1926

ONTARIO JOCKEY CLUB LTD. v. MCBRIDE.

Idington J.

clusion that this appeal should be allowed, but as to the question of costs, perhaps no need to pass thereupon.

There may be cases such as I suggest above in which the by-law might be held restrictive and hence *ultra vires*, but so far as the provision for an option at the price the shareholder wants, I do not think it more than a regulation of which notice must be imputed to the buyer.

Appeal dismissed with costs.

Solicitors for the appellant: *Ludwig & Ballantyne.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*

1926

*Nov. 9, 10.

1927

*Jan. 4.

ONTARIO GRAVEL FREIGHTING COMPANY, LTD. (DEFENDANT)..... } APPELLANT;

AND

MATTHEWS STEAMSHIP COMPANY, LIMITED (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, TORONTO ADMIRALTY DISTRICT

Shipping—Collision in St. Clair River—Vessels approaching each other—Duties as to passing and signalling—Rules of navigation in the Great Lakes—Negligence—Contributory negligence—Last act of negligence cause of collision—Evidence—Written statement used for purpose for which it was not admissible—No substantial miscarriage of justice.

The steamship *Y.*, owned by plaintiff, while going down the St. Clair river at night, collided with a barge, in tow of a tug, both owned by defendant, going up the river. The barge and tug were going up the south channel formed by Russell Island, and were on the west, or their port, side of the channel. The *Y.*, when approaching the channel, and before perceiving the tug or barge, altered her course somewhat to port. The tug gave one blast indicating her course, and the *Y.* then perceived that the tug was turning northeasterly to cross the channel and the *Y.'s* bow. The signal conflicted with the *Y's* intended course and with the right of way which she had under R. 25 (Rules for the Great Lakes, adopted by Order in Council, 4th February, 1916). The *Y.* gave the danger signal. The tug returned the danger signal and, according to some witnesses, repeated the single blast, and the tug proceeded at full speed across the channel. The *Y.* then manoeuvred to get into starboard swing. It cleared the tug but struck the barge a glancing blow with its port bow on the port quarter. The court

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

could not ascertain, on the evidence, whether the vessels were more or less than half a mile apart when the tug gave its first signal.

Held: Under all the circumstances, the neglect of the tug was the sole cause of the collision. Immediately before the tug and tow went to starboard they were either in a position of safety or where a starboard helm would have carried them clear of the *Y's* course which was then capable of perception. If the tug's signal were given before the *Y.* came within half a mile, the *Y.* was relieved of the requirement in R. 25 to signal her intended course; indeed she could not have done so without a breach of the rule forbidding a cross signal. On the other hand, if the *Y.* passed the half mile limit without signalling her course, the tug was confronted with a situation wherein the downcoming ship, which had the right of way, was on a course which would lead her to, or to the eastward of, midchannel, at the meeting place; and if, in the circumstances, the tug were in doubt about the *Y's* course her proper signal was danger under R. 22, and she was not justified in giving the starboard signal, which placed her and her tow, with their broad spread, across the channel and in front of the *Y.* It might be that the *Y.* was not required to signal, as it appeared that, by reason of the confusion of the lights on the tug and tow, she was not aware that they were in the channel until she received the tug's signal; but, assuming the *Y.* passed the half mile limit without notifying her course, and thus broke the rule, that neglect was not only antecedent to, but independent of, the negligence of the tug, which caused the accident. The case was within the class described by Lord Birkenhead's first category in *The Volute* ([1922] 1 A.C. 129 at p. 136). It could not be said that the acts of the navigation of the two ships formed parts of one transaction, or that the second act of negligence, that of the tug and tow in crossing the channel in front of the *Y.*, was consequential upon or involved with the first. *Anglo-Newfoundland Development Co.* v. *Pacific Steam Nav. Co.* ([1924] A.C. 406, at pp. 417, 420, 421, referred to.

Judgment of Hodgins L.J.A. ([1926] Ex. C.R. 210) affirmed.

A witness for the defendant had previously made a statement to an attorney of the plaintiff, which was reduced to writing and signed. The witness was cross-examined thereon, and subsequently the attorney was called to prove the statement and it was put in evidence in reply.

Held, referring to a passage in the trial judge's judgment, that if he held that the statement could be used against the defendant as evidence of the facts stated in it, he was clearly wrong; the statement was admissible only by way of contradiction and to affect the witness's credibility (*Ewer* v. *Ambrose,* 3 B. & C. 746; *Wright* v. *Beckett,* 1 M. & Rob. 414); but although the statement might have been used for a purpose for which it was not admissible, it did not, on the whole case, result in any substantial miscarriage of justice or affect the decision.

APPEAL by the defendant from the judgment of the Exchequer Court of Canada, Toronto Admiralty District (Hodgins L.J.A.) (1) in favour of the plaintiff for damages,

(1) [1926] Ex. C.R. 210.

1927

ONTARIO GRAVEL FREIGHTING CO., LTD. v. MATTHEWS STEAMSHIP CO., LTD.

and dismissing the defendant's counter-claim for damages, in respect to a collision between a ship, owned by the plaintiff, and a barge, owned by the defendant, in tow of a tug owned by the defendant. The facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

O. S. Tyndale K.C. for the appellant.

F. King K.C. and *H. Dale Harris* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The action was brought by the plaintiff company (respondent), owner of the steamship *Yorkton*, to recover, against the defendant (appellant), damages caused by collision of the steamship with the barge *Badger*, which was at the time in tow of the tug *Thomas E. Tees*, both tug and tow belonging to the defendant company. The defendant denied liability, and pleaded a counter-claim. The action was tried before the local judge in Admiralty at Toronto, who found for the plaintiff, and dismissed the counter-claim. It is from this judgment that the defendant appeals to this court.

The facts may be taken as gathered from the findings of the learned local judge, because, although the evidence is contradictory, and the result unsatisfactory to the appellant, the findings are reasonably supported by the proof, and, giving them their due weight, cannot in my opinion be disturbed. None of the specific faults alleged against the *Yorkton* by the defendant's preliminary act or pleadings is established, and the defendant, having regard to the facts found, must bear the loss occasioned by the collision, unless it can shift liability to the plaintiff by reason of the neglect of the *Yorkton* to signal her course, as required by Rule 25, which I shall quote.

I proceed then to state the material facts which are not in dispute or are found. The collision occurred in the St. Clair river, where the rules governing the navigation are those for the Great Lakes, adopted by Order in Council of 4th February, 1916. On the night of 24th June, 1925, the *Yorkton*, which is a steel steamship of 1,136 tons register, length 250 feet, beam 42 feet 8 inches, and drawing at the time 13 feet, was descending the St. Clair river from

Port Arthur, with a cargo of oats. Opposite the Chenal Ecarté, about a mile and a half above the head of Russell Island, which divides the river into two channels, north and south, the *Yorkton's* engines were checked to half speed, about six knots, and her course was laid on the flashing gas buoy at the upper end of the shoal, which projects, up stream from the head of the island, a distance of half a mile or thereabouts; and here it may be useful to observe that this shoal was being dredged, and that, by reason of the dredging which had been done, the gas buoy had been moved, and was, at the time of these occurrences, stationed 200 feet to the westward of the position which it occupies on the chart used at the trial. When the *Yorkton,* in her course toward the gas buoy, had reached a point about half a mile above it, her course was altered somewhat to port and steadied in a direction down the south channel, between the gas buoy and the lower light of Walpole Island on the opposite side of the channel, these lights bearing about a half point on the starboard and port bows respectively. Up to this time, those in charge of the navigation of the *Yorkton* had not perceived the tug or her tow, with which she subsequently came into contact. These two craft were coming up the south channel, the tug towing the barge astern by a hawser or tow line 150 feet in length. The *Badger* was a sand and gravel scow, having an open hold, with no deck for the greater part of her length. The tug was 86 feet long, beam 16 feet, draft 6 to 9 feet; the *Badger* 140 feet long, beam 36 feet, draft, at the time when she was light, 1½ feet. They were between the head of Russell Island and the gas buoy at the top of the shoal, on the west, or their port, side of the channel. The time was about 11.30, daylight saving, and the night was dark with showers. The tug and tow carried lights in excess of those prescribed by the rules, and, although some of these lights had been perceived by the *Yorkton* previously to her change of course, they were not made out to be running lights, but were mistaken for the lights of a dredge, which had been working on the shoal when the *Yorkton* passed up a few days previously. They had been attentively examined by the master of the *Yorkton* through his marine glasses as he came down, but they did not change bearing, they ranged

1927

ONTARIO GRAVEL FREIGHTING CO., LTD. v. MATTHEWS STEAMSHIP CO., LTD.

NewcombeJ.

with the flashing light, close to the shoal, and appeared to him, and to his second mate, who was also in the wheel house, as a cluster of fixed lights, such as the dredge would be likely to show; no running lights could be discerned. It was after the *Yorkton* changed her course to bear midway between the gas buoy and the lower Walpole light that the lights of the tug became distinctive, and, at the same time, the tug gave one blast indicating its course; it was then perceived that the tug was turning northeasterly to cross the channel and the bow of the *Yorkton*. The signal conflicted with the intended course of the *Yorkton*, and with the right of way which she had under Rule 25, which provides that:

> When steamers are approaching each other "head and head," or nearly so, it shall be the duty of each steamer to pass on the port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon such steamers shall pass on the port side of each other. But if the courses of such steamers are so far on the starboard of each other as not to be considered by pilots as meeting "head and head," or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his whistle, and they shall pass on the starboard side of each other: Provided, however, that in all narrow channels, where there is current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.
>
> In the night, steamers will be considered as meeting "head and head" so long as both the coloured lights of each are in view of the other.

The master of the *Yorkton* tells us that he was on the point of sounding two blasts the moment he discovered the lights of the tug, but was anticipated by its signal. This placed him in a difficult position. He was forbidden by Rule 23 to give a cross signal, and therefore could not persist in his intention to negotiate the passage on his port side, and he was entering a narrow channel with considerable current setting him on. In the circumstances he took what I have no doubt was a prudent, if not the only proper, course. He gave the danger signal, "five or more short and rapid blasts of the whistle," which, in the circumstances was, I should think, intended by the *Yorkton*, and ought to have been interpreted by the tug, to mean—"you (the tug) are

creating a dangerous situation. Reconsider." The answer from the tug was a return of the danger signal, and, according to some of the witnesses, a repetition of the single blast, and the tug proceeded at full speed across the channel. The master of the *Yorkton* then promptly executed the necessary manoeuvres to bring his ship into starboard swing. He cleared the tug, but struck the barge a glancing blow with his port bow on the port quarter, causing a breach from which the barge filled and sank, but not until it had reached the shoal to which the tug turned when the *Yorkton* passed.

It is impossible to ascertain precisely what the distance was between the *Yorkton* and the tug at the time when the latter gave its first signal. The master of the tug said in his direct examination that, as nearly as he could judge, the *Yorkton* would be within about half a mile. The learned trial judge refers to the evidence upon this point. He says:

> As to when she saw the *Yorkton* change her course, her master says: "When I got within about ½ mile as near as I could judge the *Yorkton* swung sharply to port * * * within about ½ a mile of the *Yorkton*, that is in a direct line, she swung to port." On cross-examination he says: "I would figure that we were about a mile apart when she altered her course to port; or about ½ mile, pardon * * * we would be about 1,300 feet-1,200 feet, I couldn't say just exactly." I have come to the conclusion that these last figures are incorrect and that his distance from the *Yorkton* was further than the quotation indicates.

Different witnesses give different estimates. There is no precise finding. It is possible that the vessels were still upwards of half a mile apart. It is not improbable that they were less than half a mile. The master of the *Yorkton* said in cross-examination "maybe a little bit better than a quarter of a mile." The conditions made it difficult to form an accurate opinion as to the distance. It is noteworthy, however, that the *Yorkton* is not charged, either in the defendant's preliminary act or pleadings, with any fault for not having notified her course. It would look as if the master of the tug did not realize the application of Rule 25. In any case I think it must be taken that immediately before the tug and tow went to starboard they were either in a position of safety, or where a starboard helm would have carried them clear of the *Yorkton's* course, which, in view of her position and line of progress, as dis-

1927

ONTARIO GRAVEL FREIGHTING CO., LTD. v. MATTHEWS STEAMSHIP CO., LTD.

Newcombe J.

closed by her lights and the shore lights on either side, was not then incapable of perception. If the tug's signal were given before the *Yorkton* came within half a mile of the tug the *Yorkton* would clearly be relieved of the requirement to signal her intended course; indeed she could not have done so without a breach of the rule forbidding a cross signal. On the other hand, if the *Yorkton* passed the half mile limit without signalling her course, the tug was then confronted with a situation wherein the down-coming ship, which had the right of way, was on a course which would lead her to mid-channel, or to the eastward of mid-channel, at the meeting place; and if, having regard to the circumstances, the tug were in any doubt about the *Yorkton's* course, its proper signal was danger under Rule 22, and there was no justification which I can perceive for the starboard signal which the tug did give, and which placed her and her tow, with their broad spread, across the channel, and in front of the *Yorkton*. It may be that the *Yorkton* was not required to signal, because the findings uphold the claim of her witnesses that, by reason of the confusion of the lights on the tug and tow, they were not aware that the tug and tow were in the channel until the *Yorkton* received the signal from the tug; but, assuming that the *Yorkton* passed the half mile limit without notifying her course, and thus broke the rule, that neglect was not only antecedent to, but in my view independent of, the negligence of the tug, which caused the accident. The case is within the class described by Lord Birkenhead's first category in the House of Lords in *The Volute* (1):

> In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A recovers in full: see among other cases *Spaight* v. *Tedcastle* (2) and *The Margaret* (3).

An inquiry by the tug, which could have been conveyed by a danger signal, would presumably have elicited the information that the *Yorkton* was taking her port side of the channel, a course which perhaps might have been inferred

(1) [1922] 1 A.C. 129, at p. 136. (2) (1881) 6 App. Cas. 217.
(3) (1884) 9 App. Cas. 873.

from the situation in the absence of a signal. The *Yorkton* was coming down with the current, and had to contend with the difficulties of navigation incident to a ship in that position. The channel is said, and appears by the chart to be, about or nearly 800 feet in width. The tug and tow were on the western side where the slack water was, and, if close to the bank, were safe, or, if not, they could have gone closer, and thus have avoided any danger of collision. But the master of the tug, whether because he thought he was on the wrong side of the channel or for some other reason, at the critical moment, chose to port his helm and project across the narrow channel, the unhandy triad with the navigation of which he was charged, measuring in length, tug, hawser and tow, no less than 376 feet, and occupying a very considerable expanse as compared with that which would have been taken up on a course parallel to the bank. It cannot well be said that the acts of the navigation on the two ships formed parts of one transaction, or that the second act of negligence, that of the tug and tow in crossing the channel in front of the *Yorkton,* was consequential upon or involved with the first. One can only conjecture what would have happened if the *Yorkton* had signalled her course before hearing the blast from the tug. It is true that the difference in time between the *Yorkton* passing within the half mile limit and the signal and porting of the tug was not great, but it was long enough to have enabled the master of the tug to reach an obvious conclusion, and to refrain from a course the danger of which was patent. He should have remembered Rules 37 and 38. There is in my view sufficient distinction as to time, place and circumstance to justify the treating of the negligence of the tug as the sole cause of the collision. *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (1).

There is one other point that I should mention, because, having accepted the findings of the local judge, I have not thought it necessary to review the evidence in detail. The defendant's leading witness, Capt. Duff, of the ss. *Superior,* was coming up the north channel, between the head of the island and the upper end of the shoal, at the

(1) [1924] A.C. 406, at pp. 417, 420, 421.

1927

ONTARIO GRAVEL FREIGHTING CO., LTD. v. MATTHEWS STEAMSHIP CO., LTD.

Newcombe J.

time when the vessels concerned were approaching each other and came into collision opposite to him in the south channel. He was put forward as an independent witness and he gave some testimony favourable to the defence in his direct examination, the effect of which was however considerably shattered when he came to be cross-examined. During his cross-examination it transpired that he had previously been interrogated by an attorney from Cleveland, acting under the plaintiff's instructions, and had made a statement which the attorney reduced to writing, and which Capt. Duff signed. He was cross-examined upon this statement, and subsequently the attorney was called to prove the statement, and it was put in evidence in reply. It served its purpose of course to discredit or to affect the credibility of Capt. Duff, but the learned trial judge made this comment:

> Duff, master of the Superior, called for the defendants, says that when he saw the tug and tow, they were pretty close to Russell Island, as though they intended to cross between the buoy and the island. Though this witness very clearly showed his unreliability, the defendants cannot complain if his early statement to Mr. Theodore Robinson (the attorney), Ex. 3, is used against them, especially as he adduces a reason for his belief which discloses an interest in their position in relation to his ship.

If by this the learned judge mean that the statement which Capt. Duff gave to Mr. Robinson can be used against the defendant, as evidence of the facts stated in it, he is clearly wrong. The statement was admissible only by way of contradiction and to affect the witness's credibility. *Ewer* v. *Ambrose* (1); *Wright* v. *Beckett* (2). I see no reason to believe, however, that the learned judge would or could have arrived at a different conclusion in the case if the statement had not been introduced, and, although it may have been used for a purpose for which it was not admissible, I do not think it has resulted in any substantial miscarriage of justice, or affected the decision.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Rodd, Wigle & Whiteside.*

Solicitors for the respondent: *King & Smythe.*

(1) [1825] 3 B. & C. 746.

(2) (1834) 1 M. & Rob. 414.