

1918  
Oct. 28.

## APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

S. S. "CONISTON",

APPELLANT, (DEFENDANT);

v.

FRANK WALROD,

RESPONDENT, (PLAINTIFF).

*Collision—Negligence—Tug and Tow—Currents—Rule 25—Narrow Channel—Lights on Barges.*

A collision occurred at night, in a bend of a narrow channel on the St. Lawrence River. The night was dark, but with a clear atmosphere. The "Coniston" was going up stream on the port side of the channel, in ballast, at great speed, and though she sighted the tug some miles away, descending with the current, and recognized the tug had a tow, she neglected to stop or slacken below the bend to allow the tug, encumbered with tow, to pass clear; but on the contrary maintained her speed until very shortly before the collision. Moreover she failed, when it was safe and practicable to do so, to obey rule 25 of the Rules of the Road, providing that in a narrow channel, vessels shall keep to the starboard side of the fair-way, and decided to pass starboard to starboard.

When 1,000 feet away, and on her proper side of the channel, the tug gave one blast, indicating she would keep to starboard. The "Coniston" shortly after tried to right herself back to her proper side, but was too late and collided with the barges on the *tug's side of the channel*. When the collision seemed inevitable, the tug ported her helm to try and prevent collision but failed. The barges carried white lights but no green and red lights.

*Held*, upon the facts stated, (confirming the judgment appealed from), that the "Coniston" having placed herself in a false position, was therefore navigated improperly and without ordinary care and prudence and was solely at fault and to blame for the accident.

2. That, inasmuch as the collision occurred at the head of the tow, the length thereof and the absence of red and green lights on the barges cannot be said to have contributed to the collision.

3. That inasmuch as, under the Canadian jurisprudence, following the decision in *Re S.S. "Storstad"*<sup>1</sup>) which is different from the old English law, the plaintiff has to prove not only the breach of the rule, but also that it has caused or contributed to the collision, the absence of green and red lights on the tow and the length thereof having in no way contributed to the accident, the tug and tow cannot be held liable therefor.

4. Where two steamers going in opposite directions are likely to meet in a bend of a narrow channel, one hampered with a tow and descending with the current, it is the duty of the other, going against the stream, to give all consideration to the tug and that good and prudent seamanship requires her to slacken speed or stop, according to circumstances, until the tug has cleared.

5. That while it is quite true that vessels which are travelling in opposite directions green to green for some time should continue on their course to prevent becoming crossing vessels before they could come red to red, this would not apply where in a narrow channel they suddenly came green to green a few moments before the collision.

THIS is an appeal by the defendant from the judgment of the Deputy Local Judge in Admiralty, Quebec Admiralty District, Mr. Justice Maclennan<sup>2</sup> rendered on February 20, 1918, which judgment found the S.S. "Coniston" guilty of negligence and found that the collision was the result of the failure, by the "Coniston", to observe the provisions of article 25 of the Collision Regulations and also finding that there was no blame imputable to the plaintiff and ordering that the damages be assessed.\*

The appeal was heard before the Honourable Mr. Justice Audette at the City of Montreal on May 20 and 21, 1919.

<sup>1</sup> (1915), 17 Can. Ex. C. R. 160; 40 D. L. R. 600.

<sup>2</sup> See (1918), 18 Can. Ex. C. R. 330; 45 D. L. R. 518.

\*REPORTER'S NOTE:—In this case notice of intention to appeal to the Privy Council was given, and subsequently discontinued, and then notice of intention to appeal to Supreme Court was given and has now been abandoned.

1918  
S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.

1918  
 S. S.  
 "CONISTON"  
 v.  
 FRANK  
 WALROD  
 Reasons for  
 Judgment.

*A. W. Atwater*, K.C. and *L. Beauregard*, for appellant.

*Peers Davidson*, K.C., for respondent.

AUDETTE, J. (October 28, 1918), delivered judgment.

This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, and bearing date the 20th February, 1918, in a case of damages arising out of a collision which occurred at one of the curves in the narrow ship-channel of the River St. Lawrence, on Lake St. Peter, between Montreal and Three Rivers.

As already said, in such cases when sitting, as a single Judge, in an Admiralty appeal from the judgment of the trial Judge, while I might with some diffidence feel obliged to differ in matters of law and practice; yet as regards pure questions of fact, I ought not to interfere with the judgment below, unless being clearly satisfied in my own mind that the decision is clearly erroneous.<sup>1</sup>

*The Picton* case<sup>2</sup> is further authority for the proposition that when a disputed fact, involving nautical questions with respect to what action should have been taken immediately before the collision, is raised on appeal, that the decree of the Court below should not be reversed merely upon a question of testimony. Indeed, the hearing upon the appeal is but a re-hear-

<sup>1</sup> *The Queen v. Armour* (1899), 31 Can. S. C. R. 499; *Montreal Gas Co. v. St. Laurent* (1896), 26 Can. S. C. R. 176; *Weller v. McDonald-McMillan Co.* (1910), 43 Can. S. C. R. 85; *McGreevy v. The Queen* (1886), 14 Can. S. C. R. 735; *Arpin v. The Queen* (1886), 14 Can. S. C. R. 736; and *Coutlee's Digest*, S. C. Vol. 1, p. 93 *et seq.*

<sup>2</sup> (1879), 4 Can. S. C. R. 648.

ing of the case, and while there is no presumption that the judgment in the Court below is right, it cannot, however, be overlooked that the learned Judge of first instance has had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination *Riekmann v. Thierry*.<sup>3</sup>

On the hearing of the appeal I had the advantage of the assistance, as Nautical Assessor, of Captain Demers, the Dominion Wreck Commissioner, a gentleman of large experience in nautical matters and whose opinion, I am pleased to say,—to use his own words,—coincides with mine.

Close on to midnight, on the 18th June, 1917, the steamer "Coniston", light, in water ballast, was steaming up Lake St. Peter, at full steam. She is a steel vessel of 337 feet in length, 47 feet beam, 2273 net tonnage, single screw, triple expansion, drawing light 8.6 forward, and 13.6 aft, as stated by Captain Hill. She is said to steer easily.

The weather was fine,—a splendid night, dark, but with clear atmosphere. The lights were plainly visible, and a slight south-south west breeze was blowing. According to Superintendent Weir, there was, at the time of the accident, in the *locus in quo* a current of about three miles an hour, which between Curves Numbers 1 and 2 tends to the south; and there was a breeze of 3 to 4 miles which would have absolutely no effect on loaded barges, as it would take a very strong breeze to have any effect upon them.

Pilot Mayrand, who was in charge of the bridge and of the navigation of the "Coniston", testifies

<sup>3</sup> (1896), 14 R. P. C. 105.

1918

S. S.  
"CONISTON"

FRANK  
WALROD

Reasons for  
Judgment.

1918

S. S.  
"CONISTON"v.  
FRANK  
WALRODReasons for  
Judgment.

that his vessel on the night of the accident was drawing slightly over 14 feet, and that they were going up the river against the current, at a speed of 9 or 10 miles an hour. Trattles, the Chief Officer, says that when they first saw the tug "Virginia" and her tow, they were at about three or four miles distant and that, *of course*, he knew it was a tow, as he saw the several lights of the barges. The pilot says when he first saw the "Virginia's" green light with two mast lights, and the barges showing their lights, he also knew at once it was a tow, and he adds when he saw these lights he was in the fair-way of the channel.

The average width of the channel in the locality in question is about 450 feet.

This green light he saw appeared on his port side,—the "Virginia" being in the upper reach of the curve and the "Coniston" on the lower reach. The pilot says he was at about  $1\frac{1}{2}$  miles when for the first time he saw the "Virginia's" green light and kept up at full speed all along. After seeing the green light he proceeded for  $\frac{3}{4}$  to 1 mile without changing his course, having all that time the "Virginia's" green light in sight. At 2,500 to 3,000 feet the "Coniston" blew two blasts, and the pilot says he advanced 700 or 800 feet before the "Virginia" in answer blew one blast, when, he says, (both vessels having continued to go ahead)—he was at about two lengths of his ship from the tug and still going full speed, his vessel being then (p. 68) more on the south than in the center of the channel,—at about 100 odd feet of the south line of the channel. The pilot further contents that the "Virginia" gave one blast immediately after showing her red light, when

they were at 800 to 900 feet apart and his vessel kept forging ahead full speed.

“The “Coniston” answered the “Virginia’s” one blast by one blast when they were 400 to 500 feet apart and when, the pilot says, he realized the collision *was inevitable*. He then ordered his wheel hard-a-port, (he having a right hand propeller) slow, stop, and full speed astern, and the collision took place, not end on, but the “Coniston” struck with a slanting or glancing blow the barges that were then on her port side.

The “Coniston”, however, omitted as required by art. 28, to indicate, by “three short blasts” her engines were going full speed astern.

The pilot said: “Q. Dans quelle partie avez vous “frappe avec votre batiment? A. Un peu en arriere “de la joue.”

The tug’s green light was at all times seen by the “Coniston” before the latter took the curve, and it was when she was out of or beyond this curve, No. 2, she first saw, as she should, the “Virginia’s” red light. The “Virginia’s” green light was narrowing on the “Coniston’s” port bow, as the latter was travelling in this curve.

The collision took place at about 100 feet from buoy No. 85,L. which is at the head of the curve and on the right or starboard side of the channel going down the St. Lawrence. The collision occurred on the south of the fair-way, or on the right side of the channel going down the river.

After the collision the “Coniston” righted herself, went to starboard and proceeded ahead, without

1918  
S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.

1918

S. S.  
"CONISTON"FRANK  
WALRODReasons for  
Judgment.

more ado, and without ascertaining or enquiring if she could be of any help or assistance to the sinking or damaged barges.

Before leaving the "Coniston" on this question, it will be well to refer again to the Chief Officer Trattles' evidence with respect to the course followed by the "Coniston" immediately before the accident and regarding the place of the accident. This witness states that when the pilot ordered two blasts, the "Coniston" was in the middle of the channel, and immediately after giving these two blasts, the "Coniston" starboarded her helm a little, altering her head to port at the very outside half a point and then steadied. They continued heading a little to the south, and they kept at that at the command "steady". And then he adds when the tug blew one blast she was on our starboard side between two or three points, (pp. 36 and 37). This starboarding of the helm between the time the "Coniston" gave the two blasts and the collision is also corroborated by wheelsman Baay, pp. 41-43.

Having thus followed in a general manner the course of the "Coniston" while manoeuvring in the lower reach of Curve No. 2, as shown on the chart filed as Exhibit No. 1, let us now in a similar manner, follow the course pursued by the tug and her dead tow in the upper reach, between Curves No. 1 and No. 2.

The tug "Virginia" is 115 feet in length, about 24 feet beam and has a draught of 11½ feet. By means of a hawser of 200 to 250 feet in length she was towing sixteen canal barges, lashed two by two, with bridles attached to the two front barges—the suc-

ceeding tiers stood about 15 feet apart from the tier ahead. The first five rows, of ten barges, were under cargo, and the three last rows, of six, were light—unloaded. It was a dead tow, the barges being under the entire control of the tug, as they had no means of propelling themselves. The barges were of an average length of 100 feet, more or less.

The tug was displaying her red and green side lights and two white mast head lights indicating she had a tow.

The Captain of the "Virginia" says he sighted the white light of the "Coniston" at a distance of about a couple of miles.

The crew of the "Virginia" swear they did not hear the two blasts of the "Coniston", which the latter's crew swear they did give. The wind was blowing the sound in a different direction from which the "Virginia" stood at the time. The "Coniston" did not have a siren, but an ordinary whistle which might have been, at the time, filled with water from the steam, as she was going up full speed. However, there is not much turning upon this point.

Leaving buoy No. 97, after Curve No. 1, the current throws to the south of the channel and on that account it is said to be difficult to clear it, and the Captain of the "Virginia" says that, at that spot, he passed right in the middle of the channel, between the red buoy No. 100 and buoy No. 97, and the tug passed about 50 feet from the red buoy to counteract the current which was throwing them on No. 97. After passing there he came back to the centre of the channel. At that spot in going through this manoeuvre they actually describe a half circle. The more they go down the less effect has the current.

1918

S. S.  
"CONISTON"v.  
FRANK  
WALRODReasons for  
Judgment.



1918

S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.

Half way between the two curves, the tow was absolutely straight, says the captain, and the current was shoving us to the south in a decreasing strength. Then, he says, when he saw the "Coniston" at buoy No. 91, he moved to the south (right). When the "Virginia" was opposite buoy No. 85, the captain says the "Coniston" was at about 1,000 feet, and he contends it was at that distance, when he was 50 feet away from buoy No. 85, tug and tow, all in a straight line parallel with the direction of channel, on the south side of the fair-way that he blew one blast.

Up to this time both vessels had been travelling *green to red*, that is the "Coniston" exhibiting her red and the tug her green, and looking over the chart on account of the course of the channel it could not have been otherwise, until one of the vessels got into or passed Curve No. 2.

The Captain of the "Virginia" contends that, when at about 1,000 feet from the other vessel, and 50 feet from buoy No. 85, and suddenly seeing the green light of the "Coniston", he blew one blast and went three points or more to starboard, and at that time he affirms the "Coniston" was on the south side of the channel.

The "Coniston" answered at once by one blast the one blast of the tug. Immediately after this blast the "Coniston" shutting her green showed her red light, when the "Coniston" and the "Virginia" became abreast about 250 feet below buoy No. 85, and passed one another, and when the "Coniston" came in collision with the barges, they were abreast of buoy No. 85 upon which the steamer shoved them,

damaging the buoy which passed underneath some of the barges.

As a result of the collision one barge was sunk, and the plaintiff's barges damaged.

After the collision the "Virginia" pulled in some of her hawser, went half speed, came up towards the barges to ascertain if there were any loss of life and to give help.

It is perhaps opportune at this juncture, to compare the conduct of the captain of the "Virginia" after the accident with the conduct of the captain of the "Coniston", who after the accident, steamed to starboard, cleared the barges that he had brought together in a tangle, and steamed up channel. The "Coniston" did not, contrary to her duty, stand by and assist all in her power the stricken vessels. And, as said by Todd & Whall, Practical Seamanship: "If it so happens that the stricken vessel can be kept afloat, it is the duty of the other vessel to tow and assist her into a place of safety. In all cases of collision, one vessel must stand by the other as long as necessary, and it is punishable by law if one vessel forsakes the other, besides being cowardly in the extreme."

Now, having gone so far let us ascertain the cause of the collision.

Having already found that the ship-channel at the place in question is a narrow channel, art. 25 of the International Rules of the Road must *prima facie* apply. This rule reads, as follows:

"Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that

<sup>1</sup> See now upon this question The Canada Shipping Act, R. S. C. 1906, ch. 113, sec. 920, as amended by 4-5 Geo. V., 1914, ch. 13, sec. 5, sub-sec. 2.

1918  
S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.

1918  
 S. S.  
 "CONISTON"  
 v.  
 FRANK  
 WALROD  
 Reasons for  
 Judgment.

"side of the fair-way or mid-channel which lies on  
 "the starboard side of such vessel."

The "Coniston" from the very time she sighted the tug and tow either kept in the middle of the channel or to the left or port side of the same, contrary to and in violation of art. 25, which imperatively directed her to keep to the right or starboard side of the channel. Both vessels up to the time the "Coniston" was taking the Curve No. 2, when they were about 800 to 1,000 feet apart, were travelling red to green.

Moreover, assuming both vessels had kept their courses, it is only when the ascending vessel had turned into the upper reach moving to the south, that the descending vessel would normally see the red of the ascending vessel,—unless some unusual course followed by the ascending vessel could have disclosed her green. The ascending vessel should also see the green light of the descending vessel up to that point.

What are the reasons assigned by the "Coniston" for having departed from the imperative directions of art. 25, from the time she gave her two blasts? Why was she travelling on the wrong side of the channel at full speed at such a place, with a tug, impeded by her dead tow, coming down the channel with the current, on her proper course? Art. 29.

The wind prevailing on the night of the accident, as established by the evidence, was such as it would be wasting time to discuss its slight effect on the tow, especially its effect on the second tier of the loaded barges. The same may be said with respect to the current as having any bearing on the cause of the

accident, save, however, the fact that the tug, trammelled by her tow, was coming down with the current.

The pilot's excuse for having departed from the obligations prescribed by art. 25, as for keeping to the left of the channel instead of the right—(if it is to be taken seriously or as a last straw to which he holds in attempting to excuse his lubberly manoeuvring) is that when on the lower reach, some distance away, the tug and tow appeared to him to be on the north of the channel in the upper reach of Curve No. 2. Is it not evident that the "Coniston", the ascending vessel, looking across the curve would be quite unable to ascertain with any satisfactory degree of certitude whether the down vessel ("Virginia" and tow) was on the north more than the south of the fair-way,—inasmuch as he was not looking directly up the channel. At page 30 of his evidence the pilot also makes the double statement that he *did not and did* take the wind into consideration.

However, the pilot testifies he became quite anxious in his course between the time of the two blasts and the one blast. And he might well be; yet he still proceeded at full speed (*à quelques pieds de la ligne sud du chenal*) at a few feet from the southern line of the channel, well knowing, in good and prudent seamanship, the descending vessel, hampered with a tow, coming with the current, was entitled to consideration. Had he stopped below the curve,—had he slackened to slow, as good seamanship required of him under the circumstances, the accident would have been avoided. He was guilty of a most lubberly manoeuvre under the circumstances. See art. 29.

1918

S. S.  
"CONISTON"v.  
FRANK  
WALRODReasons for  
Judgment.

1918  
 S. S.  
 "CONISTON"  
 v.  
 FRANK  
 WALROD  
 Reasons for  
 Judgment.

The "Coniston" departed from a course imperatively defined by art. 25, and still aggravated her error by proceeding at full speed,—in a curve, where navigation is necessarily intricate, in face of a tug and dead tow coming down with the current, at night and on her proper course, instead of either stopping, keeping her course to starboard or at least reducing her speed, which he only did when, as her pilot himself said, the collision had become inevitable, and made no allowance for the tug's encumbered condition.

I find that the "Coniston" placed herself, by a lubberly manoeuvre, in a false position, and that she is at fault for such manoeuvring, wanting in good seamanship, and displaying a glaring want of ordinary care and precaution.

I will cite here, although decided under the Great Lakes Rules, the case of *Bonham v. The "Honoreva"*,<sup>1</sup> which is enlightning upon the general principles.

We must not overlook that the tug and its dead tow were coming down on the right side of the channel, with the current and encumbered with her tow.

See the case of *The Montreal Transportation Co. Ltd. v. S.S. "Norwalk" et al.*,<sup>2</sup> although decided under the Great Lakes Rules.

It was held, among other things, in the case of *Earl of Lonsdale*,<sup>3</sup> affirmed by the Judicial Committee of the Privy Council, that where a steamship was ascending the River St. Lawrence, and before entering a narrow and difficult channel, had observed a tug approaching with a tow of vessels behind her,

<sup>1</sup> (1916), 54 Can. S. C. R. 51; 32 D. L. R. 196.

<sup>2</sup> (1909), 37 Que. S. C. 97; 12 Can. Ex. C. R. 434.

<sup>3</sup> (1878), Cook's Adm. 153.

but did not stop or slacken speed—a collision taking place—, that the steamer was to blame, and that the fact of the tug not porting until immediately before the collision, did not amount to contributory negligence. See also *Tucker v. The Ship "Tecumseh"*.<sup>4</sup>

“A steamer with a ship in tow is in a different “situation from a steamer unincumbered”. *The Independence*.<sup>5</sup>

And in the case of “*The Talabot*”,<sup>1</sup> it was held that, “When two steamships going in opposite directions, “in the Schelt, sighted one another, one above a point “and the other below it in the river, and if both kept “on they would meet at the point, that it was the “duty of the steamer navigating against the tide to “wait until the other steamer had passed clear.”

And again in “*The Ezardian*”,<sup>2</sup>: “Although there “is no positive rule with regard to navigation of the “narrow deep-water channel in the neighbourhood “of Whitton gas float No. 3 in the Upper Humber, “the practice, based on good seamanship, requires “that those in charge of a steamship, proceeding “against the flood tide, should avoid meeting an- “other vessel at the gas float, and should, therefore, “wait until the vessel proceeding with the tide has “rounded the bend.”

“And obedience to the rules of the road is not “exacted as strictly in the case of a tug and tow as “when a single vessel is concerned.” *Ontario Gravel Freighting Co. v. Ships "A. L. Smith" and "Chinook."*<sup>3</sup>

<sup>4</sup> (1905), 10 Can. Ex. C. R. 44.

<sup>5</sup> (1861), 4 L. T. 563, see headnote; see also *Bonham v. The "Honoreva"*, 54 Can. S. C. R. 51; 32 D. L. R. 196.

<sup>1</sup> (1890), 6 Asp. M. C. 602.

<sup>2</sup> [1911] P. 92.

<sup>3</sup> (1914), 15 Can. Ex. C. R. 111; 22 D. L. R. 488.

1918

S. S.  
"CONISTON"

v.  
FRANK  
WALROD

Reasons for  
Judgment.

1918

S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.

Moreover, Lord Alverston, in the case of the *Kaiser Wilhelm der Grosse*<sup>1</sup> says, "I am disposed to think that art. 25, in providing that a vessel shall keep to its starboard side of the channel, lays down a rule which is to be obeyed not merely by one vessel as regards another; but, *so far as practicable*, absolutely and in all circumstances."<sup>2</sup> Indeed in no case more than the present, in face of this tug and dead tow, coming down with the current, at night and in a curve,—should this imperative duty have been adhered to—it being as art. 25 says, quite "safe and practicable" to adhere to the course and pass red to red.

In the case of "*The Clydach*"<sup>3</sup> wherein the facts disclosed a practice had originated in meeting green to green in passing through a narrow channel, which resulted in a collision with a vessel not aware of such practice, and that adhered to the rules of the road;—it was held to be a clear case, because it was a direct violation of art. 25. And Butt, J., in that case, says: "What was his duty under these circumstances? His imperative duty was to keep to the starboard side of the channel. *There is only one way in which he could excuse his departure from following that course, i.e., by showing that under the circumstances it was not safe and practicable, for him to obey the rule.*" There is no such evidence in the present case, quite to the contrary. See also "*The Leverington.*"<sup>4</sup>

The obligation of keeping to the proper side of a narrow channel, in the *St. Lawrence*, was again af-

<sup>1</sup> (1907), 76 L. J. Adm. 138 at P. 140.

<sup>2</sup> See also Smith, Rules of the Road, 222.

<sup>3</sup> (1884), 5 Asp. M. C. 336.

<sup>4</sup> (1886), 11 P. D. 117 and our Art. 19.

firmed in the case of *Turret S.S. Co. v. Jenks*.<sup>1</sup> As a result of the "Coniston" disregarding art. 25, she placed the tug and tow in considerable difficulty, while the tug had the right to expect that if the "Coniston" kept her proper course, she would keep clear. The tug proceeded, as she had a right to proceed, upon the fair belief that the "Coniston" was going to perform the proper manoeuvre as required by art. 25.

Again, the case of *Bryde v. S.S. "Montcalm"*<sup>2</sup> is further authority for the proposition that: "When a ship commits a breach of the rule as to keeping the proper side of narrow channel, but alleges that a collision would not have occurred had the other ship not been guilty of negligence in taking steps which would have averted such collision, the burden of proving such allegation is on the ship primarily at fault and can only be discharged by clear and plain evidence." And no such evidence exists in this case.

See also *Bonham v. The "Honoreva."*<sup>3</sup>

Considering that the two blasts were given at quite a distance with a whistle and not a siren, with the wind against it, and that the crew of the tug, a comparatively small vessel, were close to the engine and with the noise of the engine, of the exhaust, and the churning of the water, I find the two blasts of the "Coniston" if of any importance, were not heard by the "Virginia."

I further find as against the assertion of the pilot of the "Coniston" or any of her crew, that the tug

<sup>1</sup> C. R. (1907), A. C. 497.

<sup>2</sup> C. R. (1913), A. C. 472; 14 D. L. R. 46.

<sup>3</sup> 54 Can. S. C. R. 51; 32 D. L. R. 196.

1918

S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.



1918

S. S.  
"CONISTON"  
v.  
FRANK  
WALROD  
Reasons for  
Judgment.

and tow were on the upper reach on the north side of the fairway for some length of time immediately preceding the accident. And further, I must, on that fact, accept the evidence of the several members of the crew of the "Virginia" that they were on the south or starboard side of the fair-way, confirmed as it is by the very fact that the collision actually took place on the south side of the channel, near buoy No. 85, upon which most of the barges passed. The buoy was put out of commission, extinguished, damaged and afterwards repaired.

I further find that there was no justification for the "Coniston" to depart, under the circumstances, from the rule of the road, so well and clearly defined in art. 25, and that through her lubberly manoeuvre finding herself transgressing art. 25, and being out of her course, having abandoned the safe course prescribed by the rules, she had *at her own risk to right herself back to her proper place in the channel. The "Glengariff"*<sup>1</sup> *and Union S.S. Co. v. The "Wakena."*<sup>2</sup>

Now, on behalf of the "Coniston" it is contended and much stress is laid upon it, that when two vessels are green to green they are bound to continue that course. While it is quite true indeed that when two steamers are passing on opposite courses that each must hold her course so as to pass clear of each other green to green, that rule does not apply to a case like the one under consideration. That would apply to two vessels travelling in the open for some time green to green, thus preventing them from becoming crossing vessels before they could come red

<sup>1</sup> (1905), 10 Asp. M. C. 103; [1905] P. 106.

<sup>2</sup> (1917), 16 Can. Ex. C. R. 397; 35 D. L. R. 644, reversed on appeal, 37 D. L. R. 579.

to red. In the present case the vessels had been travelling for quite a while, until they were at 800 to 1,000 feet from one another, and when the 'Coniston' had taken the curve, green to red; not green to green.

1918  
S. S.  
"CONISTON"  
V.  
FRANK  
WALROD  
Reasons for  
Judgment.

The pilot of the "Coniston" (p. 24) admits that before entering the curve he was still seeing the tug's green light, a green light that was expected to change to red in taking the contours of the curve. The 'Coniston' showing her red light took the curve before the tug, and before the accident. It was when (p. 31) the "Coniston" was at the head of the curve that she saw the red light for the first time. All of this is consistent with the physical contours of the curve. Witness Lemay (p.83) contends that at all times the "Coniston" had plenty of space to pass to the north, and that the collision took place because she tried to do so too late and when she was close to the southern line of the channel, where she should not be.

Had both vessels kept to their proper courses, both had the right to expect to come red to red after the curve, and it is only the mismanagement and want of good seamanship of the "Coniston" that brought them for a moment green to green, when the one blast was given by the "Virginia," that had no reason to expect a green, but was looking, in due course, for a red light.

The rule of green to green propounded at bar by Counsel for the appellant does not apply to a case of this kind.

A number of other charges are made by appellant.

1918  
 S. S.  
 "CONISTON"  
 v.  
 FRANK  
 WALROD  
 Reasons for  
 Judgment.

The appellant charges there was negligence in the fact that the rudders of the barges were lashed and not used when towed. It is abundantly proven that it is absolutely and clearly impracticable to use the rudders in a case of this kind.

Todd & Whall, (*supra*) at p. 263, states: "Towing with two ropes or a *bridle*, there is no necessity for any person to be on her, as she will require no tendering. It is the towing with one rope that has drowned many a good seaman."

In the present case there was a *bridle*, as admitted by Counsel, on the bow of each of the tow front barges of the first tier.

The appellant further charges that the tug should have had three white lights on her mast-head, instead of two. Furthermore, that the tug should have had a tow of only ten barges instead of sixteen—notwithstanding the obvious fact that the collision took place, in the present case, with the second tier of barges.

It is further contended that, under the Rules of the Road, each barge, besides her white light, should have carried a red and a green light. While the rule cited justifies this contention and that such course would necessarily produce great confusion and puzzle navigators and that it is in evidence—although not by any means overriding the rule—that these barges from time immemorial have never travelled, in a tow, otherwise than without such green and red lights; such departure, it is unhesitatingly found, did not in any manner whatsoever contribute to the accident. The pilot of the "Coniston" and some of her crew on the bridge, had ascer-

tained from quite a distance, that it was a tug and tow that were coming down in the upper reach. In the case of the *C.P.R. v. S.S. "Storstad"*<sup>1</sup> the late Mr. Justice Dunlop states:

1918  
 S. S.  
 "CONISTON"  
 v.  
 FRANK  
 WALROD  
 Reasons for  
 Judgment.

"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 very 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."

Obviously all these charges, as above set forth, are foreign to the decision of the present case, inasmuch as they had absolutely nothing to do with the cause of the accident. In fact they did not, either directly or indirectly, contribute to the cause of the collision.

"To render a ship liable to be deemed in fault for an infringement of the rules . . . the infringement must be one having some possible connection with the collision in question; mere infringement, which by no possibility could have anything to do with

<sup>1</sup> (1915), 17 Can. Ex. C. R. p. 160 at p. 170; 40 D. L. R. 600 at p. 607.

1918  
 S. S.  
 "CONISTON"  
 v.  
 FRANK  
 WALROD  
 Reasons for  
 Judgment.

"the collision, will not render the ship liable." *The Fanny M. Carvill*,<sup>1</sup> *The Barque "Birgitte"*,<sup>2</sup> *The "Englishman,"*<sup>3</sup> *The "Duke of Buccleuch."*<sup>4</sup>

The wrong and initial manoeuvre of the "Coniston" in departing without good cause or reason from art 25., and wrongfully starboarding in a narrow channel, obviously created the risk which caused the accident and therefore she was at fault in so doing. She was the vessel that destroyed the safe position, as required by art. 25, and moreover, even at the critical time when, the collision became inevitable, she was still at full speed, showing no effort to check that speed only until after the accident had become inevitable. Art. 29.

It was quite "*safe and practical*" (art. 25.) for the "Coniston" to keep her course to the right.

The accident resulted from the departure, by the "Coniston," for no sound or good reason, or justification, from the imperative provisions of art. 25,—maintaining that lubberly course and at full speed up to the time the accident became inevitable,—the whole after having sighted for quite a while, and on the approach of a tug, encumbered by its dead tow, descending the current in due course, on her proper side of a narrow channel.

I find the "Coniston" was solely at fault and to blame for the accident and the appeal is dismissed with costs.

*Judgment accordingly.*

Solicitors for appellant: *Atwater, Surveyer & Bond.*

Solicitors for respondent: *Davidson, Wainwright, Alexander & Elder.*

<sup>1</sup> (1875), 32 L. T. 646.

<sup>2</sup> (1904), 9 Can. Ex. C. R. 339.

<sup>3</sup> (1877), 3 P. D. 18.

<sup>4</sup> [1891] A. C. 310.