

BETWEEN :

THE SHIP *NEWBRUNDOC* APPELLANT;

AND

A. S. RUDOLF RESPONDENT.

1940
Jan. 9.
—
July 4.

Shipping—Appeal from District Judge in Admiralty—Damage to respondent's vessel in Cornwall Canal—No negligence on part of appellant ship—Damage due to negligent operation of respondent's vessel—No rule of the road, custom or practice requiring an upbound ship passing through the Cornwall Canal to wait in the Wide Bay for a vessel that has passed through Lock 21 downbound—Appeal allowed.

Appellant steamship, westbound from Montreal, and the steamer *Rutenfjell*, owned by respondent, eastbound met and passed one another in the narrow stretch of the Cornwall Canal between Lock 21 and the Wide Bay. The *Rutenfjell*, after passing through Lock 21, proceeded downward, and, after observing that the appellant steamer was not holding back in the Wide Bay, but instead was proceeding upwards and through the narrow stretch of the Canal, put its engines full speed astern, allegedly to avoid a collision. The result of this operation was that the *Rutenfjell's* stern sheered towards the south bank of the Canal and her bow to the north bank and she went out of control, ending crosswise the Canal with her bow on the north bank and her stern on the south bank. Her lines were got ashore and she was pulled over against the south bank of the Canal and tied up. The *Newbrundoc*, having held back some four or five ship lengths below, then passed the *Rutenfjell* without difficulty and without damage to either ship.

The owner of the *Rutenfjell* brought action against the *Newbrundoc* to recover for the loss of her rudder shoe alleged to have been broken off through striking some submerged object when the *Rutenfjell* was manoeuvring to avoid the collision anticipated by her pilot.

Held: That it is not the custom or the usual practice for an upbound ship to hold up in the Wide Bay and there meet and pass a downbound ship after it is definitely ascertained that the downbound ship has passed through the lock and has not stopped in the wider section just outside the lower end of the lock.

2. That there is no Rule of the Road applicable to the Cornwall Canal which requires an upbound ship reaching the Wide Bay to hold back there until a downbound ship sighted in Lock 21, or after leaving the lock, reaches the Wide Bay.
3. That the damage incurred by the *Rutenfjell* was solely attributable to the negligent handling of the *Rutenfjell* before the ships began to pass one another.

APPEAL from the decision of the District Judge in Admiralty for the Quebec Admiralty District, allowing plaintiff's action for damages for loss of a rudder shoe alleged due to the negligent operation of the defendant steamer.

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The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

C. Russell McKenzie, K.C. for appellant.

R. C. Holden, K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (July 4, 1940) delivered the following judgment.

The respondent, owner of the steamship *Rutenfjell*, was the plaintiff in an action brought against the appellant steamship *Newbrundoc* claiming damages alleged to have been occasioned by the negligent navigation of the *Newbrundoc*, in the Cornwall Canal. The action was heard by Cannon, J., District Judge in Admiralty for the Quebec Admiralty District, who found that the damage suffered by the *Rutenfjell* was attributable solely to the improper and negligent navigation of the *Newbrundoc*, and this is an appeal from that decision. On the hearing of the appeal I was assisted by Captain A. Barrett as Nautical Assessor.

The ship *Rutenfjell*, of Norwegian registry, a steel single screw steamship of 1,334 tons gross, 250 feet in length and with a beam of 41.3 feet, was on July 9, 1938, proceeding down the Cornwall Canal, east bound, laden with general cargo, on a voyage from the Great Lakes to London, England, via Montreal and Quebec. Early in the morning of that day she passed through Lock 21 of the Cornwall Canal, at or near Dickinson's Landing. The ship *Newbrundoc* is of the usual full size lower canal type of grain carrier, 1,935 tons gross, 253 feet in length, and with a beam of 43.2 feet. On the morning of July 9, 1938, the *Newbrundoc*, cargo laden, was proceeding up the Cornwall Canal on a voyage from Montreal to the Upper Lake ports. The *Rutenfjell* and the *Newbrundoc* met and passed one another in the Cornwall Canal, on the date mentioned, and in the circumstances I shall presently describe.

It will be desirable to describe generally that section of the Cornwall Canal wherein occurred the events culminating in this action. About a mile below Lock 21 there is a rather sharp bend in the Cornwall Canal and this is usually referred to as the "Big Bend." A ship proceeding west-erly up the canal and before fully rounding the Big Bend

would be unable to see a ship in Lock 21, or anywhere between that lock and the Big Bend, but once having rounded the Big Bend she would easily observe a downbound ship in the lock, and thereafter while en route between the lock and the Big Bend. A ship downbound from Lock 21 would observe an upbound ship after the latter had rounded the Big Bend. The north or land-side of the canal has a considerable elevation but the south bank—a wall or bank between the canal and the River St. Lawrence—is quite low and while there is a slight bend in one or two places between Lock 21 and the Big Bend yet the canal between those two points may be said to be comparatively straight. Immediately above and west of the Big Bend the canal is wider for a short distance than it is from there on towards the lock, and this short but wider stretch of the canal was referred to frequently as the “Wide Bay,” and it will probably avoid confusion if I continue thus to distinguish between the Big Bend and the Wide Bay, the latter being a short section of the canal where it is agreed two ships may meet and pass with ease and safety, whereas in the stretch between the Wide Bay and a point just a little below Lock 21 the canal is considerably narrower, and consequently it is more difficult for ships of full canal size to meet and pass one another in that stretch of the canal than it is in the Wide Bay, or immediately below the lock where, for a short distance, the canal also widens.

The current in the section of the canal in question is a good two knots. The canal banks are set with stones and it was suggested that in some places stones had fallen to the bottom of the canal, particularly on the south side, but the extent of this condition, if existing at all, on the occasion in question, was not clearly established. There is no system of signals of any kind for controlling or directing the movements of ships pursuing opposite courses between Lock 21 and the Big Bend, but there does appear to be some method of advising ships passing downwards through Lock 21 that a ship has passed, or is about to pass, upwards through Lock 20, the next lower lock, and that appears to have been done in this case.

On the morning in question the *Rutenfjell* left Lock 21 at 4.20 a.m., daylight saving time, it then being broad day-

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light; the weather was fine and clear with a light south-westerly wind. Early after leaving the lock, and having the Big Bend in mind, the *Rutenfjell* gave a long blast of her whistle, as the *Newbrundoc* did before rounding the Big Bend, but it appears that neither ship heard the signal of the other. The lockhand Dunlop testified that the *Rutenfjell* had just cleared the lock and was proceeding down the canal when he observed the *Newbrundoc* rounding the Big Bend. The master of the *Rutenfjell* testified that his ship had moved down the canal about one-third of the distance between the lock and the Big Bend before he first saw the *Newbrundoc* coming around that bend, while his pilot stated that she was about 900 feet below the lock when the *Newbrundoc* came into sight. There would seem to be a substantial discrepancy between the master and the pilot, as to the position of the *Rutenfjell* when the *Newbrundoc* was seen coming around the Big Bend, but mathematical exactness is not to be expected in such cases. The master of the *Newbrundoc* testified that when his ship rounded the Big Bend at half speed he saw the *Rutenfjell* in the lock and he proceeded slowly upwards expecting to pass the *Rutenfjell* in the stretch between the Wide Bay and the lock. There would not appear to be any reason why the *Rutenfjell* should not have seen the *Newbrundoc* as early as did the lockhand Dunlop, whose evidence upon this point I would be disposed to accept. The master of the *Newbrundoc*, I have no doubt, on rounding the Big Bend was able to see the *Rutenfjell*, whatever was then her precise position. However, in my view of the case, I do not think it is of vital importance at what precise points in the canal the respective ships first observed one another. In any event, the *Rutenfjell* proceeded downwards without stopping immediately outside the lock where the canal was wider than onwards to the Wide Bay, and the *Newbrundoc* passed through the Wide Bay and proceeded slowly onwards into the narrower stretch of the canal. Neither ship gave any signal after sighting one another in order to indicate what each expected the other to do, or that either anticipated difficulty in meeting and passing one another.

The pilot of the *Rutenfjell* testified that when he became satisfied that the *Newbrundoc* was not holding back in the Wide Bay and was proceeding upwards and through the

narrow stretch of the canal he made up his mind that a collision was inevitable and that he would tie up to the south bank. The engines were then put full speed astern, which continued for four or five minutes, to get the way off the *Rutenfjell*, but in this movement her stern sheered towards the south bank of the canal and her bow to the north bank and she went out of control, ultimately ending crosswise the canal with her bow on the north bank and her stern on the south bank. During this time, it is claimed, the *Rutenfjell* struck some submerged object at or near the south bank of the canal, breaking off her rudder shoe, which is the damage complained of and attributed to the *Newbrundoc*. The lines of the *Rutenfjell* had then to be got ashore to pull her over against the south bank of the canal and when this was done she was there tied up. I find it difficult to avoid the suspicion that the pilot's decision to tie up to the south bank of the canal was because he had to get lines ashore to heave his ship from being crossways in the canal. The *Newbrundoc*, which in the meanwhile had held back some four or five ship's length below, then proceeded to pass the *Rutenfjell* and this she did without difficulty and without damage to either ship of any kind. There was the suggestion that in passing the ships rubbed against one another but that, in my opinion, was not established.

It was contended on behalf of the *Rutenfjell*, that good seamanship, custom and practice, required that an upbound ship on rounding the Big Bend should hold back in the Wide Bay until any downbound ship which had left Lock 21 had passed through the intervening narrow stretch, and for such ships to meet and pass in the Wide Bay. On behalf of the *Newbrundoc* it was contended that there was no Rule requiring an upbound ship, in the situation just mentioned, to hold back in the Wide Bay for the downbound ship, and there to meet and pass one another, and that it was quite safe and usual for ships to meet and pass one another in the narrow stretch of the canal, and that no custom or practice prevailed to the contrary, though upbound ships do frequently hold back in the Wide Bay and there meet and pass downbound ships. The important question then for decision here

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would seem to be whether or not the *Newbrundoc* should have held back in the Wide Bay until the *Rutenfjell* had there passed her.

The learned trial judge, *inter alia*, found that good seamanship required and that it was a recognized custom and practice for an upbound ship to hold back in the Wide Bay, until any downbound ship which had left the lock had passed through the narrow stretch, and for such ships to meet and pass in the Wide Bay; that the *Newbrundoc* should, under the circumstances, have held back in the Wide Bay until the *Rutenfjell* had passed; that if those on the *Newbrundoc* had exercised proper care and attention and had navigated her in a proper and seamanlike manner the *Rutenfjell* would not have sustained damage; that in the emergency thus created, and throughout, the *Rutenfjell* was handled in a proper and seamanlike manner; and that whereas the *Rutenfjell* suffered damage owing to the negligent navigation of the *Newbrundoc*, the latter was liable in law for the damages incurred by the *Rutenfjell*, either by a collision between the two ships or in any other way.

There is no Rule of the Road applicable to the Cornwall Canal which requires an upbound ship reaching the Wide Bay to hold back there until a downbound ship sighted in Lock 21, or after leaving the lock, reaches the Wide Bay. Mr. Shields, the Lockmaster of Lock 21 for the past twenty-seven years, testified that ships often meet and pass one another in the narrow stretch of the canal, and his evidence is, I think, entitled to great weight. He stated that fully loaded canal boats frequently remain in the Wide Bay if the downbound ship is close, but all do not do this. The Lockmaster leaves the impression with me that it is not at all unusual for ships to meet and pass anywhere in the canal between the Wide Bay and Lock 21, in the narrow stretch, in fact, he would appear to say that such is rather the rule than the exception, but of that I cannot be quite certain. The master of the *Newbrundoc* stated that, in his own experience, ships pass one another in the narrow stretch of the canal every day. He stated that he himself would meet and pass from one to two hundred ships a year in the narrow stretch of the canal. My assessor, who has had a long and practical acquaintance with this canal informs me that ships do pass

one another frequently in the narrow stretch of the canal in question, but he also informs me that it is a common occurrence for an upbound ship to hold back in the Wide Bay for a downbound ship after she has passed through the lock. I am quite satisfied that it is quite common for ships to meet and pass one another in the narrow stretch of the canal, though it is quite possible that the more usual practice is for the upbound ship, after turning the Big Bend to remain in the Wide Bay after sighting a downbound ship below the lock, but that would not establish a custom or practice in the sense suggested here. The evidence does not establish that it is the "custom," or the "usual practice" for an upbound ship to hold up in the Wide Bay and there meet and pass a downbound ship, after it is definitely ascertained that she has passed through the lock and has not stopped in the wider section just outside the lower end of the lock. Good seamanship, in certain weather conditions, might require this, but under favourable weather conditions, as was the case here, I do not think that "custom" or "practice" requires an upbound ship to hold back in the Wide Bay for a downbound ship. A "custom," or "usual practice," of waiting at the Wide Bay should be so widely known and followed that it would be considered unusual or extraordinary to do the other thing, and that cannot be said of the situation here.

My assessor advises me that ships passing one another in the narrow stretch of the canal might rub one another or the canal banks, but without damage to either. In such circumstances the speed of the meeting ships would be the main factor determining whether they would meet and pass one another without any particular difficulty or without causing damage to one another. If each ship proceeds cautiously and slowly my assessor tells me that the risk of rubbing one another, or the canal banks, is not a very serious one, and that, I think, must be so. In such a situation both ships must, of course, proceed cautiously and well under control in order to avoid the risk of any serious collision. In the narrow stretch of the canal in question my assessor informs me that a common manœuvre for an upbound ship is to put her bow on her starboard bank with her engines working at slow speed ahead so as to hold her there until the downbound ship is nearly abreast of her bow, and then she should alter her course to port so as to bring her stern to starboard, leaving room

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for the downbound ship to pass, and as the bow of the upbound ship works clear of the banks she slowly passes by; this manœuvre would leave the bigger share of the canal clear for the downbound ship to pass in. In such a situation both ships must be well under control and proceed slowly. The *Rutenfjell* did not in my opinion observe this requirement, and I am so advised by my assessor, because, by improper handling she was allowed to get out of control and go crosswise the canal, and this was probably due to the fact that the *Rutenfjell* was attempting to get her way off too hurriedly in order to pass the *Newbrundoc* at slow speed. I am advised, and it seems quite manifest, that in going full speed astern on her engines for four or more minutes, with a current behind her, the *Rutenfjell* was bound to sheer across the canal just as she did; this my assessor tells me was not a proper handling of the ship. This could have been avoided by a proper manœuvring, that is, by going astern with an occasional full speed ahead, with her rudder hard astarboard, and the *Rutenfjell* had sufficient power to do this; had this been done I have no doubt it would have prevented her striking her stern against the south bank, and going crosswise in the canal, thus causing the damage in question, and it is the contention of the *Newbrundoc* that whatever damages the *Rutenfjell* suffered were caused by her own negligent navigation in attempting to slow up before meeting and passing the *Newbrundoc*.

We have then the following state of facts pretty clearly established in this case. Had the *Newbrundoc* remained in the Wide Bay and there allowed the *Rutenfjell* to meet and pass her the incident in question here would not have arisen. There is no Rule which required the *Newbrundoc* to await the *Rutenfjell* in the Wide Bay, and no custom or practice to that effect was established; in fact it was shown that ships do pass one another frequently in the narrow stretch of the canal, and probably there are very practical shipping considerations which necessitate this practice, otherwise serious congestion of traffic might at times ensue. The *Newbrundoc* did not hold back in the Wide Bay but proceeded upwards slowly towards the lock and it consequently became necessary for the two ships to pass one another in the narrow stretch of the canal. In slowing down preparatory to meeting and passing the *Newbrundoc* those in charge of the *Rutenfjell* lost control

of that ship and, I am satisfied, by improper handling allowed her to sheer and go crosswise the canal in the manner I have described; in this interval the *Rutenfjell* suffered the damage complained of, and the master of the *Rutenfjell* stated that it was this sheering of the stern of his ship over to and against the starboard canal bank that caused the breaking of his rudder shoe. While pulling the *Rutenfjell* over against the south bank of the canal the *Newbrundoc* held back three or four lengths below, but after the *Rutenfjell* was tied up the *Newbrundoc* proceeded ahead and passed the *Rutenfjell* without damage occurring to either ship.

The damage incurred by the *Rutenfjell* therefore seems to me to have been attributable solely to the negligent handling of the *Rutenfjell* considerably before the ships began to pass one another. I am of the opinion, as is my assessor, that with the *Rutenfjell* proceeding at the slowest possible speed, well under control, and properly handled, the two ships would have passed one another successfully and without causing any damage the one to the other. I am satisfied, upon the evidence, that in the narrow stretch of the canal there is well over 90 feet, probably 100 feet and more, at the bottom of the canal for fourteen feet navigation or draft, and that there was ample room for the ships to pass one another with safety. In passing one another it is possible that both ships might have rubbed the canal banks, or they might have rubbed one another, which would not have been a serious matter, and this is likely an almost daily experience with canal boats. I think the damage to the *Rutenfjell* was caused by her own negligent navigation and manœuvring, and by that alone. The only possible offence that might be charged against the *Newbrundoc* is that she did not hold back in the Wide Bay, but she decided to meet and pass the *Rutenfjell* in a comparatively straight section of the narrow stretch of the canal, which seems to have been a common thing to do, and against which there is no Rule; and there can be no suggestion of negligent navigation on the part of the *Newbrundoc* in attempting to carry out this intention. I do not think therefore that the *Newbrundoc* should be held liable for the occurrence causing the damage to the rudder shoe of the *Rutenfjell*, and with the greatest of respect I accordingly allow the appeal and with costs.

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Appeal allowed.