was keeping for sale, was intoxicating or alcoholic, and therefore has not committed the offence of keeping for sale without a license. He says that the liquor was sold him as non-intoxicating; that he never to his knowledge sold intoxicating liquor; that he bought the liquor in good faith, relying on the word of the sender; that it was non-intoxicating and non-alcoholic.

I must hold that this is no defence for the reason given in the case against Margaret Ryan.* I fully agree in the finding of the magistrate. The conviction will be affirmed and the appeal dismissed with costs.

---

## NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 7. NOVEMBER 24TH, 1909

IN CHAMBERS.

### REX v. FRED T. QUIRK.

*N. S. Liquor License Act—Infringement—Supplying Liquor to Minors—Conviction—Offence Committed by Servant of Licensed Vendor—Knowledge of Master—Instructions to Servant—Contravention—Liability.*

This was an appeal from the Stipendiary Magistrate's Court, City of Sydney.

R. M. Langille, for appellant.

Finlay McDonald, for informant.

*EDITOR'S NOTE.—Reported ante, page 395.

FINLAYSON, Co.C.J.:—This is an appeal from a conviction by the stipendiary magistrate, under sec. 62, Nova Scotia License Act, by which defendant was convicted of supplying or furnishing liquor to minors.

The evidence discloses on these different occasions that liquors were supplied to minors by employees, of the defendant, on the written order of one Peter Carlin. On none of these occasions was the defendant present. The defendant swears that his instructions to his employees were not to supply any liquor to minors, except on the written order of their parents. It was admitted that none of the minors, to whom liquor was furnished, was the child of Peter Carlin. There is no doubt the object aimed at by this section was to prevent minors frequenting bar-rooms and preventing them getting liquors under any pretence whatever. And it is probable that the magistrate did not consider the prohibition to supply minors wide enough, that under the instructions an offence could have been committed; that supplying the minors on the parent's written order would not constitute a defence. In this case, however, the furnishing of the liquor to the minors was in distinct violation of the master's instructions. It was done without his knowledge or consent. Is the master liable for the illegal act of his servant committed without his knowledge? The cases support the proposition that if the master's business is illegal, he is responsible for the acts of his servants whether he had knowledge or not. But if the business is lawful, the master is not criminally liable for the illegal acts of his servants alone, without his knowledge or consent, express or implied, or in his absence and in disobedience to his instructions, unless the particular statute, under which the offence is committed is broad enough to hold him so liable. In this case the defendant is conducting a legitimate business. Section 62 enacts that a licensee shall not supply or furnish or allow to be given, supplied or furnished on or about the licensee's premises, any liquor to minors. It is a violation of this section which is complained of. Besides the money penalty, the licensee forfeits his license and is thereafter disqualified from holding a license. The section being a highly penal one, must be given the strict interpretation of a penal statute, and the defendant should not be held liable, unless he is clearly within its terms. The word "allow" in this section, must, at least, be deemed to

imply knowledge, as it implies the power to prevent. I take it, therefore, that before a licensee can be held responsible for an offence under the section, he must have either supplied the liquor to the minor, or he must have connived at the act of his servant in furnishing the liquor—mens rea must be shewn. He cannot, in my opinion, be held responsible for the act of the servant furnishing the minor, contrary to his instructions. If there was connivance, it was incumbent on the prosecution to prove connivance or knowledge before they could ask for a conviction.

His own evidence is clear as to what his instructions were. They were probably not as wide as they should have been, but were wide enough to include in their prohibition the violation complained of.

The case of Emary v. Nolloth, 72 L. J. K. B. 620, under the English License Act, is very similar to this one.

The English Act has the words "knowingly allows" liquor to be supplied to a minor under fourteen years of age. In that case an employee of the licensee furnished liquor to a minor, contrary to the provisions of the Act. The licensee had given his employees instructions not to deliver liquor to minors, except as provided for in the Act. The Court of Appeal, Lord Alverston delivering the judgment of the Court, held that the licensee was not liable for the act of the servant committed without his knowledge and against his instructions. The reason in that case is applicable here. The appeal will be allowed and the conviction quashed, and an order will be granted accordingly.