

CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE

AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

CANADA STEAMSHIP LINES, LIM- } APPELLANT;
 ITED (PLAINTIFF) }

1929
 Oct. 15.
 Nov. 21.

v.

THE SS. *KINGDOC* (DEFENDANT) RESPONDENT.

AND

PATERSON STEAMSHIPS LIMITED } RESPONDENT;
 (PLAINTIFF) }

v.

THE SS. *OXFORD* (DEFENDANT) APPELLANT.

*Shipping and seamen—Collision—Canal navigation—Right of way—
 Creating a situation of danger.*

A collision occurred between the *K.* and the *O.* about 3.30 a.m., June 5, 1927, at the upper end of the Lachine Canal. The night was dark. The *K.*, upbound and light, had moored to the south revetment wall of the Canal near the place of collision on account of wind and rain. Her harbour lights were on and her red and green lights extinguished. She was drawing 3 feet 6 inches forward and 12 feet 8 inches aft, and a fresh southwest breeze was blowing across her beam. When the weather cleared, the *K.* cast off her four lines, beginning from the stern and casting the breast line last, on account of the wind. Before casting off, the *K.* had seen the starboard lights of the *O.* and knew that she was making with the current for the entrance of the Canal. After casting off, her stern, pushed by the wind, left the wall first and the ship moved towards the north side in a slanting position in the Canal, at this point about 275 feet wide. The *K.* then blew two blasts indicating she would pass starboard to starboard, forcing the *O.* to pass between her and the north side, towards which the *K.* was drifting. The *O.* answered by two blasts, but within a very few seconds perceiving the *K.* across the Canal and realizing there was not enough room to pass, the *O.* gave the danger signal and reversed full steam astern, which act, having a right hand propeller, forced her bow to the south, and the *K.* drifting across, the collision occurred,

1929

CANADA
STEAMSHIP
LINES, LTD.

v.

THE SS.
Kingdoc
AND
PATERSON
STEAMSHIPS
LTD.

v.

THE SS.
Oxford.

the stem of the *O.* striking the starboard side of the *K.* The ships were 250 feet long, with a 42 foot beam. Up to almost the time the *K.* gave the two blasts signal, the *O.* had reason to believe from the lights on the *K.* that she was still moored.

Held, on the facts, (reversing the judgment appealed from) that, the *K.*, without justification, created a situation of perplexity and danger, and that the *O.* did all, in the circumstances, that good seamanship required of her; and as she was coming down with the current she had the right of way, and the *K.*, on the evidence, failed to satisfy the burden resting upon her to excuse the collision.

Furthermore, moored at the revetment wall of the Canal, the *K.*, a light ship of 250 feet in length, with a fresh breeze blowing strong enough to affect her, on a dark night, casting off and getting unnecessarily under way, in a Canal of 275 feet in width, with the knowledge of a downbound vessel coming in at the time with the current, having thereby the right of way (Rule 25), will be held at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes.

Casting off under such circumstances and spreading, in a slanting way, her 250 feet in length in a Canal of 275 feet in width was bad seamanship amounting to negligence.

APPEAL from decision of the Local Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Audette at Montreal, on the 15th day of October, 1929.

A. R. Holden, K.C., for appellants.

Errol Languedoc, K.C., for respondents.

The facts are stated in the reasons for judgment.

AUDETTE J., now (November 21, 1929), delivered judgment.

This is an appeal, by the Canada Steamship Lines, Limited, and the SS. *Oxford*, from the judgment of the Local Judge in Admiralty, bearing date 21st May, 1929, in a collision case—both actions having been consolidated—wherein he pronounced in favour of the claim of the plaintiff Paterson Steamships Limited and condemned the ship *Oxford* and her bail in the amount to be found due to the plaintiff between Paterson Steamships Limited and in costs. And he ordered that an account should be taken and referred the same to the registrar, assisted by merchants, to report the amount due, with costs of said reference against the ship *Oxford*, and dismissed the action of the Canada Steamship Lines against the ship *Kingdoc* with costs and condemned the plaintiff Canada Steamship Lines Limited in costs.

On the hearing of this appeal, I was ably assisted by Commodore W. Hose, C.B.C., R.C.N., as nautical assessor, whose experience and opinion were of great help and advantage to me in arriving at a decision, in which I have pleasure to say, he absolutely concurs.

The collision between the *Kingdoc* and the *Oxford* occurred around 3.30 a.m., daylight saving, on the 5th June, 1927, at the upper entrance of the Lachine Canal. The night was dark. The length of these two ships is respectively a few feet over 250 feet and their respective beam around 42 feet.

About an hour before the collision, the *Kingdoc* an up-bound vessel, light, moored at the revetment wall near the upper entrance of the Lachine Canal, at Lachine, on account, as stated by her Master, of hard rain and wind.

The *Kingdoc*, while laying so moored with four lines, had her harbour lights, having extinguished her red and green lights.

An hour or so after her arrival there, the weather having cleared, she began preparing to start when she knew a ship, the *Oxford*, was making with the current for the entrance of the Lachine Canal, her lights having already been seen on the lake. When coming on the Lachine range, she was plainly showing her starboard light.

Yet, knowing of this incoming ship, the *Kingdoc*, a light ship, drawing 3 feet 6 inches forward, 12 feet 8 inches aft, a fresh wind, southwest breeze, blowing across her beam, cast off her four lines, beginning by the stern line and following up, casting the breast line last, on account of the wind (p. 38). The second mate of the *Kingdoc* testified that the least little wind will blow a light ship off. Witness Scott shares that view (pp. 7, 14).

Her stern, pushed by the wind, left the revetment wall first and she thus became at once in a slanting position in the narrow Canal and when all her lines had been cast off the whole ship moved, by the wind, towards the north—the cribs—in this slanting position.

After casting off, she blew two blasts which were asking the other ship to pass starboard to starboard, i.e., between the *Kingdoc* and the cribs towards which she was drifting. The two blasts were answered by two blasts from the incoming vessel, the *Oxford*; but within a very few seconds

1929

CANADA
STEAMSHIP
LINES, LTD.

v.

THE SS.
Kingdoc

AND

PATERSON
STEAMSHIPS
LTD.

v.

THE SS.
Oxford.

Audette J.

1929
 CANADA
 STEAMSHIP
 LINES, LTD.
 v.
 THE SS.
Kingdoc
 AND
 PATERSON
 STEAMSHIPS
 LTD.
 v.
 THE SS.
Oxford.
 Audette J.

($\frac{1}{4}$ of a minute says the Pilot of the *Kingdoc*) the *Oxford* perceiving the *Kingdoc* across the Canal, which is at that place something like 275 feet in width, and realizing she had not enough space to pass between the cribs and the stern of the *Kingdoc*, blew 5 or 6 short blasts as a danger signal and reversed full steam astern. Witness Brais, who was at the wheel of the *Oxford*, relatively close to the bow and at the best place for observation, testified that at that time the *Kingdoc* was slanting across the Canal, the wind having pushed her towards the cribs, and that they had not 20 or 25 feet to pass between the cribs and the stern of the *Kingdoc*. She was drifting across the path of the *Oxford*. According to him (p. 20), it was the wind which pushed her against the *Oxford* and which occasioned the collision. That must have occurred when the *Oxford* having reversed full speed astern, thereby causing her bow to go towards the south—towards the starboard with a right hand propeller, this reversing sent her astern towards the north and her bow to the south. Within that time the *Kingdoc* had moved ahead about two lengths and the two vessels collided, the *Oxford's* stem striking the *Kingdoc* on the starboard side 68 feet from her stem. The collision happened opposite and between the fourth and fifth cribs.

Up to almost the time the *Kingdoc* sounded her two blasts, the *Oxford* had reason to believe, from the display of her harbour white lights, that she was still moored at the revetment wall. In fact the *Kingdoc* only lighted her red and green lights a few seconds before sounding the two blasts and at that time, according to witness Brais, she still had her bow line tied (witness Redfearn swears to the contrary) and her stern slanting across the Canal, swinging with the wind. Within the space of time between the exchange of the two blasts and the danger signals given by the *Oxford*, the *Kingdoc* had drifted across the Canal obstructing the path of the *Oxford* (pp. 17, 18, 19), a ship of 250 feet in length slanting across a Canal or 275 feet in width.

Now, as is usual in Admiralty cases, the evidence is very conflicting and in this case especially so in respect of the question of the velocity of the wind at the time of the accident, which indeed was an important factor in occasioning the collision.

It is quite significant that all of the *Kingdoc* crew, *ne variatur*, swore that the velocity of the wind at the time of their casting off was between 8 and 10 miles an hour. Witness Paginton, second mate on the *Kingdoc*, swore however, there was a good fresh breeze, adding the least wind will blow a *light* boat off and the *Kingdoc* was a light boat travelling on ballast. The crew of the *Oxford* swears "qu'il y avait beaucoup *de vent*—il ventait fort," and Brais, the Pilot of the *Oxford*, estimates its velocity at 20 miles an hour. Scott, the Master of the *Oxford*, estimated the velocity of the wind at 20 to 25 miles an hour and Austen, first mate of the *Oxford*, testified the wind was "strong" (p. 15). Then witness Kelly, the Superintendent of the McGill Observatory, testified that at 3 o'clock in the morning, daylight saving, on the 5th June, the velocity of the wind was, in Montreal, 9 miles an hour. That would be about half an hour before the collision; but this statement must be approached with this qualification that wind is a very capricious and variable element, it travels in zones and is affected by the peculiarities of topographical relief and elevation and would obviously be affected by the Mount Royal, at Montreal, where the McGill University is located. The wind obeys to purely local causes, and it is therefore difficult to say that because it is blowing at a certain place at a given velocity that the same velocity may obtain at a relatively close distance. The record of the Observatory does not present any reliability to ascertain the velocity of the wind at the upper entrance of the Lachine Canal.

The question of the *wind* is not without great importance under the circumstances, especially when one has to seek and determine the truth, in case of conflicting evidence, by the probabilities of the respective cases which are set up.

Finally on this question of the wind, we have the testimony of the Master of the *Kingdoc*, who says that after casting off (p. 13) he let her drop from the pier and the reason for his two blasts asking the *Oxford* to pass starboard to starboard is quite explained in his language as follows:—

Well, in a case of blowing, when it is blowing *fresh* they generally give the *light* boat the high side. We were a light boat. Naturally the wind

1929
 CANADA
 STEAMSHIP
 LINES, LTD.
 v.
 THE SS.
Kingdoc
 AND
 PATERSON
 STEAMSHIPS
 LTD.
 v.
 THE SS.
Oxford.
 Audette J.

1929
 CANADA
 STEAMSHIP
 LINES, LTD.
 v.
 THE SS.
Kingdoc
 AND
 PATERSON
 STEAMSHIPS
 LTD.
 v.
 THE SS.
Oxford.
 Audette J.

would have a great impression on the *Kingdoc* and make her drift. If I had gone on top of those cribs with the wind blowing fresh southwest, I could not get away.

(pp. 24, 25). He wanted to keep to the south on account of the wind.

All of this goes to show conclusively that there was a substantial wind which had quite an *impression* on the *Kingdoc* just as soon as she cast off, without any momentum, and being light. She must necessarily have drifted materially to the north and the probabilities are that when the crew of the *Oxford* swear she came across this Canal, right in their path, such contention is quite reasonable and quite acceptable and not the result of hectic alarm. A light ship clearing and casting off from a pier is not under normal navigable control for some time until sufficient steering way has been obtained to ensure prompt answering to the helm.

Witness Daignault, the Pilot of the *Kingdoc*, testified that her steering wheel was hard (était dure); more force than usual had to be used to move it. She obeyed less readily and took more time to take a direction (pp. 12, 13, 14).

Therefore it would take her more time to fight the wind which made her drift to the north, if that could be done, and to extricate herself from her slanting position obtained at the time of the casting off.

We are in this case governed by the Rules of the Road for the Great Lakes and Rule 25 thereof provides that in narrow channels, as under the present circumstances, when there is a current, when two steamers are meeting, the descending vessel *has the right of way*. See also *Madden v. The SS. Vinmount* (1).

There can be no doubt that, under the circumstances of the case, the *Oxford* had the right of way as she was coming down with the current, while the *Kingdoc*, up to a few minutes before the collision, was moored to the Canal wall showing only her harbour lights, and with a fresh breeze blowing across her beam which would obviously blow and drift her across the fairway. See Rule 25. In the case of *George Hall Corporation v. The Ship Fifetown* (2), under circumstances almost similar to the present case, it was

(1) (1927) Ex. C.R. 212.

(2) (1924) Ex. C.R. 12.

held that the upbound ship should not attempt to pass the downbound ship, but should moor to the bank until the downbound ship had passed her; and to continue her course was not good seamanship. Moreover, that the downbound ship, coming down the Canal with the current had the right of way and that the burden of proof was on the upbound vessel to establish that the collision was caused by the improper navigation of the downbound vessel—which she failed to do.

And I find that in this case the *Oxford* had the right of way and did, under the circumstances, all that good seamanship required of her to avoid the accident—*The Llanelly* (1).

Neglect to wait and hold back when practical and prudent to do so,—as in this case to remain moored at the bank,—the result of which will create a position of danger will amount to negligence in navigation. *The Eastern Steamship Co. v. The SS. Alice* (2); *The SS. Wenchita* (3); Marsden's Collisions at Sea, 8th Ed., p. 464.

It was bad seamanship, bad manoeuvring on behalf of the *Kingdoc* to leave her mooring under such circumstances. It was ignoring entirely elementary prudence and precaution which are required by the ordinary good practice of seamanship. See Rules 37 and 38.

The following excerpt from the testimony of witness Redfearn, Master of the *Kingdoc*, is not without significance (pp. 26, 27).

Q. In view of your hesitation, let me ask you this: at p. 66 you were asked:

Q. Before you let go your lines from the bow you knew the *Oxford* was coming up?

A. Coming down, yes.

Q. Yes, coming down, rather.

A. Yes.

Q. You knew that.

A. Yes, sir.

Q. In view of the condition of the weather at the time, a strong breeze blowing, could you have waited till that vessel had passed before casting off the lines.

A. Could I have waited?

The COURT: Yes.

A. Yes. I could have.

Q. Would it have been wisdom on your part to remain there?

A. I can't see how it would be. I am entitled to part of the Canal.

(1) (1914) P. 40.

(2) (1927) Ex. C.R. 228.

(3) (1928) Ex. C.R. 178.

1929
CANADA
STEAMSHIP
LINES, LTD.
v.
THE SS.
Kingdoc
AND
PATERSON
STEAMSHIPS
LTD.
v.
THE SS.
Oxford.
Audette J.

1929
 CANADA
 STEAMSHIP
 LINES, LTD.
 v.
 THE SS.
Kingdoc
 AND
 PATERSON
 STEAMSHIPS
 LTD.
 v.
 THE SS.
Oxford.
 Audette J.

True as the witness says, the *Kingdoc* was entitled to part of the Canal, but she was not entitled to start across—in face of an incoming vessel with the current—from that bank of the Canal (the wrong side) which is around 275 feet in width and to spread over—a ship of over 250 feet—diagonally across such Canal and obstruct the path of such downbound vessel. Rule 25.

In the case of *Canadian Sand and Gravel Co. v. The Key-west* (1), it was held that when a ship with ordinary care, doing the thing which under any circumstances she was bound to do, could have avoided the collision, she should be alone to blame and it was in that case also contended that the accident would have been averted had the up-bound ship not cast off and remained tied to the bank.

Then at page 29:—

Q. And in that case there, with a strong breeze blowing—a *fresh wind* blowing—and a light ship, it takes some time before you leave, and you cannot help getting an angle obliquely from this wharf, because your stern went away in the first place and all the movements of the helm and engines would only accentuate the position because you cannot fight against the wind?

A. Yes, sir.

Q. Would it have been better for you to wait long enough for the *Oxford* to pass?

A. Yes, sir.

Q. You realize that now?

A. Yes, sir. If I had known what was going to happen I would not have left the pier.

When the *Kingdoc* did cast off, the *Oxford* was in the entrance of the Canal, and witness Brais (p. 5) contends that if the *Kingdoc* had waited until the *Oxford* had completely gone by, the *Kingdoc* would have lost in time: “Deux minutes et demi ou une minute et demi à peu près.”

There were a number of sketches prepared by the witnesses. Filed as Exhibits K4 K5 K6 and K7 are the sketches prepared by the crew of the *Kingdoc* as to the probable position of their ship just prior to the collision; but considering the place where these witnesses stood I find that these estimates by eye, at some distance from the stern of their ship, on a dark night, must be very problematic in their accuracy, and I rather agree with sketches K1 and K2 and more especially with K1, which was prepared by “Brais” who was in a much better position to

appreciate the true position of the two vessels, and which absolutely coincides with the reasonable probabilities of the case. The *Mary Stewart* (1); *The Ailsa* (2). And in view of the direction and force of the wind at the time the *Kingdoc* cast off and of the fact that starboard helm was predominantly used to bring the ship more and more towards the southern edge of the channel, the undoubted tendency would be for the ship to take a very pronounced angle across the Canal more in accordance with Exhibit K1.

The *Kingdoc* was guilty of want of good seamanship and elementary prudence (Rules 37 and 38) *ab initio* in casting off under such circumstances, with a stiff breeze blowing, and in transgressing Rule 25. The *Oxford* coming down with the current had the right of way, and on the evidence, the *Kingdoc* failed to satisfy the burden resting upon her to excuse the collision. She from the first to last, without justification, created a position of perplexity and danger and the *Oxford*, under the circumstances, did all that could be expected of her,—did everything reasonably possible to avoid the accident, by blowing the danger signals and reversing full speed astern, and her manoeuvring was entirely without blame. See *Madden v. The SS. Vinmount* (3); *The SS. Wenchita v. The SS. Beechbay* (4); *George Hall Corporation v. The Ship Fifetown* (5).

Moored at the revetment wall of the Canal, the *Kingdoc*, a light ship of 250 feet in length, with a fresh breeze blowing strong enough to affect her, on a dark night, casting off and getting unnecessarily under way, in a Canal of 275 feet in width, with the knowledge of a downbound vessel coming in at the time with the current, having thereby the right of way (Rule 25), will be held at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes.

Casting off under such circumstances and spreading, in a slanting way, her 250 feet in length in a Canal of 275 feet in width was bad seamanship amounting to negligence. See Rules 37 and 38 and above cited cases.

1929
 CANADA
 STEAMSHIP
 LINES, LTD.
 v.
 THE SS.
Kingdoc
 AND
 PATERSON
 STEAMSHIPS
 LTD.
 v.
 THE SS.
Oxford.
 Audette J.

(1) (1844) 2 Wm. Rob. 244. (3) (1927) Ex. C.R. 212.
 (2) (1860) 2 Stuart's Adm. R. 38. (4) (1928) Ex. C.R. 179.
 (5) (1924) Ex. C.R. 12.

There will be judgment allowing the appeal in favour of the SS. *Oxford* and maintaining the action of the appellant The Canada Steamships Lines, Limited. The whole with costs in their favour.

Judgment accordingly.