

THE SHIP "CUBA" (DEFENDANT)..... APPELLANT ;
 AND
 RONALD McMILLAN AND }
 OTHERS (PLAINTIFFS)..... } RESPONDENTS.

1896
 *Nov. 2, 3,
 *Dec. 9.

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

Maritime law—Collision—Rules of the road—Narrow channel—Navigation, rules of—R. S. C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22 and 23—" Crossing " ships—" Meeting " ships—" Passing " ships—Breach of rules—Presumption of fault—Contributory negligence—Moiety of damages—36 & 37 V. (Imp.) c. 85, s. 17—Manœuvres in " agony of collision."

If two vessels approach each other in the position of "passing" ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship.

If one of two "passing" ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel ; in starboarding her helm when it was seen that the helm of the other was hard to port and the vessels were rapidly approaching ; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows.

The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop and reverse if necessary, when approaching another ship so as to involve the risk of a collision, is not to be considered as a fact contributing to a collision, provided the same could have been avoided by the impinging vessel by reasonable care exerted up to the time of the accident.

Excusable manœuvres executed in "agony of collision" brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with.

The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard, (art. 21), does not override the general rules of navigation. *The Leverington* (11 P. D. 117) followed.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the judgment against the Steamship "Cuba" in the Nova Scotia Admiralty District of the Exchequer Court of Canada (McDonald C. J.) (1), deciding that she was wholly to blame for a collision which occurred between her and the Steamship "Elliott" in the Harbour of Sydney, Cape Breton, on the 25th September, 1895.

A sufficient statement of the case and the questions at issue appear in the judgment of the court delivered by His Lordship Mr. Justice King.

Mellish for the appellant. The findings by the trial judge, based principally on evidence taken before a referee, are clearly erroneous in view of the particular rules of navigation (2) applicable in this case. Arts. 15 and 21 cannot apply. There is no evidence that any but the red light of the "Elliott" was visible to the "Cuba" up to the time of the collision. Art. 15 does not apply by night where both green and red lights are seen anywhere but ahead. The ships were not "end on," but the "Cuba" was kept a point to a point and a half on the "Elliott's" starboard bow, and consequently they were "crossing" ships. *The Constitution* (3); *The Rona* (4); *The Henry* (5).

Article 21 is to be observed in narrow channels even when no other ship is in sight; *The Rhondda* (6); but when ships are approaching, no matter where, "so as to involve risk of collision," arts. 15, 16 and 18 must still be observed; *The Leverington* (7). The "Elliott" violated arts. 18 and 21. The roadstead of Sydney Harbour is a narrow channel; *The Santanderino* (8); and the "Elliott" entered on the same side as the vessel in that case. There is a statutory presumption

(1) 5 Ex. C. R. 135.

(2) R. S. C. c. 79, s. 2, arts. 15, 16, 18, 21 and 22.

(3) 10 L. T. N. S. 894.

(4) 2 Asp. Mar. Cas. 182.

(5) 12 W. R. 1014.

(6) 8 App. Cas. 549.

(7) 11 P. D. 117.

(8) 3 Ex. C. R. 378; 23 Can. S. C. R. 145.

that she was at fault; Marsden on Collisions (1). It is no answer to say that this fault did not contribute to the collision; *The Santanderino* (2). In the cases of *The Santanderino* (2) and *The Virgil* (3), a speed of eight or nine knots was held to be too great; the "Elliott" did not slacken, stop or reverse, but went on at the rate of eight and a half knots. The assessor reported the first course of the "Cuba" as safe and proper. When the ships afterwards approached "so as to involve risk of collision" articles 16 and 21 applied, and not article 21. The "Cuba" might obey art. 16 in any way she saw fit. *The Beyrl* (4); Marsden on Collisions (5). The "Elliott" was not justified in departing from her course as she did when there was no risk of collision. The "port helm" rule is no longer law; art. 22; Marsden on Collisions (6); *The Germany & The City of Quebec* (7). Had the "Elliott" continued to reverse, the collision could have been avoided. *Nord Kap v. Sandhill* (8). Art. 18 has this object in view. *The Beyrl* (4); *The Ebor* (9). The "Elliott" was warned by the "Cuba's" lights that she was going to port; still she kept on at full speed for ten or fifteen minutes, till after the Cuba's port light was shut out and by this fault made the collision inevitable. *The Arratoon Apcar* (10); *The Manitoba* (11). If both ships were to blame, each ought to bear a moiety of the damages (12); *The Beyrl* (4).

Harris Q.C. for the respondents. As Sydney Harbour is a "narrow channel" the duty of both ships was to alter their courses to starboard; see rule 21. The

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(1) 3 ed. p. 41.

(2) 3 Ex. C. R. at p. 385.

(3) 2 Wm. Rob. 201.

(4) 9 P. D. 137.

(5) 3 ed. p. 472.

(6) P. 422.

(7) 2 Stu. V. A. 158.

(8) [1894] A. C. 646.

(9) 11 P. D. 25.

(10) 15 App. Cas. 37.

(11) 122 U. S. R. 97.

(12) R. S. C. c. 79, s. 87.

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“Cuba” infringed this rule and cannot be excused under art. 23 unless it was not her default that caused the accident. *The Arklow* (1). They were “passing” ships and no special rules applied; they were subject only to the rules of good navigation. The ship in default risks all consequences and cannot charge the other ship with breach of other rules in order to meet her default. *The Jesmond & The Earl of Elgin* (2); *The Free State* (3); *The Araxes & The Black Prince* (4); Marsden on Collisions (5). The “Cuba” should have reversed the moment there was risk of collision; she did not, but the “Elliott” did both slacken and reverse; *The Emmy Haase* (6). The speed of the “Elliott” was safe as the night was fine and clear; see Marsden (7). In the “agony of collision” the “Elliott” was deceived by the “Cuba” blowing two blasts (art. 19) and then throwing her head to starboard, and was justified in then going full speed ahead to clear her; Marsden (8); *The Khedive* (9). This manœuvre was a necessity to be judged by the officer in charge of the “Elliott”; *The Ceto* (10).

This court will not upon disputed facts involving nautical questions, reverse a decree of the Admiralty Court. *The Julia* (11); *The Araxes & The Black Prince* (4).

The judgment of the court was delivered by :

KING J.—This is an appeal from a judgment of the Admiralty Court of the district of Nova Scotia, holding the steamship “Cuba” to be wholly responsible for a collision with the steamship “Elliott.”

(1) 9 App. Cas. 136.

(2) L. R. 4 P. C. 1.

(3) 91 U. S. R. 200.

(4) 15 Moo. P. C. 122.

(5) Pp. 41, 55, 352, 355.

(6) 9 P. D. 81.

(7) Pp. 350 *et seq.*

(8) Pp. 50 422, 480, 481.

(9) 5 P. D. 1; 5 App. Cas. 876.

(10) 14 App. Cas. 670.

(11) 14 Moo. P. C. 210.

The collision took place in the channel leading to the inner harbour of Sydney, C.B., about half-past seven o'clock in the evening of September 25th, 1895. The night was clear and the lights distinctly visible. The "Elliott" from Charlottetown, P.E.I., for Sydney, arrived off Low Point at the mouth of the entrance and stopped for a pilot. When the pilot came aboard the vessel was headed up channel at the full speed of eight knots on a course west by south, which would also take her towards the opposite or northerly side of the channel. This was to comply with the article which requires that

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in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fair-way or midchannel which lies on the starboard side of such ship.

The channel from Low Point to South-East Bar at the entrance of the inner harbour is about four miles in length with a mean width of about a mile and a quarter. It has been held to be a narrow channel within the meaning of the rule. *The Santanderino* (1). A much larger body of water—the Straits of Messina—has been also so held. *The Rhondda* (2).

When the "Elliott" had proceeded upon her course awhile the masthead light of a vessel was seen over the south-east bar moving in a northerly direction across the mouth of the harbour. Presently it became stationary and then the green and red side lights became visible as well, moving down channel. These lights continued to be seen on board the "Elliott" (according to the testimony of those on board of her) for about ten minutes, bearing about a point, or a point and a half, on the port bow.

The approaching vessel (which turned out to be the "Cuba" outward bound with a cargo of coal for Halifax) also saw the red light of the "Elliott" at a distance of a

(1) 3 Ex. C. R. 378.

(2) 8 App. Cas. 549.

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couple of miles and bearing (according to the witnesses for the "Cuba") about a point, or a point and a half, on her starboard bow. Each vessel was very soon able to make out the course of the other.

The mere discovery of a strange light does not necessarily immediately bind the person in charge of a vessel to follow any particular rule, but as soon as he has an opportunity of ascertaining by reasonable care and skill what the strange vessel is, and what course she is pursuing, then the rule which is applicable to the circumstances at once becomes binding on him. *Marsden on Collisions* (1). And when once the above condition exists the rules applicable to the navigation of a vessel are those appropriate to such condition of things and are to be consistently applied, and a vessel is not to be thrown from one rule to another by changes of condition.

Before considering what rule was applicable to the condition of things it may be convenient to follow the courses pursued by both vessels down to the time of the collision.

When those in charge of the "Elliott" saw that the approaching ship remained upon the same bearing from her for a considerable length of time—one of the most usual indications of a risk of collision and especially so as her two side lights continued always visible—the "Elliott's" helm was still further ported.

The result that might have been expected was that the red light of the "Cuba" would alone be left in sight, but this did not follow, indicating that the Cuba was responding to the movement of the "Elliott" by a still further starboarding of the helm. The vessels were then about a quarter of a mile apart. The "Elliott" then put her helm hard to port and the "Cuba" turned sharply to port shutting out her red light, and at the same time or almost immediately afterwards, and when the

(1) P. 353.

vessels were about a couple of cable lengths apart, blew two blasts of her whistle indicating that she was directing her course to port. The "Elliott" then reversed her engines but perceiving almost immediately that the bow of the "Cuba" was turning to starboard instead of to port her engines were set going again at full speed with the hope of clearing the "Cuba" by crossing her bow. The vessels were, however, now too close together and in a few moments the "Cuba's" bow struck the "Elliott" obliquely on the port side a little abaft amidships.

It appears that the object of the pilot of the "Cuba" throughout was to pass to starboard of the "Elliott." He conceived that the vessels were in the position of "crossing" ships with the obligation upon him as having the "Elliott" on his starboard bow, of keeping out of her way, but with the choice of means of accomplishing this resting with him. And the contention on the part of the "Cuba" is that the means adopted would have proved sufficient if the "Elliott" had in turn complied with her co-ordinate obligation to keep her course, art. 22 providing that "when one of two ships is to keep out of the way, the other shall keep her course."

It was argued—and expressions in the judgment seem to favour the contention—that the rule as to steam vessels keeping to their starboard side of the channel overrides the general rule of navigation, but it is decided otherwise in *The Leverington* (1).

Then as to the rules applicable to the case. It is clear that the vessels were not "meeting" ships. They would have been so if the statement made by the pilot of the "Elliott" is correct that the "Cuba" was right ahead, but on cross-examination he withdraws this and puts her on the port bow where the proved courses of both

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vessels, and the testimony of all the other witnesses, show her to have been. Upon the whole evidence for the "Elliott" it is clear that the position of the "Cuba" was a point or a point and a half on her port bow and of course in such position her red light could alone be visible to the "Cuba," and consequently the vessels were not end on or "meeting" vessels.

Then, in the next place, were they "crossing" ships as contended by the appellants? In such a relative position the lights are red to green or green to red. According to the testimony of those on board the "Cuba" such was the case, for they say that the "Elliott's" red light was a point or a point and a half on their starboard bow which would, of course, make the "Cuba's" green light alone visible to the "Elliott;" and their testimony is corroborated by the pilot of the "Elliott" in a sworn statement made by him before the Board of Pilot Commissioners forming part of the evidence in this case. He there says that the "Elliott" showed her red light and the "Cuba" her green light, and says nothing at all about both side lights of the "Cuba" being visible to the "Elliott." On the trial he says that his statement before the commissioners was not correct and agrees with the master of the "Elliott," and with her lookout and other witnesses, that both side lights of the "Cuba" were seen and so continued for some time.

It is not necessary to decide between the conflicting testimony because the learned judge has adopted the account given by the master of the "Elliott" and other witnesses on board of her, who state explicitly that both lights of the "Cuba" were, at first and for a long time, seen by them.

Accepting this finding, in accordance with the practice, it follows that the vessels were not "crossing" ships, but rather were what are known as "passing" ships, one illustration of which, as given in the

Board of Trade diagrams, is when the red (or green) light of one vessel (the "Elliott") is dead ahead of the other (the "Cuba.") In such cases no statutory rule is imposed because, unless there is a change in the course of one or both of the vessels, they will go clear of each other, and no statutory rule is made to meet the case but it is left to the operation of the rules of good seamanship.

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The result is that in porting her helm the "Elliott" violated no statutory rule, and acted consistently with good seamanship.

The "Cuba," on the contrary, appears to have been at fault in several respects. In the first place in persisting, without good reason for it, in keeping on the wrong side of the fair-way or midchannel, and needlessly interfering with the navigation of a vessel in her proper water.

Secondly, in starboarding her helm instead of porting it when it was seen that the "Elliott's" helm was hard to port, and when the vessels were rapidly approaching each other.

The following is from the evidence of Capt. Svensden of the "Cuba" :—

Q. Now you say that you noticed that the "Elliott" had her helm to port when she was five or six cable lengths from you ?

A. Yes, sir.

Q. That was before you put your helm to starboard ?

A. That was at the same time I put my helm to starboard.

Q. It was after you saw that, that you put your helm to starboard ?

A. Hard to starboard, yes, sir.

Q. When you saw that her course was directed to starboard you put your helm hard-a-starboard ?

A. Yes, sir, and blew two whistles.

Q. If you had then put your helm hard-a-port would you not have passed around her port side ?

A. Yes, I might have passed on her port side.

Q. Would you have passed on her port side and gone clear ?

A. Yes, sir.

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It seems to us, as it did to the learned Chief Justice sitting in Admiralty, and to the assessor, that the course of those in charge of the "Cuba" in starboarding her helm at this juncture was wholly wrong, and shows a want of reasonable care and skill to prevent the ship from doing injury. And that it was an efficient cause of the collision that followed cannot be doubted.

Then again, when the "Cuba" signalled that she was directing her course to port the rules made it obligatory that the ship's course should be in accordance with the signal. But instead of this her engines were reversed and under the effect of this her head turned to starboard, and according to the evidence of the master this was the known consequence of a reversing of her engine. The effect of this change of manœuvre was to confuse the "Elliott" people. They had reversed their engines on hearing the "Cuba's" signal but, on perceiving that the "Cuba's" head was turning to starboard instead of to port, they started their engine again³² at full speed ahead. Of course no blame can be imputed to the "Elliott" in this connection.

There was, then, a want of proper skill and care on the part of the "Cuba" directly conducting, as an efficient cause, to the collision unless, by the exercise of reasonable care and skill, those in charge of the "Elliott" could have avoided the mischief.

It is contended that the "Elliott" was guilty of a breach of art. 18 which requires that every vessel under steam, when approaching another ship so as³³ to involve risk³⁴ of collision, is to slacken her speed, or stop and reverse if necessary. It is contended that the non-observance of this rule either wholly occasioned the collision, or so contributed to it as to render the "Elliott" subject to a moiety of the loss under³⁵ the rules in Admiralty and the terms of the statute. Under the Imperial Act 36 & 37 Vic. ch. 85, sec.³⁶ 17, a ship infringing any of the

statutory regulations for preventing collisions is to be deemed in fault unless it is shown, to the satisfaction of the court, that the circumstances of the case made departure from the regulation necessary.

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Under the prior Acts it had been held in *Tuff v. Warman* (1), and other cases, that though the plaintiff had infringed the regulations, and by his negligence had brought the ships into danger, yet if the defendant could, by reasonable care, have avoided the collision the plaintiff could recover. Those prior Acts had made the circumstance that the collision was occasioned by non-observance of the rules a material ingredient in determining the blame. The changes in the law effected by the Act of 1873 are stated by Lords Blackburn and Watson in *The Khedive* (2).

The effect of that Act is to impose on a vessel that has infringed a regulation which is *prima facie* applicable to the case the burden of proving, not only that such infringement did not contribute but that it could not by possibility have contributed, to the collision.

Our Act uses the language of the earlier English Act 17 & 18 Vic. ch. 104, and enacts (3), that :

If in any case of collision it appears to the court * * that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel * * shall be deemed to be in fault unless it can be shown, to the satisfaction of the court, that the circumstances of the case rendered a departure from the said rules necessary.

Accordingly, it would still seem to be necessary, under our Act, to consider whether the non-observance of the rule complained of did, or did not, in fact contribute to the collision.

Apart from statutory definitions of blame or negligence there seems no difference between the rules of law and of admiralty as to what amounts to negli-

(1) 2 C. B. N. S. 740 ; 5 C. B. N. S. 573.

(2) 5 App. Cas. 876.

(3) R. S. C. ch. 79, sec. 5.

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gence causing collision. Per Lord Blackburn in *Cayzer v. Carron Co.* (1); *The Khedive* (2). As applied to the case before us the principle is that a non-observance of a statutory rule by the "Elliott" is not to be considered as in fact occasioning the collision, provided that the "Cuba" could, with reasonable care exerted up to the time of the collision, have avoided it. *The Bernina* (3).

Assuming that the "Elliott" ought to have slackened speed prior to the act of the "Cuba" in putting her helm hard to starboard, the omission to do so would have led to no injurious consequences if the "Cuba" had put her helm to port as she ought to have done instead of to starboard. And the engines of the "Elliott" were reversed when once it was seen that the "Cuba" definitely intended to cross her bows. Again, no means of preventing the collision were open to the "Elliott" after the "Cuba's" failure to carry out the manœuvre she had signalled. What was done then by the "Elliott" was done in what is called the agony of a collision brought about by the other vessel, and no blame is imputable for not continuing to keep her engine reversed.

For these reasons we think that the judgment appealed from is right and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ross, Mellish & Mathers.*

Solicitors for the respondents: *Harris, Henry & Cahan.*

(1) 9 App. Cas. 873.

(2) 5 App. Cas. 876.

(3) 12 P. D. 36.