

NEW BRUNSWICK ADMIRALTY DISTRICT.

1904
April 11.

WILLIAM L. LOVITT.....PLAINTIFF;

AGAINST

THE SHIP "CALVIN AUSTIN."

Shipping—Collision in foreign waters—Application of foreign rules—"Safe and practicable"—"Narrow channel."

Where a collision occurs in American inland waters and action is brought in this court for damages, the court will apply the rule of the road as it obtains under the *American Sailing Rules* for the purpose of determining the question of liability for the collision.

2. Article 25 of the American rules provides that "in narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fare-way or mid-channel which lies on the starboard side of such vessel."

Held, that the words "safe and practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision.

3. A harbour containing wharves and anchorage for ships on either side, and where ships and steam-tugs are continually plying back and forth, is not a "narrow channel" within the meaning of Article 25 of the above rules and the provisions of that article do not apply to cases of collision there.

ACTION for damages for collision.

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

January 4th, 1904.

The case was now argued, upon evidence taken at a previous date, before Mr. Justice McLeod, Local Judge for the New Brunswick Admiralty District.

H. H. McLean, K.C. (and *Dodge* of the Massachusetts' Bar) for the plaintiff;

Dr. Stockton, K.C. (and *Carver* of the Massachusetts' Bar) for the defendants.

McLEOD, L. J. now (April 11th, 1904) delivered judgment.

This is an action brought by William L. Lovitt, owner of the British barque *Reform*, against the steamer *Calvin Austin* for damages caused by a collision which occurred in what is known as the Boston Inner Harbour.

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The *Calvin Austin* is an American steamer of about twenty-eight hundred tons register.

The barque *Reform* is a steel vessel, British register, of about 545 tons; and was just terminating a voyage from Rosario via Buenos Ayres to Boston, with a cargo of wool and hide clippings when the collision occurred.

The steamer *Calvin Austin* is a passenger steamer running between the ports of Boston and St. John and at the time of the collision she was just leaving Boston for St. John. The collision happened in the Boston Inner Harbour, on the 30th of July, 1903, at about 15 minutes past 12 o'clock in the day. The dock which the *Calvin Austin* used in Boston is known as the Commercial Dock, and is on the south side of the harbour. On the 30th of July she left her dock a few minutes after 12 o'clock noon. Twelve o'clock is her time for sailing, but she was a few minutes late leaving that day. The pilot, Captain Mitchell, says she came out of her dock and when she left the dock—that is when she was clear of the dock—it was 10 minutes past 12 o'clock. Shortly before she left the dock, but just as she was preparing to leave, a five masted schooner, the *Van Allens Boughton*, in tow of the tug *J. S. Chandler*, passed down the harbour. The length of hawser between the tug and the schooner was about 75 fathoms. Shortly afterwards, and immediately before she, in fact, left her dock, a fishing schooner, in tow of the tug *William J. Williams*, came out of her dock just below the Commercial Dock on the same side

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of the harbour—a dock known as the T. Dock—and proceeded down the harbour. The length of hawser between the tug and the fishing schooner was about 40 or 50 fathoms. There were vessels anchored on both sides of the harbour, that is on both the north and south sides of the harbour or channel. The day was fine and clear, but there was a strong southwest or west southwest wind blowing. The *Van Allens Boughton*, in tow of the tug *Chandler*, was going down about the centre of the harbour or channel, or possibly a little to the southern or starboard side going out. The fishing schooner, in tow of the tug *William J. Williams*, was following the *Van Allens Boughton* down a little on her starboard side. When the *Calvin Austin* came out of her dock she came clear out free from the dock, some of witnesses say a length and a half or two lengths—one witness gives a shorter distance—but at all events when she got clear of the dock her helm was put hard aport. She took a southeast course, which would take her down the harbour; and from the evidence I conclude when she came on her course she was rather on the port side of the *Van Allens Boughton*.

The *Calvin Austin*, when she took her course of southeast, was going faster than the *Van Allens Boughton* or the fishing schooner. She was probably three lengths behind the *Van Allens Boughton*, and, so far as I can gather from the evidence, was just commencing to pass the fishing schooner, but was some two or three hundred feet from her port side. Captain Pike, in answer to the question: "Will you tell me the best estimate you can give as to how near you passed that schooner and fisherman when you came down that port side," says: "I should say two or three hundred feet;" and the same opinion is expressed by other witnesses. Among the vessels anchored on the north side of the harbour was a barque, the *Davie P. Davis*, that

appeared to be anchored a little outside the line of vessels, so that her bow projected somewhat farther out of the harbour than the other vessels. When the *Calvin Austin* was straightened on her course she gave a signal of two whistles. Captain Pike says they were given to the tug *William J. Williams*, having the fishing schooner in tow. At the time those whistles were given, the *Calvin Austin* had commenced to pass the fishing schooner, one of the witnesses said she had in fact passed the schooner. John Nicholson, second pilot of the *Calvin Austin*, says, in answer to questions, as follows:—

“Q. When those two blasts were blown did you have the fisherman, that is to say, the boat towing ahead of you, portward or abaft?”

“A. She was abaft of us.

“Q. At the time you blew the two blasts?”

“A. Yes.

“Q. So that when you had undertaken to pass that vessel, you were overtaking, without signalling, until you had got her abaft your beam?”

“A. No, sir; she was not abaft the beam.

“Q. I thought you said she was?”

“A. Not when we gave the signals.

“Q. Where was the schooner herself when you gave the two blasts?”

“A. She was forward of the beam.

“Q. How much forward of the beam?”

“A. Not a great deal forward of the beam.

“Q. You had already entered on the process of passing her on the port side before you gave any signal at all?”

“A. No, sir; she did not alter her course at all—the fisherman.

“Q. I am asking you about the signal and not about the course? At the time you blew the two blast

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signal the fisherman was abreast of your starboard bow. Is not that a fact?

“ A. Abreast of the starboard bow.

“ Q. Was that blast of two whistles the first blast blown after the long blast, which I have called the inspector's blast, when you came out of the dock?

“ A. Yes.

And Alonzo N. Carter, the captain of the *Van Allens Boughton*, says in answer to the question as follows:—

“ Q. Where was she when she blew those first two whistles with reference to the fisherman?

“ A. I think she was ahead of the fisherman. She was between us and the fisherman, and the fisherman between her and the South Boston Docks.

“ Q. On her starboard side?

“ A. More on her starboard quarter—more aft abeam.

“ Q. She had already passed the fisherman when she blew those two whistles?

“ A. I think she was by the fisherman; that is, I think, her stem was by the fisherman and her tow.

“ [Court:—When she blew the first two whistles?]

“ A. Yes.

“ Q. Did you hear any answer from the *Pallas* to the signals of the two whistles blown on the *Calvin Austin*?

“ A. Yes, sir.

And from all the evidence she was, at all events, passing the schooner when the whistles were given and was some two hundred feet on her port side and about two lengths or two lengths and a half behind the *Van Allens Boughton*. The whistles were answered by the *William J. Williams* towing the fishing schooner, by the *J. S. Chandler* towing the *Van Allens Boughton*, and the *Pallas* towing the *Reform*. Capt. Pike says he heard the answer of the *William J. Williams*, but did not hear the other two. A few minutes after this

signal was given, and Capt. Pike says after he had passed the tug of the fishing schooner and without any further signal being given, the helm of the *Calvin Austin* was put hard aport and she crossed the stem of the *Van Allens Boughton* and attempted to pass her on her starboard side, and as she came on her starboard quarter of the *Van Allens Boughton* she met the *Reform*, in tow of the tug *Pallas*, coming up on that side and ran into her about midship, striking her about a foot abaft the forerigging, breaking a number of her plates and doing a good deal of damage.

The pilot of the *Calvin Austin* says she left the wharf at ten minutes past twelve, that is when she swung clear of the wharf it was ten minutes past twelve and the collision occurred 15 minutes past twelve, five minutes later.

The *Reform* was coming into Boston that day, and some distance outside of the Boston light she took the tug *Pallas*, and shortly after the pilot came on board and took charge. The tug first took her in tow on a hawser about one hundred feet long and they proceeded thus to the Boston light, passing through what is called the Narrows at the entrance of the harbour, past Castle Island, until they came about to what is called Burnham's Channel Buoy. There they stopped and took in the hawser and the tug dropped down alongside the barque and made fast on her port side. The wharf she was going to is what is known as the Cunard Wharf, on the north side of the harbour, or nearly opposite the Commercial Wharf, and the captain of the tug says he went on the port side as it would be handier to put her into her wharf on that side. She would lie with her starboard to the wharf. As they were taking in the hawser, the tug *J. S. Chandler*, with the *Van Allens Boughton* in tow, was coming down the harbour or channel, and she gave two whistles to the

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Pallas, indicating that she wished to pass starboard to starboard. This was answered by the *Pallas* consenting. She then was made fast alongside the barque, and they proceeded up the harbour on the south or port side, at about 2 or 2½ knots an hour. Just after the tug was made fast alongside of the *Reform*, the first two whistles of the *Calvin Austin* were heard and were answered by the *Pallas* consenting to meet starboard to starboard. Those aboard the *Pallas* saying they supposed the signal was intended for them. The *Reform* in tow of the *Pallas* proceeded up the south side of the harbour or channel, and when she was passing the *Van Allens Boughton*, the *Calvin Austin* came across the stern of the *Van Allens Boughton* and the collision occurred. The *Calvin Austin*, as she came on the starboard quarter of the *Van Allens Boughton* and saw the *Reform*, again gave two whistles, put her helm hard to port and her engines full speed astern; the *Pallas* answered with two whistles. The helm of the *Reform* was put hard to port and the engines of the *Pallas* full speed astern, but the vessels came together and the damage occurred as stated.

Some discussion arose as to whether the case should be governed entirely by the American Sailing Rules. The collision occurred in what is known as the Boston Inner Harbour in American inland waters. The *Calvin Austin* is an American registered steamer; the barque *Reform* is a British ship. There is no evidence as to the nationality of the *Van Allens Boughton* or the fishing schooner. But I think I must take it that the three tugs that were towing these three vessels were American tugs. They were carrying on their regular business of towing vessels in and out of Boston harbour. The rules governing the sailing and signaling in these waters have been proved before me, and I must take it that these vessels in these inland waters

are governed by them and subject to them. *The Halley* (1) was cited. I think that case is an authority to enquire into the sailing rules and signals to be given in order to ascertain whether there has been negligence or not. At page 203 it is said: "It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where by express reference or necessary implication the foreign law is incorporated with the contract; and proof and consideration of the foreign law, therefore, becomes necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the questions by whose fault or negligence the alleged foul was committed." Here I think it is necessary to enquire into the signals required to be given in these waters, and the rules of sailing, in order to determine by whose fault or negligence the collision occurred. The rules were proven and the principal ones referred to and applying to inland waters are the following. They are called inland rules

Art. 18. Rule I.—"When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall

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“ answer promptly by two similar blasts of her whistle,
“ and they shall pass on the starboard side of each
“ other.”

Rule VIII.—“ When steam-vessels are running in
“ the same direction, and the vessel which is astern
“ shall desire to pass on the right or starboard hand of
“ the vessel ahead, she shall give one short blast of the
“ steam-whistle, as a signal of such desire, and if the
“ vessel ahead answers with one blast, she shall put
“ her helm to port ; or if she shall desire to pass on the
“ left or port side of the vessel ahead, she shall give two
“ short blasts of the steam-whistle as a signal of such
“ desire, and if the vessel ahead answers, she shall put
“ her helm to starboard ; or if the vessel ahead does not
“ think it safe for the vessel astern to attempt to pass at
“ that point, she shall immediately signify the same by
“ giving several short and rapid blasts of the steam-
“ whistle, not less than four, and under no circum-
“ stances shall the vessel astern attempt to pass the
“ vessel ahead until such time as they have reached the
“ point where it can be safely done, when said vessel
“ ahead shall signify her willingness by blowing the
“ proper signal. The vessel ahead shall in no case
“ attempt to cross the bow or crowd upon the course
“ of the passing vessel.”

“ Art. 25.—In narrow channels every steam-vessel
“ shall, when it is safe and practicable, keep to that
“ side of the fair-way or mid-channel which lies on the
“ starboard side of such vessel.”

The question to be determined is whether the col-
lision is the result of inevitable accident or whether
it is the result of negligence and mismanagement of
one or both of the vessels. I have gone over the evi-
dence very fully and closely, and have examined the
authorities carefully, and, dealing first with the *Calvin
Austin*, I have come to the conclusion that she must

be charged with negligence. We have the fact that she came out of her dock a little after twelve at noon; the pilot says that it was ten minutes past twelve when he straightened out on his course southeast. The day was fine and clear. There was a strong southwest or west southwest wind blowing which would tend somewhat to keep her to the north side of the channel. The captain and his officers had a full view of the harbour and of the shipping in it. They knew there were vessels anchored along down on each side, on both the north and south sides. They knew the *Van Allens Boughton*, in tow of the tug *J. S. Chandler*, was going down near the centre of the harbour or the channel just ahead of them. She had passed their dock just before they came out. So soon as they came out of the dock and turned on their course, they saw the fishing schooner in tow of the *William J. Williams* on their starboard side, and when the *Calvin Austin* passed her she was some two or three hundred feet from her. The captain and at least two of his officers saw at the entrance of the harbour a vessel which proved to be the *Reform*. The captain says he could see her masts, but did not know whether she was at anchor or what she was doing. The two officers who saw her said they saw her moving up the harbour when the *Calvin Austin* straightened out on her course. The captain says he was in the pilot house at the first window, looking out. The windows were all down. The first pilot was alongside of him at the port side, looking out of the window. The second pilot was standing alongside of the man at the wheel. The man at the wheel was standing on the starboard side of the steamer. These men all had an opportunity to see what vessels were in the harbour and evidently did see them

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As to the *Reform*, Capt. Pike says, in his direct examination, in answer to questions as follows:—

“ Q. Prior to that had you seen the vessels at anchor down below on the starboard side or south side of the channel ?

“ A. Yes.

“ Q. And you had seen the masts of the *Reform* ?

“ A. Yes. Just seen them just as we were coming from the wharf.

“ Q. When you saw the masts of the *Reform* how was she located with reference to vessels at anchor ?

“ A. She was more out in the channel.

“ Q. When you saw her masts where did you think she was ?

“ A. Well I didn't know. I could only see her masts, and didn't know whether she was at anchor or what she was doing ”

It is true on cross-examination he says that he didn't mean to say that he saw her when he first came out of the dock, but that it was later, and when he was about a length from the *Van Allens Boughton*. But having carefully considered all his evidence, it seems to me that he certainly saw her in time to have taken more precautions than he did to prevent the collision.

Frank L. Brooks, the quartermaster, in his cross-examination, says in answer to questions:—

“ Q. When was the first that you noticed of the barquentine *Reform* ?

“ A. I noticed her on our starboard bow, a little mite on our starboard bow.

“ Q. When ?

“ A. I think it was when I was told—well, just after we left the dock a little while.

“ Q. Just after you left the dock ?

“ A. Yes.

“ Q. What was she doing then ?

"A. Appeared to me to be coming up the harbour on the south side of the channel.

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"Q. You had no difficulty in seeing her ?

"A. No, I saw her. sir."

"Q. There are nothing to obstruct your view of her—just after you left the dock you saw her ?

"A. No, sir ; I saw her.

"Q. Did you see at that time that she was in charge of a tow-boat ?

"A. No, sir ; I didn't.

"Q. Did you notice she had no sails on her ?

"A. I did.

"Q. And you would assume she must have had a tow-boat with her ?

"A. I didn't know whether she was at anchor or in tow.

"Q. Did you call any body else's attention to her ?

"A. I didn't.

"Q. And you say you were standing in your place on the starboard side of the wheel ?

"A. Yes, sir.

"Q. Did you take any notice of her after that until you were actually going into her ?

"A. I saw she was still proceeding up the harbour on the south side of the harbour.

"Q. Did you see her constantly ?

"A. Not all the time—no.

"Q. Every now and then you would look up and see her. Did you notice her on the way down as many as five times ?

"A. I don't know.

"Q. Do you suppose you noticed her three times after you first saw her before the collision ?

"A. Probably might have noticed her twice.

"Q. After this first observation, which you say you had of her just as you were coming out of the dock.

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can you state what the next definite recollection is that you have of observing her at all?

“A. Well, I saw her steadily coming along on the south side of the channel?”

[“Court:—If she was coming along, how was she coming, under sail or in tow?”]

“A. After I first saw her I noticed shortly after a tug’s smokestack on her port quarter.

“Q. Was there any tug ahead when you first saw her?”

“A. No, sir.”

John Nicholson, the second pilot, after saying that he saw vessels anchored on the north side of the harbour, says in answer to questions:—

“Q. Did you notice anything on the south side of the channel coming up?”

“A. Yes, sir, there were vessels at anchor on the south side, barges and coal barges?”

“Q. More than one?”

“A. Yes, sir.

“Q. Different kinds of vessels?”

“A. Yes, a barquentine, three masted schooners, coal barges.

“Q. Did you notice the *Reform*, the vessel that afterwards collided with you?”

“A. Yes.

“Q. What did you notice with regard to her?”

“A. I noticed her spars.

“Q. Where did she appear to be?”

“A. She was ahead of the five masted schooner towing up.

[“Court:—Do you mean ahead, nearer into the harbour?”]

“A. She was further down the harbour.

“Q. On the south side you say there were barges at anchor?”

" A. Yes.

" Q. At the time you noticed her did you observe whether she was in tow or not ?

" A. No, sir.

" Q. What could you see of her ?

" A. I could only see the spars the time I seen her first.

" Q. How was she bearing with reference to the vessels at anchor on the south side of the channel ?

" A. She was a little on the port bow going down the harbour.

In his cross-examination he says he could not see that she was not a vessel at anchor, but her spars were heading substantially up and down the harbour and were not tailing with the wind. I refer thus fully to this evidence, because I think it and other parts of the evidence show not only that the officers on board the *Calvin Austin* had an opportunity to see the *Reform* when they first straightened out in their course, but that they did in fact see her. Now with all these vessels moving in the harbour it was important that due care and caution should be exercised both as regards speed and the signals to be given, if it was desired by those in charge of the *Calvin Austin* to pass any of them in order to get more quickly to sea. As to the speed, Capt. Pike says it was not over six or seven knots an hour. Other witnesses say that it was higher. One witness says it was eight knots, and another witness says it was nine or ten knots. Looking at all the evidence, and bearing in mind that according to the record kept, the collision occurred just five minutes after the *Calvin Austin* straightened out on her course, and taking the distance she travelled from the wharf to the place of collision, she must have been going at a speed of not less than eight or nine knots an hour, rather more if anything than less. She passed

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the tug *William J. Williams* and her tow. And the captain of the *William J. Williams* says he was going six miles an hour, and overtook the *Van Allens Boughton*, which was going a little faster than the *William J. Williams*. I think this speed with these vessels in front was too great. She was going so fast, and was gaining on the *Van Allens Boughton* so much, that even in that short time she had to slow down for a few minutes, and when her first signal was given she was already passing the fishing schooner. The schooner was on her starboard side some two or three hundred feet from her. Capt. Carter says she was as far down as the tug *William J. Williams*; but at all events when that signal was given she was certainly passing or had passed the tow of the tug *William J. Williams*, and was making no change in her course whatever. She was about two lengths, or two lengths and a half, from the *Van Allens Boughton* going in the same direction, but at a greater rate of speed. The captain says this signal was given to the *William J. Williams*, but he was not in the position he should have been to signal the *William J. Williams*, he was already passing her and her tow, and he was about where he should signal the *Van Allens Boughton* and her tug, if he desired to pass her. Dr. Stockton, in his very able argument, said with great strength that it was not necessary to give the signal before attempting to pass the tow, it was sufficient if he gave it before attempting to pass the tug itself. I cannot accede to that proposition. For the purpose of the regulations for preventing collisions, the tug and tow are treated as one ship. In *Marsden on Collisions* (1), it is said "When one ship is in tow "of another, the two ships are for some purposes by "intendment of law regarded as one, the command or "governing power being with the tow and the motive

(1) 4th ed. p. 198.

“power with the tug. Thus for the purpose of the regulations for preventing collision, the tug and her tow are treated as one ship and that a steaming or sailing ship according as the towing ship is under steam or not.” And see the *American and Syria* (1); the same being held in the American cases. *The New York etc. Co. vs. The Philadelphia, &c., Nav. Co.* (2) The object of the signal is that the overtaking vessel shall ascertain from the vessel in front whether it is safe and practicable for her to pass; and that the vessel in front may take the necessary precautions for safety, if she gives her permission to pass, and it is manifest that this object will be defeated if the overtaking vessel may commence to pass and pass down by the side of the two before giving any signal. No English case directly deciding this point was cited before me, and I have found none. The English rules, however, do not require an answering signal to be given, while the American rules do. I may refer, however, to *Robinson vs. The Detroit Steam Navigation Co.* (3). In that case the *Mackinaw* was overtaking the *Majestic*, the tug *Washburn* was alongside the *Majestic*, but the *Mackinaw* did not see her, and she commenced to pass the *Majestic* before giving the signal. She did give the signal, but it was given after she had just commenced to pass the *Majestic*. The tug just then let go from the *Majestic*, to go ashore, and was run into by the *Mackinaw*. The latter was held in fault for not having given the signal before attempting to pass the *Majestic*. The tug was also held to blame, but because she was undermanned. The court in giving judgment (at p. 888) said in reference to the *Mackinaw*: “The captain had had from the time he made out the

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(1) L. R. 6 P. C. 127 and 132. (2) 22 Howard 464.

(3) 73 Fed. Rep. at p. 888.

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“*Majestic* and her course the clearly formed intention to pass on this starboard hand. It certainly became his duty to signal this intention when, in so short a time, he must carry it into effect. Supervisors Rule No. 8 would be useless, indeed, if it applied only to an overtaking vessel when her bow was lapping the stern of the overtaken vessel. The purpose of the signal is to solve the doubt in the mind of each pilot or master as to the course of the other vessel; before the vessels are so near each other that the doubt may be dangerous. It is to make certain to each master the proper course of his own vessel.” I entirely agree with that. The object of the rule is safety, that is the vessel overtaking must ascertain in time whether it is safe to attempt to pass the vessel in front. As I have said, the signal was given when the *Calvin Austin* was about where she should give the signal, if she intended to pass the *Van Allens Boughton* and her tug on their port side. The signal was answered and consented to by the *Chandler*, the tug of the *Van Allens Boughton*, which supposed then that the *Calvin Austin* desired to pass on her port side. It was answered and consented to by the *Pallas*, coming up with the *Reform*, supposing that she desired to meet starboard to starboard. These whistles the captain of the *Calvin Austin* and officers say they did not hear. This, I think, is extraordinary. They were heard by the captain of the *William J. Williams*, being not far from the *Calvin Austin*. They were heard by Captain Saxon, who was in his small boat in the harbour, and not in nearly so good a position for hearing as those on board the *Calvin Austin*. They were heard by Captain Carter, who was on the *Van Allens Boughton*, and by a Mr. Habberley, a passenger, who was standing on the stern of the *Van Allens Boughton*, and from the way the wind was blowing at the time it was calculated to carry the sound

towards the *Calvin Austin*. When the *Calvin Austin* straightened out on her course she was slightly on the port quarter of the *Van Allens Boughton*, and it looked as though she intended to go down on the port side. Captain Allen, of the *Van Allens Boughton*, says from the appearance he thought she might possibly go down on the port side, but he thought if she did she was taking a good many chances of being at close quarters owing to the vessels and barges anchored on the north side, particularly this *Davie P. Davis* that was anchored a little further out than the other vessels, though at least one of the witnesses says there was room to go down on that side. I think, however, most of the evidence is that it would not have been safe at that time. Captain Pike says he never intended to go down on the *Van Allens Boughton's* port side, yet from the way the *Calvin Austin* was manœuvred one would be disposed to think that when they came out of the dock, with an evident desire to get to sea quickly, the intention was to pass the *Van Allens Boughton* on her port side; but when the *Davie P. Davis* was seen standing out in the harbour, that intention was quickly abandoned, and she was turned to starboard; and this view is strengthened by the fact that she gave the signal of two whistles at the time she did, and gave no signal at all when she put her helm to port and attempted to go down on the starboard side. However, having given the signal of two whistles when she did, I think she is bound by it; and if those on board did not hear an answer assenting, she should have waited. It only meant slowing the engines down and going a little slower. Captain Pike says he always intended to go down on the south side. That was his course. Now if that was his intention from the first it was his duty to have given the signal of one whistle; if his desire was to pass the *Van Allens Boughton* on her

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port side, he had plenty of time to do it. He did give the signal of two whistles when he was in fact in the act of passing the tug *William J. Williams* and her tow, they being then two or three hundred feet from his starboard side and the *Van Allens Boughton* just in front of him, but he gave no signal that he wished to pass the *Van Allens Boughton* on her port side, and no explanation and no reason for this omission has been given. The *Van Allens Boughton* was going down about the middle of the channel, and it was not charged at all that she was wrong; and yet it was as much her duty to go on the south side of the channel or harbour as it was the duty of the *Calvin Austin*. This, of course, does not alter the rule, but the course of vessels and the mode of using these waters may have some bearing on the question whether rule 25 applies to Boston Inner Harbour. Almost immediately after the signal of two whistles was given, and as I have said without giving any signal at all, the helm of the *Calvin Austin* was ported, and she attempted to pass the *Van Allens Boughton* on the starboard side. Under rule 8 a signal of one whistle should have been given, and the rule says:—"Under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel shall signify her willingness by blowing the proper signals." No attention whatever was paid to this rule when they attempted to pass on the starboard side.

After they had passed the fisherman, Captain Pike says, in answer to questions:

"Q. Then what did you do with your helm?"

"A. We went right down a southeast course until we got pretty well down to the five-master going out, and as we got within about once the length of the *Calvin Austin* from the five-master, and were just about

to swing over a point, heading southeast, and were going to port our wheel, and I looked over the five-master and saw this—

“ Q. Did you give any order to the man at the wheel before you saw ?

“ A. Just as we were porting the wheel we saw this over the—

“ Q. Did you give the order to port ?

“ A. Yes. The first pilot gave the order to port.

“ Q. After that order was given was there any order to steady given ?

“ A. Yes. Steady, was given.

“ Q. What change, if any, was made in her course ?

“ A. One point. She was headed southeast by south.

“ Q. After you had steadied on that course where were you with reference to the *Van Allens Boughton* ?

“ A. Just coming on her starboard quarter.

When they came out on the starboard quarter of the *Van Allens Boughton* the *Reform*, in tow of the *Pallas*, was coming up, and Captain Pike says a collision was imminent. He then blew two whistles which were answered by the *Pallas*, put his helm hard aport and engines full speed astern. The effect of putting the engines full speed astern was to render the helm useless, and she did not obey it but swung to port. A good deal of evidence was given, and discussion had, whether she had stopped at the time of the collision ; but without going through the evidence I think the result of it is that her way through the water had not stopped. She struck the *Reform* about amidships, and did the damage complained of. I think putting the engines full speed astern was an improper manoeuvre at the time, as it prevented the helm from operating. She might, if that had not been done, answered her helm and gone down the starboard side of the *Reform* without damage, as some of the witnesses say there

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was room for her to go between the *Van Allens Boughton* and the *Reform*,—though other witnesses say there was not room, and the collision at that time was inevitable. I am not able to say which is right. Putting the engines full speed astern was, however, I think from the evidence a wrong manœuvre, and might have contributed somewhat to the collision. It was urged and strongly urged, by the counsel for the *Calvin Austin*, that even if it was a wrong step it was done when they were, so to speak, in the agony of collision, and was, therefore, excusable, citing *The Bywell Castle* (1). And that is true if she were put in that position through the fault of the *Reform*, but if she was in that position through her own fault, then she was not excusable. See *Marsden on Collisions*, (2) and cases cited and the *Elizabeth Jones* (3). Dr. Stockton claims that it was the fault of the *Reform*, through being on the wrong side of the channel or harbour, and I will discuss that later. Having gone into the evidence fully and carefully, I have come to the conclusion that the *Calvin Austin* was going at too great a rate of speed in the place she was and under the circumstances; that the *Van Allens Boughton* and her tug had a right to understand from her first signal of two whistles that she desired to pass on her port side and the *Pallas* and *Reform* to understand that she desired to meet starboard to starboard; and she had no right to pass or attempt to pass the *Van Allens Boughton* on the starboard side without signalling and getting leave, and that she is in fault. The next question to be considered is whether or not the *Reform* is also in fault.

It is claimed on behalf of the *Calvin Austin* that the *Reform* was in fault. The principal claim against her is that she violated Rule 25 in taking the port side of

(1) L. R. 4 P. D. 219.

(2) 4th ed. p. 5.

(3) 112 U.S., 514 at p. 526.

the channel or harbour instead of the starboard side. It is also said that she did not put her engines astern so soon as she should.

Dealing with the first question. The plaintiffs contend in the first instance that Rule 25 does not apply to the place where the collision occurred; that that was the harbour known as the Boston Inner Harbour. They say, secondly, if it did apply, they showed sufficient reasons for taking the port side. Dealing with the first proposition as to whether the rule applies or not, a number of cases were cited by the defendant. Discussions have been had at different times as to what is a narrow channel. *Marsden on Collisions*, second edition, referring to the English rules, which are similar to rule 25, says: (p. 406.) "There is considerable difficulty in defining a narrow channel within Art. 21. "The entrance to the Straits of Messina was held by the "Privy Council to be a narrow channel within Art. 21," citing *Rhondda* (1), which case was cited in argument. In that case the court held that the Strait of Messina was a narrow channel. In giving judgment, at page 552, it is said "their Lordships do not propose to define "what is a narrow channel or to lay down what particular width or length would constitute it. It is sufficient to say that they are of opinion that this is a "narrow channel within the meaning of Art. 21 of the "regulations for preventing collisions at sea." The *Santanderino* (2) was also cited. The case holds that where the collision there occurred was in a narrow channel. It is called in the judgment a roadstead of Sydney harbour within the Canadian rule, which is similar to this. But neither case decides that the rule does apply to a ship that is in a harbour. The case of the *Devonian* (3) was cited, and it more

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(1) 8 App. Cas. 549.

(2) 3 Ex. C. R. 378.

(3) 110 Fed. Rep. 588.

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nearly applies to the present case. The collision occurred very nearly where this collision occurred, but further down and near what is called the narrows, they held there that the ship, where she was at the time, was in a channel. A harbour is defined in the *Century Dictionary* to be "A port or haven for ships. A sheltered recess in the coast line of a sea, gulf, bay or lake, most frequently at the mouth of a river, and harbours are formed artificially in whole or in part." This collision occurred in what is known as Boston Inner Harbour, where ships are anchored, and they were anchored on each side of it at the time this collision occurred. Indeed, there are wharves on both sides where the collision occurred. So that, it seems to me, to fill all the conditions of a harbour. Then, if it is a harbour I cannot think that the rule applies. No case has been cited to me, and I find no case, where the rule is applied in a harbour; and indeed, I think it would be somewhat difficult to apply it, because vessels or tugs are continually plying back and forth, and it seems to me they must be governed in their meeting or passing by signals that are given. Furthermore, in this case, it is somewhat significant that the *Van Allens Boughton*, in tow of the tug, was proceeding down about the centre of the channel or harbour. There was no complaint or suggestion made that she was in an improper position. Indeed, I rather gathered from the evidence that it was the natural way for her to go down out of the harbour, and the *Calvin Austin*, when she was first seen by those on board the *Reform*, appeared to be following down almost on her wake, a little, if anything, on her port side. I, therefore, think that the rule itself would not apply in this case; but assuming that it does apply, the question following is: Was the *Reform* justified in coming up on the southern

side? She came up as far as the Burnham's Channel buoy. The tug that was then towing her dropped down and made fast to her port side. The captain of the tug says that, as the wind was blowing on that day, he feared if he went on the other side he would be driven on the ships anchored there. There were ships at anchor on what is called Bird Island Flats, practically opposite Burnham's Channel buoy. It is claimed that she should have shortened her hawser before she did; but a number of witnesses were examined and practically all of them said on that day it would have been dangerous to attempt to shorten it below those buoys. And then, as to taking the southern side, Captain Merritt, the pilot of the *Reform*, Captain Kemp, of the tug *Pallas* towing the *Reform*, McCarthy, who was the mate of the *Reform*, all say that it was dangerous, as the wind was blowing that day, to have attempted to go up on the northern or starboard side. Captain Anderson, who was the master of the steam-tug *Chandler*, and who signalled the *Reform* to pass starboard to starboard, says: "At the time, the wind was blowing southwest 16 or 17 miles an hour, and I knew if I had gone to the other side of him it would have made it bad for him on account of vessels being anchored to leeward, near Bird Island Flats. He would have gone to leeward of me and consequently been liable to foul with them; going ahead six or seven miles an hour, it would have been a bad chance for him. The consequence was I gave him two whistles hand he answered two whistles," Captain Kenney, the captain of the tugboat *William J. Williams*, also says that under the conditions of that day the course the *Pallas* and the *Reform* took was right. Captain Carter, who was captain of the *Van Allens Boughton*, and a man with a good deal of experience, also agrees that the

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course she took was right. The rule is: "When it is safe or practicable she shall keep to that side of the fair-way or mid-channel, which lies on the starboard of the vessel." Sec. 419, sub-sec. 3 of *The Merchant Shipping Act*, 1894, and cases decided under it, were cited. That subsec. provides that if the damage occurs by the non-observance by any ship of any of the collision regulations, the damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary. I think that statute would not apply to this rule. I will assume, however, that practically the same meaning would be given to this rule that is given to a similar English rule; but whether it is safe and practicable, I think, must depend on the evidence given. Now, safe and practicable, I think, must mean when she can do it without danger; and when I have the evidence of all these practical men, who are themselves used to going in and out of the harbour, and in the habit of towing vessels in and out, and they say that on that day it was not safe for her to have taken the port or northern side of the channel, I think I cannot say that it was. There is this in addition that just before the pilot dropped down alongside of the *Reform* she received the signal from the *J. S. Chandler* of two whistles, indicating her desire to meet her starboard to starboard; and just as she dropped down the *Calvin Austin* was seen apparently coming down in the wake of the *Van Allens Boughton*, and the two whistles were given by the *Calvin Austin*, which the *Pallas* took to mean that the *Calvin Austin* desired to meet in the same way, and answered accordingly. If the captain of the *Pallas* had a right to so understand these whistles then, although it was wrong, the *Calvin Austin*

cannot be heard to complain. In *Marsden on Collisions* (1) it is said: "So where a ship is hailed from another to take a particular course and she obeys the hail, the other ship cannot be heard to say that the course was wrong, although in fact it caused the collision and was in violation of the regulations," and see cases there cited. So that under all these circumstances I think I cannot say the *Reform* was wrong in proceeding up on the side she did. As I have already said, she was seen by at least two of the officers of the *Calvin Austin* as she was going up, and long enough before the happening of the collision for steps to be taken to prevent it, or at all events to show the *Calvin Austin* that it was not safe to attempt to pass the *Van Allens Boughton* on her starboard side at the time they did. I gather from all the evidence that the *Reform* was proceeding at the rate of about two and a half, or not more than three, knots an hour. When the *Calvin Austin* came on the starboard side of the *Van Allens Boughton* and gave the second signal, the collision was imminent. The signal was answered by the *Pallas*, and almost immediately the engine of the *Pallas* was put astern. It is said that it was not done as quickly as it should have been done, but it seems to me under the circumstances that steps were taken as quickly as it was perceived that it was necessary to do so; and in any event even if it can be said that it would have been better if it had been done more quickly, it comes within the rule laid down in the *Bywell Castle*, (2) because the fault was in the *Calvin Austin* taking the course she did to pass down by the starboard of the *Van Allens Boughton* without giving the proper signal. It was strongly urged that as the *Reform* was on the port or south side of the channel that must be taken to have contributed to the accident. I think, considering the

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(1) 3rd ed. p. 6.

(2) L. R. 4 P. D. 219.

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case properly, it is not right to say that that did contribute to the accident. It is true, if she had not been there the *Calvin Austin* would not have run into her; but if the *Calvin Austin* had followed her first signal, or given the proper signal before she changed her course to go down on the starboard side of the *Van Allens Boughton*, all parties would have known what course she wished to take and the collision could have been avoided. In *Cayzer, Irvine & Co. vs. Carron Co.* (1), which was a case of collision between the steamship *Clan Sinclair*, owned by the plaintiffs, and the steamship *Margaret*, owned by the defendant, it was claimed that the *Clan Sinclair* had broken Rule 23 of the Thames Rules, the Court of Appeal held that she, having transgressed the rule, was in fault as well as the *Margaret*. The House of Lords reversed this decision on the ground that even assuming (but without deciding) that the construction put by the Court of Appeal upon rule 23 was correct, and that the *Clan Sinclair* had transgressed the rule, yet such transgression was not the cause of the collision; that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, and she was alone to blame. In giving judgment Lord Blackburn says, p. 883:—
 “Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed; but that is not sufficient ground for saying that the fact that the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there, if it had not been that that vessel did not case and wait so soon, perhaps,

(1) 9 App. Cases, 873.

as it ought to have done, but that was not the cause of the accident; but that the *Margaret*, knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr*, when there was not sufficient room."

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Now, that seems to me to apply exactly to this case. The cause of the accident was that the *Calvin Austin*, knowing that the *Reform* was coming up on the south side of the channel without giving any signal whatever and violating Rule 18 entirely, suddenly, and, as I said, without notice to the *Van Allens Boughton* that was in front of her, ported her helm and attempted to pass down on the starboard side of the *Van Allens Boughton*, although previously to that at least two of the officers of the *Calvin Austin* had seen the *Reform* coming upon that side. That, I think, was the cause of the collision.

I have not discussed the question as to the want of look-outs on both the *Reform* and the *Calvin Austin*, which was argued before me; because I think, under all the circumstances, the day being clear and fine there was sufficient look-out for the vessels to see each other. It does appear that those on board the *Calvin Austin* saw the *Reform* just after they came out and got straightened on her course. It also appears that those on board the *Reform* saw the *Calvin Austin* when they were down by Burnham's Channel Buoy, and heard her signal them; which, to them indicated that she proposed to pass the *Van Allens Boughton* on her port side, and meet the *Reform* and *Pallas* starboard to starboard.

There was also some contention that the vessels were crossing vessels, but I think that contention could not be sustained. The *Calvin Austin* was going out of the harbour and the *Reform* coming in. The case was very fully and ably argued by counsel on both sides, and I had the pleasure of hearing able arguments by

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Mr. Carver and Mr. Dodge, two leading members of the Massachusetts Bar. After giving the evidence and the argument full and careful consideration, I come to the conclusion that the *Calvin Austin* is alone to blame, and the judgment will be therefore that she be condemned in damages and costs. No evidence as to the amount of damages was given, and there will be, if necessary, a reference to ascertain the amount of such damages.

Solicitor for the plaintiff: *H. F. Puddington.*

Solicitor for the defendant: *John Kerr.*

Judgment accordingly.