

1919
 April 1.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

LE BLANC,

PLAINTIFF;

v.

THE "EMILIEN BURKE",

DEFENDANT.

Burden of proof—Regulations—Arts. 17, 21 and 27—Duty in emergency—Preliminary act.

Held, 1. Where two sailing vessels are meeting and it is the duty of one, under the rules, to avoid the other, but who fails to do so, it then becomes the duty of the other to so manoeuvre as to avoid the consequences of such breach of the rules, if possible to do so by exercise of ordinary care and prudence.

2. That the precise point when such manoeuvring should begin by the vessel with right of way cannot be arbitrarily fixed and some latitude must be allowed the master in determining this.

3. The burden of proof in such a case is on the offending vessel.

4. The object of a preliminary act is to obtain a statement, *recenti facto* of the circumstances, to prevent parties shaping their case to meet the one put forward by the other at trial.

That the following answer is entirely too vague and indefinite, to wit: "That the plaintiff, or those on board the 'Florrie V.', improperly neglected to take in due time proper measures for avoiding a collision with the 'Emilien Burke' and did not make any attempt to avoid same. She was not kept in her proper course, as required by law, and those on board the said vessel violated the rules and regulations as to her proper navigation."

THIS is an action *in rem* and counterclaim for damages due to a collision between two sailing vessels.

The facts are stated in the notes of the judge.

A. B. Warburton, K.C., and D. E. Shaw, for plaintiff.

G. Gaudet, K.C., and J. M. Hynes, for defendant.

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STEWART, L.J.A. (April 1, 1919) delivered judgment.

This is an action *in rem* brought by the plaintiff, the master of the schooner "Florrie V", registered at Arichat, Cape Breton, of about 97 tons; against the "Emilien Burke", for damages done by a collision in the Bras d'Or Lakes, off Baddeck, Cape Breton, on November 8, 1918, somewhere about 2 o'clock in the afternoon. There is a counterclaim by the owner and master of the "Emilien Burke" for damages caused to her in the same collision.

The "Emilien Burke" is a schooner of about 90 tons. She had a crew, including Capt. Arsenault, of 4 men. At the time in question she was bound on a voyage from Sydney with a cargo of coal. The "Florrie V" was coming from Crapaud, in this Province, and proceeding to Sydney laden with turnips and potatoes. She also had a crew of 4. The weather at the time was clear and fine, with a moderate breeze.

It is very creditable to the parties to this suit that there is so little contradictory evidence. I was particularly struck with the frank and candid manner in which the captain of the "Emilien Burke" gave his testimony. He has been sailing the seas for 56 years and a master mariner for 43 years. He made no attempt to suppress or explain away anything that might tend to prejudice his case; he was, in short, a model witness, and if it were necessary

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for me to decide the determining factors of this case on a conflict of evidence I would find some difficulty in disbelieving the account given by Capt. Arsenault.

There is, however, a slight disagreement between the parties as to the direction of the wind and the movements of their respective vessels a short time before the collision.

Capt. Le Blanc's account of that afternoon's event is substantially as follows: The "Florrie V" an hour or two before the collision had left the Grand Narrows bridge and was proceeding in an east-north-easterly course accompanied by the schooners, the "Rosy M.B." and the "John Halifax", all three vessels sailing close-hauled to the wind, which was north-north-east. The "Florrie V" continued on this course until she opened up into Baddeck Bay, off Burnt Point. She then headed on an east by north course and kept on that tack until she reached Coffin Island. At Coffin Island she tacked and stood on a north-west by north course for about a half a mile. Shortly before this she saw the "Emilien Burke" about 5 miles distant, coming west in a west by south course, after proceeding for about half a mile on that tack the "Florrie V" tacked again and stood on an east by north course close-hauled to the wind. The "Emilien Burke" was then coming from an opposite direction running free in a course parallel with that of the "Florrie V", and if she had kept her course would have passed the "Florrie V" 300 yards off her starboard side. The "Emilien Burke" when nearly abreast his starboard bow changed her course towards the "Florrie V". At that time his mate was stationed on the lookout and his seaman was at the wheel. The captain himself paced the deck near the lookout, and when he saw the "Emil-

ien Burke" changing her course towards him he thought her captain wished to speak with him. He walked aft to give him an opportunity of doing so, as he would go by the stern. Noticing, however, that she was luffing up towards the "Florrie V" and coming nearer, he went to the forward part of the poop and sang out, "Keep away, you are going to run into us." At this he saw a man stand up forward of the main hatch and abaft of the foremast and run towards the wheel and turn it over to starboard, but it was then too late to avert the collision.

In this he is corroborated by his mate and the seaman who was at the wheel.

The mate of the "Rosy M.B.", the master and owner of the "John Halifax", and Lorenzo Poirier, master mariner and owner of several vessels, support the evidence of Capt. Le Blanc as to the direction of the wind, and as to the vessels sailing close-hauled to the wind. Lorenzo Poirier stated that he was at New Harris, about 9 miles from Port Bevis, that morning on his way to Sydney—that there is a narrow outlet from that lake—that he couldn't get out because of a head wind blowing north-north-east—that there were 5 or 6 vessels there, and all were compelled to remain inactive, not only that, but the following day, and that if the wind had been north-north-east, as claimed by the captain of the "Emilien Burke", it would have enabled him, with the tide running out, to have got out that day and to proceed on his intended voyage.

Several of these witnesses also corroborate Capt. Le Blanc's statement that the "Florrie V." and "Emilien Burke" were sailing on parallel courses. The mate of the "Rosy M. B." also stated that hear-

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ing a call on board the "Emilien Burke" he saw a man leave her wheel and go forward, where he remained for about 2 or 3 minutes. When this man was away from the wheel he saw the "Emilien Burke" changing her course in the direction of the "Florrie V."

Capt. Arsenault of the "Emilien Burke" admits that his course was west by south and that the "Florrie V." was proceeding in a course east by north. He also admits that he was running free. He, however, claims that the two vessels were approaching each other absolutely heads on and not on parallel lines. As to the direction of the wind, he said it was varying, puffing one way and another from north-north-west to north, that there was no east in it, and that it was fully north-north-west at the time of the collision. He further testified that the courses of both vessels were as stated until they were about half a mile apart, that he then hove his helm to port in order to send his vessel to windward so that he might pass the other vessel on her port side. That he wished to bring his vessel as close to the wind as possible on the starboard tack—that at the time he began to change his course, the "Florrie V" began to change hers by starboarding her helm—that when the "Florrie V" was a quarter of a mile from him he tied his wheel with the helm ported and went forward to give two of his men a hand to raise the foreboom to get it out of the socket—that he was away from the wheel 2 or 3 minutes and while forward his vessel drew more into the wind. While rendering the assistance referred to he saw the "Florrie V" curving ahead of him, and that when he returned to the wheel she was about 300 yards

off and that he then reversed his wheel, but it was too late to avoid the collision.

Thomas Gallant, the mate, supported to some extent the evidence of Capt. Arsenault. The wind, he said, was about north, and that the last change in the course of the "Emilien Burke" was made just before the collision. Thomas McGrath, the cook, was the only other witness produced by the defendant. He seemed to know very little about the case, except that he said the wind varied about two points each way off north-north-west.

Capt. Le Blanc and those of his crew who gave evidence denied having changed their course on the approach of the "Emilien Burke", but kept it right along until the happening of the collision.

There seems to me to be a preponderance of evidence that on the day of the collision the wind was about north-north-east.

The defendant in his preliminary act, to the question "What fault or default, if any, is attributed to the other ship?" gives this answer:

That the plaintiff or those on board the "Florrie V" improperly neglected to take in due time proper measures for avoiding a collision with the "Emilien Burke" and did not make any attempt to avoid same. She was not kept in her proper course as required by law and those on board the said vessel violated the rules and regulations as to her proper navigation.

This, it seems to me, is entirely too vague and indefinite. The object of the questions is to obtain a statement *recenti facto* of the circumstances from the parties and to prevent the defendant from shaping his case to meet the case put forward by the

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plaintiff. If answers like this were sufficient, the door would be open for the making out of almost any kind of a case. As neither party is allowed to depart from the case set up in his preliminary act, it can be readily seen how necessary it is that definite and precise answers should be given to the questions submitted. Besides the kind of answer given here might suggest inability to attribute any fault or default to the other side.

The regulations which it is material to consider in this case are articles 17, 21 and 27, which are as follows:

“Article 17. When two sailing vessels are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

Article 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.”

Let me assume for the present that the direction of the wind was north-north-east and that the vessels were approaching one another on parallel courses and not heads on. It is admitted that the course of the "Florrie V" was east by north and that of the "Emilien Burke" west by south. On this assumption the "Florrie V" would be sailing close-hauled to the wind and the "Emilien Burke" would be running free. But the latter did not only keep out of the way of the "Florrie V" as provision "a" of article 17 required her to do, but, in changing her course to starboard, in place of continuing as she was going, she brought herself in the way of the "Florrie V" in direct violation of the rule.

Take now the contention of the "Emilien Burke" and assume that the wind was north-north-west, and that both vessels were coming heads on on the respective courses admitted by both sides. In this assumption it is admitted that both vessels would be running free. It would have been the duty of the "Florrie V" with the wind on her port side to have kept out of the way of the "Emilien Burke" having the wind on her starboard side. But it would equally have been the duty of the "Emilien Burke" to have kept her course and speed. This, however, is what she did not do, but deliberately altered her course when the vessels were half a mile apart, by porting his helm, and this at the very time the "Florrie V", had begun to starboard his helm, the proper move to make in order to keep out of the way of the "Emilien Burke". So whether I take the evidence of the plaintiff or the defendant, the result is the same, Capt. Arsenault has been guilty of a violation of the rules.

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But it is necessary for me to consider the question whether the "Emilien Burke" being to blame, the "Florrie V" was not to blame also.

A contention was advanced by Mr. Gaudet with considerable emphasis that the "Florrie V" did nothing to avoid the collision, that the man at the wheel never attempted to change her course, although the two vessels were advancing in dangerous proximity to one another.

There is no doubt that the "Florrie V" was bound to comply with art. 21 and keep her course and speed until she found herself so close to the "Emilien Burke" that the collision could not be avoided by the action of the latter vessel alone. Then she should endeavour if possible to prevent disaster. The defence of contributory negligence is always open to the defendant ship, although she herself may have been guilty of a breach of the regulations.

Sir Gorell Barnes in *The Parisian*,¹ deals with this point in a very common sense way. He said:

"It must always be a matter of some difficulty for
"the master of a vessel which has to keep her course
"and speed with regard to another vessel which has
"to keep out of her way, to determine when the time
"has arrived for him to take action, for if he act too
"soon he may disconcert any action which the other
"vessel may be about to take to avoid his vessel and
"might be blamed for so doing and yet the time may
"come at which he must take action. Therefore he
"must keep his course and speed up to some point
"and then act, but the precise point must necessarily
"be difficult to determine and some little latitude

¹ [1907] A.C. 193 at 207.

“has to be allowed to the master in determining
“this.”

It was the duty of the plaintiff to have avoided the consequences of the defendant's breach if he could have done so by the exercise of ordinary care and prudence. But the burden of proof lies on the offending vessel.

Reverting to the fact of the wind being north-north-east and the duty of the vessel running free to keep out of the way of the vessel which is close-hauled, Capt. Le Blanc would have no reason to doubt that the “Emilien Burke” would observe the rules and keep out of his way. When he saw her changing her course and advancing in his direction, it was not an unreasonable supposition for him to entertain that her captain desired to speak to him as he came near. He would naturally up to the last moment rely upon the “Emilien Burke” observing the rules of navigation.

If the captain of the “Florrie V” knew that the “Emilien Burke” was by means of some compelling situation obliged to run into his vessel, he should have used all necessary and possible means to avoid it. There must indeed be special circumstances within the meaning of art. 27 and the note to art. 21 to justify a departure from art. 21. Without the existence of such it would be extremely risky and likely to involve the chance of being mulcted in damages for any vessel to take such a departure. A learned judge in dealing with this point said:

“But the principle embodied in this rule, though
“a sound one, should be applied very cautiously and
“only when the circumstances are clearly excep-
“tional.”

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No such circumstances existed or were attempted to be shewn to exist in this case. The unfortunate event happened in broad daylight when the weather was clear and fine, and there was ample sea room in which to sail and manoeuvre.

I have on a careful consideration of the whole case, come to the conclusion that no fault can be attributed to the "Florrie V" her master or crew, and that the "Emilien Burke" is alone to blame for the collision, and that she must be held liable for the damages that ensued.

These damages I will now assess, as follows:

For damage done to the sails, \$140.52; for rope and block, \$21.55; for repairing boat, \$35; for plank and fittings for davits, \$58; for 24 turned stanchions, \$15.60; for towage done by the "Rosy M.B." \$40; for help, \$10; for costs of survey, \$10; for damages done to hull, \$229.33; total, \$560; for which sum with costs I condemn the ship "Emilien Burke", her sails, apparel and equipment, and decree accordingly.

Order accordingly.