

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

1908
Sept. 7.

ISALAH WATTS (SOLE OWNER OF THE
SCHOONER *REGINA B.*) CHARLES
L. AUCOIN, JOHN PORRIER,
THOMAS PORRIER AND ANSEN
BARGONS (PLAINTIFFS)..... } APPELLANTS ;

AND

THE STEAMSHIP *JOHN IRWIN* } RESPONDENT.
(DEFENDANT)..... }

*Shipping—Collision—Steamer and sailing ship—Regulations—Arts. 20 and
21—Right of sailing ship to go about when not compelled to.*

Art. 20 of the Regulations for Preventing Collisions at Sea provides that where a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Art. 21 provides that where by any of the rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Held, that under the latter rule, a sailing ship when she is compelled to go about cannot do so close ahead of a steamer, so as to embarrass the latter and make it difficult for her to keep out of the way.

2. In this case a sailing ship and a steamer were so close together as to involve risk of collision. The sailing ship undertook to go about without being compelled to and without any good reason to justify the manœuvre, and by so doing embarrassed the steamer and rendered her unable to avoid a collision.

Held, that the sailing vessel had violated Art. 21, and was responsible for the collision.

APPEAL from a judgment of the Deputy Local Judge for the Nova Scotia Admiralty District.

The case arose out of a collision in Halifax harbour.

The facts of the case are fully set out in the reasons for judgment on the trial, which are printed below.

DRYSDALE, D. L. J.:

This action is brought by the owners, master and crew of the *Regina B.* a schooner of 79 tons, which was sunk in a collision had with defendant steamer in Halifax harbour on the night of the 19th of October, 1908. The *Regina B.* in charge of Captain Aucoin was, on said night between 9 and 10 p.m., coal laden, beating into Halifax Harbour, the wind was north, or, according to the Captain of the *Regina B.*, a little east, of north "baffling to the east", as he puts it.

The contention of those on board the *Regina B.* is that after coming inside of Meagher's Beach light, at or near the point marked "G.x" on the chart used, the vessel commenced a starboard tack towards middle ground buoy; and, according to plaintiffs preliminary act, on a west northwest course; that this tack was continued until they passed the middle ground buoy about 200 yards, and passing to the south of it; that the schooner then tacked and stood to the north-east on the port tack; that before and at the time of, and after tacking, they had observed the red light of the steamer *John Irwin* only as she was coming down the harbour; that after they had proceeded about 200 yards on the port tack and when about abreast of middle ground buoy, the *John Irwin* suddenly opened her green light, altered her course and bore down on them, striking the *Regina B.* on the port side aft of the main rigging, with the stem and starboard bow of the *John Irwin*.

The master of the *Regina B.* has drawn a diagram marked "G-1" to illustrate his contention as to the manner of the collision. The contention of the *John Irwin* is that they were coming out the harbour on the fairway, heading south with the middle ground buoy always on their starboard bow; that they saw the *Regina B.* standing to the west on the starboard tack and showing her green light; that she was then about $\frac{1}{2}$ of a mile

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distant, and bearing a point and a half on the *John Irwin's* port bow ; that they then starboarded their helm so as to bring green to green and pass astern of the schooner; that whilst they were so proceeding with the intention of passing astern and having brought green to green, the *Regina B.* suddenly came up in the wind and tacked close ahead; that although they then at once ported their engines, the *Regina B.* was struck aft of the main rigging, but by the stem and port bow of the *John Irwin.*

Under the evidence I have to consider which of these contentions is supported. There is no dispute as to where the collision occurred ; it was in the main ships' channel, very near the fairway ; the *John Irwin* was admittedly going out the harbour, and it is fair to assume on the usual course in the fairway. Her officers so state, and she would, as they state, naturally be keeping the middle ground buoy on her starboard bow, and if this were so I cannot understand the statements of those on board the *Regina B.* when they say they were west of the buoy mentioned some two hundred yards when they tacked, and still saw only the red light of the *John Irwin.* If they were as far west as the buoy, the *John Irwin* keeping the fairway, as I have no doubt she did, would be shewing her green light, and I think when the *Regina B.* undertook to tack she could not have been as far west as her captain alleges. A steamer, it is true, must keep out of the way of a sailing vessel when such vessels are proceeding in such directions as to involve risk of collision. But it is also true that where by the rules one of two vessels is to keep out of the way the other shall keep her course and speed, and under this rule I take it to be settled that a sailing ship must not, when she is compelled to, go about close ahead of a steamer so as to embarrass the steamer and make it difficult for her to keep out of the way ; and that where risk of collision exists a sailing ship is not entitled to go about until

compelled to. The real point in dispute here is whether the *Regina B.* improperly tacked right, or close, in front of the steamer, and thus violated Rule 21. Captain Aucoin's statements as to the bearing of the *Irwin* when he first saw her are most unsatisfactory. In his examination he first states that he first saw the *John Irwin* when he was on a W. N. W. course on the starboard tack about half way between Meagher's beach buoy and middle ground buoy; that the *Irwin* was then about $\frac{3}{4}$ of a mile or a mile distant, coming out the harbour, and bearing about a point or a point and a half on his (the *Regina B.*'s.) starboard bow, and that the *Irwin's* red light got broader on his bow as he continued his western tack. This statement cannot be accepted as to the bearing, as it is a very material contradiction of plaintiffs' preliminary act. In such act the bearing of the *John Irwin* when first seen is given as five or six points on the starboard bow of the *Regina B.* when the *John Irwin* was first seen at a distance of about one mile, though the captain then further states that after continuing his starboard tack to the west of middle buoy the *John Irwin* was at the point when he decided to tack about a half mile distant, and bearing about $2\frac{1}{2}$ points on his starboard bow with his red light only showing. Such a statement puts the *John Irwin* in an altogether improbable place and position, considering her course out of the harbour, and her bearing when first seen; and Captain Aucoin's statements as to this position and his own reasons for tacking were most unsatisfactory. Another striking feature of Captain Aucoin's testimony was as to his course at the time of, and the manner in which the ships came together. He states he was sailing on a northeast course on the port tack for about 200 yards after tacking west of middle ground buoy when the collision occurred, and that sometime after he was on that course the *John Irwin* opened her green light and came

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in contact with him aft of the main rigging, with her stem and starboard bow. It is apparent this would require an extraordinary change of course on the part of the *John Irwin* at short range, and it difficult to accept such a statement; and the *Regina B.* could not with the wind as stated sail on a N. E. course; the best she could do would be probably a point north of east. Again, this method of collision is inconsistent with the admission that the *John Irwin's* port anchor in the collision fouled the main rigging of the *Regina B.* Looking at the whole evidence I am satisfied the vessels came together in the manner indicated by the officers of the *John Irwin*, that is to say—that the *Regina B.* had just come up in the wind, and was in the act of tacking; that the *John Irwin* in the effort to clear her under a port helm struck with her stem and port bow. As to the manner of the collision I accept the statements of the officers of the *John Irwin*. I am satisfied that when the two vessels were so close that risk of collision existed the *Regina B.* improperly undertook to go about without being compelled to, and without any good reason for so doing; that her conduct in this respect embarrassed the *John Irwin* which would otherwise have cleared her; that she was guilty of a violation of article 21, and such violation was the cause of the collision. It was contended that the *John Irwin* was in fault in not slackening her speed or stopping and reversing earlier. As to the speed the *John Irwin* was making I find it was about 7 miles an hour, which, under the circumstances, seems reasonable. I accept the statements of the officers of the *John Irwin* as to her course out of the harbour, and as to the positions of the vessels just before the collision. When the captain speaks of minutes during which he was under a starboard helm I think allowance must be made always as to time, the substance of the statement is in the fact that he went to

port enough to bring green to green, and after the *Regina B.* tacked so close as to make a collision almost inevitable no fault or delay can be attributed to the *John Irwin's* captain in his effort to stop and reverse, or in any of his emergency orders. It is true it is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done to avoid collision; at the same time, as stated in the leading case on the subject, if a steamer is to be condemned for having omitted to do something which she ought to have done, it seems right to require proof of three things—first; that the thing omitted was clearly in the power of the steamer to do; second, that if done it would in all probability have prevented collision, and thirdly that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. When the captain of the *John Irwin* brought green to green, as I find he did, the original risk of collision was determined; and going at a moderate rate I do not see he was then under any obligation to slacken or stop, and after the *Regina B.* tacked in front I do not think under the evidence there is anything that I can reasonably say he omitted that he ought to have done. In fact as to the conduct of the *John Irwin's* officers throughout I do not find any act or omission on their part that in my opinion should decree them in fault.

The action will be dismissed.

June 12th, 1909.

The appeal was argued at Halifax.

A. G. Morrison, K.C., for the defendant, contended that the *John Irwin* was out of her course, not having kept on the western side of the channel. She was therefore to blame for the collision, *The Rhondda* (1).

(1) 8 App. Cas. 549.

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Furthermore, when the *Regina B.* proceeded to come about she was half a mile away from the steamer, and there was abundant opportunity for the steamer to avoid collision. But the latter failed to keep out of the way, and so brought about the collision. She was solely to blame. The *Regina B.* was obliged to tack or go ashore. Cites the *Norma* (1). The *Palatine* (2) is express authority for the right of a sailing vessel to go about, while the obligation upon the steamer is still to keep out of her way.

As to greater credence to be given to evidence of those on board the *Regina B.*, cites *The Dahlia*, (3).

As to lights on sailing vessels, cites *The Earl Spencer* (4).

H. Mellish, K. C., for the respondent, contended that there was no evidence to justify the *Regina B.* in going about, when she did, as a matter of necessity. The steamer was on the proper course; she was steered to go astern of the schooner, and if the latter had kept her course there would have been no collision. The case of the *Palatine*, cited by counsel for appellant, supports a counter proposition to the one he contends for. The onus is on the plaintiff to show that the collision occurred by the fault of the defendant, and that onus has not been discharged. Cites *Marsden on Collisions* (5) *Williams & Bruce's Adm. Pr.* (6).

Mr. Morrison replied.

CASSELS, (now September 7th 1909) delivered judgment.

This is an appeal from the decision of Mr. Justice Drysdale, Local Judge in Admiralty at Halifax. The appeal was argued before me at Halifax. By consent of both parties Captain Neil Hall was requested to sit with me and hear the appeal as nautical assessor.

(1) 35 L. T. N. S. 418.

(2) 1 Asp. M. L. C. N. S. 468.

(3) 1 Stuart 242.

(4) L. R., 4 Ad. & Ec. 431.

(5) 5th ed. pp. 285, 286.

(6) 3rd ed. p. 99.

The appellants' case was forcibly argued by Mr. *Morrison, K.C.*

Captain Hall made his report, which reads as follows:—

“Having been requested to act as Nautical Assessor herein, and after hearing with your lordship the argument of counsel both of plaintiffs and defendant, and after carefully perusing all the evidence, I am of the opinion that the evidence goes to show the night was dark, the sky clear, and the wind blowing a stiff breeze northerly. Under such circumstances lights should be seen their full range.

“The steamer *John Irwin* going down Halifax Harbour, sights a green light on his port bow, which after proved to be the starboard light of the schooner *Regina B.* Ordinary precaution seems to have been taken by the steamer *John Irwin* to clear the *Regina B.*

I do not think the *Regina B.* could have been west of the middle ground buoy that night, or she must undoubtedly have seen the green light of the *John Irwin.* The crew of the *Regina B.* say they saw the red light of the *John Irwin* at the time of tacking west of the middle ground buoy, and continued to see the red light till just before the collision. This I cannot believe to be correct.

In regard to the *John Irwin*, porting her helm and going full speed astern was the only action she could take in the emergency, and in my opinion the *Regina B.* tacked almost under the bows of the SS. *John Irwin.*

For the above reasons I find the schooner *Regina B.* in fault.”

I have, since being furnished with this report, carefully considered the evidence and documents adduced and produced before the trial judge.

To a great extent the question involved is one of disputed fact. I think the trial judge arrived at a correct conclusion on the evidence adduced, and I agree entirely

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with his carefully considered finding, and also with the conclusions of the Nautical Assessor.

The appeal is dismissed with costs.

Judgment accordingly.

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Solicitor for appellants: *A. G. Morrison.*

Solicitors for respondent: *McInnes, Mellish, Fulton & Kenny.*
