1893

April 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY..... } PLAINTIFFS ;

AGAINST

THE SHIP "*CUTCH*."

Maritime law—Collision—Responsibility for, where uninjured ship declines to assist helpless one—The Navigation Act, R. S. C. c. 79, secs. 2 and 10.

Under the provisions of section 10 of the Navigation Act (R.S.C. c. 79) where a collision occurs, the ship neglecting to assist is to be deemed to blame for the collision in the absence of a reasonable excuse.

Two steamships, the *C.* and the *J.*, were leaving port together in broad daylight, and a collision occurred between them. The *J.* received such injury as to be rendered helpless. The *C.* did not assist, or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of the *C.* was that the *J.* did not whistle for assistance, although the evidence showed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shown that these ships were at anchor and idle.

Held, that the circumstances disclosed no reasonable excuse for failure to assist on the part of the *C.* and that the consequences of the collision were due to her default.

Held, also, that the *C.* was in fault under Art. 16 of sec. 2 of the Navigation Act for not keeping out of the way of the *J.*, the latter being on the starboard side of the *C.* while they were crossing.

ACTION for damages by collision.

The plaintiffs' vessel *Joan* and the steamer *Cutch*, both moored at the same wharf, (Gordon's wharf, Nanaimo) were advertised to leave at the same hour, 7 a.m. Both cast off their lines within a few seconds of each other. Both were endeavouring to leave the harbour by the South channel, but a short distance before entering it, they came into collision under the

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

circumstances mentioned in the judgment. The *Joan* having suffered considerable injury brought this action for damages.

April 26th and 27th, 1893.

The case was tried before Sir Matthew B. Begbie, C.J., Local Judge in Admiralty for the District of British Columbia,—Lieut. Masters, R.N., and Lieut. Nugent, R.N., sitting with him as Assessors.

Pooley, Q.C. for the plaintiffs.

E. V. Bodwell (with him *P. Æ. Irving*) for the defendants.

Sir MATTHEW B. BEGBIE, C.J., L.J.A., now (April 28th, 1893) delivered judgment.

This case has been somewhat embarrassed by the different views taken of the facts by the witnesses for the plaintiffs and defendants; a difference not altogether unprecedented in the case of maritime collisions, and naturally accounted for by the well-known, although unaccountable, sympathy that every man feels for the vessel in which he happens to be; by the suddenness and unforeseen nature, in general, of all collisions; and by the erroneous views too often taken by the masters of vessels of their own rights and of the rights of others.

The evidence, which has occupied the court nearly eleven hours on two days, refers wholly and entirely to events which, in fact, from first to last, were commenced and concluded in eight minutes of time on the morning of November 19th, 1892, just before sunrise.

A great deal of contradictory evidence was given upon a preliminary, and, I think, an immaterial point, viz., which of the two colliding vessels was the first to leave the wharf; the master and mate and some passengers on board the *Cutch* alleging (what she also

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

insists upon in her Preliminary Act) that the *Cutch* was clear of the wharf at which both vessels had peacefully lain all night, *i.e.*, had all her lines thrown off before the *Joan*. Upon this point, however, I am quite clear that they are all in error. Verbally perhaps, and for a moment, two of the *Cutch's* lines were the first removed from the mooring pile; she had come into the wharf on the 18th, later than the *Joan*, and her head and spring-lines were thrown over the *Joan's*, so that it was necessary to remove them in order to let the *Joan's* lines go, and that is what the wharfinger says he did; but he immediately, and as soon as ever he had lifted the *Joan's* lines, replaced the *Cutch's* lines on the pile; and he says he cleared the *Joan* first, and that he saw her completely detached from the wharf, although quite alongside of it, before he cast off the last line of the *Cutch*, and while the *Cutch* was still swinging to her stern line.

Both vessels were lying at Gordon's wharf, and purposed leaving by the South channel, the entrance to which is distant about 1,100 feet E.N.E. from the wharf. The *Joan* was a twin-screw moored with her head nearly S.E. The *Cutch* was a single screw, lying nearly S.W. across the *Joan's* bow, having come in at a later hour on the previous day. It was therefore necessary for the *Cutch*, in order to get her head round, that she should hang on to her stern line and that the *Joan* should have got out of her way. It was not necessary for the *Joan* to hang on to her stern line: she was a twin-screw, and had a much smaller angle to move through.

Other quite independent witnesses (Mr. Thompson and Mr. Jensen) also saw from the shore that the *Joan* was free while the *Cutch* was still fast. Now, in weighing these contradictory statements, we must consider that the wharfinger's business was to free these

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

lines; that none of the defendants' witnesses handled or could have handled the *Cutch's* ropes, or could probably have seen exactly what the wharfinger did with them, or could see the *Joan's* lines; that all the defendants' witnesses were either crew or passengers on board the *Cutch*, and so, liable to the mysterious sympathy already alluded to; and that the wharfinger's statement is supported not only by the *Joan's* crew, but by independent witnesses and by the high probabilities of the case. I am quite sure that the *Joan* was the first to get clear of the wharf. And the chief conclusion I drew from all this evidence of the defendants was, that they placed great reliance upon the point which vessel cast off first (which I consider quite immaterial as regards the actual collision), imagining that it gave them priority of right of entry into the South channel (by which both vessels purposed to leave the harbour), whereas that priority would depend entirely upon the subsequent manœuvres of the two vessels; and I think this erroneous notion of right probably influenced the subsequent conduct of the *Cutch* and the views of her master. And the positiveness with which the *Cutch's* witnesses swore to these things, which could not have been within their own knowledge, and as to which they were clearly in error (although there is no suggestion against their firm belief that they were right), very much impairs the force of their statements upon other points which they believe they saw.

The defendants' case is that she got clear of Gordon's wharf before the *Joan*, and so obtained a *primâ facie* right of priority of leaving the harbour by such channel as she might select; that she was the first to get into the open harbour, and was making at a moderate speed for the South channel, as the leading ship, with the *Joan* on her starboard quarter, when the latter exerting her full power overtook the *Cutch*, and, making for the

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

wrong side (viz., the port side) of the South channel, for which they were both bound, threw herself at full speed on the *Cutch's* bow, which was actually reversing her screw to mitigate the force of the collision which the extraordinary conduct of the *Joan* had rendered inevitable. The *Cutch* being thus entirely innocent, and the *Joan* guilty of various infractions of the Articles of the Navigation Act, as an overtaking ship she ought to have kept out of the *Cutch's* way (Art. 20),—there being risk of collision, the *Joan* ought to have slackened her speed (Art. 18),—moreover, the *Joan*, intending to leave by the South channel, ought to have left by the South or starboard side, and was guilty of gross misconduct in endeavouring to get to the North side (Art. 21).

To all this there are several answers. In the first place, it is clearly made out in the opinion of myself and assessors that the *Cutch* was not, and the *Joan* was, the first to leave the wharf. As already intimated, the mere fact of casting loose did not confer on either vessel the unqualified right of being the first to take the channel. But whatever expectations the *Cutch* founded on her supposed priority were founded on a complete misconception of the facts; and this double error, both of the facts and of the rights founded on those facts, probably influenced the subsequent conduct and belief of the master. In the next place, from a very careful measurement of distances and bearings as given by the defendants themselves, quite irrespective of the plaintiffs' witnesses, or of the natural probability of the case, the assessors have come to the conclusion that it is quite impossible that the *Joan*, which was always on the starboard hand of the *Cutch*, could ever have been abaft her beam; and therefore that the *Cutch's* second contention that she was the leading vessel at the start for the South channel, is equally devoid of founda-

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

tion. It is true, some of the passenger witnesses of the *Cutch*, and one or two others on board, were of opinion that the *Joan* was at the commencement of their course abaft the *Cutch's* beam; which would make the *Joan* a following or overtaking ship within Art. 20. But the times and distances and bearings given by the master and other skilled witnesses on the *Cutch* (the defendants' own witnesses) quite contradict this: though it would, of course, be possible that in turning and twisting in the neighbourhood of the *Babcock* (1) she might momentarily have her quarter towards the *Joan*. That would have been an accident merely: but we are of opinion that it never did so happen; and that in fact during all her manœuvres in the harbour, she had the *Cutch* forward of her beam. And then when we look at the plaintiffs' witnesses, they produce three who are quite independent of either ship: Mr. Thompson, Mr. Jensen and the mate of the *Quadra*, who all agree as to the relative position of the vessels, viz.: That the *Joan* was, from the time when the *Cutch* first began to move her head towards the South channel, always nearer than the *Cutch* to that channel. And the probabilities of the case are so great in the same direction that it would require the greatest unanimity of testimony to make one believe that the *Cutch* could ever have been the leading ship. She had on leaving the wharf eight points, an entire right angle, to make good more than the *Joan*, before she could head for the channel. On backing out it would manifestly be her natural manœuvre to turn her stern through the North towards the West as well as she could, and that the curve so described would probably carry her to the North much further than the point assigned by her master, and,

(1) NOTE.—This was a ship that happened to be lying at anchor in the harbour a short distance from Gordon's wharf.

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

indeed, according to the time and rate of speed given by him, very nearly to the position assigned by the plaintiffs in the chart submitted by them, leaving the *Joan* several points forward of the *Cutch's* beam; but even from the point indicated by the defendants on the chart submitted by them—not, as I have said, borne out by the times and rates of speed sworn to by their own master—and supposing (what is incredible, and contrary to the evidence) that the *Joan* remained stationary all that time, off the north end of Gordon's wharf, she still would be forward of the *Cutch's* beam, and therefore entitled to have her way given to her under Art. 16, and not bound to give way to the *Cutch* under Art. 20, as contended by the defendants. But it can be mathematically proved that the theory of the *Cutch* as to the conditions of the actual collision is entirely baseless. It would be mathematically impossible that the *Joan*, throwing herself at the rate of ten knots per hour across the bow of the *Cutch*, a nearly stationary ship, as the defendants' witnesses would appear to suggest, could cause the injuries described and not disputed, viz., a deep cleft nearly perpendicular to her beam. If the injuries were occasioned as the defendants contend, the rent would extend in a direction from the stem of the *Joan* towards her stern, and would be mainly external, without much penetration.

But if two vessels of nearly equal size and speed, of equal momentum, collide at an angle of about 45°, the injury will extend inwards into the vessel that receives the shock, in a direction nearly perpendicular to her beam. This will be apparent on drawing the necessary diagram so as to show the resultant thrust: the impetus of the recipient vessel being exactly represented by an equivalent thrust in the direction opposite to her motion. That is to say, the injury inflicted and shown to have been suffered by the *Joan*, is exactly

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

explained by the plaintiffs' account of the position and speed of the vessels, though their witnesses did not seem to understand that; and is quite irreconcilable with the circumstances suggested by the defendants.

Neither is there any force in the defendants' contention that the *Joan* ought to have entered the South channel close on the starboard hand, and to the Southward of the mooring buoys, (Art. 21,) and that it was improper navigation for her to attempt to pass to the North of the buoys. If the *Cutch* were, as the defendants contend, the leading vessel, surely it was equally her duty to make for the Southward of the buoys; but she was herself making for the North side. In fact, I am advised that, on the evidence and the statement of the practice, it is a reasonable and proper course of careful navigation, having regard to the risk of lines from the buoys to the wharfs, and other matters, to pass to the north of these buoys, especially when another vessel is lying between the mooring buoys. Neither vessel was in fault in this respect. I believe the *Cutch* did, in fact, go to the starboard side of the channel, South of the buoys, after the collision.

The *Cutch*, therefore, we consider to be in fault, under Art. 16, which throws upon her the duty of keeping out of the way of the *Joan*. Even if the *Joan* had been utterly mismanaged, had been steering a wrong course—it was the duty of the *Cutch* to keep out of her way; to take all possible precautions to prevent a collision. Now, what precautions did she take? None whatever; except stopping and reversing her engine two or three seconds before the impact; when such a stoppage could produce no sensible effect; and, in fact, two independent witnesses who were watching the proceedings decidedly declined to believe that the *Cutch* ever stopped her engines at all. Yet the *Joan* was in sight, and the possibility of a collision evident if the

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

Cutch had any sort of a lookout (and if she had none, she is again in fault) from the first moment that she began her forward progress, especially if, as some of her witnesses say, that was only about 300 feet off. It is possible, of course, that the master of the *Cutch* had no eyes for anything but his rival the *City of Nanaimo*, just disappearing with a few minutes start. If so, that again makes him in default. A master cannot claim to be blameless if, being on deck, he fails to see a vessel of the size of his own right ahead and only her own length off in clear daylight.

But there is another section which imposes on a colliding ship a duty the neglect of which is decisive. Seamen generally eagerly accept it as a privilege, requiring no Act of Parliament to command them, to assist fellow seamen in distress. This was entirely neglected on the present occasion. Section 20 says in the absence of a reasonable excuse, the ship neglecting to assist is to be deemed to blame for the collision. Now, what is the reasonable excuse put forward? That the *Joan* did not whistle. But there was no evidence that she could whistle. The force of the blow was so great, and on such a part of the ship as to burst the steam gear and drive all the engineers from below, the steam escaping in clouds. The master of the *Cutch* says he saw nothing of this, which seems almost incredible, but, if true, it shows that he was not in a state of attention properly to conduct the navigation of any ship; and the accuracy of all his disculpatory observations may be questioned if he did not observe this. His other excuse is that there were other ships not far off; but they were at anchor, and otiose; he was on the spot, with all his crew in hand. Life might have been at stake. If the *Joan* had drifted ashore she might have been a total loss, at all events much more extensively injured. As it was, she was only brought up

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY v. THE SHIP CUTCH.

Reasons for Judgment.

on the edge of the flat, and made fast to the black buoy on the south side of the channel, having drifted helplessly in the high wind across the tail of the middle bank, while the *Cutch* went straight on in full chase of her rival, the *City of Nanaimo*. I am bound by this section to say that it alone fixes the consequences of the collision as being due to the default of the *Cutch*.

But then, was the *Cutch* alone in default? Upon this point Mr. Bodwell urged Art. 18, which says that every steamer approaching another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary. Now, as to this, it is to be observed that the whole of these rules are intended to prevent collisions, if possible; and that it is the most mischievous pedantry to insist on a literal compliance with a rule when such compliance would increase the probability of a collision. Now, the position of the *Joan* was this: She was making, probably as fast as she could, though she had perhaps not acquired full headway, for what we think was a proper way of entering the South channel. She saw the *Cutch* coming down on her port bow, probably not quite so fast as herself, but yet fast. She would say: "The *Cutch* has, under Art. 16, to keep out of my way; she will probably slacken speed, perhaps pass under my stern, though she seems, like myself, to prefer to make for the North side of the mooring buoys. If I slacken speed, under S. 218, I shall very likely run into her. If she keeps on as at present and I slacken, I shall certainly run into her, and then I shall be liable for damages; I should be in default under Art. 22. Much my best plan is to keep my course according to that Article; if the *Cutch* slows down I shall get abundantly clear." And I am advised that such reasoning is founded on good and careful seamanship.

I therefore declare the ship *Cutch* to be alone in default, and that the *Joan* was not in any default, and

1893

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY *v.* THE SHIP CUTCH.

Reasons for Judgment.

there will be the consequent condemnation in damages and costs. I refer it to the Registrar and Merchants to ascertain the amount of damage.

I cannot conclude without some observations as to the very serious consequences of allowing several steamers to leave the wharfs, especially in narrow waters, at the same hour. In time of war, when two belligerents are in a neutral harbour, they are never permitted to leave together; nor, I believe, until a period of 24 hours has elapsed after the sailing of the first. In the present case the *Cutch* and the *City of Nanaimo* are not in one sense belligerents. They do not fire red-hot bullets or shells at each other, but they run the manifest risk of inflicting on each other, or on innocent neutrals, as the present case shows, quite as important damage and loss, both of property and life. Two steamers colliding in the Gulf and bursting their steam-chests may settle their differences quite as substantially by going to the bottom with all their cargo and passengers as they could possibly manage it with the most improved projectiles or explosives. And although it was in evidence that these vessels never race—that is forbidden by the Pilot rules—yet it was ingenuously confessed that they never meet without seeing which of them can go the fastest. This the Harbour Master can hardly prevent. But a fine of $200 upon any master who leaves this confined wharfage until some small interval—eight minutes is, according to the present case, far more than is necessary—say five minutes after the other, or even $10 on the wharfinger who throws off a line earlier, might be effective.

Judgment accordingly.