

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

J. J. SMITH AND OTHERS, OWNERS }
 OF THE AMERICAN BARQUE *ABBEY* } PLAINTIFFS;
PALMER

1901
 ~~~~~  
 April 19.

AGAINST

THE SHIP "*EMPRESS OF JAPAN.*"*Maritime law—Collision—Overtaken vessel.*

A collision occurred between a sailing vessel and a steamship in the open sea at night. At the time of the collision the sailing vessel was close-hauled on the starboard tack and was proceeding within six to seven points of the wind, the direction of the wind being north-east true. The course of the steamship when the ships first sighted each other was north 72 degrees west true, and her speed about 14 knots. The weather was comparatively clear, with the moon nearly full, but obscured by passing clouds. The sailing vessel was showing her regulation side lights, but no stern light.

*Held*, following *Inchmaree Steamship Company v. The Astrid* (6 Ex. C. R. 178, 218), that the steamship was an overtaking ship within the meaning of Art. 24 of the Rules for Preventing Collisions at Sea, and as such was obliged to keep clear of the overtaken vessel. *The Main* (11 P. D. 130) distinguished.

THIS was an action arising out of a collision on the high seas.

The case was heard before Mr. Justice Martin, Deputy Local Judge for the British Columbia Admiralty District, on the 11th, 12th, 13th and 15th days of April, 1901; Lieut. M. L. Hulton, R.N., and Lieut. J. D. D. Stewart, R.N., sitting as Nautical Assessors.

The facts of the case are stated in the reasons for judgment.

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*W. J. Taylor, K.C.* for the plaintiffs. He cited *Stoomvaart Maatschappij Nederland v. P. & O. Navigation Co.* (1); *The Barque Bougainville* (2).

*H. D. Helmcken, K.C., E. P. Davis, K.C.* and *A. P. Luxton* for the ship, contended that any breach of any of the regulations puts a ship in fault, and it is absolutely immaterial how much in fault the other ship is; it is also absolutely immaterial whether that breach of the regulations contributed to the collision or not. They cited *The Khedive* (3); *Tuff v. Warman* (4); *The Fenham* (5); *The Main* (6).

*The Hibernia* (7); *Fanny M. Carvell* (8). There was contributory negligence, see *The Tasmania* (9).

That the ship was an overtaking one, see *The Main* (10); *The Seaton* (11); *The Imbro* (12); *The Gannet* (13).

As to a party being bound by preliminary acts, see *The Inflexible* (14); *The Vortigern* (15); *The Godiva* (16).

As to infringement of a regulation, see *The Arratoon Aparcar* (17); *Sans Pareil* (18).

*W. J. Taylor K.C.*, in reply: Where there is a difference between local and international rules in case of a foreign ship, the rule of the international law will prevail in favour of the foreign ship in local forum. *The Eclipse and Saxonia* (19); *The Englishman* (20).

MARTIN, D. L. J. now (April 19th, 1901), delivered judgment.

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|-------------------------------------------|------------------------------|
| (1) 5 App. Ca. 876.                       | (10) 11 P. D. 132.           |
| (2) L. R. 5 P. C. 316                     | (11) 9 P. D. 1.              |
| (3) 5 App. Ca. 876.                       | (12) 14 P. D. 73.            |
| (4) 2 C. B. N. S. 740; 5 C. B. N. S. 573. | (13) [1900] A. C. at p. 238. |
| (5) L. R. 3 P. C. 212.                    | (14) Swab. 200.              |
| (6) 11 P. D. 132.                         | (15) Swab. 518.              |
| (7) 2 Asp. 454.                           | (16) 11 P. D. 20.            |
| (8) L. R. 4 A. & E. 417.                  | (17) 15 Ap. Ca. at p. 41.    |
| (9) 14 P. D. 53.                          | (18) 16 T. L. R. 390.        |
|                                           | (19) 31 L. J. Ad. N. S. 201. |
|                                           | (20) 3 P. D. 18.             |

From the evidence I find the following to be the material facts of this case.

A few minutes after three o'clock on the morning of the 6th of November, 1900, a collision occurred, some ten miles from Cape Beale, between the barque *Abbey Palmer* and the steamship *Empress of Japan*. At that time the barque's course was close-hauled on the star-board tack sailing within six to seven points of the wind, and the direction of the wind was east north-east true. The course of the steamship when the ships first sighted each other was north 72° west true, and her speed about fourteen knots. The weather was comparatively clear, moon nearly full, but obscured by passing clouds. It is admitted that the barque was showing her side lights according to the regulations. But it is contended that she was an overtaken vessel, and consequently should have shown from her stern a white or flare-up light, as required by Article 10; and on the assumption that it was the duty of the barque to show a stern light (which admittedly she did not), it was strongly urged that the barque, by reason of that breach of the regulations, could not in any event recover. *The Khedive* (1); *The Main* (2).

The question as to what an overtaken ship is recently came before this court in the case of *The Inchmaree Steamship Co. v. The Astrid* (3); and the definition of Lord Esher in the *Franconia* (4) approved of, which definition has been adopted in terms in Article 24:

“ Art. 24. Notwithstanding anything contained in these rules, every vessel overtaking any other, shall keep out of the way of the overtaken vessel.

“ Every vessel coming up with another vessel from any direction more than two points abaft her beam,

(1) 5 App. Cas. 876.

(2) 11 P. D. 132.

(3) 6 Ex. C. R. 178; and in

appeal, 6 Ex. 218.

(4) 2 P. D. 8.

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“ *i. e.* in such a position, in reference to the vessel  
 “ which she is overtaking, that at night she would be  
 “ unable to see either of that vessel’s side-lights, shall  
 “ be deemed to be an overtaking vessel, and no subse-  
 “ quent alteration of the bearing between the two  
 “ vessels shall make the overtaking vessel a crossing  
 “ vessel within the meaning of these rules, or relieve  
 “ her of the duty of keeping clear of the overtaken  
 “ vessel until she is finally past and clear.”

“ As by day the overtaking vessel cannot always  
 “ know with certainty whether she is forward of or  
 “ abaft this direction from the other vessel, she should,  
 “ if in doubt, assume that she is an overtaking vessel  
 “ and keep out of the way.”

Under this rule I must be satisfied that the *Empress of Japan* was in such a position in reference to the barque that the former was unable to see either of the side lights of the latter. The barque kept her course, as was her duty (*Brine v. The Tiber* (1); and so far from being satisfied that the steamer could not have seen either of the barque’s side lights, I am convinced that the green light of the barque should have been visible to the *Empress of Japan*.

My attention has been called to what Lord Esher says in *The Main* (2): “ We must lay down that where  
 “ the leading ship has the opportunity of seeing where  
 “ the other ship is, and ought to see that the hinder-  
 “ most vessel is going faster than she is, and is  
 “ approaching from any direction in such a position  
 “ that she (the hindermost ship) cannot see her lights,  
 “ the obligation arises to show a stern light.” All I can say is that the facts herein do not bring this case within that language, despite the ingenious and able argument of the defendant’s counsel. I may add, as a matter of precaution, in case it might be considered

(1) 6 Ex. C. R. at p. 410; Article 21. (2) 11 P. D. p. 132.

that the question of overtaken ship or not is one on which the views of the assessors should be stated, that they are of the same opinion as myself.

I am advised by the assessors that as a question of good seamanship there was no manœuvre which the barque should or could have executed to avoid the collision.

Under such circumstances it was the duty of the steamer to conform to the following articles:

“ Art. 20. When 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. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.”

“ Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse ”

But instead of so doing, a grave error in judgment was made by those in command of the steamer, and I am advised by the assessors that it was a wrong manœuvre on the part of the second officer to port his helm and seek to cross ahead of the barque; and assuming that he saw no lights he should have eased his speed to ascertain the nature of the object seen, and after having sighted the green light he ought then to have starboarded his helm, and if necessary reversed the port screw, and so passed under the barque's stern.

Further, assuming that the captain had only a minute in which to act after he came on the bridge, the risk of collision might even then have been very considerably diminished, if not avoided, had he

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reversed both engines instead of the starboard one only.

I may say that the advice of the assessors above given coincide with my own opinion of the matter.

Much was said, naturally, as to the look-out kept on the *Empress of Japan*, and it is impossible, in my opinion, to come to any other conclusion than that it was very far from being of that vigilant character one would expect to find on such a vessel. The evidence of Daly has been specially attacked, but at least the defendants cannot quarrel with his statement on his examination *de bene esse* at the time when he was their own witness, and his evidence then was that he sighted and reported the barque when she was about three and a quarter miles off.

I feel bound to say that so far as the captain and second and fourth officers of the *Empress of Japan* are concerned, their lack of exact knowledge in regard to the handling of their ship came as a surprise to the court, nor did their evidence as a whole in other respects impress us favourably, particularly that of the captain and second officer Davidson. The impression left on my mind is that something which would throw more light on this accident has not been forthcoming.

No useful object would be accomplished by here analysing the various more or less conflicting statements of number of witnesses, and I shall content myself with saying that I find no difficulty in accepting the barque's account of the cause of the collision as being straightforward and consistent, regarding that of the steamer as lacking those elements which carry conviction.

Taking the evidence as a whole I find that the barque was in no way to blame, and I attribute the cause of the accident to the lack of a proper look-

out on the *Empress of Japan*, and to her executing the wrong manœuvre above mentioned.

It follows that judgment should be entered up in favour of the plaintiffs with costs, and the counter-claim dismissed with costs. There will be a reference to the registrar, assisted by merchants, to assess damages.

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*Judgment accordingly.*

Solicitors for plaintiffs: *Eberts & Taylor.*

Solicitors for ship: *Drake, Jackson and Helmcken.*

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