1906

*Dec. 7.
*Dec. 26.

THE STEAMSHIP "ARRANMORE" (DEFENDANT) ..... } APPELLANT;

AND

ALEXANDER RUDOLPH AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Shipping — Collision — Violation of rules not affecting accident — Steering wrong course.

The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local Judge unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton* (4 Can. S.C.R. 648) followed.

A steamer coming up Halifax harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow and the latter starboarded her helm to pass astern and then ported. She then was so close that the engines were stopped but too late to prevent the collision.

Held, that the steamer alone was to blame for the collision.

Held, also, that though under the rules the schooner should have kept her course and also was to blame for not having a proper lookout neither fault contributed to the collision.

APPEAL from a decision of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada in favour of the plaintiffs.

The action was brought by the owners of the schooner "Alexander R.," sunk by in Halifax Harbour by collision with the SS. "Arranmore." It was tried

*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

before the local judge for the Nova Scotia district assisted by Commander E. B. Tingling, as nautical assessor, who filed the following report.

"After carefully considering the evidence given by various witnesses, also the arguments used by counsel relating to the collision between SS. 'Arranmore' and the Schooner 'Alexander R.' in Halifax Harbour, on April 2nd, 1906, I beg to state that, in my opinion, the loss of schooner and cargo rests entirely on the 'Arranmore.' The reasons for this finding are based on the fact that the 'Arranmore,' by the evidence of Captain Couillard (which is very plain and straightforward) saw a green light about three points on the port bow (exonerating the schooner from not complying with article 10 as the 'Arranmore' was not an overtaking vessel); on seeing the light, although the 'Arranmore's' helm was starboarded to allow her to pass astern of the schooner, thereby bringing her a little on the 'Arranmore's' starboard bow, yet by meeting her with port helm and then giving her port helm he acted unwisely, thus bringing about the collision. Stopping the 'Arranmore's' engines to prevent going too far to westward when he altered his course was correct, but the fact of his placing the engines full speed astern within such a short period of stopping shews that he found himself so close to the schooner that he apprehended danger of a collision. Doubtless, by rule 21, the non-giving-way-vessel has to keep her course, yet there are occasions when a vessel finding herself in imminent danger has to depart from this rule (see article 27). In this case the schooner cannot be held in default for putting her helm down and coming in to the wind, as although she did not escape the collision, yet the fact of her receiving the blow on the port side of her stern shews that had she kept her

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

course the blow would have been delivered on her starboard side—a point entailing greater danger for the saving of the crew.

"One part of the evidence endeavours to shew that the 'Alexander R.' was filling on the starboard tack and had acquired stern way. The evidence to the contrary of this must be accepted as a heavily laden vessel would carry headway for a considerable distance whilst in stays, and if on starboard tack would be headed somewhere W. by N., bringing her port side to the 'Arranmore's' bow.

"Previous to the new edition of the rules and regulations for the prevention of collisions it was optional for vessels to use sound signals when in sight of one another, but the amendment of 1896 makes this rule compulsory. The 'Arranmore' ought to have sounded two (2) blasts of her whistle and then abided by the same. Halifax does not come under the heading of a narrow water. Nowhere, except passing George's Island, is the channel less than half a mile wide.

"Not seeing the 'Arranmore' reflects on the look-out kept on board the 'Alexander R.,' but does not materially bear on this case, as the sole cause of this disaster was the improper use of port helm on board the 'Arranmore.'"

The local judge found the "Arranmore" solely to blame for the collision and gave judgment for the plaintiffs, damages to be assessed by the registrar. The "Arranmore" appealed.

Harris K.C. and *Mellish* K.C. for the appellant. We contend that the schooner should have kept her course and speed. Articles 22 and 29 were violated by her. The local judge gave no opinion on these questions,

and he is mistaken in saying that the issue is merely technical and turns on the propriety of the handling of the respective vessels. The assessor did not answer the questions submitted to him, but undertook to decide, as a matter of law, which ship was at fault.

The burthen of proof is not on the steamship: *Inman* v. *Reck*(1); Marsden, pp. 33, 407, 409, 412; *The "Illinois"*(2). See also *The "Saragossa"*(3); *The "Highgate"*(4); *The "Khedive"*(5), at page 894, and *Belden* v. *Chase*(6).

It is taken as a fault against the "Arranmore" that she did not obey article 28 and indicate her course on her whistle. The rule only comes into operation when there is danger of collision and until the schooner was brought up in the wind there was no danger of collision. The signal would then be of no use, and the non-observance of this rule did not contribute in any way to the collision. *The "Cuba"* v. *McMillan*(7), at page 661. The great weight of testimony as well as the position of the vessels before and after collision even under the evidence of the plaintiff's witnesses shew that a collision would not have taken place had the schooner kept on her course. The assessor's finding that because the schooner received the blow on the port side, she would have received it on her starboard side if she had not come about is upon the face of it ill founded. The reasoning is only applicable to an otherwise stationary schooner turning on a pivot. His suggestion that the "Arranmore" was wrong in reversing her engines, or at least that the reversal of her engines can be regarded as an ad-

(1) L.R. 2 P.C. 25.
(2) 103 U.S.R. 298.
(3) 7 Asp. M.C. (N.S.) 289.
(4) 6 Asp. M.C. (N.S.) 512.
(5) 5 App. Cas. 876.
(6) 150 U.S.R. 674.
(7) 26 Can. S.C.R. 651.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

mission of a previous mistake on behalf of the steamer, is disposed of by the consideration of the fact that the engines were only reversed after the schooner executed the unexpected manœuvre of "coming about."

We rely also on *The "Atlas"*(1), at pages 464-466; *The "Cape Breton"* v. *The Richelieu & Ont. Nav. Co.* (2), at page 576; *The "Agra"* v. *The "Elizabeth Jenkins"*(3); *The "Samuel Dillaway"*(4); *Malzard* v. *Hart*(5), and *The North British and Mercantile Ins. Co.* v. *Tourville*(6).

W. B. A. Ritchie K.C. for the respondents. The particular manœuvring of the "Arranmore" shews that it was her duty to keep out of the way, and if she kept her course until she was so close to the "Alexander R." as to cause well founded alarm to the schooner that she was being run down and must do something to save the lives of those on board, this was amply sufficient to establish plaintiff's case.

The assessor has found against the contention that the collision was caused by the schooner coming up in the wind, and that but for this action on her part the "Arranmore" would have gone clear of her, and he refers, as applicable to this case, to article 27, and that the judgment of the captain of the schooner was well founded, that if she had kept her course she would have received the blow on her starboard side, entailing greater danger to the lives of her crew. See Marsden (5 ed.), pages 3, 51, 52; *The "Bywell Castle"*(7), at page 219. The absence of a lookout had nothing to do with the collision; Marsden (5 ed.), pages 293, 394, 464; *The "Farragut"*(8).

(1) 10 Blatch. 459.
(2) 36 Can. S.C.R. 564.
(3) L.R. 1 P.C. 501.
(4) 98 Fed. Rep. 138.
(5) 27 Can. S.C.R. 510.
(6) 25 Can. S.C.R. 177.
(7) 4 P.D. 219.
(8) 10 Wall. 334.

Under the Canadian statutes, a vessel which has violated the rules is only deemed to be in fault if it appears to the court that the collision was occasioned by the non-observance of any of the rules prescribed. R.S.C. ch. 79, sec. 5; *The "Cuba"* v. *MacMillan*(1), pages 660-662; *The Hamburg Packet Company* v. *Des-Rochers* (2).

As to the "Alexander R." not having a stern light, this is an alleged violation of article 10. The assessor has found that the "Arranmore" saw a green light about three points on the port bow and exonerates the schooner from not complying with article 10, as the "Arranmore" was not an overtaking vessel.

The "Arranmore" violated article 28 in not sounding any blast on her whistle, and the question of whether the "Alexander R." was also to blame depends entirely upon whether her coming up in the wind was under the special circumstances a manœuvre reasonably necessary to avoid immediate danger. That is purely a question of fact, which the court below was peculiarly fitted to determine, and the finding of that tribunal should not be disturbed. *The "Picton"*(3), at page 653, *per* Ritchie, C.J.; *The "Sisters"*(4), *per* Mellor J.; *The "Esk"* v. *The "Niord"*(5), *per* Colville L.J., at page 440; *The "Santandarino"* v. *Vanvert*(6); *The Dominion Coal Co.* v. *The "Lake Ontario"*(7).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—We are of opinion, although we get little or no assistance from his notes, that the

(1) 26 Can. S C.R. 651.
(2) 8 Ex. C.R. 263.
(3) 4 Can. S.C.R. 648.
(4) 3 Asp M.C. (N.S.) 122.
(5) L.R. 3 C.P. 436.
(6) 23 Can. S.C.R. 145.
(7) 32 Can. S.C.R. 507.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

conclusion reached by the local judge in Admiralty as to the responsibility of the "Arranmore" for the collision complained of is justified by the evidence irrespective of the finding by the nautical assessor.

I must, however, observe that there is authority for the rule that this court will not (in a case involving difficult questions of navigation) interfere with the finding of a nautical assessor when adopted by the trial judge, unless the appellant can literally "put his finger" on the mistake and shew irresistibly that the judgment complained of is not only wrong, but entirely erroneous. *The "Picton"* (1); *The "Reliance"* v. *Conwell* (2), at page 657, and Lord Chelmsford in *Gray* v. *Turnbull* (3), page 54.

The collision out of which these proceedings arose occurred in the Harbour of Halifax at about 1.40 on the morning of April 2nd, 1906, between the "Alexander R.," a schooner of 74 tons burden and the "Arranmore," a passenger and freight steamer of about 900 tons burden.

The weather was fine and when first seen the schooner was proceeding across the harbour close hauled on the port tack, at a speed of about three knots, and on a course N.N.E. with a moderate breeze from the north.

The course of the "Arranmore" was about N. half W., her speed nine knots; the schooner bore about one point on her starboard bow and was distant about one cable and a half—both vessels had the regulation lights.

The channel at the place where the collision occurred is stated by the assessor to be over half a mile wide

(1) 4 Can. S.C.R. 648. (2) 31 Can. S.C.R. 653.
(3) L.R. 2 H.L. Sc. 53.

and does not come under the heading of a narrow water.

If both vessels kept on their respective courses there was danger of collision.

When those on board the "Arranmore" saw the schooner and ascertained the course she was pursuing then rules 20-23 and 28, which were the rules applicable to the circumstances, at once became binding on them and it was the duty of the steamer to keep out of the way of the schooner, and if necessary to slacken her speed, or stop or reverse, and to give proper sound signals. The co-ordinate obligation of the schooner was to keep her course. The contention on the part of the appellant is that if she had complied with this obligation the collision would have been avoided. The "Arranmore" has been found by the nautical assessor to be in fault in several respects, and he holds that the schooner was not in any way responsible for the accident.

When the "Alexander R." was first seen according to the preliminary act "the helm of the 'Arranmore' was put to starboard to go astern of the schooner and her engines were stopped for about a minute," and in his evidence the captain tells us that he then found it necessary to give this order to the man at the wheel, "starboard your helm—there is a vessel on the port side—starboard your helm—give her the helm quick," indicating that he must have found himself in dangerous proximity to the schooner. His duty then was to stop and reverse, that being the only manœuvre that could have prevented the collision which occurred within a minute or two afterwards. Instead of doing what prudence suggested he put his helm to starboard to pass under the stern of the

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

schooner and then to port to steady her, or, as he says, "to prevent the sheer." When he attempted to pass, he admits he was so close that it was necessary to stop his engines to let the schooner get away from him which shews that in the circumstances his action was unjustifiable. If to this we add that no sound signal was given either when the steamer was directed to port or when her head was brought again to starboard to indicate her course, the conclusion seems irresistible that the "Arranmore" was in fault.

The next question is: "Was the 'Alexander R.' also in fault?" It has been strenuously argued before us that the failure to keep her course, thereby violating article 21, makes her responsible. The captain says that he brought his schooner up in the wind only to lessen the effect of the collision which was then inevitable and the nautical assessor finds as a fact that if this manœuvre had not been adopted "the blow would have been delivered on the starboard side at a point entailing greater danger for the saving of the crew," and there is nothing in the evidence that I have seen to satisfy me that this conclusion is erroneous.

I have carefully read the case of *"The Khedive"* (1), which was much relied upon and very properly so by the appellant, and I understand the rule in that case to be as explained by Bowen L.J. in *The "Benares"* (1888) (2), that it must be shewn conclusively that obedience to the regulations would and could not have avoided the collision: *Windram* v. *Robertson* (3), Court of Sessions Cases, affirmed in H.L. (Sc.), 1906 W.N. 140. I do not think it necessary to consider whether or not, as said by King J., in 26 Can. S.C.R. on page 661, it would be necessary under our statute

(1) 5 App. Cas. 876. (2) 9 P.D. 16.
(3) 7 F. Ct. of Sess. Cas. 5 Ser. 665.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

to consider whether the non-observance of the rules complained of did or did not in fact contribute to the collision. On the evidence I am convinced that to have kept her course would not have avoided the collision, and further that for the consequences of a step taken in the agony of a collision and due entirely to the imminence of the danger, the schooner must not be held in fault. Marsden 51 and 52 (5 ed.). I admit that *The "Khedive"* (1) in effect decides that the regulations issued as orders in council are law and consequently to disobey any article is to break the law, and when any article is involved the exact letter must be observed, but all the articles of the "Regulations for preventing collisions at sea" must be read together as one Code, and if article 21 requires a ship to keep her course, other articles prescribe that she shall take such action as will best aid to avert a collision and that due regard must be had to any special circumstances which may render a departure from the rules necessary to avoid immediate danger. As Lord Bowen said in the case of *The "Benares"* (2), a captain is not obliged to sail with his eyes open into the jaws of death. Here the captain tells us that to have obeyed article 21 meant almost certain death for his crew, and that to disobey that particular rule was the one chance left open to him to save their lives and in this he is confirmed by the nautical assessor.

With reference to the lookout the schooner was in fault, although it is quite true that the whole crew, consisting of four men, were on deck at the time of the collision. It has been laid down, however, that a man on the lookout should have no other duty and should not be called away to attend sheets or braces

(1) 5 App. Cas. 876. (2) 9 P.D. 16.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

when a vessel is tacking. *The "Constantia"* (1). But in the circumstances I adopt the principle stated by Marsden, (5 ed.) page 464:

> But if the absence of lookout clearly had nothing to do with the collision, it will not be deemed to be a fault contributing to the collision.

Here the nautical assessor says:

> Not seeing the "Arranmore" reflects on the lookout kept on board the "Alexander R." but does not materially bear on this case, as the sole cause of this disaster was the improper use of port helm on board the "Arranmore."

On the whole I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondents: *H. C. Borden.*

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(1) 6 Asp. M.C. 478.