QUEBEC ADMIRALTY DISTRICT

1924
May 31.

CANADA STEAMSHIP LINES, LTD.....PLAINTIFF;

AGAINST

STEAMER *JOHN B. KETCHUM 2ND*

Shipping and Seamen—Collision—Action in rem—Navigation.

A collision occurred between the *C.* and the *K.* on the St. Lawrence, off shore near Graveyard Point; the former coming down stream and the latter going up. The *C.* gave a two-blast signal to the *K.*, in ample time to warn the *K.* of her election to pass to port, which was not answered, and the *C.* came on at full speed. When about 1,000 feet apart, the *K.* being on a course nearly at right angles to the *C.*, the *C.* still at full speed, sounded the danger signal, immediately followed by a two-blast signal, answered by the *K.* with two-blast, putting her helm to starboard and her engines at full speed astern. The *C.* starboarded and then ported her helm to avoid grounding, and struck the *K.* amidship. There was an open space of 250 or 300 feet between the *K.* and the shore through which the *C.* could have passed.

Held, that the *C.* coming down with the current had the right to elect which side she would take, under Rule 25, and that no alleged custom or convenience can override said rule.

(1) [1886] 2 R. of Tax Cases 179, at p. 181.
(2) [1901] 31 S.C.R. 244 at 296, 297.
(3) [1913] 49 S.C.R 271, at p. 282.
(4) [1913] 48 S.C.R. 588.
(5) [1879] L.R. 11 Ch. D. 170.

2. Held, however, that notwithstanding the neglect of the *K.* to obey this rule and to conform herself to the signal given by the *C.*, such faulty navigation obligated the *C.* to careful seamanship to avoid injuring the *K.*, and that the act of the *C.* in so porting immediately before collision, against her own signals, was the proximate cause of the collision.

3. Where a Judge in Admiralty is assisted by two nautical assessors and there is a conflict of opinion between such assessors, as the decision both of fact and law is the decision of the court, it is clearly the duty of the judge to form his own opinion (1).

ACTION *in rem* for damages and counter-claim, arising out of collision between the steamer *Cataract* and the schooner *John B. Ketchum 2nd.*

May 21, 1924.

Case heard before the Honourable Mr. Justice Maclennan, at Montreal.

A. R. Holden, K.C. for plaintiff.

Francis King, K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 31st May, 1924, delivered judgment.

This is an action *in rem* for damages and a counter-claim arising out of a collision between the plaintiff's steamer *Cataract* and the steamer *John B. Ketchum 2nd,* belonging to the George Hall Coal & Shipping Corporation, which occurred in the St. Lawrence River on 8th November, 1923.

[His Lordship here gives the case as stated by plaintiff and defendant, and proceeds.]

The collision occurred in daylight on 8th November, 1923. The *Cataract* was a steel steamer of 839 tons gross and 451 tons net register, 185 feet long, 36 feet beam, drawing 13 feet 6 inches, laden with grain and bound from Port Colborne to Montreal. The *Ketchum* was a steel steamer of 1,103 tons gross and 763 tons net register, light, 193 feet long, 42 feet beam, drawing 2 feet 2 inches forward and 11 feet aft. When the *Cataract* arrived about opposite the lower lock of Farran Point Canal, coming down the river at a speed of fifteen miles an hour, she gave a two-blast signal to the *Ketchum* coming up and which had then rounded Graveyard Point and was heading almost at right angles across the *Cataract's* bow. There is some contradic-

(1) See in re steamship *Euphemia* [1907] 11 Ex. C.R. 34.

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tion as to how far the vessels were apart when this signal was given. The master of the *Cataract* said at first that it was probably a little better than a quarter of a mile, and the captain of the *Ketchum* put the distance at 1,800 feet. I am satisfied both were mistaken as to the distance. The master of the *Cataract* testified later that the signal was given opposite or a little below the lock, and his evidence in that connection is corroborated by his second officer and by two lockmen and three officers on other vessels, one of which was in the lock and the other approaching its entrance. The evidence of these independent witnesses establishes conclusively that the *Cataract's* first signal was given when she was opposite or a little below the first lock of the canal, which would place her more than half a mile from the *Ketchum*. The river below the canal bends to the north and broadens into a bay down to Graveyard Point, about three-quarters of a mile below. The *Cataract* on giving the two-blast signal starboarded to follow the course of the north shore of the bay. The *Ketchum* at the same time was well around Graveyard Point heading also for the north shore, and although the *Cataract's* signal was heard on the *Ketchum* no reply was given. Both vessels continued their course until within a distance of 1,000 or 1,200 feet, the *Ketchum* being on a course nearly at right angles to that of the *Cataract*, the latter still proceeding at full speed sounded the danger signal immediately followed by a second two-blast signal, the *Ketchum* replied with a two-blast signal, put her helm to starboard and her engines full speed astern, the *Cataract* starboarded at first and then ported (her master says to avoid running ashore), and in about one minute or a little more the collision occurred, the stem of the *Cataract* hitting the port bow of the *Ketchum* almost at right angles about thirty feet from her stem.

When the *Cataract* gave the second two-blast signal she was heading for the *Ketchum's* port side amidships, according to the evidence of the master, first and second officers and firemen of the *Ketchum*. The master of the *Cataract* says the *Ketchum* was then four points on the *Cataract's* starboard bow, and her second officer says the *Cataract* was facing to the north of the *Ketchum*. The *Ketchum*

reversed her engines full speed astern at the second two-blast signal; she was going against a strong current, quickly responded to the reverse action of her engines, stopped in her course over the ground and took on sternway. Her master swears that, a minute after her engines were reversed, she stopped and her head began to swing to starboard and came down with the current. Her wheelsman swears she was going astern by the land at the time of the collision and her fireman says she was going astern. The second officer of the *Cataract* testified that just before the collision the *Ketchum* was stopped, then that she was going ahead, and when further questioned by opposite counsel said he did not see whether she had stopped and that he did not look. His evidence, if it does not corroborate that of the *Ketchum's* witnesses that she was stopped or had sternway at the time of the collision, does not contradict it. The *Ketchum* was struck on the port bow about thirty feet abaft her stem or about fifty feet forward amidships, which would indicate the *Ketchum* was backing out of the course of the *Cataract*. The latter's master admitted to counsel for the *Ketchum* that, if she had gone astern three or four feet more, there would have been no collision. When the *Cataract* gave the second two-blast signal she starboarded at first and then ported before the collision, her master giving as a reason that he ported to avoid going on the north bank, and in another part of his evidence he stated:—

If I had not done that (ported) he would have very likely hit us right amidships.

The latter answer suggests he thought there was space enough between the shore and the *Ketchum* for him to pass. At the time the *Ketchum's* engines were put full astern her master says he was about 300 feet from the shore, her first mate put it at 250 feet and her wheelsman says she was about 150 feet from the shore at the time of the collision. The master of the *Cataract* marked the place of the collision on the Canadian Chart about 260 feet from the shore and, according to the mate of the *Ketchum* who marked the place of collision on an American Chart, it happened over 300 feet from the shore.

The current at the foot of the canal is seven or eight miles an hour and follows the north shore of the bay to

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Graveyard Point and gets slower as it approaches the Point. There is an eddy on the south side between the canal and the Point, and it was to avoid getting into this eddy that the *Cataract* decided, as was her right under Rule 25. to go down on the north side when she gave the first two-blast signal to the upbound *Ketchum,* although the latter had turned the Point and was 200 or 300 feet above it then heading well in for the north shore. There is some evidence that she was following the customary track for upbound vessels, but no alleged custom or convenience can override Rule 25 which states:—

> That in narrow channels where there is a current and in the River 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 one-half mile of each other, give the signal necessary to indicate which side she elects to take.

In this case the *Cataract* had the right to elect which side she would take and did so at a proper distance by giving the required signal that she intended to go to port, which was heard on the *Ketchum* but met with a deliberate refusal on the part of the latter to obey the signal and pass the *Cataract* starboard to starboard. There is no excuse for the *Ketchum* refusing to obey the signal, and her persistance in following her course heading for the north shore was improper and wrongful. Her master admits that he could have then starboarded his helm and passed the *Cataract* starboard to starboard. But that does not dispose of the case, as there is a question whether or not, notwithstanding the neglect of the *Ketchum* to obey the rule and conform to the signal of the *Cataract,* that neglect is the cause of the accident. The faulty navigation of the *Ketchum* obligated the *Cataract* to careful seamanship to avoid injuring her, notwithstanding the failure of the *Ketchum* to observe the rule. As the *Ketchum* had been observed from the time she turned Graveyard Point to the moment she put her engines full speed astern persisting in keeping her course to the north shore, there was nothing sudden about the critical position in which the *Cataract* was placed and the principle of the *Bywell Castle* case (1) can have no application. The master of the *Cataract* dur-

(1) [1879] 4 Asp. M.C. 207.

ing all this time had before him the port side of the *Ketchum* heading for the north shore almost at right angles to the course of his own vessel and he did nothing except to continue at full speed until within 1,000 to 1,200 feet of the *Ketchum*. He admits in his evidence that he was then in a dangerous position. One of my assessors advises me that, as it was clearly apparent that the *Ketchum* was continuing her course heading for the north shore, the *Cataract* before arriving 1,000 to 1,200 feet from the *Ketchum* should have cancelled her first signal, given the danger signal and one short blast and put her helm to port, which would have enabled her to pass the *Ketchum* port to port. My other assessor disagrees and is of opinion that the *Cataract* was right in continuing on her course, giving the danger signal and two blasts on her whistle. When these two blasts were given for the second time by the *Cataract* the *Ketchum* answered with two blasts, put her helm to starboard and her engines full speed astern. Both my assessors concur in saying that what the *Ketchum* did then was good seamanship, as by reversing she gave a little more room between herself and the north shore for the *Cataract* to pass. One of my assessors however thought the *Ketchum* should have gone sooner astern so as to give more room for the *Cataract* to pass between her and the north shore. When the *Ketchum* put her engines astern she was about 300 feet from the shore, she was facing the current and very soon lost headway and began going astern, so that at the time of the collision there was between 250 and 300 feet of deep water between the bow of the *Ketchum* and the shore, more than sufficient to enable the *Cataract* to have passed down without colliding with the *Ketchum*. My assessors advise me that there was room enough for the *Cataract* to pass between the *Ketchum* and the shore, but say it would have been dangerous for the *Cataract* to attempt it, as while she would not collide with the *Ketchum* she might possibly run ashore after passing the *Ketchum*. However that may be, this collision would not have happened if the *Cataract* had not ported her helm after she gave the second two-blast signal and just before the collision. Was that negligence? The master of the *Cataract* saw the *Ketchum* going astern and there was an open space

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of 250 or 300 feet between the shore and the *Ketchum* through which the *Cataract* could have passed. The porting immediately before the collision against the *Cataract's* own signal of two blasts when there was sufficient room for her to pass, in my opinion was gross negligence and was the proximate cause of the collision and in this opinion one of my assessors concurs. No negligence on the part of the *Ketchum* which was over before the *Cataract* negligently ported her helm could be contributory negligence in the sense which is required to relieve the *Cataract* from the consequences of that negligence; *Spaight* v. *Tedcastle* (1). In the latter case Lord Selborne L.C., at page 219, said:—

> Great injustice might be done if in applying the doctrine of contributory negligence to a case of this sort, the maxim, *causa proxima, non remota spectatur,* were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by shewing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred.

In the case of *Cayzer Irvine & Co.* v. *The Carron Co.* (2), Lord Watson, in giving judgment in the House of Lords, and dealing with the breach of a Thames rule by a steamer called the *Clan Sinclair,* said, at p. 887:—

> The new and wrong position into which I assume *The Clan Sinclair* had been brought by her neglect of the rule was perfectly apparent to those on board *The Margaret,*—apparent for a considerable time and a considerable distance,—for a time and distance of such appreciable extent that they could, with ordinary care, have avoided the collision which ensued; and the ground of my judgment is shortly this, that assuming that there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of *The Margaret.* Instead of exhibiting ordinary care and prudence, those in charge of that vessel adopted a reckless course of navigation which is described so well in some of the opinions of the judges of the court below that I need say nothing further about it.

In that case the House of Lords reversed the Court of Appeal in which both vessels were held to blame and restored the decision of the Court of Admiralty holding the *Margaret* alone to blame.

(1) [1881] 6 A.C. 217. (2) [1884] 9 A.C. 873.

In the case of *The Volute* (1), Viscount Birkenhead L.C., said:—

Where a clear line can be drawn, the subsequent negligence is the only one to look to.

In the case of *The Ravenna* (2), Pickford L.J., in the Court of Appeal at p. 219 said:—

A person is not justified in carrying on in a course fraught with danger for himself or some other person in the hope that the other person will do the right thing and avert the danger.

While the *Ketchum's* failure to observe the rule cannot be too strongly condemned, her course and conduct were perfectly apparent to the *Cataract* for a considerable time and distance, while the latter vessel carried on in a course which her master admitted was dangerous, when he might by porting have avoided the collision by passing the *Ketchum* port to port. Porting then would have been a precaution required by the special circumstances to avoid immediate danger under Rules 37 and 38. In failing to port at that time the master of the *Cataract*, in my opinion, failed to show ordinary care, and in this conclusion one of my assessors concurs. Later, when the *Cataract* gave the danger signal and two blasts on her whistle, although she first starboarded intending to pass the *Ketchum* starboard to starboard and having plenty of room to do so, she deliberately and improperly ported and brought about the collision. As her master frankly admitted he preferred to hit the *Ketchum* to have the *Ketchum* hit the *Cataract,* although he had ample room to cross the bows of the *Ketchum,* then going astern and backing out of his course. In my opinion, what Viscount Birkenhead called the *clear line* existed between the negligence of the *Ketchum* and the negligence of the *Cataract,* and therefore the subsequent negligence of the latter is the one which was the direct and immediate cause of the collision and in this conclusion one of my assessors concurs. The *Cataract* did *neglect* some *precaution* which was *required by the special circumstances of the case* and is alone to blame.

Although the two assessors disagree on some of the nautical questions involved in this case and the court can call in a third and after submitting the evidence to him have

(1) [1922] 1 A.C. 129; 91 L.J. Adm. 38.

(2) [1918] P. 26. at p. 29; 87 L.J. Adm. 215.

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the case re-argued before the three assessors, I did not deem it necessary to put the parties to the additional expense which would be involved in having a third assessor and a re-argument. As the decision both of fact and law is the decision of the court, in the conflict of the assessors, it is clearly the duty of the judge to form his own opinion; *The Philotaxe* (1), *The City of Berlin* (2), and *The Gannet* (3).

There will therefore be judgment dismissing, with costs, the action of the plaintiff, and maintaining, with costs, the counter-claim of the defendant against the plaintiff, with a reference to the Deputy Registrar to assess the damages.

Judgment accordingly.