

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Redpath and others v. Allan and others (ship "Hibernian"), from the Vice-Admiralty Court of Lower Canada; delivered 17th December, 1872.*

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Present :

SIR JAMES W. COLVILLE.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THIS is an Appeal from a Decree of the Judge of the Vice Admiralty Court of Lower Canada, in a cause of damage brought by the owner of a certain cargo laden on board of two barges, against the steamship "Hibernian." The collision happened in the River St. Lawrence between Pointe aux Trembles and Varennes, off Isle à l'Aigle. The "Hibernian" was a large mail steamer, proceeding with cargo and passengers down the St. Lawrence, on a voyage from Montreal to Liverpool: the barges were proceeding up the river, in tow of a steam-tug. The "Hibernian" ran into the barges, and sank them. The Court below found that the "Hibernian" was alone to blame for this collision, and the justice of this decision has not been controverted: but the Court below also found that the "Hibernian" was at the time of the collision under the charge of a pilot, taken on board by compulsion of law; and that therefore her owners were exempt from the liability which the

ship would otherwise have incurred. It is from this part of the decision that the appeal has been prosecuted. It is not disputed that a proper pilot was on board; that he took charge of the vessel; gave the orders for her navigation; that they were obeyed; and that the collision ensued in consequence.

It has been contended by the Appellants nevertheless that the "Hibernian" is not relieved from her liability. This contention is founded upon this position, that the general and maritime law is alone applicable to the case, by which law the wrong-doing vessel is bound to make full compensation to the suffering vessel for the damage inflicted upon her.

In order to sustain this position, it has been asserted,—first, that the Canadian Statutes presently to be mentioned on which the learned Judge relied are without authority in the Vice Admiralty Court.

It has been said at the bar that this suit might, and so far the statement is correct, have been instituted in the High Court of Admiralty, which it is also said would not have taken cognizance of the Statutes, and in support of this startling proposition the case of the "Halley," decided by this tribunal, was cited. Their Lordships are wholly unable to follow the reasoning of Counsel upon this point.

In the case of the "Halley," the judgment turned upon a question as to the partial or entire adoption or rejection of the law of a foreign country. In the present case, the law invoked is contained in an Act of the Legislature of a Colony belonging to the Crown, and ratified by the express sanction of Her Majesty.

Their Lordships have no doubt whatever that this law, in every case to which it is applicable, is of binding authority, equally in the Queen's High Court of Admiralty and in the Vice-Admiralty Court of Canada as a Court of Appeal, from which, it is to be observed, their Lordships are now sitting.

Secondly, it was argued that the Canadian Statute (27 and 28 Vic., c. 58) did not make the taking of a pilot compulsory upon the "Hibernian." The tenth section of that Statute is as follows:—"The master or person in charge of each vessel over one hundred and twenty-five tons, leaving the port of Montreal for a port out of this Province, shall take on board a Branch Pilot for and above the

Harbour of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of such vessel, which penalty shall go to the Decayed Pilot Fund."

It is contended that, by the language of this section, no compulsion is put upon the master to take a pilot, but that for not doing so merely a penalty is imposed. That, though the term "penalty" is used, it is only meant in the sense of an order to contribute to a particular fund—the support of which is a matter of public policy. But their Lordships are of a different opinion; they hold that when a Statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question; and that this principle is not affected by the fact that a penalty has a particular destination.

Various decisions in the Courts of the United States of North America, and especially one of very high authority in the Supreme Court, were cited for the purpose of showing that such an Order, with respect to taking a pilot, as is contained in the Section referred to, does not release the ship from the liability, the *obligatio ex delicto*, which, by the general maritime law, attaches to the wrong-doer; and it certainly does appear that upon this point the decisions of the American Courts are at variance with the later decisions of the High Court of Admiralty, affirmed by the Judicial Committee of the Privy Council; this variance is certainly much to be regretted, but if it were necessary to decide the present case upon this point alone, their Lordships would think themselves bound to follow the precedents of the English Courts. It is to be observed, however, that no decision has yet been given by the American Courts upon the effect of a Statute releasing in express terms a wrong-doing vessel from liability, upon the ground of compulsory pilotage. In the case of the "China," decided by the Supreme Court, Mr. Justice Swayne observed: "The New York Statute creates a system of pilotage regulations. It does not attempt in terms to give immunity to a wrong-doing vessel. Such a provision in a State law would present an important question, which, in this case, it is not necessary to consider." (7 Wallace's Rep. (Sup. Ct.), p. 67.)

The other Canadian Statute, to which reference must now be made, is 27 and 28 Vict., c. 13, entitled "An Act to Amend the Law respecting the Navigation of Canadian Waters," in which waters, it is to be borne in mind, this collision took place. By the 14th Section it is enacted that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any place where the employment of such pilot is compulsory by law."

Their Lordships entertain no doubt that these two Canadian Statutes are to be read and construed together as being *in pari materia*, and that the owner of a Canadian ship navigated in Canadian waters under the directions of a pilot taken on board in compliance with the provisions of these Statutes, is a pilot taken on board by compulsion of law, and, therefore, except in circumstances of special exception, which it is not necessary to enumerate, is expressly exonerated, according to the law of Canada, from all liability to compensation for damage inflicted upon another vessel in consequence of obedience to such directions.

It remains only to notice the argument that the pilot in this case was selected by the master, and therefore that the relation of master and servant subsisted between the pilot and the captain, representing the owners: we think this argument is unsound. The 2nd Section of the former Canadian Act enacts that "The Registrar of the said Trinity House of Montreal shall record in a register, to be kept by him for that purpose, the names and residence in Montreal of all such branch pilots as shall so report themselves, from amongst whom it shall be competent for all shipmasters and others requiring branch pilots to select such pilot or pilots as they may think fit, other than those actually engaged to pilot the ocean mail steamers, or any of them, and to indicate to the said Registrar the name or names of such pilot or pilots as they may select," &c.

It is plain that the epithet "such," here applied to pilot, refers to the particular qualified class out of which the master is obliged to select one person, and their Lordships are of opinion that this restric-

tion operates to destroy the relation of master and servant which would arise in the case of a free choice made by the master.

Their Lordships will humbly recommend Her Majesty to affirm the Decree of the Vice-Admiralty Court, and to dismiss this Appeal with costs.

