ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

1908
May. 12.

ASIATIC STEAM NAVIGATION COMPANY
v.
BENGAL COAL COMPANY.*

Evidence—Depositions—Admissibility—Presumption—Indian Merchant Shipping Act (V of 1883)—Preliminary enquiry—Statements not challenged.

In the course of a preliminary enquiry, held under the Indian Merchant Shipping Act of 1883, to investigate into a collision, the defendant Company being represented by their attorney, certain officers of the defendant Company made certain statements on oath.

Held, that the failure of the attorney of the defendant Company to challenge the accuracy of these statements afforded a strong presumption that the imputations against the defendant Company therein contained were correct, and on this ground among others, the statements were admissible in evidence.

Simpson v. *Robinson* (1), *R.* v. *Coyle* (2), *Morgan* v. *Evans* (3), *Freeman* v. *Cox*(4), *Hampden* v. *Wallis*(5), and *Sookram Misser* v. *Crowdy*(6), referred to.

THIS suit was instituted by the Asiatic Steam Navigation Company for damages for the loss suffered by their S. S. "Nurani" owing to a collision with the S. S. "Sanctoria" belonging to the Bengal Coal Company. The plaintiff Company alleged that the collision was due to the negligent navigation and improper management of the S. S. "Sanctoria" and to the disregard on the part of those in charge of her of the regulations for preventing collisions at sea. This was denied by the defendant Company, who *contrà* alleged that the collision was caused by the negligence and want of care and precaution on the part of the S. S. "Nurani", and the persons in charge of her, and the disregard on their part of the rules and regulations for the prevention of collisions at sea.

* Original Civil Suit No. 827 of 1907.

(1) (1848) 12 Q. B. 511, 512.
(2) (1856) 7 Cox C. C. 76.
(3) (1834) 3 Cl. Fin. 159, 203.
(4) (1878) L. R. 8 Ch. D. 148.
(5) (1884) L. R. 27 Ch. D. 251.
(6) (1873) 19 W. R. 283.

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The collision occurred shortly before 2 A. M. on June 9th, 1907 off the coast of Ceylon. At the time of the collision Captain William Ward was in command of the S. S. "Sanctoria" and second officer Stanley Charles Bezer was the navigating officer on the watch.

Previous to suit, on the 25th July 1907, a preliminary enquiry, instituted at the instance of the Government of Bengal, was held under the Indian Merchant Shipping Act, for the purpose of making an investigation into the collision. At this enquiry, at which the defendant Company was represented by their attorney, Captain Ward and Mr. Bezer made depositions on oath, and the latter accepted responsibility for the collision in these terms: "I am prepared to admit that I made a mistake and accept responsibility for this accident." This statement was not challenged by the attorney for the defendant Company. On the 26th July 1907, on being charged by the Preliminary Court of Enquiry, with committing a negligent act, Mr. Bezer pleaded guilty.

At the time of the hearing of the suit Mr. Bezer being in England, and Captain Ward being at Colombo in command of the S. S. "Sanctoria," which was then on her way to Calcutta, were not called as witnesses, and thereupon their depositions made in the preliminary enquiry were tendered in evidence on behalf of the plantiff Company.

Mr. B. C. Mitter (*Mr. Zorab* with him) for the defendant Company.

The depositions made by the captain and mate at the preliminary enquiry could not be admitted in evidence against the defendant company in this suit, as the defendant company were not a party to those proceedings and could not be held bound by the statements of their servants.

Mr. Buckland (*Mr. Stokes* with him) for the plaintiff Company.

The statement of the master was admissible under sections 18 and 33 of the Evidence Act. Also see *The Manchester* (1) and *The Solway* (2). The statement of the mate was admissible under sections 32 (3) and 33 of the Evidence Act. The defendant

(1) (1839) 1 W. Rob. 62 (2) (1885) L. R. 10 P. D. 137.

company were a party to the preliminary enquiry: they appeared through their attorney, who cross-examined witnesses.

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WOODROFFE J. Learned counsel for the plaintiff tenders in evidence the depositions of Captain Ward and Mr. Bezer, the master and mate, respectively, of the defendant's vessel. The depositions were recorded in the preliminary enquiry, held under the Indian Merchant Shipping Act of 1883, instituted at the instance of the Government of Bengal, for the purpose of making an investigation into the collision, the subject-matter of this suit. The mate of the defendant's vessel, Bezer, at that enquiry, admitted that he was negligent and pleaded guilty, and in consequence of that, it was not necessary to form the Special Court contemplated by that Act. The statement he made was in these terms:—"I am prepared to say I made a mistake and accept responsibility for this accident." Learned counsel for the defendant stated that both the captain and mate of the vessel are not in this country, the former being in Colombo and the latter in England. I also understood from what was said, the defendant did not intend to call either of them. Learned counsel however objects to the admission of the evidence on the ground that these statements made by the defendant's officers at the enquiry do not affect the company, their employers. I am of opinion that these depositions are evidence. I admit them on the following grounds:—It is admitted that the defendant company did appear upon the preliminary enquiry and were represented therein by their solicitor. The statements therefore of the company's officers are statements made in the presence of the defendant. Further, it appears from the depositions themselves that the defendant company did not challenge the accuracy of the statements of their officers made in the presence of its representatives and in particular in no way did their solicitor challenge the statement of the 2nd mate that he made a mistake and that he accepted responsibility for the accident. It is impossible to suppose that he would not have done so, had the defendant company reason to suppose that the statement was not correct. On the contrary, all that the defendant's solicitor did, was to cross-examine to

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establish the fact that the plaintiff's vessel was a twin-screw steamer.

It has no doubt been held that statements made in a party's presence during a trial, are not generally receivable against him merely on the ground that he does not deny them, because the regularity of judicial proceedings prevents the free interposition permitted in ordinary conversation. However cases may occur in which the refusal of a party to reject a charge made in a Court of Justice, or to cross-examine or contradict a witness, or to reply to an affidavit, may afford a strong presumption that the imputations made against him are correct. See *Simpson* v. *Robinson*(1), *R.* v. *Coyle*(2), *Morgan* v. *Evans*(3), *Freeman* v. *Cox*(4), *Hampden* v. *Wallis*(5), and *Sookram Misser* v. *W. Crowdy*(6). Here the defendant's solicitor appeared at the enquiry and cross-examined, and it was clearly open to him, to challenge the accuracy of the statements relied on, but he did not. And it must be assumed that he did not do so, because the defendant company was satisfied they were true. I think on this ground the depositions both of the master and the mate are admissible. Next I think the statement of the mate is additionally admissible, because his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to be unreasonable, and because his statement under section 32(3) of the Evidence Act is a statement, which is against his interest. I mean the statement that he was the party, who was responsible for the accident. Next, I think both statements are admissible as explaining the reason why neither of these persons are called as witnesses. I was left under the impression that these witnesses would be called, but that Mr. Zorab could not for the present give me the information I desired, because these two persons were not present. I understood that they were to be called, and it was not until Friday that I heard for the first time that it was not intended to call them. If they are not called, the statements tendered show that the reason is that their evidence would be unfavourable to the defendant company and not any other, which

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may be suggested. Finally, I think the statement of the mate relevant on the question of costs. It shows that the defendant company knew that the negligence was due to their officers, yet in the pleadings they allege that the accident was entirely due to the negligent navigation of the plaintiff's vessel and it was not till Friday last I was told by counsel for the defendant, that he could not contend there was no negligence on his part. It is relevant therefore on one question, which I have to determine, namely, that of costs. On these grounds I admit these statements, which will be accordingly marked. I may add that after judgment was delivered Mr. Mitter, who appears on behalf of the defendant company, stated that, while there was no doubt the statement of the mate was against his client, yet that he would have called the master, if he could have obtained his attendance.

Attorneys for the plaintiff company: *Pugh & Co.*
Attorneys for the defendant company: *Orr, Dignam & Co*

J. C.