

Supreme Court of the Hawaiian Islands—In Admiralty. In Banco. On Appeal from the Decision of the Chief Justice February 25, 26, 28, as of the January Term.

THE PACIFIC NAVIGATION CO. VS. S. C. ALLEN. THE MOIWAHINE VS. THE PACIFIC NAVIGATION CO. THE "MOIWAHINE"—THE "JAMES I DOWSETT."

BEFORE JUDGE, C. J., McCULLY, PRESTON AND FERNANDEZ J. J. BICKERTON, J. HAVING BEEN OF COUNSEL IN THE CASE DID NOT SIT. Opinion of the Court by PRESTON J.

This is an appeal by the Pacific Navigation Co. from a decision of the Chief Justice whereby he held the steamer "James I. Dowsett" solely to blame for a collision which happened between that vessel and the schooner "Moiwahine," on the night of the 29th of June, 1886, and awarded the sum of \$676.30 to the owners of the schooner for damages sustained by reason of such collision.

The facts of the case appear fully in the decision of the Chief Justice and need not be repeated here, except so far as may be necessary to properly understand the claim made on behalf of the "James I. Dowsett."

The appellant claims that the decision of the Chief Justice is wrong in holding the "Dowsett" solely to blame and contends

1. That the weight of evidence shows the "Moiwahine" to be in fault in not exhibiting any lights.

2. That therefore the "Moiwahine" could not recover any damages against the "Dowsett," but should be held liable because the neglect to carry lights was a culpable omission and a violation of statute law.

In support of this contention counsel cited (inter alia) "The Olivia," 1 Lush. 497. Larco vs. Martha Elizabeth, 1 Sawyer 129. "The Carroll," 8 Wallace 302. The D. P. 1 Lowell 124. Taylor vs. Harwood, Taney's Decisions 437. The Helen Mar, 2 Lowell, 40.

3. That the neglect to exhibit lights contributed to the collision and therefore the damage should be divided.

4. That the collision was caused by the improper navigation of the "Moiwahine" immediately preceding the collision through her captain ordering her helm to be put up and to slack off the sheet, instead of ordering the helm to be put down, or keeping her course.

The Scotia, 14 Wall. 170. St. John vs. Paine, 10 How. 557.

The Genesee Chief, 12 How. 443, and other authorities were cited in support of this argument.

On behalf of the respondents it was contended the evidence showed that the "Moiwahine" carried proper lights, that the maneuver ordered by the captain, was proper under the circumstances in which his vessel was placed, and even supposing the "Moiwahine" did not show any lights, yet if the "Dowsett" could have avoided the collision she would be responsible, and that it would have been avoided had the "Dowsett" kept a proper lookout.

The Ariadne, 13 Wallace, 475. Counsel for the respondent also cited:

1 Parsons on Maritime Law, pp. 190, 192, 198, 395, 396.

Chamberlain et al. vs. Ward, 21 Howard, 570, 571.

St. John vs. Paine et al., Curtis Dec. U. S. S. C., 509.

Genesee Chief vs. Fitzhugh, 19 Dec. U. S. S. C., 247.

Ward et al. vs. The "Ogdensburg," 5 McLean, 634.

Larco vs. Schooner Martha and Elizabeth, 1 Saw. 134.

Baker vs. City of New York, 1 Clifford 83.

Steamboat Neptune, Oleott 495.

Empire State, 1 Benedict's Adm. 57.

By the Court:—In respect to the point, that the "Moiwahine" did not show any lights, the evidence is certainly very conflicting, as is usual in cases of this nature. The Court below found that the "Moiwahine" did carry the proper lights, and in this respect gave more credit to the witnesses on behalf of that vessel, than to those on board the "Dowsett," and we see no reason on a careful consideration of the whole of the testimony and of the arguments of counsel, to differ from the conclusion arrived at by the Chief Justice on this point; on the contrary we think and feel no doubt that the "Moiwahine" did carry the lights required by law, and in their proper position.

As to the second point that the alleged neglect of the "Moiwahine" to exhibit any lights, disentitles her to recover any damages, it is hardly necessary from the view we have taken of the evidence to consider it, except for the purpose of passing upon the authorities cited by counsel for the appellants.

The principal case relied upon is the Olivia, in which Dr. Lushington says: (1 Lushington, 502) "The question now to be determined is, whether this culpable omission of the Safe Return to show a light is to be considered as a blameable disregard of ordinary nautical precaution, or a violation of statute law. If the former only, then the plaintiff will be entitled to recover half their damages; but if the latter, a question may arise, whether the plaintiffs are not altogether barred of recovery."

The statute here referred to, is the English "Merchant Shipping Act, 1854," Section 298 of which provides that if a collision is occasioned by the non-observance of any rule for the exhibition of lights, etc., the owner of the ship by which such rule has been infringed, shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary. (See the Section in "The Milan" 1 Lush. 389.)

No such provision is contained in our statutes, and is contrary to the course of decisions since the issuance of the "Regulations for preventing Collisions at Sea," of 1863, which were adopted in this Kingdom and afterwards modified in accordance with the amended Regulations.

The case of the Martha Elizabeth was decided in the U. S. District Court, District of California, and although the head note in the report (1 Sawyer 129) tends to show that the decision was solely on the ground that "Lights required by law must be displayed." Yet the learned Judge Hoffman who heard the case, admitted testimony to show that the collision was caused, by the gross fault and mismanagement of the colliding vessel, and held that the evidence negatived such allegation.

There can be no doubt as to the rule observed in the whole course of the decisions of Courts of Admiralty that where the neglect of the vessel to obey the statutory rules as to carrying lights, or of navigation, has contributed to a collision the vessel in default is held responsible to the extent of one half, or the whole of the damages as the case may be, and the authorities cited on behalf of the appellant maintain this view.

As to the contention on behalf of the appellant that the "Moiwahine" executed a wrong maneuver immediately before the collision, we agree with the opinion of the Court below, that such maneuver was justifiable under the circumstances, and indeed prevented greater damage than would have been sustained had she continued on her course. It was made when the collision was inevitable through the default of the steamer.

Although there is authority to support the contention of the respondents that even supposing the "Moiwahine" did not exhibit any lights, yet if the "Dowsett" could have avoided the collision she would be responsible (see in addition to the authorities quoted by respondents: The Englishman, L. R. 3, P. D. 18. The Chusan 53 L. T. R. N. S. 60) and such is the view taken by Mr. Justice Farnander. We do not decide this case on that ground. We adopt the reasoning of the Court below and find

1. That the "Moiwahine" exhibited the proper lights.

2. That the navigation of the "Moiwahine" was proper under the circumstances and did not contribute to the collision, which had become inevitable.

3. That the collision was caused by the "Dowsett" neglecting to keep a proper lookout, and therefore she was solely to blame.

The decree of the Chief Justice is therefore affirmed with costs.

Neumann, Whiting and Creighton for appellant; Dole and Kinney for respondents.

Honolulu, March 8, 1887.

Opinion of Mr. Justice FARNANDER.

Having heard the evidence and the arguments of counsel, I am painfully affected by the positive and diametrically opposed character of the evidence of the two ships' crews, that of the "J. I. Dowsett" and that of the "Moiwahine," as to the fact whether the "Moiwahine" carried proper and legal lights previous to the collision.

That seven or eight men, from the master down, on one side or the other, should have wilfully and maliciously perjured themselves, is hard to believe, and though the evidence furnishes no clue to the discrepancy, I am willing to believe that each side honestly thinks itself right.

Such being the case the two sets of evidence, as to whether the "Moiwahine" was properly lighted or not, neutralize each other; and were it the only fact bearing upon the collision and its cause, judgment would have to go against the "Dowsett" as not being sufficiently proven.

But, fortunately, there is one material fact to which the crews of both vessels agree without variation. It is this: They say that "though the night was dark, yet it was a starry night." It might have been hazy under the land, but in mid channel, where they were it was not hazy. That fact and its consequences does not seem to me to have been sufficiently elucidated on the trial; but what that fact implies I will now endeavor to state. A dark but starry night implies the ability of seeing a very considerable distance ahead of the vessel on which you are. I have followed the sea professionally, in my younger days—for sixteen years, from foremast hand to master mariner, and I think I am greatly within the mark when I say that on a dark (moonless) but starry night a vessel of the size of the "Moiwahine" under all sail, mainsail, foresail and jib, standing across the course of another vessel, ought to have been distinctly visible at least half a mile off.

That the "Moiwahine" was not seen at that distance from the deck of the "Dowsett" in fact was not seen at all until the time of the collision, is to me abundant evidence that the watch or lookout of the "Dowsett" was either asleep, absent, or culpably lax in their duty.

Had they seen the "Moiwahine" as they ought to have done, on a dark but starry night, there would have been ample time to inform the officer of the deck or the captain and to adopt such maneuvers as would have avoided collision.

Our statutes are positive that steamers must give way to sailing vessels, and they have no proviso that if such sailing vessels do not carry proper lights, that fact makes the steamer excusable in case of collision.

Light or no light, the "Moiwahine," under all sails on a dark but starry night should have been seen by the "Dowsett" as an object to be avoided.

I therefore concur with the Chief Justice in dismissing the suit of the "Dowsett" and awarding the damages he does to the "Moiwahine."

Supreme Court of the Hawaiian Islands—January Term, 1887.

WILDER & COMPANY VS. HOP WO WAI CO.

BEFORE CHIEF JUSTICE JUDGE.

This action is demurred to on the ground that although it is entitled "assumpsit," by the form of the declaration, plaintiff complains of defendants "in a plea of trespass on the case upon promises."

After having reviewed all the authorities presented, to wit: Stephen on Pleading, pp. 17, 18 and 40.

Kerr's Action at Law, pp. 119, 120. 1 Chitty Pl. p. 99.

I am of opinion that it is not consonant with the modern rules of pleading to designate an action which is *ex contractu* as "case" although anciently assumpsit was trespass on the case upon promises. "Case" is suited to torts or actions *ex delictu*.

But although the complaint styles this action "trespass on the case upon promises," from what follows it is, to my mind, an ordinary declaration in *express assumpsit* upon a promissory note. The making of the note and the promise to pay is laid in apt words, and a copy of the note is annexed to the declaration and made part thereof. The *ad damnum* is laid at \$1,200. The note is for \$750.21 and interest at 10 per cent. per annum, and the principal and interest since Sept. 28, 1883, when the note was made would nearly come up to the *ad damnum*. The amount of the *ad damnum* laid cannot affect the case, provided only that the plaintiff can recover no more than he asks for, and he cannot recover in this case, except for principal and interest and costs.

I do not think the declaration is demurrable on the ground stated. The objectionable phrase which names the action may be treated as surplusage. I therefore overrule the demurrer with costs. Defendants may answer over in four days, and the answer must conform to the statute of 1876. Ashford & Ashford for plaintiffs; W. R. Castle for defendants.

Honolulu, March 5, 1887.

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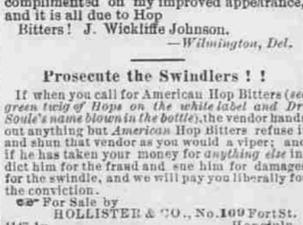
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