1908

*Nov. 19, 20.
*Dec. 1.

THE STEAMSHIP "TORDENSKJOLD" (DEFENDANT) ..... } APPELLANT;

AND

THE HORN JOINT STOCK COMPANY OF SHIPOWNERS (PLAINTIFFS) ..... } RESPONDENTS.

THE JOINT STOCK COMPANY, LIMITED, "TORDENSKJOLD" (PLAINTIFFS) ..... } APPELLANTS;

AND

THE STEAMSHIP "EUPHEMIA" (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT.

Appeal—New grounds—Admiralty law—Collision.

A court of appeal should not consider a ground not previously relied on unless satisfied it has all the evidence bearing upon it that could have been produced at the trial and that the party against whom it is urged could not have satisfactorily explained it under examination.

In this case damages were claimed from the owners of the "Euphemia" for collision with plaintiffs' ship and the latter in their preliminary act charged that the "Euphemia" was in fault for not reversing her engines. The Exchequer Court judgment held plaintiffs' ship alone in fault and on appeal the majority of the Supreme Court refused to consider the ground not previously urged that the "Euphemia" when she saw the other ship attempting to cross her bow held too long on her course instead of reversing. Fitzpatrick C.J. and Davies J. were of opinion that under the circumstances this point was open to the plaintiffs.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

APPEAL from the judgment of the local judge for the Quebec Admiralty District of the Exchequer Court of Canada (1), holding the plaintiffs' ship alone to blame for a collision.

The points for decision are stated in the head-note.

Pentland K.C. and *Meredith K.C.* for the appellants.

L. P. Pelletier K.C. and *A. H. Cook K.C.* for the respondents.

THE CHIEF JUSTICE agreed with Davies J.

DAVIES J.—I concur generally in the judgment prepared in this appeal by Duff J., but desire to add a few words, especially upon the second ground upon which the appeal is based, namely, that the "Euphemia" was in fault in not having reversed her engines sooner than she did. I am not satisfied that under the facts that ground was not open to the appellants on this appeal.

Very many of the difficulties in understanding the relative courses and distances of the two steamers for the few moments immediately preceding the collision and their relative bearings at the moment of the collision arose out of the statements of several of the witnesses that the "Euphemia's" bow collided with the starboard quarter of the "Tordenskjold" when the latter's bow was pointing almost directly up the river channel westwardly and the former's bow was pointing south across the river so that as was argued by counsel for the "Tordenskjold" the blow was almost, if not quite, at right angles. This assumed fact, which the statement of several of the witnesses justified, is not, I think, proved by the evidence as a whole. I

(1) 11 Ex. C.R. 234.

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Davies J.

have no doubt the witnesses were speaking of a time immediately following the impact or blow, and not of the relative courses of the ships at the moment of the impact and before its effect was produced.

The "Tordenskjold" was an iron steamer of 2,295 registered net tonnage, heavily laden with coal, drawing 20 or 21 feet fore and aft and running at full speed with a flowing tide of three knots. The "Euphemia" of 2,034 tons laden with grain was running at full speed down the river against the tide. The two vessels were approaching each other at the rate of two thousand feet per minute or 18 knots an hour. The impact of two such bodies must have been very great as indeed the photograph put in evidence of the breach made in the "Tordenskjold's" starboard quarter abundantly evidenced.

Was the blow struck a right angled one or nearly so? I think the photographs of the "Tordenskjold's" side where she was struck and of the injured bow of the "Euphemia" taken after the collision, and the evidence of the captain of the "Tordenskjold," who states that he was standing at the time on the starboard side of the bridge of his own ship, shew that the blow must have been at a considerable angle, but not at a right angle. The captain says (p. 100): "The 'Euphemia' struck us in the anchor from thirty degrees to forty-five degrees. His stem and starboard bow struck us." I am satisfied beyond reasonable doubt therefore that the "Euphemia's" stem and starboard bow struck the starboard bow of the other steamer at an angle considerably less than a right angle, and that as the "Tordenskjold" was the heavier ship and was going at a rate nearly double as fast as the "Euphemia," the immediate result of the blow would be not only to stop the "Euphemia," whose stem would probably be caught for a time at least in the enormous hole she

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Davies J.

made in the other ship's quarter, but to carry her bow in the direction the "Tordenskjold" was going with the tide, so that as the ship's recoiled from each other after the blow the bow of the "Euphemia" would be pointing in the direction the witnesses stated.

The manœuvre of the "Tordenskjold," which first caused danger to the ships was no doubt the porting of her helm as the ships were approaching each other. If she had not ported and shewn her red light they would doubtless have passed starboard to starboard, green light to green light. Her signal being answered and responded to by the "Euphemia" as soon as she saw the other's red light, it is more than probable the collision would have been altogether avoided even then had not the "Tordenskjold" for some inexplicable reason starboarded her helm and so crossed the "Euphemia's" bows as the latter was shearing off to starboard under a hard-a-port helm in obedience to the call of the "Tordenskjold." This last manœuvre of the "Tordenskjold" in starboarding was attempted when the steamer had reached a position slightly on the port bow of the "Euphemia" and was fatal. It seems to me that it had the effect of making it impossible for the "Euphemia" to avoid a collision even had she reversed immediately the three lights of the other steamer came into line instead of blowing the single blast as she then did. It is true she reversed full speed astern the moment the other's green light opened. The single blast and the order to reverse followed fast one upon the other, but I do not think that if the order full speed astern had preceded instead of followed the single blast of the whistle the collision could then have been avoided.

Mr. Meredith adopted and pressed upon us the

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Davies J.

finding of Captain Tooker, the assessor of the late Mr. Justice Burbidge, that the "Euphemia" was in fault in porting her helm at the moment the "Tordenskjold" shewed her red light and in not accompanying that action with a single blast of her whistle, and that she should instead, before she saw the red light and as soon as she saw the "Tordenskjold's" three lights at position T 4, in chart No. 1, have gone full speed astern giving the usual signal, three blasts. Burbidge J. thought the reference to plan No. 1 a mistake, and that the assessor meant plan No. 2. If he did, then with every respect I must concur with Mr. Justice Burbidge and dissent from the conclusion of the assessor on that point. A careful reading of the evidence convinces me that if the two ships had kept on their changed courses after porting their helms and shewing each other their red lights there was room for them to have passed and they would have done so safely had not the "Tordenskjold" made the fatal manœuvre of starboarding and so thrust herself ahead of the "Euphemia." If, on the other hand, the assessor meant the positions of the two vessels as shewn at position T 4, of plan No. 1, as expressed in his answer, I repeat what I have already said that it was then too late for the "Euphemia," by reversing, to avert the collision.

It is true that the "Tordenskjold" did in her preliminary act charge the "Euphemia" "with not stopping and reversing when risk of collision was imminent." But such fault so charged was not followed up at the trial, and, indeed, was hardly consistent with the case then put forward by the appellants. In fact the real contention put forward by the "Tordenskjold" at the trial was that

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Davies J.

the two vessels were proceeding on their respective courses, green to green, at such relative distances as would have enabled them to pass each other in perfect safety and that the "Euphemia" suddenly and without any warning changed her course to starboard and ran into the "Tordenskjold" almost, if not quite, at right angles, the latter ship having continued steadily and evenly on her westward course. There was no special examination of the witnesses produced by the "Euphemia" or other evidence given with a view of proving fault or delay on the part of the "Euphemia" in *not having reversed* sooner than she did. It is true there was evidence as to when she did reverse. But that was not the point put forward to be tried and determined nor, as my brother Duff has shewn, was the evidence given specially directed either on main or cross examination to such a point or issue as one which it was contended affected the liability of the "Euphemia." Although mentioned in the preliminary act it does not appear to have been practically made an issue until suggested by Captain Tooker, the assessor, on appeal. But as the facts relating to the time of reversing her engines by the "Euphemia" did appear, incidentally at any rate, in the evidence and was charged as a fault in the preliminary act and pleadings of the "Tordenskjold," I have thought it desirable to deal with it on the merits instead of relying upon the legal point that the objection could not now be taken on appeal.

I fully agree with all my brother Duff has said with respect to the alleged failure of the "Euphemia" to blow a single blast of her whistle when she ported, and with his conclusion that this point is not open on this appeal, and if it was, that the evidence would

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Davies J.

not under our statute justify a holding that the fault, even if proved, contributed to the collision.

I think it important that the attention of the proper authorities should be drawn to the admittedly deplorable ignorance of the pilots of these ships alike with respect to the compass and its different points as to the regulations for preventing dangers from collisions of ships, commonly called the "Rules of the Road." There was hardly any pretence of knowledge with regard to either. They were, it is true, elderly men, and one of them stated that when he obtained his branch or license many years ago he was not examined at all with respect to the compass. It was not the practice he said in those days. But it is evident that with the existing traffic of the River St. Lawrence by large and valuable steamers it is imperative that those licensed as pilots should possess in addition to their other qualifications a knowledge of the regulations by which they are bound and of the compass without which it seems impossible for them properly to discharge their duties or give intelligible evidence in cases of collision between ships such as we have now before us. The learned trial judge (Routhier J.), who saw the witnesses and heard their evidence, expresses himself on this want of knowledge of the pilots thus: "Finally I must say that the two pilots who have been heard in this case lack knowledge and they lack it in a large measure. They do not know the compass nor the rules of navigation nor much of the map of the river." We desire to emphasize his opinion.

I would also like again to repeat my regrets that our statute does not permit of our having on appeal to this court experts to advise us on nautical points in like manner as the courts of Vice-Admiralty and Ex-

chequer and the Privy Council have. In the present case we feel that such expert advice might have been of great benefit. This court stands in the anomalous position of being obliged to decide difficult nautical points on which the appeal may turn without the advice of nautical experts while the courts from which appeals are taken to us and the Judicial Committee of the Privy Council to which appeals from this court lie have the benefit of such advice as and when they desire.

IDINGTON and MACLENNAN JJ. concurred in the opinion stated by Duff J.

DUFF J.—These appeals relate to a collision which occurred in the St. Lawrence River at a place below the St. Antoine and above the Ste. Croix range lights between the SS. "Euphemia," going down, and the SS. "Tordenskjold," going up the river. Both sides concede that a short time (less than three minutes) before the mishap occurred, the ships were proceeding starboard to starboard upon courses which, had they been kept, would have taken them past one another in perfect safety.

It was found by the learned trial judge (Routhier J.) with the concurrence of his assessor (Captain Koehig)—and these findings have been affirmed by the learned judge of the Exchequer Court (Burbidge J.) with the concurrence of his assessor (Captain Tooker, R.N.)—that when at a distance of not more than a half and not less than a quarter of a mile from the "Euphemia" the "Tordenskjold," being then on the course I have mentioned, suddenly turned to starboard, first exhibiting to the "Euphemia" her three

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Duff J.

lights and then shutting out her green light; that seeing the "Tordenskjold" thus changing her course the "Euphemia" answered the movement by porting her helm; but when the "Tordenskjold's" red light was a little on the "Euphemia's" port bow the "Tordenskjold" again changed her course, this time shewing first her three lights and then shutting out her red light; that the "Euphemia" then reversed her engines at full speed, but, it being then too late to avert a collision, the "Tordenskjold," passing the "Euphemia's" bows, received on her starboard side the blow of the latter's stem.

The learned trial judge on the advice of his assessor, has held on this state of facts that the "Tordenskjold" was in fault in this; that the ships being so close together, and upon parallel courses by which they could pass with safety, the "Tordenskjold" should not have directed her course across the "Euphemia's" bows; but that, having indicated an intention of thus directing her course by exhibiting her red light alone to the "Euphemia," she should have kept that course. The opinion of the trial judge and his assessor that the "Tordenskjold" was in fault in both these respects had the concurrence of the learned judge of the Exchequer Court and of the assessor who advised him. The trial judge further held (and upon this point also his view was shared by his assessor and by the learned judge of the Exchequer Court) that the "Euphemia" was not in fault. It is in respect of this holding only that the judgment of the Exchequer Court is impugned on these appeals.

The appeals are rested on two grounds, first, that when the "Tordenskjold" shut out her green light after exhibiting her red the "Euphemia" should have

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Duff J.

seen the risk involved in proceeding further ahead and should have reversed; and secondly, that assuming she was justified in porting her helm, she was in fault in not giving the prescribed signal to indicate that she was about to direct her course to starboard.

I think neither of these grounds is available in this court.

As to the first, I cannot find, in the evidence given at the trial, or in that taken before the Commission of Inquiry which preceded the trial, anything which indicates that it occurred to the trial judge or to his assessor or the Commissioners or to the counsel for the appellants that, at the time the "Euphemia"—according to the account given by those on board of her—ported her helm (when the "Tordenskjold" was about one-half a mile distant) there was not sufficient room to enable the ships to pass port to port. The respondents in their preliminary act and in their pleadings stated the salient facts substantially as their witnesses stated them at the trial; and notwithstanding the appellants had thus the most ample notice of the respondents' account of their manœuvres which preceded the collision, there is not one word of cross-examination conveying a suggestion that (if each ship should have held her course to starboard) this manœuvre would have involved any apparent or foreseeable risk of collision. The contention seems to have been suggested for the first time in the Exchequer Court where the nautical assessor expressed the view that the only safe course for the "Euphemia," when she saw that the "Tordenskjold" had shut out her green light, was to reverse her engines.

The principle upon which a Court of Appeal ought to act when a view of the facts of a case is presented

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Duff J.

before it which has not been suggested before, is stated by Lord Herschell in *The "Tasmania"* (1), at p. 225, thus:

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a court of appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

In *The "Tasmania"* (1) the particular point referred to—which the House of Lords refused to entertain—had not been made in the pleadings. Here it is true there is in the pleadings a general charge that the "Euphemia" was in fault for not reversing her engines. In point of fact it was clearly proved that before the collision she did reverse her engines; and the allegation in the pleadings would suggest to nobody reading the pleading as a whole a hint of the contention upon which the "Tordenskjold" now actually relies.

Is it then manifest that if this controversy had arisen at the trial no facts bearing on it, other than those which the record discloses, could have been brought to light? I cannot think that can be the case. There are many things I should like to be informed about before passing upon such a question. More exact information about the width of the channel,

(1) 15 App. Cas. 223.

about the speed of the vessels, about the time and distance in which they could turn, would seem to be almost essential to enable one to form confident opinion concerning it. The opinion of the nautical assessor who assisted the judge of the Exchequer Court is entitled of course upon any question of nautical manœuvering to the highest consideration. But we have not the advantage of knowing the views upon all importportant questions of fact which formed the basis of his opinion; and without those views I am not entitled to assume that a fuller investigation specifically addressed to those questions might not present a very different case respecting them.

For the same reason I do not think we are entitled to entertain the contention which forms the second of the above-mentioned grounds of appeal. The decision of the Court of Appeal in *The "Anselm"*(1), cited by Mr. Meredith, satisfies me that, assuming a failure on the part of the "Euphemia" to sound her whistle, such a failure would have constituted a breach of article 28; but before the "Euphemia" can be convicted of fault in this regard two questions must be determined; first, whether in fact there was on her part a breach of the rule, and secondly, whether, assuming a breach established, it contributed to occasion the collision. Whether, in respect of this latter question, the onus would lie on the "Euphemia" or on the "Tordenskjold" need not concern us. Assuming that, a breach being proved, the burden is cast upon the "Euphemia" is it clear that we have before us all the evidence which would have been produced had these questions formed a subject of contest at the trial?

(1) [1907] P. 151.

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Duff J.

As to the first of them there is not in the voluminous examinations and cross-examinations which fill the record, a single word directed expressly to the point whether the "Euphemia's" whistle was or was not sounded when her helm was ported. There are, it is true, expressions throughout the case, many of them, which obliquely suggest and (if used when such a point was before the minds of those employing them) might, I think, be taken to imply with sufficient certainty that the signal was not given; and there are plenty of indications leading to the conclusion that neither pilot had a clear notion of the directions of article 28. But, on the other hand, if such a breach could have been proved, unless indeed there was some explanation which does not appear, it seems incredible that it should not have been charged in the preliminary act or in the pleadings; and that at the trial the point should have been by both sides so successfully avoided.

Whatever view may be taken, however, on this point I am satisfied that the second question involved in this ground of appeal could not be decided adversely to the respondents upon the evidence as it now stands without the gravest risk of doing injustice. In the light thrown upon the methods of these pilots by the evidence in this case, I should have no doubt that the exhibition of the "Euphemia's" red light to the "Tordenskjold" in answer to the exhibition of the "Tordenskjold's" to the "Euphemia," would be regarded by the pilot on the "Tordenskjold," even in the absence of a signal, as a definite indication of the "Euphemia's" intention to pass to starboard; the question when that occurred, that is to say at what point the red light of the "Euphemia" must have been seen

1908

SS. "TORDENSKJOLD" v. SS. "EUPHEMIA."

Duff J.

by the "Tordenskjold" is a question which, if it was to be the determining point of the litigation, should have been investigated at the trial. It is quite true there is some evidence, indeed a good deal of evidence, bearing upon it. But it is clear that neither the court nor counsel specifically addressed themselves to the point; and it is not, I think, open to doubt that, had they done so, the circumstances affecting it would have been much more fully disclosed.

In this court we suffer from the disadvantage of lacking skilled advice; that is a circumstance which emphasizes, I think, the importance of having all questions of fact—and more especially questions of seamenship—in such a case as this, distinctly raised before the court which tries it with the assistance which is not afforded us.

The appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Campbell, Meredith, MacPherson, Hague & Holden.*

Solicitors for the respondents: *W. & A. H. Cook.*