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May 18.

ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

ANGUS BRINE .....PLAINTIFF;

AGAINST

THE STEAMSHIP "*TIBER*".....DEFENDANT.

Collision—Steamer and sailing vessel—Collision Arts. 20, 22, 23 and 25—*Liability.*

The *J. M.*, a sailing vessel, was proceeding in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The *T.*, a steamship was on her way into the harbour. When the *T.* was first seen by the *J. M.* the latter was on a course of W.S.W., standing across the harbour, towards, and to the northward and eastward, of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the *J. M.* was underway on the starboard tack and going about three knots an hour, the *T.* was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre, nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the *J. M.* The bow of the *T.* struck the *J. M.* on the starboard side aft of the fore-rigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck.

Held, that the *T.* had infringed the provisions of Arts. 20, 22, 23 and 25 of the rules for preventing collisions at sea, and was responsible for the collision.

THIS was an action for damages by collision.

The facts are fully recited in the reasons for judgment.

The case was heard before The Honourable William Wilfred Sullivan, Chief Justice, Local Judge in Admiralty of the Exchequer Court for the Admiralty District of Prince Edward Island, on February 21st, 22nd, 23rd, 24th, 26th and 27th, and March 22nd, 28th, 29th and 30th, 1900.

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A. Peters, Q.C. and *A. A. McLean*, Q.C. for plaintiff.

F. L. Haszard, Q.C. and *W. A. O. Morson*, Q.C. for defendant.

SULLIVAN (C.J.) L. J. now (May 18th, 1900) delivered judgment.

This is a case of collision between a schooner called the *Janie M*, of sixty-five tons, owned by the plaintiff, of which Alexander McLellan was master, and the *Tiber*, a steamship of one thousand seven hundred and thirty-six tons, gross tonnage, owned by "The Tiber Steamship Company of Montreal," of which John Delisle was master.

The collision took place about eight o'clock in the morning of the 30th of May, 1899, near Alchorn Point, in the harbour of Charlottetown. The weather was clear and bright. The wind was about south-south-west and of a velocity of between three and four knots an hour. The tide was ebb, nearly run out, and moving between two and three knots an hour.

The *Janie M.* left her wharf at Charlottetown about seven o'clock in the morning, in light ballast, intending to proceed to ports in New Brunswick and Nova Scotia for a cargo of lumber. She was tacking out of the harbour according to the usual course of navigation. The *Tiber* was on her way into Charlottetown. When the *Tiber* was first seen by the *Janie M.* the latter was on a course of west-south-west, standing across the harbour, towards, and to the northward and eastward, of Rocky Point black buoy. The *Tiber* was then outside the entrance of the harbour, and about two miles distant from the *Janie M.* From that time until the collision took place the vessels were in full view of each other. The *Janie M* tacked close to the wind. On her way out she passed a schooner called the *Florence May*, which was also

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tacking out, and which, at the time of the collision, was about one hundred and fifty yards in the rear, and to the northward and westward of the *Janie M.* She also met the steamship *Halifax*, which passed her when on her last starboard tack before the collision. The *Halifax* changed her course, and passed to the stern of the *Janie M.* After the *Halifax* passed the *Janie M.* the latter stood across to the westward on the western side of the harbour and came about inside Alchorn Point. At that time the *Tiber* was coming in near the Blockhouse, heading straight up the harbour. The sails of the *Janie M.* had filled, and she was underway on the starboard tack going about three knots an hour for between three and five minutes when the collision took place. The master of the *Janie M.* says he was at the wheel at the time steering by the wind about south-east by south. The bow of the *Tiber* struck the *Janie M.* on the starboard side aft of the fore-rigging and nearly amidships, cutting almost through her from her hatches to her keel, driving her forward in the water about one hundred yards, and she became a total wreck.

In the plaintiff's preliminary act the fault or default attributed to the *Tiber* is stated as follows:—

"The plaintiff alleges that the steamship *Tiber* was proceeding at too high a rate of speed.

"The plaintiff alleges the steamship *Tiber* was on the wrong side of the channel. It being a narrow channel, she should have kept to the eastern side of the channel, but she improperly kept to the western side.

" The steamship *Tiber* was in the wrong in not keeping out of the way of the *Janie M.*, she being a sailing ship.

" The steamship *Tiber* was in the wrong in not stopping and reversing when she perceived there was any risk of a collision.

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"The steamship *Tiber* was wrong in not porting her helm and thereby avoiding or lessening the collision."

It was admitted at the trial that up to the time immediately preceding the collision the *Tiber* was going at the rate of eight knots an hour, nearly her full speed, which was alleged to be eight and one-quarter knots an hour. It was admitted that she did not change her course, nor execute any manœuvre, nor make any attempt to keep out of the way of the *Janie M.* It is in evidence that she did not slacken her speed, nor stop or reverse, until at the moment the collision was consummated. When about half a mile outside the Blockhouse the usual order on entering a harbour to "stand by" was given, but it was stated it had little if any effect upon the steamer's speed up to the time of the collision, and that it was not given for that purpose.

The channel of the harbour being about five hundred yards wide, is a narrow channel, and the master of the *Tiber* says he kept his ship in the centre of it, and that it was in mid-channel the collision took place. The master and crew of the *Janie M.* says that the *Tiber* was proceeding on the western side of the centre of the channel, and that it was on the western side of mid-channel the collision took place. In this view the latter are supported by the evidence of Bryant Rogers, a pilot, who said he was well acquainted with the harbour, and who was then acting as mate of a schooner called the *James Semple*, which was coming in the harbour a short distance behind the *Tiber*. He said he had from his position a full view of the *Tiber*, and that she came in on the western side of the centre of the channel. The evidence of Captain John McLean who resides at the Blockhouse, who possessed local knowledge of the place, and who was standing on the

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ground viewing the *Tiber* coming in, is to the same effect. Besides this evidence there is a circumstance in this case which tends to support the contention that the collision took place on the western side of the mid-channel. That is the respective distances traversed by the *Tiber* and the *Janie M.* from where they both were when the *Janie M.* came about on the west side to the place of collision, as located by the master of the *Tiber*. The distance each had to go would appear from the evidence to be nearly the same, and to accomplish it the *Janie M.* would require to go at about the same rate of speed as the *Tiber*, namely, eight knots an hour, which, in view of the evidence, it is impossible to believe she did, or could do. The inference, therefore, is that the *Tiber* was proceeding some distance to the westward of mid-channel.

This state of the evidence shows that the *Tiber* violated several of the statutory rules for preventing collisions at sea.

Article 20 says that:

"When a steam-vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing vessel."

Article 22 is that:

"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Article 23 says:

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

Article 25 is:

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"In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The *Tiber* did not keep out of the way of the *Janie M.*, and she did not avoid crossing ahead of her. She did not slacken her speed, nor did she stop or reverse until such action was unavailing. She did not keep to the starboard side of the fairway or mid-channel, and it was not shown that it was unsafe or impracticable for her to have done so, in fact the contrary appeared. She, therefore, violated all the rules I have cited.

It is provided by section 5 of chapter 79 of *The Revised Statutes of Canada* (*An Act respecting the navigation of Canadian waters*) that:

"If in any case of collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary."

Article 27 provides that:

"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."

Now, if the *Tiber* had in time executed a proper manœuvre and had avoided crossing ahead of the schooner the collision would not have occurred. If she had slackened her speed by even less than half what it was the collision would not have occurred. If she had kept to the starboard side of the fairway or

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mid-channel the collision would not have occurred. Therefore the collision was occasioned by the non-observance of the rules, and the *Tiber* must be deemed to be in fault, unless it appear that the circumstances of the case rendered a departure from the rules necessary.

In this case no circumstance was shown or attempted to be shown which rendered necessary a departure from the rule which provides that every steam-vessel which is directed by the rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed; nor of the rule that in narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of the vessel; therefore these two rules at least were unjustifiably violated, and if they had been observed the collision would not and could not have happened.

In the *Arklow* (1) the principle which applies to such cases is thus stated by Sir James Hannan in delivering the judgment of the Privy Council. He says:

"The principle in cases of this kind where there has been a departure from an important rule of navigation is this:—That if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused."

In the present case I am clearly of the opinion that the absence of due observance of the rules which I have quoted not only contributed to, but actually caused, the collision.

On behalf of the *Tiber* it was argued at the trial that the *Janie M.* was alone to blame for the collision, and

(1) L. R. 9 A. C. 13.

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the fault or default attributed to her is that set forth in the preliminary act filed for the *Tiber* :—

"1. When the *Janie M.* stayed or tacked immediately before the collision she should have remained until the *Tiber* went by, as there was not sufficient time to cross the bow of the *Tiber* without an almost inevitable collision.

"2. When the *Janie M.* tacked she should have seen that it was impossible to cross our bow without danger of collision, and after shaking out her jib she should have luffed and been shaken up in the wind, and if necessary should have let go her anchor until the steamer went by, to avoid a collision.

"3. The attempt to cross our bow in the narrow water where we then were at such close quarters rendered it out of our power to get by her under any circumstances, and the fault was hers in courting danger of a collision instead of avoiding it, as was her duty under the circumstances."

The answer of the master of the *Janie M.* to the first of these charges is that having tacked as closely to the western side as he could safely go, he could not have held his vessel there without immediate risk of going ashore. As to that part of the second charge which alleges that the *Janie M.* should have luffed—(which I construe to mean that she did not luff)—at the trial the evidence of the master of the *Tiber* and of his crew, so far as the crew testified on that point, was directed to show, not that the schooner did not luff, but that she did luff, which luffing, it was alleged, misled the steamer and led to the collision.

The evidence for the plaintiff, the weight of which in my opinion greatly preponderated, was directed to show that the schooner did not luff. That question, however, is concluded in favour of the plaintiff's con-

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tention by the preliminary act filed on behalf of the *Tiber*, by which she is bound.

Article 21 of the rules intended to prevent collisions at sea, provides that :

"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."

"Keeping her course," under Article 22 of the English rules of 1884, which corresponds to Article 21 of the Canadian rules, means keeping her course by the wind; and if in so doing a vessel comes to or breaks off a little she does not thereby infringe that article. (*Marsden on Collision at Sea*, p. 412.)

In the *Velocity* (1) it was held that according to the true interpretation of "keeping her course" under this rule a vessel was at liberty to hold on upon the course which she would have pursued had no vessel been in sight.

The *Janie M.* may have fallen away a little, and judging by the angle at which she was struck, it would appear that she did fall away somewhat, but, sailing as she was by the wind, the evidence shows that she kept her course by the wind.

In view of the position in which the *Janie M.* was placed by the action of the *Tiber*, I have asked the Nautical Assessor who sat in this case, whether as a question of good seamanship there was any manœuvre which the schooner should or could have executed to avoid the collision, and his answer, which meets my entire approval, is that there was not, and that her proper action was to keep her course as she did.

In the *William Frederick* v. *The Byfoged Christensen* (2), it was held that where a collision had occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out

(1) L. R. 3 P. C. App. 44. (2) L. R. 4 A. C. 669.

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of the way, of the other, that in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *primâ facie* bound to observe the rule requiring her to keep on her course, would not have been justified in departing therefrom. Sir James W. Colville, in delivering the judgment of the Privy Council, says:—

"The question raised by the cross appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that although the duty of keeping out of the way lay upon the *Christensen*, those on board the *William Frederick*, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the eighteenth rule of the road by keeping on their course, but should have adopted some manœuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding relied upon the case of the *Commerce* (1) before Dr. Lushington. Their lordships desire to remark that though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence;" and the decision of the court below in favour of the non-adherence to the rule of keeping her course was reversed. In the present case there is no *constat* at what particular time the master of the *Janie M.* ought to have come to so distinct a conclusion that the *Tiber* was not about to obey the rule as to justify his departure from what was his *primâ facie* duty.

(1) 3 W. Rob. 287.

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In the *American* and the *Syria* (2) the same principle was thus pronounced by Sir Robert Phillimore :—

"I have also considered whether there were any special circumstances which required the *American*, on her part, to execute any manœuvre whereby this collision might have been avoided, and I take it to be a sound principle of law which cannot be too carefully or uniformly applied in cases of this description, that the vessel which is ordered by the regulations to pursue a certain course has a right to presume up to the last moment that the other vessel will do her duty, and also observe the regulations."

In this case it is quite clear that if the *Tiber* had done her duty the collision would not have happened.

But the master of the *Tiber* says he concluded from the movements of the schooner that she intended to wait and allow him to go ahead. In the circumstances he was not justified in entering into calculations of this kind, because he had it in his power, and, as the evidence shows, he had ample time and space to adopt, long before the collision, measures which would have rendered it impossible.

On a full consideration of all the evidence and circumstances, I have come to the conclusion that the steamship *Tiber* was alone to blame for the collision, and that the defendant must be held liable for the damages that ensued. I therefore pronounce in favour of the plaintiff.

The only remaining question is as to the amount of the damages sustained by the plaintiff. The counsel on both sides desired that in the event of damages they should be assessed by the court.

Of the items respecting which evidence was given there are only three that I can allow, namely, the value of the schooner *Janie M.* at the time of the col-

(2) L. R. 4 Adm. & Eccl. 226.

lision, the wages of the crew with the disbursements for their board during the time they were employed in caring for the wreck and securing the sails and other appurtenances that were saved, and the amount paid for the towage of the schooner from the place of the collision to where she was finally landed.

Under the evidence which I have fully considered on this branch of the case I value the *Janie M* as she stood at the time of the collision at $1,500. The proceeds of the sails and other articles of the vessel's furniture saved and sold at auction realized $164.83, which sum, less $30, the cost of towage, leaves $134.83 to be deducted from the $1,500,

Making the net damages in respect of the vessel	$ 1,365 17
On which I allow as interest at 6 per cent from the 13th of May, 1899	78 50
Wages of Captain Alexander McLennan for ten days at $25 per month	8 34
Wages of James McInnis for ten days at $16 per month	5 34
Wages of Abel Benjamin for ten days at $15 per month	5 00
Disbursements for board	10 75
	$1,474 10

thus assuming the damages due to the plaintiff in respect of the collision at $1,474.10, for which sum, with full costs of suit to be taxed, I decree against the defendant.

Judgment accordingly.

Solicitor for plaintiff: *A. Peters.*

Solicitor for defendant: *F. L. Haszard.*