1929

June 26.
Sept. 30.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

STANDARD OIL COMPANY OF NEW JERSEY ..... PLAINTIFF;

v.

THE SS. *IKALA* ..... DEFENDANT;

AND

INDUSTRY STEAMSHIP COMPANY, LIMITED ..... PLAINTIFF;

v.

THE SS. *JAMES McGEE* ..... DEFENDANT.

Shipping—Collision—Narrow channel—Article 25—Rule 8 of Regulations for St. Lawrence River

A collision occurred between the *I.*, and the *McG.*, soon after midnight, on May 12, 1927, in a narrow channel of the St. Lawrence River between buoys 23 and 24, south of the fairway, and close to buoy 23. The weather was fine and clear, somewhat overcast, but without haze, and visibility was good. Both ships were going at full speed. The *McG.* outbound, going with the stream and a tide of 3 knots an hour and the *I.* inbound. When the *McG.* was abreast of the buoy 24 she gave a one-blast signal which was answered by the *I.* when abreast of buoy 23, indicating that they would pass port to port. The *I.* always going at full speed, then directed her course to port instead of keeping to starboard, contrary to the signal given, and to Article 25, shoving the *McG.* to the south; and the collision occurred, the *I.* striking the *McG.* on the port side just amidships, with her port bow.

Held: (Varying the judgment appealed from), that as the two vessels were travelling port to port after exchanging signals indicating they would keep their course, the speed of the *McG.* in no way contributed to the collision, but that the collision was entirely due to the fault of the *I.* in not keeping to starboard of the channel and neglecting to slow up or stop as good seamanship required.

2. That the ship primarily at fault can only discharge her liability in that respect by very clear and plain evidence of the other's fault.

3. That the descending vessel coming with the current is entitled to consideration, and an up-coming vessel, in a narrow channel, where navi-

gation is intricate, seeing another vessel coming down stream, must stop, and if necessary come to a position of safety below the point of danger and there remain until the channel is clear.

4. That where in such channel a ship fails to keep to starboard she must, at her own risk, right herself back to her proper position.

5. That where the court is assisted by a Nautical Assessor, his opinion on questions submitted to him as such may be filed of record with the judgment of the Court [*SS. Melanie* (1919) 36 T.L.R. 507 referred to and followed].

Judicial observation, that the practice, in some districts, of filing the evidence taken before the Wreck Commissioner as evidence before the trial judge is irregular and should be discouraged.

APPEAL and cross-appeal by the parties herein from the decision of the Local Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa.

A. R. Holden, K.C., for Industry Steamship Co. and the *Ikala.*

L. Beauregard, K.C., for Standard Oil Co. and the *James McGee.*

The facts are stated in the reasons for judgment.

AUDETTE J., now (September 30, 1929), delivered judgment.

This is an appeal by the SS. *James McGee* and a cross-appeal by the SS. *Ikala,* from the judgment of the Local Judge of the Quebec Admiralty District, bearing date 19th April, 1929, in a collision case, wherein he found both vessels to blame in unequal proportions and gave judgment and

pronounced in favour of the plaintiff's claim, Standard Oil Company of New Jersey, in the action bearing No. 682, and condemned the ship *Ikala* and her bail in four-fifths of the amount to be found due to the plaintiff, Standard Oil of New Jersey,—and pronounced in favour of the plaintiff's claim, Industry Steamship Company, Limited, in the action bearing No. 442 and condemned the ship *James McGee* and her bail in one-fifth of the amount to be found due to the plaintiff, Industry Steamship Company, Limited, each party to pay its costs, etc.

The collision between the *Ikala* and the *McGee* occurred soon after midnight on the morning of the 12th of May,

1929

STANDARD OIL COMPANY OF NEW JERSEY v. THE SS. *Ikala* — INDUSTRY STEAMSHIP CO., LTD. v. THE SS. *James McGee.*

Audette J.

1927. The weather was fine and clear, somewhat overcast; but without haze, everything being quite visible.

With the exception of the evidence of Pilot de Villers, amounting to about 14 pages, who was recalled at trial, the whole of the evidence, of about 600 pages, submitted to the trial judge, was the evidence taken on the inquiry or investigation before the Wreck Commissioner. Therefore, as regards pure questions of fact and the probative value of the statements of witnesses, the trial judge was in no better position than the judge sitting here on appeal. It is highly important in cases where the evidence is conflicting, unfortunately a very common occurrence in Admiralty cases, that the trial judge should have the witnesses before him so that he may equate the credibility of their testimony to the measure of impartiality and reasonableness manifested by them while under examination.

On the hearing of this appeal I had the advantage of the assistance, as nautical assessor, of Commodore W. Hose, C.B.C., R.C.N., whose experience greatly assisted me and I am pleased to say, his opinion coincides absolutely with mine. I have, following the observation made in the case of the *SS. Melanie* (1), filed in the record the opinion of the Commodore upon the case.

The evidence adduced on behalf of both parties is absolutely conflicting in all respects. Indeed, as Wellman, on the "Art" of cross-examination, so truly says that

> one sees, perhaps the most marked instances of partisanship in Admiralty cases which arise out of a collision between two ships. Almost invariably all the crew of one ship will testify in unison against the opposing crew.

I fear, as I have had occasion to say so before, that this is a weakness in the make-up of human nature, and while such a witness is not deliberately committing perjury, he is unconsciously prone to dilute or colour the evidence to suit a particular purpose by adding a bit here and suppressing one there; but these bits will make all the difference in the meaning.

Let us, therefore, endeavour to reconcile this conflict with the object of discerning the truth, bearing in mind that

> where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up.

(1) (1919) 35 T.L.R. 507.

The Mary Stewart (1); *The Ailsa* (2).

The evidence on behalf of the *Ikala* is inconsistent, unrelated and it is impossible to draw from it a consistent and controlled conclusion. That evidence creates a curious puzzle of inconsistency when it establishes that the first blast of the *McGee* was given when she was abreast of buoy No. 24, and that the *Ikala* answered the same by one blast when abreast of buoy No. 23. This fact is quite illuminating, as it establishes beyond peradventure that it is impossible,—both ships going full speed and the tide running down against the *Ikala* at about three knots an hour —for the collision to have taken place quite close to buoy 24, as contended by the *Ikala*. The probabilities of the case, consistent with common sense and surrounding circumstances, is that the collision took place, as contended by the *McGee,* southwest and close to buoy No. 23.

I wish further to add that I absolutely concur with the trial judge with respect to the conduct of the crew of the respective vessels and, with him, accept without equivocation the version of the *McGee,*—the only point, however, upon which, I feel I must differ, is upon his decision with respect to the division of responsibility; I find that the *Ikala* was solely and entirely at fault and to blame for the accident.

Indeed, the *Ikala* through some undisclosed reasons (her port steering, however, not being normal), in a narrow channel, in violation of Art. 25, unduly and through lubberly manoeuvring, directed her course to port, gradually shoving the *McGee* south. After announcing a different course by the exchange of their respective blasts, she further kept going full speed in a meeting of this kind when both vessels were to pass inside or within the channel indicated by these respective buoys,—notwithstanding that the *Ikala* was proceeding against the tide.

As found by the trial judge, and I agree with him, the river between buoys 24 and 23 must be taken to be a narrow channel (Art. 25)—with also comparatively shallow water south of buoy 23.

An up-coming vessel, like the *Ikala,* in a narrow channel and when the navigation is intricate, must stop and, if necessary, come to a position of safety below the point of

(1) (1844) 2 Wm. Rob. 244. (2) (1860) 2 Stuart's Adm. 38.

1929

STANDARD OIL COMPANY OF NEW JERSEY v. THE SS. *Ikala*

INDUSTRY STEAMSHIP CO., LTD. v. THE SS. *James McGee.*

Audette J.

danger and there remain until the channel is clear. This, the *Ikala* has absolutely failed to do, and had she complied with this requirement, it is obvious the accident would not have happened.

The descending vessel, coming with the current, is entitled to consideration. Had the *Ikala* below buoy 23—or north of it—had she slackened to slow, as good seamanship required under the circumstances, the accident would have been avoided. The *SS. Coniston* (1); the *Ezardian* (2); the *Talabot* (3). The accident happened shortly after the *Ikala* had resumed her course, after anchoring to make some repairs.

The *Ikala,* through lubberly manoeuvring, placed herself, at full speed, in a false position, thus displaying a glaring want of good seamanship care and prudence.

In a narrow channel, it is the duty of the steamer navigating against the tide, to wait until the downward bound vessel has passed clear. *Bonham* v. *Honoreva* (4).

Moreover, among the "Regulations for the River St. Lawrence from Father Point to Victoria Bridge," at Montreal, which are, among other places, to be found in the 1927 Tide Tables, etc., issued by the Department of Marine and Fisheries of Canada, the following rule appears, viz:—

(8) All up-coming vessels, on each occasion, before meeting down-bound vessels at sharp turns, *narrow passages,* or where the navigation is intricate, shall stop, and, if necessary, come to a position of safety below the point of danger, and there remain until the channel is clear.

This general rule is complete by itself; but below the same we find the further enactment.

These directions apply to the following points:—
Cap Charles
Cap à la Roche
Grandmont Poulier, etc., etc.

And I find that these latter directions do not, in any way, detract from the generality of rule 8, which is applicable at large to all such cases therein provided; and I find the *Ikala* failed to observe the same and I further find that had she complied with it, the accident would have been avoided.

The *Ikala* did not keep to the proper side of the narrow channel (Art. 25) and it is hardly in her mouth to say, when she was going full speed, that the collision would not

(1) (1918) 19 Ex. C.R. 239, at p. 249.
(2) (1911) 11 Asp. 602.
(3) (1890) 6 Asp. (N.S.) 602.
(4) (1916) 54 S.C.R. 51.

have occurred had the *McGee* not gone full speed, especially when the collision resulted exclusively from her own bad seamanship. The ship primarily at fault, the *Ikala,* could only discharge her liability in that respect by very clear and plain evidence which does not exist here, *Bryde* v. *SS. Montcalm* (1).

Moreover, the fact that the collision took place south of the fairway, between the two buoys and near buoy 23, confirms the finding that the *Ikala* did not, in compliance with Art. 25, keep to starboard, and that she had, at *her own risk;* to right herself back to her proper place in the channel. *The Glengariff* (2); *The Union SS. Company* v. *The Wakena* (3), reversed on appeal.

Was the *Ikala* carried to the south, at the place where I find the accident occurred only through lubberly manoeuvring or was it the result of some defect in her rudder—perhaps matters very little. Indeed, it is not without some significance that the pilot of the *Ikala* admits the peculiarity of her wheel which was carrying port helm; to carry her steady on her course one had to give her port helm *two turns;* she carried 1½ turns to port all the time and the pilot declares he had never seen any ship requiring 16 turns from port to starboard helm in his experience (p. 208). Witness Hay, the classification surveyor, found the chains of the steering gear of the *Ikala a little bit slack.* The wheelsman, Brown (341), testified also that crossing the Atlantic she would carry a port helm. Be all this as it may, it is not without some reason to suspect that with that defect the *Ikala* could not obey her helm on a port order as readily and effectively as if in perfect and normal order and condition.

I am unable to acquiesce in the finding below, following the *Europa* and I disagree with it, when approving of the assessor's view, it is said:

> Had she reduced her speed (the *McGee*) at the red buoy, it is probable that she would have avoided the collision at all events it would have minimized the damages.

There was no apparent reason for the *McGee* to slacken speed; the two vessels were travelling port to port after exchanging one blast indicating they would keep their course.

(1) (1913) Can. Rep. (A.C.) 472; 14 D.L.R. 46.
(2) (1905) 10 Asp. 103; (1905) P. 106.
(3) (1917) 16 Ex. C.R. 397; 35 D.L.R. 644; 37 D.L.R. 579.

1929

STANDARD OIL COMPANY OF NEW JERSEY v. THE SS. *Ikala*

INDUSTRY STEAMSHIP CO., LTD. v. THE SS. *James McGee.*

Audette J.

Had the *Ikala* kept her course, there would have been no collision. The *McGee* was led or chased out of her course to the south by the pursuit of the *Ikala.*

I am unable to share that view suggested by the assessor. One must not overlook the fact that the *McGee* was coming down with a three knot tide and that a certain speed was therefore, absolutely necessary for her to keep good command of her steering,—the duty of stopping or reducing speed, under the circumstances, was clearly upon the *Ikala* and not upon the *McGee.* Moreover, although it is hard to surmise, yet had the *McGee* reduced speed instead of the *Ikala* striking the *McGee* with her port bow, on the port side just amidship at a very slight angle, her anchor going through the side amidship,—the collision might have been either end on or bow to bow at right angle and the results would have been ever so much more disastrous. *The Bywell Castle* (1); *the Benares* (2); Marsden's Collisions at Sea, 8 Ed., p. 465.

The *Ikala* failed to keep her course to starboard, Art. 25; the *Ikala* failed to slacken or stop below buoy 23 as good seamanship required under the circumstances of the case.

The speed of the *McGee* did not in any way contribute to the collision. In re *Canadian Pacific Railway* v. *SS. Storstad* (3), the learned judge observes:—

> We find that a manoeuvre is wrong if it creates a risk of collision. The test, therefore, is whether this manoeuvre created a risk of collision. A further test is again if it did create a risk of collision did it contribute to the disaster in question? If a given manoeuvre creates a risk of collision, it would be a breach of the rule, and if it creates a risk of collision which contributed to the collision or caused it, then it would be a fault. As is well known, there is a difference between the English law and our law that used to exist and which has been but recently abolished. All the English jurisprudence is under the old law. In England, formerly, a breach of the rules was presumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law, the plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.

As I have said before the speed of the *McGee* did not contribute to the accident, and, under the circumstances of the case, considering the false manoeuvring of the *Ikala* it contributed greatly to decrease the result of the collision. Under the general trend of the evidence, taking all the circumstances into consideration, I allow the appeal of the

(1) (1879) 4 Asp. N.S. 207. (2) (1883) 5 Asp. N.S. 171.
(3) (1915) 17 Ex. C.R. 160, at p. 170; 40 D.L.R. 600, at p. 607.

McGee and dismiss the cross-appeal of the *Ikala* and order and adjudge that the judgment appealed from be varied accordingly, the whole with costs in favour of the *McGee* against the *Ikala*.

I cannot close without calling attention to the mischievous and most irregular practice which has of late crept into the practice before some of the local Courts of the Admiralty Districts and that is to accept as evidence in the case the evidence of the witnesses heard on the investigation before the Wreck Commissioner. It is most unsuitable; it involves an unnecessary mass of evidence respecting the conduct of the officers of the respective vessels (R.S.C., 1906, Ch. 113, sec. 782). Therefore, the object of proceedings before the Wreck Commissioner is quite dissimilar from that of proceeding in this court for damages arising out of a collision. This evidence is not adduced in a judicial proceeding. It is not a trial in its true sense and meaning. The evidence is not authentic, it being but testimony before an investigating commissioner. *Menard* v. *The King* (1).

The evidence before the court in the present case, taken upon such investigation, is adduced in a most unscientific manner and contrary to the well known rules in that respect. It is chaotic. The witnesses are questioned without the observance required at trial. Hearsay is allowed. The questions submitted both by the Commissioner and counsel are made at random and repeated in an unconceivable number of times, which tend to make the analysis of the same very difficult and cumbersome.

The trial judge should have, if possible, the advantage of seeing the witnesses, observe their demeanour in the box and be enabled to put such question as his legal training and experience may suggest. If the trial judge is once thus deprived of these advantages and that he has to decide upon evidence so adduced in an extra-judicial inquiry—not a court of record—he is taken out of his ordinary function and position as contemplated in the true administration of justice.

The stock argument for using such evidence is that it will make the trial less expensive, is without merit and not deserving consideration. The question of expense, in any

(1) (1919) Q.O.R. 29 K.B. 420.

1929

STANDARD OIL COMPANY OF NEW JERSEY v. THE SS. *Ikala*

INDUSTRY STEAMSHIP CO., LTD. v. THE SS. *James McGee.*

Audette J.

case, should not trammel a tribunal in the administration of justice between the parties.

Now does the acceptance of such evidence really constitute a saving? I readily answer in the negative. Indeed, in the present case where the evidence taken before a judicial tribunal, instead of being spread upon about 600 pages, 250 to 300 would have been amply sufficient, and a saving of a good half been made. And were the parties going to appeal before a tribunal exacting the printing of the evidence, the saving of the printing expense is also self-evident.

The further argument that the witnesses are difficult to assign does not either avail. What was being done before there was a Wreck Commissioner can also be done to-day.

It is a most unsatisfactory practice and contrary to the well established procedure. It is quite irregular to accept such evidence in a Court of Justice, even if tendered by the consent of the respective counsel. It is unfair both to the judge and to the litigants to attempt to make it trial evidence. The practice of accepting such evidence should be discouraged as there is a tendency at the present day of resorting to it.

Judgment accordingly.